Article

In the Shadow of Marriage:
Single Women and the Legal Construction of the Family and the State

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I. INTRODUCTION: WIDOWS AND THE LEGAL REGULATION OF SINGLE WOMEN

To many lawmakers, female poverty resoundingly signals the failure of marriage. In fact, one strand of twenty-first-century "welfare reform" identifies weaknesses in the institution of marriage as a root cause of women's poverty and, thus, proposes to fix marriage as a public policy solution to the problems faced by poor women. If only more women could be brought within marriage's protective domain, politicians reason—both by getting more women to marry, and also by strengthening the core meaning of marriage as a life-long social and, especially, economic commitment—fewer women would live in poverty. Critics of government programs promoting marriage, by contrast, denounce this logic. Government policies, they posit, must tackle directly the crisis of female poverty, locating both its causes and its potential solutions in, for example, education and labor policies, rather than deflecting discussions of women's financial needs into the private family.

Implicitly, competing descriptive and normative visions of the meaning and function of marriage drive this debate. These differing visions emerge from clashing conceptions of the proper relationship among women, the family, and the state. Proponents of marriage-promotion policies presume that the institution of marriage, if properly constructed, would do a


prodigious amount of economic work: Marriage could and would provide for women's economic needs within the family unit. If more women would get married and stay married, the logic runs, individual men—newly cast in their proper husbandly roles—would provide for the financial needs of their wives, as well as those of their wives' children. Good husbands, therefore, would play a mediating role between women's material needs and the state's limited economic resources by privatizing wives' needs within the family. Opponents of marriage-promotion policies, on the other hand, resist a vision of women's citizenship that is mediated through marriage. In so doing, they dispute both marriage's ability to guarantee that women's economic needs are sufficiently met, as well as the normative appeal of a vision of governance premised on a gendered model of male providers and female dependents within the nuclear family.

Beyond signaling the contested nature of contemporary welfare policies, the terms of the debate over marriage-promotion policies point to the complex relationship between marriage and unmarried women. To the extent that discussions over marriage-promotion policies turn on competing understandings of marriage, those understandings are being forged through discussions of the social and economic status of women living outside of marriage. Lawmakers apparently presume that the ultimate test of marriage's robustness lies in its ability or inability to act as a prescriptive solution to the problems facing even women inhabiting the world outside of its formal borders. After all, the proper role for marriage in welfare policy turns on what functions marriage—as a social, political, legal, and economic institution—can be expected to perform for those who legislators hope will enter into its domain in the future. Single women thus constitute the sociopolitical terrain on which lawmakers craft their descriptive and aspirational visions of marriage proper.

This Article uses history to analyze and critique both the expansive model of marriage that underlies marriage's viability as the policy solution to female poverty, as well as the relationship between this expansive model and the legal regulation of single women. Contemporary legal debates about the normative significance of female financial dependency—not only those conducted by legislators, but also those unfolding in writings by feminist theorists—largely eschew a historical perspective. Thus, they treat marriage's public economic role and its political ramifications as a peculiarly modern phenomenon. The notion that marriage offers a solution

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4. See, e.g., Fineman, The Neutered Mother, supra note 3; Mary Becker, Care and Feminists, 17 Wis. Women's L.J. 57 (2002); Martha Albertson Fineman, Contract and Care, 76
to female poverty, however, has a substantial history, embedded in a still larger history of marriage as a tool of public policy. In this Article, I mobilize one strand of this history to tell two stories about the relationship between formal marriage and women inhabiting the vast social and legal terrain outside of its borders.

First, I tell the story of how the ideological functions of marriage—particularly, its imagined role in solving the problem of female economic dependency—have been extended to define and regulate the rights of unmarried women and their relationship to the state. While scholars have long recognized the ways in which marriage has mediated the relationship between wives and the state, this Article argues that attention to the history of political discussions of female dependency makes visible another fundamental and, yet, overlooked feature of marriage's vast strength as a tool of public policy: Historically, marriage has functioned as a gnomon, the central pillar of a sundial, casting shadows outward and covering even women not formally under the law of coverture—the common-law system of husband-wife relations that "covered" a married woman’s legal identity with her husband’s identity—or more modernized forms of marital status law. If marriage has formally governed the legal rights and status of some

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6. As I will suggest, marriage law governed men as surely as it governed women, demanding particular modes of both husbandly and wifely behavior. See infra Subsections III.B.1-2 (discussing the ways in which marriage, broadly defined, constructed the meaning of masculinity and husbandliness); see also HENDRIK HARTOG, MAN AND WIFE IN AMERICA 136-66 (2000) (analyzing the ways in which the law defined and demanded certain forms of husbandly behavior on the part of married men); Ariela R. Dubler, Wifely Behavior: A Legal History of Acting Married, 100 COLUM. L. REV. 957, 987-88 (2000) (arguing that the doctrine of common-law marriage, which relied on inchoate legal understandings of what it meant socially to "act married," defined certain forms of male behavior as husbandly). This Article, however, focuses on how marriage constructed the legal rights and gender roles of women living outside marriage, in particular. This choice reflects the differences between the social and legal positions of single men and single women, making women living outside of marriage a greater challenge to the dominant sociolegal order.

