

## Gendered Interventions: Exploring the Historical Roots of U.S. Social Policy\*

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Among the central paradoxes of American life is that of how the United States, among the wealthiest of industrial countries and practically alone among them, has failed to produce an adequate system of social welfare. This paper is an effort to speculate about some of the historical roots of this paradox. I want to offer an interpretation that evokes not so much traditional explanations of American individualism and competitive drive, as it draws on shifting constructs of gender to help us understand contemporary attitudes towards social welfare. In the process, I want to illustrate some of the kinds of things we might learn by looking at gender (along with class and race) as an intimate participant in the construction of national identity.

This excursion will take us back into the nineteenth century; it will focus on how the lives and culture of ordinary working men and women were transformed by class-based appeals to shared gendered understandings. My intent is to demonstrate how at the end of the nineteenth century, working men and women were led to accept conceptions of their own identity that helped to translate notions of citizenship rooted in collective responsibility into gender-divided conceptions

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of citizenship based on legal rights and independence from state intervention that inhibited the growth of community. In this construction, gendered notions of citizenship provide the rationale (the motive force), the engine, for particular forms of state action that measured the continuing relationships of the state to its citizens.

We begin the story in the early history of the American Republic when contests over citizenship exacerbated the salience of gender. If the revolution had made it clear that women's citizenship was derivative of their spouses and that their political and economic rights were based on the assumption that they would marry and be 'protected' by a male; it left unclear the degree to which, in the minds of ordinary people, ideas of republicanism were themselves gendered. Those ideas were still in flux. Some adhered to John Locke's conceptions of people as the possessors of universal rights. In their view, individuals had access to rights as a function of their being. On the grounds that each individual could protect his own rights, this conception provided a framework that allowed the polity to divest itself of responsibility for its members. Others were tempted by Republican notions of rights as the legitimate by-products of status. This conception reserved access to at least some rights to those with particular and defined relationships to the polity. If it deprived some people of the full regalia of citizenship, it nonetheless offered them access to the state through a notion of collective interest.<sup>1</sup> Under this rubric, for example, republican principles justified the denial to some men of the right to vote by arguing that within a community of common interests, those with a "stake in society" would protect the interests of all of its members.

Constitutional historians have noted how the newly adopted document straddled the fence between these notions of collective and individual interest. The tension between individual rights (as it was expressed by the forces of economic change) and collective republican values (as they resided in the culture of families and working people) provided part of the dynamic of change in the nineteenth century. As legal scholar Rogers Smith has suggested, "the thrust of classical liberalism's oppositional language of personal rights is to cast the claims of all types of associations . . . as threats to personal liberty."<sup>2</sup> The pressures of an emerging industrial society led the nineteenth century judiciary increasingly to construe rights along these lines: as the property of individuals rather than of groups. Their efforts constrained the evolution of what David Thelen has described as a "sense of collec-

tive identity and goals.’’<sup>3</sup>

But judicial interpretation encountered two major repositories of collective or associational values: workingmen’s societies and the family. In the face of efforts to reify claims to individual rights, both were defended with arguments and imagery rooted in notions of masculinity, manhood, and appropriate gender roles. The claims of women on both, and their interests in them differed: a difference that, in the end, may account for their failure to prevail.

For working people whose rights often seemed most readily protected by associations with others, a legal framework of individual rights could be used to deprive them of collective protections. Organized workers therefore sought to lay claim to republican notions of collective interest through their attachment to work. But women, in this period, were subsumed by family law which acted to reinforce traditional male prerogatives primarily defined by class interests. Women appear in legal discourse largely as the subjects of questions about whether and for what purposes, they might be considered persons.<sup>4</sup> For them, a framework of individual rights offered the possibility of improved standing before the law. One practical effect of this distinction is that women could benefit from seeking access to individual rights, while many working men felt that such access might hamper their efforts to sustain a collective vision. The nineteenth century effort to infuse family and work with individual rights thus created a continuing tension between gender and class.<sup>5</sup>

In the first half of the nineteenth century, tensions between the two were subdued. Skilled mechanics and artisans (distressed by changes in their trades) often succumbed to judicial pressure to participate in developing individual claims with relation to rights. A series of decisions in response to what we have come to know as the cordwainers cases illustrates the coercive power of the courts.<sup>6</sup> When the skilled shoemakers who were members of New York’s Journeymen’s Cordwainer’s Society tried to protect their prices by refusing to work with non-members in 1809, the master shoemakers who employed them leveled accusations of conspiracy. In a series of decisions that culminated in 1837 the courts compromised. They grudgingly agreed that cordwainers could meet to discuss wages, prices and hours, but asserted that workers had no right to enforce their collective decision. They could not persuade others to withhold their labor nor insist on an agreed price.<sup>7</sup> Though the resolution did not deny cordwainers the

rights of association, it did reject their capacity to act together. The result was to leave them no alternative but the individual right to fight each other for any available work.

