

William & Mary Journal of Race, Gender, and Social Justice

Volume 6 (1999-2000)
Issue 3 *William & Mary Journal of Women and
the Law*

Article 2

April 2000

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Repository Citation

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 (2000), <https://scholarship.law.wm.edu/wmjowl/vol6/iss3/2>

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ANGLICANS, MERCHANTS, AND FEMINISTS: A
COMPARATIVE STUDY OF THE EVOLUTION OF MARRIED
WOMEN'S RIGHTS IN VIRGINIA, NEW YORK, AND
WISCONSIN

JOSEPH A. RANNEY*

As part of the explosion of interest in women's studies during the past thirty years, legal scholars have paid increasing attention to the evolution of women's property rights in the context of marriage and divorce. Detailed studies have been made of women's property rights during the colonial era,¹ of early nineteenth century married women's property acts,² and of the no-fault divorce movement of the 1960s and 1970s and its consequences.³ Many gaps, however, remain to be filled. For example, there are few longitudinal studies tracing the complete history of women's property rights for any state.⁴ The period from 1920 to 1960 has been largely ignored even though important advances took place in many states during that period.⁵ Apart from colonial era property law and no-fault divorce law, there has been little effort to compare the evolution of laws affecting women in different states or to

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1. See generally MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* (1986) (examining contract, divorce, and inheritance law); Joan R. Gundersen & Gwen Victor Gampel, *Married Women's Legal Status in Eighteenth-Century New York and Virginia*, 39 WM. & MARY Q. 114 (1982) (comparing social, economic, and political systems in New York and Virginia and their impact on the evolution of married women's property rights).

2. See generally NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* (1982) (discussing the property rights of women in the 1880s); Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983) (tracing the development of women's property rights in the early 1800s).

3. See generally *DIVORCE REFORM AT THE CROSSROADS* (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (discussing new directions in divorce reform since the advent of no-fault divorce laws); HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1988); MILTON C. REGAN, JR., *ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE* (1999) (chronicling the development of the divorce movement of the mid to late 20th century).

4. Compare JOAN HOFF, *LAW, GENDER AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* (1991) (containing a good longitudinal historical survey of women's rights for the United States as a whole but devoting little attention to comparison of states and regions), with JOSEPH A. RANNEY, *TRUSTING NOTHING TO PROVIDENCE: A HISTORY OF WISCONSIN'S LEGAL SYSTEM* 203-26, 563-82 (1999) (containing a basic longitudinal study for Wisconsin).

5. See *infra* Part IV.

examine how such differences might reflect broader differences in state cultures.⁶

This Article is an attempt to start filling these gaps. It compares the evolution of women's property rights in three very different states: Virginia, New York, and Wisconsin. These three states were chosen in order to test the hypothesis the author has advanced elsewhere that the two most important determinants of how a state's legal culture evolves are the era in which it was first settled and whether it was a slave state.⁷

Virginia was one of the original colonies, and, as such, one could hypothesize that its legal system was shaped heavily by British law and the relatively simple social and economic relationships of the pre-industrial era.⁸ Because Virginia was a slave state, one also could hypothesize that its legal system put a premium on preserving an established social hierarchy and that because the hierarchy was male-dominated, Virginia's legal system was relatively uncongenial to women.⁹

New York also had its origins in colonial times, but it has been America's most commercially advanced and culturally diverse state throughout much of its history.¹⁰ One could hypothesize that because of its diversity and commercial leadership, New York's legal culture put a premium on innovation in order to accommodate the social and economic changes wrought by the industrial revolution. Such openness to innovation would include a higher than average receptivity to improving women's rights—checked to some extent, perhaps, by the need to shed colonial legal traditions as part of that process.¹¹

Wisconsin, like New York, was a free state¹² settled initially by New Englanders and soon after by a variety of European immigrants.¹³ Wisconsin was never a British colony: it began life as a western state, steeped in enthusiasm for Jacksonian social

6. *But see generally* JACOB, *supra* note 3 (comparing the development of no-fault divorce in New York, California, and Wisconsin); SALMON, *supra* note 1 (providing a detailed comparison of the laws of different states during the colonial era).

7. *See* RANNEY, *supra* note 4, at 648-54.

8. *See* LOUIS D. RUBIN, VIRGINIA: A BICENTENNIAL HISTORY 14-15, 33-38 (1977).

9. *See id.*; DAVID HACKETT FISCHER, ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA 291-97 (1989). *See generally* VIRGINIUS DABNEY, VIRGINIA: THE NEW DOMINION (1971) (detailing Virginia's history from 1606-1970).

10. *See* DAVID M. ELLIS ET AL., A HISTORY OF NEW YORK STATE ix-xii (1967).

11. *See* BASCH, *supra* note 2, at 110-12; ELLIS ET AL., *supra* note 10, at 175-80, 256-63, 275-88.

12. *See* RANNEY, *supra* note 4, at 5.

13. *See id.* at 227-28.

reforms.¹⁴ One could hypothesize that the evolution of women's rights in Wisconsin roughly paralleled their evolution in New York. Wisconsin was not a commercial leader, as was New York, and thus had less economic incentive to make legal innovations. Wisconsin also had, however, no colonial legal tradition to overcome, and its Jacksonian origins gave it an inbred tradition of reform that New York did not have.¹⁵

Women's property rights have indeed evolved differently in the three states studied here, but the differences are more subtle and complex than the above predictions suggest. Virginia generally has been the slowest of the three states to adopt statutory women's rights reforms, such as married women's property acts and no-fault divorce.¹⁶ Themes of honor and of protection of extended families are deeply woven into the state's hierarchical tradition, however, and as a result Virginia courts consistently have found ways to extend women's property rights and bend conservative divorce laws where they have considered that necessary to achieve fairness for women and the families from which they come.¹⁷ New York has made some important innovations in women's rights law in order to meet changing conditions generated by its economic leadership, most notably the nation's first comprehensive married women's property act in 1848.¹⁸ New York's cultural diversity, however, led to deadlock over divorce reform for more than a century, making New York one of the most conservative states as to divorce until the 1960s.¹⁹ Wisconsin's reform impulses have taken an erratic course with respect to women's rights. The state enacted a far-reaching equal rights law in 1921, an advanced form of no-fault divorce in 1977, and a pioneering community property law in 1983,²⁰ but otherwise it often has followed a conservative course with respect to women's rights.²¹

14. See *id.* at 28.

15. See JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 8-9 (1950); RANNEY, *supra* note 4, at 47-49.

16. See *infra* text accompanying notes 169-70, 196.

17. See *infra* notes 215, 235-36, 249-50 and accompanying text.

18. See *infra* text accompanying note 146.

19. See *infra* text accompanying note 399.

20. See *infra* notes 335, 373, 393 and accompanying text.

21. This Article focuses primarily on statutes and cases addressing married women's property rights directly and on the way in which divorce law has affected married women's power and wealth. It mentions only in passing another area of law, dower and related inheritance rights, which historically also has played an important role in women's property rights. See, e.g., SALMON, *supra* note 1, at 13-21; CAROLE SHAMMAS ET AL., *INHERITANCE IN AMERICA: FROM COLONIAL TIMES TO THE PRESENT* 83-101 (1987). The relationship between inheritance law and women's rights in America has been more subtle and complex than the

I. THE COLONIAL AND EARLY REPUBLICAN ERAS (1607-1820)

During the American Colonial era (1607-1776) and the early Republican era (1776-1820), Virginia and New York borrowed heavily from English common law in shaping their concepts of married women's rights.²² They were not slavish to the common law, however. Both states used trusts and related equitable devices to allow married women to preserve their property by means of premarital trusts.²³ Both did so in order to preserve such property to the original kinship group from which it came.²⁴ Virginia did this to preserve an established social order; New York arguably was more concerned with allowing kinship groups free control of their property in the interest of economic growth.²⁵ In the late eighteenth century, New York became the first of the three states studied here to transfer divorce powers from the legislature to the courts on a limited basis.²⁶

A. *Virginia: Women's Rights as a Social Preservative*

Women's rights in early Virginia appear paradoxical to modern eyes. Virginia, like all other colonies, adhered to the English common law doctrine of marital unity, holding that the husband was the legal master of the marriage relationship.²⁷ Virginia strongly condemned divorces and made them nearly impossible to obtain.²⁸ Yet it also used contract law to allow many wives to maintain control of their property, notwithstanding the common law's strong strictures against such control.²⁹ In fact, there was no

relationship between property and divorce law and women's rights; accordingly, inheritance law does not provide as clear a picture of lawmakers' changing attitudes toward women as do property and divorce law. A detailed study of the relationship between inheritance law and women's rights would extend the length of this Article unduly, but its omission here should not be understood as minimizing its importance.

22. See *infra* text accompanying notes 27, 46, 94.

23. See *infra* text accompanying notes 52-58, 68-69, 104.

24. See *id.*

25. See *infra* text accompanying note 106.

26. See *infra* text accompanying note 110.

27. The British jurist William Blackstone formulated the most widely-cited definition of the doctrine: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 430 (1765-69), quoted in SALMON, *supra* note 1, at 200 n.1.

28. See *infra* notes 39-40 and accompanying text.

29. See *infra* notes 52-58 and accompanying text.

paradox at all. All these rules were designed to preserve the two things most important to Virginians—stable property ownership and social order.

Unlike the northern colonies, immigrants looking more for economic advancement than for greater social and religious freedom settled Virginia.³⁰ Virginia was also one of the most agriculturally oriented of the colonies: no cities or industries of any size developed during its first two centuries of existence.³¹ Power resided almost exclusively in ownership of land and of the labor needed to work the land.³²

Daughters of the planter class remained very much a part of their original kinship groups after they married; they were not expected to and did not always transfer their primary allegiance to their husbands.³³ The reasons for this were both social and economic. Family identity was an integral part of Virginians' sense of hierarchy and order, and retention of land holdings was the key to preserving wealth and power.³⁴ Under the common law, planters who had only daughters faced the prospect that at their death the family lands would effectively pass to the daughters' husbands.³⁵ Much of the early history of Virginia's women's rights law consists of efforts to prevent such results.³⁶

Property preservation devices were developed in the context of property law rather than divorce law because Virginia's love of things English extended to the Anglican church, and Anglican doctrine regarded marriage as "an indissoluble union—a sacred knot that could never be untied by mortal hands."³⁷ In the words of a leading social historian of Virginia, "marriage was regarded as something to be arranged between families, something that did not require love as a precondition, something that could never be dissolved, and something that joined husband and wife in an

30. See RUBIN, *supra* note 8, at 12.

31. See *id.* at 13-14, 33-35.

32. See *id.* at 33-38. The planter class had a genuine sense of responsibility for the welfare of all white Virginians and did not flaunt its power unnecessarily. It allowed some social mobility: smaller planters had real opportunities to increase their holdings and gain admittance to power, and there was much intermarriage between the two classes. As a result class distinctions acquired a degree of acceptance, but also a degree of casualness, which did not exist in other colonies or states. See *id.*

33. See FISCHER, *supra* note 9, at 281-86, 292-95.

34. See *id.* at 283.

35. See *id.*

36. See RUBIN, *supra* note 8, at 36-38; see also FISCHER, *supra* note 9, at 284, 292-97 (describing prenuptial agreements in Virginia involving families of the husband and wife as well as tenants of the land belonging to the families).

37. FISCHER, *supra* note 9, at 281.

organic and patriarchal hierarchy.³⁸ Divorce was reserved for those rare occasions when a chronically violent husband put his wife's life at risk.³⁹ Using it as a tool to end marriages for mere husbandly improvidence or incompatibility was unthinkable.⁴⁰

The unity doctrine posed formidable obstacles to the preservation of kinship group property.⁴¹ Under the doctrine, the husband acquired ownership of all property that his wife brought to the marriage and all her property and earnings acquired during the marriage.⁴² Married women could not bring lawsuits in their own names to protect their financial interests; they could not act as trustees, estate executors, or legal guardians; and they could not make contracts or transfer property unless they did so jointly with their husbands.⁴³ In addition, the unity doctrine deprived married women of the ability to provide security for themselves and their children in the event of their husbands' death.⁴⁴ This was a particular concern in Virginia and other southern colonies, in which men had lower life expectancies than men in the northern colonies, thus producing a numerous class of young widows.⁴⁵ Accordingly, Virginia embraced with particular enthusiasm the British concept of dower, which guaranteed a widow a fixed share of her husband's real property at death.⁴⁶

The two most important devices used to soften the effects of the unity doctrine were the will theory of contract and the rule of private examination.⁴⁷ Prior to the industrial revolution of the late eighteenth and early nineteenth centuries, contracts generally were made in the context of a limited set of traditional social relationships, such as those between master and servant and between family members.⁴⁸ Courts interpreted and enforced such contracts with an eye to the preservation of social norms, and as a result the parties were not always free to make the exact agreements they wished.⁴⁹ With industrialization, economic

38. *Id.* at 286.

39. *See id.* at 281.

40. *See id.*

41. *See* BASCH, *supra* note 2, at 51-52.

42. *See id.*

43. *See id.* at 51-55.

44. *See id.*

45. *See* SALMON, *supra* note 1, at 159-60.

46. *See* BASCH, *supra* note 2, at 52-55; Gundersen & Gampel, *supra* note 1, at 120-22.

47. *See infra* notes 52-69 and accompanying text.

48. *See* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 160-61 (1977).

49. *See* KEVIN M. TEEVEN, *A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT* 181 (1990).

bargains between strangers became more common, and in order to promote economic growth the courts increasingly adopted the will theory.⁵⁰ Parties were free to make whatever bargains they wished, and the social constraints the courts were willing to impose on such bargains narrowed greatly.⁵¹ It is striking that despite the great value Virginians placed on tradition and order, long before the industrial revolution Virginia courts used the will theory freely to uphold a variety of agreements between wives and prospective husbands to modify or even eliminate the unity doctrine from their marriage.

The matter-of-factness with which Virginia courts upheld such agreements is remarkable. Two early cases are illustrative. *Tabb v. Archer*,⁵² decided in 1809, involved two sisters who were heiresses to a large estate of land and slaves in the Petersburg area. The Tabb sisters' suitors agreed, at the insistence of the sisters' mother, to relinquish all claims to property that the sisters would inherit.⁵³ The husbands would have an interest only in the income from the property, which would be used for family support.⁵⁴ After marriage, the husbands persuaded the sisters to sell their property.⁵⁵ In one instance, it was sold to a third party who promptly deeded it back to the husband.⁵⁶ Mrs. Tabb, as trustee of her daughters' property under the agreements, sued the husbands for breach of contract.⁵⁷ The Supreme Court of Appeals, Virginia's highest court, summarily rejected the husbands' argument that the contracts were void as violative of the unity theory, and devoted most of its opinion to interpreting and enforcing the terms of the agreement.⁵⁸

In 1816, in *Scott v. Gibbon & Co.*,⁵⁹ the Supreme Court of Appeals of Virginia upheld a premarital agreement that barred the husband from access to both his wife's property and income. The court was concerned about the fact that the agreement was obviously designed to shelter assets from the husband's creditors.⁶⁰ One justice went so far as to suggest that the court should consider creating an equitable rule giving husbands and their creditors a

50. *See id.*

51. *See* HORWITZ, *supra* note 48, at 175-204; TEEVEN, *supra* note 49, at 181; G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 3-5 (1980).

52. 13 Va. (3 Hen. & M.) 399 (1809).

53. *See id.* at 401-02.

54. *See id.*

55. *See id.* at 402-04.

56. *See id.*

57. *See id.* at 403-04.

58. *See id.* at 418-21.

59. 19 Va. (5 Munf.) 86 (1816).

60. *See id.* at 90-91.

share of income from wives' assets during the marriage.⁶¹ In the end, however, even he agreed with his colleagues that premarital agreements properly drafted to foreclose such a result would be enforced according to their terms.⁶²

Another important device Virginia developed to protect married women was the private examination requirement.⁶³ Virginia, like most colonies, extended married women's dower rights to all property transferred during the husband's lifetime and refused to limit it to property the husband held at death.⁶⁴ As a result, most creditors refused to accept land from husbands as security for sales or loans unless the wife agreed to release her dower right to the land as part of the transaction.⁶⁵ In 1734, Virginia enacted one of the first examination statutes in the colonies, providing that dower releases would be enforceable only where the wife was examined privately to ensure that her consent was not coerced and the examination results were recorded with the local court.⁶⁶ Virginia courts enforced the examination and recordation requirements consistently and strictly for the next 150 years.⁶⁷ Closely related to this, the courts also indicated a preference that property saved to the wife under a premarital agreement be given to a trustee rather than the wife herself for administration. For example, the premarital agreements at issue in the *Tabb* case allowed the husbands to administer the Tabb estates in place of a trustee.⁶⁸ When the case came before the Court of Appeals, the court on its own initiative appointed a trustee in order to avoid further wrongdoing by the husbands.⁶⁹

Two factors, in addition to the desire to preserve kinship group power, played an important role in the shaping of women's property rights in Virginia.⁷⁰ First, Virginia, like most southern, but unlike most northern, colonies and states, had separate law and equity courts.⁷¹ Because the common law was so restrictive of women's

61. See *id.* at 91-95 (Coalter, J., concurring).

62. See *id.* at 95.

63. See SALMON, *supra* note 1, at 18.

64. See *id.* at 151-52.

65. See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 153-54 (New York, O. Halsted 2d ed. 1832). Although it is doubtful that the examination requirement eliminated all duress, scholars of the subject generally have concluded the requirement provided a genuine degree of protection to women. See SALMON, *supra* note 1, at 40-44.

66. See SALMON, *supra* note 1, at 20.

67. See *id.* at 31-32.

68. See *Tabb v. Archer*, 13 Va. (3 Hen. & M.) 399, 402 (1809).

69. See *id.* at 431.

70. See SALMON, *supra* note 1, at 11-12.

71. See *id.*

property rights, virtually all important cases involving such rights were brought in equity, and Virginia's official acceptance of a separate equity system encouraged the courts to bend the common law freely to shape women's rights through marriage settlements and otherwise.⁷² Equity was particularly important in the early development of divorce law.⁷³ Judicial divorce was virtually unknown before 1800; only the legislature could grant absolute divorces, and Virginia legislatures very rarely did so.⁷⁴ Nevertheless, separations occurred regularly and in such cases the equity courts could grant separation decrees, more commonly known as divorces *a mensa et thoro* (from bed and board).⁷⁵ Virginia equity courts had broad power to force husbands to provide what the courts considered adequate support for wives.⁷⁶ The courts exercised this power freely, not out of any particular desire to empower women but because the absolutist Anglican view of marriage included a strong belief that a husband had a duty to support his wife during marriage and that such duty did not diminish in the least if the couple separated.⁷⁷

Second, slavery was intertwined with women's property rights issues as with so many other components of life in Virginia.⁷⁸ In 1705, the Virginia legislature defined slaves as part of real estate for purposes of determining a widow's dower.⁷⁹ In making this rule Virginia departed from most other colonies, which treated slaves as personal property not subject to dower rights.⁸⁰ The 1705 law suggests Virginia wished to keep slaves with their original owners, probably more out of concern for preserving property of the original

72. See *id.*

73. Divorce law is an important part of women's property rights law because it provides an avenue by which a wife can regain the legal rights and independence of a single woman and, in addition, can obtain an interest in the property of the marriage (through property division) and the earning power attributable to the marriage (through a maintenance award). Thus the standards under which divorce can be obtained and under which property and earning power are allocated at divorce are important to determining the relative power of married women in a particular state.

