On the Question of Court Activism and Economic Interests in 19th Century Married Women's Property Law

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Abstract. Dates of passage of two sets of legislation affecting the property rights of married women in the 19th century are considered from the perspective of state judiciaries. In a content analysis drawing on a dataset of over 200 cases, I find that while most courts did not declare the Married Woman's Property Acts and Earnings Acts unconstitutional, they did qualify the scope of the laws by maintaining the husband's traditional ownership and control rights over the family estate. Additionally, courts maintained the idea of a wife's incompetence as an independent economic agent.

1. Historical Background

In the early 19th century, a married woman did not enjoy rights over any property or earnings that she may have acquired or earned. According to the common law, she was a *feme covert,* "covered woman", meaning that when she married she was placed under the protective "wing" of her husband and had no independent legal status. Legal scholars have noted that *feme covert* is an example of a legal fiction: a legal principle which creates an untruth when applied to reality – namely, the figurative nonexistence of the wife when it came to contracts or property ownership. Any contract she entered into was considered void precisely because she was under "coverture" of her husband, carrying no agency status. If she wanted to enter into an apprenticeship, or convey property, she needed the consent of her husband – otherwise the action was void and in most cases the husband was liable for any debts or obligations she may have entered into.

While the common law – and thus the common law conception of *feme covert* – remained prominent in American jurisprudence throughout the 19th century, in the late 1830s and into the 1840s married women's legal status began to change via legislative statute. Initially, the cause for concern was abuse of the marriage estate by the husband. If the wife had acquired property via dower or through the death of a family member or some other means, the husband would try to use that property to satisfy his personal debts. These laws were not meant to give a married woman any separate control or ownership rights over her property; rather, the intent behind the law was simply to protect the wife's property from abuse by the husband. And of course, the common law "fiction" of *feme covert* remained.

The second set of legislative statutes, enacted beginning in the late-1840s and 1850s, *were* meant to give married women ownership and (most importantly) use rights over their separate property. Thus, while similar in content to the first set of statutes, the intention behind these laws was much more broad. Referred to as the "married woman's property acts" (hereafter referred to simply as the "MWPAs"), the laws awarded married women a set of rights over any real or personal property they may acquire via gift or other method of transfer such as a devise or inheritance[1].

The third set of legislative statutes gave married women ownership rights over their labor market

1 To devise is to transmit property via will, while inheritance is the transfer of property via the succession of ownership rights.

earnings (these will be referred to as the "Earnings Acts"). For many states, these laws were passed concurrently or shortly after the passage of an MWPA. Many courts saw this "third wave" as a significant expansion of a married woman's rights, though of course, married women did not compose a significant proportion of the female labor force, even at the turn of the 20th century (Chused 1982-1983, 1364). Still, as others have argued (Geddes, Lueck, and Tennyson 2012), the laws likely increased the incentives for girls' education, because now their skills would be more highly valued in the labor market.

2. On the Question of Judicial Interpretation of the MWPAs and Earnings Acts: Contributing to the Existing Literature by Addressing Two Key Questions

A major question in the research on the MWPAs and Earnings acts is determining an accurate documentation of their dates of passage, because these are often used to evaluate their causes and effects. Geddes and Tennyson (2013) have developed and applied criteria for determining the crucial statutes between 1848 and 1920. Specifically, they review the legislative records for statutes which – for the MWPAs – grant married women explicit *ownership and control rights* over their separate property. They looked for similar language in the Earnings Acts.

I reexamine these dates of passage from the judicial side of the issue. I examine records of court opinion in all states in the same time period (1848-1920) to see to what extent courts were in agreement with what Geddes and Tennyson found in the legislative records. Examining court records is also an excellent opportunity to gain an additional historical perspective into the meaning and significance of the laws. To undertake this project, I searched relevant strings in a historical court case database (WestLaw) around the years which Geddes and Tennyson specified as dates of passage of both MWPAs and Earnings Acts.

