THE THREE WAVES OF MARRIED WOMEN’S PROPERTY ACTS IN THE NINETEENTH CENTURY WITH A FOCUS ON MISSISSIPPI, NEW YORK AND OREGON

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I. INTRODUCTION

As the nineteenth century began, American states adhered to the English common law rules governing the property rights of married women. Married women’s property rights at common law were based on the doctrine of marital unity or coverture, meaning “covered woman.” This was the simple presumption that “in the eyes of the law” the husband and wife were one person – the husband. As Blackstone wrote, “the very being

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or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and cover, she performs everything.\(^4\)

Under the common law, single women held the same legal property rights as men, but married women were not allowed to act independently with regard to property.\(^5\) Upon marriage, real property owned by a woman in a legal estate was subject to the management and control of her husband and her personal property became his.\(^6\)

Most Americans in the early settlements simply wanted to recreate what was familiar to them and legislators and judges usually deviated from English law only in response to novel legal problems not specifically dealt with by English common law.\(^7\) There still existed levels of diversity in the development of the law depending largely on the area of the country. States and regions varied in how they adopted local customs and the common law to their own circumstances. Similar to England, some Northern states had courts of equity where the rules were friendlier to women on the whole.\(^8\)

In early America each jurisdiction originally based its legal system on England’s but no two states evolved in the same way. With the exception of an occasional equity court decision\(^9\) there was not advancement for married women’s property rights in the first three plus decades. Finally, in the late 1830’s and early 1840’s, riding the wave of the social reform movement,\(^10\) among other influencing factors,\(^11\) married women’s property acts were starting to be passed but there was no immediate equality for married women.\(^12\)

Lawrence Freidman wrote that married women’s property acts attacked inequality piecemeal.\(^13\) Richard Chused took the piecemeal changes of the married women’s property acts in America and indexed and classified them into three main waves.\(^14\) The first wave was created largely in response to two factors: a formidable social reform movement and a

\(^4\) BLACKSTONE’S COMMENTARIES, 441 (S.G. Tucker ed., 1803).
\(^5\) Salmon, supra, nt. 1 at xv.
\(^7\) Salmon, supra, nt. 1 at xv.
\(^8\) Salmon, supra, nt. 1 at 12.
\(^11\) Infra, nt. 15.
\(^12\) LAWRENCE M. FREIDMAN, A HISTORY OF AMERICAN LAW, 184-185 (1973).
\(^13\) Id.
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depressed economy in the wake of the Panic of 1837. States were creating acts intended to protect women’s property that had been obtained through gift or inheritance against irresponsible husbands and their creditors.

This first wave left traditional marital estate rules and coverture largely untouched. The second wave is probably the most famous wave of acts being passed. The reason is that it included the most populous state, New York, leading the way and was the phase marked by the 1848 Seneca Falls Convention. This is the mark even though the act passed shortly before the first women’s rights convention convened. This second wave of acts established separate estates for women but still left coverture untouched. The majority of the third wave of acts was passed after the Civil War. This wave finally did away with the Middle Age institution of coverture.

This paper concentrates on three states that enacted married women’s property acts during the nineteenth century: Mississippi, New York and Oregon. Each state, starting with Mississippi, enacted acts that reflect a different wave. While Chused’s indexing and classification schema have been very helpful in providing order and a basic understanding of what types of married women’s property acts were passed and when in the nineteenth century, he did not arguably provide an accompanying substantive legal theory about the various acts. His classification, however, has been used by several authors to provide order to their discussion of the Nineteenth Century Acts. This is another paper that makes use of Chused’s schema but the first paper that focuses on a particular state from

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16 Chused, supra nt.12 at 1403.
17 Chused, supra nt.12 at 1398.
18 Carrie Chapman Catt, Where Women Vote, 4 Progress 3 (Oct, 1905). First organized women’s convention in America held in the state of New York where a series of resolutions favoring women were adopted. Fifty years later all of the resolutions had been legislated with the exception of suffrage.
19 Chused, supra nt.12 at 1359.
21 With the exception of Massachusetts, which eliminated coverture in 1855 and Oregon, which eliminated coverture in 1859.
22 Chused, supra nt.12 at 1398.
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each of the three waves with the goal of providing more depth to the corpus literature.

The paper starts with a brief section on early America and social reform that provides a background on why these acts happened when they did in American history. After laying the foundation, the paper will delve deeper into the three states and the process each state went through leading up to passage. Next, the paper will look into the judicial reaction of each State’s highest court. Were the courts supportive of the passed married women’s property acts or did they go back to the previous common law approach? In evaluating the courts’ rulings, an examination of the judicial decision-making process is undertaken.

II. EARLY AMERICA AND SOCIAL REFORM

Kindred humanitarian reform movements materialized in the 1830’s. Why the 1830’s? This decade sits firmly in the prime social history period that has been coined the “Freedom Ferment” running from American colonial time to the Civil War. In the 1830’s the abolitionist movement changed from one focusing on the colonization of Blacks to one advocating for immediate emancipation. Other movements like prison reform; educating the dumb, deaf and blind; world peace and women’s rights were also part of this new social period.

According to the memoirs and autobiographies of those participants who were directly involved in the reform movements, there is not one specific influencing factor but rather three that are given credit: religion, reading and reflection. Gilbert H. Barnes and Dwight L. Dumond have both pointed to Evangelist Charles Grandison Finney’s influence as tantamount in changing the focus of the abolitionist movement and spotlighting the early women’s rights movement. Finney became a professor and President of Oberlin College, the first college in America to admit both Blacks and women. Finney’s most influential convert was Theodore Dwight Weld.

26 Id. at 21.
27 Donald, supra nt. 25 at 22.
Weld was studying for the Ministry at Lane’s Seminary in Cincinnati, an institution known for its anti-slavery stance, when anti-slavery debates he had organized with ministers and other intellectuals were discontinued by the Seminary’s Board of Directors.30 Weld then formed a walk-out of Lane’s Seminary taking the majority of students with him to Northern Ohio, where he and his group of activists formed Oberlin College.31 Weld was a charismatic abolitionist who David Donald credited as the greatest of all Western abolitionists.32 He married Angelina Grimke, one of the best known abolitionists and women’s rights advocates of the nineteenth century.33 “Weld agreed with his wife's desire for equality between men and women and became an outspoken supporter of the women’s rights movement.”34

In his study of abolitionists in early America, David Donald identified 14 women.35 He also characterized almost all of the 106 abolitionists as “strong Whigs.”36 Several of these abolitionists were part of the 1830's social reform movement being comprised of mostly younger men and women advocating for other rights in addition to slave emancipation, such as women’s rights, prison reform and education for the deaf, dumb and blind.37 Coming primarily from old and dominant Northeastern families, these young, well-educated and serious future leaders were reaching maturity in the 1830’s. This happened to be the same time when the bustling new industrial-driven business world was starting to boom in the larger cities.

Many of the new leaders of industry were displacing the maturing offspring of the previous gentry.38 A few, like Daniel Webster, were able to transform their talents to the Gods of Commerce but most of them held disdain for the new money-grabbing class.39 The transfer of leadership to this new industrial upstart class created an agitation in the talented young group of men and women (mostly men), almost all of whom were offspring of well-to-do Federalist parents.40

31 Id.
32 Donald, supra nt. 25 at 24.
34 Id.
35 Donald, supra nt. 25 at 28, 32.
36 Id.
37 Donald, supra nt. 25 at 34-35.
38 Id.
39 Donald, supra nt. 25 at 33.
40 Donald, supra nt. 25 at 27, 34-35.
The old, refined Northeast gentry offspring were giving way to industrialization born on the backs of a slave-owning oligarchy. The 1830’s proved to be ripe for the young, bright and well-educated displaced to have the time and the resources to take part in serious social reform. Ironically, the same industrial revolution that these reformers were blaming for many of the country’s social ills was also breaking down some of the old man and woman divisions that were manifest under the common law.

III. LEADING UP TO PASSAGE

A. Mississippi

The state of Mississippi in 1839 became the first to pass a married women’s property act. Prior to this enactment Mississippi was a common law state placing a married woman and her property under the absolute control of her husband.

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

Mississippi state Senator T.B. J. Hadley introduced two bills in 1839. The first was for the protection and preservation of the rights and property of married women. The second was for Hadley’s own protection against creditors, "Act for the relief of T.B. J. Hadley…" which exempted Hadley from a State of Mississippi promissory note. The second passed with no difficulty.

