

# Articles

## Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880

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## INTRODUCTION

*The law is wholly masculine:* it is created and executed by our type or class of the man nature. The framers of all legal compacts are thus restricted to the masculine stand-point of observation—to the thoughts, feelings, and biases of men. The law, then, could give us no representation as women, and therefore, no impartial justice, even if the present law-makers were honestly intent upon this; for we can be represented only by our peers.

*It is to be expected, then, under the present administration, that woman should be the legal subject of man, legally reduced to pecuniary dependence upon him . . . .*

Antoinette Brown [Blackwell], 1852<sup>1</sup>

When the American feminist movement is discussed in legal circles, conversation often proceeds as if women first organized to seek equality during our lifetimes. But it was in the years before the Civil War that a “woman’s rights”<sup>2</sup> movement first demanded equality at law. Those who do acknowledge the existence of this early woman’s rights movement generally assume that its demands were satisfied long ago, with the reform of marital status law and the amendment of the Constitution to allow women to vote. Yet, as the remarks of Antoinette Brown Blackwell suggest, nineteenth-century feminists raised questions in their time that are still alive in our own.<sup>3</sup> This Article examines a nineteenth-century feminist claim that legislatures refused to recognize and historians have since overlooked: the claim that wives were entitled to property rights in their household labor. In exploring the life and demise of this rights discourse, I offer a political history of housework at the dawn of the industrial era, and an account of the earliest feminist politics of women’s work.

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1. PROCEEDINGS OF THE WOMAN’S RIGHTS CONVENTION, HELD AT SYRACUSE, SEPTEMBER 8TH, 9TH & 10TH, 1852, at 20-21 (Syracuse, J.E. Masters 1852) (emphasis added).

2. During the nineteenth century, the women’s rights movement was called the “woman’s rights” movement. Throughout this Article, I follow nineteenth-century convention, describing the movement as it described itself. See, e.g., *supra* note 1 (report of convention proceedings); *infra* note 118 (remarks of Lucy Stone).

3. Blackwell may have been one of the first feminists to note that the law reduces women to “pecuniary dependence” on men, but she was not the last. For a striking instance of historical parallelism, compare Blackwell’s remarks with those of Robin West 136 years later:

By the claim that modern jurisprudence is “masculine,” I mean . . . that the values, the dangers, and what I have called the “fundamental contradiction” that characterize women’s lives are not reflected at any level whatsoever in contracts, torts, constitutional law, or any other field of legal doctrine.

. . . The material consequence of this theoretical undervaluation of women’s values in the material world is that women are economically *impoverished*. . . Nurturant, intimate labor is neither valued by liberal legalism nor compensated by the market economy. It is not compensated in the home and it is not compensated in the workplace—wherever intimacy is, there is no compensation.

Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 58-59 (1988).

I first became involved in this project in the course of studying the nineteenth-century statutes that conferred on married women rights in their earnings. These “earnings statutes,” I discovered, did not completely abolish the common law doctrine that made a husband owner of his wife’s labor; rather, the earnings statutes gave wives rights only in their labor outside the home, and continued to protect a husband’s rights to his wife’s services in the home.<sup>4</sup> When I pointed this out to colleagues, and suggested that the earnings statutes might be understood as *preserving* the doctrine of marital service, I was informed that I was analyzing the statutes from an ahistorical vantage point: no one in the nineteenth century would have ever thought to emancipate wives’ labor in the family. I set out to determine whether nineteenth-century feminists had anything to say about the question, and discovered that they in fact did. The antebellum woman’s rights movement sought to emancipate wives’ labor in the household as well as in the market, and to do so, advocated “joint property” laws that would recognize wives’ claims to marital assets to which husbands otherwise had title. The movement argued that wives were entitled to joint rights in marital property by reason of the labor they contributed to the family economy.<sup>5</sup>

Some may find it difficult to imagine that a debate over wives’ household labor occurred in the nineteenth century, but our “common sense” intuitions about the normal subjects of political debate were formed in the aftermath of the industrial revolution, rather than at its inception. It was in the years before the Civil War, when a family-based economy was giving way to the industrial system, that feminists first attacked the common law doctrine of marital service and argued that wives were entitled to rights in their household labor. By reconstructing the social universe in which it still could be argued that wives’ work was work, and a debate over the legal status of wives’ household labor made “common sense,” I hope to explain the life of the joint property claim and thus to change our understanding of the evolution of feminism and family law.

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4. See Reva Siegel, *Of Status and Contract, Marriage and Market: Nineteenth-Century Reform of Coverture: Judicial Construction of the Earnings Statutes* (1986) (unpublished manuscript, on file with author). A growing number of historians have observed that the earnings statutes did not apply to the labor most wives performed in the home. See NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* 164-65 (1982); NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 186-87, 186 n.13 (1987); MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 111 (1989) (observing that acts in the United States and Europe giving wives rights to hold property and to their own earnings “proved to be irrelevant to one large group of marriages. When a married woman had no independent means and did not work outside the home, they affected her situation not at all.”); Amy D. Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 J. AM. HIST. 471, 495-97 (1988). See generally Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930*, 82 GEO. L.J. (forthcoming 1994) [hereinafter Siegel, *Modernization*].

5. See, e.g., *infra* text accompanying note 135.



To date, historians have scarcely noticed the joint property demands of the nineteenth-century woman's rights movement.<sup>6</sup> Amending the historical record to include this phase of woman's rights advocacy has several important implications. To begin with, the movement's joint property demands shed new light on the genesis of modern marital status law. As a growing number of historians recognize, the earnings statutes that first gave wives rights in their labor generally applied only to work performed outside the household, and so did little to alter the life circumstances of most married women, who worked on a compensated and uncompensated basis in the household setting.<sup>7</sup> As I demonstrate, the earnings statutes were enacted at a time when feminists were arguing that wives were entitled to property rights in their household labor; in a number of cases, the record reveals that legislatures entertained feminist arguments, but responded by drafting legislation that deliberately preserved a husband's common law rights in his wife's household services.<sup>8</sup> Considered from this vantage point, when legislatures emancipated wives' "personal" or "separate" labor but not their labor for the family, they were preserving and

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6. Historians who have studied the movement's marital property reform agenda have mentioned the joint property claim in passing, without remarking upon it. *See, e.g.,* BASCH, *supra* note 4, at 191, 197; PEGGY A. RABKIN, *FATHERS TO DAUGHTERS: THE LEGAL FOUNDATIONS OF FEMALE EMANCIPATION* 112 (1980). Elizabeth Warbasse, who studied antebellum marital property reform in both common and civil law states, has attended most closely to the claim; she identifies joint property as a demand of antebellum feminists, and at several junctures documents early feminist awareness of community property law in Louisiana. *See* ELIZABETH B. WARBASSE, *THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN 1800-1861*, at 257, 273, 287-88, 288 n.1 (1987). To my knowledge, the only historian to discuss the joint property concept is William Leach, who situates it within an excellent account of the economic concerns of feminists in the 1870's. *See* WILLIAM LEACH, *TRUE LOVE AND PERFECT UNION: THE FEMINIST REFORM OF SEX AND SOCIETY* 173-79, 194 (1980). Amy Stanley's study of earnings reform in the postwar period also cites some feminist commentary on the value of household labor. *See* Stanley, *supra* note 4, at 486-87.

Dolores Hayden has explored aspects of the movement's politics closely allied to those expressed in the joint property claim in a wide-ranging historical account of material feminism in the nineteenth century. Her study of "the first feminists in the United States to identify the economic exploitation of women's domestic labor by men as the most basic cause of women's inequality" traces the demand for economic remuneration of household labor as expressed in nineteenth-century cooperative housekeeping schemes. DOLORES HAYDEN, *THE GRAND DOMESTIC REVOLUTION: A HISTORY OF FEMINIST DESIGNS FOR AMERICAN HOMES, NEIGHBORHOODS, AND CITIES* 1 (1981) (footnote omitted). Yet Hayden seems to assume that the woman's rights movement articulated no legislative or political demands of direct relevance to the issue. *Cf. id.* at 50-51. In the main, historians have discussed nineteenth-century feminism as if it had no political agenda respecting women's labor in the home. *See, e.g.,* ELLEN C. DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA 1848-1869*, at 42 (1978) (quoted *infra* note 24); WILLIAM L. O'NEILL, *EVERYONE WAS BRAVE: THE RISE AND FALL OF FEMINISM IN AMERICA* 21 (1969); Jeanne Boydston, *Home and Work: The Industrialization of Housework in the Northeastern United States from the Colonial Period to the Civil War* 235-48 (1984) (unpublished Ph.D. dissertation, Yale University) (discussing "inchoate analysis" of housework advanced by Catharine Beecher and others, which "did not give rise to a full-scale critique or to an organized 'workers' rebellion," and suggesting that it was "not until . . . the second wave of feminism" in the 1960's that American women again addressed the issue); *cf.* FAYE E. DUDDEN, *SERVING WOMEN: HOUSEHOLD SERVICE IN NINETEENTH-CENTURY AMERICA* 241-42 (1983) (indicting nineteenth-century feminists who depended upon household help to pursue political careers but failed to recognize significance of household labor their servants performed).

7. *See* sources cited *supra* note 4. On wives' household labor, see *infra* Part I.B.

8. *See, e.g., infra* Part II.B (New York); *infra* note 261 (Ohio); *infra* text accompanying notes 370-75 (Connecticut) and notes 376-78 (Oregon). Many earnings statutes expressly excluded the labor a wife performed for her husband or family. *See, e.g., infra* text accompanying notes 405-12.

modernizing the doctrine of marital service.<sup>9</sup> The feminist movement's unrealized joint property demands thus shed light on the common law of marital status as it was evolving in the market economy of mid-nineteenth-century America.

At the same time, the joint property claim provides new insights into the nineteenth-century woman's rights movement. To date, most accounts of nineteenth-century feminism have focused on the movement's quest for the vote.<sup>10</sup> Scholars who do discuss the movement's marital property advocacy frequently portray it in the image of the movement's suffrage politics: a somewhat more timid expression of individualist equal rights feminism, which sought for wives a right to hold property and earnings in marriage commensurate with their husbands'.<sup>11</sup> But the movement's demand for joint property was no timid sister of suffrage advocacy. Feminists drew on conventional principles of liberalism to demand joint rights in marital property, but, in so doing, turned the liberal tradition to radically new ends. By applying principles of self-ownership to women's labor in the family, feminists demonstrated that the value of wives' labor was embedded in property to which husbands had title. The woman's rights movement thus forged an explosive critique of the family form—exposing the state's role in defining “private sphere” life and demonstrating that women's economic dependence on men was a condition imposed and enforced by law.

The joint property claim that sprang from this critique was not merely a demand for equal legal treatment. In seeking joint property rights in marriage, the movement demanded a *redistribution of property* in marriage—a distribution of property the movement believed commensurate with a wife's contribution to the household economy. Indeed, woman's rights advocates were

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9. See *infra* text accompanying notes 415-42 (discussing the interpretation of earnings statutes in Iowa and New York).

10. See, e.g., DUBOIS, *supra* note 6; ELEANOR FLEXNER, *CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES* (1959); cf. Ellen C. DuBois, *The Radicalism of the Woman Suffrage Movement: Notes Toward the Reconstruction of Nineteenth-Century Feminism*, in *MAJOR PROBLEMS IN AMERICAN WOMEN'S HISTORY: DOCUMENTS AND ESSAYS* 209, 209-10 (Mary Beth Norton ed., 1989) (“[T]he significance of the woman suffrage movement rested precisely on the fact that it bypassed women's oppression within the family, or private sphere, and demanded instead her admission to citizenship, and through it admission to the public arena. . . . [S]uffragists [thus] demanded for women a kind of power and a connection with the social order not based on the institution of the family and their subordination within it.”). But see *infra* notes 22-24 and accompanying text (discussing recent literature on feminist demands for marital property reform).

11. See KATHERINE T. BARTLETT, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 86 (1993) (“[I]n the hands of Stanton, Anthony, and other early feminists, the equal rights principle compelled not only women's suffrage, but also women's rights to own property, make contracts, serve on juries, testify in court, receive an education, and achieve legal equality with husbands in marriage.”). In this framework, demands for marital property reform reflect the same principle as demands for suffrage, but express it in weaker form. Cf. BASCH, *supra* note 4, at 164 (“The drive for married women's property rights provided [feminists] with a perfect bridge, permitting the cautious to remain on the domestic side, the intrepid to invade the political side, and some to move gradually from one to the other. Organizing for an improvement in the legal status of wives was an important precursor of the independent, post-Civil War suffragism [Ellen] DuBois has described.”).

undaunted by market-based objections to the redistribution of marital property they proposed. Feminists insisted that work women performed for the family should be valued equally with men's work, and rejected arguments that wives' labor should be emancipated in accordance with its market value because, as they saw it, the market valued women's labor in accordance with the same system of caste that gave rise to the doctrine of marital service.<sup>12</sup> In significant part, the movement's strategy of argumentation depended on demonstrating that women's work was treated like *women's* work—dispossessed and devalued, like their bodies and property in marriage, and their voice in affairs of state.

The joint property claim thus sheds new light on early feminism, suggesting that the movement's politics were more complex than conventionally portrayed. Early feminists did not merely believe women to be the same as men or define equality as an entitlement to be treated like men.<sup>13</sup> Their critical and normative understanding of gender relations was far more nuanced than the movement's commitment to "human rights" might suggest. Antebellum feminists who demanded joint property rights did not question the division of family labor, but they did challenge its gendered valuation, protesting the legal expropriation and social devaluation of wives' household work. In demanding joint property rights, antebellum feminists reasoned within and against the gender discourse of their culture.

Yet, over time, the movement abandoned this critical stance and came to embrace a more recognizably modern understanding of economic equality, premised on a different attitude toward "women's work." In the years after the Civil War, feminists began to disparage the household labor they originally sought to emancipate and to argue that women could achieve economic equality with men only by working outside the home for a market wage like men. In mounting this first challenge to the division of labor in the family, postwar feminists *also* reasoned within and against the gender discourse of their culture. Tracing the life and demise of joint property discourse thus illuminates how feminist conceptions of economic equality evolved in the market economy of mid-nineteenth-century America. More generally, if one asks how the nineteenth-century movement came to demand joint property rights and why it ultimately retreated from this strategy, one confronts fundamental questions about the sources and structure of feminist imagination—questions of theory that can elude analysis when the inquiry focuses on the agenda of the modern movement alone.

These concerns shape my account of the life and demise of the rights discourse. Part I explores the origins of the joint property claim. I first examine wives' household labor in the antebellum era, and then attempt to

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12. See, e.g., *infra* text accompanying notes 180-99 and 306-08.

13. Cf. *infra* notes 124-26, 171 and accompanying text.

explain how feminists came to argue that wives were entitled to property rights in this labor when prevailing views of the family denied that wives' work *was* work. To answer this question, I consider various political traditions in antebellum America—communitarianism, political antislavery, and the ideology of domesticity itself—that might have supplied the woman's rights movement with critical resources for challenging the expropriation of wives' family labor. At stake in this inquiry are questions with considerable contemporary resonance: What are the sources of feminist consciousness? In what ways might feminist discourse draw upon the culture it criticizes?

Parts II and III examine the theory and practice of joint property advocacy in the decades before and after the Civil War. Part II uses the records of antebellum woman's rights conventions to explore the surprisingly rich body of criticism the movement directed at family/market relations in the years before the Civil War, and then describes the movement's efforts to secure enactment of a joint property regime in New York state during the 1850's. Part III explores transformations in joint property discourse in the postwar period, drawing upon suffrage journals of the woman's rights movement to document the popularization and ultimate depoliticization of the joint property claim. As I demonstrate, the postwar movement disseminated joint property discourse to a national audience in an effort to recruit women to the suffrage cause; but even as women across the country assimilated the rights discourse, many of the movement's leaders began to despair of securing a joint property regime and settled instead for earnings legislation that recognized wives' right to wages without emancipating their household labor.

In Part IV, I attempt to explain why the movement faltered in its efforts to secure enactment of a joint property regime. To answer this question, I explore changes in the movement's vision of economic justice in the family during the postwar period, when feminists first began to discuss the concept of "two-career" marriage and to propose schemes for cooperative housekeeping intended to realize it. As one examines the movement's new prescription for economic equality—that a wife should do work like men do, for a market wage like men get—it becomes clear that the strategies the postwar movement employed to reduce the division of labor in the family reflected disparaging judgments about "women's work" of the sort the antebellum movement originally contested. Paradoxically, the movement's new understanding of autonomy and dependence was as entangled in the gender discourse of its culture as the older vision it repudiated, and tacitly class-biased as well: to achieve this new form of autonomy, women were to delegate the work of household maintenance to other women. As the movement's postwar strategies illustrate, in a world characterized by multiple systems of social subordination, feminist challenges to the gender division of labor establish new relations, not only between women and men, but *among* women as well.

While questions of contemporary theoretical interest shape this inquiry, they rarely occupy the foreground of my narrative, which is concerned with the joint property tradition in its historical particularity. To analyze this episode of woman's rights advocacy in such a way as to transform history into grist for theory—so that acts and demands become instances and examples—would obscure what is ultimately most remarkable about the joint property tradition, the simple fact that it was.

The history of joint property advocacy presents a record of women's struggles that still reverberates with passion over a century later. The voices of the women who populate my story are various: alternately proud, despairing, angry, wry, and witty, as they struggle to make visible a question of economic justice that is scarcely perceptible as a question of justice, then or now. The sheer vitality of their advocacy makes all the more remarkable the loss of this tradition of woman's rights protest. But, then, it is not terribly surprising that a rights discourse dedicated to protesting the ideological marginalization of women's household labor should meet much the same fate: joint property advocacy has been lost to history, its social significance effaced, much like the household labor whose expropriation it protested. The silence into which joint property protest disappeared has a political structure, no less a political structure than the claim itself. My ultimate purpose, then, in reconstructing the historical context in which the joint property claim had life and logic is to disrupt this silence, to create a forum in which woman's rights advocates can advance their own case, in their own words, for the reforms they sought.

## I. GENESIS OF A RIGHTS DISCOURSE

To appreciate how a debate over wives' household labor would have occurred in the decade before the Civil War, one needs an understanding of the legal, economic, and political context in which the joint property claim was raised. I begin by describing the evolving body of marital status law that feminists challenged when they argued that a wife's household labor entitled her to joint rights in marital property. I next consider the work that the joint property claim sought to emancipate: the labor wives performed for their families during the antebellum era. Finally, I explore the ideological sources of joint property advocacy, tracing the rights discourse to various political traditions and social movements of the antebellum era. The joint property claim can thus be appreciated as a logical, if socially disruptive, outgrowth of antebellum American culture.

At the same time, undertaking this inquiry provides an opportunity to consider the genesis of feminist discourse. When the joint property claim is considered in social context, one can see that antebellum feminists reasoned by appropriating, synthesizing, and so transforming diverse elements of the culture they criticized. The result is a richer portrait of the antebellum

movement—one that suggests how its understanding of equality developed, and might evolve, over time.

#### A. *The Law of Marital Property in the Antebellum Era*

In the opening decades of the nineteenth century, the common law of marital status was starkly hierarchical, imposing pervasive constraints on the lives of free women subject to its terms.<sup>14</sup> The common law charged a husband with responsibility to represent and support his wife, giving him in return the use of her real property and absolute rights in her person and “services”—all products of her labor. Unless her family was wealthy enough to provide property in an equitable trust,<sup>15</sup> a wife negotiated marriage as a dependent: without property or the legal prerogative to earn it, and impaired in her capacity to contract, to convey or devise property, and to file suit. If she survived her husband, she acquired a life estate in one-third of any real property he held during the marriage (“dower”); so long as the marriage produced offspring, a husband who survived his wife was entitled to tenancy for life of any lands she held (“curtesy”).<sup>16</sup> In jurisdictions following civil law traditions (Louisiana, Texas, and California), the law nominally recognized a marital community of goods, but vested in the husband control over all community property and similarly restricted the wife’s legal capacity.<sup>17</sup>

By the 1840’s, a number of American states had begun to modify the common law of marital status by enacting “married women’s property acts.” Some statutes exempted wives’ real property from their husbands’ debts; others codified the equitable separate estate, allowing wives to hold, though frequently not to control or dispose of, property acquired before or during

14. The common law marital status rules are often discussed as if they applied to women as a class, but the law of marital status did not apply to women who were slaves. For an account that explores distinctions between the law of marriage and slavery as well as intersections between them, see SUZANNE LEBSOCK, *THE FREE WOMEN OF PETERSBURG: STATUS AND CULTURE IN A SOUTHERN TOWN, 1784-1860*, at 87-111 (1984).

15. See BASCH, *supra* note 4, at 70-112 (discussing equitable separate estate).

16. For a general overview of common law and equitable principles governing marital status in the antebellum period, see BASCH, *supra* note 4, at 47-55, 70-112; RABKIN, *supra* note 6, at 19-24; Richard H. Chused, *Married Women’s Property Law: 1800-1850*, 71 *GEO. L.J.* 1359, 1365-72 (1983); see also LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* 137-55 (1980). On variances in colonial and state marital status law, see MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* 14-18, 56-57 (1986) [hereinafter SALMON, *WOMEN AND THE LAW OF PROPERTY*] (eighteenth century); Marylynn Salmon, *The Legal Status of Women in Early America: A Reappraisal*, 1 *LAW & HIST. REV.* 129 (1983).

17. For American community property systems in the antebellum period, see WARBASSE, *supra* note 6, at 48-56, 160-62 (Louisiana and Texas); Susan W. Prager, *The Persistence of Separate Property Concepts in California’s Community Property System, 1849-1975*, 24 *UCLA L. REV.* 1 (1976) (California); *infra* notes 136-42 and accompanying text (discussing community property law before the Civil War). See generally Mary Ann Glendon, *Matrimonial Property: A Comparative Study of Law and Social Change*, 49 *TUL. L. REV.* 21, 25-42 (1974) (comparing development of common and civil law systems of matrimonial property).

marriage.<sup>18</sup> The married women's property acts served interests of family protection: adopted in a period of economic turbulence, the statutes insulated a portion of family assets from a husband's creditors.<sup>19</sup> At the same time, the reform legislation opened vistas beyond the ancient status doctrines of the common law, suggesting that the traditional consolidation of property interests in the husband might be supplanted by a regime of separate property ownership in marriage.

It was not until the 1850's that state legislatures began to reform the common law of marital status as it governed wives' capacity to engage in legal transactions, and to modify the doctrine of marital service that gave husbands ownership of their wives' earnings. They did so by enacting "earnings statutes" modeled on the separate property principles of the first wave of reform statutes. The earnings statutes granted wives property rights in earnings from their "separate" or "personal" labor, and enabled wives to engage in many legal transactions in their own right.<sup>20</sup> This second wave of reform legislation is significant because it had the capacity to alter the life circumstances of women who had no property to hold in marriage other than the proceeds of their labor.

Yet, to date, we know relatively little about the social circumstances surrounding the enactment of the earnings statutes, and have only a rudimentary understanding of the role feminists played in the reform process.<sup>21</sup> In 1982, Norma Basch published the first major study of feminist demands for earnings reform. *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York*<sup>22</sup> documents the efforts of the early woman's rights movement's to enact New York's 1860 earnings statute. This statute expanded wives' capacity to contract and sue, improved their rights in child custody and inheritance, and most significantly, conferred on wives rights in their earnings.<sup>23</sup> Basch argues that "[e]very provision of the 1860 statute

18. See Chused, *supra* note 16, at 1398-1400; see also WARBASSE, *supra* note 6, at 276-79; Richard H. Chused, *Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures*, 29 AM. J. LEGAL HIST. 3, 3 (1985); Prager, *supra* note 17, at 5 (discussing married women's property acts with reference to questions of ownership and management of wife's property). For similar reforms in community property states, see *id.* at 8-10.

19. See WARBASSE, *supra* note 6, at unpaginated introduction (summarizing literature on social forces contributing to enactment of married women's property acts); see also BASCH, *supra* note 4, at 156-58; Chused, *supra* note 16, at 1398-1404.

20. See, e.g., *infra* text accompanying notes 248-54 (discussing earnings statute enacted in New York in 1860); *infra* text accompanying note 415 (discussing 1873 Iowa statute).

21. Most of the recent literature on common law reform examines the origins of the married women's property acts before an organized feminist movement appeared, see, e.g., RABKIN, *supra* note 6, at 12, 110-17; Chused, *supra* note 16, and most of the literature on antebellum feminism discusses marital property reform as a backdrop to the quest for suffrage, see *supra* note 10.

22. BASCH, *supra* note 4. Elizabeth Warbasse authored the first major study of marital property reform to explore women's advocacy role in any detail, but her dissertation, completed in 1960, remained unpublished until 1987. See WARBASSE, *supra* note 6.

23. Act of Mar. 20, 1860, ch. 90, § 2, 1860 N.Y. Laws 157 ("An Act Concerning the Rights and Liabilities of Husband and Wife"); see BASCH, *supra* note 4, at 164, 188-99.

... was a specific goal of the women's movement," and characterizes the statute as a "significant legislative realization of demands by women for women."<sup>24</sup>

New York's decision to grant a wife rights in earnings acquired by "trade, business, labor or services" carried on or performed "on her sole and separate account"<sup>25</sup> warrants closer scrutiny. In 1860, the national census reported that only 15% of all free women were engaged in paid labor, and most were single or widowed.<sup>26</sup> Historians estimate that 5% of married white women worked outside the home during the nineteenth century;<sup>27</sup> the 1890 census counted only 3.3% of married women working for wages.<sup>28</sup> However these figures might be adjusted,<sup>29</sup> they illuminate a basic problem with the New York statute, a problem common to other earnings statutes which would follow in its wake. In 1860, most work a wife performed was not, in any intuitive sense, carried on or performed "on her sole and separate account"; even when compensated by a wage or otherwise income-producing, a wife's labor was most likely carried on or performed in the family context.<sup>30</sup>

Historians now appreciate that the earnings statutes did not emancipate the common forms of wives' work, but instead left most wives' labor subject to the doctrine of marital service.<sup>31</sup> The earnings statutes emancipated a wife's "separate" or "personal" labor: the statutes often explicitly excluded work a wife performed for her family, and, even when they did not, courts generally construed the statutes to give a wife rights only in income earned *outside the*

24. BASCH, *supra* note 4, at 165. In her study of the movement's suffrage advocacy, Ellen DuBois is even more emphatic, remarking that the "law granted New York women all the economic rights they demanded, but still refused women the right to vote." DUBOIS, *supra* note 6, at 42. Analyzing earnings statutes enacted in Massachusetts and Illinois after the Civil War, Amy Stanley also concludes that the legislation was responsive to feminist demands. See Stanley, *supra* note 4, at 482-87.

25. Act of Mar. 20, 1860, ch. 90, § 2, 1860 N.Y. Laws 157.

26. For a discussion of the 1860 census figures, see ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* 71 (1982). See also *id.* at 47-48 (in 1840 about 10% of all women took jobs outside their home; among these, most were single women); CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 375-76 (1980) (discussing labor force participation rates in 1860 by race and marital status).

27. See BASCH, *supra* note 4, at 165; KESSLER-HARRIS, *supra* note 26, at 46.

28. KESSLER-HARRIS, *supra* note 26, at 122; see also DEGLER, *supra* note 26, at 384.

29. Nineteenth-century census figures should undoubtedly be enlarged to account for underreporting and undercounting, see *infra* note 65 (discussing gender bias in census methodology), and should be evaluated with an appreciation for the differential labor force participation rates of immigrant, free black, and other working-class wives in urban and industrial areas. Although demographic information for the antebellum period is sketchy, it does seem to suggest that wives' labor force participation varied by race and ethnicity. See, e.g., DEGLER, *supra* note 26, at 384 (in 1860, 10% of native-born wives in Poughkeepsie, New York, engaged in wage-earning activity, while recently immigrated wives took employment less frequently, with 6% of Irish wives and 2% of German wives employed; location and type of work unspecified); *id.* at 389 (in 1880, half of all black women in Poughkeepsie held jobs; location, type of work, and marital status unspecified); see also *infra* note 40 and accompanying text (discussing wage-earning of married black women).

30. See KESSLER-HARRIS, *supra* note 26, at 48, 71; see also *id.* at 54 (a quarter to a third of women in a working-class community in New York City in 1855 continued to earn money after marriage, but the "overwhelming majority of these women" did so by working at home). See generally *infra* Part I.B.

31. For sources analyzing the limited scope of earnings reform, see *supra* note 4.



*family context that was not used for family support.*<sup>32</sup> This does not make the statutes inconsequential; they still had both practical and symbolic significance for women.<sup>33</sup> Yet to suggest the earnings statutes *satisfied* feminist economic demands—as a growing literature now does<sup>34</sup>—is to present the movement's economic agenda as unresponsive to the situation of the overwhelming majority of wives, whether of middling or marginal means, who worked on a compensated and uncompensated basis in the family business, farm, or household setting.

The antebellum feminist movement did in fact challenge the common law as it deprived wives of rights in their family labor. Though the movement ultimately came to argue that wives were entitled to separate property rights in their earnings, its original demand was far more encompassing, including a claim for “joint property rights” in the fruits of the marital partnership. This joint property claim was explicitly advanced to secure wives' rights in their household labor.

To understand the demand for rights in household labor as an integral aspect of antebellum feminism, as something more than a startling anticipation of contemporary feminist critiques of housework,<sup>35</sup> two broad acts of contextualization are required. I examine, first, the household labor feminists sought to emancipate. Examining this work is crucial because the movement based its claim on the economic value of the work wives performed. Yet, to appreciate how the movement came to argue that wives were entitled to rights in the value of this work, one has to look outside the realm of economic history. For this reason, I examine the political culture of the antebellum northeast, demonstrating how it provided early feminists with the critical tools for analyzing and challenging the expropriation of wives' family labor.

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32. For a discussion of the enactment and application of the earnings statutes, see *infra* text accompanying notes 403-46.

33. Cf. BASCH, *supra* note 4, at 164-65 (noting that earnings clause of New York's 1860 statute had little practical applicability to life circumstances of vast majority of antebellum wives, but suggesting that earnings clause and other reform provisions of statute were symbolically significant as “woman-oriented goals”).

34. See *supra* note 24 and accompanying text.

35. Today, most critical analyses of wives' domestic labor have emanated from the wing of the feminist movement affiliated with the socialist tradition—not from feminists working in the liberal tradition commonly associated with antebellum feminism. See, e.g., MICHÈLE BARRETT, *WOMEN'S OPPRESSION TODAY: PROBLEMS IN MARXIST FEMINIST ANALYSIS* 187-226 (1980); JOSEPHINE DONOVAN, *FEMINIST THEORY: THE INTELLECTUAL TRADITIONS OF AMERICAN FEMINISM* 79-82 (1985); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 60-80 (1989); *THE POLITICS OF HOUSEWORK* (Ellen Malos ed., 1980); Joan Acker, *Class, Gender, and the Relations of Distribution*, 13 *SIGNS* 473 (1988); Myra M. Ferree, *Housework: Rethinking the Costs and Benefits*, in *FAMILIES, POLITICS, AND PUBLIC POLICY: A FEMINIST DIALOGUE ON WOMEN AND THE STATE* 148-67 (Irene Diamond ed., 1983).

## B. *Women's Household Labor in the Antebellum Era*

The seeming modernity of the demand for rights in household labor dissipates, at least in part, if one considers the economic development of the Northeastern and Mid-Atlantic states where woman's rights conventions first appeared in the late 1840's and early 1850's. During this period, a growing market economy had already begun to displace subsistence farming, which had dominated the region in the Revolutionary era. Farmers were producing a variety of goods for sale, and manufacture was spreading across the rural and urban landscape.<sup>36</sup> An increasing number of Americans secured a livelihood by means of wage labor rather than entrepreneurial enterprise.<sup>37</sup> But the transformations wrought by industrialization and the growth of a market economy were not uniform in impact across the region, nor did they displace the household as a locus of significant economic activity. In the antebellum period the household remained a crucial site for the production of goods and services for family use and sale. Wives played a key role in these activities.

Wives' labor varied by region and class, and contributed in diverse ways to the economic welfare of the family. In households too poor to conform to antebellum norms of domesticity, wives spent significant portions of their time earning income for the family. Poor women who lived in urban and industrial areas might find employment outside the household—in manufacture and especially domestic service<sup>38</sup>—but their income-producing work as often as not was located in the household.<sup>39</sup> Married black women, whose husbands

36. On the transition during this period, see JEANNE BOYDSTON, *HOME AND WORK: HOUSEWORK, WAGES, AND THE IDEOLOGY OF LABOR IN THE EARLY REPUBLIC* 31-74 (1990); NANCY F. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835*, at 23-26, 36-55 (1977).

37. Christopher Tomlins observes that "[b]y midcentury, on and off the farm, it seems likely that the proportion of productively engaged Americans employed by others—about one-third in 1820—had increased to about one-half. In the Eastern industrializing states (Massachusetts, Pennsylvania, New York) the proportion was probably closer to three-fourths." CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 259 (1993); see also *id.* at 259 n.1; cf. DAVID MONTGOMERY, *BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS, 1862-1872*, at 29-30 (Illini Books ed. 1981) (calculating, on basis of 1870 census data, that in postwar period 32.9% of economically active Americans were employers or self-employed and 67.1% were wage-earners, dependent upon others for employment). For census counts of women's labor force participation during this period, see *supra* text accompanying notes 26-30; *infra* note 65.

38. See DUDDEN, *supra* note 6, at 45-71 (domestic service work in antebellum era); MARY P. RYAN, *CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790-1865*, at 204-06 (1981) (female labor force of mid-nineteenth-century Utica, New York, concentrated in garment industry and domestic service); cf. MONTGOMERY, *supra* note 37, at 33 (according to 1870 census, 70% of women wage-earners working in non-farm occupations were domestic servants and more than 10% were industrial manual workers, four-fifths of whom worked for firms that made various articles of clothing). These sources, like most records of women's employment for the antebellum period, do not provide data on women's marital status. For an account of antebellum women's wage work that distinguishes the situation of married and single women, see KESSLER-HARRIS, *supra* note 26, at 45-72.

39. There were numerous ways for wives in poor families to earn income in the household setting. In the early years of industrialization, "outwork" was common; employers distributed handloom weaving, shoe binding, hatmaking, and sewing to married women to perform on a piece-work basis in their homes, a practice that provided considerable supplementary income for urban and rural families. See CHRISTINE STANSELL, *CITY OF WOMEN: SEX AND CLASS IN NEW YORK, 1789-1860*, at 106-19 (1986) (discussing

could rarely find steady employment, more frequently earned income outside the household, often in the homes of others; yet, even free black wives earned much of their income from labor performed in their own homes.<sup>40</sup>

Poor wives earned income from home-based labor in order to combine their market activities with household work and childcare.<sup>41</sup> Keeping boarders was a common way to do this.<sup>42</sup> A married woman who kept boarders performed the work of the household for her family and for the market; indeed, in this period, when much of the service sector was still embedded in the household, boarding appears to have been a more lucrative form of employment than many other types of wage work available to women.<sup>43</sup>

outwork in clothing trades in New York City); Thomas Dublin, *Women and Outwork in a Nineteenth-Century New England Town*, in *THE COUNTRYSIDE IN THE AGE OF CAPITALIST TRANSFORMATION* 51, 52-54, 60-62, 64 (Stephen Hahn & Jonathan Prude eds., 1985) (discussing rural outwork); see also BOYDSTON, *supra* note 36, at 89 (wives, black and white, performed others' housework on outwork basis). Where husbands still worked in the household, wives might assist in the family business, see Boydston, *supra* note 6, at 137; Jeanne Boydston, *To Earn Her Daily Bread: Housework and Antebellum Working-Class Subsistence*, 35 *RADICAL HIST. REV.* 7, 16, 18 (1986) (wife's work in husband's shoemaking, tailoring, tavern-keeping businesses); otherwise wives earned money by working at tasks that resembled in kind the unpaid domestic labor they performed for the family, especially washing and sewing.

40. See Boydston, *supra* note 6, at 91 (in African-American families, married women often had to accept live-in employment as cooks or maids, but they also frequently worked as seamstresses and washerwomen in either their employer's home or their own); PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 48 (1984) (noting that 1847 figures for Philadelphia indicate that "[b]lack women, both married and single, were forced to work, though single women tended to be domestics, while married women, who needed to tend to children and family, were most often washerwomen"); JAMES O. HORTON & LOIS E. HORTON, *BLACK BOSTONIANS: FAMILY LIFE AND COMMUNITY STRUGGLES IN THE ANTEBELLUM NORTH* 16-20 (1979) [hereinafter HORTON & HORTON, *BLACK BOSTONIANS*] (describing prevalence of boarding in black community; wives took in boarders, frequently took in washing and ironing, and engaged in other supplementary wage work, location unspecified); Sharon Harley, *Northern Black Female Workers: Jacksonian Era*, in *THE AFRO-AMERICAN WOMAN: STRUGGLES AND IMAGES* 5, 9-13 (Sharon Harley & Rosalyn Terborg-Penn eds., 1978) (black women, barred by prejudice from factory work, worked as domestic servants; in addition, mothers worked as washerwomen; other home-based employment included sewing and hairdressing) (rarely specifying marital status distinctions but noting husbands' aspiration to keep wives home); James O. Horton, *Freedom's Yoke: Gender Conventions Among Antebellum Free Blacks*, *FEMINIST STUD.*, Spring 1986, at 51, 61-62 [hereinafter Horton, *Freedom's Yoke*] (describing how free black wives combined work as domestic servants with taking in boarders).

41. See, e.g., Boydston, *supra* note 6, at 144-45, 148-49 (discussing strategies to combine work and childcare among urban and rural poor; noting that leaving children with another family was a last resort); Horton, *Freedom's Yoke*, *supra* note 40, at 61, 65-66 (discussing efforts of free black wives to combine childcare and wage-earning by taking in domestic work, bringing children to home of employer, or leaving children with family boarders); see also BOYDSTON, *supra* note 36, at 89 (same).

42. See BOYDSTON, *supra* note 36, at 89, 132; HORTON & HORTON, *BLACK BOSTONIANS*, *supra* note 40, at 16-20 (keeping boarders was a major source of income for antebellum free black wives); RYAN, *supra* note 38, at 201 (observing that, in 1855 and 1865, one in five wives in Utica, New York, earned money by selling housekeeping services to boarders); Joan M. Jensen, *Cloth, Butter, and Boarders: Women's Household Production for the Market*, *REV. RADICAL POL. ECON.*, Summer 1980, at 14, 18-21 (practice of keeping boarders steadily increased from 1850's until after turn of century); see also DEGLER, *supra* note 26, at 393 (in 1880 in Poughkeepsie, New York, 10% of wives took boarders; a study of Pittsburgh for that same year reports 13.4% of wives took boarders, and studies for other communities reach as high as 20%; average between 15 and 20%).

43. Jeanne Boydston calculates that when capital costs of food and rent are subtracted from boarding income, an antebellum wife earned approximately \$130 a year by keeping boarders; during the same period, needlewomen averaged about \$100 a year. BOYDSTON, *supra* note 36, at 132-33. Working with a Bureau of Labor study of Massachusetts from 1892, Joan Jensen has produced remarkably similar figures. She calculates that in Massachusetts "annual boarding income could average \$225.25, while other types of

Outside urban and industrial areas, wives still performed the traditional work of spinning, weaving, milking, foraging, gardening, and producing cheese and butter.<sup>44</sup> But the growth of a market economy transformed even this labor; by the Civil War, women's traditional gardening and dairying activities produced substantial "cash crops" for the region.<sup>45</sup>

As the examples of boarding and dairying work suggest, wives' family-based labor had considerable economic value. For this reason, any account of wives' economic contribution to the household must include their *uncompensated* labor—the work of childcare, cooking, sewing, washing, marketing, and house maintenance that rural and urban women shared.<sup>46</sup> Historians who have analyzed wives' household labor in this fashion controvert common assumptions about its social significance, demonstrating that the paid and unpaid labor of married women was crucial to the subsistence of poor working-class and farm families.<sup>47</sup>

The work of middle-class wives varied in accordance with their husbands' means, but, during the antebellum period at least, much of it resembled the work of poorer wives.<sup>48</sup> Middle-class wives generally confined income-

women's income averaged only \$184.47." Jensen, *supra* note 42, at 19. Apparently when a wife's labor was embedded in a "husband's" entrepreneurial enterprise it was more lucrative than when sold as an independent service in the market—possibly because the labor was less likely to be compensated on a gendered basis. Cf. *infra* notes 183-89 and accompanying text (discussing gendered structure of labor market in antebellum period).

44. See BOYDSTON, *supra* note 36, at 93-94; JOAN M. JENSEN, *LOOSENING THE BONDS: MID-ATLANTIC FARM WOMEN, 1750-1850*, at 134-37 (1986).

45. Economic historians have estimated that farm income from America's dairy production in 1860 was "almost equal to the value-added produced by the nation's textile (cottons and woolens) industry." JEREMY ATTACK & FRED BATEMAN, *TO THEIR OWN SOIL: AGRICULTURE IN THE ANTEBELLUM NORTH* 151 (1987); see also Jensen, *supra* note 42, at 17 ("By 1840, 14 to 23 percent of agricultural income in New England and 5 to 17 percent in Middle Atlantic states came from dairy products, many of them produced by women."). On women's involvement in truck farming, see *id.* at 17-18, and in butter production, see JENSEN, *supra* note 44, at 83-91. In her study of butter production in Pennsylvania, Jensen dates men's involvement to the 1850's, a point well after substantial production for the market had begun. Joan M. Jensen, *Butter Making and Economic Development in Mid-Atlantic America from 1750 to 1830*, 13 *SIGNS* 813, 824-25 (1988).

46. Using 1860 wages in northeastern cities for cooking, laundry, sewing, and childcare services, Jeanne Boydston has calculated the price of a wife's basic housework at about three dollars a week—or \$150 a year—excluding the value of her own maintenance. BOYDSTON, *supra* note 36, at 132.

47. For example, when Jeanne Boydston analyzed married women's labor, both paid and unpaid, she calculated the price of a poor wife's labor in the prewar period "at roughly \$250 a year beyond maintenance, or in the neighborhood of \$400 a year when the price of a single woman's maintenance purchased on the market (about \$170) is included. In working-class households with more income, where the wife could focus her labor on money-saving and on taking in a full-time boarder, that price might reach over \$500 annually, or between \$600 and \$700 including maintenance." *Id.* at 133. Because many working-class men did not earn sufficient wages to pay for their own subsistence expenses, securing the domestic labor of a wife might prove crucial in meeting their daily needs. See Boydston, *supra* note 39, at 19.

On the economic significance of rural women's labor to family farms, see Jensen, *supra* note 45, at 825-26 (arguing that family farms were able to compete with commercial operations because of unpaid labor of family members); see also Jensen, *supra* note 42, at 18 (use of rural women's cash income in support of farm family).

48. Cf. BOYDSTON, *supra* note 36, at 87-88 (middle-class wives provide board, washing, and mending services to husbands' employees, and assist in husbands' businesses, thereby saving wages); DEGLER, *supra* note 26, at 394 (several studies reporting middle- and upper-class families taking in boarders, sometimes

producing labor to the keeping of boarders, and they had cash to purchase a greater array of market goods and services—especially household “help.” But the newly available consumer goods did not relieve middle-class wives from household production, and may actually have *increased* the household work they performed.<sup>49</sup> Nor did hiring domestic help necessarily provide wives leisure; middle-class families purchased domestic labor sparingly,<sup>50</sup> and rarely in sufficient quantities to relieve wives from a ceaseless round of household work.<sup>51</sup> Indeed, in some respects, the work of maintaining a family was more complex for middle-class than poor wives; for example, the tasks of sewing, cleaning, washing, cooking, marketing, and especially childcare were greatly enlarged for wives who could afford to adhere to gender and class conventions of the era.<sup>52</sup> Moreover, wives of the middle class sought to perform each of

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in higher proportion than working-class families).

49. Ruth Cowan argues that the appearance of consumer goods in the nineteenth century reduced household chores for *men*, but actually increased the work of family maintenance for women. RUTH S. COWAN, *MORE WORK FOR MOTHER: THE IRONIES OF HOUSEHOLD TECHNOLOGY FROM THE OPEN HEARTH TO THE MICROWAVE* 63-68 (1983); *see also id.* at 40-62. For a discussion of how consumer goods appearing in the postbellum period modified the work of household maintenance performed by middle-class wives, *see* GLENNA MATTHEWS, “JUST A HOUSEWIFE”: THE RISE AND FALL OF DOMESTICITY IN AMERICA 100-03 (1987) (discussing tasks of cooking on hearths and woodstoves; sewing without and with machines; preserving foods before and after appearance of icebox; and washing and laundering before and after appearance of indoor plumbing); KESSLER-HARRIS, *supra* note 26, at 110-12 (discussing similar examples); *see also* BOYDSTON, *supra* note 36, at 106-08 (new household technologies more effective in increasing productivity than in saving wives’ labor); *cf.* DUDDEN, *supra* note 6, at 126-47 (same, but analyzing work that domestic servants were called upon to perform or assist with).

50. U.S. census data for 1850 indicate that there was about one domestic servant for every ten households in the country. *See* MATTHEWS, *supra* note 49, at 266 (census tables). In her study of mid-century Utica, New York, Mary Ryan found that servants worked in approximately one in ten households. RYAN, *supra* note 38, at 208. Ryan calculated that, in this era, “fewer than 1 in 5 [Utica] housewives had the assistance of a hired servant.” *Id.* at 201.

51. Middle-class households that employed household help frequently did so on a task-specific basis. A wife of some means might thereby cut tasks of insuperably large proportions and avoid work she found particularly noxious, while adhering to general dictates of frugality. *See, e.g.,* COWAN, *supra* note 49, at 64-65 (sewing, laundering); DUDDEN, *supra* note 6, at 130, 136, 138, 143 (sewing, cooking, marketing, seasonal house-cleaning, laundry); KESSLER-HARRIS, *supra* note 26, at 112 (“With both housewife and laundress working, family laundry took a full day.”).

Even where help was full-time, in homes with children or boarders, and in farming communities, a single servant would not begin to provide leisure to a wife. *See, e.g.,* BOYDSTON, *supra* note 36, at 95-96; COTT, *supra* note 36, at 48; GERDA LERNER, *THE FEMALE EXPERIENCE: AN AMERICAN DOCUMENTARY* 119 (1977) (reproducing letter to local newspaper that describes daily work regimen of wife of Ohio lawyer); *cf.* DEGLER, *supra* note 26, at 393-94 (study of period 1860-1870 correlates increase in household servants with increase in household boarders).

Jeanne Boydston observes that hired domestic servants in middle-class families supplemented, but did not replace, the labor of wives. Servants often performed work that traditionally had been a daughter’s, allowing for the lengthier training of young women and enabling wives to devote more attention to childrearing, which in this era was accorded heightened significance and was increasingly defined as the mother’s exclusive responsibility. *See* BOYDSTON, *supra* note 36, at 80-81, 103-04.

52. *See, e.g.,* BOYDSTON, *supra* note 36, at 90-91 (considering ways in which poverty simplified and exacerbated wives’ work in antebellum era); *id.* at 106-07 (examples showing how increase of family means and new technology complicated work of middle-class wife); *id.* at 128-30, 137 (evaluating “status work” of middle-class wives); COWAN, *supra* note 49, at 67-68 (new household technologies available to middle-class families “allowed men and boys to leave their homes [but] created new jobs that only women could perform”); *see also* DUDDEN, *supra* note 6, at 126-54 (discussing complex tasks involved in maintaining middle-class household from standpoint of servants who assisted with or performed work).

these tasks by the most frugal means, for their practices of thrift and industry contributed not only to family subsistence, but to the possibility of capital accumulation.<sup>53</sup> As Mary Ryan has observed of the women she studied in upstate New York: "The connections women forged between the household and economics were hydralike, shooting out in multiple directions, via shopping to the marketplace, through home production to family subsistence, from keeping boarders to assembling household income, by way of frugality to the capital in local savings banks."<sup>54</sup>

Many of the leaders of the nascent woman's rights movement lived in the region Ryan studied,<sup>55</sup> and the diaries and letters of these middle-class women document their involvement in the work of family maintenance. Elizabeth Cady Stanton, married to abolitionist lawyer Henry Stanton, had help with cooking, household work, and care of her seven children,<sup>56</sup> but found it a continuous struggle to find time to compose the speeches and lectures necessary to her political activities. In her letters of the 1850's, Stanton bitterly chafes at the daily round of household tasks: childcare, cleaning, cooking, washing, baking, preserving, sewing, and gardening.<sup>57</sup> A note Stanton wrote to Susan B. Anthony in 1853 vividly suggests Stanton's inability to extricate herself from household work:

Dear Susan,—Can you get any acute lawyer . . . sufficiently interested in our movement to look up just eight laws concerning us—the very worst in all the code? I can generalize and philosophize easily enough of myself; but the details of the particular laws I need, I have not time to look up. You see, while I am about the house, surrounded by my children, washing dishes, baking, sewing, etc., I can think up many points, but I cannot search books, for my hands as well as my brains would be necessary for that work. If I can, I shall go to Rochester as soon as I have finished my Address and submit it . . . to Channing's

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On the increasing responsibilities associated with the role of motherhood for middle-class women during the antebellum era, see BOYDSTON, *supra* note 36, at 80-83, 103-04; COTT, *supra* note 36, at 46-47; RYAN, *supra* note 38, at 157-161; Mary P. Ryan, *The Empire of the Mother: American Writing About Domesticity: 1830-1860*, WOMEN & HIST., Summer/Fall 1982, at 45-70, 99-104, 143-47 (prescriptive literature on motherhood); see also Nancy S. Dye & Daniel B. Smith, *Mother Love and Infant Death, 1750-1920*, 73 J. AM. HIST. 329, 337-43 (1986) (personal diaries of era document mothers' increasing involvement with children).

53. See generally BOYDSTON, *supra* note 36, at 136-37, 140; RYAN, *supra* note 38, at 201. The value of a wife's uncompensated household labor varied considerably among middle-class families, depending on the nature of the work she performed. For some illustrative calculations, see BOYDSTON, *supra* note 36, at 133-34.

54. RYAN, *supra* note 38, at 203.

55. On the residence of the movement's leadership, see 1 HISTORY OF WOMAN SUFFRAGE 465 (Elizabeth C. Stanton et al. eds., reprint ed. 1985) (1881) (describing "magnetic circle of reformers in Central New York," including Rochester, Farmington, Waterloo, Seneca Falls, Auburn, Peterboro, Whitesboro, and Syracuse); NANCY A. HEWITT, WOMEN'S ACTIVISM AND SOCIAL CHANGE: ROCHESTER, NEW YORK, 1822-72, at 169 (1984).

56. ELISABETH GRIFFITH, IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON 79, 88 (1984).

57. See *id.* at 73-74, 79, 81-82, 87, 88-89, 93, 95.

criticism. But prepare yourself to be disappointed in its merits, for I seldom have one hour undisturbed in which to sit down and write. Men who can, when they wish to write a document, shut themselves up for days with their thoughts and their books, know little of what difficulties a woman must surmount to get off a tolerable production.<sup>58</sup>

Antoinette Brown Blackwell, who like Stanton had children and a maid to help with cooking and cleaning, also complained of the difficulty of managing childcare, sewing, and gardening while pursuing political and religious work.<sup>59</sup> Their immersion in household labor was typical of the married leadership of the movement.<sup>60</sup> Some woman's rights activists also earned income for their families,<sup>61</sup> yet earning income did not excuse them from the work of family maintenance. Lydia Maria Child supported herself and her husband by writing; but her diary noted the manufacture of thirty-six pieces of clothing and seventeen items of household furnishing (as well as the preparation of 722 meals) as part of a year's work.<sup>62</sup>

### C. Ideological Sources of Joint Property Advocacy

Given the life experiences of woman's rights advocates, it is not surprising that the movement insisted that a wife's contribution to the household economy

58. Letter from Elizabeth Cady Stanton to Susan B. Anthony (Dec. 1, 1853), in 2 ELIZABETH CADY STANTON, AS REVEALED IN HER LETTERS DIARY AND REMINISCENCES 54, 54-55 (Theodore Stanton & Harriot S. Blatch eds., 1922). Stanton's predicament was continual; she frequently called upon Susan B. Anthony to "hold the baby and make the puddings" so that she could write. ALMA LUTZ, SUSAN B. ANTHONY: REBEL, CRUSADER, HUMANITARIAN 69 (1959) (citing 1856 letter from Elizabeth Cady Stanton to Susan B. Anthony); ELIZABETH CAZDEN, ANTOINETTE BROWN BLACKWELL: A BIOGRAPHY 102 (1983).

59. CAZDEN, *supra* note 58, at 126-27 (quoting 1860 letter from Blackwell to Susan B. Anthony); MATTHEWS, *supra* note 49, at 59.

60. Though Lucy Stone's husband was a successful merchant, she still made her own yeast, bread, and soap, cured meat, kept chickens, worked a garden, and tended several cows. BOYDSTON, *supra* note 36, at 83. Mary Coffin Wright, who was married to a lawyer, engaged in similar kinds of household labor. *Id.*; LERNER, *supra* note 51, at 115-16 (quoting letter from Wright to her sister, Lucretia Mott). See generally HEWITT, *supra* note 55, at 66-67 (describing families of abolitionists and woman's rights advocates in Rochester) ("Ultraist families, less urban and less affluent [than women of elite families who ran benevolent societies], continued to rely on both female labor and complex households to sustain themselves economically . . .").

61. Hannah Cutler, whose husband was disabled, supported her family by writing, lecturing, and practicing homeopathic medicine for her neighbors. See Lucy E. Murphy, *Her Own Boss: Businesswomen and Separate Spheres in the Midwest, 1850-1880*, 80 ILL. HIST. J. 155, 155-56, 172 (1987). Jane Swisshelm ran a newspaper, the *Pittsburg Saturday Visiter*, which she founded in 1848. See JANE G. SWISSELM, *HALF A CENTURY* 105-15 (2d ed. Chicago, Jansen, McClurg & Co. 1880).

Other married leaders of the movement also earned money to support their political and religious activities. Ernestine Rose, who appears to have been something of an inventor, manufactured cologne water, which she sold from her husband's jewelry repair shop. See YURI SUHL, ERNESTINE L. ROSE AND THE BATTLE FOR HUMAN RIGHTS 73-74 (1959). Antoinette Blackwell left her young daughter with her parents so that she could tour New York state giving woman's rights lectures in order to raise money to rent a hall in New York City to begin her ministry. CAZDEN, *supra* note 58, at 123-26.

62. BOYDSTON, *supra* note 36, at 83, 85, 87; LERNER, *supra* note 51, at 124-26; Boydston, *supra* note 6, at 188.

entitled her to share in the family's assets. Wives' household production and services were crucial to the family's economic welfare, and to the nation's economy as well.<sup>63</sup> Yet, considered in larger social context, the movement's demands for joint property *were* anomalous—at odds with prevailing assumptions about family life.

In the nineteenth century, wives' economic contribution to the household was no longer as "visible" as it had been in the more subsistence-oriented agrarian economies of the colonial and Revolutionary eras. Growing numbers of men had begun to work outside the household, but wives continued to work in the family setting, and so their work increasingly appeared an indistinguishable part of "family life." Moreover, the development of a market economy left most wives dependent on their husbands for cash. As it became more common for men to exchange their labor for money-wages, production for use came to be identified as a distinctly female activity, associated with the social, but not economic, maintenance of family life.<sup>64</sup> Census measures of the economy that appeared in the aftermath of the Civil War characterized such labor as "unproductive," and, consistent with this gendered valuation of family labor, excluded women engaged in income-producing work in the household from the count of those "gainfully employed."<sup>65</sup> In so doing, they gave

63. Considered in the aggregate, wives' household production and services constituted a major sector of the developing industrial economy. See *supra* notes 40-47 and accompanying text (discussing wives' industrial outwork, and boarding and dairying work); cf. RYAN, *supra* note 38, at 201-03; Jensen, *supra* note 42, at 14-15, 22; Jensen, *supra* note 45, at 828.