74. In 1681 a commentator noted with pride that Virginia had granted no absolute divorces and only one separation decree in its first 60 years of existence. See FISCHER, *supra* note 9, at 281-82. There is no evidence that the rate increased during the next 150 years.

75. See SALMON, *supra* note 1, at 60, 62, 65.

76. See *id.*

77. For an example of an early case discussing support standards, see *Purcell v. Purcell*, 14 Va. (4 Hen. & M.) 507 (1810). The *Purcell* case also presents an early example of an unfortunate modern trend. After the court made its initial support order, the husband failed to pay and the case returned to the court on an application for a contempt order. See *id.* at 509-11.

78. See SALMON, *supra* note 1, at 152; Gundersen & Gampel, *supra* note 1, at 121-22.

79. See SALMON, *supra* note 1, at 152.

80. See Gundersen & Gampel, *supra* note 1, at 121-22.

family than for the slaves' welfare, although the latter concern may not have been entirely absent.⁸¹

Many of the important early women's property rights cases in Virginia involved the disposition of slaves, and the courts generally managed to achieve results that minimized the risk that slave families would be broken up.⁸² For example, in the 1820 case *Smith v. Smith's Administrators*,⁸³ the court upheld a mother's conveyance of slaves to her married daughter for the daughter's exclusive use, the slaves to be returned to the mother or her estate at the daughter's death.⁸⁴ The intent of the conveyance apparently was to keep the slaves in the mother and daughter's kinship group.⁸⁵ The court had no difficulty concluding the mother's wishes should be enforced, and it rejected the husband's argument that the unity doctrine gave him the right to the slaves at the daughter's death.⁸⁶ In *Hughes v. Pledge*,⁸⁷ the court reviewed a premarital agreement which allowed the couple the use of the wife's slaves during her lifetime but provided they "should not be at the disposal, or subject to the control, debts, forfeitures or engagements, of the . . . husband."⁸⁸ The court overturned the husband's attempt to give the slaves to one of his creditors in order to pay off a debt.⁸⁹ Even though the agreement had not been recorded as required by Virginia law, the court had no trouble upholding the agreement on

81. See SALMON, *supra* note 1, at 152-53.

82. See *infra* text accompanying notes 86, 89.

83. 20 Va. (6 Munf.) 581 (1820).

84. See *id.* at 583-84.

85. See *id.*

86. See *id.* *Thrift v. Hannah* provides a particularly dramatic example of how slavery troubled the Virginia courts in the context of women's rights. See *Thrift v. Hannah*, 29 Va. (2 Leigh) 300 (1830). In *Thrift*, a Maryland woman, Rachel Magruder, provided in 1796 that her slave, Hannah, was to be emancipated in 1807. See *id.* at 331-32. Rachel married in 1799. See *id.* at 332. Under Maryland law, the document of emancipation had to be authenticated in court. See *id.* at 333. Rachel died in 1811, see *id.*, and the emancipation document was not authenticated until 1819. See *id.* at 335. A deeply divided Virginia Supreme Court of Appeals held on a 3-2 vote that Hannah was not free. Justice William Cabell noted that prior to authentication an emancipation document "can never operate as a contract: there can be no contract between master and slave." *Id.* at 318 (Cabell, J., concurring). Under the unity doctrine, the husband acquired an interest in Hannah at marriage and was not bound by the emancipation agreement. The dissenters argued that at marriage the interest a husband acquires in his wife's property is subject to all limitations imposed on the property before marriage, in this case the emancipation document, and that Hannah should be freed. See *id.* at 316 (Green, J., dissenting).

87. 28 Va. (1 Leigh) 443 (1829).

88. *Id.* at 444 (emphasis omitted).

89. See *id.* at 447-48.

the ground that the creditor had actual notice of the agreement at the time the husband incurred his debt.⁹⁰

B. *New York: The Beginnings of a Conflicted System*

A mix of legal cultures shaped New York's early law as to women's property rights.⁹¹ The Dutch legal system, which applied to the colony during its first 40 years, contained important strains of community property law.⁹² It permitted couples, for example, to make joint wills under which the wife would automatically become entitled to half the marital estate at her husband's death.⁹³ After Great Britain took control of the colony in 1664, it gradually replaced the Dutch system with English law but continued to enforce wills made under Dutch law.⁹⁴ Eighteenth century English settlers in New York shared many of the Anglican and hierarchical values of Virginians, but those values were tempered by the fact that commerce and manufacturing quickly became an important part of New York's economy.⁹⁵ Generally, New Yorkers preferred business development and growth to strict social order where the latter impeded the former.⁹⁶ Virginians did not.⁹⁷

In addition, a large migration of New Englanders to the upstate New York frontier between 1780 and 1820 added a new layer of influences to New York law and culture.⁹⁸ Views of divorce and family in New England differed considerably from those in Virginia.

90. *See id.* It may be significant that these cases were decided prior to 1830, at a time when many Virginians were ambivalent about slavery and believed gradual emancipation might be desirable. This attitude changed after 1830. The Nat Turner slave revolt of 1831 scared many moderates into believing that blacks and whites could not live together peacefully if widespread emancipation took place, and the raising of slaves for export to newer southern states became an increasingly important part of Virginia's economy. *See* DABNEY, *supra* note 9, at 226-29. The few reported cases involving slaves and women's property rights after 1830 arguably show less concern over keeping slave families intact than pre-1830 cases. *Compare Hughes*, 28 Va. (1 Leigh) at 443, with *Jennings v. Montague*, 43 Va. (2 Gratt.) 350 (1845). In *Jennings*, the court held that when a husband had used slaves his wife brought to the marriage as security for a debt and there was no marriage agreement restricting his rights, even though the wife had obtained a divorce *a mensa et thoro* and the trial court had returned the slaves to her as allowed by Virginia's divorce statute, the court's order was invalid because the creditor had acquired its security interest before the divorce and the court could not impair that interest. *See id.* at 352-53.

91. *See infra* notes 92-103 and accompanying text.

92. *See Gundersen & Gampel, supra* note 1, at 118

93. *See id.*

94. *See id.* at 118-20.

95. *See id.*

96. *See id.*

97. *See* BASCH, *supra* note 2, at 110-12.

98. *See* ELLIS ET AL., *supra* note 10, at 189.

The Puritans viewed marriage and the family as an integral part of an individual's covenant with God and of her quest for grace.⁹⁹ Yet failure to perform according to the terms of the Puritan covenant provided grounds for divorce.¹⁰⁰ As a result, a divorce was more easily obtained in New England than in Virginia.¹⁰¹ In New England as well as Virginia, women enjoyed neither the social status nor the legal rights available to men. Puritan theology, however, treated women as the spiritual equals of men in some respects.¹⁰² Although Puritan wives could not rely on an extended kinship system to serve as a check on their husbands' control of their property, the Puritan husband's duties to God provided an equivalent check.¹⁰³ New England influence also played an important part in the development of married women's property law in New York.

Early New York and Virginia women's property law had more similarities than differences. The differences, however, were significant. New York, like Virginia, observed the unity doctrine but softened it by allowing women to save their property from husbandly control through the use of premarital agreements and trusts.¹⁰⁴ Yet New York placed much less importance on safeguards against waiver of dower rights than did Virginia. New York did not enact a private examination statute until 1771, and the courts generally did not regard failure to comply with the statute as a reason to void waivers unless there was clear evidence that the wife's release had in fact been coerced.¹⁰⁵ It is not clear whether the legislature and the courts of New York had a more sanguine attitude than their Virginian counterparts toward a woman's ability to resist coercion or whether they simply felt that the certainty and reliability of title transfers in New York, and thus the interests of commerce, would be unduly impeded by allowing wives to challenge property transfers based on formalistic rather than substantive defects.¹⁰⁶

With respect to divorce, New York occupied a peculiar and rather ambivalent position on the spectrum between the New

99. See FISCHER, *supra* note 9, at 70.

100. See *id.* at 78.

101. See *id.* at 281.

102. See *id.* at 83.

103. See FISCHER, *supra* note 9, at 85.

104. See BASCH, *supra* note 2, at 72-75; SALMON, *supra* note 1, at 28-30, 41-44, 112-15.

105. See SALMON, *supra* note 1, at 28.

106. See *id.* at 28-30, 41-44.

England model and the southern model that Virginia exemplified.¹⁰⁷ As a practical matter, New York was far less liberal than New England in granting divorces; indeed, absolute divorces were almost as rare in New York as in Virginia.¹⁰⁸ But like Virginia, New York used equity courts and separation decrees as a safety valve to resolve bad marriages.¹⁰⁹ New York was considerably more muted in its criticism of divorce than was Virginia.

New York's first divorce statute, enacted in 1787, reflected its ambivalent position. The 1787 law conferred divorce authority on the courts some forty years before Virginia did so.¹¹⁰ The legislature, however, retained concurrent authority to grant divorces, and it made adultery the only grounds for absolute divorce.¹¹¹ The statute made fault a primary consideration; an adulterous party could not remarry under any circumstances.¹¹²

The law was controversial from its inception. The state council of revision, led by George Clinton and other leaders who would soon become the nucleus of the Jeffersonian party in New York, objected to the law's harsh limitation on remarriage. Despite the council's veto, the law's drafters, led by Alexander Hamilton and other Federalists, secured passage of the provision.¹¹³ During the next 50 years, repeated efforts to broaden the grounds of divorce were made, but all failed, "not so much [from] a stern sense of duty [on the part of the legislature] as an inability to give the problem of marital law more than fitful attention."¹¹⁴ The only reform came in 1813, when the legislature authorized the courts to award separation decrees in cases of cruelty or other behavior making it unsafe for a wife to live with her husband, and in cases of abandonment.¹¹⁵

107. For a detailed discussion of early divorce law in the southern states, see SALMON, *supra* note 1, at 58-80.

108. *See id.* at 61.

109. *See* NELSON M. BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* 43 (1962).

110. *See id.* at 52, 64.

111. *See id.* at 64; 1787 N.Y. Laws 59, reprinted in 1 LAWS OF STATE OF NEW YORK 93-94 (1802).

112. *See* BLAKE, *supra* note 109, at 65.

113. *See id.*

114. *Id.* at 64. In 1813, an effort to add desertion as a ground for absolute divorce failed. In 1827, growing enthusiasm for temperance spurred an effort to add habitual drunkenness, which also failed. Several efforts in the 1840s met a similar fate. *See id.* at 66.

115. *See id.* at 66.

II. THE JACKSONIAN ERA (1820-1850)

From roughly 1820 to 1850, a series of closely related reform movements, popularly associated with Andrew Jackson and his supporters, dominated much of American political discourse.¹¹⁶ The movements, which included goals such as increased popular participation in politics and government, expansion of debtors' rights, checks on the power of banks and creditors, and expansion of the United States across the North American continent, were linked by a common desire to renew the ideal of a decentralized democracy first articulated by Thomas Jefferson and his followers.¹¹⁷

Jacksonian reform sentiments strongly affected women's rights in New York and Wisconsin. Beginning about 1815, New York gradually abandoned the requirement that married women place their property in trust in order to shelter it from their husbands.¹¹⁸ In 1848, this movement reached a logical conclusion when the state passed a married women's property act, allowing women to control their property directly for the first time.¹¹⁹ Wisconsin enacted a similar law in 1850, soon after gaining statehood. Reform in both states, however, stemmed as much from a desire to help insolvent husbands shelter family assets from creditors as from a desire to increase women's rights.¹²⁰ Less influenced by Jacksonian sentiments, Virginia did not enact a married women's property act until 1877. Yet during the Jacksonian era, it, too, made some important advances in liberalizing its divorce law.¹²¹

A. *New York: A Brief but Glorious Revolution*

Though the Jacksonian reform movement drew its political strength chiefly from the newer American states west of the Appalachians, much of its intellectual leadership came from New York, and the Jacksonian era in New York also witnessed the greatest wave of women's property rights reforms in the state's history. The reforms were not purely a product of Jacksonian sentiment: to a large extent, they were the culmination of decades of changes in British and American law.

116. See ARTHUR M. SCHLESINGER JR., *THE AGE OF JACKSON* 134 (1945).

117. See *id.*

118. See SALMON, *supra* note 1, at 106-07.

119. See BASCH, *supra* note 2, at 156.

120. See *infra* Parts II.A-B.

121. See *infra* Part II.C.

New York increased married women's property rights modestly even before the Jacksonian era began.¹²² During the middle of the eighteenth century, English and American jurists began to question whether it was really necessary to use trusts to preserve the separate character of a married woman's property.¹²³ England formally eliminated the trust requirement in 1769,¹²⁴ and Chancellor James Kent led New York in the same direction in 1815.¹²⁵ In *Methodist Episcopal Church v. Jaques*,¹²⁶ Kent held that premarital agreements creating passive trusts—that is, trusts that created nominal trustees but allowed married women beneficiaries to manage the trust assets actively—were valid and would be enforced according to their terms.¹²⁷ Kent argued that the terms of such trusts should be construed narrowly,¹²⁸ but several years later the Court for the Correction of Errors, New York's highest court at the time, modified Kent's decree and held that broader construction was appropriate.¹²⁹ In *Bradish v. Gibbs*,¹³⁰ Kent formally held for the first time that no trust of any sort was necessary and that married women could keep their property separate by means of a simple premarital agreement.¹³¹ Kent also held, with some reluctance, that a separate estate could be used to preserve as separate property not only the estate property itself but all income it generated.¹³²

122. See SALMON, *supra* note 1, at 90-91.

123. See *id.* at 112-15.

124. See BASCH, *supra* note 2, at 74-88.

125. See *id.* at 76.

126. 1 Johns. Ch. 450 (N.Y. Ch. 1815).

127. See *id.* at 458.

128. See *id.* at 457.

129. See *Jaques v. Methodist Episcopal Church*, 17 Johns. 548 (N.Y. 1820).

130. 3 Johns. Ch. 523 (N.Y. Ch. 1818).

131. See *id.* at 551.

132. See *id.* The progress of women's property law was thrown into temporary uncertainty in 1828 when, as part of a broad revision of the New York statutes, the legislature provided that "[e]very estate which is now held as an use executed under any former statute of this state is confirmed as a legal one." 1 N.Y. REV. STAT. 727, § 47 (1829), reprinted in BASCH, *supra* note 2, at 80 n.22. Many commentators interpreted the statute as abolishing passive trusts and their usefulness as a vehicle for separate property. But in a series of cases between 1835 and 1845, Chancellor Reuben Walworth declined to interpret the statute so broadly. See, e.g., *Knowles & Hume v. McCamly*, 10 Paige Ch. 342 (N.Y. Ch. 1843); *North Am. Coal Co. v. Dyett*, 7 Paige Ch. 9 (N.Y. Ch. 1837); see also BASCH, *supra* note 2, at 80-82 (discussing the *Dyett* case). After the Chancery Court was abolished in 1846, the new Court of Appeals agreed with Walworth's holdings. See *Blanchard v. Blood*, 2 Barb. 352 (N.Y. Sup. Ct. Gen. Term 1848). The 1828 statutes allowed married women to dispose of separate property freely during their lifetime, but they excluded married women from their recitation of persons competent to make a will. In *Strong v. Wilkin*, 1 Barb. Ch. 9 (N.Y. Ch. 1845), Walworth reduced the threat this provision posed to women's rights by holding that married

There is no evidence that Kent's decisions giving women the right to control their property directly were motivated by any particular sympathy for women's rights. Kent made it clear in the *Commentaries* that he was quite comfortable with the husband's traditional role as master of the couple.¹³³ More likely, *Jaques* and *Bradish* reflected a recognition that separate estates for women benefited New York's increasingly commercialized society:

Equity offered couples who had spare assets at marriage the opportunity to protect a portion of those assets from some of the risks of the marketplace. Some astute middle-class couples were bound to take advantage of this option. The separate estate, however, best served landed and mercantile elites, the same classes for whom the first exceptions to common law marital rules had been carved out in English equity. . . . Mercenary [marriage] alliances were common throughout the period and increased in the 1840s. Marriage was simply an integral part of the acquisitive scramble in Jacksonian New York.¹³⁴

The movement to give married women the statutory right to keep their property separate without need for their husbands' consent began in the early 1830s.¹³⁵ Several western states in which Jacksonism was deeply entrenched enacted limited married women's property acts in the late 1830s.¹³⁶ Assemblyman Thomas Herttell introduced the first such proposal in New York in 1836. Opposition to a property rights law surfaced quickly. Many men—and women—genuinely feared that such a law would revolutionize society and destabilize the economy and, in so doing, hurt women more than help them.¹³⁷

Herttell and a group of prominent allies including John L. O'Sullivan, Elizabeth Cady Stanton, Ernestine Rose, and Paulina Wright Davis advanced a variety of arguments to combat these

women could control the disposition of their property by will if the trust creating separate property specifically gave them that right.

133. See KENT, *supra* note 65, at 129-32, 178-87. One modern commentator, however, has argued that Kent's view of women was considerably more respectful than Blackstone's. Unlike Blackstone, Kent viewed married women's subordinate role as a matter of social policy rather than want of ability. See BASCH, *supra* note 2, at 62.

134. BASCH, *supra* note 2, at 110-11.

135. In the late 1830s and early 1840s several states enacted statutes exempting wives' property from their husband's premarital debts. See, e.g., 1835 Ark. Terr. Laws 34-35, *noted in* Chused, *supra* note 2, at 1399 n.205. Mississippi enacted the first statute of any breadth in 1839. See 1839 MISS. LAWS 72, *noted in* Chused, *supra* note 2, at 1399 n.207.