41 Id.
42 Basch, supra nt. 2 at 103-104.
43 1839 Miss. Laws c.46.
45 RICHARD A. BALLINGER, A TREATISE ON THE PROPERTY RIGHTS OF HUSBAND AND WIFE, UNDER THE COMMUNITY OR FINANCIAL SYSTEM 4 (Bancroft-Whitney Co. 1895).
47 Id.
48 Laws of the State of Mississippi: Passed at the Adjourned Session of the Legislature, 280 (1839).
49 Benson, supra nt. 44 at 113.
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The first bill, however, was met with a great deal of opposition. Hadley was married to a well-propertied Piety Smith, the daughter of Andrew Jackson’s old friend, David Smith, and sister to Chickasaw agent, Benjamin Fort Smith.\(^50\) Piety’s sister was Obedience Smith, the wife of Governor Hiram Runnels.\(^51\) David Smith had bequeathed his assets to the daughters in trust. The trustee was Benjamin Fort Smith, who had already been accused of the misappropriation of Chickasaw tribal funds.\(^52\) Hadley, with the bills, was hoping to shield his wife from his creditors and her own trustee.\(^53\)

Many senators were worried about the effect the bill would have on the creditors of married men. “Within six months [Senator Grayson stated] all the married women would have all the property and it would thus be exempt from their husbands’ creditors.”\(^54\) The bill did not pass the Senate but two days later it was back for reconsideration.\(^55\) On February 11, 1839, the Senate committee proposed an amendment to the bill providing:

That any married woman may become seized or possessed of any property, real or personal, by direct bequest, devise, gift, purchase, or distribution, in her own name, and as of her own property, provided the same does not come from her husband after coverture.\(^56\)

Adding the words “provided the same does not come from her husband after coverture” solved the problem of a husband giving property to his wife simply to avoid creditors. The bill, as amended, passed both the Mississippi Senate and House of Representatives and was signed into law by the Governor on February 16, 1839.\(^57\)

Mississippi’s married woman’s property law, the first such law of its kind adopted by an American state,\(^58\) allowed women to hold their own property separately from their husbands. Section two of the statute expressly stated that the wife’s separate property was “exempt from any liability for the debts or contracts of the husband.”\(^59\) Section four, however,

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50 Id.
51 Id.
52 Id.
53 Id.
55 Id.
56 Brown, supra at 1116. Quoting Journal of the Senate of Mississippi 263 (1839).
57 Id. at 1116.
59 1839 Miss. Laws c.46, §2.
stipulated that slaves owned by the wife at the time of marriage or acquired afterward should be her property, but the control and management, along with any concomitant profits from their labor, should be reserved to the husband. 60 Section five further stipulated that slaves owned separately by the wife could not be sold except by joint deed of the husband and wife. 61

With little doubt, Senator Hadley would have been aware of an 1837 Mississippi Supreme Court decision, Fisher v. Allen. 62 The decision held that in certain circumstances a married woman had the right to dispose of her own property. 63 In addition, the wife’s property was not subject to the demands of the husband’s creditors. 64 The woman in Fisher was a member of the Chickasaw Indian Tribe. She had married a white man, James Allen. It was Chickasaw custom that upon marriage the property of the wife did not vest in the husband. 65 The controlling fact in the case was that the marriage in question had taken place in tribal territory before 1829, the year in which Mississippi extended its sovereignty over both the Choctaw and Chickasaw nations 66 following on the heels of Andrew Jackson’s landslide victory on 1828. 67 Therefore, tribal law prevailed.

Justices William L. Sharkey and Cotesworth P. Smith wrote the joint opinions for Fisher. The opinions have been deemed “remarkable,” even by today’s standards. 68 Sharkey and Smith realized that Chickasaw women needed to have control over their property for quick transactions. Chickasaw matrilineal custom dictated that the woman was the primary landholder within the Chickasaw Nation and they needed to convey property freely. 69 This case was decided toward the end of President Jackson’s second term, an especially shameful time 70 in America’s long term abhorrent treatment of Indians. 71

The Mississippi justices determined Elizabeth Allen’s identity as a Chickasaw via Treaty and Indian custom took legal precedence over common law coverture. 72 This decision was handed down at the same time

60 1839 Miss. Laws c.46, §4.
61 1839 Miss. Laws c.46, §5.
63 Id. at 616.
64 Id. at 614.
65 Id. at 612.
66 Id. at 613.
67 Benson, supra nt. 44 at 99.
68 Benson, supra nt. 44 at 106.
69 Fisher, 3 Miss. (2 Howard), at 615 (1837).
72 Benson, supra nt. 44 at 102.
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the federal government was designating tribal land allotments to land speculators. Were there any personal attributes in Sharkey or Smith’s available biographical data that would suggest that these two particular justices would be worthy of such a humanitarian decision in 1837, a decision that clearly bucked the national trend toward Indians?

The judicial ideology of Cotesworth P. Smith will be discussed regarding another decision decided after the passage of the Married Woman’s Property Act of 1839.73 Sharkey was a Whig and a loyal Unionist.74 Born in Tennessee, he matriculated to Lebanon, Tennessee where he read the law. He was admitted to the Bar at Natchez, Mississippi in 1822 and moved to Vicksburg in 1825.75 He served under Andrew Jackson in the Battle of New Orleans and became a state legislator in 1827.76 Sharkey, along with Cotesworth P. Smith and Daniel W. Wright,77 were the three justices elected to Mississippi’s highest court in 1833 after the adoption of a populist Constitution in 1832. Daniel W. Wright holds the dubious distinction, as of 1949, of being the only high court judge in the state of Mississippi who never wrote an opinion while in office.78 Amazingly his tenure lasted five years.79 The new 1832 Constitution reorganized the judiciary from an appointed Supreme Court to an elected, three member High Court of Errors and Appeals.80 It assumed the role of the high court in the state.

Was the Fisher decision in line with Justice Sharkey’s judicial ideology? This is the same man who later refused to participate in either state or confederate government during the Civil War and was appointed provisional Governor of Mississippi by President Johnson after the War.81 In Fisher the property in question was a slave, Toney, who Elizabeth Love Allen had deeded to one of her daughters, Susan Allen.82 There were two allotment treaties signed by the Chickasaw in the 1830’s. The first was ratified in 1833 and the second in 1834. Under the terms of the second treaty, a Chickasaw woman who was married to a white man held property in her own name with no right of alienation on behalf of the husband. 83

75 Thomas H. Somerville, A Sketch of the Supreme Court of Mississippi, 11 Green Bag 503, 507 (1899).
76 Mills, supra nt. 74 at 180.
78 L.A. Smith, Sr., Oddities and Vagaries in Judicial and Legislative History, 21 Miss. L.J. 119, 125 (1949-1950)
79 Id.
80 Mills, supra nt. 74 at 179.
81 Mills, supra nt. 74 at 180.
82 Benson, supra nt. 44 at 99.
Sharkey rightfully followed the Treaty and did not assign coverture to the wife.

Did the fact that the property was a Black slave have any effect on Sharkey’s decision? Sharkey was most likely, like many members of the pre-war southern judiciary, sensitive to a “siege mentality,”\textsuperscript{84} a white hysteria based on a defensive or overly fearful attitude\textsuperscript{85} that gradually took hold over the pre-Civil War South.\textsuperscript{86} Sharkey and others ruled against the importation of slaves and for the exportation of free Blacks.\textsuperscript{87} It is instructive to read Sharkey’s opinion as not springing from a racist point of view but rather from a realistic, practical approach meant to protect against civil unrest in antebellum Mississippi.\textsuperscript{88} One needs to look no further than his 1838 decision in \textit{Hinds v. Brazealle}.\textsuperscript{89} In \textit{Brazealle} both a Black slave woman and son were taken to Ohio to be emancipated and then returned to Mississippi.

Elisha Brazealle, the man who made the trip to Ohio possible for the woman and her son, devised his property to John Munroe Brazealle, the former slave, acknowledging him to be his son. The will was challenged by Elisha’s heirs contending that John was still a slave. Sharkey in his opinion did recognize comity but then reasoned that slavery was such a part of the essence, structure and culture of Mississippi that where questions of freedom competes against that of bondage, bondage will win.

The policy of a state is indicated by the general course of legislation on a given subject, and we find that free negroes are deemed offensive, because they are not permitted to emigrate to, or remain in the state. They are allowed few privileges, and subject to heavy penalties for offences. They are required to leave the state within thirty days after notice, and in the meantime give security for good behavior, and those of them who can lawfully remain, must register and carry with them their certificates, or they may be committed to jail. It would also violate a positive law, passed by the legislature, expressly to maintain this settled policy, and to prevent emancipation. No owner can emancipate his slave, but by a deed or will properly attested, or acknowledged in court, and proof to the legislature,

\textsuperscript{84} Mills, supra at 74 at 175; William James Hull Hoffler, North v. South: A Legal History of the Caning of Charles Sumner, 43 Rutgers L.J. 515524 (2013).
\textsuperscript{86} Lacy K Ford, Deliver Us From Evil: The Slavery Question in the Old South, 294-296 (Oxford Univ. Press, 2009).
\textsuperscript{87} Benson, supra at 44 at 103.
\textsuperscript{88} Franklin L. Riley, A Contribution to the History of the Colonization Movement in Mississippi, Publications of the Mississippi Historical Society, vol. 9, pp. 345-348 (1906).
\textsuperscript{89} Hinds v. Brazealle, 2 Howard 837, 3 Miss.837 (1838).
that such slave has performed some meritorious act for the benefit of the master, or some distinguished service for the state; and the deed or will can have no validity until ratified by special act of the legislature. It is believed that this law and policy are too essentially important to the interests of our citizens, to permit them to be evaded.  