64. On the spread of wage relations, see sources cited in TOMLINS, *supra* note 37, at 260 n.2. For an analysis of how this transformation in men's work shaped social understandings of women's work, see Boydston, *supra* note 6, at 154, 164-66, 179-80, 209-10; see also BOYDSTON, *supra* note 36, at 55, 57 ("What had originated in the northeastern colonies as a gender *division* of labor was becoming, in the culture of the new republic, a gendered *definition* of labor"; "the redefinition of labor attendant upon the coming of industrialization was equally, and simultaneously, a redefinition of *unpaid* labor"); COTT, *supra* note 36, at 43-45, 59-62 (growth of market economy transformed wives' work in household into separate "sphere"). On the "social relations of distribution" that link waged and unwaged work within families in industrial capitalist societies, see Acker, *supra* note 35, at 478-89.

A wife's dependency on her husband for cash was in fact twofold in character. In socioeconomic terms, it was produced by the interaction of gender and economic systems in the transition from a subsistence-oriented, agrarian economy to a market-based, industrial economy. As a legal matter, however, it was constant throughout the period, imposed by the common law doctrine of marital service.

65. Nancy Folbre has documented how the first national census measures of gainful occupations were structured to discount women's contribution to the nation's economy. Nancy Folbre, *The Unproductive Housewife: Her Evolution in Nineteenth-Century Economic Thought*, 16 SIGNS 463 (1991); Nancy Folbre & Marjorie Abel, *Women's Work and Women's Households: Gender Bias in the U.S. Census*, 56 SOC. RES. 545 (1989).

Francis Walker, who took charge of the census in 1870, organized it to accord with his belief that women's household work was of little economic value. Folbre, *supra*, at 476 ("We may assume that speaking broadly, [a wife] does not produce as much as she consumes") (quoting FRANCIS WALKER, POLITICAL ECONOMY 297 (Henry Hort 1911) (1883) (citation omitted)). The 1870 census stipulated that "[t]he term 'housekeeper' will be reserved for such persons as receive distinct wages or salary for the service. Women keeping house for their own families or for themselves, without any other gainful occupation, will be entered as 'keeping house.'" *Id.* at 475 (quoting CARROLL WRIGHT, THE HISTORY AND GROWTH OF THE U.S. CENSUS 159 (1900)). Women who took in boarders, helped with the family farm or business, or contracted industrial homework from factories were not counted among the gainfully occupied, even though they were earning money. Folbre, *supra*, at 476. Responding to criticisms that, even given these premises, the census had underestimated women's employment, the enumerators' response was blunt:



official expression to what were already deeply entrenched assumptions of popular discourse, which denied that wives' work *was* work.

The so-called "cult of domesticity" that developed in the early decades of the nineteenth century depicted the economic developments of the era in exaggerated, gender-conscious form. In popular discourse, family and market appeared as two distinct spheres, organized in accordance with fundamentally different norms. The market was a male sphere of competitive self-seeking, while the home was celebrated as a female sphere, a site of spiritual uplift that offered relief from the vicissitudes of market struggle.<sup>66</sup> This gender typology was expressed in now-familiar homilies that depicted the home as a place where man

*seeks a refuge from the vexations and embarrassments of business, an enchanting repose from exertion, a relaxation from care by the interchange of affection: where some of his finest sympathies, tastes, and moral and religious feelings are formed and nourished;—where is the treasury of pure disinterested love, such as is seldom found in the busy walks of a selfish and calculating world.*<sup>67</sup>

With the spheres of work and family gendered male and female, marriage was redefined as an exchange of material sustenance for spiritual sustenance, and wives were in turn defined as economic dependents of their husbands.<sup>68</sup>

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"The assumption is, as the fact generally is, that they [women and young children] are not engaged in remunerative employments. Those who are so engaged constitute the exception, and it follows from a plain principle of human nature, that assistant marshals will not infrequently forget or neglect to ask the question." Folbre & Abel, *supra*, at 550 (quoting U.S. CENSUS, NINTH CENSUS OF POPULATION, 1870, at 375 (Washington, D.C., Government Printing Office 1873)) (bracketed material in original).

The same conditions prevailed for censuses later in the century: census-takers were instructed not to record women as "gainfully employed" if they engaged in part-time irregular employment in outdoor farm or garden work, dairying, the care of poultry, or in the care of boarders or lodgers where these activities were performed as a means of supplementing family income rather than as a principal means of support. Jensen, *supra* note 42, at 15 (discussing instructions for 1890 and 1920 censuses). Thus, official definitions of "gainful employment" intentionally excluded the kinds of paid and unpaid labor by which most nineteenth-century wives contributed to the family economy. Cf. Christine E. Bose, *Devaluing Women's Work: The Undercount of Women's Employment in 1900 and 1980*, in *HIDDEN ASPECTS OF WOMEN'S WORK* 95, 96 (Christine Bose et al. eds., 1987) (arguing that, after correcting for bias in structure of 1900 census, wives' actual labor force participation in 1900 is much closer to contemporary rates than is generally assumed).

66. See COTT, *supra* note 36, at 63-100 (classic exposition of culture of domesticity); see also Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 *J. AM. HIST.* 9 (1988) (discussing developments in the historiography of woman's "sphere"); Ryan, *supra* note 52, at 1-10 (same).

67. COTT, *supra* note 36, at 64 (quoting Charles Burroughs, *An Address on Female Education, Delivered in Portsmouth, N.H., Oct. 26, 1827*, at 18-19 (Portsmouth 1827) (emphasis added)).

68. As one contemporary account of marriage described this dynamic:

When [a man] struggles on in the path of duty, the thought that it is for *her* in part he toils will sweeten his labors. . . . Should he meet dark clouds and storms abroad, yet sunshine and peace await him at home; and when his proud heart would resent the language of petty tyrants . . . from whom he receives the scanty remuneration for his daily labors, the thought that she perhaps may suffer thereby, will calm the tumult of his passions, and bid him struggle on, and find his reward in her sweet tones, and soothing kindness, and that the bliss of home is thereby

“Ironically,” Nancy Folbre observes, “the moral elevation of the home was accompanied by the economic devaluation of the work performed there.”<sup>69</sup>

The tendency of “separate spheres” reasoning was thus to reinforce the legal ordering of family life and justify a husband’s control of family assets. Jeanne Boydston observes that this mode of reasoning about family life would deter wives from asserting economic claims on family assets, no matter how hard they worked:

[T]he pastoralization of housework implicitly reinforced both the social right and the power of husbands and capitalists to claim the surplus value of women’s labor, both paid and unpaid. It accomplished this by rendering the economic dimension of the labor invisible, thereby making pointless the very question of exploitation: one cannot confiscate what does not exist. Since the ideology of spheres made the noneconomic character of housework a simple “fact of nature,” few observers in the antebellum Northeast felt compelled to argue the point.<sup>70</sup>

Yet the antebellum woman’s rights movement did insist upon the economic value of wives’ household labor, and challenged the doctrine of marital service as it expropriated the value of that work. The movement’s demand for joint rights in marital property raised in dramatic form “the very question of exploitation,” depicting the social organization of the family in terms that were at odds with its pervasive social representation. The movement did not attain this critical perspective on the family by transcending the culture of which it was a part. Feminists were able to assert the authority of their own daily experience against the logic of the separate spheres tradition by drawing on dissonant elements in the political culture from which the woman’s rights movement sprang.

### 1. *Utopian Communitarianism*

The utopian communitarian movement, which flourished in the United States in the 1840’s, undoubtedly played a critical role in provoking feminist

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made more apparent.

COTT, *supra* note 36, at 69-70 (quoting *Essay on Marriage*, in 2 UNIVERSALIST AND LADIES’ REPOSITORY 371 (1834)) (first omission in original).

69. Folbre, *supra* note 65, at 465. Despite the considerable labor required to maintain a household in the antebellum era, popular depictions of family life “relegate[d] that continuing hard work to second place, transforming the public image of the household by the 1820s and 1830s from a place where productive labor was performed to one whose main goals were the preservation of virtue and morality.” ALICE KESSLER-HARRIS, *WOMEN HAVE ALWAYS WORKED* 39 (1981). See generally BOYDSTON, *supra* note 36, at 142-63 (discussing “pastoralization” of housework accompanying industrialization during antebellum era).

70. BOYDSTON, *supra* note 36, at 158. *But cf.* Boydston, *supra* note 6, at 248 (antebellum advice manuals for wives, while participating in cult of domesticity, can also be read to contain an “inchoate analysis of the economic value and labor conditions of housework”).

thought about the family form. Communitarian settlements were scattered across America in the antebellum era, but they were concentrated in upstate New York, the “burned over district” of evangelical and reformist fervor.<sup>71</sup> This same area was the site of much early feminist agitation, including the first two woman’s rights conventions, held in Seneca Falls and Rochester in 1848.<sup>72</sup> Though settlements varied in religious and philosophical orientation, a significant number adhered to the precepts of Robert Owen and Charles Fourier. Both Owen and Fourier were outspoken critics of social life in the industrial era, who advocated communal living arrangements for the purpose of alleviating sexual as well as economic inequality. They attributed woman’s low social status to her economic dependence in the family and, to rectify this, argued that the labor women performed in the private family setting ought instead to be performed on a collective basis.<sup>73</sup> The communitarians thus questioned the social arrangements rationalized by the cult of domesticity.

Owen and Fourier were vocal critics of the marriage relation, and their followers adopted a heterogeneous array of marriage reform philosophies, often loosely referred to as “free love.” Some openly advocated the abolition of marriage, while others sought its reform.<sup>74</sup> Communitarian settlements did not always succeed in breaking from the gender conventions they set out to challenge.<sup>75</sup> Yet the movement’s numerous pamphlets, tracts, and journals stimulated wide-ranging discussions of the family relation in reformist circles.<sup>76</sup> For example, Albert Brisbane, Fourier’s principal American

71. See OLIVER CARLSON, *BRISBANE: A CANDID BIOGRAPHY* 51-53 (1937); Ryan, *supra* note 52, at 79-80; see also HAYDEN, *supra* note 6, at 33-53 (describing American communal settlements).

72. On the residence of the movement leadership, see *supra* note 55. On the 1848 conventions, see HEWITT, *supra* note 55, at 130-35.

73. See CHARLES FOURIER, *THE UTOPIAN VISION OF CHARLES FOURIER: SELECTED TEXTS ON WORK, LOVE, AND PASSIONATE ATTRACTION* 130-31, 177 (Jonathan Beecher & Richard Bienvenu eds. & trans., 1971); JOHN C. SPURLOCK, *FREE LOVE: MARRIAGE AND MIDDLE-CLASS RADICALISM IN AMERICA, 1825-1860*, at 23-42, 56-72 (1988); BARBARA TAYLOR, *EVE AND THE NEW JERUSALEM: SOCIALISM AND FEMINISM IN THE NINETEENTH CENTURY* 29, 36-37 (1983).

74. John Spurlock explores this aspect of the American communitarian movement in a study of marriage and middle-class radicalism in the antebellum era. See SPURLOCK, *supra* note 73. For a contemporary (and quite hostile) account of the “anti-marriage movement” that describes its various intellectual branches in considerable detail, see *The Free Love System: Origin, Progress, and Position of the Anti-Marriage Movement*, N.Y. DAILY TIMES, Sept. 8, 1855, at 2 [hereinafter *The Free Love System*].

75. See Ryan, *supra* note 52, at 79-95; see also Nan B. Albinski, *Utopia Reconsidered: Women Novelists and Nineteenth-Century Utopian Visions*, 13 SIGNS 830, 837-40 (1988) (women’s fictional accounts of persistent gender divisions within secular utopian communities); Jill Harsin, *Housework and Utopia: Women and the Owenite Socialist Communities*, in *WOMEN IN SEARCH OF UTOPIA: MAVERICKS AND MYTHMAKERS* 73 (Ruby Rohrlach & Elaine H. Baruch eds., 1984).

76. See, e.g., SPURLOCK, *supra* note 73, at 25 (“[T]he beliefs that inspired Owenism, Fourierism, and transcendentalism would become a creative element within the widespread discourse on marriage and sexuality taking place during the early nineteenth century.”); see also *id.* at 148-49 (journals discussing marriage and free love during antebellum era). Communitarian thought attracted a serious intellectual following. For example, followers of Fourier included Horace Greeley, George Ripley, Charles Dana, Nathaniel Hawthorne, Ralph Waldo Emerson, Theodore Parker, James Russell Lowell, Margaret Fuller, Thomas Wentworth Higginson, and Henry James. CARLSON, *supra* note 71, at 45-51; see also Arthur E. Bestor, Jr., *Albert Brisbane—Propagandist for Socialism in the 1840’s*, 28 N.Y. HIST. 128, 140-46, 148-50 (1947).

publicist, attacked the “isolated household” of the industrial era. In “our system of isolated and separate households,” Brisbane argued, “Woman is subjected to unremitting and slavish domestic duties: political liberty enfranchises Woman as little as it does the Laborer . . . . The present servile system of domestic Servitude . . . is a dead rebuke to all pretensions to Democracy . . . .”<sup>77</sup> Brisbane’s exposition of Fourier identified women’s “pecuniary dependence” in marriage as *the* problem of sexual inequality, and urged the collectivization of household labor as the path to women’s emancipation.<sup>78</sup>

The communitarian experiment bore feminist fruit. In 1848, for example, Jane Appleton penned a utopian fantasy set in 1978, in which private families secured maintenance on a collective basis.<sup>79</sup> Appleton’s time-traveller emphasized, “*Your age fondled woman. Ours honors her. You gave her compliments. We give her rights.*”<sup>80</sup> At various times in the antebellum era, both Elizabeth Cady Stanton and Amelia Bloomer espoused interest in cooperative housekeeping; and Ernestine Rose, a disciple of Robert Owen and Frances Wright, helped found the settlement of Skaneateles near Syracuse in 1843, to which she remained loyal until its demise in 1846.<sup>81</sup>

77. ANTEBELLUM AMERICAN CULTURE: AN INTERPRETIVE ANTHOLOGY 452 (David B. Davis ed., 1979) (quoting Albert Brisbane, *Exposition of Views and Principles*, 1 PHALANX 4, 5 (Oct. 5, 1843)). For some accounts of Brisbane’s views, see ANTEBELLUM AMERICAN CULTURE, *supra*, at 448-49; Ryan, *supra* note 52, at 82, 84, 90; Bestor, *supra* note 76, at 129-30, 146-47; *The Free Love System*, *supra* note 74, at 2 (describing Brisbane as advocating “the necessity of some radical and thorough change in the existing organization of society,—and especially of superseding the system of *isolated households* or separate families”).

78. Brisbane described the “Combined Kitchen of the Association” as the primary practical condition of:

the *Emancipation of Woman*—her emancipation from pecuniary dependence on man, from domestic servitude, and from a low sphere of action. Efforts are being made to secure to Woman the rights which belong to her as an independent and rational being, and to elevate her to her true position. This subject may be discussed theoretically, but no important practical reform in this direction is possible so long as the isolated household and the isolated kitchen exist.

ALBERT BRISBANE, *General View of Association*, in GENERAL INTRODUCTION TO SOCIAL SCIENCE 94 (Hyperion Press 1976) (1856).

79. Jane S. Appleton, *Sequel to the “Vision of Bangor in the Twentieth Century,”* in VOICES FROM THE KENDUSKEAG 243, 255 (1848), reprinted in AMERICAN UTOPIAS: SELECTED SHORT FICTION n.p. (Arthur O. Lewis ed., 1971) (original pagination) (attributing “this progress . . . to the genius of Charles Fourier, who, by his profound insight into the evils of society, induced such changes as gave due compensation to all industry, whether in man, woman or child”). On the origins of Appleton’s story, see AMERICAN UTOPIAS, *supra*, at xi.

80. Appleton, *supra* note 79, at 251.

81. See HAYDEN, *supra* note 6, at 50-51 (discussing Stanton and Bloomer’s interest in practice of cooperative housekeeping); SUHL, *supra* note 61, at 27-33, 75-82 (describing Rose’s Owenite faith); see also HEWITT, *supra* note 55, at 118 (noting participation of several Rochester “ultraist” families in founding of Skaneateles, and a Fourierist phalanx at Sodus Bay).

Another prominent link between communitarianism and early American feminism was the partnership of Frances Wright and Owen’s son, Robert Dale Owen; they worked to found the New Harmony settlement in Indiana, and together edited the *Free Enquirer* during the 1830’s. See CELIA M. ECKHARDT, FANNY WRIGHT: REBEL IN AMERICA 99-100, 168 (1984); Marilyn Bensman, *Frances Wright: Utopian Feminist*, in WOMEN IN SEARCH OF UTOPIA: MAVERICKS AND MYTHMAKERS, *supra* note 75, at 62-69.

Dolores Hayden has documented the tradition of material feminism to which these early utopian experiments gave rise: in the aftermath of the Civil War, Melusina Fay Peirce, Edward Bellamy, and Charlotte Perkins Gilman would each popularize collective housekeeping schemes as part of a far-reaching program of social reform.<sup>82</sup> But the communitarians influenced the development of American feminism in other ways. While communitarians sought to emancipate women from pecuniary dependence on men by reorganizing work traditionally performed in the private household, the antebellum woman's rights movement sought to emancipate women from pecuniary dependence on men without changing the work wives performed. The movement challenged the law that made husbands owners of their wives' labor and argued that, instead, wives were entitled to joint rights in marital property by reason of the labor they contributed to the household economy.<sup>83</sup>

The communitarians sought to free women from economic dependence on men, and it is this understanding of sexual inequality that guided movement advocacy. More particularly, the communitarians attributed wives' "pecuniary dependence" to their labor in the family; as we will see, woman's rights advocates appropriated this critical perception and used it to challenge the manner in which the state allocated title to property in the marriage relationship.<sup>84</sup> But in developing its case for reforming the legal structure of

In 1855, the *New-York Daily Times* described the relationship between the woman's rights movement and the communitarians, or "the Free Love School," in the following terms:

The *Woman's Rights* movement tends directly and rapidly in the same direction,—that extreme section of it, we mean, which claims to rest on the absolute and indefeasible right of woman to an equality in all respects with Man, and to a complete sovereignty over her own person and her conduct. There are very many advocates for a modification of the laws concerning married women,—for an extension of the sphere of woman's labor and for other modifications of existing laws. To them we do not refer—but to the ultra school, whose apostles claim for woman rights which nullify the very idea of Marriage, as anything more than a partnership *at will*, and who thus identify their cause entirely with that of the adherents of the Free Love School. The Christian institution of Marriage offers a perpetual barrier to the progress of what are technically styled Woman's Rights; and no one knows this better than Mrs. E. L. ROSE, the personal friend and pupil of FRANCES WRIGHT, and probably the ablest woman engaged in this enterprise.

*The Free Love System*, *supra* note 74, at 2.

82. See HAYDEN, *supra* note 6, at 1-53, 67-89, 135-49, 183-205.

83. In seeking to emancipate wives' labor within a joint property regime, the movement sought what Appleton envisioned "rights" would bring: "such changes as gave due compensation to all industry," Appleton, *supra* note 79, at 255, including the household labor wives performed. In 1848, the year Appleton's story was published, Sarah C. Owen described the joint property demand in terms much like Appleton's: "Observe the difference, when, after marriage, [a wife] assumes her right to dispose of, as she sees fit, the product of her own hard-earned toil, to which, by law, she has no right or title, except the right of dower." PROCEEDINGS OF THE WOMAN'S RIGHTS CONVENTIONS, SENECA FALLS & ROCHESTER, N.Y., JULY & AUGUST, 1848, at 9 (New York, Robert J. Johnston 1870) [hereinafter PROCEEDINGS OF THE SENECA FALLS & ROCHESTER CONVENTIONS].

84. Once the communitarians attributed women's inequality to their economic dependence on men, the same analysis could be used to challenge the legal, as well as social, organization of the marriage relationship. As early as 1830, a woman from Alabama contributed a letter to Wright and Owen's *Free Enquirer*, see *supra* note 81, that criticized common law marital property rules and advocated joint property ownership in marriage. WARBASSE, *supra* note 6, at 93-94. In 1848, Robert Dale Owen recommended the use of antenuptial marriage settlements to enhance wives' economic autonomy in the existing family form.

the marriage relationship, the early feminist movement drew upon another strand of antebellum culture. That tradition was abolitionism, so pervasive within "ultraist" reform circles that it supplied the idiom for Brisbane's attack on household labor as a form of "domestic servitude."<sup>85</sup>

## 2. Abolitionism and Political Antislavery

Most early woman's rights leaders began their political careers agitating for the abolition of slavery; it was in doing this work that they first developed a feminist agenda.<sup>86</sup> The public activism of women in the abolitionist movement violated prevailing gender norms, provoking objections, within and without the movement, about woman's "proper place."<sup>87</sup> These objections, and the conflicts they precipitated, moved many abolitionists to expand their agenda and speak directly to questions of sexual injustice.<sup>88</sup> By the late 1830's these abolitionists had embraced a Garrisonian creed of "'universal emancipation,'" thereby committing themselves "'to redeem woman as well as

See WARBASSE, *supra* note 6, at 93 (Owen contends "that it ought to be a woman's . . . first endeavor, if she have not pecuniary independence, to obtain it; and that, if she have it, it should be her care, in case she marries, to secure her property, by a marriage settlement, to herself") (quoting 1 FREE ENQUIRER 365 (Sept. 9, 1828)). Woman's rights advocates sought joint property arrangements in marriage to compensate wives for their household labor and so ensure "pecuniary independence" for those women who brought no property to marriage. Cf. *infra* text accompanying notes 156-59.

Contemporary observers recognized the linkages between woman's rights advocacy and communitarianism. In 1856, Fourier's publicist, Albert Brisbane, noted that feminists were attempting to ameliorate women's situation in marriage without implementing communitarian precepts, and he rebuked the woman's rights movement for adopting this strategy, insisting that woman's "emancipation from pecuniary dependence" required the abolition of the "isolated household." See BRISBANE, *supra* note 78, at 142 (quoted *supra* note 78). By contrast, the *New-York Daily Times* condemned the "free love" philosophy of communitarianism but distinguished and exempted from criticism the "very many advocates for a modification of the laws concerning married women." See *The Free Love System*, *supra* note 74, at 2.

85. See Bestor, *supra* note 76, at 147.

86. See, e.g., BLANCHE G. HERSH, *THE SLAVERY OF SEX: FEMINIST-ABOLITIONISTS IN AMERICA* 56-63 (1978).

87. See FLEXNER, *supra* note 10, at 42-52, 71; HERSH, *supra* note 86, at 6-34; KEITH MELDER, *THE BEGINNINGS OF THE WOMEN'S RIGHTS MOVEMENT IN THE UNITED STATES, 1800-1840*, at 222-429 (1963) (discussing conflicts within abolitionist movement provoked by "the woman question," beginning with Grimke sisters' lecture tour of Massachusetts in 1837). Both black and white women pressed at the boundaries of propriety by engaging in public speaking on behalf of the antislavery cause. See Margaret H. Bacon, "One Great Bundle of Humanity": *Frances Ellen Watkins Harper (1825-1911)*, 113 PA. MAG. HIST. & BIOGRAPHY 21, 29 (1989) ("With the exception of Frederick Douglass, Charles Remond, William Nell, and a few others, black men were not receptive to the participation of black women in public affairs at this time."); cf. DOROTHY STERLING, *WE ARE YOUR SISTERS: BLACK WOMEN IN THE NINETEENTH CENTURY* 151-59 (1984) (discussing gender conflicts within black antislavery community of antebellum north); Horton, *Freedom's Yoke*, *supra* note 40, at 62-63, 68-73 (same).

88. It is unclear whether antislavery work illuminated sexual injustice, or merely provided an example of what could be done about it. See Ellen DuBois, *Woman's Rights and Abolition: The Nature of the Connection*, in *ANTISLAVERY RECONSIDERED: NEW PERSPECTIVES ON THE ABOLITIONISTS* 238, 241-42 (Lewis Perry & Michael Fellman eds., 1979) ("American feminism developed within the context of abolitionism less because abolitionists taught women that they were oppressed than because abolitionists taught women what to do with that perception, how to develop it into a social movement."); cf. FLEXNER, *supra* note 10, at 41-52; HERSH, *supra* note 86, at 41-63. See generally MELDER, *supra* note 87 (discussing how early feminist movement developed out of antislavery work).

man from a servile to an equal condition.”<sup>89</sup> Those intent on extending the abolitionist agenda to encompass all “human rights” included not only white, but free black, members of the antislavery community, most vocal among them, Sojourner Truth and Frederick Douglass.<sup>90</sup>

By the 1840’s, a distinctive “woman’s rights” platform had begun to emerge. The transformation of abolitionist agitation during this period, from a program of moral suasion to an agenda for political reform, cast the fact of women’s disfranchisement in dramatic relief, prompting increasingly widespread demands for the vote.<sup>91</sup> But the appearance of the political antislavery movement had additional significance for the woman’s rights cause. Where Garrisonian abolitionists attacked slavery as a violation of moral and religious norms, during the 1840’s the Republican Party infused antislavery discourse with new meaning, representing the struggle as a conflict between Southern institutions of forced labor and the free labor ethic of the North.<sup>92</sup>

89. MELDER, *supra* note 87, at 278 (quoting 8 LIBERATOR 7 (Jan. 12, 1838)). For differences among women activists on the question of sex equality, see, e.g., HEWITT, *supra* note 55, at 164-66, 170-71.

90. Frederick Douglass played a key role in the antebellum woman’s rights movement, speaking out at conventions, and lending the support of his various newspapers to the feminist cause. See FREDERICK DOUGLASS ON WOMEN’S RIGHTS (Philip S. Foner ed., 1976) (reproducing Douglass’ feminist commentary from his various newspapers). To varying degrees, other men in the black antislavery community shared this commitment. See Bacon, *supra* note 87, at 29; Horton, *Freedom’s Yoke*, *supra* note 40, at 71-72; Rosalyn Terborg-Penn, *Discrimination Against Afro-American Women in the Woman’s Movement, 1830-1920*, in THE AFRO-AMERICAN WOMAN: STRUGGLES AND IMAGES, *supra* note 40, at 17, 19.

Sojourner Truth made sexual equality an explicit element of the African-American antislavery platform in the pre-Civil War years, but, in this period at least, only a small group of African-American women joined her. See Horton, *Freedom’s Yoke*, *supra* note 40, at 70-72; Terborg-Penn, *supra*, at 17, 20 (noting participation of Mary Ann Shadd Cary, Harriet Purvis, and Margaretta Forten in addition to that of Truth); cf. Bacon, *supra* note 87, at 21-22, 33-35, 38-42 (describing feminist activism of Frances Watkins Harper and several other black women in immediate postwar period). Black women struggling for race emancipation in the years before the Civil War appear to have muted public expression of intra-racial gender grievances to preserve racial solidarity. See, e.g., *id.* at 35 (Harper explains her commitment to subordinate gender to race emancipation). Yet, if black women were relatively circumspect in raising questions of sex equality that might create conflicts within their own communities, they did find ways to protest their treatment at the hands of white men. Cf. HAZEL V. CARBY, RECONSTRUCTING WOMANHOOD: THE EMERGENCE OF THE AFRO-AMERICAN WOMAN NOVELIST 53-61 (1987) (during antebellum era, black women writers authored narratives that challenged racist sexual ideologies).

91. See LORI D. GINZBERG, WOMEN AND THE WORK OF BENEVOLENCE: MORALITY, POLITICS, AND CLASS IN THE NINETEENTH-CENTURY UNITED STATES 67-132 (1990); Ellen DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878*, 74 J. AM. HIST. 836, 840-41 (1987). Not all women abolitionists were quick to adopt the tenets of political antislavery, however. See GINZBERG, *supra*, at 91 (“By emphasizing the vote, new organizationists both excluded women from their main constituency and denigrated the very means of change that women were supposed to represent. . . . Confronted with a political system in which electoral organization was gaining in importance, ultraist women were caught in an increasingly anachronistic defense of moral change. . . .”); HEWITT, *supra* note 55, at 166-68, 170 n.87 (noting conflicts between Frederick Douglass and female “ultraists” over this question in early 1850’s); see also DuBois, *supra*, at 840 (“When the American Anti-Slavery Society split in 1839, political abolitionists, largely male, were on one side, and women abolitionists, mostly Garrisonian, were on the other.”).

92. On abolitionist antislavery discourse and the emergence of political antislavery, see DUBOIS, *supra* note 6, at 31-40; ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 109-23 (1970). On the free labor ideology of political antislavery, see FONER, *supra*, at 9-18; William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 773-76; Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 444-48, 460-68 (1989); see also DANIEL T. RODGERS, THE WORK

This development was, no doubt, a provocative one for antebellum feminists, for the discourse of free labor did not pertain to women as it did to men. Considered from the standpoint of free labor ideology, the institution of marriage shared important features in common with the institution of slavery that feminists condemned. The call for the First National Woman's Rights convention made the equation explicit:

In the relation of marriage [woman] has been ideally annihilated, and actually enslaved in all that concerns her personal and pecuniary rights; and even in widowhood and single life, she is oppressed with such limitation and degradation of labor and avocation as clearly and cruelly mark the condition of a disabled caste.<sup>93</sup>

In asserting an identity of situation between free wives and the enslaved populations of the South—despite profound differences in the social circumstances separating them—antebellum feminists plainly indulged in hyperbole.<sup>94</sup> But by the 1850's, they had begun to wield the marriage-as-slavery argument with increasing precision. As a simple description of *legal* relationships, the comparison feminists drew between marriage and slavery was, in important respects, accurate.<sup>95</sup> Antoinette Brown Blackwell pointed

ETHIC IN INDUSTRIAL AMERICA 1850-1920, at 31-32 (1978). Elizabeth Cady Stanton's husband, Henry Stanton, was engaged in organizing the Free Soil Party in Buffalo, New York, during the summer of the 1848 Seneca Falls and Rochester woman's rights conventions. DuBois, *supra* note 91, at 840-41.

93. PROCEEDINGS OF THE WOMAN'S RIGHTS CONVENTION, HELD AT WORCESTER, OCTOBER 23D & 24TH, 1850, at 4-5 (Boston, Prentiss & Sawyer 1851) [hereinafter 1850 WORCESTER CONVENTION]; 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 222.

94. Cf. Karen Sanchez-Eppler, *Bodily Bonds: The Intersecting Rhetorics of Feminism and Abolitionism*, 24 REPRESENTATIONS 28, 31 (1988):

Though the metaphoric linking of women and slaves uses their shared position as bodies to be bought, owned, and designated as a grounds of resistance, it nevertheless obliterates the particularity of black and female experience, making their distinct exploitations appear as one. The difficulty of preventing moments of identification from becoming acts of appropriation constitutes the essential dilemma of feminist-abolitionist rhetoric.

95. Indeed, during the Civil War, Democrats in Congress who opposed passage of the Thirteenth Amendment would delight in pointing out commonalities in the legal relations composing the institutions of slavery and the household:

The parent has the right to the service of his child; he has a property in the service of that child. A husband has a right of property in the service of his wife; he has the right to the management of his household affairs. The master has a right of property in the service of his apprentice. All these rights rest upon the same basis as a man's right of property in the service of slaves.

CONG. GLOBE, 38th Cong., 2d Sess. 215 (1865) (statement of Rep. Chilton White); cf. ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870*, at 59 (1991) (comparing common law governing marriage and master/servant relations, each of which was "entered by means of a status contract"). See generally VanderVelde, *supra* note 92, at 454-59 (analyzing discussions of family, slavery, and employment relations in congressional debates over Thirteenth Amendment). In drafting constitutional amendments and civil rights legislation in the aftermath of the war, Congress struggled to differentiate racial and gender status laws, generally acting on the assumption "that when a measure went far enough to limit a state's freedom to legislate on married women's property, family law, marriage, or divorce it went too far in altering the balance between the federal government and the states." Patricia Lucie, *On Being a Free Person and a Citizen by Constitutional Amendment*, 12 J. AM. STUD. 343, 350 (1978); see also *infra* note 271. While Congress drafted Reconstruction-era civil rights laws to preserve the status relations of marriage, it did



out the homologous legal structure of marriage and slavery, using the comparison to great polemical effect:

The wife owes service and labor to her husband as much and as absolutely as the slave does to his master. This grates harshly upon the ears of Christendom; but it is made palpably and practically true all through our statute books, despite the poetic fancy which views woman as elevated in the social estate; but a little lower than the angels.<sup>96</sup>

As Blackwell's remarks illustrate, feminists used the marriage-as-slavery argument to expose contradictions between the ideology of domesticity and the institution of marriage, to pierce the veil of sentimentality shrouding the relation and to reveal its economic logic.<sup>97</sup> More precisely, the argument demonstrated the role of *law* in perpetuating women's economically dependent status. In political antislavery, then, antebellum feminists found a discourse of wide popular appeal that allowed them to analyze woman's situation in marriage and to dramatize it in compelling form.

An 1855 exchange between Gerrit Smith and Frances Gage illustrates the power of the marriage-as-slavery critique. Smith, a prominent abolitionist sympathetic to the woman's rights cause, had written to his cousin Elizabeth Cady Stanton a letter despairing of equal rights advocacy. Like most of his contemporaries, Smith assumed that wives did not engage in productive labor;<sup>98</sup> yet, as a woman's rights sympathizer, he thought they should. Smith counseled women to take up the cause of dress-reform and cultivate habits of economic self-sufficiency. "[T]o concede to her the rights of property would be to benefit her comparatively little," Smith reasoned, "unless she shall resolve to break out of her clothes-prison, and to undertake right earnestly, as right earnestly as a man, to get property."<sup>99</sup> The letter was published in

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abolish other forms of servitude resembling slavery in this period. See STEINFELD, *supra*, at 173-84 (discussing backdrop of Anti-Peonage Act of 1867).

96. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 580 (quoting Woman's Rights State Convention, Rochester, N.Y., November 30 and December 1, 1853); cf. PROCEEDINGS OF THE WOMAN'S RIGHTS CONVENTION, HELD AT AKRON, OHIO, MAY 28 AND 29, 1851 at 27 (Cincinnati, Ben Franklin Book and Job Office, 1851) [hereinafter PROCEEDINGS OF THE 1851 AKRON CONVENTION] (Abstract of Speeches; Speech of Mrs. [Emma] Coe) ("In one sense, the wife is considered the property of the husband. He is entitled to her services and earnings, can sue for an injury done her the same as though done to his horses, cattle, &c., and put the collected damages in his own pocket.")

97. The polemic dramatized similarities in legal relations of slavery and marriage, much as the polemic against "wage slavery" would emphasize similarities in social relations of wage labor and chattel slavery. See, e.g., ANTEBELLUM AMERICAN CULTURE, *supra* note 77, at 432-34 (antebellum); MONTGOMERY, *supra* note 37, at 30 (midcentury); RODGERS, *supra* note 92, at 32-36 (postbellum); Forbath, *supra* note 92, at 805-06, 811-12 (same). At the same time abolitionists invoked the marriage-as-slavery argument to deflate the sentimental view of marriage promoted by the cult of domesticity, they drew on the cult of domesticity to dramatize the evils of slavery. Cf. Ryan, *supra* note 52, at 137-41 (discussing *Uncle Tom's Cabin* and other antislavery fiction and tracts).

98. See *supra* notes 64-69 and accompanying text.

99. Letter from Gerrit Smith to Elizabeth Cady Stanton (Dec. 1, 1855), in 1 HISTORY OF WOMAN

*Frederick Douglass' Paper* and elicited a fiery retort from both Stanton and Gage. Gage's published reply challenged the root premise of Smith's advice:

But do not women *now* work right earnestly? Do not the German women and our market women labor right earnestly? Do not the wives of our farmers and mechanics toil? Is not the work of *mothers* in our land as important as that of the father? "Labor is the foundation of wealth." The reason that our women are "paupers," is not that they do not labor "right earnestly," but that the law gives their earnings into the hands of manhood. Mr. Smith says, "That women are helpless, is no wonder, so long as they are paupers"; he might add, no wonder that the slaves of the cotton plantation are helpless, so long as they are paupers. What reduces both the woman and the slave to this condition? The law which gives the husband and the master entire control of the person and the earnings of each; the law that robs each of the rights and liberties that every "free white male citizen" takes to himself as God-given. . . . Let us assert our right to be free. Let us get out of our prison-house of law. Let us own ourselves, our earnings, our genius; let us have power to control as well as to earn and to own; then will each woman adjust her dress to her relations in life.<sup>100</sup>

The same analysis is condensed in Stanton's responsive taunt: "And you mock us with dependence . . . *Do not the majority of women in every town support themselves, and very many their husbands, too?*"<sup>101</sup>

Because the common law categorically defined wives as dependents and so obscured their contribution to the family economy, it demeaned women in a society that celebrated labor as a source of dignity and autonomy.<sup>102</sup> But, by simple inversion, the ideology of free labor provided grounds for contesting the legitimacy of marital status law. If "labor [was] the foundation of wealth," then the law's role in expropriating wives' labor amounted to "rob[bery] . . . of the rights and liberties that every 'free white male' takes to himself as God-given." By invoking simple precepts of free labor, feminists gathered at the Fifth National Woman's Rights convention could confidently assert that "the law which gives to the husband the power to use and control the earnings of the wife, makes robbery legal, and is as mean as it is unjust."<sup>103</sup>

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SUFFRAGE, *supra* note 55, at 836, 837. Smith's daughter, Elizabeth, first advocated dress reform for women, inventing the "bloomers" that Amelia Bloomer popularized in the *Lily*. See LUTZ, *supra* note 58, at 26-27, 29, 34-35, 39-41 (controversy surrounding bloomers worn by antebellum woman's rights advocates).

100. Letter from Frances D. Gage to Gerrit Smith (Dec. 24, 1855), in 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 842, 843.

101. Letter from Elizabeth Cady Stanton to Gerrit Smith (Dec. 21, 1855) (emphasis added), in 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 839, 842.

102. Cf. FONER, *supra* note 92, at 11-18; RODGERS, *supra* note 92, at 7-17; Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 364-69 (1989).

103. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 818 (resolutions of Fifth National Woman's Rights Convention, Cleveland, Ohio, 1853); see also PROCEEDINGS OF THE WOMAN'S RIGHTS CONVENTION HELD AT BROADWAY TABERNACLE, NEW YORK, N.Y., SEPTEMBER 6TH & 7TH 1853, at 59 (New York,

Examining feminist usage of the discourse of self-ownership illustrates how the movement appropriated, synthesized, and so transformed elements of the culture it criticized. When Gage urged women to “assert our right to be free,” to “get out of our prison-house of law,” and to “own ourselves, our earnings, our genius,” she invoked Adam Smith and John Locke,<sup>104</sup> but inflected the discourse of classical political economy with an accent that was peculiarly American. In demanding self-ownership, Gage spoke from a republican tradition in which the self-owning laborer was socially and economically independent, possessing more than the formal right to sell his labor.<sup>105</sup> Gage’s demand for self-ownership also evoked the communitarian tradition, exhorting women to rebel against the condition of “pecuniary dependence” that defined their situation in marriage.

But analyzing feminist arguments about autonomy and dependence as simple expressions of the liberal, republican, or communitarian traditions

Fowlers and Wells 1853) [hereinafter 1853 BROADWAY TABERNACLE CONVENTION] (remarks of Clara Nichols) (“Man takes from her her right in property—her right over her own earnings, and offspring and services, and then, to compensate her for the robbery, enacts that she shall be held under no obligation to support her children.”). The objection was a standard feature of woman’s rights advocacy, and considered so powerful as to be beyond refutation:

We ask to be protected in the avails of our labor. . . . The right is so obvious, it has so long had place among the political maxims of our people, that “He that digs the gold out of the earth is entitled to it, and that against the universe,” that to attempt proof appears to me as absurd as to try to make self-evident truths more apparent.

J. ELIZABETH JONES, ADDRESS TO THE WOMEN’S RIGHTS COMMITTEE OF THE OHIO LEGISLATURE 10 (Columbus, Harris & Hurd 1861).

The “legal robbery” polemic was apparently quite effective. When the *New York Times*, which supported marital property reform but opposed woman suffrage, reported passage of New York’s 1860 earnings statute, it observed that the legislation would “secure a poor washerwoman in the enjoyment of the fruits of her own toil, and protection from the most cruel of robberies.” *Female Emancipation*, N.Y. TIMES, Feb. 10, 1860, at 4.

104. When woman’s rights activists invoked the discourse of self-ownership to protest the expropriation of wives’ labor, they appealed directly to the authority of Smith and Locke. See ADAM SMITH, *THE WEALTH OF NATIONS* 121-22 (Edwin Cannan ed., Modern Library 1937) (1776):

The property which every man has in his own labour, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of a poor man lies in the strength and dexterity of his hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper without injury to his neighbour, is a plain violation of this most sacred property.

See also John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government*, in SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU 17 (Oxford University Press 1947):

Though the earth and all inferior creatures be common to all men, yet every man has a *property* in his own *person*. This nobody has any right to but himself. The *labour* of his body and the *work* of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property.

105. For a distinction between these two traditions, see Forbath, *supra* note 92, at 779-80; cf. *id.* at 774-75 (in classical political economy “free labor” meant the right to sell one’s labor power, whereas in the republican tradition of the Revolutionary era it meant “economic independence, ownership of productive property—not as an end in itself primarily, but because such independence was essential to participating freely in the public realm”); see also JONATHAN A. GLICKSTEIN, *CONCEPTS OF FREE LABOR IN ANTEBELLUM AMERICA* 12-13 (1991) (in United States, proponents of free labor drew on “American exceptionalist themes,” emphasizing “the uniquely favorable outcomes that the formal right to sell one’s labor brought in the open, ‘dynamic,’ society of the North. Only here, indeed, did self-ownership attain its true meaning for laborers.”).

obscures the animating spirit of the movement's demands: a spirit of gender-skepticism that led the movement into critical dialogue with the very traditions upon which it drew. As feminists explored women's experience of dependence in marriage and struggled to articulate a vision of autonomy responsive to women's concerns, they exposed inequalities in family life that the political traditions the movement relied upon had never questioned.<sup>106</sup> Thus, as the movement appropriated the discourse of self-ownership, it demonstrated that traditional concepts of liberty were in fact gendered; they tacitly referred to men. At the same time, as the movement used the discourse of self-ownership to demand liberty for women, feminists infused the concept of self-ownership with *new* gendered meaning. When Frances Gage insisted, "Let us assert our right to be free. Let us get out of our prison-house of law. Let us own ourselves, our earnings, our genius . . . ," she was demanding freedom for *wives*, seeking an end to legally sanctioned coercion in matters of sex and motherhood, as well as to legally enforced dependency in marriage.

While feminists were cautious in discussing sex, rarely venturing beyond Gage's demand to "[l]et us own *ourselves*, our earnings, our genius,"<sup>107</sup> contemporary audiences understood the far-reaching import of the movement's demands.<sup>108</sup> During the year of Gage's exchange with Gerrit Smith, others

106. When woman's rights advocates invoked the discourse of self-ownership as authority for wives' rights in family labor, they creatively misread the political philosophers on whom they relied. See ZILLAH R. EISENSTEIN, *THE RADICAL FUTURE OF LIBERAL FEMINISM* 33-54 (1993) (analyzing John Locke's "patriarchal antipatriarchalism"); CAROLE PATEMAN, *THE SEXUAL CONTRACT* 19-38 (1988) (discussing patriarchal premises of variety of Western political theorists, including Locke). On the gendered premises of the republican tradition, see Mark E. Kann, *Individualism, Civic Virtue, and Gender in America*, 4 *STUD. AM. POL. DEV.* 46, 57-62 (1990). The American communitarian tradition *did* explore gender inequalities in the structure of family life, see *supra* text accompanying notes 73-74, 76-78, yet even communitarians continued to adhere to significant aspects of the gender system they criticized, see sources cited *supra* note 75.

107. Cf. *supra* text accompanying note 93 (call to first national woman's rights convention observes that in marriage a wife is "enslaved in all that concerns her *personal* and pecuniary rights") (emphasis added). Though feminists spoke circumspectly about matters of sex, they were violating social strictures in speaking about sex at all, especially in a public forum. At an 1855 convention, Caroline Dall discussed the common law rules giving a husband "[t]he custody of the wife's person," observing:

Probably no right with which he is invested occasions more suffering than this, yet it is necessarily of a kind to be passed over in silence, and which,—speak of it impersonally as we will,—it seems unfit to press publicly upon the attention of an audience. But, if the results of this right are sustained by the laws of the land; should they be such as we must blush to speak of; if women die under its inflictions,—are they never to find those of their own sex strong enough to show the reasons why, and pure enough to remain unsuspected in doing so?

Caroline H. Dall, *Report Concerning Some of the Laws of Massachusetts in Relation to Women*, in *REPORTS ON THE LAWS OF NEW ENGLAND, PRESENTED TO THE NEW ENGLAND MEETING CONVENED AT THE MEIGONAON, SEPT. 19 AND 20, 1855*, at 2 (n.p., 1855) (report of woman's rights convention held in Boston).

108. For example, at the "Rutland Free Convention," a maverick meeting held in 1858, whose participants included Ernestine Rose, Frances Gage, Parker Pillsbury, and Stephen Foster, a Mrs. Julia Branch set off a firestorm of controversy by introducing the following resolution: "*Resolved*, That the slavery and degradation of woman proceed from the institution of marriage; that by the marriage contract she loses control of her name, her person, her property, her labor, her affections, her children, and her freedom." SUHL, *supra* note 61, at 194. See generally *id.* at 191-94 (describing convention). The resolution was understood to promote "Free Love" as an alternative to marriage, and produced an avalanche of negative publicity for the movement, from which it struggled to disassociate itself. *Id.* at 194-95.

in the movement discussed the feminist<sup>o</sup> demand for self-ownership in terms more accessible to a modern audience. For example, Lucy Stone described the movement's priorities in a letter to Antoinette Blackwell:

It is clear to me, that . . . all our little skirmishing for better laws, and the right to vote, will yet be swallowed up in the real question, viz: Has woman a right to herself? *It is very little to me to have the right to vote, to own property, &c. if I may not keep my body, and its uses, in my absolute right.* Not one wife in a thousand can do that now, and as long as she suffers this bondage, all other rights will not help her to her true position.<sup>109</sup>

Sarah Grimké was yet more forthright as she denounced the legal structure of the marriage relationship:

A revolting experience has forced upon her the conviction that she is a *legal prostitute*, a chattel personal, a tool that is used, a mere convenience . . . . Man seems to feel that Marriage gives him the control of a Woman's person just as the Law gives him the control of her property. . . .

. . . .  
 . . . [Wives] have too soon discovered that they were *unpaid housekeepers & nurses, & still worse, chattels personal to be used & abused at the will of a master* . . . . O! the agony of realizing that personal & pecuniary independence are annihilated by that "Law which makes the husband and wife one & that one is the husband."<sup>110</sup>

Feminists demanding "self-ownership" sought for wives the right to make choices about sex *and* motherhood, as Stanton's letter responding to Gerrit Smith makes clear. In 1855, when Stanton invoked "human rights—the sacred rights of a woman to her own person, to all her God-given powers of body and soul," she asked:

*Did [man] ever take in the idea that to the mother of the race, and to her alone, belonged the right to say when a new being should be*

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Some at this convention undoubtedly did subscribe to principles of free love and seek the abolition of marriage, cf. *supra* text accompanying note 74, but most feminists sought to *reform* the institution in order to make husbands and wives equal in all aspects of the relationship, including sex; some feminists, notably Stanton, also advocated expanding wives' rights to divorce. See *infra* text accompanying note 175. The movement's critics generally overlooked such distinctions—most likely because it allowed them to represent the movement's agenda in more inflammatory terms.

109. Letter from Lucy Stone to Antoinette Brown (Blackwell) (July 11, 1855), *quoted in* CAZDEN, *supra* note 58, at 100 (emphasis added).

110. Sarah Grimké, *Marriage*, in LERNER, *supra* note 51, at 94, 96 (emphasis added). In this essay, Grimké is responding to an 1855 *New York Times* editorial charging that the woman's rights movement leads to "Free Love." See *The Free Love System*, *supra* note 74. Grimké argues that it is the inegalitarian laws and customs composing the institution of marriage that the movement opposes.

*brought into the world?* Has he, in the gratification of his blind passions, ever paused to think whether it was with joy and gladness that she gave up ten or twenty years of the heyday of her existence to all the cares and sufferings of excessive maternity?<sup>111</sup>

Antebellum feminists thus gave new sense to Locke's claim that "every man has a *property* in his own *person*,"<sup>112</sup> making it speak to women and to questions that mattered in women's family lives. They used concepts of self-ownership to demand liberty for wives in matters affecting their sexual relations with their husbands and the conditions under which they bore children, as well as to assert rights for wives in the labor they contributed to the household economy.<sup>113</sup>

Thus, while Ellen DuBois and others have traced the movement's animating philosophy to a liberating "moral abstraction" appropriated from Garrisonian abolitionism, "[t]he philosophical tenet that women were essentially human and only incidentally female,"<sup>114</sup> this portrait of the movement's politics seems only half correct. The antebellum movement did acquire strength from its "belief in the moral identity of the sexes";<sup>115</sup> this conviction enabled feminists to claim the benefit of political traditions never intended to apply to women. Yet this imaginative act of "moral abstraction" did not blind the movement to the gendered particularity of women's situation<sup>116</sup>—nor did a belief in the "moral identity of the sexes" inhibit the

111. Letter from Elizabeth Cady Stanton to Gerrit Smith (Dec. 21, 1855), in 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 839, 840-41.

112. See *supra* note 104.

113. Cf. Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 304-14 (1992) (discussing discourse of self-ownership and demands for voluntary motherhood in advocacy of postbellum woman's rights movement); DuBois, *supra* note 91, at 842-44, 856-57 (discussing movement leaders' elaboration, in prewar and postwar periods, of individual rights principles for the family, claiming right to control use of one's body).

114. DUBOIS, *supra* note 6, at 36. Historians of the movement often classify feminists by their political sensitivity to questions of gender difference; in such schemes of characterization, Stanton and the core leadership of the woman's rights movement are identified as "individualist" or "equal rights" feminists, whose politics emphasize the common humanity of woman and man, whereas other activists (called "relational," "domestic," or "social" feminists) are said to focus more on the ways women's role in the family differentiates them from men. See, e.g., BARTLETT, *supra* note 11, at 86-87. These differences in political sensibility are generally assumed to correlate with differences in political strategy, so that an individualist or equal rights feminist will advocate gender-neutral principles of social organization, while a relational feminist will endorse gender-specific rights and responsibilities. See generally Karen Offen, *Defining Feminism: A Comparative Historical Approach*, 14 SIGNS 119 (1988) (identifying two feminist traditions, individualist and relational, and suggesting that latter is dominant mode of feminist thought); *Comment and Reply*, 15 SIGNS 195 (1989) (Ellen DuBois and Nancy Cott arguing that individualism is dominant mode of feminist thought, with rebuttal by Offen); Wendy Sarvasy, *Beyond the Difference Versus Equality Policy Debate: Postsuffrage Feminism, Citizenship, and the Quest for a Feminist Welfare State*, 17 SIGNS 329, 330 (1992).

115. DUBOIS, *supra* note 6, at 37; see also *supra* text accompanying notes 89-90 (discussing Garrisonian concepts of "universal emancipation" and "human rights").

116. In her study of the nineteenth-century suffrage movement, Ellen DuBois suggests that feminists' belief in the moral identity of the sexes caused them to ignore relevant social differences between the sexes:

Just as the Garrisonian emphasis on the moral equality of the races could not account for their historical inequality, the conviction that men and women were morally identical had serious

movement from “examining the sources of sexual inequality” in family life.<sup>117</sup>

When feminists drew upon male-defined political traditions to advance woman’s rights arguments, they were not thereby alienated from their own life circumstances, but instead were using the idiom of male politics to speak about their lives as women and to dramatize the distinctive character of their oppression as women. Indeed, Gage was quite self-conscious about this; she emphasized that she was appropriating male public discourse to protest the political construction of “private” life when she dubbed the domestic sphere a “prison-house of law.” As feminists appropriated the discourse of self-ownership to talk about oppressive features of family life, they transformed the very rhetoric they were using. When feminists used the discourse of self-ownership to attack the family as an institution of gender caste,<sup>118</sup> they used a rhetoric of *autonomy* to raise questions of *equality*, and used a rhetoric of *individualism* to explore conditions of *group* domination and to articulate aspirations of *group* emancipation: “Let us get out of our prison-house of law. Let us own ourselves, our earnings, our genius . . . .” Indeed, the movement used the discourse of *self-ownership* to demand that wives’ household labor be emancipated in the form of a *joint* property right in marital assets—a rights claim, which, as we will see, can be understood as seeking gender-specific relief for women.

As one appreciates the gender-conscious fashion in which antebellum feminists used the discourse of self-ownership, it is easier to understand the joint property claim as an integral part of their political vision and sensibility. A movement that sought to enlarge conceptions of the human to address

analytical limitations. The women’s rights belief in the moral irrelevance of sexual spheres ignored the reality of women’s domestic confinement, which made them different from and dependent on men, and gave credence to the doctrine of spheres.

DUBOIS, *supra* note 6, at 37.

117. *Cf. id.* at 37-38 (“[W]hile permitting the prewar women’s rights movement to establish sexual equality as its goal, Garrisonian premises simultaneously held it back from the critical task of examining the sources of sexual inequality.”). DuBois argues that the movement’s insistence on the moral identity of the sexes, combined with its belief in natural sex differences, limited its critical analysis of women’s situation, producing a feminist politics that did not address the structure of the family and so could not attack the social sources of sexual inequality. *Id.*

118. The idiom of “caste” is the movement’s own. *See supra* text accompanying note 93 (call to First Woman’s Rights Convention). The same caste-consciousness informs Lucy Stone’s observation that the woman’s rights movement

ought to be called a Woman’s Wrongs movement, for there is not a single position or relation sustained by woman in which she is not made to feel the pressure of inequality. . . .

. . . .

. . . [T]his Woman’s Rights or Woman’s Wrongs movement, makes but the claim which our fathers made, and which we are proud to repeat . . . . Let there be no aristocracy of sex or color, but humanity be the only aristocracy, God our father, and all men and women brethren!

1853 BROADWAY TABERNACLE CONVENTION, *supra* note 103, at 51, 53-54. It is perhaps most prominently expressed in the movement’s inaugural *Declaration of Sentiments*. *See REPORT OF THE WOMAN’S RIGHTS CONVENTION, HELD AT SENECA FALLS, N.Y., JULY 19 & 20, 1848*, at 6 (Rochester, John Dick 1848) (describing “history of mankind [as] a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her”).

women's experience would naturally seek to enlarge conceptions of work to address the family labor that wives performed. But if antebellum women drew upon political discourse of their culture to talk about their own social experience as women, a new question appears: In what ways did the gender discourse of the culture shape the feminist politics that resulted?

### 3. *The Roots of "Woman's Rights" in Separate Spheres Ideology*

To this point, we have explored how communitarianism, Garrisonian abolitionism, and political antislavery enabled women's rights advocates to attain a critical perspective on the family relation otherwise occluded by the ideology of domesticity. What remains to be considered is how the ideology of domesticity itself might have contributed to the outlook of the nascent woman's rights movement.