Generally, lawmakers perceived unmarried women as a threat to an orderly polity in a way that they did not perceive unmarried men. This threat was both practical and symbolic. Practically, in an economy premised on male wage earners and female dependents, unmarried women signified likely poverty and, thus, represented a potential threat to the public fisc. See, e.g., ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 34 (2001); KARIN WULF, NOT ALL WIVES: WOMEN OF COLONIAL PHILADELPHIA 156-65 (2000) (discussing the reasons behind the disproportionate
women, other women have lived in the shadow of marriage, regulated by marriage's normative framework even as they have inhabited terrain outside of its formal boundaries.

Second, conversely, I tell the story of how—much as they do today in the welfare context—lawmakers have consistently forged the meaning of marriage proper within the peripheral terrain of its shadow. The legal regulation of unmarried women, in other words, has played a constitutive and contested role in legal constructions of the meaning of marriage, of women's rights within the family, and of the relationship between the family and the state. Hendrik Hartog has argued that "[i]t is through separations, through close examination of struggles at the margins of marital life and marital identities, that we come to a historical understanding of core legal concepts: of wife, of husband, of unity." This Article argues that understanding the meaning of marriage requires a still presence of single women among seekers of poor relief; Dubler, supra note 5, at 1894 (discussing settlement cases involving claims of common-law marriage, in which whether a woman was married determined which town would be responsible for her poor relief). Symbolically, unmarried women challenged the cultural and political conflation of women with wives. See, e.g., WULF, supra, at 1-2, 5 (arguing that "gender, rooted in assumptions about women's positions as wives, came to apply to all women regardless of their marital status" and, thus, that single women "posed a significant cultural contradiction"). This cultural conflation had its most visible manifestation in the nineteenth- and early twentieth-century "virtual representation" argument against woman suffrage, which posited that women did not need the vote because their husbands voted for them. See, e.g., AILEEN S. KRADITOR, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920, at 24 (1965); Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 HARV. L. REV. 947, 981-87 (2002). Query where single women fit into this image of the democratic polity.

7. In this sense, while clearly invoking their language, I mean to imply a dynamic that is more explicitly regulatory than the dynamic explored by Robert Mnookin and Lewis Kornhauser in their canonical article on divorce and the "shadow of the law." Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 YALE L.J. 950, 951 (1979) (arguing that "the rules and procedures used in court for adjudicating disputes affect the bargaining process that occurs between divorcing couples outside the courtroom"). As I discuss later in this Article, however, marriage has also exerted a less regulatory "shadow" over the social imagination of even critics of the family. See infra Subsection III.D.3. This second type of shadow is more analogous to the dynamic analyzed by Mnookin and Kornhauser, and to the vast body of scholarship on the relationship between legal rules and social norms. See, e.g., ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); Richard H. McAdams, The Origin, Development, and Regulation of Norms, 96 MICH. L. REV. 338, 339-50 (1997) (reviewing the legal literature on social norms); see also MICHAEL GROSSBERG, A JUDGMENT FOR SOLOMON 2 (1996) (using Alexis de Tocqueville's observation that Americans defer to the authority of even "the mere shadow of the law" as a framework for analyzing the experience of one family's child-custody battle).

Marriage is not the only institution that—historically or today—has maintained a hold on the identity of individuals who are no longer within its formal aegis. Various forms of postemployment regulation, for instance, could be said to construct retirees "in the shadow of their employment"—that is, to allocate to individuals various economic and legal rights by virtue of their terminated employment status. The methodological choice to understand a legal institution by analyzing the satellite areas around its borders, therefore, could usefully be applied to other contexts as well.

8. HARTOG, supra note 6, at 1.
further foray, beyond marriage’s margins and into the territory outside of its formal borders.

The terrain of marriage’s shadow is vast, and different groups of single women have inhabited disparate parts of it, by chance and by choice, for reasons ranging from the practical to the ideological.9 In this Article, I focus on one group of women living outside of marriage: widows. I analyze the shifting construction of widows’ legal rights—particularly, the move away from dower, a widow’s common-law inheritance right to a life estate in one-third of her deceased husband’s real property—as a way to pin down for inspection marriage’s often elusive shadow. The legal treatment of widows thus serves as a case study of the relationship between marriage’s sociolegal core and its remote periphery.

Widows have long resided squarely in marriage’s shadow, both socially and legally. By definition, widows have existed formally outside of the marriage relationship: Their husbands have died and their marriages have, indisputably, ended. Even under coverture, a widow was indisputably a single woman in the eyes of the law. In coverture’s terms, she reassumed the status of feme sole as opposed to a feme covert.10 Yet, discursively, the very appellation of “widow” has neatly tethered a woman semantically and ideologically to her deceased husband, thereby preserving her social and cultural wifely identity.” Likewise, as I will discuss below, a widow’s legal


In addition, in the antebellum era, slave women were legally excluded from marriage. See infra text accompanying notes 30-31.

10. On the widow as feme sole, see, for example, WULF, supra note 6, at 3-4; and Linda E. Speth, More than Her “Thirds”: Wives and Widows in Colonial Virginia, in LINDA E. SPFTH & ALISON DUNCAN HIRSCH, WOMEN, FAMILY, AND COMMUNITY IN COLONIAL AMERICA: TWO PERSPECTIVES 5, 24-35 (1983).

11. CAROL F. KARLSEN, THE DEVIL IN THE SHAPE OF A WOMAN: WITCHCRAFT IN COLONIAL NEW ENGLAND 75 (1987). In his analysis of the Salem witch trials, Karlsen points to this tension within widows’ social and cultural position. On the one hand, Karlsen observes, society treated widows like wives. Thus, “unlike young, single women, once accused [widows] could expect to be treated much as married women were.” Id. at 72. On the other hand, like all single women, widows were more at risk of being accused since “the absence of a protector...made women alone more susceptible than married women to witchcraft prosecutions.” Id. at 75.

