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Laissez-Unfaire: Gender and the Political Manipulation of the Common Law in Antebellum America

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In his award-winning book, *The Transformation of American Law, 1780-1860*,[1] Morton Horwitz summarized the dramatic change to the law in the antebellum period as follows:

> Law, once conceived of as protective, regulative, paternalistic and, above all, a paramount expression of the moral sense of the community, had come to be thought of as facilitative of individual desires and as simply reflective of the existing organization of economic and political power.[2]

Through a combination of market forces and the growing status of the legal profession, a new legal system emerged that advanced commercial growth and yet concealed the law's role in this process. A critical feature of this development, Horwitz observes, was that the law "actively promoted a legal redistribution of wealth against the weakest groups in the society."[3] It was the invisible hand of the law that allowed judges to assume an activist role in the economy. A clear division emerged: the private law system encouraged "disguised" forms of "economic redistribution" while the public law did the opposite, restricting legislative intervention in the economy.[4] Judges took the lead in the areas of property and contract law, simultaneously dislodging legal theory from its common law legacy, and replacing it with an instrumental and formalistic approach for rendering decisions.

But does this model work when examining legal thinking in cases involving gender issues? Is it true that judges rejected "paternalistic" reasoning—or what they perceived as a legal logic reflecting the "moral sense of the community?"[5] In fact, judicial appeals to the common law fiction of *feme covert*, custom, and husband's rights created a very different legal landscape in the realm of family law

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1. Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Harv. U. Press 1977).
2. *Id.* at 253.
3. *Id.* at 254.
4. *Id.* at 254, 256.
5. *Id.* at 253.

than what Horwitz described. In a broader sense, a closer look at debates surrounding women's legal status raised a different set of rules about property and contract rights. In statutes and rulings on married women's property rights, the contractual capacity of wives, the value of domestic services performed by married women, or women's custodial rights, judges consistently resorted to paternalistic and moralistic guidelines. Marriage raised a unique set of legal problems because the law treated the institution as both private and public.

The underlying question, then, is whether we can talk about a uniform transformation of the private law without examining the fundamental role of contractual and property issues emerging from debates over marital rights and duties. It is also relevant to consider the relationship between the common law and constitutionalism. If the law was developing a "rights discourse" that transgressed the boundaries between constitutional and civil law, private and public issues, then perhaps we can see a different pattern from Horwitz's paradigm, a pattern in which jurists manipulated the myth of the laissez-faire economy, not merely to promote the redistribution of wealth, but to justify the consolidation of political and legal power in the hands of specific groups of citizens. These issues will be addressed by examining the following: (1) What is missing from Horwitz's framework of instrumentalism? (2) Does his view of the invisible hand of power inoculate historical and legal change from the impact of politics, irrational motives, and other discourses beyond formalism? (3) How did jurists manipulate civic identity, and common law rules about marriage, in order to facilitate economic *and* political change?

I. LAW AS A METHOD OF CHANGE

Horwitz's study introduced an important perspective on the law, namely that political forces—what he calls the "unconscious" processes—informed legal change.[6] From this vantage point, the law was never a neutral playing field, where judges objectively made decisions based on higher principles, or through a strict application of the letter of the law. Horwitz's story is one of pragmatic jurists who redefined the terms of property law, laid the modern foundation of contract law, and took control of the field of commercial law. After the American Revolution, the legal profession emerged as a significant part of the economy, aligning its interests with merchants and new groups of corporate investors, as it fashioned a new discourse that protected the "moneyed men" against suits, unfavorable jury verdicts, and liability for harmful acts when engaged in risky ventures.

Yet as a historian interested in political and legal culture, I am aware how much historical inquiry has changed since 1977 when *Transformation* was published. While I applaud Horwitz's attention to power and what can be considered his quasi-Marxist concern for the ideological conditions of legal change, I was struck by the insularity of his field of vision. His tight focus on case law, and his principal cast of characters—those well-known judges, such as

6. *Id.* at 259.

Massachusetts Chief Justice Lemuel Shaw, and later United States Supreme Court Justice Joseph Story—leave one with a myopic view of antebellum civil law and its relationship to politics or economic development. Jurists did not live in a vacuum. Horwitz's notion of "unconscious" legal change diverted his analysis from exploring the political motives that informed legal innovation, motives that were conditioned by the volatile political world that these jurists inhabited. The men paraded through his book, jurists and legal commentators alike, seem to reside in a rigidly bounded intellectual sphere, developing their revolutionary legal interpretations by quoting Lord Mansfield or echoing Theodore Sedgwick's treatise on damages. While an occasional mention is made that one jurist was a Federalist, another a Whig, these judges appear to have had no intellectual life beyond the courtroom.

For a moment, let us give these jurists a human face. Did they ever look up from reading Blackstone, peruse the newspapers, and crankily complain to themselves about President Madison's wrongheaded 1817 veto of the Bonus Bill—legislation designed to use federal funding for internal improvements? Did they not marvel at the state and privately funded financial success of the Erie Canal? Did they not gossip about John Marshall's greedy maneuvering to protect his own feudal rights over his tenants when he used the Judiciary Act of 1793 to get a case moved from an unfriendly state court to the Supreme Court in 1813? Moreover, in reaction to *McCulloch v. Maryland*,[7] did these jurists support or disparage Marshall's 1819 decision not to tax the national bank?[8] Did they find Marshall's vaunted appeal to the power of the people to endow Congress with the authority to make banks to be a compelling constitutional argument? Or, as one critic put it, did they see him as saving a corrupt corporation, even though the flesh and blood people were "ruined"?[9]

The question at hand is whether Horwitz's framework of "instrumentalism" as the engine of legal change conceals the messy, irrational, and overtly political motives of judicial decision making. In Christopher Tomlins's recent comment on Horwitz's work, he similarly observed how *Transformation* defined power as a potent, yet invisible force. He too highlights Horwitz's emphasis on the law's virulent capacity "to extend its domain and to infiltrate... the every day categories of adjudication."[10] At the same time, while the law has the means to "disguise and suppress the inevitably political and redistributive functions of the law," this invisible hand of power presents itself as neutral—"a scientific, objective, professional and apolitical conception of the law."[11]

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7. 17 U.S. 316 (1819).

8. *Id.*

9. For a recent discussion of these politically charged issues, *see* John Lauritz Larson, *Internal Improvements: National Public Works and the Promise of Popular Government in the Early United States* 67-69, 73-87, 123, 131 (U. N.C. Press 2001).

10. Christopher Tomlins, *Roundtable: Morton Horwitz's "Transformation of American Law"—25 Years Later* (unpublished Comment given at the Am. Society for Leg. History Annual Meeting, Oct. 8-11, 2001) (copy on file with the author).

11. *Id.*

As Tomlins suggests, *Transformation* displays an implicit Marxist view of power. To a significant extent, this is a story devoid of historical agency, and then as now the hope of resistance is illusionary. There is a darker, perhaps dystopian, strain in this tale; Horwitz's message, in Tomlins' words, is that "we cannot even see the mechanism that controls us."[12] Here is where I see a generational gap separating Horwitz and myself. In today's postmodern academic universe, seemingly neutral discourses are prone to exposure through the process of deconstructing texts and discourses; rather than being completely concealed, power is revealed through its contradictions. Even though power is dispersed and extends everywhere, as Michel Foucault has argued, "power is inherently unstable, making it possible for resistance, struggle, and conflict."[13]

Horwitz might have been better served if he had followed the lead of one of Marx's most controversial disciples—Louis Althusser. In his landmark essay, *Ideology and Ideological State Apparatuses*,[14] Althusser included the law as one of the ideological apparatuses that reproduces economic conditions. The pivotal departure from Marx in Althusser's work was to recognize ideology not as a "set of illusions," as Catherine Belsey observed, but as "a system of representations (discourses, images, myths)" with a connection to people's real experiences.[15] For Althusser, ideology partially obscures an understanding of economic and power relations, obscuring the truth, not with intentional lies, but with a discourse that purports to offer a coherent narrative of the workings of the state and society.[16] I think that Horwitz would likely agree that the law became an apparatus of the state, or perhaps, an ideological arm of a new class of jurists who advanced commercial growth but made their decisions appear apolitical and disinterested. He also shares Althusser's emphasis on an invisible mechanism that is ultimately rooted in a system of representations, which for Horwitz became a distinct set of linguistic practices known as "formalism."