Such decisions coincided with the mobility aspirations of an emerging capitalist society, and left skilled craft workers little alternative but to construe their collective assumptions in a political context. More and more, workers adopted notions of free labor that assumed that the collective voice and self-representation of labor as a whole ultimately relied on the dignity and independence of each worker. This perspective imagined that each person had equal rights or access to economic self-sufficiency, and that those rights were essential to the dignity and independence required to participate effectively in civic life.<sup>8</sup> Labor was free, in this view (which continued to be championed in the late nineteenth century by such working-class advocates as the Knights of Labor), when it had the capacity to represent itself. Thus, notions of an integrated or collective whole and of equal rights for workers that remained at the center of workers' consciousness ultimately embodied a notion of citizenship rooted in the possibilities of self-employment and independence from wage-earning.<sup>9</sup>

As Jonathan Glickstein points out however, the entire notion of free labor was patriarchally constructed.<sup>10</sup> It was built on a concept of independence in which skill at craft work was equated with manliness; it rested on a conception of male prerogatives built on an ordered and comfortable family life that relied on female labor at home; and it utilized these constructs to develop a conception of equal rights for workers that was to guarantee effective self-representation and provide the basis for the perpetuation of a democratic republic.

From prevailing conceptions of free labor, women as individuals were virtually excluded. They were not expected to be members of the polity in the same sense as men, nor was their wage-work expected to offer access to independent judgment. Indeed, central to the male conception of republicanism was an ordered family life that incorporated male dominion over wives and children.<sup>11</sup> In men's eyes, women's wage labor, while sometimes necessary, could be dignified and offer access to self-support. But it was not expected to lead to independence and self-sufficiency. Rather, just as men's free labor was predicated on their capacity to support a family, so women's was assumed to sustain the family labor of men. Since it was expected that women would participate in the polity through their menfolk, it was assumed that

any wage-work women did would be in subsidiary positions. For if women's wage work competed with that of men, or threatened to undermine men's wages, it simultaneously challenged men's access to citizenship. The idea of free labor thus embodied the notion of separate spheres for men and women, explicitly discouraging women from participating in wage work except in ways that would help to maintain family lives.

Theory, of course was never entirely sustained by practice. Women did manage to develop artisanal skills—those of milliners and printers for example—and to set up businesses that paralleled the entrepreneurship of men.<sup>12</sup> Nor did the idea of free labor entirely quell the capacity of women to “steal” men's trades or the willingness of some men to teach their skills to daughters and wives. But for the most part, the idea of free labor neatly rationalized the sexual division of labor confining women to jobs that did not enhance their claims to citizenship.

For many women who did not earn their own wages, a different logic applied. Early nineteenth century judicial interpretation treated women, collectively, as the dependents of men and of families. Though there were exceptions, women, as a group, remained largely legal creatures of the family.<sup>13</sup> While men acquired rights not only on their own behalf, but on behalf of their families, women acquired rights through their families, and might be denied access to property (and therefore practical liberty) by their fathers and spouses. What appeared to be “rights” for men were, from the earliest days of the republic, denied to women. It is true that some rights, like speech, assembly, or the freedom of religion, were distributed without formal regard to sex, but they were often constrained by custom. Others like property and liberty frequently carried restrictions based on both race and sex. Property, for example, typically passed through a woman, to her male heirs; her right to establish her own domicile was limited. Women's capacity to resist (to keep some of their property, to claim their own wages, to engage in unorthodox behavior) required either the permission of their male kin or the intervention of the state on their behalf. At first, their efforts to be treated as individuals drew little response from the state legislatures that might have helped. But then the courts stepped in, increasingly allowing individual roles for women, through interpretations of family law that protected individuals within the family.<sup>14</sup>

