

# "Exceptions to the General Rule": Unmarried Women and the "Constitution of the Family"

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*Throughout the nineteenth and early twentieth centuries, judges and lawmakers sought to erase the visibility of unmarried women. In the public law arena, for example, legislators conflated women and wives for the purpose of the franchise, arguing that women did not need the vote because their husbands voted for them. In the private law arena, doctrines intended to guarantee support to unmarried women functioned by constructing single women's legal identities in relation to marriage, thereby suggesting that marriage could provide for all women's material needs.*

*This essay argues that understanding the history of single women's legal rights is critical to understanding the legal construction of marriage as the dominant institution for regulating all women's private relationships to men and public relationships to the state. Denying single women's existence allowed the law to ignore the potential threat they posed to a marriage-centric socio-legal order. Legal and political changes in the early decades of the twentieth century, however, made it increasingly difficult for the law to deny the existence of unmarried women. As single women gained social prominence, nonlegal writers in the 1930s and 1940s produced a new genre of prescriptive and descriptive literature for and about women living outside of marriage. Unlike earlier legal texts, these works embraced single women as a permanent and visible part of society. Like their legal predecessors,*

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*however, these modern authors sought to minimize the threat posed by single women to the institution of marriage, pointing to single women as proof of marriage's modern, consensual, democratic nature.*

## I. SOCIAL AND LEGAL CONSTRUCTIONS OF SINGLE WOMEN

Concurring in the United States Supreme Court's 1872 decision in *Bradwell v. State*, which held that the privileges and immunities clause of the Fourteenth Amendment did not guarantee Myra Bradwell the right to be admitted to a state legal bar, Justice Joseph P. Bradley offered his now infamous meditation on women's legal rights.<sup>1</sup> The United States Constitution, he argued, offered little by way of protection for Bradwell's employment rights because her claims were controlled by a different constitution: the "constitution of the family."<sup>2</sup> The terms of this alternate constitution derived not from legal principles, but rather from social norms that "indicate[d] the domestic sphere as that which properly belongs to the domain and functions of womanhood."<sup>3</sup> Women's proper social roles, Bradley concluded, determined their limited, gender-specific legal rights.

What, though, of women whose lives did not descriptively match Bradley's normative vision of a "separate spheres" society with men in the public sphere of the market and women in the private sphere of the home? Unlike Myra Bradwell — a wife and mother — some women had neither husbands nor children and, thus, could not be ushered with such ease back into their wifely and maternal roles within the constitution of the family.<sup>4</sup> Even Bradley felt compelled to concede that "many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state."<sup>5</sup> But if these single women gave Bradley reason to pause momentarily, their existence did little to shake his confidence in his basic understanding of women's proper place within the American socio-legal order. Unmarried women, Bradley concluded, are "exceptions to the general rule ... . And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases."<sup>6</sup>

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1 *Bradwell v. State*, 83 U.S. 130 (1872).

2 *Id.* at 141 (Bradley, J., concurring).

3 *Id.*

4 On Myra Bradwell, see Carol D. Rasnic, *America's First Woman Lawyer: The Biography of Myra Bradwell*, 4 *Tex. J. Women & L.* 231 (1995) (book review).

5 *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring).

6 *Id.* at 141-42.

Justice Bradley's concurrence constitutes not only a legal moment in the history of the interpretation of the Fourteenth Amendment, but also a cultural marker of the dominant social landscape of the 1870s, a world in which single women occupied little enough public space and made few enough public gestures as single women that their existence could be dismissed as socially and legally inconsequential by a member of the United States Supreme Court. Even as Justice Bradley penned his concurrence, however, the social world that he purported to reflect in his legal analysis was beginning to shift. Indeed, over the course of the ensuing decades, the social landscape of gender roles changed dramatically and new cultural markers pointed precisely to the social visibility of single women. Specifically, by the 1930s and 1940s, texts created not by judges but, rather, by journalists, sociologists, and doctors reflected the new place of women living outside marriage. In studies and advice manuals with titles like *The Single Woman* and *Live Alone and Like It*, academic and popular commentators acknowledged this female cohort as an accepted and integral part of social life, not a group to be dismissed or ignored.<sup>7</sup> Thus, while in 1872 Justice Bradley could draw on his social environment to brush aside single women as "exceptions to the general rule," by 1942 Ruth Reed, a professor of sociology and economics at Mount Holyoke College, would observe in *The Single Woman* that "the single woman plays a vital and important role in our society as it is presently constituted."<sup>8</sup>

This essay argues that these very different texts — Justice Bradley's 1872 concurrence and books for and about women living outside marriage in the 1930s and 1940s — actually served a common purpose: they sought to explain the relationship between single women and marriage in a social and political world ordered around the latter. Specifically, they sought to minimize the potential threat that single women posed to marriage's role as both the primary structure for male-female relations, as well as the public locus for women's citizenship within a democratic polity. This essay explores changes in the legal regulation of single women between the 1870s and the 1930s — changes that made the law an increasingly weak discourse within which to define single women's relationship to marriage — as a way to understand the importance of both Bradley's concurrence and the

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7 See Robert Latou Dickinson & Lura Beam, *The Single Woman: A Medical Study in Sex Education* (1934); Marjorie Hillis, *Live Alone and Like It: A Guide for the Extra Woman* (1936); Ruth Reed, *The Single Woman* (1942).

