

The Three Waves of Married Women's Property Acts in the Nineteenth Century with a Focus on Mississippi, New York, and Oregon

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Recommended Citation

Custer, Joseph A. () "The Three Waves of Married Women's Property Acts in the Nineteenth Century with a Focus on Mississippi, New York, and Oregon," *Ohio Northern University Law Review*. Vol. 40: Iss. 2, Article 4.

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**The Three Waves of Married Women's Property Acts in the
Nineteenth Century with a Focus on Mississippi,
New York, and Oregon**

JOSEPH A. CUSTER *

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I. INTRODUCTION

As the nineteenth century began, American states adhered to the English common law rules governing the property rights of married women.¹ The doctrine of marital unity or coverture was the basis of married women's property rights at common law,² meaning, "covered

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1. See MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* xi-xvii (1986); MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* ix-xii (1985); JOAN HOFF, *LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* 1-6 (1991).

2. Suzanne D. Lebsack, *Radical Reconstruction and the Property Rights of Southern Women*, 43 J. S. Hist. 195, 209 (1977) ("Georgia wives were not granted legal control over their own earnings until 1943").

woman.”³ This was the simple presumption that “in the eyes of the law” the husband and wife were one person—the husband.⁴ As Blackstone wrote, “the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband : under whose wing, protection and *cover*, she performs everything”⁵

Under the common law, single women held the same legal property rights as men, but married women were not allowed to act independently with regard to property.⁶ Upon marriage, real property owned by a woman in a legal estate was subject to the management and control of her husband, while her personal property became his.⁷

Most Americans in early settlements simply wanted to recreate what was familiar to them; legislators and judges usually deviated from English law only in response to novel legal problems that English common law did not specifically deal.⁸ Depending on the area of the country, however, there still existed levels of diversity in the development of the law.⁹ States and regions varied in how they adopted local customs and the common law.¹⁰ Similar to England, some Northern states had courts of equity empathetic to women.¹¹

In early America, each jurisdiction originally based its legal system on England’s, but no two states evolved in the same way.¹² With the exception of equity court decisions, advancement in married women’s property rights did not happen in the first three decades.¹³ Finally, in the late 1830s and early 1840s, married women’s property acts began to be passed, but there was no immediate equality for married women.¹⁴

3. Kerry Abrams, *Citizen Spouse*, 101 CALIF. L. REV. 407, 415 (2013).

4. NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* 224-32 (1982).

5. 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 441 (St. George Tucker ed., 1803).

6. SALMON, *supra* note 1, at xv.

7. 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).

8. SALMON, *supra* note 1, at 3-4.

9. *Id.*

10. *Id.*

11. *Id.* at 12.

12. *Id.* at 3-5.

13. BASCH, *supra* note 4, at 226; *see also generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

14. Linda E. Speth, *The Married Women’s Property Acts, 1839-1865: Reform, Reaction, or Revolution?*, in 2 *WOMEN AND THE LAW: A SOCIAL HISTORICAL PERSPECTIVE* 69-70 (D. Kelly Weisberg ed., 1982); *see* BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 459 (1957); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 185 (1973).

Lawrence Freidman wrote that married women's property acts attacked inequality "piecemeal."¹⁵ Richard Chused took the piecemeal changes of the married women's property acts in America and indexed and classified them into three main waves.¹⁶ The first wave was created largely in response to two factors: a formidable social reform movement and a depressed economy in the wake of the Panic of 1837.¹⁷ States created acts intended to protect the property women obtained through gift or inheritance against irresponsible husbands and their creditors.¹⁸

This first wave left traditional marital estate rules and coverture largely untouched.¹⁹ The second wave is probably the most famous wave of acts because New York led the way.²⁰ The second phase was marked by the 1848 Seneca Falls Convention.²¹ While this second wave of acts established separate estates for women,²² it still left coverture untouched.²³ The majority of the third wave of acts were passed after the Civil War.²⁴ The third wave finally did away with the Medieval institution of coverture.²⁵

This paper concentrates on three states that enacted married women's property acts during the nineteenth century: Mississippi, New York, and Oregon.²⁶ Each state, starting with Mississippi, enacted acts that reflect a different wave.²⁷ While Chused's indexing and classification schema have been groundbreaking and extremely helpful in providing order and a basic understanding of what types of married women's property acts were passed and when in the nineteenth century, in my opinion he did not clearly provide any underlying explanation or "why" for the passage of the acts.²⁸

15. *Id.*

16. Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1398-99 (1983).

17. *Id.* at 1400; *see also* HAMMOND, *supra* note 14, at 459 (attributing crisis to erratic American banking policy and real estate bubble).

18. Chused, *supra* note 16, at 1403, 1410-11 & n. 267.

19. *Id.* at 1398.

20. *Id.* at 1359.

21. *Id.*; WHERE WOMEN VOTE (1897), *microformed on* Research Publ'ns, Inc., Fiche 9423, (Schlesinger Library, Radcliffe Coll., Cambridge, Mass.). This was the first organized women's convention in America held in the state of New York where a series of resolutions favoring women were adopted. Fifty years later all of the resolutions had been legislated with the exception of suffrage.

22. Chused, *supra* note 16, at 1359; Mary L. Heen, *From Coverture to Contract: Endangering Insurance on Lives*, 23 YALE J.L. & FEMINISM 335, 363 n.172 (2011).

23. Chused, *supra* note 16, at 1398.

24. *Id.*; Inara K. Scott, *A Window for Change: Conflicting Ideologies and Legal Reforms in Late Nineteenth-Century Oregon*, 37 WILLIAMETTE L. REV. 433, 445 (2001) (noting the exception of Massachusetts, which eliminated coverture in 1855, and Oregon, which eliminated coverture in 1859).

25. Chused, *supra* note 16, at 1398.

26. *See infra* Part III-IV.

27. *See infra* Part III.A-C.

28. *See* Chused, *supra* note 16, at 1398-1400.

This is not taking anything away from Chusad's substantial contribution, but does present an opportunity to explore for an explanation.

Several authors have used his classification to provide order to their discussion of the nineteenth century acts, providing substantial authority to his scholarship.²⁹ Indeed, my paper is yet another example of the impact of Chused's schema. My contention is that underlying considerations should be explored, such as the ideology of the judges who ruled to support the acts, that may shed more light on the "why" of passage in the Nineteenth Century. I narrowed my focus to just one state from each of the three waves with the hope that this more focused analysis of just three states may provide the better vehicle to deeper analyze a state to find possible underlying considerations for an explanation.

This paper begins with a brief section, Part II, on early America and social reform that provides a background on why these acts happened when they did in American history.³⁰ There is nothing particularly novel regarding this section, as it has been written before by different scholars. Borrowing from the scholars, I intend to use this section as a foundation. Next, I move to Part III, describing what happened in the three states that led to the eventual passage of the married women's property acts.³¹ Part IV reviews both the legislative and judicial response to passage in each state.³² In the next section, Part V, I borrow from the scholarly literature of the political science of the courts.³³

Biological information on judges presented in Parts III and IV provides the basis for a qualitative narrative in Part V.³⁴ My intent in Part V is to examine certain personal characteristics of judges that proved probative in the political science scholarly literature covering 20th century judges to ascertain whether these same characteristics were probative to the 19th century judges who ruled to support the married women's property acts.³⁵ I was fortunate to find biographical information on the 19th century judges who wrote the majority opinions.

29. Ellen Dannin, *Marriage and Law Reform: Lessons from the Nineteenth-Century Michigan Married Women's Property Acts*, 20 TEX. J. WOMEN & L. 1, 6 (2010); Janet D. Ritsko, Comment, *Lien Times in Massachusetts: Tenancy by the Entirety after Coraccio v. Lowell Five Cents Savings Bank*, 30 NEW ENG. L. REV. 85, 95, n.83-85 (1995); B. Zorina Kahn, *Married Women's Property Laws and Female Commercial Activity: Evidence from United States Patent Records, 1790-1895*, 56 J. ECON. HIST. 356, 360-65, nn.15, 20, 26 (1996); Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 374 (1989); Rhonda Wasserman, *Parents, Partners, and Personal Jurisdiction*, 1995 U. ILL. L. REV. 813, 826, n.58-59 (1995).

30. See *infra* Part II.

31. See *infra* Part III.A-C.

32. See *infra* Part IV.A-C.

33. See *infra* Part V.

34. See *infra* Parts III, IV, V.

35. See *infra* Part V.

In Part V, my findings suggest that the characteristic of the judges' party affiliation did have a positive correlation on how the judges of the 19th century voted on married women's property acts.³⁶

II. EARLY AMERICA AND SOCIAL REFORM

Kindred humanitarian reform movements materialized in the 1830s.³⁷ Why the 1830s? This decade sits firmly in the prime social history period that has been coined the "Freedom's Ferment," running from American colonial time to the Civil War.³⁸ In the 1830s, the abolitionist movement was changing from one focusing on the colonization of Black people to one advocating for immediate emancipation.³⁹ Other movements such as prison reform; educating the dumb, deaf, and blind; world peace and women's rights, were also rising during this new social period.⁴⁰

Those who were directly involved in the reform movements did not identify one specific influencing factor, but rather credited three in their memoirs and autobiographies: religion, reading, and reflection.⁴¹ Gilbert H. Barnes and Dwight L. Dumond pointed to Evangelist Charles Grandison Finney's influence as tantamount in changing the focus of the abolitionist movement to immediate emancipation and also sparking the early women's rights movement.⁴² Finney became both a professor and president of Oberlin College, the first college in America to admit both Black people and women.⁴³ Finney's most influential convert was Theodore Dwight Weld.⁴⁴

Weld studied the Ministry at Lane's Seminary in Cincinnati, an institution known for its anti-slavery stance. The Seminary's Board of Directors then discontinued anti-slavery debates that Weld organized with ministers and other intellectuals.⁴⁵ Weld then organized a walkout of Lane's Seminary taking the majority of students with him to Northern Ohio,

36. *See infra* Part V.

37. DAVID DONALD, *LINCOLN RECONSIDERED* 21 (1959).

38. ALICE FELT TYLER, *FREEDOM'S FERMENT: PHASES OF AMERICAN SOCIAL HISTORY FROM THE COLONIAL PERIOD TO THE OUTBREAK OF THE CIVIL WAR* iiiv-ix, 1-2 (Harper & Rowe, 1961) (providing classic discussion of variety of social reform movements in early America).

39. DONALD, *supra* note 37, at 21.

40. *Id.*

41. *Id.*

42. *See generally* GILBERT H. BARNES, *THE ANTISLAVERY IMPULSE, 1830-1844* 7-9 (Harcourt, Brace & World, 1957); Letter from John Keep to Weld (Jan. 11, 1839), *in* *LETTERS OF THEODORE DWIGHT WELD, ANGELINA GRIMKÉ WELD AND SARAH GRIMKÉ 1822-1844* 739-84 (Gilbert H. Barnes & Dwight L. Dumond eds., 1934).

43. *People & Ideas: Charles Finney*, PBS, <http://www.pbs.org/godinamerica/people/charles-finney.html> (last visited May 5, 2014).

44. Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165, 176 n.28 (2011); DONALD, *supra* note 37, at 24.

45. Barnett, *supra* note 44, at 176.

where he and his group of activists formed Oberlin College.⁴⁶ Weld was a charismatic abolitionist, who David Donald credited as “the greatest of the Western abolitionists . . .”⁴⁷ He married Angelina Grimke, one of the best known abolitionists and women’s rights advocates of the nineteenth century.⁴⁸ “Weld agreed with his wife’s desire for equality between men and women and became an outspoken supporter of the women’s rights movement.”⁴⁹

In his study of abolitionists in early America, David Donald identified fourteen women.⁵⁰ He characterized almost all of the 106 abolitionists he studied as “strong Whigs.”⁵¹ Several of these abolitionists were part of the 1830s social reform movement comprised mostly of younger men and women.⁵² Coming primarily from old and dominant Northeastern families, these well-educated, and serious young people were reaching maturity in the 1830s.⁵³ At the same time, the bustling new industrial-driven business world was starting to boom in the larger cities.⁵⁴

Many of the new leaders of industry displaced these maturing offspring of the previous gentry.⁵⁵ A few, like Daniel Webster, were able to transfer their talents to the “god of trade,” but most of them held “disdain for the new money-grabbing class . . .”⁵⁶ The transfer of leadership to this new industrial upstart class created an agitation amongst the offspring of the well-to-do Federalist parents.⁵⁷ The old, refined Northeast gentry offspring gave way to industrialization born on the backs of a slave-owning oligarchy.⁵⁸ The 1830s proved to be ripe for young, bright and well-educated displaced individuals who had the time and resources to take part in serious social reform.⁵⁹ Ironically, the same industrial revolution that these reformers blamed for many of the country’s social ills also broke down some of the old gender roles that were manifest under the common law.⁶⁰

46. *Id.*

47. DONALD, *supra* note 37, at 24.

48. Theodore D. Weld, OHIO HISTORY CENTRAL, http://www.ohiohistorycentral.org/w/Theodore_D._Weld (last visited May 5, 2014).

49. *Id.*

50. DONALD, *supra* note 37, at 28-29.

51. *Id.* at 26, 32.

52. *Id.* at 21, 34-35.

53. *Id.* at 33.

54. *Id.*

55. DONALD, *supra* note 37, at 34-35.

56. *Id.* at 33-34.

57. *Id.* at 27, 33-34.

58. *Id.* at 33-35.

59. *Id.* at 33-34.