Sharkey was a member of the Whig Party, and as depicted above and below in the paper, the Party with the more progressive views toward Blacks and women in the mid-nineteenth century before its disbandment. It’s very unlikely that Sharkey was a racist but rather succumbed under the political realities of his state. He did, however, find a convenient avenue to rule for a married woman’s property rights in Fisher. In the final analysis it appears that a worried Senator’s concern about the impact that his wife’s trustee and his own creditors may have had on her property, in addition to the Fisher case allowing a married woman to own her own property under Treaty law and Indian custom, paved the way for the passage of the first married woman’s property act in America.

**B. New York**

New York in the early nineteenth century was a common law state with a court system closely modeled after England’s. Like England and unlike most American states, New York separated its common law and equity courts. Although the common law granted husbands complete control and management over property coming to the marriage by either side, the chancery courts in New York made it possible in some instances for married women to hold a separate estate. The equitable rulings in New York researched for the paper were made prior to the enactment of the married women’s property act.

The most successful mode of circumventing the common law was the marriage settlement. If there were special circumstances, such as a large inheritance expected during marriage or a substantial dowry,
marriage settlement could be entered into designating what his or her property would consist of after the wedding vows, providing for any contingencies. A marriage settlement could be used to keep property out of the husband’s reach and out of the reach of his creditors. It gave the wife powers over her property that she did not have at common law. Powers reserved to the wife could run anywhere from full autonomy over her property to complete dependence on a trustee. The marriage settlement was an antenuptial contract, however, and had to be approved by the husband-to-be.

If the objective was to insulate the wife’s property from the husband, the active trust – a conveyance of the wife’s property to a trustee who actively managed it for her benefit – was the most secure arrangement. An antenuptial agreement drawn up with a trust presented wealthy New York families an alternative to the common law arrangement of marital property. Such a trust arranged by a father for his daughter, for example, could insulate the daughter’s property from the husband-to-be.

In *Methodist Episcopal Church v. Jaques*, the New York Chancery Court recognized the passive trust. These are trusts that created, through nominal trustees, a device that allowed “married women beneficiaries to manage the trust assets actively,” reserving powers to the married woman. Mary Alexander, a widow with an estate valued at $22,000, created a trust for the use of herself and her husband-to-be in an antenuptial contract. The trust deed conveyed her entire estate to trustee, H. Cruger until she got married and after that for such purposes as she and her husband should designate with the acknowledgement of two witnesses.

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

The chancery court ruled that the first trust Mary Alexander had created was fictional in a legal sense. The trust deed, although signed by H. Cruger and witnessed, never left her possession and Cruger never actively managed the trust. The second trust was created after Mary Alexander’s

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99 Id. at 74.
100 Basch, Supra. at 3 at 75.
103 Methodist Episcopal Church v. Jaques, 1 Johns. Ch. 450 (1815).
marriage on the basis of the powers reserved to her in the original trust and antenuptial contract. Chancellor Kent honored the specific terms of the antenuptial contract, affirming the viability of the arrangement and ruling that no allowances were to be made for the support of the couple out of the rents of the trust because support was the husband’s common law duty and neither of the trusts stipulated otherwise. Chancellor Kent established the principal that the wife enjoyed powers over her separate estate only to the extent that they were spelled out in the deed that created the trust.

In *Bradish v. Gibbs*, the issue was whether a married woman was able to devise her real property. In 1814, Helen Gibbs entered into an antenuptial agreement with her fiancé stipulating that any profits and sales from her estate made during the marriage were for her own separate use. She was to have full power during the marriage to dispose of her property by will or any instrument in writing. Her transactions were to be considered as valid as if she were a single woman. A separate schedule listed her property which included a house in New York City valued at $23,500. The contract said that if her husband died before her, her property was to vest in her completely as if no marriage had taken place.

In 1816, Helen Gibbs died and Mr. Brandish, her husband, sued his wife’s relatives. He contended that his wife, Helen, as part of her will, had conveyed the house title to him. Helen’s relatives stated that the will, having been executed during coverture in favor of the husband, was void at law and in equity. Chancellor Kent found the will valid and the reservation of testamentary power to the wife was safe from the husband’s coercion because the will was “revocable at the pleasure of the wife.” Chancellor Kent held that the creation of a trust, even a trust that functioned as a legal fiction, was not necessary. He upheld the validity of the antenuptial contract without a trust.

These early decisions in New York Chancery Courts made it possible and fairly simple for a married woman to create a separate estate as long as her husband-to-be agreed to release his common law marital rights over her property. Since these early cases in the state of New York were decided in equity courts, the ideology of the judges, while presumably interesting, was not researched because of the nature of the court and the fact that more options were available to the Chancery Judges that were not available to the Law Judges making it difficult to examine judicial ideology in the same context.

105 Methodist Episcopal, *Supra* nt. 91 at 456 – 57.
107 *Id.* at 550-51.
108 Basch, *supra* nt. 3 at 79.
The battle for a comprehensive married woman’s property act in the state of New York earnestly began in the 1830’s with New York City Assemblyman Thomas Hertell introducing a resolution for the appointment of a committee to report on the married women’s property rights in the state of New York. Hertell was influenced by several of the social reform orators arguing for women’s rights in the 1830’s and in 1837 introduced a bill that was endorsed in Godey’s Lady Book, a journal with wide circulation around the country. Hertell argued that the common law deprived wives of their inalienable, natural right to property. Advocating for a rightful solution, “He pointed to French and Louisiana law and Quaker custom.” He stated “married women, equally with males and unmarried females, possess the right to life, liberty, and property and are equally entitled to be protected in all three.” Hertell would eventually become the sponsor of the first passed New York married women’s property act in 1848.

The New York Legislature in 1840 turned its attention to widowhood. The widow was viewed as an object of pity, an unsupported woman, and a potential drain on the economy. The 1840 legislature passed a married women’s insurance act that enabled a wife to own life insurance on her husband and to receive its benefits free from the claims of his creditors. The statute marked the emergence of life insurance as an important business. The New York Legislature in 1845 passed a statute that allowed a wife to own her own patent. This was the only law of its kind in the country.

The acts of 1840 and 1845 were certainly victories for married women in New York. Some of this positive movement was almost inevitable. The new economic structures fostered by burgeoning industrialization and business required a certain amount of legal change. The insurance business could not have grown and flourished under the old

109 Basch, supra nt. 3 at 115.
111 Basch, supra nt. 3 at 120.
113 Basch, supra nt. 3 at 118. Quoting T. Hertell, Argument in the House of Assembly of the State of New York in the Session of 1837 in Support of the Bill to Restore to Married Women “The Right of Property” as Guaranteed by the Constitution of This State (New York, Durell)(1839).
114 Geddes, supra nt. 110 at 843.
115 1840 N.Y. Laws c.80.
116 1845 N.Y. Laws c.11.
117 Basch, supra nt. 3 at 137.
common law terms of marriage. There was a real recalcitrance in giving married women more rights during this time.\textsuperscript{118} The belief was that these rights or powers could erode the separation of the public arena, work and politics, from the private area of domesticity and reproduction.\textsuperscript{119} The gradual erosion of the sexual division of labor was a critical ingredient of industrial capitalism.

Although most legislators were resolutely committed to serving the legal needs of an expanding market economy, they were disturbed by its social consequences. They were concerned about eroding the sexual division of labor. If the wife were liberated from her common law restrictions, she might very well enter the commercial arena as a wage owner or, even worse, an entrepreneur, becoming in a sense her husband’s competitor.\textsuperscript{120}

The most popular argument advanced in favor of a married women’s property act was based on the established equity precedents.\textsuperscript{121} The New York Judiciary Committee to the Assembly insisted that it was satisfied with the general principles established in equity relating to a married woman’s separate estate, but suggested that there was considerable confusion in the legal profession about the principles.\textsuperscript{122} The committee also drew attention to the fact that for most couples the common law ruled and prevailed over their marriages. The committee reported that if the equity principles were put into statute form the problems for the legal profession and the common people would be solved.\textsuperscript{123}

The delegates to the 1846 New York Constitutional Convention voted to insert a married women’s clause into the state constitution. After three days of debate they rescinded it.\textsuperscript{124} The debates of the Constitutional Convention demonstrated the growing desire for reform in the property

\textsuperscript{119} Basch, supra nt. 3 at 144.
\textsuperscript{120} Basch, supra nt. 3 at 141.
\textsuperscript{121} Basch, supra nt. 3 at 148.
\textsuperscript{122} Report of the Committee on the Judiciary in Relation to Divorce and the Separate Property of Married Women, New York Assembly Documents, May 9, 1846, vol. 6, no. 219, pp. 1-2.
\textsuperscript{123} Id.
\textsuperscript{124} Basch, supra nt. 3 at 150 – 156.
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rights of married women, and in 1848 a bill was introduced, passed and signed into law. Section one of the 1848 statute stated that the real and personal property of any woman who was married after the bill became law would continue to own the property as if she were single. The property was not subject to her husband’s debts. Section two retroactively repeated the same provisions for women who were married before the act. Section three allowed a married woman to receive by gift, grant or devise, real and personal property free from her husband’s disposal and his creditors. Section four recognized the ongoing validity of antenuptial agreements. This was the first statute in the state of New York that specifically allowed married women the right to possess her own separate property.