Even in analyzing the complicated position of widows, Karlsen reproduces the academic assumption that widows are not single women in his own typology. Karlsen notes that “[s]ingle, married, and widowed women are all found in significant numbers among accused witches in early New England.” Id. at 71; see also VICINUS, supra note 9, at 6 (excluding widows from her
identity has long remained linked to her status as the (former) wife of her (deceased) husband. As a point of historical entry into marriage’s legal shadow, widows hold a peculiar appeal. Widows are like many groups of single women in that, time and again, they have forced judges and legislators to confront the problem of female poverty. In so doing, they—like other groups of unmarried women in dire financial straits—have drawn lawmakers into the project of defining the reach of marriage’s shadow as lawmakers have struggled to find ways to tie these single women’s economic claims to the resources of particular men. Unlike other women living outside of marriage, however, widows have never been understood simply as “single women” with the cultural connotations of exclusion from, or rejection of, marriage. They did, after all, once marry. Therefore, even as politicians’ and lawmakers’ reactions to most single women have ranged from anxiety to scorn, they generally have sympathized with widows, seeking to aid them through their legislative efforts.

study of single women, arguing that “[t]heir unique economic and social status deserves a separate study”).

12. Cf. WULF, supra note 6, at 8-9 (“Within the parameters of their individual class, religion, and specific historical and geographical context, unmarried women were poorer than married women.”); see also id. at 156-65 (discussing the prevalence of unmarried women among the poor in colonial Philadelphia).

13. See Alexander Keyssar, Widowhood in Eighteenth-Century Massachusetts, 8 PERSP. AM. HIST. 83, 118 (1974) (“Women were expected to marry, but women whose husbands had died occupied a legitimate station in society.”).

14. Widows shared this characteristic with divorced women, of whom there were many fewer in the nineteenth century in light of generally restrictive divorce laws. See, e.g., NORMA BASCH, FRAMING AMERICAN DIVORCE: FROM THE REVOLUTIONARY GENERATION TO THE VICTORIANS (1999) (tracking the history of divorce from the late eighteenth to late nineteenth centuries). Whereas widows elicited sympathy from lawmakers, however, divorced women elicited suspicion and disdain. By choosing to exit marriage formally and irrevocably, divorced women more effectively took themselves out of marriage’s regulatory reach—both its benefits and its ideological constraints.

15. Historically and in our own day, widows represent to lawmakers the most sympathetic female citizens and lobbyists: women who married only to meet with their husbands’ deaths. Their situation, presumably, is doubly sympathetic. Their marriages signify—in broad-stroke cultural shorthand—that these women followed traditional societal expectations and gender norms. In other words, from the perspective of most policymakers, they played by the rules. Their loss further designates widows as victims and innocents, signaling that the rules failed to protect them from the whims of fate.

Lawmakers have thus tended to pay attention to widows’ economic, political, or legal needs, even as these same lawmakers have often turned a deaf (or even hostile) ear to the entreaties of other groups of women. See, e.g., W.D. MACDONALD, FRAUD ON THE WIDOW’S SHARE 3 (1960) (noting that protective legislation for widows “is a popular mandate. It caters to the needs of the widows. The policy is wholesome.”). A few quick examples—historical and contemporary—make the general point across time and context. In the latter half of the nineteenth century, in the aftermath of the Civil War, the “sorrow-striken women made widows by the late war” and left without husbands to represent their views at the ballot box constituted one argument for granting women the vote. CONG. GLOBE, 40th Cong., 3d Sess. 862 (1869) (statement of Sen. Warner). Thereafter, lawmakers’ sympathies for widows—left husbandless and poor by the tragedies of the industrialized workplace—motivated them to enact women’s compensation statutes. See JOHN WITT, THE ACCIDENTAL REPUBLIC (forthcoming 2003) (manuscript on file with author). Almost
Widows' evolving rights thus provide a novel prism through which to view lawmakers' efforts to extend the far reaches of marriage's legal powers, subtly defining and redefining marriage as an institution capable of enveloping even formally unmarried women. Focusing on the abolition of dower in New York in 1929, I argue that, when confronted repeatedly with the specter of widows in dire financial straits, lawmakers have refashioned marriage's shadow, hoping to return widows to their proper places as dependents within families with responsible (albeit dead) male providers. In so doing, legislators have both defined widows' rights in marriage's shadow and defined the meaning of marriage itself—as both a set of relations between men and women, and as a mediating institution between individuals and the state—in the terrain beyond marriage's formal borders. Likewise, as the abolition of dower in New York demonstrates, within the murky terrain beyond marriage proper, politicians and activists have confronted the disparate rights of men and women within marriage and, thus, the relationship between marriage as a regulatory system and deeply contested notions of sex equality.

Until now, wives, not widows or any women living outside of marriage, have been cast in the central, starring role in scholarly accounts of the relationship among marriage, the family, the state, and evolving norms of sex equality. Both historians and legal scholars have looked to the legal regulation of the husband-wife relationship as the key to understanding the development of family law, women's claims to rights within the family and the larger polity, and the changing relationship between the family and the

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a century and a half later, after the terrorist attacks of September 11, 2001, the widows of the attacks constituted the "group that no city official wanted to offend" and, thus, the leading "political voice" shaping the rebuilding agenda. Dan Barry, As Sept. 11 Widows Unite, Grief Finds Political Voice, N.Y. TIMES, Nov. 25, 2001, at A1.