Thus the citizenship divide was born. For white men of all classes,

the discourse of rights placed them in direct opposition to the state which, by restricting the power of association, threatened to limit their liberty at every turn. But women (especially women of property) stood in a somewhat different relation to the state which could, and sometimes did, act as a mediator between male prerogative and female dependence. For example, between 1839 and 1865, when state after state refused to concede the need for regulations of wages and hours for workers, twenty-nine states passed laws to protect the property of married women from improvident husbands. Norma Basch suggests the importance of these laws in extending "the individualistic egalitarian premises of the revolution to the women of the nation, not only in their capacity as women and mothers but also as independent citizens of the state."<sup>15</sup> By affirming the state's capacity to act on behalf of women, they ratified what legal historian Lawrence Friedman has called "a silent revolution," a revolution that had already taken place.<sup>16</sup>

Poor women also seem to have perceived the state as a potential guardian of liberty. The generally abortive appeals of factory women to state legislatures for a shorter work-day, and the futile array of petitions to the U.S. Congress to abolish slavery affirm the willingness of women of all kinds to see the state as bearing a more benign aspect than the one it presented to most men, and especially to most ordinary working men. And indeed, there were early harbingers of success. By 1860, New York State included earnings protection in property laws. And in 1876, Massachusetts, which, like every other state, kept its distance from male working conditions, became the first state to limit the numbers of hours women could work.<sup>17</sup>

Still, these were limited gains. As long as women could be conceived as functioning largely in the private sphere (that is as long as most women did not earn wages outside their homes), their legal standing derived primarily from their status. Efforts to access individual rights drew little public or legal attention. From the perspective of contemporaries, the state's denial of rights to women, when it was noticed at all, appeared both "benign and paternalistic;" its offers of occasional protection were designed to preserve family well-being, not to undermine women.<sup>18</sup> To the historian, the invisibility of women in the constitution affirmed what was thought to be their primary allegiance to a well-defined private sphere of family.<sup>19</sup> But the use by the judiciary of the family to mediate women's relationship to the constitution foun-

dered in the period after the civil war, partly as the result of the women's rights movement, and partly in consequence of the salience of issues of class as a central category around which constitutional struggle emerged. Together these created urgent pressures on working-class families to reaffirm the republican tradition of collective rights in the face of a dramatic deterioration of practical liberty.

The passage of the Fourteenth Amendment to the constitution and the subsequent debate around it exacerbated both the conflict between working men and the state and the dissimilar relationship of men and women to it. The amendment, which affirmed a Lockean conception of human rights, explicitly assigned them to all persons, including especially freed slaves and people of color. Because it provided the basis for each individual to contract freely, or liberty of contract, it provided justification for an all-out assault on notions of citizenship derived from the Republican tradition of community. At the same time it explicitly excluded women from the exercise of many of the political and civil rights to which men were entitled. The same courts that construed universal rights as adequate shelter for wage-earning individuals and defined individual rights in opposition to collective protection, affirmed the state's capacities to refuse women the right to be persons under the law.

The twin assumptions about gender and class embedded in such interpretations are difficult to separate, but their consequences for the development of state policy are enormous. Briefly, this set of decisions turned women into a protected legal "class" on whose behalf the state could and did act, while it excluded male workers from comparable standing. If the workers happened to be women, they could seek protection on the grounds of their sex. If they were men, their diminished capacity to seek legislative and judicial remedies urged re-vitalized forms of association. The trade unions that developed, which often explicitly excluded women, as often coalesced around explicitly work-centered forms of masculinity. The ability of the courts in the late nineteenth century to distinguish family from labor law relied heavily on conceptions of women as part of a "separate sphere." When maintaining those conceptions became palpably impossible in the rapid industrialization of the 1870s and after, the resulting conflation of family and labor placed issues of gender at the center of a negotiating process over the meaning of democracy in the progressive era.

At first, it appeared as if the Fourteenth Amendment spoke most

sharply to divisions between men and women. In a series of cases, the Supreme Court refused to acknowledge that women were persons protected under freedom of contract.<sup>20</sup> At the same time, however, it expanded women's rights in the home. Thus the meaning of its decisions and the cultural consensus they represented differed for different women. On the one hand, the courts allowed states to restrict women's access to political citizenship by such means as denying them the right to vote or to appear as attorneys before the bar. On the grounds that women's primary responsibility was to their families the courts also allowed states to regulate women's access to economic citizenship by setting the terms under which women might earn a living as Massachusetts did in 1876. Consistent with their concern for individual rights, however, the courts took a less indulgent view of state efforts to hamper women's rights within the family.