C. Oregon

Oregon in the early nineteenth century was part of an unsettled frontier. Both the United States and Great Britain asserted claims to the area. The laws before 1843 were based on the organic laws of the Northwest Ordinance of 1787, which were very similar to the Common Law of England. A provisional government termed the Oregon Country was established in 1843. This provisional government adopted the organic laws already in place in addition to the Laws of Iowa, leaving anything unsettled to the Laws of England. Iowa Law, as adopted by the provisional government, stated that women could not enter into contracts, own personal property or be sued.

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125 Basch, supra nt. 111 at 120. Hertell sponsored the act.
126 Supra nt. 17-19. Associated with Seneca Falls Convention where a group of feminists convened in Seneca Falls, New York, signaling the birth of the women's movement that took place shortly after the passage of the 1848 act.
127 1848 N.Y. Laws c. 200.
128 1848 N.Y. Laws 200 § 2.
129 1848 N.Y. Laws 200 § 3.
130 1848 N.Y. Laws 200 § 4.
132 An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio, Congress of the Confederation, July 13, 1787.
133 Id.
134 Cloran, supra, nt.131 at 642.
136 Cloran, supra nt. 131 at 642.
137 Abrams, supra nt.135 at 1391.
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The Act to establish the Oregon Territory was passed on March 3, 1849. The Donation Land Claim Act, which went into effect in 1850, was intended to promote homestead settlements in the Pacific Northwest. It was the only federal land grant act permitting married women to obtain title to federal lands in their own right. The Donation Land Claim Act provided that people settling in Oregon by December 1, 1850, could claim:

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

The House of Representatives adopted an amendment to the Donation Land Claim soon thereafter. New York Whig Congressman, William Sackett moved to have the following words inserted “no interest in the part so held by the wife in her own right, shall be liable for, or subject to sale upon the debts of the husband.”

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

The property benefits to women in the Oregon Territory through the rest of the 1850’s until 1857 were a mixed bag. Women gained a victory in 1853 by being given the right to make wills to dispose of their real property. The Territorial Legislature however adopted an act the next year that repealed all but a few statutes which had been passed before 1854.

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139 Act to Create the Office of Surveyor-General of the Public Lands in Oregon, and to Provide for the Survey, and to Make Donations to Settlers of the Said Public Land, ch. 76, 9 Stat. 496 (1850).
140 Id. at ch. 76 § 4.
142 General Laws Passed by the Legislature Assembly of the Territory of Oregon, 3d. Sess., at 64 (1852). Reprinted in Chused, supra, nt. 6 at 9.
143 Of Wills (Act of Dec. 15, 1853), 1843-1872 Or. Gen. Laws ch. 64, § 3.
The act had the effect of repealing the Exemption Act of 1852.144 Once again a wife’s claim could be subject to her husband’s debts.

Although the Donation Land Claim Act was not repealed, the property was still subject to the management and control of husbands under the Act. Married women received title to half a section, or 320 acres, but the practical impact on the common law was not always that significant.145 For example, if husbands died before the requisite four year occupational requirement, the Donation Land Claim Act would deprive a widowed woman of her claim.146

Delegates from the Oregon Territory met in August 1857 for a constitutional convention. On September 16, 1857, a debate on the provision of a married women’s property section took place. Delegates from both sides of the issue wrangled for or against the right for a woman to own her own property. Delegate George Williams147 supported the motion to strike the Donation Land Claim Act out of the Constitution stating that “In this age of woman’s rights and insane theories, our legislation should be such as to unite the family circle, and make husband and wife what they should be – bone of one bone, and flesh of one flesh.”148 Williams went on to contend that the “Donation Law”149 had been the cause of many divorces.150

Delegate David Logan countered that the law “furnished the wife protection for her property against the improvidence or spendthrift habits of her husband.”151 He continued to argue that if the husband was not prudent and thrifty the law would “have the power to preserve her property to support herself and educate her children.”152 Logan also offered that he had never heard of any divorces growing out of the Donations Law.153

Delegate John Kelsay said that he had heard of such divorces and to not strike out the law “would make the husband simply a border at his wife’s establishment.”154 In response, Delegate Frederick Waymire stated he was against striking out the law. Both his mother and his wife were

144 Chus Henderson, supra, nt. 6 at 10.
145 Act to Create the Office of Surveyor-General of the Public Lands in Oregon, supra nt. 69 at ch. 76 § 4.
146 Id.
147 Democrat, who in 1865 joined the Republican Party and was appointed to the United States Senate later in the same year. In 1873 he became the United States Attorney General under President Grant. He authored the 14th Amendment to the U.S. Constitution.
150 Carey, supra, nt. 148 at 368.
151 Id.
152 Carey, supra, nt. 148 at 368.
153 Carey, supra, nt. 148 at 368-369.
154 Carey, supra, nt. 148 at 369.
women and if they should legislate for any class it should be the women in the country because they work harder than anyone.\textsuperscript{155} He went on to say that if men “married money they should not have control of it. Every day they lived together they lived in adultery, for he married the money and not the girl.”\textsuperscript{156}

Delegate Paine Page Prim shot back that if the day of payment came only to find that the property belonged to the wife, “the honest creditor” would be the one who is cheated.\textsuperscript{157} The debate ended with Delegate Delazon Smith asserting that it was not “separate and distinct property which causes divorces,” but rather the want of affection, “the want of marriage of the heart.”\textsuperscript{158} Smith went on to state that he was “for woman’s rights, and was not afraid of her having too many. She had been too long denied her just rights. [And he]…would protect her property from dissipated or mercenary wretches.”\textsuperscript{159}

The provision remained in the draft with a vote of 22 yeas to strike out the law opposed to 27 nays. Delegate Williams, the most outspoken Delegate to strike the law, wasted no time in moving to amend the provision so that only the wife’s property obtained by gift, devise or inheritance should be exempt from the debts and contracts of the husband. The remaining property he thought was “too indefinite and uncertain.”\textsuperscript{160} William’s motion was adopted by 31 voting yea.

The draft provision became part of the Constitution when Oregon became a state in 1859. The provision did away with coverture, stating:

\begin{quote}
The property and pecuniary rights of every married woman, at the time of marriage, or afterwards, acquired by gift, devise, or inheritance, shall not be subject to the debts or contracts of the husband; and laws shall be passed providing for the registration of the wife’s separate property.\textsuperscript{161}
\end{quote}

\section*{III. Responses to Passage}

How did the state Supreme Court Judges from Mississippi, New York and Oregon vote on nineteenth century married women’s property acts? There has been considerable discussion in legal scholarly research
over the last several years as to what judges consider in arriving at their decisions.162 There are several models and methods that have been discussed and examined. Many studies have concentrated on the attitudinal and strategic models.163 This paper lent itself most easily to the personal attributes model.164

The strategic model is an attractive model but not enough information is available on the various judges in this nineteenth century study to make it feasible. One of the tenants of the strategic model is the realization that judges do not make decisions in a vacuum based solely on their own ideological beliefs and values. They act strategically, taking into consideration the preferences of other actors, in particular other judges, and institutional settings.165 While there was voting information available on the judges writing the main court opinions and some of the concurrences, the lack of information available regarding how all of the other various judges sitting on the states’ high courts voted on the nineteenth century acts made the use of the strategic model in this study impractical.

The attitudinal model is constructed on a belief that judges are placing more emphasis on political and policy considerations than they are on legal considerations in their determination of cases.166 The attitudinal

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164 Joseph A. Custer, Ideological Voting Applied to the School Desegregation Cases in the Federal Courts of Appeals from the 1960’s and 70’s, 16 Scholar 1, (2013). Custer suggests the attitudinal and personal attributes models are best for historical empirical research.


166 Mark J. Richards & Herbert M. Kritzer, Jurisprudential Regimes in Supreme Court Decision Making, 96 Am. Pol. Sci. Rev. 305, 315-16 (2002); Bryan D. Lammon, What We Talk About When We Talk About Ideology: Judicial Politics Scholarship and Naive
model will usually place judges on an ideological spectrum in determining how liberal each judge is. Invariably political scientists use ideological proxies, usually the party membership of the appointing executive or the judge him or herself at the time of nomination. An appointee of a Governor who was a member of the more progressive Whig Party, for example, would be more likely to vote for women’s property rights in the nineteenth century than an appointee of a Governor who was a member of the nineteenth century conservative Democratic Party. The same goes with the political party of the judge him or herself. A Whig would be predicted to vote more liberally than his Democratic counterpart.

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

The use of the attitudinal model in this study is limited however due to the fact that the state Supreme Court Judges in Mississippi and New York were elected rather than appointed during the periods studied. Therefore, the proxy of the party membership of the appointing executive will not prove useful for those two states. During this time, Oregon would go back and forth between electing and appointing their Supreme Court Judges in the nineteenth century and only one of the three judges analyzed in the study had been appointed, Rueben Boise.

