# There's No Place Like Home: Homestead Exemption and Judicial Constructions of Family in Nineteenth-Century America

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In 1871, former slave Lettie Marshall sued the estate of B. G. Marshall, her former master, arguing that she was entitled to farm two hundred acres of his land in Fort Bend County, Texas. Her claim was based on a "homestead exemption" provision of the Texas Constitution, which exempted the homestead of a "family" from "forced sale for debts" and vested continued occupancy rights in surviving "family" members after the death of the family head. After Emancipation, Marshall and her family had become sharecroppers on B. G. Marshall's estate and continued to farm the land until his death. At trial, Marshall portrayed herself as B. G. Marshall's "confidential servant" whom he treated "like she was one of the family." As proof that their bond transcended a mere contractual relationship, she noted that he had entrusted her with overseeing a "squad of eight or ten hands," and that upon occasion she "lent him money" and even "lived in the same house with Marshall, who was a cripple, and . . . waited on

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him, &c" when her legal status no longer obliged her to do so. Not only did she fulfill "all of the duties and relations to him of mother, sister, and daughter," but Lettie Marshall, her husband, and their descendents were the only named beneficiaries of his will.[1]

B. G. Marshall's insolvency at his death placed the Texas judiciary in a difficult bind. Since there was no estate left for Lettie Marshall to inherit, the only way she could continue to farm the estate was if she were deemed a member of his "family." Yet the provision of the Texas Constitution granting homestead rights to "heads of families" and their survivors left the term "family" undefined.

Although unique in some respects, the statute that placed the Texas Supreme Court in such a doctrinal quandary was a nearly ubiquitous feature of the nineteenth-century legal landscape. Although the particulars varied somewhat across states, homestead exemption statutes typically shared several basic characteristics. A plot of land generally could not be designated as a homestead unless it was actually occupied as a home by a head of household and his (or her) family.[2] Assuming this condition was met, the acts extended protection to two classes of beneficiaries. First, during his or her lifetime, the head of a family could prevent creditors from claiming the homestead for the non-payment of debts.[3] Second, after the death of the family head, immediate family members (typically the surviving widow and minor children) could continue to occupy the homestead even if creditors or legal heirs held superior title.

The unusual breadth of Texas's homestead law made it uniquely hospi-

1. *Howard v. Marshall,* 48 Tex. 471 (1878).

2. See *Iken v. Olenick,* 42 Tex. 195, 198 (1875), cited in Seymour D. Thompson, *A Treatise on Homestead and Exemption Laws* (St. Louis: F. H. Thomas and Company, 1878), 86, construing *Norris v. Kidd,* 28 Ark. 485 (1873). In a few exceptional states, the benefits of the act were at least temporarily extended to all citizens. The statutes of Wisconsin, Minnesota, and Alabama are rare in that they seem never to have restricted the homestead right to heads of households. The issue of whether a bachelor or single woman could claim the right may never have been directly posed to the high court, however, since all of the published appellate case law involved the claims of spouses, widows, or widowers. Although three other states—Texas, Georgia, and Arkansas—passed statutes to similar effect in the immediate aftermath of the Civil War, all reinstated the household headship requirement by 1874 (in Texas and Georgia through a supreme court holding that the statutory revisions were unconstitutional, and in Arkansas through constitutional amendment). Alabama seems to have been unique in permanently (and belatedly) amending its provision in 1886 to grant the right to "every resident of this state." Al. Code of 1886, 2507.

3. In some states, however, mechanics' liens could be enforced on homestead property, forming an exception to this rule. See, e.g., *Johnson County Sav. Bank v. Carroll,* 109 Ia. 564, 564–65 (1899) (citing Sect. 2975 of Iowa Code); *Bagley v. Peffer,* 76 Minn. 226 (1899); *Farnsworth v. Hoover,* 66 Ark. 367 (1899); *Utley v. Jones,* 92 N.C. 261 (1885); *Thompson v. Wickersham,* 68 Tenn. 216 (1877).

table to a claim like Lettie Marshall's; not only did the Texas Constitution exempt the "homestead of a family" from forced sale for debts, but under the probate law, homestead property was exempted from a decedent's estate as long as "a constituent of [his] family survives." Given the Texas Constitution's complete silence on the issue of who qualified as a "family" member, unrelated cohabitants of deceased landowners, like Lettie Marshall, had every incentive to portray themselves as "family" members after the landowner's death.

Unlike Texas, most state legislatures circumscribed the range of possible survivors' claims by enumerating which "family" members could claim homestead rights after the death of the head. For example, a typical provision from the Tennessee Constitution provided, "[A] homestead in possession of each *head of family* and the improvements thereon, to the value in all of $1,000, shall be exempt from sale under legal process, during the life of such *head of family,* and inure to the benefit of the widow, and shall be exempt during the minority of their children occupying the same. . . ."[4] Since the widow and minor children were the only enumerated family members who could claim benefits after the owner's death, a former slave like Lettie Marshall would have had no colorable claim in Tennessee. Nevertheless, in Tennessee and Texas alike, the legislature's failure to define the term "head of family" left vital questions unanswered. For example, besides married men, could other self-described "heads of families"—such as married women, or perhaps even adults caring for dependent relatives—claim the law's protection?[5]

In the latter half of the nineteenth century, the burden of resolving such uncertainties largely fell to U.S. state court judges. Confronting a lack of social consensus on these issues, jurists had no choice but to engage in tortuous doctrinal line-drawing, struggling to define the legal entitlements of claimants whose domestic living arrangements often deviated from the basic nuclear prototype. What made the delineation of such boundaries so difficult is that the definition of "family" was itself in flux during the latter nineteenth century. In traditional parlance, the term was often used broadly to include all members of the household, and it was not until the postbellum era that many legal and popular dictionaries began to feature the nuclear cluster of "husband, wife, and children" as one of its leading definitions.

As the century progressed, the interpretive confusion surrounding such terms as "family" and "head of family" in homestead exemption law ripened

4. Tennessee Constitution, Art 11, §11 (1870) (emphases added). See also Laws of 1870, c. 80, § 1 (statute implementing constitutional provision).

5. See *Macrae v. Macrae,* 57 S.W. 423 (Tenn.Ch.App. 1899) (citing above provisions).

into a profound and far-reaching doctrinal crisis. As early as the 1870s, contemporary jurists began to deplore the bewildering state of the jurisprudence. As one New Hampshire judge lamented in 1871, homestead exemption case law had evolved into "a confused and almost inexplicable system, indicative of differing intentions, theories, and designs on the part of law-makers"; the only point on which there was "general agreement" was "in sentiments of disgust for the unsatisfactory and uncertain condition of this department of jurisprudence."[6] Similarly, in the preface to his 1878 treatise on the subject, Seymour Thompson described homestead exemption as a "discordant mass of statute law"; most state court decisions, he said, were based on nothing more than "a conjectural feeling for the 'intention of the legislature,' where questions arose which legislative omniscience could not foresee, and where, consequently, the legislature had *no* intention."[7]

Given these deep doctrinal divisions, it is hardly surprising that homestead exemption statutes were such an intensely litigated fixture of the postbellum legal landscape. Those cases that reached state high courts before the turn of the century probably number around four thousand.[8] The overwhelming majority of state court appeals regarding the homestead exemption were brought during the latter half of the nineteenth century, with the bulk of appellate litigation occurring after the Civil War.[9] It is hard to find other nineteenth-century statutes that generated such a vast flood of appellate litigation.[10] Yet remarkably, in light of the copious litigation

6. *Barney v. Leeds,* 51 N.H. 253 (1871).

7. Thompson, *A Treatise on Homestead and Exemption Laws,* vi–vii.

8. Thomson West's editorial staff has attempted to include in its online database all published state case opinions prior to 1900. Although a few cases could not be obtained, the staff estimates that the percentage of omitted decisions probably is less than two percent. (Discussions with Bryan Bochler, Team Coordinator for Cases, Thomson West, June 17, 2005.) A fairly broad search in Westlaw's "AllStates-Old" database [homestead w/15 exempt! & da(before 1/1/1900)] retrieves 4054 cases. Some of these cases, perhaps ten or fifteen percent, contain merely incidental references to homestead exemption. On the other hand, a search that excludes references to "exempt" [da(bef 1/1/1900) & homestead w/5 (act rule law bill statute) % exempt!] yields 1288 records, of which a surprising number, perhaps as many as half, actually refer to homestead exemption (as opposed to government land grants generally known as homestead acts) even though they do not actually contain the word "exempt" or "exemption." In light of these countervailing factors, four thousand is probably a reasonable approximation of the number of cases. The two earliest homestead exemption appeals date from 1849; the frequency of high court appeals reached several dozen per year by the late 1850s; and by the 1870s state high courts were hearing more than a hundred appeals annually.

9. Thompson, *A Treatise on Homestead and Exemption Laws,* 496.

10. For example, nineteenth-century appeals involving fugitive slave laws, state and federal land grants (known as the homestead acts), and miscegenation numbered only in the dozens or hundreds. Even divorce—despite its widespread liberalization and a transfer of

and doctrinal confusion that homestead exemption engendered, the early history of the doctrine has remained virtually unexcavated.[11] This article is the first to take up the task of unearthing, and interpreting, the early development of the doctrine in published state court opinions.

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jurisdictional authority to state appellate courts beginning in the 1790s—generated no more than eight thousand appeals during the entire nineteenth century. See generally Roderick Phillips, *Putting Asunder: A History of Divorce in Western Society* (New York: Cambridge University Press, 1988), 155–58. A broad Westlaw search, intended to exclude only those uses of the word "divorce" outside the context of marriage [da(bef 1/1/1900) & divorce! & (wife husband marriage married)] generated 8461 cases. Casual scrutiny suggests, however, that many of these cases contain merely tangential references to divorce. Therefore, the true number of divorce cases is most likely well under 8,000.

11. For full-length treatises from the nineteenth century, see Thompson, *A Treatise on Homestead and Exemption Laws,* John H. Smyth, *The Law of Homestead and Exemptions* (San Francisco: S. Whitney & Co., 1875), and Rufus Waples, *A Treatise on Homestead and Exemption* (Chicago: T. H. Flood, 1893). Also see J. G. Woerner, *A Treatise on the American Law of Administration* (Boston: Little, Brown, and Company, 1889), §§ 94–104 (treatise that devotes considerable attention to homestead exemption) and William Lambdin Prather, Jr., *The Economic Effects of the Homestead and Exemption Laws, With Special Reference to the Development of the Homestead and Exemption Laws in Texas* (1903) (unpublished master's thesis, University of Texas, in collection of Lillian Goldman Library of Yale University). Leading reference texts for lawyers, such as legal restatements and encyclopedias, also included detailed annotations on homestead exemption. See, e.g., J. F. Dillon, Annotation, "The Homestead Exemption," *American Law Register* 10 (1862): 641–56; Annotation, "Exemption of Proceeds of Voluntary Sale of Homestead," *American Law Reports* 1 (1919): 483–88; Annotation, "Homesteads," *Corpus Juris Secundum* 29 (1922): §2; Annotation, "Time As of Which, and Extent to Which, Homestead Exemption Attaches to Property Received in Exchange for Homestead," *American Law Reports* 83 (1933): 54–62. For law journal articles, see George H. Haskins, "Homestead Exemptions," *Harvard Law Review* 63 (1950): 1289–1320; Note, "State Homestead Exemption Laws, *Yale Law Journal* 46 (1937): 1023–41. Although a few recent studies of married women's property law have adverted to its existence and offered some brief commentary, homestead exemption is still a subject virtually untouched among legal historians. For modern works of legal history that make note of the existence and/or remedial purposes of the statutes, see, e.g., Richard H. Chused, "Married Women's Property Law: 1800–1850," *Georgetown Law Journal* 71 (1983): 1359–1425, 1402; Reva Siegel, "Home as Work: The First Women's Rights Claims Concerning Wives' Household Labor, 1850–1880," *Yale Law Journal* 103 (1994): 1073–1217, 1139; Reva Siegel, "The Modernization of American Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930," *Georgetown Law Journal* 82 (1994): 2127–2211, 2135–36. Paul Goodman has written the only political history of the movement, which links the spread of the statutes to broader social and economic trends. See Paul Goodman, "The Emergence of the Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840–1880," *Journal of American History* 80 (1993): 470–98. See also, Joseph W. McKnight, "Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle," *Southwestern Historical Quarterly* 86 (1983): 369–99 (discussing the statute's early origins in Mexico and Texas).

The story that emerges provides important new insights into the complexity of Victorian jurists' attitudes toward economic dependency. The statutes seemed straightforward: they were designed to protect families against poverty and homelessness, or as one state court judge put it in 1864, "like an angel of mercy to hover over and bless the families of our nation."[12] Beneath this superficial consensus, however, were deeply contested and opposing visions of *how* the state should protect the family home and *who* should be the principal beneficiaries of state protection. Given their typically vague statutory enactments, homestead exemption laws were generally capacious enough to embrace several distinct (albeit overlapping) models of state intervention. In one view, the overriding objective was to help indebted male providers survive financial misfortune. Alternatively, the paramount goal was to protect vulnerable women and children from insolvency and homelessness. There were even some for whom the objective was to encourage able-bodied workers—whatever their gender or marital status—to provide for those who were incapable of supporting themselves.

To scholars of the twentieth-century welfare state, much of this is familiar ideological terrain. The complex origins and rationales of modern "welfare" and "social insurance" programs—whose primary beneficiaries were, respectively, single mothers and male wage-earners—have been fertile subjects of scholarly research. Yet what scholars have only recently begun to recognize—and what this article reveals—is that debate over the proper scope and aims of the "social safety net" began long before the New Deal.[13] Decades before such definitions were thought to figure in public policy, what it meant to be a husband or wife, a provider or dependent—and even what it meant to be a "family"—preoccupied U.S. judges struggling to develop a coherent body of homestead exemption jurisprudence.[14]

12. Smyth, *The Law of Homestead and Exemptions,* sect. 5–6.

13. See, e.g., Linda Kerber, *No Constitutional Right to Be Ladies* (New York: Hill and Wang, 1998); Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge: Harvard University Press, 1992); Robyn Muncy, *Creating a Female Dominion in American Reform, 1890–1935* (New York: Oxford University Press, 1991); Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in Twentieth-Century America* (New York: Oxford University Press, 2001); Linda Gordon, *Pitied but Not Entitled* (Cambridge: Harvard University Press, 1994); Michele Landis Dauber, "Forum: The Sympathetic State," *Law and History Review* 23 (2005): 387–442.

14. For tractability's sake, I have narrowed the scope of my study in three ways. First, since the doctrine reached full maturity in the latter nineteenth century and that is also the period in which the statutes probably peaked in economic influence, I have confined the study to decisions published before the year 1900. Second, from among the vast array of primary sources, I have tried to isolate those that best highlight the family-oriented features

Detailed analysis of published state court opinions also reveals intriguing dualities in nineteenth-century attitudes toward land ownership, gender roles, and economic dependency. On one hand, exemption statutes significantly disrupted men's traditionally extensive control over real property. Married women suddenly acquired important new rights over family land—rights that could be used to challenge their husbands' authority. Moreover, single women who assumed the traditionally masculine role of supporting dependents might sometimes be treated as "heads of families" on that basis alone. Yet most state court judges also took great pains to safeguard the link between land ownership, providership, and masculinity. Men who took up their prescribed gender role of supporting dependents were almost always rewarded with homestead exemption rights. In fact, men who entered into marriage were usually allowed to retain such rights even if the marriage was dissolved or they outlived their dependents. Judges' willingness to intervene on behalf of female claimants, particularly those who never married or repudiated their wifely obligations, was generally far more circumscribed.

Part I sets the stage for the doctrinal analysis by briefly summarizing the origin and growth of homestead exemption as a political movement. Part II begins the substantive analysis by exploring the complex, often contradictory ways in which homestead exemption affected the balance of power within marriage. I argue that homestead exemption posed an unusually direct threat to the twin premises of male headship and family unity, although, ironically, some married men may have been its indirect material beneficiaries. The next three parts analyze common fact patterns that deviate, in particular respects, from the nuclear family ideal. Part III, which considers the effects of divorce, separation, and spousal abandonment, reveals important dualities in judicial attitudes toward family dissolution. Women who divorced or separated from their husbands often risked forfeiture of their homestead rights, especially if they caused the marital breakup; yet married male landowners were rarely dispossessed of their land even if divorce or separation stripped them of headship status. Part IV, which focuses on the plight of bereaved husbands, reveals that most states preserved the homestead exemption rights of widowers even though they were not themselves

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of the legislation and their interpretation by state jurists. Finally, I have decided to tell a national story. My goal is to sketch several salient contours of the doctrine in broad analytic strokes, suggesting that the ways judges mediated these doctrinal fault lines resonates with historical significance. Although I may well have missed important variations across regions and across decades, my hope is to inspire other scholars to explore the interpretive themes raised in this article and undertake the detailed research necessary to develop a more nuanced, finely grained portrait of the doctrine's evolution over time and within individual states.

considered dependents (as were widows) and frequently had no dependents for whom to provide. Part V widens the lens even further by considering the claims of putative "families" other than married couples. Even here, I show, male claimants had a distinct advantage in the courtroom. More broadly, I suggest that the judiciary's failure to integrate formalist and functionalist approaches into a unitary conceptual model of "family" created considerable doctrinal instability in the treatment of unmarried cohabitants. The conclusion suggests that homestead exemption law reveals important fractures in the ideology of family, gender, and property that divided legal policymakers on the brink of large-scale industrialization.