Perceiving opportunity, an active women's rights movement began eagerly to seek those rights, successfully pressing for enlarged access to child custody, divorce and control over property. In practice then, as women's rights in the home broadened, their liberty in the workplace narrowed, thus endowing women's citizenship with a double meaning: restricted in the public marketplace and enhanced in the home.<sup>21</sup> If working women gained what some activists then called "practical liberty," the shift in stance nevertheless exacerbated the differences in the meaning of citizenship for men and women.

At the same time, the courts sharpened the differential relationship of men and women to the increasingly influential state by insisting that, whatever the disadvantages of liberty of contract for men, its exercise precluded any but an individual relation to the Constitution.<sup>22</sup> In the two decades before the turn of the century, the processes of rapid industrialization, urbanization, and immigration meant that the majority of the gainfully employed could no longer expect self-directed employment. Despite their efforts to encourage producer cooperatives and engage in political action, the defenders of free labor waged a futile battle against the challenges of a debilitating and all-encompassing wage-system.<sup>23</sup> Eager for a rapid transformation of control into their own hands and anxious to maximize the possibilities of cheap labor, a new generation of industrialists and entrepreneurs treated workers as individuals, each capable of negotiating, and each protected by the Fourteenth Amendment's prohibitions on deprivation of property. Labor's freedom, they suggested, with the concurrence of the courts, inhered



only in its right to freely contract to sell itself.

This view, commonly known as freedom of contract, appeared to extend democracy because it offered all workers (black and white, male and female) a putative equality from which to negotiate. Equal rights were embedded in the capacity of individuals (male and female) to compete freely against each other: to be free from restraint in selling labor. But the doctrine of freedom of contract also prevented workers from acting together to achieve ultimate economic independence, thus simultaneously negating the collective (or associational) possibilities inherent in republican conceptions of citizenship and preventing the state from acting on their behalf.

As a matter of formal and legal principle, the courts, beginning in the 1880s, ignored the vulnerable position of workers, and turned the Fourteenth Amendment's prohibition on depriving citizens of life, liberty, and property on its head. Consistently, they interpreted freedom of contract to mean that men could not be prevented from entering into exploitative relationships with employers: as a ban on virtually all state efforts to regulate the relations between employers and employees.<sup>24</sup> The courts thus effectively snuffed the associational dreams of working people, severing the connection between workplace dignity and manhood, and negating the political visions of free labor. With a few specific exceptions, the doctrine of freedom of contract outlawed protective labor legislation for most workers, depriving them of state intervention while employers were left free to impose their own conditions of work.<sup>25</sup> The crack in this system was gender.

Continuing to see women in terms of their status as family members rather than as individuals posed an incipient conflict, which emerged forcefully in the late nineteenth century. As women began to enter the "public" sphere of wage work in large numbers, increasing proportions of married women and of self-supporting women with children began to earn wages outside the home. Although this provided a large pool of 'cheap labor,' it also left women in vulnerable positions. Women who were treated as individuals for the purposes of the workplace and whose relative lack of skill subjected them to low wages and harsh working conditions could not fulfill socially necessary roles as family members. And jobs that undermined the working class family by destroying women's health or fertility or jobs that encouraged female aspirations to work at men's wages, could easily destroy the golden egg that produced the next generation of workers.

Thus, male workers, the courts, and employers, came together on the issue of women's family roles. Women could not be individuals in the same sense as men. Labor's conception of womanhood was rooted in the belief that effective civic participation demanded workplace dignity which in turn rested on an ordered and comfortable family life. The value of male skills threatened with obsolescence, manly aspirations to independence undermined by wage-work, claims to citizenship frustrated by shifting definitions of masculinity, manhood now located itself around the size of the wage packet. Women, seen either as individuals who competed with men for jobs or as family members on whose household labor they relied, belonged at home. If business' conception derived from the desire to preserve the family as an economic unit that could socialize future workers and provide incentives to stable and loyal work force participation, still, for both, ideas of gender difference defined women as family members whose work roles were secondary. But for business, placing women in separate spheres meant that employers needed to treat women simultaneously as individuals from whose labor they wished to benefit and with whom they could freely negotiate pay and working conditions; and as family members in whose non-waged family work they had an indirect but important stake.