Another proxy that political scientists use for determining a judge’s ideology is to look at the judge’s own party membership. For this paper the party identification was available for the 10 judges who wrote the majority decisions in the paper. This number is so small that the results will, out of necessity, be anecdotal but still there may be some insights that support, at least anecdotally, some professed ideological assessments.
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Some scholars view the attitudinal model to be most valuable as a predictor of what judges will be doing in the future\(^\text{173}\) rather than as a model used to test and evaluate why judges behaved or voted the way they did.\(^\text{174}\)

It is used in this study with the proxy being the political party membership of the judge.

The personal attributes model looks at attributes that exist independent of the judge’s vote, so there is no circularity involved. The personal attributes model is sometimes referred to as the social background theory.\(^\text{175}\) Regardless of the label, “these studies hypothesize that judicial characteristics influence judicial decisions.”\(^\text{176}\) The attributes are those that a judge brings to his or her position. Some of the attributes or more likely the experiences associated with them can later appear to play a role in a judge’s policy preferences. Scholars who study this model look toward traits like political party, prior employment, religion, region and education.\(^\text{177}\) These attributes can be measured reliably. Either the judge has the attribute or not. In one recent study the three attributes that were studied were where the judge went to law school (was it an Ivy League Law School or not), the religion of the judge and the previous work experience of the judge (including whether the judge had been a prosecutor).\(^\text{178}\)

In this paper there were not that many judges that could be studied due to the dearth of information available on many of them.\(^\text{179}\) There was significantly more biographical information available for researching the ideologies of federal judges from the 1960’s and early 1970’s.\(^\text{180}\) While not able to uncover information on all the various judges sitting on the three states’ high courts in the 1800’s, there was some information regarding the personal attributes of the judges writing the main court opinions. The one personal attribute that could be ascertained on all 10 of the nineteenth century state judges writing the majority opinions was the political party membership of the judge. This also happens to be the attribute that allows some additional discussion of the attitudinal model.\(^\text{181}\)


\(^{175}\) Tracey E. George, From Judge To Justice: Social Background Theory And The Supreme Court, 86 N.C. L. Rev. 1333 (2008).

\(^{176}\) Id. at 1336.


\(^{178}\) Custer, supra, nt. 163 at 19-33.

\(^{179}\) Author was not successful in finding information on many of the judges who were not writing the majority opinions.


\(^{181}\) See supra, nts. 166-174 and accompanying text.
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Information was also available on each of the ten judges regarding prior work experience, including whether or not the judges had been prosecutors. All the judges had read the law as opposed to graduating from a law school. The regions in which the 10 judges grew up were also available. Some of the judges’ religious affiliations were available. All of these traits or attributes will be reviewed more as we discuss the associated cases that these judges decided. In the Judicial Ideology Section, IV., below there will be a summary of the attributes in addition to what each attribute is professed to suggest in regard to a judge’s ideology. Table One helps to illustrate the findings.

A. Mississippi

In *Ratcliffe v. Dougherty* the Mississippi Supreme Court interpreted the Act of 1839. The issue was whether a deed of a gift made by a husband directly to his wife after the passage of the act of 1839 was valid. The court ruled that by common law rule, a gift by the husband directly to his wife, without the intervention of a third party, whether by deed or not, was void and could not be enforced. The court did, however, recognize the Act of 1839; it just didn’t fit the facts of the case. “It was passed by the legislature for the purpose and with the intent of giving to married women certain rights, which, by the strict rules of the common law, they did not possess.”

The court held that the deed of gift could not be enforced at law but as long as the nature and circumstances of the gift were such that there was no reason to suspect fraud, it was valid and could be enforced in equity. The holding in *Ratcliffe* follows logically from the language of the statute. The woman’s law stated that a married woman may keep a gift of property as her own separate property “provided the same does not come from her husband after coverture.”

Justice William Yerger, who wrote the opinion for *Ratcliffe*, like William Sharkey discussed above, was a well–respected judge known for his adherence to statutory law. Also, like Sharkey, Judge Yerger was an old-line Whig with decided Union leanings.

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182 See *infra*, p.43.  
183 *Ratcliffe v. Dougherty* 24 Miss. 181 (1852).  
184 1839 Miss. Laws c-46, supra nt. 15.  
185 *Ratcliffe*, supra, nt.183 at 182.  
186 Id. at 184.  
187 Id.  
188 1839 Miss. Laws c-46, § 1, p.72.  
189 *Supra*, nts. 74-83 and accompanying text.  
190 The Southern States of America, Chap. IV, Mississippi a Part of the Nation, 1865-1909.  
Pre-Civil War supporters of women rights in America, from the late 1830’s to the early 1850’s, tended to be Whigs. Beginning with the 1840 presidential campaign, the Whig Party was the first to systematically include women in its public rhetoric and rituals. When Whig luminary, Daniel Webster, spoke at the Whig National Party Convention in October 1840, he talked about the “vast influence” of women on the well-being of American society. Webster and popular Whig spokesmen and former Governor from Virginia, James Barbour, and well-known lawyer, James Lyons, articulated a new theory of women’s civic role at the Convention dubbed “Whig womanhood.”

Whig womanhood in “its equation of female patriotism with partisanship and its assumption that women had the duty to bring their moral beneficence into the public sphere” urged women to no longer avoid the contentious political arena but rather bring their “shield of purity” to protect the men and provide fairness, harmony and self-control to the public arena.

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

In Lee v. Bennett the Mississippi Supreme Court construed both the Acts of 1839 and 1846. The main issue centered on whether a married woman had the capacity, with the consent of her husband, to make a will of her own separate property. The court stated that the Acts of 1839 and 1846 “were passed avowedly for the better preservation and protection of the rights of married women. They enlarge their capacity to acquire and hold property, real and personal, and are to be regarded strictly in the character of enabling statutes.”
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The court went on to say that it would “defeat the legislative intention, to give them such a construction as would abridge, instead of enlarg[e] the rights of married women.” Yet the court held that the Acts of 1839 and 1846 did not affect the ability of married women to make wills. The court stated that under the Mississippi Statute of Wills the general rule was that married women were incapable of making wills. An exception did exist which allowed a married woman, with the consent of her husband, to make a will of personal property. The court in Lee refused, however, to allow a married woman to make a will to dispose of her real property. The court reasoned that under interstate succession, the wife’s real property would not devolve by law upon the husband. The court’s concern was:

If the husband, by his assent, could give legal affect to a devise of her real estate by the wife, he would be under the strongest possible temptation to control her will, so as to secure the property for himself to the prejudice of the heir.

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

Smith was fearless and upright when he was part of a 2 – 1 decision in the opinion of State v. Johnson, in which he wrote the case opinion joined by Yerger’s concurrence, stating that under the Mississippi Constitution and Laws of the state, a bondholder could sue the state and recover the amount of principal and interest of the bond. Both of these

202 Id.
204 1 Jarman on Wills 32, 33, note 1, and authorities there cited; 3 Rand. 373 1 Lomax on Ex. 11, 12.
205 Lee, supra, nt. 200 at 127.
206 Supra, nts. 73 and accompanying text.
207 Fisher v. Allen, 3 Miss. (2 Howard) 611 (1837).
209 Id.
210 25 Miss. 625 (1853).
Whig Judges knew that this decision could be the start of their political demise in taking on the Democratic Party of Mississippi which controlled the state government.

B. New York

The New York Legislature between 1848 and 1884 progressively altered the “one flesh” presumption of the common law with a series of statutes. The 1848 statute gave married women in New York the right to own real and personal property but it did not give them the right to contract. Married women in New York, therefore, owned property that they could not sell or invest. The New York Legislature passed a statute in 1849 that amended the separate property section and allowed wives to convey and devise real and personal property as if they were single. The 1849 statute also enabled married women who were beneficiaries of a trust to petition a Judge of the Supreme Court for personal control of her property.

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

The New York Earnings Act, a legislative response in 1860 to feminist pressures, “allowed a woman to hold, and transfer her separate property, and sue or be sued.” The act included, for the first time, female wage earners and businesswomen. Section one restated the provision of the 1848 Act which allowed married women the right to hold their own separate property but expanded it to include “that which she acquires by her trade, business, labor or services, carried on or performed on her sole

211 Yerger would lose in his next judicial election.
213 1849 N.Y. Laws 375 §3.
214 1849 N.Y. Laws 375 §3.
215 1850 N.Y. Laws 91 §1.
216 1851 N.Y. Laws 321.
217 1860 N.Y. Laws 90.
218 Kaye, supra, nt. 212 at 104, fn. 13. (For a complete discussion of the women’s rights movement relating to the Earnings Act of 1860, see Basch, supra nt. 3 at 162-199).
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separate account.”219 Section two allowed a woman to keep the earnings of her business or labor as her sole and separate property and in addition allowed her to invest it in her own name.220 Section three granted a married woman the power to convey or transfer real property held as separate property, but only with the consent of her husband.221 Sections four, five and six spelled out a procedure whereby a married woman wishing to convey her separate real estate, but unable to get her husband’s consent, could get a court order granting the conveyance.222 Section eight provided that any contract made by a married woman, relating to her own separate property, would not be binding on her husband or his property.223 Section nine declared that a married woman could be a joint guardian of her children.224 Unfortunately this opportunity for joint guardianship was quickly set aside by the New York Legislature with an 1862 amendment to the Earnings Act returning legal guardianship solely to the father.225