136. See Chused, *supra* note 2, at 1398-1401.

137. See BASCH, *supra* note 2, at 135.

fears.¹³⁸ They relied in part on the growing sentiment for more favorable legal treatment of debtors: married women's property acts could be used to shelter at least part of a couple's assets from creditors.¹³⁹ In New York, growing sympathy for the plight of debtors had resulted in relaxation of the laws of imprisonment for debt during the 1820s and early 1830s.¹⁴⁰ The debtor relief movement gained impetus nationwide when a severe depression began in 1837,¹⁴¹ and it was aided in New York by an anti-rent movement.¹⁴² The anti-rent movement abolished remnants of the feudal landholding system in which a handful of Dutch and English patroon families had operated huge agricultural estates in the Hudson Valley and southern New York on a tenancy basis for almost two centuries.¹⁴³ Another effective argument invoked by reformers combined a direct political challenge to extend Jacksonian democratic principles to women and a sentimental appeal based on the "cult of true womanhood"—that is, the increasingly popular view of women as noble but fragile creatures who needed protection from vice-prone husbands, particularly from the consequences of drunkenness and improvidence.¹⁴⁴

At New York's 1846 Constitutional Convention, which in many ways was the high-water mark of the Jacksonian movement in New York, reformers almost achieved their goal. The convention voted to place a married women's property clause in the constitution, but three days later reconsidered and overturned its vote for reasons that are still not entirely clear.¹⁴⁵ In 1848 the reformers finally

138. O'Sullivan was editor of the *United States Magazine and Democratic Review* and was perhaps the leading intellectual of the Jacksonian movement. *See id.* at 138. Stanton was a nationally prominent women's rights leader throughout the last half of the 19th century and is best known for her role in the fight for women's suffrage. Rose and Davis were leaders of the women's movement in New York. *See id.* at 136-37.

139. *See* BASCH, *supra* note 2, at 135-42.

140. *See* PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-1900*, at 105-29 (1974).

141. *See* ELLIS ET AL., *supra* note 10, at 216.

142. *See id.* at 220.

143. *See id.* at 160.

144. *See* BASCH, *supra* note 2, at 115. Herttell also expressed concern about the potential for confusion that the 1828 statutory revisions had created, and argued that a sweeping law clarifying women's rights would help eliminate such confusion. *See id.* at 116-17.

145. *See* BASCH, *supra* note 2, at 150. The clause which was passed and later rescinded provided that:

All property of the wife, owned by her at the time of her marriage, and that acquired by her afterwards by gift, devise or descent, or otherwise than from her husband, shall be her separate property. Laws shall be passed providing for the registry of the wife's separate property, and more clearly defining the rights of the wife thereto as well as to property held by her with her husband.

succeeded in obtaining a married women's property act, the central provision of which read:

The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents issues and profits thereof shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female.¹⁴⁶

The 1848 statute was a pioneering measure at the national and state levels. No previous women's rights law had covered as broad a scope of property. Nevertheless, the law was conservative in important ways. In particular, it did not contain enforcement provisions and it did not give women the right to enter into contracts independent of their husbands. Perhaps the legislature discerned a cautionary lesson from past opposition and regarded the law as something of an experiment.¹⁴⁷ Over the next few years the legislature filled many of the gaps in the 1848 law with considerable speed, by New York standards. In 1849 it gave women the power to petition for control of their assets previously placed in trust.¹⁴⁸ During the 1850s reformers focused their efforts on obtaining for women the right to control their own earnings and eliminating the long-standing legal presumption that the husband should have guardianship of a couple's children. In 1860 they succeeded when the legislature modified the 1848 law to allow a married woman control of all property "which she acquires by her trade, business, labor or services."¹⁴⁹ The 1860 earnings law also explicitly authorized married women to operate businesses on their own accounts, to contract to the extent necessary to operate such businesses, and to sue and be sued with respect to their property.¹⁵⁰ In cases in which a husband would not consent to his wife's transfer of her separate real estate, the courts were authorized to transfer the property upon petition of the wife unless there was "good cause" for not doing so.¹⁵¹ Finally, the law also decreed that married

2 JOURNAL OF THE CONVENTION OF THE STATE OF NEW YORK 1264-65 (1846), reprinted in BASCH, *supra* note 2, at 150-51.

146. See 1848 N.Y. Laws 200, § 1.

147. See BASCH, *supra* note 2, at 157.

148. See 1849 N.Y. Laws 375. In 1851, the legislature also allowed women to vote shares of stock they owned. See 1851 N.Y. Laws 321.

149. 1860 N.Y. Laws 90; see also BASCH, *supra* note 2, at 176-82.

150. See 1860 N.Y. Laws 90, §§ 4-6.

151. See *id.*

couples were joint guardians of their children and that the wives were to have "equal powers, rights and duties in regard to them, with the husband."¹⁵²

Unlike property rights, liberalization of divorce was not a part of the Jacksonian program in New York. The most notable development in divorce law during the Jacksonian era was the passing of anti-reform leadership from the old Federalists to the Catholic church, which assumed an important place in New York politics due to the influx of Irish and German immigrants to the state in the mid-nineteenth century.¹⁵³ The change in the dynamics of the divorce reform debate can be illustrated by two quotations, one from the beginning and one from the end of the Jacksonian period. Chancellor Kent was an exemplar of the old conservative leadership. In his *Commentaries*, first published at the beginning of the Jacksonian era, he opposed the liberalization of separation grounds for reasons of social policy and general morality.¹⁵⁴ Separation agreements, he argued, were "hazardous to the morals of the parties. . . . [I]t is throwing the parties back upon society, in the undefined and dangerous characters of a wife without a husband, and a husband without a wife."¹⁵⁵ By 1850, the debate had shifted from a question of general policy and morality to the question of protecting Protestant values against encroaching Catholicism. An 1850 legislative committee report criticized the theory of indissolubility of marriage in ethnic terms that would have made Kent and even his opponents blanch:

"[The] pernicious effects [of restrictive divorce laws] are visible in the social institutions and domestic manners of most of the countries of Catholic Europe. And a more forcible commentary can scarcely be made upon the subject under consideration than by a comparison of the manners and morals of two such [Protestant] countries for example, as Scotland and Holland, where not only adultery but desertion are causes of divorce with the morals and manners of Italy or Spain, where the marriage tie is indissoluble."¹⁵⁶

152. *Id.* at § 9.

153. See ELLIS ET AL., *supra* note 10, at 285.

154. See KENT, *supra* note 65, at 127-28.

155. *Id.*

156. N.Y. ASSEM. DOC. NO. 75-73 (1852), *quoted in* BLAKE, *supra* note 109, at 77. The 1852 legislature that produced this commentary was one of the few New York legislatures of the 19th century controlled by the Whigs. Up to 1854, the Democratic Party, which was considerably more receptive to Catholics and immigrants and consequently less receptive to divorce reform, controlled most sessions of the legislature. See *id.* at 76-78.

The 1852 committee's reaction to Catholicism is in striking contrast to Kent's views

Divorce reforms were proposed sporadically throughout the 1840s and 1850s but they all failed, usually because of legislative committee inaction and delay rather than a direct vote against them.¹⁵⁷

B. Wisconsin: Western Jacksonians and Women's Rights

Wisconsin came into existence as a state at the end of the Jacksonian era. Perhaps largely due to its frontier status, Wisconsin was a more thoroughly Jacksonian state than was New York.¹⁵⁸ A constitutional convention was called to prepare for statehood shortly after New York's 1846 Constitutional Convention concluded, and Wisconsin Jacksonians, like their New York counterparts, tried to enshrine a guarantee of married women's property rights in the state constitution. As in New York, both sides framed the debate more in terms of debtor protection than in terms of women's advancement. In order to allay fears that a married women's property provision would revolutionize relations between the sexes, supporters of the provision spoke of women in sentimental terms and discounted the idea that women might actually use their new rights in an independent manner. One supporter argued:

Let every member ask himself the question . . . Is it true that his bosom companion, the young, intelligent, and lovely wife, . . . who . . . separated herself from friends that were near and dear to her to embark with her bare-handed husband for the far West, taking in all probability the last farewell of friends, affluence, and luxury, would ever for the mere paltry consideration

on the community property system, which at that time was confined to Catholic Europe and Latin America. Kent initially criticized the community property system as unduly complicated, but he clearly understood its underlying "presumption that the wife, by her industry and care, contributes, equally with the husband, to the acquisition of property." KENT, *supra* note 65, at 183. He concluded: "It cannot be denied, that the pre-eminence of the Christian nations of Europe, and of their descendants and colonists in every other quarter of the globe, is most strikingly displayed in the equality and dignity which their institutions confer upon the female character." *Id.* at 187.

157. See BLAKE, *supra* note 109, at 76-78.

158. For example, Wisconsin adopted several of the most important Jacksonian legal reforms much earlier in its history and with considerably fewer struggles than New York. Wisconsin abolished imprisonment for debt in 1837, while it was still a territory. See 1837-38 Wis. Terr. Laws 37. New York abolished imprisonment for debt in stages over the better part of a century. See 1831 N.Y. Laws 300. Wisconsin's first state legislature enacted a homestead exemption law in 1848. See WIS. REV. STATS. §§ 51-58 (1849). New York had enacted a homestead law earlier, but only after extensive debate. See 1815 N.Y. Laws 227.

of dollars and cents become the tyrant of him she thus loved and adored? Who believes that [married women's property rights] will make a fiend of a worthy wife? . . . Sir, I do contend that for the true merit the female sex stand much higher than the male. They know but little of the low, truckling, vacillating demagogism that pervades the male portion of creation, and in that particular their ignorance is a jewel.¹⁵⁹

Wisconsin voters rejected the 1846 constitution in part because of the married women's property clause, although many did so only because they felt such reforms should be enacted by statute rather than enshrined as a constitutional right.¹⁶⁰ The constitution adopted at statehood in 1848 left the issue to the legislature, which passed a married women's property act in 1850.¹⁶¹ Wisconsin's 1850 law was modeled closely on the 1848 New York law, with one important difference: the New York law explicitly provided that married women's property would remain available to satisfy their husbands' debts incurred before passage of the act.¹⁶² The Wisconsin law contained no such provision.¹⁶³ The Wisconsin legislature also did not give women the right to control their own earnings.¹⁶⁴

Wisconsin's early divorce laws, like those of many other western states, were shaped by the state's Jacksonian sentiments and the fact that unlike New York and Virginia, Wisconsin was not an heir to more rigid seventeenth and eighteenth century notions of divorce. The state's 1848 constitution abolished all legislative divorce,¹⁶⁵ and the state's first domestic code, enacted in 1849, allowed broader grounds for divorce than in New York and Virginia. In addition to adultery and impotence, grounds for divorce in Wisconsin included cruel and inhuman treatment, habitual drunkenness, desertion, or imprisonment of one spouse.¹⁶⁶

159. David Noggle, *Exemption and the Rights of Married Women, The Convention of 1846*, reprinted in 27 WISCONSIN HISTORICAL COLLECTIONS 658, 662 (Milo M. Quaife ed., The Society Madison 1919).

160. See RANNEY, *supra* note 4, at 58-61.

161. See Act of Feb. 1, 1850, ch. 44, 1850 Wis. Laws 29.

162. See 1848 N.Y. Laws 200, § 2.

163. See 1850 Wis. Laws 29.

164. See *id.* The difference in wording between the two acts eventually turned out to be academic. In 1880, the Wisconsin Supreme Court indicated that the 1850 law did not shelter married women's property from the claims of husbands and their creditors based on obligations incurred before the act's passage, because to interpret the act otherwise would be to render it unconstitutional. See *McKesson v. Stanton*, 50 Wis. 297, 304-05 (1880).

165. See WIS. CONST. of 1848, art. IV, § 24.

166. See 1849 Wis. Laws 79; Mark A. Stamp, *Wisconsin's Marriage and Divorce Laws: A Historical Perspective* 78-79 (1982) (unpublished L.L.M. thesis, University of Wisconsin) (on file with author).

C. Virginia: An Era of Reform at the Margins

Virginians were less receptive to Jacksonian reforms than were New Yorkers and Wisconsinites. During the decades before the Civil War, however, Virginia made some important social reforms. Most notably, a readjustment in 1851 gave the western part of the state representation more proportional to its population and reduced the power of the planter class.¹⁶⁷ Yet this progress was counterbalanced by the state's increasing reliance on the slave trade during the Jacksonian period and by the resultant need to defend slavery and its underlying social order.¹⁶⁸

Virginia did not enact a married women's property act during the Jacksonian era. Its most important reform affecting women during the era was the transfer of divorce-granting functions from the legislature to the courts. Pressures for liberalized divorce appeared in the early nineteenth century and rose slowly but steadily as the century progressed.¹⁶⁹ In 1827, the Virginia legislature gave the courts concurrent power to grant absolute divorces and separations.¹⁷⁰ The initial effect of this change was more symbolic than real because the legislature permitted divorce only on very narrow grounds. Absolute divorces could be granted for impotence, "idiocy," and bigamy, and separation decrees were allowed for adultery, cruelty, and "just cause of bodily fear."¹⁷¹

Reflecting the state's longstanding equity practice, the legislature gave the courts broad powers to divide property and provide for the support of wives and children "as may seem right" and declared that the courts should "restore to the injured party, as far as practicable, the rights of property conferred by the marriage on the other."¹⁷² The legislature, however, also imposed some checks on the courts and made clear its intent that divorce should not be made easy.¹⁷³ Evidence from outside parties was required in order to support a decree of absolute divorce.¹⁷⁴ Thus, the divorcing spouses could not collude to show impotence or idiocy. The

167. See Dabney, *supra* note 9, at 222.

168. See *id.* at 277-78.

169. See BLAKE, *supra* note 109, at 50-52.

170. See 1826-27 Va. Acts ch. 23, §§ 1-2.

171. *Id.* § 2.

172. *Id.* § 3.

173. See *id.*

174. See *id.*

legislature also indicated that fault should be considered in awarding property and support.¹⁷⁵

In 1841, the legislature added abandonment and desertion as grounds for separation decrees.¹⁷⁶ In 1848, it relinquished its divorce-granting powers and added adultery as a ground for absolute divorce.¹⁷⁷ In 1853, the legislature made desertion a ground for absolute divorce as well as for separation.¹⁷⁸

The most important women's rights issue the Virginia Supreme Court of Appeals was called upon to address during the Jacksonian era, both in the context of interpreting the new divorce laws and in the context of married women's property rights, was how competing claims of a wife and her husband's creditors to her property should be balanced. In *Jennings v. Montague*,¹⁷⁹ the court held that lower courts could not exercise their divorce powers to restore wives' premarital property where that would interfere with creditors' rights.¹⁸⁰ When a husband pledged his wife's property as security for the debt, the property could only be restored to the wife subject to the security interest.¹⁸¹

Shortly before the Civil War, the Supreme Court of Appeals made two incremental but important advances in married women's property rights. In *Penn v. Whiteheads* [sic],¹⁸² the court held that in the context of businesses operated by husbands but owned by wives, the relative rights of wives and creditors of husbands must be balanced.¹⁸³ Creditors who made sales or loans to the husband based on the business were entitled to some interest in the business's assets, particularly where the husband provided most of the skill and labor for the business, but the wife was to be given priority over creditors to the extent of her "just interests" or for "necessary support of [the] family."¹⁸⁴ *Poindexter v. Jeffries*¹⁸⁵

175. *See id.*

176. *See* 1840 Va. Acts ch. 71, §§ 1-2.

177. *See* 1848 Va. Acts ch. 122.

178. *See* BLAKE, *supra* note 109, at 22.

179. 43 Va. (2 Gratt.) 350 (1845).

180. *See id.* at 353.

181. *See id.*

182. 53 Va. (12 Gratt.) 74 (1855).

183. *See id.* at 79-82.

184. *Id.* at 81. When the *Penn* case returned to the Supreme Court of Appeals after the Civil War, the court affirmed in broad terms the right of women to engage in trade apart from their husbands and elaborated on its prior decision. Wives could put their assets into a business and allow their husbands to run it without subjecting the assets to claims by the husband's creditors, but to the extent the profits were due to the husband's labor they would be reachable by his creditors. *See Penn v. Whitehead*, 58 Va. (17 Gratt.) 503, 512-13 (1867).

185. 56 Va. (15 Gratt.) 363 (1859).

conclusively established the "wife's equity" doctrine in Virginia, holding that a wife who instituted a separation or support proceeding against an insolvent husband would have an equitable claim against the husband's assets.¹⁸⁶ The court left open the possibility that notwithstanding the deference to creditors required by *Jennings*, courts might be able to exercise their equitable powers to award a certain portion of the husband's assets to the wife even if other creditors had previously perfected an interest in the assets.¹⁸⁷

III. THE ERA OF THE FIRST WOMEN'S MOVEMENT (1850-1920)

In women's history, the years from 1850 to 1920 are best known as the era of the rise and triumph of the women's suffrage movement. In the three states studied here, the era also was marked by a struggle to consolidate and implement married women's property reform. The New York and Wisconsin courts declined to interpret their married women's property acts liberally: women could make contracts and could keep their own earnings only within the strict limits of the original laws, which limits were mildly extended by the New York and Wisconsin legislatures from time to time.¹⁸⁸ Following the social upheaval of the Civil War and Reconstruction eras, which wrought major changes in the role of women in Southern society, Virginia enacted a married women's property act in 1877.¹⁸⁹ The Virginia Supreme Court of Appeals did not go out of its way to limit the act by narrow construction, perhaps because by the time it was called upon to deal with the act the general legitimacy of such acts was well established in the United States. Virginia also began to catch up with New York and Wisconsin in shaping its modern divorce law.¹⁹⁰

A. *Virginia: Edging Toward Modern Women's Rights*

One student of married women's property acts has identified three phases of the property acts movement.¹⁹¹ The first phase,

186. *See id.* at 380.

187. *See id.* at 372-73. New York had previously adopted the wife's equity doctrine; indeed, the courts' power to make the wife an allowance out of an insolvent husband's estate over the claims of creditors seems never to have been in doubt. *See BASCH, supra* note 2, at 90-91; KENT, *supra* note 65, at 16-22.

188. *See infra* text accompanying notes 257-77, 292-308.

189. *See infra* text accompanying note 207.

190. *See infra* text accompanying notes 228-56.

191. *See Chused, supra* note 2, at 1398.

which took place before and during the 1840s, featured laws sheltering property brought to the marriage by wives from their husbands' creditors.¹⁹² The second phase, which took place between 1840 and 1870, witnessed the enactment of laws explicitly classifying such property as wives' separate property and giving them limited direct control over it.¹⁹³ The third, which took place in most states during the 1870s, gave women control over their earnings.¹⁹⁴ As has been seen, New York and Wisconsin passed through all three phases between 1848 and 1860.¹⁹⁵ Virginia followed a different pattern. It enacted no women's property statutes before the war, but passed through the first and second phases simultaneously when it finally enacted a married women's property act in 1877.¹⁹⁶ Virginia never enacted a separate earnings law.