8 Reed, *supra* note 7, at vii.

later prescriptive literature in organizing the relationship among women, marriage, and the state.

Implicitly, most legal historians — even those intent on refuting, descriptively or normatively, the harsh simplicity of Bradley's separate-spheres account of women's private world — have adopted Bradley's view of single women's exceptional nature within a social order organized around the "general rule" of the marriage-centered family. As such, although the past two decades have witnessed the creation of a robust legal historiography of marriage and married women,<sup>9</sup> the legal regulation of women living outside marriage has remained virtually unexamined.<sup>10</sup>

Understanding the law's treatment of marriage and gender in the nineteenth and early twentieth centuries, however, requires attention to the law's treatment of single women. Since the law imagined marriage as infinitely powerful, single women — those who, despite marriage's vast imagined domain, lay just beyond the borders of its formal reach — constituted contested terrain in which judges and lawmakers forged the meaning of marriage itself, as well as the content of women's

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- 9 See, e.g., Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (1982); Nancy F. Cott, *Public Vows: A Political History of Marriage in the United States* (2000); Hendrik Hartog, *Man and Wife in America: A History* (2000); Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (1985); Michael Grossberg, *A Judgment for Solomon: The d'Hauteville Case and Legal Experience in Antebellum America* (1996); Linda K. Kerber, *Women of the Republic: Intellect and Ideology in Revolutionary America* (1980); Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (1998); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Cal. L. Rev. 1373 (2000); Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117 (1996); Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 Yale L.J. 1073 (1994); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings*, 82 Geo. L.J. 2127 (1994); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947 (2002) [hereinafter Siegel, *She the People*].
- 10 Social histories of single women are almost as scarce. See, e.g., Lee Virginia Chambers-Schiller, *Liberty, A Better Husband: Single Women in America: The Generations of 1780-1840* (1984); An Evening When Alone: *Four Journals of Single Women in the South, 1827-67* (Michael O'Brien ed., 1993); Martha Vicinus, *Independent Women: Work and Community for Single Women, 1850-1920* (1985); Karin Wulf, *Not All Wives: Women of Colonial Philadelphia* (2000); Zsuzsa Berend, "The Best or None!": *Spinsterhood in Nineteenth-Century New England*, 33 J. Soc. Hist. 935 (2000).

legal identities.<sup>11</sup> Justice Bradley's treatment of unmarried women, I argue, exemplifies the willful blindness that characterized the law's attitude toward women living outside marriage throughout the nineteenth century. Rather than confront explicitly the potential challenges to marriage's power inherent in the diverse reality of women's intimate lives outside marriage, judges and politicians like Justice Bradley found ways to bring single women within the marriage-centric constitution of the family. Specifically, in both public and private law settings, formal definitions of women's political citizenship and common law doctrines of female support — such as common law marriage, heartbalm actions, and dower — allowed nineteenth-century lawmakers to define all women as wives, thereby erasing the non-marital identities of single women.

Nevertheless, by the early decades of the twentieth century, social and legal changes forcefully challenged the continuing vitality of this approach: many states rejected the traditional common law doctrines of female support; the Nineteenth Amendment granted women the right to vote; single women gained new social visibility; and norms of companionate marriage pushed hard at the persistent remnants of coverture. These changes rendered Justice Bradley's approach to married life and unmarried life untenable, based as it was on ignoring the latter. With the destabilization of the traditional legal approaches to minimizing the threat of single women, alternate nonlegal discourses arose to explain why women living outside marriage would not overturn marriage's dominion. In the final part of this essay, I turn to advice manuals for single women from the 1930s and 1940s to cast a new model of the relationship among single women, marriage, and American democracy. Rather than deny the existence of single women, this model embraced their social prominence as the very proof of marriage's modern, consensual, democratic nature.

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11 Cf. Hartog, *supra* note 9, at 1 ("It is through separations, through close examination of struggles at the margins of marital life and marital identities, that we come to a historical understanding of core legal concepts: of wife, of husband, of unity.") In this work and elsewhere, I take Hartog's methodological insight one step further, moving entirely out of marriage's formal borders to understand its internal terrain. See Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 Yale L.J. 1641, 1646 (2003).

## II. SINGLE WOMEN AS A USEFUL CATEGORY FOR ANALYSIS IN LEGAL HISTORY

As a preliminary matter, it is worth pausing to question the coherence and utility of the category of "single women," by which I mean to refer to adult women living outside marriage by choice or accident. Legal historians have long considered "married women" a useful analytic category. From a social perspective, of course, the extreme diversity among married women forcefully challenges any attempt to categorize them into a coherent group across time and space. Historically, as is the case today, women have married for vastly different reasons — from passion, to convenience, to economic necessity — and different wives have experienced marriage with emotions ranging from awe to disdain. Moreover, while they all have had husbands, married women's infinitely divergent class, race, and cultural positions often have distinguished them from one another in ways that vastly outweigh their common wifely identities. Just as feminist scholars have revealed the essentialist biases inherent in analyses of "women" *qua* women, so too analyses of "married women" necessarily ignore the critical differences that separate individual wives from one another, both subjectively and in terms of their cultural and socio-economic positions.