The New York Courts many times criticized and strictly interpreted the statutes that had been passed between 1848 and 1884. In the case of Yale v. Dederer,226 the husband offered a promissory note to the plaintiff in payment for certain cows he wished to purchase. The plaintiff required him to also have his wife sign the note because of the husband’s less than stellar credit history. At the time of the note signing both the husband and the wife signed and Mrs. Dederer stated that if her husband could not fulfill the contract she would. This sentiment was not specifically documented on the contract, however. The husband became insolvent and the question became whether the wife’s estate could be charged to satisfy the claim.227

There was contention in the trial court that there was not sufficient evidence to establish that the purchase of the cows was in any way a benefit to the wife.228 The case appeared before the New York Court of Appeals twice, once in 1858 and again in 1860.229 In 1858, the Court of Appeals praised the common law and denied the woman the power to contract. The court held that the wisdom of the common law was paramount in protecting

219 1860 N.Y. Laws 90 § 1.
220 1860 N.Y. Laws 90 § 2.
221 1860 N.Y. Laws 90 § 3.
223 1860 N.Y. Laws 90 § 8.
224 Joint guardians with their husbands. 1860 N.Y. Laws 90 § 9.
225 1862 N.Y. Laws 172.
226 Yale v. Dederer, 18 N.Y. 265 (1858), 22 N.Y. 450 (1860).
227 Yale v. Dederer, 18 N.Y. 265. 266-267, 281-284 (1858).
228 Yale at 265-266 (1858).
229 Yale, supra, at 226.
women and that the woman should not be granted legal capacity to contract.230

The Court of Appeals in 1860 also held against Mrs. Dederer’s right to contract. The practical result of these rulings was that the Dederers were not found to be financially bound but the precedential result was a ruling against the contractual property rights of women. The court ruled that the wife signed the note but only in her capacity as a surety for her husband. The court found that none of the consideration went to enhance her own estate or her own benefit.231 The court held that for Mrs. Dederer to be financially responsible she would have had to clearly express her intentions in writing on the note.232

The lead opinion of the first Dederer decision was written by George F. Comstock. Before becoming a judge, Comstock had been appointed the State Reporter. He also practiced law and in 1852 he was named the Solicitor of the United States Treasury under President Millard Fillmore.233 Comstock became the Chief Judge of the New York Court of Appeals in 1860.234 After his Presidency, the conservative Whig, Fillmore235 joined the American Party as did Comstock.236 The American Party had largely consisted of the dying conservative wing of the Whig Party. Comstock ran on the American Party ticket for the position of Chief Judge of the New York Court of Appeals but by the time his term began, on January 1, 1860, the American Party had disbanded so he became a Democrat.237 Comstock, a member of the Episcopal Church,238 was a conservative who, like Fillmore,239 was sharply critical of President Lincoln and the abolitionist views espoused by the more progressive Republicans.240

Samuel Selden,241 a lifelong Democrat, was elected to the position of Chief Justice of the New York Court of Appeals in 1862 and he wrote the second Dederer majority opinion.242 Selden had previously worked as

230 Yale, supra, at 228 at 272.
231 Yale v. Dederer, 22 N.Y. 450 (1860).
232 Id.
234 Id.
235 http://www.whitehouse.gov/about/presidents/millardfillmore (last view Aug. 9, 2013).
236 Supra, nt. 233.
237 Id.
238 Supra, nt. 233.
239 Supra, nt. 235.
242 22 N.Y. 450 (1860).
Clerk of Chancery and practiced law. He approached the *Dred Scott*\textsuperscript{243} decision from a constitutional law perspective believing that any state had the right to secede from the Union.\textsuperscript{244} Two years later, when the issue came before the New York Court of Appeals in *People v. Lemmon*,\textsuperscript{245} Judge Selden dissented from the Court's decision that sustained the slaves' release. He reiterated his support for principles of comity "which should at all times pervade our inter-state legislation."\textsuperscript{246}

In *Birkbeck v. Ackroyd*,\textsuperscript{247} a husband sued a woolen mill for the wages a wife had earned through her labor. The Court of Appeals ruled that it was the husband’s right to recover for the labor and services of his wife despite the Earnings Act of 1860.\textsuperscript{248} “She may still regard her interests and those of her husband as identical, and allow him to claim and appropriate the fruits of her labor.”\textsuperscript{249} The court stated that when the husband and the wife were living together and both working, the wife had never claimed her earnings as her separate property. Therefore, the wife’s earnings came under the control of the husband. “The bare fact that she performs labor for third persons, for which compensation is due, does not necessarily establish that she performed it, under the act of 1860, upon her separate account.”\textsuperscript{250}

Charles Andrews, who would later in 1881 become the Chief Judge of the New York Court of Appeals,\textsuperscript{251} was the Associate Judge who penned the *Birkbeck* decision. He was Mayor of Syracuse, New York,\textsuperscript{252} twice\textsuperscript{253} and a devout Episcopalian, who for many years was a delegate of the Episcopal diocese of Central New York and served as chancellor of the diocese.\textsuperscript{254} Episcopal judges,\textsuperscript{255} even those who were devout,\textsuperscript{256} have been seemingly split on the political ideological scale but the conservative

\textsuperscript{243} *Dred Scott v. Sandford*, 60 U.S. 393 (1856).
\textsuperscript{244} http://www.courts.state.ny.us/history/legal-history-new-york/history-legal-bench-court-appeals.html (last view Aug. 12, 2013).
\textsuperscript{245} 20 N.Y. 562.
\textsuperscript{247} *Birkbeck v. Ackroyd*, 74 N.Y. 356 (1878).
\textsuperscript{248} Id.
\textsuperscript{249} Birkbeck v. Ackroyd, 74 N.Y. 356 at 358 (1878).
\textsuperscript{250} Id. at 358.
\textsuperscript{253} In 1861-1862 & 1868. Source: http://www.syracuse.ny.us/Mayors_of_Syracuse.aspx
Episcopal elite have long controlled the American Episcopal Church. Three of the four New York Judges studied, George Comstock, Charles Andrews and Robert Earl were Episcopalian and conservative. Andrews also served as a prosecutor prior to his service as a judge. He had been a Democrat when the Democratic Party was the consensus conservative party in the United States. He did shift his party allegiance to Republican later in his life, but he remained conservative.

In 1883, on a 5 to 2 vote, the New York Court of Appeals in the case of *Bertles v. Nunan* continued in its efforts to limit the impact of the 1860 Earnings Act. In the *Bertles* case, by virtue of the rule at common law, the Court of Appeals ruled that a deed to the husband and wife was taken as tenants by the entirety giving the husband control and use of the property during the couple’s joint lives. The Court of Appeals held that the 1860 law did not affect the husband’s common law inheritance rights in any way and that a wife’s “general engagements are absolutely void, and she can bind herself by contract only as she is expressly authorized to do so by statute.” Finally the New York Legislature took conclusive action in 1884 stating “[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.”

Another Democratic judge, who also happened to be Episcopalian, wrote the *Bertles* majority opinion. As a young lawyer, Judge Robert Earl was active in politics and public affairs acquiring the *Herkimer Democrat*, a weekly conservative political newspaper. He became its sole editor and publisher in 1849. After retirement from the bench, the New York Democratic Party offered him the nomination to be the party’s gubernatorial candidate in 1894 and 1898. Earl turned down both nominations not wishing to become that politically active again.

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258 *Infra*, nt. 266. Robert Earl’s Obituary.
259 *Id*.
260 He later in life became a Republican.
262 *Bertles v. Nunan*, 92 N.Y. 152 (1883).
263 *Id*.
265 1884 New York Laws 381.
266 New York State Bar Association, 26 *Proceedings of the New York State Bar Association* 475 (1903). Earl’s Obituary
268 *Id*.
C. Oregon

A very important Oregon Supreme Court case that came after the passage of the Oregon Donation Land Claim Act and eventual statehood was *Brummet v. Weaver*. Sarah Brummet, a married woman, purchased and registered three horses as her separate property in 1861 with money from the sale of her Donation Act claim. She later divorced Mr. Brummet but then remarried him. She did not reregister her horses after the second marriage. Her husband unitarily sold the horses later to Mr. Weaver and Sarah sued to recover possession.

The Oregon Supreme Court held that the divorce revoked the registration of the horses but noted that under the Constitution no woman will lose any pecuniary rights by marriage.

Whatever property a woman has at the time of marriage, or afterward acquired by gift, devise, or inheritance, remains hers, until, she, by her own consent, express or implied, parts with it. Without that consent she cannot be divested of her title to it, whether registered or not.\(^270\)

The court stated that actual or constructive notice of the wife’s ownership will be enough to bind the party dealing with the husband regardless of whether the property had been registered. The court remanded the case for a new trial stating that how she managed her property would help in determining the likelihood that she would be successful in repudiating the sale. On retrial, the court held that the horses were her property and correctly interpreted the Oregon Constitution, which in 1859 had done away with coverture, giving a married woman the authority “to sell any part of her separate property and retain the purchase money as her own, or with it buy other property to be held by her in the same manner and for the same purpose.”\(^271\)

Erasmus Shattuck was the Chief Justice of the Oregon Supreme Court who wrote the majority opinion in *Brummet*. Shattuck, who was born and raised in Vermont, having graduated from Vermont University in 1848, served as a prosecutor in the role of United States District Attorney for one year before becoming a judge. Shattuck was a member of the

\(^{269}\) *Brummet v. Weaver*, 2 Or. 168 (1866).