Virginia's delay was not due to happenstance. The political and social impulses responsible for married women's property reform in New York and Wisconsin were virtually nonexistent in Virginia before the Civil War. Debtor rights was not an important issue: the Virginian concept of honor afforded little sympathy to debtors who did not pay their bills, and the 1837 depression which fueled concern over the issue in New York and Wisconsin had considerably less impact on Virginia than on most other states.¹⁹⁷ Virginia's love of established order and its relatively advanced system of equitable protection for married women dampened the impulse to redefine women's role in society, which had been an element behind married women's property reform elsewhere. However, the many deaths and widespread destruction that the Civil War wrought in Virginia changed women's role in Virginia society profoundly: "In some ways the South in 1865 became again a frontier where there were few precedents to help people deal with their problems and few supporting structures for those who needed support."¹⁹⁸ In addition, "the experience of self-sufficiency during the war had opened the door a crack to the 'strong-minded' women."¹⁹⁹ Finally,

192. *See id.*

193. *See id.*

194. *See id.*

195. *See infra* text accompanying notes 257-77, 292-301.

196. *See infra* note 207 and accompanying text.

197. *See* DABNEY, *supra* note 9, at 231-33. Virginia enacted some provisions to make it easier for hard-pressed debtors to pay, but the state consistently resisted abolition of imprisonment for debt. *See* COLEMAN, *supra* note 140, at 191-206 (describing Virginian approaches to economic hardship).

198. ANNE FIROR SCOTT, *THE SOUTHERN LADY: FROM PEDESTAL TO POLITICS, 1830-1930*, at 94 (2d ed. 1995).

199. *Id.* at 101.

"[f]unctionally the patriarchy was dead, though many ideas associated with it lived on for years."²⁰⁰

The war also brought debtors' rights to the forefront of Virginia politics for the first time.²⁰¹ The federal government required all the former Confederate states to repudiate their wartime debts as a condition of being readmitted to representation in Congress.²⁰² Many states seriously considered using the occasion to repudiate their prewar debts as well and start afresh. Virginia, ever conscious of honor, did not.²⁰³ As a result, most of the limited revenue which the state could elicit from taxation of a war-ravaged populace went to pay interest on the state debt at the expense of education, subsidies for railroads and business, and other projects which were becoming important to many Virginians for the first time.²⁰⁴ An increasing number of Virginians came to favor partial or complete repudiation of the state's debt or, failing that, restructuring of debt payment over a longer period in order to release tax revenues for more important purposes.²⁰⁵ By the mid-1870s the "Readjusters" were an important force in Virginia politics; they controlled the state from 1879 to 1885.²⁰⁶ There is little direct evidence of what motivated the 1877 legislature to pass a property rights law, but in 1877 the concepts of women's role in society and of the proper treatment of debt had reached approximately the same state in Virginia as they had reached in New York and Wisconsin in the 1840s, and it is reasonable to conclude these were the main forces behind the 1877 Virginia act. Not surprisingly, the legislature tried to make up for lost time by combining into one law features that New York and Wisconsin had adopted gradually over time. The 1877 Virginia act contained the basic provisions of the 1848 New York law. The Virginia act also authorized married women to contract with regard to their property and, where their husbands would not agree to the conveyance of their separate property, empowered women to petition the courts to authorize conveyance.²⁰⁷

200. *Id.* at 102.

201. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 302-04, 325-28, 374-77 (1988).

202. See *id.* at 375-77.

203. See DABNEY, *supra* note 9, at 377.

204. See *id.*

205. See *id.*

206. See *id.* at 374-93; RUBIN, *supra* note 8, at 143-47.

207. See 1876-77 Va. Acts ch. 265, §§ 1, 3. Unlike New York and Wisconsin, the Virginia Supreme Court of Appeals never had to address the issue of whether the act applied to the rights of husbands and their creditors that had vested before passage of the act. If the issue had come before the court, most likely it would have followed New York's and Wisconsin's

The 1877 act generated substantial protest among Virginia's legal traditionalists. John B. Minor, a long-time law professor at the University of Virginia and the author of a treatise widely used by Virginia lawyers during the late nineteenth and early twentieth centuries, was one of the leading critics of the law.²⁰⁸ Interestingly, Minor was more disturbed by the general threat the act posed to traditional Virginian social values than by the specific changes it made in the law.²⁰⁹ He complained that the act operated:

To subvert the long-tried, and, in the main, well-settled doctrines of the common law . . . to abolish virtually the husband's headship of the family, contrary to the common law, to common reason, to the Scriptures, and to the fruitful experience for many centuries of the race from which we spring. . . . to introduce causes of domestic strife . . . [and] to encourage[] frauds against creditors²¹⁰

Minor particularly complained of the 1877 act's failure to insulate husbands from debts incurred by their wives even though it had deprived husbands of the ability to prevent their wives from running up such debts.²¹¹ The 1887 legislature modified the law to insulate the husband's separate estate from the wife's premarital debts and debts she incurred in running a separate business,²¹² and in 1900 it eliminated husbands' liability for their wives' torts and other wrongs committed during marriage.²¹³ Minor was somewhat mollified by these changes, but he continued to emphasize that "no modifications can do away with the grave objections to the *policy* of such legislation."²¹⁴

The Virginia Supreme Court of Appeals construed its state's property act more even-handedly than did the New York and Wisconsin courts. This is surprising, considering Virginia's long delay in enacting such a law and the continuing conservative opposition to the act. The reasons for the court's even-handedness are not clear, but two explanations are plausible. First, because

lead and would have held the act could not be applied retroactively. *See infra* text accompanying notes 259-60, 295.

208. *See generally* 1 JOHN B. MINOR, INSTITUTES OF COMMON AND STATUTE LAW (Richmond, Whittet & Shepperson 3d ed. 1882) (discussing common and statutory law relating to the rights of people).

209. *See id.* at 346-47.

210. *Id.*

211. *See id.* at 347, 369.

212. *See* 1887 Va. Code 103, § 2290.

213. *See* 1900 Va. Acts ch. 1139(3).

214. MINOR, *supra* note 208, at 348.

Virginia had taken so long to make a commitment to a married women's property act and because such acts were relatively common by 1877, the court may have been more reluctant to limit the act by judicial construction than judges in New York and Wisconsin. Second, the upheaval in the role of women in southern society caused by the Civil War and Reconstruction, combined with the remnants of Virginia's equity court tradition which had always been relatively liberal as to women's property rights, may have created a more accepting judicial climate than existed in New York and Wisconsin.

In *Williams v. Lord & Robinson*,²¹⁵ the first major case involving the 1877 act, the Supreme Court of Appeals indicated that the act conferred very broad rights on women and would be enforced according to its terms. The court gave no sign that it would try to interpret the act restrictively. Conversely, the court refused to apply other restrictions on disposal of property less strictly to women than to men.²¹⁶ For example, prior to 1877 it was not uncommon for husbands to try to shelter their own property from creditors by transferring the property to their wives or to a trust in the wife's name.²¹⁷ In response, the courts had created a rebuttable presumption that such transfers were fraudulent.²¹⁸ In *Yates v. Law*²¹⁹ and again in *Johnson v. Ables*,²²⁰ the Supreme Court of Appeals held that the 1877 act had not destroyed this presumption. The court recognized that many states placed the burden on creditors to prove fraud rather than on husband and wife to disprove it, but commented that such decisions "attached more weight in this respect to the change of property rights, and less to the unchanged domestic relationship than is consistent with the long and uniform course of authority in this state."²²¹

During the years after they enacted married women's property laws, Virginia, New York, and Wisconsin all had to deal with a closely related question: the extent to which women would be allowed to enforce their newly granted rights by suit. Virginia, like New York, declined to expand married women's rights to sue by

215. 75 Va. 390 (1881). In *Williams*, after a husband's business failed, his wife bought part of his stock for consideration. The Supreme Court of Appeals held that under such circumstances, the stock was not reachable by the creditors. See *id.* at 403-06.

216. See *id.*

217. See, e.g., *William & Mary College v. Powell*, 53 Va. (12 Gratt.) 372 (1855).

218. See *id.* (finding a rebuttable presumption of fraudulent transfer when husbands transfer property to their wives).

219. 9 S.E. 508 (1889).

220. 89 S.E. 908 (1916).

221. *Id.* at 910.

broad statutory interpretation or otherwise. In *Keister's Administrator v. Keister's Executors*,²²² a wife who had been assaulted by her husband asked the court to hold that, by necessary implication, the 1877 married women's property act gave married women the right to sue their husbands for personal injuries. The court refused to do so.²²³ It noted that the Virginia statute was couched in procedural terms. The statute gave a married woman the right to sue and be sued as if she were unmarried,²²⁴ which was different than some states that allowed women to enjoy all rights as though they had never been married.²²⁵ The court reasoned that this language did not confer on married women "the substantive civil right of a legal existence and legal personality separate and apart from that of the husband . . . but merely enlarge[d] the remedies of married women with respect to substantive rights of theirs existing at common law."²²⁶ Justice Martin Burks, the court's expert on women's property law issues, emphasized that a more liberal interpretation would injure the sanctity of the family:

I am unwilling, upon such language as is contained in the foregoing statute, to obliterate the primary obligations growing out of the marriage relation, to revolutionize the whole law relating to the husband and wife, and open the courts to the public discussion of domestic differences, which, when of sufficient consequence, may be settled by the chancellor in suits for divorce, or by prosecution for violation of the criminal laws of the state.²²⁷

Virginia also began to develop a body of divorce case law for the first time in the 1870s. The Supreme Court of Appeals warned in severe terms that it would do everything in its power to limit the number of divorces in Virginia,²²⁸ but its actions visibly failed to match its words. In its first divorce case, *Bailey v. Bailey*,²²⁹ the court warned that "the whole scope and purpose of [the divorce statutes] was to limit the jurisdiction of the courts, and to

222. 96 S.E. 315 (1918).

223. *See id.* at 316.

224. *See id.* at 322 (Burks, J., concurring).

225. *See id.* at 318.

226. *Id.* at 317.

227. *Id.* at 322 (Burks, J., concurring).

228. *See, e.g., Bailey v. Bailey*, 62 Va. (21 Gratt.) 43 (1871); *Latham v. Latham*, 71 Va. (30 Gratt.) 307 (1878).

229. 62 Va. (21 Gratt.) at 43.

discourage suits of this character."²³⁰ It concluded its decision in even stronger terms:

[W]e express the hope that such cases may be in the future as infrequent as they have been in the past; that, amid the whelming tide of social and political revolutions which threaten to sweep away all the forms of our cherished southern civilization, one pillar at least of the social fabric may still stand firm . . . that marriage may in the future, as it has been in the past, be ever recognized in Virginia as an institution to be cherished by law and sanctified by religion, upon which alone the happiness and purity of social and domestic life must ever depend.²³¹

Nevertheless, the *Bailey* court passed up a prime opportunity to interpret Virginia's divorce statutes narrowly. It held that no minimum period of living apart was required to obtain a separation decree based on desertion and that the intent to desert could be established by the testimony of the divorcing spouses alone without extrinsic evidence, despite the opportunities for collusion this presented.²³²

*Latham v. Latham*²³³ was one of the most important early Virginia divorce cases. It sheds particular light on how the Supreme Court of Appeals was grappling with the changing role of women in southern society and southern marriages. The Lathams were a prominent couple in Lynchburg society, and their divorce had ample ingredients to cause a public furor: a bitter division between the spouses over Reconstruction politics; a wife who showed unmistakable signs of chafing in a traditional role, who announced after the birth of their son that she would have no more children and who eventually refused to have sexual relations with her husband, perhaps because of illness or perhaps because of hostility; and bitter quarrels between the wife and the husband's family, all of which culminated in the husband's unannounced flight with their son.²³⁴

The court made two important holdings. *Latham* was the first case to consider how broadly to define cruelty for purposes of divorce. The court refused either to limit cruelty to cases of

230. *Id.* at 49.

231. *Id.* at 59.

232. *See id.* at 46, 50-52.

233. 71 Va. (30 Gratt.) at 307.

234. *See id.* at 321-22.

physical violence or to extend it to all mental abuse.²³⁵ In the majority opinion, Justice Waller Staples conceded that "there may be cases in which the husband, without violence, actual or threatened, may render the marriage state impossible to be endured," but he emphasized that "what merely wounds the feelings without being accompanied by bodily injury or actual menace" would not be grounds for divorce.²³⁶ Notwithstanding the great bitterness between the Lathams, the court found that the altercations between them did not rise to the level of cruelty, particularly as Mrs. Latham was substantially at fault in destroying the parties' relationship.²³⁷ Because Mr. Latham was willing to reconcile with his wife and showed no intent to leave her for good, there was no desertion.²³⁸

The court's holding provoked a lengthy dissent from Justice Francis Anderson, who vehemently argued that the new cruelty standard had been met based on Mr. Latham's removal of the parties' child.²³⁹ He considered this to be outrageous.²⁴⁰ Anderson took pains to deny that Mrs. Latham "had any sympathy with the dogmas known as 'woman's rights,'" and he characterized her as simply a woman of pride and spirit—traditional values with which all Virginians could sympathize.²⁴¹ Anderson argued that Mrs. Latham had not challenged her husband's authority but had merely exercised her right to demand that he exercise it "with tenderness and consideration, which she rightly claims is due the wife."²⁴² He also suggested that if fault was to be considered, under traditional Virginian standards of manhood Mr. Latham should bear a portion of the fault.²⁴³ "A pretty complaint for a *man* to make to a court of justice against his wife!" sniffed Anderson.²⁴⁴ "If it [Mrs. Latham's refusal to have intercourse with her husband] was true," he asked, "why didn't he put her privately away and let her take her child with her?"²⁴⁵

Latham was also the first Virginia case to address child custody issues. The court firmly adhered to the traditional common-law

235. *See id.* at 321.

236. *Id.*

237. *See id.* at 318-22.

238. *See id.*

239. *See id.* at 343, 388-89 (Anderson, J., dissenting).

240. *See id.* (Anderson, J., dissenting).

241. *Id.* at 346 (Anderson, J., dissenting).

242. *Id.* at 347 (Anderson, J., dissenting).

243. *See id.* at 372 (Anderson, J., dissenting).

244. *Id.* (Anderson, J., dissenting).

245. *Id.* (Anderson, J., dissenting).

rule giving the husband complete control of the children, but it carved out some narrow exceptions.²⁴⁶ For example, husbands could be denied custody if they had committed "gross misconduct" or if "the interest or happiness of the child imperatively require it."²⁴⁷ Some other states had adopted a "tender years" exception to the traditional custody rule, giving mothers custody of very small children.²⁴⁸ The Virginia court grudgingly allowed a limited "tender years" rule, with an interesting gender distinction. The rule could be used to allow little girls to remain with their mothers, but would only be applied to little boys in extreme cases.²⁴⁹ The court also injected an element of fault into the custody issue.²⁵⁰ Although Mrs. Latham had been a good mother and was close to her children, the court refused to allow her visitation because she refused to attempt reconciliation with her husband.²⁵¹

Anderson again disagreed with the majority. He argued that the tender years doctrine should be adopted for both sexes and should be a mandatory rather than merely a permissible exception to paternal custody.²⁵² In closing, Anderson implicitly illustrated a central dilemma of fault-based divorce and drew a link between women and slavery in language more characteristic of the 1970s than the 1870s:

It is true that it is the husband's God-given prerogative to be the head of his family, . . . but a woman when she marries does not surrender *all* her rights. . . . She is not the slave of her husband (though she is too often made such); she is morally and socially his equal. She has her rights and privileges within her sphere, which the husband cannot withhold from her except by an act of oppression. And the care and nurture and training of her children in the nursery is within her sphere, and properly belong to her peculiar province.

. . . .

246. See *id.* at 332.

247. *Id.*

248. The "tender years" doctrine was first enunciated by the Pennsylvania Supreme Court in *Commonwealth v. Addicks*, 5 Binn. 520 (Pa. 1813). See Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1052-59 (1979). New York adopted the doctrine soon after Pennsylvania. See *Ahrenfeldt v. Ahrenfeldt*, 1 Hoff. Ch. 497 (N.Y. Ch. 1840). In some cases, New York allowed children nearing adulthood to decide which parent should have custody. See, e.g., *In Matter of Wollstonecraft*, 4 Johns. Ch. 80 (N.Y. Ch. 1819).

249. See *Latham*, 71 Va. (30 Gratt.) at 321-22.

250. See *id.* at 332-33.

251. See *id.*

252. See *id.* at 387 (Anderson, J., dissenting).

The moral sentiment of the world looked with abhorrence on the separation of a female slave who was a mother from her offspring of tender years. It was not often done But to tear from the bosom of a young, ardent, refined, highly cultivated, amiable, devoted mother, eminently qualified, morally and mentally, for rearing it, in defiance of her cries and entreaties, the infant child that she has borne . . . is a barbarity and refinement of cruelty which no man has a right to inflict on his wife. . . . It is cruelty when inflicted, which entitles a wife to be released from her obligations to her husband and to the protection of the law in her custody of her child.²⁵³

The court continued to construe divorce standards narrowly and to maintain an atmosphere of general disapproval of divorce, broken only by an occasional equitable exception, during the half century following *Latham*.²⁵⁴ It consistently required substantial reconciliation efforts to be made before divorce would be considered: if one spouse indicated a desire to reconcile, divorce would be refused even if the other spouse did not wish to reconcile or felt with good objective reason that reconciliation was hopeless. In *Haynor v. Haynor*,²⁵⁵ the court explained the policy behind this rule:

"When people understand that they *must* live together, except for a few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off. They become good husbands and good wives from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching duties which it imposes."²⁵⁶

253. *Id.* at 387, 389 (Anderson, J., dissenting).

254. *See, e.g., Haynor v. Haynor*, 70 S.E. 531 (Va. 1911) (reasoning that couples will work out their differences if not given the option of divorce). For an example of an equitable exception made by the Virginia court, see *Ringgold v. Ringgold*, 104 S.E. 836 (Va. 1920). In *Ringgold*, the court upheld a judgment of divorce for a wife whose husband refused to cohabit with her after she told him of a youthful flirtation. *See id.* at 842. Although the husband had not committed physical or verbal abuse, the court emphasized that the wife had made extraordinary efforts to reconcile, all of which had been spurned; that the husband had made her a "mere inmate" of their home; and that he had imposed a series of reconciliation conditions which the court felt were unreasonable. *See id.* at 838-40.

255. 70 S.E. at 531.

256. *Id.* at 532 (quoting Sir William Scott's opinion in *Evans v. Evans*, 1 Hogg. C.R. 35 (1790)). Scott's opinion was a favorite of the court, which also quoted it in *Latham* and many other late 19th century and early 20th century divorce cases. Scott's opinion was also a favorite of the New York Court of Appeals.