16. Although the language of New York's new law was explicitly gender-neutral, lawmakers worried specifically about the social and economic position of widows, not widowers, because of the gender-specific associations between life outside marriage and poverty. See supra note 6. These concerns about women drove their legal reforms. See, e.g., infra Part IV. The New York inheritance law, therefore, fits into a larger history of legislators' gender-specific concerns for widows. See, e.g., WITT, supra note 15 (manuscript at ch. 5) (discussing the gender asymmetry of early workmen's compensation statutes, which allowed widows but not widowers to recover); John Fabian Witt, From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family, 25 LAW &SOC. INQUIRY 717 (2000) (analyzing the gender-specific nature of nineteenth-century wrongful death statutes, which permitted widows to recover for their husbands' deaths but not widowers for their wives' deaths).

17. Cf. SUSAN STAVES, MARRIED WOMEN'S SEPARATE PROPERTY IN ENGLAND, 1660-1833, at 28 (1990) (pointing, in the British context, to connections between the history of dower and "the contemporary ideology of marriage and the family"). This connection, and the broader link between the history of private inheritance law and public constructions of marriage, is virtually absent in American legal historiography. Although Alexander Keyssar gestured at the possible connection between women's rights and widowhood in the brief conclusion to his 1974 article on widows in colonial Massachusetts, scholars have largely failed to explore this nexus. See Keyssar, supra note 13, at 118-19.
state. Since widows sit outside of the formal law of marriage and the social history of married women, however, the history of dower and inheritance law has been largely overlooked as a site of contestation over gender-differentiated family roles and the meaning of marriage. Conversely, the standard tale of dower’s demise in America pays little, if any, attention to the relationship between inheritance and legal constructions of the family. Instead, classic historical accounts of dower’s decline have focused on changing meanings of property rather than the family, positing that dower—which limited the alienability of married men’s land by preserving a widow’s one-third interest in real property transferred to a new owner—declined as a natural result of shifting understandings of real property in an expanding and increasingly productive national economy.

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18. See, e.g., COTT, supra note 5; MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA (1985); HARTOG, supra note 6; Reva B. Siegel, Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1830-1880, 103 YALE L.J. 1073 (1994) [hereinafter Siegel, Home as Work]; Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117 (1996) [hereinafter Siegel, Rule of Love]. Legally minded historians have analyzed the effects of coverture and women’s struggles for equality within the family and the larger polity by examining, among other things, the passage of married women’s property acts and earning statutes, see, e.g., NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK (1982); AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998); Reva B. Siegel, The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 82 GEO. L.J. 2127 (1994) [hereinafter Siegel, Modernization], the rise of divorce law, see, e.g., BASCH, supra note 14; Hendrik Hartog, Marital Exits and Marital Expectations in Nineteenth Century America, 80 GEO. L.J. 95 (1991), the forms of contestation surrounding marital rape, see, e.g., Jill Elaine Hadas, Contest and Consent: A Legal History of Marital Rape, 88 CAL. L. REV. 1373 (2000); Siegel, Rule of Love, supra, the evolution of maternal child-custody norms, see, e.g., GROSSBERG, supra note 7, and the fight for suffrage, see, e.g., ELLEN CAROL DUBoIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN’S MOVEMENT IN AMERICA, 1848-1869 (1978); Siegel, supra note 6. A noteworthy exception to this historiographical focus on married women is WUlf, supra note 6. Wulf explicitly “engages the historical problem of detangling the history of women from the history of women in marriage.” Id. at 6.

19. From a more social or demographic perspective, a number of historians have examined widows and inheritance law in early America. These studies have tended to focus on widows who inherited by will, rather than claimed dower rights, because of the richness of wills for social historians. See, e.g., TOBY DITZ, PROPERTY AND KINSHIP: INHERITANCE IN EARLY CONNECTICUT, 1750-1820 (1986); Lois Green Carr, Inheritance in Colonial Chesapeake, in WOMEN IN THE AGE OF THE AMERICAN REVOLUTION 155 (Ronald Hoffman & Peter J. Albert eds., 1989); Gloria L. Main, Widows in Rural Massachusetts on the Eve of the Revolution, in WOMEN IN THE AGE OF THE AMERICAN REVOLUTION, supra, at 67; David E. Narrett, Men’s Wills and Women’s Property Rights in Colonial New York, in WOMEN IN THE AGE OF THE AMERICAN REVOLUTION, supra, at 91; Daniel Scott Smith, Inheritance and the Social History of Early American Women, in WOMEN IN THE AGE OF THE AMERICAN REVOLUTION, supra, at 45. As one scholar observed, wills offer a precious view into people’s intimate lives, as they “capture the decisions of individuals,” as well as “the flavor of family life.” Smith, supra, at 46, 47. For such scholars, in other words, wills offer a much-coveted window into individual men’s values, lives, and attitudes toward their wives. This Article, by contrast, looks to inheritance law first and foremost to understand the law’s ideological premises vis-à-vis the family.