What of their economic and social effects? Geddes, Lueck, and Tennyson (2012) argued that increased returns to market work encouraged state adoption of the laws and that this, in turn, promoted increased investment in girls' schooling. They convincingly argue that legal change responds strongly to economic incentives, particularly ones that enhance efficiency. On the other hand, Norma Basch's (1979) article was an early and influential study of the judicial interpretation of the statutes which asserted the continued relevance of the common law default of coverture. Focusing on New York, she found that they were subject to a strict construction and were at one point declared unconstitutional. She uses these observations to argue that both legal opinion and society at large continued to share in the common law "fiction" of *feme covert,* preventing either the MWPAs or the Earnings Acts from leading to any real social reform.

While Geddes, Lueck, and Tennyson (2012)'s argument about the economic changes driving the law is strongly supported by the available evidence, Basch's thesis (hereafter named the "judicial conservatism hypothesis") is also compelling, particularly when we consider the political economy of women's legislation in the late-19th century. Women were often seen as "wards of the state", and legal reform was enacted in order to protect women from their husband's creditors or their employers (Kessler-Harris, 2003; Salmon 1989). Coupled with the fact that, regardless of the content of the statutes, the default position of the courts was still one of *coverture* (the statutes could not dismantle the common law tradition, they could only modify it), Basch's argument seems plausible. Additional empirical evidence also suggests that the laws had limited social impact on married women's labor force participation (Roberts 2006).

The main drawback to Basch's study was that it focused solely on New York. We may infer that judges

in New York – having a similar educational background to judges in other states, at least in New England – were representative of the broader legal position on married women's legal reform. But without carrying out a comprehensive study of other state courts, we cannot be sure that New York judges were not simply more activist than their peers. And indeed, recent research seems to suggest that New York judges *were*, at least in the late-1840s, much more activist than their peers.[2]

This paper expands the analysis of the judicial perspective in order to shed light on the validity of Basch's judicial conservatism hypothesis. To that end, the main results of my analysis, presented in the next section, show that only the laws in New York were declared unconstitutional, and that decision did not remain law for more than 2 or 3 years. In short, there was no widespread trend toward declaring the laws invalid. Judges in most states settled disputes with reference to them, with many ruling in favor of the wife's claims to her separate property.

These findings do not imply that judges read the cases liberally. While many of the state judiciaries did not overturn the laws, they did maintain traditional conceptions of a husband's rights over family wealth, and they also reinforced the idea that married women did not enjoy independent contracting status. Many of the legal disputes overlapped across states, and judges often independently came to similar conclusions, suggesting that certain dominant views prevailed about women's position in society and in the political economy of the 19th century. My results support a modified form of Basch's "judicial conservatism hypothesis", in which courts do not overturn laws but may have prevented them from leading to significant social reform.

The final contribution of this paper is to test the claim that the laws had limited social impact. The laws, if effective, should have given married women a reliable claim to their property and increased divorce rates. The laws should have encouraged married women to seek divorce more often because less was at stake for them in the separation of the family estate. My results show that while the late 19th century U.S. saw a rise in divorce rates, this trend cannot be linked to the passage of MWPAs or Earnings Acts. My results therefore fail to reject the hypothesis that, due to a variety of factors, laws failed to expand women's household bargaining power.

3. Analysis and Main Results

My data collection strategy involved searching for relevant strings in the online case law database *WestLaw*. I compiled my results into a dataset of over 200 relevant cases across 46 states. The results allow me to reconsider – from a judicial perspective – the legislative history of the MWPAs and Earnings Acts. The first main finding is simply working through Geddes and Tennyson's dates of passage from a judicial perspective. The second main finding is that, contrary to the strong form of Basch's judicial conservatism thesis, most states did not overturn either the MWPAs or the Earnings Acts.

The table below lists the dates of passage of the MWPAs and Earnings Acts according to Geddes and Tennyson (2013) along with the revised dates of passaged based on my court case analysis. The revisions include a footnote referring to the relevant case analysis used to justify my argument for revision.

3.1 Table of Revisions Based on an Analysis of Judicial Interpretation

2 We know that New York experienced one of the strongest movements for judicial elections in this period. The movement for judicial elections was, in turn, based on popular support for judicial review (Shugerman 2009-2010). Basch does not mention the connection between popular elections and judicial review in New York.