Nonetheless, from the perspective of historians with a legal focus, married women's common status as wives properly comes to the fore, counseling in favor of their aggregation as a historical subject. Whatever their social, economic, or racial characteristics, all married women during what Hendrik Hartog has called "the very long nineteenth century" — stretching well into the twentieth century — came under the powerful legal pull of coverture, the common law of husband-wife relations, in its pure or more modernized forms.<sup>12</sup> From the Founding, marriage constituted the dominant regime through which legislators and courts sought to define women's relationships to individual men, as well as women's relationships to the state.<sup>13</sup> Coverture defined married women as economic and political dependents, protected by the law and by their husbands and, in exchange, deprived of independent legal identities. Under coverture, therefore, all married women's legal identities were figuratively "covered" by their husbands, rendering them doctrinally

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12 Hartog, *supra* note 9, at 309. Of course, as I discuss below, for much of the nineteenth-century, African-American women slaves were denied access to marriage and, thus, stood outside coverture's reach. See *infra* text accompanying notes 15-18.

13 On marriage as a public, regulatory institution, see Cott, *supra* note 9.

unable to enter contracts, hold property, bring suit in their own names, or be sued. Different married women, of course, experienced the social and economic consequences of these disabilities differently, as did their husbands and families. Married women's common legal status, however, constituted coverture's power as a regulatory regime that defined both the particular legal rights of wives as well as the larger meaning of gender and femininity within the law.

Similarly, as a category for historical analysis, "single women" initially seems doomed by the vast diversity of social experience enfolded into the general label. Just as women have married for all different reasons and inhabited their marital relationships in myriad physical and emotional ways, so too have women lived outside marriage for many different reasons and in as many different circumstances. Some women have avoided marriage by design; others by accident. Some women, for instance, never married out of principled opposition to legal marriage. Others longed to marry, but never encountered the right mate at the right time. Of these women who remain unmarried throughout their entire adult lives, some entered short-term or long-term romantic relationships with men, some entered romantic relationships with other women, some did neither. Other women would eventually marry, but for some period of their adult lives they lived alone, with extended family, or with other unmarried women. Others entered long-term, intimate relationships with men, perhaps considering themselves married, although they never formalized their unions in formal marriage ceremonies. Still others got married, living as wives for a long or short period of time, and then re-entered single life as widows or divorcées.

Nevertheless, despite these tremendous differences, women living outside marriage — like married women — constitute a critical, if overlooked, analytic category for legal historians. For despite the radical dissimilarities among disparately socially and culturally situated single women, their commonality becomes significant when viewed from a legal perspective — that is, through the eyes of judges and legislators. From this perspective, just as all married women in the nineteenth century came under the legal disabilities of coverture, all women living without husbands seemingly stood outside the powerful regulatory regime of marriage.<sup>14</sup>

Moreover, the very strength and breadth of coverture's powers renders

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14 See, e.g., Hartog, *supra* note 9, at 118 ("[T]he fundamental contrast that framed the law of husband and wife in the treatises was not that between men and women but that between single women and married women. An unmarried woman was not subject to the disabilities of coverture; single women possessed all of the rights married women lost.").

women living outside marriage — from women who never married to widows — all the more worthy of historical analysis. In a marriage-dominated socio-legal order, the very existence of single women quietly presented lawmakers with a forceful challenge to marriage's legal hegemony. The mere visibility of single women threatened to expose the basic inability of marriage to define all women's rights and the misprision inherent in embracing marriage as a totalizing approach to women's social and legal identities. Unmarried women raised the question of how lawmakers could frame and define the legal status of women who were, empirically, not wives. Single women who could have legally married but did not, therefore, constitute a worthy category for historical analysis precisely because their very existence challenged the dominant, nineteenth-century, legal normative model of the relationship among gender, the family, and the legal order.

Of course, for much of the nineteenth century, not all women were legally permitted to make the choice to marry. If marriage constituted the primary locus of white women's citizenship, slave women's exclusion from formal marriage powerfully marked them as non-citizens.<sup>15</sup> The law of slavery expressly denied slaves' biological and emotional familial bonds, constructing enslaved women as at once white men's commodified property and biological breeders of more white men's property, not as wives and mothers with human kinship ties of their own.<sup>16</sup> As scholars of slavery have documented, enslaved men and women developed diverse forms of intimate relations in reaction to their exclusion from marriage.<sup>17</sup> These alternate familial forms continued to shape African-American communities even after emancipation, as formerly enslaved people grappled with both the legal privileges as well as the forms of intimate regulation inherent in embracing state-recognized marriage.<sup>18</sup>

Unintentionally, perhaps, scholarly analyses of the varied forms of family and intimate organization in African-American communities — slave and free — have implicitly reinforced the tacit conflation of white women and wives. Historical analyses of the intimate and familial identities of African-Americans have presumed that their diversity stands in marked

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15 See Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 *Yale J.L. & Human.* 251 (1999). On marriage among free African Americans in the slave south, see Brenda E. Stevenson, *Life in Black and White: Family and Community in the Slave South* 258-85 (1996).