60. DONALD, *supra* note 37, at 28, 30, 34.

III. LEADING UP TO PASSAGE

A. *Mississippi*

In 1839, Mississippi became the first state to pass a married women's property act.⁶¹ Before this enactment, Mississippi was a common law state that placed a married woman and her property under the absolute control of her husband.⁶²

The Louisiana Territory bordering Mississippi retained the civil law system that was in force under the previously ruling French and Spanish administrations.⁶³ Under civil law, community property acquired during marriage became part of the joint property of the husband and wife.⁶⁴ Other property not held jointly remained the separate estate of the owner.⁶⁵ A married woman in a civil law state could hold her separate estate free from any title or proprietary right of her husband.⁶⁶ Mississippi, as stated above, was a common law state, but the proximity of civil law had an influence.⁶⁷

Mississippi State Senator T.B.J. Hadley introduced two bills in 1839.⁶⁸ The first was “for the protection and preservation of the rights and property of married women.”⁶⁹ The second was for Hadley's own protection against creditors, “for the relief of T.B.J. Hadley” which exempted Hadley from a State of Mississippi promissory note.⁷⁰ The second bill passed without difficulty.⁷¹ The first bill did not.⁷²

Hadley married well-propertied

Piety Smith, daughter of Andrew Jackson's old friend, David Smith and sister of Chickasaw agent Benjamin Fort Smith Piety's sister was Obedience Smith, the wife of Governor Hiram Runnels. David Smith had bequeathed his assets to the daughters in trust. The trustee was brother Benjamin, already accused of the misappropriation of Chickasaw tribal funds. No doubt Hadley

61. 1839 Miss. Laws 920.

62. Elizabeth Gasper Brown, Book Note, *Memorandum on the Mississippi Woman's Law of 1839*, 42 MICH. L. REV. 1110, 1110-11 (1944).

63. *Id.* at 1111.

64. RICHARD A. BALLINGER, A TREATISE ON THE PROPERTY RIGHTS OF HUSBAND AND WIFE, UNDER THE COMMUNITY OR GANANCIAL SYSTEM 4 (1895).

65. *See id.*

66. *See id.*

67. LeAnne Howe, *Betsy Love and the Mississippi Married Women's Property Act of 1839*, MISS. HISTORICAL SOC'Y (Sept. 2005), <http://mshistorynow.mdah.state.ms.us/articles/6/betsy-love-and-the-mississippi-married-womens-property-act-of-1839>; Brown, *supra* note 63, at 1110-11, 1117.

68. Brown, *supra* note 62, at 1113-14.

69. *Id.*

70. *Id.*; Howe, *supra* note 67; 1839 Miss. Laws 280-81.

71. Brown, *supra* note 62, at 1113-14.

72. *Id.* at 1114.

hoped to shelter his wife's assets both from his own creditors and from her own trustee.⁷³

Many senators worried about the effect the first bill would have on the creditors of married men.⁷⁴ “[Senator Grayson] stated, all the married women would have all the property and it would thus be exempt from their husbands’ creditors.”⁷⁵ The bill did not pass the Senate the first time it was introduced, but it was reconsidered two days later.⁷⁶ On February 11, 1839, the Senate committee proposed an amendment to the bill providing:

[t]hat any married woman may become seized or possessed of any property, real or personal, by direct bequest, demise, gift, purchase, or distribution, in her own name, and as of her own property, provided the same does not come from her husband after coverture.⁷⁷

Adding the words, “provided the same does not come from her husband after coverture,” solved the problem of a husband giving property to his wife simply to avoid creditors.⁷⁸ The bill, as amended, passed both the Mississippi Senate and House of Representatives, and the governor signed it into law on February 16, 1839.⁷⁹

Mississippi's married women's property law, the first law of its kind that an American state adopted, allowed a woman to hold her own property separately from her husband.⁸⁰ Section two of the statute expressly stated that the wife's separate property was “exempt from any liability for the debts or contracts of the husband.”⁸¹ Section four, however, stipulated that even if the wife owned slaves coming into the marriage or acquired them afterward, their control and management, along with any concomitant profits from their labor, should be reserved to the husband.⁸² Section five further stipulated that slaves the wife separately owned could not be sold except by joint deed of the husband and wife.⁸³

73. Megan Benson, *Fisher v. Allen: The Southern Origins of the Married Women's Property Act*, 6 J. S. LEGAL HIST. 97, 113 (1998).

74. Brown, *supra* note 62, at 1114.

75. *Id.*

76. *Id.* at 1115.

77. *Id.* at 1116 (quoting J. OF THE SENATE OF MISS. 263 (1839)).

78. *Id.* at 1114-16.

79. Brown, *supra* note 62, at 1116.

80. *Id.*; *but see* Michael B. Dougan, *The Arkansas Married Woman's Property Law*, 46 ARK. HIST. Q. 3, 3 (1987) (crediting Arkansas Territory as first adopter of married woman property act).

81. 1839 Miss. Laws 920.

82. *Id.* at 921.

83. *Id.*

With little doubt, Senator Hadley was aware of an 1837 Mississippi Supreme Court decision, *Fisher v. Allen*.⁸⁴ The decision held that in certain circumstances a married woman had the right to dispose of her own property.⁸⁵ In addition, a wife's property was not subject to the demands of her husband's creditors.⁸⁶ The wife in *Fisher*, was a member of the Chickasaw Indian Tribe.⁸⁷ She married a white man, James Allen.⁸⁸ It was Chickasaw custom that, upon marriage, the wife's property did not vest in the husband.⁸⁹ The property in question was a slave, Toney, whom Elizabeth Allen had decided to deed to one of her daughters, Susan Allen.⁹⁰ The Chickasaw signed two allotment treaties in the 1830s.⁹¹ The first was ratified in 1833 and the second in 1834.⁹² "Under the terms of the [second] treaty, any Chickasaw woman married to a white man held land in her own name with no right of alienation enjoyed by her husband."⁹³

Justices William L. Sharkey and Cotesworth P. Smith wrote the joint opinions for *Fisher*.⁹⁴ Sharkey and Smith realized that Chickasaw women needed to have control over property for quick transactions.⁹⁵ Chickasaw matrilineal custom dictated that the woman was the primary landholder within the Chickasaw Nation and women needed to convey property freely.⁹⁶ The Mississippi justices determined Elizabeth Allen's identity as a Chickasaw through treaty and Indian custom took legal precedence over common law coverture.⁹⁷ Tribal law prevailed because tribes were not subject to Mississippi law when the marriage was formed.⁹⁸ This case was decided toward the end of President Jackson's second term, an especially shameful time in America's long-term abhorrent treatment of Indians.⁹⁹ This was the same time the federal government was designating tribal land

84. *Fisher v. Allen*, 3 Miss. (2 Howard) 611, 614 (Miss. 1837).

85. *Id.* at 614, 616.

86. *Id.*

87. *Id.* at 612.

88. *Id.* at 612-13.

89. *Fisher*, 3 Miss. (2 Howard) at 612.

90. Benson, *supra* note 73, at 99.

91. *Id.* at 103-104.

92. *Id.* at 103-104.

93. *Id.* at 104.

94. *Id.* at 611, 614.

95. See Benson, *supra* note 73, at 611, 614.

96. *Id.* at 103-06.

97. *Id.* at 102, 104.

98. *Fisher*, 3 Miss. (2 Howard) at 613.

99. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 532 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 13-14 (1831); see generally Calvin Martin, *Preface to THE AMERICAN INDIAN AND THE PROBLEM OF HISTORY* viii (Calvin Martin ed., 1987); see also generally *RETHINKING AMERICAN INDIAN HISTORY* (Donald L. Fixico ed., 1997); see also generally ROBERT F. BERKHOFFER, JR., *THE WHITE MAN'S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT* (Vintage Books, 1978).

allotments to land speculators.¹⁰⁰ Were there any personal characteristics or attributes identified in Sharkey or Smith's available biographical data that would suggest such a "remarkable decision" even by contemporary standards in 1837?¹⁰¹

For one thing, Sharkey and Smith were both Whigs. For purposes of analyzing both judges, Sharkey will be discussed now and Smith when discussing another case decided after the passage of the Married Woman's Property Act of 1839.¹⁰² Sharkey was a Whig and a loyal Unionist.¹⁰³ He refused to participate in either state or confederate government during the Civil War. President Johnson appointed him as provisional Governor of Mississippi after the War.¹⁰⁴ Did the fact that the property was a Black slave have any effect on Sharkey's decision? Sharkey was most likely, like many members of the pre-war Southern judiciary, sensitive to the "siege mentality," a white hysteria based on a defensive or overly fearful attitude that gradually took hold over the pre-Civil War South.¹⁰⁵

Sharkey in a different case, ruled against the importation of slaves to Mississippi and for the exportation of free Blacks.¹⁰⁶ Sharkey's opinion did not spring from a racist point of view, in fact it is similar to that of the early abolitionists. Rather it is from a realistic, practical approach meant to protect against civil unrest in antebellum Mississippi.¹⁰⁷ The 1838 decision was *Hinds v. Brazealle*.¹⁰⁸ In *Brazealle*, a man took both a Black slave woman and her son to Ohio to be emancipated, and then returned to Mississippi.¹⁰⁹

Elisha Brazealle, the man who made the trip to Ohio possible for the woman and her son, devised his property to John Munroe Brazealle, the former slave, acknowledging him as his son.¹¹⁰ Elisha's heirs challenged

100. Benson, *supra* note 73, at 102-03.

101. *Id.* at 106.

102. See *infra* notes 272-294 and accompanying text.

103. Michael P. Mills, *Slave Law in Mississippi from 1817-1861: Constitutions, Codes and Cases*, 71 Miss. L.J. 153, 180 (2001).

104. *Id.* at 104.

105. Mills, *supra* note 103, at 175; William James Hull Hoffer, *North v. South: A Legal History of the Caning of Charles Sumner*, 43 RUTGERS L.J. 515, 524 (2013) (explaining that judges and legislators in South Carolina also suffered from siege mentality); see *Siege Mentality*, MERRIAM WEBSTER, <http://www.merriam-webster.com/dictionary/siege%20mentality> (last visited May 6, 2014); LACY K. FORD, *DELIVER US FROM EVIL: THE SLAVERY QUESTION IN THE OLD SOUTH* 294-96 (2009) (explaining the reaction to abolitionism in several southern states).

106. Benson, *supra* note 73, at 103.

107. Mills, *supra* note 103, at 180-83; see also Franklin L. Riley, *A Contribution to the History of the Colonization Movement in Mississippi*, in 9 PUBL'NS OF THE MISS. HISTORICAL SOC'Y 345-48 (1906).

108. *Hinds v. Brazealle*, 3 Miss. (2 Howard) 837, 841-44 (Miss. 1838).

109. *Id.* at 841.

110. *Id.*

the will, contending that John was still a slave.¹¹¹ Sharkey did recognize comity but reasoned that slavery was such a part of the essence, structure, and culture of Mississippi that freedom would have to lose to bondage in this case.¹¹²

The policy of a state is indicated by the general course of legislation on a given subject, and we find that free negroes are deemed offensive, because they are not permitted to emigrate to, or remain in the state. They are allowed few privileges, and subject to heavy penalties for offences. They are required to leave the state within thirty days after notice, and in the meantime give security for good behavior, and those of them who can lawfully remain, must register and carry with them their certificates, or they may be committed to jail. It would also violate a positive law, passed by the legislature, expressly to maintain this settled policy, and to prevent emancipation. No owner can emancipate his slave, but by a deed or will properly attested, or acknowledged in court, and proof to the legislature, that such slave has performed some meritorious act for the benefit of the master, or some distinguished service for the state; and the deed or will can have no validity until ratified by special act of the legislature. It is believed that this law and policy are too essentially important to the interests of our citizens, to permit them to be evaded.¹¹³

B. *New York*

In the early nineteenth century, New York was a common law state with a court system closely modeled after England's.¹¹⁴ Like England, but unlike most American states, New York separated its common law and equity courts.¹¹⁵ Although the common law granted husbands complete control and management over property coming to the marriage through either side, the chancery courts in New York made it possible in some instances for married women to hold a separate estate.¹¹⁶

The most successful mode of circumventing the common law in New York was the marriage settlement.¹¹⁷ If there were special circumstances,

111. *Id.* at 841-42.

112. *Id.* at 842-43.

113. *Brazealle*, 3 Miss. (2 Howard) at 842-43.

114. G. Edward White, *The Chancellor's Ghost*, 74 CHI.-KENT L. REV. 229, 233-34 (1998).

115. *Id.*

116. BASCH, *supra* note 4, at 73.

117. *See generally* *M'Cartee v. Teller*, 2 Paige Ch. 511, 526 (N.Y. Ch. 1831); *see also generally* *McWhorter v. Agnew*, 6 Paige Ch. 111, 115-16 (N.Y. Ch. 1836); *see also generally* *Temple v. Hawley*, 1 Sand. Ch. 153, 154-55 (1844).

such as a large inheritance expected during marriage or a substantial dowry, the couple could enter into a marriage settlement designating what each person's property would consist of after the wedding vows, providing for any contingencies.¹¹⁸ “[A marriage] settlement [could be used to keep] property out of the husband's reach . . . [and] out of the reach of [his] creditors”¹¹⁹ It gave the wife powers over her property that she did not have at common law.¹²⁰ “Powers reserved to the wife ran anywhere from full autonomy over her property to complete dependence on a . . . trustee.”¹²¹

The marriage settlement was an antenuptial contract, however, and the husband-to-be had to approve it.¹²²

If the main objective was to insulate the wife's property from the husband, the active trust—the conveyance of the wife's property to a trustee who actively managed it for her benefit—was the most secure arrangement . . . [A]n antenuptial contract drawn up . . . with a trust presented New York families of wealth and standing with an attractive alternative to the common law arrangement of marital property.¹²³

Such a trust that a father arranged for his daughter, for example, could insulate the daughter's property from the husband-to-be.¹²⁴ In *Methodist Episcopal Church v. Jaques*,¹²⁵ the New York Chancery Court recognized the passive trust.¹²⁶ These trusts created, through nominal trustees, a device that allowed “married women beneficiaries to manage the trust assets actively . . . ,” reserving powers to the married woman.¹²⁷

Mary Alexander, a widow possessed of an estate valued at \$22,000, created a trust for her own use and that of her husband in an antenuptial agreement. Her trust deed conveyed all her estate real and personal to one H. Cruger until her marriage should take place, and after that for such purposes as she and her husband should designate by deed with two witnesses. After her marriage she

118. BASCH, *supra* note 4, at 74.

119. *Id.* at 74-75.