Dates of Passage According to Geddes and Tennyson (2013), Along With Suggested Revisions Based on the Case Analysis Research				
State	MWPA	Revision	Earnings	Revision
Alabama	-		1887	
Arizona	1871	1885[3]	1973	
Arkansas	1873		1873	
California	1872	1874[4]	1872	-?[5]
Colorado	1861		1861	
Connecticut	1877	1878-1882, then-?[6]	1877	1878-1882, then-?[7]

3 A series of cases in Arizona shows that while the 1871 law did give ownership and control rights of the property to the wife, the ownership and control rights over the *rents and profits derived from that ownership* were assigned community property status: "[b]y [1871] act it is provided that the wife shall have the sole and exclusive control of her separate property, with power to sell, etc.; nothing is said about the rents and profits, while the other portion of the statute stands in full force, making the rents and profits common property." This was overturned in an 1885 statute. The specific wording of the 1885 statute is that "the rents, issues, and profits of the husband's separate property shall be his separate property, and the rents, issues, and profits of the wife's separate property shall be her separate property."

4 California is a difficult state. I revise to 1874 because in that year there was a revision of the original statute, which allowed her property to be sold for money. Selling for property was not permitted beforehand, meaning that a married woman did not have complete ownership and control over her property because she could not convey her property for money. See Marlow v. Barlew (3 P.C.L.J. 68, 1879), "A married woman's power under Civ.Code, § 158, to "enter into any transaction respecting property," includes giving a note and a mortgage of her separate estate to secure it.... She was deprived of the capacity to make a contract *for the payment of money* by sec. 167 of the Code as first adopted; but the section was repealed in 1874" (my emphasis added). Also see Wood v. Orford (52 Cal. 412, 1877), "As it stood at first, a married woman could not bind herself by any contract for the "payment of money," *even if that contract was respecting her separate property*. As amended, it leaves a married woman to make such contracts as sec. 158 provides that she may make."

5 It is not clear *when* control and ownership rights over earnings was granted: Tobin v. Galvin (49 Cal. 34, 1874) references an 1869-70 Act in rejecting a married woman's case: "Act March 9, 1870, St.1869–1870, p. 226, which provides that while the wife lives separate and apart from her husband she shall have the sole use of her property, and may sue and be sued, etc., does not apply to a case where the wife is temporarily absent from her husband with his consent, but to cases where there has been an abandonment on the part of the husband or wife, or a separation which is intended to be final." While the dispute in this case is not directly relevant, one can see by implication the perspective of the law toward earnings in a traditional marriage. Furthermore, as late as 1886, her control ownership of earnings was questioned since the earnings were allocated to the community property, which was under the husband's control (see Smith v. Furnish, 70 Cal. 424, 1886). Her earnings were, since section 168 of the Code referenced by Geddes and Tennyson, protected from the debts of the husband, but that is the extent of her ownership rights (see *Finnigan v. Hibernia Sav. & Loan Soc.*, 11 P.C.L.J. 362, 1883, for additional support of this claim). It is, at the very earliest, after 1920 that a fuller earnings act could be passed (note that my estimate is according to my study of the court records, *not* legislative documents).

6 It is not clear when married women had ownership and control over their property in Connecticut. It appears that for a brief period, 1878-1882, they had ownership and control rights over property, including earnings, but then an 1882 statute repealed the 1878 one: in Shea v. Maloney (52 Conn. 327, 1884) "The act of 1878 (Session Laws 1878, ch. 61), since repealed [in 1882 according to Justice Granger], provided that "all property" thereafter acquired by any married woman should be held by her to her sole and separate use. Held that money due for the personal services of a married woman in washing and house cleaning, was property acquired by her within the meaning of the statute." In short, the wife won this case because it fell within the time that the 1878 statute was in force. No other relevant cases after this one, either upholding the acts or not, can be found. But the repeal of the 1878 is real. From the *Public Statutes Laws of Connecticut*, 1882: "Chapter sixty-one of the public acts of 1878, which reads as follows: 'All property hereafter acquired by any married woman shall be held by her to her sole and separate use,' is hereby repealed" (approved, March 9, 1882).