Althusser's theory returns to my earlier observation of Horwitz's pristine portrait of legal wheeling and political dealing in the early national and antebellum periods. Horwitz treats his historical subjects—the jurists and legal commentators—as basically rational agents; they alter the law in a case-by-case fashion, incrementally shifting the law's role in society while reconstituting economic relations through the distribution of wealth in favor of the "haves" and against the "have nots."[17] Missing here is a larger blueprint of what Althusser defined as ideology: the necessary beliefs, myths, and commonsense assumptions

12. *Id.*

13. Michel Foucault, *Discipline and Punish: The Birth of Prison* 222 (Vintage Books 1979); *see* Michel Foucault, *The History of Sexuality* vol. 1, 154 (Random House 1980); Jane Sawicki, *Disciplining Foucault: Feminism, Power, and the Body* 25-26 (Routledge 1991).

14. Louis Althusser, *Ideology and Ideological State Apparatuses*, in *Lenin and Philosophy and Other Essays* 121-73 (New Left Books 1971).

15. *See* Catherine Belsey, *Critical Practice* 57 (Metheun 1980).

16. Althusser, *supra* n. 14, at 121-73; Belsey, *supra* n. 15, at 56-68.

17. As Horwitz explained: "Practical men [jurists], they may never have stopped to reflect on the changes they were bringing about, nor on the vast differences between their own assumptions and those of their predecessors." Horwitz, *supra* n. 1, at 34.

and obvious "givens" that informed antebellum jurists' legal reasoning. Althusser recognized that literature, religion, and the law were all part of the ideological apparatus of the state. Althusser saw ideology as constituting both a real and imaginary relation to the world; that is, he acknowledged the centrality of imagined relations, the basic process of human society for constructing people as "subjects"—in effect, literary subjects in the human consciousness.[18] Horwitz's legal innovators, though well versed in Blackstone's codification of English common law, never reveal how they imagine their idealized version of the economic actor. Nevertheless, all of these jurists, profoundly educated men of letters, such as Joseph Story or Tapping Reeve, come to the law with assumptions about political economy. They can claim a fuller picture of the actual relationships forged by the nation state, the family, the market, and they possess an understanding of the divisions between the private and public law systems, and the law's role in upholding civil society. By focusing only on incremental change, Horwitz does not explore how judges might frame their decisions in political or cultural terms; he should not assume that they simply use the law in an instrumental fashion.

My point is simple: perhaps these jurists were men who steered the law in a certain direction because they incorporated new discourses into the process of adjudication. Perhaps they were less instrumental and more expansive in their legal understanding, conceiving the law as a means for prescribing social relations in the new nation. Perhaps jurists saw themselves to be less like scientists, and more like schoolmasters, imitating Jean Jacques Rousseau's notion of the enlightened tutor who engineers a new social order by relying on a system of natural deduction and moral reasoning.[19] Perhaps every time a jurist reviewed a case, he saw political implications in his decision, and he drew his reasons from a vast grab bag of new cultural ideas, such as republican theories of political economy, religious notions of liberal humanism, and enlightened ideas about the public sphere—human progress and civic identity. Indeed, all of these jurists voiced an emerging view—as well as a contested perspective—on the relationship between civic identity and economic independence.

Why is this larger political and cultural landscape missing from Horwitz's study? In part, he was addressing a scholarly audience of lawyers and legal historians. As Horwitz stated in the introduction, he sought to turn the focus from constitutional law to civil law, arguing that constitutional law was an "unreliable guide" to real legal change.[20] He implicitly accepted the division between these two fields of law, claiming that constitutional law provided only "episodic legal intervention" and was more "rhetorical" than private law.[21] His task was to

18. *See* Althusser, *supra* n. 14, at 160.

19. For the schoolmaster ideal as part of the political and civic identity of jurists in the early republic, *see* Ralph Lerner, *The Thinking Revolutionary: Principle and Practice in the New Republic* 91-136 (Cornell U. Press 1987).

20. Horwitz, *supra* n. 1, at xii.

21. *Id.*

redirect legal scholars toward studying an overlooked body of law—civil law. Today, most legal historians would agree with him that constitutional law alone cannot explain historical developments in jurisprudence.

It is debatable whether early republican and antebellum jurists shared his assumption that private and constitutional law were distinct, autonomous domains. Presumably, judges and lawyers developed an overlapping discourse about rights; one in which they imagined legal actors as agents endowed with certain capacities, duties, immunities, liabilities, disabilities, and standing. Also, judges and lawyers evaluated case law through the *persona ficta* of the legal actor who was operating within an idealized public sphere; here one was subject to the shifting demands of the "public good" and conflicting private interests. Thus, the ways in which the law constructs civic identity was very much a part of legal thinking in both constitutional and civil jurisprudence.

A. Judge Brockholst Livingston's Political Marketplace

A crucial case in *Transformation* is the 1805 New York Supreme Court case of *Palmer v. Mulligan*,[22] for which Brockholst Livingston wrote the majority opinion. Livingston was a member of an influential proprietary clan who owned a vast amount of property in New York. As an extended family, they established a powerful political faction in the state. Before his appointment to the New York Supreme Court, Livingston was a prominent lawyer in New York City. He also played a major role in the birth of the party system in the United States. Aligning his interests with those of Aaron Burr in the presidential election of 1800, Livingston helped to secure a victory for the Democratic Republican Party candidates. Seven years later, Jefferson rewarded Livingston for his support by appointing him to the United States Supreme Court. Neither a scientist, a pragmatist, nor a sober moralist, Livingston's real literary talent lay in his satirical prose. In the year of *Palmer,* he displayed his judicial wit in *Pierson v. Post*,[23] a property case involving a fox; he mocked the conventions of legal reasoning, the reliance on ancient precedents, and the silliness of using legal fictions to equate the "saucy intruder," the said fox, to a "pirate," as "the law of nations does."[24] During his four years on the New York court, he wrote 149 opinions, and kept a hand in local and national politics. Family connections, landed wealth, and political ambition defined his career.[25]

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22. 3 Cai. R. 307, 1805 WL 809 (N.Y. 1805).

23. 3 Cai. R. 175, 1805 WL 781 (N.Y. Sup. 1805).

24. Gerald Dunne, *Brockholst Livingston, The Justices of the United States Supreme Court, 1789-1969: Their Lives and Opinions* 400 (Leon Friedman & Fred L. Israel eds., Chelsea House Publishers 1969).

25. *Id.* at 388, 391, 400. In 1800, Burr had convinced Livingston to run on the Republican ticket for the State Assembly, because they would select the presidential electors. Livingston had been a close friend of Burr since college, and their relationship extended to several financial collaborations: Livingston was on the Board of Directors of the famous Manhattan Company, a brilliant scheme by Burr to provide the city with a new water system, as well as allow the Republicans to have access to capital. A special rider in the charter permitted the Manhattan Company to provide the services of a Bank. Livingston also pulled out of another speculation venture with Burr that ruined the latter's

Livingston worked with a natural rights concept in *Palmer*. In this case, which dealt with water rights, he contended that the common law action of interference must be restrained "within reasonable bounds so as not to deprive a man of the enjoyment of his property."[26] He also appealed to an imaginary public sphere: "the public," he wrote, "whose advantage is always to be regarded, would be deprived of the benefit which always attends competition and rivalry."[27] Where did these assumptions come from? Livingston had been a Federalist turned Anti-Federalist, and later joined the Jeffersonian Republican party. He fell into a rising group of procommerce Anti-Federalists in New York, who, along with the constitution's supporters, like Jefferson and Madison, strongly endorsed free trade principles. In fact, Livingston's strident opposition to the 1795 Jay Treaty gives several clues to why he so plainly promoted commercial trade. The Jay Treaty, Republicans believed, threatened to emasculate American trade and its republican economy, placing the young nation under the "commercial manacles" of British mercantilism, a system that severely restricted individual industry and economic freedom. His celebration of competition and rivalry, moreover, suggest more than a model for economic development. Livingston believed in partisan politics and political rivalry that was based on contending economic interests. Never neutral or inconspicuous, he readily took to the streets and engaged in a fierce shouting match with Alexander Hamilton over the Jay Treaty.[28]

Livingston does not neatly fit into Horwitz's new legal model. This New Yorker did not simply advocate the distribution of wealth against the weak to the benefit of the strong. Two years before *Palmer*, he rendered a decision that endorsed legislation for imprisoned debtor relief.[29] Livingston's jurisprudence crossed the line separating law and politics, private law and constitutional law, and he was not a purely rational actor. Not only did he argue with Hamilton in the streets, and kill a man in a duel, but at James Madison's first inaugural ball in 1809 he revealed his forthcoming position on the Yazoo land case, *Fletcher v. Peck*,[30] to John Quincy Adams, who happened to be one of the lawyers in the proceedings.[31]

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finances in 1801. *See* Nathan Schachner, *Aaron Burr: A Biography* 22, 160, 171-73, 220 (A. S. Barnes & Co., Inc. 1961).