20. See, e.g., LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 430-31 (2d ed. 1985) (discussing the limitations of dower in the nineteenth-century economy); MORTON J.
In Part II, before turning to the history of dower, I provide a general map of marriage's shadow in the nineteenth century, pointing to the ways in which, historically, marriage has provided a normative model for the legal regulation of women living outside marriage. In so doing, I explicate the ideological stakes of extending marriage's reach to provide for the economic needs of some groups of unmarried women. Then, in Part III, I turn to the history of dower and its demise, locating the regulation of widows' rights within the legal history of marriage and the family. The traditional, whiggish story of dower's demise—with its focus on the natural decline of antidevelopment forms of property regulation—obscures the ideological purposes served by dower, which played a critical role in defining the meaning and the reach of marriage, as well as the meaning of masculinity and femininity within the family. The standard story of the shift away from dower also ignores a robust history of contestation over inheritance law based not on shifting understandings of property, but rather on evolving gender-conscious visions of marriage and the family. Although their efforts in this area have been largely forgotten, members of the nineteenth-century woman's rights movement fought for dower reform, recognizing something that more recent scholarship has overlooked: the ideological role of dower in shaping the female-dependent/male-provider model of the family, as well as women's second-class citizenship rights. I argue that nineteenth-century woman's rights activists shaped their attack on dower in gender-salient terms that foreshadowed later discussions of dower reform in New York in the 1920s, using a vocabulary that at once radically demanded sex equality within the family and, simultaneously, bolstered the traditional, class- and gender-salient model of the private, male-headed family with a dependent wife.

In Part IV, I analyze the statutory abolition of dower in New York in 1929, the culmination of a lengthy legislative reform effort that garnered widespread attention and resulted in a constitutional challenge in the U.S.

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21. I refer to the nineteenth-century women's movement, as they referred to themselves, as the "woman's rights movement." See NANCY F. COTT, THE GROUNDING OF MODERN FEMINISM 3 (1987) ("Nineteenth-century women's consistent usage of the singular woman symbolized, in a word, the unity of the female sex."). By contrast, when talking about twentieth-century feminists, I talk about "women's rights activists." See id. ("The appearance of Feminism in the 1910s signaled a new phase in the debate and agitation about women's rights and freedoms that had flared for hundreds of years.").
Supreme Court. I depict the lawmaking process as a conversation among lawmakers, feminist activists, and social observers about the various contested meanings of sex equality and marriage, as well as the proper relationship between women and the state.

In replacing dower with a facially sex-neutral elective share, which guaranteed to a widow or widower a certain share of her or his deceased spouse's real and personal property, New York's lawmakers understood themselves to be legislating what they explicitly termed "equality between men and women."\(^{22}\) The complex meaning of sex equality in this context points to both the radical potential of inheritance law reform to disrupt traditional gendered understandings of marriage, as well as the conservative potential of inheritance law reform to fortify the traditional, private family and reinforce the law's ability to define women's rights within the framework of marriage. That is, even as widows gained important rights with the demise of dower, the law held tight to dower's ideological as well as economic functions. In fact, when a constitutional challenge to New York's elective share statute reached the U.S. Supreme Court in 1942, the Court confirmed that, even after dower, marriage was a social and economic institution that necessarily extended beyond a husband's death even if he wished otherwise.\(^{23}\) In so doing, the Court both legally anchored widows in marriage's shadow, and also issued a powerful blow to cultural understandings of absolute male prerogative and property rights.

Part V argues that the model of marriage embraced by dower reform represented not only a rethinking of women's status within the family, but also an aspirational vision of the relationship between the family and the state.\(^{24}\) While contemporary critics of marriage often assume that women's material needs were once—in the good old days—effectively privatized within the family, the history of dower suggests otherwise.\(^{25}\) Dower, like coverture, sought to ensure a woman's economic reliance on a particular


\(^{24}\) Cf. Adrienne D. Davis, The Private Law of Race and Sex: An Antebellum Perspective, 51 STAN. L. REV. 221 (1999) (arguing that, while most scholars have focused on the ways in which public law has defined the meaning of race, the private law of inheritance has been critical to legal definitions of race and gender).

\(^{25}\) Martha Fineman, for instance, has argued that the privatization model of marriage "is failing in contemporary society. Marriage is no longer able to serve its historic role as the repository for dependency." Jeffrey Evans Stake et al., Roundtable: Opportunities for and Limitations of Private Ordering in Family Law, 73 IND. L.J. 535, 540, 542 (1998); see also FINEMAN, THE NEUTERED MOTHER, supra note 3, at 165 ("[T]he private-natural family is no longer viable as the sole, or even primary, institutional response to dependency."). This Article, however, refutes any notion of a golden age in which, unlike today, marriage effectively played this public role.
man. In so doing, it bolstered the assumption that the state had no responsibility for her financial needs. Over time, however, as poor widows provided graphic evidence of dower's failure to fulfill its imagined provider function, lawmakers turned to inheritance law reform to reconstruct marriage according to their vision of marriage's posthumous power and its ability to coerce private economic support even for women living outside of marriage.

In evaluating this aspect of dower reform, I theorize the relationship between private-law and public-law models of female support by juxtaposing the history of dower, the private solution to some widows' economic needs, with the history of mothers' pensions, the public solution to other widows' economic needs. This constitutes a comparison of legislative approaches to two very different groups of women: Dower's failings implicated primarily middle-class and wealthy women, whereas mothers' pensions addressed the needs of some of the most impoverished women. I reason across these groups not to minimize their class differences or their different levels of economic need and privilege, but rather to make visible a story about the relationship among women, marriage, and the state that transcends class differences. 26 By focusing on the economic plight of middle- and upper-class widows, dower reform unintentionally exposed as false the implicit premise of early twentieth-century discussions of mothers' pensions: that only certain widows—that is, poor women whose husbands had died in especially bad economic straits—needed more support than the family and private inheritance law provided. The failure of dower thus implicated a much deeper critique of marriage as a viable model for women's support and exposed a fundamental tension within a model of the family that simultaneously embraced female support and male control as bedrock values. Lawmakers therefore turned to inheritance law reform to counter the destabilizing potential of critiques of dower by reproducing a fortified version of the traditional private family with widows at its core.