Delaware	1873	1875[8]	1873	1875
Florida	1943	1885[9]	1892	1906[10]
Georgia	1873	1866[11]	1861	1866[12]
Idaho	1903		1915	
Illinois	1861[13]		1869	
Indiana	1879		1879	
Iowa	1873		1873	
Kansas	1858[14]		1858[15]	
Kentucky	1894		1873[16]	

7 See previous footnote.

8 Moore v. Darby (6 Del. Ch. 193, 1889) shows that there were two acts in question, 1873 and 1875, and the latter is more broad by including women who were already married and who acquire property and earnings AFTER the date of passage of the statute. Given that New York courts initially struck down their statute on the basis of the claim of abrogation of an already-existing contract contract, extending married women's rights to property already acquired is an important extension which warrants the suggested revision. Note that Geddes and Tennyson also find this minor distinction in the language, saying the two statutes are "almost identical". But as I have argued, there is a big difference both in theory and application of the acts.

9 According to a court case from 1911, the 1885 constitution gave ownership and control rights to a married woman over her property.

10 The clause in the 1885 constitution was followed up with a statute in 1906 which gave the wife control over her earnings (Lerch v. Barnes, 61 Fla. 672, 1911).

11 The reason for a suggested revision to 1866 is based on several cases which referenced the statute in that year (as well as the state's constitution in 1868) as the point at which a married woman obtained all rights of ownership and control over her property. See for example Dunnahoo v. Holland (51 Ga. 147, 1874) for property and Eichberg v. Bandman (74 Ga. 834, 1885) for earnings. From *Eichberg*: "Where a married woman, living with her husband, owned a separate estate, which consisted in part of a house and lot where they resided, and she carried on the business of keeping a boarding-house, since the act of 1866, her earnings in that enterprise belonged to her, and she was entitled to sue and recover in her own name from one who boarded with her and failed to pay the amount due therefor."

12 See previous footnote.

13 Not a suggested revision, only a particularly strong backing of the Geddes and Tennyson date. A court case from 1870, *Musgrave v. Musgrave* (54 Ill. 186, 1870), affirms without question the validity of both property and earnings acts: "Prior to the act of 1861, a married woman could not own separate property in her own name and right. But that act invests her with her property, free from the control of her husband, and gives her the same power over it as if she were sole and unmarried. Again, in 1869 (Pub. Laws, 255), it was enacted that any married woman shall be entitled to receive, use and possess her own earnings, and sue for the same in her own name, free from the interference of her husband or his creditors, etc. These acts have manifestly radically changed the common law. Under them, she may hold, use and enjoy separate property, and her earnings free from the interference of her husband."

14 I quickly note, addressing Geddes and Tennyson (2013), pg. 177 who make a comment regarding the similarity between the 1868 and 1858 acts, that the difference between the 1868 and 1858 act for property seems to be that the 1868 act was much broader in the sense that it established feme sole trader status and allowed the wife to "purchase on credit such property as is necessary to carry on such trade or business, and may hold the same as her sole and separate" (*Tallman v. Jones*, 13 Kan. 438, 1874).

15 While I have no direct evidence to dispute the 1858 date, I first note that there is no record cases at the state level that occurred prior to 1865 (there was a case that enforced a part of the 1858 statute which only protected the wife from the husband transferring property to her to avoid paying creditors). Second, I note that several later cases explicitly refer to an 1862 statute as "authorizing married women to perform labor and services on their sole and separate account, and making their earnings their sole and separate property". See Larimer v. Kelly (10 Kan. 298, 1872). But since I can neither confirm nor deny that any statute prior to 1862 did not carry the same force, I accept the 1858 date for the Earnings Act.

16 Several early cases clearly rule that the wife had no right to her earnings unless the husband agreed to do so ("[i]f a married woman desires to secure the fruits of her own labor or accumulations, she must in conjunction with her husband pursue the mode pointed out by the statute authorizing her to trade as feme sole," Strowd v. Stanley and Son 1876), or

Louisiana	1916		1928	
Maine	1855		1857	
Maryland	1860		1842[17]	
Massachusetts	1855		1846	1855[18]
Michigan	1855		1911	
Minnesota	1869		1869	
Mississippi	1880		1873	
Missouri	1875		1875	
Montana	1887		1887	
Nebraska	1871		1871	
Nevada	1873		1873	
New Hampshire	1860		1867	
New Jersey	1852		1874	
New Mexico	1884		-	
New York	1848		1860	
North Carolina	1868		1913	
North Dakota	1877		-	
Ohio	1861		1861	
Oklahoma	1883		-	
Oregon	1878		1872	
Pennsylvania	1848		1872[19]	1887[20]

in a related set of cases (*Brown v. Casbier*, 1882) unless the husband and wife went through the court of Chancery. These cases do not reference an act from 1873. Nevertheless, I cannot find anything that explicitly overturned the 1873 law, and indeed eventually the courts were recognizing the wife's ownership of earnings based on the 1873 statute (*Bullock v. Commonwealth*, 16 Ky.L.Rptr. 806, 1884). I cannot determine why the earlier cases did not reference the 1873 statute.