120. *Id.* at 75.

121. *Id.*

122. *Id.*

123. BASCH, *supra* note 4, at 75.

124. *Id.*

125. *Methodist Episcopal Church v. Jaques*, 1 Johns. Ch. 450 (N.Y. Ch. 1815).

126. BASCH, *supra* note 4, at 76.

127. Yvette Joy Liebesman, *No Guarantees: Lessons from the Property Rights Gained and Lost by Married Women in Two American Colonies*, 27 WOMEN'S RTS. L. REP. 181, 198 (2006) (citing *Methodist Episcopal*, 1 Johns. Ch. at 507).

conveyed her property in trust to Robert Jaques, a relative of her husband, stipulating that at her death one-third of the surplus after expenses was to go to the Methodist Episcopal Church, one-third to relatives, and one-third to her husband. The trustees of the church demanded an accounting, claiming that the husband . . . had used the income from the realty for personal expenses and had appropriated her personal property.

[The chancery court ruled] . . . that the first trust she created was fictional in a legal sense. The trust deed, although signed by Cruger and properly witnessed, never left her possession and Cruger never actively managed her property. Her second trust was created after her marriage on the basis of the powers reserved to her in the original trust and antenuptial contract. Chancellor Kent affirmed the validity of the arrangement . . . ruling that no allowances were to be made for the support of the couple out of the rents of the trust because support was the husband's common law duty and neither [of the trusts] . . . stipulated otherwise. More important, he established the principle that the wife enjoyed powers over her separate estate only to the extent that they were spelled out in the deed that created the estate.¹²⁸

In *Bradish v. Gibbs*,¹²⁹ the issue was whether a married woman was able to devise her real property.¹³⁰

In 1814, Helen Gibbs entered into a marriage contract with her fiancé stipulating that any profits and sales from her estate made during her marriage were for her own separate use. She was to have full power during her coverture to dispose of her property . . . by will or by any instrument in writing. Her transactions were to be considered as valid as if she were a feme sole. A separate schedule listed her property, including a house in New York City purchased at the time of her marriage for \$23,500. [The contract said that] [i]f her husband died before her . . . her property was to vest in her absolutely, as if no marriage had taken place.

[[In 1816,] Helen Gibbs Brandish's husband was forced to sue his wife's relatives . . . [He contended that his wife, Helen, as part of her will, had conveyed the house title to him.] . . . The attorney for

128. BASCH, *supra* note 4, at 76-77.

129. *Bradish v. Gibbs*, 3 Johns. Ch. 523 (N.Y. Ch. 1818).

130. *Id.*

her relatives argued that her will, [having been executed during coverture in favor of the husband, was void at law and in equity.] Kent found the will valid and the reservation of testamentary power to the wife quite safe from the husband's coercion because a will was 'revocable at the pleasure of the wife.'¹³¹

"Chancellor Kent held that the creation of a trust, even a trust that functioned as a legal fiction, was not necessary [He upheld] the validity of her antenuptial contract without a trust."¹³² These early decisions in New York Chancery Courts made it possible and simple for a married woman to create a separate estate as long as her husband-to-be agreed to release his common law marital rights over her property.¹³³ Since these early cases in New York were decided in equity courts, the ideology of the judges, while presumably interesting, was not researched. Because of the nature of the court and the fact that more options were available to the chancery judges than the law judges, it would be difficult to examine judicial ideology in the same context.¹³⁴

The battle for a comprehensive married woman's property act in New York earnestly began in the 1830s when New York City Assemblyman Thomas Hertell introduced a resolution for the appointment of a committee to report on married women's property rights in New York.¹³⁵ Several of the social reform orators arguing for women's rights in the 1830s influenced Hertell, and in 1837, he introduced a bill that *Godey's Lady Book*, a journal with wide circulation around the country, endorsed.¹³⁶ "Hertell argued that the common law deprived wives of their inalienable, natural right to property."¹³⁷ Advocating for a rightful solution, "[h]e pointed to French and Louisiana law and Quaker custom."¹³⁸ He stated that "[m]arried women, . . . equally with males and unmarried females, possess the right to *life, liberty, and PROPERTY* and are equally entitled to be protected in all three."¹³⁹ Hertell would eventually become the sponsor of the first married women's property act passed in New York in 1848.¹⁴⁰

131. *Id.*

132. *Id.*

133. *Id.* at 78-79.

134. *But see* White, *supra* note 114, at 233-34 (providing a biography of Kent).

135. BASCH, *supra* note 4, at 113, 115.

136. Rick Geddes et al., *Human Capital Accumulation and the Expansion of Women's Economic Rights*, 55 J.L. & ECON. 839, 843 (2012) (quoting PEGGY A. RABKIN, *FATHERS TO DAUGHTERS: THE LEGAL FOUNDATIONS OF FEMALE EMANCIPATION* 87 (1980)); BASCH, *supra* note 4, at 120.

137. BASCH, *supra* note 4, at 118.

138. Mary Moers Wenig, *The Marital Property Law of Connecticut: Past, Present and Future*, 1990 WIS. L. REV. 807, 817 n.40 (1990) (quoting E. WARBASSE, *THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN, 1800-1861* 107 (unpublished thesis, Harvard Univ. Archives, 1960)).

139. BASCH, *supra* note 4, at 118-19.

140. Geddes, *supra* note 136, at 843.

The New York legislature in 1840 turned its attention to widowhood.¹⁴¹ The widow was viewed as an object of pity, an unsupported woman, and a potential drain on the economy.¹⁴² To empower the widow, the 1840 legislature passed a married women's insurance act that enabled a wife to own life insurance on her husband and to receive its benefits free from the claims of his creditors.¹⁴³ "[T]his statute marked the emergence of life insurance as an important business"¹⁴⁴ In 1845, the New York legislature passed a statute that allowed "a wife to own her own patent [T]his was the only law of its kind in the [country]"¹⁴⁵

The acts of 1840 and 1845 were certainly victories for married women in New York.¹⁴⁶ Some of this positive movement was almost inevitable.¹⁴⁷ The new economic structures fostered by burgeoning industrialization and business required a certain amount of legal change.¹⁴⁸ The insurance business could not have grown and flourished under the old common law terms of marriage.¹⁴⁹ There was still a real recalcitrance in giving married women more rights during this time.¹⁵⁰ The belief was that these rights or powers could "erode the separation of the public arena of work and politics from the private sphere of domesticity and reproduction [The gradual erosion of] the sexual division of labor was a critical ingredient of industrial capitalism."¹⁵¹

Although most legislators were resolutely committed to serving the legal needs of an expanding market economy, they were disturbed by its social consequences. They were concerned about eroding the sexual division of labor. If the wife were liberated from her common law restrictions, she might very well enter the commercial arena as a wage owner or, even worse, an entrepreneur, becoming in a sense her husband's competitor.¹⁵²

141. BASCH, *supra* note 4, at 137; 1840 N.Y. Laws 59.

142. See Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1662-68 (2003).

143. BASCH, *supra* note 4, at 137; 1840 N.Y. Laws 59.

144. BASCH, *supra* note 4, at 137.

145. *Id.*; 1845 N.Y. Laws 11.

146. See BASCH, *supra* note 4, at 137.

147. See *id.*

148. See *id.* at 121.

149. See *id.* at 137.

150. See generally Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 33-34 (2012); Dubler, *supra* note 142, at 1655.

151. BASCH, *supra* note 4, at 144.

152. *Id.* at 141.

The most popular argument advanced in favor of a married women's property act was based on the established equity precedents.¹⁵³ The New York Judiciary Committee to the Assembly insisted that it was satisfied with the general principles established in equity relating to a married woman's separate estate, but suggested that there was considerable confusion in the legal profession about the principles.¹⁵⁴ The committee also drew attention to the fact that the common law ruled and prevailed over most couples' marriages.¹⁵⁵ The committee reported that if the equity principles were put into statute form, the problems for the legal profession and the common people would be solved.¹⁵⁶

The delegates to the 1846 New York Constitutional Convention "voted to insert a married women's clause into the state constitution . . . [but after three days of debate] they rescinded it."¹⁵⁷ The debates of the Constitutional Convention demonstrated the growing desire for reform in the property rights of married women, and, in 1848, a bill was introduced, passed, and signed into law.¹⁵⁸

Section one of the 1848 statute stated that the real and personal property of any woman who was married after the bill became law would continue to own the property as if she were single.¹⁵⁹ The property was not subject to her husband's debts.¹⁶⁰ Section two retroactively applied the same provisions to women who were married before the act.¹⁶¹ Section three allowed a married woman to receive, by gift, grant, or devise, real and personal property free from her husband's disposal and his creditors.¹⁶² Section four recognized the ongoing validity of antenuptial agreements.¹⁶³ This was the first statute in New York that specifically allowed married women the right to possess their own separate property.¹⁶⁴

153. *Id.* at 148.

154. REPORT OF THE COMM. ON THE JUDICIARY, IN RELATION TO DIVORCE AND THE SEPARATE PROPERTY OF MARRIED WOMEN, No. 219, 69th Sess., at 1-3 (N.Y. 1846).

155. *See id.* at 2-3.

156. *Id.* at 1-3.

157. BASCH, *supra* note 4, at 150.

158. *Id.* at 136, 156. Hertell sponsored the act and associated with the Seneca Falls Convention, where a group of feminists convened in Seneca Falls, New York, signaling the birth of the women's movement that took place shortly after the passage of the 1848 act. *See supra* notes 19-22 and accompanying text.

159. 1848 N.Y. Laws 307.

160. *Id.*

161. *Id.* at 308.

162. *Id.*

163. *Id.*

164. Joseph A. Ranney, *Anglicans, Merchants, and Feminists: A Comparative Study of the Evolution of Married Women's Rights in Virginia, New York, and Wisconsin*, 6 WM. & MARY J. WOMEN & L. 493, 506 (2000).

C. Oregon

In the early nineteenth century, Oregon was part of an unsettled frontier.¹⁶⁵ Both the United States and Great Britain asserted claims to the area.¹⁶⁶ The organic laws of the Northwest Ordinance of 1787, which were very similar to the common law of England,¹⁶⁷ were the basis of the laws before 1843. In 1843, a provisional government termed Oregon Country was established.¹⁶⁸ Oregon Country adopted the organic laws already in place and the Laws of Iowa leaving anything unsettled to the Laws of England.¹⁶⁹ Iowa law stated that women could not enter into contracts, own personal property, or face suit.¹⁷⁰

The act establishing the Oregon Territory was passed on August 14, 1848.¹⁷¹ The Donation Land Claim Act, which went into effect in 1850, was intended to promote homestead settlements in the Pacific Northwest.¹⁷² It was the only federal land grant act permitting married women to obtain title to federal lands in their own right.¹⁷³ The Donation Land Claim Act provided that people settling in Oregon by December 1, 1850 could claim:

the quantity of one half section, or three hundred and twenty acres of land, if a single man, and if a married man, or if he shall become married within one year from the first day of December, eighteen hundred and fifty, the quantity of one section, or six hundred and forty acres, one half to himself and the other half to his wife, to be held by her in her own right¹⁷⁴

Soon thereafter, the United States House of Representatives adopted an amendment to the Donation Land Claim Act.¹⁷⁵ New York Whig Congressman William Sackett moved to have the following words inserted:

165. See William F. Cloran, *The Ownership of Water in Oregon: Public Property vs. Private Commodity*, 47 WILLAMETTE L. REV. 627, 642 (2011).

166. *Id.*

167. An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, (July 13, 1787), reprinted in 1 LAWS OF THE UNITED STATES OF AMERICA FROM THE 4TH OF MARCH, 1789, TO THE 4TH OF MARCH 1815 (1989); Cloran, *supra* note 165, at 642.

168. Cloran, *supra* note 165, at 642.

169. Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1391 (2009); Cloran, *supra* note 165, at 642.

170. Abrams, *supra* note 169, at 1391.

171. An Act to Establish the Territorial Government of Oregon, ch. 177, 9 Stat. 323 (1848).

172. An Act to Create the Office of Surveyor-General of the Public Lands in Oregon, and to Provide for the Survey, and to Make Donations to Settlers of the Said Public Lands, ch. 76, 9 Stat. 496 (1850) (hereinafter Surveyor General); see Robert J. Miller, *American Indians, the Doctrine of Discovery, and Manifest Destiny*, 11 WYO. L. REV. 329, 347-48 (2011).