How this difficulty was negotiated reflects the dilemma of seeking equal rights for women at home in the context of a labor market within which male workers and employers resisted equal opportunities in the workplace. It signals the transformation of gendered meanings that moved women as a group from an invisible constitutional category to a protected class. As the idea of free labor (which located manliness in the independence derived from skill) gave way to that of freedom of contract (which located manliness in the more ambiguous independence derived from wage-earning capacity), the concept of citizenship as a community activity gave way to that of representation of the narrowly defined family. Though the virtue inhering in the male's capacity to earn sufficient wages had always underlined male claims to citizenship, now the dignity of wage-work became a new battle cry intended to unify the political interests of working people. But the cry was explicitly gendered.

It is difficult to read the labor history of the late nineteenth century without noting how explicitly reliance on gendered constructs shaped the meaning of work and helped to replace a sense of community with

notions of independent self-sufficiency. By the late nineteenth century, wages, manhood, and citizenship, were inextricably linked in a nexus that presented male workers as defenders of the home and justified tacit neglect, if not opposition to women's economic rights. Enhanced efforts to achieve a family wage or a living wage for men rested on continuing assertions of male rights to female labor inside the home and provided parallel illustrations of women's living wages that universally omitted any mention of support for the family.<sup>26</sup> At the same time, the struggle over the right of married women to keep their own wages pointed up the contradiction inherent in a manliness that relied on dominion over women and a woman's claim to individual rights.<sup>27</sup> Joy Parr captures the transition in the efforts of trade unions to persuade members to give up control over jobs in return for cash which would "smooth the way to domestic satisfaction, to all those things a couple shared when the wife was not nervous and the husband was doing what husbands should do."<sup>28</sup>

We can hear the muffled claims to manhood articulated in a range of late nineteenth century working class voices. Historian David Montgomery describes the manly bearing and mutual support that constituted the final defense of skilled machine workers for control of the workplace. For Montgomery, workers' dignity resided in the superior knowledge that made them self-directing at their tasks, and in the supervision of one or more helpers.<sup>29</sup> The history of the declining Knights of Labor after 1886 reveals something of how as these claims weakened, skilled workers expanded their efforts to organize collectively around assertions of fraternity, defenses of their masculinity in comparison with slaves, and the exclusion of women from male crafts. More assertively, skilled workers, whose competence no longer guaranteed their power in the workplace, constructed new forms of masculinity at work to define their territory and restrain incursions on their influence.<sup>30</sup> The implications of declining claims to manhood for citizenship did not go unnoticed among male workers who increasingly resorted to the language of republicanism to defend themselves. As the mechanics and laborers engaged in the 1892 Homestead Strike argued in response to a particularly egregious assault on their manhood, "we believe that in this free land, all men should be free."<sup>31</sup>

The play of gendered ideas around the meaning of labor and access to individual rights heightened definitions of working class masculinity that revolved around protecting homes. The resulting tensions in the

family had substantive consequences for the meaning of republican citizenship among different women and men. Changing notions of manhood incorporated working class males within a circle of individual rights that encompassed jobs as mechanisms for preserving homes, while locating the rights of women within an expanding definition of the home. Independence for working class men all but required a conception of dependency in women, a conception that served to sustain the new economic and psychological position of men. So, for example, by the early 1900s, skilled craft trade unions routinely barred women from membership while simultaneously expressing moral support for the organization of women in female trades.<sup>32</sup> In the same period, Samuel Gompers, president of the AFL included among the inalienable rights of workers the right “to protect their lives, their limbs, their homes, their firesides, their liberties as men, as workers and as citizens. . .”<sup>33</sup>

The shift left working class women especially vulnerable. A working man’s right to make a living (a family wage) could be and was interpreted as enjoining women from taking away, undercutting or otherwise threatening the jobs and wages of men. The rights of men as husbands to the unpaid labor of their wives and daughters competed with the rights of women as individuals to train for good jobs, to work, and to keep their own wages. The right of employers to purchase labor at the market price could be and until 1908, generally was interpreted as preventing state intervention in market dynamics that exploited the labor power of women.<sup>34</sup> And the right of a working class women to work could be and was interpreted by middle class women as inimical to the interests of motherhood and child-rearing. In contrast to men, a women’s right to a living was severely restricted by custom, her family’s income and status, her own marital status and so on.