26. *Palmer*, 1805 WL 809, at *5.

27. *Id.*

28. *See* Dunne, *supra* n. 24, at 389; Sidney I. Pomerantz, *New York, An American City, 1783-1803: A Study in Urban Life* 300 (Columbia U. Press 1938); Paul A. Gilje, *The Road to Mobocracy: Popular Disorder in New York City, 1763-1834,* at 103 (U. N.C. Press 1987); Drew R. McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* 76, 91, 138, 164, 168 (U. N.C. Press 1982). Saul Cornell argues that one group of New York Anti-Federalists espoused a procommerce, interest-orientated theory of political representation and a salutary view of economic diversity. His model for this procommerce position was Melancton Smith, who remained a strong Burr supporter (during the 1792 and 1796 presidential elections) throughout the decade. *See* Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828,* at 83-84, 98-99 (U. N.C. Press 1999); *Political Correspondence and Public Papers of Aaron Burr* vol. 1, 139-40, 278 (Mary-Jo Kline & Joanne Wood Ryan eds., Princeton U. Press 1983).

29. *Manhattan Co. v. Smith*, 1 Cai. R. 67, 1803 WL 599 (N.Y. Sup. 1803).

30. 10 U.S. 87 (1810).

31. Dunne, *supra* n. 24, at 393. Dunne incorrectly identifies Livingston and Adams' discussion as occurring at the Madison's second inaugural ball. Although the case was argued in 1809, Supreme Court Justice John Marshall did not offer a ruling, and the outcome was delayed for another year. *See*

Was this a breach of decorum or political maneuvering? Perhaps it was both. Clearly, Livingston's motives become far more complicated, his decision-making far less predictable, especially when we see him outside the court, and as part of a larger chain of meaning generated by the political controversies of his time. A closer look at his language, too, reveals that Livingston imagined economic actors as public men. From his perspective, if freed from the manacles of excessive regulation, economic agents should be capable of competition, yet still be entitled to legal protection from debt when impoverished and financially disabled in the marketplace.

II. CRITICISM OF TRANSFORMATION

Horwitz can respond that he did not intend to write the kind of book I wish he had written. It is a fair defense. The problem in *Transformation*, however, does not simply lie in the way he interprets case law, but in what he leaves out. Every narrative has gaps and omissions, because every scholar makes interpretative choices. In the introduction of *Transformation*, Horwitz discloses some of his choices: he states that he will not address corporate or labor law, but instead study areas considered "neutral" in terms of their effect on economic growth.[32] My critique may be attributable to scholarly genealogy, that is, the difference in when it was that we each nurtured our intellectual identity. From where I stand, nothing is neutral—and yet Horwitz seems to have ignored areas of the law that he himself would describe as "neutral."

The most glaring oversight is "domestic relations" or family law. Family law emerged as a separate area of the law during the nineteenth century. Equally significant, what Tapping Reeve called "domestic relations" became a crucial legal field in the early republic. One example of Horwitz's blind spot can be found in his selective reading of what he calls the "influential lectures" of Tapping Reeve and James Gould, who offered the first systematic training in the law at the Litchfield Law School founded in 1784.[33] The notebooks of Roger Minott Sherman, a student at Litchfield in 1794, reveals that Reeve divided his lectures into ten categories. Tellingly, the three topics that required the most extensive notes (measured by the number of pages in Sherman's notebooks) were: "Contracts with its Actions" (176 pages); "Real Property with its Actions" (126 pages); and "Domestic Relations" (95 pages).[34]

If we use Horwitz's definition of neutrality, then "domestic relations" is just as "neutral" as real property and contract law. Why is this obviously important

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Leonard Baker, *John Marshall: A Life in Law* 567-68 (Macmillan Publg. Co., Inc. 1974).

32. *See* Horwitz, *supra* n. 1, at 256.

33. *Id.* at 23. The Litchfield Law School was the most important during the early republic. More than three hundred students had taken his course before 1800, and the graduates included many prominent jurists and politicians. His training first introduced the "case method" (using examples from case law in legal training). Both the Yale and Harvard Law Schools libraries own several sets of the Litchfield students' notes. Horwitz consulted the notebooks for *Transformation*. For a history of Litchfield, *see* Marian C. McKenna, *Tapping Reeve and the Litchfield Law School* 17, 82, 84-85 (Oceana Publications 1986).

34. McKenna, *supra* n. 33, at 81.

area of the law ignored? One reason is that Horwitz's book predated the rise of modern feminist legal theory and women's history. *Transformation* probably reflects the common bias at the time, by marginalizing the history of the family. But this omission raises many difficulties, because the family was the most important legal framework for defining property rights and relations in the common law tradition—a fact that Tapping Reeve understood only too well.[35] Marriage was also a pivotal economic relation that contributed to competing definitions of contractual agreements in the antebellum period. The question, then, is how can one trace the transformation of American law—the changing meaning of common law doctrine—if one ignores what was a central field of the law—domestic relations? This blindspot definitely requires closer scrutiny.

A. Examination of Neutral Cases

Certain patterns of inheritance, such as how the courts adjudicated contested wills—protecting rights and enforcing the obligations of testators and heirs—clearly falls under the rubric of what Horwitz would call "neutral." Horwitz does address one such case involving dower rights, which is revealing because of the strained logic of the ruling. Decided in the Supreme Court of Massachusetts, *Conner v. Shepherd*[36] denied a widow the right to dower in wild and uncultivated land. In his opinion, Judge Parker invoked what Horwitz contends was the "discredited common law doctrine of waste."[37] This doctrine prohibited the widow from attempting to improve uncultivated land; if she did cut trees or farm the land, she committed waste, and forfeited her dower rights. At the same time, Parker claimed that the dower only existed in productive land that can provide "rents and profits, or income."[38] The real purpose of this ruling, as Horwitz concludes, was "to undermine the right of dower itself."[39] Dower inhibited land speculation for "future fund" on the part of the heirs; in Parker's words, it would "operate as a clog, upon estates, designed to be the subject of transfer."[40]

Why was this case, as Horwitz's concludes, "an exception to the general policy" for encouraging improvements?[41] Or, to put it another way, why did Parker find it difficult to reconcile a policy of improving uncultivated lands and the economic and legal status of widows? Parker's reasoning was premised on the assumption that widows were incapable of making the land productive. At best, a "tenant for life" might clear the land "for the purpose of getting the greatest crops

35. Tapping Reeve's influence extended beyond the classroom. He published the first U.S. treatise on domestic relations, entitled, *The Law of Baron and Femme; of Parent and Child; of Guardian and Ward; of Master and Servant; and the Powers of the Courts of Chancery: With an Essay on the Terms, Heir, Heirs, and Heirs of the Body* (Oliver Steele 1816).

36. 15 Mass. 164, 1818 WL 1700 (Mass. 1818).

37. Horwitz, *supra* n. 1, at 57.

38. *Conner*, 1818 WL 1700, at *3.

39. Horwitz, *supra* n. 1, at 58.

40. *Id.* at 57-58; *Conner*, 1818 WL 1700, at *3.

41. Horwitz, *supra* n. 1, at 58.

with the least labor, which is all that could be expected from a tenant in dower."[42] Parker imagined a small-scale, domestic agricultural enterprise. Surprisingly, he scoffed at such a prudent, self-sustaining operation, despite its inherent capitalist logic: higher profits combined with lower labor costs. For Parker, what was absent from his imaginary profile of the widow entrepreneur was a necessary feature for commercial enterprise: the impulse for risk. And this quality, of course, had a distinctly gendered meaning in antebellum America. His gendered coda might go as follows: men speculate on land, while women insulate from the market the realty on hand; men make the market grow, women fail to reap the best price for what they sell or sow.