173. Scott, *supra* note 24, at 433.

174. Surveyor General, *supra* note 172, at 497.

175. CONG. GLOBE, 31ST CONG., 1ST SESS. 1094 (1850).

“And no interest in the part so held by the wife in her own right, shall be liable for, or subject to sale upon the debts of her husband.”¹⁷⁶

In 1852, the Oregon territorial legislature adopted an act that exempted married women’s donation claims from their husbands’ debts.¹⁷⁷ The act stated that a wife’s donation claim was “secured to the sole and separate use and control of the wife” and that all legal and equitable interests in such claims “shall in no [way] be made subject to or liable for the debts or liabilities of her husband, whether contracted before or after the passage of this act.”¹⁷⁸ With the exception of donation land, no other real estate was covered and the common law rule that men gain title to their wives’ personal property upon marriage was not affected.¹⁷⁹

The property benefits for women in the Oregon Territory through the rest of the 1850s until 1857 were a mixed bag.¹⁸⁰ Women gained a victory in 1853 by being given the right to make wills to dispose of their real property.¹⁸¹ The territorial legislature, however, adopted an act the next year that repealed all but a few statutes that had been passed before 1854.¹⁸² The act had the effect of repealing the Exemption Act of 1852.¹⁸³ Once again a wife’s claim could be subject to her husband’s debts.¹⁸⁴

Although the Donation Land Claim Act was not repealed, the property was still subject to the management and control of husbands under the act.¹⁸⁵ Married women received title to half a section, or 320 acres, but the practical impact on the common law was not always that significant.¹⁸⁶ For example, if husbands died before the requisite four-year occupational requirement, the Donation Land Claim Act would deprive a widowed woman of her claim.¹⁸⁷

Delegates from the Oregon Territory met in August 1857 for a constitutional convention.¹⁸⁸ On September 16, 1857, a debate on the provision of a married women’s property section took place.¹⁸⁹ Delegates from both sides of the issue wrangled for or against a woman’s right to own

176. *Id.*; BENJAMIN PERLEY POORE, THE POLITICAL REGISTER AND CONGRESSIONAL DIRECTORY 608 (1878).

177. Chused, *supra* note 7, at 9 & n.15.

178. *Id.*

179. *Id.*

180. *See id.* at 9-13.

181. *Id.* at 10; 1853 Or. Laws 788 (1853).

182. Chused, *supra* note 7, at 10.

183. *Id.*

184. *See id.* at 10-11.

185. *Id.* at 10.

186. Surveyor General, *supra* note 172, at 497; *see* Chused, *supra* note 7, at 10-16.

187. Surveyor General, *supra* note 172, at 497; Chused, *supra* note 7, at 10-11.

188. Chused, *supra* note 7, at 16.

189. *Id.*

her own property.¹⁹⁰ Delegate George Williams¹⁹¹ supported the motion to strike the Donation Land Claim Act out of the constitution, stating that “[i]n this age of woman’s rights and insane theories, our legislation should be such as to unite the family circle, and make husband and wife what they should be—bone of one bone, and flesh of one flesh.”¹⁹² Williams went on to contend that the “Donation Law” had been the cause of many divorces.¹⁹³

Delegate David Logan countered that the law “furnished the wife protection for her property against the improvidence or spendthrift habits of her husband.”¹⁹⁴ He continued that if the husband was not prudent and thrifty the law would “have the power to preserve her property to support herself and educate her children.”¹⁹⁵ Logan also offered that “[h]e had never heard of any divorces growing out of [the Donation Law].”¹⁹⁶

Delegate John Kelsay said that he had heard of such divorces and if the Act is not stricken the law “would make the husband simply a boarder at his wife’s establishment.”¹⁹⁷ In response, Delegate Frederick Waymire stated he was against striking out the law.¹⁹⁸ Both his mother and his wife were women and if they should “legislate for any class it should be the women of this country[] [because] [t]hey worked harder than anybody else in it.”¹⁹⁹ He went on to say that “[i]f men married for money they ought not to have control of it. Every day they lived together they lived in adultery, for he married the money and not the girl.”²⁰⁰

Delegate Paine Page Prim shot back that if the day of payment came only to find that the property belonged to the wife, “the honest creditor” would be the one who was cheated.²⁰¹ The debate ended with Delegate Delazon Smith asserting that “[i]t was not separate and distinct property which caused divorces[, but rather] the want of affection—the want of marriage of the heart.”²⁰² Smith went on to state that “[h]e was for

190. *Id.* at 16-17.

191. George Williams was a democrat who, in 1865, joined the Republican Party and was appointed to the United States Senate later in the same year. In 1873, he became the United States Attorney General under President Grant. He authored the 14th Amendment to the U.S. Constitution. *Biographical Sketch of George Williams*, OREGON STATE ARCHIVES, <http://arcweb.sos.state.or.us/pages/exhibits/1857/during/bios/williams.htm> (last visited Jan. 29, 2014).

192. THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857 368 (Charles Henry Carey ed., 1926).

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 368-69.

197. Carey, *supra* note 192, at 369.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. Carey, *supra* note 192, at 369.

woman's rights, and was not afraid of her having too many. She had been too long denied her just rights [And he] would protect her property from dissipated or mercenary wretches."²⁰³

The provision remained in the draft with a vote of twenty-two yeas to strike out the law opposed to twenty-seven nays.²⁰⁴ Delegate Williams, the most outspoken delegate in favor of striking the law, wasted no time in moving to amend the provision "so that only the wife's property obtained by gift, devise and inheritance should be exempt from the debts and contracts of the husband. The [remaining property] he thought was too indefinite and uncertain."²⁰⁵ Thirty-one yeas led to the adoption of William's motion.²⁰⁶ The draft provision became part of the Constitution when Oregon became a state in 1859.²⁰⁷ The provision did away with coverture, stating:

The property and pecuniary rights of every married woman, at the time of marriage, or afterward acquired by gift, devise, or inheritance, shall not be subject to the debts or contracts of the husband; and laws shall be passed providing for the registration of the wife's separate property.²⁰⁸

IV. RESPONSES TO PASSAGE

How did the state Supreme Court judges from Mississippi, New York, and Oregon rule on nineteenth century married women's property acts? There has been considerable discussion in scholarly legal research over the last several years as to what judges consider in arriving at their decisions.²⁰⁹

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. Miller, *supra* note 172, at 348.

208. OR. CONST. of 1857, art. XV, § 5.

209. See generally Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUSTICE SYS. J. 219, 220 (1999); Donald R. Songer & Stefanie A. Lindquist, *Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1049, 1049 (1996); Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1275 (2005); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 33 (2005); Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 744-46 (2005); Jack Knight, *Are Empiricists Asking the Right Questions About Judicial Decision Making?*, 58 DUKE L.J. 1531, 1540 (2009); Frank B. Cross, *Decision-making in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1459-60 (2003); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1377 (1998); Michael A. Perino, *Strategic Decision Making in Federal District Courts: Evidence from Securities Fraud Actions* 1-2 (St. John's Univ. Sch. of Law, Legal Studies Research Paper Series, No. 05-013, 2005), available at <http://ssrn.com/abstract=727905> (analyzing two hundred and sixty-eight opinions from federal district courts considering motions to dismiss after 1996). *But cf.* Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1335 (1998) (arguing that judicial decision-making in the D.C. Circuit is facilitated by congeniality

There are several models and methods that have been discussed and examined.²¹⁰ Many studies have concentrated on the attitudinal and strategic models.²¹¹ This paper lent itself most easily to the personal attributes model.²¹²

The strategic model is an attractive model, but not enough information is available on the various judges in this nineteenth century study to make it feasible.²¹³ One of the tenets of the strategic model is the realization that judges do not make decisions in a vacuum based solely on their own ideological beliefs and values.²¹⁴ They act strategically, taking into consideration the preferences of other actors, in particular other judges, and institutional settings.²¹⁵ While there was voting information available on the judges writing the main court opinions and some of the concurrences, the lack of information available regarding all the other various court judges made the use of the strategic model in this study impractical.

The attitudinal model is constructed on a belief that judges place more emphasis in their determination of cases on political and policy considerations compared to legal considerations.²¹⁶ The attitudinal model places judges on an ideological spectrum to determine how liberal each judge is.²¹⁷ Invariably political scientists use ideological proxies, usually the party membership of the appointing executive or the judge him or herself at the time of nomination.²¹⁸ An appointee of a Whig governor, for

among judges and not principally by ideology); Joseph A. Custer, *Ideological Voting Applied to the School Desegregation Cases in the Federal Courts of Appeals from the 1960's and 1970's* (St. Louis Univ. Sch. of Law, Legal Studies Research Paper Series, Paper No. 2012-25, 2012) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2142172.

210. See generally Posner, *supra* note 209; Cross, *supra* note 209.

211. Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 302-04 (2004); Corey Rayburn Yung, *Beyond Ideology: An Empirical Study of Partisanship and Independence in the Federal Courts*, 80 GEO. WASH. L. REV. 505, 507-08 (2012); Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1640-42 (1998).

212. Custer, *supra* note 209, at 45 (suggesting "the attitudinal and personal attributes models" are best for "historical empirical research").

213. *Id.*

214. John Christopher Anderson, *The Mysterious Lockstep Doctrine and the Future of Judicial Federalism in Illinois*, 44 LOY. U. CHI. L.J. 965, 980 (2013).

215. Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1751-59 (1997); Anderson, *supra* note 214, at 980.

216. Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 315-16 (2002); Bryan D. Lammon, *What We Talk About When We Talk About Ideology: Judicial Politics Scholarship and Naive Legal Realism*, 83 ST. JOHN'S L. REV. 231, 244-45 (2009); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1636 (1995).

217. Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN. ST. L. REV. 923, 965 (2011).

218. Custer, *supra* note 209, at 17-19; Sunstein et al., *supra* note 211, at 303; Robert Steinbuch, *An Empirical Analysis of the Influence of Reversal Rates in the Eighth Circuit for 2008*, 43 LOY. L.A. L.

example, would be more likely to be in favor of women's property rights in the nineteenth century than an appointee of a Democratic governor.²¹⁹ The same applies to the political party of the judge himself or herself.²²⁰ Every thing being equal, a Whig would rule more liberally than his Democratic counterpart.²²¹

Ideologically contested cases are the best to analyze with the attitudinal model.²²² Some of these current day subjects could include federalism, the rights of criminal defendants, racial discrimination, gender discrimination, women's rights, property rights, and capital punishment.²²³ The judicial interpretation of married women's property acts passed in the nineteenth century would clearly fall under the auspices of ideologically contested cases.

The use of the attitudinal model in this study is limited, however, due to the fact that the state Supreme Court judges in Mississippi and New York during the period studied were elected rather than appointed.²²⁴ Therefore, the proxy of the party membership of the appointing executive will not prove useful for those two states. Oregon, in comparison, went back and forth between electing and appointing their Supreme Court judges during the period studied. Only one of the three Oregon judges analyzed in the study, Ruben Boise, was appointed.²²⁵

Another proxy that political scientists use for determining a judge's ideology is to look at the judge's own party membership.²²⁶ For this paper, party identification was available for the ten judges who wrote the majority decisions in the paper.²²⁷ This number is so small that the results will, out

REV. 51, 51-52 (2009); Joshua B. Fischman & David S. Law, *What is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 166-67 (2009).

219. See *infra* notes 279-284 and accompanying text; see Elizabeth R Varon, *Tippecanoe and the Ladies, Too: White Woman and Party Politics in Antebellum Virginia*, 82 J. AM. HIST. 494, 496-502 (1995).

220. See Fischman, *supra* note 218, at 166-67.

221. See Varon, *supra* note 219, at 496-502.

222. See Sunstein et al., *supra* note 211, at 304-07.

223. *Id.* at 304.

224. *Selection of Judges*, USLEGAL, <http://courts.uslegal.com/selection-of-judges/> (last visited Jan. 30, 2014); Barbara F. Berenson, *The People's Court: Pursuing Judicial Independence in America by Jed Handelsman Shugerman* (Harvard University Press, 2012), 400 Pages, 94 MASS. L. REV. 147, 148 (2013) (book review).

225. See *infra* note 420 and accompanying text; *Reuben P. Boise Biography*, STATE OF OREGON LAW LIBRARY, http://www.oregon.gov/SOLL/Pages/ojd_historyjustice_biographies/r_p_boise_bio.aspx (last visited Jan. 30, 2014); *Erasmus D. Shattuck Biography*, STATE OF OREGON LAW LIBRARY, http://www.oregon.gov/SOLL/Pages/ojd_historyjustice_biographies/e_d_shattuck_bio.aspx (last visited Jan. 30, 2014); *Benjamin F. Bonham Biography*, STATE OF OREGON LAW LIBRARY, http://www.oregon.gov/SOLL/Pages/ojd_historyjustice_biographies/b_f_bonham_bio.aspx (last visited Jan. 30, 2014).

226. Fischman, *supra* note 218, at 166-70.

227. See *infra* Table 1.

of necessity, be anecdotal, but there still may be some insights that support, at least anecdotally, some professed ideological assessments.

Some scholars view the attitudinal model to be most valuable as a predictor of what judges will do in the future, rather than as a model used to test and evaluate why judges behaved or ruled the way they did.²²⁸ The model is used in this study with the proxy being the political party membership of the judge.²²⁹

The personal attributes model looks at attributes that exist independent of the judge's decision. No circularity is involved.²³⁰ The personal attributes model is sometimes referred to as the social background theory.²³¹ "Regardless of the label, these studies hypothesize that judicial characteristics influence judicial decisions."²³² The attributes are those that a judge brings to his or her position.²³³ Some of the attributes, or more likely the experiences associated with them, can later appear to play a role in a judge's policy preferences.²³⁴ Scholars who study this model look toward traits like political party, prior employment, religion, region, and education.²³⁵ These attributes can be measured reliably.²³⁶ Either the judge has the attribute or not. In one recent study, the three attributes studied were where the judge went to law school (whether it was an Ivy League Law School or not), the judge's religion, and the judge's previous work experience (including whether the judge had been a prosecutor).²³⁷

In this paper, there were not that many judges that could be studied due to the dearth of information available on many of them.²³⁸ There was significantly more biographical information available for researching the ideologies of federal judges from the 1960s and the early 1970s.²³⁹ While it was not possible to uncover information on all the various judges sitting on

228. Fischman, *supra* note 218, at 166-70; Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 592 (2003); Custer, *supra* note 209, at 6.

229. See *infra* Part V.

230. Tracey E. George, *From Judge to Justice: Social Background Theory and the Supreme Court*, 86 N.C. L. REV. 1333, 1336 n.12 (2008).

231. *Id.*

232. *Id.*

233. *Id.*

234. C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economic Decisions, 1946-1978*, 75 AM. POL. SCI. REV. 355, 363-366 (1981).

235. *Id.* at 363.

