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Women's Bodies, Government's Vessels: Control of Women's Reproductive Capacity in U.S. Policy, 1837 - 1924

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by

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Abstract

This thesis explores the changing boundaries of women's property rights in the nineteenth and early twentieth century with a critical eye on the intentions of white male policymakers. I analyze the development of laws regarding married women's property rights, homesteading, and workplace relations to understand how lawmakers and judges viewed white women's reproductive capacity as a state policy tool in varying ways. The expansion of women's property rights in the U.S. revolved around women's reproductive labor and funneled women into their assumed roles of wives and mothers. Weaving together historical moments across a century of great advancement for women, I show how government entities repeatedly used the law to steer women's bodies towards the spaces and conditions most advantageous to the state.

Introduction

Women's bodies have always been at the epicenter of policymaking in the United States. There is a long history of state and federal governments' legislative and judicial attempts to control and limit women. As women freed themselves from various forms of oppression, they fundamentally challenged the notion that they themselves were property. In our current struggle over women's reproductive control, the U.S. Supreme Court in 2022 dictated that women's bodily autonomy should be "rooted in our Nation's history and tradition."[1] This "history and tradition" is ripe with manipulation and exploitation of women's bodies to varying degrees.

This thesis explores the changing boundaries of women's property rights throughout this country's history with a critical eye on the intentions of white male policymakers. The development of laws regarding marriage, homesteading, and workplace relations illustrates this interconnected and pervasive history of state and federal government attempts to control women's bodies.

Property rights refer to the legal and economic power to own, control, and profit from economic assets and resources. This entails land, earnings, resources, and personal belongings. Historians often credit John Locke for heavily influencing colonial and early American conceptions of property rights: in his *Second Treatise of Civil Government*, Locke offered a justification for private property, arguing property rights derive from labor. This perspective also provided a basis for dispossessing Indigenous people of their

[1] Dobbs v. Jackson Women's Health Organization, 597 U.S. ___ (2022).

land, as they failed to "improve" it.[2] Culturally and legally, the U.S. intertwines property rights with the labor contributions of individuals.

Labor also represents a form of property. The ability to control and profit from one's own labor represented the highest form of freedom for much of U.S. history, embraced by key figures such as Thomas Paine and Thomas Jefferson. Independent and self-employed laborers — such as farmer, the artisan, and the shop owner — embodied this agrarian ideal. This dominant standard offered a justification for slavery as the ownership of enslaved peoples' labor represented a critical aspect of the "ownership" of their person. Citizenship, or even personhood, was closely related to the ability to own and profit from one's own labor. Following the Civil War and the rise of industrial wage labor in the end of the nineteenth century, legal and cultural understandings of "freedom," in the context of labor, shifted towards the ability to freely sell one's labor in the market.[3]

Through much of the country's history, property also denoted human beings. Scholars often note the preoccupation of the U.S. legal system with protecting property rights, including the ability to continue owning other humans.[4] The institution of slavery claimed millions of Black people as property. This economic system relied upon the dehumanization of enslaved persons, denying their claims to their body, their labor, and their offspring. Notions of propertied ownership weighed especially heavily on enslaved

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[2] Allan Greer, "Commons and Enclosure in the Colonization of North America," *The American Historical Review* 117, no. 2 (2012): 366-367.
[3] William E. Forbath, "The Ambiguities of Free Labor: Labor and the Law in the Gilded Age," *Wisconsin Law Review* 767 (July and August 1985): 2-7.
[4] Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (Oxford University Press, 2009) 105.

women, whose reproductive labors were often violently claimed by slave owners through rape and coercion. A myriad of state laws facilitated enslaved women's status as unfree by denying them control over the most intimate property a human could have, vested in themselves and their kin. To a lesser degree, nineteenth-century women more broadly represented a form of property for their husbands, fathers, and brothers to control. Various legal instruments ensured women's subjugation to the men in their lives, as they often held little claim over their body, their offspring, or other forms of property.[5]

Property rights coincided with power. A person's ability to control their body, independently manage their finances, and structure their life as they chose were all intimately related to their legal property rights. Throughout U.S. history, Congress, state legislatures, and state and federal courts gradually expanded the scope of who could hold such power.

As the following chapters illustrate, the expansion of women's property rights in the U.S. revolved around women's reproductive labor and funneled women into their assumed roles of wives and mothers.

Framing Women's History

Feminist histories of the United States tend to chart a consistently upward course which began with a flurry of feminist organizing in the early part of the nineteenth century. The story of women's gradual emancipation and suffrage often follows a path from the Seneca Falls Convention in 1848 to the passage of the Nineteenth Amendment in 1920 with a sense of consistent progress and optimism. Landmark achievements

[5] Pascoe, *What Comes Naturally*, 22.

— such as the establishment of married women's property rights, the inclusion of women in the Homestead Act, and the creation of labor protections for women — often dot the pages of feminist texts, telling a story of women's slow march toward gender equality. Each victory moved the women's movement steadily forward. As a country with a complicated legacy towards those who were not propertied white men, this story represents the condensed version of the history of American women, who bettered their status, one generation at a time, with persistence and faith in the institutions of the U.S. government. It reads as a classic tale of morality dominating oppressive forces.

However, this narrative so often erases the experiences of women who were not white or wealthy. This consistently upward trajectory of women's status was not equally accessible or enjoyed by all women. Many of these monumental steps forward intentionally and strategically excluded Black women, Indigenous women, immigrant women, and poor women. The protective arm of the state did not reach them.

Many advancements in women's legal status in the nineteenth and early twentieth century originated in an intersecting web of state and federal policies which sought to actively reinforce the sacred role of women as wives, mothers, and homemakers. State policymakers, judges, and activists sought to steer and control white women's reproductive energies. The dominant discourse for expanding women's rights tended not to recognize the human rights of women or the value which they brought to society. Rather, white male policymakers and elites centered their arguments on the economic and political potential embodied by white women's reproductive labors.

The resulting policies functionally expanded women's rights. Women gained greater opportunities to control their finances, own property, live independently, and support themselves and their families. These state and federal laws justifiably earned a place in feminist histories of the U.S. as they each played a discrete role in advancing the position of women — defined in a monolithic sense — and aiding the further liberation of women. Often these advancements were narrow, illusory, and accessible only to wealthy, white women. These short term wins, and even their contribution to eventual larger feminist victories, do not overturn the dominant ideologies.

Lawmakers, judges, and activists reinforced understandings of women as reproductive vessels and steered women's reproductive capacity towards certain conditions and spaces in pursuit of settler colonial and capitalist policy goals. Adopting Alaina Roberts definition, settler colonialism refers to the "exploitation of a region or country's resources by the forcible resettlement of Indigenous peoples and their replacement by settlers who then move onto their lands and rewrite history in an effort to erase the longevity of their presence, and often their very existence." In the western territories, this violent process crucially involved the "replacement" of Indigenous populations with white people.[6] Further, settler colonialism intentionally created geographic and social space for the institutions and inequalities of U.S. capitalism to thrive in the West. Throughout the rest of the country, capitalism matured and expanded

[6] Alaina E. Roberts, *I've Been Here All the While: Black Freedom on Native Land* (Philadelphia, PA: University of Pennsylvania Press, 2023): 2.

in various forms, and contemporary understandings of economic necessity fluctuated according to the dominant economic system.

Women's rights, or lack thereof, revolved around this discourse, expanding and shrinking based on the utility of women's reproductive labor to state projects. Over the course of nearly a century, this language of protective paternalism frequently bubbled up in the chambers of state legislatures, in the halls of the U.S. Congress, and in courtrooms across the country.

This thesis surveys various moments in U.S. history which were critical to the development of women's property and labor rights to understand how state and federal government entities sought to steer and control women's reproductive capacities. A full assessment of state control of women's reproductive capacity in the U.S. far exceeds the bounds of this project. Rather, I chose to focus on periods where specific legislation had an immense impact on women's rights while the underlying policy urges suggested coercive concerns over women's reproductive capacity. Each policy attempted to steer women towards marriage and the home in discrete ways which align with their unique political contexts.

I use the term "reproductive capacity" to encompass the assumed experience that all women of reproductive age — from their early teenage years through their fifties — can produce children through reproduction. This capacity for pregnancy existed both as a reality for many women, but also as a normative expectation placed on women broadly by policymakers and society. Similarly, I use the term "reproductive labor" in reference to the process of pregnancy and childbirth. As this thesis demonstrates, U.S. law and

society framed reproductive labor as synonymous with womanhood. Given this assumption as well as the time span explored in this thesis, I focus exclusively on the experience of cisgender women. The outwardness with which nineteenth- and early twentieth-century U.S. society communicated this expectation for women to bear children varied. Some policymakers and activists explicitly articulated women's expected status as reproductive vessels, while others passively supported such notions when politically convenient. Across these varied levels of consciousness was a consistent devaluation of women's humanity in favor of policy aims.

My first chapter, "Degrees of Unfreedom: Coverture, Slavery, and the Advent of Women's Rights," explores the degrees of oppression endured by nineteenth-century women based on their race, class, and status as free or enslaved, as well as their proximity to the institution of marriage. Marriage law, guided by the legal principle of coverture, ensured that women lost all legal claim to her body and her property in marriage. In the eyes of the law, her earnings, land, and personal property transferred to the control of her husband. As Elizabeth Cady Stanton described to her audience at the Seneca Falls Convention in 1848, coverture made married women "civilly dead."[7] She ceased to exist independently in the eyes of the law. A woman's very body existed as her husband's property, meaning there was no such thing as marital rape.[8]

State legislators eagerly regulated the boundaries of marriage, and in the mid-nineteenth century, state legislatures began expanding married women's property rights.

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[7] Elizabeth Cady Stanton, "Declaration of Sentiments," July 1848.
[8] Rebecca M Ryan, "The Sex Right: A Legal History of the Marital Rape Exemption," *Law & Social Inquiry* 20 no. 4 (Autumn 1995): 946-947.

Spurred by an economic crisis, Mississippi became the first state to grant married women the right to own property, specifically her property vested in enslaved human beings. The 1839 law insulated a married woman's property from being seized by her husband's creditors, which, as lawmakers intended, provided her a level of economic security to continue fulfilling her responsibilities as wife, mother, and homemaker in the event of her husband's economic misfortune. Securing a married woman's financial future also ensured her labor would remain reproductive, as financial insecurity could force women into the workforce. Many state legislatures followed suit, and in 1848, New York passed its own married women's statute, which granted women limited control of their finances and became an early milestone in the feminist movement.

Such reforms left wholly intact the existing gender order which oppressed women to varying degrees and ensured their continued economic and legal subjugation. Arguments of women's equality and natural rights collided with the more politically expedient calls of insulating women's special roles as wives, mothers, and homemakers from economic uncertainty. Married women's property laws reinforced the existing cult of domesticity and allowed wealthy white to concentrate their labor on childbearing, child rearing, and homemaking. This ideal did not extend to poor women, as such laws did not touch them.

Further, enslaved women existed wholly outside of this framework and endured vastly greater degrees of oppression. The institution of slavery systematically denied enslaved women ownership of their body, their property, or their offspring with incredible and incomparable brutality. As white women enjoyed marginally expanded

property rights within the larger system of patriarchal oppression, enslaved women's utter lack of property rights further reinforced their dehumanization.

Chapter 2, entitled "Steering Women Westward: Marriage and Reproduction on the Frontier," moves further into the nineteenth century and focuses on the Homestead Act of 1862. This landmark law populated the western "frontier" of the continent by providing land to U.S. citizens, including unmarried women. The inclusion of unmarried women represented a critical break from past land distribution laws and gender norms of the period.[9] During a decade of debate in the U.S. Congress, lawmakers expressed their commitment to promoting marriage and reproduction in the region through the presence of women.

Congress imagined white women as the vehicles for populating the region and enticing young men to move westward in search of a wife. They sought to steer white women's bodies towards the "frontier," often speaking of the immense importance of their reproductive labors in accomplishing discrete policy goals. The unmarried woman Congress hoped to send westward was explicitly racialized: white women's bodies would reproduce whiteness in the western territories. Congressmen spoke frankly about the maternal duties that women owed to society and the need to populate the region with strong, white children via white women's reproductive labors.

Many young, unmarried women did travel westward alone in search of new opportunities and a sense of independence. However, their positive experiences do not

[9] Margaret D. Jacobs, "Reproducing White Settlers and Eliminating Natives: Settler Colonialism, Gender, and Family History in the American West," *Journal of the West* 56, No. 4, (2017): 16.

overturn the dominant ideologies. Their well-documented stories both subverted and fulfilled the expectations of congressmen. Lawmakers framed women as the vessels for creating and sustaining an empire in the new western territories. They sought to reassert women's gendered duties — encapsulated by the cult of domesticity — in the supposedly uncivilized and uncultivated West. The law functioned to steer women towards the spaces and relationships most advantageous to capitalist, settler colonial, and white supremacist policy goals.

My third and final chapter, "Protecting the Mothers of the Race: Legislating and Adjudicating Protective Laws," moves into the late nineteenth and early twentieth century. Spurred by industrialization, urbanization, and economic necessity, women increasingly entered the wage labor force. State legislatures reckoned with the need to prioritize and safeguard women's reproductive labor while also fulfilling market demands for workers. Dozens of states passed laws claiming to protect women from the dangers of industrial capitalism by limiting women's hours, work responsibilities, and professions on account of protecting their reproductive capacity. However, this protection extended only to white women in male-dominated industries and relied upon their presumed reproductive contributions to society. Such laws ignored the economic needs of working women, speaking for and over them in an attempt to define their best interests, while also protecting narrow classes of female workers whose positions could easily be filled by men.

Lawmakers sought to narrow white women's labor contributions to their reproductive responsibilities. If a woman spent thirteen hours each day in a factory, she

could not adequately mother her existing children, maintain her home, or bear more children. In the laws explored in Chapters 1 and 2, lawmakers presumed all women of reproductive age to be able and willing to have children. In the age of industrial capitalism, lawmakers reckoned with the consequences of wage labor on women's reproductive duties. Wage labor appeared, in the minds of many late-nineteenth and early-twentieth century activists and lawmakers, to be fundamentally oppositional to women's reproductive labor.

They solved this contradiction by passing protective laws to ensure a woman's labor did not impede her true responsibilities as wife and mother. However, state lawmakers narrowed their protection to certain classes of women whom they deemed worthy of protection and without whose labor the industry could still function. This predictably excluded Black women, immigrant women, and many poor women. Capitalists eagerly challenged such laws in court, seeking to continue their exploitation of female workers, but they found little success, as judges overwhelmingly upheld protective laws.

Countless state and federal court decisions regarding these "protective laws" spelled out and reinforced dehumanizing language about the role of women in the workplace and the reproductive duties that women owed society. The legal battles surrounding protective laws illuminate the intentions and impact of the laws. The courts reinforced women's vessel status in the face of societal and industrial challenges to women's traditional roles of wife, mother, and homemaker. Lawmakers, judges, and activists successfully reasserted women's traditional gendered responsibilities and steered

their bodies towards the spaces most advantageous to capitalist and white supremacist goals.

These three historical moments illustrate a persistent legal understanding of women, first and foremost, as wives, mothers, and homemakers, rather than autonomous human beings and citizens. Government entities repeatedly used the law to steer women's bodies towards the spaces and conditions most advantageous to the state. This thesis draws attention to a recurring logic employed by policymakers at various levels grounded in notions of women's vessel status. A woman's labor was inextricable from her reproductive capacity, and the rights she enjoyed in this country revolved around that assumption.

The shifts in modes of analysis throughout this thesis reflect changes in society. In the nineteenth century, the U.S. was a predominantly agricultural society dually reliant upon independent labor and enslaved labor. States passed ample laws dictating the exchange of property and the distribution of land in this period. In the latter half of the nineteenth century and the beginning of the twentieth century, the U.S. transitioned towards a more urban, industrialized economy reliant upon wage-labor. In this context, state and federal courts took on the critical role of determining the boundaries of work relations in society.[10] As economic and political conditions fluctuated, women's necessary and desired roles in society shifted and the instruments for controlling women's reproductive capacity shifted as well.

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[10] William E. Forbath, "The Ambiguities of Free Labor: Labor and the Law in the Gilded Age," *Wisconsin Law Review* 767 (July and August 1985): 2-7.

In my analysis, I draw upon an approach to feminist history applied by Dorothy Sue Cobble, Linda Gordon, and Astrid Henry in their book *Feminism Unfinished*. Rather than considering discrete policies and moments in the legal labor history of women in the U.S., I utilize a "century-long view." This offers "a long and continuous rather than episodic history."[11] Despite my focus on the words, decisions, and policies of white men, women lived within these histories. Women felt the impact of the privileges and exclusions implicit in these policies. Further, nineteenth- and early twentieth-century women had vastly different degrees of privilege and power, and they likely also had different levels of awareness surrounding the policies and court decisions that shaped the opportunities and choices available to them.

The conditions of women in this period resulted from centuries of compounding legal doctrine, social norms, and philosophical theory. No singular statute can be held responsible for creating or disassembling their oppression.

The policies and court decisions that steered the direction of women's lives, labor, and reproductive energies did not arise in isolation. Historiography must reflect that fact. Examining the laws and policies of this thesis in a discrete and isolated way perpetuates the patriarchy by blurring the complex web of oppressive structures that fuel gender, race, and class inequalities. Women's advancement has not been consistently upward nor has it been equally accessed. As women's rights fluctuated and progressed in this period,

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[11] Dorothy Sue Cobble, Linda Gordon, and Astrid Henry, *Feminism Unfinished: A Short, Surprising History of American Women's Movements* (New York: Liveright Publishing Corporation, 2015): xiv.

such advancement often came with a cost, and progress often served larger capitalist, settler colonial, and white supremacist goals.

This thesis by no means represents a complete legal history of women during this period, nor does it tackle the breadth of women's experiences. I focus primarily on the experiences of white women with additional attention to the experiences of Black women and poor women. I was not able to adequately speak to the experiences of Black women, Indigenous women, Asian women, or immigrant women, all of whose histories enter the narrative at times but without the analysis they deserve. The main focus of this thesis is on white women, as lawmakers largely targeted this population of women with paternalistic policies that advanced their status while undermining their personhood and autonomy. I discuss Black women and poor women largely in the context of how their experiences were shaped by their (often intentional) exclusion from such policies. In the eyes of federal and state government officials of the period, white women, especially wealthy white women, were the desired reproducers of American citizens, American capitalism, and the American empire. These paternalistic efforts to protect, shield, and control women's bodies applied primarily to white women, even as such policies appeared to speak to women broadly.

Simultaneously, white women stepped into this role with varying degrees of embrace. Although they existed as the subject of paternalistic and degrading policy initiatives, white women were not merely pawns in this game. Some women utilized their power and privilege to advance the needs of themselves and their families, while other white women weaponized that same privilege to oppress women of color and poor

women. Further, some white women thrashed against government attempts to steer them in ways which were favorable to policymakers, instead using their relative power to fight the law and dominant culture. In considering the experiences of women of this period, I continuously interrogated the varying levels of power, guided by the recognition that the story I sought to tell was one of women with little agency and very few good choices, which white male policymakers offered to women via the law.

Chapter 1

Degrees of Unfreedom: Coverture, Slavery, and the Advent of Women's Rights

Introduction

In the nineteenth century, women in the United States endured oppression of widely varying degrees. Women's degrees of unfreedom depended upon the intersection of their gender, race, and class, as well as their proximity to the institutions of marriage and slavery. Across a century of great social and economic change, women's legal rights fluctuated, and the rising cult of domesticity reinforced and sentimentalized women's duties as wives and mothers.[1]

Many state legislatures reevaluated marriage laws in the mid-nineteenth century, specifically the property rights of married women. By the early nineteenth century, unmarried white women could own property in their own name; however, this right dissolved through the marriage contract. Any property she held at the time of her marriage — her earnings, her inheritance, her land, and her body, which for most women was all the only form of property she entered marriage with — transferred to the control of her husband. This began to change as states passed married women's property acts.

Through a web of state laws, married women earned the right to own, control, and profit from the property they held at the time of their marriage. Analyzing the development of such laws in Mississippi and New York — the former being the first state

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[1] Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (Ithaca, NY.: Cornell University Press, 1982): 40-41.

to grant married women's property rights and the latter credited as influencing a successive wave of legislation — illustrates the politics of expanding women's rights in this period. Benevolence alone did not drive these lawmakers to change women's legal status.

Lawmakers sought to contain women's labor in the home. Arguments for women's equality and natural rights collided with the more politically expedient calls for insulating women's special roles as wives, mothers, and homemakers from economic uncertainty. If women controlled their property, they would not be pushed, by economic necessity or by their husbands' financial mismanagement, to join the wage labor force. The notion of women working outside the home deeply upset these men. In the eyes of lawmakers, a woman's labor was fundamentally connected to her reproductive labor and her body.

However, in marriage, her body did not belong to her. A woman's claim to her own body was a question of her property rights, or lack thereof. Through shifting marriage laws, policymakers exerted control over women's reproductive capacity, steering and restricting women in the interests of maintaining the orderly transfer of property, protecting the interests of the wealthy, and furthering white supremacy. The same legislators who were immensely concerned with discerning the boundaries of the marriage contract then systematically denied enslaved people access to legal marriage and all its many privileges. Marriage structured relationships even in its absence.

Marriage loomed large over nineteenth-century women. As wealthy white male lawmakers across the U.S. reconsidered the legal boundaries of the marriage contract,

they intentionally reinforced women's economic, social, and political domination by men.

Marriage in the Nineteenth Century

In the nineteenth century, public conceptions of marriage were in flux. Americans liked to see their unions as the product of romantic love, distinct from ancient ideas of marriage as a propertied agreement.[2] This idyllic image differed from reality, though. A nineteenth-century marriage functioned as a legal contract grounded in the orderly transfer of property, which was highly regulated by state and federal law and significantly disempowered women. In 1852, American lawyer Joel Prentiss Bishop described marriage as a contract covered in "drapery… giving it ornament and hue, yet having no inherent connection with it. Denude of this drapery, and nothing remains but the shadow of its origin, in our memory, which bears even similitude of a contract."[3] His famous book, *Commentaries on the Law of Marriage and Divorce,* represented a shift away from his abolitionist roots and offered a comprehensive legal analysis of state laws related to marriage, divorce, and sexual intercourse in the mid-nineteenth century.[4]

Fundamentally, nineteenth-century marriages were contracts, unique from other contractual agreements in their intimate nature, but contracts, nonetheless. Judges in the early part of the century routinely described marriage in this way, simultaneously distinguishing marriage from other forms of contracts while emphasizing its nature as a

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[2] Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (Oxford University Press, 2009): 22.
[3] Joel Prentiss Bishop, *Commentaries on the Law of Marriage and Divorce, and Evidence in Matrimonial Suits*, 1st ed (Oxford University, 1852): 32.
[4] "Joel Prentiss Bishop (U.S. National Park Service)," National Parks Service (U.S. Department of the Interior), accessed March 28, 2023, https://www.nps.gov/people/joel-prentiss-bishop.htm.

relationship grounded in property.[5] State legislatures and courts considered marriage in this framework: they reckoned with critical questions of who could own property, who could financially benefit from the ownership and sale of property, and who could inherit property.

Nineteenth-century women could own property in their own right; however, this right dissolved through the marriage contract. Under the common law practice of coverture, a woman came under the "cover" of her husband. Often described as a "feme covert," married women were unable to buy or sell property, take legal action in their own name, or create contracts and wills herself. All of the property, personal and real, that she earned or inherited prior to marriage transferred to the control of her husband.[6] As Elizabeth Cady Stanton described to her audience at the Seneca Falls Convention in 1848, the law made married women "civilly dead."[7] At the core of coverture was the notion of "marital unity," described through the equation in which "one plus one equaled one by erasing the female one."[8] This condition of women's total legal and economic dependence originated in English common law, and it found ample support in the legislatures, courts, and culture of the U.S., beginning to falter a few decades into the nineteenth century, yet remaining for decades to come in some states.[9]

Centrality of Marriage to the State

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[5] Howard v Howard 51 N.C. 235 (1858); Dickson v. Dickson's Heirs, 9 Tenn. 110, 1 Yer. 110 (1826); Fisher v. Allen, 3 Miss. 611, 2 Howard 611 (1837).
[6] Basch, *In the Eyes of the Law*: 17.
[7] Elizabeth Cady Stanton, "Declaration of Sentiments," July 1848.
[8] Basch, *In the Eyes of the Law*: 17.
[9] Hazem Alshaikhmubarak, R. Richard Geddes, and Shoshana A. Grossbard, "Single Motherhood and the Abolition of Coverture in the United States," *Journal of Empirical Legal Studies* 16, no. 1 (2019): pp. 94-98.

As an institution, marriage was central to the state.[10] In 1826, the Tennessee Supreme Court described marriage as "a connection of such a deep-toned and solemn character, that society has even more interest in preserving it than the parties themselves."[11] It serves as a personal, romantic, and often religious practice, as well as a government-regulated union. Marriage fulfilled a variety of functions in nineteenth-century society, including the perpetuation of gender roles, the establishment of a family unit financially dependent on a man, and the orderly management of property.[12] Through the multitude of state laws regulating who could marry whom and under what circumstances, government institutions historically asserted influence over such crucial aspects of individuals' lives. The reproduction of desired social norms, racial groups, and economic relationships were all facilitated, in part, by state marriage laws.

Marriage also served to "naturalize" certain relationships, thereby encouraging certain types of reproduction.[13] As Joel Prentiss Bishop wrote in 1852, marriage "confer[ed] the status of legitimacy onto children born in wedlock."[14] The consequences of this can be seen in the construct of illegitimacy for children born out of wedlock. Further, nineteenth-century lawmakers and judges often used marriage law to deny rights to children born in conditions of enslavement and children born as a result of amalgamation or miscegenation, terms which described sexual intercourse between individuals of different races.[15] Most states did not pass miscegenation laws, which

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[10] Pascoe, *What Comes Naturally*, 23.
[11] Dickson v. Dickson's Heirs, 9 Tenn. 110, 1 Yer. 110 (1826).
[12] Pascoe, *What Comes Naturally*, 23.
[13] Ibid., 2.
[14] Bishop, *Commentaries on the Law*: 28.
[15] Pascoe, *What Comes Naturally*, 2.

banned sexual intercourse between white and Black people, until after the Civil War. However, laws banning interracial marriage thrived in the early half of the nineteenth century. Often the passage of the latter was a critical aspect of achieving statehood, and prior to the Civil War, twenty-eight states passed laws banning interracial marriage.[16] In banning marriage between white and Black people, state legislatures systematically ensured the denial of legitimacy to any child born from such a relationship. Regulation of marriage functioned as a regulation of reproduction, steering certain people together with the force of law.