## I. A Brief History of Homestead Exemption

Speaking before Nevada's first Constitutional Convention on July 13, 1864, the Honorable J. A. Collins declared, "I do think that this idea of the homestead [exemption] is one of the sublimest ideas of our age."[15] Collins could speak with the assurance that history was on his side. By 1864, thirty-one other U.S. states and territories had already passed provisions exempting the family homestead from the reach of creditors.[16]

Although laws exempting certain articles of personal property (such as the tools of one's trade) from execution for debt were not uncommon in colonial America, the notion of extending such protection universally to land did not permanently take root.[17] As early as the 1820s, Mexico began offering free land, secured from U.S. creditors, to attract settlers; colonial Texas (under Mexican rule) adopted a similar statutory provision in 1829.[18] After earning its independence, Texas quickly reinstated its two-pronged recruitment strategy of free land grants and homestead exemption.[19] In 1841,

15. See Smyth, *The Law of Homestead and Exemptions,* sect. 5–6.

16. Goodman, "The Emergence of the Homestead Exemption in the United States," 472.

17. Under traditional English law, an individual's title to land was protected from claims of unsecured creditors. Through the early eighteenth century, many American colonies recognized similar exemptions. However, beginning in the late seventeenth century, most colonies began treating land as the legal equivalent of chattel property for the purpose of satisfying debt. See Claire Priest, "Creating an American Property Law: Alienability and Its Limits in American History," mimeo on file with author.

18. See William Lambdin Prather, Jr., *The Economic Effects of the Homestead and Exemption Laws,* 5.

19. Ibid., 5. Also see Goodman, "The Emergence of the Homestead Exemption in the United States," 477.

Georgia and Mississippi became the first U.S. states to follow Texas's lead and enact their own homestead exemption provisions.[20]

The homestead exemption movement swept through the South rapidly during the 1850s and '60s. Its appeal was multi-faceted. The Panic of 1837—which threw a broad class of citizenry into bankruptcy, unemployment, and poverty—hit the South particularly hard.[21] In the midst of the ensuing depression, homestead exemption was championed not only as a way to deter residents from leaving the region to make a fresh start in Texas, but also more generally as a way to curb the destructive potential of the free market by protecting families against financial destitution.[22] The popularity of homestead exemption in the South transcended partisan or class boundaries. In Alabama, Georgia, and Tennessee, for example, roll call votes reveal that its supporters included both Whigs and Democrats with both large and moderate property holdings.[23] The mass appeal of the movement led ten of fourteen Southern states to pass homestead laws as early as 1859.[24] After the Emancipation Proclamation, many southern states seized on the laws as a useful tool to keep land out of the hands of freedmen and, in time, to re-establish the economic supremacy of white plantation owners.[25] All four southern states still lacking homestead exemption laws on the eve of the Civil War passed them between 1863 and 1868.[26]

Outside the South, the homestead exemption movement also began gathering momentum by mid-century. By 1852, all of the northeastern and mid-Atlantic states (with the exception of Delaware, Rhode Island, and Maryland) exempted at least $300 of a homestead from the reach of

20. Goodman, "The Emergence of the Homestead Exemption in the United States," 478.

21. See ibid., 477; Edward J. Balleisen, *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America* (Chapel Hill: University of North Carolina Press, 2001); Charles Warren, *Bankruptcy in United States History* (Cambridge: Harvard University Press, 1935), 52–55, 60; Richard H. Chused, "Married Women's Property Law: 1800–1850," 1400–1.

22. Goodman, "The Emergence of the Homestead Exemption in the United States."

23. See ibid., 478–79, and accompanying notes.

24. Ibid., 472. The ten Southern states passed their first homestead exemption laws in the following years: Texas in 1839; Georgia in 1841; Mississippi in 1841; Alabama in 1843; Florida in 1845; South Carolina in 1851 (repealed seven years later); Louisiana in 1852; Tennessee in 1852; Arkansas in 1852; and North Carolina in 1859. The remaining four states—Missouri, West Virginia, Kentucky, and Virginia—did not pass their first laws until 1863, 1864, 1866, and 1867, respectively.

25. See, e.g., Eric Foner, *A Short History of Reconstruction* (New York: Harper & Row, 1990), 45–48; See Goodman, "The Emergence of the Homestead Exemption in the United States," 491.

26. Goodman, "The Emergence of the Homestead Exemption in the United States," 492.

creditors.[27] Every single midwestern state and territory passed a similar provision by 1858.[28] The region in which homestead exemption was the latest to arrive was the Far West. Although California enacted homestead exemption immediately after entering the Union in 1850, its neighboring states did not begin to follow suit until the 1860s.[29]

Particularly in the Northeast and Midwest, homestead exemption became intertwined with several broader social movements—most notably land reform, the labor movement, abolition, and temperance—that shaped antebellum politics. The National Reform Association (NRA), a labor group that broke away from the democratic party, embraced a program of comprehensive land reform in the 1840s including the provision of free and secure homesteads, which helped push the issue into the political mainstream.[30] Key segments of the abolitionist movement aligned themselves with the NRA in endorsing these goals.[31] Although the Free Soil party did not formally incorporate land reform into its political platform in 1848, many of its members helped push homestead exemption through state legislatures in the late 1840s and 1850s, and at least one statewide chapter officially endorsed the homestead exemption at its annual convention.[32]

27. Ibid.

28. Ibid.

29. Ibid.

30. Ibid.

31. For a brief overview of the Abolitionist movement's involvement in homestead exemption, particularly insofar as it intersected with agitation for land reform, see ibid., 483–84. An intriguing exchange of letters published in an Abolitionist periodical from August through October of 1849 suggests that Abolitionist support for homestead exemption was widespread but not universal. The disagreement seems to have rested partly on differing expectations about the law's redistributive consequences. An editorialist who adopted the penname "T." argued that the homestead exemption would unjustly secure to the proprietor the very "portion of the property which, in justice and equity, belongs to the poor laborer who remains unpaid" and predicted that "it will be found in practice that such a law will most frequently rob the poor—the laborer, who possessed nothing—and give to the person who already possesses at least a house and a lot, perhaps of a value of several thousand dollars." See T., "Slavery and Homestead Exemption," *The National Era,* August 16, 1849, 137. In later issues, three readers took issue with T's claim, predicting instead that homestead exemption would have the salutary effect of breaking up large, monopolistic land holdings, with their attendant social ills. See Charles E. Millard, "Slavery and Homestead Exemption," *The National Era,* September 20, 1849, 149; H., "Homestead Exemption," *The National Era,* September 20, 1849, 152; and Harry the Lesser, "The Homestead Scheme," *The National Era,* October 5, 1849, at 169. Millard and H. described the ability to preserve one's homestead as a God-given and inalienable right. Millard and Harry the Lesser also opined that protecting homesteads was crucial to encouraging poor laborers' upward mobility and that statutes would help protect women and children from villainous alcohol vendors who encouraged alcoholism among male breadwinners for personal gain.

32. See Goodman, "The Emergence of the Homestead Exemption in the United States,"

Homestead exemption also drew support from the temperance movement, whose members often accused creditors of encouraging alcoholism among male breadwinners.[33] Although at least one historian has suggested that the movement also drew political support from the largely contemporaneous effort to reform women's property law, the precise political connections between the two movements remain unclear.[34]

The movement was not without its critics. Detractors argued the laws encouraged families to defraud creditors, dried up credit markets, undermined economic self-sufficiency by encouraging dependence on the state, and gave wives undue influence over the financial dealings of their husbands. In a few states, such arguments carried the day. Connecticut and South Carolina repealed their laws within a decade after passage (although later reinstated them); and three U.S. states (Rhode Island, Delaware, and Maryland) never adopted homestead exemption laws.[35] Yet in most states, officials from across the political spectrum helped to enshrine them in state law.[36]

Homestead exemption, in some form, endures to this day in all but two states.[37] Yet the scant scholarly attention that the laws have received since

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483–84; *The National Era,* February 8, 1849, 23 (reprinting the resolutions adopted by the Free Soilers of Wisconsin at their state convention, including a resolution stating "that the principle of homestead exemption is humane and just, and should be maintained inviolate").

33. Millard, "Slavery and Homestead Exemption." See also Harry the Lesser, "The Homestead Scheme."

34. It is certainly suggestive that the first wave of homestead exemption laws were passed at the same time as the first wave of married women's acts, which protected wives' property from the debts of their husbands. See Chused, "Married Women's Property Law: 1800–1850," 1400–3. Moreover, in several state constitutional conventions—Texas, Wisconsin, Michigan, Alabama, Arkansas, Georgia, and North Carolina—married women's property rights and homestead exemption were combined into a single article. See Jane W. Paulsen, "Community Property and the Early American Women's Rights Movement: The Texas Connection," *Idaho Law Review* 32 (1996): 641–89, 671 (noting that married women's property rights and homestead exemption were proposed as a package in Texas and combined into the same article), and Goodman, "The Emergence of the Homestead Exemption in the United States," 489 (noting that both reforms were combined in a single article in the latter six states). Yet homestead exemption does not appear to have been a major component of the mid-Victorian feminist agenda. For example, during the years 1870 and 1874, a leading suffragist periodical with a substantial feminist readership, *The Woman's Journal,* contained only two references to the homestead exemption statutes, both fleeting and critical in tone. To date, there is apparently no scholarship assessing systematically the extent of early women's rights activists' involvement in the homestead exemption movement.

35. See Goodman, "The Emergence of the Homestead Exemption in the United States," 489.

36. Ibid.

37. All but two states—Pennsylvania and Rhode Island—have either statutory or constitutional homestead protection. See Lawrence Ponoroff, "Exemption Limitations: A Tale

World War II suggest that they have declined dramatically in economic and social importance.[38] The development of a public safety net in the twentieth century—including public assistance, unemployment insurance, Social Security, and bankruptcy protection—have all but eclipsed the function of the homestead exemption as a form of social insurance. Consequently, most contemporary commentators treat homestead exemption as little more than an adjunct of bankruptcy law, either deploring the prevalence of fraud or abuse[39] or debating the merits of uniformity among state exemption provisions.[40] Since my goal is to understand homestead exemption jurisprudence in light of nineteenth-century legal and social history, I have confined my study to the period preceding the year 1900, and especially the years 1850–1880, when the statutes peaked in influence.[41]

## II. Homestead Exemption and the Marital Balance of Power

On June 5, 1883, Ezra McCallister filed a declaration of homestead in the recorder's office of San Diego County, California. A married man, Ezra

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of Two Solutions," *American Bankruptcy Law Journal* 71 (1997): 221–47, 222 and accompanying notes. Florida's unlimited exemption has become particularly controversial in recent years, since it may permit individuals to convert nonexempt assets into exempt assets in anticipation of bankruptcy. See Fla. Const. Art. IV, § 4 (amended 1984), construed in *Butterworth v. Caggiano,* 605 So.2d 56 (Fla. 1992).

38. Although more than twenty articles with "Homestead Exemption" in the title have been published in law journals since 1950, most confine themselves to summarizing recent cases or analyzing a particular state statute. See, e.g., Leslie A. Shames, "Calling a Fraud a Fraud: Why Congress Should Not Adopt a Uniform Cap on Homestead Exemptions," *Bankruptcy Developments Journal* 16 (1999): 191–220; Matthew J. Kenner, "Personal Bankruptcy Discharge and the Myth of the Unchecked Homestead Exemption," *Missouri Law Review* 56 (1991): 683–704; Phyllis A. Klein, "'A Fresh Start with Someone Else's Property': Lien Avoidance, the Homestead Exemption and Divorce Property Divisions under Section 522(f) of the Bankruptcy Code," *Fordham Law Review* 59 (1990): 423–52; Terrence C. Brown-Steiner, "Federal Tax Liens and State Homestead Exemptions: The Aftermath of *United States v. Rodgers,*" *Buffalo Law Review* 34 (1985): 297–327.

39. See, e.g., Ross Lloyd, Esq., "Bankruptcy: Ex-Husband Uses Bankruptcy Homestead Exemption to Cut Off Ex-Wife's Interest in Marital Home," *Real Estate Law Report* 20 (August 1990): 2–4, 2.

40. Compare, e.g., Leslie A. Shames, "Calling a Fraud a Fraud," with William Houston Brown, "Political and Ethical Considerations of Exemption Limitations: The 'Opt-Out' as Child of the First and Parent of the Second," *American Bankruptcy Law Journal* 71 (1997): 149–219.

41. Tracing the doctrinal evolution of the homestead exemption from the antebellum period to the twentieth century, and determining the degree to which the modern statutes differ from their nineteenth-century ancestors, is a task that has not yet been attempted, and I will not do so here.

averred that he resided with his wife and four children on land valued at two thousand dollars. Since the statute required both husband and wife to consent to any sale or mortgage, Ezra and Mary McCallister both appeared to execute a mortgage. By the early 1890s, however, the loan fell badly into arrears and the bank began foreclosure proceedings. It was then that Ezra dropped his bombshell: Mary was an imposter, and his lawful wife, Amanda Fisher McCallister, was legally insane. Since the homestead could not be alienated lawfully without the consent of both spouses, and Amanda had never joined in its execution, Ezra demanded that the court void the mortgage. After permitting Amanda to intervene through a guardian ad litem, the court rendered judgment in her favor, and the California Supreme Court affirmed. It is unclear whether the ruling directly benefited Amanda herself, whose "home" (the opinion implied) was an insane asylum. However, Ezra was certainly richly rewarded for his clever fraud. The bank's only remedy was to use further legal process in an attempt to recover the value of the promissory note and costs of the appeal.[42]

The *McCallister* case suggests that the distributional effects of homestead exemption within nuclear families must be analyzed with care. On one hand, the necessity of joint spousal alienation gave women unprecedented forms of control over family property. Of course, contemporary developments in married women's property law also gradually increased women's control over familial assets. By the end of the eighteenth century, many courts began exercising their equitable powers to recognize women's separate estates. The first wave of married women's property reform, beginning in the 1840s, broadened a woman's access to such protection by automatically sheltering her separate assets from seizure by her husband and his creditors.[43] A second wave of reforms, enacted immediately before and after the Civil War, gave married women property rights in their own (waged) labor as well as the capacity to act as legal agents on their own behalf.[44] In analogous fashion, homestead exemption formally disrupted

42. *Sec. Loan & Trust Co. v. Kauffman,* 108 Calif. 214 (1895).

43. As Richard Chused has noted, however, the intra-household effects of these statutes were less straightforward than they may have seemed. It is true that they afforded middle- and upper-class women at least minimal protection against husbands who might otherwise appropriate and dispose of their assets. Yet the statute could also, indirectly, inure to the benefits of husbands. A man secure in the knowledge that his wife would never challenge his authority over household finances—even if she held such authority "on paper"—could effectively protect his property from creditors by transferring title to his wife. Chused, "Married Women's Property Law: 1800–1850," 1403.

44. Reva Siegel, "The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930," *Georgetown Law Journal* 82 (1994): 2127–2211, 2145; Amy Dru Stanley, "Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation," *Journal of American History* 75 (1988): 471–500. Antebellum feminist arguments that

traditional patriarchal authority over the household property. Yet at the same time, the very provisions that strengthened women's control over family property could be exploited by their husbands for personal material gain. As the McCallister case reveals, homestead exemption had complex, and possibly contradictory, effects on the marital balance of power.

The necessity of joint spousal alienation was the most widespread of the homestead exemption's progressive features: nearly every U.S. state required both spouses to consent to the alienation of the homestead. Thus, in principle, a wife could bar outright the sale of land to which her husband held legal title.[45] Moreover, at some point before the turn of the century,

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women's domestic labor justified granting them an equal claim on family assets never bore political fruit. Reva Siegel, "Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880," *Yale Law Journal* 103 (1994): 1073–1217, 1076.