236. See *id.*

237. Custer, *supra* note 209, at 19-33.

238. Author was not successful in finding information on many of the judges who were not writing the majority opinions.

239. *Biographical Directory of Judges, 1789-Present*, FED. JUDICIAL CTR., www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.aspx (last visited Aug. 13, 2013).

the three states' high courts in the 1800s, fortunately there was information available on the judges writing the majority opinions.²⁴⁰ The one personal attribute that could be ascertained on all ten of the nineteenth century state judges writing the majority opinions was the judges' political party membership.²⁴¹ This also happens to be the attribute that allows some additional discussion of the attitudinal model.²⁴²

Information was also available on each of the ten judges' prior work experience, including whether or not the judges had been prosecutors.²⁴³ All the judges had read the law as opposed to graduating from a law school.²⁴⁴ The regions in which the ten judges grew up were also available.²⁴⁵ Some of the judges' religious affiliations were available.²⁴⁶ All of these traits or attributes will be reviewed more as we discuss the associated cases that these judges decided.²⁴⁷ In the Judicial Ideology section, Section V, below, there will be a summary of the attributes, in addition to what each attribute is professed to suggest in regard to a judge's ideology.²⁴⁸ Table One helps to illustrate and compare the findings.²⁴⁹

A. Mississippi

In *Ratcliffe v. Dougherty*,²⁵⁰ the Mississippi Supreme Court interpreted the Act of 1839.²⁵¹ The issue was whether a deed of a gift made by a husband directly to his wife after the passage of the Act of 1839 was

240. See *infra* Part V.

241. See *infra* Part V.

242. See *supra* notes 229-241 and accompanying text.

243. See *infra* Part V.

244. MISSISSIPPI DEPARTMENT OF ARCHIVES AND HISTORY, MISSISSIPPI 1022 (Dunbar Rowland ed., 1907); *Reuben P. Boise Biography*, *supra* note 225; Veronica Benigno, *Robert Earl*, NY COURTS, <http://www.nycourts.gov/history/legal-history-new-york/luminaries-court-appeals/earl-robert.html> (last visited Jan. 30, 2014); Brian Quinn, *Charles Andrews*, NY COURTS, <http://www.nycourts.gov/history/legal-history-new-york/luminaries-court-appeals/andrews-charles.html> (last visited Jan. 30, 2014); Frances Murray, *Samuel Lee Selden*, NY COURTS, <http://www.nycourts.gov/history/legal-history-new-york/luminaries-court-appeals/selden-samuel.html> (last visited Jan. 30, 2014); DUNBAR ROWLAND, COURTS, JUDGES, AND LAWYERS OF MISSISSIPPI 1798-1935 87 (1935); *Benjamin F. Bonham Biography*, *supra* note 225; Thomas M. Kernan, *George Franklin Comstock*, NEW YORK STATE COURTS, <http://www.courts.state.ny.us/history/legal-history-new-york/luminaries-court-appeals/comstock-george.html> (last visited Aug. 9, 2013); *Erasmus D. Shattuck Biography*, *supra* note 225; James Daniel Lynch, *The Bench and Bar of Mississippi*, MISS. GENEALOGY TRAILS, <http://genealogytrails.com/miss/benchandbar2.html#COTESWORTH> (last visited May 2, 2014).

245. See *infra* Part V.

246. See *infra* Part V.

247. See *infra* Part IV.A-C.

248. See *infra* Part V.

249. See *infra* Table 1.

250. *Ratcliffe v. Dougherty*, 24 Miss. 181 (Miss. 1852).

251. 1839 Miss. Laws 920.

valid.²⁵² The court ruled that by common law rule, “a gift by the husband directly to the wife, without the intervention of a third party, whether by deed or parol, was void, and could not be enforced.”²⁵³ The court did, however, recognize the Act of 1839; it just did not find that it fit the facts of the case.²⁵⁴ “It was passed by the legislature for the purpose and with the intent of giving to married women certain rights, which, by the strict rules of the common law, they did not possess.”²⁵⁵

The court held that the deed of gift could not be enforced at law, but as long as the nature and circumstances of the gift were such that there was no reason to suspect fraud, it was valid and could be enforced in equity.²⁵⁶ The holding in *Ratcliffe* follows logically from the language of the statute.²⁵⁷ The women's law stated that a married woman could keep a gift of property as her own separate property “[p]rovided, the same does not come from her husband after coverture.”²⁵⁸ Justice William Yerger, who wrote the opinion for *Ratcliffe*, like William Sharkey discussed above,²⁵⁹ was a well-respected judge known for his adherence to statutory law.²⁶⁰ Also, like Sharkey, Judge Yerger was an old-line Whig with decided Union leanings.²⁶¹

Pre-Civil War supporters of women rights in America, from the late 1830s to the early 1850s, tended to be Whigs.²⁶² Beginning with the 1840 presidential campaign, the Whig Party was the first to “systematically include women in its public [rhetoric and] rituals.”²⁶³ When Whig luminary, Daniel Webster, spoke at the Whig National Party Convention in October 1840, he talked about the “‘vast influence’ of women on the well-being of [American] society.”²⁶⁴ Webster and James Barbour, a popular Whig spokesmen and former Governor from Virginia, and well-known lawyer, James Lyons, articulated a new theory on women's civic role at the convention dubbed “Whig womanhood.”²⁶⁵ Whig womanhood in “its equation of female patriotism with partisanship and its assumption that

252. *Ratcliffe*, 24 Miss. at 182.

253. *Id.*

254. *Id.* at 184-85.

255. *Id.* at 184.

256. *Id.* at 185.

257. 1839 Miss. Laws 920.

258. *Id.* (emphasis in original).

259. See *supra* notes 94-95, 101-112 and accompanying text.

260. See *The Southern States of America, Chap. IV, Mississippi a Part of the Nation, 1865-1909*, ELEC. SCOTLAND, <http://www.electricscotland.com/history/america/south/south38.htm> (last visited Aug. 8, 2013); *Ratcliffe*, 24 Miss. at 184-85.

261. *Southern States*, *supra* note 260.

262. CONCISE PRINCETON ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY 600-602 (Michael Kazin et al. eds., 2011).

263. Varon, *supra* note 219, at 498.

264. *Id.* at 501-02.

265. *Id.*

women had the duty to bring their moral beneficence into the public sphere” urged women to no longer avoid the contentious political arena, but rather bring their ““shield of purity””²⁶⁶ to protect men and provide fairness, harmony, and self-control to the public arena.²⁶⁷

After the passage of the Act of 1839, subsequent legislatures broadened the scope of the women’s law in Mississippi.²⁶⁸ The Mississippi legislature in 1846 allowed married women to contract freely to own and manage slaves.²⁶⁹ An 1857 bill was passed allowing married women in Mississippi to enter into contracts for family supplies and necessities, the education of her children, and for work or labor to be done on her property.²⁷⁰ Liability was also limited to the woman’s separate estate.²⁷¹

In *Lee v. Bennett*,²⁷² the Mississippi Supreme Court construed both the acts of 1839 and 1846.²⁷³ The main issue centered on whether a married woman had the capacity, “with the consent of her husband, to make a will of her separate personal estate[.]”²⁷⁴ The court stated that the acts of 1839 and 1846 “were passed avowedly for the better preservation and protection of the rights of married women. They enlarge their capacity to acquire and hold property, real and personal, and are to be regarded strictly in the character of enabling statutes.”²⁷⁵ The court went on to say that it would “defeat the legislative intention, to give them such a construction as would abridge, instead of enlarg[e] the rights of married women.”²⁷⁶

Yet the court held that the acts of 1839 and 1846 did not affect the ability of married women to make wills.²⁷⁷ The court stated that under the Mississippi Statute of Wills,²⁷⁸ the general rule was that married women were incapable of making wills.²⁷⁹ An exception did exist which allowed a married woman, with the consent of her husband, to make a will of personal property.²⁸⁰ The court in *Lee* refused, however, to allow a married woman to make a will to dispose of her real property.²⁸¹ The court reasoned that under interstate succession, the wife’s real property would not devolve by

266. *Id.* at 502-03.

267. *Id.*

268. *See* 1846 Miss. Laws 152; 1857 Miss. Laws 336.

269. 1846 Miss. Laws 152.

270. 1857 Miss. Laws 336.

271. *Id.*

272. *Lee v. Bennett*, 31 Miss. 119 (Miss. 1856).

273. *Id.* at 124-25.

274. *Id.*

275. *Id.* at 125.

276. *Id.*

277. *Lee*, 31 Miss. at 124-27.

278. 1857 Miss. Laws 432.

279. *Lee*, 31 Miss. at 124-27.

280. *Id.* at 126-227; *West v. West’s Executors*, 24 Va. (3 Rand.) 373, 375 (Va. 1825).

281. *Lee*, 31 Miss. at 127-28.

law upon the husband.²⁸² The court's concern was that "if the husband, by his assent, could give legal affect to a devise of her real estate by the wife, he would be under the strongest possible temptation to control her will, so as to secure the property for himself to the prejudice of the heir."²⁸³

Although the court in *Lee* did not expand the rights of married women to devise their own separate real estate, it is clear that this right was denied in order to protect the separate estates of married women.²⁸⁴ The *Lee* opinion was written by Cotesworth P. Smith, mentioned above,²⁸⁵ who, along with William Sharkey, wrote one of the two *Fisher* opinions supporting the property rights of a wife in the Choctaw Tribe.²⁸⁶ Cotesworth Smith was a Whig,²⁸⁷ and his sensitivity to the separate rights of women in both the *Fisher* and *Lee* cases seem apparent.²⁸⁸ At a resolution of the Mississippi Bar, presented by the Honorable T.J. Wharton on February 23, 1863, Wharton described Smith as "[l]earned, conscientious, fearless and upright"²⁸⁹

Smith was fearless and upright when he was part of a two-to-one decision in *State v. Johnson*,²⁹⁰ in which he wrote the case opinion, joined by Yerger's concurrence, stating that under the Mississippi Constitution and laws of the state, a bondholder could sue the state and recover the amount of principal and interest of the bond.²⁹¹ Both of these Whig judges knew that this decision could be the start of their political demise in taking on the Democratic Party of Mississippi, which controlled the state government.²⁹²

B. New York

The New York legislature progressively altered the "one flesh" presumption of the common law with a series of statutes between 1848 and 1884.²⁹³ The 1848 statute gave married women in New York the right to own real and personal property, but it did not give them the right to contract.²⁹⁴ Married women in New York, therefore, owned property that

282. *Id.*

283. *Id.* at 126-27.

284. *See id.*

285. *See supra* note 94 and accompanying text.

286. *Fisher*, 3 Miss. at 615-16.

287. ROWLAND, *supra* note 244, at 92.

288. *See Fisher*, 3 Miss. at 615-16; *Lee*, 31 Miss. at 126-127.

289. ROWLAND, *supra* note 244, at 93.

290. *State v. Johnson*, 25 Miss. 625 (Miss. 1853).

291. *Id.* at 756.

292. Yerger would lose in his next judicial election. *See ROWLAND, supra* note 244, at 93-94.

293. Judith S. Kaye, *Women in Law: The Law Can Change People*, 66 N.Y.U. L. REV. 1929, 1932 n.13 (1991).

294. 1848 N.Y. Laws 307-08.

they could not sell or invest.²⁹⁵ The New York legislature passed a statute in 1849 that amended the separate property section and allowed wives to convey and devise real and personal property as if they were single.²⁹⁶ The 1849 statute also enabled married women who were beneficiaries of a trust to petition a judge of the Supreme Court for personal control of her property.²⁹⁷

The New York legislature passed a statute in 1850 that protected the deposits of married women in savings banks.²⁹⁸ A married female was now allowed to withdraw her deposits.²⁹⁹ The act was actually “for the protection of savings banks . . . receiving deposits from married women,”³⁰⁰ but it had the effect of giving a married woman control over her own savings.³⁰¹ The legislature in 1851 allowed married women who owned stock the option to vote for corporate officers in person or by proxy.³⁰² A father could now bequeath stock to his daughter and remain confident that she would have voting rights.³⁰³ This act made all stockholders equal regardless of sex or marital status.³⁰⁴

The New York Earnings Act,³⁰⁵ a legislative response in 1860 to feminist pressures “allowed a woman to hold property, collect rents, bargain, sell, and transfer her separate property, and sue or be sued.”³⁰⁶ The act included, for the first time, female wage earners and businesswomen.³⁰⁷ Section one restated the provision of the 1848 act that allowed married women the right to hold their own separate property, but expanded it to include “that which she acquire[d] by her trade, business, labor or services, carried on or performed on her sole separate account”³⁰⁸ Section two allowed a woman to keep the earnings of her business or labor as her sole and separate property, and in addition, allowed her to invest it in her own name.³⁰⁹ Section three granted a married woman the power to

295. *Id.* at 307.

296. 1849 N.Y. Laws 528.

297. *Id.*

298. 1850 N.Y. Laws 142.

299. *Id.*

300. *Id.*

301. *See id.*

302. 1851 N.Y. Laws 616.

303. *See id.*

304. *See id.*

305. 1860 N.Y. Laws 157.

306. Kaye, *supra* note 293, at 1932 n.13. For a complete discussion of the women’s rights movement relating to the Earnings Act of 1860, *see* Basch, *supra* note 4, at 162-99.

307. *See* 1860 N.Y. Laws 157.