17 Not a revision, but I briefly note that an 1859 case confirms the strength of the 1842 law giving rights over earnings: a married woman had undertaken a business from which she was earning some money. Her husband was sued and the sheriff tried to take her property. Ruling for the wife, the court referenced the 1842 law (*Bridges v. McKenna*, 14 Md. 258, 1859).

18 In Massachusetts, many of the cases after 1855 referenced the 1855 statute as the more salient one when it came to earnings. In *McKalvin v. Bresslin* (8 Gray 177, 1857) justice stated that "[b]efore the St. of 1855, c. 304, the earnings of the personal labor of a wife, even when living apart from her husband, were his property, and might be recovered by him from one to whom she had assigned them without value." See also *Gerry v. Gerry* (11 Gray 381, 1858). The difference seems to be that the 1846 case was a “protection” statute, i.e., was primarily intended to further protect the wife's property or earnings from a husband's debtors (see, for example, *Maxwell v. McGee*, 66 Mass. 143, 1853). This is confirmed in the secondary literature on the laws, though some remark that there were still qualifications in the 1855 Act for work done in service to her family (Siegel 1994).

19 A dilemma arises in Pennsylvania, as well as Montana (see *Barger v. Halford*, 10 Mont. 57, 1890), regarding whether to categorize a law that required a woman to register with the court before she could have ownership of her earnings, as a full Earnings act. Since husband's consent is not the same thing as control and ownership rights, the issue is complicated. Because there were several other laws, including one in 1887, which the court claimed to have “confer[red] on married women the same power over their property and earnings, and the same rights and remedies incident thereto, that men have” (*Small v. Small*, 129 Pa. 366, 1889). In the case *In re Bowler's Estate* (20 Phila. 44,

Rhode Island	1872		1872	
South Carolina	1868		1887	
South Dakota	1877		-	
Tennessee	1919		1919	
Texas	1913		1913	
Utah	1872		1897	1888[21]
Vermont	1881	1884[22]	1888	
Virginia	1877		1888	
Washington	1881		1881	
West Virginia	1868		1893	1891[23]
Wisconsin	1850		1872	
Wyoming	1869		1869	

3.2 Discussion of the Results on Judicial Interpretation

In some states, judges give an explicit discussion of the history of the statutes in their state, with direct references to how the wording of each statute changed. In others, they provided an assessment of the extent and scope of a given statute. Since they were well-read in the history of the laws in their respective states (and in some cases in other states as well), I weigh these assessments strongly. I then consider Geddes and Tennyson's own work on the legislative side before coming to a decision on a suggested revision.[24] The result is a set of suggested revisions based purely on the technical differences between how the laws were viewed on the legislative and judicial side. In section 4 I delve into some of

1890) Justice Hanna also makes reference to the “proceedings” that a married woman had to follow in order to be granted rights to her separate earnings. Since an explicit date of a more expanded statute can be found for Pennsylvania, I adopt it as a suggested revision. But either case may be used, subject to this caveat.

20 See previous footnote: either date may be used, subject to the caveat.

21 From Compiled Laws 1888, Vol. II, Part 5 on Domestic Relations, Section 2528: “All property owned by either spouse before marriage, and that acquired afterwards by purchase, gift, bequest, devise or descent, with the rents, issues, and profits thereof, is the separate property of that spouse by whom the same is so owned or acquired; and separate property owned or acquired as specified above, may be held, managed, controlled, transferred and in any manner disposed of by the spouse so owning or acquiring it, without any limitation or restriction by reason of marriage.” As quoted in *Culmer v. Wilson* (13 Utah 129, 1896).