While it is clear that Gerrit Smith's advice to women "to undertake right earnestly, as right earnestly as a man, to get property" reflects gender conventions of domesticity in its assumption that wives do not work—it is also possible to detect those same gender conventions shaping Frances Gage's rejoinder: "But do not women *now* work right earnestly? . . . Do not the wives of our farmers and mechanics toil? Is not the work of *mothers* in our land as important as that of the father?"<sup>119</sup> Feminists drew upon communitarianism and abolitionism when they insisted that wives' work was work, but they spoke from gender conventions of the era when they insisted that wives' work was *valuable* work, as valuable as "men's work." As Gage reasons about her social experience as woman, she understands the sexes to perform different, yet complementary roles; her belief that mothers' work, once considered as work, is as valuable as fathers' work is an affirmation of self-worth that draws upon concepts of role-reciprocity rooted in the nineteenth-century separate spheres tradition.<sup>120</sup>

A number of historians have considered how separate spheres ideology might have engendered incipient forms of feminist consciousness amongst nineteenth-century women.<sup>121</sup> A rich literature now demonstrates how antebellum gender norms prompted women to join social reform movements (e.g., benevolence work, abolitionism, temperance)<sup>122</sup> and to embrace various

119. See *supra* text accompanying notes 99-100.

120. Cf. *supra* text accompanying notes 66-68.

121. See COTT, *supra* note 36, at 1, 9, 200-01; *Politics and Culture in Women's History: A Symposium*, 6 FEMINIST STUD. 26-64 (1980); Eileen Boris, *Looking at Women's Historians Looking at "Difference,"* 3 WIS. WOMEN'S L.J. 213, 218-26 (1987) (reviewing literature on varieties of women's activism emanating from concept of "woman's sphere").

122. One significant way in which antebellum women employed their authority "as women" was in social reform activities, the pursuit of which enabled intensive involvement in public affairs. See HEWITT, *supra* note 55, at 38-41 (approximately 10% of Rochester's adult women in mid-1800's were active in public endeavors, in charitable or "benevolent" enterprise, evangelical or "perfectionist" reform, and egalitarian or "ultraist" advocacy); see also GINZBERG, *supra* note 91; Ryan, *supra* note 52, at 39-40



forms of “domestic feminism” premised on the different and complementary roles of the sexes.<sup>123</sup> The separate spheres tradition influenced woman’s rights activists as well.<sup>124</sup> Movement leaders frequently acknowledged differences between women and men in matters of temperament and life circumstance, even as they challenged the status constraints imposed on women by the cult of domesticity.<sup>125</sup> They freely spoke *as women* when discussing the movement’s political objectives—invoking women’s distinctive moral sensibility and mission and their special domestic concerns and competencies in discussing equal rights claims, without hesitation or sense of contradiction.<sup>126</sup>

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(popular discourse of “woman’s influence” in 1840’s); *id.* at 71-79 (antebellum women’s role as moral reformers); Paula Baker, *The Domestication of Politics: Women and American Political Society, 1780-1920*, 89 AM. HIST. REV. 620, 620-38 (1984).

123. See *supra* note 114; Offen, *supra* note 114; cf. OLIVE BANKS, *FACES OF FEMINISM: A STUDY OF FEMINISM AS A SOCIAL MOVEMENT 13-59* (1981) (comparing and contrasting “equal rights” feminism during 1840-1870 period to feminism of evangelical and socialist orientation).

124. See, e.g., Ryan, *supra* note 52, at 111-12 (noting that woman’s rights activists, including Amelia Bloomer, Ernestine Rose, Lucretia Mott, Elizabeth Cady Stanton and Sarah Grimké, invoked woman’s moral superiority in 1850’s); Elizabeth B. Clark, *Religion, Rights, and Difference in the Early Woman’s Rights Movement*, 3 WIS. WOMEN’S L.J. 29, 33-39 (1987) (arguing that mid-nineteenth century woman’s rights advocates believed simultaneously in women’s “essential humanity” and “womenly difference”); see also *supra* note 122 (historians describe how culture of domesticity spurs moral reform efforts among women, inculcating new tradition of public activism that includes early woman’s rights movement).

125. Antebellum woman’s rights advocates did not deny the existence of gender differences, although they repeatedly denounced rigid or artificial role-typologies, especially when these were employed to constrain women’s opportunities. Paulina Wright Davis, president of the First National Woman’s Rights Convention, spoke for many when she asserted:

Nature does not teach that men and women are unequal, but only that they are unlike; an unlikeness so naturally related and dependent that their respective differences by their balance establish, instead of destroying, their equality. . . .

. . . .  
 . . . . I will not accept the concession of any equality which means identity or resemblance of faculty and function. I do not base her claims upon any such parallelism of constitution or attainment. I ask only freedom for the natural unfolding of her powers, the conditions most favorable for her possibilities of growth . . . I ask that she shall fill the place that she can attain to, without settling any unmeaning questions of sex and sphere, which people gossip about for want of principles of truth, or the faculty to reason upon them.

1850 WORCESTER CONVENTION, *supra* note 93, at 9-11. For an excellent analysis of the movement’s sensibility in these matters, see Clark, *supra* note 124, at 30 (“although ‘equality’ was the watchword of the movement, in the antebellum period it referred largely to a negative proposition; the removal of the false and artificial restraints of woman’s sphere, restraints which prevented her full entry into public life. ‘Equal’ was not ‘like’ . . .”).

126. The 1853 diary entry in which unmarried activist Susan B. Anthony recorded her first recognition of the significance of earnings reform illustrates how gendered concepts of identity rooted in the separate spheres tradition could prompt women to assert equal rights claims. On a trip through New York state, Anthony learned that many temperance societies had disbanded for lack of funds, a fact attributable in part to wives’ inability to secure money from their husbands. Anthony thus recognized that women needed control of the family purse if they were to be able to effectuate moral reform:

As I passed from town to town I was made to feel the great evil of woman’s entire dependency upon man for the necessary means to aid on any and every reform movement. Though I had long admitted the wrong, I never until this time so fully took in the grand idea of pecuniary and personal independence. It matters not how overflowing with benevolence toward suffering humanity may be the heart of woman, it avails nothing so long as she possesses not the power to *act* in accordance with these promptings. Woman must have a purse of her own, and how can this be, so long as the *Wife* is denied the right to her individual and joint earnings.

LUTZ, *supra* note 58, at 38 (quoting diary entry from 1853).

Yet when it comes to explaining how the gender norms of the separate spheres tradition might have contributed to the movement's understanding of equality, historians have been reticent, often treating the gender norms of antebellum America and the ideology of the antebellum woman's rights movement as distinct and fundamentally antagonistic to each other. So, for example, Ellen DuBois' pathbreaking work on the nineteenth-century woman suffrage movement identifies Garrisonian abolitionism as the mediating influence which "provided an ideology of equality for women to use in fighting their way out of a society built around sexual difference and inequality."<sup>127</sup> In this framework, the ideology of spheres is at best a social catalyst for the nineteenth-century feminist movement—a regressive ideology that had to be transcended for feminist concepts of sex equality to develop.

Given the pervasive and often contradictory manifestations of separate spheres ideology in antebellum America, it seems more reasonable to assume that gender conventions of the era shaped feminist conceptions of equality than to proceed as if the movement's political thought transcended the gender discourse of the period and can be intelligibly separated from it.<sup>128</sup> Just as the gender, race, and class norms of contemporary American culture shape the imagination of the current feminist movement,<sup>129</sup> so, too, it would seem, the

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The demand for rights in household labor was advanced in tandem with a demand for equal rights in child custody, in the pursuit of which antebellum feminists freely and passionately invoked women's role as mothers. See BASCH, *supra* note 4, at 179-81 ("feminists celebrated the sanctity of motherhood, drawing freely on the cult of domesticity" in advocating reform of child custody laws). When the movement secured a sweeping marital status reform statute in New York, Ernestine Rose ranked legislative reform of custody the movement's most significant achievement. See PROCEEDINGS OF THE TENTH NATIONAL WOMAN'S RIGHTS CONVENTION, HELD AT THE COOPER INSTITUTE, NEW YORK CITY, MAY 10TH AND 11TH, 1860, at 47-48 (Boston, Yerrington & Garrison 1860) [hereinafter TENTH NATIONAL CONVENTION]. Addressing her audience as "my sisters, mothers of the State of New York," she boasted: "We, 'Woman's Rights women,' have redeemed our last Legislature, by inducing them to give us one good act, among so many corrupt ones; and it strikes me, that they owe us quite as many thanks as we owe them!" *Id.* at 47.

127. DUBOIS, *supra* note 6, at 36.

128. Nancy Cott has observed that "woman's sphere . . . contained within itself the preconditions for organized feminism, by allotting a 'separate sphere' for women and engendering sisterhood within that sphere," but argues that "it oversimplifies to call woman's sphere ideology 'protofeminist' or to give both principles the same lineage." COTT, *supra* note 36, at 201, 205; see also *Comment and Reply*, *supra* note 114, at 205 (remarks of Nancy Cott) (rejecting claim that "relational arguments" premised on notions of gender difference dominate thought of Elizabeth Cady Stanton, "usually seen as the archetypical American equal-rights individualist"; suggesting that even if this characterization of Stanton's thought were persuasive, it would still be necessary to determine whether it was relevant "to explicat[ing] the specificities of Stanton's feminism, or of her belonging to the mid-nineteenth century").

129. The sociohistorical contingency of feminist theory might be described from a range of vantage points. For example, it is frequently noted that in the twentieth century, just as in the nineteenth century, changing social attitudes about race relations facilitated the rise of feminist consciousness. At the same time, numerous commentators have observed that the feminist movement is permeated by the racial, and racist, norms of the society it criticizes. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (arguing that feminist legal theory reflects positional bias of its predominantly white expositors). Other feminist theorists have pointed to the ways in which feminist theory is permeated by the gender norms of the culture it criticizes. Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1989-1990) (discussing heterosexist assumptions on which much of feminist legal theory is premised); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 806-13 (1989) (tracing intellectual orientation of "relational" feminists such as Carol Gilligan to norms of domesticity; observing that this tradition developed in reaction to capitalist market relations

antebellum movement reasoned within, as well as against, the norms of its culture. Feminist thought neither transcends *nor* reflects the gender discourse of its culture in any simple sense. Rather, like any political ideology, feminism seems to develop by synthesizing, and so transforming, the multiple, and often contradictory, social discourses composing it. While the heterogeneous elements of feminist discourse may compromise its critical force, they do not necessarily do so; feminist thought, like any political ideology, may be enriched rather than diluted by the disparate elements of which it is comprised.

When Frances Gage insisted, "But do not women *now* work right earnestly? . . . Is not the work of *mothers* in our land as important as that of the father?"<sup>130</sup> she was speaking from a position informed by ideology of domesticity, although wholly not defined by it. Gage does not question the gender conventions that differentiate family roles. Yet she does insist, contrary to separate spheres conventions, that wives work just like their husbands do. She then draws on those very same gender conventions to insist that wives' work is as valuable as their husbands'. The net result is an egalitarian impulse more concerned with the gendered *valuation* of women's household labor than with its gendered *differentiation*. This egalitarian impulse, harnessed to an institutional critique of marital status law, produced the antebellum feminist claim that wives were entitled to joint rights in marital property.

In demanding joint property rights in marriage, feminists thus drew upon the gender norms of antebellum culture, transforming them without wholly transcending them. Of course, one can debate whether the gender norms informing joint property advocacy empowered or constrained it as a feminist politics, but it is important to observe that this question *can* be debated. For while the movement's immersion in the culture of antebellum America produced an equal rights discourse that accepted important aspects of the gendered division of labor, it also produced an equal rights discourse that was confident of the value of "women's work." Indeed, the critical power of joint property discourse lies in precisely this paradox. As we will see, it was the movement's immersion in the gender conventions of its era that enabled it to challenge gendered aspects of the market ideology that would come to order

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and embodies an implicit critique of norms of possessive individualism).

Indeed, as the modern movement has struggled to define its agenda, there have been numerous debates about whether and how traditional gender norms shape feminist politics. The so-called "sameness/difference" debate and related arguments over "protectionism" raise such questions, most prominently in matters concerning the treatment of pregnancy in the workplace, and efforts to regulate pornography. But the similar questions recur, less prominently, in debates about child custody, surrogacy, statutory rape, "date rape," and sexual harassment, as well. While it is conventionally assumed that feminist theory has failed as such if it is "contaminated" by the gender norms of its culture, some feminist theorists contest this assumption. Cf. Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 203-24 (1992); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987).

130. Letter from Frances D. Gage to Gerrit Smith, *supra* note 100, at 843.

the relations of the sexes with the demise of an openly hierarchical regime of marital status law.

## II. JOINT PROPERTY ADVOCACY IN THE ANTEBELLUM ERA

It is difficult to understand joint property discourse or to appreciate its historical significance without considering how usage of the word “earnings” has changed over time. In the 1850’s, when feminists argued that a wife was entitled to rights in her “earnings,” they were not necessarily discussing her salary or wages; often, they meant the material gains that accrued from the work a wife performed. For example, when Frances Gage sought to explain why married women and slaves were “paupers,” she pointed to “[t]he law which gives the husband and the master entire control of the person and the *earnings* of each.”<sup>131</sup> Gage, of course, understood that married women and slaves did not commonly receive salary or wages; she was arguing that the law expropriated the value of the work they performed—or, as she put it, “the earnings of each.” Her usage of “earnings” dates from an era when it was still possible to discuss the value of labor in terms that did not refer to its market price.<sup>132</sup>

When Gage and her contemporaries in the antebellum woman’s rights movement argued about the ownership of wives’ earnings, they did not take the labor market as the central point of reference for understanding the value of work. Indeed, they paid relatively little attention to the fact that wives’ labor was, in the market idiom that now defines its marginality, “unpaid labor.”<sup>133</sup> Yet the movement was cognizant of the ways in which a growing labor market had begun to affect social perceptions of women’s household labor. In important respects, the joint property demand contested emergent market-based perceptions of women’s work.

In this Part, I explore the social dynamics of joint property advocacy. I first consider the arguments feminists advanced for the claim and their reasons for embracing this reform strategy, and then examine the movement’s campaign to enact a joint property regime in New York state in the decade before the Civil War.

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131. *Id.* (emphasis added).

132. Jeanne Boydston traces similar transformations in the meaning of “industry” during the antebellum period: “The purpose of industry was no longer conceived of as simple economic independence, but rather as profit and wealth. . . . In a sharp reversal of imagery from the earlier artisan/yeoman culture, individual profitability became the chief evidence of the value of an undertaking to the good of the community.” BOYDSTON, *supra* note 36, at 67-68.

133. In antebellum feminist discussions of wives’ household labor, I have only found one reference to such work as “unpaid.” See *supra* text accompanying note 110 (Sarah Grimké discusses wives as “unpaid housekeepers & nurses”). By contrast, in the 1870’s feminists often discuss wives’ labor as “unpaid labor,” and are quite self-conscious about the fact that wives earn no money. See *infra* notes 461-67 and accompanying text.

### A. *Critical Premises of the Joint Property Claim*

The records of antebellum woman's rights conventions provide rich evidence of the arguments the movement used to justify its demand for joint property rights in marriage. Feminists argued that wives' economic dependence on their husbands was a condition imposed by the state through its marital property laws and consequently was a condition that could and should be remedied by law. Reconstructing the movement's analysis of how the state subordinated women in marriage is relatively easy. It is more difficult to determine why the movement sought relief for wives in the particular form it did.

With this question in mind, I consider the strategic concerns informing joint property advocacy, exploring some reasons why the woman's rights movement may have embraced a joint rather than separate property regime as the best method of emancipating wives from economic dependence on their husbands. This inquiry reveals that the movement's effort to emancipate wives' household labor in the form of a joint property right in marital assets—rather than a separate property right in labor that might be exchanged for wages—was a strategic choice, informed by judgments about the valuation of wives' work in both the market and family. Considered from this vantage point, joint property discourse can be read as an early feminist analysis of the conditions of women's work in the emergent market economy.

#### 1. *Exposing the Gendered Structure of Property Law*

The records of the First National Woman's Rights Convention held in 1850 at Worcester, Massachusetts, provide a surprisingly detailed account of the movement's early marital property demands. The convention's resolutions, presented by Wendell Phillips, opened with a demand for woman suffrage and closed with a vow to remember the "million and a half of slave women at the South, the most grossly wronged and foully outraged of all women."<sup>134</sup> The intervening planks prominently featured this call for marital property reform:

*Resolved*, That the laws of property, as affecting married parties, demand a thorough revisal, so that all rights may be equal between them;—that the wife may have, during life, an equal control over the property gained by their mutual toil and sacrifices, be heir to her husband precisely to the extent that he is heir to her, and entitled, at her death, to dispose by will of the same share of the joint property as he is.<sup>135</sup>

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134. 1850 WORCESTER CONVENTION, *supra* note 93, at 15-17.

135. *Id.* at 15.

The joint property regime proposed at Worcester resembled the community property regimes of civil law jurisdictions; indeed, it was most likely modeled on Louisiana's.<sup>136</sup> But the proposal's similarity to existing community property regimes should not obscure the fact that woman's rights advocates had adapted civil law precedent to their own ends. For example, during this period, Louisiana recognized a marital community consisting in "the produce of the reciprocal industry and labour of both husband and wife,"<sup>137</sup> but the state made the husband "head and master" of the partnership of gains, allowing him to administer and even alienate community property without his wife's permission.<sup>138</sup> During this same period, Louisiana prohibited a wife from conducting business without her husband's consent, even with regard to her separate property.<sup>139</sup> By contrast, the resolution feminists advanced at

136. Some portion of the antebellum woman's rights community was aware of Louisiana's community property law at an early date. Harriet Martineau called attention to it in *Society in America*, criticizing the common law marital property rules and endorsing the notion of wives sharing marital property. See HARRIET MARTINEAU, *SOCIETY IN AMERICA* 297 (Seymour M. Lipset ed., 1968) (1837). Sarah Grimké in turn quoted Martineau's observations in *Letters on the Equality of the Sexes*. See SARAH M. GRIMKÉ, *LETTERS ON THE EQUALITY OF THE SEXES AND THE CONDITION OF WOMAN* 81 (Lenox Hill 1970) (1838). Because Louisiana law allowed wives to hold separate property in marriage (dotal property in which the husband had a marital interest and paraphernal property over which the wife had complete control), LA. CIV. CODE arts. 2315, 2317, 2327, 2329, 2330, 2360, 2361 (New Orleans, J.C. De St. Romes 1825), Louisiana precedent was cited to illustrate the feasibility of common law reform prior to passage of New York's Married Woman's Property Act in 1848, see WARBASSE, *supra* note 6, at 288 & n.1.

After woman's rights activists introduced their joint property proposal in the 1850's, they invoked Louisiana precedent in its defense. See *infra* text accompanying note 181; PROCEEDINGS OF THE SEVENTH NATIONAL WOMAN'S RIGHTS CONVENTION, HELD IN NEW YORK CITY, AT THE BROADWAY TABERNACLE, ON TUESDAY AND WEDNESDAY, NOV. 25TH AND 26TH 1856, at 14 (New York, Edward O. Jenkins 1856) [hereinafter SEVENTH NATIONAL CONVENTION] (remarks of Ernestine L. Rose). It is unclear whether antebellum feminists were aware that Louisiana vested exclusive management of the community in the husband, cf. PROCEEDINGS OF THE 1851 AKRON CONVENTION, *supra* note 96, at 13 (Maria L. Giddings erroneously describing Louisiana law), but feminists clearly understood this in the postbellum era. Compare *infra* text accompanying note 181 (in 1853, William Channing invokes Louisiana law as precedent for the joint property claim) with *Civil Code of Louisiana*, REVOLUTION, Sept. 23, 1869, at 1-2 (reproducing, with emphasis, Louisiana civil code provisions vesting exclusive management of community in husband).

137. LA. CIV. CODE art. 2371 (New Orleans, J.C. De St. Romes 1825).

138. LA. CIV. CODE art. 2373 (New Orleans, J.C. De St. Romes 1825).

139. See LA. CIV. CODE art. 124 (New Orleans, J.C. De St. Romes 1825). *But cf. id.* arts. 125-29 (vesting legal capacity in wives to act without husbands' consent in limited circumstances).

Other American community property jurisdictions of the era had similar laws. Under the community property law adopted by the Republic of Texas in 1840, a husband could manage a wife's separate property and dispose of the community property as he wished. Act of Jan. 20, 1840, §§ 3-4, 1840 Republic of Texas Sess. Laws 4. After Texas was admitted to statehood, it maintained this legal framework. Act of Mar. 13, 1848, ch. 79, §§ 2-3, 1848 Republic of Texas Sess. Laws 77-78. See generally KATHLEEN E. LAZAROU, *CONCEALED UNDER PETTICOATS: MARRIED WOMEN'S PROPERTY AND THE LAW OF TEXAS 1840-1913*, at 46-49 (1986) (discussing husband's powers over separate and community property under Spanish marital property law, the antecedent of early Texas law).

The community property law adopted by California in 1850 had a similar history and content. See Act of Apr. 17, 1850, ch. 103, §§ 6, 8-9, 1850 Cal. Stat. 254 (assigning husband "management and control" of wife's separate property for duration of marriage, along with "entire management and control of the common property, with the like absolute power of disposition as of his own separate estate," qualifying husband's discretion over wife's separate property by requiring wife's signature before her separate property could be alienated, and providing that wife request court appointment of trustee if her husband mismanaged her property); Act of Apr. 10, 1850, ch. 72, § 2, 1850 Cal. Stat. 177 (requiring consent of husband in order for wife to make valid will); see also Prager, *supra* note 17, at 25-33 (mix of Spanish and common law influences on 1850 California statutes). During California's first decade of statehood, a husband's rights

Worcester emphasized that husband and wife were to have “an equal control” over marital property during life and the same testamentary and inheritance rights at death. As this language and subsequent discussions make clear, the group intended to give wives meaningful control of marital assets—even in cases of spousal conflict. (At a Rochester convention in 1853, Frederick Douglass inquired about circumstances where husband and wife disagreed; Antoinette Brown Blackwell responded that “[l]aw must regulate differences where there is not true union, and as a business copartnership, if the matter could not be adjusted between themselves . . . [it would] be referred to a third person.”<sup>140</sup>) Thus, in the 1850’s, the convention endorsed a principle of joint management that would not be adopted in American community property jurisdictions until the late 1960’s and early 1970’s.<sup>141</sup> Feminists quite self-consciously justified their departure from contemporary community property precedents with a theory of marital contribution, demanding that a wife share with her husband “an equal control over the property gained by their mutual toil and sacrifices.”<sup>142</sup>

The group described the theory underlying the joint property claim in more detail at the following year’s convention in Worcester. There, it was resolved:

That since the economy of the household is generally as much the source of family wealth as the labor and enterprise of man, therefore the wife should, during life, have the same control over the joint earnings as her husband, and the right to dispose at her death of the same proportion of it as he.<sup>143</sup>

Where proponents of the earliest married women’s property acts had argued that wives should be allowed to hold assets they brought to or acquired during marriage as separate property in order to *protect women* from improvident, profligate, or intemperate husbands,<sup>144</sup> those gathered at the Worcester

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in community property were so extensive that the wife’s interest was characterized as a “mere expectancy.” *Id.* at 35 (quoting *Van Maren v. Johnson*, 15 Cal. 308, 311 (1860)). For continuing discussion, see *id.* at 35-39.

140. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 587. The business partnership analogy Blackwell employed was frequently invoked in discussions of a joint property regime. See *infra* note 207 (remarks of Ernestine Rose); 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 711 (Tenth National Woman’s Rights Convention, Cooper Institute, New York, May 10-11, 1860) (remarks of Elizabeth Jones); cf. Harriet S. Daggett, *Is Joint Control of Community Property Possible?*, 10 TUL. L. REV. 589, 602 (1936) (advocate of joint control of community property invoking commercial partnership analogy in 1930’s).

141. See GLENDON, *supra* note 4, at 123. For example, it was not until 1973 that California granted equal management rights over community property to spouses regardless of the source of the earnings. See Prager, *supra* note 17, at 73.

142. 1850 WORCESTER CONVENTION, *supra* note 93, at 15.

143. THE PROCEEDINGS OF THE WOMAN’S RIGHTS CONVENTION, HELD AT WORCESTER, OCTOBER 15TH AND 16TH, 1851, at 18 (New York, Fowlers and Wells 1852) [hereinafter 1851 WORCESTER CONVENTION].

144. See, e.g., BASCH, *supra* note 4, at 115, 153. Arguments for protecting wives from profligate or intemperate husbands were distinct from, but ultimately compatible with, arguments for reform that stressed the need to protect some assets from a husband’s creditors in times of economic instability. See *id.* at 122-

conventions situated the argument for joint property rights on very different grounds. In their view, marital property reform was not about protecting economically dependent women from men, but instead was about empowering economically productive women to participate equally with men in managing assets both had helped to accumulate. The joint property claim thus repudiated the rhetoric of protection in a bid for equal governance rights in the household, much as the movement's suffrage arguments repudiated claims of virtual representation in a bid for equal governance rights in the polity.<sup>145</sup>

As the records of the Worcester convention suggest, feminists had adopted a particular critical perspective on the law of property. They argued that title to family assets should be redistributed because the prevailing distribution of property in marriage was illegitimate, reflecting norms of gender status rather than individual desert. In making their case, joint property advocates attacked the premises of protectionism and illustrated how the state transformed economically productive wives *into* economic dependents. In a lengthy address before the convention, Clara Nichols contended "that the law which alienates the wife's right to the control of her own property, her own earnings, lies at the foundation of all her social and legal wrongs."<sup>146</sup> Nichols insisted that it was not "only the wives of reckless and improvident husbands who suffer under its operation"; the common law was "an unjust law of general application . . . even more fruitful of suffering to the wives of what are called *good* husbands."<sup>147</sup> Marital status doctrines injured wives legally, by

25; *id.* at 125 (noting that "interests of debtors and married women meshed. The committee did not plead for expansion of the wife's powers; rather it urged the better insulation of family assets from creditors in order to protect the wife's domestic role just as it was.").

145. See 1850 WORCESTER CONVENTION, *supra* note 93, at 16 (resolutions demanding a "*Partnership* in the labors, gains, risks, and remunerations of productive industry . . ." and "[a] *co-equal share* in the formation and administration of law . . ."). With this understanding, Wendell Phillips deftly transformed the movement's joint property demands into an argument for the vote:

Often by her efforts, always by her economy, [a wife] contributes much to the stock of family wealth, and is therefore justly entitled to a voice in the control and disposal of it. Neither common sense nor past experience encourage her to trust the protection of that right to the votes of man. . . .

Make the case our own. Is there any man here willing to resign his own right to vote, and trust his welfare and his earnings entirely to the votes of others?

WENDELL PHILLIPS, FREEDOM FOR WOMEN: SPEECH OF WENDELL PHILLIPS, ESQ., AT THE CONVENTION HELD AT WORCESTER, OCTOBER 15 AND 16, 1851, at 10 (published text of speech in *Woman's Archives*, Schlesinger Library, Radcliffe College, Cambridge, Mass.). In attacking the logic of protectionism, Phillips spoke as a man to men. Ernestine Rose offered an even more emphatic rendering of this argument, speaking as a woman to women, at the movement's Tenth National Convention. See TENTH NATIONAL CONVENTION, *supra* note 126, at 53:

Talk about "protection"! Who is it of whom woman needs to be afraid? Who is it against whom she requires protection? . . . How, then, can man be the protector of woman? You might as well appoint a wolf to protect the lamb. Woman alone must protect herself, or she will never be protected. (Applause.) All history demonstrates that a human being is never safe in the hands of another.

146. 1851 WORCESTER CONVENTION, *supra* note 143, at 66 (emphasis omitted).

147. *Id.* Nichols was in fact speaking to opponents of marital property reform, and to *feminist* proponents of marital property reform who offered protectionist arguments on its behalf. During the antebellum period, the *Lily*, published by Amelia Bloomer, featured stories that fused temperance and



depriving them of rights to the value of their labor; but, as Nichols emphasized, the law also injured wives socially, by defining them as beneficiaries of their husbands' largesse. Nichols protested this dignitary affront in a mocking account of the doctrines of service and support:

Our legislators tell us it is right to give the legal control of our earnings to the husband, because "in law" he is held responsible for our support, and is obliged to pay our debts(?), and *must have our earnings to do it with!* Ah, I answer, but why don't the State . . . release to us the "*consideration*" of that support—our earnings in the property which he leaves at his death?<sup>148</sup>

As Nichols described it, the marriage bargain was no bargain at all, but a coerced exchange that transformed an economically productive individual into a life-long dependent who required a husband's "support."

At first glance, the analysis of marital property law the movement advanced seems strangely modern; yet the movement's critical acuity is more explicable if one considers the law prevailing at the time of the Worcester conventions. In 1851 no jurisdiction had recognized a wife's right in earnings of any sort; in all but a narrow class of circumstances, the common law doctrine of marital service vested title to the proceeds of a wife's labor in a husband's name.<sup>149</sup> If a married woman worked for pay in or out of the home, it was the husband's prerogative to collect her wages.<sup>150</sup> Wives frequently had no say in money decisions in the family,<sup>151</sup> and if widowed were treated as an "encumbrance" on the estate.<sup>152</sup> Even in the best of marriages, where husband and wife worked and shared together, the doctrine of marital service imposed itself: because the law categorically defined wives as dependents, it effaced their contribution to the family economy and posed

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woman's rights concerns. See BASCH, *supra* note 4, at 172-73. "In the typical temperance tale, the husband squandered all the couple's resources. Usually, even as creditors clamored at the door of his home, he indulged 'in the wine cup to drown his care.'" *Id.* at 173 (quoting *The Governess*, LILY, May 1, 1849, at 33).

148. 1851 WORCESTER CONVENTION, *supra* note 143, at 70.

149. The first modern earnings statutes were enacted in Massachusetts in 1855 and in Maine in 1857. See *infra* note 248 and accompanying text. It should be noted, however, that some states had procedures for declaring wives who ran independent businesses "sole traders," and for petitioning courts for emancipation of a wife's earnings where a husband abandoned or separated from his wife. See SALMON, *WOMEN AND THE LAW OF PROPERTY*, *supra* note 16, at 44-53 (sole traders); *id.* at 53-56 (agents of necessity); WARBASSE, *supra* note 6, at 283 n.5, 284-85.

150. See, e.g., Dublin, *supra* note 39 (discussing practice with respect to outwork in antebellum north); cf. Boydston, *supra* note 6, at 155-58 (discussing significance of claims on marital property for working poor).

151. See Viviana A. Zelizer, *The Social Meaning of Money: "Special Monies,"* 95 AM. J. SOC. 342, 355 (1989) (in antebellum America, "[a] woman might handle the housekeeping expenses, but 'serious money' was a man's currency"). Working-class wives seemed to have greater control in administering housekeeping expenses, but they did not necessarily have discretion to determine how the money was to be spent. *Id.*; see also *supra* note 126 (Susan B. Anthony discussing husbands' control over family purse, as manifested by wives' inability to secure even small sums required to pay temperance society dues).

152. See *infra* note 161 and accompanying text.

a dignitary affront in a culture that celebrated labor as the source of autonomy. Indeed, of all the ways in which a wife might follow Gerrit Smith's prescription to "get property," work simply was not one of them.

For this reason, woman's rights advocates were exquisitely sensitive to the legal status of a family's property holdings. When, at an 1852 convention in Westchester, Pennsylvania, a participant suggested that husbands follow the tradition of Martin Luther and will "the whole property of their joint industry and economy to the wife," Lucretia Mott quickly rejected the proposal, insisting that such an arrangement would

only prove[] the degrading relation she bore to her husband. There is no recognition of her equal right to their joint earnings. While the wife is obliged to accept as a gift that which in justice belongs to her, however generous the boon, she is but an inferior dependent.<sup>153</sup>

As the antebellum movement saw it, law penetrated family dealings in a fashion that only legal change could rectify.

Joint property advocacy reflected a sophisticated grasp of law. Advocates recognized that the value of wives' labor was embedded in property to which a husband held title, and turned this critical perception into an argument for redistribution of marital assets. But they were not solely concerned with demonstrating the justice of the redistribution they proposed. In developing their case for joint property rights, feminists emphasized that the law of marital property had extralegal force. The law of marital property did not merely impose dependency by divesting wives of rights in their labor; it defined wives as dependents who were "supported" by their husbands, thereby obscuring the fact that wives' labor *had* value.<sup>154</sup>

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153. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 359 (Woman's Rights Convention, Westchester, Pennsylvania, 1852). At a convention held the following year in Rochester, New York, Matilda Joslyn Gage explained the movement's demand for joint property rights in similar terms. She argued that the manner in which the state allocated title to family property would define a wife as either a dependent or a productive member of the family:

A wife has no management in the joint earnings of herself and her husband; they are entirely under control of the husband, who is obliged to furnish the wife merely the common necessities of life; all that she receives beyond these is looked upon by the law as a favor, and not held as her right.

*Id.* at 579. Clara Nichols eloquently expressed the dignitary concerns underlying the movement's critique of title when she concluded her speech by emphasizing, "We wish to feel, and have [our husbands] feel, that our own good right hands have won for them . . . the same pleasure and happiness which they confer on us by benefits given." Her remarks elicited "[g]reat cheering" from the audience. 1851 WORCESTER CONVENTION, *supra* note 143, at 69.

154. *Cf. supra* text accompanying notes 100, 148, and 153 (remarks of Frances Gage, Clara Nichols, and Lucretia Mott) and *supra* note 153 (remarks of Matilda Gage and Clara Nichols).

## 2. *Joint Property as a Strategy for Economic Emancipation*

In demanding joint property rights, feminists reasoned from considerations of principle *and* pragmatism, seeking to reform the law in a way that would make a concrete difference in women's lives. A resolution of the 1851 Worcester convention explained the movement's guiding assumption:

*Resolved*, That so weighty is the influence of Property in modern society, that we cannot reasonably look for the emancipation of one sex or the elevation of the other, while Woman occupies her present position in regard to property—a mere dependent in too many cases on the bounty and care of man.<sup>155</sup>

A variety of strategic considerations informed the demand for joint property rights. Feminists sought to reform the law of marital property in a way that would benefit the largest possible class of women, and they coordinated their plans for revising the law of marital property with other reforms intended to improve women's socioeconomic status.

Movement leadership understood that the initial phase of marital property reform, which conferred on wives the right to hold property in marriage,<sup>156</sup> would do little in most cases to alleviate wives' economic dependency on their husbands. Ernestine Rose had canvassed New York for more than a decade agitating for passage of its 1848 married woman's property act,<sup>157</sup> yet she offered a blunt assessment of its limitations:

According to a late act, the wife has a right to the property she brings at marriage, or receives in any way after marriage. Here is some provision for the favored few; but for the laboring many, there is none. The mass of people commence life with no other capital than the union of heads, hearts and hands. To the benefit of this best of capital, the wife has no right. If they are unsuccessful in married life, who suffers more the bitter consequences of poverty than the wife? But if successful, she can not call a dollar her own.<sup>158</sup>

As Rose analyzed it, the legal and customary allocation of title in a separate property system left a wife who spent her life working for the family unable

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155. 1851 WORCESTER CONVENTION, *supra* note 143, at 17; *cf. id.* at 65 (remarks of Clara Nichols) ("We claim the full development of our energies by education, and legal protection in the control of all the issues and profits of ourselves, called *property*.").

156. *See supra* text accompanying notes 18-19.

157. *See* SUHL, *supra* note 61, at 55-65.

158. 1851 WORCESTER CONVENTION, *supra* note 143, at 40. This polemic was something of a "stump speech" for Rose, which she gave on numerous occasions in the 1850's. *See, e.g.,* SEVENTH NATIONAL CONVENTION, *supra* note 136, at 74-75; *cf. infra* note 254 (Rose assessing New York's 1860 earnings statute from similar perspective).

to “call a dollar her own”—holding nothing but a paltry life-interest in dower at her husband’s death.<sup>159</sup>

The critique yielded two reform strategies which woman’s rights advocates pursued, alternately and simultaneously, in the ensuing years: the claim for joint property rights during marriage, and for equal testamentary and inheritance rights in the “joint estate” at death.<sup>160</sup> As Rose’s audience well appreciated, a widow’s common law dower (a life estate in one-third of a husband’s real property) provided no security against destitution.<sup>161</sup> But Rose did not demand better protection for widows; she sought recognition of their contribution to the estate partitioned at a husband’s death:

Let married women have the same right to property that their husbands have; for whatever the difference in their respective occupations, the duties of the wife are as indispensable and far more arduous than the husband’s. Why then should the wife, at the death of her husband, not be his heir to the same extent that he is heir to her?<sup>162</sup>

By demanding simple equality of inheritance rights—that is, claiming for the wife a right of survivorship in the husband’s property akin to his estate by curtesy in hers—woman’s rights advocates cannily employed formal reasoning to buttress a wife’s claim to a “husband’s” property at death.<sup>163</sup>

159. Her remarks continue:

The husband may will away every dollar of the personal property, and leave her destitute and penniless, and she has no redress by law. And even where real estate is left, she receives but a life-interest in a third part of it, and at her death, she cannot leave it to any one belonging to her, it falls back even to the remotest of his relatives. This is law, but where is the justice of it?

1851 WORCESTER CONVENTION, *supra* note 143, at 40. For a recent analysis of the gendered operations of the title system, see Isabel Marcus, *Locked In and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 BUFF. L. REV. 375 (1988-1989).

160. See, e.g., *supra* text accompanying notes 135 and 143 (resolutions of 1850 and 1851 Worcester conventions).

161. For women whom the movement addressed, the question of a wife’s inheritance rights in the “common” estate was a pressing and practical one. The movement emphasized its inheritance reform demands at antebellum conventions, and they reliably elicited an enthusiastic response from the audience. At an 1853 meeting held in New York, Rose treated her audience to an itemized reading of the paltry articles of personal property allowed to a widow by the state’s statute of distribution, the enumeration punctuated by “hissing,” “[g]reat laughter,” and tumult from the audience. 1853 BROADWAY TABERNACLE CONVENTION, *supra* note 103, at 48-51. At the same convention Frances Gage “caused a great deal of amusement among the audience by reading a will, . . . interchanging the names [of husband and wife]”: “Thus the testatrix left to . . . her husband, \$100, 40 acres of wild land in Illinois, and their bed, *as long as he remained her widower, &c., &c.*” *Id.* at 63-64; see also SEVENTH NATIONAL CONVENTION, *supra* note 136, at 75 (remarks of Ernestine Rose) (mocking notion of widow’s dower as “an encumbrance” and protesting widow’s share of real and personal property as “too degrading even to talk about”); 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 669-70 (Proceedings of the [Eighth] National Woman’s Rights Convention (New York, May 13-14, 1858)).

162. 1851 WORCESTER CONVENTION, *supra* note 143, at 39.

163. The movement’s demands for inheritance reform took various forms. See *infra* text accompanying notes 223-24 (describing evolution of claim in New York campaign prior to Civil War). Sometimes advocates argued that a wife should have a right of survivorship in the “joint” assets of the estate. See, e.g.,

If the joint property claim had strategic purpose within the group's marital property reform agenda, it also played a key role in a larger, sociopolitical agenda for women's emancipation, which, as Paulina Wright Davis, president of the First National Woman's Rights Convention, urged, required "changes . . . in the intimate texture of all societary organizations," and "a conforming re-organization of all social, political, and industrial interests and institutions."<sup>164</sup> Abby Price, the main speaker at this 1850 convention, presented its three key demands:

1. That women ought to have equal opportunities with men for suitable and *well compensated* employment.
2. That women ought to have equal opportunities, privileges, and *securities* with men for rendering themselves *pecuniarily independent*.
3. That women ought to have equal legal and political rights, franchises, and advantages with men.<sup>165</sup>

Ranked in a pivotal position, between demands for equality in the economic and political spheres, was the demand for "pecuniary independence"—recalling the communitarian prescription for women's emancipation. As Price elaborated the concept, "pecuniary independence" meant, first, equal employment and educational opportunity that would alleviate economic pressure driving women to marriage. (She stated her case succinctly: "Very few girls can acquire enough money to compete with the aspirants of the other sex, and so they must submit to their destiny. . . . All the education she is allowed, all the resources opened before her, have for their object *marriage*, that is to say, a husband."<sup>166</sup>) But Price invoked "pecuniary independence" in a second sense,

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*infra* text accompanying note 212. (This claim approximated a husband's marital rights; a husband owned a wife's personal property outright, and at her death inherited her real property—although his right of curtesy was a life estate conditional upon birth of live issue.) On other occasions, however, the movement contended that a couple's "joint" assets should be divided at the death of a spouse. *See, e.g., infra* text accompanying note 220; *cf. infra* note 212 (discussing civil and common law precedents for movement's inheritance claims).

164. 1850 WORCESTER CONVENTION, *supra* note 93, at 7.

165. *Id.* at 21.

166. *Id.* at 27-28. Ernestine Rose made the same point in less delicate terms. She argued that because women were paid so much less than men for performing the same work, women were forced to marry; under these conditions, Rose insisted, marriage was tantamount to prostitution: "What was left for her but to sell herself for food and clothing either in matrimony or out of it; and it would require a wise head to determine which was the worse." *Woman's Rights Convention in New York*, THE LIBERATOR, Dec. 5, 1856, at 196; *cf. id.* (remarks of Henry Blackwell) ("Half the marriages which [sic] were now contracted would not be, were women pecuniarily independent."). Lucy Stone also pointed to similarities between marriage and prostitution. *See* 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 166 (National Woman's Rights Convention, Oct. 17-18, 1855, Cincinnati, Ohio) ("Is it a wonder that women are driven to prostitution? . . . Woman must marry for a home, and you men are the sufferers by this; for a woman who loathes you may marry you because you have the means to get money which she can not have.").

The resolutions of the Massillon, Ohio convention (1852) illustrate the organic relation of feminist demands for the "pecuniary independence" of single and married women:

*Resolved*, That in the general scantiness of compensation of woman's labor, the restrictions imposed by custom and public opinion upon her choice of employments, and her opportunities of earning money, and the laws and social usages which regulate the distribution of property

here contemplating legal reform necessary to emancipate women from economic dependence *in* marriage:

I say, then, that we are cramped, dwarfed, and cowed down, for the want of pecuniary independence. Is not this a miserable doctrine, that woman is subject to the man, that she must, if married, ask her husband to dole out her charities for her . . . ? . . . [G]ive her her right to the disposal of her own property, to the disposal of her own earnings. . . . The rightfulness of this is beginning to be felt and acknowledged. Laws have been recently passed by many of the States, giving to wives the right to control property owned before marriage; and *would it not be equally just to give them also some well protected rights regarding what they may save and acquire by a faithful discharge of their duties as wives and heads of families.*<sup>167</sup>

When coupled with the demand for “equal opportunities . . . for suitable and well compensated employment,” the joint property demand thus completed the antebellum agenda for woman’s economic emancipation: an end to the economic necessities that drove women to marriage, and relief from the condition of economic dependency they endured within it.

Because there is ample evidence that the joint property claim was the product of strategic deliberation, it seems appropriate to scrutinize more carefully the movement’s reasoning in advancing the claim. What kinds of social judgments was the movement making when it adopted this particular tactic for securing women’s “pecuniary independence”?

First, while the movement sought to enhance education and employment opportunities so that women had greater freedom of choice in deciding whether and when to marry, the movement assumed that in the course of things most women would marry. From this it followed that in order to redress women’s economic subordination it was necessary to reform the institution of marriage. Unlike the communitarians who inspired them, however, antebellum woman’s rights advocates did not insist on collectivizing the work performed in the private household. Instead, they sought to alleviate wives’ economic dependency without changing the organization of work in marriage. A basic premise of the joint property claim was that husbands and wives had *different* roles in the family economy. So far as antebellum convention records reflect,

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as between men and women, have produced a pecuniary dependence of woman upon man, widely and deeply injurious in many ways; and not the least of all in too often perverting marriage, which should be a holy relation growing out of spiritual affinities, into a mere bargain and sale—a means to woman of securing a subsistence and a home, and to man of obtaining a kitchen drudge or a parlor ornament.

*Id.* at 817.

167. 1850 WORCESTER CONVENTION, *supra* note 93, at 28 (emphasis added).

the movement neither attacked nor endorsed the division of labor in the family.<sup>168</sup>

While the movement did not attempt to change wives' productive role in the family economy, it did advocate revising the laws governing title to family assets. To appreciate the sense of the movement's strategy, it is helpful to distinguish between social relations concerned with producing wealth and those concerned with distributing wealth. Marital property laws, like systems of taxation, are part of the social relations of distribution;<sup>169</sup> marriage laws allocate wealth in a fashion that is distinct from, although entangled with, social relations in which wealth is produced. For example, if a wife kept boarders, the common law gave her husband property rights in the income her work generated, as well as the economic benefit of the same services provided directly to family members; the wife received subsistence or "maintenance" in return, a support allowance which she received as her husband's dependent and at his discretion. Should her husband die, the woman might continue to perform the same work for boarders and family members, now taking its cash and in-kind "profits" in her own right. Feminists demanding joint property rights wanted to give the woman access to such "earnings" *during* marriage. Thus, while the movement's strategy for reforming marriage did not challenge wives' role in the relations of production, its demand for joint property rights was an ambitious effort to reform "the laws and social usages which regulate the distribution of property as between men and women, [which] have produced a pecuniary dependence of woman upon man."<sup>170</sup>

In some of its demands for marital property reform, the movement advocated changing the social relations of distribution to give wives the same rights as their husbands; for example, it claimed for wives the right to hold property in marriage (like their husbands had) and, later, property rights in the

168. The antebellum movement did often object to gendered constraints on women's employment, *cf. supra* note 125 and accompanying text; *supra* note 166; *infra* note 199; *infra* text accompanying notes 184 and 188; but in this period no similar challenge was directed to the division of labor in the family. *Cf. supra* notes 124-26 and accompanying text (discussing attitudes of antebellum woman's rights activists toward gender difference).

169. Relations of distribution include, but are not limited to, laws and customs governing the ownership of personal, family, and business assets (including their transfer by sale or gift, and at death); taxes; and various forms of public regulation (*e.g.*, environmental laws, welfare laws, and the law of contract, torts, and crimes). One could easily expand this account of the relationships through which social resources are distributed. For example, many facets of the employment relation—including various modes of compensation and the laws concerning it—can be analyzed as part of the relations of distribution and production both. As Joan Acker argues, relations of production and distribution interact in a complex and multidirectional fashion. *See generally* Acker, *supra* note 35. Acker traces the analytical distinction between relations of production and distribution to the work of Karl Marx, who treated "the structure of distribution [as] entirely determined by the structure of production." *Id.* at 477 n.16 (quoting Karl Marx, *Introduction to a Critique of Political Economy*, in *THE GERMAN IDEOLOGY* 135 (C.J. Arthur ed., 1970)). Acker offers a more complex model of the relation between modes of production and distribution, attending especially to the role of gender relations in shaping each.

170. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 817 (resolutions of Massillon, Ohio convention, 1852) (resolution quoted in full *supra* note 166).

wages they earned (like their husbands had). But if one focuses on the movement's advocacy concerning wives' household labor, a different picture emerges. Just as the movement did not propose that married women obtain work like their husbands', it did not urge that wives' family labor be compensated with a wage—like their husbands' work increasingly was. When the movement demanded that wives' labor be emancipated in the form of a joint right in marital property, it was seeking *gender-specific* relief for women.<sup>171</sup>

When joint property advocacy is considered from this perspective, one question immediately arises. Why didn't the movement demand that wives' household labor be emancipated in the form of a separate property right that might be exchanged for a wage—a demand for “equality of treatment” seemingly more consistent with the movement's demand for “self-ownership”?

Considerations of tradition and practicality may have exerted a shaping force here. Traditionally, the law regulated marriage as a relation of structured reciprocity; emancipating wives' labor in the form of a separate property right would have been deeply at odds with this tradition, and difficult to administer as well.<sup>172</sup> But there were additional reasons why woman's rights advocates adopted a joint property agenda. Antebellum convention records provide intriguing evidence that the movement's effort to emancipate wives' domestic labor by means of a joint rather than separate property right reflected considerations of both principle and strategy. While the record of such deliberations is fragmentary, enough evidence has survived that it is possible

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171. Joint property advocates contended that wives were performing valuable labor, for which they were entitled to compensation; yet to provide wives “equality of treatment,” the movement demanded compensation for this labor in a form quite different from the compensation husbands received. The joint property regime feminists proposed was gender-neutral on its face; however, considered in social context, it perpetuated gender-specific structures in the relations of distribution. By advocating that wives' family labor be emancipated in the form of a joint, rather than separate, property right, the movement was thus endeavoring to reform gendered aspects of the relations of distribution in a gender-specific fashion.

172. Traditionally, intrafamilial property rights were ordered by means of a body of status law, which delimited the extent to which parties could (re)define their relations by contract. To emancipate wives' family labor in the form of a separate property right—as labor commodified and compensated by a wage—would have imposed contractual ordering on the marriage relationship in ways that would give disturbingly literal meaning to the “marital bargain.” If spouses were to bargain over their contribution to the family economy and corresponding rights in family assets, norms of possessive individualism would come to structure the marriage relationship. To say the least, expanding the market ethic in this fashion would threaten core conceptions of the marriage relationship. Cf. Marjorie M. Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 241-43 (1982) (discussing why contract has traditionally been deemed inappropriate governing tool for marriage).

Furthermore, administration of such a marital property regime would have posed enormous practical difficulties. The common forms of wives' labor were not personal or separate, but practically and ideologically entangled with family life. Wives performed much of their unpaid labor and even their income-producing work on a collaborative basis, with family members and others (e.g., boarding, dairying, cooking, caregiving, cleaning, laundering, sewing); the work frequently involved goods and tools to which a husband had title, and much of it was of a character not conventionally measured in economic terms. Then, as now, compensating such work with a wage was possible, but would not have been simple. Cf. *id.* at 291-307.



to identify two concerns underlying the movement's decision to emancipate wives' family labor by means of a joint property right.

For some in the woman's rights movement, joint property ownership seems to have represented a vision of equality in marriage that was rooted in values of community and sharing, rather than the individualism of the liberal tradition. Today we might describe these advocates as espousing a "relational" or communitarian ethic, and understand their embrace of joint property principles as an effort to secure equality in marriage without embracing norms of possessive individualism.<sup>173</sup> This feminist vision of marriage as a form of community or partnership undoubtedly drew strength from religious conceptions of the relationship.<sup>174</sup>

The clearest statement of this motivation for the joint property claim was offered by the Reverend Antoinette Brown Blackwell during a debate on the movement's reform agenda that occurred in 1860. On this occasion, Elizabeth Cady Stanton proposed that the movement undertake to reform divorce law, and Wendell Phillips objected, arguing that divorce was extraneous to the group's agenda because it involved competing theories of marriage rather than the question of equal legal treatment in it.<sup>175</sup> Blackwell, who approached the divorce question far more cautiously than Stanton,<sup>176</sup> rose to insist on the propriety of its debate—and to dispute Phillips' formalistic account of the movement's goals. To refute Phillips' claim that the movement only sought equal legal treatment in marriage, Blackwell posed the counter-example of joint property—a demand that would not be satisfied by giving wives formal equality in ownership of earnings. As Blackwell saw it, the joint property

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173. For a discussion of "relational" feminism, see *supra* note 114; Offen, *supra* note 114, at 135-36 (relational feminism postulates "a companionate, non-hierarchical, male-female couple as the basic unit of society"); Williams, *supra* note 129, at 806-13 (in espousing norms of domesticity, relational feminism implicitly criticizes norms of "possessive individualism" associated with capitalist market relations). Martha Minow has argued that the activism of nineteenth-century women grew primarily out of their sense of connection to others, rather than more atomistic concepts of individual autonomy. See *infra* note 179.

174. Cf. Nancy G. Isenberg, "Coequality of the Sexes": The Feminist Discourse of the Antebellum Women's Rights Movement in America 133-39 (1990) (Ph.D. dissertation, University of Wisconsin, Madison) (antebellum feminists attacked prevailing interpretations of Bible, which held that male supremacy was divinely ordained, and instead read the Bible to endorse "co-equality," a "partnership between the sexes . . . which extended to all their social, legal, political, and religious relationships"); *infra* notes 178-79 (on Blackwell's religious faith and Stanton's interpretation of the gospel, 1848); TENTH NATIONAL CONVENTION, *supra* note 126, at 50 (protesting New York's failure to enact a joint property regime, Ernestine Rose invokes "sacred" notions of marital unity, discusses practices of sharing in business partnerships, and then remarks dryly, "Is marriage beneath even a common copartnership? If it is, speak out and let us know it!").

175. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 732-33. As Phillips argued:

All we have asked in regard to the law of property has been, that the statute-book of New York shall make the wife exactly like the husband; we do not go another step, and state what that right shall be. We do not ask law-makers whether there shall be rights of dower and courtesy—rights to equal shares—rights to this or that interest in property. That is not our business. All we say is, "Gentlemen law-makers . . . make what laws you please about marriage and property, but let woman stand under them exactly as man does . . . ."

*Id.* at 733.

176. See *id.* at 723-29.

claim was premised on a particular vision of equality in marriage, a vision compromised by passage of New York's 1860 earnings statute, which did not recognize joint property principles:

I spent three months asking the State to allow the drunkard's wife her own earnings. *Do I believe that the wife ought to take her own earnings, as her own earnings? No; I do not believe it. I believe that in a true marriage, the husband and wife earn for the family, and that the property is the family's—belongs jointly to the husband and wife.* But if the law says that the property is the husband's, if it says that he may take the wages of his wife, just as the master does those of the slave, and she has no right to them, we must seek a temporary redress. We must take the first step, by compelling legislators, who will not look at great principles, to protect the wife of the drunkard, by giving her her own earnings to expend upon herself and her children, and not allow them to be wasted by the husband. I say that it is legitimate for us to ask for a law which we believe is merely a temporary expedient, not based upon the great principle of human and marriage equality.<sup>177</sup>

For Blackwell, at least, joint property reform was intended to secure a community of property in marriage, a regime of sharing to which the separate property principles of New York's 1848 and 1860 statutes posed a threat. Like traditionalists who defended the common law doctrine of marital unity, Blackwell viewed separate property ownership in marriage as contrary to the spirit of the relation, but unlike the traditionalists, she insisted that fidelity to the true spirit of marriage required the marital community to be organized on equal terms.<sup>178</sup> Similar justifications for the joint property claim were offered in the years before the Civil War and after.<sup>179</sup> From this perspective, feminist

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177. TENTH NATIONAL CONVENTION, *supra* note 126, at 89 (emphasis added). Elizabeth Cady Stanton also responded to Phillips' claim; like Blackwell, she insisted that the woman's rights movement was properly interested in evaluating marriage as an institution. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 738-40 (*New York Tribune* letter to editor).

178. Like many in the movement, Blackwell's attitudes about marriage are the product of deep religious and feminist commitments. Blackwell, however, distinguished herself in her efforts to integrate these oft-times conflicting traditions in a coherent stance toward marriage. See generally Elizabeth B. Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America*, 8 LAW & HIST. REV. 25, 41-42 (1990) (discussing Blackwell's covenantal view of marriage, and contrasting it to Stanton's more contractual approach to the relationship).

179. In one of the earliest recorded instances of joint property advocacy, Elizabeth Cady Stanton defended the claim in similar terms. At an 1848 Rochester meeting held some weeks after the Seneca Falls convention and some months after passage of the New York statute that allowed wives to hold separate property in marriage, Stanton confronted a gentleman in the audience who defended the doctrine of marital unity as ordained by gospel. Stanton did not attack the notion of marital unity. Instead, Stanton replied that "*she thought the gospel, rightly understood, pointed to a oneness of equality, not subordination, and that property should be jointly held.*" PROCEEDINGS OF THE SENECA FALLS & ROCHESTER CONVENTIONS, *supra* note 83, at 14 (emphasis added).

Martha Minow argues that in the nineteenth century women's political and social activism was shaped by their connections to others rather than by values of individual autonomy. She quotes an example of joint property advocacy from the post-Civil War period to illustrate the relational character of women's rights

advocacy of a separate property right in earnings would amount to an act of expedience—a compromise of feminist principle intended to secure such relief as a legislature might grant.