Finally, in Part VI, I offer a brief account of the ways in which the abolition of dower constituted the beginning of a general revision of the shape of marriage's shadow in New York. I conclude with a contemporary perspective on the ways in which, although the reach of marriage's regulatory shadow has changed since the early twentieth century, courts continue to use marriage as the normative framework for evaluating the legal worthiness of nonmarital relationships and, thus, for determining the legal rights of women living outside of marriage.

26. Notably, too, this discussion of dependency does not frame women as mothers, as most discussions of female dependency tend to do. See Franke, Theorizing Yes, supra note 4, at 183 (criticizing feminist legal theory for conflating women and mothers in discussions of dependency).
Moreover, even as the contemporary law of nonmarital relations allows women to seek legal rights without situating themselves within the shadow of marriage proper, lawmakers still look to marriage as a public policy tool capable of privatizing women’s economic dependency. Thus, policymakers continue to imagine marriage as a mediating institution between women and the state. Once again, by drawing links between historical discussions of dower and contemporary discussions of welfare reform, I seek not to minimize the class and race specificity of today’s political discussions of female poverty, but rather to point to the ways in which marriage constitutes a regulatory system that seeks to reach women—married and unmarried—across boundaries of race and class.

I conclude with these contemporary observations to point to the ways in which the history of dower and its demise constituted part of a story of both continuity and change with respect to unmarried women’s relationships to the family and the state. I therefore offer the history of dower reform in order to initiate a conversation about the ways in which marriage continues to regulate the legal rights and citizenship of unmarried women, as well as legal and social understandings of equal citizenship. I ground that conversation in the history uncovered in this Article—the history not only of dower’s demise, but also, more broadly, of evolving forms of status regulation, feminist activism, and legislative and judicial approaches to the family roles of male provider and female dependent. This history provides a new framework within which to analyze the contemporary legal and political links between marriage and economic dependency, as well as the limits on sex equality imposed by a model of the relationship between the family and the state premised on marriage’s ability to privatize women’s material needs. Ultimately, history should make us skeptical of contemporary claims, made by proponents of welfare policies promoting marriage, that marriage can serve as an effective policy tool to eliminate women’s poverty.

II. MAPPING MARRIAGE’S SHADOW

When legal scholars and historians analyze the power of marriage as a regulatory institution that defines women’s rights within the family and the state, they generally consider married women. The law of the family, especially the common law of coverture, seems to demand that focus explicitly: Coverture’s categories of feme covert and feme sole seemingly erected a clear dividing line between married women and unmarried women, figuratively covering only the former with a stunning array of status-defining legal restrictions. Thus, coverture restricted only a married woman’s ability to convey or devise property, enter into contracts, or file lawsuits. Since her legal identity was “covered” by that of her husband, the
law presumed that he could perform those legal roles on her behalf if he so chose.

Even with coverture's gradual demise, married women remained a logical focus of analyses of the complex and often mediated relationship between women and the state. Long after the passage of married women's property acts beginning in the 1840s and the passage of married women's earnings statutes later in the nineteenth century, married women's legal and political identities continued to be defined and limited by their marital status. 27 A married woman's legal rights thus remained deeply intertwined with her status as a wife, creating deep tensions between family law and evolving notions of sex equality.

Complicating the relationship among women, marriage, and the state were deep tensions between notions of subordination and protection. Despite the obvious disabilities thrust upon wives, many of the legal restrictions defining the status of a married woman were couched in the language, not of restriction, but rather of marital protection. Marriage, in the eyes of the law, entailed a particular bargain (albeit one the terms of which a woman was powerless to alter): In exchange for giving up certain rights, the law protected a married woman by requiring her husband to represent her legally and politically and to support her economically. From the point of view of nineteenth-century lawmakers, married women—that is, the white, middle-class married women whom lawmakers considered—got the better of this bargain, gaining both the social status of marriage and the legal protections of coverture.

At the level of doctrine, unmarried women had no place in this peculiar bargain. Thus, the feme sole's legal identity was seemingly unconstrained by coverture's strictures; the feme sole, after all, lived outside of marriage and, therefore, from a doctrinal perspective, outside of the regulatory framework of marriage law. Likewise, as the bases of coverture shifted and evolved, formally uncovering the feme covert in various ways—for example, by allowing her to own property and to keep her earnings—subsequent incarnations of marital status law explicitly defined the rights and responsibilities of married women, while purporting to be silent on the legal status of unmarried women. Working within this framework, legal historians of the family have generally paid scant attention to unmarried women, implicitly treating them as exceptional and assuming that they stood outside of the bounds of legal regulation.

Despite the explicit boundaries between the legal rights of married and unmarried women, the law understood and constructed the social and legal

27. See, e.g., COTT, supra note 5, at 156-79; Siegel, Home as Work, supra note 18, at 1084-85. In fact, as Hendrik Hartog has observed, even in the middle of the twentieth century, "much of the nineteenth-century law of husband and wife remained," extending the "very long nineteenth century" way beyond its temporal borders. HARTOG, supra note 6, at 306, 309.
status of many unmarried women in relation to marriage. In other words, even as they marked single women as outside the protective auspices of marriage, lawmakers and judges defined many unmarried women’s legal rights by organizing them into intelligible, proximate relationships with the institution of marriage. In so doing, they created the legal rules that constituted the muddled terrain of marriage’s shadow: The doctrinal sites at which the law—its imagination bounded by marriage’s normative paradigm of both private heterosexual relations and relations between women and the state—defined an unmarried woman’s legal status, in one way or another, by virtue of her contiguous relationship to marriage.