Unsurprisingly, marriage revolved around reproduction. In naming the elements "essential to a valid marriage" in his *Commentaries on the Law of Marriage and Divorce,* Bishop included capability of sexual intercourse, describing reproduction as "the first cause and reason of matrimony."[17] In the early nineteenth century, many courts viewed impotence as a potential violation of the marriage contract, bolstering Bishop's assessment of reproduction as one of the prime functions of marriage. In his nearly forty pages on the subject, Bishop spoke in visceral detail of the potential danger to marriage posed by women's "barrenness," "malformation," or "extreme brevity of the vagina."[18] In the framing of the marriage contract, sexual intercourse and reproduction played a central role, reinforcing propertied understandings of women.

A woman's most intimate and consequential form of property was her body and her reproductive capacity. In this period, proper femininity reflected Victorian ideals of

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[16] Ibid., 21.
[17] Bishop, *Commentaries on the Law*: 35, 175.
[18] Ibid., 180-181.

purity, modesty, and the eventual performance of duties as wife and mother. While the dominant culture embraced a booming prostitution industry, respectable womanhood relied upon "self-denial and chastity." Sex was supposed to occur within the confines of marriage or as a form of prostitution, arrangements which similarly disempowered and/or commodified women.[19] Women, and men, absorbed these messages through advice manuals, newspapers, and sermons. *Godey's Lady's Book*, a widely popular magazine in the mid-nineteenth century, reminded women that "there is no power like that of virtue." In one article from 1850, a reverend informed women that the way to attract a husband was through piety, virtue, and moral goodness, rather than "gayety, frivolity, and dissipation."[20] In another article from the same issue, a man watched a woman sleep, enjoying the look of her "angelic purity" and "unstained" body.[21] *Godey's Lady's Book* offers just one example of the dissemination of Victorian standards of femininity surrounding sex. Such values not only shaped cultural norms around sex, but also guided understandings of women's bodies as a commodity.

Once married, coverture laws removed a woman's claim to her own body. The property which a woman held in her own body transferred to the control of her husband through the marriage contract. This means there was no such thing as marital rape. In the eyes of the law, marriage provided men "immunity" and a "natural sexual authority" over their wives. In practice, this meant there was no notion of rape within marriage, a

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[19] Linda Gordon, *The Moral Property of Women: A History of Birth Control Politics in America* (University of Illinois Press, 2007): 9-10, 74.
[20] E. P. Rogers, "Woman's Best Ornament," *Godey's Lady's Book* 40 (1850): 141-142.
[21] Julian Creamer, "On a Sleeping Wife," *Godey's Lady's Book* 40 (1850): 220.

dangerous legal fiction which lasted well into the twentieth century. Such marital rape exemptions codified women's lack of possession of her own body, as men could literally "claim" her right to consent.[22]

Even prior to marriage, a woman's claims to her body were marginal. Marriage cast an omnipresent shadow over all women — married, single, widowed, divorced, or deserted.[23] A woman could not legitimately, in the eyes of the law or society, have a child without being "covered" by a man. Her reproductive capacity, in that sense, did not truly ever belong to her given that the state controlled and male-oriented institution of marriage ensured her inability to claim her body as her own.

The Deconstruction of Coverture and Mississippi's Married Women's Property Act

State legislatures began the slow process of dismantling coverture through the development of what later became known as the married women's property acts in the middle of the nineteenth century. In the 1830s, Mississippi, with the acquisition of new Native lands and a booming economy reliant upon cotton, experienced a period of great speculation and economic growth.[24] Credit arose as a key feature of this economy, offering entrepreneurs and enslavers money to invest in their business endeavors with the hopes of earning great wealth. The slave economy relied heavily upon credit to facilitate its expansion and continued functioning. Speculators "rolled the dice," hoping they

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[22] Rebecca M Ryan, "The Sex Right: A Legal History of the Marital Rape Exemption," *Law & Social Inquiry* 20 no. 4 (Autumn 1995): 946-947.
[23] Ariela R. Dubler, "In the Shadow of Marriage: Single Women and the Legal Construction of Family and the State," *The Yale Law Journal* 112, no. 7 (May 2003): 1646.
[24] Sandra Moncrief, "The Mississippi Married Women's Property Act of 1839," Hancock County Historical Society, May 15, 2012.

would be able to pay off their debts.[25] However, between 1836 and 1838, cotton prices plummeted, placing immense pressure on indebted farmers and enslavers.[26] Creditors called in their loans, spurring cries for the protection of debtors and the wives of debtors whose property was subject to seizure as it legally belonged to their husbands. An 1839 article from the *Charleston Courier* lamented this period of "great distress" in Mississippi, as "extensive plantations [were] thrown out of cultivation, and… the slaves having been seized under execution and carried off by the sheriff."[27] These conditions created an environment ripe for the reexamination of debtors' protections and property rights.

In 1837, the Mississippi Supreme Court considered the issue of married women's property rights in a narrow case about the property of a married Chickasaw woman, Betsy Love. Seven years earlier, the Mississippi legislature extended the laws of the state over the Chickasaw territory, abolishing their tribal customs but recognizing the continued validity of all existing contracts, including marriages. When Love's husband incurred debts, creditors attempted to seize an enslaved person, Toney, who belonged to Love prior to her marriage. Astonishingly, the Court ruled that her husband, and thus his debt collectors, had no claim to her property.[28] This case largely hinged upon the matrilineal tribal customs of the Chickasaw prior to the laws of Mississippi being extended over their territory: these customs governed the marriage contract of Betsy Love

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[25] Edward E. Baptist, *Half Has Never Been Told: Slavery and the Making of American Capitalism* (New York: Basic Books, 2016): 91-97.
[26] Woody Holton, "Equality As Unintended Consequence: The Contracts Clause and the Married Women's Property Acts," *The Journal of Southern History* 81, no. 2 (2015): 326-327.
[27] "Mississippi," *Charleston Courier*, April 12, 1839, from America's Historical Newspapers.
[28] Fisher v. Allen, 3 Miss. 611, 2 Howard 611 (1837).

and her husband, and state law accepted the validity of such marriage contracts. Even so, the case represented a confirmation of married women's property rights in the state of Mississippi. Betsy Love became the first married woman in the U.S. to own her own property. Tragically, that property was in the form of an enslaved man whom her father "gifted" to her and she then intended to "gift" her own daughter.[29] Only two years after this monumental case, the Mississippi legislature introduced legislation to wholesale protect married women's property rights, becoming the first state in the U.S. to do so.

A deeply southern state with an economy reliant upon the enslavement of human beings and a culture committed to Victorian gender ideals and the expulsion of Indigenous people became the first state to free women from the restrictions of coverture. For its immense significance, neither the text of the bill, nor the legislators debating its passage, signaled that this was the intention of its passage. The bill conceived of married women through the lens of capitalist contributions and obligations, as well as through the image of the self-sacrificing and dutiful mother.

The law — titled An Act for the Protection and Preservation of the Rights and Property of Married Women — passed surprisingly quickly in the early months of 1839. State Senator Thomas B.J. Hadley introduced and championed the bill. His wife came from a very wealthy family, and historians widely speculate he promoted the bill to shelter his wife's plentiful assets from his creditors, as he was experiencing financial difficulty at the time.[30]

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[29] "Betsy Love – the First Married American Woman to Gain Rights to Property (U.S. National Park Service)," National Parks Service (U.S. Department of the Interior), accessed March 28, 2023.
[30] Joseph A. Custer, "The Three Waves of Married Women's Property Acts in the Nineteenth Century with a Focus on Mississippi, New York and Oregon," *Ohio Northern University Law Review* 40 (2014): 403.

In the slaveholding state of Mississippi, the term "property" denoted land holdings, enslaved persons, livestock, tools, furniture, clothing and more; yet Hadley's bill focused almost entirely on enslaved persons. The bill contained five sections, four of which specifically addressed women's property rights over their slave holdings. Creditors eagerly seized enslaved people from debtors, and southern states' married women's property acts consistently reflected this narrow focus on enslaved property.[31]

These laws freed white women to own their slaves. They earned the right to brutalize and manage enslaved persons as they saw fit. The significance of this legislation originating in Mississippi, a slave state with a struggling economy, should not be lost on modern readers. Slaves were a valuable form of property that lawmakers were eager to insulate from creditors. Creating a legal boundary between the enslaved property of husbands and wives shielded that property from seizure. Lawmakers relied upon the rhetorical villain of the "unscrupulous husband," wasting his money on vice and risky investments and thus failing to provide for his family; however, as the price of cotton and enslaved peoples plummeted, men and women alike face economic uncertainty.[32] Extending married women property rights ensured that in the face of economic turmoil, a husband could rely upon his wife's assets.

According to lawmakers, the greatest threat to women was their need to concern themselves with money. Proponents of the bill described it as a "shield of protection" for women from such worries, the denial of which would be a "gross injustice."

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[31] Woody Holton, "Equality As Unintended Consequence: The Contracts Clause and the Married Women's Property Acts," *The Journal of Southern History* 81, no. 2 (2015): 314-315.
[32] Suzanne Lebstock, "Radical Reconstruction and the Property Rights of Southern Women," *The Journal of Southern History* vol 43 no 2 (May 1977): 202-203.

Contemporary newspaper coverage lamented the need for "prevent[ing] idle and dissipated husbands from wantonly squandering the estate vested in them by marriage, and bringing virtuous wives and helpless children to want and wretchedness."[33] The image of the vulnerable woman and the predatory husband loomed large in advocacy of the bill. In theory, separating the finances of husbands and wives prevented her from needing to concern herself with money. As Senator Hadley argued, the law intended to safeguard a woman's "happiness" and "pleasure" in the home.[34] This chivalrous bill necessarily protected a woman's responsibilities against the effects of her husband's vice.

However, opponents of the bill recognized its underlying function to shield debtors' property from creditors. As a result of the boom and bust economy, many men in Mississippi owed immense debt to creditors. Senator Grayson, one of the chief opponents, described the bill as "one of the most stupendous frauds that has ever been presented" and predicted that "within six months, the wives will have all the property in their own right, exempt from the husbands." His comment relied upon the apparent ridiculousness of married women owning property in the nineteenth century; however, he also pointed to the laws intent to insulate men's property under their wives' names. In focusing on the economic impact of the bill, the opposition arguments offer a more complete picture of the impulses motivating such legislation. This bill represented a critical form of debtor relief, hidden behind calls for protecting the vulnerable and endangered wife: this tale of the unjustly impoverished wife was sure to evoke an

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[33] *The Southern Sun*, Feb 5, 1839, from America's Historical Newspapers.
[34] "Saturday, February 9, 1839. Senate," *The Weekly Mississippian*, Feb 9, 1839, from America's Historical Newspapers.

emotional response from lawmakers and observers.[35] Senator Hadley artfully relied upon this imagery in his advocacy of the bill.

Lawmakers on both sides weaponized their paternalistic concern for women. Opponents of the law seized upon the proposed expansion of women's rights, suggesting that granting financial control to women would corrupt their very nature. The opposition flipped proponents' arguments on their head. One senator ridiculed the bill and tauntingly asked supporters "if we place so low an estimate on female worth as to believe that the ladies would be influenced by the paltry and sordid consideration of 'dollars and cents."[36] A woman's "delicacy" necessitated her protection via the law; however, her delicate state could easily be compromised through "participation [in] the turmoils and strife of business." In a similar tirade against the bill, Senator Grayson proclaimed, "If you would degrade and disgrace all that is lovely in women, pass this bill; but if you would sustain them firmly on the high and exalted eminence which they now occupy in the eyes of the world and of man, spurn and reject this bill."[37] After this interaction, the bill was put up for passage and was rejected, suggesting the strength of Grayson's arguments. A few weeks later, advocates succeeded, and the bill became law.

The debate surrounding the passage of the first married women's property act demonstrates the flexibility of dominant ideals of proper femininity and motherhood to oppress and restrain women. Mississippi's law enhanced married women's property rights, but the potential of this outcome was not the primary motivating factor.

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[35] Lebstock, "Radical Reconstruction": 203.
[36] "Speech of Mr. Boyd," *The Weekly Mississippian*, Feb 16, 1839, from America's Historical Newspapers.
[37] "Saturday, February 9, 1839. Senate," *The Weekly Mississippian*.

Lawmakers rhetorically constructed women in certain lights to serve their arguments. Men's policy aims were largely independent of expanding women's rights: instead, they sought to insulate property, maintain the gendered order, and strengthen the struggling slave-based and credit-dependent economy.

New York's Married Women's Property Act

Mississippi created a template for expanding women's property rights that the rest of the South adopted. The reliance of the slave economy on credit and the volatility of speculation was not limited to Mississippi but impacted all slave states. Nearly all southern and agricultural states' passed married women's property laws fixated on insulating women's slaves and land from creditors. However, northern states and those with greater urban populations began to adopt more expansive property protections for women.[38] Scholarship on the subject often focuses on the debate surrounding the 1848 New York law, An Act for the Effectual Protection of the Property of Married Women, given the influence it had on prominent feminists of the time, including Elizabeth Cady Stanton, Ernestine Rose, and Paulina Wright.[39]

New York Assemblyman Thomas Hertell first proposed the creation of the law in 1837 and agitated for its passage until its eventual success in 1848. As a longtime proponent of debtor relief, Hertell was deeply concerned with the victimization of wealthy wives via their husbands' financial mismanagement; however, his arguments

[38] Richard H. Chused, "Married Women's Property Law: 1800-1850," *The Georgetown Law Journal* 71 Geo. L. J. 1359 (1982-1983): 1403.
[39] Basch, *In the Eyes of the Law*: 166.

also reflected the emerging discourse on women's rights.[40] Hertell spoke passionately of women's "equal rights," equating women's current loss of property "as if she instead of being married, had been sold a slave to a master."[41] In this period, advocates of women's rights commonly compared the oppression of white women to that of enslaved people but this did not inherently represent a critique of slavery, rather it dramatically drew attention to gender-based power imbalances.

In addition to promoting women's equality, Hertell's primary arguments hinged on the larger economic benefits of protecting women. Ensuring women had access to their own finances in the event of their husbands' misfortunes secured women's ability to bear and rear children and keep the home. As the "natural, and most immediate guardians and primary teachers of their infant offspring," women must be protected to ensure their performance of such immense responsibilities. Romanticization of the "self-sacrificing mother" was common during this period and remained a feature of advocacy for married women's property legislation. Advocates celebrated women's superior morals and integral contributions to society within the walls of her home. This seemingly complementary dominant discourse served as a reminder of women's true sphere amidst discussions about providing women increased economic independence.[42]

In Hertells's view of women, as with many men of the period, women not only required the protection of their husband, but also the masculine arm of the state. In his

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[40] Ibid., 115.
[41] Thomas Hertell, *Remarks Comprising in Substance Judge Hertell's Argument in the House Assembly of the State of New York in the Session of 1837 in Support of the Bill to Restore to Married Women 'The Right to Property' As Guaranteed by the Constitution of this State* (New York: Published by Henry Durell, 1839): 9.
[42] Gordon, *The Moral Property of Women*: 10.

initial remarks on the bill, Hertell relied upon the image of the irresponsible and rapacious husband looking to take advantage of "young, inexperienced, unsuspecting, and credulous females."[43] This common trope of the period relied upon women's assumed weakness and emasculating images of men who succumbed to the evils of vice and corruption.[44] While likely born out of genuine concern about the exploitation of women, such attitudes reinforced notions of women's necessary dependence.

In her extensive book on the debates and discourse surrounding New York's married women's property statue, Norma Basch notes the web of intersecting issues which led to the passage of the law, including "the instability of the antebellum economy, the inequities of the legal system, and… the woman question."[45] The expansion of rights to women was not the main motivation for the statute, but it inevitably became a key feature of debates. Building upon the arguments of Hertell in the late 1830s, those advocating for the bill in the 1840s relied heavily upon the image of the "self-sacrificing mother."[46] In an 1841 New York Senate Judiciary Committee report, legislators emphasized the "quiet and unostentatious, yet powerful and pervading influence of virtuous wives and mothers upholding the domestic relations, preserving the social order, and promoting general prosperity."[47] Lawmakers' chief concern was the corruption of

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[43] Hertell, *Remarks Comprising in Substance Judge Hertell's Argument:* 58.
[44] Basch, *In the Eyes of the Law*: 115-116.
[45] Ibid., 114.
[46] Gordon, *The Moral Property of Women*: 10.
[47] "Report of the Committee on the Judiciary, on Several Petitions for a Law to Extend the Exemption of Personal Property from Sale on Execution or Distress for Rent," NYSD, April 22, 1841, no. 81, as quoted in Basch, *In the Eyes of the Law:* 125.

women's special domestic and reproductive role, especially from the dangerous forces of the market.

While there were lawmakers who advocated on behalf of the bill because of their genuine and sincere belief in women's natural rights, that was not the dominant discourse. Hertell's bill intended to give women more economic control, not to empower them to work or earn money, but to enable them to perform their proper work safely and securely in the home.

The eventual New York law, passed in 1848, gave married women control of the property they entered marriage with, "as if she were a single female."[48] A husband could no longer unilaterally dispose of his wife's assets, nor could debt collectors claim a wife's assets to satisfy her husband's debts. However, a husband retained the ability to manage his wife's assets as he pleased.[49] The 1848 New York law earned a central spot in women's history and spurred another wave of similar legislation in the succeeding decade.[50] Conditions differed between New York and Mississippi and nearly a decade occurred between the passage of their initial property statutes. Even so, both states expanded women's rights in a contained and calculated way. Advocates largely relied on the image of the endangered mother as a mechanism for insulating assets, relieving male debtors, and safeguarding women's place in the home.

Married women's property laws were not the only statutory changes of this period focused on improving the conditions of women: in the first few decades of the nineteenth

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[48] "An Act for the effectual protection of the property of married women," 307, 1848 New York Laws ch. 200 (1848).
[49] Chused, "Married Women's Property Law": 1411.
[50] Basch, *In the Eyes of the Law*: 166.

century, several states created protections for deserted wives, outlawed the imprisonment of women debtors, and recognized widows as a protected class in land grant policy.[51] Even in the midst of statutory changes to married women's property rights and women's legal rights more broadly, most women remained squarely under the control of the men in their lives. These changes intentionally occurred in the context of preserving male economic, political, and social control.

Poor Women, Wage Labor, and Coverture

Despite the apocalyptic concerns of opponents to expanding married women's property rights, the "revolution" did not occur. The gender hierarchy did not collapse. Domestic order was not lost. The economy continued to function.[52] Instead, wealthy wives in the South got the chance to own and brutalize their own slaves. Wealthy husbands ensured their financial future with the inheritance and land of their wives. Extending property rights to married women changed the lives of only a select few.

Early legislation was often narrowly tailored and faced revisions in the latter half of the nineteenth century. Following the 1848 New York law, a married woman's earnings still remained under her husband's control. If she worked, her earnings belonged to him. This lasted until 1860, when the legislature allowed married women control of their property, in the form of earnings, acquired "by her trade, business, labor or services."[53] Following the passage of the first married women's property acts, many states left in place severe disabilities in the rights of married women, including their

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[51] Chused, "Married Women's Property Law": 1406-1408.
[52] Basch, *In the Eyes of the Law*: 30.
[53] Basch, *In the Eyes of the Law*: 234-237.

inability to own their earnings or be recognized as joint guardians to their children alongside their husbands. Even further, the limited effects of the legislation resulted from their narrow focus on family units with immense financial assets, specifically the most affluent families in the United States.

Proponents of married women's property reform concerned themselves primarily with wealthy, propertied women, who were but a small fraction of the female population. Most nineteenth-century women did not enter their marriages with large landholdings or property vested in enslaved persons. Most women did not have much, if anything, in the way of dowry.[54] Most women had no protections for their financial, physical, or personal wellbeing. Evidently, lawmakers were not concerned with most women.

In debating married women's property reform, lawmakers in Mississippi and New York relied heavily on the trope of the vulnerable, exploited wife who struggled to care for herself and her children in the face of her husband's economic misfortunes. Such women existed, but this hypothetical woman also was implicitly classed and raced: she was a white woman of high social standing and familial wealth whose personal fortunes had been unjustly squandered. She was decidedly middle class. In the eyes of legislators, this woman whom they so eagerly sought to protect was surely not a working woman, let alone an immigrant or a Black woman. Lessening the impact of poverty on women was not lawmakers' focus. Instead, they sought to protect a certain type of woman from a very specific type of perceived injustice grounded in ensuring the continued access of men to her property.

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[54] Basch, *In the Eyes of the Law*: 135.

The image of the vulnerable mother simply did not extend to poor women, as Victorian ideals of femininity rejected them. Nineteenth-century beauty standards emphasized "delicacy, fragility, paleness, [and] softness." True femininity correlated with whiteness, wealth, and privilege and was incompatible with participation in wage labor.[55] Advice manuals, magazines, and newspapers preached the associated values of republican motherhood to eager ears. As Catherine Beecher, a prominent educator and advocate for women's education, wrote in in 1871, "Woman's greatest mission is to train immature, weak, and ignorant creatures, to obey the laws of God… first in the family, then in the school… then in the nation."[56] *Godey's Lady's Book* frequently reiterated this message of women's esteemed and singular role of raising children.[57] Industrialization and the commercialization of agriculture pushed labor outside of the home, lessening the labor of wealthier, married white women. Increasing wages for men and an influx of immigrants to perform cheap domestic labor ensured that motherhood became a "job" for many wealthy white women. Married women had more time and energy to devote to their children within their rightful sphere of the home.[58]

This cult of domesticity celebrated the domestic contributions of married women, but it smothered poor women, who could not turn away from wage labor. Many nineteenth-century poor white women worked as domestic servants, textile workers, or teachers, while also managing their own household. Free Black women and immigrant

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[55] Gordon, *The Moral Property of Women*: 9-10.
[56] Catherine Beecher, *Woman Suffrage and Woman's Profession* (Hartford: Brown & Gross, 1871): 175.
[57] "Editor's Table," *Godey's Lady's Book* 40 (1850): 75.
[58] S. J. Kleinberg, *Women in the United States, 1830-1945* (New Brunswick, NJ: Rutgers University Press, 1999): 34-39.

women had even fewer opportunities, mostly as laundresses or as domestic servants for white families. Given the high levels of poverty in these communities, most women worked well into old age.[59] Notions of purity and republican motherhood were inaccessible to these women because of their race and their class. Further, the booming prostitution industry of this period relied upon the exploitation of poor women whose purity was sacrificed for men's pleasure.[60]

Most nineteenth-century women were propertyless and largely financially unaffected by the advent of married women's property rights.[61] Since they did not have property to hold on to, their economic struggles manifested differently than lawmakers cared to imagine. In the last quarter of the nineteenth century, Susan B. Anthony described the persistence of women's widespread economic dependence, even following the passage of married women's property laws across the U.S.: "The vast majority of married women will never earn a dollar by work outside their families, or inherit a dollar from their fathers, it follows that from the day of their marriage to the day of the death of their husbands, not one of them ever has a dollar, except it shall please her husband to let her have it."[62] The first half of Anthony's quote appears categorically incorrect, as many women did work outside the home; her own middle-class bias ignores women's contributions to the labor market, especially through industrial labor in the latter half of the century. However, her comments on inheritance and the larger patriarchal structure

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[59] Kleinberg, *Women in the United States*: 12-18.
[60] Gordon, *The Moral Property of Women*: 11.
[61] Basch, *In the Eyes of the Law*: 135.
[62] Susan B. Anthony, "Speech after Arrest for Illegal Voting." 1872. In *Feminist Theory: A Reader*, 4th ed., ed. Wendy K. Kolmar and Frances Bartkowski (New York: McGraw-Hill Higher Education, 2013): 98-102.

governing women's lives illuminate the shortcomings of existing legislation. Married women's property law largely denoted women's property as that which she entered marriage with through her inheritance or family wealth, but most women had nothing of the sort. Further, for the large proportion of poor women who did work outside the home, their earnings belonged to their husbands. Married women's property laws left this aspect of coverture untouched for several more decades.

Even as the propertied elements of coverture did not structure the lives of most married women, their relationships were still guided by its values. In marriage, she was erased — legally, financially, and socially. With or without property, the equation remained the same: one plus one equals one.[63] With the help of legislatures and courts throughout U.S. history up to this point, coverture deeply embedded itself in gendered expectations of marital roles and responsibilities. Coverture served as a guide for relationships, domestic structure, and gender hierarchy within the household, all of which placed a woman squarely under her husband's control. For working class households, the subordination of women — wives and daughters alike — helped construct an image of masculinity that "created cross-class unity among men."[64] The domination of women extended beyond propertied families, as women's steadfast and esteemed role as mother and wife widely functioned as a source of her subjugation.

Married women's property acts did not change most women's lives because that was not their intent. They were not meant to radically improve women's economic and

[63] Basch, *In the Eyes of the Law*: 17.
[64] Gordon, *The Moral Property of Women*: 11.

social standing. Such laws, including the 1839 Mississippi statute and the 1848 New York statute, represented the self-interested desires of lawmakers to insulate property and safeguard women's special reproductive and household duties. Their concern lay with the protection of property and orderly maintenance of inheritance, rather than the dire plight of nineteenth-century women.

This is not to say that the development of married women's property acts did not contribute to reshaping women's rights. While women were constrained to varying degrees, they were also recognized as playing a crucial role within the family. Their authority in the home expanded. Aspects of coverture withstood the legislative attacks of the nineteenth century, but married women's property acts contributed to reshaping, albeit slowly, the culture and expectations surrounding marriage. Even with its narrow focus and impact, the debates surrounding these laws implicitly, and often unintentionally, questioned the notion that wives' were property of their husbands.[65] This contribution merits a critical spot in the history of women's fight for their rights.

However, the narrow nature of this legislation cannot be understated. Propertied white women were the main beneficiaries. Poor white women may have felt the grip of coverture slowly easing as successive state laws eroded the notion of man's ownership over his wife and her property. Enslaved Black women received no such relief. Such legislation left untouched the most pervasive system for oppressing and commodifying women's bodies and reproductive capacities.

Enslaved Women and Reproductive Control

[65] Basch, *In the Eyes of the Law*: 37-39.