While an effort to realize a particular social vision of equality in marriage may have animated joint property advocacy, there is evidence that the decision to emancipate wives' labor in the form of a joint property right sprang from more pragmatic concerns about securing economic justice for women. Woman's rights advocates may have demanded a regime of joint property ownership in marriage as a strategy to secure what they viewed as fair compensation for wives' labor. Indeed, they may have structured their demand for compensation in a joint property framework precisely to avoid market methods of measuring its value.

A colloquy that occurred at an 1853 woman's rights convention held in Rochester, New York, provides direct evidence of this strategic motivation for the claim. At this convention, participants engaged in an extended discussion of how a joint property regime could be implemented. E.A. Hopkins, a lawyer from Rochester, applauded the general objects of marital property reform, but took exception to "making the man and wife joint owners of property."<sup>180</sup> When William Channing observed that Louisiana and California provided for joint ownership of marital property,<sup>181</sup> the lawyer confessed ignorance of this fact, and immediately objected that "he did not see why labor, worth in the market no more than one or two dollars per week, should be paid for at the rate of, it may be, \$200 per week."<sup>182</sup>

The group assembled at Rochester was not receptive to Hopkins' market-based objections to the joint property proposal. The convention had just finished discussing the gendered organization of the labor market, with debate featuring observations such as Frederick Douglass' that "as teachers women get one-fourth the pay men do."<sup>183</sup> Objections to gender bias in the labor market were a common part of feminist gatherings since the first Worcester conventions, where Abby Price attacked the market as "undervaluing our labor,—taking from us our right to choice in our industrial avocations,—inflict[ing] . . . pecuniary dependence,—shutting us from the

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assertion. See Martha Minow, "Forming Underneath Everything That Grows": Toward a History of Family Law, 1985 WIS. L. REV. 819, 890-92 (quoting E.P.W. PACKARD, MARITAL POWER EXEMPLIFIED IN MRS. PACKARD'S TRIAL, AND SELF-DEFENCE FROM THE CHARGE OF INSANITY; OR THREE YEARS' IMPRISONMENT FOR RELIGIOUS BELIEF, BY THE ARBITRARY WILL OF A HUSBAND, WITH AN APPEAL TO THE GOVERNMENT TO SO CHANGE THE LAWS AS TO PROTECT THE RIGHTS OF MARRIED WOMEN 131 (1866)).

180. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 584. Hopkins did concede that the law "should be altered so that the widow may have control of property while her children are minors." *Id.* In 1860, New York in fact reformed the statute of distribution in this way, although it repealed the 1860 amendment in 1862. See *infra* text accompanying notes 251 and 264.

181. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 584.

182. *Id.*

183. *Id.*

trades, and the learned professions”<sup>184</sup> and Wendell Phillips objected that “[t]he woman of domestic life receives but about one third the amount paid to a man for similar or far lighter services. The woman of out-door labor has about the same. The best female employments are subject to a discount of some forty or fifty per cent. on the wages paid to males.”<sup>185</sup> This was not polemical excess; the wage ratios Phillips reported were substantially correct.<sup>186</sup> Thus, the group assembled at Rochester did not view the labor market as a neutral arbiter of value, but instead saw the market as shaped by norms and practices of gender caste; the convention’s resolutions described the market as an institution in which wages were set according to “the sex of the worker”<sup>187</sup> and “women are kept poor, by being crowded together, to

184. 1850 WORCESTER CONVENTION, *supra* note 93, at 34.

185. PHILLIPS, *supra* note 145, at 17.

186. In her study of the gender gap, Claudia Goldin reports:

The ratio of female to male earnings was exceptionally low in the northeastern states prior to industrialization but rose quickly wherever manufacturing activity spread. Around 1815, the ratio of female to male wages in agriculture and domestic activities was 0.288, but rose to about 0.303 to 0.371 among manufacturing establishments at the very inception of industrialization in America around 1820. By 1832, the average ratio in manufacturing was about 0.44, and it continued to rise to just below 0.50 in the northeastern states by 1850.

CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN 63 (1990) (citation omitted). She further notes that “[w]omen who labored in manufacturing at the inception of the factory system and throughout the nineteenth century were almost all young and unmarried. . . . Industrial development significantly altered the paid labor and wages of single women, but it left those of married and older women virtually untouched.” *Id.* at 67.

The variance in wage ratios Wendell Phillips reported is entirely consistent with Goldin’s account, insofar as only a minority of women earned income from factory employment. Moreover, Goldin provides support for his claim that the wage gap between men and women was not due simply to occupational segregation, but also reflected a practice of paying women a fixed percentage less than was paid to men for performing “similar or far lighter services.” PHILLIPS, *supra* note 145, at 17; *see* GOLDIN, *supra*, at 69-71 (econometric analysis of historical data suggesting that “although occupations matter, they may not be the primary determinants of earnings differences”). In her study of antebellum New York, Christine Stansell reports that seamstresses often earned no more than one-fourth (and at most one-half) the wages of men who sewed. STANSELL, *supra* note 39, at 111.

The practice of paying women a fixed percentage of men’s wages that Phillips described is graphically documented in an appendix to the proceedings of the Eleventh National Woman’s Rights Convention. It contains a report “To the Committee of the Massachusetts Legislature, on the eight hour movement” in which various towns in the state forwarded information on women’s wages, *with many towns simply reporting women’s wages as ratios of men’s*. For example:

CHICOPEE—pays women 90 per cent. the wages of men. . . .

FAIRHAVEN—gives to female photographers one-third the wages of men.

HADLEY—pays three-fourths; to domestics, one-third; seamstresses, one-quarter to one-third.

HOLYOKE—in its paper mills, offers one-third to one-half. . . .

NORTH BECKET—pays to women one-third the wages of men. . . .

SOUTH YARMOUTH—half the wages of men, or less.

TAUNTON—one-third to two-thirds the wages of men.

WALPOLE—pays two-thirds the wages of men.

PROCEEDINGS OF THE ELEVENTH NATIONAL WOMAN’S RIGHTS CONVENTION HELD AT THE CHURCH OF THE PURITANS, NEW YORK, MAY 10, 1866, at 62 (New York, Robert J. Johnston 1866) [hereinafter PROCEEDINGS OF THE ELEVENTH WOMAN’S RIGHTS CONVENTION].

187. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 581 (“[T]he custom of making small remuneration for woman’s work . . . has sprung from her dependence, which dependence is prolonged and increased by this most irrational and unjust habit of half pay; . . . women equally with men, should be paid for their services according to the quality and quantity of the work done, and not the sex of the worker.”).

compete with and undersell one another in a few branches of labor.”<sup>188</sup> Indeed, feminists frequently criticized the gender-based wage system of the era as an institution that drove women *into* dependence in marriage.<sup>189</sup> For this reason, the group was in fact critically equipped to respond to the market-based objections Hopkins raised against the joint property claim.

Antoinette Brown Blackwell rejected the notion of compensating wives’ domestic labor at market rates on the grounds that such an arrangement would perpetuate, rather than alleviate, conditions of gender inequality. She made this point in the form of a gentle but firm taunt. Invoking principles of brotherly love, Blackwell suggested that women would entertain Hopkins’ objections “[w]hen our brothers are ready to be paid a dollar a week for keeping house and nursing the children.”<sup>190</sup> In essence, Blackwell was arguing that it was because *women* performed the work of housekeeping and childcare that such services could be purchased for a dollar a week; if the market value of wives’ work was depressed by norms and practices of gender caste, it would be foolish to emancipate wives’ labor from the caste structure of marriage by taking compensation for it at market rates.

Blackwell underscored this point by simple analogy. “[I]f we are to be satisfied with things as they are,” she contended, “so should the slave be. He should be grateful for the care of his master, for according to the established price paid for labor, he does not earn enough to take care of himself.”<sup>191</sup> Blackwell’s rejoinder drew upon labor criticisms of “wage slavery”<sup>192</sup> to make a somewhat different point about the market in “free labor”: the labor market was an integral part of systems of social caste that found more direct legal expression in the institutions of slavery and marriage.<sup>193</sup> This

188. *Id.* Discussions of “crowding” are common at antebellum conventions. For Wendell Phillips’ account of the practice, see *infra* note 199; see also STANSELL, *supra* note 39, at 111.

189. See *supra* note 166 and accompanying text.

190. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 586.

191. *Id.* at 587. In other words, Blackwell dismissed market-based objections to the joint property proposal on the grounds that market valuation of labor was distorted by the systemic influence of sex and race bias—an intriguing anticipation of the critical predicates of the comparable worth claim. *Cf. infra* text accompanying notes 306-08 (commentary on these questions in postwar period).

192. In the antebellum period, labor radicals protested the demise of craft traditions and the falling standard of living under the industrial system by attacking this new form of “employment” as “wage slavery.” See *supra* note 97; *infra* note 208. Democrats also used the “wage slavery” argument to debunk the Republican Party’s “free labor” creed. See, e.g., SEAN WILENTZ, CHANTS DEMOCRATIC: NEW YORK CITY & THE RISE OF THE AMERICAN WORKING CLASS, 1788-1850, at 333 (1984) (discussing arguments of Northerner Mike Walsh and Southerner George Fitzhugh).

193. At the 1851 Worcester convention, Wendell Phillips also analyzed the labor market as an integral part of a social system of caste. He argued that biases about women’s roles emanated from institutions outside the labor market, producing distortions in the labor market (“crowding”) that in turn depressed women’s wages. See PHILLIPS, *supra* note 145, at 17-18 (“It is futile . . . to blame individuals for this. We have all been burdened long by a common prejudice and a common ignorance. . . . We inveigh against the wealthy capitalist, but it is not exclusively his fault. It is as much the fault of society itself.”); *cf. id.* at 21 (describing woman’s rights as “a great social protest against the very fabric of society. It is a question which goes down—we admit it, and are willing to meet the issue—goes down beneath the altar at which you worship, goes down beneath this social system in which you live.”).

observation had enormous practical import. To emancipate wives' labor in the form of a separate property right, as labor that could be exchanged for a market wage, would secure formal equality for women but perpetuate social relations of inequality. In other words, given prevailing market conditions, if wives were granted the freedom to sell their household labor, they would attain formal equality with their husbands but remain "pecuniarily dependent" upon them in fact. To secure pecuniary independence—that measure of autonomy which would signify an escape from gender caste status—another strategy was required.

The joint property claim represented such a strategy. The claim for joint property rights in marital assets amounted to an effort to secure compensation for wives' contribution to the family economy—in terms unbiased by assumptions of gender caste, as market measures of value were. Consider again the justification for the claim offered at the 1851 Worcester convention: "That since the economy of the household is generally as much the source of family wealth as the labor and enterprise of man, therefore the wife should . . . have the same control over the joint earnings as her husband . . . ."<sup>194</sup> The movement was in effect asserting that a wife's labor contributed as much to family wealth as the income earned by a husband from his labors—notwithstanding what the market might measure as its worth.<sup>195</sup> Joint property advocates may well have developed a theoretical justification for the scheme of compensation they proposed in lieu of market measures, but if they did, scant record of their efforts survives. Two attempts to articulate the distributive principles informing the joint property proposal are, however, worth examining briefly.

At the Seventh National Woman's Rights Convention, Wendell Phillips defended a joint property regime by arguing that in market societies the relation between the productive value of labor and its remuneration, and thus between labor and property ownership, is systemically distorted. The joint property proposal was intended to remedy this bias:

Now I contend that woman, broadly considered, makes half the money that is made. Go the world over, take either Europe or America; the first source of money is intelligence and thrift, it is not speculation. The masses of money that are wrought commonly are wrought by continuous personal labor and thrift; and who that knows the masses of his own country or of Europe, will doubt for a moment that in hard labor, or in common-sense thrift, woman, the race through, does not exhibit as much of both of these qualities as man? Out of the twenty millions of American people that make money,

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194. 1851 WORCESTER CONVENTION, *supra* note 143, at 18.

195. For examples of such an assertion, see *supra* text accompanying note 100 (letter from Frances Gage) and *infra* notes 207 (remarks of Ernestine Rose), 302 (remarks of Thomas W. Higginson in postwar period). See also JONES, *supra* note 103, at 11-12.

woman does more than half of the work that insures the reward. I claim for that half of the race whose qualities garner up wealth, the right to dispose of it, and to control it by law.<sup>196</sup>

In this analysis, the source of wealth is not “speculation” or capital, but labor. Phillips invoked a variant of the labor theory of value that was widely embraced in antebellum America—not only by defenders of the “free labor” system, but also by radicals in the incipient labor movement;<sup>197</sup> yet Phillips turned the labor theory of value to new, gender-conscious ends. In essence, Phillips was arguing that men expropriate the surplus value of women’s household labor, much as Marx and radicals in the antebellum American labor movement argued that capitalists expropriate the surplus value of the wage-earners’ labor.<sup>198</sup> A joint property regime would effect restitution of the expropriated value of wives’ household labor.

Yet in a certain sense Phillips advanced the movement’s argument no further than did the resolution of the Worcester convention. Once joint property advocates repudiated the labor market as a neutral arbiter of value, on what ground did they stand in making the claim that a wife’s labor was worth as much as her husband’s? Why was Phillips so confident that a wife’s “qualities” of “hard labor” and “common-sense thrift” were as valuable as her husband’s business skills? The question is especially intriguing because at the same time that Phillips and other woman’s rights advocates were arguing that

196. SEVENTH NATIONAL CONVENTION, *supra* note 136, at 22.

197. See BOYDSTON, *supra* note 36, at 67 (discussing “the theory of labor value that informed most labor dissent during the [antebellum] era”). Sean Wilentz observes:

The labor theory of value—the doctrine that all wealth is derived from labor—claimed a diverse array of supporters in antebellum America. The idea was at the core of Lockian theories of property; students of such different Enlightenment writers as Volney and Adam Smith held it axiomatic; so did public officials ranging from Andrew Jackson to Daniel Webster and John C. Calhoun. . . . Such wide currency was possible because the concept of “labor” was very supple. A broad definition might include merchants, professionals, and bankers as productive citizens; a narrow one might exclude all but those who actually worked with their hands. Depending on one’s point of view, the labor theory could be used either to defend “productive” capitalist entrepreneurship or to condemn it.

WILENTZ, *supra* note 192, at 157-58.

In attempting to justify the distributive principles of a joint property regime, Phillips likely drew on the work of contemporaries who used the labor theory of value to criticize the capitalist system. His argument might be traced to communitarian Robert Owen, who attacked unearned profit, denounced capitalists as parasites, and argued that “manual labor, properly directed, is the source of all wealth.” *See id.* at 163 (citing and quoting ROBERT OWEN, A NEW VIEW OF SOCIETY 19-24 & *passim* (facsimile reprint 1948) (London 1817)). But there were many others writing in this vein as well. For example, Phillips’ argument could be compared to the work of Langton Byllesby, who contended that wealth was “properly and only an excess of the Products of Labour,” and claimed that the “products of labour belong to almost any other than the producer, who generally obtains from the application of his power no more than a bare subsistence.” *See id.* at 165 (quoting LANGTON BYLLESBY, OBSERVATIONS ON THE SOURCES AND EFFECTS OF UNEQUAL WEALTH *passim* (New York, Nichols 1826)). Byllesby attacked the employment relation as a form of wage slavery and analyzed how the mechanization of production gradually transferred social wealth to the hands of speculating merchant-capitalists. *Id.*

198. *Cf. infra* note 399 (postwar convention resolves that “[m]an, standing to woman in the position of capitalist, has robbed her through the ages of the results of her toil.”).

the market systematically undervalued wives' labor, Phillips and many others in the abolitionist movement were endorsing the labor market as the institution appropriate to determine the economic fortunes of the working class and emancipated slaves.<sup>199</sup>

The movement's attitude toward the market seems most plausibly explained by its complex relationship to the gender conventions of its era. As vociferous critics of the separate spheres tradition, woman's rights advocates were able to discern the latent caste structure of a labor market that regulated employment opportunities and pay in an openly sex-based fashion. Yet when woman's rights advocates insisted that wives' labor was worth far more than the price it could command on the market, it would seem that they were speaking from within the very gender conventions they otherwise criticized. Their repeated assertion that a wife's labor was as valuable as her husband's is an economic expression of precepts of gender role complementarity. Women and men might do different work but the performance of their respective roles was of equal importance to society. As Paulina Wright Davis argued at the First National Woman's Rights Convention: "Nature does not teach that men and women are unequal, but only that they are unlike; an unlikeness so naturally related and dependent that their respective differences by their balance establish, instead of destroying, their equality."<sup>200</sup> This conviction lay at the heart of the joint property claim.<sup>201</sup> Thus, the movement's principled and strategic reasons for employing a joint property form to emancipate wives' labor share roots deep in the gender discourse of the culture—suggesting one reason why Antoinette Brown Blackwell was a principal expositor of each.<sup>202</sup>

Yet joint property discourse was no simple expression of the gender discourse of the culture. Woman's rights advocates transformed the gender

199. See, e.g., Forbath, *supra* note 92, at 784-85 & n.50 (only "[a] handful of middle-class abolitionists . . . specifically attacked new forms of 'dependency' like factory wage labor and linked them to slavery"). To Phillips' credit, he did offer an explanation for this apparent inconsistency. Phillips argued that there were gender-based distortions in the market, which he attributed to "a common prejudice" that "declares it indecorous in woman to labor, except in certain occupations, and thus crowds the whole mass of working women into two or three employments, making them rivet each other's chains." PHILLIPS, *supra* note 145, at 17-18. In explicating the crowding theory of gender-based wage distortions, Phillips expressed confidence in the normal functioning of the labor market. See *id.* at 18. Yet, it is worth noting that, in the postwar period, Phillips and other abolitionists changed course and became champions of the labor movement. See Forbath, *supra* note 92, at 785 n.50.

200. 1850 WORCESTER CONVENTION, *supra* note 93, at 9 (quoted in full *supra* note 125).

201. As Henry Blackwell would explain the core precept of the joint property proposal in the postwar period, "the principle of reciprocity is the key to the problem." Response of Henry B. Blackwell to *Equality Before the Law Once More*, WOMAN'S J., June 14, 1873, at 191 (passage quoted in full *infra* note 382). For an 1872 report of a special committee of the California legislature explicating the joint property concept within the idiom of spheres, see *infra* text accompanying note 360 ("While the husband may prosper in business and accumulate wealth, the wife may at the same time perform equally well her duties in a more narrow, but not less important, sphere.").

202. It was Antoinette Blackwell who gave the most cogent account of the movement's principled reasons for adopting the joint property regime as appropriate to the relational structure of marriage, see *supra* text accompanying note 177, and who gave the most sophisticated response to market-based criticisms of the joint property proposal, see *supra* text accompanying notes 190-95.



conventions of domesticity, even as they drew upon them. Whereas conventional representations of the wife's domestic role idealized it as a quasi-spiritual practice capable of redeeming husband (and nation) from the vicissitudes of the market,<sup>203</sup> woman's rights activists quite aggressively insisted that a wife's work was work, of economic as well as spiritual value—even going so far as to suggest some sociological reasons why that work might have value in excess of what the market might measure as its worth.

The manner in which joint property discourse transvalued gender conventions of the antebellum era is evident in the second surviving example of the movement's efforts to justify its proposal in market terms. When Elizabeth Jones made her case for joint property rights before the Ohio legislature in 1861, her argument infused a practical account of a wife's labors with an idealized account of a wife's labors—one that drew heavily on the separate spheres tradition the movement was engaged in criticizing:

I would like to have some gentleman tell me how much the care, the labor, the love of a patient wife and tender mother are worth. How much is it worth to bring up a family of children, and fit them, even imperfectly, for life and its duties—to heed all their numberless wants, settle their controversies in the right spirit, watch all their ailments and patiently abide their nights of suffering? How much is it worth per annum to seek the comfort and happiness of a husband, to cater to his appetite, to look after his wardrobe, and see that he be prepared to meet the claims of decency? What is it, gentlemen, that gives that indescribable charm to your own homes? Why is the fire in your own grate so much more to you than a fire any where else? Why is the food on your own table, so much better than the dinner you buy? What is the meaning of that strange beauty in the flowers around your own dwelling? And why, when you return to your home, will your heart bound with gladness as you come in sight of the curling smoke of your own chimney? It is the being that ministers within, to whom you are indebted for all this; and I pray you that before you shall meet her again, you will show your appreciation of her, and of her service, by making her an equal legal proprietor, at least, of the earthly comforts you have heaped together.<sup>204</sup>

Jones' appeal fuses the idiom of masculine and feminine spheres as it moves from inquiring how much a wife's labors are "worth per annum" to a plea that husband/legislators "show [their] appreciation" for "the being that ministers within" the home. As Jones represents her, the wife tending family and hearth is both at work and creating for her husband a spiritual retreat from work. It

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203. See *supra* text accompanying notes 66-67.

204. JONES, *supra* note 103, at 12.

is from this most conventional representation of a wife's labors<sup>205</sup> that Jones makes the counterconventional claim that a wife's labors entitle her to be "equal legal proprietor" of property otherwise thought to be the husband's.

Jones' appeal was of course structured to present the movement's joint property proposal in terms most likely to persuade the audience of male legislators at whom it was directed. But the rhetorical structure of Jones' appeal seems to reflect the synthetic logic of the movement's own reasoning as well. Joint property discourse creatively reinterpreted the gender conventions of antebellum America, challenging them without wholly transcending them. Paradoxically, the movement's immersion in the gender discourse of its era seems to have provided it a standpoint from which to criticize the labor market as an institution capable of reproducing the gender caste relations from which the movement was seeking to emancipate women.

While the movement continued its efforts to rebut market criticisms of the joint property proposal in the postbellum period,<sup>206</sup> it never produced a defense of the joint property regime that was more theoretically sophisticated than the arguments examined here. Nor did advocates explain cogently the application of joint property principles to households of differing means, in which both a wife's economic role and its remuneration might vary widely.<sup>207</sup> Nevertheless, the arguments the movement did advance are striking in their critical perspicacity. In the early years of industrialization, before dissemination of the works of Marx and Engels, the woman's rights movement was exploring the social structure of the labor market in terms that are critically acute, even by modern standards. In describing how relations of gender caste penetrated the labor market, the movement offered its own

205. Cf. *supra* text accompanying note 67 (quoting antebellum literature on domesticity).

206. See *infra* text accompanying notes 300-03.

207. Ernestine Rose confronted this question at an 1860 convention as she attempted once again to counter arguments "usually brought against" joint property ownership in marriage: "woman does no business—the married woman earns no money." TENTH NATIONAL CONVENTION, *supra* note 126, at 50. Rose defended the joint property claim by analogizing it to a "business . . . partnership" whose partners contributed equally to the enterprise. In marriage, she argued, "the in-door business is as requisite as the out-door, and if it is sometimes easier, it is sometimes a great deal harder." *Id.* Comparing the wife's duties to those of the husband "who sits in an office, or goes out and sells goods, and brings home so many shillings or dollars," *id.*, Rose contended that they were equally important. But she did so somewhat defensively, and her uneasiness escalated as she attempted to apply a contribution-based theory of joint property to women of the upper class. *Id.* at 51-52. Why should a woman married to a man of wealth receive greater remuneration for her contribution to the family economy than a working-class wife who might labor far more strenuously on her family's behalf?

As Rose uneasily acknowledged the variances in economic status differentiating women as a class, she began to retreat from a contribution-based theory of the claim, first insisting that a joint property regime would cause men to select wives who *would be* productive in marriage, *id.*, and then retreating to the ground of abstract principle, claiming joint property as a "Human Right[]" that would benefit all, *id.* at 52. This rare show of analytical confusion by one of the movement's most able advocates demonstrates the movement's critical neglect of the question. Although Rose and others were aware of economic class differences among women, see, e.g., *supra* text accompanying note 158; *infra* note 254, they never squarely addressed the questions of economic-class equity presented by a joint property regime, cf. *infra* text accompanying notes 540-42.

critique of the employment relation, distinct from, although convergent with, labor criticisms of it as a form of “wage slavery.”<sup>208</sup> And in devising a rights claim designed to rectify the latent caste structure of the labor market, joint property advocates anticipated by over a century efforts of the contemporary feminist movement to secure pay equity for women. In theory, if not design, the joint property demand is an antecedent of the modern comparable worth claim.

#### B. *The New York Campaign: 1850's*

Proponents of joint property reform did not contemplate radical social transformation of the sort demanded by utopian communitarians who advocated collectivizing the family form. Indeed, feminists embraced the joint property scheme precisely because they believed it could effectuate fundamental social change within the existing social order. Paulina Wright Davis, president of the First National Woman's Rights Convention, stated the case succinctly: “A profound expediency, as true to principle as it is careful of success, is, above all things, rare and necessary.”<sup>209</sup> For Davis, the joint property proposal exemplified the virtues of “expediency”: “[T]he [wife's] right to the control and enjoyment of her own property and partnership in all that she helps her husband to earn and save, needs only to be stated to command instant assent.”<sup>210</sup> It goes without saying that for all her emphasis on worldly calculation, Davis seriously miscalculated the resistance joint property advocates would encounter. Nonetheless, her remarks demonstrate the movement's initial animating conviction that its joint property demands were capable of imminent realization.

In the decade prior to the Civil War, the movement steadfastly advanced its joint property demands by every means available to a disfranchised class. Woman's rights advocates did not merely agitate for reform at their national and regional conventions; they assiduously pursued the adoption of a joint property regime in New York, canvassing the state with petitions and lobbying the state legislature at every opportunity. It is worth examining this campaign for several reasons. First, the campaign demonstrates the movement's commitment to enact joint property principles and its belief that such a goal could in fact be achieved in antebellum America. Second, the campaign

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208. For antebellum usage of the “wage slavery” argument, see ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 169 (1945) (contest between interests of “producer” and “capitalist”); WILENTZ, *supra* note 192, at 326, 331, 333, 385. Labor advocates used the “wage slavery” argument in the antebellum period, but it was not until after the Civil War that the argument gained widespread popularity in the movement. Cf. Forbath, *supra* note 92, at 782-86, 801-12. See generally MONTGOMERY, *supra* note 37, at 237-60 (1860's and 1870's); William E. Forbath, *The Shaping of the American Labor Movement*, 102 *HARV. L. REV.* 1109, 1122-23, 1203-17, 1225-35 (1989) (1880's and early 1890's).

209. 1850 WORCESTER CONVENTION, *supra* note 93, at 13.

210. *Id.* at 12.

provides an opportunity to observe the interaction between feminists and legislators over the movement's joint property demands. Over the course of the 1850's, the New York legislature shifted from a stance of outright resistance to a strategy of partial accommodation. At the same time, the woman's rights movement compromised its joint property demands in search of a reform package the legislature would accept. Analyzing the reception of the movement's joint property demands in New York thus reveals that the marital property reform statute the state adopted in 1860 was an important defeat for the movement, as well as the major victory it is conventionally thought to be.<sup>211</sup> Considered from this perspective, the New York campaign provides an important benchmark for evaluating the efforts of woman's rights advocates and state legislatures to reform the law of marital property in the years following the Civil War—the period when most earnings reform would occur.

As we have seen, in the first years after the Seneca Falls convention feminists demanded joint property rights in marriage by publicizing and defending the claim in a series of national and regional conventions. But by 1853, their demands had acquired a distinct political focus. In a convention held in Rochester, New York, William H. Channing presented for discussion a resolution urging the state to adopt a system of joint property rights in marriage. The resolution applauded New York for enacting legislation in 1848 and 1849 that granted wives the right to hold property in marriage, and “call[ed] upon the Legislature of the State to take the next step—so plainly justified by its own precedents—of providing that husbands and wives shall be joint owners of their joint earnings—the community estate passing to the survivor at the death of either party.”<sup>212</sup> Succeeding resolutions asked the legislature to appoint a special joint committee to consider marital property reform and related issues of woman's rights—apparently, an effort to

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211. See *supra* note 24 and accompanying text.

212. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 581. The resolution approvingly cites the state's 1848 married women's property act and calls for joint ownership of “joint earnings,” suggesting that the group was moving toward endorsing a form of separate property ownership in marriage—presumably based on Louisiana's community property model (property brought to marriage or acquired by gift or devise during marriage). Cf. LA. CIV. CODE art. 2314 (New Orleans, J.C. De St. Romes 1825). A diary entry Susan B. Anthony made that same year seems to substantiate this reading of the resolution. Anthony observes, “Woman must have a purse of her own, and how can this be, so long as the *Wife* is denied the right to her *individual and joint earnings*.” LUTZ, *supra* note 58, at 38 (second emphasis added) (passage quoted in full *supra* note 126).

The resolution's suggestion that the “community estate” would be inherited by the survivor at the death of either party varies from the language of prior proposals, which simply demanded equality in inheritance rights. See *supra* text accompanying notes 135 and 143. The right of survivorship concept most likely derives from the common law estate by *entireties*, see, e.g., SALMON, WOMEN AND THE LAW OF PROPERTY, *supra* note 16, at 144, 162-63; Annotation, *Married Women's Act as abolishing estates by entireties*, 141 A.L.R. 179 (1942), though it could have been an effort to extend to women the rough equivalent of a husband's rights of *curtesy*, cf. *supra* note 163. In community property regimes of the era, marital property was typically divided at the death of a spouse between the surviving spouse and the decedent's heirs. See, e.g., Act of Apr. 17, 1850, ch. 103, § 11, 1849-50 Cal. Stat. 255; Prager, *supra* note 17, at 27 (California); LA. CIV. CODE art. 2375 (New Orleans, J.C. De St. Romes 1825) (equal division of community property at death of spouse); Act of Mar. 13, 1848, ch. 79, § 3, 1848 Tex. Laws 77.

circumvent the Assembly Judiciary Committee, whose hostility to the cause was notorious.<sup>213</sup>

After the convention, the group canvassed half the counties in the state, with more than sixty women collecting over 10,000 petition signatures in two months.<sup>214</sup> In February of the following year the group reconvened in Albany to publicize demands for suffrage and marital property reform contained in the petitions, which were concurrently delivered to the New York legislature.<sup>215</sup> Antoinette Brown Blackwell presented the resolutions of the 1854 convention,<sup>216</sup> including a plank delineating the desired terms of future marital property reform in which a demand for joint ownership figured centrally.<sup>217</sup>

The legislature was sufficiently impressed by the convention that it created, as requested, a special committee in each house to entertain the group's demands.<sup>218</sup> Two weeks later Susan B. Anthony appeared before the Assembly's select committee to present a paper (prepared by Judge William Hay of Saratoga<sup>219</sup>) that enumerated the specific legal reforms woman's rights advocates demanded. As reported in the *Albany Argus*, the

213. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 581, 583. The following year, during a debate in the legislature over the request for the special committee, it was observed that the Judiciary Committee was the appropriate group to receive the petition "if it would not be sure, if sent to that Committee, to sleep the sleep of death." *Id.* at 615 (quoting ALBANY EVENING JOURNAL, Feb. 20, 1854); *see also* BASCH, *supra* note 4, at 192-93.

214. *History of Woman Suffrage* reports collecting 13,000 signatures, 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 588-89, but also relates a formal presentation of two petitions to the state legislature, with 5931 signatures on a petition for equal rights, and 4164 on a petition for suffrage. *Id.* at 612.

215. The appeal and petitions are reproduced in full in *History of Woman Suffrage*. *See id.* at 588-89 n.\*. The petition for marital property reform requests the appointment of a joint committee of both houses of the New York legislature (as did the resolutions of the 1853 convention), before which representatives of the woman's rights movement might appear.

216. *Id.* at 593.

217.

6. *Resolved*, That in consistency with the spirit and intent of the Statutes of New York, enacted in 1848 and 1849, the design of which was to secure to married women the entire control of their property, it is the duty of the Legislature to make such amendments in the laws of the State as will enable married women to conduct business, to form contracts, to sue and be sued in their own names—to receive and hold the gains of their industry, and be liable for their own debts so far as their interests are separate from those of their husbands—to become joint owners in the joint earnings of the partnership, so far as these interests are identified—to bear witness for or against their husbands, and generally to be held responsible for their own deeds.

*Id.* at 594.

218. *See* 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 612-16.

219. Judge Hay was among those appointed at the 1853 Rochester convention to prepare and present the group's address to the legislature. *See id.* at 583. He was a signatory to the call for the 1854 Albany convention, *id.* at 592, wrote a paper that Anthony presented to the select committee, *id.* at 607 (quoting ALBANY ARGUS, Mar. 4, 1854), and was requested by Stanton to assist with legal aspects of the suffrage speech she made before the legislature, *see* Letter from Elizabeth Cady Stanton to Susan B. Anthony (Dec. 1, 1853), *supra* note 58, at 54. Hay was a member of the New York Assembly, and a staunch supporter of woman's rights who corresponded with Anthony. *See* SUHL, *supra* note 61, at 168; *infra* note 238 and accompanying text.

demands—which addressed matters ranging from custody and divorce to suffrage, public office, and jury duty—began with a proposal that

husband and wife should be tenants in common of property without survivorship, but with a partition on the death of one; . . . that married women shall have power to make contracts and transact business as though unmarried; that they shall be entitled to their own earnings, subject to their proportionable liability for support of children; that post-nuptial acquisitions shall belong equally to husband and wife; [and further] that the homestead shall be inviolable and inalienable for widows and children.<sup>220</sup>

Read together, Anthony's speech and the convention's resolution<sup>221</sup> illustrate that the group's marital property demands had shifted ground from the first Worcester conventions. The plan now advanced was hybrid in character, advocating both separate and joint property ownership in marriage, with the form of ownership determined by the character of a wife's labor: separate property ownership in circumstances where the wife was engaged in business, employed or otherwise receiving income (with some portion of family expenses charged against a wife's separate earnings), and joint property ownership in circumstances where the wife labored in the family on an uncompensated basis.<sup>222</sup> Inheritance demands had shifted ground as well. Where initially the group demanded a spousal right of survivorship in marital property,<sup>223</sup> it now edged closer to contemporary community property

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220. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 607 (quoting ALBANY ARGUS, Mar. 4, 1854).

221. *See supra* note 217.

222. The convention's joint property resolution called for laws that would "enable married women . . . to receive and hold the gains of their industry, and be liable for their own debts so far as their interests are separate from those of their husbands—to become joint owners in the joint earnings of the partnership, so far these interests are identified . . ." 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 594 (quoted in full *supra* note 217); *see also supra* note 212 (discussing resolution of 1853 Rochester convention). The group would pursue a similar strategy in Ohio at the end of the decade. In 1861 Elizabeth Jones sought legislation "securing to woman the avails of her own labor" which would "apply to women who have a separate business of their own," and then observed: "Generally, the earnings of the wife all go into the common estate. That is acquired by the joint exertions of husband and wife, we pray that it may be jointly owned." JONES, *supra* note 103, at 11.

In advocating a wife's separate ownership of her earnings in a joint property regime, the movement anticipated by decades developments in community property jurisdictions that undertook to emancipate wives' earnings from community control by the husband. In California, for example, the legislature in 1870 finally exempted a wife's earnings from liability for the debts of her husband. Act of Mar. 9, 1870, ch. 161, § 1, 1870 Cal. Stat. 226; *see also* Prager, *supra* note 17, at 46. Not until 1951 did wives in California gain management and control over community property money they earned, Act of June 16, 1951, ch. 1102, 1951 Cal. Stat. 2860, and not until 1973 did spouses in California have equal management rights over community property regardless of the source of the earnings, *see* Prager, *supra* note 17, at 73-80.

For a discussion of similar developments in other community property states, *see, e.g.,* Harriet S. Daggett, *The Modern Problem of the Nature of the Wife's Interest in Community Property—A Comparative Study*, 19 CAL. L. REV. 567 (1931) (discussing, *inter alia*, California, Louisiana, Idaho, Texas, Nevada, New Mexico, Arizona, and Washington).

223. *See supra* note 212 and accompanying text (resolution introduced at 1853 Rochester convention claiming right of survivorship in community estate; concept may derive from common law estate by

precedents, proposing that the family homestead be exempted from holdings otherwise to be partitioned at the death of either spouse.<sup>224</sup> The record does not make clear whether any effort was made to integrate the proposed earnings and inheritance regimes. What does emerge quite plainly is the group's insistence that wives be liable for family support once their labor was emancipated<sup>225</sup>—expressing the group's commitment to eradicate a wife's status as her husband's dependent, in both economic and ideological terms. Neither common law nor community property states would take such an unequivocal stand for decades to come.<sup>226</sup>

By the end of March, the select committee of the Assembly had entertained the convention's marital property demands and roundly rejected them. Its report invoked the doctrine of marital unity to attack the subversive vision of marital community feminists advanced.<sup>227</sup> The committee did introduce a bill that was grudgingly responsive to the movement's demands, but this bill granted wives neither a joint nor a separate property interest in their labor. It recognized wives' rights in earnings only in one circumstance—the *only* circumstance in which the committee would concede that wives were not supported. The bill entitled wives to claim their own earnings if their husbands were drunkards, profligates, or otherwise deserted them; in addition, it afforded wives a veto in matters implicating apprenticeship or guardianship of their children.<sup>228</sup> The bill was consistent with protectionist traditions at common law,<sup>229</sup> and responsive to the kind of protectionist arguments used to support giving wives the right to hold property

entireties).

224. The homestead exemption was advanced in lieu of a right of survivorship, which the movement had advocated in 1853. *See supra* text accompanying note 212. On homestead exemptions adopted in the nineteenth century, see J.F. Dillon, *Homestead Exemption*, 10 AM. L. REG. (1 U. PA. L. REV.) 641, 643 n.1 (1862); W.R. Vance, *Homestead Exemption Laws*, in 7 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 441, 442 (1932); *see also infra* note 367. The proposal to partition marital property at the death of either spouse resembles the inheritance provisions of contemporary community property regimes. *See supra* note 212.

225. While the 1854 resolutions speak in terms of individual liability, *see supra* note 217, Anthony's speech to the legislature proposes that wives be "subject to their proportionable liability for support of children," *see supra* text accompanying note 220, an account confirmed by Anthony's biographer, *see* RHETA L.C. DORR, SUSAN B. ANTHONY: THE WOMAN WHO CHANGED THE MIND OF A NATION 99 (1928) ("while joint property laws should be enacted, women should be subject to proportional liability for the support of the children").

226. *Cf.* 3 CHESTER G. VERNIER, AMERICAN FAMILY LAWS § 160, at 102-07 (1935) (state-by-state discussion of respective liability of husband and wife for family expenses as law stood during 1930's).

227. N.Y. ASSEMBLY DOCUMENTS, 77th Sess., vol. 4, no. 129, at 2-3 (1854) ("In the formation of governments, the manner in which the common interest shall be . . . embodied and represented is a matter of conventional arrangement; but in the family an influence more potent than that of contracts and conventionalities, and which everywhere underlies humanity, has indicated that the husband shall fill the necessity which exists for a head.").

228. *See* 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 618 n.\* (reproducing text of bill); *see also* N.Y. ASSEMBLY DOCUMENTS, *supra* note 227, at 3-4 (discussing relevant sections of bill).

229. The earnings provisions of the bill would have codified certain precedents already recognized in common law jurisdictions throughout the country. In certain cases wives were recognized as "sole-traders" because of a husband's consent, long absence, desertion, or non-support during the years before the doctrine of marital service was modified by earnings statutes. *Cf.* KERBER, *supra* note 16, at 148-52; SALMON, WOMEN AND THE LAW OF PROPERTY, *supra* note 16, at 45-49.

in marriage, especially those that appeared in temperance tracts and journals of the period.<sup>230</sup>

The bill was never enacted.<sup>231</sup> But the legislature's receptivity to reform invigorated woman's rights advocates. From 1854 until the Civil War, the movement conducted annual petition campaigns, orchestrated by Susan B. Anthony.<sup>232</sup> In 1855 the group reconvened at Albany, and Ernestine Rose, Antoinette Brown Blackwell, and Anthony once again presented suffrage and marital property petitions to a select committee of the Assembly, on which Elizabeth Cady Stanton's husband was now appointed to serve.<sup>233</sup> This time the committee introduced a bill incrementally more responsive to their demands. While silent on the question of property relations during marriage, the bill conferred on wives, in a narrow set of circumstances, an inheritance interest approximating the right of survivorship joint property advocates once contemplated. It provided that when a spouse died intestate and without children, the survivor would take a life estate in the decedent's property—a significant improvement over existing New York law, which gave wives common law dower, a life interest in one-third of a husband's real property.<sup>234</sup>

Though the bill apparently was not enacted, the movement's success in securing even this cautious response to its demands produced a backlash. In 1856, the Assembly's Judiciary Committee reassumed jurisdiction over the petitions.<sup>235</sup> Its report, read by Chairman Samuel A. Foote to an Assembly convulsed by "roars of laughter,"<sup>236</sup> openly mocked the movement's demands.<sup>237</sup> William Hay was sufficiently disgusted by Foote's behavior that

230. See *supra* note 147.

231. See FLEXNER, *supra* note 10, at 86; WARBASSE, *supra* note 6, at 261; cf. *Woman's Rights Convention in New York*, *supra* note 166, at 196 ("In New York, Mrs. Rose and Susan B. Anthony had been before the Legislature, and for the last two years, there had been a bill before the Legislature providing that when a husband is a drunkard or a profligate, his wife shall have a right to what she earns.").

232. See DORR, *supra* note 225, at 105-09; see also BASCH, *supra* note 4, at 191.

233. N.Y. ASSEMBLY DOCUMENTS, 78th Sess., vol. 5, no. 129, at 1 (1855).

234. The bill provided:

If the intestate be a married man, living and having lived with his wife during marriage, or if the intestate be a married woman, living and having lived with her husband during marriage, and shall die without lawful descendants, born or to be born of such marriage or a prior marriage, the inheritance shall descend to the surviving husband or wife, as the case may be, during his or her natural life, whether the inheritance came to the intestate on the part of the mother or father, or otherwise.

*Id.* at 2. At the time the bill was introduced, New York's law of real property descent codified common law dower and curtesy, but otherwise made no mention of husband or wife as beneficiary of an intestate's estate. See 1852 N.Y. Rev. Stats., pt. II, ch. II, § 20.

235. See 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 629.

236. *Id.* (quoting REGISTER, Mar. 1856).

237. Advising the legislature that the bachelors on the committee had deferred to the judgment of its married members (in view of the married members' greater experience, and the unmarried members' interests as "suits for the favors of the gentler sex"), Foote announced that the committee would take no action on the petitions, it being the judgment of its married members that "if there is any inequality or oppression in [marriage], the gentlemen are the sufferers. They, however, have presented no petitions for redress, having doubtless made up their minds to yield to an inevitable destiny." N.Y. ASSEMBLY



he wrote Susan B. Anthony notes of apology and reassurance, insisting that reform “has become a question of time only.”<sup>238</sup>

Hay proved correct in his prediction. Annual petitioning continued under Anthony’s direction,<sup>239</sup> despite the fact that in 1857 births and family obligations had so overwhelmed the movement’s leadership that no national convention was held.<sup>240</sup> By 1859, Anson Bingham, a long-time friend of the woman’s rights movement, assumed the chair of the Assembly Judiciary Committee, and a bill giving wives a right to make contracts and to own their wages passed the Assembly by a vote of 102 to 2. This bill, however, never reached the Senate floor.<sup>241</sup>

The movement’s petitions that summer and fall continued to press for a broad range of reforms, calling for laws “securing to married women the full and entire control of all property originally belonging to them, and of their earnings during marriage,” and for equalizing spousal inheritance and custody rights—for making “the rights of a widow . . . the same as a husband has in the property and over the children of his deceased wife.”<sup>242</sup> While it is unclear whether the demand that wives be granted “full and entire control . . . of their earnings during marriage” contemplated joint property rights during the life of the marriage, Stanton’s appeal to her canvassers explained the facts surrounding the near-passage of the 1859 bill and directed their attention to securing *wives’ right to wages*:

Think of the 40,000 drunkards’ wives in this State—of the wives of men who are licentious—of gamblers—of the long line of those who do nothing; and is it no light matter that all these women who support themselves, their husbands and families, too, shall have no right to the disposition of their earnings? Roll up, then, your petitions on this point, if no other, and secure to laboring women their wages at the coming session!<sup>243</sup>

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DOCUMENTS, 79th Sess., vol. 4, no. 147, at 1-2 (1856).

238. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 631. Hay wrote at least two notes to Anthony. In one dated March 20, 1856, he apologized for Foote’s conduct (“I write this in the Assembly Chamber which has so recently been disgraced by an old fogy—Sam. A. Foote. He can not, however, prevent the agitation as to Woman’s Rights.”). The second, penned the following day, assessed the movement’s prospects for securing suffrage and marital property reform, concluding with the assurance that reform had “become a question of time only.” *Id.*

239. See *supra* text accompanying note 232; see also BASCH, *supra* note 4, at 194.

240. KATHLEEN BARRY, SUSAN B. ANTHONY: A BIOGRAPHY OF A SINGULAR FEMINIST 122 (1988); CAZDEN, *supra* note 58, at 118; see also 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 668.

241. See N.Y. ASSEMBLY J., 82d Sess. 1147 (1859); TENTH NATIONAL CONVENTION, *supra* note 126, at 100 app.; *Property of Married Women*, N.Y. TIMES, Apr. 8, 1859, at 4 (reproducing text of bill and characterizing it as “just”); see also BASCH, *supra* note 4, at 194. See generally 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 676.

242. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 676-77 n.\*.

243. *Id.* at 676-77 (footnote omitted). In advancing this protectionist rationale for the earnings statute, Stanton followed the reasoning of the 1854 select committee and of the common law traditions on which the Assembly committee relied. See *supra* text accompanying notes 228-29. Her appeal is quite plainly cast in temperance rhetoric, of a sort employed by legislators and, intermittently, by feminists, to criticize

And so, as Antoinette Blackwell ruefully recalled, "I spent three months asking the State to allow the drunkard's wife her own earnings . . . ask[ing] for a law which we believe is merely a temporary expedient, not based upon the great principle of human and marriage equality."<sup>244</sup> Although the movement had now significantly compromised its goals, it staged an energetic campaign, in which numerous canvassers and lecturers swept the state.<sup>245</sup> A convention was held in Albany in February of 1860, coinciding with the Legislature's next session.<sup>246</sup> With Stanton addressing a joint session of the Senate and Assembly, and Anthony working behind the scenes with supporters in the Senate, a reform statute was finally enacted.<sup>247</sup>

The earnings statute the New York legislature enacted was considerably more liberal than any yet adopted in the nation.<sup>248</sup> Among its numerous provisions, the statute enabled a married woman to "perform any labor or services on her sole and separate account," and provided that "the earnings of any married woman, from her trade, business, labor or services, shall be her sole and separate property."<sup>249</sup> It declared husband and wife joint guardians of their children.<sup>250</sup> Further, it provided that when a spouse died intestate, the survivor would inherit the decedent's estate intact for the minority of the youngest child and then hold one-third of the estate for the remainder of the child's natural life.<sup>251</sup> Like the bill reported out of committee in 1855,<sup>252</sup>

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common law marital property rules. *See supra* notes 144-47 and accompanying text.

244. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 734 (passage quoted in full *supra* text accompanying note 177).

245. *See* 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 677-78; *id.* at 690-92 (Susan B. Anthony describing campaign to Tenth National Woman's Rights Convention; reporting that during year prior to passage of statute, six women lectured in New York for several months each, conventions were held in forty counties, one or more lectures were given in 150 towns and villages, petitions were circulated and tracts sold across state, with year's work costing nearly \$4,000); *see also* CAZDEN, *supra* note 58, at 125-26 (reprinting letters by Antoinette Brown Blackwell, describing Blackwell's and Anthony's lecture work).

246. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 678.

247. *See id.* at 679-87; *see also* DORR, *supra* note 225, at 135. Norma Basch attributes passage of the statute to a confluence of factors. She points out that woman's rights advocates by then had sufficient Republican allies in the legislature as well as friends on both judiciary committees. In addition, she argues that the movement's demand for the vote affected popular attitudes toward marital property reform. Against the backdrop of its suffrage demands, the movement's marital property demands appeared increasingly moderate. BASCH, *supra* note 4, at 194-97.

248. The predecessor earnings statutes were enacted in Massachusetts and Maine. *See* Act of May 5, 1855, ch. 304, 1855 Mass. Acts 710; Act of Apr. 17, 1857, ch. 59, 1857 Me. Acts 49.

249. Act of Mar. 20, 1860, ch. 90, § 2, 1860 N.Y. Laws 157. This section of the act followed Massachusetts law, *see* Act of May 5, 1855, ch. 304, § 7, 1855 Mass. Acts 710, but other sections of the New York law granted wives rights not available in Massachusetts, *see infra* note 257 and accompanying text.

It should also be observed that several provisions of the New York statute conferred legal capacity on wives to act with respect to their separate property, *see* Act of Mar. 20, 1860, ch. 90, § 2, 1860 N.Y. Laws 157, generally following equitable traditions that recognized capacity in wives only so far as it pertained to their separate property, *cf.* David Stewart, *Contracts of Married Women Under Statutes*, 19 AM. L. REV. 359, 369-70 (1885).

250. Act of Mar. 20, 1860, ch. 90, § 9, 1860 N.Y. Laws 159.

251. *Id.* at §§ 10-11. The provisions of the statute are somewhat confusing, seeming to effect a partial reform of common law marital inheritance rights, as well as those of intestate succession. They read:

the inheritance provisions of the 1860 statute equalized spousal interests in a fashion that bore the impress of the joint property claim,<sup>253</sup> but its earnings provisions were clearly structured on the separate property model. As feminists well appreciated, the earnings clauses nowhere recognized a joint interest in the assets of the marital partnership.<sup>254</sup>

Woman's rights advocates played a significant role in enacting this legislation, as a survey of its provisions might indicate.<sup>255</sup> The statute was modeled on a bill just introduced in the Massachusetts legislature; Andrew J.

10. At the decease of husband or wife, leaving no minor child or children, the survivor shall hold, possess and enjoy a life estate in one-third of all the real estate of which the husband or wife died seised.

11. At the decease of the husband or wife intestate, leaving minor child or children, the survivor shall hold, possess and enjoy all the real estate of which the husband or wife died seised, and all the rents, issues and profits thereof during the minority of the youngest child, and one-third thereof during his or her natural life.

The gender-neutral inheritance rights conferred by the 1860 statute increase, in certain circumstances, those available to husband and wife at common law. Most noteworthy is section 11, which expanded a wife's rights of intestate succession. Prior to enactment of the 1860 statute, when a husband died intestate leaving a widow and children, the widow inherited a life interest in one-third of the estate (common law dower). See 1852 N.Y. Rev. Stats., pt. II, ch. II, § 20. The 1860 statute increased her share, entitling her to hold the whole of the estate so long as she had minor children—giving the wife rights akin to a husband's estate by curtesy, and an inheritance interest approximating the right of survivorship which joint property advocates demanded. Cf. *supra* note 212 and accompanying text.

252. See *supra* note 234 and accompanying text.

253. The inheritance provisions of the statute resembled those for which the movement had petitioned in 1859-1860, cf. *supra* text accompanying note 242, but were modified in ways that in fact more closely approximated the proposal of the Rochester lawyer who raised market-based objections to the joint property claim at the 1853 convention, cf. *supra* note 180.

254. At a convention held just after the passage of the 1860 act, Ernestine Rose discussed the statute's deficiencies bluntly, assessing the legislature's work in light of the classes of women it benefitted. In 1848, she argued, the legislature had granted wives the right to hold property in marriage, and so had provided a measure of relief "for wealthy women." TENTH NATIONAL CONVENTION, *supra* note 126, at 49. By contrast, in 1860, the legislature granted wives the right to their wages, and so provided assistance "for the poor woman, for her who has to labor for a subsistence; for her whose husband is a millstone about her neck, instead of a support and protection." *Id.* at 49-50. As Rose pointed out, these reforms enhanced the economic autonomy of some, but not all, wives; in rejecting the movement's joint property demands, the New York legislature had turned its back on those wives who spent their lives working for their families on an uncompensated basis. "But what," Rose queried, "shall the great mass of women, the wives of the middling classes, of the bone and sinew and marrow, do? . . . What right have they in the property obtained after marriage?" *Id.* at 50 (repeating joint property speech given at Worcester in 1851, see *supra* text accompanying note 158).

Thus, feminist proponents of the 1860 statute understood it to grant wives rights in wages or income they earned. The *New York Times* explained the earnings statute in even more restrictive terms, contending that it gave wives rights in only those earnings which they held separate from other family assets:

We know no way of preventing wives from presenting their husbands either with their possessions or their earnings, if they feel so disposed, and we have no doubt wives will continue to do so as long as wives are women and husbands men. The law protects a woman if she chooses to carry her own purse, but if she prefers handing it over to her dear tyrant, we must leave MRS. STONE to discover a remedy for any evils that may result from such deplorable weakness. For that large class of cases—unhappily very large indeed in all great cities—in which drunken or profligate husbands endeavor to live in idleness and vice upon the proceeds of their wives' industry, the new bill provides a complete remedy, and will thus put an end to one of the most indefensible and absurd abuses of our time.

*Female Emancipation*, *supra* note 103, at 4. The New York Court of Appeals ultimately interpreted the statute in remarkably similar terms. See *infra* text accompanying notes 427-35.

255. Norma Basch has most forcefully argued this point. See BASCH, *supra* note 4, at 164-65, 188-99.

Colvin, Senate sponsor of New York's 1860 legislation, substituted this version for a substantially narrower Assembly bill. It was Susan B. Anthony who supplied Colvin with the Massachusetts bill, to which "two or three more liberal clauses" were added.<sup>256</sup> Among the "liberal clauses" added to the Massachusetts bill after its introduction in the New York Senate were the sections governing custody and inheritance—illustrating that Anthony was at least partially successful in pressing the joint property claim.<sup>257</sup> (There is evidence suggesting that Colvin *was* willing to entertain the group's demands, but only to the extent that he believed they would not compromise the bill's passage.<sup>258</sup>) Perhaps more important than the statute's inheritance provisions, however, was the language of its earnings clauses. Unlike Maine law, which emancipated a wife's "personal labor, *performed other than for her own family*,"<sup>259</sup> the New York statute specified no such limitations on its coverage, thus preserving for its advocates an opportunity to press the claim.

In this they were not demure. The resolutions of the Tenth National Woman's Rights Convention, which convened in New York City some seven weeks after the statute's passage, featured this pointed reminder:

*Resolved*, That we return thanks to the Legislature of New York for its acts of justice to woman during the last session. But the work is not yet done. We still claim the ballot, the right of trial by a jury of our own peers, the control and custody of our persons in marriage, and an equal right to the joint earnings of the co-partnership. The geographical position and political power of New York make her example supreme; hence we feel assured that when she is right on this question, our work is done.<sup>260</sup>

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256. See 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 686-87.

257. For the text of the Massachusetts bill Colvin originally moved to substitute for the Assembly's proposed legislation, see *Legislature of New York*, ATLAS & ARGUS, Feb. 24, 1860, at 1. The Massachusetts bill Colvin was using contained no provisions like the inheritance and custody sections of the New York act. See Act of Mar. 20, 1860, ch. 90, §§ 9-11, 1860 N.Y. Laws 157. Thus, the sections of the 1860 statute dealing with inheritance provide strong evidence that Anthony and others raised joint property issues with Colvin. See also *infra* text accompanying notes 443-46 (subsequent exchange of letters between Colvin and Stanton).

258. The New York statute's limited recognition of the joint property concept in matters of inheritance would seem to reflect a judgment of political feasibility on Colvin's part. Two pieces of circumstantial evidence support this. First, a letter Colvin wrote to Anthony concerning the legislature's failure to act on suffrage matters during its 1860 session suggests that he worked quite deliberately to draft a bill that would carry in both houses of the legislature. See 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 691 (letter from Sen. Andrew J. Colvin to Susan B. Anthony, read at Tenth National Woman's Rights Convention, New York, 1860). Second, the state legislature repealed the inheritance (and custody) provisions of the 1860 statute during the war years, see *infra* text accompanying note 264, suggesting that support for these provisions of the statute was weak.