B. New York: Judicial Reaction to the Married Women's Property Laws

The advances in women's property rights in New York between 1848 and 1860 were followed by a long period in which judicial checks alternated with modest legislative advances. New York judges generally interpreted the 1848 married women's property act and the 1860 earnings law narrowly. Their conservatism was not due purely to a sense of judicial restraint: they were deeply divided over the wisdom of the early property acts. A few judges praised the acts openly as a high embodiment of Jacksonian democratic principles:

We have here no lords to whom we are bound to render homage. We are all equal peers. A citizen here receives no new dignity by holding an interest in lands. The maintenance and support of the child, which was a reason for the introduction of such an estate [i.e., a husband's right to his wife's property under the unity doctrine], is more certain now by directly inheriting from the mother, than to be dependent upon a father, whose dignity and importance consist in the fact of having been a husband of a wife who had an estate in lands.²⁵⁷

The newly-formed Court of Appeals, however, was less enthusiastic. The 1848 law faced constitutional challenges soon after its enactment: opponents argued that it deprived husbands of property without due process of law and impaired the contractual obligations that spouses assumed at the time of their marriage vows. In several early decisions, lower courts affirmed the legislature's general power to regulate property rights arising out of marriage, reasoning that because of the great effect the institution of marriage had on society as a whole, marriage contracts could be subjected to greater state regulation than other contracts.²⁵⁸ In *Holmes v. Holmes*,²⁵⁹ however, the Court of Appeals held the act did not apply to marriage rights in existence prior to its enactment, because retroactive application of the act would impair previously vested rights. Speaking for the majority of the court, Justice Seward Barculo expressed open skepticism about the legislature's decision to change the traditional common-law system:

257. *Billings v. Baker*, 28 Barb. 343, 349-50 (N.Y. App. Div. 1849).

258. See, e.g., *Blood v. Humphrey*, 17 Barb. 660 (N.Y. App. Div. 1854) (allowing married woman's property to be deeded as an unmarried woman's property would be); *White v. White*, 5 Barb. 478 (N.Y. App. Div. 1849) (holding the 1848 law constitutional).

259. 4 Barb. 295 (N.Y. 1848).

The experience of the sages and venerable men who have preceded us, is as nothing, compared to the intuition of the Solons of this "progressive" age. Legal forms, authorities, precedents, maxims, adjudications, the knowledge of the past, the learning of the present, all fade away and disappear before the dazzling brightness of the new era. Whether these sudden and violent innovations in a science which, of all others, is most emphatically the result of *time* and *experience*, are to prove beneficial to society, it remains to be seen.²⁶⁰

During the last half of the nineteenth century, New York courts gave full effect to the 1848 law as a device for protecting family assets against claims of the husband's creditors, but they were considerably more restrained in allowing the laws to serve as a vehicle for the advancement of women's rights. In *Yale v. Dederer*,²⁶¹ the Court of Appeals held the laws eliminated any rights that creditors might have to seek attachment of a wife's assets to satisfy a husband's debts. Creditors could reach the wife's assets only with respect to debts which had been incurred for the direct benefit of the wife or her property, or for which the wife had directly agreed to assume responsibility.²⁶² The court refused to place debts incurred for family purposes in this class.²⁶³ In a series of cases concerning the status of businesses owned by the wife but operated by the husband, the courts consistently held that the husband's involvement did not make the business assets available to his creditors: if his wife owned the land or facilities used to operate the business, they were protected.²⁶⁴ The profits of the business also belonged to the wife and were sheltered, even if they were generated through the husband's efforts or, conversely, were given

260. *Id.* at 299. The courts also rejected several invitations to construe the 1848 and 1849 acts broadly. *See, e.g.,* *Hurd v. Cass*, 9 Barb. 366 (N.Y. App. Div. 1850) (holding that the acts did not affect dower, curtesy, or common law rights of inheritance generally).

261. 22 N.Y. 450 (1860).

262. *See id.* at 460-61.

263. *See id.* The *Yale* case had come before the court two years previously, prior to the passage of the 1860 earnings law. At that time the court praised the common law's wisdom in denying women the power to contract, viewing it as the best safeguard for the family against the husband's creditors and commenting that "[t]his legal incapacity is a far higher protection to married women than the wisest scheme of legislation can be." *Yale v. Dederer*, 18 N.Y. 265, 272 (1858). What the court thought of the 1860 law, which gave women limited power to contract, and of the subsequent 1884 law giving women full power to contract is unclear. *See supra* notes 257-60 and accompanying text. In contrast to its comments on the 1848 and 1849 property laws in *Holmes*, it refrained from publicly giving its views on the wisdom of the 1860 and 1884 laws.

264. *See Gage v. Dauchy*, 34 N.Y. 293 (1866); *Sherman v. Elder*, 24 N.Y. 381 (1862).

to the husband: the courts reasoned that such income should be applied first to support the family and that creditors had no priority either morally or legally.²⁶⁵

The New York courts applied quite different rules to work performed by the wife. In *Birkbeck v. Ackroyd*,²⁶⁶ the Court of Appeals created a presumption that a wife's entire wages, including those earned outside the home, belonged to her husband: to preserve her rights to her own income the wife had to explicitly elect to exercise them.²⁶⁷ Even in cases where the wife made such an election, the Court of Appeals refused to apply the 1860 earnings law to income from work directly or indirectly related to household activities.²⁶⁸ In so doing, the court affirmed that the asset-sheltering function of women's property laws remained uppermost in its mind and that the cult of true womanhood was still thriving as the century neared its end:

It would operate disastrously upon domestic life and breed discord and mischief if the wife could contract with her husband for the payment of services to be rendered for him in his home To allow such contracts would degrade the wife by making her a menial and a servant in the home where she should discharge marital duties in loving and devoted ministrations, and frauds upon creditors would be greatly facilitated, as the wife could frequently absorb all her husband's property in the payment of her services, rendered under such secret, unknown contracts.²⁶⁹

In *Bertles v. Nunan*,²⁷⁰ the Court of Appeals also made clear it would limit as much as possible the rights that the 1860 earnings law had given women to make independent contracts. On a 5-2 vote, the court 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

265. See *Abbey v. Deyo*, 44 N.Y. 343 (1871); *Buckley v. Wells*, 33 N.Y. 518 (1865). This position stands in contrast to the Virginia Supreme Court of Appeals decision in *Penn v. Whitehead*, which gave Virginia couples considerably less protection against the husband's creditors in such situations. See *supra* notes 182-84 and accompanying text.

266. 74 N.Y. 356 (1878).

267. See *id.* at 358; see also *Filer v. New York Cent. R.R. Co.*, 49 N.Y. 47 (1872) (noting that a woman's services belong to her husband and he may have an action for the loss of her services due to personal injury).

268. See *Coleman v. Burr*, 93 N.Y. 17, 25 (1883).

269. *Id.* at 25-26.

270. 92 N.Y. 152 (1883).

statute.²⁷¹ The legislature finally reacted by providing in 1884 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."²⁷²

Apart from the 1884 law, the legislature's attitude toward expanding married women's rights was mixed throughout the second half of the nineteenth century. In 1862 it amended the 1860 earnings law to allow married women to enforce their rights by suit,²⁷³ but in 1880 it repealed the law²⁷⁴ and did not restore it until 1890.²⁷⁵ The 1890 law gave married women a right of action for injuries to their persons or property and also for injuries arising out of the marriage "in all cases in which an unmarried woman or a husband now has a right of action by law."²⁷⁶ In 1902, the legislature also gave women the right to bring actions directly against their employers to collect their wages and to redress other work-related grievances.²⁷⁷

The roles of the legislature and the courts were reversed with respect to divorce law. Here, the legislature was the conservative force and what little progress took place during the era came through the courts. New York's population grew steadily during the late nineteenth and early twentieth centuries, and presumably the number of troubled marriages in the state grew accordingly. The legislature consistently declined to add new grounds for divorce,²⁷⁸ so the social pressure for new means of ending bad

271. *Id.* at 160.

272. 1884 N.Y. Laws 381.

273. *See* 1862 N.Y. Laws 172.

274. *See* 1880 N.Y. Laws 245.

275. *See* 1890 N.Y. Laws 51.

276. *Id.* The New York courts construed the suit provisions of the 1860 and 1862 laws even-handedly while they were in effect, but they refused to interpret the laws to allow wives to sue their husbands for torts, reasoning that the purpose of the provisions was "to distinguish . . . [a wife's] property from her husband's, and not to confer rights of action upon her, against him." *Longendyke v. Longendyke*, 44 Barb. 366, 368 (N.Y. App. Div. 1863); *see also* *Abbe v. Abbe*, 48 N.Y.S. 25 (N.Y. App. Div. 1897) (denying a woman's right to maintain an action against her husband for assault and battery). *But cf.* *Bennett v. Bennett*, 23 N.E. 17, 17 (N.Y. 1889) (holding that, under New York common law, wives had the right to bring suit against other women for alienation of their husbands' affection). The *Bennett* court also noted that lower courts routinely allowed wives to sue in their own name even after the 1880 repeal of the suit laws. *See id.* at 18-19.

277. *See* 1902 N.Y. Laws 289.

278. Several highly publicized divorce cases in the 1870s, most notably a divorce trial involving religious and antislavery leader Henry Ward Beecher, made divorce reform a touchy political topic. Furthermore, Elizabeth Cady Stanton and some other leaders of the women's movement in New York advocated divorce on demand a century before its time. Stanton urged that: "The wisest possible reform we could have on this whole question is to have no legislation whatever. The relations of the sexes are too delicate in their nature for

marriages found three new outlets: out-of-state divorces, annulments, and a widespread but tacit agreement among litigants, lawyers, and many trial judges to accept minimal evidence of adultery as adequate proof in divorce cases.²⁷⁹

Out of state divorces found particular favor with wealthy New Yorkers. One spouse would establish temporary residence in a state that allowed divorce based on a minimal period of separation or based on other grounds more liberal than New York's. As soon as the divorce was granted, the spouse would move back to New York.²⁸⁰ Opponents of divorce reform raised the question of whether New York was obligated to recognize such divorces but the New York courts, citing the need to give official acts of other states comity in New York, declined to overturn such divorces to any significant extent.²⁸¹ Most out of state divorces, however, were agreed on by both spouses and were not challenged in court.²⁸²

Paradoxically, although New York provided only narrow grounds for divorce, it provided a higher than average number of grounds for marriage annulment. Fraud was the most popular ground for annulment, and an extensive body of case law developed in New York as to what constituted fraud. The traditional common-law rule was that pre-marriage misrepresentations would warrant annulment only if they went to the "essentials" of the marriage relationship.²⁸³ In the late 1890s several decisions suggested the courts were expanding their definition of what types of misrepresentations went to "essential" matters.²⁸⁴ In *DiLorenzo v.*

statutes, lawyers, judges, jurors, or our public journals to take cognizance of, or regulate." BLAKE, *supra* note 109, at 99 (quoting Elizabeth Cady Stanton). Such remarks "made it easy to denounce the protagonists of divorce reform as advocates of free love," and thus eroded middle-class support for divorce reform. MAX RHEINSTEIN, *MARRIAGE, STABILITY, DIVORCE AND THE LAW* 40 (1972).

279. See BLAKE, *supra* note 109, at 190-200.

280. See *id.* at 169-72.

281. See *id.* at 174-76.

282. See *id.* at 159-65, 179-88. Blake commented that when he moved from Massachusetts to New York in the mid-20th century, he was struck by the unique "atmosphere surrounding divorce [in New York]. It was not that divorce was less common. . . . But over the landscape of divorce a cloud of embarrassing ambiguity seemed to hang." *Id.* at vii.

283. See *DiLorenzo v. DiLorenzo*, 174 N.Y. 467, 471-72 (1903); see also BLAKE, *supra* note 109, at 194-99 (discussing the rule).

284. See *King v. Brewer*, 29 N.Y.S. 1114 (N.Y. Sup. Ct. 1894) (annulling a marriage because the husband had failed to tell his wife before marriage that he was running an illegal pool hall); *Keyes v. Keyes*, 26 N.Y.S. 910 (N.Y. Sup. Ct. 1893) (annulling a marriage because the husband did not tell his wife about his criminal past as a thief before marriage); BLAKE, *supra* note 109, at 194-95; see also *Fisk v. Fisk*, 39 N.Y.S. 537 (N.Y. App. Div. 1896) (refusing to annul a marriage based on the wife's failure to disclose a prior marriage and criticizing trial courts' increasing liberality as to annulments).

DiLorenzo,²⁸⁵ the Court of Appeals ruled that fraud should turn more heavily on the subjective intent of the parties than on the objective nature of the misrepresentations. The *DiLorenzo* court thus invoked the will theory of contract—last seen in use by the Virginia Supreme Court of Appeals to enforce premarital property agreements²⁸⁶—to make annulments easier to obtain.²⁸⁷ In *Pearson v. Pearson*,²⁸⁸ the court liberalized the standard for proving cruelty, a less common ground of annulment, in a similar fashion: it abandoned a long-standing rule limiting cruelty to physical abuse and conduct endangering physical safety and held that cruelty also could include serious mental abuse.²⁸⁹

Perhaps the most important device available to New Yorkers not wealthy enough to afford out of state divorces was a tacit but increasing trend among trial courts to accept only the most minimal circumstantial evidence of adultery as sufficient for divorce. As part of a nationwide reaction at the end of the nineteenth century against increasing divorce rates, the legislature made several attempts to restrict adultery divorces by tightening standards of proof and requiring the plaintiff's spouse to show that he or she had not condoned the defending spouse's behavior.²⁹⁰ By the early 1900s agencies had arisen to provide ready-made proof of "adultery" for husbands who desired a divorce. Such agencies would supply young women that would go with the husband to a hotel. The two would partially disrobe and climb into bed; after a few minutes, a detective also employed by the agency would enter the room to witness this proximity. Trial courts consistently held this was adequate circumstantial evidence of adultery. The agencies quickly became a scandal and remained so for decades, but the Court of Appeals never took formal notice of the situation and for the most part resisted invitations to make the trial courts' standards of proof stricter.²⁹¹

285. 174 N.Y. at 467.

286. See *supra* notes 47-51 and accompanying text.

287. See 174 N.Y. at 471-73. The court shied away, if only temporarily, from its consistent pronouncements in other cases that because marriage contracts affected an important social institution, the courts must consider the interests of society as well as the contracting parties in interpreting them. The court suggested that in the future it would apply to "a contract of marriage . . . those salutary and fundamental rules, which are applicable to contracts generally when determining their validity." *Id.* at 474.

288. 129 N.E. 349 (N.Y. 1920).

289. See *id.* at 350.

290. See 1899 N.Y. Laws 661; 1877 N.Y. Laws 168.

291. See BLAKE, *supra* note 109, at 189-94, 211-14.

C. *Wisconsin: Judicial Reaction and Legislative Counterreaction*

Even more than New York, Wisconsin's legislature and Supreme Court engaged in a prolonged tug of war over the state's 1850 married women's property act for decades after it was passed. The court consistently interpreted the act narrowly, and the legislature made periodic efforts to broaden it. In *Connors v. Connors*,²⁹² the court held that Wisconsin's 1850 law did not extend to a married woman's earnings.²⁹³ The legislature reacted by passing an earnings law the same year, but the law allowed a wife to retain her earnings only where the husband did not adequately provide for her support.²⁹⁴

Notwithstanding the 1855 earnings law, the Supreme Court held in the early 1860s that in most cases a married woman's wages, as well as profits she realized from her own business, were not separate property and therefore were within reach of her husband's creditors. The court recognized that its holdings went against the purpose of the 1850 law to shelter a married woman's assets from her husband's creditors, but it held the law did not clearly state this and refused to supply the omission.²⁹⁵ In this respect, the court was significantly more conservative than its New York and Virginia counterparts. Soon afterward the court also narrowed the 1855 earnings law by holding that the law allowed a married woman to control her wages only when her husband's failure to support her was caused by "vice."²⁹⁶ The court interpreted the statute so as not to cover cases of mere poverty or improvidence.²⁹⁷

Women's rights groups began to form in Wisconsin for the first time in the late 1860s.²⁹⁸ The groups focused primarily on suffrage and temperance, but they also criticized the state of women's property rights in Wisconsin.²⁹⁹ In 1872, in response to these complaints and in order to better shelter married women's assets, the legislature passed a revised married women's property act which unequivocally made a married woman's wages her separate

292. 4 Wis. 131 (1854).

293. *See id.* at 135.

294. *See* 1855 Wis. Laws 49.

295. *See Elliott v. Bentley*, 17 Wis. 610, 615 (1863); *Todd v. Lee*, 15 Wis. 400, 401 (1862).

296. *See Edson v. Hayden*, 20 Wis. 715, 718 (1866).

297. *See id.*

298. *See Catherine B. Cleary, Married Women's Property Rights in Wisconsin, 1846-1872*, 78 WIS. MAG. HIST. 110, 119 (1994-95).

299. *See id.*

earnings in all cases.³⁰⁰ The act also exempted husbands from liability for their wives' premarital debts.³⁰¹

The tug of war between the legislature and the Supreme Court continued after 1872. In *Fuller & Fuller Co. v. McHenry*,³⁰² the court sharply limited married women's right to use their property in any way which might threaten the traditional balance of power within the marriage—in this case by contributing property to and sharing management of a business in which a husband and wife were partners. In *Emerson-Talcott Co. v. Knapp*,³⁰³ the court expanded its ruling and explicitly stated that any business conducted by both spouses would belong exclusively to the husband.³⁰⁴ Again, this was a sharply more conservative treatment of married businesswomen than in New York or Virginia. The Wisconsin court also suggested that notwithstanding the wage provisions of the 1872 law, a wife could not keep her wages as separate property without her husband's consent.³⁰⁵ Justice Silas Pinney, speaking for the court in the *McHenry* case, made clear in blunt terms that the court wished to preserve the traditional balance of power within the marriage:

It is not to be supposed that the legislature intended that such relations and duties as exist between copartners in trade should be devolved on husband and wife . . . as a possible means of disturbing domestic peace and confidence, or that they might become contentious litigants in an action to wind up, with a receiver in charge of their affairs and resources.³⁰⁶

The Wisconsin court also may have been motivated in part by a continuing desire to protect creditors. Shortly after a severe depression began in 1857, the court was forced to defend creditors' rights by striking down a series of popular debtor relief laws enacted by the legislature.³⁰⁷ As a result, it was arguably more sensitive to creditors' rights than its counterparts in Virginia and New York, and this may have carried over to its interpretation of the married women's property laws. The Wisconsin legislature did not respond directly to the *Fuller* and *McHenry* decisions, but

300. See 1872 Wis. Laws 155.

301. See *id.*

302. 53 N.W. 896 (Wis. 1892).

303. 62 N.W. 945 (Wis. 1895).

304. See *id.* at 945.

305. See *id.*

306. *McHenry*, 53 N.W. at 898.