\(^{270}\) *Brummet v. Weaver*, 2 Or. 168 at 173 (1866).

\(^{271}\) Id. at 171.


\(^{274}\) Supra, n. 265.
Whig party until it disbanded in 1860 right before the outbreak of the Civil War. He then became a member of the Republican Party. Later in his life he was associated politically with the Democratic Party but he never did become a member and he wasn’t thought to be particularly partisan, but rather more of an independent thinker, finding fault with the platforms of the various political parties.

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

In the 1872 case, Frarey v. Wheeler, the Oregon Supreme Court held that the Oregon Donation Act and Oregon Constitution referred only to the holding of property and not to its disposition. In 1867, Mr. and Mrs. Wheeler agreed to sell Mrs. Jemima Wheeler’s donation claim to Mr. Frarey. The contract provided that Frarey would pay $20, gain immediate possession and upon payment of an additional $380 one year later, be given title. Frarey took until August of 1870 to tender the money with accrued interest. Frarey made permanent improvements on the land during this time, but the Wheelers declined payment and refused to execute the deed. Frarey sued for specific performance.

The Oregon Supreme Court in Frarey held that Jemima Wheeler’s contract to sell her donation claim was invalid. Although the decision was in favor of the Wheelers, the wider impact restricted women’s ability to contract to sell separate property. This was a clear step back from the more progressive Brummert decision. The Frarey case stated that “at common law married women are not only held incompetent to enter into covenants to convey their real estate, but they are classified with those who are under disability to make any contract whatever.”

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275 JOHN F. BIBBY, BRIAN F. SCHAPFNER, POLITICS, PARTIES, AND ELECTIONS IN AMERICA ch. 2, p. 50 (Cengage 2007).
276 Supra, nt. 272.
280 Frarey v. Wheeler, 4 Or. 190 (1872).
281 Id. at 195-96.
282 Frarey, supra, nt. 280 at 191.
283 Frarey, supra, nt. 280 at 194-195.
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The Oregon Supreme Court had moved back to the more paternalistic approach that many courts had taken in regard to married women’s property rights in the nineteenth century.284 “If Brummett were applied, the court could easily have found that Jemima had gained the right to covenant with regard to her land via the 1859 constitution, and held in favor of Mr. Frarey.”285

The Frarey decision was written by a strong Democrat, Benjamin Bonham.286 Bonham, a member of the Methodist Episcopal Church,287 served both locally and nationally on the Democratic Party. Before he became a judge he worked as a school teacher and superintendent; he practiced law and was a Democratic representative in the Oregon State Legislature.288 After Bonham retired from the bench, President Grover Cleveland, a Democrat, appointed him to the position of Consulate-General to British India, a very instrumental position at that time in history.289

The 1872, Oregon Legislature responded immediately to the decision of Frarey by enacting another married women’s property act.290 The 1872 act brought back a married woman’s rights established in Brummett, but it went even further in stating that property acquired by a woman’s own labor should also be regarded as her separate property.291

An important Oregon Supreme Court case that once again had the state moving in harmony with their Constitution was Rugh v. Ottenheimer.292 Nancy Rugh, one year before her marriage, purchased a 160 acre farm with money from the sale of her donation claim. The deed was not delivered until after her marriage. Later she agreed to trade the land for some land owned by Mr. Gardner who ended up defying her wishes and deeding the land to her husband, William Hugh. Her husband soon thereafter promised to deed the land to his wife, but he never did. Eventually her husband abandoned Nancy leaving behind a number of creditors.293

The Oregon Supreme Court held that the Oregon Constitution operated to cut off the husband’s common law rights in his wife’s

285 Id. at 447 (2001).
287 Id.
288 Gaston, supra. nt. 279 at 241.
289 Id.
291 Chused, Late Nineteenth Century Married Women's Property Acts, supra nt. 5 at 29.
292 Rugh v. Ottenheimer, 6 Or. 231 (1877).
293 Id at 232-233.
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property. Even though the transaction in question occurred before 1859, the date that Oregon became a state with a new Constitution, all property owned by married women when the Constitution went into effect was freed from the common law control of their husbands. The court in Rugh stated that the husband’s limited interest in his wife’s land “was the right to enjoy the rents and profits during their joint lives, and the right of curtesy (in case of issue born alive) after her death.”

Judge Rueben Boise wrote the Rugh decision for the Oregon Supreme Court. Boise, after passing the bar and prior to his service on the bench, had been both a practicing and prosecuting attorney and a legislator. In a portrait and biographical account of Judge Boise written in 1903, his political leanings were described. “During his voting days the judge was a Douglas Democrat, but after the war subscribed to the principles of the Republican Party.”

Boise’s progressive approach is exemplified in the following:

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

The Rugh case was just another indication of his sensitivity to women’s rights. Of all the judges studied in the paper, Boise was the only judge writing a majority or concurring opinion that had actually been appointed by an executive. Boise was actually appointed twice. He was appointed to the Oregon Territorial Supreme Court in 1857 by President James Buchanan, a Democrat, and he was appointed again in 1878 to the Oregon Supreme Court by Governor W.W. Thayer, another Democrat. Boise had been previously elected to the Oregon Supreme Court. If more of the ten judges in this study had been appointed as opposed to elected and

295 Rugh, supra nt. 292 at 233.
296 Oregon Historical Society, Two of Oregon’s Foremost Commonwealth Builders: Judge Reuben Patrick Boise and Professor Thomas Condon, Quarterly of the Oregon Historical Society, pp. 201-204 (March-December, 1907).
298 Id at 210.
302 Supra, nt. 299.
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the attitudinal model in this study was based on the proxy of the party membership of the appointing executive as opposed to the party membership of the judge, there would be no positive correlation of appointment of Rueben Boise by the more conservative party.

Soon after the *Rugh* decision, the Oregon Legislature adopted another married women’s property act in 1878. This act permitted married women the right to manage, transfer and write wills. The act also designated a wife’s wages as her own and allowed married women to sue and be sued. The act also stated that neither spouse was liable for the other’s debts except for family expenses and education.

Another act was passed in 1880 stating that “all laws which impose or recognize civil disabilities upon a wife which are not imposed or recognized as existing as to the husband, are hereby repealed.” This act also gave married women equal rights and responsibilities as to child custody. Chused stated it well in regard to the 1878 and 1880 Acts, “These two statutes represent a watershed in the development of Oregon’s married women’s property law. For the first time, married women’s property was to be treated the same as their husbands’ assets.”

IV. JUDICIAL IDEOLOGY

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

The two Mississippi Judges, William L. Sharkey and Cotesworth P. Smith, who wrote the majority and concurring opinions in *Fisher* respectively, were both Whigs. Justice William Yerger who wrote the

304 Id.
305 Id.
306 An Act to Establish and Protect the Rights of Married Women, 1880 Or. Laws § 1.
308 *infra*, p. 43.
309 *supra*, nts. 296-302 and accompanying text. Rueben Boise was identified to be a Douglas Democrat but switched to being a Republican after the Civil War.
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concurrence in the *Ratcliffe* case to Cotesworth P. Smith’s majority, was also a Whig. It was held in that case that the act did not change the rule in equity, and left the subject as it stood before.\(^{310}\) Cotesworth P. Smith also wrote the *Lee* opinion, giving homage to the 1839 and 1846 Acts stating that the acts “were passed avowedly for the better preservation and protection of the rights of married women”\(^{311}\) but differentiating the facts in *Lee* because generally at that time in Mississippi, “the husband is entitled to administration on his wife’s estate.”\(^{312}\)

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

In tallying the Democrat’s votes look no further than the two *Dederer* decisions decided in New York. George F. Comstock wrote the first *Dederer* opinion. He was a member of the conservative American Party when he ran for election to the New York Court of Appeals in 1860. By the time he actually took office in 1861, he had become a member of the Democratic Party due to the disbandment of the American Party. The second *Dederer* case was written Samuel Selden, a lifetime conservative Democrat. Two more conservative Democratic judges, Charles Andrews and Robert Earl, both of New York, penned the *Birkbeck* and *Bertles* cases respectively.

The last of the five Democrats, Benjamin Bonham from Oregon, wrote the majority opinion in *Frarey*. *Frarey* was a case in Oregon that was clearly a step back from the more progressive *Brummert* decision authored by Whig, turned Republican, Erasmus Shattuck.

In regard to attitudinal voting and married women’s property acts in the nineteenth century there was a significant party ideological distinction for the 10 judges surveyed. The Whig and Republican judges voted to support the married women’s property acts 100% of the time. The Democratic judges, on the other hand, voted against supporting the married women’s property acts 100% of the time. With only 10 judges’ voting information tabulated this result can’t be considered dispositive but more

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310 *Ratcliffe*, supra, at 183.
311 *Lee*, supra, at 201.
312 *Lee*, supra, at 200 at 203.
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than anecdotal. It may be a clue to the positive role that party ideology may have played in regard to nineteenth century judges.