45. In at least thirty-three states, the terms of the statute and/or subsequent case law specifies the necessity of joint spousal alienation: Alabama, see *Moses v. McClain,* 82 Ala. 370 (1887) (construing Code 1876, § 2822); Arizona, see Paragraph 2141, Comp. Laws, quoted in *Luhrs v. Hancock,* 6 Ariz. 340, 344 (1899); Arkansas, see *Pipkin v. Williams,* 57 Ark. 242 (1893) quoting Statute of Acts 1887, p. 90 (March 17, 1887); California, see *Moss v. Warner,* 10 Ca. 296 (1858); Colorado see *Wright v. Whittick,* 18 Colo. 54, 57 (1892), see also *Drake v. Root,* 2 Colo. 685 (1875); Florida, see Florida Constitution of 1868, Art. 9 §1; see also Florida Constitution of 1885, Art. 10 § 1; Georgia, see *Frost v. Borders,* 59 Ga. 817 (1877), citing Code 1869, § 2047; Idaho, see *Kneed v. Halin,* 6 Id. 621 (1899), citing Rev. St. §2921; Illinois, see *Hotchkiss v. Brooks,* 93 Ill. 386 (1879); Indiana, see 2 R. S. p. 337 § 3, quoted in *Slaughter v. Detiny,* 10 Ind. 103, 103 (1858); Iowa, see Section 1990 of Code cited in *Stinson v. Richardson,* 44 Iowa 373 (1876), see also *Lunt v. Neeley,* 67 Iowa 97 (1885); Kansas, see *Helm v. Helm,* 11 Kan. 19 (1873), see also *Morris v. Ward,* 5 Kan. 239 (1869); Louisiana, see Louisiana Constitution of 1898, Art. 246 (altering earlier rule, illustrated by holding in *Allen, Nugent & Co. v. A. Carruth,* 32 La. Ann. 444 (1880); Michigan, see *McKee v. Wilcox,* 11 Mich. 358, 361; Minnesota, see *Williams v. Moody,* 35 Minn. 280, 281 (1886); Mississippi, compare Code § 1983, quoted in *Scott v. Scott,* 73 Miss. 575, 575 (1896), with earlier, contrary, rule expounded in *Thoms v. Thoms,* 45 Miss. 263 (1871); Missouri, see *Greer v. Major,* 114 Mo. 145, 154 (1893) citing Section 2689 Rev. St. 1879; Montana, see *American Savings & Loan Ass'n. v. Burghardt,* 19 Mont. 323, 326 (1897) quoting Comp. Stat. 1887, § 323, Div. 1; Nebraska, see *Larson v. Butts,* 22 Neb. 370, 374 (1887) citing Comp. St. c. 36, § 4, see also *Clarke v. Koenig,* 36 Neb 572 (1893); Nevada, see *Johns v. Singleton,* 15 Nev. 461 (1880) citing Const., art. IV., sec. 3 and Comp. L 186; New Hampshire, see *Folsom v. Folsom,* 68 N.H. 310, 311 (1895) citing Pub. St. c. 138, §§ 2, 4; North Carolina, see *Wittkowsky v. Gidney,* 124 N.C. 437 (1899) citing Const. Art. 10 § 8; North Dakota, see *Roby v. Bismarck Nat. Bank,* 4 N.D. 156 (1894); Oklahoma, see *Hall v. Powell,* 8 Okla. 276, 281 (Okla.Terr. 1899) citing St. Okl. 1893, tit. "Conveyances," c. 21 § 21; South Carolina, see S.C. Const. Art. III, § 28 (1895); South Dakota, see *Northwestern Loan & Banking Co. v. Jonasen,* 11 S.D. 566, 568 (1899) quoting Comp. Laws, § 2451; Tennessee, see *Couch v. Capitol Building & Loan Assn.,* 64 S.W. 340, 343 (1899) citing Article 11, § 11, Const.; Texas, see *Inge v. Cain,* 65 Tex. 75 (1885) citing Sec. 22 of Gen. Prov.; Utah, see *Nielson v. Peterson,* 30 Utah 391, 395 (1906), quoting R.S. 1898 §1155;

the majority of states that considered the question also permitted a wife to unilaterally designate her husband's land as a homestead, or at least to enforce an exemption on her family's behalf.[46] Finally, the majority of states deciding the issue also permitted wives to declare homestead on their separate property, so long as the husband's property was not already designated as such.[47]

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Vermont, see *Welch v. Miller,* 70 Vt. 108, 108 (1897) citing V.S. § 2189; Washington, see *Anderson v. Stadlmann,* 17 Wash. 433, 437 (1897) quoting Section 483, 2 Hill's Ann. Code; Wisconsin, see R.S. 1858, ch. 134, sec. 24, quoted in *Ferguson v. Mason,* 60 Wis. 377, 386 (1884); Wyoming, see Rev. St. Wyo. §§ 2780–2791 cited in *Arp v. Jacobs,* 3 Wyo. 489, 495 (1891). The right apparently did not exist in Kentucky. See *Brame v. Craig,* 75 Ky. 404 (1876) (holding that ch. 38, art. 13, sect. 9 of General Statutes, although requiring spousal consent for "mortgage, release or waiver" of homestead, did not restrain husband's general right of alienation). The question seems not to have been squarely presented in West Virginia, leaving its status unclear. Compare Ch. 193, Acts 1872–73, Sect. 11, quoted in *Moran v. Clark,* 30 W. Va. 358, 378 (1887) (stating that if husband wishes to waive the right to claim homestead exemption at the time of contracting a debt, his wife must join him in such waiver) with dicta in *Moran v. Clark,* 30 W. Va. 358, 378 (1887) (emphasizing right of homestead owner to sell or encumber it) and *Speidel v. Schlosser,* 13 W. Va. 686, 694, 697 (1879) (opining, in dicta, that legislature did not intend to interfere with "man's dominion over his own property," nor to make it subject to "the whims of an inconsiderate wife, and the foolish caprice of insubordinate children").

46. In at least thirteen states, at some point before the turn of the century, the constitution, statutes, and/or case law suggested (and in some instances squarely held) that wives could claim homestead protection on their husbands' property. For Arkansas, see *Hollis v. State,* 59 Ark. 211, 27 S.W. 73 (1894); California, see Civ. Code § 1262, quoted in *Farley v. Hopkins,* 79 Cal. 203, 205 (1889); Georgia, see *Bowen v. Bowen,* 55 Ga. 182 (1875) (wife could apply for exemption of her husband's homestead property as long as husband did not object on the record as a party defendant); Idaho, see *Wilcox v. Deere,* 5 Id. 545 (1897) (wife's alleged filing of homestead held invalid, apparently not because her legal status implied a *per se* bar, but because couple colluded in attempt to defraud creditors); Iowa, see *Boling v. Clark,* 83 Ia. 481 (1891); Kentucky, see *Hemphill v. Haas,* 88 Ky. 492 (1889); Michigan, see *Comstock v. Comstock,* 27 Mich. 97 (1873); Missouri, see Section 2689, Rev. St. 1879, quoted in *Greer v. Major,* 114 Mo. 145, 154 (1893); New Mexico, see Laws 1887, pp. 75, 76, §§ 13, 16, quoted in *U.S. v. Lesnet,* 9 N.M. 271 (1897); Ohio, see *Ditty v. Ellifritz,* 4 Ohio C.D. 465 (1894) citing Rev. St. § 5435; South Dakota, see Sec. 2458 Code of 1877, quoted in *Hesnard v. Plunkett,* 6 S.D. 73, 78 (1894); Tennessee, see *Rhea v. Rhea,* 83 Tenn. 527, 527 (1885); Utah, see R.S. 1898 § 1150, quoted in *Nielson v. Peterson,* 30 Utah 391, 395 (1906). Married women apparently did not enjoy such rights in North Carolina, West Virginia, and Illinois. See *Finley v. Saunders,* 98 N.C. 462, 464 (N.C. 1887); W. Va. Const. Art., VII, § 48 and Acts of 1872–73, p. 554, quoted in *Speidel & Co. v. Schlosser,* 13 W. Va. 686, 697–98 (1879) (limiting class of potential claimants to husbands, parents, and infant children of deceased parents), *Moran v. Clark,* 30 W. Va. 358, 378 (1887); *Kenley v. Hudelson,* 99 Ill. 493 (1881) (suggesting in dicta that if husband and wife live together that homestead should be set off to husband rather than wife).

47. There are at least seventeen states in which the constitution, statutes, and/or case law suggest that either spouse could claim homestead on the wife's property: Alabama, see

Such judicial liberality was not universal. A cluster of postbellum decisions by several Southern courts and the New Jersey Chancery barred married women from declaring homestead on the theory that the common law designated the husbands, not their wives, as the heads of household.[48]

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*Beard v. Johnson,* 87 Ala. 729 (1889); Arkansas, see *Thomson v. King,* 54 Ark. 9, 14 S.W. 925, 926 (1890); California, see *Gambette v. Brock,* 41 Cal 78, 84 (1871); Colorado, see *McPhee v. O'Rourke,* 10 Colo. 301, 305; Kansas, see *Kansas & T. Coal Co. v. Judd,* 6 Kan. App. 487, 50 P. 943, 944 (1897); Michigan, see *Orr v. Shraft,* 22 Mich. 260, (1871), see also *Kruger v. Le Blanc,* 75 Mich. 424, 429–30 (1889) citing How. Ann. Stat. §§ 7721, 7723, 7728; Mississippi, see *Partee v. Stewart,* 50 Miss. 717, 717 (1874); Montana, see *Mitchell v. McCormick,* 22 Mont. 249, 56 P. 216 (1899); Nebraska, see Sec. 2, c. 36, Comp Stat., quoted in *Klamp v. Klamp,* 58 Neb. 748, 751 (1899) (noting necessity of wife's consent); Nevada, see Comp. L. 186 Sec. 1, quoted in *Lachman v. Walker,* 15 Nev. 422 (1880); North Carolina, see *Finley v. Saunders,* 98 N.C. 462, 463 (1887) (implying in dicta that wife may claim homestead exemption in her own right); Ohio, see *Hill v. Myers,* 46 Ohio St. 183, 192 (1889); South Carolina, see *Norton v. Bradham,* 21 S.C. 375 (1884); South Dakota, see Sec. 2449 Comp. Laws, quoted in *Hesnard v. Plunkett,* 6 S.D. 73, 76 (1894); Utah, see R.S. 1898 § 1148, quoted in *Nielson v. Peterson,* 30 Utah 391, 85 P. 429, 430 (1906) (specifying necessity of wife's consent); Washington, see *Wiss v. Stewart,* 16 Wash. 376 (1897); Wyoming, see *Arp v. Jacobs,* 27 P. 800, 802 (1891). The following states held (or at least implied in dicta) to the contrary: Illinois, see *Kenley v. Hudelson,* 99 Ill. 493 (1881) (apparently resting holding that married woman could claim homestead exemption on her own property on fact that she was permanently separated from her husband); Indiana, see *Holman v. Martin,* 12 Ind. 553, 553 (1859); Oklahoma, see *McGinnis v. Wood,* 4 Okla. 499 (1896); Tennessee, see *Turner Bros. v. Argo & Co.,* 89 Tenn. 443, 445 (1890) and *Producers Nat'l. Bank v. Cumberland Lumber Co.,* 100 Tenn. 389, 390 (1898).

In two states, high courts judges allowed a married female claimant to claim homestead exemption without recognizing her as the head of a family. In 1899, Montana's high court allowed a married woman to claim exemption on her own property without even adverting to the potential relevance of gender to her headship status. See *Mitchell v. McCormick,* 22 Mont. 249 (1899). What makes the latter holding so curious is that just two years earlier, the same court had emphatically rejected the homestead claim of another property-owning wife on the grounds that her husband, not she, was the head of the family, notwithstanding her role as sole family breadwinner. See *Watterson v. E. L. Bonner Co.,* 19 Mont. 554 (1897). Meanwhile, in Georgia, a married woman could not claim homestead exemption on her own land as the head of a family unless she was living separate and apart from her husband. See Code 1873, § 2019, cited in *Bechtoldt v. Fain,* 71 Ga. 495 (1883). See also *Camp v. Smith,* 61 Ga. 449 (1878). However, under the Constitution of 1877, a married woman with dependent daughters was permitted to exempt her separate estate as a person "having the care and support of dependent females of any age, who is not the head of a family." See *Johnson v. Little,* 90 Ga. 781 (1893).

48. Under Louisiana law, a wife could claim homestead exemption if and only if the other members of her family were solely dependent upon her for support. See *Fuselier v. Buckner,* 28 La.Ann. 594, 595 (1876); Hardin v. Wolf, 29 La. Ann. 333 (1877) (overruled in part by *Allen v. Carruth,* 32 La. Ann. 444 (1880); and *Taylor v. McElvin,* 31 La.Ann. 283 (1879). The leading cases in Georgia include *Lathrop v. Soldiers' Loan & Bldg. Ass'n,* 45 Ga. 483, 485 (1872), *Camp v. Smith,* 61 Ga. 449, 449 (1878), *Neal v. Sawyer,* 62 Ga. 352

Typical of this line of case law was a decision by the Louisiana Supreme Court in 1876. In rejecting the claim of a married woman who was the family's primary breadwinner, the court opined that "[d]uring the marriage the husband is the head of the family, upon whom devolves the support of the family, and whether, in exceptional cases, the wife may have to contribute to the support of the family or not can not affect the interpretation of this statute."[49]

Significantly, even those decisions *upholding* a married woman's right to claim homestead protection often sought to avoid formally designating her as the family head. For example, while the South Carolina Supreme Court allowed a married woman to claim exemption on her separate property in 1884, it took pains to construe the statute in a convoluted manner that formally preserved the notion that her husband, not she, was the family head.[50] Only one state championed a wife's right to claim homestead exemption while openly endorsing the notion that she could qualify as household head in her own right. In a remarkable opinion, the Colorado Supreme Court in 1887 declared that "[u]nder our statutes [reforming married women's property law in 1874] the married woman never did occupy the dwarfed position that afflicted her under the common law. . . . in the legislative mind, the husband and wife both possess the character of a householder and head of a family. . . ."[51] It is probably not accidental

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(1879), *Robson v. Walker,* 74 Ga. 823 (1885), and *Johnson v. Little,* 90 Ga. 781, 17 S.E. 294 (1893). The Arkansas case exemplifying this trend is *Rosenberg v. Jett,* 72 F. 90 (C.C.E.D. Ark. 1896), although the court's statements technically qualify as dicta since the court ruled against the wife on other grounds. (Oddly, the 1896 opinion also seems to conflict with an earlier opinion, *Memphis & Little Rock Ry. v. Adams,* 46 Ark. 159, 162–3 [1885].) For Tennessee, see *Turner v. Argo,* 89 Tenn. 443, 444–45 (1890). In *Muir v. Howell,* 37 N.J. Eq. 39 (1883), the New Jersey Chancellor denied the female claimant the benefit of the exemption because the "principles of law on which [her] claim of right rests are disputed" among the states, even though the equities of the case obviously pointed strongly in her favor (she was admitted to be the sole means of support for both her husband and her children). For Montana, compare *Watterson v. E. L. Bonner Co.,* 19 Mont. 554 (1897) (denying homestead claim of married woman supporting four children and indolent husband, on express ground that her husband was still legally head of family) and *Mitchell v. McCormick,* 22 Mont. 249 (1899) (granting homestead exemption to married woman on her own property without discussing relevance of her gender).

49. *Fuselier v. Buckner,* 28 La.Ann. 594, 595 (1876). Also see *Taylor v. McElvin,* 31 La.Ann. 283 (1879) (also holding that married woman without her own dependents cannot claim homestead).

50. *Norton v. Bradham,* 21 S.C. 381 (1884). Also see *Bowen v. Bowen,* 55 Ga. 182, 182 (1875), *Beard v. Johnson,* 87 Ala. 729 (1889), *Partee v. Stewart,* 50 Miss. 717, 721 (1874), *Hill v. Myers,* 46 Ohio St. 183, 192–93 (1889), *Moss v. Warner and Wife,* 10 Cal. 296, 297 (1858).

51. *McPhee v. O'Rourke,* 10 Colo. 301, 306 (1887).

that Colorado was the only state willing to take this bold doctrinal step: by the mid 1880s, Colorado feminists had begun spearheading a broad-based campaign for women's suffrage. Colorado soon became the first state in the nation to approve women's suffrage by popular election and elected the first three female state legislators in U.S. history.[52]

To the extent that legal doctrine is construed as an implicit reflection of cultural ideology, the rights granted to wives under the homestead exemption laws launched an unusually direct assault on the twin premises of male headship and family unity. Homestead exemption arguably went further than either dower or married women's property reform in blurring the boundary between "woman's sphere" and the market. Unlike dower, a wife's rights did not merely encumber land sales by raising transaction costs, increasing uncertainty, and possibly lowering the purchase price.[53] Instead—far more radically—a wife's failure to consent voluntarily to the sale of homestead property rendered the entire transaction null and void.[54] Moreover, she could exercise her rights not only after her husband's death, but also during his lifetime and at his expense. Meanwhile, unlike married women's property reforms, a married woman's influence over the disposition of property extended not only to her own assets, but also to real property owned by her husband. Wives' newfound right to veto their husbands' disposition of family land challenged the common law fiction of marital unity, casting doubt on the wisdom of making men the sole trustees of family resources.

The possibility of a married woman's intervening if her exploitative or feckless husband imperiled the family's survival by selling the family home was, in fact, one of the very rationales given for the necessity of joint alienation. As the Kansas Supreme Court intoned in 1869, "The homestead was not intended for the play and support of capricious husbands merely, nor can it be made liable for his weaknesses or misfortunes. It was not established for the benefit of the husband alone, but for the benefit of the

52. See Eleanor Flexnor, *Century of Struggle: The Woman's Rights Movement in the United States* (Cambridge, Mass.: Belknap Press, 1996), 168, 214.

53. Ariela Dubler has argued that dower—a widow's common law right to a life estate in one-third of her deceased husband's real property—implicitly challenged men's role as household heads. Unless a wife relinquished her dower rights, "behind any land transfer loomed the specter of a widow knocking at a buyer's door many years later to claim her dower rights in a long-ago sold piece of property." Ariela Dubler, "In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State," *Yale Law Journal* 112 (2003): 1641–1716, 1664. See also Linda K. Kerber, *Women of the Republic: Intellect and Ideology in Revolutionary America* (Chapel Hill: University of North Carolina Press, 1997), 9–10, 123–34, 146–48, 170.