16 See, e.g., Herbert G. Gutman, *The Black Family in Slavery and Freedom, 1750-1925*, at 75-80 (1976).

17 See, e.g., Laura Edwards, *Gendered Strife and Confusion: The Political Culture of Reconstruction* (1997); Stevenson, *supra* note 15, at 226-57; Franke, *supra* note 15.

18 See Franke, *supra* note 15.



contrast to the ubiquity of marriage as the sole model of intimate relations among white people. From different scholarly perspectives, therefore, both histories of the slave family and its legacy as well as histories of coverture's powerful role in legal constructions of gender have reinforced the very ideological premise that coverture itself sought to enshrine within the law: that white women's intimate lives were organized exclusively around marriage and that the traditional family constituted the sole building block of white, American, democratic society.

In allowing unmarried women — other than slave women — to recede from a social and legal landscape dominated by the institution of marriage, contemporary legal historians have fallen prey to the crafty sleight of hand performed by the judges and lawmakers faced with the potential threat posed by single women in the nineteenth century. Having embraced marriage as the dominant legal framework for regulating women's legal rights and social status — that is, for defining femininity as coterminous with wifedom — lawmakers surreptitiously sought to deny the widespread existence of single women. To this end, judges and legislators either denied the existence of women living outside marriage or found ways to bring single women within the normative framework of marriage.

Many women who could have married within the law, however, did not do so, and their decision to forego marriage marks them as historically significant precisely because they were expected to do otherwise. Specifically, white women who chose not to marry posed a particular challenge to lawmakers and judges who — witness Justice Bradley — had these women in mind when they referred to "women" generally as wives. The existence of single women within this particular, limited demographic, therefore, constituted a particularly stunning challenge to a normative vision of free, white society with marriage, motherhood, and the nuclear family necessarily at its core.<sup>19</sup> These women are the subject of this essay.

### III. THE NINETEENTH-CENTURY DISAPPEARING ACT

A willful blindness to single women constituted a critical part of nineteenth-century lawmakers' approach to women's political citizenship and, thus, to their definition of American democracy. Lawmakers' insistent conflation of women and wives structured the dominant nineteenth-century discussion

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<sup>19</sup> On the family and, especially, motherhood as the foundation of political society, see Kerber, *supra* note 9, at 269-88 (analyzing the ideal of republican motherhood).

of women's rights — that is, the question of woman suffrage. While an organized woman's rights movement demanded the extension of the franchise to women, opponents of woman suffrage embraced a vision of American democracy premised on women's minimal political participation from within a traditional, marriage-centric family structure. In so doing, they formally defined women as wives for the purpose of adjudging women's constitutional rights as citizens.<sup>20</sup>

As historians of the woman suffrage movement have analyzed, the concept of "virtual representation" constituted the dominant trope crafted by opponents of extending the franchise to women. Women, the argument ran, did not need the vote because they were already represented in the political process by their husbands.<sup>21</sup> A married man, anti-suffrage lawmakers opined, voted with the interests of his whole family, particularly his wife, in mind. Thus, in casting his ballot, a husband voted for himself as well as for his wife and other familial dependents. Though the ballot was individually cast, male suffrage constituted a collaborative, collective, familial enterprise that rendered woman suffrage unnecessary and, in fact, potentially redundant.<sup>22</sup> Throughout the nineteenth century, therefore, marriage and the family made sense of the meaning of a core component of American democracy.

The family, in this view, literally mediated women's political and legal identities as rights-bearing citizens. White women were most certainly citizens under the Constitution, but they voted through their husbands.<sup>23</sup>

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20 For an excellent analysis of the social conflation of women and wives in colonial Philadelphia, see Wulf, *supra* note 10.

21 See, e.g., Aileen S. Kraditor, *The Ideas of the Woman Suffrage Movement, 1890-1920*, at 24 (1965); Siegel, *She the People*, *supra* note 9, at 981-87.

22 Note that even as legislators championed virtual representation and, thus, a collaborative image of the franchise, they simultaneously argued that women should not vote because they would be unable to vote independently — that is, without being unduly influenced by their husbands. The juxtaposition of these arguments reveals that lawmakers embraced two separate models of voting: men, while presumed to vote in consultation with others, were nonetheless presumed to be independent citizens; women, by contrast, were rendered unfit to vote by virtue of their dependent, familial roles.

23 In fact, as citizens with civil, but not political, rights, single white women constituted a model of second-class citizenship that Reconstruction-era lawmakers understood to be available to formerly enslaved black men. See Cott, *supra* note 9, at 1450-51 ("When Republicans ... had, prior to 1866, emphasized that civil rights or citizenship would not automatically bring along political rights to the freedmen, their premier example was the half of the white adult population who were citizens without voting or holding office: women."); see also Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *Yale L.J.* 1131, 1164 (1991). However, even as single women offered this example to lawmakers pondering the expansion of male citizenship,

Thus as one anti-suffrage, Reconstruction-era legislator argued, "I think they ought not to vote double; and inasmuch as their husbands vote once for them they ought not vote at all."<sup>24</sup> Moreover, opponents of woman suffrage argued, allowing women to vote would not only upset women's proper relationship to the state (that is, as citizens already represented by their husbands), but it would also undermine the harmonious family structure anchoring their citizenship as well as women's basic nature. As one senator observed, voting would

associate[] the wife and mother with policies of the state, with public affairs ... and necessarily disseverate[] her from purely domestic affairs, peculiar care for and duties of the family; and, worst of all, assign[] her duties revolting to her nature and constitution, and wholly incompatible with those which spring from womanhood.<sup>25</sup>