The same re-definitions of individual rights and gender sharpened distinctions of race. Squeezed into corners of the labor market by white male assertions of manly territoriality, white women assigned women of color into even narrower spaces. But this was only the beginning. While for poor white women, judicially conferred and legislated constructs split their class and gender identities, so for African-American women these constructs split racial identities as well. Since what Evelyn Brooks Higginbotham calls the “metalanguage of race” provided a different meaning for gender than the one that prevailed among white women, its practical effect was to exclude women of color from the

category of “woman” in much the same way that white women continued to be excluded from the category of “person.”<sup>35</sup> Translating this into policy produced very different legislative effects for women of color, as, for example when the job categories in which they worked were systematically excluded from protective labor legislation, or when mothers were required to earn wages under circumstances where white women might have been exempted. It may also have created different patterns of solidarity, encouraging class alliances among African-American women where divisions appeared among white women.<sup>36</sup>

The contested nature of equal opportunity in the workplace (with its consequent limits on job choice for women) restricted the kind of political strategies that men or women might conceive to enhance the positions of both. At the narrowest level, strategies that embraced male job security limited female options. Unionized men increasingly defended their job rights with strategies that embraced higher wages, job security, and independent action, while becoming increasingly suspicious of state intervention in job-related arenas.<sup>37</sup> Working class women, in response, located their job-related concerns in the protection of the home, allying with the movement of middle class women who sought greater protection for individual rights at home and in the family. Together these provided an effective justification for poor and working class women to seek state intervention and a rationale for law makers, reformers and the judiciary to intervene in women’s lives in order to protect the home. At the same time, it discouraged a politics of state regulation of industry on behalf of the efforts of working people to construct dignified working conditions. The ensuing renegotiation of gendered constructs may have finally eroded the republican/ collective/ community tradition on which workers had relied since the ante-bellum period and contributed to producing the compromises in which relationships of ordinary people to the state were rooted.

Some of these compromises are well known to historians. In summary, they include the resistance of the American trade union movement to a political strategy that might have encouraged state intervention in the market; and most particularly, the stubborn refusal of most trade unions to countenance many forms of legislation that might have benefited workers. This stance minimally deprived Americans of any equivalent of the social democratic parties of Europe and might also be held responsible for the absence of the kinds of social insurance that came to be so valued by the workers of most industrial countries.

Second, they encouraged the intervention in the lives of poor women of a strong, largely middle-class, women's movement whose central goal was to protect the home. The welfare legislation that resulted is often labeled maternalist because it was designed to protect motherhood and the home. It defined all women, whatever else they did, as home-makers, reducing women's wage-earning roles to a secondary position. Middle class intervention provided the single strongest voice in the passage of state legislation on behalf of women at home and in the workplace.<sup>38</sup> It had contradictory effects for different kinds of women, empowering middle class women to speak on behalf of women wage-earners, discouraging working class women from certain kinds of jobs, and excluding most jobs in which black women were heavily employed. It produced legislation that was simultaneously maternalist and regulatory but not universally applicable in that its rationale for including women rotated around the family and mothering. Occasional gestures and government workers excepted, federal workplace regulation did not attempt to cover most men until the 1930s.

Third, the language utilized to legitimize passage of legislation on behalf of women inhibited the capacity of social justice legislation to assume a more universal aspect because it framed issues that might have been in the domain of the workplace in ways that turned them into women's problems or placed them in the nexus of the family where they became appropriate subjects for middle class influence and state action. While in many European countries maternalist legislation occurred in the context of a broader acceptance of state intervention in the market, in the United States gendered language negated the possibilities for achieving universal job protections, encouraging men to see it as inimical to their familial or personal interests. In consequence, efforts to acquire legislation regulating the hours and wages of workers were, with few exceptions, restricted to women.<sup>39</sup> That huge confluence of legislation we call protective labor legislation provides a case in point. Rooted as it was in arguments for the protection of motherhood, and in efforts to reify the home at the expense of female independence, there was little chance for the legislation to serve as a model for men. The debate around restricting night work, for example was languaged in ways that explicitly denigrated the employability of the women who were said to need it.<sup>40</sup> One might argue that it turned motherhood and maternalism into an instrument for undermining the

universal rights that workers in other industrial countries were beginning to acquire. That it did so in the name of the workers' self-interest in the home is the more remarkable. Legislation passed for women, made possible because of their differential relationship to the state, thus served to deter redistributive efforts.<sup>41</sup>

Fourth, redistributive policies do not seriously appear on the agenda of U.S. social legislation until the crisis of the 1930s, at least a generation later than in most of Europe. Before that sporadic efforts to develop a rationale for achieving such entitlements as health care and unemployment insurance fall foul of a gendered language that roots manliness in self-protection or, like workmen's compensation, confines it to programs in which employers agree to participate. One explanation for the tentative nature of such redistributive strategies as the 1920s mother's pensions initiatives (which were punitive in nature, discriminatory in their application, and incorporated requirements that revolved around women's successful performance of their home roles) lies in their violation of male claims to provider-hood.