22 Geddes and Tennyson's explanation for 1881 is somewhat confusing (pp. 184-185). They immediately state 1881, but never give a reference. They go on to cite an 1884 statute which was “stronger” but didn't include earnings. I agree that the 1884 act does not give earnings, but I also think that the MWPA should be set to 1884, based on the following assessment of the history of the laws from Justice Start in *Fletcher v. Wakefield* (75 Vt. 257, 1903): “[b]y No. 21 of the Acts of 1867, p. 29, a married woman was authorized to hold to her sole and separate use all personal property and rights of personal action acquired by her during coverture, by inheritance or distribution. This right to hold separate personal estate was, by No. 140 of the Acts of 1884, p. 119, enlarged so that she could hold all personal property and rights of action acquired before or during coverture, except those acquired by her personal Industry or by gift from her personal industry or by gift from her husband, and by No. 84 of the Acts of 1888, p. 98, the exception of property acquired by her personal Industry was removed.”

23 I list 1891 given the following justice's opinion: "A wife's earnings, at common law prior to chapter 109, § 14, Acts 1891, belonged to the husband” (*Roberts v. Coleman* 37 W.Va. 143, 1892). Another case, also from 1892, confirms a married woman's rights to her separate earnings (*Trapnell v. Conklyn*, 37 W.Va. 242).

24 In some cases, judges interpreted the statutes very strictly without overturning them. I do not give a specific analysis of those states in this paper.

the more substantial ideological issues that my have prevented the laws from having a significant social impact.

In some cases, it was the judges who found minor qualifications to the acts, leading the legislatures to revise them accordingly. These examples are as much the fault of the legislatures as the judiciaries: while the courts could have read the initial acts more broadly to support a married woman in a given dispute, in some cases significant conceptual differences between a dispute and a given law prevented judges from taking such a broad view. For example, an Arizona court found that the MWPA in that state initially awarded married women ownership and control rights over her property, but not over the rents, issues, and profits derived from the use of that property. The original act was revised in 1885. In California, the initial MWPA was found to leave out the possibility that a married woman might exchange property for the payment of money. This led to a revised statute two years later. Finally, for some states, such as Florida, there simply appears to be an error in reviewing the legislative documents which may have caused Geddes and Tennyson to overlook some of the crucial statutes.

At any rate, results suggest that most statutes were *not* overturned. Rather, some were delayed slightly due to problems in the initial statute or simply the misapplication of a particular statute. Only Connecticut saw its statute overturned, and that was done by the legislature itself 6 years after its initial passage. In other words, the claim that the statutes were literally overthrown by activist judges is not supported by a state-by-state analysis of judicial interpretation.

4. Generalizable Trends in the Judicial Perspective on the MWPAs and Earnings Acts

A state-by-state content analysis of judicial opinion brings to light many important themes regarding the extent and nature of court activism. In this section, I summarize 2 particularly important trends and elaborate on each issue. I argue that courts, while not overturning the laws, maintained a conservative stance both on women's position in nineteenth century political economy as well as her ability to act as an independent economic agent. These trends suggest that the courts limited social reform. The first trend I focus on is the issue of labor performed in connection to a married woman's obligations to her family. The second is how the courts handled cases involving a married woman entering into contracts involving debt obligations.

4.1 Community Property States and Services Performed for the Family

"Community property" states borrowed their legal system from the civil law tradition rather than the common law one. In these states, the earnings of either the husband or the wife would fall within the "community property", over which the husband had exclusive control. A similar though less explicit concept of a common pool of "family assets", in the exclusive control of the husband, also existed in common law states. In both cases, courts found used these concepts to qualify a married woman's rights over property or earnings acquired. Specifically, the courts found that if the wife's property or labor could be construed to be within the domain of services performed for the family, then exclusive control rights would be awarded to the husband.

While Geddes and Tennyson (2013) suggest that community property states would, on average, pass MWPAs and Earnings Acts later than non-community property states, no rationale was given for why they would do so. In an earlier paper Geddes wrote with Dean Lueck, it is suggested that married women in community property states may start out with more rights than in non-community states (making the incentives to grant additional rights to the wife lower than in common law states), supposedly because the property was already seen as held *equally* by both husband and wife (Geddes

and Lueck 2002). Historically, however, husbands were the only ones with ownership and control rights. The logic for later adoption, suggested by the definitions of community property above, may have been that legislatures in community property states needed to jump an additional "hurdle" by granting the wife equal ownership and control rights over the community property in addition to establishing separate property rights (Siegel 1994).