308. *Id.*

309. *Id.*

convey or transfer real property held as separate property, but only with the consent of her husband.³¹⁰

Sections four, five and six spelled out a procedure whereby a married woman wishing to convey her separate real estate, but unable to get her husband's consent, could get a court order granting the conveyance.³¹¹ Section eight provided that any contract made by a married woman, relating to her own separate property, would not be binding on her husband or his property.³¹² Section nine declared that a married woman could be "the joint guardian of her children . . ."³¹³ Unfortunately, this opportunity for joint guardianship was quickly set aside by the New York legislature with an 1862 amendment to the Earnings Act returning legal guardianship solely to the father.³¹⁴

The New York Courts criticized and strictly interpreted the statutes passed between 1848 and 1884. For example, in the cases of *Yale v. Dederer (Yale I)*,³¹⁵ and *Yale v. Dederer (Yale II)*,³¹⁶ the husband offered a promissory note to the plaintiff in payment for certain cows he wished to purchase.³¹⁷ The plaintiff required the husband to have his wife also sign because of the husband's less than stellar credit history.³¹⁸ At the time of the note signing Mrs. Dederer stated that if her husband could not fulfill the contract she would.³¹⁹ This sentiment was not specifically documented on the contract.³²⁰ The husband became insolvent and the question became whether the wife's estate could be charged to satisfy the claim.³²¹

There was contention in the trial court that there was not sufficient evidence to establish that the purchase of the cows was in any way a benefit to the wife.³²² The case appeared before the New York Court of Appeals twice, once in 1858 and again in 1860.³²³ In 1858, the Court of Appeals praised the common law and denied the woman the power to contract.³²⁴ The Court held that the wisdom of the common law was paramount in

310. *Id.*

311. *Id.* at 158.

312. 1860 N.Y. Laws 159.

313. *Id.*

314. 1862 N.Y. Laws 343-44.

315. *Yale v. Dederer (Yale I)*, 18 N.Y. 265 (N.Y. 1858).

316. *Yale v. Dederer (Yale II)*, 22 N.Y. 450 (N.Y. 1860).

317. *Yale I*, 18 N.Y. at 265; *Yale II*, 22 N.Y. at 450.

318. *Yale II*, 22 N.Y. at 450.

319. *Id.*

320. *Id.* at 451-52.

321. *Yale I*, 18 N.Y. at 266-67, 281-84.

322. *Id.* at 265-66.

323. *Id.* at 265; *Yale II*, 22 N.Y. at 450.

324. *Yale I*, 18 N.Y. at 270-72.

protecting women and that the woman should not be granted legal capacity to contract.³²⁵

The Court of Appeals in 1860 also held against Mrs. Dederer's right to contract.³²⁶ The practical result of these rulings was that the Dederers were not financially bound, but the precedential result was a ruling against the contractual property rights of women.³²⁷ The Court ruled that the wife signed the note, but only in her capacity as a surety for her husband.³²⁸ The Court found that none of the consideration went to enhance her own estate or her own benefit.³²⁹ The Court held that for Mrs. Dederer to be financially responsible, she would have had to clearly express her intentions in writing on the note.³³⁰

George F. Comstock wrote the lead opinion of the *Yale I* decision.³³¹ Before becoming a judge, Comstock had been appointed the State Reporter.³³² He also practiced law, and in 1852 he was named the Solicitor of the United States Treasury under President Millard Fillmore.³³³ Comstock became the Chief Judge of the New York Court of Appeals in 1860.³³⁴ After his presidency, the conservative Whig Fillmore joined the American Party, as did Comstock.³³⁵ The American Party had largely consisted of the dying conservative wing of the Whig Party.³³⁶ Comstock ran on the American Party ticket for the position of Chief Judge of the New York Court of Appeals, but by the time his term began, on January 1, 1860, the American Party had disbanded, so he became a Democrat.³³⁷

Comstock, a member of the Episcopal Church, was a conservative who, like Fillmore, "was sharply critical of President Lincoln and the abolitionist views espoused by the [more progressive] Republicans."³³⁸ Samuel Selden, a lifelong Democrat, was elected to the position of Chief Judge of the New York Court of Appeals in 1862 and he wrote the *Yale II* majority

325. *Id.*

326. *Yale II*, 22 N.Y. at 460-61.

327. *Id.*

328. *Id.* at 450, 460-61.

329. *Yale I*, 18 N.Y. at 270.

330. *Yale II*, 22 N.Y. at 460-61.

331. *Yale I*, 18 N.Y. at 267.

332. *Kernan*, *supra* note 244.

333. *Id.*

334. *Id.*

335. Frank Freidel & Hugh Sidey, *Millard Fillmore*, WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/millardfillmore> (last visited Aug. 9, 2013); *Kernan*, *supra* note 244.

336. Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1136-37 (2010).

337. *Kernan*, *supra* note 244; Shugerman, *supra* note 336, at 1136-37.

338. *Kernan*, *supra* note 244; Freidel & Sidey, *supra* note 335; Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1797 (2006).

opinion.³³⁹ Selden had previously worked as Clerk of Chancery and practiced law.³⁴⁰ He “approached the *Dred Scott*³⁴¹ decision from [a] . . . constitutional law [perspective] believing that any State had the right to secede from the Union.”³⁴² Two years later, when the issue came before the New York Court of Appeals in *People v. Lemmon*,³⁴³ Judge Selden dissented from the Court’s decision that sustained the slaves’ release. He reiterated his support for principles of comity, “which should at all times pervade our inter-state legislation.”³⁴⁴

In *Birkbeck v. Ackroyd*,³⁴⁵ a husband sued a woolen mill for the wages a wife had earned through her labor.³⁴⁶ The Court of Appeals ruled that it was the husband’s right to recover for the labor and services of his wife despite the Earnings Act of 1860.³⁴⁷ “She may still regard her interests and those of her husband as identical, and allow him to claim and appropriate the fruits of her labor.”³⁴⁸ The court stated that when the husband and the wife were living together and both working, the wife had never claimed her earnings as her separate property.³⁴⁹ Therefore, the wife’s earnings came under the control of the husband.³⁵⁰ “The bare fact that she 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.”³⁵¹

The *Birkbeck* decision³⁵² was penned by Associate Judge Charles Andrews. Andrews would later become the Chief Judge of the New York Court of Appeals in 1881.³⁵³ He was Mayor of Syracuse, New York, twice.³⁵⁴ A devout Episcopalian, who “for many years . . . was a delegate . . . of the Episcopal diocese of Central New York and served as chancellor of the diocese.”³⁵⁵ Episcopal judges, even those who were devout,³⁵⁶ have

339. Murray, *supra* note 244; *Yale II*, 22 N.Y. at 451.

340. Murray, *supra* note 244.

341. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

342. Murray, *supra* note 244.

343. 20 N.Y. 562 (1860).

344. Murray, *supra* note 244 (quoting *Lemmon*, 20 N.Y. at 644 (Selden, J., dissenting)).

345. *Birkbeck v. Ackroyd*, 74 N.Y. 356 (1878).

346. *Id.* at 356.

347. *Id.* at 358.

348. *Id.*

349. *Id.* at 358-59.

350. *Birkbeck*, 74 N.Y. at 359.

351. *Id.* at 358.

352. *Id.* at 357.

353. Brian Quinn, *Andrews Charles*, NY COURTS, <http://www.courts.state.ny.us/history/legal-history-new-york/luminaries-court-appeals/andrews-charles.html> (last visited Aug. 10, 2013).

354. Quinn, *supra* note 353; *Mayors of Syracuse, New York*, CITY OF SYRACUSE, http://www.syracuse.ny.us/Mayors_of_Syracuse.aspx (last visited Feb. 2, 2014).

355. Quinn, *supra* note 353.

been seemingly split on the political ideological scale. The conservative Episcopal elite, however, have long controlled the American Episcopal Church.³⁵⁷ Three of the four New York judges studied, George Comstock, Charles Andrews, and Robert Earl, were Episcopalian and conservative.³⁵⁸ Andrews was also served as a prosecutor prior to his service as a judge.³⁵⁹ Though a Democrat when the Democratic Party was the consensus conservative party in the United States, Andrews shifted his allegiance to the Republicans later in his life, but he remained conservative.³⁶⁰

In *Bertles v. Nunan*³⁶¹ the New York Court of Appeals continued in its efforts to limit the impact of the 1860 Earnings Act. In *Bertles* by virtue of the rule at common law, the Court of Appeals ruled that a deed to the husband and wife was taken as tenants by the entirety, giving the husband control and use of the property during the couple's joint lives.³⁶² The Court of Appeals held that the 1860 law did not affect the husband's common law inheritance rights in any way and that a wife's "general engagements are absolutely void, and she can bind herself by contract only as she is expressly authorized to do so by statute."³⁶³ Finally in 1884, the New York legislature took conclusive action stating that "[a] married woman may contract to the same extent, with like effect and in the same form, as if unmarried, and she and her separate estate shall be liable thereon . . ."³⁶⁴

Another Democratic judge, who also happened to be Episcopalian, wrote the *Bertles* majority opinion.³⁶⁵ As a young lawyer, "Judge Earl was active in . . . politics and public affairs . . . acquir[ing] the *Herkimer Democrat*, a weekly conservative political newspaper . . ."³⁶⁶ He became its sole editor and publisher in 1849.³⁶⁷ After retirement from the bench, the New York Democratic Party offered him the nomination to be the party's

356. See generally Thomas C. Berg & William G. Ross, *Some Religiously Devout Justices: Historical Notes and Comments*, 81 MARQ. L. REV. 383, 400 n.76 (1998); Daniel D. Blinka, *The Roots of the Modern Trial: Greenleaf's Testimony to the Harmony of Christianity, Science, and Law in Antebellum America*, 27 J. EARLY REPUBLIC 293, 302-03 (2007).

357. Custer, *supra* note 209, at 22; Eugene C. Bianchi, *John XXIII, Vatican II, and American Catholicism*, 387 ANNALS AM. ACAD. POL. & SOC. SCI. 30, 36 (1970).

358. See *supra* note 338 and accompanying text; see also Quinn, *supra* note 353; New York State Bar Ass'n, *Obituary, Robert Earl*, 26 PROC. OF THE N.Y. ST. B.A. 475 (1903).

359. Quinn, *supra* note 353.

360. *Id.*

361. 92 N.Y. 152 (N.Y. 1883).

362. *Id.* at 166.

363. Ranney, *supra* note 164, at 528-29 (citing *Bertles*, 92 N.Y. at 160.)

364. 1884 N. Y. Laws 381.

365. *Robert Earl*, *supra* note 358, at 475.

366. Benigno, *supra* note 244.

367. *Id.*

gubernatorial candidate in 1894 and 1898.³⁶⁸ Earl turned down both nominations, not wishing to become politically active again.³⁶⁹

C. Oregon

Brummet v. Weaver was an important case decided by the Oregon Supreme Court after the passage of the Oregon Donation Land Claim Act.³⁷⁰ With money from the sale of her donation act claim, Sarah Brummet purchased and registered three horses as her separate property in 1861.³⁷¹ She later divorced Mr. Brummet, but then remarried him.³⁷² On remarriage she did not re-register her horses.³⁷³ Her husband unilaterally sold the horses later to Mr. Weaver. Sarah sued to recover possession.³⁷⁴ The Oregon Supreme Court held that the divorce revoked the registration of the horses, but noted that

under [the constitution] no woman loses any pecuniary rights by marriage. Whatever property a woman has at the time of marriage, or afterwards acquired by gift, devise, or inheritance, remains hers, until she, by her own consent, express or implied, parts with it. Without that consent she cannot be divested of her title to it, whether registered or not.³⁷⁵

The court stated that actual or constructive notice of the wife's ownership was enough to bind the other party.³⁷⁶ The court remanded the case for a new trial, stating that she managed her property well which should bode her well on retrial.³⁷⁷ The court on retrial correctly interpreted the Oregon Constitution, which in 1859 had done away with coverture. Sarah, as a married woman, had the authority "to sell any part of her separate property and retain the purchase money as her own; or with it to buy other property to be held by her in the same manner and for the same purpose."³⁷⁸

Erasmus Shattuck, Chief Justice of the Oregon Supreme Court, wrote the majority opinion in *Brummet*.³⁷⁹ Shattuck, who was born and raised in

368. *Id.*

369. *Id.*

370. *Brummet v. Weaver*, 2 Or. 168 (Or. 1866).

371. *Id.*

372. *Id.* at 172.

373. *Id.* at 168, 172.

374. *Id.* at 168, 173-74.

375. *Brummet*, 2 Or. at 173.

376. *Id.* at 168, 173.

377. *Id.* at 173-74.

378. *Id.* at 171.

379. *Id.* at 170.

Vermont, having graduated from Vermont University in 1848, served as a prosecutor in the role of United States District Attorney for one year before becoming a judge.³⁸⁰ Shattuck was a member of the Whig party until it disbanded in 1860, right before the outbreak of the Civil War.³⁸¹ He then became a member of the Republican Party.³⁸² Later in his life he was associated politically with the Democratic Party, but he never did become a member, and he was not thought to be particularly partisan, but rather more of an independent thinker, finding fault with the platforms of the various political parties.³⁸³

The strongest response to the *Brummert* decision came from creditors who were worried about “their ability to collect on contracts and securities agreements involving separately-held property.”³⁸⁴ Almost immediately, the Oregon legislature passed a new provision that effectively reversed the *Brummert* decision by requiring that all married women’s personal property be registered.³⁸⁵ The act protected the husband’s creditors by including a prima facie presumption that all unregistered personal property belonged to the husband.³⁸⁶

In the 1872 case *Frarey v. Wheeler*,³⁸⁷ the Oregon Supreme Court held that the Oregon Donation Claims Act and the Oregon Constitution referred only to the holding of property and not to its disposition.³⁸⁸ In 1867, Mr. and Mrs. Wheeler agreed to sell Mrs. Jemima Wheeler’s donation claim to Mr. Frarey.³⁸⁹ The contract provided that Frarey would pay twenty dollars, gain immediate possession, and, upon payment of an additional \$380 one year later be given title.³⁹⁰ Frarey took until August of 1870 to tender the money with accrued interest.³⁹¹ Frarey made permanent improvements on the land during this time, but the Wheelers declined payment and refused to execute the deed. Frarey sued for specific performance.³⁹²

The Oregon Supreme Court in *Frarey* held that Jemima Wheeler’s contract to sell her donation claim was invalid.³⁹³ Although the decision

380. HISTORY OF PORTLAND, OREGON: WITH ILLUSTRATIONS AND BIOGRAPHICAL SKETCHES OF PROMINENT CITIZENS AND PIONEERS 514-15 (H.W. Scott ed., 1890).