Acknowledging the existence of unmarried women citizens would have forced lawmakers to confront the fundamental misprision at the heart of their rhetorical equation of women with wives. Single women, after all, stood as powerful reminders that — even accepting the anemic normative vision of women's citizenship underlying the virtual representation argument — not all women's lives conformed to the norms embodied by lawmakers' imagined "nature and constitution" of womanhood. Not all women, after all, had husbands to vote on their behalf. Nor did all women have other male relatives to carry their views to the voting booth. Nonetheless, lawmakers committed to the model of the relationship between marriage and the state embodied in the virtual representation argument, studiously ignored this social reality, defining women as necessarily members of male-headed households. Like Justice Bradley, they offered a very occasional reference to "[t]he exceptional cases of unmarried females," but labeled them "too rare to change the general policy."<sup>26</sup>

Even the most sympathetic of single women — widows — could not alter lawmakers' commitment to this model of the relationship between the family and the state. Unlike other women living outside marriage, widows generally evoked sympathy, not befuddlement or disdain.<sup>27</sup> Widows, after all, had ostensibly made every effort to conform to traditional family norms

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lawmakers contemplating women's rights within the constitutional order focused virtually exclusively on married women.

24 Cong. Globe, 38th Cong., 1st Sess. 2243 (1864) (Sen. Howe).

25 Cong. Globe, 39th Cong., 2d Sess. 40 (1866) (Sen. Morrill).

26 H.R. Rep. No. 48-1330, at 3 (1883) (quoted in Siegel, *She the People*, *supra* note 9, at 986).

27 On widows as sympathetic figures, see Dubler, *supra* note 11, at 1648 n.15.

and, yet, had failed through no fault of their own. They had been wives, but their wifely identities had not shielded them from the whims of fate.

For Reconstruction-era and post-Reconstruction-era lawmakers in particular, Civil War widows posed an especially poignant challenge to their committed willful blindness to single women. Civil War widows sparked particular sympathy since they had been robbed of their family comforts, as well as their political representatives, by virtue of their husbands' commitment to their country. Even these women, however, did not shake legislators' basic commitment to linking the vote indelibly to marriage. One senator, for example, opposed extending the ballot to women, even as he recognized that he had no answer to give to "the many sorrow-stricken women made widows by the late war," any of whom might say to him: "[M]y husband and two sons lie in yonder national cemetery, their graves marked, cared for, cherished gratefully and tenderly by the nation, as the last resting-place of the heroic defenders of its life. I have no husband, no son, no brother, no father, no man left to represent me."<sup>28</sup>

The rhetoric of virtual representation, however, defined women's citizenship in a manner that could not account for these widows' misfortune. In so doing, it erased the possibility of women's existence outside marriage by choice or by accident. As a basis for female citizenship, therefore, virtual representation necessarily erased the diverse reality of women's intimate lives, forcibly locating all women as wives — real or imagined — within the family.

As I have analyzed elsewhere, this commitment to locating all women within marriage and the constitution of the family carried into the private law arena as well in this era.<sup>29</sup> In a context far less politically charged than the battle for suffrage, courts often confronted women living outside marriage when they brought claims deriving from their precarious economic positions. After all, in an economy premised on a male-provider/female-dependent familial structure, single women were particularly likely to find themselves in dire economic straits. Furthermore, unlike married women, whose legal identities were quashed by coverture, single women could bring claims of financial need to court on their own behalf. And come to court they did, not in search of public support, but rather in search of judicial protection for what they understood to be their rights to the financial resources of particular men.

In particular, unmarried women enlisted three doctrinal areas in their

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28 Cong. Globe, 40th Cong., 3d Sess. 862 (1869) (Sen. Warner).

29 See Dubler, *supra* note 11.

search for male financial support: the so-called heartbalm actions of seduction and breach of promise to marry; common-law marriage; and dower.<sup>30</sup> These doctrines are not usually understood as connected to one another, let alone as forming any kind of coherent regulatory regime of female life outside marriage. Nevertheless, viewing these areas together — as sites where the law confronted women living outside marriage — reveals a common thread in the legal regulation of unmarried women. These common law doctrines of female support pushed single women into what I have called the *shadow of marriage*. Within this territory, the law understood single women's legal demands and rights by placing them in intelligible relationships to marriage proper and by imagining them within the basic male-provider/female-dependent structure of marriage even as they clearly stood outside marriage's borders.<sup>31</sup> In fact, for purposes of making plausible legal claims, the law compelled single women, whether living outside marriage by accident or design, to construct their intimate identities as internal to the general regulatory structure of marriage proper. In so doing, legal rules again forcefully effaced the diverse social choices women might have made with respect to their intimate lives.