It follows that significant reform could be achieved in community property states if and only if the wife enjoyed ownership and control rights over the community property. This would make community property law more restrictive of women's rights before and after the passage of an MWPA or Earnings Act, not less, as Geddes and Lueck (2002) and later Geddes and Tennyson (2013) suggest. While it does not change their prediction that community property states would pass an MWPA or Earnings Act after non-community property states, the interpretation of the variable clearly matters for understanding the history and nature of married woman's property reform.

How did these ideas operate historically? In community property states, if a married woman had obtained rents or profits from her separate property[25], or if she had performed a service such as a nurse[26], then that property would be assumed to be community property due to the connection to family assets. It was then ruled that the husband would have full control and ownership rights. Since courts were not willing to "break up" the economic basis of the family, community property law generally acted as an additional barrier to women's property ownership.

In common law states, when similar disputes arose, the same idea was applied of preserving the husband's control over the household's wealth. However, because the common law contained no institutionalized conception of ownership rights over the pool of family assets, I found cases in which the wife enjoyed unqualified rights over her separate property. For example, if it could be established that the wife's earnings from services, or rents and profits from her property, were related her familial duties, then the husband often retained rights over them.[27] (Duties often involved anything performed in the household, such as taking in boarders.) If not, then in most cases the wife retained rights over either her rents and profits accruing from her separate property, or earnings from services performed.
In a representative case from Delaware in 1886 ruling for the husband's ownership over the wife's earnings it was ruled that "[w]hatever, therefore, a wife does, in the performance of the duties devolving upon her as such (as all of you no doubt know what they are in the case of a farmer's wife in good health), cannot be looked upon otherwise than as her wifely service." Delaware passed its Earnings Act in 1873, and still over 10 years later the court's opinion was shaped by the traditional conception of family assets.[28]

The key unifying feature on the common law and community property states is that in both cases, the property rights of married women were qualified by traditional norms of who controlled ownership over household wealth. The feature was simply more institutionalized in community property states.[29]

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25 *Woffenden v. Charaleau* (2 Ariz. 91, 1886).

26 *Smith v. Furnish* (70 Cal. 424, 1886).

27 *Valentine v. Tatum* (7 Houst. 402, 1886), a Delaware case.

28 Another important piece of evidence in support of the argument in this section is the fact that while Arizona's (a community property state) initial MWPA gave a married woman ownership and control rights over her separate property, according to the courts it did not give her ownership and control rights over the *rents and profits derived from that separate property*, because presumably the gains were made in some way in connection to the household. This "gap" in the legislation, which was not found in other community property states, was eventually rectified in 1885.

29 MWPAs or Earnings Acts in common law states often contained phrases such as "other than work done in service to her family" as a qualification on her separate property rights. So as long as the laws did *not* contain such wording, it was harder for courts to maintain the husband's ownership rights. [

An additional rationale given for a husband's rights over his wife's property, even in the presence of an MWPA or Earnings Act, is the fact that the wife is obligated to perform certain familial duties to the household, so that if she is injured at some point, the husband can sue to recover on "damages", and these are his property, not his wife's.[30] Again, the court framed the issue in terms of the obligations to support the family's wealth.

4.2 Debt Contracts

In some states, courts ruled that a married woman could not enter into contracts that contained a debt obligation, including promissory notes. In others, courts ruled that the wife could enter into such contracts, but only if she used her separate property as equity. In most cases involving either type of dispute, an implicit or explicit assumption was made that women did not hold the capacity to enter into contracts respecting "certain" types of property.[31] What made judges interpret the acts in such a narrow manner?

An example of a stricter construction of the acts, in which only contracts directly involving a married woman's separate property were valid, was an Arizona court's position in *Stiles v. Lord* (2 Ariz. 154, 1886). A married woman had endorsed a promissory note to another individual in exchange for money. The individual then failed to recover on the note from the initial issuer of the note, and went to court to hold the woman accountable. The court held that married women did not, within the 1871 MWPA, have the right to enter into a general contract regarding the endorsement of a promissory note because the promissory note was not a valid form of property within the meaning of that statute. The justice ruled that "we are not prepared to extend [the meaning of the 1871 statute] beyond such a simple contract as is necessary to the sale of personal property."