As white women of the mid-nineteenth century gradually gained more rights, Black enslaved women suffered the greatest degrees of unfreedom and violence, intimately tied to their reproductive capacity. Through married women's property acts, lawmakers and white women implicitly challenged white women's status as property, but largely accepted or tolerated the widespread enslavement of human beings. In most southern states, these laws freed married women to own their slaves, a contradiction which was apparently lost on lawmakers. By the early nineteenth century, slavery was largely a southern phenomenon. Abolition and emancipation efforts in the northern states resulted in slavery becoming geographically concentrated in the South, which continued to increase its enslaved population and its reliance on a cotton-based economy.[66]

The U.S. slave system relied chiefly upon female reproduction. Enslaved women's bodies ensured its continued economic viability through an ample supply of unfree laborers. In the U.S. context, enslavement was considered an inherited trait. In 1662, the state of Virginia passed a law dictating, "All children borne in this country shall be held bond or free only according to the condition of the mother."[67] The legal doctrine of "*partus sequitur ventrem*," or "offspring follows belly," ensured that enslaved women had no claims to their offspring. This became a staple of southern slave law. In the seventeenth and eighteenth centuries, several southern states — including Maryland, South Carolina, and Georgia — developed similar laws dictating the heritability of

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[66] "Number of Slaves in the Territory Enumerated, 1790 to 1850," *Teaching American History,* September 10, 2021.

[67] Act XII, Virginia (1662), as quoted in Jennifer L. Morgan, "Partus Sequitur Ventrem: Law, Race, and Reproduction in Colonial Slavery," *Small Axe: A Caribbean Journal of Criticism* 22, no. 1 (2018): 1–2.

enslavement, though not always reliant upon the condition of the mother. However, following the Revolutionary War and into the early nineteenth century, many states — including Kentucky, Florida, Mississippi, and Louisiana — passed statutes which explicitly tied the condition of freedom or enslavement to that of the mother.[68] By the mid-nineteenth century, state courts across the South largely embraced the principle of slavery as a condition inherited from the mother. In 1842, the Supreme Court of North Carolina ruled on the status of a child whose mother, a freed woman, gave birth while enslaved, finding that the child was not free. The court conclusively connected their ruling to "the maxim, *partus sequitur ventrem*; which, we believe, has been universally adopted in this country."[69] The widespread adoption of this legal notion ensured that Black women's bodies functioned as the engines reproducing the slave system.

Enslaved women's bodies did not belong to them. Claims to enslaved women's labor extended to their physical labor as well as their reproductive labor, the latter being the most lucrative. In 1819, Thomas Jefferson noted the reliance of a slave-based economy on Black women's reproductive labor, stating that "a child raised every 2 years is of more profit than the crop of the best laboring [. . .] man."[70] Slavery commodified and dispossessed the bodies of Black women in a particularly brutal way. As Sarah Grimké, an abolitionist and suffragist, wrote in 1837, enslaved women's willingness to have sex could be central to her safety or very existence: if an enslaved woman "desires

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[68] Thomas D. Morris, *Southern Slavery and the Law, 1619-1860* (United States: The University of North Carolina Press, 2004): 38-48.
[69] Mayho v. Sears 25 N.C. 224 (1842).
[70] Thomas Jefferson, *Extract from Thomas Jefferson to Joel Yancey, 17 January 1819*, letter, from Jefferson Quotes and Family Letters, tjrs.monticello.org/letter/2117.

to preserve her virtue unsullied, she is either bribed or whipped into compliance, or if she dares resist her seducer, her life by the laws of some of the slave states may be, and has actually been, sacrificed to the fury of disappointed passion."[71] Despite laws against interracial sex, it was common for slaveholders to have sex with the women they enslaved, a practice which reiterated the subjugation of women and potentially increased a masters' wealth through reproduction.[72]

For enslaved women, there was no question of consent. According to the law, it was not possible to rape her. For a slave owner to rape an enslaved woman was to exercise his right over his property. Two decades after the Mississippi legislature granted married women the right to own and control their property, the Mississippi Supreme Court reiterated the utter lack of property which enslaved women held in their own body. The 1859 case concerned an enslaved Black man who was convicted of raping an enslaved Black girl. She was not even ten years old. The Court found that it was not possible to rape an enslaved woman because "their sexual intercourse is left to be regulated by their owners," rather than themselves. Any "violation" of an enslaved woman was "mere assault and battery."[73] This legal fiction contrasts starkly with the treatment of Black men, enslaved or free, who were accused of raping white women.[74] The legal crime of rape fundamentally undermined the slave system if applied to enslaved women. Further, rape reinforced the slave system by violently reasserting the

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[71] Sarah Grimké, "Letters on the Equality of the Sexes and the Condition of Women" (Boston: 1838).
[72] Pascoe, *What Comes Naturally*, 24-25.
[73] George v. State, 37 Miss. R., 316 (1859).
[74] Jeffrey J. Pokorak, "Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Disparities," *Nevada Law Journal* 7 no. 1 (2006): 8.

hierarchy. The violation and exploitation of an enslaved woman's body had a unique economic purpose, reinforced by laws dictating matrilineal descent and further facilitated by laws undermining marriage between enslaved people.

Slavery and marriage were incompatible and necessarily separated from one another. In the eyes of the law, marriage among enslaved people was illegitimate. Even though slave owners encouraged enslaved people to "pair up" and procreate, they were not granted legal marital status, and thus they were denied all the benefits of property, guardianship, and security which marriage offered.[75] The denial of marriage was often attributed to the apparent inability of enslaved persons to enter into contracts. In 1858, The Supreme Court of North Carolina reaffirmed the illegitimacy of marriage between enslaved persons, grounding its decision in the contractual nature of marriage: "Marriage is based upon contract; consequently, the relation of 'man and wife' cannot exist among slaves. It is excluded on account of their incapacity to contract and of the paramount right of ownership in them, as property."[76] The decision built upon the U.S. Supreme Court's decision in *Dred Scott v. Sanford* only a year earlier, which denied citizenship to Black people.[77] The *Howard* decision demonstrates the consistent legal effort to safeguard the practice of marriage given the power and legitimacy it confers onto relationships in the eyes of the law.

Even in its absence, marriage structured the relationships of enslaved people by placing them outside of the traditionally constructed family. Denying enslaved persons

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[75] Pascoe, *What Comes Naturally*, 24-25.
[76] Howard v Howard 51 N.C. 235 (1858).
[77] Dred Scott v. Sandford, 60 U.S. 393 (1856).

the ability to enter legal marriages diluted their claims of parenthood, reinforcing the hereditary nature of slavery.[78] In her 1851 speech at the Women's Rights Convention in Akron, Ohio, formerly enslaved abolitionist Sojourner Truth lamented the commodification of her children through slavery: "I have born thirteen children, and seen most of them sold off into slavery, and when I cried out with my mother's grief, none but Jesus heard me! And ain't a woman?"[79] While scholars dispute the accuracy of the speech's transcription as Truth had only five children, her words famously capture slavery's denial of motherhood and the positioning of slaves as outside of traditional understandings of motherhood and family.

In denying marriage to enslaved people, the slavocracy exploited Black women's reproductive capacity by denying them autonomous reproductive and romantic relationships, reinforcing their status as property. For enslaved Black women, their relationship to sex and motherhood was inextricably tied to the absence of such a legitimate legal relationship and its resulting insulated family unit. Marriage law worked alongside a myriad of other state laws to facilitate enslaved women's status as unfree by denying them control over the most intimate property a human could have, vested in themselves and their kin.

Women as Agents and Subjects of Oppression

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[78] Jennifer L. Morgan, "Partus Sequitur Ventrem: Law, Race, and Reproduction in Colonial Slavery," *Small Axe: A Caribbean Journal of Criticism* 22, no. 1 (2018): 1.
[79] Sojourner Truth, "Ain't I A Woman?" (1851), in *Feminist Theory: A Reader,* 4th ed., ed. Wendy K. Kolmar and Frances Bartkowski. New York: McGraw-Hill Higher Education, 2013.

In considering the varied experiences of nineteenth-century women in relation to the legal and economic institutions of marriage, coverture, and slavery, it is crucial to note the duality of women's experiences. Women of this period experienced greatly varying levels of oppression, but also had different levels of consciousness to their specific condition. As abolitionist and suffragist Jane Elizabeth Jones proclaimed at the Ohio Women's Rights Convention in 1850, many women did not recognize or fight against the oppression they faced, often because of their various degrees of safety and security within the patriarchal system. Jones outlined the various responses of women of the period, noting that some women "would not think of taking their rights if offered [to] them," while others endured men's brutality yet "vigorously oppose all efforts to destroy the rule and dominion." Many poor women "labor for a mere pittance because they are women; they suffer oppression little less than absolute slavery." Lastly, many women had "no sense of injury, because they have never felt it in their own persons," and they were satisfied with what they had been supplied by the men in their lives.[80] As Jones recognized, a woman's consciousness to structural oppression was often deeply connected to her position in society, both in terms of the relative security she found within marriage and her own social power to resist.

Broadly speaking, women with the greatest degrees of financial security and social privilege enjoyed the greatest protection from the law. Married women's property acts were just one of the many instruments for protecting the interests of the wealthy. The

[80] Jane Elizabeth Jones, "The Wrongs of Women" (speech, Salem, OH, April 19, 1850) Speaking While Female Speech Bank. https://speakingwhilefemale.co/human-rights-jones1/.

rhetorical figure of the helpless and endangered mother utilized by legislators and activists in debates over this legislation must not obscure the wealth and relative privilege which such women held. Much of the property that legislators fought for married women to retain their control over was in the bodies of enslaved persons, whom women often participated in brutalizing. Histories of slavery in the U.S. point to a common trend of white women projecting their jealousy, shame, and anger onto the bodies of enslaved women, especially as a result of their husbands' infidelity.[81] Even beyond the institution of slavery, the low wages of domestic workers in the nineteenth century allowed many white women to hire household servants, who were often women of color.[82] Such relationships empowered white women in household management, offering them a level of control which was implicitly racialized.

Power and oppression are not mutually exclusive. They coexist and are contingent upon the social, political, and legal environment. Returning to the institution of slavery, it is crucial to recognize the complicity of white women, who were the subject of property legislation and the focus of public sympathies. Sisters and abolitionists Sarah and Angelina Grimké wrote extensively on this subject. As Sarah Grimké wrote in 1838, "the moral purity of the white woman is deeply contaminated" through her proximity and participation in the horrors of slavery. She was especially concerned with married

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[81] Jacqueline Jones, *Labor of Love, Labor of Sorrow: Black Women, Work, and the Family from Slavery to the Present* (New York: Basic Books, 1995): 25-26.
[82] David R. Roediger and Elizabeth D. Esch, *The Production of Difference: Race and the Management of Labor in U.S. History* (New York: Oxford University Press, 2014): 113-114.

women, many of whom considered themselves Christian, ignoring or facilitating the rape and brutalization of enslaved Black women.[83]

Despite the relative lack of power of most nineteenth-century women relative to men, propertied white women played a crucial role in the perpetuation of slavery and the systemic oppression of enslaved persons. Angelina Grimké spoke directly to this demographic in her *Appeal to the Christian Women of the South*: "I know you do not make the laws, but I also know that you are the wives and mothers, the sisters and daughters of those who do; and if you really suppose you can do nothing to overthrow slavery, you are greatly mistaken."[84] Grimké recognized the revolutionary power of women using their privilege, wealth, and whiteness, grounding her appeal to women in their common humanity and religious convictions. However, her hopes largely failed to materialize, as slavery persisted for decades. As nineteenth-century white women experienced violence and oppression, they also acted as agents of violence and oppression, both passively and actively.

Expanding the Empire

As the U.S. expanded its territories throughout the nineteenth century, marriage remained a key institution for social control. The western half of the continent— with its ample "open" land and need for populating by families, laborers, and soldiers — represented a space ripe for the reproduction of American institutions, norms, and

[83] Grimké, "Letters on the Equality of the Sexes."
[84] Angelina Grimké, "Appeal to the Christian Women of the South," (New York: American Anti-Slavery Society, 1836).

values. Women's bodies sat at the center of this literal and rhetorical reproductive process.[85]

Married women's property acts collided with the rising cult of domesticity to cement women's unique responsibilities within the home. New advancements in industry and agriculture, alongside the financial security offered to women through the law, enabled women to concentrate their labor on childbearing, child rearing, and homemaking. This story may not have been true for all women, or even most women, but the message offered about women's dependence was the same, and it was powerful in shaping the culture. Women and men absorbed these messages through advice manuals, newspapers, and sermons, as well as through the words of lawmakers and judges. The language of republican motherhood, fusing civic responsibility with motherhood, was perfected and disseminated in the middle part of the century.[86] White women had a central place in American society, which translated nicely to the process of empire building.

The family, contained through marriage, became the building block of the western frontier. As a result, attracting women westward became a key government initiative. Many western territories and states established generous married women's property statutes for the purpose of drawing women to the region.[87] However, the federal government established its own method. Following decades of debate on the subject, U.S.

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[85] Margaret D. Jacobs, "Reproducing White Settlers and Eliminating Natives: Settler Colonialism, Gender, and Family History in the American West," *Journal of the West* 56, No. 4, (2017): 13.
[86] Basch, *In the Eyes of the Law*: 163.
[87] Alshaikhmubarak, et al., "Single Motherhood": 98.

Congress passed the 1862 Homestead Act, granting land to single women for the first time in United States history. As with the passage of married women's property legislation, congressional debate illustrates the extent to which policymakers sought to steer white women's reproductive capacities and ensure their careful containment within the institution of marriage.

The law positioned women's bodies as a key policy tool for ensuring U.S. dominance in the West, populating the land, and reproducing social norms. Women's rights and opportunities revolved around such policy efforts as their bodies, commodified and dehumanized, became vehicles of settler colonialism and, in turn, capitalist expansion. White women continued to endure various degrees of oppression, while simultaneously brutalizing and subjugating free and enslaved Black women and other more marginalized groups across the United States and the western territories.

As the following chapters will illustrate, marriage has remained a chief instrument for state and federal governments to control, steer, and exploit women's reproductive capacity. The desire to control women's reproduction persists as a consistent theme in American lawmaking and judicial activism through the next century and into the modern day. However, what would shift is the character and legal strength of the instruments with which women's dependence on men has been enforced and coerced by the law. In the eyes of the law, women's labor is inextricable from her reproductive labor, as a civic duty, a wifely responsibility, and a supposedly natural and inevitable fact.

Chapter 2

Steering Women Westward: Marriage and Reproduction on the Frontier

Introduction

The Homestead Act of 1862 revolutionized property rights in the United States. Men flocked to the West on the promise of free land, and, for the first time in U.S. history, unmarried women enjoyed the same opportunity. The law intended to disperse public land for the purpose of settlement, while alleviating poor working conditions, high unemployment, and overcrowding in American cities.[1] With these noble aims in mind, Americans settled more than 10 percent of all US land, over 270 million acres.[2] In prior federal land distribution policies, women's claims to free land hinged upon their proximity to marriage as married women, who could jointly own land with their husbands, or widows. However, in a major advancement for women's rights, the Homestead Act offered single women the opportunity to claim land and live in the West on their own.

In passing the Homestead Act, white male policymakers sought to steer white women's reproductive capacities and ensure their careful containment within the institution of marriage. Single women flocked to the West for land, opportunity, and

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[1] Hannah L. Anderson, "That Settles It: The Debate and Consequences of the Homestead Act of 1862," *The History Teacher* 45, no. 1 (November 2011): 117-118.

[2] "The Homestead Act of 1862," National Archives and Records Administration (National Archives and Records Administration), accessed March 30, 2023, https://www.archives.gov/education/lessons/homestead-act#background.

independence. Men clambered after them with marriage on their minds, or so lawmakers hoped.

The qualifications clause of the Homestead Act stated, "Any person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States" could apply to claim 160 acres of "unappropriated public lands" on the "western frontier."[3] The law allowed unmarried women to receive free land, but married women could only enjoy the benefits of the land claimed by their husband. Crucially, married women were excluded as beneficiaries. By 1862, more than twenty states had passed married women's property laws, which gave married women various degrees of control over their property and earnings. As discussed in Chapter 1, these laws often functioned to insulate property from the husband's creditors rather than changing the position of married women in society.[4]

Free land from the federal government was not a new concept, nor was the strategic inclusion of women in such policies. The Oregon Donation Act of 1850 provided free land to men living in the Oregon Territory or intending to settle there. Congress offered twice as much land to married men compared to single men. Notably, the law enabled a married woman to jointly own the land with her husband. In her article, "Proper Women/Propertied Women," Tonia Compton studies the congressional debate surrounding the bill, highlighting lawmakers' focus on populating the region with families in pursuit of settler-colonial goals. Additionally, this joint ownership scheme

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[3] Ibid.

[4] Tonia Compton, "Proper Women/Propertied Women: Federal Land Laws and Gender Order(s) in the Nineteenth-Century Imperial American West" (PhD diss., University of Nebraska-Lincoln, 2009): 74.

ensured the insulation of a married woman's property from her husband's creditors.[5] However, no previous federal land distribution policy included unmarried women.

Proposals for homesteading legislation aimed at the West first emerged in the mid-1840s. The free land debate fiercely divided Congress in the mid-nineteenth century. The issue of homesteading and the question of slavery in the western territories exacerbated tensions between the North and the South. Many Southerners in Congress opposed homesteading out of fears it would undermine slavery. In the mid-1850s, the newly formed Republican Party — emerging, in part, from the anti-slavery Free Soil Party — championed homesteading. Debate about homesteading legislation occurred largely in the House, as these bills tended to die in the Senate due to southern dominance. However, the secession of southern states enabled Congress to pass the long awaited legislation in 1862.[6]

The eventual law represented decades of debates on federal land distribution in the West. Congress debated various free land proposals between 1845 and 1851, but serious debate over the inclusion of unmarried women did not occur until 1852 with the 32nd Congress.[7] Between 1852 and 1862, lawmakers discussed the prospect of women's inclusion as beneficiaries with varying degrees of fervor and exasperation, often laughing at the very notion of a single woman supporting herself in the West. The debates around women generally existed on the fringes. There was no climactic moment when Congress

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[5] Ibid., 24-25.
[6] Anderson, "That Settles It": 117-118.
[7] Hannah Haksgaard, "Including Unmarried Women in the Homestead Act of 1862," *Wayne Law Review* 67, no. 253 (2022): 273-275.

decided that unmarried women should be included. Credit cannot be given to one individual or a single impassioned speech. In fact, nearly every Congress saw versions of the bill in which women both were and were not included, and the 1862 Congress which passed the Homestead Act did not even discuss unmarried women.[8] This chapter relies upon a close reading of congressional debate leading up to the passage of the Homestead Act. Over the course of a decade, lawmakers discussed, proposed, denied, and passed countless iterations of the bill and subsequent amendments before passing the final version of the Homestead Act in 1862.

Analysis of this debate provides a snapshot of a crucial moment in American history and offers a window into the role that Congress intended women to play in the empire building process.[9] In the second half of the nineteenth century, social, economic, and political changes swept the country. Urbanization, industrialization, and the commercialization of agriculture drastically changed American life, especially in northern cities. Tensions brewed between northern and southern states as the country hurtled towards the Civil War. The government claimed vast territories in the West, occupied simultaneously by white Euro-Americans, immigrants, Indigenous peoples, free Black people, and enslaved populations. In this period, the legal and social position of white women in society fluctuated with the passage of married women's property laws and the growing women's rights movement. White male lawmakers imagined women to

[8] Ibid., 254.
[9] Compton, "Proper Women/Propertied Women": 6.

play a crucial role in responding to the changing circumstances of the country, specifically as agents and vehicles of empire building.

The West loomed large in the nineteenth-century U.S. imagination. The fertile, open lands overflowed with promise.[10] With the passage of the Homestead Act, lawmakers hoped to populate the land and expand their "civilization" across the continent. They sought to build an empire. They imagined women's labor, specifically their reproductive labor, as central to this process.[11] In the eyes of lawmakers, women birthed the soldiers, farmers, and laborers who would "improve" the land and defend against Indigenous incursions. Arguments for women's equality and natural right to the land collided with the more politically expedient appeals grounded in the political, social, and economic benefits of steering white women's reproductive capacity towards the western frontier.

The law positioned women's bodies as the vehicles for achieving their settler-colonial, capitalist, and white supremacist policy aims. In placing single women's bodies on the frontier, Congress hoped to draw young and fertile unmarried men westward with the prospect of marriage. Congress offered unmarried women a modicum of independence and opportunity, but it served to reinforce their singular status as wives, mothers, and daughters, rather than autonomous citizens.

Homes for All?

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[10] "Speech of Mr. McMullen," Appendix to the Congressional Globe, 32nd Congress, 1st Session (April 29, 1852), 520.

[11] Jacobs, "Reproducing White Settlers and Eliminating Natives: Settler Colonialism, Gender, and Family History in the American West," *Journal of the West* 56, No. 4, (2017): 13.

The Homestead Act may have involved free land, but the law should not be understood as charity. Lawmakers often described the principle of homesteading bills as "homes for all," but this rhetoric disguised their limited intentions.[12] As debate picked up steam in the early 1850s, lawmakers expressed their sincere belief that the benefits of free land should not be wide-reaching but should only extend to specific groups. Representative William Sackett of New York outlined this principle in 1852: "If [this bill] is intended as a gratuity, why, then, the bounty is only provided for a certain class of citizens… But gratuity is not the great foundation on which the bill stands. It is a bill… to promote the general interests of the country."[13] Lawmakers carefully debated the beneficiaries of the bill, weighing the potential benefits of empowering certain groups over others. Gender was not the only point of contention. Congress debated the utility of including immigrants as well, weighing the potential contributions of their labor against the impact of elevating their social and legal status.

The land may have been free, but Congress did not truly intend to provide "homes for all." Representative Thompson Campbell of Illinois responded to Representative Sackett's comment, reiterating that the law was not "an actual gift… to all who are willing to receive it," but rather a "sale" paid for by the labor of the settler.[14] Lawmakers viewed the Homestead Act not as a form of charity, but as an exchange. They imagined labor as the crux of this contract. After living on the land for five years, those who

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[12] "Speech of Mr. Cable," Appendix to the Congressional Globe, 32nd Congress, 1st Session, (March 10, 1852): 296.
[13] Congressional Globe, 32nd Congress, 1st Session (May 6, 1852): 1279.
[14] Ibid., 1279-1280.

claimed land in the West had to prove that they sufficiently cultivated the land in order to receive full ownership.[15]

In addition to occupying and "improving" the land, lawmakers held a variety of intersecting, and at times contradictory, beliefs about the intentions of homesteading bills. Some believed the policy would protect against attacks by Indigenous populations and cement the military position of the U.S. in the West, while others saw its chief contribution as alleviating overcrowding and squalor in northeastern cities. In response to Representatives Sackett and Campbell, Representative Willard P. Hall of Missouri argued population growth was the chief purpose of a homesteading bill: "[W]hen you adopt a acquire territory, you do it for the purpose of covering it with population; and for the purpose of securing the great object of that acquisition, you have the right to adopt the means which you deem the best to secure a population of that territory."[16] Representative Hall's comment alludes to the variety of considerations of lawmakers in determining who could claim land. The intention of lawmakers was not to simply give away free land as a form of charity. They had specific political, social, and economic goals that influenced their desire to extend the benefits of the law to certain groups of people.

For women, expectations of labor were intimately tied to population growth. Her labor contribution would be reproductive. In the latter half of the nineteenth century, public discourse revolved around women's contributions as wives and mothers. Sermons, advice manuals, and magazines preached motherhood as an esteemed form of civic duty.

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[15] "The Homestead Act of 1862," National Archives.
[16] Congressional Globe, 32nd Congress, 1st Session (May 6, 1852): 1280.

This cult of domesticity reinforced the expectation that women's labor was reproductive. Men would cultivate the land, but she, too, would "improve" the region with her labors as wife and mother.

Protecting Widows and Vulnerable Women

As Congress focused its attention westward, lawmakers sought to promote marriage in the new territories. Marriage served a variety of functions in society, including the maintenance of gender roles, the establishment of a family unit financially dependent on a man, and the orderly management of property.[17] The romanticized image of the fertile West held a central role in the U.S. imagination; however, lawmakers were keenly aware of the challenges posed by Indigenous peoples, the uncertain terrain, and the lack of social infrastructure. Recreating American society in the West was no small feat. Lawmakers hoped to recreate social norms and institutions in the new territories, and marriage offered a powerful instrument for doing so. As lawmakers debated the potential benefits of including certain groups of people, marital status emerged as a key mode of classification.

Marriage defined a nineteenth-century woman's identity. As such, Congress distinguished between a variety of categories of women based on their marital status: widows, unmarried women, divorced women, deserted women, and married women. Historically, U.S. free land policies included widows, especially military widows, as beneficiaries as a form of "national thanks."[18] Through the debates on homesteading bills,

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[17] Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (Oxford University Press, 2009): 23.
[18] Haksgaard, "Including Unmarried Women": 262.

Congress widely agreed with the notion of widows receiving free land. This matter was largely uncontested. Widows had immense emotional appeal as a vulnerable group in society whom lawmakers sought to protect: she was the dutiful wife who lost her husband, now struggling to raise her children and manage her household alone. This hypothetical figure loomed large in debate.

In April of 1852, Representative LaFayette McMullen of Virginia gave an impassioned speech proclaiming his support for widows' inclusion in the bill: "Is there a man in this House who would, by his vote, deny a home to the fatherless and to the widow." McMullen went on to describe widows as "helpless," "weeping," and deserving of land to "derive sustenance for her orphan children."[19] Evidently, such language persuaded lawmakers to support giving free land to widows to travel westward. A few weeks after McMullen's speech, Representative Andrew Johnson of Tennessee — who would eventually become the 17th president of the U.S. — advocated for a bill which gave land to "every man or widow who is head of family." He described the bill as "a naked, clean homestead proposition."[20] His depiction of the bill as simplistic and agreeable reflects the widespread consensus surrounding widows' inclusion.

This poses the crucial question of why widows were seen as a group deserving of inclusion without much debate, while other classes of women were subject to immense scrutiny over their potential inclusion. A widow's marital status defined her legal identity in perpetuity. Beyond her emotional appeal, the widow deserved support because she

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[19] "Speech of Mr. McMullen," Appendix to the Congressional Globe, 32nd Congress, 1st Session (April 29, 1852), 520.
[20] Congressional Globe, 32nd Congress, 1st Session (May 6, 1852): 1275-1276.

performed her gendered duties to society through marriage.[21] Ideally, she also had children. Lawmakers discussed widows almost exclusively in connection to their children, whom they would bring westward with them to populate the land. Perhaps as a bonus to their hypothetical children, widows had further reproductive potential, as they could remarry. Congressmen emphasized widows deserving nature and dependent children because they fulfilled their gendered duties to society through marriage in a way which single women had not. Lawmakers often juxtaposed the romanticized image of the helpless widow with that of the young single woman, creating an ideal for single women to strive towards through marriage and motherhood.