The heartbalm actions of seduction and breach of promise to marry, for example, allowed a woman (or, originally, at common law, her father) to sue her paramour if he ended their relationship prior to an expected legal marriage.<sup>32</sup> In so doing, the law insisted that a woman present herself as a thwarted wife — that is, as hopelessly aspiring to live within a traditional marriage and pursuing romantic love only in pursuit of that goal rather than for more short-term hedonic satisfaction — if she wanted the economic support of a long-time lover. Similarly, the doctrine of common-law marriage allowed courts to transform long-term, nonsolemnized, heterosexual unions into legal marriages by virtue of a couple's public, marriage-like behavior over time. In order to be entitled to legal support as a common-law wife, however, a woman plaintiff had to tell a court that she had always understood her nonsolemnized relationship not as a nonmarital affair, but

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30 *See id.*

31 *See id.*

32 *See* Michael Benjamin Warren Sinclair, "Seduction and the Myth of the Ideal Woman," 5 *Law & Ineq.* 35 (1987); Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* 34-63 (1985); Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction, 93 *Colum. L. Rev.* 374 (1993); Lea Vandervelde, *The Legal Ways of Seduction*, 48 *Stan. L. Rev.* 817 (1996).

rather as a marriage.<sup>33</sup> Finally, although widows' marriages were undeniably over, dower's meager entitlement to a life interest in one-third of a deceased husband's real, not personal, property effectively perpetuated the male-provider/female-dependent model of the family beyond the termination of a marriage. As such, it extended the ideological apparatus of coverture beyond the death of a husband, thereby preserving the legal fiction that widows were internal to the structure of marriage.<sup>34</sup>

It is impossible to estimate how often these legal assumptions matched the subjective experiences of the female plaintiffs living outside marriage who availed themselves of the available common law doctrines of female support with their attendant narratives of intimate identity. No doubt, some single women thought of their romantic lives as internal to the basic framework of marriage, while others did not. These doctrines, though, forced all women plaintiffs in need of financial support to give a marriage-centric account of their intimate lives, regardless of its correspondence to their lived experiences. The law thus simultaneously brought single women within the normative framework of marriage and vindicated its willful blindness toward the diverse lives women created outside marriage's borders. In so doing, these legal doctrines transformed single women from a potential threat to marriage's singular status into a constitutive part of marriage itself. Marriage, the common law implicitly reinforced, constituted a regime of intimacy so powerful that it reached all male-female relations.

#### IV. SINGLE WOMEN AND MODERN MARRIAGE IN DEMOCRATIC SOCIETY

By the early decades of the twentieth century, the anchors of marriage's shadow — the heartbalm actions of seduction and breach of promise to marry, common-law marriage, and dower — had lost their moorings amidst national trends away from the common law in these areas. Although judicial and legislative reforms varied from state to state (with some states retaining the doctrines), in general, each doctrine came to be seen as an unwelcome relic of a prior age. Dower, lawmakers concluded, provided widows with insufficient financial support.<sup>35</sup> By contrast, heartbalm actions and common-law marriage

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33 See Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 *Colum. L. Rev.* 957 (2000).

34 See Dubler, *supra* note 11, at 1667-68.

35 See *id.* at 1684-86.

came to be seen as excessively generous, providing financial support to women who had, in fact, never married, and thereby creating incentives for deceitful women to claim they had been married when they had not in order to lay claim to innocent men's resources.<sup>36</sup>

In different ways, then, the respective movements away from the common law anchors of marriage's shadow each recognized that not all women's intimate lives could be brought within Justice Bradley's constitution of the family. These legal shifts thus highlighted the existence of women living outside marriage, implicitly granting that single women were not simply exceptions that could be crammed within the general rule. Even as courts would eventually find ways to maintain marriage as the reigning normative model for intimate relations,<sup>37</sup> the trend away from these doctrines represented a powerful symbolic severing of the doctrinal link between women and wives, as well as a forceful check on the law's ability to construct cultural narratives about the unthreatening relationship between single women and marriage.

As these trends coalesced in the early decades of the twentieth century, the passage of the Nineteenth Amendment in 1920 rendered permanent this symbolic severing within the political arena, marking the death of the virtual representation theory of political citizenship and, with it, of a formal definition of female citizenship tethered to wifedom.<sup>38</sup> Moreover, in the years surrounding the suffrage amendment's passage, Justice Bradley's separate-spheres typology looked increasingly fantastical as more women — single and married, particularly in urban areas — entered the paid workforce, repudiating any absolutist separate-spheres vision of women's place in the home and not the market.<sup>39</sup> In 1929, the American Academy of Political and Social Science heralded the dawning of the era of "Women in the Modern World."<sup>40</sup>

Amidst these changes, single women in particular became more socially prominent than ever before, especially in their leisure and dating lives. New York, for instance, became a particular site of a visible public culture

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36 See Dubler, *supra* note 33, at 1002-03.

37 See *id.* at 1011-21; Dubler, *supra* note 11, at 1712-15.

38 See Siegel, *She the People*, *supra* note 9; on the continuing link between marriage and women's citizenship, see Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 *Am. Hist. Rev.* 1440 (1998).