Further evidence of this point can be found by looking at the precedent that Parker ignored when making his ruling. Counsel for Elizabeth Conner cited the New York case of *Jackson v. Sellick*.[43] In the opinion, written by Justice Kent, the court declared that a wife, even under disability of *feme covert*, was the owner of wild and uncultivated lands. This decision protected the husband's right to tenant by the curtesy, providing him with rents and profits from his wife's land. These cases addressed similar problems: the widow and the husband were treated as "tenants," and both were entitled to rents and profits. Kent argued that to deny this right to the husband would be "extinguishing the title of tenant by the curtesy, to all wild and uncultivated land," a divesture that he found far too expansive, because it literally eliminated the right itself.[44] Parker obviously ignored Kent's warning. He showed little concern for the possible precedent he might be setting for extinguishing dower rights in uncultivated lands.

Later Massachusetts cases had to contend with Parker's ruling, as in *Shattuck v. Gragg*,[45] in which a dower's claim to use a wooded pasture was contested in an action of trespass by the current owner of the land. The plaintiff inherited the land from his father, who had originally obtained the land through conveyance from the widow's husband; and the plaintiff had agreed to recognize the widow's dower rights, but felt that the pasture area was not dowable. Plaintiff's counsel relied on Parker's argument in *Conner*. Judge Putnam, in *Shattuck*, nevertheless dismissed this line of reasoning on two grounds: (1) the plaintiff could not assume that the pasture land "was exempted or not liable to her dower"; and (2) the land in question could not be considered "wild and uncultivated land" because it had been "occupied as a part of the homestead of her husband."[46] Putnam had it both ways. He recognized that uncultivated lands were dowable (and not exempt from dower) and he incorporated the disputed land within the domesticated landscape of the homestead.

All three of these cases reveal how property disputes involved presumptions on the part of the judge about the gendered behavior of the parties involved.

42. *Conner*, 1818 WL 1700, at *2.
43. 8 Johns. 262, 1811 WL 1323 (N.Y. Sup. 1811).
44. *Id.* at *5.
45. 40 Mass. 88, 1839 WL 3022 (Mass. 1839).
46. *Id.* at *3.

Jackson centered on protecting the husband's rights; the decision reinforced a custodial image of the husband as the manager and guardian of his wife's assets. In *Shattuck*, Putnam likewise defined the widow's legacy through his historic reconstruction of how a husband had occupied and used the land: if the wooded and pasture area, as he claimed, had been conceived of as "part of the homestead of her husband," then she was "clearly entitled to be endowed of it."[47] And in *Conner*, Parker also saw the widow's dower as either a barrier to reaping the peak value of the land through speculation, or as an unproductive use of the land; in both instances, Parker believed that productivity demanded financial investment. In fact, the counsel for the tenant in *Conner* painted an even darker picture, portraying the widow as not only devoid of any capital, but lacking the will to guard the property from insolvency. "The dowager," he claimed, "would have no motive to pay the taxes," then the land would be "sold."[48] The widow's presumed civic irresponsibility and fiscal incapacity made her unfit to occupy the land.[49]

B. The Role of Political Ideology in Credit and Bankruptcy

Jeanne Boydston has argued that antebellum Americans increasingly divorced women's work from any labor value. After the War of 1812, particularly in New England, only work associated with the "cash market" was seen as productive.[50] Parker, moreover, assumed that the widow in *Conner* had no access to the "credit system."[51] All kinds of commerce in the American marketplace was structured around "borrowed money."[52] Independent enterprise required credit, knowledge of the world of finance, and a willingness to risk failure and bankruptcy. Not so surprisingly, lawyers were among the leading ranks of large-scale land speculators. It would be interesting to see if Judge Parker shared the "rage for speculation."[53] It is revealing that his opinion was issued during "flush times"[54] and just a year before the Panic of 1819, the first in a series of four market collapses to rock the American economy before the Civil War.[55]

With financial risk came "wreckage."[56] Corporations, business firms, land speculators, artisans, jobbers, and farmers experienced debt and insolvency. Historians have estimated that failure was widespread with at least one in three antebellum proprietors suffering from overwhelming debts.[57] Horwitz only briefly

47. *Id.*
48. *Conner*, 1818 WL 1700, at *2.
49. *Id.*
50. Jeanne Boydston, *Home & Work: Housework, Wages, and the Ideology of Labor in the Early Republic* 44-45, 48, 52-55, 58 (Oxford U. Press 1990).
51. Edward J. Balleisen, *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America* 27 (U. N.C. Press 2001).
52. *Id.*
53. *Id.* at 57.
54. *Id.* at 53.
55. *Id.* at 27, 33, 53, 57; Bray Hammond, *Banks and Politics in America from the Revolution to the Civil War* (Princeton U. Press 1957).
56. Balleisen, *supra* n. 51, at 136.
57. *Id.* Shipwreck as the metaphor for economic failure was common in the eighteenth and

addresses this important legal and economic condition. He argues that, after the Panic of 1819, entrepreneurs conceived of business failure as "a random consequence of uncontrollable economic forces."[58] This change in attitude led businessmen and lawyers to campaign for bankruptcy legislation. While Horwitz notes the heightened concern for financial "ruin and desolation," he misses how debt played a major role in redefining the common law rules for insolvency and marriage.[59] Debtor-creditor relations also shaped modern contract law.

Two dramatic patterns emerged during the antebellum period: (1) debtors enhanced their power to negotiate and reduce their liability for their debts; and (2) debtor relief generated a legal and gendered discourse that was protective, paternalistic, moralistic, and, paradoxically, emancipatory. The law imagined the debtor as a male head of the household and a proprietor, a provider and risk-taker, whose economic potential was intimately tied to his martial status. Antebellum businessmen were never truly "independent" or "self-made."[60] Their families were often a valuable resource, providing loans, sheltering assets, and providing contacts for furthering their economic ventures. Yet the cultural fiction of economic autonomy for male entrepreneurs was just as crucial as the reality of men's fiscal dependence on relatives. A man's failure was shared by his family, his legal dependents, whose economic dependence made them vulnerable to losing their support if the husband/father went bankrupt. Like widows' dower rights, wives facing wreckage needed financial security, some insurance, and a legal safety-net that protected them and their children from their husbands' risky enterprises.[61]

Consequently, bankruptcy reform, abolition of imprisonment for debt, homestead exemptions, and married women's property rights all reinforced a two-track and gendered system for relieving insolvency. One the one hand, bankruptcy legislation and debtor relief from imprisonment enhanced the capacity of male debtors to be independent once again and escape the stigma of failure. On the other hand, homestead exemption laws and married women's property rights rewarded men for being providers, and women for being dependents, while allowing families to shelter assets from creditors trying to recover the husband's debts.[62]

Given this trend, Parker's attitude in *Conner* toward dower rights reflected the cultural pattern for equating debt and dower with female dependency. In the

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nineteenth centuries. *See* Toby Ditz, *Shipwrecked; or, Masculinity Imperiled: Mercantile Representations of Failure and the Gendered Self in the Eighteenth Century*, 81 J. of Am. History 51, 51-80 (1994).

58. Horwitz, *supra* n. 1, at 229.

59. *Id.*

60. Balleisen, *supra* n. 51, at 13.

61. *Id.* at 13-15, 95, 107, 216-17; Richard H. Chused, *Married Women's Property Law, 1800-1850*, 71 Geo. L.J. 1359, 1400-02, 1410-12, 1424-25 (1983).