As debate continued, widespread consensus surrounding the inclusion of widows lent itself to a discussion of the inclusion of women more broadly. In response to Representative Johnson's "clean" homesteading bill that included widows, Representative John Allison of Pennsylvania moved to strike the line "who is head of a family" because it excluded single women. He believed land should "also be given to the persons of the opposite sex," at which the record indicates laughter in the chamber.[22] Laughter at the inclusion of women demonstrates the initial resistance in Congress to the inclusion of single women.

However, some did argue on the basis of women's equality to men. A few days after Congress heard and rejected Allison's amendment to the bill, Representative James Gaylord of Ohio again proposed the inclusion of single women, arguing women have "as

[21] Compton, "Proper Women/Propertied Women": 80.
[22] Congressional Globe, 32nd Congress, 1st Session (May 6, 1852): 1280.

much right there as bachelors" in reference to their right to access land on their own.[23] On that same day, Representative Joseph Cable of Ohio expressed a similar sentiment: "[Y]oung men and maidens…would be benefitted by the privilege of locating and cultivating one hundred and sixty acres…which are their natural birthright."[24] The term maidens denoted young unmarried women, while also subtly alluding to their virginity.[25] These comments demonstrate the seemingly genuine beliefs of some congressmen that women had a natural right to access land in the West. However, such comments were few and far between, sporadically appearing with little success and at times evoking laughter from Congress.

Often such comments on women's equal rights appear hollow. When pressed on his belief in the "natural birthright" of maidens to the land, Representative Cable clarified his standpoint: "I had made reference to maidens now, but who shall become wedded hereafter, for they could not conveniently till the soil." Lawmakers' advocacy for single women's inclusion most often reflected their assumption that these women would inevitably marry. A young woman's "natural right" to land was contingent upon her eventual marriage. Representative Cable, like many of his peers, adamantly supported the inclusion of unmarried women as beneficiaries of the Homestead Act. He recognized the victimization of women in nineteenth-century society and saw the benefit of giving free land in the West. Representative Cable continued his impassioned speech, urging

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[23] Congressional Globe, 32nd Congress, 1st Session (May 10, 1852), 1316.
[24] "Speech of Mr. Cable," Appendix to the Congressional Globe, 32nd Congress, 1st Session, (March 10, 1852): 298.
[25] Compton, "Proper Women/Propertied Women": 82.

Congress to "[s]ecure the mother and her little ones from the consequences of weakness or misfortunes — from the vices and follies — the dissipation or crimes of the husband and father."[26] Similar to debate surrounding married women's property laws, lawmakers relied upon the image of the vulnerable woman and the predatory husband.

A woman required the protection of her husband, and when he failed, the masculine arm of the state must protect her by providing her opportunities for a new life. They painted this paternalistic concern with a wide brush. A woman without a husband embodied fragility and weakness, and the state had a duty to protect her. The rhetorical reliance on single women's frailty appears at odds with the desires of lawmakers to send them westward. Lawmakers portrayed women as simultaneously self-sufficient and fragile. A young woman held a "natural right" to the land, but her weakness would prevent her from being able to "conveniently till the soil," as Congressman Cable argued. This dichotomy represents the core of women's inclusion in the Homestead Act.[27] Her weak and dependent state offered a reason for supporting her, but this very state reinforced her need to marry on the frontier. Congress hoped to draw young, single women westward towards marriage and motherhood.

Reproduction in the West

Lawmakers sought to steer women's labor towards the open, fertile western frontier. The inclusion of single women in the Homestead Act was fundamentally connected to their reproductive labor. If, as Representative Hall of Missouri noted,

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[26] "Speech of Mr. Cable," Appendix to the Congressional Globe, 32nd Congress, 1st Session, (March 10, 1852): 298-299.
[27] Compton, "Proper Women/Propertied Women": 26.

populating the West was the chief purpose of a homesteading bill, then it was not enough to merely attract families to the region.[28] Prior federal land distribution policies largely focused on families: The Oregon Donation Act of 1850 provided free land to men who settled in the Oregon Territory, offering married men twice as much land as single men.[29] The Homestead Act represented a changing strategy. Lawmakers no longer prioritized families, but rather they realized the benefit of attracting single men and women to the region. Representative Sackett made this argument in 1852: "It would be greatly detrimental to it to confine the settlement to the heads of families exclusively."[30] In order to truly populate the West, it was crucial to have reproduction occur in the West itself.

In the eyes of Congress, reproduction on the frontier not only populated the land, but it created active, strong, patriotic citizens. The U.S. government's settler colonial project of conquering the "frontier" crucially involved the "replacement" of Indigenous populations with white people. Individual settlers placed a central role in this violent, exploitative, and dehumanizing process through their very presence, but also through their physical "defense" of the region.[31] Settler colonialism required a sturdy population of white men to defend against Indigenous incursions and tame the supposedly wild landscape. Congress saw something special in the conditions of a child born and raised in the West. They spoke of these hypothetical children as soldiers and patriotic citizens.[32] In

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[28] Congressional Globe, 32nd Congress, 1st Session (May 6, 1852): 1280.
[29] Compton, "Proper Women/Propertied Women": 25.
[30] Congressional Globe, 32nd Congress, 1st Session (May 10, 1852), 1316.
[31] Alaina E. Roberts, *I've Been Here All the While: Black Freedom on Native Land* (Philadelphia, PA: University of Pennsylvania Press, 2023): 2.
[32] "Speech of Hon. W.R. Smith," Appendix to the Congressional Globe, 32nd Congress, 1st session (April 27, 1852): 514.

1852, Representative Cable articulated this idea: “Secure to every family a home…and you secure a love of country, lasting as the evergreens of our native country. From childhood to manhood that love of country will grow with his growth, and strengthen with his strength."[33] Women’s reproductive labors created an ideal class of future citizens in the West.

Single women served the crucial purpose of both populating the West through reproduction and drawing men westward with the prospect of marriage. In late April of 1852, the House of Representatives heard ample arguments advocating for single women’s inclusion to entice strong, patriotic men westward. Alabama’s Representative William R. Smith offered an ideal hypothetical in which a young man could claim land, and “if he is not married — this being necessary to perfect his possessions — his neighbor has a daughter whom he will woo and marry. The land will become the dowry to his young bride…And the fact that this bill will promote early marriages is no light argument in its favor.”[34] Homesteading created ideal circumstances for marriage and reproduction to flourish.

Two days later, Representative McMullen reiterated this idea in an impassioned speech on the merits of the present homesteading bill: the law intends “not only to promote agriculture, commerce, and navigation, but conduces to the promotion of Christianity, civilization, and industry.” Congressman Gaylord interrupted, inquiring

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[33] “Speech of Mr. Cable,” Appendix to the Congressional Globe, 32nd Congress, 1st Session, (March 10, 1852): 299.
[34] “Speech of Hon. W.R. Smith,” Appendix to the Congressional Globe, 32nd Congress, 1st session (April 27, 1852): 514.

"whether it will extend any encouragement to matrimony." McMullen confidently responded: "The passage of this bill will inspire young men with hope, and energy, and enterprise. He will be seen flying to the fertile regions of the West, with her who is dear to his heart, to seek a home."[35]

Congress expected young men to feel invigorated by the presence of young, fertile women in the West. They conceived of women's entire place in the West as a benefit and opportunity for bachelors. Lawmakers saw women as a living, breathing incentive for young men to move westward. Further, the lofty intentions of the law, articulated by Congressman McMullen, spoke to the centrality of women's reproductive labor in fulfilling lawmakers' goals. The family unit, bound together in a heterosexual marriage, offered the building blocks for promoting social norms and institutions of American life.

In the 33rd Congress, lawmakers vigorously debated the beneficiaries of homesteading bills with a special focus on ensuring reproduction on the frontier. Congressmen continued to rely upon the assumed allure of single women in the West, often framing it as a personal benefit to all young men. In debates over a homestead bill in February of 1854, Representative Williamson R.W. Cobb of Alabama chided his fellow congressman, saying "I did hope that my friend from Tennessee, [Mr. Jones] who is a bachelor, would have brought forward an amendment proposing to extend the privileges of this bill to unmarried females," so as to "entitle himself to enjoy the

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[35] "Speech of Mr. McMullen," Appendix to the Congressional Globe, 32nd Congress, 1st Session (April 29, 1852), 520.

privileges of the bill by enjoying them with a female."[36] This dehumanizing perspective implied that women would wait patiently in the West for a man to join them in marriage. Single young men in Congress, like Representative Jones, were individually called out for failing to see the opportunity before them — the opportunity being marriageable women.

In order to promote marriage and reproduction in the West, lawmakers experimented with setting different ages of qualification for men and women to access free land. Most homesteading proposals set the minimum age between eighteen and twenty-one with twenty-one being the most common. In response to Congressman Cobb's comments, Representative George Jones of Tennessee proposed an amendment to include single women and suggested lowering the age of qualification for all beneficiaries from twenty-one to eighteen: "There are many persons in this country who marry at as early an age as eighteen; and there are many who, at that age, might desire to go and make a location of land preparatory to forming that union."[37] Jones' comment alludes to the favorability of early marriages in the eyes of Congress and the accepted belief that free land would instigate marriages. Lawmakers presumed homesteaders would acquire land, find a spouse, and start a family, in that order.

If early marriages were ideal, then sending young women of reproductive age westward was crucial to accomplishing this goal. As a result, many in Congress believed the qualification age for women should be lowered compared to men, and they offered a

[36] Congressional Globe, 33rd Congress, 1st Session (Feb. 28, 1854): 501.
[37] Congressional Globe, 33rd Congress, 1st Session (Feb. 28, 1854): 501.

variety of justifications. Representative John L. Taylor of Ohio responded to Representative Jones' proposal and suggested the minimum age should be twenty-one for men and eighteen for women because "a young lady is, by law, of age at eighteen years." Representative William Richardson of Illinois then responded that he could "very cheerfully vote" for such an amendment: "If he is not married, it is his fault." Often discourse on the subject reflected contempt towards single men for their perceived failure to marry. Amidst this discourse, Representative Richardson also remarked that "bachelors ought not to be given land," to which the record noted laughter.[38] The House rejected Jones' amendment to stagger the qualification age, but many congressmen made similar proposals over the coming days, weeks, and years.

Later that day, Representative William B.W. Dent of Georgia spoke in favor of a similar amendment to set the minimum age as nineteen for men and eighteen for single women: "[When] young men twenty-one years of age are not married, it is generally their own fault; but it is also true that there are a great many young ladies eighteen years of age who are unmarried, though it is not their fault". In reiterating Representative Richardson's earlier comment, Representative Dent demonstrated the salience of such ideas about women's earlier maturity, or at least the usefulness of their earlier inclusion to the aims of policymakers. Dent continued, proclaiming his support for the inclusion of young single women: "Then I go it for the women," to which the record noted "great

[38] Congressional Globe, 33rd Congress, 1st Session (Feb. 28, 1854): 502-503.

laughter." Another congressman then questioned him on the age at which he believed women typically married, and Dent stated, "Some of them marry at sixteen."[39]

Congressmen often subscribed to the belief that women came of age before men, and, as a result, were able to marry and bear children at an earlier age. Such discussions of women's maturity reinforced arguments in favor of sending women westward at a young age. Whether or not these congressmen believed that women truly matured at an earlier age, they saw it as useful to the project of promoting early marriage and reproduction in the West, and, as such, they advanced this idea on the House floor.

Belief in women's early maturity coincided with the traditional age of marriage during this period. The median marriage age in 1850 was 25.3 for native-born white men and 21.3 for women. This number stayed consistent for women from 1850 through 1870; however, the age for men greatly decreased after the Civil War. Additionally, scholars note the relationship between availability of land and young marriages: towards the end of the century, the average age of marriage increased, potentially due to the decrease in available land, which limited "opportunities for family formation."[40] Overall, the median marriage age of white women during the period of congressional debate about the Homestead Act was around twenty-one years old. Those who supported the inclusion of women at a younger age were operating from an understanding that women married at an earlier age than men, and that age hovered somewhere around twenty-one. It is notable

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[39] Ibid., 505.

[40] Catherine A. Fitch and Steven Ruggles, "Historical Trends in Marriage Formation, United States 1850 — 1900." University of Minnesota (2000): 7-8.

that many congressmen suggested women did, or should, marry at an even younger age, such as sixteen or eighteen.

Inducing young, viable men and women to marry was crucial to populating the West and reproducing gendered social norms. Congress positioned women's bodies as the vehicles for accomplishing such goals. When Congress rekindled this debate several months later in July of 1854, Representative William C. Dawson of Georgia built upon the arguments of his peers and forcefully advocated for the inclusion of women because of their immense reproductive potential. "[H]ence, I say, give it to every citizen, native or adopted, for the purpose of encouragement; and a still more important thing, to increase population by reproduction; give to every girl over the age of eighteen or twenty-one, one hundred and sixty acres of land." In his opinion, reproduction was the chief goal of a homesteading law. Free land encouraged family formation. Another senator then asked how this would affect reproduction, and Senator Dawson answered simply: "By inducing someone to unite with her."[41] This quote encapsulates the interconnectedness of land, marriage, and reproduction assumed by Congress, as well as the intended impact of this legislation. To give a woman land was to induce a man to marry her.

Women existed as a living, breathing incentive for young men to move westward in the hopes of finding and marrying a young woman of reproductive age. The efforts to specifically lower the age of qualification for women aimed to increase the potential pool of young women of reproductive age who could travel westward, thus increasing the likelihood of marriage and reproduction in the West. Efforts to stagger the age of

[41] Congressional Globe, 33rd Congress, 1st Session (July 10, 1854): 1669.

qualification failed; however, the fierce advocacy of many congressmen on the matter reflects their desire to steer women's reproductive energies towards the West.

Contrasting Expectations: Bachelors vs. Maidens

Women's bodies may have been the vessels for populating and securing the West, but men's reproductive energies were no less needed for this project. Congress sought to stimulate marriage and reproduction in the region, specifically among white men and women of reproductive age. In March of 1860, the House passed a homesteading bill which offered the prospect of free land to "any person who is the head of a family, or who has arrived at the age of twenty-one years.[42] The law included unmarried women as beneficiaries. In April and May of 1860, the U.S. Senate took up the issue of homesteading in response to the House bill; however, they narrowed the qualification clause to only include heads of families.

In an impassioned speech on the Senate floor, Senator Morton Wilkerson of Minnesota argued for the inclusion of unmarried men: These "active and energetic young men" were "the vanguard of civilization upon this continent. They penetrate the wild solitudes far beyond the safety and comforts of society."[43] Wilkerson explicitly tied his romanticization of the young male settler to his reproductive potential through his descriptions of their vigor and ability to "penetrate" the landscape. He believed the law must extend its benefits to single men and women in order to "furnish the proper encouragement" for marriage, given that "early marriages [are] predictive of great moral

[42] Congressional Globe, 36th Congress, 1st Session (March 12, 1860): 1115.
[43] Congressional Globe, 36th Congress, 1st session (April 3, 1860): 1509.

good in a community." Wilkerson continued, "when the ambition of the settler has been attained… then the young settler will require no stimulation into matrimony. He will feel for himself the necessity of a partner and a helpmate in his free home, won by his own toil."[44] Send young men West, they believed, and marriage and children would follow.

As the Senate debated the qualification clause of the Homestead Act, many focused their attention on the inclusion of young men, while discussions of young women often occurred on the periphery. In the eyes of lawmakers, men offered ample forms of labor: they protected the frontier, cultivated the land, established institutions, and "[laid] the foundations of future States."[45] So great were the contributions of young men in the West. A woman's labor was reduced to her reproductive and household contributions. In the eyes of many congressmen, women were unable to participate in any other way. They emphasized women's weakness and frailty. Her contributions would be as mother, wife, and homemaker.

For many congressmen, homesteads were synonymous with the family unit. A few days after Senator Wilkerson made his impassioned plea for the inclusion of single men and women, Senator James Doolittle of Wisconsin proclaimed the benefits which would result from a homestead bill: "happy homes filled with brave sons and blooming daughters with well tilled fields and orchards and gardens." Doolittle continued, arguing homesteading would "overwhelm Mormonism and polygamy, as with a flood, wiping them out more efficiently than by penal enactments or with the Army." Homesteading

[44] Congressional Globe, 36th Congress, 1st session (April 3, 1860): 1510.
[45] Ibid.

represented a reinstitution of domestic stability in the region by reinforcing the institution of marriage recognized by the state: a marriage between one husband and one wife, ideally of the same racial group. Through their very presence in the region, the nuclear family structure offered an example of "civilization" to those whose lives existed, to varying degrees, outside of dominant standards, such as Mormons and Indigenous peoples.[46] Senator James Green of Missouri reiterated this belief a few moments later: "This word 'homestead' implies always something sacred, to be preserved as home to the husband, wife, and children."[47] In the eyes of Congress, homesteading was synonymous with marriage and the family unit. This "sacred" institution would be brought westward through the relationships between young men and women in the region.

The 36th Congress also developed an understanding of homesteading as a mechanism for building an empire, specifically to defend against attacks from Indigenous people. As Senator Wilkerson proclaimed, young men on the frontier acted as "the vanguard of civilization."[48] In the American imagination, homesteaders, assumed to be men, would act as the first line of defense against the Indigenous populations whose stolen land they would be living upon. Senator Doolittle reiterated this idea, noting that the population of the West would "become so strong for self-defense as to put an end to all Indian depredations, which are the prolific sources or pretexts for Indian wars." A few moments later, Senator James D. Mason of Virginia described the policy as "a mode of

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[46] C. Elman et al., "Drawn to the Land: Women's Life Course Consequences of Frontier Settlement over Two North Dakotan Land Booms, 1878-1910," *Social Science History* 37, no. 1 (2013): pp. 53.
[47] Congressional Globe, 36th Congress, 1st Session (April 10, 1860): 1631- 1635.
[48] Congressional Globe, 36th Congress, 1st session (April 3, 1860): 1509-1510

attaining empire and of using it when attained."[49] The phrasing of "using it when attained" alludes to its larger goals as a mechanism of cementing U.S. control of the region. Lawmakers described their presence in the region defensive terms; however, the law fundamentally functions in the offensive as an instrument of settler colonialism. They sought not just to populate the land with people and urge reproduction, but Congress hoped to attract strong, young, able-bodied men to physically defend the region.

The following day, Andrew Johnson, then a Senator of Tennessee, described the ideal young men they sought to attract westward: the proposed law "is not a bill for paupers, for miserable lazzaroni, for persons from lazar houses, for vagabonds, not for what are denominated sometimes poor people in one sense; but it is for men who have arms, who have muscles, who have sinews, and who have willing hearts to work."[50] The language which lawmakers used to describe men contrasted sharply with their expectations for women. They imagined homesteading men to be physically strong, rugged, and patriotic. Meanwhile, they imagined women as dutiful and supportive wives and mothers. This disparity speaks volumes. Women's existence on the frontier was defined by the benefit they offered to men and society through their reproductive labors.

Women's labor may have been crucial to populating the region, but some senators recognized the shift in gender relations implicit in the bill and adamantly opposed its passage. The law empowered single women to travel westward and live on their own. In early May of 1860, Senator Robert Johnson of Arkansas expressed his fears that single

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[49] Ibid.
[50] Congressional Globe, 36th Cong., 1st Session (April 11, 1860): 1654.

women homesteaders would remain single: "Young women…are to be brought in the wilderness, make a settlement, build a house, and live in it by themselves, and unmarried. Why, sir, I hope the Senator does not wish to encourage that state of things."[51] He played upon the apparent ridiculousness of women living independently on the frontier. Most lawmakers believed that sending single women westward would entice men, in part, because of their vulnerability and weakness. Men would clamber after them in hopes of marriage. Although some, like Senator Robert Johnson, felt deeply uncomfortable making such a wager. Sending unmarried women westward was one thing, but having them remain unmarried was an entirely different issue. Interestingly, Senator Robert Johnson was one of the few voices expressing this concern, despite widespread concern over single men remaining unmarried.

Most congressmen viewed unmarried men and women as a source of potential, but many also saw bachelors as posing a potential threat to the gender order. In addition to expanding the rights of women, the proposed Senate bill offered free land to single men, whom many in congress looked up with derision. Senator Robert Johnson accused his peers of attempting to "aid bachelors" by including them as beneficiaries: single men "do not need our sympathies… In some States it has been said that bachelors are no better than dogs; they do not discharge their duties towards society."[52] His language paralleled the discourse within the House in the 33rd Congress, demonstrating the salience of this brand of criticizing bachelors for their failure to fulfill their gendered responsibilities.

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[51] Congressional Globe, 36th Congress, 1st Session (May 9, 1860): 1993.
[52] Congressional Globe, 36th Congress, 1st Session (May 9, 1860): 1993.

Just like women, men had a "duty towards society" to marry and reproduce. However, women had few options outside of fulfilling this civic duty. In the latter half of the nineteenth century, most women remained squarely under the control of the men in their lives. State legislatures had only just begun to deconstruct coverture in a narrow way which largely preserved the husband's economic control over his wife's assets, earnings, and property. The cult of domesticity reinforced and romanticized a woman's duties within the home, smothering poor women under the dual burden of wage labor and housework. If she was not white, her economic opportunities were even fewer.

Nineteenth-century society placed the burden of reproduction squarely onto women's shoulders, but lawmakers recognized that women had less power to resist this responsibility compared to men. Many congressmen devoted much time and energy to lambasting bachelors for not finding themselves a wife, but they did not express the same level of concern over single women. Perhaps they could not imagine a young white woman seeking any future for herself outside of marriage. They expected men to marry, but a young white man had more social, political, and economic power to resist the normative framework if he so chose. White men had the power to reject expectations of marriage and family. This deeply unsettled some congressmen, including Senator Robert Johnson. While many congressmen opposed including bachelors because of their failure to adhere to their gendered responsibilities, they were also essential for accomplishing the goals of the Homestead Act. Women were the vessels for populating the land and reproducing gendered social norms, but this also required an ample supply of young white men.

After much debate, the Senate passed a homesteading bill, and in June of 1860, President James Buchanan vetoed the bill. In December, the first southern state seceded from the United States. When Congress assembled in 1861, the southern opponents to homesteading legislation were gone. On May 20th, 1862, President Abraham Lincoln signed the Homestead Act into law.[53]

As the country hurtled towards the Civil War over the right to enslave human beings, those who remained in Congress passed a homesteading law that ensured the expansion of white supremacy across the continent, in part, through the inclusion of single women.

Instruments for Building an Empire

The Homestead Act positioned women's bodies as the instruments of empire building. Lawmakers hoped to populate the vast western frontier and expand "civilization" across the continent. Congress utilized such sweeping language in discussing various homesteading bills, but this attitude also extended into the public discourse. In May of 1862, the *St. Joseph Saturday Herald*, a newspaper out of Michigan, reflected upon the "splendid achievement" of the recently passed the Homestead Act: "It is a stately advance-step in this sluggish world, and as we follow it for fifty future years, its promise reaches to the Pacific and fills a zone of earth with the new music of summer fields."[54] The American empire was seen to be revitalized by this bill, just as Congress

[53] Haksgaard, "Including Unmarried Women": 293-394.
[54] "Land for the Landless," *St. Joseph Saturday Herald*, May 28, 1862, from America's Historical Newspapers.

intended. White women's reproductive labors played an integral role in manifesting this vision.[55]

Congress intended the Homestead Act to benefit primarily, if not exclusively, white people.[56] While no exclusions were written into the law on account of race, Congress deferred to highly restrictive contemporary understandings of citizenship in this period. The final text of the Homestead Act extended its benefits to citizens as well as those "who shall have filed his declaration of intention to become such."[57] When Congress debated and passed this law, Black people were not considered citizens of the United States.[58] Though several states extended citizenship to Black people, the issue was highly contested.[59] In the South, slavery relegated millions of Black people to the status of property with no claims to ownership of their body, offspring, or labor. Seemingly racially neutral language about citizens or soon-to-be citizens functionally excluded Black people, enslaved and free.

This changed after the Civil War and the ratification of the Fourteenth Amendment in 1868 which extended citizenship to Black people. In the following decades, many Black men and women, including formerly enslaved people, enjoyed the benefits of the Homestead Act. However, as Congress debated the bill, lawmakers presumed the beneficiaries of the bill would be white, as evidenced by their focus on "citizenship" as a central qualifying factor.

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[55] Jacobs, "Reproducing White Settlers": 13.
[56] Roberts, *I've Been Here All the While*: 78; Hannah Haksgaard, "Including Unmarried Women": 265-266.
[57] "The Homestead Act of 1862," National Archives.
[58] Roberts, *I've Been Here All the While*: 78.
[59] Congressional Globe, 33rd Congress, 1st Session (1854): 503-504.

The congressional record further clarifies the intention of the law to benefit white people. In the decade of debate leading up to the passage of the Homestead Act, lawmakers repeatedly clarified their hopes and intentions to establish a white empire in the West. The 33rd Congress discussed this subject at length. In 1854, Representative Hendrick B. Wright of Pennsylvania sought to explicitly define the beneficiaries of a homesteading bill as "free white men." Representative Dawson believed this was unnecessary, saying, "[The] Supreme Court of Pennsylvania ha[s] decided that the term 'citizen' means 'white men.'"[60] Dawson was referencing *Hobbs v. Fogg* (1837) in which a free Black man, William Fogg, attempted to vote in Pennsylvania, but county election officials refused him. The Pennsylvania Supreme Court ruled that Black men, even if free from slavery, were not truly free and thus had no right to suffrage.[61]

Representative Wright then described the case to his peers, stating that the Court determined "a negro there was a not a citizen," just as other courts across the U.S. had done. He continued, "I do not think that the question should be left as an open question here. I prefer that this House should put its own construction upon it, and that will settle the matter." Soon after, Representative Dawson responded, "It was never contemplated for a moment that the black population of this country should be put on equality with the white population, in the enjoyment of the benefits of this bill…The language of the bill was intended to secure its provisions and privileges only to the white population of the country." Such an amendment to explicitly define the beneficiaries as white men was

[60] Congressional Globe, 33rd Congress, 1st Session (1854): 503-504.
[61] Hobbs et al. v. Fogg, 6 Watts 553 (PA 1837).