Lawmakers thus clung to the normative model of marriage as a template for defining the legal identities of some women who were explicitly outside of the formal and carefully demarcated boundaries of legal marriage. Three areas of the law, the details of which varied from jurisdiction to jurisdiction, exemplified the contours of marriage’s shadow in the nineteenth and early twentieth centuries: the so-called “heartbalm actions” of breach of promise to marry and seduction, common-law marriage, and dower. Each of these three legal sites brought a different group of unmarried women within marriage’s normative framework. In so doing, the law deemed particular unmarried women’s relationships worthy of legal recognition and thus allowed them to make financial claims on particular men’s resources.

Understanding these different doctrinal sites as comprising a coherent regulatory scheme—rather than an unrelated assortment of common-law relics—is particularly important for making sense of the legal position of widows as unmarried women. Because, unlike other single women, widows were once wives, it is tempting to see dower, and inheritance law more generally, as simply just acknowledgments of widows’ former status and their former formal relationship to marriage. When viewed in the context of other common-law rules, however, a larger picture begins to emerge in which the legal regulation of widows resonates in a different register. Even if their social status as formerly married women differentiated widows from other women living outside marriage, the law constructed the parameters of widows’ legal rights based on the same concerns and preoccupations that shaped the legal treatment of other single women.

The heartbalm tort actions of breach of promise to marry and seduction, for instance, allowed a single woman to sue a man who terminated their romantic relationship prior to an expected marriage ceremony.28 These

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28. At common law, the right of action belonged to the woman’s father for loss of his daughter’s services. Many states codified these actions around the turn of the century, and a number of those gave the woman herself the right to sue. See M.B.W. Sinclair, Seduction and the Myth of the Ideal Woman, 5 LAW & INEQ. 33, 61 n.211 (1987). On the history of these heartbalm actions, see GROSSBERG, supra note 18, at 34-63; Jane E. Larson, “Women Understand So Little,
actions thus subtly transformed *non*marital, dating relationships into legally recognized *pre*marriage relationships. By framing these relationships as necessarily on the way to marriage—and thus within the general social framework of marital relations, as opposed to any potentially subversive world outside of that framework—these actions entitled a single woman to claim monetary damages if her beau ended the relationship prior to the anticipated marriage.

Common-law marriage similarly defined formally nonmarital relationships as within the legal and social world of marriage. As I have explored elsewhere, the doctrine of common-law marriage transformed long-term, heterosexual, intimate, nonmarital relationships that “looked like marriages” into legal marriages.29 In so doing, it bestowed the legal rights of married partners on couples who had never married by judging their nonmarital relationships against the normative model of marriage. Finally, as I will analyze in the next Parts of this Article, dower and subsequent legal approaches to widows’ inheritance rights sought to prolong widows’ legal identities as internal to the institution of marriage despite the absence of their deceased husbands. Inheritance rights thus sought to define widows as wives, despite both their husbands’ obvious absence and their formal legal status as unmarried women.

These doctrinal sites—the heartbalm actions of seduction and breach of promise to marry, common-law marriage, and dower—benefited many women by granting them an impressive set of powerful rights and entitlements precisely by positioning them into legally recognized relationships to marriage. In a legal system characterized by male privilege and prerogative, each of these doctrinal areas offered women powerful tools to acquire individual men’s financial resources. In the antebellum era, after all, the very right to marry, or plausibly to make a legal claim to marriage’s shadow, marked white women as citizens in sharp contradistinction to slave women, who were explicitly excluded from the privileges and protections of marriage law.30 After the Civil War, the right to marry constituted a core component of freedpeople’s newly acquired citizenship.31 The ability to situate oneself in marriage’s shadow therefore constituted a formidable entitlement.

Moreover, by bringing women within marriage’s normative domain, the assumptions about women’s intimate identities underlying heartbalm
actions, common-law marriage, and dower undoubtedly vindicated the subjective experiences of many unmarried women. No doubt, many women longed to live in marriage's emotional, social, and ideological shadow. Some women who brought actions for breach of promise to marry had truly thought of themselves as wives-to-be, and felt entitled to compensation for their lost expectations and dreams. Similarly, some women who brought common-law marriage claims genuinely considered themselves wives within traditional marriages and were shocked—upon the death or disappearance of their husbands—to learn that their relationships were not legally recognized. And, without question, some widows continued to identify themselves, emotionally and socially, as the wives of their deceased husbands.

Just as surely, though, other women had conceived of their intimate lives in radically different terms, deliberately choosing not to marry or feeling liberated by their release from wifehood. Regardless of women's particular subjective experiences, by bringing single women within marriage's normative framework, the laws anchoring marriage's shadow performed substantial ideological work that served the interests of a legal system committed to marriage's ability to define all forms of intimate identity and gender relations. First, these doctrinal areas bolstered the view that only marital relationships—now broadly defined to include both formal marriages and many other marriage-like relationships—were worthy of legal recognition. This message had powerful consequences for women seeking financial support, the group that made up the plaintiff class in these actions. In order to gain legal rights as a member of a relationship, these legal doctrines implicitly told women that they had to present their nonmarital relationship as marriage-like.