62. Balleisen, *supra* n. 51, at 15; Chused, *supra* n. 61, at 1400-03, 1410-12; Paul Goodman, *The Emergence of the Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840-1880*, 80 J. of Am. History 470, 472, 487-88 (1993); Rufus Waples, *A Treatise on Homestead and Exemption* 99-100 (T.H. Flood & Co. 1893); Seymour D. Thompson, *A Treatise on Homestead and Exemption Laws* 45-47 (St. Louis F. H. Thomas & Co. 1878).

common law, dower was considered a gift, a bounty: it was bestowed on the wife as a patron might generously reward a faithful client, or a master might recompense a loyal servant.[63] The widow was made "tenant for life;" she had no title to the land, but simply enjoyed the privilege of occupancy for the services she rendered to her husband while he was alive. As the counsel remarked in *Conner*, the intent of dower was "for the sustenance and support of the widow," reflecting that dower continued the husband's common law duty to maintain his family.[64] In the antebellum period, debt meant "being dependent on the indulgence of others," which essentially described the condition of dower.[65]

C. *The Restoration of Manhood through Bankruptcy*

Extreme debt and bankruptcy came to symbolize the loss of manhood, the legal incapacity for manly independence; in effect, the insolvent man was "unmanned."[66] Imprisonment for debt divested men of their reputation, an important dimension for defining masculinity and public identity during the early republic and antebellum periods. Reputation was everything; it determined a man's ability to make deals, get credit, secure endorsements, acquire new customers—that is, reputation created the means for contracting in the marketplace. Trust and personal honor were essential to a credit system in which promises were a principal form of currency in a cash poor society. The political language of republicanism, calling for autonomous and virtuous citizens, reinforced this view; men without an economic stake in society, or lacking financial independence, could be denied political rights. Fiscal weakness invited political divestment, as one delegate to the 1844 New Jersey state constitutional convention argued: he claimed that a pauper "voluntarily surrenders his rights," because he "parts with his liberty—he loses his control of his children and labors for others."[67]

To be unmanned implied the loss of liberty and mastery—the capacity to control one's destiny and master one's household.[68] To avoid this fate, law and politics worked together to empower debtors to remake and redeem themselves. The 1841 Bankruptcy Act, for example, was a unique law in comparison to other laws. It gave unprecedented power to debtors; they could be discharged from their debts, and they were exempt from legal prosecution. The passage of the law also gave debtors greater leverage for negotiating better terms from creditors in the shadow of the law. Bankrupts were allowed to keep $300 worth of

63. *See Legal Condition of Woman*, 59 North Am. Rev. 349-50 (1828).

64. *Connor*, 1818 WL 1700, at *1.

65. *Id.*; *see* Reeve, *supra* n. 35, at 82; Balleisen, *supra* n. 51, at 167.

66. *Id.* at 79. Eighteenth-century debtors also described themselves as being unmanned. *See* Ditz, *supra* n. 57, at 51.

67. *See Proceedings of the New Jersey State Constitutional Convention of 1844*, at 88, 101-02 (Trenton, N.J. 1942); Nancy Isenberg, *Sex and Citizenship in Antebellum America* 8, 28, 184 (U. N.C. Press 1998). For the importance of reputation, *see* Joanne B. Freeman, *Affairs of Honor: National Politics in the New Republic*, at xix-xxi, 39, 42, 46 (Yale U. Press 2001).

68. For the importance of mastery and men's role as heads of household, *see* Isenberg, *supra* n. 67, at 181, 196.

"necessaries" beyond the reach of creditors. But the main goal was to give these men a second chance; in the words of historian Edward Balleisen, the "statute literally created new legal persons."[69]

The 1841 Bankruptcy Act was a Whig policy, incorporating a decidedly moralistic perspective on human behavior. The very idea of giving someone a second chance was drawn from the religious notion of moral reformation—the duty of society to redeem the fallen, reclaim the outcast. This belief in redemption was combined with the evangelical ideal that the human spirit had the power to undergo a radical conversion experience—and thus save the individual from sin.[70] If prostitutes, drunkards, and criminals might be forgiven for their sins and redeemed, then why not debtors too? Whig morality informed a similar exemption law proposed in 1841 for the impoverished tenants trapped in the feudal manorial system in New York. Manhood was again the issue. "Extreme poverty," as one legislator argued in support of the bill, "discourages effort and represses the manly ambition of the willing debtor to apply his labor to the payment of his debts and the bettering of his condition."[71]

Even earlier legal adjudication over debtor relief aimed to protect or restore "manly ambition."[72] Judge Brockholst Livingston's opinions deserve closer examination. In one case, he rejected imprisonment for debt because "[t]he rigour of the practice was, in his opinion, enough to condemn it."[73] He further argued, in another case, that debtor relief "ought to operate as a discharge from his creditors in every part of the world."[74] He did not, however, always side with the debtor, especially those who used the law as a "pretence" [sic] for evading responsible behavior.[75] His theory rested on his understanding of action in the public sphere, and it comported with his support of competitive marketplace found in *Palmer.*

In the same year, in his opinion for *Reynolds v. Corps and Douglas,*[76] Livingston outlined the view that debtor relief should encourage debtors to resolve their obligations in a more direct fashion. Rather than sending the debtor

69. Balleisen, *supra* n. 51, at 105-07, 152, 167.

70. *Id.* at 165; *see* George M. Thomas, *Revivalism and Cultural Change: Christianity, Nation-Building, and the Market in the Nineteenth Century* (U. Chi. Press 1989); Virginia Lieson Brereton, *From Sin to Salvation: Stories of Women's Conversions, 1800 to the Present* (Ind. U. Press 1991); William G. McLoughlin, *Revivals, Awakenings, and Reform: An Essay on Religion and Social Change in America, 1607-1977* (U. Chi. Press 1978); Laurence R. Moore, *Selling God: American Religion in the Marketplace of Culture* (Oxford U. Press 1994); Daniel Walker Howe, *The Evangelical Movement and Political Culture in the North during the Second Party System,* 77 J. of Am. History 1216, 1216-39 (Mar. 1991).

71. Charles W. McCurdy, *The Anti-Rent Era in New York Politics, 1839-1865,* at 65-66 (U. N.C. Press 2001).

72. *Id. See Manhattan,* 1803 WL 599; *Van Raugh v. Van Arsdlan,* 3 Cai. R. 154, 1805 WL 766 (N.Y. Sup. 1805).

73. *Manhattan,* 1803 WL 599, at [¶ 1].

74. *Van Raugh,* 1805 WL 766, at *2. This opinion was really a dissent, although Livingston chose not to treat it as such. *Id.* He explained: "To this opinion, which is the result of much reflection and research, I still adhere; but being recently informed that a different decision had been made by this court, in the case mentioned by the *Chief Justice,* I do not think myself at liberty to dissent from the judgment just rendered." *Id.*

75. *Hendricks v. Judah,* 2 Cai. R. 25, 1804 WL 718, at *2 (N.Y. 1804).

76. 3 Cai. R. 267, 1805 WL 804 (N.Y. Sup. 1805).

to prison, Livingston sought to replace a penal sentence with a market solution. He did not wish to see all obligations absolved or the creditor denied "all right of personal recourse" in the courts.[77] Instead, he wanted to save the debtor from the humiliation of prison, which imposed an unnecessary hardship; he sought to place him in a better position to negotiate a reasonable arrangement that satisfied creditors, yet preserved the debtor's dignity as economic actor and public man.[78]

D. *Exemption of Necessaries under Bankruptcy*

Common law and later statutory exemption laws worked from a similar premise of preserving the debtor from the shame associated with complete poverty—what some equated to civil death. Often, as in the case of the 1841 Bankruptcy law, "necessaries" were exempt from confiscation: these included personal belongings, tools, furniture, clothing, and the basic articles needed to participate in civil society.[79] Necessaries were also what the common law required a husband to provide for his wife; if a married man refused to support his wife, she could contract debts for necessaries in his name. The right to necessaries was not a strict entitlement, but a contingency; a claim for necessaries was not earned, but a form of welfare. In the antebellum period, necessaries did not include cash, implying that the common law assumed that a husband's responsibility was only to provide maintenance for his household dependents. Nineteenth-century jurists made sure to distinguish wives' domestic services from the wage economy, as in the 1858 New York case of *Cropsey v. Sweeny*.[80] In this case, the judge ruled that the marriage contract had nothing to do with the sordid business of profits or wages, ruling that the wife's services "were performed not as a servant, with a view to pay, but from higher and holier motives."[81] With the single exception of Massachusetts, all other antebellum state legislatures refused to allow wives to keep their own wages.[82]

Clearly, jurists and politicians were granting certain citizens immunities, yet such exemptions served different moral and civic purposes. The concept of immunity came out of the clerical tradition, the idea that the church was a separate jurisdiction.[83] Marriage was considered a sacred contract, a covenant,

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77. *Id.* at [¶ 4].

78. *Id.* In his opinion in an ejection case, Livingston reflected the same concern for avoiding hardship and harassment. He wrote: "It comports, then, neither with reason nor feeling, to permit him to be put to the expense and vexation of an ejectment, without a previous request to quit." *Id.* at [¶ 2]. Here again Livingston rejected the common law doctrine because of his view of the public sphere which should be dictated by "reason" and "feeling." *See Jackson, ex dem. Benton v. Laughhead*, 2 Johns. 75, 1806 WL 950 (N.Y. Sup. 1806).