"wholly unnecessary."[62] A few congressmen pushed back against this dominant understanding of the bill as intended for white people and condemned white supremacist thinking, but their arguments gained little traction. Further, some moved to qualify the word citizen as someone who is "more than one half" white.[63] The discussion over the need, or lack thereof, to outline the specific racial parameters of the bill shows the true intentions of many congressmen.

Citizenship implied whiteness. Congress believed it was simply unnecessary to explicitly note the exclusion of Black people when, in the eyes of the law, Black people were not citizens. In the years following this debate, the U.S. Supreme Court validated the beliefs of Congressmen Wright and Dawson with their decision in *Dred Scott v. Sandford* (1857). The Court denied citizenship to all Black people, enslaved or free.[64] In the later years of debate over the Homestead Act, the question of extending benefits to Black people or naming the exclusive beneficiaries as white people largely died down. The question appeared settled. As Congressman Dawson stated in 1854, to define the beneficiaries as white people would be "wholly unnecessary."[65]

Congress intended the law to reproduce whiteness in the western territories, and white women's bodies were the chief instrument for doing so. In April of 1860, Senator James Doolittle of Wisconsin reiterated this idea. He noted that opening the frontier exclusively to free white men would "secure in the end, what I believe God in His

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[62] Congressional Globe, 33rd Congress, 1st Session (1854): 503-504.
[63] Ibid, 504.
[64] Dred Scott v. Sandford, 60 U.S. 393 (1856).
[65] Congressional Globe, 33rd Congress, 1st Session (1854): 504.

providence intended, that the temperate regions under our control shall become the permanent homes of the pure Caucasian race."[66] Congress intended the bill as a mechanism for reproducing whiteness into the western territories, especially through the encouragement of matrimony and reproduction among white people.

Real World Policy Implications

In extending the benefits of the Homestead Act to unmarried women, Congress sought to steer white women's reproductive energy westward. The law positioned white women's bodies as the vehicles for populating the West and reproducing social norms. Many in Congress operated from the perspective that women were weak, submissive, and valuable only because of their contributions as mothers, wives, and daughters. However, women were not merely pawns in this game. Scholars estimate that nearly twelve percent of homesteaders were single women.[67] They traveled westward for a variety of reasons, emboldened by the opportunity for free land and a sense of independence. Their stories are well documented: Elinore Pruitt Stewart's *Letters of a Woman Homesteader* chronicles her experiences, and many other women's letters to family and friends describe their daily lives and challenges. These women found immense opportunity in the Homestead Act in ways which simultaneously subverted and supported the hopes of lawmakers.

Even so, the law itself steered women's reproductive potential in pervasive ways that were felt by single women seeking land claims. One such woman was Minerva

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[66] Congressional Globe, 36th Congress, 1st Session (April 10, 1860): 1632.
[67] "U.S History Young Women Homesteaders & the Promise of the West: Letters to Home." The Chronicles of History, July 28, 2022.

McClintock. In August of 1901, twenty-five-year-old Minerva filed a land claim as a single woman in Oklahoma. Her claim was approved, but before she received her claim and entered her land, she married. As a result, she "forfeited her right to make entry." In an interview to the *Washington Post*, an assistant attorney at the Department of the Interior, George V. Ross, stated that McClintock "ceased to be the head of a family (her husband then occupying that status), and she thereby, ipso facto, disqualified herself." Ross continued, "it may be a cruel thing, but such is the law." The article repeatedly emphasized that McClintock herself was to blame: she "voluntarily" disqualified herself because she "married too soon."[68]

This story garnered immense attention because McClintock's name was selected on the first day of Oklahoma's "great land lottery," a major event which drew thousands of observers. On this day, a lottery determined the individuals who could make the first claims to land in Oklahoma. The *Fort Morgan Times* provided similar commentary in their reporting on McClintock's lost land claim. Given that she was only the eighteenth name drawn in the lottery, "she might have chosen a claim near a county seat worth several thousand dollars," which would have been a very valuable plot at the time.[69] The case of McClintock and the matter-of-fact reporting surrounding her disqualification illustrates the impact of the Homestead Act and the commitment of federal, state, and local officials in upholding this scheme. The theoretical distinctions made between

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[68] "Married Too Soon: Miss McClintock Could have Saved Homestead," *Washington Post*, August 2, 1901, from America's Historical Newspapers.
[69] "Our Uncle Samuel's Lottery: Land Drawing in Oklahoma," *Fort Morgan Times*, August 3, 1901, from America's Historical Newspapers.

married, widowed, single, and divorced women defined women's access to the land. Restrictions surrounding women's eligibility were not merely words on paper, but land officials actively enforced them and disqualified women on such technicalities.

Minerva McClintock would have received land as a wife, not as a single woman. Her story demonstrates the rigid boundaries of the government's willingness to invest in single women: the land functioned to entice single white men to marry and reproduce on the frontier. Congress gave single women land to steer their reproductive energies westward. If this was the function, as articulated by members of Congress who developed the policy, why would the government waste free land on a woman who was already married? Giving a married woman, like Minerva McClintock, a homestead would not help attract men westward or encourage men to procreate with her. Congress still imagined married women to play the crucial role of child bearing, child rearing, and homemaking in the West; however, those responsibilities and duties had already been imposed upon McClintock through marriage. She needed no steering westward. She could merely follow her husband.

Just as Congress intended, single women homesteaders felt immense pressure to marry. On the same day that Minerva McClintock was disqualified from claiming land, another single woman, Mattie H. Beals received land through Oklahoma's "great land lottery." The government official announcing lottery winners, Colonel Dyer, supposedly "cried out, 'I have the pleasure to announce the name of the first woman to draw a prize." Colonel Dyer then described Beals "as twenty-three years of age, five feet three inches in height." Beals happened to be the same height as the man whose name was selected

before her. The *Fort Morgan Times* wrote, "Instantly the crowd caught the humor of the situation and thousands of throats sent up the shout: 'They must get married.'"[70]

This amusing anecdote demonstrates the centrality of marriage to the homesteading process. As a woman claiming land on her own, Beals literally had the notion of marriage imposed upon her by the crowd of thousands of onlookers. Now that she secured a homestead, she must marry. She could not escape this pressure. White male congressmen's attitudes on the role of single women in the West were intimately connected to public sentiment of the period. As a single woman, Beals existed in a transitional period in the eyes of the law and the public. Marriage cast an omnipresent shadow over all women — married, single, widowed, divorced, or deserted.[71]

In his 1937 book, *The Sod House Frontier 1854-1890*, historian Everett Dick offered analysis of gender dynamics on the frontier which suggest the pervasive impact of the law's prioritization of marriage on women. He described single women on the frontier as "not left to bloom alone and unseen. A marriageable lady with a homestead certainly was not unattractive in a land of unlimited bachelors who…readily succumbed to the wiles of these prairie sirens."[72] Dick recognized that a "new country is made up of young people," and women's reproductive labors were integral to populating the region. He continued, "The demand for marriageable women was so great… Indeed, a young girl was a rare creature on the plains and was quickly given an opportunity to accept the love

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[70] Ibid.
[71] Ariela R. Dubler, "In the Shadow of Marriage: Single Women and the Legal Construction of Family and the State," *The Yale Law Journal* 112, no. 7 (May 2003): 1646.
[72] Everett Dick, *The Sod-House Frontier 1854-1890: A Social History of the Northern Plains from the Creation of Kansas & Nebraska to the Admission of the Dakotas* (Lincoln: University of Nebraska Press, 1937): 129-130.

and protection of a vigorous young man."[73] Contemporary historians, just like many in Congress, placed value on women's presence in the West because of their potential to attract young single men. According to Dick, young men clambered for the opportunity to marry one of these "prairie sirens" before she bloomed, perhaps alluding to her maturity and reproductive development. His analysis suggests the success of the law in manifesting the hopes of Congress: single men flocked to the frontier eager for marriage, and single women jumped at the chance to "accept the love and protection" of these men.

Marriage was embedded in the spirit of the Homestead Act. Just as Congress intended, public sentiment and action steered white women's bodies towards the frontier in hopes that they would marry and reproduce. Even if women took out land claims alone, in crafting the Homestead Act, Congress hoped that they would be reintegrated into a state of marital dependence — a fact which women like Minerva McClintock and Mattie H. Beals were sharply reminded of.

Changing Economic Conditions and Persistent Standards for Women

The Homestead Act of 1862 revolutionized women's property rights in the U.S. As men flocked to the West on the promise of free land, for the first time in U.S. history, unmarried women enjoyed the same opportunity. The law created immense opportunities for women homesteaders, like Mattie Beals, providing them with free land and a sense of independence. Between 1852 and 1862, white male policymakers eagerly debated the inclusion of unmarried women, ultimately deciding to include them because of their reproductive potential. In passing the Homestead Act, Congress sought to steer white

[73] Ibid., 232.

women's reproductive capacities westward and ensure their containment within the institution of marriage.

The land may have been free, but Congress did not truly intend to provide "homes for all." They expected those whom they allowed to receive land would "improve" the land through their labor: for women, their labor contributions would be reproductive. Including unmarried women ensured that young men and women would marry and reproduce in the region, not only populating the landscape but creating a special class of strong, patriotic citizens. As Representative Joseph Cable of Ohio proclaimed in 1852, "From childhood to manhood that love of country will grow with his growth, and strengthen with his strength."[74] Women would reproduce strong young men with a fierce sense of duty who could cultivate the region and defend against Native incursions. This family unit, bound together through marriage and embodied by the homestead, would be the building blocks of "civilization" in the West. Congress assumed this family unit to be white, and lawmakers stated as much several times. Lawmakers intended to reproduce whiteness in the western territories, and white women's bodies were the chief instrument for doing so.

Across several different sessions of Congress and various versions of the bill, lawmakers expressed their commitment to promoting marriage and reproduction in the region through the presence of women. They imagined white women's bodies as drawing white men westward. If strong men were the "vanguard of civilization," as Senator

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[74] "Speech of Mr. Cable," Appendix to the Congressional Globe, 32nd Congress, 1st Session, (March 10, 1852): 299.

Morton Wilkerson of Minnesota argued in 1860, then young white women would draw them westward.[75] Lawmakers hoped single white women would flock to the West for land, opportunity, and independence, while men would clamber after them with marriage on their minds.

The congressional debates around the Homestead Act demonstrate how Congress imagined white women to play a central role in shaping the West as agents and vehicles of empire building. Women's rights, or lack thereof, revolved around these conversations. The law expanded opportunities available to unmarried women, while reinforcing oppressive notions of all women as wives and mothers. The law relied upon women's continued dependence and fulfillment of reproductive duties to society.

Congressmen expressed attitudes reminiscent of mid-nineteenth century lawmakers in Mississippi and New York who sought to deconstruct coverture. A woman's duty as wife and mother was sacred and in need of protection. Congress held women's unique contributions to society, encapsulated by their reproductive and household labor, in high esteem. As Congress looked westward, towards those vast stolen lands, they saw uncertainty, violence, and competing cultures. Women's presence in the region subverted some of these concerns, especially through their gendered responsibilities in marriage. In the context of this cult of domesticity, Congress reinforced and romanticized a woman's duties within the home on the western frontier.

Even as many women's opportunities within society advanced through the Homestead Act, lawmakers framed women as the vessels for creating and sustaining an

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[75] Congressional Globe, 36th Congress, 1st session (April 3, 1860): 1509.

empire. The law functioned to steer women towards the spaces and relationships most advantageous to capitalist, settler colonial, and white supremacist policy goals.

As the U.S. inched towards a new century, understandings of women's labor continued to fluctuate, spurred by economic changes and shifting understandings of women's proper sphere. While many single women took advantage of the Homestead Act and enjoyed new opportunities in the West, women in the rest of the country increasingly entered the labor market in the late nineteenth century. In the South, the Civil War and its aftermath drastically redefined labor relations as slavery gave way to an agricultural economy reliant upon the labor of mostly Black sharecroppers.[76] In the North, urbanization and industrialization pushed labor towards factories and away from the home.

As the industrial wage labor force expanded, the nature of work took on new legal and cultural definitions, and with it came changes in notions of property. Who *owned* the labor of an industrial factory worker — the individual worker or the factory owner? By the last quarter of the nineteenth century, an increasing proportion of the country's laborers enjoyed freedom not in the sense of "owning" the fruits of their labor, but rather they were free to sell their labor.[77] Labor and property became further intertwined in ways which required legal clarification. These fluctuating social relations also critically necessitated a renegotiation of gendered labor norms, legally and socially.

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[76] Nancy Wolach, *A Class by Herself: Protective Laws for Women Workers, 1890s-1990s* (Princeton: Princeton University Press, 2017): 18-19.
[77] William E. Forbath, "The Ambiguities of Free Labor: Labor and the Law in the Gilded Age," *Wisconsin Law Review* 767 (July and August 1985): 4-7.

State legislatures rushed to protect the increasing population of white women entering the workforce, often operating from the assumption that women's labor belonged in the home. These policies, dubbed "protective laws," protected mostly white women in male-dominated industries by limiting their hours, opportunities, and autonomy.

Once again, state and federal law eagerly legislated on the rights of white women to protect their reproductive labor. State and federal courts overwhelmingly backed protective legislation for women and, in doing so, they further enshrined such paternalism in the U.S. legal system. Lawmakers and judges steered white women's bodies away from wage labor in order to ensure their labor remained reproductive and household. As opportunities for women expanded and the need for women's participation in the labor market increased, the U.S. government at various levels redefined, but did not abandon the expectation that a woman's contributions to society revolved around her reproductive labor.

Chapter 3

Protecting the Mothers of the Race: Legislating and Adjudicating Protective Laws

Introduction

By the late nineteenth century, wage labor dominated the United States economy. While the Homestead Act propelled Americans to the "western frontier," abolition and industrialization transformed the South and the North, respectively. Factory work increasingly replaced independent and agricultural labor.[1] Between 1870 and 1930, the proportion of Americans performing agricultural labor fell from 27.1 percent to 11.8 percent, as the number of people working in manufacturing settings soared.[2] In 1898, the U.S. Supreme Court lamented a bygone era in American history when "we were then almost purely an agricultural people, the occasion for any special protection of a particular class did not exist."[3] In this new industrial labor context, such "special protection[s]" became critical to workers navigating the changing nature of the workplace. Industrial capitalism presented complex power dynamics between workers and management and created new workplace hazards.

The judiciary, at all levels, increasingly took on the role of determining the nature of work relations in this industrial society.[4] Against this backdrop, women rapidly entered the workforce. According to U.S. Census data, the percentage of women gainfully

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[1] William E. Forbath, "The Ambiguities of Free Labor: Labor and the Law in the Gilded Age," *Wisconsin Law Review 767* (July and August 1985): 2-7.
[2] U.S. Census Bureau, "Comparative Occupation Statistics: 1870-1930" (98-100).
[3] Holden v. Hardy, 169 U.S. 366 (1898).
[4] Forbath, "The Ambiguities of Free Labor": 14.

employed increased dramatically from 13.3 percent in 1870 to 22.0 percent in 1930. These women were overwhelmingly young — more than 70 percent were between the ages of fifteen and forty-four — because many women stopped working after they got married. Once married, women's chief form of labor became, in the eyes of society, reproductive and household.[5] State legislatures reckoned with the need to prioritize and safeguard women's reproductive labor while also fulfilling the market demand for women's wage labor. Dozens of states passed "protective laws" to protect the increasing population of white female workers by limiting their work hours and responsibilities.

Protective legislation represented the attempts of various levels of the U.S. government to alleviate tension between industrial capitalism, women's dependence, and white racial superiority with an explicit focus on women's bodies as an instrument of policy making and economic growth. As state legislatures passed these laws, state and federal courts overwhelmingly upheld them.

This chapter analyzes state protective laws and the related court cases with a greater emphasis on the former. In upholding protective laws, the courts fleshed out a logic of paternalism that allowed such laws to grow and flourish in the American legal system. Court opinions at all levels of the U.S. judicial system spelled out and reinforced dehumanizing language about the role of women in the workplace and the reproductive duty that women owed society.

In this period, women's increasing presence in the workforce created a fundamental tension between capitalism and the maintenance of femininity and

[5] U.S. Census Bureau, "Comparative Occupation Statistics: 1870-1930" (95).

motherhood. In the laws explored in Chapters 1 and 2, lawmakers presumed all women of reproductive age to be able and willing to have children. In the age of industrial capitalism, government officials reckoned with the consequences of industrial labor — characterized by long hours of standing in often unsafe conditions — on women's reproductive capacity.[6] Wage labor appeared, in the minds of many late nineteenth- and early twentieth-century activists and lawmakers, fundamentally oppositional to women's reproductive labor. They solved this contradiction by passing protective laws to ensure a woman's labor did not impede her true responsibilities as wife and mother.

I refer to the range of state laws which sought to control various aspects of the work experience, predominantly for women and children, as protective laws. These laws included limitations on working hours, prohibitions on night work, and restrictions on acceptable occupations and work conditions. Such laws hindered women's competitiveness in the workforce, blocked them from entering certain roles, and limited their earning power, all of which diminished women's economic opportunity and social advancement. In a period marked by women's increasing freedom from coverture and restrictions of their property rights, the discourse surrounding protective laws reiterated women's reproductive responsibilities to society and steered women's labor into the home. Not all women enjoyed this protection: lawmakers filtered valuations about who deserved protection through assumptions about race, class, and economic necessity, and the laws "protected" mostly white women in male-dominated industries.

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[6] Judith A. Baer, *The Chains of Protection: The Judicial Response to Women's Labor Legislation* (Westport, CT: Greenwood Press, 1978): 15-16.

The legal battles surrounding protective laws illuminate the intentions and impact of the laws. Only a minority of protective laws were challenged, but more than twenty-five cases challenging protective laws made their way into the court system between 1876 and 1924. In these cases, lawyers and activists arguing on behalf of protective laws fiercely defended the need to safeguard women's reproductive capacity from the ills of industrial labor. Judges generally embraced this dominant discourse and wrote opinions describing women as the "mothers of the race" who must conserve their energy for the childbearing, child rearing, and housework.[7] In their eyes, society relied upon women's reproductive labor. Women's wage-labor, especially when dictated by the free market, fundamentally endangered not only women and their eventual offspring, but society as a whole.

A myriad of conflicting interests complicated the debate about protective laws. While most of the lawmakers and lawyers promoting protective laws were white men, many of the most vocal supporters were wealthy white women. Influential white women worked alongside, and often claimed to speak on behalf of, working-class women seeking better pay, working conditions, and quality of life. Many feminist organizations, including the National Women's Party, adamantly opposed gendered protective laws, instead advocating for women's political and economic equality.[8] These feminists found themselves quietly and unfortunately aligned with business leaders who sought to

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[7] Nancy Wolach, *A Class by Herself: Protective Laws for Women Workers, 1890s-1990s* (Princeton: Princeton University Press, 2017): 53.
[8] Peter Geidel, "The National Women's Party and the Origins of the Equal Rights Amendment, 1920-1923," *The Historian* 42. no 4 (August 1980): 557-558.

continue their exploitation and mistreatment of female workers. Women on both sides of the debate about protective laws believed they represented the true interests of working women. Many working women embraced the protections offered, whether eagerly or passively, because of the tangible benefits it provided them in the workplace. Regardless of the larger implications for a feminist agenda, these laws freed many women from long hours and oppressive conditions. However, these short term wins and small reforms do not negate the dominant ideologies.

White male lawmakers, lawyers, and judges held the instruments and institutions of power. They exerted immense influence on the landscape of women's labor, generally promoting arguments grounded in women's assumed roles as wives and mothers. State and federal courts navigated the perceived disconnect between capitalist expansion and women's burgeoning labor market participation. Over several decades, judges largely embraced restrictions on women's labor to safeguard her reproductive capacity. Protective legislation reflected the attempts of various levels of the U.S. government to alleviate tension between industrial capitalism and women's reproductive responsibilities by strategically steering women's bodies away from the workplace and towards the home.

Legal Precedent for Restricting Women's Labor Opportunities

This chapter analyzes protective laws from 1876, when the first challenge to a women's protective law was upheld in state court, through the mid 1920s, after which point fewer cases challenging such laws found their way into the judicial system. As the previous chapters illustrated, the U.S. boasts a long legacy of legislative and judicial

attempts to control and limit women. For much of the country's history, lawmakers enshrined in the law notions of women as property, to varying degrees. By the last quarter of the nineteenth century, many states had eliminated the common law restrictions of coverture, granting women ownership over their property and earnings; however, many states did not do so until the first decades of the twentieth century.[9]

Prior to tackling the issue of protective laws, courts in the U.S. embraced restrictions on women's labor because of their feminine responsibilities. In 1873, the U.S. Supreme Court validated the exclusion of women from practicing law in *Bradwell v. State of Illinois*. Myra Bradwell — an exceptional woman who learned about the law from her husband and independently founded the *Chicago Legal News* — became the first woman to pass the Illinois bar exam in 1869. However, the Illinois Supreme Court refused to grant her a license to practice law.[10] The U.S. Supreme Court upheld this decision, proclaiming: "God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws."[11] According to the Court, certain labor was simply not meant for women. The concurring opinion by Justice Joseph P. Bradley further elaborated on the implications of women's gainful employment: "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations

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[9] Hazem Alshaikhmubarak, R. Richard Geddes, and Shoshana A. Grossbard, "Single Motherhood and the Abolition of Coverture in the United States," *Journal of Empirical Legal Studies* 16, no. 1 (2019): pp. 94-98.

[10] "The Rise of Women Attorneys and the Supreme Court: Myra Bradwell and the *Chicago Legal News*." *Supreme Court of the United States*. https://www.supremecourt.gov/visiting/exhibitions/LadyLawyers/section1.aspx.

[11] Bradwell v. The State, 83 U.S. 130 (1872).

of civil life." He continued, "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."[12] Bradwell's work as a lawyer would contradict her "paramount destiny" to reproduce.

The Court defined a woman's labor through association with motherhood. The broad language of the Justices left ample room for future courts to apply this decision beyond just the legal industry that Mrya Bradwell sought to join. According to the Court, a woman's reproductive potential offered ample reason to deny her work opportunities.[13] This decision collapsed labor opportunities for women into those that served the home and family. Notably, this case occurred several years after the state of Illinois passed its married women's property law and subsequent earnings law.[14] Evidently, Myra Bradwell did not gain much protection from that legislation.

Two years later, the Court further remarked on the subjugation of women in *Minor v. Happersett* by reinforcing the constitutionality of denying women the right to vote.[15] Protective laws were first conceived, legislated, and adjudicated in this legal environment. The government sought to control the jobs women held and how they performed their jobs based on broader social notions of women's proper "spheres of action" within the home. The Supreme Court articulated a logic of women's necessary restriction in the labor force given their higher calling of wife and mother. This created a

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[12] Bradwell v. The State, 83 U.S. 130 (1872) (Bradley F. concurring).
[13] Sue M. Norton, "Jobs, Gender, and Foetal Protection Policies: From Muller V. Oregon to Johnson Controls," *Gender, Work & Organization* 3, no. 1 (1996): pp. 3-4.
[14] Alshaikhmubarak, et al., "Single Motherhood": pp. 94-98.
[15] Minor v. Happersett, 88 U.S. 162 (1874).

roadmap for future activists, attorneys, and judges to follow in establishing the constitutionality of protective laws.

Women Under Industrial Capitalism

The rise of industrial wage labor redefined work relations in the late nineteenth century. The demands of this burgeoning industrial economy necessitated women's increased labor force participation, creating a fundamental tension with societal attitudes of the period. Despite persistent expectations for women to remain in the home — evidenced by the Supreme Court's decision in *Bradley* — wage labor began to engross entire working-class households. Increasing numbers of women and children entered the workforce.[16] By the turn of the century, more than five million women were gainfully employed in the U.S., with more than one million based in manufacturing and nearly two million working in domestic service. These numbers continued to steadily climb, and by 1920, nearly eight and a half million women worked for wages.[17]

Many of these women were young, white, and unmarried, and they were often foreign-born or the daughters of immigrants. They often labored as garment workers, saleswomen, clerical workers, and domestic workers, in addition to working in industries such as bookbinding, jewelry work, and box-making.[18] Many of these opportunities were only available to white women, and Black women enjoyed fundamentally different and fewer work opportunities. The experience of women's industrial labor discussed in this

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[16] Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation*, (Cambridge: Cambridge University Press, 2011): 152.
[17] U.S. Census Bureau, "Comparative Occupation Statistics: 1870-1930" (100)..
[18] Kathy Lee Peiss, Cheap Amusements: Working Women and Leisure in Turn-of-the-Century New York (Philadelphia: Temple University Press, 2014): 34-38.

section and the following section largely reflects the experiences of white women. Black women around the turn of the century often found that such jobs in factories and stores were not available to them.[19]

In the age of industrial capitalism, white women's labor prospects expanded; however, wage labor was not a new concept for many working-class white women. The history of industrialization was inextricably linked to women's early industrial labor, especially in the textile and garment industries. In a 1906 article for the *Journal of Political Economy*, economist Edith Abbott rejected the contemporary myth that women were somehow new to industrial labor. She articulated the often unseen history of women's industrial employment, noting that women composed a large proportion of workers in nineteenth-century woolen, silk, and paper mills, as well as in establishments for printing, book binding, and book making. According to Abbot, the degree of women's labor force participation may have soared in the end of the nineteenth century, but so did "prejudice against the industrial employment of women." She noted the absence of this prejudice in the "early days of the factory system" and lamented the "jealous fear…that domestic life and the home would be ruined" by women's labor that arose around the turn of the century.[20]

Alongside women's increasing labor force participation arose a sharpened discourse on the impact of their labor on their bodies and relationships. The reality of

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[19] Mary White Olvington, *Half a Man: The Status of the Negro in New York* (New York: Longmans, Green, and Co, 1911): 143-146.
[20] Edith Abbott, "The History of Industrial Employment of Women in the United States: An Introductory Study" *Journal of Political Economy* 14, no. 8 (Oct., 1906), pp. 485-490.

women's wage labor collided with powerful societal expectations for women to commit themselves to reproductive labor and housework.

White Women's Working Conditions

The rise of the factory presented many similar challenges to male and female laborers, including poor working conditions and long hours. However, management often assumed women would be only temporary additions to the labor market. The dominant cultural expectation was for young women to leave the labor force once married. As mentioned earlier, this generalization was unfounded as entire households, including married women, often participated in wage labor. Women's presumed status as temporary workers placed them in a position ripe for exploitation through long hours, low pay, and poor conditions.