381. *Id.* at 516; JOHN F. BIBBY & BRIAN F. SCHAFFNER, POLITICS, PARTIES, AND ELECTIONS IN AMERICA 50 (6th ed. 2007).

382. HISTORY, *supra* note 380, at 516.

383. *Id.*

384. Scott, *supra* note 24, at 446.

385. *Id.*

386. *Id.*

387. 4 Or. 190 (Or. 1871).

388. *Id.* at 195-96.

389. *Id.* at 190-91.

390. *Id.*

391. *Id.*

392. *Frarey*, 4 Or. at 190-91.

393. *Id.* at 194.

was in favor of the Wheelers, the wider impact restricted women's ability to contract to sell separate property.³⁹⁴ This was a clear step back from the more progressive *Brummert* decision.³⁹⁵ The *Frarey* case stated that "at common law married women are not only held incompetent to enter into covenants to convey their real estate, but they are classified with those who are under disability to make any contract whatever"³⁹⁶

The Oregon Supreme Court had moved back to the more paternalistic approach that many courts had taken in regard to married women's property rights in the nineteenth century.³⁹⁷ "If *Brummert* were applied, the court could easily have found that Jemima had gained the right to covenant with regard to her land via the 1859 constitution, and held in favor of Mr. Frarey."³⁹⁸

The *Frarey* decision was written by a strong Democrat, Benjamin Bonham.³⁹⁹ Bonham, a member of the Methodist Episcopal Church, served both locally and nationally on the Democratic Party.⁴⁰⁰ Before he became a judge, he worked as a schoolteacher and superintendent, he practiced law, and he was a Democratic representative in the Oregon legislature.⁴⁰¹ After Bonham retired from the bench, President Grover Cleveland, a Democrat, appointed him to the position of Consulate-General to British India, a very notable position at that time in history.⁴⁰²

In 1872, the Oregon legislature responded to *Frarey* by enacting another married women's property act.⁴⁰³ The 1872 act brought back a married woman's rights established in *Brummert*, but went even further in stating that property acquired by a woman's own labor should also be regarded as her separate property.⁴⁰⁴

The *Rugh v. Ottenheimer* opinion once again had the state supreme court moving in harmony with its constitution.⁴⁰⁵ Nancy Rugh purchased a 160-acre farm one year before her marriage with money from the sale of her donation claim.⁴⁰⁶ The deed was not delivered until after her marriage.⁴⁰⁷

394. *See id.*

395. *Compare id.* at 197 (restricting women to sell separate property via contract), with *Brummet*, 2 Or. at 174 (expressing a more open view).

396. *Frarey*, 4 Or. at 195.

397. Scott, *supra* note 24, at 447-49.

398. *Id.* at 447; *Frarey*, 4 Or. at 194.

399. JOSEPH GASTON, PORTRAIT AND BIOGRAPHICAL RECORD OF THE WILLAMETTE VALLEY, OREGON: CONTAINING ORIGINAL SKETCHES OF MANY WELL KNOWN CITIZENS OF THE PAST AND PRESENT 241 (1903).

400. *Id.*

401. *Id.*

402. *Id.*

403. Chused, *supra* note 7, at 29.

404. *Id.*

405. 6 Or. 231 (Or. 1877).

406. *Id.* at 231-33.

Later she agreed to trade the land for some land owned by Mr. Gardner, who ended up defying her wishes and deeding the land to her husband, William Hugh.⁴⁰⁸ Her husband promised to deed the land to Nancy, but never did. Eventually her husband abandoned Nancy, leaving behind a number of creditors.⁴⁰⁹

The Oregon Supreme Court held that the Oregon Constitution “operated . . . to cut off the husband’s common-law rights in his wife’s property”⁴¹⁰ Even though the transaction in question occurred before 1859,⁴¹¹ the year that Oregon became a state with a new constitution,⁴¹² all property owned by married women when the Oregon Constitution went into effect was freed from the common law control of their husbands.⁴¹³ The court in *Rugh* ruled that the husband’s limited interest in his wife’s land “was the right to enjoy the rents and profits during their joint lives, and the right of curtesy (in case of issue born alive) after her death.”⁴¹⁴

Judge Reuben Boise wrote the *Rugh* decision for the Oregon Supreme Court.⁴¹⁵ Boise, after passing the bar and prior to his service on the bench had been both a practicing and prosecuting attorney and legislator.⁴¹⁶ Judge Boise’s political leanings were described in a portrait and biographical account written in 1903.⁴¹⁷ “During his voting days the judge was a Douglas Democrat, but after the war subscribed to the principles of the Republican Party.”⁴¹⁸ Boise’s progressive approach is represented in the following:

He was always in the forefront of those who advocated the extension of greater legal rights to women and while in the constitutional convention he worked effectively for the adoption of provisions which put a wife upon the same condition before the law as her husband. His decisions in matters relating to property and

407. *Id.* at 232.

408. *Id.* at 231-33

409. *Id.*

410. William Maohofsky, Comment, *Community-Property Law - Constitutionality*, 27 OR. L. REV. 301, 317 (1948).

411. *Rugh*, 6 Or. at 231-32.

412. See *Oregon History: Statehood*, OREGON BLUE BOOK, <http://www.bluebook.state.or.us/cultural/history/history15.htm> (last visited May 6, 2014).

413. Maohofsky, *supra* note 410, at 317.

414. *Rugh*, 6 Or. at 233.

415. *Id.*

416. Oregon Historical Soc’y, *Two of Oregon’s Foremost Commonwealth Builders: Judge Reuben Patrick Boise and Professor Thomas Condon*, Q. OR. HIST. SOC’Y 201, 201-04 (1907).

417. GASTON, *supra* note 399, at 209.

418. *Id.* at 210.

contract rights of married women showed an inclination in this direction.⁴¹⁹

Of all the judges studied in the paper, Boise was the only judge writing a majority or concurring opinion that had actually been appointed by an executive.⁴²⁰ Boise was actually appointed twice.⁴²¹ In 1857, he was appointed to the Oregon Territorial Supreme Court by Democratic President James Buchanan.⁴²² In 1878 he was appointed again to the Oregon Supreme Court by Democratic Governor W.W. Thayer.⁴²³ Boise was a conundrum being a progressive judge that appealed to Democrats also. If more judges had been appointed in this study, as opposed to elected, and the proxy version of the attitudinal model was employed, there would not be a positive correlation with Reuben Boise's appointments.

Soon after the *Rugh* decision, the Oregon legislature adopted another married women's property act in 1878.⁴²⁴ This act permitted married women the right to manage, transfer, and write wills.⁴²⁵ The act also designated a wife's wages as her own, and allowed married women to sue and be sued.⁴²⁶ The act also stated that neither spouse was liable for the other's debts, except for family expenses and education.⁴²⁷

Another act passed in 1880 stated "[a]ll laws which impose or recognize civil disabilities upon a wife which are not imposed or recognized as existing as to the husband, are hereby repealed"⁴²⁸ This act gave married women equal rights and responsibilities as to child custody.⁴²⁹ Chused stated it well in regard to the 1878 and 1880 acts: "These two statutes represent a watershed in the development of Oregon's married women's property law. For the first time, married women's property was to be treated the same as their husbands' assets."⁴³⁰

419. *Reuben P. Boise Biography*, *supra* note 225.

420. *Judicial History*, OREGON JUDICIAL DEP'T, http://courts.oregon.gov/Yamhill/pages/judicial_history.aspx (last visited Aug. 7, 2013).

421. *Id.*

422. *Id.*; *James Buchanan*, WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/jamesbuchanan> (last visited May 4, 2014).

423. *Judicial History*, *supra* note 438; *William W. Thayer Biography*, STATE OF OREGON LAW LIBRARY, http://www.oregon.gov/SOLL/Pages/ojd_historyjustice_biographies/w_w_thayer_bio.aspx (last visited May 4, 2014).

424. THE STATE OF OREGON, THE LAWS OF OREGON; AND THE RESOLUTIONS AND MEMORIALS OF THE TENTH REGULAR SESSION OF THE LEGISLATIVE ASSEMBLY THEREOF 92 (W.B. Carter, State Printer, 1878).

425. *Id.*

426. *Id.* at 93.

427. *Id.*

428. An Act to Establish and Protect the Rights of Married Women, 1880 Or. Laws § 1.

429. *Id.*

430. Chused, *supra* note 7, at 34.

V. JUDICIAL IDEOLOGY

Table One below depicts four Whigs, including one that became a Republican after the Whig Party disbanded.⁴³¹ There are five members of the more conservative Democratic Party and one judge who can be labeled a Republican.⁴³² For the purposes of this study and the attitudinal model, the Whigs and the Republican can be lumped together and be predicted to have ruled more liberally, acting either to support or recognize the married women's property acts as authority.⁴³³ The Democrats, on the other hand, can be predicted to have ruled conservatively, or against supporting the married women's property acts.⁴³⁴

The two Mississippi Judges, William L. Sharkey and Cotesworth P. Smith, who wrote the two opinions in *Fisher* were both Whigs.⁴³⁵ Justice William Yerger who wrote the opinion in *Ratcliffe* case to Cotesworth P. Smith's majority, was also a Whig.⁴³⁶ *Ratcliffe* upheld the act and left the subject as it stood before in equity.⁴³⁷ Cotesworth P. Smith also wrote the *Lee* opinion, giving homage to the 1839 and 1846 acts stating that they "were passed avowedly for the better preservation and protection of the rights of married women."⁴³⁸

Erasmus Shattuck, the Oregon judge who was a Whig until the party disbanded and then became a Republican, also ruled for married women's property acts like the three Whigs from Mississippi.⁴³⁹ Shattuck penned the majority opinion in the *Brummet* case that correctly interpreted the constitutional clause that effectively eliminated coverture and supported women's property rights.⁴⁴⁰ In *Rugh*, the Oregon Supreme Court held that the Oregon Constitution operated to cut off the husband's common law rights in his wife's property.⁴⁴¹ The opinion was written by Rueben Boise, the Douglas Democrat turned Republican, who was also a women's rights advocate.⁴⁴²

In tallying the Democrat's votes look no further than the two *Yale* decisions decided in New York.⁴⁴³ George F. Comstock wrote the *Yale I*

431. See *infra* Table 1.

432. See *supra* notes 417-418 and accompanying text (identifying Rueben Boise to be a Douglas Democrat, but he switched to being a Republican after the Civil War); GASTON, *supra* note 399, at 210.

433. See, e.g., *Fisher*, 3 Miss. at 611; *Ratcliffe*, 24 Miss. at 181.

434. See, e.g., *Birkbeck*, 74 N.Y. at 356; *Bertles*, 92 N.Y. at 152.

435. *Fisher*, 3 Miss. at 611, 614; *supra* notes 94, 103, 287 and accompanying text.

436. *Ratcliffe*, 24 Miss. at 182, 185; *supra* note 259-261 and accompanying text.

437. *Ratcliffe*, 24 Miss. at 181, 185.

438. *Lee*, 31 Miss. at 125.

439. See *supra* notes 381-382 and accompanying text; see, e.g., *Brummet*, 2 Or. at 168.

440. *Brummet*, 2 Or. at 170.

441. *Rugh*, 6 Or. at 236.

442. *Id.* at 231; GASTON, *supra* note 399, at 210.

443. *Yale I*, 18 N.Y. at 285; *Yale II*, 22 N.Y. at 460-61.

opinion.⁴⁴⁴ He was a member of the conservative American Party when he ran for election in the New York Court of Appeals in 1860.⁴⁴⁵ By the time he actually took office in 1861, he had become a member of the Democratic Party due to the disbandment of the American Party.⁴⁴⁶ Samuel Selden, a lifetime conservative Democrat, wrote the *Yale II* case.⁴⁴⁷ Two more conservative Democratic judges, Charles Andrews and Robert Earl, both of New York, penned the *Birkbeck* and *Bertles* cases respectively.⁴⁴⁸ The last of the five Democrats, Benjamin Bonham from Oregon was a strong conservative who wrote the majority opinion in *Frarey*.⁴⁴⁹

There was a significant party ideological distinction for the ten judges surveyed.⁴⁵⁰ The Whig and Republican judges ruled to support the married women's property acts 100% of the time.⁴⁵¹ The Democratic judges, on the other hand, ruled against supporting the married women's property acts 100% of the time.⁴⁵² With only ten judges' ruling information tabulated, this result cannot be considered dispositive, but it can be considered more than anecdotal. It may be a clue to the positive role that party ideology may have played amongst nineteenth century judges.

The personal attributes model examines a judge's biographical data to determine if there are any attributes present that may explain why a judge ruled on a particular legal topic as he did.⁴⁵³ The political party of a judge has been examined as an attribute that may have an influence.⁴⁵⁴ The politics of the ten judges has already been explored above in considering the attitudinal model.⁴⁵⁵ In regard to the personal attributes model, there was a positive correlation between the five members of the more historically liberal parties of the nineteenth century, the Whigs and Republicans, ruling progressively to support or recognize the married women's property acts.⁴⁵⁶ The Democratic judges, likewise, represented a positive correlation in ruling conservatively to not recognize the authority of the passed married women's property acts.⁴⁵⁷

444. *Yale I*, 18 N.Y. at 267.

445. Kernan, *supra* note 244.

446. *Id.*

447. *Yale II*, 22 N.Y. at 450; *see supra* note 339 and accompanying text.