The personal attributes model is used to examine a judge’s biographical data to determine if there are any attributes present that may help explain why a judge voted on a particular legal topic the way he or she did. The political party of a judge has many times been examined as an attribute that may have an influence on how a judge votes. The politics of the ten judges has already been explored above in considering the attitudinal model. In regard to the personal attributes model, there was a positive correlation between the five members of the more historically liberal parties of the nineteenth century, the Whigs and Republicans, voting progressively to support or recognize the married women’s property acts. The Democratic judges, likewise, represented a positive correlation in voting conservatively to not recognize the authority of the passed married women’s property acts.

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

Episcopalians, along with Methodists, Presbyterians and Congregationalists (more recent history has most of them as part of the United Church of Christ) are Protestant denominations that have been associated with liberal Protestantism since the early nineteenth century. The Episcopal Church also has a very strong conservative wing which has yielded great influence. Table One below indicates four identified Episcopalians among the 10 judges; George Comstock, Charles Anderson and Robert Earl from New York and Benjamin Bonham from Oregon. All voted conservatively against recognizing the married women’s property

317 Id.
319 Supra, nts. 25-259 and accompanying text.
320 Infra, p. 43.
acts. Erasmus Shattuck from Oregon was identified as a Christian but whether he was of a particular denomination or sect is unknown. There was no religious membership information available on the other five judges. If the four Episcopalian judges happened to be members of the conservative wing of the Episcopal Church there would be a positive correlation among this very small sample.

Prior work experience is another personal attribute that some scholars have found to be an influence on how judges vote. Corey Rayburn Yung has tested particular attributes and their potential effect on contemporary Federal Circuit Judges and has discovered that a judge’s prior work experience in the government (outside of the judiciary and elected office) will tend to indicate a liberal voting preference.321 How well Yung’s results correlate to state Supreme Court judges from the nineteenth century is another matter but worth examining if data was discoverable.

Only one of the 10 judges in the study had this attribute in his biographical data and that was George Comstock. Comstock was a high level government official in both the state of New York and Federal Governments. He was appointed New York State Reporter and also the Solicitor of the United States Treasury under President Millard Fillmore.322 There was not a positive correlation in that Comstock did not vote liberally on married women’s property acts.

Another prior work experience that has been researched and found to have a positive correlation is that between twentieth century Federal Court Judges having served as prosecutors and later voting conservatively on the bench.323 The correlation was not supported in this study. There were four nineteenth century state Supreme Court Judges who had previously been prosecutors, Cotesworth Smith of Mississippi, Charles Anderson of New York and both Erasmus Shattuck and Rueben Boise of Oregon. Only Judge Anderson voted conservatively on married women’s property acts.

The last personal attribute considered in the study of the nineteenth century judges was region. Tate didn’t find any particular relationship between the regions a judge worked and resulting judicial ideology.324 Donald R. Songer and Sue Davis’s research found that region combined with party can make a difference in explaining variance in congressional

322 Supra, nt. 235 and accompanying text.
324 Id.
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voting and federal district court voting but it did not prove to make a difference in their study of federal appeals judges.

In addition to the region where the 10 nineteenth century judges worked, the area of the country where the judges were born was also examined in case it could shed any insight. All three of the Mississippi judges were born in the South and were Whigs. At first blush this would appear to be unusual for all three southern justices to be Whigs but the Whig Party did have a significant following in the South. Henry Clay, the founder of the Whig Party, was from Kentucky and the states of Kentucky and neighboring Tennessee voted for the Whig candidate in each of the Presidential elections from 1836 through 1852. The states of Georgia and North Carolina voted for Whig candidates in three of the five elections covering the same period, Louisiana did so twice, and Mississippi and Florida did once. The Whigs carried Mississippi in 1840 and lost by just two percent in the state in the 1836 Presidential election.

The four judges from New York all grew up in the area. Only Samuel Selden was born outside the state in neighboring Connecticut. All four of the Judges were Democratic and voted conservatively on married women’s property acts. The state of New York voted Democratic in three of the six Presidential elections running from 1844 to 1864. The state voted


327 Songer, supra, nt. 335 at 300-301.


330 Supra, nt. 327.

331 Id.

332 Id.

333 Id.


for Whig candidate and President–elect, Zachary Taylor in 1848. The state voted for the Republican candidate in both the 1856 and 1860 Presidential elections.

With Oregon being such a young state in the nineteenth century, having become a state only in 1859, the three judges from Oregon all came from other parts of the country. Erasmus Shattuck came from Vermont, Benjamin Bonham came from Tennessee and Rueben Boise came from Massachusetts. The state of Oregon voted for the Republican Party three of first five times the Presidential election was held in the state. The state went Democratic in both 1864 and 1868.

All three regions during the periods studied showed some variance in party preference. There was only one state during the periods studied that voted consecutively for the same political party beyond two Presidential elections and that was Mississippi that voted for the Democratic Party from 1840 to 1860. In 1848, however, the Democratic Party carried the state of Mississippi by only 1.2% over the Whig Party. The findings don’t support any kind of correlation regarding region even when taking political party into account.

Of the attributes studied only that of the political party membership of the judges had a positive correlation. Religion did seem to have a positive correlation in that all the judges who were Episcopalian voted conservatively against the married women’s property acts. Discernible information on the judges’ religious preferences was available for only four of the ten judges however, which make the results questionable.

V. CONCLUSION

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

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

The second wave, beginning in the late 1840s and ending after the Civil War, dealt with the ability of married women to hold separate estates. Some of these state acts were an attempt to eradicate the inconsistencies that had arisen between common law and equity. The New York acts of 1848 and 1849 receive much credit for influencing the rest of the country on the right of married women to hold separate estates. The New York statutes were severely restricted by the New York

343 Supra, nt. 13 and accompanying text.
345 Supra, nts. 48-52 and accompanying text.
346 Fisher v. Allen, 3 Miss. (2 Howard) 611 (1837).
347 Deborah M. Thaw, The Feminization of the Office of Notary Public: From Feme Covert to Notaire Covert, 31 J. Marshall L. Rev. 703, 721 (1998). “Law of the Creator” is a strong sentiment that has had a history of significant influence, particularly in the United States South. It means that the “paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.”
348 Thaw, supra, nt. 313 at 721.
350 Chused, supra nt. 154 at 1398.
351 See supra nts. 17-22.
353 1848 N.Y. Laws c. 200.
354 1849 N.Y. Laws c. 375.
Courts however. The New York common law courts were very dilatory in letting go of the England Common Law that favored the husband. 356

The third wave acts passed primarily after the Civil War and were designed to protect married women’s earnings from coverture. 357 The Oregon Territory was very motivated in attracting settlers to the Northwest and one of the main motivators was the Donation Land Claim Act. 358 The 1850 Federal territorial act was not what placed Oregon into the third wave but it helped provide a path toward a debtor exemption provision to be embedded in the state’s 1859 constitution.

The property and pecuniary rights of every married woman, at the time of marriage, or afterwards, acquired by gift, devise, or inheritance, shall not be subject to the debts or contracts of the husband; and laws shall be passed providing for the registration of the wife’s separate property. 359

The reactions of the three states’ Supreme Court judiciaries to the passage of the married women’s property acts were varied. Analyzing the judicial ideologies of the various judges who wrote the majority opinions for the cases discussed in this paper may provide some clues. Table One below 360 illustrates the findings from researching the biographical information available on the judges who wrote the majority opinions.

Future research on the historical voting of judges on particular legal subjects prone to ideologically contested cases going back to the nineteenth century could be useful and add to the literature corpus on judicial ideology. This study was useful in demonstrating that not all the state high court judges in the nineteenth century were voting against supporting the married women’s property acts. 361 With the results of this paper there are some more possible clues as to why the judges were voting the way they did. Even though the number of studied judges was just 10, the use of the attitudinal and personal attributes model did show a strong positive correlation between the political party the judges were members of and how the judges voted in regard to the married women’s property acts. In using the personal attributes model, religion also seemed to offer some possibilities.

357 See supra nt. 316 at 1398.
358 See supra nts. 139-140.
359 Article XV, Section V, of the Oregon Constitution of 1859.
360 Infra, p. 43.
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Table One
Judges’ Biographical Data

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<thead>
<tr>
<th>Judge</th>
<th>State/Region</th>
<th>Party</th>
<th>Born</th>
<th>Religion</th>
<th>Prosecutor</th>
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<td>George Comstock</td>
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<td>Amer./</td>
<td>New York</td>
<td>Episcopal</td>
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<td>Law practice &amp; State and Federal Gov’t Appt.</td>
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<td>Samuel Selden</td>
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<td>Connecticut</td>
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<td>Charles Andrews</td>
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<td>Robert Earl</td>
<td>New York</td>
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<tr>
<td>Erasmus Shattuck</td>
<td>Oregon</td>
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