Women also had few outlets for contesting such conditions. In the late nineteenth and early twentieth century, unions largely closed their ranks to women, sometimes out of fears that women would displace them in the workforce.[21] Even as women formed independent unions, such as the International Ladies Garment Workers Union, the labor movement largely excluded women. As one of the leading labor organizations, the American Federation of Labor (AFL), concentrated power in the last two decades of the nineteenth century, they actively worked to prevent women and racial and ethnic minorities from joining their ranks.[22] In many ways, protective laws arose as an alternative to collective bargaining to protect predominantly white women. Many craft

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[21] Peiss, Cheap Amusements: 42.
[22] John P. Enyeart, *The Quest for "Just and Pure Law": Rocky Mountain Workers and American Social Democracy, 1870-1924* (Stanford, CA: Stanford University Press, 2009): 10.

unions supported gendered protective laws as a way to keep women out of organized labor.[23] Even so, the lack of access to collective bargaining compounded existing sexist social norms, placing women in a position to be easily exploited by management.

In 1900, the "average workweek" was fifty-seven hours, and many female industrial laborers worked even longer.[24] Nineteenth-century labor activists targeted this long work week, and they made gains in some occupations towards securing a ten hour workday and six day work week. However, such developments often did not affect large-scale factories where many women worked. In addition to longer hours, women were often subject to more overtime: in 1910, labor organizers reported that female laundry workers labored for up to eighteen hours in their busy seasons.[25]

Further, women generally made less money than their male counterparts. In the 1910s through the 1920s, state legislatures also passed laws under the umbrella of protective legislation which set minimum wages for women. However, the logic of minimum wage laws differed from those related to restricting women's hours and working conditions. Given that women were paid less than male workers, the minimum wage push fought not for women to earn more than men, but for women to simply earn a more liveable and comparable wage.[26] Women often earned below the "living wage," estimated to be between nine or ten dollars per week in New York City in 1910.[27] In contrast with other forms of protective laws, minimum wage laws did not perpetuate

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[23] Peiss, Cheap Amusements: 42.
[24] Wolach, *A Class by Herself*: 7-8.
[25] Judith A. Baer, *The Chains of Protection: The Judicial Response to Women's Labor Legislation* (Westport, CT: Greenwood Press, 1978): 17.
[26] Ibid., 73.
[27] Peiss, *Cheap Amusements*: 52.

women's economic dependence: hours laws, night work bans, and occupational restrictions devalued women's labor and made them less competitive in the workforce.

This is not to say that minimum wage advocates did not rely upon paternalistic logic which exploited the reproductive health of women, but the discourse was distinct from other protective laws.[28] Many scholars discuss minimum wage laws in conjunction with other protective laws, but for the purpose of this thesis, minimum wage laws will not be discussed.[29] A focus exclusively on protective laws which limited the hours, conditions, and occupations of women provide an adequate window into restrictions of women's wage labor opportunities on account of their reproductive labor.

This chapter does not intend to downplay the exploitative and hazardous working conditions that women faced in the end of the nineteenth century and early part of the twentieth century. This point must not be lost in the critique of protective laws. Most of the cases discussed in this chapter reflect those in industrial management seeking relief from fines or consequences they faced for employing women for a time or capacity which violated an existing state law. Those in power sought a remedy for the restraints placed on their labor force for the purpose of continuing to exploit the women in their workforce.

Conversely, many activists and lawmakers offered genuine concern over the treatment of female workers. Faced with intolerable conditions and long hours, gendered protective laws arose as the dominant method of recourse for working-class women and

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[28] Wolach, *A Class by Herself*: 105-106.
[29] Baer, *The Chains of Protection*; Peiss, *Cheap Amusements*; Wolach, *A Class by Herself*.

the progressive activists who claimed to speak for them. Regardless of influential white men and women's potential genuine concern for women, they articulated a paternalistic discourse that grounded women's humanity in their reproductive potential, subsequently devaluing their economic contributions and reinforcing notions about women's dependency.

Working Conditions for Black Women

In the end of the nineteenth-century, Black women labored at higher rates than white women, often in different industries, under different conditions, and beyond the scope of government "protection." Black women's opportunities were largely confined to two types of labor: "the first was domestic and institutional service, vindictively termed women's work; the other was manual labor so physically arduous it was usually considered men's work."[30] Many Black women worked in agriculture, often as tenant farmers or sharecroppers.[31] The high proportion of Black women working as agricultural laborers reflects the economic opportunities available to Black people following the Civil War and the collapse of Reconstruction. In the South especially, "modernization and Jim Crowe grew to maturity together." In urban centers, Black women often worked in the domestic sphere, "confined" to such work with limited opportunity for economic advancement.[32]

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[30] Jacqueline Jones, *Labor of Love, Labor of Sorrow: Black Women, Work, and the Family from Slavery to the Present* (New York: Basic Books, 1995): 4.
[31] Wolach, *A Class by Herself*: 18-19.
[32] Hunter, Tera W. *To 'Joy My Freedom: Southern Black Women's Lives and Labors After the Civil War* (Cambridge: Harvard University Press, 1997): 98; 120.

In 1911, suffragist and journalist Mary White Olvington noted the "narrow range of the New York colored woman's working life," as Black women disproportionately occupied roles in personal and domestic service compared to white women. As she wrote, the "factory and store are closed to her."[33] As industrialization transformed job opportunities for white women, such roles largely excluded Black women wage-earners. By 1900, less than 3 percent of Black women worked in manufacturing, compared to 38 percent of native-born white women. Domestic service paid significantly less than manufacturing or clerical jobs, and those Black women who did gain manufacturing jobs tended to be placed in the lowest paying positions. When Black women entered northern factories, management often assigned them to the most menial roles of sweeping, scrubbing, and disposing of waste, in addition to working in segregated and "inferior" facilities. While more "overtly brutal" in the South, segregation and racism relegated Black women laborers to low paying and often exploited roles across the country.[34]

While the dominant discourse of the period framed young white women as only temporary to the labor force, Black women worked through marriage at higher rates than white women. According to Olvington, in 1900, "whereas 4.2 per cent of white married women in New York were engaged in gainful occupations, 31.4 per cent of the Negro married women were earning their living."[35] Even further, management often saw Black

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[33] Olvington, *Half a Man*: 143-146.
[34] Jones, *Labor of Love*: 161-168.
[35] Olvington, *Half a Man*: 144.

women as a "reserve labor force" in segregated Northern factories, stoking racial animosity among white women workers.[36]

In addition to segregation, disparities in generational wealth and expectations to Black peoples' labor shaped Black women's participation in the labor force. In the aftermath of the Civil War, the government extended the notion of the free wage contract to Black people in an especially coercive manner. The newly created Freedmen's Bureau played a crucial role in delineating expectations of labor participation to formerly enslaved Black people, women especially. The Bureau "depreciated as idle the freedwoman who did unpaid household work — who refused to turn her labor into a commodity." In the eyes of the government, Black women needed to make their labor available for purchase — an expectation that white women did not face.[37] In this industrial age, the idea of freedom became synonymous with owning and selling one's own labor.[38] Black women entered the "free" market and encountered an unwavering cultural and legal sense of entitlement to their bodies and labors.

Simultaneously, social and legal structures rushed to guard white women from the ills of labor participation through protective legislation. These laws rarely extended to industries dominated by Black women, such as work in the agricultural or domestic spheres. While such laws make no mention of race, because of the industries they targeted, the effect was the "protection" of mostly white women.

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[36] Jones, *Labor of Love*: 168.
[37] Stanley, *From Bondage to Contract*: 188-192.
[38] Forbath, "The Ambiguities of Free Labor": 6-7.

In this historical moment, the same courts addressing protective laws also adjudicated the boundaries of whiteness. Beginning in 1878 and continuing well into the mid-twentieth century, U.S. courts heard such "prerequisite" cases in which judges took on the responsibility for "deciding not only who was white, but why someone was white."[39] The quiet focus of protective legislation on white women and the courts' concern with clarifying whiteness helped construct the legal notion of race in an increasingly multiethnic and multiracial society. These legal mechanisms functioned together to privilege whiteness and protect white women's reproductive capacity in pursuit of white supremacist goals, while neglecting Black women workers.

Given that protective laws largely excluded Black women, their voices and experiences did not make it into the judicial system where these cases were debated and discussed. Activists, lawyers, and judges frequently discussed the plight of "women," without acknowledging narrow concern with white women.

Proponents of Protective Legislation

In response to the rise in women's industrial labor in the late nineteenth century, state legislatures across the country debated and passed gendered protective legislation over the course of several decades. In this debate, middle-class reformers collided with working-class women seeking to improve their own conditions and craft unions seeking to push female workers away from organized labor. Around the turn of the century, these

[39] Haney-López Ian, *White by Law: The Legal Construction of Race* (Brantford, Ontario: W. Ross MacDonald School Resource Services Library, 2017): 2.

middle-class progressives —often well-off, educated, white men and women — overtook unions as the most vocal proponents of protective legislation.[40]

Unlike the debates surrounding married women's property laws and the Homestead Act, many advocates for protective laws were women who viewed themselves as operating from a feminist perspective. The feminism of these women, dubbed "social feminists," differed significantly from what has come to be seen as the main feminist movement of the period, embodied by the National Women's Party and those advocating for passage of the Equal Rights Amendment. Social feminists sought *political* equality for women, but advocated for special protections, especially within the workplace, and they upheld the traditional forms of labor for women as wife and mother.[41] Their ideology reflects the discourse examined in this paper: social feminists sought to safeguard women's traditional role of wife and mother.[42]

Victorian ideals of femininity and proper behavior — grounded in motherhood, purity, and modesty — deeply informed their desires to "help" working-class women. Many prominent activists did not engage in wage labor themselves, but rather came from wealthy and influential families, often with connections to male politicians. Beyond merely observing women's conditions in the workplace, middle-class reformers concerned themselves with women's morality and feminine duties, which they feared would be compromised by wage labor. Similar to the perspective of the lawmakers debating married women's property acts and the Homestead Act, those in power cast

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[40] Wolach, *A Class by Herself*: 7.
[41] Geidel, "The National Women's Party": 557.
[42] Peiss, *Cheap Amusements*: 154.

working-class women as a group in need of protection, whose individual decision making skills paralleled that of children. These middle-class women became the best proponents of protective legislation, claiming to speak for and on behalf of working women, whom they viewed in a monolithic sense, ignoring class, race, and ethnic differences.[43]

A network of women's groups, governmental departments, and consumer advocacy organizations laid the groundwork for state level protective laws and supplied judges with the language to uphold such statutes. The National Consumer League (NCL), founded in 1899, and its "indomitable leader," Florence Kelley, spearheaded this movement. The NCL sought not only to protect women, but all industrial workers. In the eyes of many activists and lawmakers, women were the weakest and most exploited group in the labor force, alongside children. Protection of women opened the door to eventually secure greater protections for all workers: this was the so-called "gender-as-an-entering-wedge" strategy.[44] Many prominent women's groups adopted this strategy, including the Women's Joint Congressional Committee (WJCC) which formed in 1920 as an umbrella organization to unify the legislative efforts of various women's groups.[45]

These progressive groups advocated for protective laws in state legislatures, the public discourse, and the courts. Their efforts proved highly successful: by the second of the twentieth century, more than twenty already had protective laws on the books and nineteen more states passed such laws in the following years.[46] As courts heard

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[43] Ibid., 154-166.
[44] Jan Doolittle Wilson, *The Women's Joint Congressional Committee and the Politics of Maternalism: 1920-30* (Urbana: Univ. of Illinois Press, 2007): 23-24.
[45] Wilson, *The Women's Joint Congressional Committee*: 1-3.
[46] Wolach, *A Class by Herself*: 87-93.

challenges to protective laws, often brought by business owners and individuals in management, the NCL and related activists shaped the debate. They submitted *amicus curiae* briefs, publicly advocated on behalf of such laws, and supported states facing lawsuits. Through their efforts, they helped perfect and disseminate the argument that women's reproductive capacity and maternal duties necessitated special labor laws. The most famous example of this advocacy was the "Brandeis brief," an *amicus curiae* brief written by future Supreme Court Justice Louis Brandeis and the NCL on behalf of the state in *Muller v. Oregon* (1908), which I discuss in depth later in the chapter. Brandeis advocated for protective legislation by focusing on "scientific" evidence about the harm which certain labor would have on the female body. The highly successful Brandeis brief represented the perfection of a strategy which activists and lawyers had developed over the course of decades.[47]

Reformers focused their efforts squarely on the judiciary to cement the validity of protective laws. As Florence Kelley wrote in *Some Ethical Gains through Legislation*, "until it has been sustained by the Supreme Court of the United States, a statute is merely a trial draft, the enactment of which is but the first step in its development into valid law."[48] In advocating on behalf of such laws, collaborating with states facing lawsuits, and writing *amicus* briefs, progressive reformers placed institutional weight behind the defense of protective laws. They drove the discourse. Activists and lawyers narrowed in, over the course of several decades, on a highly effective argument for protective laws,

[47] Baer, *The Chains of Protection*: 57.
[48] Florence Kelley, *Some Ethical Gains through Legislation* (New York: MacMillan, 1910): 127.

centered on the unique physicality of women, the role of women's reproduction to the state, and the necessary dependence of women.

I divide my analysis into three main sections: 1876-1898, 1900-1908, and 1910-1924. Within these three distinct periods, I analyze the trends that emerge within and between court opinions and highlight the development of a widely accepted, paternalistic, and dehumanizing logic for upholding women's protective laws. The discourse centers around women's reproductive duties to society as the government steers women away from wage labor and towards marriage, motherhood, and the home.

Gradual Development of a Logic of Paternalism: 1876 - 1898

The first significant case challenging protective laws, specifically a maximum hours law for women, was *Commonwealth v. Hamilton Manufacturing Co.* in 1876. The Massachusetts Supreme Court unanimously upheld a law that limited the working hours for women and children to ten hours per day. The short, vague decision began a growing body of precedent for future rulings which would center their logic more explicitly around women's reproductive capacity. Following the validation of protective laws in *Commonwealth v. Hamilton Mfg. Co.*, many states passed similar gender-based legislation. However, another challenge to a women's hours law would not make it to a state supreme court for another twenty years.[49]

In 1895, the Illinois Supreme Court in *Ritchie v. People* deviated from the Massachusetts Supreme Court and overturned an 1893 state law preventing women from working more than eight hours per day in a factory or workshop. The Court found that

[49] Baer, *The Chains of Protection*: 53.

the legislature sought to "impose an unreasonable and unnecessary burden" upon female laborers in an overreach of state police power.[50] This decision not only served as a rebuke of the growing tide of protective laws across the country, but it explicitly rejected the argument made by NCL lawyers on behalf of the state of Illinois. Lawyers for the state argued long work hours uniquely harmed women, and in turn society, by damaging women's ability to have children and creating "physically and often mentally degenerate offspring."[51]

Ritchie represented the emergence of the argument that women were the "mothers of the race."[52] This logic framed women not as individuals, but as the vessels for producing the next generation, whose health was integral to the wellbeing of society. Although the state of Illinois was unsuccessful in *Ritchie*, the "mothers of the race" argument found ample validation in successive decades as countless court decisions rejected the *Ritchie* decision and embraced the state's argument for protecting women on account of their reproductive health.

The argument articulated by the state of Illinois in *Ritchie* also presumed societal welfare relied upon the health of individual women. Three years later in *Holden v. Hardy*, the U.S. Supreme Court validated this idea. The Court upheld a Utah statute limiting the hours of men working in mines to eight hours per day. Given the dangerous nature of mining, the Court ruled such regulations were acceptable: "[t]he whole is no greater than

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[50] Ritchie v. People, 155 Ill. 98 (1895).
[51] "Brief and Argument of Defendant in Error," Ritchie v. People, Supreme Court of Illinois, Southern Grand Division, May Term, 1894, quoted in Wolach, A Class by Herself: 41.
[52] Wolach, *A Class by Herself*: 43.

the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer."[53] The decision in *Holden v. Hardy* resulted from fierce union activism towards achieving an eight-hour workday for certain industries in a time when most judges overlooked the need for work protections, believing instead in the validity of free contracts between workers and employers.[54] The Court validated the general principle of restrictions on labor in the name of protecting the public interest. Certain occupations required additional protection from the state given their hazardous conditions. This idea easily lent itself to the notion that certain groups of laborers, namely women, required special protection because their bodies left them uniquely susceptible to hazards, which did not negatively affect male laborers. *Holden* served as precedent for many successive decisions focused on women's protective legislation.[55]

The major cases of this period also considered the constitutionality of selective application of protective laws, something which became a staple of future protective legislation. The law in question in *Holden* applied specifically and exclusively to miners given the specific conditions of their labor. The Illinois Supreme Court in *Ritchie* questioned the establishment of specific classes within the law. The Court criticized the inconsistency of the law as it limited its application to women working in factories, without considering women "employed as saleswomen in stores, or as domestic servants,

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[53] Holden v. Hardy, 169 U.S. 366 (1898).
[54] Enyeart, *The Quest for "Just and Pure Law"*: 104.
[55] Commonwealth v. Beatty, 15 Pa. Super. 5 (1900); Wenham v. State, 65 Neb. 394 (1902); State v. Buchanan, 29 Wash. 602 (1902); Muller v. Oregon, 208 U.S. 412 (1908); W. C. Ritchie & Co. v. Wayman, 244 Ill. 509 (1910); People v. Charles Schweinler Press, 214 N.Y. 395 (1915).

or as book-keepers, or stenographers, or type-writers, or in laundries, or other occupations not embraced under the head of manufacturing."[56]

Inconsistency in occupations covered under protective legislation emerged as a common theme across state protective legislation. The U.S. Supreme Court's decision in *Holden v. Hardy* reinforced the constitutionality of this trend. *Holden*, as well as nearly every successive state and federal court case, rejected the doubt posed in *Ritchie* about the classification of laborers in this way and the selective enforcement of the law. Such targeted enforcement would become a staple of protective laws, and decisions like *Hamilton Mfg. Co*. and *Holden* offered early precedent for establishing such classifications, as *Ritchie* slowly became an outlier in its rejection of arbitrary and burdensome restrictions on women's labor on account of their reproductive capacity. These cases laid the groundwork for the judicial enforcement of protective legislation and the legal restrictions on women's labor. However, they did so in a broad way, mainly through establishing the connection between individual health and societal welfare.

Emboldened by such judicial victories and a growing number of state protective laws, progressive reformers, state legislatures, and social feminists set out to use the courts to restrict and constrain women's bodies and labor. They spent the next two decades articulating a more forceful, narrow defense of protective laws grounded in ensuring women's ability to fulfill her labor commitments through reproduction and household work.

A Narrowing Argument: 1900 - 1908

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[56] Ritchie v. People, 155 Ill. 98 (1895).

In the first decade of the twentieth century, court challenges to state protective laws occurred with increasing frequency. The laws themselves varied little in their substance compared to those that came before them, but proponents of protective laws found increasing success. The legal reasoning, perfected by the NCL and embraced by the courts, differed significantly in its embrace of narrowly targeted laws which treated women as a vulnerable class united through reproductive capacity. In the eyes of the law, women's individual rights could reasonably be subverted in favor of the public interest, as the general welfare depended upon their reproductive labors. Nearly every case in this period upheld state protective laws, creating a rich body of precedent across different states and different affected industries.

In the first significant case of this period, *Commonwealth v. Beatty* (1900), the Pennsylvania Supreme Court upheld an 1897 law limiting women's work hours on account of protecting their reproductive capacity.[57] In 1902, Nebraska and Washington followed suit as their respective state supreme courts upheld women's maximum hour laws on similar grounds.[58] These three decisions, in quick succession, narrowed the logic offered in *Commonwealth v. Hamilton Mfg. Co*. and *Holden*, and explicitly connected the wellbeing of society with the control of women's bodies via restrictions of their labor.

In the following six years, several other challenges to protective laws worked their way through the courts, most of which resulted in judges upholding the law in question. In 1905, the U.S. Supreme Court appeared to slow the onslaught of protective

[57] Commonwealth v. Beatty, 15 Pa. Super. 5 (1900).
[58] Wenham v. State, 65 Neb. 394 (1902); State v. Buchanan, 29 Wash. 602 (1902).

laws with its rejection of New York's maximum hours law for bakers, a profession historically held by men. Although rejecting the specific statute, the Court laid the groundwork for the idea that certain groups, defined by their physical and mental fitness, needed state protection, paving the way for future decisions.[59] Shortly after, the Supreme Court of Oregon upheld a 1903 women's hours law in *State v. Muller* (1906) on the grounds that overwork damaged the health of female workers.[60] The U.S. Supreme Court upheld this decision in *Muller v. Oregon* but they did so in a way which narrowed the focus to women's reproductive health and her essential role of ensuring the "vigor of the race," citing *Commonwealth v. Beatty*, *Wenham v. State*, and *State v. Buchanan* as critical precedent.[61]

Activists of this period identified a successful argument in favor of women's protective laws which hinged upon women's physical disabilities and reproductive duties to society. The following subsections explore various facets of the protective laws and judicial opinions of this period with a critical eye towards the intentions of white male policymakers.

Targeted Enforcement of Protective Laws

Protective laws ensured specific classes of women enjoyed "protection" from gainful employment. The U.S. Supreme Court's opinion in *Holden* offered strong precedent for states to create laws which targeted certain classes of laborers while

[59] Lochner v. New York, 198 U.S. 45 (1905).
[60] State v. Muller, 48 Or. 252, 85 Pac. 855 (1906).
[61] Muller v. Oregon, 208 U.S. 412 (1908).

exempting others. Similar to the Homestead Act, not all women would enjoy the benefits, rather lawmakers carefully considered who needed, or deserved, protection.

The titles of protective laws specified the industries they addressed. An 1899 Nebraska women's hours law concerned the "employment of females in manufacturing, mechanical and mercantile establishments, hotels and restaurants."[62] Generally, protective laws focused on women working in manufacturing settings: in these environments, women often worked alongside men for a salary that was less than their male counterparts' but greater than the pay in female-dominated industries. The laws targeted workplaces in which women were "marginal workers," rather than the bulk of the labor force.[63] When courts upheld protective legislation, the initial laws often specified these industries in which women's labor was "marginal," including jobs in manufacturing, laundries, mechanical establishments, and mills, with few outlier industries.[64]

At face value, these industries underwent a shift towards industrial capitalism, possibly necessitating protections for the women within the field. However, women in these industries actively worked alongside and competed with male workers, who were often seen as the "real worker."[65] Functionally, such laws made women less competitive in the workforce by limiting their potential hours and responsibilities. This counteracted

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[62] Wenham v. State, 65 Neb. 394 (1902).
[63] Sue M. Norton, "Jobs, Gender, and Foetal Protection": pp. 8.
[64] Commonwealth v. Beatty, 15 Pa. Super. 5 (1900); Wenham v. State, 65 Neb. 394 (1902); State v. Buchanan, 29 Wash. 602 (1902); Muller v. Oregon, 208 U.S. 412 (1908); Miller v. Wilson, 236 U.S. 373 (1915); Bunting v. Oregon, 243 U.S. 426 (1917).
[65] Sue M. Norton, "Jobs, Gender, and Foetal Protection": pp. 8.

the reality of women's entrance into the competitive labor market and devalued women's labor.

Further, protective laws often appeared to offer blanket protections for women but created specific exclusions for female-dominated industries. For instance, Nevada's eight hour law for women exempted "nurses, or nurses in training in hospitals; harvesting, curing, canning, or drying of perishable fruits or vegetables." Similarly, New Mexico's eight hour law similarly exempted women working in "hospitals, sanitariums, registered or practical nurses, midwives, domestic servants."[66] Such loopholes, common in protective laws, demonstrate the valuations made by legislators and activists about women who needed protection and industries which could afford to have workers' hours restricted.[67] In many of these exempted industries, such as hospital work, women's contributions were indispensable.[68] Lawmakers sought to ease the tension between the maintenance of femininity and women's necessary role in the industrial workforce.

Progressive reformers' fierce calls for protection lessened to only a dull hum in certain industries that relied upon women's labor, especially the labor of Black women. Nevada and New Mexico's exceptions for domestic work and labor involving perishable food are notable given the high proportion of Black women who occupied these roles. More broadly, many industries that legislatures commonly exempted were historically dominated by women. In a similar sense, the role of telephone operator, a job frequently

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[66] The Women's Bureau, U.S. Department of Labor, *State Labor Laws for Women: Hours, Home Work, Prohibited or Regulated Occupations, Seats, Minimum Wage*, by Florence P. Smith (Washington D.C: United States Government Printing Office, 1937): 20.
[67] Peiss, *Cheap Amusements*: 43.
[68] Mary E. Becker, "From Muller v. Oregon to Fetal Vulnerability Policies," *The University of Chicago Law Review* 53, no. 4 (Autumn 1986): 1225.

exempted from state protective laws, was seen as "women's work" and "paid a weekly sum of $10.00."[69] This amount hovered at the level considered to be a "living wage," a concept ripe with class assumptions, in this period. This amount contrasted starkly with the potential earnings for work which women were protected from, such as night work and other restricted industries.[70] This also points to the role of class in determining who deserved protection.

The restrictions on women working in male-dominated fields demonstrates the assumption of maleness in wage labor itself. In limiting women's hours or responsibilities in a certain industry, state legislatures reduced their value in the job market and ensured that certain fields remained dominated or led by men. Even further, such laws also codified an assumption that some forms of labor were not made for women. Certain labor — whether because of the physical demands, the inherent hazards, or, as was often the case, unstated reasons — was explicitly closed to women. Ohio, for instance, passed a law prohibiting women from working as a "crossing watchman, express driver, molder, taxi driver… baggage handler" and more. California, Massachusetts, Ohio, Pennsylvania, and Washington relied upon more vague policies that prohibited women from "lifting or carrying heavy weights."[71]

Through women's exclusion from certain industries, lawmakers communicated their belief that certain labor was outside the realm of women. The courts embraced this

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[69] Jennifer Friesen and Ronald K.L. Collins, "Looking Back on Muller v. Oregon," *American Bar Association Journal* 69, No. 4 (April 1983): pp. 474.
[70] Peiss, *Cheap Amusements*: 52.
[71] The Women's Bureau, *State Labor Laws for Women*: 7-8.

assumption, and many decisions described women as distinct from "all other laborers."[72] Rather than describing women as distinct from "men," these judges assumed the maleness of "all other laborers." They relied upon the assumption that laborers were men without classifying them as a cohesive unit in the same way as women were identified as a class.