259. Act of Apr. 17, 1857, ch. 59, 1857 Me. Acts 49 (emphasis added). Massachusetts law contained no such exclusion until 1874. Compare Act of May 5, 1855, ch. 304, § 4., 1855 Mass. Acts 710 with Act of Apr. 24, 1874, ch. 184, § 1, 1874 Mass. Acts 117.

260. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 708 n.\* (Tenth National Woman's Rights Convention, Cooper Institute, New York, May 10-11, 1860).

Susan B. Anthony proudly announced that, having expended four thousand dollars on the year's work in New York, the group intended during the next year to devote its funds and efforts to achieve similar gains in Ohio.<sup>261</sup> In the main, however, the convention devoted little attention to the joint property question. Its attention was otherwise occupied, in celebrating the substantial gains the 1860 statute represented and debating whether divorce reform ought to be, as Stanton now urged, included in the movement's agenda.<sup>262</sup>

New York's 1860 statute represented an unmistakable advance for the cause of marital property reform, but, at the same time, a setback for the joint property agenda. The New York legislature was an influential leader in marital property reform, and its decision to employ separate property principles for recognizing wives' rights in earnings would have national consequence. Yet reform advocates persisted undaunted. Their 1860 petition drive featured demands for the ballot and jury membership, as well as a renewed demand for equal rights in the joint earnings of the marital partnership.<sup>263</sup> The issue was soon thereafter obscured by national events of far greater magnitude, as the outbreak of the Civil War diverted attention from matters of marital property reform.

Not all lost interest, however. In 1862, the New York legislature quietly repealed the inheritance and custody provisions of the 1860 act.<sup>264</sup> By this point, Stanton and Anthony were otherwise occupied, orchestrating a national petition drive in support of the Thirteenth Amendment (collecting 400,000 signatures in the process).<sup>265</sup> The circumstances of the repeal proved telling. At the war's end, the question of whether woman's rights would be embraced by the Reconstruction amendments was to divide the movement, diverting attention from issues of marital property reform. Only in this period did the loose coalition of woman's rights advocates assume organizational structure,

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261. *Id.* at 692; *see also id.* at 743 n.\*. Later during the convention, Elizabeth Jones, an activist from Ohio, energetically made a case for joint property rights in marriage. *See* 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 711. She renewed this appeal in a lengthy address to the woman's rights committee of the Ohio legislature, in a speech that provided a multifaceted set of arguments for reform of earnings and inheritance law and featured an extended defense of the joint property proposal. *See* JONES, *supra* note 103 (quoted in part *supra* text accompanying note 204). The 1861 campaign in Ohio produced a series of bills approximating the coverage of the New York statute (including an amendment to the state's statute of distribution to ensure that "something more than a paltry dower should be secured to the widow in the common estate"), 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 169-70 (report of J. Elizabeth Jones). However, only the provisions emancipating wives' real and personal property from a husband's control were enacted before the war's outbreak. *See id.*; Act of Apr. 3, 1861, 1861 Ohio Acts 54.

262. *See supra* text accompanying notes 175-76.

263. BASCH, *supra* note 4, at 197-98 (citing Appeal to the Women of New York 4 (Nov. 1860)); 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 743, 744. A year later, in 1861, Stanton appeared before the legislature to renew her appeal for reform of the state's divorce laws. *See* ELIZABETH CADY STANTON, EIGHTY YEARS & MORE: REMINISCENCES 1815-1897, at 216 (Schocken Books 1971) (1898).

264. Act of Apr. 10, 1862, ch. 172, § 2, 1862 N.Y. Laws 343, 344; *see also* 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 749-50.

265. 2 HISTORY OF WOMAN SUFFRAGE 50-89 (Elizabeth Cady Stanton et al. eds., reprint ed. 1985) (1882); DORR, *supra* note 225, at 158-70; DUBOIS, *supra* note 6, at 53.

forming two national associations, *each* dedicated to woman suffrage aims, differing primarily in their stance toward the Reconstruction agenda of the Republican Party.<sup>266</sup> Woman's rights advocates would continue to agitate for marital property reform, but the issue was now overshadowed by suffrage concerns, and would remain so for the rest of the century.

### III. JOINT PROPERTY ADVOCACY IN THE POSTBELLUM ERA

The Civil War left few aspects of American life untouched, and the woman's rights movement was no exception. Constitutional reform during the Reconstruction era reconfigured the movement's agenda, elevating suffrage issues to the forefront of attention, demoting issues of marital property reform to a decidedly secondary status, and embroiling the movement in a conflict over strategy that ultimately caused it to divide into two competing organizations. But these developments did not lead to the abandonment of the movement's joint property demands. In important ways they fueled joint property advocacy—which emerged in the postwar period as a key weapon in the movement's arsenal of suffrage arguments and an effective tool for recruiting new membership to the suffrage cause.

In the 1870's, feminists discussed joint property rights in the pages of the movement's various journals, using the claim to illustrate the injuries of disfranchisement in terms that might move new women to join the suffrage cause. In this process, suffragists disseminated a new form of rights consciousness that altered the way ordinary women understood intimate details of family life. As correspondence in the suffrage journals shows, women across the nation assimilated the rhetoric and conceptual repertoire of the rights discourse. They used joint property idiom to protest the deprivation and humiliation they experienced as hard-working wives who were treated by their husbands as economic wards, and offered personal anecdotes to demonstrate how the law of marital property subordinated women in marriage.

Yet even as the movement popularized joint property discourse in the pages of the nation's suffrage journals, those same journals reveal that many of the movement's leaders were beginning to drift from the joint property cause. Their waning interest can be attributed to a consuming preoccupation with suffrage; but other social forces seem responsible as well. As the movement expanded, it divided in age, region, and class. In the postwar period, not all women in the movement's leadership were as involved with household work as antebellum leaders had been, and many were beginning to imagine escaping from the work in ways an earlier generation of leaders never had.

The leadership's declining interest in joint property reform had concrete consequences as suffragists engaged state legislatures in their quest for the

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266. See DUBOIS, *supra* note 6, at 162-202.

vote. In this process, suffragists consistently demanded earnings reform but did not always demand joint property rights, and few pursued the matter with the tenacity the antebellum leadership had. Thus, suffrage advocacy produced a new wave of marital property legislation at a time when only some of the movement's leaders were focused on the economic issues the joint property critique illuminated.

In the years after the Civil War, legislatures and courts developed a new body of law to govern wives' earnings that was either unresponsive or openly antagonistic to the movement's joint property critique. This body of law was self-consciously designed to protect a husband's property rights in the paid and unpaid labor his wife performed in the household. And so, in an era when women across the nation were imagining what it would be like to be recognized as equals in the household economy, legislatures and courts "emancipated" wives from the common law in ways that left most economic dependents of their husbands, in law and fact.

#### A. *Shifting Priorities of the Postwar Woman's Rights Movement*

In many of the States there has been special legislation, giving to married women the right to property inherited, or received by bequest, or earned by the pursuit of any avocation outside of the home; also, giving her the right to sue and be sued in matters pertaining to such separate property; but *not a single State of this Union has ever secured the wife in the enjoyment of her right to the joint ownership of the joint earnings of the marriage copartnership.* And since, in the nature of things, the vast majority of married women never earn a dollar by work outside of their families, nor 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.

Susan B. Anthony, 1873<sup>267</sup>

The refrain was familiar, but the context new. Susan B. Anthony's 1873 elaboration of the joint property claim represented a new species of woman's rights advocacy—and a new strategy of self-defense. Having registered to vote in Rochester, New York, Anthony was now facing trial for voting unlawfully.<sup>268</sup> Her remarks were part of a lengthy speech she delivered

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267. 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 265, at 642-43.

268. Anthony was arrested on federal criminal charges of "having voted without the lawful right to vote" under § 19 of the Civil Rights Act of 1870, 16 Stat. 144, legislation intended to protect the freedmen's exercise of suffrage under the Fifteenth Amendment by making it a federal offense for white voters to cast multiple votes (a strategy intended to nullify black suffrage). See SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 9 n.19. (Barbara A. Babcock et al. eds., 1975). Federal involvement in Anthony's case reflected the Grant Administration's interest in securing a definitive construction of the Reconstruction amendments, in light of the growing incidence of women's attempts to vote. See *id.*;

repeatedly in the days before her trial, in which she invoked the Privileges and Immunities clause of the Fourteenth Amendment as well as the Fifteenth Amendment in defense of her right to vote. It was in this latter aspect of the defense that the law of marital status figured prominently. As Anthony urged, a review of marital status law, even as then modified, led to one inexorable conclusion: "all married women, wives, and widows, by the laws of the several States, [must] be technically included in the XV. Amendment's specification of 'condition of servitude,' present or previous."<sup>269</sup>

In an important sense, woman's rights advocacy was a child of the abolitionist movement, and an argument that the law of marital status amounted to a law of slavery had always played a key role in agitation for common law reform. Agitation for suffrage and marital property reform had, moreover, coexisted within the woman's rights movement since the antebellum period. But in the postwar period, one element of the reform agenda was clearly subordinated to the other. If Anthony's argument that marital status law constituted a regime of servitude drew on a decades-old tradition of advocacy, its contemporaneity may be discerned in the fact that it had now been cast in the constitutional discourse of suffrage.

The priority attached to suffrage in the postwar period was immediately attributable to the Reconstruction amendments whose meaning Anthony contested. That no explicit recognition of women's right to vote appeared in the amended Constitution enraged many movement activists, who expected the Republican Party to pursue a platform of universal suffrage at the war's end, only to discover that Republican sympathizers like Charles Sumner and Horace Greeley, as well as abolitionist allies including Wendell Phillips and Frederick Douglass, insisted on the primacy of enfranchising the freedmen.<sup>270</sup> This policy of selective emancipation informed the drafting of all major Reconstruction civil rights legislation,<sup>271</sup> to the dismay, and ultimate division,

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FLEXNER, *supra* note 10, at 165-66 (in 1871 and 1872 some 150 women tried to vote in 10 states and District of Columbia). See generally 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 265, at 586-601 (describing voting cases). Anthony was convicted, her trial marked by such evident judicial overreaching that the case inspired protest even from those unsympathetic to woman suffrage. Because the court never enforced its judgment—a \$100 fine and court costs—Anthony could not appeal her conviction. See *United States v. Anthony*, 24 F. Cas. 829 (N.D.N.Y. 1873) (No. 14,459). For full accounts of the trial and events surrounding it, see 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 265, at 627-715; CARRIE C. CATT & NETTIE R. SHULER, *WOMAN SUFFRAGE AND POLITICS: THE INNER STORY OF THE SUFFRAGE MOVEMENT* 99-106 (1923).

269. 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 265, at 644.

270. DUBOIS, *supra* note 6, at 54-55, 59-63, 87-88, 166-67.

271. The second clause of the Fourteenth Amendment provided for reductions in congressional representation whenever states denied male inhabitants the right to vote, thereby introducing sex distinctions into the Constitution for the first time. U.S. CONST. amend. XIV, § 2; see DUBOIS, *supra* note 6, at 60-62. The Civil Rights Act of 1866 provided that "citizens, of every race and color . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens," 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (1988)), defining equality on the basis of race to avoid emancipating married women and thus preserve the states' control over marital status law. The Fifteenth Amendment was similarly



of the woman's rights movement. One wing, led by Lucy Stone, Henry Blackwell, Abby Kelley Foster, and Thomas W. Higginson ultimately accepted Republican counsel that Reconstruction was, as Wendell Phillips first dubbed it, "the Negro's Hour," while another, led by Stanton and Anthony, denounced the Reconstruction amendments as a compromise of universal suffrage principles. As they viewed it, unless woman's rights activists seized the historical moment, no similar opportunity for major civil rights reform would present itself for decades.<sup>272</sup> Born of this conviction, Anthony's attempt to vote was part of a "New Departure" strategy inaugurated by Frances and Virginia Minor during ratification of the Fifteenth Amendment, whose object was to establish that the amended postwar Constitution by its terms conferred suffrage as a right of national citizenship.<sup>273</sup> In 1878, three years after the defeat of the New Departure strategy in *Minor v. Happersett*,<sup>274</sup> Stanton and Anthony's wing of the movement began national petitioning for a sixteenth amendment securing woman suffrage, efforts which bore fruit forty-two years later with passage of the Nineteenth Amendment.<sup>275</sup>

Conflicts precipitated by the Republican Party's decision to subordinate sexual to racial emancipation in the postwar years decisively reshaped the woman's rights movement. Unified in the antebellum period as a wing of the abolitionist movement, activists emerged from the Reconstruction era independent, but divided into two organizations, each dedicated to woman suffrage aims. Intent on securing universal suffrage, Stanton and Anthony attempted a series of alliances, first, with elements in the Democratic Party that were clearly racist, if not opposed to black suffrage, and then with various elements of the labor movement. In 1869 they responded to the enactment of the Fifteenth Amendment by organizing the National Woman's Suffrage Association (NWSA), whose goal was to enfranchise women by constitutional amendment.<sup>276</sup> Stone, Blackwell, Douglass, Higginson, and others who remained faithful to the Republican Party countered the organization of NWSA

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drafted, forbidding discrimination in matters of voting on the basis of "race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1; see Lucie, *supra* note 95, at 349-56 (discussing efforts of Reconstruction Congress to change law of racial status without changing law of gender status). *But cf.* Nina Morais, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 YALE L.J. 1153, 1155-63 (1988) (arguing that distinctions in language of first and second clause of Fourteenth Amendment demonstrate that framers intended to preclude woman suffrage claims under Amendment, but not other sex equality claims).

272. See DUBOIS, *supra* note 6, at 59-63, 162-202.

273. See DuBois, *supra* note 91, at 852-60; 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 265, at 586-755.

274. 88 U.S. 162 (1875).

275. U.S. CONST. amend. XIX. The Nineteenth Amendment was ratified on August 18, 1920. Stanton and Anthony's wing of the movement advocated a suffrage amendment as early as 1869, see 5 HISTORY OF WOMAN SUFFRAGE 622-23 (Ida H. Harper ed., reprint ed. 1985) (1922); FLEXNER, *supra* note 10, at 151-52, but did not focus on this strategy in earnest until 1878, 3 HISTORY OF WOMAN SUFFRAGE 57-149 (Elizabeth C. Stanton et al. eds., reprint ed. 1985) (1886). *Cf.* 5 HISTORY OF WOMAN SUFFRAGE, *supra*, at 623; DuBois, *supra* note 91, at 861.

276. DUBOIS, *supra* note 6, at 92-161, 180-95.

by founding the American Woman Suffrage Association (AWSA).<sup>277</sup> AWSA subordinated woman suffrage goals to ratification of the Fifteenth Amendment—but balanced this apparent compromise of feminist principle by declaring that its purpose was to concentrate solely on the demand for woman suffrage and avoid all “side issues”; it criticized NWSA for being “too heterogeneous” and confusing woman suffrage with sexual and economic issues.<sup>278</sup> While the NWSA focused its advocacy efforts on the national government, AWSA leaders were committed to tactics of state-by-state agitation, a strategy rooted, at least initially, in an effort to avoid conflicts with the Republican Party’s agenda for Reconstruction.<sup>279</sup>

The decade’s conflicts shaped the movement that emerged in the 1870’s in other important ways. Once the Republican Party committed the national government to rectifying matters of racial, but not gender, inequality, the movement’s sense of the linkage between gender and race oppression began to break down. Abolitionist women who had believed that the war between the states would secure “human rights” for all now struggled to devise their own strategy for women’s emancipation, but their newfound independence fostered insularity and a concomitant narrowing of affinity and concern. These developments exacerbated racism in the predominantly white movement, making it difficult for emancipated, but still disfranchised, African-American women to participate on dignified terms.<sup>280</sup>

277. *Id.* at 164-71, 180, 195-98.

278. *Id.* at 197. For a particularly strong expression of such sentiments, see *The “Revolution” and Woman Suffrage*, WOMAN’S J., Oct. 15, 1870, at 325.

279. STEPHEN M. BUECHLER, *THE TRANSFORMATION OF THE WOMAN SUFFRAGE MOVEMENT: THE CASE OF ILLINOIS, 1850-1920*, at 9-11 (1986); DUBOIS, *supra* note 6, at 169-71; see also FLEXNER, *supra* note 10, at 173; Henry B. Blackwell, *State and National Work*, WOMAN’S J., July 22, 1882, at 228.

280. See Bettina Aptheker, *Abolitionism, Woman’s Rights and the Battle over the Fifteenth Amendment*, in WOMAN’S LEGACY: ESSAYS ON RACE, SEX, AND CLASS IN AMERICAN HISTORY 9 (1982); cf. DUBOIS, *supra* note 6, at 86-104, 174-78. Black women who did participate in the feminist movement in the postwar period tended to ally themselves with Stanton and Anthony’s wing of the movement. Thus, while Harriet Tubman “steered clear of the bitter factional disputes in the movement, she told an interviewer, ‘I belong to Miss Susan B. Anthony’s association.’” STERLING, *supra* note 87, at 411. Likewise, Sojourner Truth explained her position:

There is a great stir about colored men getting their rights, but not a word about the colored women; and if colored men get their rights, and not colored women theirs, you see the colored men will be masters over the women, and it will be just as bad as it was before. So I am for keeping the thing going while things are stirring; because if we wait till it is still, it will take a great while to get it going again.

2 HISTORY OF WOMAN SUFFRAGE, *supra* note 265, at 193 (First Annual Meeting of American Equal Rights Association, New York, New York, May 9-10, 1867).

Frances Watkins Harper was the only prominent black feminist to affiliate herself with the AWSA. See STERLING, *supra* note 87, at 416. She explained her position in an 1869 speech that was summarized as follows:

When it was a question of race, she let the lesser question of sex go. But the white women all go for sex, letting race occupy a minor position . . . . If the nation could only handle one question, she would not have the black women put a single straw in the way, if only the men of the race could obtain what they wanted.

2 HISTORY OF WOMAN SUFFRAGE, *supra* note 265, at 391-92 (Anniversary Meeting of Equal Rights Association, New York, May 12-14, 1869). Harper bluntly discussed the racism of white women in the movement and in the working class at large, *id.*, a theme she emphasized even when demanding reform

At the same time, the consuming preoccupation with suffrage precipitated by the constitutional struggles of the 1860's persisted, demoting marital property reform to a decidedly secondary position in the movement's agenda. During the 1870's, feminists did not abandon marital property reform, but neither NWSA nor AWSA pressed it with the energy or urgency of the prewar years. Instead, feminists increasingly argued that the deplorable state of marital property law illustrated women's need for the vote.<sup>281</sup> The recurrence of this polemic signaled a fundamental transformation in the movement's agenda: demands for marital property reform now served suffrage ends.

These developments were not, however, wholly detrimental to joint property advocacy. Engaged in a competitive process of organizing, the movement acquired a wider national following—enlisting many women drawn into public service during the Civil War, as well as women in the western states and territories.<sup>282</sup> Stanton and Anthony's decision to start a weekly journal, *Revolution*, dedicated to suffrage advocacy and wide-ranging matters of economic and sexual reform, provoked a competing endeavor by the AWSA, the *Woman's Journal*, a polished weekly that was more conservatively edited and better funded.<sup>283</sup> Other suffrage journals, both regional and national, appeared in their wake.<sup>284</sup> And so even as the movement's

of marital property laws, *see id.*; PROCEEDINGS OF THE ELEVENTH NATIONAL WOMAN'S RIGHTS CONVENTION, *supra* note 186, at 46 ("I do not believe that white women are dewdrops just exhaled from the skies. I think that like men they may be divided into three classes, the good, the bad, and the indifferent.").

On the increasing racism of the postwar suffrage movement, see NANCIE CARAWAY, *SEGREGATED SISTERHOOD: RACISM AND THE POLITICS OF AMERICAN FEMINISM 141-57* (1991); DUBOIS, *supra* note 6, at 174-78; GIDDINGS, *supra* note 40, at 123-31; Aptheker, *supra*, at 42-52.

281. For feminist arguments invoking the inequality of marital property law as a reason for the vote, *see*, for example, 'All the Rights I Want,' NAT'L CITIZEN & BALLOT BOX, Jan. 1879, at 2; Lewia C. Smith, *A Lecture on the Equality of the Sexes*, BALLOT BOX, Apr. 1877, at 2; *The Pauper Sex*, BALLOT BOX, Sept. 1876, at 3; "With All My Worldly Goods I Thee Endow," NEW NORTHWEST, Apr. 17, 1874, at 2; 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 265, at 827-28 (remarks of Lucy Stone at AWSA meeting, New York, May 9, 1872); *see also Marital Equality*, REVOLUTION, July 20, 1871, at 7 (letter to editor) (discussing woman's "right to ownership of property and earnings as an argument for her possession of the ballot"); *The Wife's Property*, REVOLUTION, July 28, 1870, at 57 (reprinting letter from C.I.H. [Clara] Nichols); L.S. [Lucy Stone], *The Widow's Incumbrance*, WOMAN'S J., Feb. 5, 1870, at 37; *The Working Women's Association*, REVOLUTION, June 3, 1869, at 346 (remarks of Susan B. Anthony); *Woman vs. The Labor Party*, NAT'L CITIZEN & BALLOT BOX, Oct. 1878, at 2.

In his study of the Illinois suffrage movement, Stephen Buechler observes that in the postwar period, "movement ideology increasingly presented the vote as both a necessary and sufficient condition for achieving all other goals." BUECHLER, *supra* note 279, at 42.

282. *See* BUECHLER, *supra* note 279, at 56-60, 62-67 (leadership of Illinois movement came from abolitionist backgrounds, but primary practical experience was service in Sanitary Commission and other benevolent work); DUBOIS, *supra* note 6, at 180-86 (discussing Stanton and Anthony's organizing efforts in midwest, where most who joined movement began their political careers not as abolitionists, but as members of Sanitary Commission and other home-front support efforts during war); *see also* FLEXNER, *supra* note 10, at 156-63 (postwar suffrage activity in West). For a glimpse of the struggle between NWSA and AWSA to align affiliates, *see Michigan Suffrage Convention*, REVOLUTION, Feb. 10, 1870, at 94.

283. *See* FLEXNER, *supra* note 10, at 152-53.

284. *See* 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 45-49.

leadership argued over postwar strategies in an effort to regain the momentum of the prewar period, its message reached an ever-widening audience.

Arguments about marital property reform played an important role in efforts to recruit new women to the suffrage cause. When suffragists invited married women to consider how the law made wives financial dependents of their husbands and devalued the work they performed for their families, they made concrete the injury of disfranchisement in a way that abstract appeals to rights could not. Presented in this fashion, the quest for the vote was a quest for relief from the indignities and deprivations of family life.<sup>285</sup> The suffrage journals published in the aftermath of the Civil War thus served as national fora for criticizing property relations in marriage; feminist arguments reached a larger audience than they had in the antebellum era,<sup>286</sup> and so inculcated in a new generation a deeper understanding of the evils of enforced pecuniary dependence.

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285. The postwar organizing successes of the Women's Christian Temperance Union (WCTU) illustrate the power of this recruiting strategy. Ellen DuBois points out that during this period the WCTU took as its starting point woman's position within the home; it catalogued the abuses she suffered there and it proposed reforms necessary to ameliorate her domestic situation. . . . The WCTU spoke to women in the language of their domestic realities, and they joined in the 1870s and 1880s in enormous numbers. Anchored in the private realm, the WCTU became the mass movement that nineteenth-century suffragism could not.

DuBois, *supra* note 10, at 214.

286. The suffrage journals of the postwar movement had a national audience, even though their subscriber lists look quite small by modern standards. In 1878, for example, the *Woman's Journal* had 4000 subscribers throughout the country. See PETTINGILL'S NEWSPAPER DIRECTORY AND ADVERTISER'S HANDBOOK FOR 1878, at 11 (New York, S.M. Pettingill & Co. 1878) [hereinafter PETTINGILL'S]. Circulation of the *Ballot Box* was under 5000 as well, *cf. id.* at 305, and *New Northwest* reported a circulation of 1800, *see id.* at 196. Available circulation figures for *Revolution* are conflicting. The best estimate seems to be that *Revolution* never had more than 3000 subscribers. See LUTZ, *supra* note 58, at 171; PATRICIA S. BUTCHER, EDUCATION FOR EQUALITY: WOMEN'S RIGHTS PERIODICALS AND WOMEN'S HIGHER EDUCATION 1849-1920, at 5 (1989). *But see* 2 GEO. P. ROWELL & CO.'S AMERICAN NEWSPAPER DIRECTORY 703 (New York, Geo. P. Rowell & Co. 1870) (commonly known as ROWELL'S AMERICAN NEWSPAPER DIRECTORY; printed with THE MEN WHO ADVERTISE and AMERICAN NEWSPAPER RATE BOOK) [hereinafter ROWELL'S] (noting that *Revolution* "claims 10,000 circulation"); *cf.* LUTZ, *supra* note 58, at 138 (reporting that in 1868, "under the frank of Democratic Congressman James Brooks of New York," Susan B. Anthony distributed 10,000 copies of *Revolution's* first issue across the country).

Other specialized newspapers of the era reported similar circulation figures, suggesting that the suffrage papers were in fact performing decently in the existing market. In the 1870's, *Progress*, a weekly paper that styled itself "the organ of all the temperance societies," had a circulation of between 3000 and 5000. See ROWELL'S, *supra*, at 703. The *National Temperance Advocate*, a monthly, had a circulation of 8000. See PETTINGILL'S, *supra*, at 52. The *American Socialist*, a weekly, had a circulation of 1000. *See id.* at 55. The *National Anti-Slavery Standard*, a weekly, had a circulation of approximately 2000. *See* ROWELL'S, *supra*, at 702. In this same period, the *Washington Post*, a daily, had a circulation of 10,000, *see* PETTINGILL'S, *supra*, at 201, and *Godey's Lady's Book*, a monthly woman's magazine somewhat comparable to the modern *Ladies Home Journal*, is reported to have had a circulation of 106,000 in 1870, *see* ROWELL'S, *supra*, at 736.

Despite their relatively small market shares, the movement's various journals did reach a significant segment of the reading public. Many suffrage journals published on a weekly basis, as did all of those described above, with the exception of the *Ballot Box*, a monthly. The journals reprinted each other's articles and correspondence, and to judge from reader commentary, they were lent by women from household to household, a practice necessitated by husbands' control of the family purse.

## B. *Popularization and Depoliticization of the Joint Property Claim*

In woman suffrage journals of the postwar era, discussions of the joint property claim and the critical concepts supporting it appeared in a variety of formats, most of them informal: in reports on state legislative developments, essays, short stories, and reader letters. In this way, the claim was disseminated in the years after the Civil War, translated from a formal legislative demand into an informal rights discourse that could be assimilated by a lay readership untutored in the niceties of marital property doctrine. Reader letters attest to the popularization of the claim, and richly document the power of this rights discourse to transform women's understanding of their daily experience and most intimate relationships. At the same time, the postwar journals illustrate that joint property discourse was undergoing striking transformations, changing in ways that suggest its growing insularity from the realm of practical politics, and foreshadow its demise as a feminist strategy for legal reform.

### 1. *Dissemination of the Rights Discourse in Postwar Suffrage Journals*

The first journal to take up the joint property claim in the postwar era was *Revolution*, the suffrage journal that Stanton and Anthony inaugurated in 1868 while they were affiliated with the Working Women's Association and the National Labor Union, the political arm of the postwar labor movement. *Revolution* provided coverage of multiple aspects of the labor question;<sup>287</sup> amidst reports on barriers to women's employment and unequal pay, cooperative housekeeping and communitarians,<sup>288</sup> stories on the devaluation of women's household labor found a natural place.<sup>289</sup> The paper published articles reproducing Louisiana's community property law,<sup>290</sup> articles

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287. See DUBOIS, *supra* note 6, at 105-61.

288. Ellen DuBois provides a detailed account of the journal's coverage of the labor question. See *id.* On *Revolution's* coverage of cooperative housekeeping, see HAYDEN, *supra* note 6, at 51, 60, 79.

289. *The Pecuniary Independence of Wives*, for example, featured this bitter assessment of a wife's uncompensated contribution to a family's material welfare:

An ordinary servant receives better wages. A cook is entitled to her board and a certain sum besides; a waitress likewise, a seamstress likewise, a child's nurse likewise, their board guaranteed and their recompense stipulated. But the wife, who combines all these and more, who serves in any and every capacity which the need calls up, who may even assist her husband in his employment in addition to her own, who may even be an active but silent partner in his business, has bestowed upon her as a gift, a charity, a donation, the scanty primitive support her body demands.

Marie A. Brown, *The Pecuniary Independence of Wives*, *REVOLUTION*, June 3, 1869, at 355; see also *The Poverty of Women*, *REVOLUTION*, Nov. 3, 1870, at 280 ("It would be a curious and pathetic statement if we could have placed before us the sums which women have added to the wealth of the world, to which they have no title, and for which they receive no credit."); cf. *Marriage and Woman's Rights*, *REVOLUTION*, July 6, 1871, at 6 ("Miss Parkes said, in one of her essays on Labor, that a wife's time and presence at home are of much greater value to a workman than the money she could earn away from home; and this is undoubtedly true in every branch of society") (letter to editor).

290. *Civil Code of Louisiana*, *supra* note 136, at 1 (quoting, with emphasis, LA. CIV. CODE art. 2369: "Every marriage contracted in this state, superinduces of right, partnership, or community of acquets or

demanding inheritance reform so that wives would receive their fair share of property jointly acquired in marriage,<sup>291</sup> and articles by Clara Nichols that denigrated compensation by inheritance, contending that wives were entitled to a present proprietary interest in family assets.<sup>292</sup> Joint property advocacy was not limited to discussion of legal reform, but spilled over into social commentary. Writers assessed *The Husband of To-Day* and diagnosed the ills of modern marriage in light of society's failure to recognize wives' entitlement to an equal share of marital assets.<sup>293</sup>

The *Woman's Journal*, sponsored by the AWSA, began weekly publication in 1870 under the editorship of Lucy Stone, Henry Blackwell, and Mary Livermore.<sup>294</sup> It, too, carried forward the tradition of joint property advocacy in a lively fashion, at least in its inaugural years. In 1871, for example, Jane Grey Swisshelm, an advocate of marital property reform since the 1840's,<sup>295</sup> published a two-part story exploring the experience of marriage and motherhood for a woman who had supported herself as a schoolteacher while single.<sup>296</sup> Swisshelm's heroine so bristles at her condition of financial dependence in marriage that, after the birth of her first child, she returns to teaching to secure wages that she might, under statute, hold in her own name. From this bargaining position the woman forges an agreement with her husband to abandon outside employment and resume a full-time domestic role, with half his earnings secured to her by contract. Swisshelm carefully explained to her readers that no court would enforce a contract that altered the marriage relation in this way,<sup>297</sup> but nevertheless used the arrangement to

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gains, if there be no stipulation to the contrary.'" (noting other relevant provisions of Louisiana community property law and emphasizing relevant terms, including husband's exclusive management of the community).

291. *Marriage and Woman's Rights*, *supra* note 289, at 6 (letter to editor; name withheld); *Woman's Wages*, *REVOLUTION*, Jan. 21, 1869, at 1 (proposing inheritance and distribution rules).

292. See *infra* notes 368-69 and accompanying text.

293. See *The Husband of To-Day*, *REVOLUTION*, July 8, 1869, at 3; *Justice vs. Law and Custom*, *REVOLUTION*, Jan. 5, 1871, at 7 (letter to editor from "L.H."); see also *Our Women Paupers*, *REVOLUTION*, July 14, 1870, at 24; *The Poverty of Women*, *supra* note 289, at 280.

294. See FLEXNER, *supra* note 10, at 152.

295. See SWISSELM, *supra* note 61, at 72, 101-05 (autobiography describing Swisshelm's own marital conflicts over property, and her work in support of married women's property act enacted in Pennsylvania in 1848).

296. Jane G. Swisshelm, *The Coming Woman; And the Woman Who Has Come*, *WOMAN'S J.*, Mar. 18, 1871 (pt. 1), at 86, *WOMAN'S J.*, Mar. 25, 1871 (pt. 2), at 94 [hereinafter *The Coming Woman*].

297. See *The Coming Woman*, pt. 2, *supra* note 296, at 95:

The State was a third party to our marriage contract, and should be a party to its alteration. It will, no doubt, be difficult to arrange it all; for the old Saxon swine-eaters . . . were pleased to enact that all contracts between husband and wife, either before or after marriage, are null and void. The law has always proved inconvenient, but, as wisdom died with them, there has arisen no power equal to its repeal.

While Swisshelm explained the legal debilities of the contract in overbroad terms (in this period, some antenuptial agreements were valid), she correctly pointed out that the contract she described would have been unenforceable. Courts uniformly refused to enforce contracts that they viewed as altering the status obligations of marriage, especially those agreements that abrogated the doctrine of marital service by compensating wives for their domestic labor. See *infra* text accompanying notes 415-24 (discussing case law in Iowa and New York); see also Hendrik Hartog, *Marital Exits and Marital Expectations in*

depict what life would be like under a joint property regime.<sup>298</sup> The story deftly illustrated the interplay of social, legal, political, and economic forces that made wives dependents of their husbands, and dramatized the structure of an emancipated relationship in terms that made it an immanent and unthreatening possibility.<sup>299</sup>

Henry Blackwell, who edited and regularly contributed to the *Journal*, joined Swisshelm in endorsing a joint property system in which marital assets would be pooled and divided.<sup>300</sup> Yet when a reader objected that the assets of the marital partnership ought to be divided, but divided in proportion with the market value of a husband's and wife's labor, Blackwell found himself grappling with a question that Swisshelm's story of intramarital bargaining avoided. To defend the marital property regime he proposed, Blackwell contended that equal ownership was just because a wife's maternal role defied market valuation:

[A] woman assumes peculiar duties and functions as a wife and mother which no money can compensate and which, being essentially feminine, no man can possibly fulfil. She perils her life and health, and invests her whole physical and moral being in the function of maternity and its consequences. Therefore the woman, as a wife, becomes the equal of the man as a husband. He acquires an equal interest in the children and home, she an equal interest in the proceeds of his masculine labor.<sup>301</sup>

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*Nineteenth Century America*, 80 GEO. L.J. 95, 100-05 (1991) (discussing doctrines rendering unenforceable intramarital contracts, focusing on separation agreements that relieve husband's duty of support). The contract Swisshelm described sought to alter marital obligations in two ways—by providing that a husband compensate his wife for her domestic labor and by releasing the husband from his duty of support. See *infra* note 298.

298. As Swisshelm envisioned it, implementing such a regime would entail abolishing marital duties of service and support (inclusive of inheritance rights); dividing equally between the spouses the family's cash income, which each spouse would then hold individually; and making each spouse liable for personal expenses as well as for a half share of the family's support. The terms of the contract Swisshelm's heroine proposed are as follows:

I must release my right of dower in your estate, and you your right of courtesy in mine. I must be bound to provide for myself and pay half of all our common expenses in consideration of your paying to me the half of your salary or of the net proceeds of any business in which you are engaged. The income of your estate must be yours, as that of mine must be mine.

*The Coming Woman*, pt. 2, *supra* note 296, at 95.

299. Swisshelm continued her polemic against the expropriation of wives' labor in subsequent pieces for the *Journal*. See, e.g., Jane G. Swisshelm, *Woman's Sphere Pure and Simple*, WOMAN'S J., Apr. 3, 1875, at 108-09, reprinted in NEW NORTHWEST, Apr. 30, 1875, at 1.

300. H.B.B. [Henry B. Blackwell], *Are Wives Supported?*, WOMAN'S J., Apr. 30, 1870, at 129; cf. H.B.B. [Henry B. Blackwell], *Do Husbands Support Their Wives?*, WOMAN'S J., July 22, 1882, at 228 (noting that "[t]he part of a wife in the family is as necessary and valuable as is that of a husband"); *Equality Before the Law Once More*, WOMAN'S J., June 14, 1873, at 191 (letter to editor) (imputing equal division concept to Blackwell).

301. *Marital Justice*, WOMAN'S J., Mar. 7, 1874, at 80 (H.B.B. [Henry B. Blackwell] responding to letter to editor).

Thomas Wentworth Higginson also argued that a wife's "labor" in bearing and rearing children justified her equal claim on marital assets. Like Blackwell, he met market-objections to the proposal by observing that "[i]f [a wife's labor] does not earn money, it is because it is not to be measured in money, while it exists—nor to be replaced by money, if lost."<sup>302</sup> Higginson thus depicted family and market as separate spheres, defined and distinguished by the physiology of sex. Whereas the antebellum movement had countered market-based objections to joint property by arguing that the labor market was shaped by the same caste values that structured marriage,<sup>303</sup> Blackwell and Higginson now rested their defense of joint property on the *incommensurability* of economic and affective spheres. Though premised on a considerably more conservative understanding of the joint property claim, the stories broached the problem of valuing wives' family labor for a national readership.

The *New Northwest*, first published in Portland, Oregon, by Abigail Scott Duniway in 1871, added a distinctively western voice to suffrage journalism. The frontier experience of the *New Northwest's* editor and contributors immediately distinguished it from the cosmopolitan ethos of the *Woman's Journal*.<sup>304</sup> Where Blackwell and Higginson discussed the joint property claim in the *Woman's Journal* as if a wife's role in marriage consisted primarily in her work bearing children, Duniway's journal offered a very different picture of a wife's contribution to family life.

Contributors to the *New Northwest* were confident of the economic value of wives' labor. One writer recounted the story of a man who taunted her, "Who will support you when you get your rights?"—bragging that *he* supported his wife and five children, and had even "laid up money enough to buy a little house." The author's rejoinder analyzed the relation of waged and unwaged labor with more critical sophistication than Blackwell and Higginson:

"Suppose your wife had done nothing, as would have been the case if you had supported her, could you, out of your fifteen dollars a week, have kept your family? If you had paid for the cooking, baking, washing, ironing, sweeping, dusting, making and mending of

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302. T.W.H. [Thomas W. Higginson], *A Co-Partnership*, WOMAN'S J., July 1, 1871, at 201:

The very laws of nature, by giving her the children to bear and rear, absolved her from the duty of their support, so long as he is alive who was left free by nature for that purpose. Her work on the average was as hard as his; nay, a portion of it is so especially hard that it is distinguished from all others by the name "labor." If it does not earn money, it is because it is not to be measured in money, while it exists—nor to be replaced by money, if lost. . . . Indeed, it is a palpable insult to the whole relation of husband and wife when one compares it, even in a financial light, to that of business partners. It is only because a constant effort is made to degrade the practical position of woman below this standard of comparison, that it becomes her duty to claim for herself at least as much as this.

303. See *supra* text accompanying notes 182-93.

304. See FLEXNER, *supra* note 10, at 159.



clothes, would your wages have kept you, your wife, and five children as comfortably as you have lived, and enabled you to lay by a little each year?"

"Certainly not, certainly not; thirty dollars a week would not have done it."

"Then your wife made the extra fifteen dollars by her hard work and economy. She came almost as near supporting you as you did supporting her, did she not?"<sup>305</sup>

Perhaps even more striking is the critical facility with which writers in the *New Northwest* analyzed the social structure of the labor market. For example, when Duniway discussed wives' work bearing and rearing children, she did not describe it as a unique natural capacity that transcended market valuation; rather, she described it as socially productive work that was systematically devalued by reason of the caste status of the women who performed it:

[W]hile the ignoramus who feeds the pigs or cattle is paid for his labor in proportion to his toil, the wife and mother, who rears the family, is not considered "self-supporting" because in her position of political subjugation, though doing two-thirds of the work of the world, her protector (?) man usurps and controls nine-tenths of the pay.<sup>306</sup>

Another contributor, Helen P. Jenkins, attacked the sentimentalization of reproductive labor as a ploy to obscure its devaluation: "This work of the home—this mother work, which men poetically praise (praise is so cheap!), is not recognized by the State as having any value whatever. Neither does society recognize a value in it, notwithstanding it never tires of lauding and flattering."<sup>307</sup> For Jenkins, "[t]he estimated worth of a thing, 'as the world goes,' is its money value. Law and society say this home work need not be paid in money; therefore, society and law value this work of the mothers of the nation at—how much?" Her answer was simple: "nothing."<sup>308</sup>

Jenkins, like Swisshelm before her, proposed the "shocking" idea that the husband pay the wife, reasoning "[a]t least he *ought* to pay her, as the law gives to him the property resulting from their combined labor and prudence, instead of recognizing her as an equal partner in the matrimonial firm."<sup>309</sup> Other *New Northwest* stories emphasized the illegitimacy of a husband's

305. Matilda Hindman, *Who Will Support You?*, NEW NORTHWEST, Oct. 10, 1878, at 4.

306. *Liberty for Married Women*, NEW NORTHWEST, Aug. 15, 1873, at 2 (editorial response to comment in *Chicago Balance* professing mystification at claim of "'some of our most radical friends . . . that married women can be, to any great extent, what is usually termed self-supporting'").

307. Helen P. Jenkins, *Do Mothers Earn Their Own Support?*, NEW NORTHWEST, July 5, 1872, at 2.

308. *Id.*

309. *Id.*

control over marital property,<sup>310</sup> and invoked joint property principles to criticize earnings reform bills in the Oregon legislature<sup>311</sup> as well as to demand inheritance reform.<sup>312</sup> By 1875, Duniway had begun to focus on securing for widows a right of survivorship in their husbands' estate.<sup>313</sup> Duniway's success in persuading the Oregon legislature to adopt a separate-property earnings statute did not diminish her enthusiasm for the right of survivorship concept—a reform which, for a time, she believed Oregon women had secured.<sup>314</sup>

## 2. *Assimilation of Rights Discourse by Journal Readership*

Vigorous discussion of joint property in the suffrage journals made them a natural forum for subscribers interested in advancing, defending or buttressing aspects of the claim. Only some published correspondence focused on joint property issues, but these letters reveal the impact of joint property advocacy on women affiliated with the suffrage cause—illustrating how diffusion of the critical concepts supporting the claim altered the worldview and self-understanding of woman's rights sympathizers.

The most striking letters are those in which readers describe years of labor in the family setting that left them with no property to their name and no voice in the disposition of family assets. In these letters it is possible to see how joint property concepts could transform an individual's experience of frustration, privation, or humiliation into consciousness of class-based disempowerment. To appreciate the transformative power of the rights discourse one need only examine a letter written to the *Ballot Box*, which the editors of the *Woman's Journal* reprinted in full:

MRS. S.R.L. WILLIAMS, ED. *Ballot Box*:—I wish to give a bit of my history. Am a farmer's wife. Married in pioneer times a poor man,

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310. See *The Reason Why*, NEW NORTHWEST, Sept. 1, 1876, at 2; "With All My Worldly Goods I Thee Endow," *supra* note 281, at 2 ("Where neither have property to begin with, and both work together to obtain it, then it *all* belongs to the man. It is called 'common property,' but it is common in just this way: The man claims it all while living, and dying, the law allows the woman the interest upon one-third . . .").

311. See *Married Woman's Property Bill*, NEW NORTHWEST, Sept. 27, 1872, at 2 ("While we look upon this Bill as a step in the right direction, it does not by any means meet the difficulties of the case. . . . [Women] want the marriage contract recognized as a full co-partnership in which neither party can claim 'marital rights' . . . above the other . . .").

312. J.W. Stow, *My Probate Pilgrimage*, NEW NORTHWEST, June 14, 1878, at 1.

313. See *Woman's Declaration of Independence*, NEW NORTHWEST, July 9, 1875, at 1 ("[F]or denying us the right to administer upon estates; for robbing us of the control of two-thirds of the property rightfully belonging to us in case of widowhood. He has made us political, financial and personal nonentities."). Duniway argued her case on grounds of formal equality as well as restitution; thus, she countenanced equalizing inheritance rights at the level of a wife's existing entitlement, but was plainly interested in securing for widows a right of survivorship in a husband's property—a right similar to the common law estate by curtesy or a husband's inheritance rights in community property states. See *Community Property*, NEW NORTHWEST, Oct. 2, 1879, at 2.

314. See *infra* text accompanying notes 376-78.

and by our joint efforts have made us a home worth several thousand dollars; have borne nine children, and took the whole care of them. Five are men grown, four of them voters. The first twenty years I did all my house-work, sewing, washing and mending, except a few weeks at the advent of the babies. For the last sixteen years have had help part of the time; but have had from two to four grandchildren to care for the last three years, one of them a baby. And now I want to go to the Centennial and cannot command a sixpence for all my labor. Husband owns and controls everything and says we have nothing to spend for such foolishness. Have no more power than a child. Now if my labor has been of any value in dollars and cents I want those dollars and cents to do as I please with. I feel like advising every woman to not do another day's labor unless she can be owner of the value of it.

All the property that I possess in my own right is this pen and holder; a present from my brother in California. PEN HOLDER.<sup>315</sup>

"Pen Holder" continued to write to the *Ballot Box*; her next letter advocated suffrage, temperance, and male sexual restraint.<sup>316</sup>

"Pen Holder" openly drew upon her life to fashion an argument for the woman's rights cause. Other readers advanced arguments cast in more impersonal terms, which nevertheless resonated with the energy of personal experience. One such argument for suffrage and control over "joint earnings" in marriage is filled with transparently autobiographical rage. A paragraph of this polemic suggests its fury:

As a mother, a woman goes through the tragedy of giving birth to her son, watches over and cares for his helpless infancy, brings him through all the diseases incident to childhood, is his nurse, physician, seamstress, washerwoman, teacher, friend, and guide, spending the cream of her days to bring him up to be a voter with no provision in law for her own support in the mean time, with not so much as "I thank you." Then he leaves home and marries a wife, whom it took some other mother twenty-one years to raise, educate, and teach to cook his meals, to make and wash his clothes, to furnish him with a bed, and to fill the house with comforts, of which he has the larger share, at her own expense. And all this done for him up to this period of his life without any cost to himself. Then he votes to help make a law to disfranchise his wife and these two mothers, who have unitedly spent forty-two years of the prime of their days for his benefit, without any compensation. And then he makes another law to compel his wife to do all the same kind of drudgery which [sic] his mother had done, with the addition of giving birth to as many children as in his good pleasure he sees fit to force upon her. And all her earnings

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315. *Subjection of Women*, WOMAN'S J., Dec. 23, 1876, at 410, reprinting BALLOT BOX, Nov. 1876, at 2.

316. See *Correspondence*, BALLOT BOX, Jan. 1877, at 3.

and the fruit of her labor are his, his wife being the third woman who spends her life to support him. It takes three, and sometimes four women to get a man through from the cradle to the grave, and sometimes a pretty busy time they have of it, too. It is time we stated facts and called things by their right names, and handled this subject without kid gloves.<sup>317</sup>

For this writer, the discourse of woman's rights illuminates latent conflicts of family life. As she considers the relationships in which women work, she confronts relationships in which women are exploited. Her narrative thus exposes violent cleavages in family affiliation, revealing a world in which mothers and sons and wives and husbands face each other as antagonists. Paradoxically, she finds naming this state of affairs empowering—a mode of collective action which she exhorts her sisters to join: “It is time we stated facts and called things by their right names, and handled this subject without kid gloves.” Raising the veil of domesticity exposes a world divided, where gender does not cohere in patterns of complementarity and reciprocity, but instead is expressed in relations of domination and resistance.

The reader letters reproduced here are notable for their ability to express the anger fueling joint property demands, but are otherwise representative in the critical sentiments they articulate. Subscriber correspondence illustrates that movement leaders were quite successful in popularizing the rights discourse—not merely its rhetoric, but the repertoire of critical concepts supporting the claim.<sup>318</sup> For example, many journal readers attacked the notion that wives and mothers were “supported.”<sup>319</sup> Others challenged inheritance rules that left wives a meager share of the estates they had labored to build.<sup>320</sup> Still others responded to reports of marital property reform by disparaging the significance of formal equality granted: Of what value was the right to hold property at law when wives had no property to hold, their labor

317. *A Wife's Protest*, WOMAN'S J., Mar. 6, 1875, at 74.

318. For a letter from a male subscriber advocating a wife's “ownership and control of one half of the common property,” see Thomas S. Collier, *Our Work in the Centennial Year*, WOMAN'S J., Feb. 26, 1876, at 67 (“I know this assertion from me, a man, is heresy, but I hold it to be simply justice.”).

319. See Hindman, *Who Will Support You?*, *supra* note 305, at 4; Julia M. Dunn, *The Average American Woman*, BALLOT BOX, Mar. 1878, at 2 (letter observing “[i]t is the ‘average American woman’ who takes ten cents worth of flour and converts it into thirty-five cents worth of bread,” querying “[w]ho earns the bread for the family, the husband who gives ten cents worth of labor, or the wife who gives twenty-five?” and concluding “[i]t is the unpaid labor of the average American woman which makes it possible for a poor man to raise a family of children in tolerable comfort”); *Letter from Salem*, NEW NORTHWEST, Feb. 5, 1875, at 2.

320. See, e.g., *Laws and Women*, BALLOT BOX, May 1877, at 2 (letter to editor signed “E.S.F.”); *The Widow's Incumbrance*, WOMAN'S J., Feb. 17, 1872, at 50 (letter to editor from farmer's widow signed “L.H.O.”); see also *Marriage and Woman's Rights*, *supra* note 289, at 6 (contending that wife should be recognized as equal partner in marriage partnership, entitling her to “full half share in the earnings of her husband”; conceding that husband is to control capital on daily basis, but insisting wife have access to her share “in the great crisis and settling points of life,” namely, bankruptcy and death) (letter to editor; name withheld) (emphasis omitted).

redounding by law to the husband's benefit?<sup>321</sup> Readers in community property states such as California employed joint property rhetoric to protest rules that gave husbands sole management of the community and an advantage in inheritance.<sup>322</sup> By no means was subscriber correspondence focused on joint property issues. But the claim had national currency: it was advanced with cogency and regularity by readers of diverse economic and regional backgrounds. In short, movement leadership was remarkably effective in popularizing the rights discourse, transforming a rhetoric of formal political petition into a colloquial idiom capable of describing the injuries and indignities of family life. When Abigail Duniway lobbied the Oregon legislature for marital property reform in 1878, arguing that "Married women are servants without wages,"<sup>323</sup> she was only echoing a complaint raised at the outset of the decade by a woman in private correspondence with Isabella Beecher Hooker: "I am nothing but a housekeeper without wages, doing *all* the work of the family."<sup>324</sup>

### 3. *Postwar Transformations in Joint Property Discourse*

While perusal of postwar suffrage journals reveals the movement succeeded in popularizing the joint property claim, it also reveals striking generational differences in attitude toward the claim amongst the movement's leadership. In the aftermath of the Civil War, joint property demands were publicized by those who joined the suffrage movement through abolitionist activity in the antebellum era—prominent among them, Elizabeth Cady Stanton, Susan B. Anthony, Clara I.H. Nichols, Henry Blackwell, Jane Swisshelm, Thomas Higginson, Lucy Stone, Matilda Josyln Gage, and Amelia Bloomer.<sup>325</sup> Others, however, seemed to lose interest. Antoinette Blackwell,

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321. See, e.g., *A Wife's Protest*, *supra* note 317, at 74 (letter to editor commenting on deficiencies of marital property legislation enacted in Massachusetts and elsewhere, signed "Yours for justice, A SUBSCRIBER"); M. Williams, *No Equal Rights for Wives Anywhere*, *WOMAN'S J.*, May 10, 1873, at 1 (letter to editor commenting on deficiencies of Illinois and Iowa earnings statutes).

322. See, e.g., *Justice vs. Law and Custom*, *supra* note 293, at 7 (letter to editor from "L.H."). For an example of a California suffrage and marital property reform petition resembling in remarkable degree those from common law states, see *Woman Suffrage in California*, *WOMAN'S J.*, Feb. 12, 1876, at 56 (state laws "confer upon the husband—'otherwise than testamentary'—absolute control over the management and disposition of the common property . . . , which affords him ample opportunity . . . to defraud his widow of her equitable share of the family estate."); see also J.W. Stow, *Probate Confiscation in California*, *WOMAN'S J.*, June 12, 1875, at 186; C.C. Stephens, *Legal Disabilities of Women in California*, *WOMAN'S J.*, Aug. 5, 1871, at 247.

323. See *infra* note 376 and accompanying text.

324. Letter from S.H. Graves to Isabella Beecher Hooker (Oct. 24, 1871), in *THE LIMITS OF SISTERHOOD* 204 (Jeanne Boydston et al. eds., 1988) ("Of course, [my husband] is bitterly opposed to 'woman's rights' and loses no opportunity for the usual sneer. I have no money and but few clothes. . . . [E]verything is *his* and nothing mine. In short I am nothing but a housekeeper without wages, doing *all* the work of the family.").

325. Stanton and Anthony sustained discussion of the claim in *Revolution*, and later, in collaboration with Matilda Josyln Gage, in the *National Citizen and Ballot Box* (which Gage took over from Sarah Williams in 1878). While neither paper devoted extensive coverage to the claim, the first volume of *History*

adamant in her support for joint property when addressing the Tenth National Woman's Rights convention in 1860, did not mention the subject in a lecture series on women's labor in and out of the home delivered in the early 1870's.<sup>326</sup>

More noticeable is the silence of many leaders who joined the movement in the postwar period. When Clara Nichols sent a letter to *Revolution* illustrating that New York's reputedly generous marital property legislation did not recognize a wife's rights in her family labor, Laura Bullard (who assumed editorship of *Revolution* from Stanton and Anthony) published the letter annotated to the effect that Nichols' "communication . . . takes what we conceive to be rather extreme ground in regard to the control, by the wife, of property acquired by the husband and wife during coverture."<sup>327</sup> When challenged by Nichols, Bullard pled ignorance, claiming she had passed the article to a lawyer for comment: "Our legal friend is, therefore, responsible and not we, for the vagaries of the answers given."<sup>328</sup> Activists with far more legal knowledge than Bullard demonstrated indifference to, or ignorance of, the joint property claim. For example, Myra Bradwell took credit for drafting Illinois' 1869 earnings statute, and reported it, in the legal newspaper she edited, as an unqualified victory for women—despite the fact that wives' labor in the family was expressly excluded from its terms.<sup>329</sup> Women who broke into the legal profession in the postwar years regularly discussed marital property law without so much as mentioning joint property concepts;<sup>330</sup>

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of *Woman Suffrage*, which they edited together, does treat the claim extensively; early drafts of the volume were serially published in the *National Citizen*. Nichols, Henry Blackwell, Swisshelm, Higginson, Stone, and Bloomer all published articles. For Nichols, see *infra* text accompanying notes 368-69; for Blackwell, see *supra* text accompanying note 301; for Swisshelm, see *supra* text accompanying notes 295-99; for Higginson, see *supra* note 302 and accompanying text; for Stone, see *infra* note 346; for Bloomer, see *infra* note 365.

326. Compare *supra* text accompanying note 177 with Antoinette B. Blackwell, *Work in Relation to the Home* (pt. 1), *WOMAN'S J.*, May 2, 1874, at 137 (paper presented to the New England Women's Club); *The Woman's Congress*, *WOMAN'S J.*, Nov. 8, 1873, at 359, 360 (reprinting an essay that Blackwell read before the Woman's Congress, entitled *The Relation of Woman's Work in the House to the Work Outside*). For an account of Blackwell's postwar vision of marital equality, see *infra* text accompanying notes 453-54.

327. *The Laws of New York*, *REVOLUTION*, June 16, 1870, at 378.

328. *The Wife's Property*, *supra* note 281, at 57 (letter to editor from Clara I.H. Nichols, with quoted rejoinder signed "Ed. Revolution"). The full explanation Bullard provided was as follows: "[T]he first letter, containing [Nichols'] queries with regard to the rights of women to property, we gave to a lawyer, with the request that he would answer them, as we were not versed enough in legal lore to reply to the questions intelligently. Our legal friend is, therefore, responsible and not we, for the vagaries of the answers given." *Id.*

Under Bullard's (and Theodore Tilton's) editorship, *Revolution* did begin to promote joint property concepts, but generally presented them as a matter of intrafamilial concern rather than as a claim of right. See *infra* note 347 and accompanying text.

