

The Legal Status of Women, 1776–1830

by Marylynn Salmon

State law rather than federal law governed women's rights in the early republic. The authority of state law meant that much depended upon where a woman lived and the particular social circumstances in her region of the country. The disparity in standards can perhaps be seen most dramatically in the experiences of African American women. In the North, where states abolished slavery after the Revolution, black women gained rights to marry, to have custody of their children, and to own property. On paper at least, their rights were identical to those of white women. In the slaveholding South, lawmakers continued to deny enslaved workers these basic human rights. But even in the South, a rising number of freed black women theoretically enjoyed the same privileges under the law as white women. However, racial prejudice against both black and Native American women made it difficult to ensure these rights in practice.



"The Life and Age of Woman," by A. Alden, Barre, MA, ca. 1835. (Library of Congress Prints and Photographs Division)

In every state, the legal status of free women depended upon marital status. Unmarried women, including widows, were called "femes soles," or "women alone." They had the legal right to live where they pleased and to support themselves in any occupation that did not require a license or a college degree restricted to males. Single women could enter into contracts, buy and sell real estate, or accumulate personal property, which was called *personalty*. It consisted of everything that could be moved—cash, stocks and bonds, livestock, and, in the South, slaves. So long as they remained unmarried, women could sue and be sued, write wills, serve as guardians, and act as executors of estates. These rights were a continuation of the colonial legal tradition. But the revolutionary emphasis on equality brought some important changes in women's inheritance rights. State lawmakers everywhere abolished primogeniture and the tradition of double shares of a parent's estate, inheritance customs that favored the eldest son. Instead, equal inheritance for all children became the rule—a big gain for daughters.

Marriage changed women's legal status dramatically. When women married, as the vast majority did, they still had legal rights but no longer had autonomy. Instead, they found themselves in positions of almost total dependency on their husbands which the law called *coverture*. As the English jurist William Blackstone famously put it in his *Commentaries on English Law* (1765–1769):

By marriage, the husband and wife are one person in the law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing.

Coverture was based on the assumption that a family functioned best if the male head of a household controlled all of its assets. As a result, a married woman could not own

property independently of her husband unless they had signed a special contract called a marriage settlement. Such contracts were rare and even illegal in some parts of the country. In the absence of a separate estate, all personalty a woman brought to her marriage or earned during marriage, including wages, became her husband's. He could manage it or give it away, as he chose, without consulting her.

This sounds bad, and it was. But one rule worked to mitigate some of the worst effects of coverture. A married woman had the right to be maintained in a manner commensurate with her husband's social status. If he refused to provide for her appropriately, she could sue and win support from the courts. While waiting for the court's judgment, she was permitted to run up charges at local stores and taverns—and her husband had to pay for them. Judges consistently applied this rule, called the *doctrine of necessities*, in order to prevent men from neglecting their wives. But the courts could not stop husbands from gambling or making bad investments. Women had no protection when their husbands proved irresponsible. If creditors pursued a husband for debts, his wife was entitled to keep only the bare necessities of life. This was usually defined as two dresses (so she would have one to wear while the other was being washed), cooking utensils, and a bed.

Women's rights to *real property*—the lands and buildings that constituted most wealth in the early national period—were more extensive than their rights to personalty. A husband could not sell or mortgage the realty his wife brought to their marriage without her consent. He could use it, but he could not convey it because a woman's real estate, generally inherited from her father, was meant to stay in the family and descend through her to her children. A wife also had important rights to the real property that her husband brought to the marriage or purchased afterwards. He could not sell or mortgage it unless she signed a statement signifying her free consent, which was recorded with the deed. Few mortgagors or buyers would enter into an agreement without the wife's consent. They knew that she retained her right to be maintained by the property in the event of her husband's death, even if he died insolvent. Courts were careful to ensure that a wife signed a conveyance of her own free will and not because of pressure from her husband. A court officer questioned her apart from him to confirm that she actually agreed to the sale or mortgage.

One of the most important rights of a married woman was *dower*, which was designed to provide her with support during widowhood. It consisted of a life estate in one-third of the husband's real property if there were children and one half if there were not. A "life estate" did not mean actual ownership of the property. It was meant only to provide for the wife as her husband would have done had he lived, under a legal system that recognized her position of dependency within the family. When a widow died, her dower lands descended automatically to her husband's heirs or to his creditors. A solvent husband could leave his widow more than dower if he chose to. He could even leave her his entire estate in fee simple (absolute ownership). But he could not leave her less. Most couples relied on dower as their standard for how much to leave.

Dower was a legal tradition carried over from colonial days. This and other rules about married women's property rights were meant to support the family as a unit. They worked reasonably well in an economic system based on landed wealth, under which families typically stayed in one place and rarely sold or mortgaged their farms. They did

not work as well, however, in a society like the rapidly expanding and industrializing nineteenth-century United States, where lands changed hands frequently and where there was growth in personal property as well as land.

Under these new circumstances, the old system of property law faltered. It failed to give adequate protection to women and, at the same time, denied them the ability to safeguard their own interests. In recognition of this dilemma, states began to pass married women's property acts in the antebellum decades. These acts gave wives the same legal rights as single women with regard to their estates and wages. It was piecemeal legislation, enacted reluctantly by male lawmakers who would have preferred to keep women dependent within the family. Yet the lawmakers recognized that these reforms were essential in a capitalist economy based on movable wealth.

Political rights were a function of control over property for men in the republic, but gender alone was the basis for women's exclusion from voting or holding office. Simply put, men with property had the right to vote in the early national period but women, no matter how wealthy, did not, even though women paid the same taxes as men. The reasoning behind this discrimination rested on the assumption that married women were liable to coercion by their husbands; if a wife voted, legislators argued, it meant that a man cast two ballots. As one man put it, "How can a fair one refuse her lover?" Yet single women were also denied suffrage, a clear sign that more was at stake than the power of a husband to influence his wife's choices at the polls.

Blatantly discriminatory attitudes kept lawmakers from giving women the vote. They did not want to share their political power with daughters, mothers, and wives, just as they did not want to share it with freed black men or immigrants. This pattern can be seen clearly in New Jersey, the one state where women with property were allowed to vote after the Revolution. In 1807 legislators took this right away—not only from women but from black men and aliens as well. As it turned out, discrimination against women in the area of the franchise lasted the longest of any disadvantaged group, at least on paper.

American independence brought women greater freedom from husbands who were abusive, neglectful, or adulterous. In colonial society, divorce was virtually impossible under English precedent, but all of the new states recognized the need to end unhappy marriages. The choice of appropriate remedies varied considerably, however. Some states, particularly in the South, only allowed separate residence with alimony (called divorce from bed and board). Other states granted absolute divorce with the right of the innocent party to remarry. In matters of divorce, social and religious values affected the laws in different parts of the country. The conservatism of divorce laws in the southern states, for example, was probably related to slavery: it was difficult for lawmakers to grant women absolute divorces because of their husbands' adulterous relationships with slaves. Liberal New England laws, in contrast, stemmed from a longstanding Puritan belief that it was better for unhappy couples to separate and remarry than to be joined forever in a state of discord and temptation to sin.

Child-custody rights also changed after the Revolution. The courts were increasingly willing to bypass colonial precedents that favored men in custody disputes. Instead, they placed young children and daughters (although not sons) under the care of mothers. These

reforms reflect the rising importance of the gender-based ideology of separate spheres, which gave women moral preeminence in the private sphere of the home and men supremacy in the marketplace and politics. Women would use the concept of moral motherhood to great advantage in their struggle for social justice over the next century.

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