Male laborers became a class through their profession, not through their gender. For instance, the U.S. Supreme Court's opinion in *Lochner v. New York* (1905) concerned a protective law which applied to bakers, and the Justices referred to "bakers as a class" of workers distinct from other trades.[73] The same courts spoke of women as a monolithic class whose connection transcended specific industry differences. Even when considering restrictions of female workers of a specific industry, judges did not confine their commentary on women's weakness to specific industries. As a result, a web of state supreme court cases arose from this period, concerning specific laws and specific affected industries, but each spoke broadly on the conditions of women, building on the preceding cases.

Regardless of whether advocates, legislators, and judges intended to actively limit women's labor competitiveness to ensure their exclusion from certain industries, they promoted the idea that labor belonged inherently and concretely within men's sphere. This assumption of masculinity permeated widely at this time. Amusingly, the opinion of the Nebraska Supreme Court in *Wenham v. State* (1902) stated, "[t]he members of the

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[72] Commonwealth v. Beatty, 15 Pa. Super. 5 (1900)
[73] Lochner v. New York, 198 U.S. 45 (1905).

legislature come from no particular class. They are elected from every portion of the state, and come from every vocation and from all the walks of life."[74] From a modern perspective, such a statement appears blatantly false: the members of the legislature did come from a particular class, one which was overwhelmingly, if not all, white and male, to say nothing of potential class dynamics.

Just as masculinity dominated in the halls of the state legislatures passing protective laws, conveniently many of the industries protected were those where women's rising presence threatened the male workforce. As activist Sophonisba Breckinridge wrote in 1906, a medieval idea permeated protective legislation that "where unsuitable conditions of intercourse between the sexes exist it is the women whose presence is the disturbing factor."[75] Unequivocally, lawmakers and judges tended to identify women as the "disturbing factor" given the natural distance between women and wage labor itself.

Equivalency of Women and Children

In articulating women as a class in need of special protection, protective laws tended to categorize women and children together. Lawyers, activists, and judges framed them as groups in need of special consideration given their general vulnerability and natural state of dependency. Women and children, as well as those deemed to be "insane persons," needed the protective arm of the state, even if that protection infringed upon their rights. In the late nineteenth century, the law viewed liberty of contract as a right

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[74] Wenham v. State, 65 Neb. 394 (1902).
[75] Sophonisba Breckinridge, "Legislative Control of Women's Work," *Journal of Political Economy* 14 (February 1906): 108.

enjoyed chiefly by adult men.[76] As a result, the laws of this period often collectively addressed women and children together.

The association of women and children was not incidental but reflected the specific strategies of activists. This formed a crucial aspect of the NCL's "entering wedge" strategy of promoting labor legislation for women and children in an effort to achieve broad labor protections. Florence Kelley, NCL leader, actively developed the association between women and children, stating that the "mass of unskilled workingwomen [are] as unorganized and defenseless as the children themselves."[77] Such childlike depictions of working women ran rampant during this period. In 1906, Sophonisba Breckinridge critiqued the frequent protective laws as preventing the "exploitation of the improvident, unworkmanlike, unorganized women."[78] Unsurprisingly, judges adopted a similar rhetoric, affirming the equivalency of women and children. In 1900, the Pennsylvania Supreme Court upheld a maximum hour law for women and children, stating that "adult females are a class as distinct as minors."[79] Similarly, in 1902, the Nebraska Supreme Court noted that "women and children have always, to a certain extent, been wards of the state."[80]

In this period, the courts navigated gendered differences between men and women in a binary way which framed women as childlike, fragile, and weak. According to the *Wenham* decision, "certain kinds of work which may be performed by men without injury

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[76] Nancy Erickson, "Muller v. Oregon Reconsidered: The Origins of a Sex-Based Doctrine of Liberty of Contract," *Labor History* 30, no. 2 (1989): 239.
[77] Kelley, *Some Ethical Gains through Legislation*: 112.
[78] Breckinridge, "Legislative Control": 108-109.
[79] Commonwealth v. Beatty, 15 Pa. Super. 5 (1900)
[80] Wenham v. State, 65 Neb. 394 (1902).

to their health, would wreck the constitutions and destroy the health of women."[81] In articulating women's delicacy, the courts utilized sweeping language: women were weak and men were strong. Like children, women were utterly incapable of working more than a certain number of hours, as determined by activists and legislators.

The notion of women as having the strength and decision making skills of children served as a justification for their "protection," but it also illustrates deeply held class assumptions within protective legislation. There was a power imbalance between those advocating for protective laws — middle-class white women and white male legislators — and those on the receiving end of such protection — working-class women. This distance allowed women who did not perform to wage labor to speak of its corrupting power towards women without implicating themselves or attacking the capitalist system which relegated some women to such precarious economic positions.

Activists often argued working women needed protection not only from management, but from themselves. In *Commonwealth v. Beatty,* the Pennsylvania Supreme Court described how women must be protected from "being tempted to endanger their life and health."[82] The activeness of the word "endanger" implied that women placed themselves into knowingly dangerous situations without regard for the societal consequences. Such infantilizing language framed working-class women as reckless and easily corrupted by vice. Florence Kelley promoted this perspective in her

[81] Ibid.
[82] Commonwealth v. Beatty, 15 Pa. Super. 5 (1900)

book *Some Ethical Gains through Legislation* in which she lamented how "vice flourishes wherever self-support for honest women is unusually difficult."[83]

Such language masks disapproval and distaste in paternalistic concern for working-class women. The vice which Kelley spoke of evidently developed through association with wage labor. Although she spoke of women supporting themselves, protective legislation infringed upon a woman's ability to provide for herself and her family by restricting her economic opportunities. Kelley, as well as the decision in *Commonwealth v. Beatty*, spoke of women endangering their reproductive health by placing the burden on working women, rather than on the systems that forced women to work such grueling shifts. Implicit in the discourse surrounding protective laws — beneath the genuine concern of many activists and government officials — was an assumption that working women could not, or would not, make decisions for themselves which prioritized their moral responsibilities as wife and mother.

The U.S. Supreme Court validated these assumptions in two cases concerning maximum hour laws. In *Lochner v. New York* (1905), the Court rejected a ten hour law that applied exclusively to bakers, a field which has historically been male-dominated. They stated, "the trade of a baker… is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor." Bakers were "in no sense wards of the State" given their comparable intelligence and mental capacity to "men in other trades" and their lack of need for the "protecting arm of the State."[84] Through this

[83] Kelley, *Some Ethical Gains through Legislation*: 111.
[84] Lochner v. New York, 198 U.S. 45 (1905).

decision, the Court established the notion that certain groups could be considered "wards of the state," necessitating their protection. Three years later, in *Muller v. Oregon*, the Court defined women as a class in need of protection. In *Muller*, the Court upheld a maximum hours law for women laundry workers, describing women as dependent and in need of state protection to safeguard her health and maternal functions. The Court identified a woman's reproductive capacity as the root of her weakness. As Justice Brewer declared, even if women "stood, so far as statutes are concerned, upon an absolutely equal plane with [men], it would still be true that … her physical structure and a proper discharge of her maternal functions… justify legislation to protect her."[85]

A woman's reproductive duties were, in the eyes of the Court, an immutable aspect of her identity which permanently debilitated her. A woman could never escape this apparent responsibility and biological fact. As the Court stated, "[d]ifferentiated by these matters from the other sex, she is properly placed in *a class by herself.*"[86] In classifying women based on their reproductive capacity, all women fell into the categories of mother or potential mother under the law. This rhetorical framework was useful not only in upholding specific restrictions on women's labor, but also in establishing women's bodies as tools for securing the public welfare.

Women as Vehicles for the Next Generation

As described by lawmakers in previous chapters, women's bodies functioned as the vessels for producing the next generation. The fitness and vitality of future citizens,

[85] Muller v. Oregon, 208 U.S. 412 (1908).
[86] Ibid.

laborers, and soldiers developed in direct proportion to women's individual health. In *Holden*, the Supreme Court articulated the general connection between individual wellbeing and public wealth; however, state courts built upon this decision and applied a gendered, dehumanizing lens.

If women's reproductive health determined the wellbeing of society, and if wage labor compromised their reproductive health, then the state needed to intervene. In 1902, the Washington Supreme Court projected the burden of ensuring public health onto women's bodies, stating, "that which would deleteriously affect any great number of women who are [to be] mothers of succeeding generations must necessarily affect the public welfare and the public morals."[87] In *Muller v. Oregon*, the U.S. Supreme Court clarified the active role that the state should play in ensuring women remained reproductively viable: "[A]s healthy mothers are essential to vigorous offspring, the physical wellbeing of women becomes an object of public interest."[88] In this period, many believed that "the status of women was an indicator of civilization," justifying special policies and restrictions to ensure the health of civilization.[89] In classifying women's bodies as "an object of public interest," the Court not only blurred the humanity of individual women, but demonstrated its immense concern with ensuring the wellbeing of society via reproduction

[87] State v. Buchanan, 29 Wash. 602 (1902).
[88] Muller v. Oregon, 208 U.S. 412 (1908).
[89] Linda Gordon, *The Moral Property of Women: A History of Birth Control Politics in America*, (University of Illinois Press, 2007): 80.

The Court's concern with "public interest," which women's bodies either emboldened or imperiled, reflected widespread concerns of the period as the eugenics movement gained favor. In the early twentieth century, eugenicists sterilized more than 60,000 people across the U.S. The movement sought to eliminate the reproductive capacities of those deemed "unfit," a label which often included immigrants, Black people, Indigenous people, and people with mental and physical disabilities. Black women were disproportionately subject to forced sterilizations, a practice which peaked in the 1930s and 1940s but carried on well into the late twentieth century.[90] Eugenics ideology often intersected with the discourse surrounding protective laws, as they similarly defined a woman's existence based on her reproductive capacity.[91]

The project to ensure the strength and vigor of the next generation, understood through ideas about race and maternal health, went beyond the Homestead Act or protective legislation. While beyond the scope of this paper, the eugenics movement thrived during the early twentieth century out of a concern about ensuring that the right kind of people reproduced. In a period of immense concern over reproduction, framed in a racial-ethnic and class sense, protective legislation can be seen as a complimentary movement to eugenics, working to ensure the right kind of women reproduced. In this framework, women's bodies assumed a crucial and involuntary role in the effort to "conserv[e] the public health and welfare."[92]

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[90] Alexandra Minna Stern, "Forced Sterilization Policies in the US Targeted Minorities and Those with Disabilities – and Lasted into the 21st Century," The Conversation, January 18, 2023, https://theconversation.com/forced-sterilization-policies-in-the-us-targeted-minorities-and-those-with-disabilities-and-lasted-into-the-21st-century-143144.
[91] Gordon, *The Moral Property of Women*: 85.
[92] Wenham v. State, 65 Neb. 394 (1902).

In the eyes of the law, women were not only assumed to be mothers in an individual sense, but they were the "*mothers of the race*." Lawyers from the National Consumers League first developed this argument in *Ritchie v. Illinois* in 1895 when they unsuccessfully argued that long work hours would catastrophically harm future generations given women's central role in reproduction. Lawyers and activists continued to promote this line of reasoning, finding success in 1900 when a Pennsylvania district court, and later the Pennsylvania Supreme Court, upheld a maximum hour law for women on the grounds that "surely an act which prevents the *mothers of our race* from being tempted to endanger their life and health by exhaustive employment can be condemned by none."[93] The U.S. Supreme Court drew upon this language in *Muller v. Oregon*, speaking of the need to "preserve the strength and vigor of the race" through limiting women's hours.[94]

Eugenicists and others during this period often applied the term race in a purposefully ambiguous way: "[I]t could mean the human race or the white race. The trope was powerful precisely because it connotated both meanings simultaneously, encouraging a tendency to identify the human race with the white race."[95] In analyzing contemporary news articles, a similar conflation of whiteness and the human race can be seen within public discourse. Many news articles in Pennsylvania in the years following *Commonwealth v. Beatty* discussed a deep concern with the "betterment of the race" and

[93] Commonwealth v. Beatty, 15 Pa. Super. 5 (1900).
[94] Muller v. Oregon, 208 U.S. 412 (1908).
[95] Gordon, *The Moral Property of Women*: 91.

the degeneration of the race.[96] Journalists and religious leaders urged mothers to "work for a new race enthusiasm, in the bearing of children more robust physically, keen in intellect, purer in spirit, than any the world has yet known."[97] While such language spoke of "race" in an amorphous way, lawyers and judges implied women's role in reproducing whiteness.

If women did not fulfill their reproductive duties, the "race" would suffer. Fears of "race suicide" emerged in the early twentieth century as President Theodore Roosevelt mainstreamed the idea. In a 1905 address before the National Congress of Mothers, President Roosevelt described the "first and greatest duty of womanhood" as being "able and willing to bear… healthy children" who would be "numerous enough so that the race shall increase." Women deserved respect "only because, and so long as, she is worthy of it." He posited several reasons why women, and men, would not reproduce, suggesting it was due to "viciousness, coldness, shallow-heartedness, [or] self indulgence."[98] As prior chapters discussed, government officials concerned themselves not only with reproduction but with reproduction of the right kind of children, often meant to mean white, male, and physically fit. Journalist Mary A. Livermore spoke in 1903 on the subject, arguing that "the need is not for more children, but better ones." According to

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[96] "A Book About Babies," *Philadelphia Inquirer*, April 20, 1903, from America's Historical Newspapers; "Mothers Plan For Betterment Of Race League Organized The Scope Of Which Is Described By," *Patriot* (Harrisburg, Pennsylvania), September 29, 1900, from America's Historical Newspapers.
[97] "Addressed Civic Club Mrs. Mumford, of Philadelphia, Gives the December Talk," *Patriot*, December 22, 1903, from America's Historical Newspapers.
[98] Theodore Roosevelt, *Presidential Addresses and State Papers,* vol. 2 (New York: Review of Reviews, 1910): 282-291.

Livermore, women were primarily responsible for ensuring this ideal.[99] As argued in court opinions of this period, healthy potential mothers produced vigorous, strong children, qualities which reflected positively on society as a whole.

The concept of "race suicide" existed alongside protective legislation and similarly scapegoated women out of fear of the growing immigrant population and women's increasing labor outside of the home.[100] Amidst segregated labor markets, forced sterilizations, and deep fears about the future of the race, social and legal structures rushed to guard white women from the ills of labor participation through protective legislation.

Activists of this era operated within this historical context, both promoting certain ideas about women's proper labor and discerning effective strategies to advance protective legislation. In this period — from *Commonwealth v. Beatty* to *Muller v. Oregon* — lawyers and judges developed and cemented a successful and highly persuasive argument which identified women's reproductive capacity as the basis for protective legislation. Over the following decade, this strategy continued to find immense success in court.

A Golden Age for Protecting Women: 1910 - 1924

In the second decade of the twentieth century, protective labor laws prospered in court.[101] State courts largely upheld protective legislation through visceral discussions of

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[99] "Mary A. Livermore on 'Race Suicide.'" *Jackson Citizen* (Jackson, Michigan), May 8, 1903. From America's Historical Newspapers.
[100] Gordon, *The Moral Property of Women*: 87-102.
[101] Wolach, *A Class by Herself*: 119.

women's bodies and a broad embrace of the "mother of the race" argument. Over the course of a decade and a half, the Supreme Court frequently weighed in on various forms of protective laws and identified the boundary where the "protection" of women ends. With the help of the Court, advocates identified the acceptable balance between the maintenance of capitalism and the preservation of women's reproductive expectations.

The Supreme Court's decision in *Muller v. Oregon* marked a critical shift in judicial response to protective laws: the court centered reproduction so completely as the basis for limiting women's labor opportunities, and successive cases followed suit. In 1910, the Illinois Supreme Court, citing *Muller* and *Commonwealth v. Beatty*, upheld a 1909 law limiting women's work hours given women's "physical structure and performance of maternal functions" and the public interest in ensuring she was able to fulfill her maternal duties. The Illinois Supreme Court drastically changed course from its 1895 decision in *Ritchie v. People*, a decision which had been largely rejected by other state supreme courts in the intervening years.[102] The decision in *W.C. Ritchie & Co. v. Wayman* served as the groundwork for four decisions upholding women's maximum hour laws in the following three years across four different states.[103]

The courts continued to validate this discourse in quick succession. In 1914 and 1915, the U.S. Supreme Court upheld maximum hour laws for women in four separate cases, relying heavily on *Muller* and the need to "preserve the strength and vigor of the

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[102] W. C. Ritchie & Co. v. Wayman, 244 Ill. 509 (1910).
[103] People v. Bowes-Allegretti Co., 244 Ill. 557 (1910); Withey v. Bloem, 163 Mich. 419 (1910); Commonwealth v. Riley, 210 Mass. 387 (1912); People ex rel. Hoelderlin v. Kane, 139 N.Y.S. 350, 79 Misc. Rep. 140 (1913).

race."[104] In 1915, the supreme courts of New York and Massachusetts each upheld protective laws on the grounds of safeguarding women's "duty of maternity."[105]

Through this period, *Muller* reigned supreme, and state courts embraced its explicit language on the implications of gendered differences. Following the success in these cases, the NCL applied their "entering wedge" strategy and began experimenting with maximum hours laws for men and women. After Louis Brandeis took his place on the Supreme Court, another future Supreme Court Justice, Felix Frankfurter, defended a 1913 Oregon protective law before the Court in *Bunting v. Oregon* (1917). Armed with a brief written by Brandeis himself, Frankfurter successfully defended the Oregon law, and the Supreme Court extended protective laws to men, essentially overruling *Lochner*. Interestingly, this decision did not lead to a rise in general protective laws, but rather ended the campaign as there was little public interest in men's protective laws.[106]

The "golden age" of protective laws ended with *Bunting*: after this point, a more conservative judiciary slowed its embrace of such laws and "outspoken hostility to protective laws erupted among women."[107] However, in 1923 and 1924 the Supreme Court heard two more cases that cemented the future of maximum hours laws. In *Adkins v. Children's Hospital* (1923), the Court rejected a minimum wage law for women in D.C. This decision baffled progressive reformers, but, only one year later, the Court upheld a New York night work ban for women in *Radice v. New York*. In these two

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[104] Hawley v. Walker, 232 U.S. 718 (1914); Riley v. Massachusetts, 232 U.S. 671 (1914); Miller v. Wilson, 236 U.S. 373 (1915); Bosley v. McLaughlin, 236 U.S. 385 (1915).
[105] People v. Charles Schweinler Press, 214 N.Y. 395 (1915); Commonwealth v. John T. Connor Co., 110 N.E. 301 (Mass. 1915).
[106] Wolach, *A Class by Herself*: 98-102.
[107] Ibid., 119

decisions, the Court articulated its belief in the enormous difference between "wage-fixing" laws and laws which address the hours and conditions of labor.

Over the course of a decade and a half, the courts, guided by the frequent decisions of the Supreme Court on the subject, articulated and refined a logic of women's dependence based on her reproductive capacity, building on the work of activists, judges, and lawyers of the preceding decades.

An Increased Focus on Women's Bodies

In this period, state and federal courts discussed women's bodies, not just their health, with more pointed concern and crude detail. Court opinions often used visceral and exaggerated language to emphasize the assumed and imposed relationship between mother and child — or between woman and potential offspring. In *People v. Charles Schweinler Press* (1915), the Supreme Court of New York upheld a ban on night work for women "for the sake of the offspring whom they might bear." The decision lamented the hypothetical offspring "who will almost inevitably display in their deficiencies the unfortunate inheritance conferred upon them by physically broken down mothers."[108]

This discourse acknowledged the mere potential that a woman would have a child, but it confidently spoke of the inevitable damage that a mother's labor would do to her child. Lawyers and judges weaponized the intimate and inherently connected relationship between mother and child. Women, no matter their reproductive capacity or desire to reproduce, were the vehicles for producing the next generation, and any damage to her own health was the inheritance of her children. Absent from this commentary was

[108] People v. Charles Schweinler Press, 214 N.Y. 395 (1915).

any concern with the health of women for women's own sake. This "duty of maternity" served as a justification for women's subjugation, regardless of their desire or ability to reproduce.[109]

As activists more fully conflated the mother-child relationship to the connection between woman and potential offspring, discussions of women's bodies often described their weakness and frailty. Interestingly, court opinions oscillated between lamenting women's innate weakness and articulating how the disparate impact of industrial labor weakened women, who would otherwise produce healthy, vigorous children. In *W.C. Ritchie & Co.*, for instance, the Illinois Supreme Court lamented that "weakly and sickly women" result from "the consequences induced by long, continuous manual labor in those occupations which tend to break them down physically." Wage labor deteriorated women's physical condition in a unique way, necessitating their protection. However, the Court then contradicted itself: "It is known to all men (and what we know as men we cannot profess to be ignorant of as judges) that woman's physical structure… place[s] her at a great disadvantage in the battle of life."[110] Courts often described women's "disadvantage," "disability," and "inferior" nature.[111] When convenient, judges and lawyers relied upon the naturalized notion of women's weakness, using it to their advantage.

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[109] Commonwealth v. John T. Connor Co., 110 N.E. 301 (Mass. 1915).
[110] W. C. Ritchie & Co. v. Wayman, 244 Ill. 509 (1910).
[111] People ex rel. Hoelderlin v. Kane, 139 N.Y.S. 350, 79 Misc. Rep. 140 (1913); Commonwealth v. John T. Connor Co., 110 N.E. 301 (Mass. 1915); People v. Charles Schweinler Press, 214 N.Y. 395 (1915).

In framing women as both naturally weak and weak because of wage labor, the courts offered a complete and contradictory assessment of women's condition. The validity of protective laws relied upon both truths existing simultaneously: women needed protection because they were inherently weak and fragile, and labor uniquely injured women and their maternal functions. However, the logic of protective laws took the latter argument to its natural conclusion that laws regulating the hours and conditions of women's labor would alleviate the pressures weakening women and allow them to produce vigorous children. The overall message regarding women as weak, fragile, dependent individuals remained the same, but in considering the proclaimed source of this weakness, such discrepancies highlight the true function of the law: controlling women and limiting their labor to reproductive labor.

Such language must not be dismissed as merely a product of its time. In a 1918 U.S. Senate debate over a protective law for the women and children of Washington D.C., Missouri Senator James A. Reed pushed back against the prevailing logic: "Do women need protection? Are women unable to take care of themselves? [B]y this bill" its sponsors "class them with children and put them in one contemptible position of needing guardianship."[112] As articulated by Senator Reed, such laws were not "protection" per se but "guardianship" given their targeted application. In lamenting the negative health impacts of industrial labor's long hours and conditions, court opinions generally failed to recognize that the issue was not women's frailty or nature, but the conditions of industrial labor itself.

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[112] Friesen and Collins, "Looking Back on Muller v. Oregon": pp. 475.

The courts engaged with the dangers of industrial labor only in the impact it had on those believed to be the weakest in society. It was women's *unique* frailty, rather than the conditions of industrial capitalism, which posed the key issue for activists, lawmakers, and judges. For instance, the Supreme Court of New York in *People v. Charles Schweinler Press* (1915) described night work as "in a word, against nature."[113] They lamented the "evils" of night work, while failing to critically analyze the conditions that forced individuals to engage in night work, in addition to ignoring the practice of night work by men. Such "evils" only corrupted women. Similarly, the Kansas state legislature passed a law in 1915 declaring that "inadequate wages, long continued hours and unsanitary conditions of labor, exercise a pernicious effect on the health and welfare of women, learners, and minors"; learners referred to apprentices or similar training positions.[114] The law made no mention of the effect of these conditions on adult men. Protective laws drew explicit links between working conditions and the health of women and children, while failing to recognize the effect that such conditions could also have on men.

Activists, lawmakers, and judges recognized the rise in women's labor that industrial capitalism both sparked and necessitated. In seeking to steer women away from gainful employment, they blamed, in part, the unique impact of labor on women's bodies as such labor endangered her reproductive capacity and fulfillment of gendered duties.

Expansion of the "Mother of the Race" Argument

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[113] People v. Charles Schweinler Press, 214 N.Y. 395 (1915).
[114] *Revised Statutes of Kansas (annotated), 1923* (Topeka: Kansas State Printing Plant, B. P. Walker, State Printer, 1923): 707.

The courts justified protective laws by identifying a state interest in ensuring the maintenance and proper functioning, defined by men, of women's bodies. Women required protection from strenuous labor not for their own sake, nor only for the sake of their children, but for the sake of society. The "mother-of-the-race" argument, first pioneered in *Ritchie v. Wayman* and revolutionized in *Muller*, found great success in this period. *Muller* grounded the constitutionality of maximum hours laws in the notion that "as healthy mothers are essential to vigorous offspring, the physical wellbeing of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."[115]

Just two years after *Muller*, the Illinois Supreme Court reiterated the "obvious" conclusion that the statute in question "would tend to… insure the production of vigorous offspring."[116] The Supreme Court of New York similarly promoted this idea in 1915 in calling for women to be "specially guarded by the state if it is to be preserved and if she is to continue successfully and healthfully to discharge the duties which nature has imposed upon her."[117]

As an "object of public interest" with "duties" to society, a woman's own interests, desires, and agency were easily subverted in favor of state goals. The individual became, in the eyes of the law, a reproductive vessel. In framing women's bodies as objects to be guarded, these opinions moved further from a consideration of women as

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[115] Muller v. Oregon, 208 U.S. 412 (1908).
[116] W. C. Ritchie & Co. v. Wayman, 244 Ill. 509 (1910).
[117] People v. Charles Schweinler Press, 214 N.Y. 395 (1915).

individuals in need of protection and embraced a dehumanized understanding of women as existing in service of broader social goals.

Depictions of women as unequivocally weak justified their status as "wards of the state," not only in the sense of their dependence, but in a sense that they were less in control of their bodies and person. In lamenting how "weakly and sickly women cannot be the mothers of vigorous children," the Illinois Supreme Court in *W.C. Ritchie & Co.* argued that "it is of the greatest importance to the public that the State take such measures as may be necessary to protect its women."[118] This decision, as is the case in many others, cited the general welfare of the public and immediately linked that collective concept to visceral, depressing descriptions of women's bodies. In the face of weak, overworked women, the state must step in to protect them, from exploitation and from themselves.