39 See Alice Kessler-Harris, *Out to Work: A History of Wage-Earning Women in the United States* 217-49 (1982).

40 See *Women in the Modern World: The Changing Educational, Political, Economic, and Social Relationships of Women in the United States* (Viva B. Boothe ed., 1929).

of female life and intimate relationships outside marriage.<sup>41</sup> As one social observer of single women noted in 1936,

New York has witnessed, during the past thirty-six years, the mustering of an entirely new kind of army, a host composed of a quarter of a million capable and courageous young women, who are not only successfully facing, and solving, their economic problems, but managing all the while to remain preternaturally patient, personable and polite about it.<sup>42</sup>

This army of single women incited the interest of a wide range of popular and academic commentators. From perspectives ranging from the medical to the sociological to the pedagogical to the journalistic, the 1930s and 1940s witnessed the publication of new advice manuals for and scholarly studies about women living outside marriage.<sup>43</sup> While these new books did not adopt a uniform approach to life outside marriage, they shared the common premise that single women constituted a visible and growing part of society and that marriage was but one choice of many that a woman might make when choosing how to order her intimate life.<sup>44</sup>

In *How to Win and Hold a Husband*, for instance, columnist Dorothy Dix recognized that many women would live outside marriage, even as — witness her title — she continued to hold up marriage as the ideal end for romantic love.<sup>45</sup> Despite her goal of advising women how cleverly to manipulate themselves into legal matrimony, even Dix conceded that marriage was not an ideal relationship for all women. Instead, marriage loomed large as a choice to be carefully and thoroughly considered. Thus, she advised that

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41 See Kathy Peiss, *"Charity Girls and City Pleasures": Historical Notes on Working-Class Sexuality, 1880-1920*, in *Passion and Power: Sexuality in History* 57 (Kathy Peiss & Christina Simmons eds., 1989); Christina Simmons, *Modern Sexuality and the Myth of Victorian Repression*, in *Passion and Power*, *supra*, at 157.

42 Frank Croninshield, *Introduction*, in Marjorie Hillis, *Live Alone and Like It: A Guide for the Extra Woman*, at viii-ix (1936).

43 See, e.g., Dickinson & Beam, *supra* note 7; Dorothy Dix, *How to Win and Hold a Husband* (1974); Jean Van Evera, *How to Be Happy While Single* (1949); Hillis, *supra* note 42; Reed, *supra* note 7. See also Leonora Eyles, *Unmarried But Happy* (1947); Ruth Reed, *The Modern Family* 85-92 (1929); Dame Mary Scharlieb, *The Bachelor Woman and Her Problems* (1930); M.B. Smith, *The Single Woman of Today* (1952).

44 As one study of single women noted, "[t]he social problem of the single is wide. In the population fifteen years old and older, every fourth woman and every third man is single." Dickinson & Beam, *supra* note 7, xi n.2.

45 See Dix, *supra* note 43.



once a woman fell in love "[s]he should decide whether or not she is cut out for marriage."<sup>46</sup> Marriage, in this sense, was a life activity like any other, and "[n]ot every woman has a talent for matrimony, any more than every woman has a talent for sewing or keeping books or acting. There are women who are wretched as wives and who make their husbands miserable."<sup>47</sup>

Dix's description of women who were unlikely to make happy wives says as much about her modern understanding of marriage as it does about her traditional understanding of femininity. Those women who should beware of marriage, Dix noted, included

[t]he girl who is old-maidish in her ways, and who is upset by anyone moving a chair out of its appointed place, and who has to live by a schedule that is as inflexible as the laws of the Medes and the Persians, and who can't endure tobacco smoke in the curtains ... . Nor should the girl marry who feels that she has a sacred call to reform everyone with whom she comes in contact. Nor should any girl marry who is not domestic in her tastes and who doesn't just love to coddle a man and make him comfortable and who doesn't think that making a home is just the most exciting adventure in the world.<sup>48</sup>

Even as Dix clung to marriage as a clear normative ideal, then, she recognized its limitations. Marriage was not, in her view, an infinitely flexible relationship; instead, it demanded certain sacrifices and gender roles that could not fulfill all women's hopes and life preferences. As Ruth Reed likewise observed, these sacrifices seemed all the more significant in changing social times. "With the increasing tendency to regard the individual rather than the family as the unit of society," Reed wrote in discussion of unmarried women in her study of the modern family, "th[e] submergence of the personality and responsibility of the married woman becomes a greater cause for complaint."<sup>49</sup>

Compared with *How to Win and Hold a Husband*, Marjorie Hillis's *Live Alone and Like It* — once again, the title says it all — went even further in embracing the reasons that life outside marriage might hold considerable appeal for many single women, from those "between husbands" to those who considered themselves "widow[s] or spinster[s]."<sup>50</sup> Whatever the volitional or

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46 *Id.*

47 *Id.*

48 *Id.*

49 Reed, *supra* note 43, at 91.

50 Hillis, *supra* note 42, at 15, 25. Hillis considered these terms horribly outdated.

unintended cause for a woman's single status, Hillis instructed her unmarried readers to embrace their circumstances. As she wrote,

This business of making your own life may sound dreary — especially if you have a dated mind and still think of yourself as belonging to the Weaker Sex. But it really isn't. You can have a grand time doing it. You can — within the limitations imposed on most of us, whether we live singly or in herds — live pretty much as you please. ... You can, in fact, indulge yourself unblushingly — an engaging procedure which few women along are smart enough to follow. ... Living alone, you can — within your own walls — do as you like. The trick is to arrange your life so that you really do like it.<sup>51</sup>