79. *See* Balleisen, *supra* n. 51, at 25, 152 (In *Hunt's Merchant's Magazine* (1846), it was observed: "Bankruptcy . . . is like death, and almost as certain.").

80. 27 Barb. 310 (N.Y. 1858).

81. *Id.* at 315.

82. Isenberg, *supra* n. 67, at 171, 173-75, 262 n. 121, 267-78 n. 169. *See* Reeve, *supra* n. 35, at 81; Chused, *supra* n. 61, at 1398, 1424.

83. Neil H. Cogan, *"Standing" Before the Constitution: Membership in the Community*, 7 L. & History Rev. 1, 14 (1989). Tapping Reeve includes a historical perspective on the treatment of widows and orphans when the husband becomes "an insolvent debtor." He explains that the King's

which explains why a judge could claim that a wife performed her obligations "from higher and holier motives."[84] Here, the immunity was granted to the husband, protecting his domicile from the sordid and immoral world of the commercial wage system. Livingston, through his claim in *Van Raugh* that debtor relief in one state should "operate as a discharge from his creditors in every part of the world,"[85] offered a far more radical interpretation of immunity. Most antebellum jurists agreed that states could not discriminate against residents from other states, as Joseph Story reasoned in his 1833 *Commentaries* on the purpose of the privileges and immunities clause of Article IV of the United States Constitution. But these states never endorsed the principle that a resident from another state might be immune from their state laws.[86]

By the time of the 1841 Bankruptcy Act, however, the federal government allowed debtors to adopt a new legal identity born out of a double immunity: they were protected from prosecution and from the liability to repay previous contractual obligations. The state adopted the moral authority of the church, absolving debtors both financially and morally for their delinquency. The federal government sheltered these redeemed men from the state courts. In effect, once granted their certification, debtors were "new men," their past failures erased—no longer a concern of any secular tribunal.

Contrary to Horwitz's argument, debtor laws demonstrate that the triumph of the contract was far from complete. By using exemptions to resolve creditor-debtor disputes, the state retained its paternalistic authority for expressing "the

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responsibility was passed to the church, because "no men would more regard the rights of widows and orphans than clergymen." Further, he wrote, "the whole personal property of the deceased . . . went to the king, and from him passed to the clergy. They held it as trustees to pay the debts, and after the debts were paid, to distribute the residue to the issue of the deceased." Reeve, *supra* n. 35, at 9, 14.

84. Joel P. Bishop, a Whiggish Massachusetts lawyer, became the foremost authority on domestic relations and marriage law. His *Commentaries on the Laws of Marriage and Divorce* first appeared in 1852, and even in his 1881 edition, he wrote:

> So that, if marriage was pronounced a contract, it was said also to be more than a contract, and to differ from all other contracts. A frequent question was, whether it is a civil contract, or a religious vow. The Roman Catholic Church holds it to be a sacrament; and, though Protestants do not generally so esteem it, they account it as of Divine origin, and invest it with the sanctions of religion. Therefore it has been said, that, "according to juster notions of the nature of the marriage contract, it is not merely either a civil or religious contract; and at the present time it is not to be considered as originally and simply one or the other.

For Bishop's 1881 quotation, *see American Legal History: Cases and Materials* 273 (Kermit L. Hall, William M. Wiecek & Paul Finkelman eds., 2d ed., Oxford U. Press 1996).

By 1881, he wished to limit claims that marriage was a religious institution under the law, but his own comment (and actual case law) suggests that other jurists did not agree with him. In the 1852 text, he stated that marriage was never simply a contract, but defined by social duties that "circumscribed," according to Michael Grossberg, "its contractual nature independent of the agreement that created it." Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* 23 (U. N.C. Press 1985).

85. *See Van Raugh,* 1805 WL 766, at *2.

86. Joseph Story, *Commentaries on the Constitution of the United States* 674-75 (Hillard Gray 1833), as quoted in Earl M. Maltz, *Fourteenth Amendment Concepts on the Antebellum Period*, 32 J. Am. Leg. History 305, 305-46 (1988). It is interesting that Story, also a moralist Whig, was a major advocate of the 1841 Bankruptcy Act. His position with this Act contradicted his opinion in his *Commentaries. See* Balleisen, *supra* n. 51, at 114.

they inevitably made issues of civic identity and marital status central to the evolving doctrine of property law.

The courts were not consistent. Tapping Reeve, for example, wrote in 1816 that in Connecticut, the estate of dower may be "barred" if the "husband is an alien" or the wife is an "alien."[92] But the New York Supreme Court in 1802, in *Jackson v. Lunn*,[93] affirmed that the American Revolution "did not work a forfeiture" of previously vested rights in the land.[94] Another case, *Kelly v. Harison*,[95] cited by Judge Kent in his opinion in *Jackson*, had allowed "the alien widow her dower in all the lands owned her husband at the time of revolution, although the husband was still alive."[96]

Quite clearly, the court in *Kelly v. Harison* recognized the problem of the dual political identities of husband and wife; he became a citizen, she did not. The judges were divided in their opinion. They all agreed that the wife should retain her dower rights, but they disagreed over the meaning of her alien status. Judges Kent and Radcliff believed the widow was entitled to dower in all land her husband had purchased before July 4, 1776. Judge Lansing felt otherwise. He saw the wife as *feme covert*; neither her alien status, nor her residence in Ireland had any bearing, because her identity flowed from her husband's domicile. Lansing assumed that marital status trumped political status. A married woman could live anywhere in the world, apart from her husband for years, and yet her *legal* domicile *was with her husband.* Like Livingston's expansive view toward debtor exemption laws—applicable to any place in the "world"—a wife's status extended to any place in the world: her standing was derived from the polity of her marital household, which, according to Judge Lansing, superceded other political claims on her.[97]

A. Moral Objectives in the Redistribution of Property Rights

Moral considerations also informed how the courts redistributed inherited property after the Revolution. Tapping Reeve noted that in most modern cases the courts directly interfered with inheritance rights on moral grounds: he wrote that it was the "governing principle . . . that the widow shall not have both dower

92. Reeve, *supra* n. 35, at 40.

93. 3 Johns. Cas. 109, 1802 WL 919 (N.Y. Sup. 1802).

94. *Id.* at [¶ 7].

95. 2 Johns. Cas. 29, 1800 WL 2428 (N.Y. Sup. 1800).

96. *Jackson,* 1802 WL 919, at [¶ 7].

97. *See Kelly,* 1800 WL 2428. Judge Lansing claimed that her alien status (or the fact that she had lived in Ireland and remained separated from her husband from 1770 until his death in 1798) did not matter. Lansing viewed her as a *feme covert* and "under the control of her husband." *Id.* at *10. Furthermore, her "residence in Ireland, in legal construction, must have been dictated by her husband; and her domicile, constructively, is that of her husband." *Id.* She did nothing in the eyes of her husband "to forfeit her dower." *Id.* His conclusion was more expansive, concluding that she had right to claim her dower on lands her husband acquired "before or after the Revolution." Lansing's position was similar to the decision rendered in *Martin v. Commonwealth,* 1 Mass. 347, 1805 WL 580 (Mass. 1805), in which a married woman was seen as having no political identity except through her husband. For *Martin v. Commonwealth, see* Kerber, *No Constitutional Right to Be Ladies, supra* n. 91, at 25-33.

moral sense of the community."[87] It is equally apparent that insolvency law was a major concern of both politicians and jurists. Livingston's radical position—allowing debtor exemption in one state to have standing anywhere in the "world"—had far-reaching consequences for property and constitutional law. The implication of Livingston's view returns us to the original premise of the piece: the law was never divorced from political considerations.

Private and constitutional law shared a discourse of rights, and an imaginary conception of the rights-bearer, which fundamentally shaped the legal culture of the antebellum period. As Charles McCurdy has contended in his research on law and politics during the Anti-Rent era in New York, the United States developed a "polity of courts and parties."[88] While the courts and politics have what he called "distinctive logics," and even "distinctive cultures," lawyers bridged these two public areas, "integrating legal theory and political ideology."[89] Not only were jurists invested in advancing political agendas, but the very process of adjudication was ideological. Ideology constructed "people as subjects,"[90] and judges contributed to this process by writing opinions that generated imaginary legal parties and then systematically plotted them into a field of vision—a narrative script that was bounded by legal doctrine. This process, by its very nature, allowed jurists to introduce moralistic, as well as gendered, assumptions when resolving legal disputes. The law was never blind, or neutral, when sorting out the claims, interests, rights, and duties of contending parties. Indeed, all parties to a case were transformed into subjects, in which judges tried to balance legal precedents against the imagined duties, rights, and economic capacities of claimants and defendants.