54. See Waples, *A Treatise on Homestead and Exemption,* 383–87.

family and society—to protect the family from destitution, and society from the danger of her citizens becoming paupers."[55]

The other important (albeit less widespread) characteristics of the statutes—married women's right to claim homestead exemption in their own right on their own and/or their husband's land—also challenged traditional, gendered understandings of marital roles and the common law ideal of family unity. Exempting the family homestead dramatically altered a family's relationship to the market economy by constraining its access to consumer credit. Choosing whether to designate family land as homestead property, and memorializing that choice through the use of legal process, was quintessentially a managerial task that fell within the realm of a husband's traditional authority. To be sure, the notion of wives shouldering "male" responsibilities was not unprecedented. As early as colonial times, married women often functioned as "deputy husbands," performing "men's" work on an as-needed basis, especially during their husbands' absence.[56] Also, to a limited extent, eighteenth- and nineteenth-century policymakers were willing to disregard the premise of family unity to protect wives' material interests. For example, it was standard practice in the colonies for American jurists to privately examine married women to ensure that their conveyance of ownership and/or dower rights in real property was not the result of male coercion.[57] Nevertheless, none of these practices directly challenged the notion that the husband controlled his own as well as joint family assets, or that a married woman would function as her husband's agent, in conformity with his wishes, in daily affairs. A wife's newfound ability to veto the sale of realty to which her husband held sole title, and to set apart a homestead on land without his consent, posed a more direct ideological challenge to the settled linkage between land ownership, household headship, and patriarchal authority.

These progressive aspects of homestead exemption did not go unnoticed among contemporary jurists. In the introduction to his treatise on homestead exemption, for example, Waples observed that an important consequence of homestead exemption was its "tend[ency] to promote the individualism of the wife in her rights of contract and property disposition

55. *Morris v. Ward,* 5 Kan. 239 (1869).

56. Laurel Thatcher Ulrich, *Good Wives: Image and Reality in the Lives of Women in Northern New England, 1650–1750* (New York: Knopf, 1982); Jeanne Boydston, *Home and Work: Housework, Wages, and the Ideology of Labor in the Early Republic* (New York: Oxford University Press, 1990), 14, 16; Lisa Norling, *Captain Ahab Had a Wife: New England Women and the Whalefisher, 1720–1870* (Chapel Hill: University of North Carolina Press, 2000).

57. Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986), 15–16.

in the face of previously established jurisprudence."[58] State court judges often expressed similar sentiments.[59] Thus, homestead exemption should be considered along with married women's property acts as a legal reform that reshaped, at least formally, the distribution of legal entitlements between nineteenth-century spouses.

Yet despite the progressivity of many of its doctrinal provisions, it is far from certain that homestead exemption improved the relative material position of most married women. Given the manifold opportunities for strategic behavior by one spouse (or collusive behavior among spouses)—combined with most nineteenth-century husbands' pervasive *de facto* control over marital decision making—the technical restraints on men's property-holding prerogatives may, ironically, have accrued primarily to the benefit of married men. Unscrupulous husbands like James McCallister could—and, not infrequently, did—execute land sales without their wives' consent before bringing suit (often joined by their wives) to invalidate the conveyance.[60] As Richard Chused has pointed out, married women's property laws had the similarly perverse consequence of facilitating debtor fraud, since husbands could render their property immune from seizure by transferring legal ownership to their wives.[61] Appellate cases in which a married woman claimed an interest in homestead property adverse to that of her husband are scarce.[62] Cunning husbands could also manipulate "loopholes" in the common law definition of domicile to evade the necessity of joint spousal consent. Since the domicile of the wife and children traditionally followed that of the husband and father under coverture, one treatise writer noted that a husband might recast his unilateral alienation of homestead property as a necessary incident to an abandonment of the homestead undertaken

58. Waples, *A Treatise on Homestead and Exemption,* xcviii.

59. See, e.g., *Morris v. Ward,* 5 Kan. 239 (1869); *Connally v. Hardwick,* 61 Ga. 501 (1878); *McPhee v. O'Rourke,* 10 Colo. 301, 306 (1887); *Gunnison v. Twitchel,* 38 N.H. 62 (1859).

60. See, e.g., *Morris v. Sargent,* 18 Ia. 90 (1864); *Ayres v. Probasco,* 14 Kan. 175 (1875); *Coker v. Roberts,* 71 Tex. 597 (1888); *Partee v. Stewart,* 50 Miss. 717 (1874); *Gleason v. Spray,* 81 Cal. 217 (1889); and *Phillips v. Stauch,* 20 Mich. 369 (1870).

61. Chused, "Married Women's Property Law: 1800–1850," 1402–3. See, e.g., *Citizens' Bank of Garnett v. Bowen,* 21 Kan. 354 (1878) (fact pattern suggesting that married couple deliberately colluded in order to defraud the husband's creditors).

62. See *Hemphill v. Haas,* 88 Ky. 492 (1889) (wife sued alone to recover homestead property after her husband refused to unite with her in suit); *Scott v. Scott,* 73 Miss. 575 (1896) (wife sued to set aside husband's conveyance of homestead); *Thoms v. Thoms,* 45 Miss. 263 (1871) (wife sought, unsuccessfully, to set aside husband's conveyance of homestead); *Helm v. Helm,* 11 Kan. 19 (1873) (held that married woman, whom husband and purchaser had forced into signing homestead deed by threatening her life, could bring suit to void her signature).

in preparation for a change of domicile.[63] Although one state high court foreclosed this possibility, three supported the proposition that a husband's right to change the family domicile trumped (and thus effectively obliterated) his wife's statutory right to prevent unilateral alienation.[64]

At least one postbellum feminist questioned whether the apparent benefits to married women of homestead exemption and married women's property law acts outweighed the enhanced temptation to defraud creditors. Writing in the pages of a prominent suffragist periodical, Jane Slocum, an early female graduate of Michigan Law School, criticized the homestead acts and married women's property reforms as "the result of a false application of a true principle of chivalry" that "seeks to make comfortable and attractive, a condition of dependence." Rather than "following the current of progress" by placing women "on a more independent footing," she argued, the acts were likely to weaken "Woman's honesty," "weaken[] family ties," and "destroy[] the jealousy of the wife for honor of her husband. . . ."[65] Even to some of her contemporaries, Slocum's critique may have seemed overdrawn. For example, Emily Haddock, who graduated from the University of Iowa Law School in the 1870s, recalled that "[m]y subject [for the Commencement address, which she was asked to deliver] was 'Homesteads,' in which I tried to bring out the great good to women as well as men that had grown out of these laws."[66] Yet Slocum might have been correct that one of the statutes' primary material effects was to

63. See Thompson, *A Treatise on Homestead and Exemption Laws,* 230–31.

64. Compare *Guiod v. Guiod,* 14 Cal. 506 (1860) (property owner automatically relinquished homestead right by releasing possession, and wife was obliged to follow); *McDonald v. Crandall,* 43 Ill. 231 (1867) (abandonment of homestead automatically triggers forfeiture of homestead rights as long as no family member stays behind); and *Scott v. Scott,* 73 Miss. 575. 575 (1896) (opining that since husband has "recognized right" to fix family domicile, his departure from homestead strips it of its status as such, leaving him free to convey it unilaterally if he holds legal title) with *Morris v. Ward,* 5 Kan. 239 (1869) (man cannot defeat his wife's right to bar alienation of homestead by abandoning property). Of course, in jurisdictions or time periods in which joint spousal alienation was not explicitly required, courts did not hesitate to withhold homestead exemption rights from wives and widows. See, e.g., *Jordan v. Godman,* 19 Tex. 273 (1857) (holding that wife's willingness to accompany husband to new home out of state equivalent to abandonment, albeit during period when necessity of joint spousal alienation was not established under state law), and *Thoms v. Thoms,* 45 Miss. 263 (1871) (man's abandonment of homestead held enforceable since wife's consent not required).

65. Jane M. Slocum, "The Law of Coverture," *The Woman's Journal,* September 5, 1874, 289.

66. See Barbara G. Drachman, *Women Lawyers and the Origins of Professional Identity in America: The Letters of the Equity Club, 1887 to 1890* (Ann Arbor: University of Michigan Press, 1993), 262–65.

encourage husbands (often with the complicity of their wives) to evade their creditors' grasp.

In the final analysis, then, homestead exemption likely affected the balance of marital power in complex, shifting, and contradictory ways. On one hand, several of its salient features seemed to disrupt hallowed assumptions about the connection between marriage, masculinity, and economic stewardship. In authorizing a wife to "veto" her husband's decision to sell his land, state lawmakers implicitly conceded that husbands might not always act in their families' best interests, and that it might further family stability for married women occasionally to assume supervisory authority. Even more challenging to traditional patriarchal authority—and, perhaps for this reason, less widely adopted—was married women's newfound right to make unilateral decisions regarding the treatment of land, thereby reconfiguring the family's exposure to market risk and access to consumer credit. Such provisions seemed to point the way to a new, "functional" model of marital relations, in which each spouse's claim to household headship was determined not by gender, but by his or her stewardship of the household economy. Yet it is unclear whether the egalitarian thrust of these doctrinal innovations significantly altered the felt experience or economic circumstances of most married women. Although some Victorian wives might have used their new rights to bargain more effectively over household assets, or even to directly challenge their husband's authority in court, appellate court decisions provide scant evidence of such behavior. Ironically, it is much easier to identify cases in which married men were the statutes' immediate material beneficiaries. In the first instance, a man could render his property immune from seizure simply by getting married. Some husbands exploited the acts for even greater advantage by unilaterally selling or encumbering homestead property (often through outright fraud), then using their wives' lack of consent as grounds to invalidate the transaction.

## III. Homestead Exemption Rights in the Wake of Family Dissolution

When Thomas and Mary Byers divorced in 1864, the property division seemed straightforward: Thomas was to keep the forty-acre homestead, and Mary was to receive $2,000 in alimony. For Mary, however, collecting alimony turned out to be anything but simple. When the sale of couple's personal property garnered only $1500, Mary sued to compel the sale of the homestead to recover the $500 remainder. Thomas objected on the grounds that he was still the "head of a family" entitled to an exemption, and thus Mary—like any other creditor—had no recourse.

Although the trial judge sided with Mary, the Supreme Court of Iowa took a different view:

> [Thomas] is the head of a family, and did not cease to be such by reason of the divorce. [Mary], by the divorce, ceased to be a member of *his* family. . . . In the divorce suit [Mary] obtained no special order in relation to the children (if there are any), or the property of her husband. . . . The wife, it is true, should be paid her support. But it does not follow that her right to support is greater than the right of the children to shelter. Suppose in this case that there is a family of children, and that the property in question is all that is left. Should this be sold to pay the wife, and the children left without a home?[67]

What makes the court's holding so remarkable is that the couple probably had no minor children. (Neither the court below, nor the divorce agreement, nor the parties themselves ever alluded to any children. Since the two had been married for forty-one years, any children they had would have long since reached the age of legal majority.) In light of this fact, the ruling seems motivated less by judicial regard for the "family of children"—which the court itself conjures into existence—than by a reluctance to strip Thomas of his land and headship status, even at the cost of depriving Mary of a quarter of her alimony.

As the *Byers* case illustrates, marital dissolution vastly complicated the judicial task of allocating homestead exemption rights. By the time Iowa's high court decided the case, divorce had erupted in the national consciousness as a complex, contentious cultural symbol of social decay. On one hand, early Victorian reformers argued that divorce should be permitted not only for adultery or nonsupport, but also for subtler forms of abuse such as physical cruelty, intemperance, and temperamental incompatibility. Such arguments carried the day in many state legislatures in the 1830s, leading to a wave of permissive divorce laws.[68] The divorce rate began rising after 1840 even in states that did not liberalize their laws, suggesting that the trend was not caused solely by the enhanced ease of legal process.[69] As divorce became more common, a broad-based coalition of postbellum lawmakers, academics, journalists, and religious leaders launched a counterattack, accusing the reform movement of promoting moral laxity and

67. *Byers v. Byers,* 21 Ia. 268 (1866) (emphasis supplied).

68. Norma Basch, *Framing American Divorce: From the Revolutionary Generation to the Victorians* (Berkeley: University of California Press, 1999), 8. Indiana's law, for example, was so permissive it soon became "the first divorce mill of the nineteenth century." Ibid.

69. See Steven Mintz and Susan Kellogg, *Domestic Revolutions: A Social History of American Family Life* (New York: Free Press, 1988), 61; Lawrence Friedman, *Private Lives: Families, Individuals, and the Law* (Cambridge: Harvard University Press, 2004), 33–34.

family dissolution.[70] By the century's end, social reformers also began to identify marital desertion, "the poor man's divorce," as an important and growing social problem that required government attention.[71]

Against this backdrop of increasing marital instability, adjudicating the homestead rights of fractured nuclear families surely was a perplexing endeavor. The leading rationale for homestead exemption, after all, was family preservation. How could homestead exemption help preserve a family that had already fallen apart? Waples, in answer to this conundrum, drew a bright line in his turn-of-the-century treatise. "It is not still a homestead," Waples declared, "when the property loses that character on the dissolution of the marriage. . . . The reason . . . disappears when both cease to be one. No family, no homestead."[72] Despite its compelling logic, Waples's common-sense approach (which he limited to divorce) was not shared by most state jurists. Detailed analysis of high court opinions suggests that it was less the legal status of the marriage than the gender of the claimant that explains most appellate decision making.

Marital desertion proves the point. With few exceptions, a husband's homestead rights survived marital desertion by either spouse, even if he lost all contact with his dependents. The traditional common law precept that "the residence or domicile of the husband and father of the family will determine the place of residence of the wife and children" often was the doctrinal hook used to reach this result.[73] As Waples put it in his turn-of-the-century

70. Michael Grossberg, *Governing the Hearth: Law and Family in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1985), 83; Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge: Harvard University Press, 2000), 107; John C. Spurlock, *Free Love: Marriage and Middle Class Radicalism in America, 1825–1860* (New York: New York University Press, 1988).

71. Michael Willrich, "Home Slackers: Men, the State, and Welfare in Modern America," *Journal of American History* 87 (2000): 470–71. See also Gordon, *Pitied but Not Entitled,* 18–20.

72. Waples, *A Treatise on Homestead and Exemption,* 70.

73. Thompson, *A Treatise on Homestead and Exemption Laws,* 230. Seemingly exceptional cases, in which a married man's homestead rights were jeopardized by the fact that his wife was not living with him when he purchased the property, or subsequently abandoned him, include *Riddick v. Turpin,* 79 Tenn. 478 (1883) (wife's desertion obliterated husband's homestead rights); *Cary v. Tice,* 6 Cal. 625, 625 (1856) (wife's absence during husband's purchase of property failed to impress it with character of homestead); and *Benedict v. Bunnell,* 7 Cal. 245 (1857) (same). Interestingly, Alabama and Pennsylvania reached similar holdings in early exemption cases that preceded the passage of homestead exemption laws. See *Allen v. Manasse,* 4 Ala. 554 (1843), and *Starrett v. Wynn,* 17 Serg. & Rawle 130, 17 Am.Dec. 654 (Pa., 1828). Also, as noted above, in some jurisdictions a married man could alienate the homestead (and, where applicable, circumvent the necessity for joint spousal consent) by relocating to a new residence. See *Guiod v. Guiod,* 14 Cal. 506 (1860); *McDonald v. Crandall,* 43 Ill. 231 (1867); *Burson v. Dow,* 65 Ill. 146 (1872); *Jordan v. Godman,* 19 Tex. 273 (1857); *Thoms v. Thoms,* 45 Miss. 263 (1871).

volume, "[a]s the representative of the family, [the husband] controls the home, makes the selection of the property [the wife and children] are to live upon, and may change his domicile at will. . . . His domicile is theirs. . . . [H]is temporary absence, while the right to return to the hearth-stone remains, and while his home continues to be theirs, does not affect his family headship."[74] In short, even a man's prolonged separation from his family rarely jeopardized his homestead rights, unless he literally banished his wife and children from the property. Neither, by similar logic, could the desertion of a man's wife jeopardize his status as head of the family.[75] In effect, then, a married man's homestead rights generally endured unless and until he permanently severed his marital ties.

Spousal desertion affected women's homestead rights in more complex ways. In one common scenario, a deserted wife sought to preserve the homestead on which she was living alone following her husband's desertion. Under English common law, a woman whose husband abjured the realm was "exempted from the disabilities of coverture [and] . . . might in all things act as if her husband were dead. . . ."[76] By the early nineteenth century, many American courts relied on this precedent to grant deserted wives privileges otherwise reserved to single women.[77] Most states extended such liberality into the realm of homestead exemption.[78] In 1867, for example, the Illinois Supreme Court held that "where the husband abandoned his wife and family, she might remain and hold the homestead against his acts, or those of his creditors."[79] The court went even further in 1881, allowing a married woman with children to claim homestead protection even though she and her husband had separated by mutual consent.[80] In

74. See Waples, *A Treatise on Homestead and Exemption,* 60–61.

75. See ibid., 66. See also *Gates v. Steele,* 48 Ark. 539, 542–43 (1887) (opining that the claimant "was a married man, and the head of a family. He owed his wife and son protection and support. The wife, though living separate [for the past eight years with the couple's only son] might have returned to her duty at any moment. . . .[I]t is hard to understand how the voluntary desertion of his wife could alter the legal status of [the husband]"). But see *Riddick v. Turpin,* 79 Tenn. 478 (1883) (contrary holding).

76. See *Gregory v. Paul,* 15 Mass. 30, 32, & n. 1–8 (1818).

77. See, e.g., *Gregory v. Paul,* 15 Mass. 31 (1818), and *Starrett v. Wynn,* 17 Serg. & Rawle 130, 17 Am.Dec. 654 (Pa. 1828). Also see *Rhea v. Rhenner,* 26 U.S. 105, 108 (1828) (describing law as "settled" that "when the wife is left without maintenance or support, by the husband, has traded as a feme sole, and has obtained credit as such, she ought to be liable for her debts").