307. See RANNEY, *supra* note 4, at 88-93.

between 1890 and 1920 it continued to increase women's property rights in a slow, piecemeal fashion.³⁰⁸

Although Wisconsin's divorce laws were more liberal than those of New York, the trends in each state during the late nineteenth and early twentieth centuries show some striking similarities. Cruelty was the preferred ground for divorce in Wisconsin during this period.³⁰⁹ Wisconsin, unlike New York, did not expand the cruelty grounds for divorce to include abusive language or other conduct creating mental distress.³¹⁰ Nevertheless, a culture developed among litigants, lawyers, and trial judges whereby "cruelty" was interpreted to cover a broad range of marital conduct and disputes, many of which were not stigmatizing.³¹¹ Cruelty was the most popular ground for divorce in Wisconsin because it best reconciled the conflicting moral and practical sentiments of Wisconsinites as to divorce. Wisconsinites, like New Yorkers, wanted divorce to retain a moral component but at another level they recognized the increasingly important role divorce played as a safety valve, and they did not want the moral component to block that valve. The cruelty ground for divorce, liberally interpreted, met both needs.³¹²

Wisconsin gave women a somewhat more prominent role in child custody than did New York and Virginia. This was perhaps due in part to the fact that Wisconsin came into existence much later than New York and Virginia so the traditional rule of husbandly dominion over children never took deep root and was thus easier to break away from. In *Campbell v. Campbell*,³¹³ the

308. See, e.g., 1905 Wis. Laws 17 (allowing wives to sue for alienation of affection); 1891 Wis. Laws 34 (allowing women to receive assignments of property and act as receivers in bankruptcy proceedings). The 1905 law was passed in reaction to *Duffies v. Duffies*, 45 N.W. 522 (Wis. 1890), in which the court clung to traditional limits on married women's right to sue by holding they could not sue for alienation of affection even though their husbands could.

309. See Stamp, *supra* note 166, at 84-88.

310. See *Johnson v. Johnson*, 4 Wis. 154 (1855); see also *Beyer v. Beyer*, 6 N.W. 807 (Wis. 1880) (holding that at least one incident of physical abuse or threat of physical harm was necessary to establish cruelty).

311. See GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION* 98-90 (1991); Stamp, *supra* note 166, at 84-88.

312. Conservative influences made themselves felt even in the state's efforts to liberalize its divorce laws before 1900. In 1866 the Wisconsin legislature allowed divorce after a voluntary separation of five years, making Wisconsin one of the first states to create a no-fault ground of divorce. See 1866 Wis. Laws 37; Stamp, *supra* note 166, at 79. But the voluntary separation law proved to be less revolutionary than expected, simply because divorcing couples made little use of it. Cruelty continued to be the most popular ground for divorce. See *id.* at 87.

313. 37 Wis. 206 (1875).

Wisconsin Supreme Court declared that the rule in favor of husbands had never been more than a presumption.³¹⁴ It made clear that the presumption was rebuttable and that custody would depend on the circumstances of both parents and the best interests of the children.³¹⁵ The difference between Wisconsin's rule and the rules followed in New York and Virginia was real: nineteenth century Wisconsin courts granted custody to mothers more frequently than did most other states.³¹⁶

IV. THE YEARS OF INTERLUDE (1920-1960)

The most dramatic advance in American women's rights came in 1920 with the ratification of the Nineteenth Amendment to the United States Constitution, extending suffrage to women.³¹⁷ The Nineteenth Amendment was the culmination of a seventy-year campaign which had consumed much of feminists' energy during that period.³¹⁸ Partly because of sheer fatigue and partly because of a split between "equal rights" feminists who wanted a broad equal rights amendment to the Constitution and "special rights" feminists who wanted to preserve women's special social identity and many of their special legal privileges, a period of dormancy ensued: few major advances in women's rights were made during the decades following 1920.³¹⁹ This held true in New York and Virginia, and to a lesser extent in Wisconsin also.³²⁰

A. *New York: An Era of Piecemeal Reforms*

There was little change of any significance in New York women's property rights or divorce rights between 1920 and 1960.³²¹

314. *See id.* at 210.

315. *See id.* at 211. The court also gave nominal support to the "tender years" doctrine, but it consistently emphasized that trial courts had broad discretion to depart from the paternal custody rule and tender years doctrine whenever they saw fit to do so. *See Jensen v. Jensen*, 170 N.W. 735 (Wis. 1919); *Welch v. Welch*, 33 Wis. 534, 542 (1873); *see also Dovi v. Dovi*, 13 N.W.2d 585 (Wis. 1944) (discussing 19th century custody rules).

316. *See RILEY, supra* note 311, at 92.

317. *See* U.S. CONST. amend. XIX.

318. *See* GENEVIEVE G. MCBRIDE, *ON WISCONSIN WOMEN* 294-98 (1993).

319. *See id.*

320. *See id.*

321. The most important change during the period was the legislature's abolition of curtesy and dower in 1930, in favor of a new statutory system which guaranteed widows minimum shares of both real and personal property from their husbands' estates, the shares varying based on whether the couple had children. *See* 1929 N.Y. Laws 229. As previously noted, a detailed study of the relationship between inheritance laws and women's rights is outside the scope of this Article.

The struggle over the extent to which women should be allowed to enforce their statutory property rights against their spouses by suit came to a conclusion during the era. In *Allen v. Allen*,³²² the Court of Appeals held on a 5-2 vote that notwithstanding the legislature's 1890 reinstitution of women's right of suit, the court's late nineteenth century decisions declining to extend this right to tort claims against their husbands were still good law.³²³ Justice Cuthbert Pound, dissenting, argued that interspousal immunity was no more than a remnant of the unity doctrine, that "[e]very step in the history of legislation in regard to married women . . . has been in the direction of the complete abrogation of the rule," and that "vestigial rights of the husband should disappear with the shattered organism,"³²⁴ but his arguments were not persuasive to his colleagues. They were more persuasive to the public: *Allen* triggered a wave of protest, and, after the usual procedural delays and committee deliberations, the 1937 legislature enacted a comprehensive statute abolishing all remaining interspousal immunities.³²⁵

The tension between divorce traditionalists and reformers continued to produce stalemate throughout the era. "Adultery agencies" continued unabated, as did the tacit agreement among divorce courts and lawyers to accept contrived evidence of adultery as sufficient. Conservatives lamented that "our courts and our judges have been conditioned by public opinion to dispose of matrimonial matters in the same manner as ordinary commercial litigation, without any expressed concern for the larger public interest."³²⁶ Legal commissions regularly called for liberalization of divorce as the only solution, particularly after the New York City (Manhattan) district attorney made a well-publicized investigation of fraud in the divorce system in 1948.³²⁷ The New York State Catholic Welfare Committee, however, was a formidable force against divorce liberalization throughout the era; and by taking advantage of its political power and legislative inertia, it succeeded in blocking any important legislative reform of the divorce laws.³²⁸

322. 159 N.E. 656 (N.Y. 1927) (per curiam).

323. See *id.* at 656.

324. *Id.* at 660-61 (Pound, J., dissenting).

325. See 1937 N.Y. Laws 669.

326. Richard H. Wels, *New York: The Poor Man's Reno*, 35 CORNELL L.Q. 303, 308 (1950). Wels believed the courts condoned easy divorce in part because if out-of-state divorces were the sole outlet available to New Yorkers it would lead to widespread economic resentment on the part of those who could not afford such divorces. See *id.* at 315.

327. See BLAKE, *supra* note 109, at 211-17; Wels, *supra* note 326, at 305.

328. See BLAKE, *supra* note 109, at 206-08.

B. Virginia: The Effects of Creeping Divorce

Virginia courts and legislators made no significant changes in married women's property rights law or divorce law between 1920 and 1960. An important subterranean change marked the period, however: Virginia's divorce rate accelerated sharply, and this started a process that eventually led to major changes in the state's divorce laws after 1960. Selected divorce rates for each of the three states featured in this study are shown in the table below.

Divorces per 1,000 Population³²⁹

	United States	Virginia	New York	Wisconsin
1870	0.28	0.05	0.16	0.38
1880	0.39	0.11	0.16	0.40
1916	1.13	0.86	0.33	0.69
1930	1.56	1.34	0.38	0.85
1940	2.00	2.00	0.80	1.10
1950	2.60	1.80	0.80	1.40
1960	3.20	2.40	0.40	0.90
1970	3.50	2.60	1.50	2.00
1980	5.20	4.40	3.50	3.70
1990	4.70	4.40	3.20	3.60
1995	4.40	4.40	3.10	3.40

329. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 108 (1997); BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 67-68 (1975); MARY SOMERVILLE JONES, AN HISTORICAL GEOGRAPHY OF THE CHANGING DIVORCE LAW IN THE UNITED STATES 37-38, 49-51, 72-73, 92-93, 101-02, 117-18, 128, 154 (1987).

How did Virginia accommodate the increasing demand for divorce in the face of its long tradition of official disapproval of divorce? The Supreme Court of Appeals did not relax its standards for proving adultery to any significant degree: in 1961 a commentator concluded that a Herculean effort was still required to obtain a divorce for adultery in Virginia.³³⁰ Desertion became the most popular ground for divorce among Virginians in the early twentieth century.³³¹ The Supreme Court of Appeals sent some signals that it was willing to allow separation decrees for cruelty on a more liberal basis than before,³³² and, conspicuously, the strong tone of disapprobation so common in late nineteenth century opinions was replaced by a distinctly weary tone in the 1930s.³³³ There are no studies or statistics proving that Virginia trial courts followed New York's example of turning a blind eye to collusion and manufactured evidence in adultery, desertion, and cruelty cases, but it seems likely that they did so to some extent: the dramatic increase in the divorce rate surely cannot be accounted for by statutory changes and court signals alone.

C. *Wisconsin: A Judicial Boost for Women's Rights*

Although Wisconsin was not a leader in the women's suffrage movement, after the Nineteenth Amendment was ratified Wisconsin went beyond mere implementation of the Amendment: it enacted a group of laws that substantially expanded women's rights, including a pioneering equal rights law. At the beginning of the 1921 legislative session, a bill to give women the right to sit on juries was defeated.³³⁴ The defeat spurred Wisconsin feminists to mount a campaign for more comprehensive antidiscrimination laws. After extensive lobbying, the 1921 legislature enacted a law giving men and women equal rights with respect to custody of their children and eliminating the presumption of paternal

330. See Alexander J. Michalos, Note, *Some Statistics and Comments on the Statutory Grounds for Divorces in Virginia*, 3 WM. & MARY L. REV. 181, 181 (1961).

331. See JONES, *supra* note 329, at 92-93.

332. See, e.g., *Gentry v. Gentry*, 172 S.E. 157 (Va. 1934) (allowing divorce where husband abandoned wife for "necking" with another man); *Ringgold v. Ringgold*, 104 S.E. 836 (Va. 1920) (allowing divorce for mental cruelty alone).

333. Compare *Devers v. Devers*, 79 S.E. 1048 (Va. 1913) (speaking disapprovingly of divorce in the 19th century manner), with *Gentry*, 172 S.E. at 157 (speaking of divorce in a more resigned tone).

334. See Zona Gale, *The Status of Wisconsin Women Under the Equal Rights Law*, 1923 WIS. ST. B. ASS'N PROC. 168, 168-69.

guardianship.³³⁵ Feminist forces then obtained passage of a broad equal rights bill which provided:

Women shall have the same rights and privileges under the law as men in the exercise of suffrage, freedom of contract, choice of residence for voting purposes, jury service, holding office, holding and conveying property, care and custody of children, and in all other respects.³³⁶

Yet the law did not by any means signal the end of the cult of true womanhood in Wisconsin. The law's supporters took pains to assure the public that the law would promote, not destroy, women's role as a nobler if weaker counterpart of men. Novelist Zona Gale of Portage, one of the leaders of the 1921 campaign, explained to a meeting of the state bar association:

[E]very man knows what a woman's point of view, when it is wise and sane and kindly, can contribute to life. . . . The difficulty is to generalize, to realize that more women have that wisdom and that sanity or, when they haven't, that we must help them to develop these broadly social qualities. The opportunities of men to express a social spirit in their living are still double and triple those of women. Yet women have a spiritual genius which has never been given social expression. It is precisely this which they could liberate into the world, for the general welfare, if all these meshes of little circumstance hampering them could be swept away and they could be given the moral backing of a general consciousness of equality of opportunity.³³⁷

In *Wait v. Pierce*,³³⁸ a deeply divided Wisconsin Supreme Court departed dramatically from its past practice of interpreting women's rights laws narrowly. The court held by a 4-3 vote that the 1921 equal rights law abolished husbands' immunity from suit by their wives.³³⁹ The dissenters accused the majority of sweeping away the common law of married women's rights without legislative authority and striking a blow at the sanctity of family.³⁴⁰ Justice

335. See 1921 Wis. Laws 15, 147.

336. 1921 Wis. Laws 529.

337. Gale, *supra* note 334, at 182.

338. 209 N.W. 475 (Wis. 1926).

339. See *id.* at 480-81; see also *First Wis. Nat'l Bank v. Jahn*, 190 N.W. 822 (Wis. 1922) (holding that the 1921 law eliminated common law restrictions on married women's right to guarantee payment of promissory notes).

340. See *Wait*, 209 N.W. at 481-83 (Eschweiler, J., dissenting).

Marvin Rosenberry, speaking for the majority, bluntly refuted these objections. Rosenberry concluded the 1921 law was too broad to be limited to suffrage and emphasized that the law, by its wording, provided for equality "in all . . . respects."³⁴¹ Rosenberry discounted the dire predictions of the dissenters:

[T]he family relation is not disturbed by the enactment of statutes conferring rights upon married women. It is only when the ideal family relation has for some reason been disrupted that rights under the statute are asserted. . . . [W]hile there are many persons, particularly those of the older generation, who are genuinely alarmed at the statutory modification of the family status as it existed at common law, there are an equal if not a greater number who see in the emancipation of married women a necessary genuine social advance.³⁴²

The *Wait* decision was emblematic of the times: in the 1920s and 1930s, the Wisconsin court was known for its propensity to make policy and to defend its policymaking in unusually blunt terms.³⁴³ Wisconsin's departure from strict construction was in striking contrast to the New York court's refusal in *Allen*, decided the year after *Wait*, to eliminate interspousal immunity.³⁴⁴ Virginia has preserved the interspousal immunity doctrine to the present, although the Supreme Court of Appeals carved out limited exceptions to the doctrine.³⁴⁵

Cruelty continued to be the most popular divorce ground in Wisconsin after 1900, accounting for more than eighty percent of all

341. *Id.* at 478.

342. *Id.* at 478-79. In *Fontaine v. Fontaine*, 238 N.W. 410 (Wis. 1931), the court conceded that *Wait* was "probably against the weight of authority," but it noted the legislature had not overturned *Wait*, and accordingly it declined to do so. *Id.* at 412.

343. See, e.g., *State ex rel. Wisconsin Inspection Bureau v. Whitman*, 220 N.W. 929 (Wis. 1928) (recognizing, contrary to prevailing doctrine, that administrative agencies had de facto law-making powers and arguing that frank recognition of that fact was necessary to accommodate the law to modern society); see also RANNEY, *supra* note 4, at 381-88.

344. See *supra* text accompanying notes 322-24.

345. See *Counts v. Counts*, 266 S.E.2d 895 (Va. 1980) (refusing to extend *Korman* to a case where the wife had contracted to have her husband killed and stating that interspousal immunity is "an integral part of the public policy of the Commonwealth to preserve the family unit"); *Korman v. Carpenter*, 216 S.E.2d 195 (Va. 1975) (allowing wife's estate to sue husband for killing wife and noting that this was an extreme case and that exceptions to interspousal immunity should be made sparingly because "interspousal immunity is only a part of a whole system of laws and policies which recognizes the mutual obligations arising from a marriage and which encourages both marital and family harmony"); *Surratt v. Thompson*, 183 S.E.2d 200 (Va. 1971) (allowing suit against husband for injuries due to his negligence in automobile accident); *Vigilant Ins. Co. v. Bennett*, 89 S.E.2d 69 (Va. 1955) (allowing wives to sue husbands for property damage).

divorces by the 1930s.³⁴⁶ The culture that nineteenth century trial courts had developed of using cruelty as a "catch-all for widely varied types of marital friction"³⁴⁷ and for granting divorces they felt were equitably necessary grew ever stronger. According to Professor Nathan Feinsinger of the University of Wisconsin Law School, who investigated the system in the early 1930s, most Wisconsin judges believed that when a marriage deteriorated to the point of filing a divorce suit, they could do little to save the marriage.³⁴⁸ If they refused to grant divorces because the evidence of cruelty was thin or fictitious, they would only encourage unhappy couples to commit real cruelty and violence.³⁴⁹ The Wisconsin Supreme Court did not encourage this trend, but it did condone it. In 1916, four years before New York (but forty years after Virginia), the court relaxed the nineteenth century rule that actual or imminent physical harm must be shown in order to establish cruelty and held that conduct causing mental suffering, serious stress, or a threat to health was sufficient.³⁵⁰ The court also began to focus on the effects rather than the nature of conduct in determining whether it was cruel, thus further softening the law.³⁵¹ The legislature made no substantive changes in the divorce statutes during this period. It created the post of divorce counsel in each county court to guard against collusive cases,³⁵² but due to inadequate funding and lack of cooperation from trial judges the law was never effective.³⁵³

V. THE SECOND WOMEN'S RIGHTS MOVEMENT (1960-PRESENT)

In the mid-1960s, women's place in American society began to receive renewed attention. It is no exaggeration to label the changes in women's rights that have taken place during the last

346. See Stamp, *supra* note 166, at 87.

347. N.P. Feinsinger, *Observations on Judicial Administration of Divorce Law in Wisconsin*, 8 WIS. L. REV. 27, 32 (1932).

348. See *id.* at 30.

349. See *id.* at 30-32.

350. See *Hiecke v. Hiecke*, 157 N.W. 747 (Wis. 1916); *Banks v. Banks*, 155 N.W. 916 (Wis. 1916). New York relaxed the standard for cruelty in the 1920 *Pearson* case, see *supra* notes 288-89 and accompanying text, and Virginia allowed some consideration of mental cruelty for the first time in the 1878 *Latham* case, see *supra* notes 235-36 and accompanying text. The leading cases for the original strict definition of cruelty in Wisconsin were *Beyer v. Beyer*, 6 N.W. 807 (1880) and *Johnson v. Johnson*, 4 Wis. 154 (1855).

351. See *Bird v. Bird*, 177 N.W. 4 (1920).

352. See 1909 Wis. Laws 323. The Supreme Court had held that collusive divorces constituted a fraud on the court in *Hopkins v. Hopkins*, 39 Wis. 167, 170 (1876).

353. See Feinsinger, *supra* note 347, at 34-35.

three decades as a revolution, the full consequences of which are still unfolding. Much of the revolution has taken place within the framework of the law: American lawmakers have had to grapple as never before with the proper role of divorce in the social fabric and the concomitant issues of what property and custody rights women should have during and after marriage.