In drawing upon a broader public good, this rhetoric blurred women's control, or even claim, to their own bodies. If women's weakness necessitated state protection, then this physical state justifiably weakened their very control over their body. The ultimate stated goal of these laws, articulated by activists and attorneys and embraced by judges, was the creation of healthy, strong future generations. As the center of reproductive processes, women were the instrument of this policy aim.

Ensuring the vigor of future generations relied upon limiting the wage labor contributions of women thereby maximizing their reproductive labor contributions. In 1910, sociologist and activist Annie MacLean articulated this tradeoff: "The prime

[118] W. C. Ritchie & Co. v. Wayman, 244 Ill. 509 (1910).

function of women must ever be the reproduction of the race… The woman is worth more to society in dollars and cents as the mother of healthy children than as the swiftest labeler of cans."[119] The idea of worth to society and the invocation of monetary value highlights how women's status circulated around the needs of society. Women's chief labor contributions were reproductive, and society, at least as articulated by the courts in relation to protective legislation, depended upon her fulfillment of these duties.

A woman's duty was not only to reproduce, but to reproduce strong, healthy children. Fueled by eugenic logic, if women served as the vehicles for ensuring the wellbeing of the public, then weak women would produce weak children. In wrestling with this assumption in 1915, the Massachusetts Supreme Court embraced the idea, stating "thus the public welfare is injured by affecting deleteriously the vigor of mothers and through them the virility of the race."[120] Similar to the congressional debate surrounding the Homestead Act, government officials worried deeply about children. The next generation needed to be vigorous and virtuous. Given the targeted nature of protective legislation — predominantly white, male-dominated industries were "protected" — government officials rooted their concern for the future of the race in ensuring the breeding of physically healthy, white children raised by healthy, present mothers.

A woman's reproductive labor did not end with child labor, but she needed to actively and personally maintain the home, educate the children, and occupy her rightful

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[119] Anne Marion MacLean, *Wage-Earning Women* (New York: The MacMillan Company, 1910): 177-178.
[120] Commonwealth v. John T. Connor Co., 110 N.E. 301 (Mass. 1915).

sphere. Such a broad understanding of womanly expectations expanded the burden placed on women and further justified mechanisms to maximize women's time in the home. Long work hours threatened not her reproductive labor, but her labor in the home, as mother and homemaker. The courts embraced an expansive view of women's duties within the home, including not only reproduction, but "the rearing and education of children" and "the maintenance of the home."[121] Wage labor interfered not only with a woman's ability to literally reproduce, but also to reproduce social norms and moral standards to the next generation.

Protective laws expressed a wide concern for the corruption of a woman's morals, especially in relation to her reproductive duties. As a 1913 Michigan newspaper article proclaimed, "The woman who meets her obligations to home and society is the more moral woman, because she has grasped and adjusted in her own life more of these human relationships."[122] Women's morality was inextricably tied to her performance of maternal duties.

Protective laws reflected this preoccupation with labor corrupting women's morality. North Dakota, for instance, declared it unlawful for women to work in "surroundings or conditions, sanitary or otherwise, as may be detrimental to their health or morals."[123] The Michigan legislature went further, preventing any employment for women which could be "detrimental to her morals, her health, or her potential capacity

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[121] W. C. Ritchie & Co. v. Wayman, 244 Ill. 509 (1910).
[122] B. K. Kuiper, "Final Exchange Of Views On Equal Suffrage Issue Prof. Kniper Holds That the Family Is," *Grand Rapids Press*, April 5, 1913, from America's Historical Newspapers.
[123] *Supplement to the 1913 Compiled Laws of North Dakota, 1913-1925* (Lawyers' Co-operative Publishing Company, 1926): 396b1.

for motherhood."[124] Lawmakers, and later judges, labeled the labor market as inherently corrupting to women, necessitating their confinement to the home. This concern over women's morality was not limited to the political elite whose voices come through in protective laws and judicial opinions. In the first two decades of the twentieth century, newspapers and religious leaders actively debated, often in the context of discussions about women's suffrage, the superior morality of women compared to men.[125] Women were seen as the "moral custodian of the race."[126]

This societal belief in women's superior morals offered justification for her subjugation as a means of protecting that same morality. While society labeled women as the more "moral" sex, public discourse demonstrated concern with the easy corruption of those morals. A woman's morality depended upon her proper performance of femininity, especially through reproduction and sex within the confines of marriage. The term "morality" was deeply connected to sex: New York City Mayor William Jay Gaynor noted in 1913 that "if women and girls were paid a living wage very few of them would become immoral for pay."[127] In this sense, immorality represented "prostitution,"

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[124] *The Compiled Laws of the State of Michigan, 1929: Compiled, Arranged, and Annotated under Act 389 of 1927 as Amended by Act 63 of 1929* (Lansing, Michigan: Franklin De Kleine Co., 1931): 3055.
[125] "Church And Its Work," *Grand Rapids Press*, January 28, 1913, from America's Historical Newspapers; "Must Save Women From Themselves So Declares Mr. Sherred in Approving 'Ameer Mann's' Article," *Grand Rapids Press*, February 12, 1913, from America's Historical Newspapers; "Woman Forge Own Fetters 'Doors of Opportunity for Emancipated Women' Is Topic of Sermon. Rev," *Grand Forks Daily Herald*, May 7, 1912, from America's Historical Newspapers.
[126] "Local Clergymen Express Approval of Suffrage for Women in Strong Terms," *Grand Forks Daily Herald*, May 2, 1914, from America's Historical Newspapers.
[127] "Women Police To Solve The Vice Problem Mrs. G. H. P. Belmont Holds That an." *Grand Rapids Press*, March 13, 1913, from America's Historical Newspapers.

highlighting the interconnectedness of morality and proper expressions of sexuality during the period.

To be a moral woman was to perform sexuality and motherhood in the socially prescribed way, and this standard relied upon the prioritization of reproductive labor. As the "mothers of the race," the courts articulated that women's role was to not only produce the next generation of healthy, vigorous citizens, but also to be active and present in the home to ensure the reproduction of social norms and moral standards. Women's full labor force participation contradicted these expectations.

Discerning the Boundaries of Protection

In light of the crucial responsibilities of women within the home, judges of this period articulated the appropriate boundary between the protection of women and capitalist interests. In 1918, the U.S. Supreme Court appeared to validate the NCL's long-awaited entering-wedge strategy: the Court upheld a 1913 Oregon law limiting men's and women's hours in any factory to ten hours per day. The decision appeared to invalidate the 1905 *Lochner* decision, which rejected maximum hours laws for men on the grounds that male workers did not require state protection. However, the Court did not address *Lochner*, *Muller*, nor any case discussed thus far in this chapter. They also did not focus on the health of workers. Rather, the decision hinged upon the fact that the law regulated hours, not wages, which was a point of contention between the state and the plaintiff.

Surprisingly, *Bunting* did not lead to a rise in state legislatures passing general maximum hours laws. The few states that did pass such laws — California, Oregon, and Washington — were defeated via referenda. However, just five years later, a more

conservative Supreme Court weighed in again on protective laws, this time in relation to a minimum wage law for women in Washington D.C.[128] In *Adkins v. Children's Hospital*, the Court rejected the minimum wage law, drawing a sharp distinction between hours laws and wage laws. While hours laws still "leav[e] the parties free to contract about wages," minimum wage laws hindered the very ability of an employer to contract labor at all.[129] The Court rejected the relevance of maximum hour laws to the establishment of a minimum wage for women, and, in doing so, the Court cemented the constitutionality of maximum hours laws for women.

The Court solidified the boundaries of women's protection by stating that mechanisms to protect women could not injure the employer. The "protection" of women could only go so far. Any penalty on the employer caused by the state was unacceptable: "The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do."[130] While lawyers opposing the minimum wage law, supported by the National Women's Party, laid out an argument grounded in the rising political equality of women and the danger such laws posed to women's rights, the Court did not accept the feminist argument. Rather, they rejected the minimum wage law based on the needs of the employer.[131]

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[128] Wolach, *A Class by Herself*: 98-102, 115-116.
[129] Adkins v. Children's Hospital, 261 U.S. 525 (1923).
[130] Ibid.
[131] Wolach, *A Class by Herself*: 115.

Additionally, women's newfound suffrage offered a convenient and secondary reason to deny them the protection they once enjoyed without invalidating the arguments of women's dependence which dominated court opinions for the last two decades. It was not that women no longer needed protection, but rather their status as "political equals" subjected them to "the same unregulated free market as men."[132]

In light of this newly articulated boundary, only one year later, the Supreme Court upheld a New York night work ban for women in *Radice v. New York*. Lawyers for the state of New York returned to the traditionally successful arguments of women's dependence, stating that night work for women "threatens to impair their peculiar and natural functions, and so exposes them to the dangers and menaces incident to night life in large cities." The Court embraced this argument in the name of "public health and welfare," given women's "more delicate organism."[133] More importantly, the Court demonstrated its newly created distinction for women's protective laws: while "wage fixing laws" were unconstitutional, laws concerning the "hours and conditions of labor" were acceptable.

In simultaneously approving women's protective laws and rejecting women's minimum wage laws, the Court went further than merely upholding freedom of contract. The Court suggested that protection of women depended on the market and the needs of employers, rather than the work conditions faced by women.

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[132] Dorothy Sue Cobble, Linda Gordon, and Astrid Henry, *Feminism Unfinished: A Short, Surprising History of American Women's Movements* (New York: Liveright Publishing Corporation, 2015): 10.
[133] Radice v. New York, 264 U.S. 292 (1924).

Despite the massive precedent, outlining women's fragile health, crucial reproductive duties, and general dependence, the Court found that women need not always be protected. Protection had its limits. The maintenance of capitalism proved a powerful counterforce to the strength of a decades old legal argument for protecting women from wage labor.

Maintaining the System

Over the course of several decades, state and federal courts struck a balance between the restriction of women's bodies and the maintenance of industrial capitalism. The tension between these two dominant interests of the period highlight the push and pull of forces at play in determining the constitutionality of women's protective laws. As "obvious" as many judges proclaimed the issue to be, women's protective laws relied upon a variety of issues, only one of which was the protection of women.[134]

Women's increasing presence in the workforce created a fundamental tension in society between enduring expectations for women's labor to remain in the home and the necessity of women's labor to the industrial economy around the turn of the century. Government officials reckoned with the consequences of industrial labor — characterized by long hours of standing in often unsafe conditions — on women's reproductive capacity. They solved this contradiction by passing protective laws to ensure a woman's labor did not impede her true responsibilities as wife and mother. Activists, including many influential white women, shaped this discussion; however, white male lawmakers, lawyers, and judges held the instruments and institutions of power.

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[134] W. C. Ritchie & Co. v. Wayman, 244 Ill. 509 (1910).

Protection extended only to white women in male-dominated industries and relied upon their presumed reproductive contributions to society. Such laws ignored the economic needs of working women, as activists and lawyers spoke for and over them in an attempt to define their best interests, while focusing their attention on narrow classes of white female workers whose positions could easily be filled by men. Functionally, such laws made women less competitive in the workforce by limiting their potential hours and responsibilities. This counteracted the reality of women's entrance into the competitive labor market and devalued women's labor

Emboldened by a growing number of state laws, progressive reformers, lawyers, and social feminists turned towards the judiciary to defend states' rights to restrict and constrain women's labor. Prior to tackling the issue of protective laws, courts in the U.S. embraced restrictions on women's labor because of their feminine responsibilities. In the eyes of the law, a woman's labor belonged in the domestic sphere.

Countless state and federal court decisions regarding these "protective laws" spelled out and reinforced dehumanizing language about the role of women in the workplace and the reproductive duty that women owed society. Judges utilized a variety of arguments in defense of protective laws, often equating women's mental capacity and decision making skills with those of children. State supreme courts borrowed the language of their peers in other states to describe women as the vessels for creating the next generation. The courts consistently defined a woman's labor through association with motherhood, describing women as the "mothers of the race" whose health would determine the vigor and strength of future generations. A woman's reproductive labor

needed to be prioritized and safeguarded not for her own sake, but for the sake of her future offspring and society as a whole. Government officials placed this grave responsibility on her shoulders.

By 1924, the courts, chiefly the U.S. Supreme Court, discerned a navigable boundary where the protection of women ceased to be the priority in favor of business interests. The "protection" of women could not infringe upon the employer. This protection could not seriously interrupt economic growth. As the courts validated this boundary, fewer protective laws found their way into the increasingly conservative judiciary. However, these laws and the activists who championed them laid the groundwork for the federal labor protections, for men and women, of the 1930s. Unsurprisingly, New Deal labor legislation reflected the commitment to segregation and racism embodied by protective laws' exclusion and disregard for agricultural and domestic laborers. State-level women's protective laws remained intact for decades, largely unquestioned again until the passage of the Civil Rights Act of 1964.[135] For some women, these laws offered genuine protections, and for others, they constrained their choices, economic opportunities, and potential for advancement within their field.

Enforcement of such laws ebbed and flowed according to the needs of the market through the majority of the twentieth century. At the start of World War II, millions of women entered the workforce and took on historically male-dominated jobs, only to be forced out of such jobs at the end of the war.[136] Given such mass changes in the labor

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[135] Baer, *The Chains of Protection*: 5.
[136] Robert Blank, *Fetal Protection in the Workplace: Women's Rights, Business Interests, and the Unborn*. (New York: Columbia University Press, 1993): 33.

force, states reevaluated, relaxed, and removed protective laws which limited the conditions and hours of women's labor.[137] The state could not afford to "protect" women in this context. Women's utility, specifically the utility of their wage labor, outweighed the benefits of safeguarding their reproductive labor. Just as the Supreme Court determined protective laws could not interfere with the ability of an employer to set wages as they saw fit, states recognized the economic need to cease women's protections.

The inconsistencies of upholding protective laws and the courts' unwillingness to protect women at the expense of industry reflect the dominant logic of the period. Government officials sought to steer white women's labor away from gainful employment and towards reproduction and housework. A woman's labor belonged first and foremost in the home.

[137] Wolach, *A Class by Herself:* 168.

Conclusion

The policies explored in this thesis functionally expanded women's rights. Women gained greater opportunities to control their finances, own property, live independently, and support themselves and their families. These state and federal laws justifiably earned a place in feminist histories of the U.S. as they each played a discrete role in advancing the position of women, defined in a monolithic sense, and aiding the further liberation of women.

However, the privileges offered by these laws intentionally benefited mostly white women - often white women of great socioeconomic status. These laws shaped the experiences of Black, Indigenous, immigrant, and poor women through their exclusion. In targeting white women, lawmakers at various levels of government defined the boundaries of women's legal advancement as beginning and ending with the protection and control of white women's bodies. Despite their rhetoric of having women's best intentions in mind, lawmakers sought to steer white women's (reproductive) labors towards certain spaces and conditions that served their capitalist, settler colonial, and white supremacist policy goals. By these initial and intended metrics, the laws were also widely successful.

Married women's property acts, with their insulation of married women's property, did not push women into the workforce en masse. Rather, such laws amplified and reflected the dominant "cult of domesticity" as white, propertied women largely remained in their place within the home, benefitting from the protections of such laws which further insulated their labor. In their neglect of poor women and enslaved women,

state policymakers ensured these women simultaneously managed multiple labor burdens to allow the burgeoning industrial economy and southern slave economy to continue running smoothly.

Unmarried women did, in fact, claim land on the Western frontier through the Homestead Act in rather large numbers. The law succeeded in populating the region with young women of reproductive age, and marriage rates in the West steadily rose as the U.S. cemented its control across the continent.[1] The law facilitated the settlement of the West, by white people and eventually Black people, which greatly furthered the settler colonial process as migration served as an instrument of oppression of Indigenous populations.[2]

Lastly, protective laws kept women's hours and opportunities in certain targeted sectors of the labor force severely restricted. Lawmakers and judges eagerly protected white women in competitive industries, ensuring their depressed wages, limited advancement, and restricted opportunities for the sake of safeguarding their reproductive labor. Meanwhile, protective laws neglected the exploitative conditions faced by Black women and women in female-dominated industries; their labor was too essential to be restricted via protective laws. These policies ultimately contributed to the development of federal labor protections for all workers, representing the great goal of Florence Kelley and the NCL.[3]

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[1] Catherine A. Fitch and Steven Ruggles, "Historical Trends in Marriage Formation, United States 1850 — 1900" (University of Minnesota): 7-8.
[2] Alaina E. Roberts, *I've Been Here All the While: Black Freedom on Native Land* (Philadelphia: University of Pennsylvania Press, 2021): 74-78.
[3] Jan Doolittle Wilson, *The Women's Joint Congressional Committee and the Politics of Maternalism: 1920-30* (Urbana: Univ. of Illinois Press, 2007): 23-24.

These short term wins, and even their contribution to eventual larger feminist victories, do not overturn the dominant ideologies. The laws explored in this thesis succeeded based on their initial and intended metrics of steering white women's bodies and reproductive labors towards the spaces and conditions most advantageous to the goals of white male policymakers.

Women's rights, or lack thereof, revolved around this discourse, expanding and shrinking based on the utility of women's reproductive labors to state projects. Over the course of nearly a century, this language of protective paternalism frequently bubbled up in the chambers of state legislatures, in the halls of the U.S. Congress, and in courtrooms across the country.

A Recurring Logic

The first chapter of my thesis explored the degrees of legal and economic oppression faced by nineteenth-century women. Marriage law, guided by the legal principle of coverture, ensured that a woman lost all legal claim to her body and her property in marriage. A woman belonged to her husband. Coverture restricted the rights and opportunities of propertied white women, while also presenting a coercive power structure that guided the relationships of poor white women. Enslaved women existed wholly outside of this framework and endured vastly greater degrees of oppression, as the institution of slavery systematically denied them ownership of their body, their property, or their offspring.

State legislators eagerly regulated the boundaries of marriage with a focus on validating certain types of reproduction and delegitimizing other relationships.

Mississippi, and later New York, led the way in deconstructing coverture by granting married women property rights in the mid-nineteenth century. However, such laws reflect white male policymakers' desires to insulate property from creditors and protect women's esteemed contributions in the home.

Such reforms left wholly intact the existing gender order which oppressed women to varying degrees and ensured their continued economic and legal subjugation. Despite their often sweeping language and dramatized fears, state lawmakers did not change the lives of most women, nor did they ever intend to do so. Arguments of women's equality and natural rights collided with the more politically expedient calls of insulating women's special roles as wives, mothers, and homemakers from economic uncertainty. Married women's property laws reinforced the existing cult of domesticity and allowed wealthy white to concentrate their labor on childbearing, child rearing, and homemaking. This story may not have been true for all women, or even most women, but activists, newspapers, religious leaders, and elected officials offered a consistent message of women's dependence based on this model. It was powerful in shaping the culture.[4] Such laws protected women's labor to reinforce their reproductive duties and steered their white women's bodies towards careful containment within the institution of marriage.

In my second chapter, I analyzed the congressional debates leading up to the Homestead Act of 1862, a landmark law which populated the western part of the continent by providing free land to U.S. citizens, including unmarried women. During a

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[4] Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (Ithaca, NY.: Cornell University Press, 1982): 163.

decade of debate in Congress, lawmakers expressed their commitment to promoting marriage and reproduction in the region through the presence of women. Congress imagined white women as the vehicles for populating the region and drawing young men westward. They sought to steer women's bodies towards the "frontier," often speaking of the immense importance of their reproductive labors on accomplishing settler colonial and capitalist goals. The imagined unmarried woman Congress hoped to send westward was explicitly racialized: white women's bodies would reproduce whiteness in the western territories.

Even as many women's opportunities within society advanced through the Homestead Act, lawmakers framed white women as the vessels for creating and sustaining an empire. They sought to reassert women's gendered duties — encapsulated by notions of republican motherhood and romanticized domesticity — in the supposedly uncivilized and uncultivated West. The law functioned to steer women towards the spaces and relationships most advantageous to capitalist, settler colonial, and white supremacist policy goals.

In my final chapter, I analyzed the policy impulses which drove states to create and fiercely defend protective laws, which limited women's hours, work responsibilities, and professions on account of protecting their reproductive capacity. As women increasingly entered the wage labor force, state legislatures reckoned with the need to prioritize and safeguard women's reproductive labor while also fulfilling market demands for workers. They passed laws claiming to protect women from the dangers of industrial capitalism; however, this protection extended only to white women in male-dominated

industries and relied upon their presumed reproductive contributions to society. Such laws ignored the economic needs of working women, speaking for and over them to define their best interests, while also protecting narrow classes of workers whose positions could easily be filled by men. Lawmakers sought to narrow white women's labor contributions to their reproductive responsibilities.

Countless state and federal court decisions regarding these "protective laws" spelled out and reinforced dehumanizing language about the role of women in the workplace and the reproductive duty that women owed society. The legal battles surrounding protective laws illuminate the intentions and impact of the laws as they reinforced women's vessel status in the face of societal and industrial challenges to women's traditional roles of wife, mother, and homemaker. Lawmakers, judges, and activists successfully reasserted women's traditional gendered responsibilities and steered their bodies towards the spaces most advantageous to capitalist and white supremacist goals.

In threading together these particular historical moments, I offered a "century-long view" of U.S. state and federal government discourse surrounding women's reproductive capacity as a tool of the state.[5] Implicit in the laws and court decisions were sustained and widespread efforts to enshrine in the law an understanding of women first and foremost as wives, mothers, and homemakers, rather than autonomous human beings and citizens. These laws viewed women first and foremost as property, to varying

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[5] Dorothy Sue Cobble, Linda Gordon, and Astrid Henry, *Feminism Unfinished: A Short, Surprising History of American Women's Movements* (New York: Liveright Publishing Corporation, 2015): xiv.

degrees, but with a persistent disregard for their desires, needs, and interests. The state largely reserved its protection of women for when they were pregnant or giving birth, only then were their contributions to society recognized and safeguarded.

Reverberations in Modern Day

Controlling women's reproductive capacity has always been a favored instrument for controlling women. Marriage offered state and federal governments the unique opportunity to control, steer, and exploit women's reproductive capacity. However, in many cases, such attempts to manipulate women's reproductive capacity served as a tool for their eventual liberation. The deconstruction of coverture helped spark feminist organizing in the mid-nineteenth century and became a key platform of the watershed Seneca Falls Convention in 1848.[6] The Homestead Act not only offered many women the chance to own property in their own name, but it also served as a key catalyst for women's suffrage.[7] Protective laws resulted in the eventual expansion of labor protections for all workers, while also providing tangible relief for many female workers from exploitative and oppressive work conditions.

This complicated legacy does not absolve lawmakers, lawyers, activists, and judges of their responsibility for promoting such harmful, sexist ideas about women in their time. The character and legal strength of the instruments with which women's dependence on men has been enforced and coerced by the law have fluctuated. Yet this remains a central feature of governance in the U.S. Our country boasts a long and

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[6] Elizabeth Cady Stanton, "Declaration of Sentiments," July 1848.
[7] Hannah Haksgaard, "Including Unmarried Women in the Homestead Act of 1862," *Wayne Law Review* 67, no. 253 (2021): 302-303.

shameful history of manipulating women's reproductive capacity, and today we see lawmakers at every level of government explicitly targeting women's bodies with a similar fervor and commitment to controlling women.

The scope of this paper shifted significantly in June of 2022 with the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, which ended the constitutional right to abortion. Following *Dobbs*, the prevailing standard which guides women's bodily autonomy in this country is "rooted in our Nation's history and tradition." By this standard, only those rights with deep foundations in our country's early history enjoy constitutional protections. The Court relied upon numerous nineteenth-century laws, court opinions, and legal commentaries, many of which originate prior to the passage of the earliest laws explored in this thesis.[8]

The Court grounded women's bodily autonomy in the rights that they enjoyed prior to the deconstruction of coverture. A woman's rights today rely, in part, upon a time when she would have been considered property. In an unfortunate full circle moment, I began my thesis with an exploration of Mississippi's deconstruction of coverture and will end with Mississippi's Gestational Age Act upheld in *Dobbs* which banned abortion after fifteen weeks of pregnancy.[9] In 1839 as much as today, the right of a woman to control her body defines the degree of freedom she enjoys. As in 1839, women's freedom is neither equally accessed nor enjoyed by all women, but rather it depends upon her race and class.

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[8] Dobbs v. Jackson Women's Health Organization, 597 U.S. ___ (2022).
[9] Ibid.

Although outside the scope of this paper, the history of abortion and reproductive healthcare in the U.S. is inextricable from the discussion of state control and coercion of women's bodies. This thesis only scratches the surface of exploring the myriad of ways in which local, state, and federal government entities historically coerced, manipulated, abused, and exploited women's reproductive capacity.

I chose to focus on white women as lawmakers largely targeted this population of women with paternalistic policies that advanced their status while undermining their personhood and autonomy. However, as lawmakers targeted Black, Indigenous, and immigrant women with such coercive policies, they often removed the mask of paternalism and perpetuated intense violence and oppression upon these women. This is the history of the U.S. which the Court asks us to recall in understanding the rights we hold today.

The language of nineteenth- and early twentieth-century lawmakers in describing women's reproductive duties echo loudly in our modern discourse on bodily autonomy and reproductive rights. This discourse is both shaped by societal attitudes and, as appears to be the case in *Dobbs*, also plays a significant role in shaping, or attempting to shape, the attitudes of the public. Discerning the interplay between laws and public opinion in the nineteenth and early twentieth century can be difficult. Luckily, lawmakers were often quite frank in their commentary on women's dependency and subordination.

Throughout my research, I recognized a recurring logic employed by policymakers at various levels grounded in notions of women's vessel status to varying degrees. Lawmakers, judges, and activists disseminated these attitudes to the public via

the law, public statements, newspapers, and sermons. Such policies framed women's personhood as contingent upon her reproductive status and contributions. These laws offer a reflection of public understanding in that time, but also deeply influenced women's opportunities and societal attitudes regarding women's proper sphere.

As the legal boundaries of women's bodily autonomy shift, women's bodies continue to occupy a central spot in U.S. governance. The experience of cisgender womanhood today is still one in which the role of wife and mother is largely assumed and projected onto women. While women can shed these normative expectations much easier today, reproductive capacity is still an integral part of the social construction of womanhood.

How, where, and with whom women choose to have children, if at all, remains a matter of chief importance to the U.S. government at all levels. The history of the legal and social treatment of women, especially non-white women, in the U.S. is inextricable from the history of settler-colonial expansion, capitalism, and the creation of a racial hierarchy given the intentional centrality of women's bodies to these processes. In the eyes of the law, a woman's labor is inextricable from her reproductive labor, as a civic duty, a wifely responsibility, and a supposedly natural and inevitable fact.

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