78. See, e.g., *Keiffer v. Barney,* 31 Ala. 192 (1857). *Finley v. Saunders,* 98 N.C. 462, 464 (1887).

79. *Titman v. Moore,* 43 Ill. 169, 173 (1867). Also see *Mix v. King,* 66 Ill. 145 (1872); *Alexander v. Alexander,* 52 Ill.App. 195 (3d.D. 1893); and *White v. Clark,* 36 Ill. 285 (1865).

80. *Kenley v. Hudelson,* 99 Ill. 493 (1881).

1871, the California Supreme Court decided the claim of a married woman supporting her sister and niece, whose husband had never resided on the homestead. Although conceding that "the husband is the head of the family, and . . . his residence is the residence of his wife," the court nevertheless held that it was "entirely consistent with the spirit of the Homestead Act that the wife having a family of her own should be allowed to select and establish a homestead by her own residence upon it with her family," unless the husband demonstrably had "a home or fixed residence elsewhere, or any other family than his wife."[81] Similar protections were also made available in Kentucky, Ohio, Missouri, and Minnesota.[82]

In another frequent scenario, an "absentee widow" who had left her husband many years earlier showed up after his death to claim survivorship rights. Confronted with this fact pattern, four states reasoned that the wife's prior desertion was immaterial from a doctrinal perspective. After all, as long as the couple did not divorce during the husband's lifetime, the wife retained her legal status as wife and thus her rights to his property. The Arkansas Supreme Court, for example, opined that "[i]n this state it is held that the domicil[e] of the wife follows that of the husband. . . . the fact that she abandons her husband . . . will not form an exception, nor cause her to forfeit her right to the homestead. . . . as long as the relation of husband and wife existed by law . . . however reprehensible her conduct morally may have been."[83] The high courts of California, Louisiana, and Vermont followed suit.[84] Yet eight other states—a decisive majority of those that considered the question—held otherwise. Rather than focusing on the absentee widow's legal status, most of these states focused on her moral culpability (or lack thereof) for the breakup of the family. If the reason for her desertion—such as domestic abuse or her husband's infidelity—seemed to absolve her of blame, her homestead rights were preserved. If she appeared to be the guilty party, however, she was stripped of her

81. See *Gambette v. Brock,* 41 Cal. 78, 84 (1871).

82. *Warren v. Block,* 1 Ky.L.Rptr. 121, 10 Ky.Op. 650 (1880); *Dittey v. Ellifritz,* 8 Ohio Cir. Ct. R. 278 (1894); Missouri Acts of 1873, p. 16, § 1; R.S. § 2689; *Michaelis v. Michaelis,* 43 Minn. 123, 124–25 (1890); Waples, *A Treatise on Homestead and Exemption,* 964. Also see *Blandy v. Asher,* 72 Mo. 27 (1880) (discussing effect of recent amendments).

83. *Duffy v. Harris,* 65 Ark. 251, 254 (1898).

84. For cases holding that a wife who deserts her family does *not* forfeit her homestead rights, see, e.g., *Duffy v. Harris,* 65 Ark. 251 (1898), *Johnson v. Turner,* 29 Ark. 280 (1874); *Lies v. De Diablar,* 12 Cal. 327 (1859) (abandonment and adultery on the part of the wife will not defeat or impair her rights to the homestead); *Succession of Daniel Christie,* 20 La. Ann. 383 (1868) (voluntary abandonment and adultery on part of wife will not impair her homestead rights); *Lindsey v. Brewer,* 60 Vt. 627 (1888) (woman who deserted her husband without sufficient cause does not thereby lose homestead rights).

survivorship rights. Texas went even further in holding that any married woman who "voluntarily withdr[ew] from the narrow but sacred precincts of that home in which she was protected by law . . . and [was] no longer found a priestess ministering at the household altars" automatically lost her homestead privileges, even if she had fled from domestic abuse.[85]

As compared to marital desertion and separation, divorce did even more to strip the marriage itself (and both spouses) of legal status. A divorced man lost his status as "husband" just as fully and irrevocably as a divorced woman lost her status as "wife." Yet as with marital desertion, state high court appeals involving male and female claimants reveal markedly different trends.

A majority of high courts that confronted the issue (six out of eleven) held that a divorced man could keep his headship status and exemption

85. *Trawick v. Harris,* 8 Tex. 312, 317–18 (1852). See also *Stanton v. Hitchcock,* 64 Mich. 316 (1887) (wife of bigamist, who remarried after abandoning her and relocating to another state, had no homestead rights after his death); *Farwell Brick v. McKenna,* 86 Mich. 283 (1891) (wife who abandoned husband under circumstances that would not entitle her to a divorce lost homestead rights); *Prater v. Prater,* 87 Tenn. 78 (1888) (woman who deserted husband without cause and eloped with another man to another state forfeited homestead rights); *Bonnell v. Smith,* 53 Ill. 375 (1870) (wife's rights are not jeopardized if she is meritorious party in divorce proceeding and there is evidence of domestic abuse); *Vanzant v. Vanzant,* 23 Ill. 536 (1860) (wife who abandoned homestead prior to divorcing her husband, for fear of personal injuries, did not jeopardize her homestead claim since she was the meritorious party in the divorce action); *Barker v. Dayton,* 28 Wis. 367 (1871) (wife who left home retained homestead rights since she suffered from domestic abuse); *Keyes v. Scanlan,* 63 Wis. 345 (1885) (following Barker v. Dayton); *Meader v. Place,* 43 N.H. 307 (1861) (where husband suspected of having illicit affair with wife's sister, voluntary separation of husband and wife held not to jeopardize wife's homestead claims after husband's death); *Hairston v. Hairston,* 27 Miss. 704, Miss.Err.App. (1854) (widow did not lose homestead rights by virtue of husband's abandonment); *Lamb v. Wogan,* 27 Neb. 236 (1889) (where husband abused wife and step-daughters, and deserting wife visited husband during his subsequent illness, her desertion did not jeopardize her homestead rights); *Dickman v. Birkhauser,* 16 Neb. 686 (1884) (wife who abandons her husband without cause sufficient to make her the meritorious party in subsequent divorce action forfeits her homestead rights); *Trawick v. Harris,* 8 Tex. 312, 317–18 (1852) (wife who deserted husband and moved to another state forfeited her homestead rights, even though no evidence pointed to her having done so "under circumstances that would have disgraced and branded her with infamy"); *Meyer v. Claus,* 15 Tex. 516 (1855) (wife who remained in foreign country while husband acquired a home in the state was not entitled to homestead, despite evidence that she was deliberately defrauded by her husband and his mistress); *Earle's Ex'ors v. Earle,* 9 Tex. 630 (1853) (wife who abandoned husband and lived apart from him held not entitled to homestead, despite evidence of husband's mistreatment); *Sears v. Sears,* 45 Tex. 557 (1876) (wife who abandons husband, even if some evidence suggests he abused her, loses homestead rights); *Cockrell v. Curtis,* 83 Tex. 105, 18 S.W. 436 (1892) (wife who abandons husband loses homestead rights).

rights even if he was adjudged the guilty party in the divorce and/or his ex-wife took custody of their children.[86] To reach this result, judges generally appealed to common understandings of the link between manhood, landowning, and household headship, sometimes opining that a father was still morally (if not legally) obliged to support his children. As the Illinois Supreme Court intoned, "The divorce did not change [the husband's] position, he still remained the head of the family. . . . Whatever right the [ex-wife] may have had while she was the wife of the defendant . . . was subordinate to his right while he lived, and continued to occupy the premises."[87] Michigan's high court similarly declared that "the wife's abandonment [through divorce] was not a fact in itself sufficient to destroy [the husband's homestead rights]. His right did not lie at her mercy."[88] Of the five remaining states, three took a functional approach, linking the man's exemption rights to whether he was actually supporting any minor children or other dependents,[89] and two focused on whether the husband was to blame for the breakup of the marriage.[90]

The treatment of divorced women exhibits noticeably different trends. The difficult cases were those in which the divorce decree made no specific provisions for the homestead.[91] When the status of the homestead was unresolved, most state courts relied on one, if not both, of two doctrinal approaches. First, some courts held that unless the divorce decree specified otherwise, the divorce automatically extinguished a woman's homestead rights on her ex-husband's land.[92] As the Illinois Supreme Court explained,

86. See *Zapp v. Strohmeyer,* 75 Tex. 638 (1890); *Biffle v. Pullman,* 114 Mo. 50 (1893); *Woods v. Davis,* 34 Ia. 264 (1872) and *Byers v. Byers,* 21 Ia. 268 (1866); *Griffin v. Nichols,* 51 Mich. 575 (1883); *Doyle v. Coburn,* 88 Mass. 71 (1863); *Redfern v. Redfern* and 38 Ill. 509 (1865); and *Blue v. Blue,* 38 Ill. 9 (1865).

87. *Redfern v. Redfern,* 38 Ill. 509, 510 (1865).

88. *Griffin v. Nichols,* 51 Mich. 575, 579 (1883).

89. See *Cooper v. Cooper,* 24 Ohio St. 488 (1874), *Kunkle v. Reeser,* 5 Ohio Dec. 422 (Ohio Prob. 1898), and *Weber v. Beier,* 7 Ohio C. D. 781 (Ohio Cir. 1897); *Wiggin v. Buzzell,* 58 N.H. 329 (1878); and *Shoemake v. Chalfant,* 47 Cal. 432 (1874), *Simpson v. Simpson,* 80 Cal. 237 (1889), *Burkett v. Burkett,* 78 Cal. 310, and *Grupe v. Byers,* 73 Cal. 271 (1887).

90. See *Arp v. Jacobs,* 3 Wyo. 489, 27 P. 800 (1891); *Owen v. Bracket,* 75 Tenn. 448 (1881).

91. Courts did not hesitate to protect ex-wives' homesteads if the divorce decree specifically gave them legal title or occupancy rights. See, e.g., *Wiggin v. Buzzell,* 58 N.H. 329 (1878), *Stahl v. Stahl,* 114 Ill. 375 (1885); *Bonnell v. Smith,* 53 Ill. 375 (1870), *Jackson v. Shelton,* 89 Tenn. 82 (1890); *Brandon v. Brandon,* 14 Kan. 342 (1875); *Tiemann v. Tiemann,* 34 Tex. 522 (1871); *Wickersham v. Comerford,* 96 Cal. 433 (1892); *Simpson v. Simpson,* 80 Cal. 237, 22 P. 167 (1889).

92. Appellate opinions in six states reveal this logic. *Heaton v. Sawyer,* 60 Vt. 495 (1888), *Burns v. Lewis,* 86 Ga. 591 (1891), *Brady v. Krueger,* 8 S.D. 464 (1896), *Skinner v. Walker,* 98 Ky. 729 (1896), *Trawick v. Harris,* 8 Tex. 312 (1852), *Earle v. Earle,* 9 Tex. 630 (1853),

"Upon the granting of the divorce, Catharine Stahl's relation of wife to Christian Stahl was severed—she then became entirely disconnected with the homestead estate, and had no right pertaining to any property of Christian Stahl by virtue of having been his wife. . . ."[93] Another, less common, approach was to make the divorcée's homestead rights contingent on whether she had been adjudged the guilty party in the divorce proceedings.[94] Functional concerns, such as childcare arrangements, generally played a minor (if any) role in judicial reasoning.[95]

Taken as a whole, the legal fortunes of separated and divorced claimants shed further light on the connection between masculinity, landholding, and family status boundaries. Although homestead exemption laws gave married women unprecedented control over family property, such rights could easily be thrown into jeopardy if the marriage broke down. A married woman usually could retain control over the property if her husband abandoned her, or if the divorce decree specifically gave her rights to the homestead. But women who left their husbands or obtained a divorce could be severely penalized for triggering the breakup of the marriage, abandoning their wifely duties, or simply for losing their legal status as wives. Men whose marriages fell apart faced fewer risks. Even when divorce stripped them of their status as husbands, and even if they were to blame for the family's breakup, many state judges took pains to preserve their rights over homestead property. Many high courts, it seems, were strongly disinclined to let marital dissolution sever the link between a married man and his land, a reluctance that did not extend to married women.

## IV. Once a Husband, Always a Husband: Adjudicating Claims of Single Widowers

When James H. Wilkinson declared homestead on his Alexandria, Virginia house in 1883, the only persons he listed as part of his "family" were an adult son, who lived nearby, and a ten-year-old grandson. Although most details of James' life and background remain mysterious, he emerges as

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*Sears v. Sears,* 45 Tex. 557 (1876), *Hall v. Fields,* 81 Tex. 553 (1891), *Stahl v. Stahl,* 114 Ill. 375 (1885).

93. *Stahl v. Stahl,* 114 Ill. 375, 380 (1885).

94. High courts in four states adopted such reasoning. *Rendleman v. Rendleman,* 118 Ill. 257 (1886), *Blandy v. Asher,* 72 Mo. 27 (1880), *Keyes v. Scanlan,* 63 Wis. 345 (1885), *Atkinson v. Atkinson,* 37 N.H. 434 (1859).

95. For opinions that allude to functional concerns, see *Blandy v. Asher,* 72 Mo. 27 (1880), *Bahn v. Starcke,* 89 Tex. 203 (1895), *Vanzant v. Vanzant,* 23 Ill. 536 (1860).

the hero of a gothic morality play in an 1891 opinion by Judge Lacy of the Virginia Supreme Court. The archvillain of the tale is one John M. Truslow, the appellee, to whom James owed two hundred dollars. The court initially expresses the belief that seven years earlier, Truslow violently beat James and then drowned his grandson in the Potomac River, with the express purpose of destroying the old man's "family" and thus his homestead exemption rights. Truslow's crime apparently having gone unpunished, he convinces the commissioner—and, later, the circuit court—that James is no longer "a householder and head of family," and thus his property must be sold. At this climactic juncture, the high court finally frames the issue on appeal: "The only question we are called upon to decide is whether this homestead exemption, which had, in form of law, been set apart to this householder, was ended and determined by the death of his little grandson." Emphatically resolving this question in the negative, the court dramatically concludes, "[The] head of family is himself a part of the household—a part of the family. The exemption is . . . not only for the benefit of the family, but for his benefit also. . . . [I]t would be an illiberal construction of this provision of the Constitution to hold that, if he survived the other members of his family, this provision would no longer shield him against his creditors. . . . [W]e must not disregard the benefits provided for the householder. . . ."[96]

Through a remarkable feat of literary alchemy, the court thus cleverly transforms a man who has had no dependents for at least seven years into a self-sacrificing paterfamilias who must be shielded from the vicissitudes of fortune (and a murderous creditor) in exchange for a lifetime of presumed paternal devotion. In so doing, the opinion interweaves two contrasting images of James: he is both a frail, aged victim whom the state must shield from devious creditors; and a steadfast provider who has nobly devoted his entire adult life to provisioning his dependents.

The *Wilkinson* case is one of dozens in which single men, usually widowers, sought to claim homestead exemption rights after their dependent family members passed away. Like James Wilkinson, such claimants embody an intriguing duality. On one hand, they are quintessential providers—men who agreed to provide for the needs of others within the strictures of marriage. In the "grammar of manhood," Mark Kann has shown, this accomplishment made them the symbolic exemplars of republican manhood and patriotic citizenship.[97] Yet at the same time, a solitary widower was the antithesis of a manly provider. Not only did he have no dependents reliant upon him

96. *Wilkinson v. Merrill,* 87 Va. 513 (1891).

97. Mark E. Kann, *A Republic of Men: The American Founders, Gendered Language, and Patriarchal Politics* (New York: New York University Press, 1998), 3.

for support, but in bringing a homestead claim, he betrayed his inability even to meet his *own* material needs without state intervention. The lone widower thus straddles the doctrinal boundary between providership and dependency, both exalted and pitied. Judges' remarkable solicitude toward male widowers, I will argue, highlights the powerful linkage in the judicial imagination between masculine identity and property ownership. Most judges were loathe to deprive a man of his land—the bedrock of his masculine identity—even if he had little credible claim to household headship.

Not all high court opinions were animated by such pathos. Analyzing a widower's homestead claim in 1877, the Mississippi Supreme Court reasoned:

> It is as illogical to say that the exemption shall continue after the family has ceased, as to say that it can exist before the family comes into existence. It will not be pretended that a man could claim a homestead exemption upon the ground that he *intended* to have a family. How can it be said, with more reason, that he is entitled to one because he *formerly* had a family? . . . The exemption is given to enable the owner to meet and discharge the burden of supporting the family. When the family does not exist, there is no burden, and there can be no exemption. . . . [I]t must be wholly immaterial whether the [burden] once existed and has ceased, or whether it never existed at all.[98]

The court's logic is difficult to assail. If the justification for homestead exemption was family preservation, how could a man plausibly claim the benefits of the law if he had no family? Seven other states—Georgia, Ohio, Louisiana, Michigan, Nevada, Oklahoma, and Tennessee—joined Mississippi in adopting a bright-line rule that excluded the homestead claims of solitary widowers, on the grounds that they failed (by definition) to qualify as heads of families.[99] Yet such states were in the minority. A decisive majority of high courts (nineteen out of twenty-seven that grappled with the issue) championed the homestead exemption rights of single widowers.[100]

98. *Hill v. Franklin,* 54 Miss. 632, 635 (1877).

99. See *Cooper v. Cooper,* 24 Ohio St. 488; *Parnell v. Allen,* 1 McGl. 322 (La. App. 1881); *Benedict, Hall & Co. v. Webb,* 57 Ga. 348 (1876). See also *Barney v. Leeds,* 51 N.H. 253, 259–60 (Murray, J., dissenting).