Hillis thus thought it acceptable to highlight the distinct advantages of single life, contrasting its freedoms with the strictures and sacrifices of marriage. She instructed women to embrace their independence outside marriage, much as men had long felt entitled to do. "A woman," she observed, "is now a woman, just as a man is a man, and expected to stand on her own feet, as he (supposedly) stands on his."<sup>52</sup> As such, women could lead successful and fulfilling lives — socially, economically, and even sexually — without entering marriage.<sup>53</sup>

In one sense, this new literature on life outside marriage addressed itself to single women themselves, advising them on the choice to marry or not marry. Much as Justice Bradley sought to define women's social roles, confining them to the domestic sphere as wives and mothers, authors like Dix, Reed, and Hillis sought to define women's social roles for them, displaying and validating for them a larger array of models and options. In so doing, these advice manuals constructed the choice to marry or not to marry as a meaningful one in a peculiarly modern way.

In another important sense, however, the 1930s and 1940s literature on single women addressed itself to society at large, explaining to those observing single women's new social prominence how to understand a gendered world in flux. In this sense, much as Justice Bradley and nineteenth-century lawmakers had done decades earlier, these new works sought to

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As she noted, they "are rapidly becoming extinct — or, at least, being relegated to another period, like bustle and reticule." *Id.* at 25.

51 *Id.* at 17-18.

52 *Id.* at 26.

53 As Hillis observed, "practically every woman on her own goes in for one affair, at least." *Id.* at 94. She did caution, however, that "[c]ertainly, affairs should not even be thought of before you are thirty." *Id.* at 95.

make sense of single women within a culture committed to marriage's power. Thus, like Justice Bradley, these modern authors sought to minimize the extent to which single women constituted a threat to either society or marriage. Unlike nineteenth-century jurists, however, the prescriptive and descriptive literature of the 1930s and 1940s approached this task not by denying single women's existence or dismissing them as exceptional, but, rather, by pointing to the ways in which the choice of some women to remain single actually bolstered marriage's appeal and power in a modern, democratic society.

If Justice Bradley's concurrence in *Bradwell v. State* stands as the paradigmatic nineteenth-century approach to the place of single women within the constitution of the family, then Ruth Reed's *The Single Woman* might be seen as the paradigmatic modern approach of the post-suffrage era. Although with the demise of the common law doctrines of female support and the passage of the Nineteenth Amendment, the law had moved away from the private and public doctrinal sites at which it could formally define unmarried women within marriage's shadow, social commentators like Reed — even as they highlighted the social status of single women — stepped in to perform that function. Writing in 1942, Reed argued

that the single woman plays a vital and important role in our society as it is presently constituted; that her life as a single woman has value and worth, and that she can in the fulfillment of her social life achieve contentment and peace in a well-rounded existence and participate fully in the good life.<sup>54</sup>

She sought neither to convince women to marry nor to convince them to stay single, but only to "accept [single life] for the fact that it is."<sup>55</sup>

Even as Reed explicitly repudiated any outdated denial of single women's social roles, however, she continued to understand single women within a marriage paradigm. Thus, she scolded critics of unmarried life for failing to grasp "the contribution which the single woman herself makes to the institution of monogamous marriage and the family life of today."<sup>56</sup> Social anxieties concerning women outside marriage, she insisted, were misplaced, because "the existence of the single woman is in no way a reproach to the institution of the family nor a menace to it. Rather is it true that all families are

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54 Reed, *supra* note 7, vii.

55 *Id.*

56 *Id.* at xi.

more secure because some women have not married."<sup>57</sup> Unmarried women, after all, often played important familial functions, from teaching children to nursing the sick.<sup>58</sup>

Beyond these practical functions, however, marriage's very power as a modern institution rested on the existence of women who did not marry. These women, Reed opined, constituted irrefutable proof of marriage's fundamentally consensual — and, thus, its modern — nature. "In a democratic society," she wrote, marriage "is based upon the freedom of the parties concerned to consent to marriage or to refrain from marriage."<sup>59</sup> As such,

the right of single women to make for themselves a satisfactory position in society is necessary in order to maintain the freedom of consent to marriage. For if single women are not free to make a tolerable existence for themselves, then marriage becomes to that degree compulsory for all women and the position of women in marriage is correspondingly lowered.<sup>60</sup>

Marriage's power, in other words, rested not on the denial of single women's existence, but, rather, on their very visibility.

Seventy years after *Bradwell v. State*, therefore, single women's exceptional status emerged as something to be celebrated, not repressed. By the middle of the twentieth century, the constitution of the family still remained the dominant framework for structuring relations between the sexes as well as women's intimate lives. The "constitutional" rhetoric of marriage and the family, however, had changed. Justice Bradley's vision of marriage and democracy had rested on virtually represented women citizens whose husbands carried their views to the voting booth while they remained ensconced in the domestic sphere. Visible single women, therefore, constituted a threat to the power of the family to structure the meaning of all women's private and public lives. By contrast, as Reed's analysis suggests, modern marriage rested on a normative vision of women's choice to live within its general rules. Single women, therefore, were to be celebrated, for their very existence marked the constitution of the family as a consensual social contract perfectly suited to a modern democracy.

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57 *Id.*

58 *See id.* at xii.

59 *Id.* at xi-xii.

60 *Id.* at xii.