III. REDISTRIBUTION OF PROPERTY RIGHTS

From the time of the American Revolution, property rights and marital rights were intertwined in politically charged ways. Confiscation laws passed during the war allowed governments to take possession of Loyalists' vast land holdings in the states. But the 1783 Treaty of Paris ending the war forbade forfeitures and confiscations on either side of the Atlantic. The 1794 Treaty of Amity and Commerce with Great Britain reinforced the legal protection of property rights of aliens. As Linda Kerber has shown, property disputes involved issues of citizenship in resolving the massive redistribution of wealth resulting from the war.[91] Disputes over land continued into the nineteenth century, and

87. Horwitz, *supra* n. 1, at 253.

88. McCurdy, *supra* n. 71, at xvi.

89. *Id.* at xv, 334. For the concept of "polity of courts and parties," McCurdy cites Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920,* at 5-35 (Cambridge U. Press 1982).

90. Althusser, *supra* n. 14, at 160.

91. *See* Linda K. Kerber, *"May all our Citizens be Soldiers, and all our Soldiers be Citizens:" The Ambiguities of Female Citizenship in the New Nation,* in *Arms at Rest: Peacemaking and Peacekeeping in American History* 1-21 (Joan R. Challinor & Robert L. Beisner eds., Westport, Conn. 1987); Linda K. Kerber, *No Constitutional Right to be Ladies: Women and the Obligations of Citizenship* 3-46 (Hill & Wang 1998) [hereinafter Kerber, *No Constitutional Right to be Ladies*].

and legacy."[98] One such case that made its way to the Court for the Correction of Errors of New York in 1808 demonstrated the moral logic of judges in the Court of Chancery. Without hesitation, the judge presumed to know the real intention of the testator, who was the husband, claiming "he never intended that she should go beyond her third" (or dower rights).[99] The judge based his decision on the power of "parental affection," what he called the "strongest feeling of the human heart, the sacrament of nature, implanted by the Deity in our bosoms."[100] No father would have intentionally injured his children's welfare, by granting his wife more than she needs, and denying his offspring the "blessings" of his "enterprise and industry." In fact, he concluded that the "man who would leave his children destitute, and bequeath his estate to strangers, must be a monster in the scale of moral estimation."[101] Moral intervention was a public responsibility of the court.[102]

This decision raises questions about the relationship between wills and contracts. The court might interfere in the disposition of a will if it showed evidence of incapacity on the part of the testator; a father who was a "moral monster" demonstrated that he was morally impaired and unfit to devise a fair will. The courts were equally moralistic in deciding dower rights when the claimant was divorced. In New York, the state legislature passed a bill in 1787 that permitted divorce in cases of adultery. In 1813, that New York law was amended to include the following stipulation: wives found guilty of adultery would be penalized and denied their dower rights. In an 1850 case, *Wait v. Wait*,[103] counsel rejected the argument that a wife was still entitled to dower, even if she was not guilty of adultery. He argued that dower rights were only acquired at death, and given that at the husband's death, his former wife was no longer his wife, she had forfeited her rights. Her rights, he asserted, depended on whether the wife had "a dowable capacity at the time of his death."[104]

In his opinion, Judge Harris rejected this argument. He contended that dower was an "inchoate right" that could be barred or divested for various reasons, but he felt that "it is a vested right, of which she can only be deprived by her own act or by forfeiture."[105] Significantly, counsel attempted to recast marital obligations in the language of marital duties and contractual performance. By classifying dower as a capacity, or what he called a "mere possibility," marriage gave her the option rather than a guarantee to receive dower rights.[106] Without the marriage contract fully in tact, the wife had no standing to claim her dower. The judge was not convinced. He echoed the sentiment of the legislature and the

98. Reeve, *supra* n. 35, at 47.
99. *Rogers v. Cruger*, 7 Johns. 557, 1808 WL 1430, at [¶ 32] (N.Y. 1808).
100. *Id.*
101. *Id.*
102. *Id.*
103. 4 N.Y. 95, 1850 WL 5365 (N.Y. 1850).
104. *Id.* at [¶ 96].
105. *Id.* at [¶ 99].
106. *Id.* at [¶ 96].

public that marriage was a unique kind of contract; in this case, rights could only be barred if the wife had committed the moral transgression of adultery. Since the husband had been found guilty of adultery, the court would be punishing the wife for the immorality of her spouse. Simply put: moral logic trumped the contractual model used by counsel.[107]

B. Political Objectives in the Redistribution of Property Rights

Political motives might also subvert the religious sanctity of marriage in the eyes of the law. In the case of *Dickson vs. Dickson's Heirs*,[108] Judge Catron, a loyal supporter of Andrew Jackson, rendered a conflicted decision, in which his political agenda took precedence over his moral sentiments. Mary Dickson had been married and divorced in Kentucky, and according to that state's law, she was barred from remarrying until after the death of her ex-husband. However, Mary moved to Tennessee, where she married John Dickson while her former husband was still alive. Judge Catron began his decision with a lengthy disquisition on the uniqueness of the marriage contract, its "deep-toned and solemn character," and the state's interest in preserving this connection because it formed one of the "strongest ligament in human society."[109] Next, he addressed himself to "[e]very honest and prudent man," and warned about the dangers of allowing the state of Tennessee to be seen as being too lenient in the treatment of divorce.[110] If that were the case, he conjectured, then his state might become a "receptacle" for the "refuse" of the nation, attracting "prostituted vagabonds, outcasts," and anyone seeking to remarry who had been "disabled from marrying" in his or her home state.[111]

However, Judge Catron did not stop there. He then dismissed all of this reasoning, directly challenging the nature of the Kentucky law. If husband and wife were divorced, he mused, then it was "impossible, in the nature of things, that all the relations of wife shall exist when she has no husband."[112] He essentially concluded that Kentucky law could not have it both ways, allowing for divorce, and at the same time punishing ex-wives for bigamy when they had no fulltime husbands. Catron felt it was the relationship itself, the ongoing exchange of obligations and services, which constituted a marriage. Moral penalties denied what he called "the nature of things;"[113] that is, it created an unnatural condition or status for the divorcee in which she held a contradictory and dual identity of being both a wife and not a wife, accountable to some marital obligations, but

107. *Id.*
108. 9 Tenn. 110, 1826 WL 438 (Tenn. Ct. App. 1826).
109. *Id.* at *2.
110. *Id.*
111. *Id.* at *2. Catron was fully aware of the impact of immoral behavior on public opinion. In 1836, Catron advised Jackson against forcing his choice for vice-presidential candidate (as Van Buren's running mate) on the Democratic National Convention. His designee was Colonel Richard M. ("Tecumseh") Johnson of Kentucky, a man who openly lived with a "mulatto mistress." *See* Marquis James, *The Life of Andrew Jackson* 695 (Bobbs-Merrill Co. 1938).
112. *Dickson*, 1826 WL 438, at *3.
113. *Id.*

released from others. Behavioral guidelines for marriage and divorce could not be fused into one legal identity.