100. See *Myers v. Ford,* 22 Wis. 139 (1867); *Blum v. Gaines,* 57 Tex. 119 (1882); *Kessler v. Draub,* 52 Tex. 575 (Tex. 1880); *Taylor v. Boulware,* 17 Tex. 74 (Tex. 1856); *Stewart v. Brand,* 23 Ia. 477 (1867); *Parsons v. Livingston,* 11 Ia. 104 (1860); *Silloway v. Brown,* 94 Mass. 30 (1866); *Doyle v. Coburn,* 88 Mass. 71 (1863); *Wilkinson v. Merrill,* 87 Va. 513 (1891); *Barney v. Leeds,* 51 N.H. 253 (1871); *Stults v. Sale,* 92 Ky. 5 (1891); *Ellis v. Davis,* 90 Ky. 183 (1890); *Kimbrel v. Willis,* 97 Ill. 494 (1881); *Beckmann v. Meyer,* 75 Mo. 333 (1882); *Bank of Versailles v. Guthrey,* 127 Mo. 189 (1895); *Pierce v. Kusic,* 56 Vt. 418 (1883); *Towne v. Rumsey,* 5 Wyo. 11 (1894); *Rollings v. Evans,* 23 S.C. 316 (1885);

To justify the preservation of widowers' homestead exemption rights, most courts invoked one (or more) of three rationales. First, judges often opined that once homestead rights were conjured into existence, they permanently attached the household head to his parcel and could be forfeited only through his abandonment or renunciation. (Most offered no statutory or jurisprudential basis for treating homestead exemption as a "vested" right in this context.[101]) Second, like the *Wilkinson* court, many judges proclaimed that homestead exemption was intended not only for the benefit of dependents, but also for the benefit of indebted men who assumed the headship of nuclear families. By rhetorically emphasizing the widower's former roles as husband and father, such opinions obscured the fact that he was no longer married or supporting any dependents. A third common approach was simply to highlight the pathos of the widower's plight and deplore any rule that would compound the loss of his family with the loss of his home.

The judicial treatment of single widowers is intriguing because it reflects neither a functionalist, nor a strict formalist, approach toward family status boundaries. From a functionalist perspective, as the Mississippi Supreme Court observed, the designation of a solitary widower as the "head of family" was incoherent, since he had no one but himself to support.[102] Yet a widower's claim to headship status on formalist grounds was hardly more compelling. The death of his nuclear family stripped him of his legal status as "husband" just as surely as if he had never been married.

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*Rollings v. Evans,* 23 S.C. 316 (1885); *Darrington v. Meyers,* 11 Neb. 388 (1881), *Parnell v. Allen,* 1 McGl. 322 (La. App. 1881); and *Roth v. Insley,* 86 Cal. 134 (1890) (implicitly overruling *Santa Cruz Bank of Sav. v. Cooper,* 56 Cal. 339 [1880]); *Gee v. Moore,* 14 Cal. 472 (1859), and *Revalk v. Kraemer,* 8 Cal. 66 (1857). See also *Bunnell v. Hay,* 73 Ind. 452 (1881) (implying, although not squarely holding, that status as widower was sufficient grounds to claim homestead exemption).

101. The heyday of vested rights doctrine in the U.S. was roughly contemporaneous with the postbellum development of homestead exemption law, and the theory had underpinnings in classical legal thought. Yet high court opinions did not address the fundamental (and logically prior) question of why or how homestead rights "vested" in single widowers in the first place.

102. Although contemporary jurists did not articulate such a view, an economist might argue (in a neo-functionalist vein) that giving a man "homestead exemption for life" in exchange for marital vows furthered the ultimate goals of the statute by enhancing his incentives to marry in the first place. However, the marginal impact of such incentives was probably relatively minor, since marriage already rewarded a single man by enabling him to claim homestead exemption as long as his wife (or minor children) were alive. Moreover, preserving a widower's right to hold his land exempt from creditors would have come at the cost of reducing widowers' incentives to assume support for other family members after the deaths of their wives.

Interestingly, however, many judges used formalist rhetoric to elide the distinction between a widower's former and current status, dwelling on the momentous change that the marriage once wrought, rather than the later change precipitated by his wife's death.

High courts' widespread willingness to sacrifice the interests of creditors (and a measure of doctrinal clarity) to aid indebted widowers seems somewhat anomalous in light of recent historiography. Many accounts of nineteenth-century marital status law have suggested that courts' preoccupation with *female* dependency chiefly animated judicial decision making in the domestic relations arena. Lawrence Friedman, for example, has argued that common-law marriage drew its appeal from the desire to protect the rights and reputation of "wives" of informal unions, as well as their children, after the death of the male provider.[103] Katherine Franke has reached similar conclusions based on her analysis of the Freedmen's Bureau's regulation of African-American marriage during Reconstruction.[104] More controversially, Ariela Dubler has made the stronger claim that both common-law marriage and dower grew largely out of the desire to transfer the burden of supporting unmarried women from the state onto the family unit.[105]

To be sure, the economic insecurity of male workers—particularly hirelings left at the mercy of the wage labor system—was a major preoccupation of postbellum labor reformers and social scientists.[106] Yet most recent work suggests that the judiciary was largely unsympathetic to the working

103. Friedman, *Private Lives,* 20–21.

104. Katherine M. Franke, "Becoming a Citizen: Reconstruction Era Regulation of African American Marriages," *Yale Journal Law and the Humanities* 11 (1999): 251–309.

105. Dubler, "In the Shadow of Marriage," 1649–50. To the extent that Dubler's claim is that the desire to protect the state from the burden of female dependency was an important rationale for dower, the argument seems difficult to reconcile with the fact that the long-established custom of dower became an enforceable legal right in England by the early thirteenth century, centuries before such incentives might have come into play. See Theodore F. T. Plucknett, *Concise History of the Common Law,* 5th ed. (Boston: Little Brown and Company, 1956), 566–68. See also Thomas Lund, "Women in the Early Common Law," *Utah Law Review* 1997 (1997): 1–62, 36–38 (analyzing English dower claims from the late thirteenth and early fourteenth centuries). With regard to common-law marriage, Lawrence Friedman has noted that secret and informal marriages were accepted practice in England well before the mid-eighteenth century, when such a motivations also would not have been primary. Friedman, *Private Lives,* 18. Besides the desire to protect the reputations of "informal" wives and children, Friedman identifies the shortage of clergy, the necessity of settling claims to property, and the desire to uphold traditional morality by minimizing "illicit intercourse" as important functions of the practice. Ibid, 20–24.

106. Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (New York: Cambridge University Press, 1998), 69.

man's plight, staunchly reifying principles of individual free contract at the economic expense of laboring men. In the 1870s, for example, many jurists joined charity reformers in an effort to stamp out vagrancy. Under the new criminal statutes, a man found guilty of vagrancy could be penalized with months of hard labor. State judges nearly always upheld such laws, helping to send thousands of impoverished and unemployed men to the jails and workhouses.[107] Beginning in 1890, many U.S. states began to make a husband's desertion or failure to support his wife or children a criminal offense punishable by imprisonment at hard labor, and by 1915 every state in the union had enacted such legislation.[108] John Witt's history of personal injury law also suggests an escalating judicial reluctance in the nineteenth century to compensate married men for economic loss. When wrongful death statutes replaced "loss of services" claims in the 1840s, it was married men who paid the price. Since "manly and upstanding men" were presumptive breadwinners who financially supported their wives, a husband could no longer seek financial compensation for the death of his wife or minor children. Only his dependents now had standing to seek recompense for the loss of *his* income.[109] In light of these trends, judges' widespread solicitude toward widowers in the context of homestead exemption seems puzzling. Why did judges go to such lengths to help lone widowers keep their homes, when they were unmoved by the plight of other men who faltered in their role as breadwinners?

Perhaps what distinguishes homestead exemption from other areas of law is its unique linkage of a man's claim for state protection to his identity as a landowner. In the Jeffersonian ideal of republican democracy, land ownership was the only lasting foundation for male citizenship. Its function was not merely to confer wealth on its owner, but "to anchor individual independence so that virtuous citizens were free to pursue the common good."[110] Like John Adams, many feared that men who depended on others for their livelihood, with no property of their own, could not exercise independent political judgment.[111] As nineteenth-century industrialization inexorably transformed land from a basic accouterment of male citizenship to a fungible market commodity, champions of industrializa-

107. Ibid., 115, 119.

108. Willrich, "Home Slackers," 460.

109. 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," *Law & Social Inquiry* 25 (2000): 717–55, 744.

110. Gregory S. Alexander, "Time and Property in the American Republican Legal Culture," *New York University Law Review* 66 (1991): 273–352, 285.

111. Adams to James Sullivan, letter, 26 May 1776, *The Works of John Adams,* ed. Charles Adams (Boston: Little, Brown, 1854), 9:376.

tion hailed wage labor as a new basis for masculine autonomy, buttressed by the ideal of contract freedom.[112] Yet this ideological transition was neither complete nor uncontested. Even as the norm of contract freedom gained increasing sway, many critics deplored wage labor as a form of economic dependency and championed independent land ownership as the only viable basis for citizenship.

It is likely, then, that protecting male land ownership carried a special resonance for nineteenth-century jurists, so that the symbolic importance of a man's home—literally the bedrock of his masculine identity—could not fully be captured by its market value. When a man raised a family in his home, the land came to *belong* to him in a manner that elevated his ownership stake into a quasi-permanent entitlement. In this sense, homestead exemption offered a more compelling rationale for state intervention than either vagrancy or wrongful death. Vagrancy laws, like wrongful death claims, cast men in the role of financial supplicants who required monetary support to make up for their own deficiencies as providers. In adjudicating homestead rights, however, state intervention could be sanctioned—not as a palliative for male economic dependency—but as a just and hard-won reward for manly providership.

## V. Homestead Exemption and the First Great Family Definition Debate

Lettie Marshall, the freedwoman whose unique appeal before the Texas Supreme Court introduced this article, had cause for optimism when she filed for homestead exemption on her former master's land in 1871. Two years earlier, Judge Lindsay, writing for the Texas Supreme Court, had handed down a decision that seemed to bode well for "families" related by neither blood nor marriage. The claimant was an unmarried man living alone. Before reaching the merits of the petitioner's claim, the court set forth a startlingly expansive definition of the term "family":

> The constitution protects from forced sale . . . the inviolable sanctuary of a family: not merely the head of the family, but of all of its members, whether consisting of a husband, wife, and children, or any other combination of human beings, living together in a common interest and having a common object in their pursuits and occupations. . . . the word "family". . . was most certainly used in its generic sense, embracing a household, composed of parents and children, or other relatives, or domestics and servants: in short, every collective body of persons living together within the same curtilage,

112. Stanley, *From Bondage to Contract.*

> subsisting in common, directing their attention to a common object, the promotion of their mutual interests and social happiness. These must have been the characteristics of the "family" contemplated by the framers of the constitution . . . in unison with the beneficent conception of the political power of the state. . . .[113]

Only after concluding that the petitioner had no family, as defined "either in a popular, legal, or constitutional sense," did the court reject his appeal.

Judge Lindsay's definition of "family" certainly seems capacious enough to encompass the claim of a servant, such as Lettie Marshall, who not only lived with B. G. Marshall, but also "fulfill[ed] all of the duties and relations to him of mother, sister, and daughter."[114] Remarkably enough, at the trial level, Lettie Marshall's case was assigned to none other than Judge Lindsay himself. The jury was instructed that "if B. G. Marshall had a family at the time of his death, composed of domestics or servants, who were 'recognized, considered, treated, and regarded by him as his family,' living in the same house, under the same roof, until he died, and then were left by him, when he died, in said house as surviving members of his family, [then] the Constitution exempted the homestead of 200 acres, 'so long as such surviving family may continue to occupy it as a homestead.'" The jury dutifully returned a plaintiffs' verdict, and the two-hundred-acre homestead was set aside to Lettie Marshall and her descendants.

When the administrator of B. G. Marshall's estate appealed the judgment to the Texas Supreme Court, however, Lettie Marshall's fortunes took an abrupt turn for the worse. This time it was Associate Justice Gould who wrote the majority opinion. Noting that "[t]he nature of the family intended is left undefined by the Constitution," Justice Gould opined that "the framers of that instrument had in view a family composed of husband, wife, and children, for whose protection, in the enjoyment of their homestead, they intended to provide. . . . the Constitution did not contemplate a family composed of persons neither related by blood nor connected by marriage. The object of the Constitution . . . [is] mainly to secure to the husband, wife, and children an asylum beyond the reach of the creditor. . . . it was not the design of this [law] to change the constituents of the family, or to secure benefits to those not related to the deceased."[115] Although acknowledging that Judge Lindsay had espoused a far broader definition of the term "family" just two years earlier, Justice Gould dismissed the analysis as mere dicta.

113. *Wilson v. Cochran,* 31 Tex. 677, 680 (1869).
114. *Howard v. Marshall,* 48 Tex. 471, 474.
115. Ibid., 478.

Judge Lindsay and Justice Gould, each of whom played a role in adjudicating Lettie Marshall's claim, stand at opposite poles of an ideological continuum. At one extreme is Justice Gould's contention that the only "family" worthy of government recognition is the nuclear household consisting of "husband, wife, and children." The state's overriding interest in promoting the institution of marriage justifies the conferral of unique material benefits on marital unions. At the other extreme is Judge Lindsay's view that any group of cohabitants who "direct[] their attention to a common object, the promotion of their mutual interests and social happiness" has an equal claim to legitimacy. In the latter functionalist perspective, "family" is defined not by its members' legal status, but by the functions that it performs and the mutuality of purpose with which its members structure their lives.

Perusing modern textbooks on domestic relations law, one could easily infer that jurists did not grapple with the definitional boundaries of "family" until the latter half of the twentieth century.[116] Yet even a cursory examination of homestead exemption case law reveals otherwise. Like Judges Lindsay and Gould, many state court judges were called upon to decide what the term "family" meant. And many of the putative "families" that sought judicial recognition did not consist of married couples and their children. Some were heterosexual couples who never properly solemnized their union with marital vows. Some were clusters of extended family members living together. And a few—as in the Lettie Marshall case—were cohabiting persons related by neither blood nor marriage. The question confronting judges in the nineteenth century was which of these clusters, if any, should be accorded the privilege of state recognition.

Interestingly, state high courts rejected the outlying views of *both* Judge Lindsay and Justice Gould, charting instead a delicate middle course between the two extremes. Generally speaking, clusters of immediate blood relatives were treated as "families" as long as they exhibited a provider-dependent relationship. Yet importantly, not all providers were created equal in the eyes of the law: men who described themselves as heads of non-nuclear families were markedly more likely to be treated as such than their female counterparts.

The easiest cases were "nuclear style" and single-parent families such as unwed mothers and heterosexual couples who never formalized their union. As long as the head was demonstrably supporting his or her dependents,

116. See, e.g., Judith Areen, *Family Law: Cases and Materials,* 4th ed. (New York: Foundation Press, 1999), 931–74, and Milton C. Regan, Jr., *Supplement to Judith Areen, Family Law: Cases and Materials* (New York: Foundation Press, 2001), 66.

courts did not hesitate to confer "family" status on such groups.[117] For example, California and New York both treated single mothers supporting young children as heads of families.[118] The high courts of Kentucky, Texas, and South Carolina granted homestead protection to men (including one freedman) who resided with and claimed to be supporting their common-law wives and/or illegitimate children, even though the men were not legally obligated to support them.[119] Although Illinois denied homestead protection to a woman with three children, it did so on the basis that she had turned them over to the care of her relatives sixteen years before and contributed nothing to their support.[120]

The fact that single-parent families and heterosexual couples who "acted

117. Two unusual fact patterns, however, generated greater controversy. For example, Texas and Michigan were forced to choose which of two putative widows could claim survivorship rights in a decedent's homestead. The Texas Supreme Court summarily rejected the homestead claim of a decedent's mistress and her children, thundering that "[w]e are not disposed to put a premium upon lewdness and crime, by cutting out the rights of a lawful wife and legitimate children, to bestow gratuities upon an adulteress, and her illegitimate offspring." See *Robinson v. Crump,* 35 Tex. 426 (1872). Michigan's high court, however, decided (over strong dissent) that the homestead claim of a bigamist's second wife trumped that of his first wife, since the latter had never actually lived with him on the premises. See *Stanton v. Hitchcock,* 64 Mich. 316 (1887). Miscegenation also created special doctrinal problems for Texas in the 1870s. Two similar cases reached the high court, both involving African American women who had spent most of their lives in monogamous relationships with (now-deceased) white men. In the 1871 case, the court went to great lengths to give Leah Foster the benefit of homestead exemption, even though she had never been legally married and miscegenation was outlawed in Texas during the relevant time frame. Observing that the couple had spent several years in Ohio, where there was "no legal impediment to marriage," the court declared that such a marriage would be legally presumed to have taken place, and the couple's subsequent removal to Texas would not dissolve the earlier marriage. *Bonds v. Foster,* 36 Tex. 68 (1872). In 1878, however, Chief Justice Roberts affirmed the district court's denial of survivorship rights to Phillis Oldham and her children, even though the couple had cohabited for twenty-nine years, jointly raised several children, and always held themselves out as man and wife. No reference was made to the earlier case. See *Oldham v. McIver,* 49 Tex. 556 (1878).