329. See *infra* note 394 and accompanying text.

330. Appearing before the Fourth Annual Woman's Congress, Lavinia Goodell presented a paper entitled *Women in the Legal Profession* that discussed how women attorneys could assist women, in which she analyzed the reform of family law. Goodell talked about legislation granting wives rights in earnings without mentioning the joint property claim. Lavinia Goodell, *Woman in the Legal Profession*, in *PAPERS READ AT THE FOURTH CONGRESS OF WOMEN HELD AT ST. GEORGE'S HALL, PHILADELPHIA, OCTOBER 4, 5, 6, 1876*, at 103, 109-10 (Washington, D.C., Todd Bros. 1877) [hereinafter *FOURTH CONGRESS PAPERS*]

indeed, only one of this first group of women attorneys seems to have devoted her skills to elaborating the joint property claim.<sup>331</sup>

When leadership advocacy is analyzed, a rough line of demarcation appears. Those feminists whose work dated from the antebellum period generally continued to publicize joint property issues; and they were enthusiastically joined by women, such as Abigail Duniway, who entered the suffrage movement from poor, rural, and frontier backgrounds.<sup>332</sup> By contrast, many of those who joined the movement after acquiring wartime leadership experience in the Sanitary Commission<sup>333</sup>—especially those women from affluent, cosmopolitan backgrounds, with professional affiliations and aspirations—were seemingly indifferent to, or ignorant of, joint property concepts.

The new outlook of this cohort of the movement's leadership is especially evident in pages of the *Woman's Journal*, where growing numbers of commentators began to discuss household labor as a problem concerning "[t]he scarcity of domestic help"<sup>334</sup> without drawing connections between a servant's household services and a wife's<sup>335</sup>—despite the paper's frequent

(reprinted in WOMAN'S J., Nov. 25, 1876, at 378); see also Lavinia Goodell, 'Ownership of Wives,' WOMAN'S J., Oct. 28, 1876, at 348.

Upon graduating from Michigan Law School, Jane Slocum authored a thesis on marital property law in which she touched on the joint property claim without displaying a grasp of its critical predicates; Slocum was clearly uneasy with the joint property concept insofar as it appeared to suppose wives' dependency. See Jane M. Slocum, *The Law of Coverture: A Legal Thesis*, WOMAN'S J., Sept. 5, 1874, at 289; see also *Married Women's Property Acts in the United States, and Needed Reforms Therein*, 48 ALB. L.J. 206 (1893) (summarizing paper by Mary A. Greene, member of Massachusetts bar, read at opening of Congress of Jurisprudence and Law Reform at Columbian Exposition held in Chicago in 1893) (no mention of joint property claim).

331. So far as I know, M. Fredrika Perry was the only one of the group of women that first secured admission to the bar who discussed marital property reform in terms that included the joint property claim. See M. Fredrika Perry, *Property Rights of Married People*, 1 CHI. L. TIMES 187 (1887); see also Ellen A. Martin, *Admission of Women to the Bar*, 1 CHI. L. TIMES 76, 82-83 (1887) (biography of Perry who died in 1887).

332. Duniway was of pioneer stock and married to a farmer who suffered financial reverses and then an accident that crippled him for life. See ABIGAIL S. DUNIWAY, *PATH BREAKING: AN AUTOBIOGRAPHICAL HISTORY OF THE EQUAL SUFFRAGE MOVEMENT IN PACIFIC COAST STATES* 14-16 (1914). Similarly, Marietta Stow took up the cause of inheritance reform in the 1870's after widowhood catapulted her from wealth to poverty. See *infra* text accompanying notes 356-57.

333. See *supra* note 282 and accompanying text.

334. *Ennoble Domestic Work*, WOMAN'S J., Apr. 16, 1870, at 116 (quoted *infra* text accompanying note 338).

335. See, e.g., *The Work, Wages, and Needs of Women*, WOMAN'S J., May 7, 1870, at 138 (arguing "that domestic service should be more sought and more faithfully performed by the poor women who crowd into cities" and discussing need to "overcom[e] the unreasonable dislike now entertained by working-women for doing housework"); see also L. Maria Child, *Is Intellectuality the Bane of American Women?*, WOMAN'S J., July 19, 1873, at 228 ("Our domestic affairs are indeed woefully mismanaged by unintelligent and wasteful Bridgets, but our out-door work is also done in a very slovenly and careless manner by ignorant Patricks."); Thomas W. Higginson, *Ruling at Second-Hand*, WOMAN'S J., July 23, 1870, at 225 (observing that an elegant woman of author's acquaintance "is simply wearing out her life in ruling a dozen quarrelsome domestics, and providing for the material needs of a large household"). *But cf. Modern Housekeeping*, WOMAN'S J., July 9, 1870, at 212 ("The discomforts of the modern kitchen in which these, and all other household operations, are continually going on, especially in summer, to say nothing of the severity of the labor they impose, repel young women of ordinary sense and judgment, who can earn more

coverage of the joint property claim. The *Journal's* tendency to equate domestic labor with the "servant problem" did not pass unnoticed by its readership. At least one subscriber gently chastised the paper for the regional and class bias of its commentary:

We housekeepers in the West are not the kind represented in "We and our Neighbors." It amuses us to have Eva represented as a remarkable woman, because she was serene over having company on wash-day, while the strong-armed "Mary" was there to bear the brunt of the inconvenience. Why we are "Mary" and the lady of the house too. . . . Now we in this case does not mean the conventional newspaper "we," for we are many. What wonderful women we must be! Will not some one please write a story about us?<sup>336</sup>

The same regional and class differences are evident in stories on the new goods and services that modernized household work in the 1870's—amenities initially available only to wealthy women living in urban centers.<sup>337</sup> An editorial in the cosmopolitan *Woman's Journal* bemoaning "the scarcity of domestic help" observed: "In the present improved condition of our houses, where there is every device to render housework easy . . . we marvel at the contempt openly expressed for domestic work by even sensible American women, who are compelled to earn their own living."<sup>338</sup> By contrast, an editorial in the frontier-oriented *New Northwest* entitled *Woman's Rights* argued, "It is a woman's right to be supplied with labor-saving appliances to assist her in the labor of the house," complaining that men purchased new machines for farm work where they would not consider purchasing appliances to assist with sewing, knitting, washing, and drawing water; the editorial advocated that wives attempt to save some portion of the income from their work raising livestock or poultry for this purpose.<sup>339</sup> In short, wealth and urbanization increasingly determined how women experienced housework. These same regional and class differences are expressed in joint property

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and lead a more satisfactory life, than as a cook or house-maid.").

336. *Letter from a Housekeeper*, WOMAN'S J., Apr. 20, 1878, at 126 (letter to editor from Lake City, Colo., signed "Housekeeper").

337. See Susan J. Kleinberg, *Technology and Women's Work: The Lives of Working Class Women in Pittsburgh, 1870-1900*, 17 LAB. HIST. 58, 65 (1976):

Beginning in the 1870s some American households were revolutionized by mechanical devices capable of doing housework (e.g., washing machines, central heating, toilets, and iceboxes), the replacement of dirty fuel (coal and wood) by clean fuel (gas and electricity), the city's provision of paved roads, sewers, and municipal water systems, and by new forms of communication and transportation. Well into the twentieth century, however, the benefits of the new municipal and domestic technologies were limited to the middle classes and the very upper reaches of the working class.

On the new postwar technologies as they transformed a woman's work of family maintenance, see sources cited *supra* note 49.

338. *Ennoble Domestic Work*, *supra* note 334, at 116.

339. *Woman's Rights*, NEW NORTHWEST, Oct. 31, 1873, at 1.



discourse as well. When joint property advocates in the *New Northwest* discussed a wife's work of family maintenance, their arguments sounded much like those of the antebellum movement, but in the *Journal* and elsewhere, the demand for joint property rights was often justified as compensation for a wife's maternal role, without mention of the myriad tasks running a household might entail.<sup>340</sup>

Thus, many women in the suffrage movement were performing fewer household tasks, and were growing restless with the household work they did perform. For the first time in the postwar period, advocates began to talk about the joint property claim as compensation to keep woman in her "sphere." Jennie Croly, who made it her life's work to help women break into the professions, captured this new mood when she pointedly inquired: "[W]hat motive is presented to women to induce them to be good wives and mothers, beyond their own natural affection and instincts? None at all. Under the present system, the more exemplary a woman is, the less compensation and acknowledgment she receives . . ." <sup>341</sup> While some advocates (mostly men) argued that a joint property regime rewarded women for performing their role in the "natural" division of family labor,<sup>342</sup> the women making such arguments spoke with more ambiguous intent: paying women to keep them in their sphere raised the possibility of their flight from it. Indeed, Croly rather bluntly suggested that compensation for domestic labor was necessary to induce women who could support themselves to marry,<sup>343</sup> and Jane Swisshelm argued that some mode of compensating wives for their family labor was necessary to keep them from straying into the market where they now could keep wages they earned in their own right.<sup>344</sup> In a similar vein,

340. See *supra* text accompanying note 301; *supra* note 302; see also JENNIE C. CROLY, FOR BETTER OR WORSE: A BOOK FOR SOME MEN AND ALL WOMEN 102-04, 106-08 (Boston, Lee & Shepard 1875); J.W. Stow, *Anti-Probate League*, NAT'L CITIZEN & BALLOT BOX, Sept. 1878, at 4 ("We claim that wives stand equal with husbands in the economy of life—even the most favored—as producers of life in contradiction to the producers of wealth in its coarser fiber, and that the real wealth of nations, is brain, brawn and sinew—human life—beside which, gold is dross . . .").

341. CROLY, *supra* note 340, at 103. Croly was the founder of one of the earliest women's clubs, Sorosis, which provided an intellectual and social forum for educated middle-class women excluded from professional organizations of the era. See FLEXNER, *supra* note 10, at 180.

342. See, e.g., H.B.B. [Henry B. Blackwell], *Reciprocity of Responsibility*, WOMAN'S J., Nov. 1, 1873, at 348 ("In the division of labor which Nature indicates . . . [the] home is a natural partnership, which can be sustained only by the united energies of husband and wife."); see also *supra* text accompanying note 301 (quoting Henry Blackwell); *supra* note 302 (quoting Thomas Higginson).

343. See CROLY, *supra* note 340, at 102-08.

344. *The Coming Woman*, pt. 2, *supra* note 296, at 94:

The new law which enables a wife to contract for her labor with an outside party, and control her [wages], is a premium inviting her out of her husband's employ, and into that of any other person. Do you not see the snarl? I think any one might learn from this how impossible it is for men, exclusively, to legislate for both men and women. Would you not think any man was a fool who would work sixteen hours out of every twenty-four, as I used to do here, for nothing, when he could get eight hundred dollars for working eight hours, five days in a week, for nine months?

It is after banter and bargaining such as this that Swisshelm's heroine secures her husband's acquiescence in an agreement that she will resume a full-time role at home with a contractual right in half

editorials in the *New Northwest* (likely authored by Abigail Duniway) exploited class- and race-based fears about the falling birth rate to promote joint property concepts—contending that devaluation of women’s reproductive role created an incentive for wives to have abortions rather than assume the duties of motherhood. “All work becomes oppressive that is not remunerative,” the paper opined. “To this idea, more than any other, may be traced the prejudice against bearing children which has become so ingrafted upon the minds of married women, that tens of thousands annually commit ante-natal murder.”<sup>345</sup>

These justifications for joint property rights reflect preoccupations that played no part in antebellum advocacy. In the original position, advocates accepted the division of labor structuring family life, and focused their energies on challenging the caste treatment of women’s family labor, protesting both its societal devaluation and legal expropriation. Now the attention of many joint property advocates was drifting from the original impulse from which the claim sprang. Increasingly, joint property arguments began to dramatize the fluidity of role ascriptions and to question gender norms that *differentiated* the work of men and women. In this way, joint property conversation began to revolve around questions of social roles rather than legal rights.

In those circumstances where joint property discourse was dissociated from its original preoccupations—the gendered valuation and legal expropriation of women’s household labor—the discourse quite naturally lost much of its political focus. Articles appearing in the *Woman’s Journal* frequently cast arguments for the redistribution of family wealth in psychological or sociological, rather than economic or legal, terms. Authors peppered their arguments with anecdotes of domestic discord, offering joint property arrangements as the key to harmonious interpersonal relations; in this posture, the joint property concept appeared as a species of marital therapy, rather than a claim of right.<sup>346</sup> Articles of similar tone appeared in *Revolution* after

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his income—her share of the partnership’s earnings. Throughout, Swisshelm’s tone suggests that she is less interested in promoting wives’ fidelity to the domestic sphere than in playing upon the fears of those who were. She is, however, consistently ambiguous on this point—while entirely unsentimental about the rigors a wife’s daily lot entailed. See, e.g., Swisshelm, *Woman’s Sphere Pure and Simple*, *supra* note 299; see also *Woman’s Wages*, *supra* note 291, at 1.

345. *Liberty for Married Women*, *supra* note 306, at 2; see also “With All My Worldly Goods I Thee Endow,” *supra* note 281, at 2 (“With a wisdom almost superhuman Oregon law-makers have decreed that the childless wife may inherit her husband’s property . . . while . . . the mother of children may not; thus making it for the interest of Oregon women to keep empty cradles.”).

346. Thus, Lucy Stone pointed out that “[o]ne of the most fruitful sources of discontent in the home is the too dependent position of the wife”; after assuring her readers that the law would recognize joint property rights “[s]ometime,” Stone advised them that “[u]ntil that time, the thoughtlessness of really good men may be cured by the frank speech of the wife, who is daily hurt by a feeling of dependence which ought never to exist between the equally valuable partners in the home.” L.S. [Lucy Stone], *Wives and Money*, *WOMAN’S J.*, Sept. 7, 1872, at 284. An emphasis on matters of domestic psychology appeared in Higginson’s discussion of the claim as well. See T.W. Higginson, *Asking for Money*, *WOMAN’S J.*, Oct. 11, 1873, at 321, *reprinted in* *NEW NORTHWEST*, Oct. 31, 1873, at 1.

Laura Bullard assumed editorship from Stanton and Anthony in 1870,<sup>347</sup> and were in fact a staple in the folksy *New Northwest*.<sup>348</sup> During the antebellum period feminists had emphasized wives' humiliation in asking their husbands for money, but insisted that the problem could not be rectified by a husband's generosity.<sup>349</sup> Now many, though by no means all, contemplated intrafamilial, as distinct from legislated, remedies to the problem.<sup>350</sup> The development signaled a fundamental transformation in the nature of the joint property claim: only understood as a problem of "pin money" rather than expropriated labor could personal appeals substitute for political forms of relief. In this depoliticized form, joint property discourse merged with popular debates about the control of "domestic money," which escalated in the decades after the Civil War.<sup>351</sup>

### C. *The Waning of Legislative Advocacy*

The leadership's changing attitude toward joint property had practical consequences that can only partially be discerned in the pages of the suffrage journals. While the journals reveal the drift and disaffection of some movement leaders, they also document that others continued passionately to believe in the claim. Yet even the most ardent proponent of joint property rights might despair of investing resources in a quest for its implementation. A disfranchised woman could easily write a story explaining the equities of joint property to her uninitiated sisters; it took more work to persuade a male

347. See *Our Women Paupers*, *supra* note 293, at 24:

To bring about a clearer idea of the importance and worth of woman's work in the home, needs only a little effort on the part of women themselves. Men are not unnaturally unjust, and their attention needs only to be called to this defect in the administration of household finance to have it remedied at once. . . . It is time that all this was changed—that a woman should become not only in name, but in fact, the equal partner of her husband in the money which he amasses, and that at least whatever may be said as to her participation in business matters, that she should be consulted with regard to the household expenditures.

See also *The Poverty of Women*, *supra* note 289, at 280.

348. See, e.g., *Separate Pocket-Books*, *NEW NORTHWEST*, Oct. 22, 1875, at 1 (reprinting letter from *Western Rural* signed "Aunt Patsy"); Higginson, *Asking for Money*, *supra* note 346, at 321. Some of the pieces displayed more critical "bite" than those appearing in the *Woman's Journal*. See *Pauper Wives*, *NEW NORTHWEST*, Jan. 1, 1875, at 2; Jenkins, *supra* note 307, at 2.

349. See *supra* text accompanying note 153.

350. See, e.g., *supra* note 153 and accompanying text. For discussions of joint property issues from the late 1870's that equal those of the antebellum period in their insistence on the necessity of legal relief, see, for example, *Governor McClellan's Veto*, *NAT'L CITIZEN & BALLOT BOX*, May 1879, at 2 (editorial, likely by Matilda Joslyn Gage); Stow, *Anti-Probate League*, *supra* note 340, at 4.

351. As Viviana Zellizer has explained it, public interest in the subject was sparked by conflicts between the cult of domesticity, which defined the wife "as specialist in affect, not finances," Zellizer, *supra* note 151, at 355, and the rise of postwar consumer culture, which defined the wife as purchasing agent for the family; a role conflict resulted in which wives, who were expected to shop for the family, often lacked access to the cash necessary to purchase new consumer amenities, *id.* at 354-56 (describing ideological parameters of the debate, in which "domestic money" became "a controversial currency"); *id.* at 356 (observing that "[w]omen's stratagems to extract some cash from their unforthcoming husbands were the subject of jokes and a staple of late 19th-century vaudeville routines").

legislature to implement such a regime—if, indeed, this was even possible. Many thought it made better strategic sense to invest resources in one quixotic battle: the quest for the vote itself.

But as women assailed state legislatures with demands for suffrage, they brought marital property arguments along with them; arguments about the law of marital property were always useful to debunk claims of virtual representation.<sup>352</sup> State legislatures in turn sought to counter suffragists' arguments for the vote, and granting demands for marital property reform was an effective way to do this. In this fashion, the quest for suffrage accelerated the pace of marital property reform and forged a new body of law governing ownership of wives' earnings.<sup>353</sup>

Suffragists engaged legislators about issues of marital property at a time when movement leaders no longer possessed the coherent vision of reform, or the single-minded commitment to it, that they had in the antebellum era. It was out of this postwar dialogue, however, that the nation's new earnings law grew. Issues that feminists raised in the 1850's made their way into the nation's legislatures and courthouses in the 1870's—although the results were generally not those the antebellum movement sought. During the 1870's, laws granting wives rights in their earnings were enacted that left "Pen-Holder" and her sisters in the nation's farms, towns, and cities in substantially the same position as under the common law rule. While the movement's responsibility for this result is difficult to determine, the record is quite clear in other respects: legislatures and courts putatively engaged in "emancipating" women from the common law deliberately designed their reforms to preserve a husband's rights in his wife's labor. Those superintending earnings reform were no more ready to grant married women "self-ownership"—in a regime of joint *or* separate property—than they were to grant women the vote.

### 1. *Postwar Marital Property Reform Efforts*

Because suffragists' arguments and demands for marital property reform varied across the country, it is impossible, without engaging in a state-by-state analysis, to discern the directions in which local suffrage organizations and advocates attempted to orient the path of marital property reform. Nonetheless, there is evidence that in some areas of the country, suffragists did continue to press the joint property claim.

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352. *Cf. supra* note 281 and accompanying text.

353. *See, e.g., infra* text accompanying notes 396-97.

a. *Joint Property in Inheritance*

Suffragists devoted their most concerted efforts to achieving joint property reform in the area of inheritance law. During the 1870's, many suffragists employed joint property concepts to seek an expansion of women's inheritance rights in marriage; most often they argued that a wife was entitled to a right of survivorship in a "husband's" property (analogous to his estate by curtesy in hers) in recognition of the wife's contribution to the accumulation of the estate. Reasoning along these lines, Celinda Lilley drafted a bill for the Vermont legislature that would have enlarged common law dower to a right of survivorship in a husband's property.<sup>354</sup> In New Jersey, suffragists petitioned the legislature to provide that a wife would inherit the whole of her husband's personal property and a life estate in her husband's real property, or, in the alternative, to make the interest of the surviving spouse the same for husbands and wives.<sup>355</sup>

Perhaps the most prominent spokeswoman for the cause was Marietta Stow. Stow made inheritance reform the subject of a national campaign after widowhood catapulted her from wealth to poverty. She began her campaign by attacking the law of estate administration in her home state of California. Later, travelling throughout the northeast, Stow increasingly employed joint property concepts in her arguments for enhancing a widow's management rights in the estate, and for enlarging the widow's share of "dower in the joint estate, or what is miscalled the husband's estate."<sup>356</sup> Stow sought, and achieved, a national audience for her demands: she published *Probate Confiscation* in 1876, organized state societies for reform of probate law, and served as Belva Lockwood's running mate in the presidential campaign of 1884.<sup>357</sup>

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354. Celinda A.B. Lilley, *Married Women in Vermont*, WOMAN'S J., Apr. 12, 1873, at 116 (reproducing and commenting on earnings and inheritance bill author drafted). Lilley drew on joint property concepts to justify the right of survivorship:

But when the children have all been reared, it has been by the care and labor of the mother quite as much as by the father's labor and care, and it took the vigor and strength of the best years of her life, and the labor of women is so much poorer paid than the labor of men, that when she is old she needs her earnings more than her husband needs his, and she ought to have just the same right to hold and use their united earnings that he has to hold the property and use it.

*Id.* Lilley's bill would have also granted a wife a separate property right in "any money she may earn or acquire during her married life, either by going out to work or by taking in work." *Id.*

355. See *Woman Suffrage in New Jersey*, WOMAN'S J., Feb. 5, 1870, at 40.

356. J.W. Stow, *Pennsylvania Marriage-Property Laws*, WOMAN'S J., Oct. 26, 1878, at 344.

357. See MRS. J.W. STOW, *PROBATE CONFISCATION* (3d ed. 1878) (published by author) (originally published 1876); Madeleine B. Stearn, *Two Unpublished Letters from Belva Lockwood*, 1 SIGNS 269, 271-72 (1975); Donna C. Schuele, Marietta Stow, the Widow's Widow: Reform in the Later Nineteenth Century (1992) (unpublished manuscript, on file with author).

For an account of Stow's travels through New England as she advocated "making a wife and widow . . . equal as regards marriage property with a husband and widower," see J.W. Stow, *My Probate Pilgrimage*, WOMAN'S J., Jan. 12, 1878, at 16; see also J.W. Stow, *My Probate Pilgrimage*, WOMAN'S J., Apr. 20, 1878, at 128. Stow's campaign for probate reform in Massachusetts illustrates how she drew upon

Joint property advocates who focused their reform efforts on matters of inheritance elicited some positive response from state legislatures during the 1870's, just as they did in New York in 1860.<sup>358</sup> For example, in 1872, after the California legislature received a petition with 5000 signatures seeking an amendment to the state constitution that would grant woman suffrage and equalize marital property rights, a special committee of the legislature recommended giving wives a right of survivorship in community property equal to their husbands'.<sup>359</sup> The committee justified its recommendation in the idiom of joint property—and of separate spheres:

Being familiar with business, the husband assumes the control of out-of-door matters; the wife, educated to indoor labors, takes charge of the house, the home, and family. While the husband may prosper in business and accumulate wealth, the wife may at the same time perform equally well her duties in a more narrow, but not less important, sphere. . . .

Unless money is more valuable than the mind of man, and coin than character, the business qualifications of the husband may be fairly and equitably offset by the home duties of the wife. . . . If either partner of the matrimonial firm fails to perform a full share of the labor assumed or assigned that is a misfortune, but it should not be allowed to vitiate the personal or property rights of either partner.<sup>360</sup>

The California bill granting wives a right of survivorship in community property was never signed into law.<sup>361</sup>

Several years later, Minnesota extensively revised its law of dower, intestacy, and homestead in a fashion that demonstrably improved women's inheritance rights in the family estate.<sup>362</sup> Together, the reforms seem

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joint property discourse in her arguments for revising inheritance law. See *infra* note 383 and accompanying text.

358. Cf. *infra* notes 383-85 and accompanying text.

359. See *Report of Special Committee in Relation to Granting Women Political Equality*, in APPENDIX TO JOURNALS OF SENATE AND ASSEMBLY, OF THE NINETEENTH SESSION OF THE LEGISLATURE OF THE STATE OF CALIFORNIA [1871-72 SESSION] 3, 9-11 (1872) [hereinafter *1872 Special Committee Report*]. In this period, California provided the husband a right of survivorship in community property, but only gave the wife half the community property at her husband's death, with the remainder going to the husband's descendants. Act of May 8, 1861, ch. 323, § 1, 1861 Cal. Stat. 310-11.

360. *1872 Special Committee Report*, *supra* note 359, at 10.

361. For an account of subsequent reform efforts in the state, see *Husband and Wife in California*, WOMAN'S J., Mar. 18, 1876, at 91; *Woman Suffrage in California*, *supra* note 322, at 56.

362. In 1858 Minnesota had adopted a homestead statute entitling a wife, at her husband's death, to continue to occupy the homestead, exempt from attachment, levy, or sale. Act of Aug. 12, 1858, ch. 35, 1858 Minn. Laws 89. In 1875, Minnesota granted wives a life estate interest in such property. In addition to the homestead interest, the law gave wives statutory "dower" in fee simple (or "such inferior tenure" as the husband possessed) in one-third of lands other than the homestead a husband held at death. Act of Mar. 9, 1875, ch. 40, 1875 Minn. Laws 74. In 1876, the "dower" interest was extended to all lands other than the homestead a husband held during marriage. Act of Mar. 2, 1876, ch. 37, 1876 Minn. Laws 55. The reforms of the mid-1870's (which governed wives' interests whether husbands died with or without a will) significantly increased a wife's inheritance rights, giving her a life estate in the homestead, and, in addition,

responsive to the sense of the joint property demand, and were in fact so reported by suffrage leader Sarah Burger Stearns: “So that now the widow has the absolute ownership, instead of the life use of one-third of whatever she and her husband may have together earned and saved.”<sup>363</sup> But in this respect Minnesota appears exceptional. The dominant trend in postwar inheritance reform—if its byzantine path can be said to exhibit any regularities—was to equalize spousal inheritance interests at a level that generally approximated a wife’s traditional dower interest in one-third of her husband’s estate.<sup>364</sup> Of course, equalizing inheritance rights *by reducing a husband’s share in a wife’s separate property* only perpetuated the root inequality in ownership of marital assets of which joint property advocates had long complained.<sup>365</sup>

Indeed, when Kansas considered revising its inheritance laws at the outset of the decade, Clara Nichols, an acerbic critic of marital property law since the days of the Worcester conventions,<sup>366</sup> wrote a series of letters to the *Topeka Commonwealth*, arguing that common law dower and laws protecting a

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a one-third “dower” share in any other lands a husband owned during marriage, an interest now made absolute.

363. 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 275, at 655.

364. For example, when Connecticut enacted its first sweeping reform act in 1877, it equalized the inheritance interests of husband and wife, affording the survivor a life estate in one-third of the decedent’s estate, or one-half if no children or representatives of children survived. The surviving spouse inherited in fee simple if the decedent left no will. Act of Mar. 16, 1877, ch. 114, § 3, 1877 Conn. Laws 211-12. After altering and revising inheritance interests for several decades, Iowa’s major reform statute of 1873 established that one-third of a husband’s or wife’s estate at death was to go to the survivor in fee simple. IOWA CODE tit. 16, ch. 4, §§ 2436, 2440 (1873); see RUTH A. GALLAHER, LEGAL AND POLITICAL STATUS OF WOMEN IN IOWA 94-102 (1918). While the new statutes did tend to cast spousal “dower” interests in absolute rather than life-interest terms, the distributive share generally pertained only to properties held at death. See 1 J.G. WOERNER, A TREATISE ON THE AMERICAN LAW OF ADMINISTRATION 221 (Boston, Little, Brown & Co. 1889).

For a general overview of inheritance law as it appeared after the turn of the century, see 3 VERNIER, *supra* note 226, at 534 (“Of the thirty-one jurisdictions which give both spouses a survivor’s share, widow and widower are treated alike in twenty-two . . .”); *id.* at 535-53. Ultimately, the sheer variety and complexity of the statutes (compounded by judicial interpretation in light of persisting common law traditions) prevents meaningful summary of developments in this body of law across states or over time.

365. At his wife’s death, a widower would hold the couple’s “joint” property and one-third of his wife’s separate estate (if she had any); in contrast, at her husband’s death, a widow would hold her separate property (if any) and one-third of the couple’s “joint” property. Given the typical distribution of marital assets, the two amounts were likely to be grossly unequal. For Amelia Bloomer’s critique of the “seemingly equal provisions of [Iowa’s] code,” see 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 275, at 637; *cf. supra* note 364 (Iowa law providing that one-third of a spouse’s estate would go to survivor in fee simple). For an example of the antebellum antecedents of this argument, see 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 361 (Woman’s Rights Convention, Westchester, Pennsylvania, June 2, 1852) (remarks of Ann Preston).

366. See *supra* text accompanying notes 146-48.

widow's interest in the family homestead<sup>367</sup> provided completely inadequate recognition of a wife's contribution to the household economy:

To speak of the wife's right in the estate, real and personal, accumulated by the joint savings and earnings of husband and wife, is dealing in [legal] fiction; *widowhood* being absolutely necessary to give her any claim to *hold, convey* or *use* any portion of the same. . . . As only a minority of husbands own real estate and die first, so only a minority of wives come in possession of "dower". . . .<sup>368</sup>

To remedy "the present invidious legal distinctions" in marital property law, Nichols proposed that "the wife be legally joint partner and proprietor in the common estate; no notes, endorsements or other obligations to be valid against her half of the same, without her signature."<sup>369</sup>

#### b. *Joint Property During Marriage*

There is evidence that some in the postwar suffrage movement did try to secure legislative recognition of joint property principles during the life of the marriage partnership, although in no state did they succeed in enacting a joint property regime. For example, in 1877 Connecticut adopted a sweeping marital property reform statute, drafted by John Hooker,<sup>370</sup> the husband of Isabella Beecher Hooker and a strong supporter of the feminist movement in his own right. The statute equalized spousal inheritance rights in such a way that, in limited circumstances, wives inherited a larger share of the estate than they

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367. The homestead exemption laws enacted during the nineteenth century typically granted the surviving wife a right to reside in the family home not amounting to an alienable interest in the property; some states also required an election as against dower. See 3 VERNIER, *supra* note 226, at 631-34, 638-62; RUFUS WAPLES, A TREATISE ON HOMESTEAD AND EXEMPTION 589-92 (Chicago, T.H. Flood & Co. 1893); 1 WOERNER, *supra* note 364, at 195-98, 202-07; Note, *State Homestead Exemption Laws*, 46 YALE L.J. 1023, 1029 (1937). The laws recognized wives as having an attenuated interest in the homestead as an incident of their main purpose, which was family protection. See 1 WOERNER, *supra* note 364, at 194 (statutes protect family, in particular, minor children); see also 29 C.J.S. *Homesteads* § 2 (1922) ("[T]he purpose of the homestead provisions is to protect the family as an entirety, and not the individual who for the time being is the head of the family.") (citing case law from 15 states). Jane Slocum distinguished homestead exemption statutes from married women's property legislation, describing "the 'Homestead Acts'" as "the result of a false application of a true principle of chivalry, [which] seeks to make comfortable and attractive, a condition of dependence." Slocum, *supra* note 330, at 289.

368. C.I.H. [Clara] Nichols, *Property Rights of Wives*, REVOLUTION, Sept. 2, 1869, at 139.

369. *Id.* In 1870, when a resolution seeking a right of survivorship for widows was introduced in the Kansas legislature, *Revolution* reported Nichols' response, in which she once again derided the notion of compensation by inheritance—remarking, "Men must have great confidence in the forbearing love of women to sleep of nights with such a premium attached to their decease!"—and demanded legislation recognizing the property rights of widows of "living husbands." *Widows of Husbands, Dead and Living*, REVOLUTION, Apr. 14, 1870, at 238 (indirectly quoting Nichols). Nichols turned the same analysis into a bitter critique of New York's 1860 earnings statute. See *The Laws of New York*, *supra* note 327, at 378 (reprinting letter from Nichols).

370. See JOHN HOOKER, SOME REMINISCENCES OF A LONG LIFE 57 (Hartford, Belknap & Warfield 1899); see also LEACH, *supra* note 6, at 181 & n.121.



would receive as common law dower.<sup>371</sup> But the inheritance provisions of the statute are not the only evidence of joint property advocacy. Contemporaneous commentary on the earnings clauses of the statute provide strong evidence that the Hookers raised joint property issues in the course of negotiating its provisions.

The Connecticut statute declared that “[t]he separate earnings of the wife shall be her sole property,” while reiterating the common law principle that “[i]t shall . . . be the duty of the husband to support his family, and his property when found shall be first applied to satisfy any . . . joint liability . . . .”<sup>372</sup> Governor Richard D. Hubbard’s statement in support of the legislation suggests that, as in New York, the legislature’s decision to grant wives rights in their “separate earnings” was in fact a repudiation of the joint property claim. The governor provided a gloss on the statute’s “separate earnings” language, explaining that the statute afforded a wife rights in “all her earnings for personal services *not rendered to her husband or minor children*”; for this reason, the governor argued, a husband’s primary liability for family support was justly preserved—as “much more than neutralized by the fact that, *in most cases, the wife’s whole life is spent in the toilsome and unpaid service of the household.*”<sup>373</sup> When Marietta Stow passed through the state on her probate reform campaign, she acknowledged that the legislative victory was also a joint property defeat: “Last winter a law was passed here, which protects the wife’s separate estate and earnings, apart from household ones.”<sup>374</sup> However, an editorial in the *Springfield Republican* described the legislation without reference to the limiting gloss the governor had placed upon its language—explaining the husband’s continuing obligations of familial support in protective, not compensatory, terms: “The new Connecticut statute also puts the burden of the family maintenance on the man, as under most circumstances the real bread-winner.”<sup>375</sup>

Oregon is another state where a separate-property earnings statute was adopted in response to a feminist campaign led by a proponent of joint property rights. The *Morning Oregonian* described Abigail Duniway’s appearance before the state assembly in 1878 in a report that focused on issues of suffrage, but that summarized her argument for earnings reform in the terse line: “Married women are servants without wages . . . .”<sup>376</sup> The report of

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371. See *supra* note 364.

372. Act of Mar. 16, 1877, ch. 114, §§ 1, 2, 1877 Conn. Acts 211-12.

373. See 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 275, at 325 (emphasis added).

374. See Stow, *My Probate Pilgrimage*, WOMAN’S J., Jan. 12, 1878, *supra* note 357, at 16.

375. 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 275, at 326.

376. *Oregon Legislature*, MORNING OREGONIAN, Sept. 30, 1878, at 1. On Duniway’s role in lobbying for Oregon’s earnings statute, see *Minutes and Proceedings of the Ninth Annual Convention of the Oregon State Woman Suffrage Association*, NEW NORTHWEST, Feb. 10, 1881, at 1 (describing Duniway’s role in lobbying for passage of 1878 Oregon statute; misascribing earnings reform to 1880 statute); cf. *Women’s Property Rights*, NEW NORTHWEST, Apr. 15, 1880, at 2 (reproducing text of act approved Oct. 21, 1878). The 1878 statute provided in relevant part:

Duniway's speech shows that she did in fact base her argument for earnings reform on joint property concepts.<sup>377</sup> Yet there is evidence that Duniway had begun to retreat from her initial demand for the kind of full-scale joint property regime Nichols advocated; in the years immediately before and after passage of the 1878 earnings statute, Duniway devoted her efforts to securing a right of survivorship for widows—a reform which, for a time, she believed she had persuaded the legislature to grant Oregon women.<sup>378</sup>

In other states, suffragists who asked legislatures to grant wives rights in earnings seem never to have raised joint property issues. In Massachusetts, for example, feminists sought amendments that would improve wives' rights under the state's 1855 earnings statute. The legislature obliged the feminist community in 1874 by enacting a statute providing that "all work and labor performed by [a wife] for others than her husband and children shall, unless there is an express agreement on her part to the contrary, be presumed to be on her separate account";<sup>379</sup> as it strengthened the earnings clause, the legislature excluded from its coverage the work a wife performed "for . . . her husband and children."<sup>380</sup> Samuel Sewall, a proponent of the legislation who had authored a marital property treatise and was married to an editor of the *Woman's Journal*, reported on the legislation without commenting on the exclusionary language or its import; even after Lucy Stone and others objected,

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A wife may receive the wages of her personal labor, and maintain an action therefor in her own name, and hold the same in her own right, and she may prosecute and defend all actions at law or in equity, for the preservation and protection of her rights and property as if unmarried.

Act of Oct. 21, 1878, § 7, 1878 Or. Laws 92 ("An Act defining the Rights and fixing the Liabilities of Married Women, and the relation between Husband and Wife").

377. Duniway used joint property concepts in demanding earnings reform throughout the decade. In 1872, for example, the *New Northwest* criticized earnings bills in the Oregon legislature on the grounds that women "want the marriage contract recognized as a full co-partnership in which neither party can claim 'marital rights' . . . above the other." See *Married Woman's Property Bill*, *supra* note 311 (unsigned editorial).

378. Articles appearing in the *New Northwest* during the 1870's document Duniway's growing interest in the right of survivorship concept. See *supra* note 313 and accompanying text. Duniway apparently thought that a wife's right of survivorship in marital property had been secured with enactment of an 1880 Oregon law. See *Married Women's Rights*, NEW NORTHWEST, Oct. 28, 1880, at 4 (claiming Oregon statute provides "that in case of the husband's death the wife shall come into as full and complete control of the estate and the children as the father now does in the case of the mother's death"); Untitled Note, NEW NORTHWEST, Oct. 28, 1880, at 4 (suggesting that Oregon (and Mississippi) had passed "community laws" which might serve as precedent for suffragists attempting to persuade the California legislature "to confer upon the wife the power to succeed to community property on the decease of a husband, as he now does upon the death of the wife"). Duniway was shortly disabused of this impression; she was either misinformed about or had misinterpreted the statute, which provided that "in case of the father's death the mother shall come into as full and complete control of the children and *their* estate as the father does in case of the mother's death." Act of Oct. 21, 1880, § 2, 1880 Or. Laws 7 (emphasis added); see *Married Women's Rights*, NEW NORTHWEST, Dec. 9, 1880, at 1 (quoting legislation of Oct. 20, 1880). As Duniway bitterly noted, the episode only illustrated the necessity of securing suffrage to effect meaningful marital property reform. See "*Rights of Married Women*," NEW NORTHWEST, Apr. 21, 1881, at 4 ("A disfranchised class is at the mercy of those in power. . . . All talk about 'emancipating' women without enfranchising them is mere dawdling") (unsigned editorial).

379. Act of Apr. 21, 1874, ch. 184, § 1, 1874 Mass. Acts 117.

380. *Id.*; cf. Act of May 5, 1855, ch. 304, § 7, 1855 Mass. Acts 711 (no language excluding work for husband and children).

he continued to discuss the statute as an unqualified victory for women.<sup>381</sup> Nor does it appear that long-time joint property advocates such as Stone and Henry Blackwell made an effort to present joint property arguments to the legislature; although each advocated joint property principles in the pages of the *Women's Journal*, they discussed the concept in quite vague terms, as a goal that might be recognized in the distant future.<sup>382</sup> It took Marietta Stow to bring joint property arguments before the Massachusetts legislature in the form of a demand for probate reform; Stow argued that a widow should be made joint executor of her husband's estate, to serve alongside any executor named in his will, because it was property "she had helped to earn. . . . The assumption that women earn no money in wedlock is vicious."<sup>383</sup> Stow's bill<sup>384</sup> was resoundingly defeated.<sup>385</sup> Though Sewall appeared to testify on its behalf, he retreated under questioning, conceding that he believed that "the

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381. See Samuel E. Sewall, *Property Rights of Massachusetts Wives*, WOMAN'S J., May 23, 1874, at 164. Lucy Stone immediately remarked upon the significance of the exclusionary language. See Lucy Stone, *The Real Estate of Wives*, WOMAN'S J., June 20, 1874, at 198. Sewall was apparently unperturbed; he continued to discuss the 1874 earnings amendments as an unqualified victory for women, his remarks at the Massachusetts Woman Suffrage Association annual meeting the following year drawing angry reproof from a *Journal* reader. See *A Wife's Protest*, supra note 317, at 74 (letter signed "A Subscriber"); cf. Samuel E. Sewall, *The Legal Condition of Women in Massachusetts in 1875* (pt. 3), WOMAN'S J., July 3, 1875, at 216 (Sewall's position unchanged).

382. Before its enactment, Blackwell described the Massachusetts bill "as a long step in the right direction, though it does not make the husband and wife joint owners of the accumulations of the marriage partnership." He attempted to rebut one *Journal* reader's market-based objections to the joint property proposal, and concluded abruptly with the observation: "That there are great difficulties in legislating equitably for a partnership so intimate and complicated as marriage, all must admit. But the principle of reciprocity is the key to the problem." *Equality Before the Law Once More*, supra note 300, at 191 (Blackwell rejoinder). Neither here nor elsewhere in his *Journal* commentary on the joint property proposal did Blackwell ever discuss taking practical steps to implement the concept, or discuss asking the legislature to do so. Writing in the *Journal*, Stone and Higginson were equally vague about acting on the plan they repeatedly endorsed. See Thomas W. Higginson, *The Need of Women Lawyers*, WOMAN'S J., Sept. 12, 1874, at 291 ("But to perfect the details of the more enlightened system that is superseding [the common law],—this is not so easy; and in this part of the work much service can be rendered by a class of well-trained women-lawyers"); cf. Stone, supra note 346, at 284 ("Sometime, the law will recognize the undoubted right of the wife to her full share of the money value which accrues to the marriage firm. Until that time, the thoughtlessness of really good men may be cured by the frank speech of the wife . . ."). By contrast, the legislative activities of suffragists like Abigail Duniway, Marietta Stow, and Myra Bradwell are amply discussed in their commentaries on marital property reform.

383. *The Rights of Widows*, BOSTON EVENING TRANSCRIPT, Feb. 6, 1878, at 5 (reporting Stow's remarks) ("In law there was no money value attached to a woman's services as wife. As widow, she had no control over the property she had helped to earn.").

384. See *The Rights of Widows*, WOMAN'S J., Feb. 9, 1878, at 44 (unattributed).

385. Henry B. Blackwell, *The Protection of Widows*, WOMAN'S J., Mar. 2, 1878, at 72 (reporting "almost unanimous" vote in Massachusetts Senate rejecting "[t]he bill inspired by Mrs. J. W. Stow, of California, permitting widows to be joint executors of their husbands, whether they are so designated by the will or not . . ."); see also J.W. Stow, *Widow's Rights in Massachusetts*, WOMAN'S J., Mar. 16, 1878, at 88 (describing how bill was killed in state senate) (reporting how one state senator, "an avowed Suffragist, failed to see any merit in it, claiming that a husband had the absolute right to the devise of property which is the product of the joint efforts of husband and wife" and closing with the query: "Do women in Massachusetts earn money as wives? If so, the defeat of the bill carries with it its own condemnation.").

husband was generally a better judge of the ability and capacity of the wife to act as executor than the judge of probate.<sup>386</sup>

As Amy Stanley recounts, feminists seeking earnings reform in Massachusetts and Illinois used protectionist arguments spun from temperance polemics<sup>387</sup>—much like those the movement had successfully relied on in the closing years of the antebellum New York campaign.<sup>388</sup> They asked legislatures to provide destitute working-class wives rights in their wages so that a drunken husband or his greedy creditors could not seize a starving family's only means of support.<sup>389</sup> This approach to earnings reform deflected attention from questions of gender equality in the conventional family structure, and focused instead on protecting poor women in dysfunctional families from husbands who had failed to perform their part of the marital bargain. For example, in Illinois, Myra Bradwell's arguments for earnings reform focused on the plight of the wife deprived of wages that she needed "for the purpose of supporting her ragged, starving children, which a drunken or unfortunate husband failed to provide for,"<sup>390</sup> and Mary Livermore demanded rights in earnings for "poor and down-trodden women, the wives of drunkards and wife-beaters."<sup>391</sup> To these stories of poor wage-earning women, Bradwell added tales of middle-class families in which the wife labored for years building equity in a store, only to have the fruits of her labor seized by her husband's greedy creditors.<sup>392</sup> In these circumstances, a statute recognizing a wife's right to her earnings would function as the married women's property acts did—protecting the wife's earnings as her separate property protected family assets in times of financial adversity.<sup>393</sup> Both arguments justified wives' rights to their earnings in the idiom of virtue and family commitment, intentionally skirting larger questions of equality in the family structure. Moreover, they focused on wives' income-earning activities, not their unpaid labor of family maintenance.

386. *The Rights of Widows*, *supra* note 383, at 5. William Lloyd Garrison did speak strongly on the bill's behalf, as well as for woman suffrage. *Id.*

387. See Stanley, *supra* note 4, at 484-85.

388. See *supra* text accompanying notes 243-44. Abigail Duniway and Matilda Joselyn Gage supplemented joint property arguments with protectionist rhetoric as well. See "With All My Worldly Goods I Thee Endow," *supra* note 281, at 2 (Duniway criticizes Oregon bill on grounds that it allows "an incompetent or a dissipated husband" to waste family assets by denying a wife control of "her separate, or the common property") (unsigned editorial); *infra* note 399 (address of Matilda Gage).

389. Cf. *The Woman Question*, BOSTON POST, Nov. 19, 1868 (Address of Hon. Samuel E. Sewall) ("A woman cannot earn money for the support of herself and children which may not be taken away from her by a miserable husband.").

390. *Social Science Association*, 1 CHI. LEGAL NEWS 37 (1868) (editorial comment).

391. Stanley, *supra* note 4, at 485 (quoting NATION, Jan. 20, 1870).

On Bradwell's and Livermore's backgrounds, see BUECHLER, *supra* note 279, at 62-67. Mary Livermore was editor of the *Agitator* in 1869, and then joined with Lucy Stone to create the *Woman's Journal* in 1870. *Id.* at 76-77. On the efforts of Bradwell, Livermore, Stanton, and Anthony to secure passage of Illinois' earnings statute, see *id.* at 75.

392. *Law Relating to Women: Married Woman's Earnings*, 1 CHI. LEGAL NEWS 60 (1868).

393. Cf. *supra* text accompanying note 19; *supra* note 144 (discussing married women's property acts).

Feminists like Bradwell and Livermore were far more interested in wives' income-earning activities than their labor of family maintenance. Bradwell drafted Illinois' earnings statute, which, like the Massachusetts statute, expressly excluded labor a wife performed for her family; and she discussed the legislation in her paper, the *Chicago Legal News*, as a victory for women, without commenting on its exclusionary language.<sup>394</sup> Moreover, Bradwell regularly reported on issues of marital property law in ways that made no reference to joint property principles, even in discussing matters of dower and inheritance law.<sup>395</sup> Similarly, feminists petitioning the Iowa legislature for suffrage persuaded it to adopt an earnings statute of the separate-property model<sup>396</sup>—seemingly without ever raising issues of joint property. As the *Woman's Journal* reported it: "The Legislation [sic] there, as here [in Massachusetts], debated the question of Suffrage for Women and defeated it. Then, nearly all who opposed suffrage wanted to show that they were ready to grant women everything else, and our friends had no difficulty in effecting the desired changes, which were readily adopted by the Legislature."<sup>397</sup>

### c. *Abandonment of Joint Property Advocacy*

From this cursory examination of the record, it appears that legislatures facing suffrage demands in the postwar period proved increasingly willing to modify the law of marital status, but not all suffragists presented legislatures with joint property demands. Many who petitioned legislatures for marital property reform in the course of suffrage advocacy were silent about matters of joint property—either because they were ignorant of or indifferent to the claim, or because they simply despaired of raising it. At the same time, we know that other suffragists did make joint property arguments to state

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394. For the text of Illinois' earnings statute, see *infra* text accompanying note 408. For Bradwell's account of her advocacy efforts, see *Ourselves*, 1 CHI. LEGAL NEWS 188 (1869); *The Laws of Illinois*, 1 CHI. LEGAL NEWS 212 (1869); see also 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 275, at 569-70; *Married Women in Illinois*, WOMAN'S J., Apr. 12, 1873, at 116 (attributing authorship of earnings statute to Bradwell). Whether Bradwell herself drafted the exclusionary language or it was subsequently added, it apparently caused her no concern. As an outspoken critic of marital property law (and much else), Bradwell would have objected had the limitation seemed significant to her.

395. For example, Bradwell received a letter from a distraught reader asking whether a husband was entitled to sell real and personal property over a wife's opposition and without her signature releasing her dower interest in the real estate. Bradwell replied by explaining that "[a] husband may dispose of his personal property without asking his wife's permission" and that he could "also sell his real estate subject to her dower"; a wife had no interest in dower until her husband's death, but might be able to stop transactions in real and personal property injurious to her if she filed for divorce. *Correspondence*, 1 CHI. LEGAL NEWS 324 (1869). Bradwell often criticized the marital property laws on which she reported, but offered no critical commentary on this occasion. Her silence is striking in view of the fact that this domestic scenario provided the basis for some of the movement's most passionate joint property advocacy.

396. IOWA CODE tit. 15, ch. 2, § 2211 (1873). See GALLAHER, *supra* note 364, at 186-89; see also *infra* text accompanying notes 415-20 (discussing statute and its judicial interpretation).

397. *Married Women in Iowa*, WOMAN'S J., Apr. 12, 1873, at 116.

legislatures, but only a very few seem to have pressed the claim with the urgency of the antebellum movement.

Indeed, when suffrage leaders met at conventions, they rarely discussed joint property reform—despite the fact that they regularly used the claim to recruit women to the suffrage cause. In conventions, suffrage leaders meticulously tracked legislative and judicial developments pertinent to the vote, and gave brief reports on marital property developments,<sup>398</sup> but when they discussed joint property issues it was only in very general terms without a view toward securing legislation.<sup>399</sup> Perversely, *failure* to secure joint property rights had polemical value to suffrage advocacy: it illustrated that legislatures' growing beneficence in marital property reform did not moot women's need for the vote.<sup>400</sup> A slogan decorating the walls of NWSA's Twelfth Annual Convention in 1880 expresses the movement's priorities:

398. See, e.g., *American Woman Suffrage Association: Mass Convention*, WOMAN'S J., May 21, 1870, at 156; *American Woman Suffrage Association: Fourth Anniversary and Fifth Annual Meeting*, WOMAN'S J., Oct. 18, 1873, at 329; *The Eleventh Annual Convention of the National Woman's Suffrage Association*, NAT'L CITIZEN & BALLOT BOX, Feb. 1879, at 2 [hereinafter *Eleventh Annual Convention*]; *Nat'l Woman Suffrage Association, Washington Convention*, NAT'L CITIZEN & BALLOT BOX, Feb. 1881, at 1 (thirteenth annual NWSA convention).

399. The only reported discussions of joint property at postwar conventions that I have found are quite general in tenor. For example, at an 1878 NWSA convention celebrating the thirtieth anniversary of Seneca Falls, it was

*Resolved*, That the question of capital and labor is one of special interest to us. Man, standing to woman in the position of capitalist, has robbed her through the ages of the results of her toil. No just settlement of this question can be attained until the right of woman to the proceeds of her labor in the family and elsewhere is recognized, and she is welcomed into every industry on the basis of equal pay for equal work.

3 HISTORY OF WOMAN SUFFRAGE, *supra* note 275, at 124. Joint property concepts appear in similarly general terms in the eleventh resolution offered at NWSA convention in 1879:

*Resolved*, That the oft-repeated declaration by women, "I have all the rights I want," is due to the same feeling of intimidation and subserviency to those who feed, clothe and shelter them (out of their own unpaid earnings) which prevents the colored men in the South from expressing an opinion or casting a vote contrary to the wishes of their former masters, unless the Army of the United States is at hand to protect them from the consequences.

*Eleventh Annual Convention*, *supra* note 398, at 3; see also *infra* note 400 (1876 NWSA convention); *infra* note 401 and accompanying text (1880 NWSA convention). A meeting of the New York Suffrage Association delivered a lengthy report to the state legislature, which contained a complaint that state laws "give the husband almost absolute control of the common property [and] allow him to spend the whole personal estate in riotous living, or otherwise dispose of it despite all opposition on the part of the wife." *Address to the Voters and Legislators of New York, May, 1877*, NAT'L CITIZEN & BALLOT BOX, Aug. 1877, at 1 (address by Matilda Joselyn Gage, president, New York State Woman Suffrage Association).

400. For one instance of this argument, see the remarks of Susan B. Anthony which open Part III, *supra* text accompanying note 267. In 1876, when NWSA celebrated the centennial, Anthony read a document entitled *Declaration of Rights for Women* in front of Independence Hall in which the argument recurs. See *Declaration of Rights*, NAT'L CITIZEN & BALLOT BOX, June 1881, at 1 (observing variance in civil and political rights possessed by women in states around the country: "But in no state of the union has the wife the right to her own person, or to any part of the joint earnings of the co-partnership during the life of her husband."); cf. *Eleventh Annual Convention*, *supra* note 398, at 3 (speech by Susan B. Anthony at NWSA convention entitled *Bread and the Ballot*) ("Woman wants Bread not the Ballot, but give her the ballot and she will vote herself an opportunity to get her bread.") (discussing public offices and job opportunities vote will open to women, and concluding that "[w]ives of laboring men and mechanics will then own half the money that the husband earns").

“True labor reform: the ballot for woman, the unpaid laborer of the whole earth.”<sup>401</sup>

By the decade’s end, the joint property claim seems to have dropped from the suffragists’ legislative agenda. When Harriet Robinson, vice-president of NWSA, opened its thirteenth annual convention in 1881, her welcoming remarks included the observation:

I hope the time will come, when *by established custom*, the average woman will have a certain portion of the family means for her own unquestioned use, and like her husband, or her father, have a purse of her own, with money in it, to spend as she pleases. *This, for her, will be true property equality!*<sup>402</sup>

## 2. *Reconsidering the Earnings Statutes in Context: Legislation and Interpretation*

Though most movement leaders seem to have abandoned joint property advocacy by the end of the 1870’s, their pursuit of suffrage did not compromise the general cause of marital property reform, and most likely hastened its progress. To legislators in state houses across the country who were beset with escalating demands for suffrage, satisfying at least some petition demands for marital property reform appeared an increasingly appealing alternative.<sup>403</sup> The pace of earnings reform thus accelerated in the very period when joint property advocacy was waning.

401. 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 275, at 151 n.\*. The convention’s resolutions are themselves indicative of the legislative agenda of the movement. Those pertaining to suffrage are strategic, focused and particular; those pertaining to women’s household labor are general and exhortative. *See id.* at 152-53 (“Resolved, That the giant labor reform of this age lies in securing to woman, the great unpaid and unrecognized laborer and producer of the whole earth, the fruits of her toil.”).

402. *National Woman Suffrage Association: Boston Convention*, NAT’L CITIZEN & BALLOT BOX, June 1881, at 1 (reporting on thirteenth annual NWSA convention, Boston, Mass., May 26-27, 1881) (emphasis added).

403. *See, e.g., supra* text accompanying note 397 (Iowa and Massachusetts). Richard Chused attributes the earliest married women’s property acts to debtor-creditor conflicts and to the influence of separate spheres ideology, Chused, *supra* note 16, at 1397-1412, and describes the earnings statutes enacted later in the century in terms that similarly minimize the role feminist advocacy played in reform, *see id.* at 1424. For example, Chused notes that in 1890, 17% of the labor force was female and 14% of the female labor force was married, and suggests that the entrance of this scant number of women into the labor force prompted enactment of Oregon’s 1878 earnings statute—even as he acknowledges “[p]ressure from suffragists” in a concluding note. Chused, *supra* note 18, at 34-35 & nn.118-19. Chused’s own evidence casts doubt on his thesis. No significant change in the relations of production prompted the state to alter the distribution of property in marriage; rather, as Chused belatedly acknowledges, the impetus for reform seems to have come from Abigail Duniway and the suffrage movement itself.