Although the modern women's movement is popularly thought of as national,³⁵⁴ modern divorce and women's property laws have evolved in New York, Wisconsin, and Virginia in strikingly different ways. New York adopted a rudimentary no-fault divorce system in 1967 but waited until 1980 to make meaningful reforms in property division and maintenance rules. Wisconsin adopted a comprehensive reform plan covering all three areas in 1977. Wisconsin also made a profound change in married women's property rights in 1986 when it became the first and so far only common law state to convert to a community property system. Virginia, by contrast, has found ways to liberalize its divorce and property laws while preserving an important element of its tradition of official disapproval of divorce.

A. No-Fault Divorce and Its Relationship to Marital Property Rights

The concept of no-fault divorce was first developed about 1915 and first received serious attention at the national level in the late 1940s.³⁵⁵ During the next twenty years, for a variety of reasons, it gained support only slowly. Judicial distaste for forcing couples at risk for serious discord to stay together, which trial courts had manifested through liberal interpretations of cruelty since the early twentieth century, became increasingly less tacit and more overt.³⁵⁶ But Americans' traditional reluctance to condone divorce publicly remained so strong that in many states, no progress toward a no-fault system was made until it was promoted as a procedural rather than a substantive legal reform.³⁵⁷ During the 1950s and early 1960s the Catholic church continued to make opposition to divorce reform a priority, but after that time the church increasingly turned its attention to abortion issues.³⁵⁸ Growing public familiarity with

354. See, e.g., HOFF, *supra* note 4, at 231, 291-92, 324-30.

355. See RILEY, *supra* note 311, at 161-62. See generally Reginald Heber Smith, *Dishonest Divorce*, ATLANTIC MONTHLY, Dec. 1947, at 42.

356. See *supra* text accompanying note 347; see also JACOB, *supra* note 3, at 31-35, 78-79.

357. See JACOB, *supra* note 3, at 31-36, 90-95.

358. See *id.* at 34-40.

child welfare laws, which had been commonplace since the Progressive era in most states, led to increasing acceptance of the idea that the state had the right to intervene in troubled family structures. The fault concept, which at bottom is useful only in evaluating purely private relationships, was correspondingly weakened.³⁵⁹

In the 1970s no-fault divorce achieved a sudden breakthrough. In 1970 only a handful of states had any sort of no-fault divorce grounds, and only one state, California, had a "pure" no-fault divorce law.³⁶⁰ By 1987, thirty-six states had some form of no-fault divorce.³⁶¹ The sudden shift was due in part to the culmination of many of the factors discussed in the preceding paragraph, but it also was related to a dramatic increase in divorce rates between 1965 and 1980. The reasons for that increase have been and continue to be the subject of vigorous and often bitter debate. One group of scholars has argued that the increase in divorce rates and in permissiveness toward divorce was part of the more general ascendance of the culture of self in American law and society. In Lawrence Friedman's words:

[In t]he nineteenth century . . . [m]obility was economic and political; it was not a freedom to contrive a lifestyle; the body and mind still proceeded within narrow but invisible ruts. . . . The new century redefined the terms, and added freedom to shape one's own life, expressive freedom, freedom of personality, freedom to spend a lifetime caressing and nurturing a unique, individual self.³⁶²

Other scholars, however, have viewed the modern history of divorce as a largely unintended and unforeseen consequence of women's increasing economic power and social rights:

359. See *id.* at 9-11.

360. See Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CINN. L. REV. 1, 5-6 (1987).

361. See *id.* There are three main types of no-fault systems. "Pure" no-fault systems generally specify that irremediable breakdown of a marriage is the sole ground for divorce and do not permit any consideration of fault in awarding maintenance and dividing property. "Mixed" no-fault systems combine traditional fault-based grounds such as adultery and cruelty with marital breakdown; however, most such systems permit consideration of fault as a factor in custody, maintenance, and property division decisions. Divorce after a period of separation may also be defined as a third no-fault ground of divorce. In 1987, 15 states including Wisconsin had "pure" no-fault systems; 21 states had a "mixed" system; and 14 states, including New York and Virginia, allowed divorce based on separation for a given period of time. See *id.* at 1 n.1.

362. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 12, 13 (1993); see also BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* 44, 70 (1997).

The strains that women's entry into the workforce put on many marriages, as men and women adjusted to new and more fluid roles, cannot be gainsaid At least as important, though, is the fact that many more wives can now imagine surviving economically on their own, and so have much less incentive to stay in lousy marriages.

. . . [T]he growing tendency of courts to award custody of young children to their mothers [also encouraged more women to divorce.]³⁶³

Surprisingly, feminists devoted relatively little energy to the no-fault divorce movement. Probably the most important impetus came from two pillars of the legal establishment, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Bar Association (ABA). In 1970 the NCCUSL, after years of hesitation, adopted a Uniform Marriage and Divorce Act which specified "irretrievable breakdown" of the marriage as the only ground for divorce.³⁶⁴ In 1974, after a prolonged debate, which focused mostly on technical details rather than broad policy issues, the ABA approved the Act.³⁶⁵ The Act has not been used widely as a model by the states, but the imprimatur it received from the NCCUSL and the ABA gave no-fault divorce a legitimacy in the eyes of many who would not otherwise have accepted it.³⁶⁶

B. Wisconsin: *The Reform Tradition in Flower*

Wisconsin fell squarely in the mainstream of the no-fault divorce movement. The Wisconsin legislature first seriously considered no-fault divorce in 1957 but, due in large part to opposition from the Catholic Council for Home and Family, the proposal did not come close to passage.³⁶⁷ In 1967 a bill was

363. Margaret Talbot, *Love, American Style: What the Alarmists About Divorce Don't Get About Idealism in America*, NEW REPUBLIC, Apr. 14, 1997, at 30, 34-35; see also RILEY, *supra* note 307, at 163-66.

364. See UNIF. MARRIAGE & DIVORCE ACT § 305, 9A U.L.A. 242 (1998).

365. See JACOB, *supra* note 3, at 74-77.

366. See *id.* at 66-77. It is also important to note that even before the no-fault era, many states including Wisconsin and Virginia allowed divorce on grounds that were effectively no-fault, such as separation for a given number of years. Wisconsin first adopted such a standard in 1866, Virginia in 1960. See *supra* note 312; Part IV.B. An important but little recognized by-product of the no-fault movement was that between 1960 and 1980, it became acceptable for the first time to refer openly to these grounds as no-fault grounds.

367. See Stamp, *supra* note 166, at 118.

introduced adding incompatibility as a new ground for divorce, but it also failed.³⁶⁸

After the NCCUSL adopted the Uniform Marriage and Divorce Act in 1970, many Wisconsin lawmakers worried the state would fall behind the times if it did not follow the NCCUSL's lead. In 1971 the legislature reduced the waiting period for divorce based on voluntary separation from five years to one year, and this ground of divorce swiftly gained popularity.³⁶⁹

Several no-fault bills were introduced into the 1975 legislature. Catholic forces were considerably more muted on divorce than they had been during the 1950s, but influential Wisconsin feminists took the position that any divorce reform should include a comprehensive overhaul of property award rules as well as "pure" no-fault divorce based on irretrievable breakdown only.³⁷⁰ In particular, they argued, any new system should include strictly objective standards for dividing property and awarding support—standards which recognized the difficulty newly-divorced homemakers would have re-entering the job market—and strong support enforcement and collection programs.³⁷¹ A debate also took place over counseling: several Catholic groups wanted mandatory pre-divorce counseling to encourage reconciliation, and many feminists wanted counseling to help the parties adjust to divorce.³⁷²

In 1977, the Wisconsin legislature resolved these disputes and enacted a "pure" no-fault divorce system.³⁷³ The new system made irretrievable breakdown the sole ground for divorce and provided that breakdown could be established by the testimony of a single spouse, even over the other's opposition.³⁷⁴ The new law made a bow to traditionalists by emphasizing in its preamble that it was "not intended to make . . . divorce . . . easier to obtain"³⁷⁵ and by requiring reconciliation counseling.³⁷⁶ The mandatory counseling requirement was repealed in 1987, although the law still provides

368. *See id.* at 118-19.

369. *See id.* at 120-22; 1971 Wis. Laws 220.

370. *See* Kurt Dettman, Note, *The Displaced Homemaker and the Divorce Process in Wisconsin*, 1982 WIS. L. REV. 941, 952-54.

371. *See id.*

372. *See id.*; Stamp, *supra* note 166, at 122-23.

373. 1977 Wis. Laws 105.

374. *See id.* § 23. The law provided that testimony of a single spouse was sufficient to establish irretrievable breakdown only if the parties had lived apart voluntarily for one year or more. Otherwise, if one spouse opposed the divorce, the court could order the divorce action to be held in abeyance pending counseling or could determine after a hearing that the marriage was irretrievably broken. *See id.*

375. *Id.* § 1.

376. *See id.* § 15.

for voluntary counseling which is used mostly to mediate child custody disputes.³⁷⁷

Soon after the legislature enacted no-fault divorce, it established pioneering standards for support. It required the State Department of Health and Social Services to establish child support payment guidelines and required the courts to consider the guidelines in establishing child support.³⁷⁸ In 1985 it required the courts to follow the guidelines in all but exceptional cases.³⁷⁹ The legislature also created a presumption that marital property should be divided equally between the spouses, although it also gave trial judges limited discretion to divide property unequally in exceptional cases.³⁸⁰ The legislature gave trial courts more discretion in awarding spousal support, although it indicated judges should consider dividing income so as to enable each spouse to enjoy as nearly as possible the standard of living both had had before divorce.³⁸¹

This represented an important departure from prior practice. Unlike New York and Virginia, which for the most part left property division and maintenance to the equitable discretion of trial courts and were reluctant to set guidelines, Wisconsin was thought to have established a rule of thumb that maintenance and property division should be tied to the widow's one-third dower share.³⁸² Yet in 1970, the Supreme Court disclaimed such a rule and returned to a system of pure equitable discretion.³⁸³ But the new system went farther. Not only were trial judges required to consider the wife's needs in dividing property and awarding alimony: they were now required to start from the presumption that the property and living standard of each spouse should be equalized and to justify any departure from that standard.³⁸⁴

377. See 1987 Wis. Acts 355.

378. See 1983 Wis. Acts 27, § 1762; 1981 Wis. Laws 20, § 1785. The Department eventually established a sliding scale of percentages. Each parent in a one-child family was required to contribute 17% of his or her income to child support; in a 2-child family, 25%; in a 3-child family, 29%; and in a 4-child family, 32%. See WIS. STAT. § 767.25 (1997-98); WIS. ADMIN. CODE § 80 (1998).

379. See 1985 Wis. Acts 29, § 2360.

380. See 1977 Wis. Laws 105, § 41.

381. See WIS. STAT. ANN. § 767.26(6) (West 1993); *Bahr v. Bahr*, 318 N.W.2d 391 (Wis. 1982).

382. See, e.g., *Gauger v. Gauger*, 147 N.W. 1075 (Wis. 1914).

383. See *Lacey v. Lacey*, 173 N.W.2d 142 (Wis. 1970). In fact, the court contended that it had always evaluated property and alimony division on an equitable, case-by-case basis. See *id.* at 144.

384. See *id.*

Wisconsin made another change in women's property rights which broke new ground not only at the state but at the national level. Beginning in the early 1970s a group of legal scholars, including Professor June Miller Weisberger of the University of Wisconsin Law School, focused its attention on the community property system that prevailed in eight southern and western states.³⁸⁵ The system, which had its origins in Roman law and had prevailed in continental Europe for centuries, gave both spouses equal control over all property acquired during marriage.³⁸⁶ Weisberger and other reformers argued that community property reflected much better than prevailing common law rules the nature of marriage as a partnership and the economic contributions that married women made to their households.³⁸⁷ The movement undoubtedly was helped by the fact that the proportion of married women earning income outside the home had increased rapidly since the 1940s, but the reformers favored community property law because it recognized the value of household work as well as income-producing work.³⁸⁸

The movement began in earnest in Wisconsin in 1974, when hearings of the Governor's Commission on the Status of Women revealed widespread concern that existing inheritance laws were not providing adequate security for women.³⁸⁹ It accelerated in 1983 when the NCCUSL published a Uniform Marital Property Act recommending a community property system nationwide.³⁹⁰ The movement gradually gained bipartisan support in the Wisconsin legislature. Opponents of community property did not challenge the need for laws giving women equal property rights; rather, they argued that the common law had proved sufficiently adaptable to changing concepts of women's rights in the past and that conversion to a new system was unnecessary and socially disruptive. They proposed a "common law alternatives" bill, which would allow

385. See generally Howard S. Erlanger & June M. Weisberger, *From Common Law Property to Community Property: Wisconsin's Marital Property Act Four Years Later*, 1990 WIS. L. REV. 769; June M. Weisberger, *The Wisconsin Marital Property Act: Highlights of the Wisconsin Experience*, 13 COMMUNITY PROP. L.J. 1 (1986).

386. A short summary of the historical origins of community property law and its introduction into the southwestern United States can be found in KATHLEEN E. LAZAROU, *CONCEALED UNDER PETTICOATS: MARRIED WOMEN'S PROPERTY AND THE LAW OF TEXAS 1840-1913*, at 44-50 (1986).

387. See Erlanger & Weisberger, *supra* note 385, at 771-75; Weisberger, *supra* note 385, at 11-12.

388. See *id.*

389. See *id.*

390. See UNIF. MARITAL PROPERTY ACT, 9A U.L.A. 103 (1987); Erlanger & Weisberger, *supra* note 385, at 771-74.

married couples to choose either community property or the existing common law system.³⁹¹ The reformers replied that only a community property system could give women adequate and guaranteed access to marital income and property and also to credit based on shared income and assets. Many supporters emphasized that a new system would have symbolic as well as practical value in showing women that Wisconsin was committed to equal rights in practice as well as in theory.³⁹²

The legislature finally enacted the proposed system in 1983.³⁹³ Wisconsin's marital property act closely followed the Uniform Act: it created a presumption that all income and property of spouses is marital and subject to equal sharing. Yet the Wisconsin act went beyond the Uniform Act in some respects, most notably in providing assurances that married women who do not work outside the home will be able to use marital property and income to get easier access to credit.³⁹⁴

C. New York: Stop-and-Go Reform

New York has moved in the same direction as Wisconsin, though not as far. Pressure for divorce reform in New York increased steadily after World War II.³⁹⁵ As in Wisconsin, Catholic resistance to reform gradually slackened as the church focused its efforts on fighting abortion reform rather than divorce reform.³⁹⁶ The final catalyst was *Rosenstiel v. Rosenstiel*,³⁹⁷ in which the Court of Appeals decided to recognize the validity of Mexican divorces, which were notoriously easy to obtain, in New York. Despite the protest of two dissenters that federal comity rules did not require

391. See Erlanger & Weisberger, *supra* note 385, at 775-76; Weisberger, *supra* note 385, at 11-13. See generally WISCONSIN LEGISLATIVE REFERENCE BUREAU, INFORMATIONAL BULL. 84-IB-1, MARITAL PROPERTY ACT: A COMPILATION OF MATERIALS (1984) [hereinafter BULL. 84-IB-1].

392. See generally Lynn Adelman et al., *Departures from the Uniform Marital Property Act Contained in the Wisconsin Marital Property Act*, 68 MARQ. L. REV. 390 (1985).

393. See 1983 Wis. Acts 200.

394. See *id.*; WIS. STAT. ANN. § 766.56 (West Supp. 1999). In 1985 the legislature belatedly followed New York's lead by replacing dower and curtesy with an augmented estate system, similar to another plan recommended by the NCCUSL. See 1985 Wis. Acts 37; see also WIS. STAT. ANN. §§ 861.01-861.43 (West 1991 & Supp. 1999). Wisconsin's delay in reforming its inheritance laws may have been due in part to the fact that, unlike New York and Virginia, its dower system included personal property as well as real property. This feature dated from the Northwest Ordinance of 1787. See Maxwell H. Herriott, *Should the Estates of Dower and Curtesy Be Abolished in Wisconsin?*, 1948 WIS. L. REV. 461, 464.

395. See BLAKE, *supra* note 109, at 211-25.

396. See JACOB, *supra* note 3, at 34-37.

397. 262 N.Y.S.2d 86 (N.Y. 1965).

New York to recognize foreign divorces, the majority bluntly stated that "such recognition . . . offends no public policy of this state."³⁹⁸ *Rosenstiel* was interpreted as a message from the state's highest court that the time had come to liberalize divorce.

These forces, together with a prudent decision on the part of reformers to present no-fault divorce as a procedural rather than a policy reform, finally induced the legislature in 1966 to add a no-fault ground, namely separation for two years, to the state's divorce law.³⁹⁹ As in Wisconsin, a mandatory conciliation provision was inserted in the law in order to obtain its passage.⁴⁰⁰ Once the no-fault threshold had been crossed, additional reforms came relatively quickly: the separation period was reduced to two years in 1968,⁴⁰¹ and in 1973 the conciliation provision was repealed.⁴⁰² But unlike Wisconsin, New York did not couple property division and alimony reform with no-fault reform, and it did not eliminate fault as a factor in property division and maintenance awards.

It is not clear whether no-fault divorce improved the lot of married women in New York. In 1973, one commentator concluded: "It must, with regret, be reported that . . . lower New York courts appear somewhat loathe to leave the 19th century behind."⁴⁰³ A limited survey of divorces during the early years of the no-fault era suggested that only about one-sixth of all couples invoked separation as their ground for divorce.⁴⁰⁴ More than half of all divorces were based on cruelty, and the trial courts were applying traditional standards for awarding support and property.⁴⁰⁵ About five percent of all separating couples continued to seek annulment.⁴⁰⁶ In 1980, the legislature finally addressed property and maintenance reform when it enacted an Equitable Distribution Law as part of a general effort to make the state's statutes gender neutral.⁴⁰⁷ The Equitable Distribution Law required trial courts to distribute all marital property "equitably" between the parties, but unlike Wisconsin, the New York legislature did not create an initial

398. *Id.* at 91.

399. See 1966 N.Y. Laws 254.

400. See *id.*

401. See 1968 N.Y. Laws 799.

402. See 1973 N.Y. Laws 1034.

403. Lee E. Teitelbaum, *Cruelty Divorce Under New York's Reform Act: On Repeating Ancient Error*, 23 BUFF. L. REV. 1, 28 (1973).

404. See *id.* at 39-40.

405. See *id.*

406. See *id.* For examples of post-reform decisions applying traditional standards to divorces based on cruelty, see *Rios v. Rios*, 311 N.Y.S.2d 664 (N.Y. App. Div. 1970); *Pierone v. Pierone*, 293 N.Y.S.2d 256 (N.Y. Sup. Ct. 1968).