Second, by narrowing the field of plausible legal claims, these areas of the law rendered legally invisible a woman's decision to live completely outside of marriage's normative structure, implicitly denying the possibility that couples wished to conduct their intimate relations in a social world completely apart from marriage. At the very least, these laws precluded women from acknowledging any such intent if they wanted to invoke the protections of the law. Through these legal rules, therefore, the law pulled single women into the confines of marriage, at least if they wanted the law to recognize them as rights-bearing members of intimate relationships. These actions, in other words, defined the boundaries of the law's concept of intimacy as coterminous with marriage's boundaries. In so doing, they denied the possibility of women's unbounded intimate imaginations, and thus their diverse intimate identities.

Finally, the legal rules responsible for casting broadly the reach of marriage's shadow played a critical role that was at once economic and ideological: They sought to contain the economic dependencies of many
unmarried women within the conventional framework of marriage. As Martha Fineman has analyzed, legislators have long imagined that marriage serves the critical social and political function of attaching dependent women to provider men, thereby creating "the mechanism through which we can avoid assuming collective (or state-assumed) responsibility for dependent members of our society." Bolstered by a work force structured around notions of the family wage, policymakers thus have confidently presumed that married women will be supported by their husbands' earnings, not public funds.

The ideological genius of the laws constructing marriage's shadow consisted of their ability simultaneously to capture a vast range of women's intimate identities within marriage and to privatize the economic needs of unmarried women by constructing their financial claims as internal to marriage's structure broadly defined. Thus, formally unmarried women could make claims on the financial resources of particular men only by legally situating their relationships within marriage's shadow. Moreover, through these legal doctrines, the law strengthened and expanded the core meaning of marriage with its gender-specific provider/dependent roles, defining it as a powerful social and legal institution capable of bringing within its confines even couples on its remote periphery.

As the remainder of this Article explores, the legal history of widows' rights exemplifies this dynamic relationship between marriage's core and its periphery. No longer formally internal to marriage, widows nonetheless derived their social and legal status from what lawmakers perceived to be their proximate relationship to marriage. In defining and redefining widows' rights, judges and legislators ossified the link between this group of unmarried women and the institution of marriage, stretching the meaning of marriage as well as its regulatory powers in ways that fortified

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32. Stake et al., supra note 25, at 541-42.
33. As John Witt has argued, beginning in the mid-nineteenth century, wrongful death statutes powerfully reinforced this model of the family and the economy by creating asymmetrical regimes within which women could recover for the wrongful deaths of their husbands, but men could not bring parallel actions for the wrongful deaths of their wives. See Witt, supra note 16, at 736-46. Even after a man's death, the law perpetuated the idea that he would provide for his dependent wife. Furthermore, in the early twentieth century, similar gender asymmetries in workmen's compensation legislation carried into the late twentieth century this vision of the family wage structured around male providers and female dependents. See WITT, supra note 15 (manuscript at ch. 5).
34. Karin Wulf has argued that, in colonial Philadelphia, [d]espite the fact that most women who needed poor relief were unmarried, and were not dependent [on] an individual man, officials still looked for indications of dependence or traits associated with dependence, such as subordination and submissiveness. Thus, officials were unwilling to see many men in the position of social dependence, but they were committed to seeing women in that role. WULF, supra note 6, at 168-69.
marriage's dominion over not only widows, but also other groups of women living outside of formal marriage.

III. DOWER AND ITS CRITICS

A. The Legal Rights of Widows

Dower constituted "the core of the wife's entitlement under the old common law system."\(^{35}\) Incorporated into early American law, albeit with variations from colony to colony (and, later, state to state), dower generally guaranteed a widow a fixed entitlement to her deceased husband's estate: a life interest in one-third of all the real, not personal, property of which he was seized during their marriage.\(^{36}\) On the whole, this constituted a rather modest financial entitlement. A woman's dower rights were deemed inchoate while her husband was alive, and, even after his death, her life estate precluded her from selling her interest in her share of her husband's land or even, in many states, improving the land in productive ways lest she run afoul of the common-law doctrine of waste.\(^{37}\)

Moreover, upon her husband's death, although a widow's dower rights became "consummate," she had "no seisin in law, nor ha[d] she any right of entry, nor c[ould] she exercise any act of ownership over the lands upon which her right ha[d] attached."\(^{38}\) Instead, she had to wait until her husband's estate was assessed and her share was assigned, either voluntarily by her husband's heirs or through legal proceedings at her initiation.\(^{39}\) This placed a widow in a uniquely uncomfortable position that was "governed by its own particular circumstances, neither borrowing nor affording any analogies."\(^{40}\) Although at common law a widow had a "quarantine" right to remain in her deceased husband's home for forty days after his death, thereafter the legal heirs of her husband's property had the right to expel her, leaving her with only the right to sue for dower.\(^{41}\)

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35. See STAVES, supra note 17, at 5.
37. See HORWITZ, supra note 20, at 56-58; SALMON, supra note 20, at 143.
38. 2 SCRIBNER, supra note 36, at 27.
39. See 2 id. at 30 n.1 (citing cases). Further legal procedures existed if a widow sought dower rights in land that had been conveyed by her husband. See 2 id. at 91-204.
40. 2 id. at 27.
41. See 2 id. at 53-69. These legal conditions led to the crises for widows that nineteenth-century woman's rights leaders so strongly decried. See infra Subsection III.D.3 (describing the dual tragedy faced by a widow who lost both her husband and her home). As a leading nineteenth-