Debtor-creditor conflicts under the reform statutes may well have moved legislators to continue common law reform. Undoubtedly such litigation did create pressure on legislatures and courts to grant wives full capacity to engage in legal transactions and to clarify matters concerning title to marital property. Commercial conflicts of this sort, however, do not explain the enactment of statutes emancipating wives’ earnings or reforming the laws of inheritance or child custody. Ultimately, the coincidence of feminist demands and common law reform (in both substance and timing) illustrates that political agitation was an important stimulus to reform in the immediate prewar period, *see* BASCH, *supra* note 4, and after.

In what ways, then, did the new earnings legislation modify the common law doctrine of marital service? Statutes according wives a separate property right in their labor emancipated them as formal equals of their husbands. Did these statutes make wives owners of the labor they performed in the household, and so accomplish, at least in part, the objects of joint property advocacy? If not, what labor did the statutes emancipate? The question was further complicated by the fact that wives performed much of their income-earning labor in the household, where it was often entangled with the uncompensated labor they performed for the family.<sup>404</sup> Under these circumstances, the practical reach of the statutes remained ambiguous at best.

We know that in some states, at least, legislatures that granted wives separate property rights in their earnings explicitly sought to preserve a husband's rights in his wife's household labor. In 1856, when antebellum agitation for joint property reform was at its height, Lucy Stone reported to the Seventh Annual Woman's Rights Convention that the legislature of Maine, "having granted nearly all other property rights to wives, found a bill before it asking that a wife should be entitled to what she earns, but a certain member grew fearful that wives would bring in bills for their daily service, and, by an eloquent appeal to pockets, the measure was lost for the time."<sup>405</sup> The following year the legislature declared:

Any married woman may demand and receive the wages of her personal labor, *performed other than for her own family*, and may hold the same in her own right against her husband or any other person, and may maintain an action therefor in her own name.<sup>406</sup>

In the postwar period a number of legislatures adopted this model.<sup>407</sup> For example, when Illinois declared in 1869 that a "married woman shall be entitled to receive, use and possess her own earnings," it provided that "this act shall not be construed to give the wife any right to compensation for any labor performed for her minor children or husband."<sup>408</sup> Wisconsin recognized a wife's rights in earnings in 1872, but expressly excluded those "accruing from labor performed for her husband or in his employ or payable by him"<sup>409</sup>—an exclusion similar to the one Massachusetts adopted when it amended its earnings statute in 1874.<sup>410</sup> In 1879, Indiana granted wives rights

404. For one feminist attempt to redress this problem, see quoted text of the bill drafted by Vermont activist Celinda Lilley, *supra* note 354.

405. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 632.

406. Act of Apr. 17, 1857, ch. 59, 1857 Me. Acts 49 (emphasis added).

407. The language of Minnesota's earnings statute resembled Maine's: "The wages of any married woman, earned after or before marriage by her personal labor performed for any other person than her husband, shall be paid and held to her sole and separate use . . ." 1866 Minn. Laws, ch. 69, § 6.

408. Act of Mar. 24, 1869, ch. 255, § 1, 1869 Ill. Laws 440.

409. Act of Mar. 25, 1872, ch. 155, § 2, 1872 Wis. Laws 218.

410. Act of Apr. 24, 1874, ch. 184, § 1, 1874 Mass. Acts 117 ("[A]ll work and labor performed by



in earnings from any "trade, business, services or labor, other than labor for her husband or family,"<sup>411</sup> and Alabama took similar precautions when it enacted earnings legislation in 1886.<sup>412</sup>

But large numbers of states enacted earnings legislation without such limiting language.<sup>413</sup> Absent an analysis of feminist demands and legislative deliberations in these states, one cannot determine how legislatures intended to alter the doctrine of marital service. Where the requisite evidence survives, it will likely reveal that in some cases, at least, legislatures emancipating a wife's "separate" or "personal" labor intended to exclude work performed for the family. As we have seen, Connecticut provides one clear example of an earnings statute devoid on its face of any limiting language, but adopted with the intent to leave wives' family labor unemancipated.<sup>414</sup>

Yet, if legislators in these states wanted to exclude wives' household labor from earnings reform, it is unclear why they did not use the language of the many statutes that expressly did so. In fact, with feminist advocacy focused on suffrage and increasingly disassociated from joint property traditions, legislators enacting a multi-sectioned reform statute may not have considered the meaning of a clause granting wives rights in their "separate" or "personal" labor. Nevertheless, its practical reach was virtually ordained by the structure of the separate property right accorded. To emancipate any significant part of a wife's household labor within a regime of separate property would be to recognize husband and wife as economic agents having distinct and possibly antagonistic interests in marriage. Courts called upon to construe the new earnings statutes were uniformly determined to prevent such a result. The threat that the earnings statutes would give literal meaning to the "marriage bargain" haunts their interpretation and application.

To explore but one example, when in 1873 Iowa adopted a statute providing that a "wife may receive the wages of her personal labor and

[a wife] for others than her husband and children shall, unless there is an express agreement on her part to the contrary, be presumed to be on her separate account . . ."); see also *supra* notes 381, 382 (Lucy Stone and Henry Blackwell remarking upon exclusion in *Woman's Journal*).

411. Act of Mar. 25, 1879, ch. 67, § 2, 1879 Ind. Acts 160.

412. "The earnings of the wife are her separate property; but she is not entitled to compensation for services rendered to or for the husband, or to or for the family." ALA. CODE pt. 2, § 2342 (1887). A wife generally needed her husband's written consent, however, to "enter into and pursue any lawful trade or business, as if she were sole." ALA. CODE pt. 2, § 2350 (1887).

Delaware and Montana enacted similar statutes. See DEL. REV. STAT. ch. 87, § 3059 (1915) (giving wife right to "receive the wages of her personal labor not performed for family"); MONT. REV. CODE § 5797 (1921) ("All work and labor performed by a married woman for a person other than her husband and children shall . . . be presumed to be performed on her separate account.").

413. An early model was New York's 1860 statute, which enabled a married woman to "perform any labor or services on her sole and separate account," and provided that "the earnings of any married woman, from her trade, business, labor or services, shall be her sole and separate property." Act of Mar. 20, 1860, ch. 90, § 2, 1860 N.Y. Laws 157. For an overview of such legislation, see Joseph Warren, *Husband's Right to Wife's Services* (pts. 1 & 2), 38 HARV. L. REV. 421, 622 (1925). For analysis of legislation containing no explicit limitations, see, e.g., *id.* at 623-43.

414. See *supra* text accompanying notes 370-75.

maintain an action therefor in her own name, and hold the same in her own right,"<sup>415</sup> it did not define the "personal labor" emancipated, or explain how the statute altered a wife's common law obligations of service. The legislative declaration clearly abrogated a husband's common law rights in his wife's labor—but to what extent?

In the year of its enactment, one "M. Williams" reported on the Iowa statute in the *Woman's Journal*. Williams first objected that the earnings statute gave the wife no control over property the married couple had "jointly acquired." She then direly predicted its judicial construction:

Yet I hardly think this clause would bear strict interpretation. It cannot mean that a wife is expected to receive wages for what she does in the house of her husband, and maintain an action therefor if she is not paid. And notwithstanding it is the opinion of the court of Illinois that a married woman has the right to labor and acquire property, still, I think if she gave up the care of the husband's family to do this for any considerable time, the husband would be entitled to a divorce.<sup>416</sup>

Williams proved quite prescient. Within two years the Supreme Court of Iowa had so construed the statute. Called upon to determine whether a husband was entitled to tort damages for loss of his wife's services, the court reasoned that he was, construing the statute's language to preserve a husband's common law rights in his wife's labor:

We think that the terms, "wages of her personal labor," as here used, refer to cases where the wife is employed to some extent in performing labor or services for others than her husband, or where she is carrying on some business on her own behalf; such, for instance, as dress-making, or the millinery business, or school-teaching. In a word, she is entitled to the wages for her personal labor or services performed for others, but her husband is entitled to her labor and assistance in the discharge of those duties and obligations which arise out of the married relation.<sup>417</sup>

Of course, by recognizing wives' rights in earnings the legislature *had just altered* the "duties and obligations which arise out the married relation," but the court was confident that a wife's common law duties persisted, albeit in modified form. Its reasoning was simple: construing the earnings statute to emancipate a wife's labor completely would undermine the family form.

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415. IOWA CODE tit. 15, ch. 2, § 2211 (1873).

416. Williams, *supra* note 321, at 1. Given the sophistication of the correspondent's analysis, "M. Williams" was likely Mary Williams, who would publish and edit the *Ballot Box* in 1878.

417. *Mewhirter v. Hatten*, 42 Iowa 288, 291 (1875).

We feel very clear that the legislature did not intend by this section of the statute to release and discharge the wife from her common law and scriptural obligation and duty to be a “help-meet” to her husband. *If such a construction were to be placed upon the statute, then the wife would have a right of action against the husband for any domestic service or assistance rendered by her as wife.* For her assistance in the care, nurture and training of his children, she could bring an action for compensation. *She would be under no obligation to superintend or look after any of the affairs of the household unless her husband paid her wages for so doing.* Certainly, such consequences were not intended by the legislature, and we cannot so hold in the absence of positive and explicit legislation.<sup>418</sup>

The court apparently had no evidence before it illuminating the intentions of the legislature that had enacted the statute just two years prior; it was nevertheless quite certain that in granting wives rights in the wages of their personal labor, the legislature did not wholly abrogate their common law obligations of service. Lacking legislative guidance, the court offered its own interpretation of the statute: A wife’s “personal labor” was labor performed “for others than the husband,” or “on her own behalf.” In drawing this distinction, the court did not focus on a wife’s motives in working. In part, it considered her occupation. But the court was primarily interested in discriminating between a wife’s labor inside and outside of the household. For this reason, the court barely emphasized the statute’s reference to “wages.”<sup>419</sup> Wives’ labor in the household, even if compensated by third parties, would for years be construed as a husband’s common law right.<sup>420</sup> As Williams had predicted, if the legislature had granted a wife rights in her personal labor, the earnings statute would have no bearing on “what she does in the house of her husband.” Such labor was not “personal” but remained a husband’s by marital right.

In a letter to *Revolution* in 1870, Clara Nichols predicted that New York’s 1860 statute would be construed along similar lines:

“[B]eyond securing to her, in her own right, property inherited or earned outside her husband’s service—I am not aware that a New York wife has any property rights. . . . If a single state has recognized the right of the wife to control one penny worth—capital or use—of

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418. *Id.* at 291-92 (emphasis added).

419. *Id.* at 292 (“[F]or labor performed and assistance rendered in the discharge of her domestic duties as a wife no wages, in the proper meaning of that term, attach or follow.”).

420. The court had recently dismissed a widow’s suit against her husband’s estate seeking payment for nursing her husband during a period of insanity—payment her husband’s guardian had promised her. The court barred recovery, despite the guardian’s agreement to compensate the plaintiff, on the grounds that such labor merely constituted discharge of her obligations as wife. *Grant v. Green*, 41 Iowa 88, 91-92 (1875). For years to come, Iowa courts would recurrently characterize wives’ labor performed in the household for third parties (typically boarders) as part of their common law obligations of service. *See McClintic v. McClintic*, 111 Iowa 615, 618-19 (1900); *Hamill v. Henry*, 69 Iowa 752, 753-54 (1886).

the estate accumulated by the joint savings and earnings of husband and wife, I beg to be informed of the fact."<sup>421</sup>

During the ensuing decade, the New York Court of Appeals construed the 1860 statute in terms that substantially confirmed Nichols' analysis. Its first pronouncement on the statute was accomplished by indirection in 1873 in *Whitaker v. Whitaker*,<sup>422</sup> a case that presented the New York Court of Appeals with the circumstance of intramarital contract the Iowa court feared. A wife sought to recover on a promissory note that her husband had given her in recognition of her labor on the family farm. The husband died intestate; his wife, father, and three brothers survived him. While the lower courts allowed the claim against the estate, the Court of Appeals reversed, subordinating the wife's claim to the rights of the husband's collateral heirs. In the court's view, the husband's note failed for want of consideration; the labor it purported to compensate belonged to the husband by marital right:

If a wife can be said to be entitled to higher consideration or compensation because she labors in the field instead of in her household (which I do not perceive and cannot admit), the law makes no such distinction. It never has recognized the right to compensation from her husband on account of the peculiar character of her services. In most cases she probably contributes more to the happiness of her family by the proper discharge of the delicate and responsible duties of her household, than by any outside labors, however arduous. It is clear that the law regards neither as any consideration for a promise founded thereon from the husband.<sup>423</sup>

While the court granted that the husband might have provided for his wife by will, its hostility to the transaction was evident. At root, the court judged the note without effect because it attempted to alter the obligations and entitlements of marriage, a prerogative reserved to the state alone. Only a reform of the statute of distribution, the court suggested, might authorize the allocation of marital property the plaintiff sought.<sup>424</sup>

*Whitaker's* ruling that the intramarital contract was unenforceable for want of consideration emphatically confirmed Nichols' contention, three years prior, that under New York law wives' labor in the family context remained subject to the common law of marital service. In a case decided the same year as *Whitaker*, the Court of Appeals announced that the 1860 statute did grant

421. *The Laws of New York*, *supra* note 327, at 378.

422. 52 N.Y. 368 (1873).

423. *Id.* at 371.

424. *See id.* at 373:

While a man lives, a legal obligation rests upon him to sustain his wife and children. When he dies, the law declares what is the proper share of his property—the legal and equitable share—that belongs to each of them. If either claim more, the claim should be founded in the law. If it do not allow enough, it may be safely enlarged by statute.

wives rights to their earnings from third parties.<sup>425</sup> However, three years later, it qualified that ruling, allowing a husband to recover compensation from the estate of a boarder for work his wife had performed under an express agreement with the boarder for testamentary compensation.<sup>426</sup>

Finally, in 1878, the Court of Appeals issued a definitive pronouncement on the earnings legislation of 1860-62. *Birkbeck v. Ackroyd*<sup>427</sup> involved a husband's suit against a mill owner for wages; the plaintiff sought compensation for his own services, as well as those of his wife and minor children, and further, by assignment, those of his two adult sons and their wives. Although the case involved labor outside the home and for a third party, the court declared the husband the proper party to recover his wife's wages:

The bare fact that [a wife] performs labor for third persons, for which compensation is due, does not necessarily establish that she performed it, under the act of 1860, upon her separate account. The true construction of the statute is that she may elect to labor on her own account, and thereby entitle herself to her earnings, but in the absence of such an election or of circumstances showing that she intended to avail herself of the privilege and protection conferred by the statute, the husband's common law right to her earnings remains unaffected.<sup>428</sup>

While nominally deriving the doctrine of election from statutory language,<sup>429</sup> the Court of Appeals turned to statutory purpose to find support for its decision. The court's reading of the statute reflected the cross-currents of earnings advocacy in the preceding decades. New York's earnings legislation, the court reasoned, was enacted to remedy a "defect in prior laws": "[I]n cases where the husband was unable or unwilling to support his family, or was idle or dissolute," the "hardship" of allowing a husband to control a wife's earnings "was apparent."<sup>430</sup> Thus, to effectuate the protective purposes of the statute, it was "not necessary . . . to hold that, irrespective of her intention, [a wife's] earnings, in all cases, belong to her and not to the

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425. See *Brooks v. Schwerin*, 54 N.Y. 343, 348 (1873) (while "services of the wife in the household in the discharge of her domestic duties still belong to the husband . . . when she labors for another, her service no longer belongs to her husband, and whatever she earns in such service belongs to her as if she were *feme sole*") (tort action; married woman working as servant allowed to recover value of lost wages, but husband entitled to losses stemming from disruption of wife's household labor).

426. *Reynolds v. Robinson*, 64 N.Y. 589 (1876). The court characterized the wife's work "as part of her household duties, rendered . . . to a person in her husband's house." *Id.* at 593.

427. 74 N.Y. 356 (1878).

428. *Id.* at 358.

429. See, e.g., *id.* at 358-59; cf. Act of Mar. 20, 1860, ch. 90, § 2, 1860 N.Y. Laws 157:

A married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account, and the earnings of any married woman, from her trade, business, labor or services, shall be her sole and separate property, and may be used or invested by her in her own name.

430. *Birkbeck*, 74 N.Y. at 358.

husband.”<sup>431</sup> Properly analyzed, the question turned on whether the wife intended to labor on her sole and separate account. An inference that she elected to do so could be made “where the wife is living apart from her husband, or is compelled to labor for her own support, or the conduct or habits of the husband are such as to make it necessary for her protection that she should control the proceeds of her labor.”<sup>432</sup> Equally, “[w]here the wife is engaged in a business, as that of a trader . . . there would be no room to question her right to the avails and profits.”<sup>433</sup> But, “where the husband and wife are living together, and mutually engaged in providing for the support of themselves and their family,—each contributing by his or her labor to the promotion of the common purpose,” a wife’s wages presumptively belonged, as at common law, to her husband.<sup>434</sup> Thus, in what appears to be an aggressive repudiation of joint property advocacy, the court held that *because* the household was “supported out of the joint earnings of the family, and the wife has never claimed her earnings as her separate property . . . . the plaintiff [husband] was entitled to recover their value.”<sup>435</sup>

*Birkbeck* neatly turned the critical premises of joint property advocacy on their head. A wife labored on her “sole and separate account” only if her earnings were not applied to family support; once applied to family support, the “joint earnings” of the family became a husband’s by marital right. Where woman’s rights advocates had argued that a wife’s labor for the family justified her claim to joint title in marital assets, the court drew the opposite conclusion: it was precisely a wife’s labor for the family that defined her in law, and consequently, in fact, as her husband’s dependent.

Though the *Birkbeck* court nominally invited scrutiny of a wife’s intent in determining legal title to her earnings, the doctrinal presumptions it announced invited scrutiny of the household economy instead: so long as a husband performed his duty of marital support, he was entitled to claim the benefit of a wife’s labor for the family. In practice, the doctrine served to ratify a husband’s litigation decisions—protecting exercise of his traditional prerogative to appropriate his wife’s earnings.<sup>436</sup> And it was to that end that, in the years following *Birkbeck*, New York courts frankly turned their inquiry from the

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431. *Id.* at 359.

432. *Id.*

433. *Id.*

434. *Id.*

435. *Id.* at 360; *cf.* *Blaechinska v. Howard Mission & Home*, 130 N.Y. 497, 499 (1892) (“When [a wife] works with her husband for another and their joint earnings are used to support the family, if there is no special contract that she is to receive the avails of her labor, they belong to him and he is entitled to recover their value.”) (tort action in which married woman sought damages for earnings lost from employment as seamstress in husband’s tailor shop; held, husband was proper party to recover).

436. The doctrinal framework elaborated in *Birkbeck* proved sufficiently flexible that courts were able to allow wives to recover on claims for earnings from third parties, while at the same time allowing recovery by husbands who chose to claim legal title to their wives’ wages. *See, e.g., Carver v. Wagner*, 51 A.D. 47, 50 (N.Y. App. Div. 1900). *See generally* Siegel, *Modernization*, *supra* note 4.

wife's intent to the husband's in determining ownership of her earnings.<sup>437</sup> Analyzing the problem from the standpoint of a husband's consent resolved the statutory dilemma more satisfactorily: it aligned a wife's statutory right to earnings from third parties with longstanding equitable traditions,<sup>438</sup> recognizing her "right" without intruding upon his prerogative.<sup>439</sup> This construction of the earnings statute evidently had broad appeal, and was employed by courts construing similar statutes across the country.<sup>440</sup> It was, moreover, apparently satisfactory to the New York legislature. The *Birkbeck* case was decided in 1878, but it was not until 1902 that the legislature intervened to reverse the legal presumptions the case announced.<sup>441</sup> The legislature's delay was not for lack of opportunity: in the interim it adjusted the law of marital status in 1884, 1887, 1892, and 1896.<sup>442</sup>

In 1881 Elizabeth Cady Stanton reflected upon the course of marital property reform in New York, as she completed the first volume of the *History of Woman Suffrage*. Although in the intervening two decades Stanton had devoted the better part of her energies to securing the vote, more liberal divorce laws, and various economic rights for women, her perspective on earnings reform had not changed. Commenting on a letter from the sponsor of

437. For example, in 1905, the Court of Appeals discussed a wife's election in terms that revealed it to depend on her husband's consent:

We have here the situation where a wife for a period of six years or more was engaged openly in a separate occupation *without protest or interference from her husband, the record disclosing that he was entirely willing that she should recover for her services*. This is a sufficient election on the part of the wife to embark in an outside undertaking whereby she may earn wages on her own account, *no complaint being made that she was in any way neglecting her duties as a wife*.

Stevens v. Cunningham, 181 N.Y. 454, 460 (1905) (emphasis added).

438. For the equitable roots of the consent paradigm, see JOHN F. KELLY, A TREATISE ON THE LAW OF CONTRACTS OF MARRIED WOMEN ch. VI., § 15 (Jersey City, N.J., F.D. Linn & Co. 1882). At equity, a husband might settle a business or its profits on his wife, as he might make a gift of any assets in trust. See also David Stewart, *Married Women Traders*, 24 AM. L. REG. 353, 354, 358-60 (n.s. 1885). In this circumstance, a wife's interest in the profits of her business enterprise derived from his consent, and generally could be attached by his creditors (unless given for "valuable consideration"). *Id.* at 360.

439. The consent paradigm was in fact endorsed by the New York Court of Appeals prior to *Birkbeck*, in a case involving a wife's claim to earnings from a boarder. See *Reynolds v. Robinson*, 64 N.Y. 589, 593 (1876) ("husband might covenant and agree that his wife should receive pay for her services on her own account; but in the absence of some arrangement to that effect, the inference of law and fact would be that she was working for husband in the discharge of her marital duties"). The rule tracing a wife's right to earnings to her husband's consent was actually in some tension with the prohibition on intramarital contracts announced in *Whitaker v. Whitaker*, 52 N.Y. 368 (1873). See *supra* text accompanying notes 422-24. One court distinguished the two doctrinal rules by focusing on the adversarial structure of the lawsuits: "In the one case the wife is seeking to maintain her claim in antagonism to the husband and in disregard of her wifely duties. In the other case the husband, the party affected, renounces his paramount right to the money she has earned." *Carver v. Wagner*, 51 A.D. 47, 51 (N.Y. App. Div. 1900).

440. See Annotation, 9 A.L.R. 1303 (1920) (consent of husband to rendition of services by wife as prerequisite to her recovery); Annotation, 1917E L.R.A. 282, 294-98 (married women's services outside home; husband's relinquishment).

441. Act of Apr. 2, 1902, ch. 289, § 1, 1902 N.Y. Laws 844.

442. See Act of May 28, 1884, ch. 381, 1884 N.Y. Laws 465; Act of June 6, 1887, ch. 537, 1887 N.Y. Laws 667; Act of May 14, 1892, ch. 594, 1892 N.Y. Laws 113; Act of Apr. 17, 1896, ch. 272, §§ 20-29, 1896 N.Y. Laws 219-22.

New York's 1860 earnings statute, who characterized the legislation as affording husbands and wives complete equality in all matters excepting suffrage, Stanton vigorously objected. Senator Colvin, she charged, had "quite forg[otten] that the wife has never had an equal right to the joint earnings of the copartnership, as no valuation has ever been placed on her labor in the household . . . . This is *the vital point* of interest to the vast majority of married women, since it is only the *few* who ever possess anything through separate earnings or inheritance."<sup>443</sup> Nonetheless, Stanton observed, a law recognizing wives' rights in their family labor appeared nowhere "on the statute-books of any civilized nation on the globe."<sup>444</sup> Neither extant community property regimes nor the regime of separate property emerging in common law states in the years since enactment of the New York statute emancipated wives' labor in the household.<sup>445</sup> The picture Stanton painted was indeed bleak: "Legislation for woman proceeds on the assumption, that all she needs is a bare support; and that she is destitute of the natural human desire to accumulate, possess, and control the results of her own labor."<sup>446</sup>

Stanton blamed state legislatures for the inadequacies of common law reform—but there was more than a touch of disingenuousness in the charge. For Stanton herself deemed marital property reform a subordinate task of feminist advocacy, contending only several years prior, "we should make woman suffrage the first, last and only work until it is secured."<sup>447</sup> As the remarks of Stanton, Nichols, and Williams might suggest, the joint property concept was swiftly emerging as a standard by which to measure the deficiencies of earnings legislation already enacted, rather than a strategy for guiding the course future reform might take. Although woman's rights advocates occasionally commented on matters of statutory construction, their litigation efforts during the 1870's were directed elsewhere: the New Departure strategy focused on access to the vote and the bar.<sup>448</sup> Feminist interest in practical design and implementation of a joint property system persisted,<sup>449</sup>

443. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 751-52.

444. *Id.* at 752.

445. On wives' rights in community property jurisdictions, see GEORGE MCKAY, A TREATISE ON THE LAW OF COMMUNITY PROPERTY §§ 1132-1133, 1210-1216 (2d ed. 1925); see also Daggett, *supra* note 140; Daggett, *supra* note 222; M.R. Kirkwood, *Equality of Property Interests Between Husband and Wife*, 8 MINN. L. REV. 579 (1924).

446. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 752.

447. E. Cady Stanton, *The Parable of the Ten Virgins*, BALLOT BOX, Dec. 1877, at 1 ("The ballot is the pivot round which all reforms must revolve . . . hence, the work of woman suffragists in all other directions, should be personal and individual, and ever subordinate to active, combined efforts for this primal reform."); see also 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 275, at 122 (Wendell Phillips, in 1878, advising movement to concentrate all its energies on suffrage).

448. See *supra* text accompanying notes 273-74; DuBois, *supra* note 91, at 852-60. It does not appear that woman's rights advocates ever attempted to use the courts to assert or publicize demands concerning marital property reform—at least I find no record of such an attempt in the volumes of *History of Woman Suffrage* (an absence notable in light of its exhaustive coverage of the New Departure strategy). See generally 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 265, at 586-755.

449. See Perry, *supra* note 331.



but the attention of the movement's leadership was now clearly and firmly fixed on matters of suffrage. In consequence, those who best appreciated the limits and possibilities of earnings reform allowed legislatures and courts to define its future.

#### IV. EXPLORING THE MOVEMENT'S RETREAT FROM JOINT PROPERTY ADVOCACY

It is tempting to attribute the movement's waning interest in joint property rights to its postwar preoccupation with suffrage. But it was not only suffrage that diverted feminist attention from joint property reform. As we have seen, changes in the generational, regional, and class background of the movement's leadership also contributed to the movement's growing disengagement from the claim.<sup>450</sup> To get a better understanding of the social forces that caused the movement to falter in its quest for joint property rights, it is helpful to examine two other strategies for achieving marriage equality that feminists pursued during the postwar period.

During the 1870's, while petitioning state legislatures for marital property reform, feminists began to discuss marriage equality in new and recognizably modern terms. Feminists now envisioned equality for wives in an arrangement called "two-career marriage."<sup>451</sup> To realize this goal they sought to reorganize the tasks of family maintenance, promoting a variety of schemes called "cooperative housekeeping."<sup>452</sup> These postwar strategies sought to change wives' role in the relations of production, unlike the joint property concept, which attacked gender inequality in the relations of distribution. Analyzed from a somewhat different vantage point, the movement's new strategies for securing economic equality in marriage challenged the gendered *differentiation* of labor, not its gendered *valuation*. In these respects, postwar plans for two-career marriage and cooperative housekeeping differ dramatically from the joint property strategy of the antebellum era.

The career of Antoinette Brown Blackwell typifies these changes in the orientation of feminist advocacy. In the early days of the woman's rights movement, Blackwell was a key spokeswoman in the campaign for joint property; during the 1850's, she eloquently described the vision of marriage equality the plan embodied, and offered a sophisticated defense of joint property rights when critics raised market-based objections to the claim.<sup>453</sup> Yet, by the 1870's, Blackwell no longer discussed issues of joint property when she described her vision of equality in marriage. Instead, at the 1873 meetings of the Woman's Congress, she presented a paper entitled *The*

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450. See *supra* Part III.B.3.

451. See *infra* Part IV.A.

452. See *infra* Part IV.B.

453. See *supra* text accompanying notes 190-93.

*Relation of Woman's Work in the House to the Work Outside*, in which she described her new vision of two-career marriage. Blackwell's new feminist vision of "work outside" the house contemplated a flight from "woman's work in the house":

*Women are less in need of more work than of a more sensible class of occupations on which to wisely expend their energies. To this end, also, we need a general reconstruction in the division of labor. Let no women give all their time to household duties, but require nearly all women, and all men also, since they belong to the household, to bear some share of the common household burdens.*<sup>454</sup>

Even a cursory examination of postwar plans for two-career marriage and cooperative housekeeping reveals an attitude toward domestic labor not found in prewar plans for joint property. As feminists explain their new strategies for emancipating wives, they do not discuss the work of family maintenance as expropriated or devalued labor, but rather as oppressive labor from which women seeking equality need to escape.<sup>455</sup> As importantly, their proposals for escaping the work of family maintenance involve schemes for delegating such labor to other women, revealing growing forms of socioeconomic stratification in the movement's conception of women's interests—tendencies already visible in the suffrage journals' habit of discussing the problem of household labor as "the servant problem."<sup>456</sup> As we will see, the movement's postwar strategies for attacking the gendered differentiation of family labor contemplate new social relationships, not only between men and women, but amongst women as a class.

It is instructive to consider postwar proposals for two-career marriage and cooperative housekeeping, not only because they do much to explain the movement's retreat from joint property advocacy, but also because they illuminate the genesis of a recognizably modern feminist sensibility in matters of "family and work." In the postwar period, the movement began to challenge the division of labor in the family as the antebellum movement never had, and it embraced employment outside the home as the path to women's economic emancipation in marriage. But in so doing, the movement did not escape from gendered assumptions about women's work. To the contrary, the movement embraced a new understanding of autonomy and dependence that was rooted in the gendered organization of the labor market. Moreover, the movement

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454. *The Woman's Congress*, *supra* note 326, at 360 (emphasis added) (reprinting an essay Blackwell read before the Woman's Congress, entitled *The Relation of Woman's Work in the House to the Work Outside*); see also Blackwell, *Work in Relation to the Home* (pt. 1), *supra* note 326, at 137; Antoinette B. Blackwell, *Work in Relation to the Home*, WOMAN'S J., May 9, 1874 (pt. 2), at 144, WOMAN'S J., May 16, 1874 (pt. 3), at 153, WOMAN'S J., May 23, 1874 (pt. 4), at 161 (essay elaborating this theme read before the New England Women's Club).

455. See *infra* text accompanying notes 470-76.

456. See *supra* text accompanying notes 334-36.

elaborated its new vision of marriage equality in terms that presupposed the socioeconomic stratification of the postwar industrial order. Analyzing the shift in social sensibilities that caused the movement to direct its advocacy energies away from the joint property strategy and towards the two-career marriage strategy thus reveals critical lacunae in the modern feminist vision of justice in the family relation.

A. *A New Concept of Marital Equality: "Two-Career Marriage"*

When antebellum feminists analyzed wives' economic dependency, they linked women's circumstances in and out of marriage. As they saw it, barriers to employment crowded women in a few occupations where they were grievously underpaid; unable to support themselves, they were forced to marry. Once married, the common law enforced their dependent status as wives, no matter how valuable their labor. This institutional analysis yielded a two-part agenda designed to secure women's economic autonomy: access to paid employment that "would place woman above the necessity of any mercenary marriages" and common law reform that would secure "[t]he wife . . . equal and joint proprietorship with her husband."<sup>457</sup>

Few expressly disavowed this analysis in the postwar period, but growing numbers of feminists came to emphasize an adequate and independent source of income as the most promising avenue to economic autonomy for women—both *within* and without marriage. The shifting focus of the movement's critique of marriage is apparent in a series of articles published in the *Woman's Journal* in April of 1875. "Beth," a correspondent from San Francisco, depicted her ideal of "Matrimonial Partnerships" in terms that diverged dramatically from the vision of antebellum feminists: "We shall be glad when every woman shall be able and shall expect to support herself. And then, men with money will, we hope, outgrow the foolish idea that they are to be married 'for their money.' *Individual pecuniary independence will soon promote the true matrimonial partnership.*"<sup>458</sup> As Beth elaborated her point two weeks later, emancipation from family dependency required emancipation from familial sources of support: "We don't want the purses of our 'husbands, brothers, parents. . . .' That is just what independent minded women rebel against; *we want an independent way of earning honestly our own supply.*"<sup>459</sup> That same month Jane Grey Swisshelm, an early and feisty satirist of common law coverture rules, took up the refrain, caustically observing "The

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457. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 711 (remarks of Elizabeth Jones at Tenth National Convention, Cooper Institute, New York, May 10-11, 1860); *see also supra* notes 166-67 and accompanying text.

458. *Matrimonial Partnerships*, WOMAN'S J., Apr. 3, 1875, at 106 (emphasis added).

459. *Financial Equality of the Sexes*, WOMAN'S J., Apr. 24, 1875, at 131 (emphasis added).

philosophers seem to know that work never unsexes a woman. Only wages can do this . . . .”:

When one grubs and plows for a master who is entitled to “all she can acquire by her labor, service or act,” she is not likely to forget her sex, and consequent inferiority; but if she goes to writing briefs or prescriptions or taking fees! Whew! How are the philosophers to keep her in sufficient consciousness of her sex?<sup>460</sup>

Increasingly, the movement’s analysis of “pecuniary dependence” contemplated independent employment as the path to wives’ economic autonomy in marriage. This development signaled a fundamental reorientation of the feminist critique of marriage. Feminists now attributed a wife’s dependency not to the law governing title to a wife’s labor, but instead to the labor of family maintenance itself.

Postwar proposals for two-career marriage depict autonomy and dependence in terms quite different from antebellum joint property discourse, reflecting several beliefs about social status that can be detected in *postwar* joint property discourse, although to a lesser degree. Perhaps most striking is the judgment that “real” work is work that earns a wage—or, as Swisshelm put it, “only wages” can “unsex[] a woman.” This perception, which lies at the heart of the two-career marriage concept, focuses on the social relations of distribution, and finds expression in postwar joint property discourse in several ways. In the years after the Civil War, joint property advocates began to discuss wives’ household labor in a new market idiom, as “*unpaid* labor,”<sup>461</sup> and to describe a wife as a “servant without wages.”<sup>462</sup> At the same time, they began to refer to the joint property claim as a demand for “equal division” of marital assets and to discuss a husband paying his wife for her work.<sup>463</sup> Helen Jenkins, writing for the *New Northwest*, expressed these new concerns about household labor when she observed that “[t]he estimated worth of a thing . . . is its money value. Law and society say this home work need not be paid in money; therefore society and law value this work . . . at—how much?

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460. Swisshelm, *supra* note 299, at 109. It is worth noting that, during this same period, Swisshelm presented the joint property claim as a payment to keep women in their “sphere,” in order to dramatize the fact that women were interested in leaving it. See *supra* note 344 and accompanying text. Swisshelm herself began working as a journalist in the years before the Civil War. See *supra* note 61.

461. Cf. 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 275, at 152 (1880 NWSA resolution referring to woman as “the great unpaid and unrecognized laborer and producer of the whole earth”); *Eleventh Annual Convention*, *supra* note 398, at 3 (1879 NWSA resolution referring to wives’ “unpaid earnings”); Dunn, *supra* note 319, at 2 (“It is the unpaid labor of the average American woman which makes it possible for a poor man to raise a family of children in tolerable comfort.”); 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 275, at 325 (1877 remarks of Connecticut governor, Richard D. Hubbard) (“in most cases, the wife’s whole life is spent in the toilsome and unpaid service of the household”); Swisshelm, *Woman’s Sphere Pure and Simple*, *supra* note 299, at 108 (discussing men who “live by the unpaid labor of women”).

462. Cf. *supra* text accompanying notes 323-24; *supra* note 289.

463. Cf. *supra* text accompanying notes 300, 309, and 369; *supra* notes 298 and 400.

. . . [N]othing”—observations prompting Jenkins to suggest that she “would . . . have the husband pay the wife.”<sup>464</sup> These changes in feminist idiom and expectation suggest that the growing preeminence of wage work in the postwar industrial economy had isolated the labor of family maintenance in an increasingly anomalous economic status.<sup>465</sup> Thus, while it was possible for antebellum feminists to discuss a wife’s “earnings” without discriminating between her paid and unpaid labor,<sup>466</sup> by the postwar period this was no longer possible; by the 1870’s many feminists uneasily noted that wives “are not earners but savers of money.”<sup>467</sup>

But postbellum feminists were not merely sensitive to the fact that wives earned no money. Equally evident in postwar proposals for two-career marriage is a conviction that the *type* of work wives performed impeded their economic emancipation. As Antoinette Brown Blackwell put it when she called for “a general reconstruction in the division of labor,” wives “need a more

464. Jenkins, *supra* note 307, at 2 (discussed at *supra* text accompanying notes 307-09).

465. In the second half of the nineteenth century, the process of industrialization transformed growing numbers of workers into wage-laborers; the 1870 census was the first to find more persons working for others than self-employed. See BUECHLER, *supra* note 279, at 46; see also *supra* note 37 (discussing census data). This development affected social perceptions of wives’ work in the family, exacerbating the gendered devaluation of such work already expressed in antebellum separate spheres ideology. See *supra* text accompanying notes 66-70. The 1870 census, for example, excluded the work of family maintenance from the list of “gainful employments,” and in this and other ways discounted the productive value of women’s labor in the family. See *supra* note 65 and accompanying text.

466. See *supra* text accompanying notes 131-32.

467. When Mary Livermore criticized the methodology of the 1870 census, see *supra* note 65, she argued that “[w]omen had a monetary value as wives and mothers, and they ought to insist upon a recognition of that value. Eight millions of American women were wives and housekeepers, but according to the census they were ‘doing nothing.’” *Second Woman’s Congress*, WOMAN’S J., Nov. 7, 1874, at 356. However, while Livermore couched her objections to the census in terms that might date from the antebellum era, other feminists began to talk about wives’ work in ways that bore the impress of the very cultural developments they were resisting. For example, Massachusetts suffragist Harriet Robinson granted that housework *was* anomalous, though not valueless. To situate housework in the relations of production and distribution, Robinson, along with many other feminists in the postwar era, characterized the wife as a “money-saver”:

The census does not include the services of the mother and daughter among the *paid* vocations, though, as is well known, in many instances they do all the housework of the family. They get no wages, and therefore do not appear among the “useful classes.” They are not earners, but savers of money. A money-saver is not a recognized factor, either in political economy or in the State census. The mother, daughter or wife is put down in its pages as “keeping house.” If they were paid for their services they would be called “housekeepers,” and would have their place among the paid employments.

3 HISTORY OF WOMAN SUFFRAGE, *supra* note 275, at 305 (1886); accord Perry, *supra* note 331, at 188 (“They toil on for years, the husband taking the role of the money-getter, and the wife that of the money-saver.”); cf. *The Woman’s Congress*, *supra* note 326, at 360 (remarks of Antoinette Brown Blackwell) (“Women need a purpose; a definite pursuit in which they are interested . . . . If their necessities compel this, let them seek for the stimulus of pecuniary gain, with the hopeful feeling that *they can earn more abroad than they can possibly save at home.*”) (emphasis added).

Melusina Fay Peirce, an exponent of cooperative housekeeping, see *infra* text accompanying notes 500-05, went even further, questioning whether in fact married women of the social elite could be characterized as “money-savers.” See Melusina F. Peirce, *Co-operation*, in FOURTH CONGRESS PAPERS, *supra* note 330, at 34, 42 (“[W]ith a few professional exceptions, the whole class of educated women have become *spenders* instead of *earners* or (what is the same thing) *savers* of money. The grand function of our housewifery is BUYING.”).

sensible class of occupations on which to . . . expend their energies."<sup>468</sup> This perception is conspicuously absent in antebellum joint property advocacy, but begins to appear in the postwar period, as advocates present the joint property claim as a reward or incentive designed to keep women in their "sphere."<sup>469</sup>

Thus, in the postwar period, feminists interested in reforming marriage began to scrutinize the relations of production as they had not in the antebellum era. Many feminists began describing household labor as work that women seeking equality should flee—a belief expressed in some arguments for joint property and in most proposals for two-career marriage. This new attitude toward domestic labor might be attributed to the reorganization of work in the industrial era, which marked the household as an atavistic site for performing productive labor,<sup>470</sup> and which caused women's labor in the family to appear "unspecialized."<sup>471</sup> But postwar feminists did not merely view the work of the household as retrograde labor; many viewed it as servile labor.

In the years after the Civil War, many feminists came to believe that labor traditionally performed within a relation of legally enforced dependency could never provide a wife autonomy and dignity, but instead would mark her as socially subordinate—"a *servant* without wages."<sup>472</sup> As Swisshelm put it, "[w]hen one grubs and plows for a master who is entitled to 'all she can acquire by her labor, service or act,' she is not likely to forget her sex, and consequent inferiority . . ."; but, Swisshelm asked, if a woman performed a man's job, "[h]ow are the philosophers to keep her in sufficient consciousness of her sex?"<sup>473</sup> Other feminists joined Swisshelm in describing domestic labor as subservient labor. Only a year after "Beth" announced that "independent minded women . . . want an independent way of earning honestly our own supply,"<sup>474</sup> she wrote another column for the *Woman's Journal* in which she recommended strategies for educating children that would break down the division of labor in the family;<sup>475</sup> in her view, it was "unjust . . .

468. *The Woman's Congress*, *supra* note 326, at 360; *see supra* text accompanying note 454.

469. *See supra* text accompanying notes 341-45.

470. *Cf. Peirce*, *supra* note 467, at 35:

In modern times the combination and accumulation of capital, the organization and division of labor, and the employment of machinery, have taken nearly all the ancient household industries out of the household, and instead of everything being produced singly, on the spot where it is wanted, and by the persons who are to use it, every article about us is manufactured by the thousand in mills and factories of every size and every conceivable function, and then distributed over the world by a wonderful and costly and complicated network of roads, railroads, canals, wagons, ships, horses and men, which convey them first to wholesale warehouses and retail stores, and finally to the families which consume them.

471. References to women's household labor as "unspecialized" labor are common in feminist proposals for cooperative housekeeping, which we will examine shortly. *See, e.g., infra* notes 521-22 and accompanying text; *see also infra* notes 502, 508 and accompanying text.

472. MORNING OREGONIAN, Sept. 30, 1878, at 1 (remarks of Abigail Duniway).

473. Swisshelm, *supra* note 299, at 109; *see supra* text accompanying note 460.

474. *Financial Equality of the Sexes*, *supra* note 459, at 131; *see supra* text accompanying note 459.

475. *Domestic Education of Boys*, WOMAN'S J., Mar. 18, 1876, at 91 (reader's column signed "Beth") ("The fact is we bring our boys up to be undomestic, and then we complain that they are 'so different from girls.' We educate the sexes away from each other."). Beth thought that boys, as well as girls, should be

to both boys and girls, that the girls should always be called upon to sew on all the buttons and do all the mending, and make the boys' beds, *and wait upon them*" when "[t]he most manly quality you can teach the boy, is to be independent and self-helpful, in domestic life as well as in business life."<sup>476</sup>

Yet feminists seeking to escape domestic labor were not merely rebelling against gender hierarchy in the traditional family structure. Their belief that domestic labor was servile labor also seems to reflect changes in the relation between mistress and servant—changes involving matters of ethnicity, race, and class. While in the antebellum period, the young single women who provided household "help" typically came from the same socioeconomic background as their employers and worked with their employers in a relation of relative equality,<sup>477</sup> this relation changed over the course of the century. As immigrants (especially Irish-, German-, and Chinese-Americans) and emancipated African-Americans filled the ranks of domestic service,<sup>478</sup> the labor they performed for their native-born employers was status-marked accordingly, as the work of "menials."<sup>479</sup> At least some postwar feminists came to believe that "the true function for educated women is the superintendence and organization of manual labor, not the doing it themselves."<sup>480</sup> The caste stigmatization of domestic labor thus occurred within two status relations—husband-wife and mistress-servant.

Proponents of two-career marriage reasoned from a class-specific vision of autonomy and dependence.<sup>481</sup> This can be discerned, not only in the work feminists urged wives to flee, but in the work they urged wives to perform. The work that Swisshelm suggested would surely "unsex" a woman was

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given dolls, to cultivate the "father principle" in them. *Id.*

476. *Id.* (emphasis added).

477. LUCY M. SALMON, *DOMESTIC SERVICE* 54-62 (reprint ed. 1972) (1897); JUDITH ROLLINS, *BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS* 50 (1985).

478. See ROLLINS, *supra* note 477, at 51 ("From the mid-nineteenth century until World War I, non-Southern servitude [changed]: immigrants replaced native-born whites as the dominant group of servants, and employers, as a result, 'consciously attempted to enforce social distance between themselves and their servants.'") (citation omitted); SALMON, *supra* note 477, at 61-65 (describing changes between 1850 and 1870 that "revolutionized the personnel in domestic service and consequently its character"); see also DANIEL E. SUTHERLAND, *AMERICANS AND THEIR SERVANTS: DOMESTIC SERVICE IN THE UNITED STATES FROM 1800 TO 1920*, at 56-59 (1981) (socioeconomic profile of American servants during 1870's and 1880's). These changes are evident in feminist complaints about "the servant problem" during the postwar period. See, e.g., *supra* note 335 (in 1873, the *Woman's Journal* reports that "[o]ur domestic affairs are indeed woefully mismanaged by unintelligent and wasteful Bridgets [and] our out-door work is also done in a very slovenly and careless manner by ignorant Patricks").

479. See ROLLINS, *supra* note 477, at 52 (describing how race, ethnic, and class prejudice interacted to produce social norms degrading servants and the domestic labor they performed). See generally Evelyn N. Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, 18 *SIGNS* 1, 3 (1992) (history of domestic labor in the South, the Southwest, and the Far West, which analyzes how the work "has divided along racial as well as gender lines").

480. See *infra* note 505 (quoting Melusina F. Pierce). During the 1870's, feminist proponents of cooperative housekeeping discussed domestic labor as "manual labor" that servants were to perform and wives to manage. For illustrative commentary, see *infra* notes 505-09 and accompanying text.

481. See BUECHLER, *supra* note 279, at 141-43 (discussing growing economic-class stratification of American society in postwar era, and heightened forms of class-conscious reasoning associated with it).

professional in character—reflecting the quest for access to higher education and the professions (medicine, law) that absorbed the movement in the postwar period.<sup>482</sup> However daunting that campaign, it was one only privileged women could pursue.<sup>483</sup>

The postwar demand for two-career marriage had far-reaching implications. It challenged the division of labor on which marriage was premised<sup>484</sup>—a premise so entrenched that even the most avid exponents of two-career marriage conceded that wives would suspend nondomestic vocations while they raised their children.<sup>485</sup> But the marital norm that feminists challenged pertained primarily to women of means, and the marital alternatives that feminists explored were available primarily to women of means.<sup>486</sup>

For women who had to pursue “two-career” marriages for their families to survive, the movement’s message was more complex. Feminists continued to demand equal pay for equal work, and protested gender bias in the labor

482. See, e.g., BUTCHER, *supra* note 286, at 69-92 (professional and graduate education of women); FLEXNER, *supra* note 10, at 113-30; cf. BUECHLER, *supra* note 279, at 141 (“If any noteworthy change occurred [in the leadership of the postwar movement], it probably involved a greater role for professional women.”); LEACH, *supra* note 6, at 180-89 (describing movement as its focus shifted from working-class women to middle-class women interested in securing foothold in the professions).

483. Plainly, only women of considerable means could obtain the education necessary to pursue professional careers, but race as well as economic class determined access. See, e.g., Aptheker, *supra* note 280, at 89-110 (discussing black women in the professions during postwar period).

484. See generally LEACH, *supra* note 6, at 195-202 (discussing advocacy of two-career marriage during 1870’s).

485. Mary Putnam Jacobi suggested that motherhood might require women to suspend their careers for a period ranging from two months to nine years. LEACH, *supra* note 6, at 199. Antoinette Brown Blackwell assumed that women would suspend their careers for an equally lengthy period of time, but she also insisted that mothers pursue nondomestic vocations during this period. See *infra* note 486; cf. *infra* note 508 (Anna Garlin’s proposal for cooperative housekeeping contemplates that women would take “from two to four hours a day freedom for special pursuits” “during the period of child-bearing and rearing”).

486. To appreciate the middle-class assumptions shaping the two-career marriage concept, one need only consider the lengthy period of time that mothers were advised to suspend income-earning activities to raise young children—or the emphasis that two-career marriage advocates placed on the psychological value of extradomestic pursuits. See sources cited *supra* note 454.

Proponents of two-career marriage did discuss the benefits of wage-earning for working-class wives, but their commentary has an air of unreality about it. On the one hand, they tended to romanticize wage work, describing the income-earning activities of poor wives in terms shaped by their own middle-class aspirations; on the other hand, they complacently recommended such work as therapeutic in circumstances where they would have rebelled at performing it themselves. For example, when Antoinette Brown Blackwell discussed strategies for combining childrearing and leisure activities, she observed:

I am ready to concede, most fully, that the mothers of young children ought not to be considered the bread-winners. Their leisure should be largely play, recreation—the most perfect freedom to follow whatever personal bent will injure neither themselves nor their offspring . . .

No well-to-do household, where there are children under ten years, if it would consult its own interests, can afford to let the mother toil for many hours daily . . .

However, in discussing childcare arrangements for the poorer wage-earning wife, Blackwell took a strikingly different position:

If one is unskillful and yet very poor, better to go out every day as rag-picker than to pinch and pine at home in unbroken weariness. Better to turn char-woman and leave a six-years old girl to play mother and housekeeper a few hours of pleasant daylight, waiting hopefully for mamma’s return with a little hoard of luxuries as the result of her earnings.

*The Woman’s Congress*, *supra* note 326, at 360.



market as it afflicted women across the class spectrum.<sup>487</sup> But where feminists devoted attention and resources to breaking into the professions, they repeatedly emphasized the vote as the means by which women might secure equal pay.<sup>488</sup> After the collapse of NWSA's attempted alliance with labor at the outset of the decade,<sup>489</sup> equal pay—like joint property—increasingly assumed the status of a polemical demand to which the movement was committed in principle but to whose attainment it devoted few advocacy resources.<sup>490</sup>

The same latent class bias informed the movement's postwar demands for earnings reform. In this period, feminists did urge legislators to consider the plight of the destitute wage-earning wife, whose drunken or otherwise irresponsible husband was entitled to abscond with her wages, leaving his family to starve.<sup>491</sup> Such arguments had strategic utility. By presenting the poor wage-earning wife as a victim, feminists made the case for earnings reform in terms that would inspire legislative pity, chivalry, and protection<sup>492</sup>—responses that their own aspirations to enter the market were unlikely to elicit. These arguments might also have reflected concern for

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487. See, e.g., Susan B. Anthony, *Suffrage and the Working Woman*, in THE ELIZABETH CADY STANTON-SUSAN B. ANTHONY READER: CORRESPONDENCE, WRITINGS, SPEECHES 139 (Ellen DuBois ed., 1992) [hereinafter CORRESPONDENCE, WRITINGS, SPEECHES].

488. See, e.g., *Woman Suffrage Convention: The Proceedings Yesterday—Organization of an Association*, BOSTON POST, Nov. 20, 1868 (remarks of Dr. William M. Cornell, Rev. Charles F. Barnard, and William Lloyd Garrison); *Eleventh Annual Convention*, *supra* note 398, at 2-3 (speech by Susan B. Anthony entitled "Bread and the Ballot").

489. See *supra* text accompanying note 276.

490. Of all the leaders of the suffrage movement, Thomas Wentworth Higginson came closest to admitting this. In an uncharacteristically blunt moment, he characterized the movement's equal-pay arguments for the vote as "unsound," and suggested that even if the movement obtained the vote for women, exercise of the franchise would not and could not do much to alter the wage structure of the labor market. See T.W.H. [Thomas W. Higginson], *Votes and Wages*, WOMAN'S J., Feb. 26, 1870, at 61 ("Wages depend on the working of profounder laws, upon relations of demand and supply, which legislation cannot touch."). It is unclear whether and to what extent other leaders of the suffrage movement shared his views. To my knowledge, none spoke about the movement's commitment to securing equal pay as bluntly—and a number of postwar feminists would have disagreed with his characterization of the labor market. Cf. *supra* text accompanying notes 306-08.

491. Such arguments for earnings reform were by no means the sole focus of the feminist case, but they increasingly became an important part of it. See *supra* text accompanying notes 387-93.

492. The argument echoed protectionist traditions at common law, see *supra* note 229, and was therefore likely to elicit legislative sympathy. Protectionist arguments were successfully used in New York in a last appeal for passage of that state's 1860 earnings statute. See *supra* text accompanying notes 243-44; *supra* note 254. The New York Court of Appeals also seized upon them as the basis of a restrictive construction of the 1860 earnings statute. See *supra* text accompanying note 432.

working-class wives,<sup>493</sup> but such concern did not move feminists to act in a fashion that might divert resources from suffrage advocacy.

As courts construed the earnings statutes to emancipate income derived from labor outside the home that was not applied to family support, movement leadership protested, but apparently made little effort to intervene.<sup>494</sup> Given the locus and character of poor wives' wage work,<sup>495</sup> working-class women were barely protected by the earnings statutes as enacted and increasingly construed. What the statutes best protected were earnings of a professional or entrepreneurial type, derived from work that was "personal" or "separate" in its character, location, and, from a judicial perspective at least, immateriality to family support.<sup>496</sup> Yet it does not appear that feminists sought to amend the statutes to emancipate the compensated and uncompensated labor that poor wives performed in the household.<sup>497</sup> This was a campaign that movement leadership was disinclined to undertake; in the postwar period, feminists were far more interested in emancipating wives' work *from* the household.

#### B. *A New Perspective on Women's Household Labor: Cooperative Housekeeping*

It is easier to appreciate how feminist attitudes toward household labor changed in the nineteenth century if one examines the plans for "cooperative housekeeping" that feminists began to promote in the postwar era with the kind of energy once devoted to the joint property claim. While many in the movement continued to insist that wives' family labor was a productive activity deserving economic reward like any other, growing numbers began to describe household labor as an atavistic, "unspecialized" type of labor from which women needed to be emancipated. To implement the concept of two-career marriage, these women argued, wives' work should be removed from the home and organized on a collective basis—much as industrialization had transformed so many other aspects of productive endeavor. During the 1870's the cooperative housekeeping concept was elaborated by the Association for Advancement of Women (AAW), an organization composed of women

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493. Yet there is plenty of evidence to the contrary. For example, feminists in Illinois demanded earnings reform for destitute wage-earning wives, *see supra* text accompanying notes 387-93, but the Illinois movement had little to do with working-class women, *see* BUECHLER, *supra* note 279, at 128 (discussing postwar suffrage movement in Illinois) ("unlike middle- and upper-class organizations, virtually no connections between working-class women and the suffrage movement existed in this period"); *see also id.* at 129-30 (working-class women turned away from 1880 NWSA suffrage convention in Chicago, on nominal grounds that they had not paid membership dues; Chicago leadership rebuked by Anthony). For another glimpse of the postwar movement's attitudes toward the working class, *see* the comments on domestic servants, quoted *supra* note 335 and *infra* note 509.

494. *See supra* Part III.C.2.

495. *See* Stanley, *supra* note 4, at 489-91 (wives' wage work most often in home in 1870's).

496. *See, e.g., supra* text accompanying notes 417 and 431-35.