In North Carolina a judge argued in *Pippen v. Wessen* (74 N.C. 437, 1876) that married women do not fall under the category of "obligors *pleni juris,*" meaning they do not enjoy the contracting rights of a full citizen. Specifically, a suit to recover on a bond that was given by the wife was not upheld, due to her legal inability to enter into contracts regarding debt obligations. In an early case in Pennsylvania, *Mahon v. Gormley* (24 Pa. 80, 1854), Justice Lewis argued that a married woman could not enter into debt contracts generally because the statutes were primarily designed "for [a married woman's] protection, not for their injury, and must receive such a construction as shall promote that object." Lewis went on to note that "[i]n her dependent condition, with duties which preclude and habits which unfit her for out-door business of life, to give her these extensive powers [to enter into debt contracts] would be an injury instead of a benefit to her, and would be altogether at variance with the benevolent purposes of the legislature."[32]

Lewis' reasoning here is instructive for understanding the general perspective on women's capacities to contract throughout the 19th century. Lewis based his argument on the assumption that it would be dangerous, because of a married woman's incapacity to enter into some kinds of contract, to let her enter into a contract regarding a debt obligation. Debt contracts, while essential for an economy to

30 See *City of Wyandotte v. Agan*, 37 Kan. 528, 1887. Similarly, see *Norfolk & W.R. Co. v. Prindle* (82 Va. 122, 1886): only the husband can recover for injury to the wife.

31 While an additional set of states did read within their MWPA a right a enter into contracts involving a debt obligation, I reserve discussion of these states to the following section.

32 The entire opinion is illustrative, but here is one more quote to give one a sense of the court's position under the *strict* interpretation: "The Act of 1848 gives her a right to acquire property by "deed of conveyance or otherwise," and therefore by implication confers upon her the right to charge it with the payment of the purchase-money, for that is a part of the act of acquisition; but it has been held that she cannot charge her other estate with the debt."

function, contain elements of risk and uncertainty. In order to minimize these factors, the law must prevent persons who are not of a “sound mind” from entering into such contracts. Thus, women should not be allowed to issue bonds or endorse promissory notes because then they are taking on a risk in the obligation to pay.

Some states endorsed a less-strict construction of a married woman's right to enter contracts in which debt obligations *could* be sustained, but only as long as her separate property was used as equity. There was a case from Nebraska in which a married woman was allowed to give a promissory note to another person as a debt which would be recoverable on her separate property. Courts in Arkansas ruled similarly, as did Idaho. The uniting feature in all of these cases was that a married woman was free to enter into such contracts as long as they were made with respect to her separate property. In other words, she needed to supply the equity at the time of signing to prove that she could pay off the debt, bringing the contract closer to a simple exchange contract than a debt contract.[33]

In New York, a series of cases revolving around *Yale v. Dederer* also affirmed the above position regarding the capacity to contract, but also included a discussion of the logic behind the idea that married women had a right to enter into contracts of debt as long as they are made with respect to her personal property. Justice Comstock wrote, “I think it is plain, however, that the [MWPA] does not remove her incapacity, which prevents her from contracting debts. She may convey and devise her real and personal estate, but her promissory note or other personal engagement is void, as it always was by the rules of the common law. *This legal incapacity is far higher protection to married women than the wisest scheme of legislation can be, and we should hardly expect to find it removed in a statute for 'the more effective protection of her rights'* ” (emphasis added). The allowance of a married woman to enter into debt contracts respecting her personal property, Comstock goes on to note, is within the logic of the “rights to disposal of property” which the MWPA does grant.

In summary, it is apparent from the above discussion of the two cases why courts were willing to accept that a married woman could own, control, and even convey her property, but not enter into contracts in which she would be liable for debt: it boiled down to assumptions regarding (the extent of) her capacity to make contracts, and specifically, to continue to be protected under the law given the incapacities. This tradition in the common law had not been overturned by either the MWPA or the Earnings Acts.

5. Conclusion

The significance of legislation seeking to overturn a married women's property holding status in the mid- to late-19th century is called into question by a review of court opinion. While the acts did award separate property rights, they were qualified by traditional conceptions of a women's duty of service toward her family and her (in)ability to enter into contracts entailing a debt obligation.

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33 List cases here.