118. See *Ellis v. White,* 47 Cal. 73 (1873), *Cantrell v. Conner,* 6 Daly 224, 1875 WL 9540 (N.Y. Sup. Ct. 1875) (involving exemption of personalty rather than homestead). Similarly, under an antebellum statute exempting farm horses for heads of farm families, a widow with three sons who went to live with her parents was deemed the head of a family, even though her father could also properly be considered the head of the household. However, in *In re Romero's Estate,* 75 Cal. 379 (1888), the California high court denied two children survivor's rights in their homestead of the man they claimed to be their father, and who also claimed them as his children, since they were born when their mother was married to (albeit probably separated from) another man and thus could not legally presumed to be his issue.

119. See *Bell v. Keach,* 80 Ky. 42 (1882), *Lane v. Phillips,* 69 Tex. 240 (1887), *Myers v. Ham,* 20 S.C. 522 (1884).

120. See *Rock v. Haas,* 110 Ill. 528 (1884).

married" could usually count on judicial support—at least in the absence of bigamy or miscegenation—is not surprising in light of related historiography. A wave of state reforms in the first half of the century made weddings subject to far less state regulation. Licensing fees were progressively lowered, and a broader array of officials were empowered to perform marital rites.[121] Also by mid-century, the declining formalism of marriage led many courts to recognize common-law marriages, in which partners dispensed altogether with ceremonial formalities. Although common-law marriage began to decline in the latter nineteenth century, with some states beginning to insist on ceremonial marriage,[122] this trend toward increasing formalism was not reflected in high court adjudications of homestead exemption by the century's end. Many of the high court decisions allowing single mothers and cohabiting couples to claim homestead rights date from the 1870s and '80s.[123]

As compared to nuclear (and "nuclear-style") families, non-traditional families typically suffered from one, if not both, of two doctrinal deficiencies. First, since wives and minor children shared the same legal domicile as the patriarchal provider, and were assumed to be dependent on him, a court could safely ignore the possibility, for example, that a married woman was cohabiting with her husband not out of dependence but in order to keep land out of creditors' reach.[124] No such presumption applied to non-traditional families, thus forcing judges to consider in each case whether cohabitants were truly dependent on the self-proclaimed family head. Another key hallmark of nuclear families was the supposition that spouses shared a long-term commitment to mutual support and cohabitation. In contrast, non-traditional families could be cohabiting merely out of economic self-interest or short-term convenience. Defining "family" too broadly, judges reasonably feared, would license widespread fraud and allow the formation of "family" bonds to devolve into cynical contractualism. As Mississippi's high court queried rhetorically, "May an unmarried man, by inviting strangers to live with him, entitle himself to the homestead exemption? If so, there is an end of that distinction between those who have and those who have not families."[125]

121. See, e.g., Grossberg, *Governing the Hearth,* 76.

122. See Friedman, *Private Lives,* 44–45.

123. See *Ellis v. White,* 47 Cal. 73 (1873), *Cantrell v. Conner,* 6 Daly 224, 1875 WL 9540 (N.Y. Sup. Ct. 1875), *Bell v. Keach,* 80 Ky. 42 (1882), *Lane v. Phillips,* 69 Tex. 240 (1887), *Myers v. Ham,* 20 S.C. 522 (1884).

124. See, e.g., *Guiod v. Guiod,* 14 Cal. 506, 507 (1860) (describing "natural dependence" of wife and children on the husband as "not only essential to the peace and happiness of the family itself, but to the well-being of society").

125. *Hill v. Franklin,* 54 Miss. 632, 633 (1877).

In short, the claims of non-nuclear families raised deeply perplexing doctrinal problems. Which ingredients were essential to the definition of "family"? To qualify, must a cluster of individuals share deep psychological ties? Must it contain at least one provider-dependent dyad? Or must it mimic the nuclear family in fulfilling *both* these criteria? Such claims also posed an array of practical questions. Should certain clusters of persons be legally *presumed* to meet a given criterion, as with the nuclear family model, or should each putative "family" be evaluated on its own unique merits? Once a non-nuclear unit was deemed a "family," should its dependent members be granted the same rights as wives and children? As the South Carolina Supreme Court frankly acknowledged in 1890: "It is . . . well settled that it is not necessary that the relation of husband and wife, nor that of parent and child, should exist in order to constitute a family. . . . But where these relations are absent, we have no case . . . which decides distinctly what other relations existing between persons living together will be sufficient to constitute a family. . . ."[126]

On several points, the case law reveals, nineteenth-century jurists were in universal agreement. No court adopted Justice Gould's view that only nuclear families qualified as "families" or that only a husband or parent could be a family head.[127] On the other hand, no state high court defined "family" so broadly as to include a single adult living with individuals unrelated by blood, marriage, or adoption. Between these two extremes, each state's high court (sometimes with legislative input) struggled to define which types of cohabitants should be accorded the benefit of family status. Although a few courts tried to draw a bright line rule by recognizing as family heads only those who had a *legal* obligation to support their dependents,[128] most felt that "natural" and/or "moral" support obligations would suffice.[129] Since judgments regarding "natural" or "moral" duties were not,

126. *Moyer v. Drummond,* 32 S.C. 165, 167–68 (1890).

127. Although Justice Gould endorsed this view in *Howard v. Marshall,* 48 Tex. 471 (1878), the Texas Supreme Court never followed such a narrow definition.

128. See, e.g., *Marsh v. Lazenby,* 41 Ga. 153 (1870) (bachelor supporting aged mother held head of family because paupery statute imposes mutual support obligation on parents and children); *Dendy v. Gamble & Copeland,* 64 Ga. 528 (1880) (man supporting indigent sister and her children cannot claim exemption because there is no legal duty of support); *Decuir v. Benker,* 33 La. Ann. 320 (1881) (mother living with three healthy adult daughters held not head of family because although her obligation of support was "natural" and "actual," it was not "necessary"); *Hill v. Franklin,* 54 Miss. 632 (1877); *Betts v. Mills,* 8 Okla. 351 (1899).

129. *Moyer v. Drummond,* 32 S.C. 165, 169 (1890) ("We are inclined to agree . . . [that] the whole theory and policy of the homestead [law] is founded upon the principle that there is a natural and moral obligation on the head of a family to provide for the support of his wife and children and other persons dependent on him, towards whom he stands almost in

by definition, grounded in legal precedent, and were not always universally shared,[130] the latter approach provided little concrete guidance.

The appellate case law also reveals that in practice, different types of putative "families" had variable rates of success. If the self-described head was an adult male, and his alleged dependents were immediate family members (i.e., siblings or parents) who were minors and/or females, he could usually count on judicial support. For example, five out of six states held that adult men living with minor siblings and/or widowed sisters qualified as heads of family (although adult male claimants residing with *adult* brothers were denied similar protection).[131] Similarly, all six high courts

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loco parentis. . . .") (internal citations omitted). See also *Calhoun v. Williams,* 73 Va. 18 (1879); *Harbison v. Vaughan,* 42 Ark. 539; *Holnback v. Wilson,* 159 Ill. 148 (1895); *Graham v. Crockett,* 18 Ind. 119 (1862); *Bunnell v. Hay,* 73 Ind. 452 (1881); *Arnold v. Waltz,* 53 Ia. 706 (1880); *Brooks v. Collins,* 74 Ky. 622 (1876); *Lancaster v. Slavin's Trustee,* 10 Ky. Op. 739 (1880); *Bosquett v. Hall,* 90 Ky. 566 (1890); *Wade v. Jones,* 20 Mo. 75 (1854); *Smythe v. Kane,* 42 Mo. App. 253 (1890); *Barney v. Leeds,* 51 N.H. 253, 267–68 (1871); *Moyer v. Drummond,* 32 S.C. 165 (1890); *In re Summers,* 23 F.Cas. 379 (Tex. 1869); *Connaughton v. Sands,* 32 Wis. 387 (1873); *Calhoun v. Williams,* 73 Va. 18, 25–26 (1879); *Burns v. Jones,* 37 Tex. 50 (1873); *Roco v. Green,* 50 Tex. 483 (1878) (legal or moral obligation is sufficient); *Wolfe v. Buckley,* 52 Tex. 641 (1880), *Barry v. Hale,* 2 Tex.Civ.App. 668 (1893).

130. Compare, e.g., *In re Lambson,* 14 F.Cas. 1047 (S.C. 1877) (man held not head of family because no natural obligation to support adopted son) with *Wolfe v. Buckley,* 52 Tex. 641 (1880) (adoption, "if made in good faith," would create "such legal relation of parent and child as would constitute a family"); *Brooks v. Collins,* 74 Ky. 622 (1876) (mother living with adult children held head of family because debtors have natural and/or legal obligation to support their adult or infant children) with *Decuir v. Benker,* 33 La. Ann. 320 (1881) (mother living with three healthy adult daughters held not head of family because although her obligation of support was "natural" and "actual," it was not "necessary"); and *Roco v. Green,* 50 Tex. 483 (1878) (adult daughter has duty to support aged mother) with *Woodworth v. Comstock,* 92 Mass. 425 (1865) (adult daughter living with mother held not head of family, presumably because of absence of support obligation).

131. See *Holnback v. Wilson,* 159 Ill. 148 (1895) (stating, in dicta, that a single man living with dependent siblings would qualify as household head); *Graham v. Crockett,* 18 Ind. 119 (1862) (man, living with sister, who "appear[ed] to direct and control affairs" held head of family, although both owned property and shared household expenses); *Bailey v. Comings,* 2 F. Cas. 367 (E.D. Mo. 1877) (man whose widowed sister had periodically lived with him held head of family); *McMurray v. Shuck,* 74 Ky. 622 (1869) (adult bachelor supporting minor siblings, including a sister, held head of family); *Lancaster v. Slavin's Trustee,* 10 Ky. Op. 739 (1880) (unmarried brothers living with minor nephew held not head of family because no legal obligation to support him and his parents were still alive); *Moyer v. Drummond,* 32 S.C. 165 (1890) (man living with sickly sister held head of family); *Connaughton v. Sands,* 32 Wis. 387 (1873) (man supporting siblings held head of family); *Dendy v. Gamble & Copeland,* 64 Ga. 528 (1880) (man living with widowed sister and her three children held not head of family because had no legal duty to support them), *Whalen v. Cadman,* 11 Ia. 226 (1860) (man living with adult brother and brother's wife held not head of family). See also *Wade v. Jones,* 20 Mo. 75 (1854) (man living with widowed sister and her children held head of family for purposes of personal property exemption).

that reached the issue deemed fathers living with adult children (usually widowed daughters, but occasionally adult sons) to be heads of families.[132] Bachelors living with their widowed mothers also fared extremely well: all six states declared them heads of families.[133] As the Missouri Supreme Court declared in 1854, "[t]he man who controls, supervises and manages the affairs about the house, is the head of a family, and such a man need not necessarily be a husband or father."[134]

But those few female petitioners in like circumstances who claimed headship status in state high courts faced greater uncertainty. On one hand, a female claimant caring for her invalid sister was held the head of a family.[135] Yet of three mothers who claimed homestead exemption on the basis that they were supporting adult children, only one was adjudged a household head.[136] A female petitioner who claimed headship status on the grounds that she was supporting her aged mother also lost her case.[137]

Although appeals involving foster parents are scarce, high court holdings suggest that the gender of the claimant's gender was less important

132. See *Blackwell v. Broughton,* 56 Ga. 390 (1876) (man living with adult daughter and her three children held head of family); *Doolin v. Dugan,* 12 Ky. L. Rptr. 749 (1891) (father living with adult, self-supporting daughter held head of family); *Woods v. Perkins,* 43 La. Ann. 347 (La. 1891) (man living with self-sufficient eighteen-year-old son, whose other minor son lived away from home, held head of family); *Dorrington v. Myers,* 11 Neb. 388 (1881) (man living with married son and his wife, and wife and children of a second son away in mining country, held head of family); *Bank of Vesailles v. Guthrey,* 127 Mo. 189 (1894) (man living with adult children held head of family, even though adult son might more plausibly be considered the head); *Childers v. Henderson,* 76 Tex. 664 (1890) (widowed daughter living with father at time of his death held part of his family). But see *Burns v. Jones,* 37 Tex. 50 (1873) (dicta that survivorship rights could not vest in adult married children who lived with decedent at his death).

133. *Holnback v. Wilson,* 159 Ill. 148 (1895) (dictum that single man living with dependent parents would qualify as household head); *Parsons v. Livingston & Kinkead,* 11 Ia. 105 (1860) (man residing with aged mother held head of family); *Roth v. Insley,* 86 Cal. 134 (1890) (man residing with aged mother held head of family even after her death); *Marsh v. Lazenby,* 41 Ga. 153 (1870) (man supporting indigent mother held head of family); *Smythe v. Kane,* 42 Mo. App. 253 (1890) (bachelor living with mother held head of family); *Connaughton v. Sands,* 32 Wis. 387 (1873) (man supporting mother held head of family); *Barry v. Hale,* 2 Tex. Civ. App. 668 (1893) (same).

134. *Wade v. Jones,* 20 Mo. 75, 78 (1854).

135. *Chamberlain v. Brown,* 33 S.C. 597 (1890).

136. Compare *Brooks v. Collins,* 74 Ky. 622 (1876) (mother living with adult children held head of family) with *Decuir v. Benker, Sheriff, et al.,* 33 La. Ann. 320 (1881) (mother supporting three adult daughters held not head of family) and *Roco v. Green,* 50 Tex. 483 (1878) (mother held not head of family since had no moral or legal obligation to support adult daughter).

137. *Woodworth v. Comstock,* 92 Mass. 425 (1865) (single woman living with mother held not head of family). But see *Roco v. Green,* 50 Tex. 483 (1878) (dictum that adult daughter could have duty to support aged mother).

than whether he or she was related to the child by blood or marriage. In five out of seven states, claimants raising unrelated minor children were denied homestead exemption, even though one of the minors in question had been legally adopted.[138] (Idiosyncratic features of the two exceptional cases also helped guarantee a favorable result.[139]) On the other hand, both a woman raising her young nieces after her sister's death, and a widow caring for her step-grandchildren, were victorious.[140] Although a man living with his teenage nephew did not prevail, the court rested its holding on the fact that the boy was "pecuniarily independent" of his uncle.[141]

A few individuals claimed unrelated adult cohabitants as "family" members. Bachelors living with hired servants and apprentices, a widower residing with an unrelated married couple, and even the madam of a New York brothel were among the diverse claimants who sought homestead protection. Like Lettie Marshall, however, all left the courthouse empty-handed.[142]

138. See *In re Taylor,* 23 F.Cas. 730 (S.D. Ga. 1869) (man living with widow whom he treated like a daughter, but never formally adopted, and her children, not entitled to homestead enlargement accorded to heads of families); *In re Lambson,* 14 F.Cas. 1047 (1877) (man with adopted minor son held not head of family); *Bosquett v. Hall,* 90 Ky. 566 (1890) (man living with unrelated minors held not head of family because had no legal or natural duty to support them); *Galligar v. Payne,* 34 La. Ann. 1057 (1882) (woman raising two unrelated minor children held not head of family); *Hill v. Franklin,* 54 Miss. 632 (1877) (childless widower living with informally adopted daughter and her husband held not head of family); *In re Lambson,* 14 F.Cas. 1047 (1877) (man living with adopted son held not head of family); *In re Summers,* 23 F.Cas. 379 (Tex. 1869) (bachelor living with orphaned minor apprentices held not head of family). But see *Rountree v. Dennard,* 59 Ga. 629 (1877) (male guardian of minor child held head of family in reliance on statutory provision granting exemption to a "guardian or trustee of a family of minor children") and *Bunnell v. Hay,* 73 Ind. 452 (1881) (man living with adopted daughter held head of family, but holding seems to rest at least partly on his status as widower). See also *Burns v. Jones,* 37 Tex. 50 (1873) (suggesting, in dicta, that wards living with decedent at time of his death could claim survivorship rights in homestead).

139. The Georgia statute specified that a "guardian or trustee of a family of minor children" qualified as a household head. See *Rountree v. Dennard,* 59 Ga. 629 (1877). Meanwhile, the Indiana high court seemed to rest its holding on the fact that the claimant was also a widower. *Bunnell v. Hay,* 73 Ind. 452 (1881).

140. See *Arnold v. Waltz,* 53 Ia. 707 (1880) (woman raising orphaned nieces, whom she never formally adopted, held head of family); *Wolfe v. Buckley,* 52 Tex. 641 (1880) (widow raising her husband's grandchildren by a former marriage held head of family).

141. See *Harbison v. Vaughan,* 42 Ark. 539 (1884).

142. *Bowman v. Quackenboss,* 3 Code Rep. (N.Y.) 17 (1850) (woman running a brothel held not a head of family unless she had dependents whom she was legally bound to support); *Calhoun v. McLendon,* 42 Ga. 405 (1871) (bachelor living with hired servants not head of family); 54 Miss. 632 (1877) (widower living with an unrelated married couple not head of family); *Garaty v. Du Bose,* 5 S.C. (5 Rich.) 493 (1875) (bachelor living with servants and employees not head of family).

In reality, then, courts did not probe the *bona fides* of provider-domestic arrangements uniformly. Instead, a three-tiered system emerged, in which the degree of scrutiny applied to each group hinged on the objective indicia of kinship shared by its members. At one extreme, immediate relatives (especially parents and children) were assumed to be bound together by genuine, long-term emotional ties, at least if the self-proclaimed family head was male. At the opposite extreme, persons unrelated by blood, matrimony (including common-law marriage), or adoption were universally precluded from "family" status no matter how convincingly they demonstrated the sincerity and durability of their bonds. Between these two extremes fell extended, step- and foster relatives who, although presumed to lack familial bonds, occasionally rebutted this presumption.