497. *Cf. supra* text accompanying notes 443-49.

interested in the professions—especially the emergent social sciences.<sup>498</sup> Cooperative housekeeping commanded the support of many joint property advocates; it was endorsed by Lucy Stone of AWSA and by Stanton and Anthony of the NWSA as well.<sup>499</sup>

Melusina Fay Peirce was one of the first women to propose a detailed critique of household labor and concrete measures for reorganizing it.<sup>500</sup> In a series of articles appearing in the *Atlantic Monthly* in 1868 and 1869 Peirce described an arrangement whereby groups of women would organize cooperative associations to perform all their domestic work collectively; significantly, to receive the benefits of women's collective enterprise, husbands would now be required to pay. As Peirce elaborated her plan, members were to work in the association, although some might choose to pursue careers or spend more time with their children. Those who did work in the association would receive wages reflecting the market value of their labor; yet, she assured her readers, economies of scale would make costs per household reasonable.<sup>501</sup>

While Peirce's plan had roots in the antebellum communitarian tradition, she elaborated her communitarian vision in congruity with the logic of industrialization, not against it. Peirce distilled the essence of her strategy in a paper presented to an 1876 meeting of the AAW's Woman's Congress: Women must "organize the great function which God has given us—that of housewifery—on the fundamental principles of all modern civilization—the Combination of Capital and the Division of Labor."<sup>502</sup> A tacit theory of sex-class interest informed Peirce's work. She urged that women seize the initiative in organizing their labor on a collective basis, lest men do so to women's detriment, as men already had in the textile industry.<sup>503</sup> But her world view

498. On the AAW, see LEACH, *supra* note 6, at 185-89.

499. For Lucy Stone's endorsement of cooperative housekeeping, see HAYDEN, *supra* note 6, at 117-18. Stanton endorsed cooperative housekeeping at the First Woman's Congress in 1873. LEACH, *supra* note 6, at 211. Editorials praising Peirce's scheme appeared in Anthony's paper, *Revolution*, in 1868 and 1869. See HAYDEN, *supra* note 6, at 79 & n.27. Elizabeth Cady Stanton, Amelia Bloomer, and Ernestine Rose endorsed communitarian versions of the idea in the antebellum period as well. See *supra* text accompanying note 81.

500. For an account of Peirce's life, thought, and position as a first generation leader of "material feminists," see HAYDEN, *supra* note 6, at 67-89.

501. See Melusina F. Peirce, *Co-operative Housekeeping*, 22 ATLANTIC MONTHLY 514 (1868) (pt. 1), 22 ATLANTIC MONTHLY 682 (1868) (pt. 2), 23 ATLANTIC MONTHLY 29 (1869) (pt. 3), 23 ATLANTIC MONTHLY 161 (1869) (pt. 4), 23 ATLANTIC MONTHLY 286 (1869) (pt. 5). For a "paper constitution" of the plan, see Peirce (pt. 2), *supra*, at 682-97. On pay, see *id.* at 684-85; Peirce (pt. 3), *supra*, at 36-37.

502. Peirce, *supra* note 467, at 45. The Congress was an annual meeting of the AAW. For similar claims, see *Why Women Should Study Political Economy*, WOMAN'S J., Mar. 20, 1875, at 91 (demanding application of division of labor to housework, to emancipate "thinking women"); *Modern Housekeeping*, *supra* note 335, at 212 ("Domestic labor is the only department of industry in which division of work has not been applied, and labor-saving machinery come into general use."). These editorials are likely by Mary Livermore, editor of the *Journal* and an advocate of cooperative housekeeping. See HAYDEN, *supra* note 6, at 115-31.

503. As Peirce described her project, she warned women of

was equally structured by economic class. Even as Peirce emphasized the advantages for women in cooperative housekeeping, she detailed its benefits in class-specific terms: productive work managing the organizations for women of leisured means and "feminine employments . . . [for] the laboring women who . . . *must* earn their living."<sup>504</sup>

Peirce's challenge to the division of labor was at best incomplete. She did not question the persistence of socioeconomic distinctions among women, nor did she imagine the complete eradication of gender distinctions between women and men. The result was a feminist scheme designed to disrupt the gendered organization of work within the family while reproducing it in a new form as a relation between women of different socioeconomic status.<sup>505</sup> Anna Garlin, who presented the Congress with a plan for organizing household labor on a smaller scale, similarly emphasized that removal of wives' labor from the home would create entrepreneurial opportunity for some women, employment for others, and for those "who had chosen and trained themselves for some other business freedom to practice it, to some extent, after marriage without neglect of family claims."<sup>506</sup> Garlin presented her vision of organization and specialization of function as one calculated to secure woman's emancipation: "[W]hen we have stripped from the natural and necessary demand made by family life upon women the covering of conventional tradition," Garlin argued, "it may be found to contain nothing incompatible with that education and mode of life which seem best adapted to the personal development of woman . . . ."<sup>507</sup> Yet, it was clear, women would be emancipated from household labor on socially differentiated terms.<sup>508</sup>

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the absolute necessity of organizing their housekeeping on the industrial principles of our own era, if they did not wish to see it all taken out of their hands and organized by men. For it will not be long before capitalists will wake up to the fact that there is just as much money to be made out of cookery, as a hundred and fifty years ago there was out of spinning and weaving . . . . [W]omen will be in *this* great domestic industry also, what they have been reduced to in the spinning and weaving mills,—*hands*, not heads.

Peirce, *supra* note 467, at 44.

504. *Id.* See generally *id.* at 41-45 (detailing plan for cooperative stores with respect to situation of women across class spectrum).

505. See, e.g., Peirce (pt. 1), *supra* note 501, at 522 ("Educated women, then, should seek to produce, not with their hands, but with their heads . . . ."); Peirce (pt. 2), *supra* note 501, at 693 ("[T]he true function for educated women is the superintendence and organization of manual labor, not the doing it themselves . . . ."); Peirce (pt. 4), *supra* note 501, at 161 ("[Educated married women], if liberated from the prison of the household and freed from the fetters of the needle, the broom, and the receipt-book, would play the same noble part among women that masculine leaders of knowledge, of art, of government, and of morality have enacted among men."); see also *infra* note 509 (Peirce discussing cooperative housekeeping as strategy to "control" servants).

506. Anna Garlin, *The Organization of Household Labor*, in *FOURTH CONGRESS PAPERS*, *supra* note 330, at 34 ("In this way women, whether married or single, could be independent in purse so far as their own personal needs were concerned, and the family expenses could *all* be definitely estimated and given into the hands of the masculine head.").

507. *Id.* at 33.

508. As Garlin described her vision:

[H]ome-making and housekeeping are not synonymous terms. The one is spiritual, and is successful or unsuccessful according to the individual character. The other is a collection of

For many, the appeal of the cooperative housekeeping concept was precisely that it would allow more efficient (and distant) management of household servants—"the ignorant, thriftless, wasteful, insubordinate, unteachable servants now in possession of the American kitchen," as Mary Livermore editorially opined for the *Woman's Journal*.<sup>509</sup> Others argued that cooperative housekeeping would improve the lives of working-class women—emphasizing, for example, as Peirce did, that women's management of collective enterprise would create working conditions for women superior to those prevailing in domestic industries men organized (e.g., textile manufacture) and the private homes where women worked as servants.<sup>510</sup> However, many benevolent justifications for cooperative housekeeping were ultimately as concerned with maintenance of class privilege as those that expressly identified management of domestic servants as the principal purpose of the project.<sup>511</sup> And, those cooperative housekeeping proposals most self-consciously designed to improve the lot of working-class women were forwarded by advocates from outside the ranks of suffrage leadership.<sup>512</sup>

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industrial pursuits which lie nearest the home-life, and are therefore dependent on the home maker's *direction*; but which are susceptible, like all other industries, of organization into an orderly process of business. How may such organization be effected? By the process of division and combination man has used in his work.

*First*, By the annihilation of the private kitchen and laundry, and by such an arrangement of house-maid service as will secure to it the same freedom enjoyed by the male mechanical laborer, and to housekeepers the services of a competent person by the hour.

*Second*, By the establishment of public nurseries under the charge of trained nurses, not, of course, as substitutes, but as supplements . . . to those of private homes. These would secure to women during the period of child-bearing and rearing from two to four hours a day freedom for special pursuits . . .

*Id.* at 33.

509. *Modern Housekeeping*, *supra* note 335, at 212 (unsigned editorial likely by Mary Livermore); see also HAYDEN, *supra* note 6, at 124 (discussing Livermore's preoccupation with shortage of domestic servants). Peirce expressed views similar to Livermore's:

[I]t is absurd to hope for obedience and respect [from servants], and the only way to control them is by the unalterable laws and regulations of an organized corporation [i.e., a cooperative].

The community would need fewer of them, their wages would be higher, and . . . service would then be as "respectable" and "independent" as factory work . . .

Peirce (pt. 3), *supra* note 501, at 35; see also *id.* at 34 ("Co-operative housekeeping, then, will almost entirely blot out from our domestic life the SERVANT ELEMENT [, relieving us of] [t]hose outrageous little kingdoms of insubordination, ignorance, lying, waste, sloth, carelessness, and dirt, that we unhappy home-queens have to subdue afresh every day . . ."); see also *supra* note 508 (Anna Garlin discussing cooperative housekeeping as strategy to manage servants). For an argument that enthusiasm for cooperative housekeeping sprang primarily from an interest in escaping "the servant problem," see DUDDEN, *supra* note 6, at 183-92.

510. See HAYDEN, *supra* note 6, at 124-27, 162-74; see also DUDDEN, *supra* note 6, at 189-90. On Peirce, see *supra* note 503 and accompanying text.

511. Proponents of cooperative housekeeping advanced arguments for the fledgling "helping profession" of home economics; the tendency of these arguments, like "social housekeeping" arguments for suffrage, was to enlarge women's sphere by redefining women's work in a manner that created opportunities for some women to administer other women's lives, in the case of the home economics professionals, by educating "untrained housewives" on the "scientific" aspects of household work. See HAYDEN, *supra* note 6, at 174-78.

512. The settlement workers carried this aspect of the project to its most complete realization in the 1890's—attempting to provide day care centers and public kitchens for working-class women, and different kinds of institutional assistance for domestic workers (including support for unionization, or, alternatively,

As cooperative housekeeping schemes suggest, economic class membership played an increasingly important role in shaping the outlook of the postwar feminist movement.<sup>513</sup> But the movement's new outlook reflected changes in gender relations as well. Because the movement was slowly succeeding in breaking barriers to women's participation in the professions, its middle-class leaders and members could now aspire to public roles consistent with their education and means. And, because urban families of means were the first beneficiaries of the new goods and services that modernized household work in the 1870's,<sup>514</sup> affluent women could now purchase (or imagine purchasing) freedom from the consuming work maintaining a family traditionally entailed. These developments shaped feminist conceptions of economic equality in the postwar period, as the generational, class, and regional differences in joint property advocacy suggest.<sup>515</sup> The prospect of attaining status commensurate with their class position encouraged many women who joined the movement in the postwar years to define emancipation of "the sex" as that which would secure for the movement's middle-class members the privileges enjoyed by men of their social class.<sup>516</sup> Freedom from labor associated with family life was one such privilege.

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placement and mediation services). See HAYDEN, *supra* note 6, at 162-74. The settlement workers were generally not part of the leadership group that led the suffrage movement in the decades after the Civil War.

By the end of the century, however, a new generation assumed leadership of the suffrage movement that sought to promote cross-class alliances among women. Stanton's daughter, Harriet Stanton Blatch, was part of this new leadership group, and her account of cooperative housekeeping attended more to the interests of working-class women. See *infra* note 522.

513. Stephen Buechler has analyzed the impact of industrialization on the suffrage movement. He compares the movement's perspectives in the periods 1850-1870 and 1870-1890, and observes:

The worldview of the middle-class suffragists was class conditioned in both periods; that is, it was shaped by their particular location in class structure. But whereas that worldview was "class blind" in the earlier period, it became strikingly class conscious in the [later] period. The perspective of middle-class suffragists shifted from minimizing the enduring significance of class factors (and generalizing their own class prospects to all sectors of society) to acknowledging this enduring significance as well as their distinctive location within class structure.

BUECHLER, *supra* note 279, at 142.

514. See *supra* text accompanying notes 337-39.

515. See *supra* text accompanying notes 330-40.

516. Stephen Buechler has analyzed the suffrage movement in Illinois in some detail for the period 1870-1890, and emphasizes that in its "insensitivity to class and economic factors, and its increasingly class-conscious voice, the movement in the 1880's had become [sic] distinctly different from the movement of the 1860's." BUECHLER, *supra* note 279, at 137. For an analysis of transformations in the Illinois movement that find expression in the national movement's vision of economic equality in marriage, see *id.* at 137-47.

I find Buechler's analysis extremely persuasive, and concur with the following qualification. While Buechler attributes changes in movement politics to changes in the situation of the middle class generally, see *id.* at 140-43, I would give decidedly more weight to changes in the position of women *within* the middle class, see *supra* text accompanying notes 482-83, a phenomenon Buechler dubs the "social differentiation of women," BUECHLER, *supra* note 279, at 143. The addition of "professional women" to the movement's social-class base, see *id.* at 141, and the significance of professional aspiration to the formulation of the movement's agenda, do not simply reflect changes in "the class situation of the middle-class," *id.*, but also changes in the position of women within the middle-class. In short, the outlook of the postwar movement was shaped by developments in both economic and gender relations.

The cooperative housekeeping concept soared in popularity during the 1880's with publication of Peirce's *Cooperative Housekeeping*<sup>517</sup> and Edward Bellamy's *Looking Backward 2000-1887*,<sup>518</sup> reflecting a variety of developments in economic and gender relations. But, however one explains the popularity of the concept,<sup>519</sup> feminist enthusiasm for cooperative housekeeping illustrates the change in social sensibilities responsible for the movement's retreat from joint property advocacy. As many in the suffrage movement now saw it, a wife's labor in the household was flatly inconsistent with her aspiration to equality in marriage.

From this perspective, the enthusiastic reception of Charlotte Perkins Gilman's *Women and Economics*<sup>520</sup> (1899) marks the demise of the joint property tradition. In advancing her argument for cooperative housekeeping, Gilman aggressively recast the feminist prescription for equality in marriage: "Marriage is not perfect unless it is between class equals. There is no equality in class between those who do their share in the world's work in the largest, newest, highest ways and those who do theirs in the smallest, oldest, lowest ways."<sup>521</sup> For Gilman, the list of household activities cited by joint property advocates did not properly serve as a predicate for an equality claim, but as proof of a wife's socioeconomic degradation: "Specialization and organization are the basis of human progress, the organic methods of social life. They have been forbidden to women almost absolutely."<sup>522</sup> So conceived, joint property

517. MELUSINA FAY PEIRCE, *COOPERATIVE HOUSEKEEPING: HOW NOT TO DO IT AND HOW TO DO IT* (Boston, J.R. Osgood & Co. 1884).

518. EDWARD BELLAMY, *LOOKING BACKWARD 2000-1887* (John L. Thomas ed., 1967) (1888). In Bellamy's utopian vision, the cooperative society of the future would organize not only industrial but domestic enterprise on a collective basis. The book, an immense popular success, provoked the establishment of "nationalist clubs" throughout the country, which were committed to exploring Bellamy's program of evolutionary socialism. See HAYDEN, *supra* note 6, at 135-37. On the reception of the cooperative housekeeping concept, see DUDDEN, *supra* note 6, at 183-85; HAYDEN, *supra* note 6, at 118-24, 135-37, 151-62.

519. Historians have portrayed the cooperative housekeeping movement in strikingly discrepant ways. William Leach describes it as a triumphant development of nineteenth-century feminism, though he notes in closing that it provided "an important key to the emancipation of *middle-class* women." LEACH, *supra* note 6, at 212 (emphasis added). At the opposite extreme, Faye Dudden treats cooperative housekeeping as a pure expression of class privilege, the outgrowth of elite women's problems in managing their servants. See DUDDEN, *supra* note 6, at 183-92. Dolores Hayden provides a more tempered view, emphasizing the movement as an important outgrowth of material feminism—a tradition which nonetheless increasingly betrayed the economic class status of its proponents. See HAYDEN, *supra* note 6.

520. CHARLOTTE P. GILMAN, *WOMEN AND ECONOMICS* (9th ed. 1920) (1899). Elizabeth Cady Stanton's daughter, Harriot Stanton Blatch, reported that "*Women and Economics*[]" was "The Bible of the student body" at Vassar. Gilman's work also elicited tributes from Blatch and Carrie Chapman Catt. AILEEN KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT 1890-1920*, at 97 n.1 (1965); see also Ellen C. DuBois, *Working Women, Class Relations, and Suffrage Militance: Harriot Stanton Blatch and the New York Woman Suffrage Movement, 1894-1909*, 74 J. AM. HIST. 34, 54-55 (1987) (noting Gilman's popularity among college women).

521. GILMAN, *supra* note 520, at 220.

522. *Id.* at 67. Harriot Stanton Blatch, who greatly admired Gilman, see *supra* note 520, also embraced specialization as the path to emancipation for wives:

It is because the professional woman seems never to have recognized that it is her co-operation with other women which has given her the freedom to specialize; it is because the great movement for the emancipation of women has remained so completely a well-dressed

rights could not emancipate woman from economic subordination in marriage, but only bind her more closely to a relation of intrinsic dependency.

If Gilman gave a decades-old tradition of material feminist thought its most systematic exposition, she also distinguished herself by addressing forthrightly the conflict in feminist thought posed by the coexistence of joint property and cooperative housekeeping commitments. *Women and Economics* opens with what, by virtue of its directness, should be ranked as the first feminist attack on the notion of “marriage [as] a ‘partnership,’” the first feminist critique of the notion that “the wife [is] an equal factor with the husband in producing wealth,” and the first feminist insistence that a woman “is supported by her husband.”<sup>523</sup> For Gilman, a wife’s dependency could only be eliminated and her emancipation secured with the collectivization of domestic labor and the “break up [of] that relic of the patriarchal age,—the family as an economic unit.”<sup>524</sup>

While the critical stance Gilman invited feminists to adopt was empowering, it was disabling as well. Gilman’s impatience with family life brooked no compromise. She repudiated a half century of egalitarian thought directed at the existing family form, scorning feminist efforts to value women’s family work as complicit in women’s socioeconomic degradation. The result was an eerie congruence between the “new” feminist vision of women’s economic emancipation and that of the legislatures and courts engaged in emancipating women from the common law. Women’s work “apart” from family life defined them as autonomous economic agents; women’s work in and for the family defined them as dependents in the new economic order. The convergence of feminist and juridical paradigms of family life had been imminent since the appearance of arguments for “two-career” marriage in the aftermath of the Civil War. Gilman merely rendered the congruence explicit. Postwar feminists reconceived women’s economic emancipation in new and

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movement, that it has been possible to ignore the disastrous part unspecialized work has played in the lives of most women. . . . How to be free to do the work for which she has a gift, how to do her work efficiently and gain independence, and yet satisfy her maternal instinct and love of home, is a problem difficult of solution for the professional woman, and insoluble—under present conditions—for the household drudge and the women of the poor. On the other hand, were there organization in woman’s sphere, we should see the woman cook working up to the position of *chef*, the operative into positions of highest skill and trust, the little nursery-maid into the trained woman, knowing scientifically how to feed and clothe a child.

Harriot S. Blatch, *Specialization of Function in Women*, 10 GUNTON’S MAG. 349, 354-55 (1896).

523. GILMAN, *supra* note 520, at 10, 18. Many in the suffrage movement may well have believed that a wife was supported by her husband. Gilman’s claim was distinctive, however, in that it was part of a feminist analysis of family life intended to support a sex-equality argument. In making this claim, Gilman expanded upon the analysis of her predecessor, Melusina Fay Peirce, who in 1876 asked, “*Can the ‘Lady’ Class Ever be Self-Supporting?* . . . Can she not, with all her intelligence, all her energy, all her resources, be a help instead of a hindrance—be, in other words, what the millions of her countrywomen who are socially and intellectually below her, yet so truly are—SELF-SUPPORTING?” Peirce, *supra* note 467, at 43. Peirce, like Gilman, made this observation as part of an argument for collectivizing housework.

524. GILMAN, *supra* note 520, at 151; *cf.* Blatch, *supra* note 522, at 350 (repudiating marital property advocacy).



more expansive terms, but they tended to share as well in their culture's contempt for "women's work."

If antebellum feminists drew upon the gender conventions of their era when they insisted that wives' work was as valuable as their husbands',<sup>525</sup> postwar proponents of cooperative housekeeping *also* drew upon the gender conventions of their times when they insisted that "[t]he isolated household is responsible for a large share of women's ignorance and degradation,"<sup>526</sup> when they argued that "[t]here is no equality in class between those who do their share in the world's work in the largest, newest, highest ways and those who do theirs in the smallest, oldest, lowest ways"<sup>527</sup>—and most especially when they asserted that the wife "*is* supported by her husband."<sup>528</sup> In so arguing, postwar feminists embraced a historically specific vision of autonomy and dependence with deep roots in the gender discourse of the industrial era. It was the vision of Francis Walker, who reasoned from the categorical presumption that a wife "does not produce as much as she consumes" when he excluded women's family labor from the census definition of "gainful employment."<sup>529</sup> The vision of autonomy and dependence postwar feminists embraced had roots in the antebellum ideology of spheres, but it expressed gender status in the idiom of a society that was increasingly populated by wage-laborers; in this society, self-sufficiency no longer meant the mastery of multiple skills associated with the agrarian, entrepreneurial, or artisanal traditions of a subsistence economy, but instead meant *the ability to earn a wage* by performing a specialized task in the emergent industrial economy. While work performed in the household had dignity in the family-based economy of the early nineteenth century, the social organization of housework now marked it as "women's work," an atavistic practice of doubtful economic utility that wives seeking autonomy would have to escape. It was upon this deeply gendered conception of autonomy and dependence that the leaders of the postwar movement based their new vision of economic equality for women.

### C. *Shaw v. Gilman: Debating a Now-Bankrupt Tradition*

In 1909, Charlotte Perkins Gilman joined Anna Howard Shaw, then president of the (reunited) National American Woman Suffrage Association (NAWSA),<sup>530</sup> in a debate over the economic value of a wife's household

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525. See *supra* text accompanying notes 200-06.

526. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 55, at 21 (remarks of Elizabeth Cady Stanton).

527. See *supra* text accompanying note 521.

528. See *supra* text accompanying note 523.

529. See *supra* note 65 and accompanying text.

530. For a discussion of Anna Shaw's background, see FLEXNER, *supra* note 10, at 237-38. On the merger of the American Woman Suffrage Association and the National Woman Suffrage Association, see *id.* at 216-20.

labor. The circumstances of the debate testified to new developments in the woman suffrage movement, developments crucial to its ultimate victory in 1920. The debate was sponsored by the Woman's Trade Union League (WTUL), a coalition of working-class and elite women dedicated to improving the lot of wage-earning women, and by the Equality League of Self-Supporting Women, a new suffrage organization representing working-class and professional women.<sup>531</sup> The organizational sponsorship of the meeting illustrated the efforts of a new generation of feminists to reach across class lines in elaborating the movement's economic agenda.<sup>532</sup> In both form and substance, the debate provides an intriguing glimpse of how feminists understood issues raised by joint property at the turn of the century.

Gilman, speaking for the Equality League of Self-Supporting Women, defended the proposition that the unemployed wife was in fact supported by her husband. Defining support as "to provide with the means of subsistence" and observing that "to subsist to-day, one must have money,"<sup>533</sup> Gilman went on to argue that women of the "immense middle class" ("fifteen-sixteenth [sic] of the American families") who might work ten to fourteen hours a day for the household, but contributed no money to the family economy, were unproductive economic dependents.<sup>534</sup> Gilman described the work of family maintenance (including the work of "reproducing" the labor force) as leisured, wasteful, or parasitical—proof of which lay in the fact that it was uncompensated.<sup>535</sup> She refused to concede that the purchasing power of a husband's income was in any way extended by his wife's household work, that a wife's work had value accruing either to her husband or to the employer who paid him a "family" wage. Only if the work of family maintenance were reorganized on a market basis, Gilman reasoned, would the labor involved amount to productive industry. Recalling the antebellum Fourierists, Gilman

531. The creed of self-support was probably taken from Elizabeth Cady Stanton's famous speech, *The Solitude of Self*. See Elizabeth C. Stanton, *The Solitude of Self*, in CORRESPONDENCE, WRITINGS, SPEECHES, *supra* note 487, at 246, 248 (Jan. 18, 1892) ("The great lesson that nature seems to teach us at all ages is self-dependence, self-protection, self-support . . ."). The Equality League of Self-Supporting Women was founded by Stanton's daughter, Harriot Stanton Blatch, whose participation in WTUL moved her to attempt a suffrage coalition between industrial workers and educated professional women. See DuBois, *supra* note 520, at 46, 48-57.

532. See DuBois, *supra* note 520, at 46, 48-57; see also Nancy Cott, *Feminist Theory and Feminist Movements*, in WHAT IS FEMINISM? 49 (Juliet Mitchell & Ann Oakley eds., 1986).

533. *Women Debate Wife's Economic Relation*, N.Y. EVENING CALL, Jan. 7, 1909, at 1 [hereinafter *Women Debate*].

534. *Id.* at 4.

535. Gilman reasoned that if a woman performed uncompensated housework ten to fourteen hours a day and then died, the family income would remain the same: either her husband would have to "find another servant to whom he does not have to pay anything," or, assuming he could not afford to hire one to replace her labor, "he must either do the work himself or the work would go undone and he would miss the comfort and care and cleanliness, but his income would remain precisely what it was before." If the woman's husband died, she "could work her fourteen hours a day just as before, but that would not bring anything into the house to eat and she could not pay the rent." Gilman's conclusion was emphatic: "Her labor is not productive industry." *Id.* at 4.

asserted that the “unpaid wife” was “a domestic servant in the extremely wasteful and expensive class of one servant to one man,” and concluded, “[t]hat is the kind of work which does not constitute self-support.”<sup>536</sup>

Shaw, speaking for NAWSA, undertook to rebut Gilman, drawing on a feminist tradition of joint property advocacy, now six decades old. Her defense of the proposition that wives were self-supporting began, as it had to, by disputing Gilman’s initial equation of “individual economic independence” with compensated labor.<sup>537</sup> Reciting the myriad tasks entailed in a wife’s traditional work of family maintenance, Shaw queried, “Has she not put something economically valuable into [the husband’s money] which has increased, if not its incoming power, at least its outgoing power . . . ?”<sup>538</sup> Shaw’s case leaned heavily on an analysis of the work her mother’s generation performed, but she strove to extrapolate her argument to the work of the modern wife. Here Shaw sought to distinguish the value of a wife’s work from that of purchased domestic labor, resting her case squarely on a wife’s role in reproducing a skilled modern labor force.<sup>539</sup> Indeed, she went so far as to defend the discrepant rates at which a wife’s work of family maintenance was compensated in the prevailing economic order. The wife who presided over a complex of servants did no more manual labor than the “president of an insurance company,” but her work of superintendence was as valuable as his. Further, “the salary of the wife, paid in the things with which men pay their wives, [should] be exactly proportioned to the position . . . which the institution over which she presides holds in society.”<sup>540</sup> Shaw’s rebuttal of the notion that a wife was supported was canny in tracing the value of a wife’s uncompensated labor in an industrial market economy. It was also remarkably complacent in its defense of the division of labor and distribution of wealth that that order had produced.<sup>541</sup> Shaw apparently contemplated no

536. *Id.* At the dawn of the century, Fourier had denounced the isolated household, characterizing women as “domestic parasites.” See FOURIER, *supra* note 73, at 131 (“Three-fourths of the WOMEN who live in cities and half of those who live in the country. . . . are unproductive because they are absorbed in household work which entails the wasteful duplication of functions.”).

537. Drawing upon the antebellum movement’s understanding of the social relations of distribution, Shaw observed that “individual economic independence among human beings means that the individual . . . either pays for what he gets, or works for what he gets.” *Women Debate*, *supra* note 533, at 4.

538. *Id.*

539. *Id.* Shaw argued:

[T]he woman furnishes her share of work—wealth—in the world, and she is of intense economic value, because she utilizes her work to make the home such that the individuals who go out from it are better fitted to do the work of the world intelligently, and because of the home life are more valuable in their work and can do more work than they could if it were not for the home life.

*Id.* In this respect Shaw offered a sophisticated account of the work of social reproduction a wife performed, a much more sophisticated account of the economic value of a mother’s work than the sentimentalized accounts given in the 1870’s by Thomas Wentworth Higginson and Henry Blackwell. Cf. *supra* text accompanying notes 301-03.

540. *Women Debate*, *supra* note 533, at 4.

541. In this respect, Shaw’s argument resembles the analysis of women’s managerial functions that cooperative housekeeping advocates offered in the postwar period. See, e.g., *supra* note 505; *supra* note

reorganization of labor, and endorsed no redistribution of wealth, either within the family or across class lines.

The working-class women assembled to judge the debate between Gilman and Shaw responded unambiguously. When Gilman complained that the married woman “works as an unpaid servant for her husband and that her support comes from his and is in proportion to his earning and bears no relation to her labor,”<sup>542</sup> she struck a sympathetic chord; the audience “warmly applauded”<sup>543</sup> remarks of this sort, expressing its sense of the sexual and economic inequity of the prevailing social order. By contrast, at the close of the debate, when the audience was asked whether a wife was supported by her husband, “[a] few scattered ayes were heard,” the *New York Evening Call* reported, “but when the judge asked for the ‘noes’ the answers were so vigorous and numerous that it was easily apparent that the vast majority of the audience had no doubts . . . .”<sup>544</sup>

For this audience, Gilman’s argument simply made no sense. Whatever dignitary appeal concepts of individual autonomy and “self-support” in marriage possessed, the ideal was social strata away from the prospect of marriage women in the audience faced. Their labor as wives—whether performed in or out of the household, for money-wages or not—would be for support of family as much as self, entailing work sufficiently consuming that few could fathom why Gilman would deny the value of household labor or define its value exclusively in market terms. Whether or not women in the audience viewed their work for the family as intrinsically degrading, they were in no position to escape it; nor, for that matter, were their prospects in the market such that wage work necessarily promised “personal development.”<sup>545</sup> The audience’s receptivity to Shaw’s argument is thus not surprising: she at least affirmed the social and economic value of women’s contribution to family welfare.

Whether the joint property polemic Shaw elaborated described with any accuracy the concerns of women then active in the suffrage movement is another question altogether. By 1909 the movement employed joint property rhetoric primarily to buttress its case for the vote.<sup>546</sup> The argument was bereft of practical political content; the reform strategy from which it sprang was dying of neglect.<sup>547</sup> No effort had been made to translate its critical

509 and accompanying text.

542. *Women Debate*, *supra* note 533, at 4.

543. *Think Husbands Aren’t Mainstays*, N.Y. TIMES, Jan. 7, 1909, at 9.

544. *Women Debate*, *supra* note 533, at 4.

545. See *supra* text accompanying note 507 (quoting Anna Garlin).

546. See, e.g., KRADITOR, *supra* note 520, at 120-21.

547. The *Woman’s Journal* of that year contained virtually no discussion of the “family work” issue, except as raised by Henry Blackwell in the months prior to his death. See H.B.B. [Henry B. Blackwell], *Undervalued Work of Wives*, WOMAN’S J., May 8, 1909, at 74. On publication of the fourth volume of *History of Woman Suffrage* in 1902, Susan B. Anthony felt constrained to explain to her readers in a preface to the volume’s survey of state law developments that the practical circumstances of women’s

predicates to more contemporary reform strategies. By this point, the mainstream of the suffrage movement was less inclined to criticize the family than to idealize it as an institutional model for social life.<sup>548</sup>

As the feminist movement entered the twentieth century, it exhibited two polarized impulses: one which discounted and the other which celebrated woman's family role. Gilman, speaking for the emergent radical wing of the feminist movement, depicted woman's economic emancipation in terms that disparaged her labor in the family setting. Shaw employed a depoliticized version of the joint property polemic in virtual endorsement of the existing family form. The working-class audience assembled to judge the contest threw its lot with Shaw because she described the women's life circumstances; Shaw was not, however, prepared to challenge or change them.<sup>549</sup>

household labor "should be borne in mind when reading the laws which declare that husband and wife have the same power to dispose of separate property." 4 HISTORY OF WOMAN SUFFRAGE 457 (Susan B. Anthony & Ida H. Harper eds., reprint ed. 1985) (1902). The suffragists who supplied the summaries of state law developments for the fourth volume of *History of Woman Suffrage* were casual at best in their accounts of developments in marital property law, and seemingly unaware of the joint property claim—either as an agenda for reform, or a critical standard to assess the gendered logic of common law reform. For a discussion of marital status reform activity in the period after ratification of the Nineteenth Amendment, see *infra* note 549.

548. See BUECHLER, *supra* note 279, at 168-70 (movement shifts from challenging traditional notions of women's role to endorsing them and begins to rely on "municipal housekeeping" arguments for the vote, contending that women needed to participate in governmental decisionmaking if they were fully to discharge their responsibilities as wives and mothers); KRADITOR, *supra* note 520, at 67 ("Thus the statement that the home was woman's sphere was now an argument not against woman suffrage but in favor of it, for government was now 'enlarged housekeeping' . . ."). For a fuller discussion of the ideological shift in the movement during the Progressive era, see *id.* at 65-74.

549. During the 1920's, after ratification of the Nineteenth Amendment, feminists did continue to push for reform of marital status law. The effort was part of a larger campaign conducted by the National Woman's Party (NWP) to remove existing sex distinctions from the law—a campaign that the NWP undertook as it attempted to build consensus among feminists for pursuing an Equal Rights Amendment. Although the campaign did not focus on issues of earnings reform, it did address them. A "Declaration of Principles" adopted by NWP in 1922 listed among its many goals: "[t]hat the wife shall no longer be considered as supported by the husband, but their mutual contribution to the family maintenance shall be recognized"; "[t]hat the husband shall no longer own his wife's services, but these shall belong to her alone as in the case of any free person"; "[t]hat the husband shall no longer own his wife's earnings, but these shall belong to her alone"; and "[t]hat the husband shall no longer control the joint property of his wife and himself, but the husband and wife shall have equal control of their joint property." National Woman's Party, *Declaration of Principles*, EQUAL RIGHTS, Feb. 17, 1923, at 5 (emphasis omitted); see also Mary Winsor, *The Freedom of Equality*, EQUAL RIGHTS, Feb. 24, 1923, at 12 (observing "the fact that in . . . practically all States the wife is discriminated against for the benefit of her husband in that he owns her services in the home").

In the early 1920's the Legal Research Department of the NWP began drafting a host of reform bills for individual states, many of which focused on marital status issues. State affiliates of the NWP introduced the legislation, often with the support of League of Women Voters' affiliates and other social welfare feminists opposed to an equal rights amendment. See FELICE D. GORDON, *AFTER WINNING: THE LEGACY OF THE NEW JERSEY SUFFRAGISTS, 1920-1947*, at 106-12 (1986) (describing coordinated efforts of national and local activists to reform New Jersey marital status law).

In 1923 and 1924, the NWP and the League of Women Voters introduced a series of bills in New York which sought to amend that state's earnings statute so as completely to emancipate a wife's labor. The amendments the groups proposed made no mention of joint property principles, however. Instead, they sought to emancipate wives' labor by extending New York's separate property regime so that a wife could contract with her husband regarding her family labor. The bills, which were never enacted, provided that:

(1) The marriage shall not give any right, title or interest to the husband as to [a wife's] services or labor.

Today, the question of equality in the family remains a source of conflict and ambivalence for feminists. One need only look to retrospectives on the recent Equal Rights Amendment campaign<sup>550</sup> or modern divorce reform,<sup>551</sup> to intrafeminist disputes over pregnancy in the workplace<sup>552</sup> and women's child custody claims,<sup>553</sup> or for that matter, to consider the perfunctory way feminists often discuss the household labor women perform and purchase,<sup>554</sup>

(2) Every married woman in this state shall own her labor and shall be absolutely entitled to have, hold, retain and enjoy as her separate property any and all earnings or profits resulting therefrom.

(3) The above shall be so, whether the labor or service performed (a) *within or without the home*, and (b) whether for her *husband* or any third person.

(4) All work and labor performed by a married woman shall be presumed to be performed on her separate account.

1 ALBERT C. JACOBS & ROBERT C. ANGELL, *A RESEARCH IN FAMILY LAW* 510-11 (1930) (quoting Bill No. 233, introduced in New York Senate, Jan. 23, 1923, and reintroduced in the Senate as Bill No. 120 on Jan. 14, 1924, and in the Assembly as Bill No. 306 on Jan. 16, 1924) (neither bill enacted). In 1924 and 1925, the two groups also introduced bills "allowing the husband and wife before or after marriage to contract 'concerning all rights, duties, obligations and liabilities growing out of the marital relations,' and to make any contract with each other which either might make with a third person." *Id.* (emphasis omitted) (quoting bills introduced in, but never enacted by, New York Senate and Assembly during 1924 and 1925).

While leadership of the woman's movement seemingly embraced a separate property strategy for emancipating wives' labor during the 1920's, their tactical decision did not go unchallenged. For a critique by a woman who worked for the Bureau of Home Economics of the U.S. Department of Agriculture, see Hildegard Kneeland, *Woman's Economic Contribution in the Home*, *ANNALS OF AM. ACADEMY* 33, at 35, 40 (1929) (raising various objections to "[a] solution of the problem which is frequently heard of late . . . that of 'wages for wives,'" and proposing equal division of family income, not "mere joint use"); see also Kirkwood, *supra* note 445, at 579 (article written in response to "the fact that there is now much agitation for complete equality of property interests as between husband and wife and in view of the further fact that in a number of states this agitation has led to the suggestion that the community property system be more generally adopted because of a supposed greater degree of equality therein").

For a list of the statutes the NWP succeeded in enacting during the 1920's—none of which altered the legal status of wives' labor in the family—see *Report of Legislative Work from 1921 to 1929*, *EQUAL RIGHTS*, Jan. 4, 1930, at 379 (listing by state the group's legislative achievements over decade and noting that "Equal Rights measures which have been enacted into law are few indeed in comparison with those which have been defeated despite the most vigorous and brilliant campaigns.").

550. See *infra* note 557.

551. See, e.g., DIVORCE REFORM AT THE CROSSROADS (Stephen D. Sugarman & Herma H. Kay eds., 1990); MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 1-75*, 173-90 (1991); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 15-51, 215-61, 357-401 (1985); Patricia A. Cain, *In Search of a Normative Principle for Property Division at Divorce*, 1 *TEX. J. WOMEN & L.* 249 (1992) (reviewing FINEMAN, *supra*); Herma H. Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 *U. CIN. L. REV.* 1 (1987); Martha Minow, *Consider the Consequences*, 84 *MICH. L. REV.* 900 (1986) (reviewing WEITZMAN, *supra*).

552. See Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 *COLUM. L. REV.* 1118, 1118-22, 1142-70 (1986); Frances Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869-1895*, 84 *MICH. L. REV.* 1518, 1518-21 (1986); Nadine Taub & Wendy W. Williams, *Will Equality Require More than Assimilation, Accommodation or Separation from the Existing Social Structure?*, 37 *RUTGERS L. REV.-CIV. RTS. DEVS.* 825, 832-42 (1985).

553. See, e.g., FINEMAN, *supra* note 551, at 79-169; Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 *BERKELEY WOMEN'S L.J.* 9 (1986); Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 *WOMEN'S RTS. L. REV.* 235 (1982); Rena K. Uviller, *Father's Rights and Feminism: The Maternal Presumption Revisited*, 1 *HARV. WOMEN'S L.J.* 107, 108-12, 114-23 (1978).

554. But see sources cited *supra* note 35; Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 *ARIZ. L. REV.* 431 (1990); Nancy E. Dowd, *Work and Family: The Gender Paradox and*

in order to appreciate that the question of equality as it bears on family life remains a deeply troubling one for the modern movement.

So long as the work associated with family life persists, and so long as any women, by compulsion or choice, perform it, grappling with the family relation as an economic relation remains a crucial task for the feminist movement. The questions of equality it poses are preeminently institutional, not formal, and, as the history of joint property advocacy illustrates, they implicate relations, not only between women and men, but among women as a class.

#### CODA: REFLECTIONS AT THE CROSSROADS OF HISTORY AND THEORY

There are many ways in which the history of joint property bears on modern feminist dilemmas in matters of family and work. Exploring these questions of policy and theory would, however, extend far beyond the scope of this Article. In closing, therefore, I limit my remarks to some reflections prompted by researching the history of the claim.

I began this project with an interest in marital status law, but without much knowledge of the early feminist movement and no investment in any particular interpretation of the movement's politics. Over time, as I struggled to make sense of the rise and demise of the joint property claim, I began to consider how the imagination of early feminists might have developed and matured. For this reason, I became increasingly attentive to the ways in which the imagination of early feminists differed from, and ultimately began to converge with, my own more modern outlook. The results of this inquiry were not wholly predictable. I came to believe that early advocates of sex equality possessed critical instincts that were in important respects sharper than my own. My relative sophistication in thinking about equality in the family caused me to overlook dimensions of inequality on which they focused. From this perspective, I could see that the demise of joint property advocacy was tied to dynamics of feminist thought at work in the modern era.

Upon first examining the records of antebellum woman's rights conventions, I was impressed by the range and complexity of the movement's politics.<sup>555</sup> In time I came to appreciate that early advocates of joint property

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*the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79 (1989); Glenn, *supra* note 479; Suzanne Goldberg, *In Pursuit of Workplace Rights: Household Workers and a Conflict of Laws*, 3 YALE J.L. & FEMINISM 63 (1990); Margaret K. Nelson, *Mothering Others' Children: The Experiences of Family Day-Care Providers*, 15 SIGNS 586 (1990); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1595-1634 (1991).

555. As I worked with the records of the early movement, I marveled at the inadequacies of the classificatory apparatus typically used to describe the history of feminist thought. In evaluating the feminisms of different movements and eras, scholars tend to focus on the question of whether advocates accepted or challenged gender distinctions in the organization of social life. *Cf. supra* note 114 and accompanying text. While the early feminist movement challenged gender distinctions in many areas of social life, and failed to question them in others, this is hardly the only (or even the most interesting) aspect of its politics. The records of the antebellum conventions are rich with observations about the sociology

were “naive” in that they never questioned the division of the labor in the family; their inattention to this question revealed them to be reasoning in paradigms very different from my own. But, as I worked with convention records and tried to understand what the joint property strategy meant to the antebellum women who adopted it, I quickly lost interest in the movement’s failure to insist, catechistically as moderns do, that the labor of family maintenance was something the sexes should share or that women should escape. Early feminists reasoned about this work as *women’s work*—something I know it to be today. The question they asked was what women should do about their labor in the family, given all the ways, positive and negative, that doing women’s work situates women as women.

The joint property strategy early feminists settled upon was a canny strategy for challenging women’s economic subordination in the world in which these advocates found themselves. The claim did not challenge the division of labor in the family, and, as I belatedly came to realize, was rooted in forms of separate spheres reasoning; but, while these aspects of the rights discourse might mark joint property as deficient by conventional feminist criteria, the joint property tradition nonetheless had striking critical, strategic, and polemical power. Reasoning within the gender discourse of their culture, early feminist women were able to challenge the gender discourse of their culture: to expose the legal expropriation and social devaluation of women’s family labor.

As I followed the trail of my evidence into the postwar period, attempting to determine what became of the joint property tradition, I was first perplexed at the movement’s growing disengagement from the claim, and then absorbed in an effort to explain why postwar feminists failed aggressively to pursue joint property rights, even as they continued to polemicize the claim. While I was able to attribute the drift from joint property advocacy to the changing socioeconomic profile of movement leadership, and to changing cultural perceptions of wives’ household labor, I also came to believe that the movement’s drift from joint property was in fact tied to the “maturation” of its feminism: once feminists began to challenge the division of labor in the family, they grew correspondingly less interested in challenging the devaluation of women’s family labor. What follows are some thoughts about why this might be so.

As various feminist theorists have emphasized, sexual inequality is reproduced by the hierarchical valuation of gender differences, not merely the process of gender differentiation alone. Social practices can be imbued with gendered value, even when they are no longer exclusively performed by one

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of caste, and with ruminations about various strategies for challenging it; the movement’s strategic reasoning is as striking as its normative reasoning, and its complex rhetoric as fascinating as its counterconventional ideals. Clearly we require a more complex framework for describing and discriminating among feminists and feminisms of different eras.



sex.<sup>556</sup> With this understanding of sexual inequality, it is possible to see how feminist strategies that are designed to reduce the gendered differentiation of social life may unwittingly *reinforce* the gendered valuation of certain social practices. An advocate may claim she seeks to promote a world in which persons of both sexes perform activities formerly performed by one sex only. But, given the gender-hierarchical valuation of social practices, she will likely devote her energies to expanding women's access to activities traditionally designated "male." To the extent that she so dedicates her energies, she endorses traditionally "male" activities as socially privileged—and encourages women to repudiate traditionally "female" activities as socially subordinate.<sup>557</sup> Thus, feminist advocates who seek to reduce the gendered differentiation of social life may actually reinforce the gendered valuation of social practices.

This dynamic is not surprising. Considered in historical perspective, it is clear that feminism is an integral part of the culture it criticizes; when feminists articulate a vision of freedom and equality, they reason within as well as against the status values of their society. Yet, a common if rarely stated assumption of much feminist theory is that feminist advocates can in fact transcend the gender discourse of their culture, and from this vantage

556. Cf. MACKINNON, *supra* note 35, at 221-25 (discussing social treatment of gender differences, "original, imposed, or imagined"); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1324-35 (1987) (discussing differently gendered complements or traits that are "socially" male and female). For an analysis of the extent to which legal language and reasoning are gendered, see generally Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989). For a similar analysis of racial norms, see Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1373 (1988).

557. It is for this reason, I believe, that the contemporary feminist movement has been criticized for denigrating women's traditional activities and attributes. Though the movement is inclined to brush aside such criticism—claiming an inclusive stance that values equally activities and attributes traditionally gendered "male" and "female"—I believe there is more weight to the charge than the movement generally acknowledges.

For example, during the 1970's, proponents of the Equal Rights Amendment discussed women's need for liberation from motherhood and family in ways that demeaned and threatened "traditional homemakers," thus enabling Phyllis Schlafly and others to organize women in opposition to the amendment. See, e.g., DONALD G. MATHEWS & JANE S. DE HART, *SEX, GENDER, AND THE POLITICS OF THE ERA* 152-53 (1990):

[M]any opponent women distrusted change sponsored by feminists who seemed to think marriage, love, babies, and families restrictive and burdensome. The view seemed to reflect "male" values, and if attributing it to all feminists was unfair, it was nonetheless a fair interpretation of what feminists had in fact said. Feminism seemed to demean what women had traditionally valued and, through the Equal Rights Amendment, seemed about to be written into the fundamental law of the land.

See also Carol Sanger, *M Is for the Many Things*, 1 S. CAL. REV. L. & WOMEN'S STUD. 15, 20-26 (1992) ("The identification of motherhood as a source of subordination led early [second-wave] feminists to direct their energies toward creating social structures less encumbered by maternal obligation. . . . Distancing women from motherhood seemed the key to a better life.")

For other accounts of conflicts between the women's rights movement and women in traditional roles, see SYLVIA A. HEWLETT, *A LESSER LIFE: THE MYTH OF WOMEN'S LIBERATION IN AMERICA* 184-218 (1986); JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 90-112 (1986); DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 68-70 (1989); Deborah L. Rhode, *Equal Rights in Retrospect*, 1 LAW & INEQ. J. 1, 30-41, 67-72 (1983).

point, work to reduce the social significance of gender so that individuals are “sex-blind” and “androgynous.” Merely to state this assumption is to reveal its implausibility.<sup>558</sup> When the nineteenth-century feminist movement shifted from the joint property to the two-career marriage strategy, it began to challenge the division of labor in the family, but, in so doing, did not transcend the gendered values of its society. Instead, the movement exchanged a vision of equality funded by the gendered assumptions of the separate spheres tradition for a vision of equality funded by the gendered assumptions of the postwar labor market. In neither period did the movement uncritically endorse the gender norms of its society; but in neither did it wholly transcend them. Rather, in each period, as feminists challenged the discourse of gender, they were both drawing upon it and changing it.

In the imaginable future, it does not seem possible for us to transcend or escape gender<sup>559</sup>—a discourse of which feminism is an important part. The discourse of gender is capable of endless permutations and transformations, and it thrives even when couched in gender-neutral rhetoric. As is by now painfully obvious, an assault on formal criteria of gender status produces social norms and practices that are gender-neutral in form but nevertheless remain profoundly gendered in fact. We may talk about “spouses” and “parents” but still live in a social world populated by husbands and wives and fathers and mothers.<sup>560</sup> In this world, women still perform the labor of family maintenance—whether “for” family or “for” cash—a fact that no feminist endeavor to date has succeeded in changing. Today, as in the nineteenth century, it is women who perform the work of the family, women who seek to escape the work, and women who eke out a living performing the work—for other women. In this world, a world in which the discourse of gender changes without diminishing in intensity, challenging the gendered differentiation of social life cannot suffice as the ultimate measure of a feminist strategy. Therefore, to evaluate a program or practice as a feminist program or practice, it is more reasonable to ask whether a given strategy

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558. Just as importantly, many, if not most, contemporary feminist theorists would now repudiate this end-state as an aspirational goal of feminist politics. See, e.g., Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975, 979-80 (1993). Some might ask a series of skeptical questions about the social norms on which this society of the future was premised; others might declare a preference for a social order that institutionalized values associated with “women’s culture”; still others might declare themselves satisfied with a realm in which women had attained equal social status with men, regardless of the degree to which gender differentiation persisted.

559. For similar observations about the discourse of race, see PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 216-17 (1991) (author discussing roots of her racial and gender identity in her family’s experience in slavery: “Yet claiming for myself a heritage the weft of whose genesis is my own disinheritance is a profoundly troubling paradox.”); Harris, *supra* note 129, at 608-09 (black women’s “experience of multiplicity is also a sense of self-contradiction, of containing the oppressor within oneself”).

560. For a provocative meditation on this issue, see Martha A. Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653, 653 (1992) (“The Neutered Mother presents a gendered noun, degendered by the adjective that precedes it—an opposition of meaning that mirrors the conflicts in culture and in law over the significance and potency of the symbol of Mother.”).

changes the distribution of power between the sexes or otherwise improves women's welfare, attending closely to the questions of whom the strategy aids and how, whom it hurts and how, and, finally, the precise terms in which the strategy defines "women's welfare." Considered from this vantage point, the joint property strategy, advanced and then abandoned by the nineteenth-century woman's rights movement, had considerable merit as a feminist strategy.

#### CONCLUSION

The joint property claim had remarkable critical and strategic power. Feminists demanding joint property rights analyzed "women's work" from the standpoint of women's experience, defying conventional assumptions about the family form and challenging the law of marital property as it expropriated the value of women's household labor.

The demand for joint property rights illuminated the gendered predicates of market relations, identifying labor crucial to maintenance of life in the industrial order, but not compensated within it. Joint property advocates were barely equipped to reason about the claim in this fashion.<sup>561</sup> They reasoned within, as well as against, the norms of the economic system, rarely questioning the property relations that differentiated *families*, shying from discussing the class-differentiation of women's household labor and the class-stratified terms in which a joint property claim would have "compensated" it. Nevertheless, joint property advocates understood that the world in which they moved was in some fundamental sense organized by sex, and that implementation of a joint property regime would have importantly reorganized that world. The depoliticization of joint property discourse in the postwar period, its degeneration into a simple suffrage polemic, represented a significant feminist concession, a retreat from aggressive legal activism directed at the family form.

Had a joint property system giving wives equal control of marital assets been adopted in the nineteenth century, it would have changed perceptions of women's work in the emergent industrial order, with far-reaching practical and ideological consequences. Such a regime would have altered the legal status of property holdings across the class spectrum; by redistributing control of private assets, a joint property system would have drawn attention to work that was essential to the reproduction of social life, but increasingly ignored or undervalued in modern accounts of social life.

Implementation of a joint property regime would have had a variety of legal and extralegal consequences for women. Litigation under the earnings

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561. They did not, for example, consider the fact that owners of capital paid their employees wages premised on the uncompensated labor of their employees' wives—a consideration which would have revealed that middle-class women benefitted from the expropriated labor of other women.

statutes enacted in the postwar years suggests that women of widely discrepant means became embroiled in legal conflicts over assets they claimed by virtue of work in or for the family—claims whose disposition joint property principles would have radically altered.<sup>562</sup> With joint property principles governing such litigation, generations of women would have had a much greater role in the management of family assets and, with it, the kind of autonomy and opportunity that only money can purchase in this society. Perhaps more significant still would have been the impact of joint property principles *outside* the litigation context. Law governing title to marital assets importantly shapes quotidian family dealings that are negotiated by conflict and acquiescence and never find their way into the legal system. Socially speaking, it defines who gives and who takes in the family situation, who supports and who depends, and thus shapes the authority, choices, and self-worth of family members, the social meaning of womanhood and manhood, for those of abundant, middling, and even marginal means.<sup>563</sup>

In the largest sense, what the joint property claim put in issue was the value of women's economic contribution to social life—manifest in the movement's frequent taunt that it was in fact woman who supported man. The claim was radical in its insistence that women in their activities *as* women were engaged in life-sustaining and creative work, whose value was material and not merely spiritual; the claim was radical, in short, as it measured value from the social standpoint of woman rather than man. It was this aspect of the claim, as much as the sheer quantity of wealth it implicated, that inspired legislative resistance akin to, if not exceeding, that provoked by the movement's demand for suffrage. One has only to look to the earnings statutes enacted in the industrial era to realize that, while legislatures and courts may have been prepared to emancipate women's labor when it looked like man's, they were in no way prepared to emancipate the work that was "women's." In short, legislators and judges fathomed the radical import of treating women's work as if it were work.

Standing alone, the joint property claim would not have transformed women's status; but the critical reasoning from which it sprang was crucial to that task. Joint property discourse analyzed inequality and imagined equality from the standpoint of women's actual social situation, and in that sense was pragmatic, even anti-utopian, but not the less critical for it. Its strength was precisely its grounding in the material circumstances of women's working lives, its willingness to defend women as women without denial or apology, to dispute directly the logic of valuation that gives gender difference its social salience. Its weakness, if it had one, was its inattention to the differences of

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562. See Siegel, *Modernization*, *supra* note 4.

563. See, e.g., *supra* text accompanying notes 315-22 (suffrage journal readers discussing joint property advocacy); *supra* note 153 (movement leaders discussing dignitary significance of earnings reform).

women's lives, its attempt to express the value of women's work in the homogenizing categories of marital property law. This failure can fairly be attributed to the legal structure of the claim, or to its proponents' socioeconomic status, but not to its root impulse. The root impulse from which the joint property claim sprang was comfortable in the face of difference, confident enough to speak to it without speaking of it in the language of exceptionalism.

That the joint property claim unabashedly celebrated women's work as such was no debility. The demand for gender equality, in its most extravagant and disruptive form, *requires* gendered content. It has to take meaning from women's lives as they are lived, and not merely as they might be lived. When equality is defined with reference to the actuality, as well as the potentiality, of women's lives, it is inevitably shaped by the gendered particularities of women's circumstances, commitments, desires, and relations. When this conflictual allegiance to women's present and potential lives no longer haunts the meaning of equality, something profound is lost. The quest risks disembodiment. Nor is it necessarily the purer for it. When feminists turn from women's present circumstances in the name of a gender-equal future, the vision they embrace may challenge the social construction of gender, yet still retain a gendered referentiality—by default, in this culture, to men and to some women's lives.

No doubt, when feminists defend women in gendered circumstances, they risk reinforcing the gendered differentiation of social life. But feminist advocacy must spring from sympathetic allegiance to women as something more than "social constructs," mere vessels of unrealized social possibilities. Defending women as they are is crucial if the meaning of woman is to be repossessed from men, if the meaning of equality is to be liberated from its tacit reference to men. And, it is crucial if feminism is to fulfill its claim to be a genuinely representative politics.