Catron's opinion was highly political. In less than a year, Andrew Jackson's own marriage would become a national political scandal. The subject of gossip for years, Jackson's marriage had been contracted under questionable circumstances relating to his wife's previous marriage and divorce. During the election of 1828, Rachel Jackson would be publicly accused of bigamy. She was painted the harlot, ridiculed as a woman of loose morals, who brazenly lived in an adulterous relationship with Jackson. Ohio Whig Charles Hammond accused Old Hickory of "gross adultery," a man driven by "lewd desires," a person devoid of "all the moral and religious restraints" needed for the presidency.[114] Whig moralists, then, intended to domesticate national politics through a moral discourse of salvation and censure, reclaiming worthy debtors, as well as condemning unredeemed adulterers for past sins.[115]

It is evident that judges sought to place legal and moral limits on creditors, and that they thought about marriage (like debt) in terms of creating a web of relations. The law was not always "facilitative of individual desires," as Horwitz contends, for individual property owners were rarely disconnected from families, but were instead enmeshed in layers of obligations.[116] In the 1820 Maine case of *Babb & Wife v. Perley*,[117] the judge rejected the precedent set in *Conner*, and agreed that the wife's dower rights had been violated when the defendant trespassed on her land and cut down trees. Judge Mellen arrived at an interesting conclusion: he reasoned that the creditor had no more *right* to cut down trees than her husband had. He went on to argue that the husband "had the *power* to do it," just as he had the power to "beat and wound his wife," but he did not have the "*right* to do this."[118] The husband may be the "absolute proprietor of the inheritance," the "governor of the family," and "master" of it, as Blackstone wrote, but the judge contended that the husband could not transfer a power to a "third party" that he himself does not have the moral and natural right to possess.[119] What is striking about this case is that the judge did not empower a creditor at the expense of a dower or debtor; and he conceptualized the rights of the creditor through the prism of the husband's marital rights—not as an individual.[120]

Just as the voters evaluated Jackson by his moral character and his martial standing, judges readily applied a similar kind of guideline in homestead

114. *See* Norma Basch, *Marriage, Morals, and Politics in the Election of 1828*, 80 J. Am. History 890, 902 (1993).

115. Charles Hammond, *View of General Jackson's Domestic Relations, in reference to his fitness for the Presidency* [from *Truth's Advocate*, Cincinnati, Ohio, Jan. 1828]. For the importance of the Whig Party's domestic morality, *see* Elizabeth R. Varon, *We Mean to be Counted: White Women and Politics on Antebellum Virginia* (U. N.C. Press 1998).

116. Horwitz, *supra* n. 1, at 253.

117. 1 Me. 6, 1820 WL 183 (Me. 1820).

118. *Babb*, 1820 WL 183, at *3.

119. *Id.* at **2-3.

120. *Id.* at *1.

exemption cases. If the candidate's moral character constituted one of his qualifications to represent the nation, then average homeowners were subject to similar expectations in the polity of the home. Many of the antebellum homestead exemption laws protected the husband's right of domicile. Like debtors, they sought to strengthen and reward the husband's ability to be a good provider, and they sought to protect his duty as "the representative head of the family." The "right of homestead immunity" was nevertheless subject to a character evaluation, and the rules were often different for male as opposed to female claimants. Women's sexual misconduct was invoked more often than men's behavior was, in order to disqualify women from enjoying the exemption.[121]

Women were rarely seen as individual actors in the eyes of the law. Under the terms of *feme covert*, wives could not make contracts on their own. They could contract for necessaries if their husband refused to maintain them, as a right of last resort. Married women's contractual capacity was strangely limited in another way; they were not empowered to make contracts or agreements in an active sense—that is, as independent agents capable of assuming full liability for their contractual responsibilities. Yet wives could contract in a negative fashion. Rather than contracting into an agreement, they could contract out of one; they could consent to release their husbands from providing their dower rights in lieu of a cash payment or annuity.

This limited right was recognized early on by the courts.[122] In the case of *Larrabee v. Van Alstyne*,[123] Judge Livingston, sounding incredulous that anyone might attempt to dispute this point, insisted that such releases were happening "every day," proving that wives can and do regularly make contracts with husbands and relatives.[124] In an 1818 case, *Jackson, ex dem. Woodruff v. Gilchrist*,[125] the judges noted that the law could not be used as "pretence" [sic] to deny that such releases took place. An act had been passed in 1771 rejecting the common law argument that land, belonging to the wife or requiring her consent, could not be conveyed unless the wife had been privately examined.[126] The courts thus had an added moral duty to protect such agreements. Even Judge Parker of Massachusetts, in an 1822 case, argued that the "release of an incumbrance of dower" had to be guarded, because a dower's remedies were limited.[127] Again, contractarian ideology was compromised. Parker's ruling was still framed as "protective, regulative, paternalistic," recognizing the special legal and moral obligations that existed in such an agreement between a widow and her adult

121. Waples, *supra* n. 62, at 60-61.
122. *See* Marylynn Salmon, *Life, Liberty, and Dower: The Legal Status of Women After the Revolution*, in *Women, War, and Revolution* 85-106 (Carol R. Berkin & Clara M. Lovett eds., Holmes & Meier 1980).
123. 1 Johns. 307, 1806 WL 878 (N.Y. Sup. 1806).
124. *Id.* at [¶ 3].
125. 15 Johns. 89, 1818 WL 1787 (N.Y. Sup. 1818).
126. *Id.* at [¶ 12].
127. *White v. Westport Cotton Mfg. Co.*, 18 Mass. 215, 1822 WL 1579, at *15 (Mass. 1822).

son.[128]

IV. CONCLUSION

The transformation of the law in antebellum America operated on several levels. While the courts mediated the redistribution of wealth, and property was a major area of dispute, judges never approached their task unaware of political or moral considerations. Judges constructed narratives; they viewed the parties involved through a political and cultural lens, and they were forced to integrate party ideology, legal practice, and cultural norms. Horwitz revealed one side of the economic role of the courts in private law, the pattern in which jurists facilitated the growth of commercial expansion in the nineteenth century. But with commercial growth in the marketplace came commercial failure. Debtors became a highly visible and common problem that both the courts and political parties had to redress. Male debtors and bankrupts were never strictly conceived of as purely autonomous individuals before the courts; they were simultaneously self-made men and victims of the market, risk-takers, and morally accountable heads of households. Their public actions had private consequences. In many respects, the courts had to mediate moral issues, because cases dealing with property or contract disputes regularly involved family members.

It is also apparent that the courts made legal analogies between marriage law and contract law. In an 1806 New York alimony case, counsel drew a comparison between debtors and divorcees. He claimed that the courts would not "allow a discharge obtained by a debtor under the bankrupt or insolvent laws of another state, to defeat the right of his creditor on a contact made here," so they should not "permit so important and sacred a contract as that of marriage to be dissolved by the laws of another country, while the parties remain citizens of this State."[129] But, on both counts, the law would undermine the contract: debtors would be absolved and emancipated from their obligations, and spouses were allowed to escape marital bonds and seek divorces in other states. Hendrik Hartog has noted that the nation always had a "divorce haven," first Connecticut, later Illinois and Indiana, and the most famous twentieth-century divorce mill, Nevada, suggesting a pattern that began in the nineteenth-century and continued to the present.[130] In the 1830s, as Norma Basch has discovered, states legislatures passed a wave a permissive divorce laws, including as causes various moral reasons for ending a marriage, such as intemperance and physical cruelty.[131] These new divorce laws presumed that the state had the power to evaluate the "moral fitness" of husband and wife.[132] The state therefore continued to be regulatory, paternalistic, and, at

128. *Id.*

129. *Jackson v. Jackson*, 1 Johns 424, 1806 WL 1810, at [¶ 7] (N.Y. 1806).

130. Hendrik Hartog, *Man and Wife in America: A History* 14, 29 (Harv. U. Press 2000).

131. Norma Basch, *Framing American Divorce: From the Revolutionary Generation to the Victorians* 8 (U. Cal. Press 1999).

132. Isenberg, *supra* n. 67, at 158-67. Michael Grossberg addresses the state's interest in imposing matrimonial limitations on who can get married as well as evaluating the fitness of potential spouses. *See* Grossberg, *supra* n. 84, at 103-52.

other times, emancipatory when adjudicating martial rights and duties. Marriage law offered a countervailing approach that revealed that the triumph of the modern contract was perhaps not a firmly entrenched achievement of the antebellum legal system as Horwitz might have us believe.

We can learn a great deal about our national polity when we understand that its boundaries contain, and struggle to balance, often imperfectly, the conflicting interests of courts and parties. Motives of judges may be less transparent or less obscure than we have assumed, depending on whether we treat the judicial process as one that promotes objective decision-making, or whether we agree with Horwitz that the law uses "disguised forms" of power hidden behind formalistic rules.[133] I do agree with Horwitz in his notion that the free market was never free, because state governments and courts actively tried to prescribe civic, economic, and moral behavior when resolving issues of debt, property, contract, and marital rights. The clues to how judges resolved cases can be teased out of their narratives. Their presumptions about gender behavior, the trumping of some rights over others, evolved according to the manner in which they *transformed parties in a case into subjects of legal doctrine.* Then as now, jurists neither rose above nor completely disguised their ideology.

133. Horwitz, *supra* n. 1, at 254.