407. See 1980 N.Y. Laws 281.

presumption of equal division.⁴⁰⁸ The legislature also replaced alimony with maintenance payments, which were to be based largely on the goals of maintaining the parties' standard of living during the marriage and providing for the recipient's "reasonable needs."⁴⁰⁹ As initially written, the law encouraged courts to limit the duration of maintenance in order to push recipients to become self-supporting as quickly as possible. After extensive protests that the law ignored the needs of older and disabled women with no job skills other than homemaking, the legislature in 1986 amended the law to encourage more liberal use of indefinite maintenance in such cases.⁴¹⁰

The legislature deadlocked over whether fault should be a factor in making maintenance awards and dividing property. Accordingly, the Equitable Distribution Law did not address the issue, but allowed the courts to consider "any . . . factor which [they] shall expressly find to be just and proper."⁴¹¹ After some early disagreements among the lower appellate courts, the Court of Appeals ruled in *O'Brien v. O'Brien*⁴¹² that fault could not be considered in property division "[e]xcept in egregious cases which shock the conscience of the court."⁴¹³ The New York courts consistently have emphasized that consideration of fault is inconsistent with the underlying assumption of the Equitable Distribution Act "that each party has made a contribution to the marital partnership and that upon its dissolution each is entitled to his or her fair share of the marital estate."⁴¹⁴ The courts have indicated that fault may be more pertinent to maintenance awards, but they have been reluctant to give fault much weight even in the maintenance context because of the legislature's stated goal of using maintenance to allow the economically weaker spouse to achieve self-sufficiency rather than to assign blame for the failure of the marriage.⁴¹⁵

408. *See id.* § 9.

409. *See id.*

410. *See* 1986 N.Y. Laws 892, 894.

411. N.Y. DOM. REL. LAW § 236, pt. B, §§ 5(d)(13) & 6(a)(11) (Consol. 1990).

412. 66 N.Y.2d 576 (1985).

413. *Id.* at 589-90; *see also* *Blickstein v. Blickstein*, 472 N.Y.S.2d 110 (N.Y. App. Div. 1984).

414. *Blickstein*, 472 N.Y.S.2d at 113.

415. The leading case on this issue is *Wilson v. Wilson*, 476 N.Y.S.2d 120 (N.Y. App. Div. 1984).

D. *Virginia: Balancing Reform with Tradition*

Virginia further illustrates the pitfalls of regarding the no-fault movement as a simple, cohesive reform movement. It is the only one of the three states in this study that did not have a no-fault movement denominated as such in the late 1960s and 1970s; but in its own way it took more dramatic steps away from its traditional divorce system than did either New York or Wisconsin.

By the 1960s, Virginia, like much of the rest of the South, was experiencing substantial social and demographic upheaval. World Wars I and II created two major urban areas in what had previously been an almost entirely rural state: the Virginia suburbs of Washington, D.C. and the Norfolk region. Both areas continued to grow rapidly after 1945, supported by the continuing growth of the national government and the defense buildup of the Cold War era. Residents of these areas had a degree of cosmopolitanism and national orientation that was new to Virginia. Richmond and other cities, which were also growing rapidly due to migration from the Virginia countryside, experienced some of the same influences.⁴¹⁶ Virginia retained (and retains to this day) a strong element of cultural conservatism, but its new demographics affected its views of divorce and women's property rights as well as many other aspects of its political and social life.

Virginia has engaged in an incremental but almost continuous course of divorce and property law reform since 1960. In the latter year the legislature enacted the first divorce ground that could fairly be termed no-fault: separation for three years.⁴¹⁷ In 1964 the separation period was reduced to two years,⁴¹⁸ and in 1975 it was reduced to one year.⁴¹⁹

In 1982, the Virginia legislature followed the lead of Wisconsin and New York in revamping its property division and alimony standards.⁴²⁰ Virginia's reforms were more conservative than those of New York and Wisconsin. The 1982 standards required trial courts to consider factors very similar to those used in Wisconsin and New York in setting alimony and maintenance, but where New

416. See DABNEY, *supra* note 9, at 463-64, 564-67; RUBIN, *supra* note 8, at 160-61, 173-76, 207-08.

417. See 1960 Va. Acts ch. 108; see also 1962 Va. Acts ch. 288.

418. See 1964 Va. Acts ch. 648.

419. See 1975 Va. Acts ch. 644; D.A. Hendler & W. Kendall Lipscomb, *The Ninth Ground for Divorce in Virginia: Statutory Separation for Three Years*, 3 WM. & MARY L. REV. 311 (1962); W. Kendall Lipscomb, *Ninth Ground for Divorce: Addendum*, 4 WM. & MARY L. REV. 36 (1963).

420. See 1982 Va. Acts ch. 309.

York allowed only limited consideration of fault in making such awards⁴²¹ and Wisconsin's pure no-fault system did not allow it at all,⁴²² the Virginia standards explicitly required courts to consider fault in cases in which the parties invoked a fault-based ground of divorce.⁴²³ The standards also required the courts to deny maintenance to adulterous spouses.⁴²⁴ In 1988, however, the law was amended to prohibit using fault as a basis for denying all maintenance except in limited circumstances.⁴²⁵

The Virginia courts' treatment of the new divorce laws is reminiscent of their even-handed implementation of the married women's property act a century ago. They have not used the new laws to try to move Virginia closer to a "pure" no-fault model, but neither have they tried to limit the effect of the changes made by the legislature. They have emphasized that Virginia, like New York and Wisconsin, now regards marriage as a full partnership which must be treated as such in divorce proceedings. Fault can be considered in dividing property only to the extent that it has affected the financial well-being of the marriage. The Virginia courts, like their New York counterparts, have given fault a somewhat larger role in maintenance decisions, but they have made clear that maintenance is to be based primarily on each spouse's financial need and ability to pay.⁴²⁶ The courts also have emphasized that Virginia's long equity tradition will continue in this area: property division and maintenance awards ultimately "involve[] an adjustment of the equities, rights and interest of the parties."⁴²⁷ These rules reflect the courts' broader "recognition of the regrettable fact of human experience that for various reasons parties determine to terminate their marriage."⁴²⁸

421. See *supra* text accompanying notes 402-03.

422. See *supra* text accompanying note 373. The 1977 Wisconsin divorce law did not explicitly ban consideration of fault, but the Wisconsin legislature's decision to make irretrievable breakdown the only ground for divorce effectively excluded any consideration of fault from the divorce process. The Wisconsin Supreme Court confirmed this in *Dixon v. Dixon*, 319 N.W.2d 846 (Wis. 1982).

423. See 1982 Va. Acts ch. 309.

424. See *id.*

425. See 1988 Va. Acts ch. 620.

426. For examples of maintenance awards, see *Mason v. Mason*, 165 S.E.2d 392 (Va. 1969), and *Dotson v. Dotson*, 480 S.E.2d 131 (Va. Ct. App. 1997). For examples of property division, see *id.* and *O'Loughlin v. O'Loughlin*, 458 S.E.2d 323 (Va. Ct. App. 1995).

427. *Dotson*, 480 S.E.2d at 132 (quoting *Brown v. Brown*, 361 S.E.2d 364, 368 (Va. Ct. App. 1987)).

428. *Dexter v. Dexter*, 371 S.E.2d 816, 819 (Va. Ct. App. 1988). Virginia, like Wisconsin, also has made important changes in the field of inheritance rights. In the early 1960s, a movement arose to abolish dower and curtesy rights in Virginia and replace them with a uniform augmented estate system. Proponents argued that existing laws had worked for

VI. CONCLUSION

A. *A Mixed Outcome for the Initial Predictions*

How do the predictions set forth at the beginning of this article hold up against the historical reality of married women's rights in Virginia, New York, and Wisconsin? The experiences of each state prove the predictions right in some respects and disprove them in others. Both the proof and the disproof yield valuable insights into what makes each state's legal culture distinctive.

1. *Virginia and the Use of Women's Rights as a Social Preservative*

Any theory that assumes there is a direct correlation between social progressivism and promotion of women's rights is exploded as soon as one looks at Virginia's early history. Virginia's policy of fostering premarital trusts to preserve to women their separate property did not evolve out of solicitude for women as individuals: it evolved out of solicitude for the preservation of their kinship groups' place in the state's social order, combined with a recognition that, due to the laws of biology, not all planters would have sons to whom they could pass on their holdings.

To a lesser extent, the same is true of New York, which, although it was more commercially oriented than Virginia, remained a heavily agricultural state with an important concentration of large landholders well into the nineteenth century. Though the trust system was not intended to help promote women's rights, it ultimately had that effect by providing a tool that, as the New York courts eliminated trustees in the early nineteenth century, allowed women to exercise more direct power over their property and helped pave the way for married women's property laws.

a predominantly rural society but no longer served in a rapidly urbanizing state with an increasing proportion of its wealth in personal property and intangibles rather than real estate. See generally Joseph L. Lewis, *It's Time to Abolish Dower and Curtesy in Virginia*, 3 U. RICH. L. REV. 299 (1969); Maria Dill, Note, *The Constitutionality of the Feme Sole Estate and the Virginia Supreme Court's Creation of an "Homme Sole" Estate in Jacobs v. Meade*, 19 U. RICH. L. REV. 163 (1984). In 1977 the legislature enacted a law providing that dower and curtesy were to be equal in all respects, and in 1990 it abolished them outright and replaced them with an augmented estate system similar to Wisconsin's system. See 1990 Va. Acts ch. 831; 1977 Va. Acts ch. 147.

2. *The Link Between Debtor Relief and Women's Rights*

In all three states studied, married women's property acts originally were enacted primarily to shelter assets from husbands' creditors rather than to give women greater power over their own destiny. This link between debtors' rights and women's rights raises larger questions which deserve exploration. Did legislators view the increase in women's rights which the acts created as an unpleasant but necessary price to be paid for debtor relief, or did they at least to some extent see both results as a public good? Were states that favored debtor relief likely to favor expansions of civil rights more than states that were less sympathetic to debtor relief?

3. *Judicial Resistance to Broad Interpretation of Married Women's Property Acts*

In the states covered by this study, judicial enthusiasm for implementing married women's property acts was inversely proportional to the speed with which legislators enacted such laws. New York and Wisconsin were among the earliest states to adopt such laws, but a struggle then followed between the legislature and the courts over expansion and implementation of the laws. New York's and Wisconsin's courts did not strike down the women's rights laws, but they consistently gave the laws a narrow interpretation and tried to preserve much of the old order of common law property rights.

Virginia was slow to adopt a married women's property law, but once it did the Supreme Court of Appeals explicitly renounced a narrow interpretation of the law in the *Williams* case.⁴²⁹ The Virginia court did not go out of its way to expand women's rights by liberal statutory construction—indeed, in *Keister* it proved as reluctant as the New York and Wisconsin courts to expand women's capacity to sue in order to enforce their statutory rights⁴³⁰—but the fact that it formally renounced narrow construction when it did not have to is significant. As a general matter, did states that adopted married women's property acts relatively late experience less judicial resistance and less tension between legislators and courts than did states that adopted such acts early? This question also deserves further exploration.

429. See *supra* text accompanying note 215.

430. See *supra* text accompanying notes 222-23.

4. *"Cultures" for Accommodating Social Pressure for Divorce*

From the mid-nineteenth century onward Virginia, New York, and Wisconsin all experienced real, if unacknowledged, social pressure to make divorce easier and, concomitantly, a steady increase in divorce rates. Each state developed a separate response to this pressure. The differences say much about the overall culture of each state.

Virginia developed what may be called the "culture of rhetoric," which combined sharp official denunciations of divorce as an institution with flexible applications of conservative divorce laws. Much more than New York or Wisconsin, the Virginia Supreme Court of Appeals took pains to attack divorce in the abstract as an evil and a blight on society. Yet when the court had opportunities to back up its rhetoric by construing grounds for divorce narrowly, more often than not it passed them up. The court continued to denounce divorce well into the 1930s, but even as Virginia's divorce rate soared, the hand-wringing over "adultery agencies" and complaisant trial judges common in New York and Wisconsin was conspicuously absent in Virginia decisions and legal commentary. It is entirely possible that the "culture of rhetoric" that the Supreme Court of Appeals developed gave Virginia trial courts cover to follow the high court's underlying policy of flexibility, while allowing the state to postpone formal change until its sense of conservatism and social order had time to adjust to the true inevitability of such change.

New York, by contrast, developed a "culture of tension" in dealing with divorce, which to some extent corresponded to its demographic and economic diversity. The legislature's consistent failure to expand the grounds for divorce beyond adultery created an acute dilemma for unhappy couples and for the courts. As a result, the New York courts led the way in devising alternate means of separation including liberalized annulment standards, broad comity for out-of-state divorces, and relaxed evidentiary standards for adultery. But such creativity did not go without severe criticism, even from some of its active practitioners who felt their efforts to accommodate the reality of family discord came at the price of eroding respect for the law. New York finally took a step over the barrier of divorce reform in 1967, but the tension between supporters of more complete reform and those who wish to preserve at least some of the traditional stigma of divorce continues to this day.

Wisconsin has long had a propensity for legal independence and innovation. Given the Wisconsin legislature's regular efforts to overcome judicial conservatism in family law during the late nineteenth century and the state's innovativeness during the no-fault era, its response to increased pressure for divorce can accurately be labeled the "culture of reform." Wisconsin law and society have been influenced heavily by New York in many ways. Why has Wisconsin's divorce experience been so different? Part of the answer lies in the fact that the legacy of colonial law was much weaker in Wisconsin than New York: as a new state in the late 1840s, heavily influenced by New England's more liberal notions of family law as well as by New York law, Wisconsin had an opportunity to develop a relatively liberal divorce system from scratch which New York did not.

5. The Universal but Irregular Modern Revolution

Viewing the post-1960 changes in women's property rights in historical context makes clear just how revolutionary these changes have been. A particularly striking feature of the revolution is its universality: Virginia, New York, and Wisconsin all have enacted important changes in married women's property law and divorce law. Yet the pace of change has varied in each state and has been affected by the unique underlying characteristics of each state.

New York and Virginia represent conservative models of modern change. Both states implemented no-fault divorce law not by enacting a "pure" no-fault system, with marital breakdown as the only ground for divorce, but simply by allowing divorce based on separation. Their choices reflect a continuing tension between traditional and modern concepts of divorce and family. New York's difficulties in letting go of the traditional system have been contentious and well publicized; Virginia's less so, in keeping with its long tradition of cloaking change in the language of moderate conservatism.

Property reform has occurred at a different pace in each state. Wisconsin, in keeping with its penchant for making major changes in bursts rather than in steps, overhauled its rules for maintenance and property division in 1977 to conform closely to a community property concept of marital assets and earning powers. New York and Virginia remodeled their maintenance and property division rules later and less completely. New York legislators were ambivalent about abandoning the fault concept in these areas, Virginia legislators less so. The courts in both states have shown

considerably less ambivalence than their legislatures in minimizing the role of fault in both areas: their decisions may be paving the way for eventual public acceptance of a community property concept of marriage and divorce.

B. Fitting the States into a Larger American Model

This Article's foray into comparative state legal history suggests that, at least with respect to married women's rights, Virginia, New York, and Wisconsin all fall within the boundaries of a larger American tradition. If there is a single overriding theme characterizing the American tradition, it is reliance on notions of equity. Women are not, and never have been, a group that lawmakers can isolate by means of special laws. Men and women are irrevocably bound together in the world, and in law as in most other aspects of life they cannot exist without each other. Thus in the end, it is not surprising that Virginia and New York tempered the harsh effects of the unity doctrine on women by use of trusts and other equitable devices. At some level, legislators and judges must have realized that was necessary for society as a whole, not just for women. When equity disappeared as a separate legal system, these states and the new state of Wisconsin preserved a large element of equity in the form of broad judicial discretion over such subjects as maintenance, property division in divorce, and carving out a "wife's equity" in assets of insolvent husbands as against the claims of creditors. Equity has not been a cure for all injustice to women, but it has served as a useful safety device during the long periods between major reforms.

The three states show a consistent sequence of women's rights reforms that is probably characteristic of many states and is also part of an overall American model. The equitable trust system of the seventeenth and eighteenth centuries slowly gave way to a sense that women should be given a direct, statutory right to control their property rather than having to rely on equitable relief fashioned by the courts. The married women's property laws of the nineteenth century were the result. Although such laws were passed mainly because of a desire to shelter assets for the benefit of husbands, they established a framework on which later feminists could build.

During the century following the wave of married women's property acts, women's rights evolved slowly and fitfully out of a tug of war between state legislatures and courts. In most states the legislature took the lead in expanding property rights; but courts

took the lead in accommodating increased social pressure for divorce. For better or worse, divorce inevitably freed women from the legal constraints marriage imposed on them and gave them a legal right to a portion of the family's property and income. The more accepted divorce was, the more established such rights became in the minds of the public, the legislators, and the judges. This helped pave the way for the no-fault revolution and for modern changes in maintenance and property division rules after 1960.

Virginia, New York, and Wisconsin all have followed this sequence, but they have done so in unique ways. New York's following of the sequence was marked by innovation and controversy, like many other aspects of the state's social history. New York was the first state to adopt a broad married women's property act, and it was one of the most important battlegrounds for the subsequent struggle between lawmakers and judges over how fast the rights conferred by those acts would be expanded. The battle between divorce traditionalists and reformers, and the related battle over maintenance and property division reform, also have been more acute in New York than elsewhere.

Stylistically, Virginia has been New York's exact opposite. Virginia's order-loving nature has not caused massive resistance to expansion of women's rights, but it has produced the "culture of rhetoric" which the state has used to effect gradual but real change while reassuring its people that social order and regularity continue. This culture appears to have been eminently satisfactory to most Virginians and to have been a mostly successful method for allowing Virginia to follow the American model of change.

Wisconsin at some points has been even more contentious than New York. The late nineteenth century struggle between its legislature and courts over implementation of women's property laws was the sharpest of the three states, yet several decades later the Wisconsin Supreme Court's decision to maximize the scope of the far-reaching 1921 women's equal rights law, which had no contemporary counterpart in either New York or Virginia, was equally controversial. In the end, women's property rights in Wisconsin have largely been saved from the level of contentiousness that has plagued New York by the fact that Wisconsin generally does not undertake reform unless it is ready to make a thorough job of it. This is evidenced most recently by the fact that Wisconsin's no-fault reform, combined with its 1984 community property law, constitutes a far more decisive move toward the modern concept of marriage as a community of interest than have either New York's or Virginia's reforms.

As predicted at the beginning of this Article, the influences of colonial law, slavery, a concomitant preference for strong social hierarchy, economics, commerce, Jacksonian ideas, and the frontier lifestyle all have played a role in explaining the different evolutions of married women's rights in the states studied here. But individual character quirks of each state also have emerged in this study. Those quirks—Virginia's love of order and moderation, New York's extreme diversity, Wisconsin's restiveness and penchant for periodic but thorough reform—are real, not flights of romantic fancy, and they too have played an important role in shaping each state's law. What quirks characterize other states, and how such quirks have influenced those states' legal systems in the area of women's rights and elsewhere, is a potentially vast field ripe for further study.