What explains the tacit judicial consensus that "natural" or "moral" obligations could exist only between immediate blood relatives (and, in extraordinary cases, extended or step- relatives)? Simple expedience was surely an important motivation. Analyzing on a case-by-case basis whether unrelated persons truly shared a long-term commitment and meaningful emotional bonds would have been difficult and costly. Nevertheless, mere judicial economy may not fully explain why state judges uniformly rejected the notion that cohabitants unrelated by blood, marriage, or adoption could form a family. After all, throughout the nineteenth century (and for centuries prior), Anglo-American law defined "family" to include individuals who were neither spouses nor blood relatives. The word "family" itself, in fact, derived from the Latin word for "servant," and both legal and popular dictionaries throughout the nineteenth century featured "all persons who live in the same house, including servants" (or words to that effect) as a leading definition.[143]

Following Judge Lindsay's example, courts could have embraced such traditional usages of the term, while examining the circumstances in which its members came to know each other, how long their cohabitation preceded the onset of financial misfortune, and so forth, to distinguish the authentically constituted families from the malingerers.[144] Although time-consum-

143. The 1846 edition of Worcester's *Dictionary,* for example, defined "family" as "persons collectively who live together in the house; household; those who descend from one common progenitor; a race; a generation; a course of descent; a genealogy; house; lineage; race; a class; a tribe; a species." Bouvier's *Law Dictionary* of 1867 opined, "In a limited sense it signifies the father, mother, and children. In a more extensive sense it comprehends all the individuals who live under the authority of another, and includes the servants of the family. It is also employed to signify all the relations who descend from a common ancestor, or who spring from a common route."

144. See *Wilson v. Cochran,* 31 Tex. 677, 680 (1869) (opining that "lexicographers, from whom, in our literary education, we derive all our knowledge of the correct import of words,

ing, such a fact-specific inquiry was one that jurists were familiar with and equipped to undertake. As the Georgia Supreme Court explained, "it must appear to the satisfaction of the jury on the trial, that the [dependents] were legitimately members of the family, had been so long enough and under circumstances to show that they were not brought into the household of the applicant on purpose to avoid the payment of debts . . . and not gathered for the moment to defraud creditors as a mere trick or sham. . . ."[145]

Judges may have feared that, in the long run, granting legal imprimatur to an expansive definition of "family"—at least when property rights hinged on such designations—could impose far greater social costs than a mere drain on judicial resources. First, to treat domestic servants like Lettie Marshall as part of the "family" of their employers would have been to acknowledge both their true financial dependency and the enduring emotional ties that they often shared with their employers. Both these admissions would have done violence to the emerging ideology of free labor and its attendant glorification of contract freedom. As Amy Dru Stanley has shown, an important ideological project of the latter nineteenth century was to define wage labor as a voluntary, arm's-length contract between free individuals.[146] As free contract was counterposed with dependency-based models of status relations, such as slavery and master-servant doctrine, the disappearance of personal bonds between employer and employee was viewed as a necessary incident to the triumph of contract freedom. Meanwhile, the home was increasingly defined as a shelter from—rather than the locus of—economic production. As "home" and "market" became conceptually distinct, what took place in the home between family members was treated as operating outside, and independently of, the self-interested exchange that characterized market relations. Defining "family" to include those who were not linked by blood or marriage, but were sharing a home merely "because agreeable to all concerned, and as a matter of convenience,"[147] would have blurred these important, emerging conceptual boundaries.

Second, and perhaps even more important, broadening the scope of "family" beyond blood kin (and their spouses) implicitly threatened to

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tell us that the word 'family,' in its origin, meant servants; that this was the signification of the primitive word. It now, however, has a more comprehensive meaning, and embraces a collective body of persons living together in one house, or within the curtilage, in legal phrase. This may be assumed as the generic description of a family. . .").

145. *Blackwell v. Broughton,* 56 Ga. 390, 392 (1876).

146. Stanley, *From Bondage to Contract.* Additionally, see Christopher L. Tomlins, *Law, Labor and Ideology in the Early American Republic* (Cambridge: Cambridge University Press, 1993); Mary P. Ryan, *Cradle of the Middle Class: The Family in Oneida County, New York, 1790–1865* (Cambridge: Cambridge University Press, 1983).

147. *Hill v. Franklin,* 54 Miss. 632, 634 (1877).

upset the intergenerational transmission of wealth and even class boundaries. Under the laws of intestate property succession, only a man's spouse and legitimate issue were guaranteed to inherit a portion of his estate if he died without a validly executed will. Parents, siblings, illegitimate children, and more distant relatives had no such rights, and indeed were sure to inherit nothing if the decedent was survived by a spouse or minor children. Granting special treatment to extended relatives who lived with a provider before his death (let alone domestic servants or other unrelated persons) could substantially diminish other relations' inheritance rights. This prospect was more than theoretical: several widely cited opinions from Texas and California considered whether certain of a deceased provider's blood relatives, with whom he lived before his death, could assert claims superior to those of other lawful heirs.[148] The Lettie Marshall case raised the even more frightening prospect of freed slaves preventing the lawful heirs of their former masters from acquiring family land. It surely was not accidental that a claim by a former slave was brought in Texas: the Probate Act of 1870 invited all manner of claimants to test its definitional boundaries by declaring cryptically that homestead property "does not form any part of the estate of a deceased person when a constituent of the family survives."[149]

Unlike Texas, most states superseded claims like Lettie Marshall's by implicitly (and sometimes explicitly) adopting a bifurcated definition of "family." When a household head sought to claim the benefits of the homestead exemption, the definition of "family," as we have seen, was not strictly limited to nuclear families. The term sometimes could include other clusters of immediate relatives, and sometimes even extended, foster or step- relatives. However, after the provider's death, a more restrictive definition took hold: the only "family" members who could claim survivorship rights were the decedent's spouse and minor children.

Thus in declining to treat most extended relatives, and all unrelated

148. See *Burns v. Jones,* 37 Tex. 50 (1873) (containing dicta to the effect that unmarried or minor children, wards, grandchildren, or apprentices who survived a decedent could continue to occupy the homestead as his family); *Roco v. Green,* 50 Tex. 483 (1878) (daughter who lived with her elderly mother after death of her first husband, and before marrying her second husband, sought to displace claims of other siblings by claiming survivors' rights after mother's death); *Childers v. Henderson,* 76 Tex. 664 (1890) (widowed daughter granted survivorship rights in deceased father's homestead, where she lived before his death); *In re Romero's Estate,* 75 Cal. 379 (1888) (two children who alleged to be biological children of deceased property owner sought to displace rights of "collateral kin" by claiming survivorship rights in father's homestead).

149. Texas Probate Act of 1870, Paschal's Dig., Art. 5437 (cited in *Roco v. Green,* 50 Tex. 483 [1878]).

persons, who lived together as a "family," nineteenth-century jurists (and legislatures) avoided a host of practical difficulties. Yet what resulted was an awkward doctrinal hybrid. As contemporaries were well aware, the jurisprudence of homestead exemption lacked a coherent, internally consistent account of why certain "families" should be awarded the benefits of state recognition. Insofar as the goal was simply to preserve lawful marriages and the rearing of children by their parents—as Justice Gould claimed—then the definition of "family" was too broadly defined. If, on the other hand, the objective was to protect stable households whose members shared permanent emotional and economic bonds—as Judge Lindsay contended—then the concept's definitional boundaries were drawn too narrowly. In short, although nineteenth-century courts struck an *ad hoc* balance between formalist and functionalist approaches, in so doing they sacrificed a good measure of doctrinal clarity, leaving to future generations the task of developing a more coherent doctrinal blueprint of "family" status.

## VI. Conclusion

To its contemporaries, one of the most puzzling and controversial aspects of homestead exemption was the scope of the protected class. Although advocates shared a willingness to manipulate credit markets to deter family poverty and homelessness, precisely *which* "family" members were the statutes designed to protect? Upon whom did the laws intend to confer new rights? As long as the head of a family and his or her dependents constituted a nuclear family (or a fragment thereof), such debates were academic. Assisting a spouse or parent to retain the homestead could be presumed to benefit the entire family group, and high courts routinely did so. But when there could be no assumed identity of interests between "family" members—or when the "family" itself had dissolved—doctrinal interpretation was fraught with myriad complexities.

For some, the primary objective was to shield male landowners from financial misfortune. Advocates of this approach could point to the statute's conferral of homestead exemption rights on heads of families, who were allowed to keep a roof over their families' heads while struggling to escape the burden of debt. For others, however, the chief goal was to alleviate the devastating effects of insolvency on the wife, children, and other household dependents. This view also found support in the black letter law: not only did wives enjoy the novel ability to prevent their husband's unilateral alienation and enforce homestead rights on the family's behalf, but they and their minor children were permitted to occupy the homestead after the

patriarch's death. In effect, then, the laws embraced two distinct (albeit partially overlapping) models of state intervention.

To scholars of the twentieth-century welfare state, this implicitly bifurcated vision of the social safety net looks familiar. Modern accounts have traced its origins to the development of two distinct, parallel channels of social legislation. On one hand, state-administered mother's aid laws of the 1910s and '20s, a victory for a "maternalist" coalition of reformers including feminists, charity workers, and social workers, served as models for the first federal "welfare" program, Aid to Dependent Children (ADC), and its progeny. The focus of such programs has always been on protecting vulnerable mothers and children who lack a masculine provider. Meanwhile, a coalition of primarily male, academically oriented advocates of "social insurance" spearheaded the passage of workers' compensation, unemployment insurance, and Social Security in the 1920s and '30s. The animating principle behind social insurance was to sustain many American workers—especially male wage earners—during periods when they could not draw income in the labor market.

Historians such as Linda Kerber and Alice Kessler-Harris have argued that the development of these "two channels," along with their very different social meanings, are rooted in historically specific and politically charged conceptions of wage labor, family sex roles, and economic dependency.[150] Kessler-Harris has gone even further in arguing that our most deeply held notions of fairness—and the social institutions to which they gave rise in the twentieth century—betray the influence of a model in which only men can be full economic citizens.[151] While "welfare mothers" have long been considered morally suspect for relying on "charity" (and, in the latter twentieth century, for not engaging in wage labor), social-insurance-based "entitlement" programs for wage earners such as Social Security, workers' compensation, and unemployment have never inflicted such social stigma on their recipients.[152]

The disparate social meanings of welfare and social insurance led to very different political trajectories by the close of the twentieth century. Notwithstanding their often dire impact on both state and federal budgets, most social insurance programs—worker's compensation, unemployment insurance, and social security—have survived intact into the twenty-first century. Welfare programs have not fared as well. By the turn of the century, Aid to Families with Dependent Children (AFDC) had been replaced

150. Kerber, *No Constitutional Right to Be Ladies;* Kessler-Harris, *In Pursuit of Equity.*

151. See Kessler-Harris, *In Pursuit of Equity,* 4–5.

152. Gordon, *Pitied but Not Entitled,* 2–3.

with Temporary Assistance for Needy Families, which offers only temporary relief and focuses on pushing mothers into the wage labor market.

No prior scholarship has explored whether homestead exemption laws influenced the development or architecture of the twentieth-century social welfare state, and this article does not examine the question. Moreover, homestead exemption and modern entitlement programs differ in many features of programmatic design. While homestead exemption was the exclusive province of state governments, the federal government engineered the establishment and administration of welfare and most forms of social insurance. Homestead exemption was designed to protect ownership in land, whereas most twentieth-century programs focused on the replacement of wage income. Finally, while homestead exemption protected families who possessed at least a modicum of wealth (in the form of land), AFDC and social insurance programs have targeted, respectively, very low-income families and veteran participants in the wage labor market. For these reasons, analogies between them must be drawn with caution.

Nevertheless, the way in which judges exercised their discretion to interpret homestead exemption in the latter nineteenth century seems to foreshadow both the ascendancy of "masculine" social insurance programs and the decline of feminized "welfare" programs in the latter twentieth century. Nineteenth-century judges, as we have seen, shaped the doctrine in ways that staunchly preserved the interests of white male landowners, while carefully circumscribing the entitlements of women (particularly unmarried women) and other economic dependents. Divorced men, separated men, widowers, single men living with parents or adult siblings—all could usually lay claim to family headship status, even if they were not demonstrably supporting any dependents when they applied for judicial protection. Female claimants generally had far narrower grounds for optimism. If they belonged to intact marital unions, they could usually count on the court's protection, and in fact they even gained important new rights. But women who fell outside these narrow strictures met with limited success. Those whose fidelity to their wifely role was called into question—such as divorced women and those who chose to separate from their husbands—risked forfeiture of their homestead rights. Meanwhile, women living with other adults were rarely treated as heads of families, even if they provided material support.

In short, the jurisprudence of homestead exemption reflects a judicial preoccupation with safeguarding the link between property ownership, manhood, and citizenship. Shoring up female providers outside marriage and extending protection to non-nuclear dependents were, at best, secondary concerns. These twin trends seem to presage the disparate paths of "welfare" and social insurance in the twentieth century. Those programs de-

signed to sustain male breadwinners progressively eclipsed those intended to aid "dependent" women and children. Kessler-Harris's work illustrates how "gendered habits of mind"—in which only men were breadwinners and only breadwinners were entitled to full economic citizenship—inscribed themselves into twentieth-century social welfare policy.[153] Yet a century earlier, as discussed above, similar patterns of thought had already woven themselves into the doctrinal fabric of homestead exemption, an early social safety net that was also ostensibly designed to protect middle-class families.

Also for the first time in U.S. history, homestead exemption transformed the construction of "family" into a divisive, politically charged locus of public policy. Indeed, debates over the meaning of "family" in the context of homestead exemption may have helped, in a literal sense, to shape the meaning of the word "family" in postbellum America. Remarkably, it was not until the postbellum period—the heyday of homestead exemption litigation—that the nuclear family began to appear as one of the definitions of "family" in legal and popular dictionaries. For example, none of the five definitions in the 1880 edition of Noah Webster's *American Dictionary of the English Language* described a nuclear family.[154] In the 1890 edition, however, the second definition of "family" became: "[t]he group comprising a husband and wife and their dependent children, constituting a fundamental unit in the organization of society."[155]

Since the archival materials used in the preparation of *Webster's* have not been preserved, it is impossible to know whether homestead exemption law directly influenced the postbellum appearance of the nuclear family as a leading definition. At the very least, however, it is clear that American

153. Kessler-Harris, *In Pursuit of Equity,* 18.

154. The first three of the five listed definitions are, respectively: "(1) The collective body of persons who live in one house, and under one head or manager; a household, including parents, children, and servants, and as the case my be, lodgers or boarders"; "(2) Those who descend from one common progenitor; a tribe or race; kindred; as, the human *family;* the *family* of Abraham"; and "(3) Course of descent; genealogy; line of ancestors; lineage."

155. The 1798 edition of Samuel Johnson's dictionary contains only four definitions of "family": "Those who live in the same house; household"; "Those that descend from one common progenitor; a race; a tribe; generation"; "A course of descent; a genealogy"; and "A class; a tribe; a species." Neither does Worcester's *Dictionary of the English Language,* published in Boston in 1846 and 1864, list the nuclear family as a definition. Apparently one of the first legal dictionaries to include the nuclear family as a definition of "family" was Bouvier's *Law Dictionary Adapted to the Constitution and Laws of the United States of America,* published in 1867. Bouvier defined "family" as follows: "In a limited sense it signifies the father, mother, and children. In a more extensive sense it comprehends all the individuals who live under the authority of another and includes the servants of the family. . . ."

jurists' impulse to limit the scope of the term to blood relatives (if not the nuclear family) was not lexicographically foreordained. If anything, the choice to infuse "family" with a more restricted meaning than "household" altered traditional understandings of both terms.[156]

As postbellum judges were well aware, expanding the definition of "family" was a costly endeavor. The broader the term's conceptual boundaries, the greater the potential for manipulation and abuse, and the more numerous the potential threats to existing class boundaries, the protection of inherited wealth, and the ideology of "free" labor. Given these significant concerns, what is perhaps most remarkable about the judicial interpretation of homestead exemption is that nineteenth-century courts rejected Justice Gould's invitation to limit its beneficiaries to "husband, wife, and children." Rather than adopting a purely formalist approach, most jurists permitted some groups of cohabitants that bore a functional resemblance to nuclear families to enjoy the same privileges as husband and wife. To be sure, judges showed a strong preference for groups that were linked at least distantly by consanguinity or matrimony, and that were headed by an adult male provider. Nevertheless, more than half a century before the birth of the modern welfare state, American judges exploited the elasticity of family-related terminology to confer special privileges on adult relationships that were cemented not by wedlock, but by mutual psychological bonds and a long-term commitment to cohabitation.

156. Interestingly, many modern scholars of the family seem to be unaware of this fact. See, e.g., Martha Albertson Fineman, "Progress and Progression in Family Law," *University of Chicago Legal Forum* 1 (2004): 1–25, 2 (asserting that "[h]istorically, the term 'family' was assumed to be synonymous with the traditional unit of husband, wife, and their biological children"); Martha M. Ertman, "Contractual Purgatory for Sexual Marginorities: Not Heaven, but Not Hell Either," *Denver University Law Review* 73 (1996): 1107–68, 1167 (referring to traditional "definition of family [as] the heterosexual dyad with biological offspring").