448. *Birkbeck*, 74 N.Y. at 356; *Bertles*, 92 N.Y. at 166; *see supra* note 358 and accompanying text.

449. *Frarey*, 4 Or. at 193; *see supra* notes 392-398 and accompanying text.

450. *See infra* notes 451-457 and accompanying text.

451. *See supra* Part IV.

452. *See supra* Part IV.

453. NIALL BOLGER ET AL., PERSONS IN CONTEXT: DEVELOPMENTAL PROCESSES 30 (2007).

454. Tate, *supra* note 234, at 355.

455. *See supra* Part IV.

456. *See supra* Parts IV-V.

457. *See supra* Parts IV-V.

Other scholars analyzing the personal attributes model hold out religion as a possible influence on how judges make decisions.⁴⁵⁸ Some believe a systematic difference exists in how judges decide depending on their religious affiliation.⁴⁵⁹ Jewish justices, for example, have been viewed by some to decide for the underdog because of their own historical outsider status.⁴⁶⁰ Despite various conservative rules governing the Roman Catholic Church, there is the thinking that American Catholics are more liberal than most non-American Catholics.⁴⁶¹ Evangelical judges are generally thought to be conservative.⁴⁶²

Episcopalians, along with Methodists, Presbyterians, and Congregationalists (more recently the United Church of Christ) are Protestant denominations that have been associated with liberal Protestantism since the early nineteenth century.⁴⁶³ The Episcopal Church also has a very strong conservative wing, which has yielded great influence.⁴⁶⁴ Table One below indicates four identified Episcopalians among the ten judges; George Comstock, Charles Andrews, Robert Earl from New York, and Benjamin Bonham from Oregon.⁴⁶⁵ All ruled conservatively against recognizing the married women's property acts.⁴⁶⁶ Erasmus Shattuck from Oregon was identified as a Christian, but his membership in a particular denomination or sect is unknown.⁴⁶⁷ There was no religious membership information available on the five other judges. If the four Episcopalian judges happened to be members of the conservative wing of the Episcopal Church, as was Charles Andrews,⁴⁶⁸ there would be a positive correlation amid the very small sample.⁴⁶⁹

458. Tracey George, *Court Fixing*, 43 ARIZ. L. REV. 9, 13-14 (2001); Paula J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 ALB. L. REV. 1101, 1115-16 (2000); Rick A. Swanson & Albert P. Melone, *The Partisan Factor and Judicial Behavior in the Illinois Supreme Court*, 19 S. ILL. U. L.J. 303, 307-08 (1995).

459. Brian H. Bornstein & Monica K. Miller, *Does a Judge's Religion Influence Decision Making?*, 45 J. AM. JUDGES ASS'N 112, 113 (2009); Scott C. Idleman, *The Role of Religious Values in Judicial Decision Making*, 68 IND. L.J. 433, 433 (1993).

460. ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND 3-4 (1990).

461. Sheldon Goldman, *Voting Behavior on the U.S. Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 498 (1975).

462. Stephen M. Feldman, *Empiricism, Religion, and Judicial Decision-Making*, 15 WM. & MARY BILL RTS. J. 43, 48-49 (2006).

463. See A COMPANION TO AMERICAN THOUGHT 394 (Richard Wightman Fox & James T. Kloppenberg eds., 1995).

464. See *supra* notes 356-360 and accompanying text.

465. See *infra* Table 1.

466. See *Yale I*, 18 N.Y. at 270; *Birkbeck*, 74 N.Y. at 358; *Bertles*, 92 N.Y. at 160; *Frarey*, 4 Or. at 194.

467. HISTORY, *supra* note 380, at 515.

468. See *supra* notes 352-360 and accompanying text.

469. See *infra* Table 1.

Prior work experience is another personal attribute that some scholars have found to influence how judges vote.⁴⁷⁰ Corey Rayburn Yung has tested particular attributes and their potential effect on contemporary Federal Circuit judges and has discovered that a judge's prior work experience in the government (outside of the judiciary and elected office) will tend to indicate a liberal voting preference.⁴⁷¹ How well Yung's results correlate to state Supreme Court judges from the nineteenth century is discussed below.⁴⁷²

Only one of the ten judges in the study had the attribute of government work experience in his biographical data; George Comstock.⁴⁷³ Comstock was a high level government official in both the New York and federal governments. He was appointed New York State Reporter, and also the Solicitor of the United States Treasury under President Millard Fillmore.⁴⁷⁴ There was not a positive correlation because Comstock did not rule liberally on married women's property acts.⁴⁷⁵

Another prior work experience attribute that has been explored is that between twentieth century federal court judges who served as prosecutors and later ruling conservatively on the bench.⁴⁷⁶ The correlation is not supported in this study. There were four nineteenth century state Supreme Court judges who had previously been prosecutors: Cotesworth Smith of Mississippi, Charles Andrews of New York, and both Erasmus Shattuck and Rueben Boise of Oregon.⁴⁷⁷ Only Judge Andrews ruled conservatively on married women's property acts.⁴⁷⁸

Other personal attributes considered in this study of the nineteenth century judges were region and area of the country in which the judge was born and raised. Neither attribute showed any type of relationship between the judges and the attribute. Of the attributes studied, the judges' political party membership had a positive correlation for all ten judges. Religion held a positive correlation for the four Episcopalian judges, assuming they were all of the conservative wing of the religion.

470. See, e.g., Corey Rayburn Yung, *Judged By the Company You Keep: An Empirical Study of the Ideologies of Judges on the United States Court of Appeals*, 51 B.C. L. REV. 1133, 1188 (2010); Tate, *supra* note 235, at 359-63.

471. Yung, *supra* note 470, at 1133.

472. See *infra* notes 473-475.

473. See *infra* Table 1.

474. See *supra* notes 332-333 and accompanying text.

475. See *supra* notes 331-337 and accompanying text; see also *Yale I*, 18 N.Y. at 270.

476. Tate, *supra* note 235, at 359-63.

477. See *supra* notes 285, 359, 380, 416 and accompanying text.

478. See *Birkbeck*, 74 N.Y. at 358.

VI. CONCLUSION

The social reform movement of the 1830s had many causes, one being the passage of married women's property rights.⁴⁷⁹ Freidman identified married women's property acts as evolving piecemeal efforts in the nineteenth century.⁴⁸⁰ Chused categorized and indexed them into three waves.⁴⁸¹ The first wave of statutes was passed primarily in the later 1830s and 1840s, and dealt with the need to free married women's estates from the debts of their husbands.⁴⁸² Most of these statutes were motivated by the Panic of 1837 and the subsequent depression.⁴⁸³

The Panic of 1837 most likely did have an influence upon the Mississippi legislature. The bill's sponsor, Senator T.B.J. Hadley, was trying to shield his own wife from the debts of her trustee and himself.⁴⁸⁴ Hadley's bill, combined with the *Fisher* case, laid the foundation for the passage of the first married women's property act in a state that many would consider a surprising locale. Mississippi is a state where the "Law of the Creator"⁴⁸⁵ and its various tenets have been a prevailing sentiment throughout its less-than-progressive history.⁴⁸⁶ While the social reform movement had an impact on the passage of married women's property acts in the 1800s, it is hard to say how much of an influence it had specifically on antebellum Mississippi, where the economy was based on industrial-driven cotton and slave labor.⁴⁸⁷

The second wave . . . , beginning in the [late] 1840s and ending after the Civil War, dealt with the ability of married women to hold separate estates. [Some of these state acts] were . . . an attempt to eradicate the inconsistencies that had arisen between common law and equity.⁴⁸⁸

479. See *supra* Parts II-III.

480. See *supra* note 15 and accompanying text.

481. See *supra* note 16 and accompanying text.

482. See *supra* notes 61-67 and accompanying text.

483. See *supra* note 17 and accompanying text.

484. See *supra* notes 68-77 and accompanying text.

485. Deborah M. Thaw, *The Feminization of the Office of Notary Public: From Feme Covert to Notaire Covert*, 31 J. MARSHALL L. REV. 703, 721 (1998). "Law of the Creator" is a strong sentiment that has had a history of significant influence, particularly in the United States South. It means that the "paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother." *Id.*

486. *Id.*

487. Eugene R. Dattel, *Cotton in a Global Economy: Mississippi (1800-1860)*, MISS. HISTORY NOW, <http://mshistorynow.mdah.state.ms.us/articles/161/cotton-in-a-global-economy-mississippi-1800-1860> (last visited Aug. 15, 2013).

488. Kathleen M. O'Connor, *Marital Property Reform in Massachusetts: A Choice for the New Millennium*, 34 NEW ENG. L. REV. 261, 292 (1999).

The New York acts of 1848 and 1849 receive much credit for influencing the rest of the country on the right of married women to hold separate estates.⁴⁸⁹ The New York statutes, however, as discussed above were severely restricted by the New York Courts. The New York Courts were very dilatory in letting go of the English common law, which favored the husband.⁴⁹⁰

The third wave acts passed primarily after the Civil War, and were designed to protect married women's earnings from coverture.⁴⁹¹ The Oregon Territory was very motivated to attract settlers to the Northwest, and one of its main incentives was the Donation Land Claim Act.⁴⁹² The 1850 Federal Territorial Act was not what placed Oregon into the third wave, but it helped provide a path toward a debtor exemption provision that was later embedded in the state's 1857 constitution.⁴⁹³

The property and pecuniary rights of every married woman, at the time of marriage, or afterwards, acquired by gift, devise, or inheritance, shall not be subject to the debts, or contracts of the husband; and laws shall be passed providing for the registration of the wife's separate property.⁴⁹⁴

The reactions of the three studied states' Supreme Court judiciaries to the passage of the married women's property acts were varied. Analyzing the judicial ideologies of the various judges who wrote the majority opinions for the cases discussed in this paper may provide some clues. Table One below illustrates the findings from researching the biographical information available on the judges who wrote the majority opinions.⁴⁹⁵

This study does demonstrate that judges were voting for married women's property acts early on.⁴⁹⁶ Even though the number of studied judges was just ten, the use of the attitudinal and personal attributes models showed a strong positive correlation between the political party the judges were members of and how the judges decided in regard to married women's

489. See Ray August, *The Spread of Community-Property Law to the Far West*, 3 W. LEG. HIST. 35, 45-47, 61 (1990); see 1848 N.Y. Laws 307; 1849 N.Y. Laws 528.

490. Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2149-57 (1994).

491. See Chused, *supra* note 16, at 1398-99.

492. See *supra* notes 171-174 and accompanying text.

493. See OR. CONST., art. XV, § 5 (1857).

494. *Id.*

495. See *infra* Table 1.

496. See generally, Harlan F. Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4 (1936); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 Geo. L.J. 2127, 2149-57 (1994).

property acts.⁴⁹⁷ The personal attributes model also displayed that religion may be a factor in how judges voted.⁴⁹⁸

Chused classified the acts but did not provide an explanation for their creation or a “why” for their passage and subsequent court support.⁴⁹⁹ I borrow from the political scientist literature and suggest that the political affiliations of the majority decision makers and their religious convictions discussed here provide an explanation as to why the judges voted as they did. This explanation is not based on a legal theory, but rather a political science theory. I also contend that further research on the states’ legislatures is also needed which will arguably be even more telling as to the explanation for the passage.

Some may argue that applying political science judicial behavior literature to married women’s property cases is unconvincing. In analyzing my paper, some may argue that the ten judges that I found bibliographic information on are not representative of the larger population of state appellate judges at the time. In addition, some may argue that the probative characteristics of judges in the 20th century studies may not be applicable to judges of the 19th century.

In answering these imagined criticisms, first, I could find biographical information on all of the majority opinion writers. Did I find biographical information on these judges because they were the better judges of their day and more renowned for their judicial acumen? I suggest that these judges were representative of the notable, better followed state appellate judges of that time. I further contend that because these judges produced more noteworthy case law, they are more likely to be the recipients of biographical coverage at this early period in our country’s history.

Second, anytime you pair studies from different centuries there will be potential time associated issues. One way to account for this is to look at the underlying factors affecting the characteristics. For example, the Whig and Republican administrations in both Federal and state government positions in the 19th century can be compared favorably to the more liberal New Deal and Great Society run administrations of the 20th century. Similarly, in regard to government service one could correlate the liberal nature of the New Deal to the more progressive Lincoln administration.

Future research should focus upon the legislative behavior that was involved in passing these acts. While beyond the scope of this paper, analyzing the voting behavior of the actual legislators who passed the acts, juxtaposed against their personal attributes, may offer a deeper explanation.

497. *See generally supra* Parts IV-V.

498. *See generally supra* Parts IV-V.

499. *See generally*, Chused, *supra* note 16.

TABLE ONE: JUDGES' BIOGRAPHICAL DATA

Judge	State/Region	Party	Born	Religion	Prosecutor	Work
William Sharkey	Mississippi	Whig	Tennessee	Unknown	No	Law practice & Legislator
Cotesworth Smith	Mississippi	Whig	South Carolina	Unknown	Yes	Law practice & Legislator
William Yerger	Mississippi	Whig	Tennessee	Unknown	No	Law practice
George Comstock	New York	Amer./ Democrat	New York	Episcopal	No	Law practice & State and Federal
Samuel Selden	New York	Democrat	Connecticut	Unknown	No	Law practice & Clerk of Chancery
Charles Andrews	New York	Democrat	New York	Episcopal	Yes	Law practice & Mayor of Syracuse, N.Y.
Robert Earl	New York	Democrat	New York	Episcopal	No	Law practice & Newspaper Publisher
Erasmus Shattuck	Oregon	Whig/ Repub.	Vermont	Christian	Yes	Law practice & Super. of Schools

Benjamin Bonham	Oregon	Democrat	Tennessee	Episcopal	No	Law practice & Super. of
Ruebin Boise	Oregon	Democrat/Repub.	Massachusetts	Unknown	Yes	Law Practice & Legislator