Fifth and finally, because the construction of women's rights in relation to the home restricts the parameters within which social legislation is discussed, some issues remain out of bounds. Maternity legislation, the cornerstone of European protections for women workers is the most vivid example. While in many European countries, some combination of legislation offering medical care and time off with job protection to women workers at childbirth was standard by World War I, in the United States such legislation was seriously considered by only one state (New York) and passed in none. Florence Kelley, Director of the National Consumers' League and champion of protective legislation for women workers, explained that she opposed "any law which provides for recognition by the state, of the practice of sending childbearing wives out of the home into industry."<sup>42</sup> At the same time attaching women's rights to the home fosters disputes among women around such issues as whether married women had a right to a job, the nature of "respectable" versus "disreputable" jobs, and whether the state should support unwed mothers.

From our perspective what is significant about this period is the cross-class construction of individual rights and equal opportunity as gender-linked prerogatives—available to men in some ways and to women in others. Their differential application to the home and workplace resulted in legitimizing appeals to the state for protection for

the family and the women within it at the cost of conceiving any broader state role in the workplace. No longer invisible in the light of the constitution, gendered constructions of the rights of citizenship emerged at the turn of the century as articulated rationales for the way democracy was to evolve and for restricting or enhancing the role of the state. The close relationship of equal rights under the law for men, and the denial of economic opportunity to women justified and enhanced the dependence of working class women, constructing access to citizenship as a condition of gender, and fostering a variety of strategies that implicitly linked the well-being of men and their families with demands for access to economic democracy that tended to exclude women. The result was to exacerbate both class and gender conflict in ways that limited conceptions of a welfare state.

The process affirmed the unwillingness of the state to mediate between the market and workers while providing a mechanism for state intervention between the market and women/mothers who sometimes happened also to be workers. Men of all classes participated in this strategy because it helped to bond them together regardless of their economic position.<sup>43</sup> The gendered association on which the strategy builds between independence and manliness and freedom from state intervention on one side and dependence, community, regulation and femininity on the other, creates conflicts among workers. At the same time, male workers, denied access to universal benefits, develop a compensatory ideology of the home which purports to limit competition in the labor market. Female workers, in contrast, struggle among themselves to define the boundaries between regulations designed to benefit the home (which now fall within the state's jurisdiction) and their access to jobs that are threatened by efforts to preserve their motherhood.

The gendered lens allows us to see the particular circumstances that encouraged the disintegration of a community of interest and it helps us to see how notions of individual rights altered the relation of women to the state. At the same time it allows us to see how working men constructed themselves with relation to the state in ways that made them not only "not women"—not dependent, but magnified their claims to equality of opportunity at the cost of the potential benefits of collective interests. To ignore this piece of the gendered equation, by focusing, for example, on the influence of women alone, obscures the complex array of negotiations that illustrates how, in a difficult economic mo-



ment, efforts to reconcile and re-shape prevailing conceptions of liberty, contract, and labor within the context of familiar gendered understanding culminated in the restrictive system of social justice we sometimes call the semi-welfare state.

### NOTES

\* c. Alice Kessler-Harris. This is a revised version of a paper prepared for delivery at the Japanese Association for American Studies, Kyoto, April 3, 1993. I have been working on the ideas contained herein for some time, and want to thank the Indiana Association of American Historians and the European Association for American Studies for giving me an opportunity to present some of them earlier. A version of that talk will appear in a collection of papers from the EAAS conference in Seville, March, 1992 edited by Maria Irene Ramalho de Sousa Santos and Mario Materassi to be published by VU University Press (Amsterdam, 1994). My thanks to Beatrix Hoffman and Stephen Robertson for research help and to Linda Kerber, David Thelen, and Bert Silverman for cogent criticism.

<sup>1</sup> Daniel T. Rodgers, "Republicanism: The Career of a Concept," *Journal of American History*, 79 (June, 1992), 11-38; Rogers M. Smith, "One United People: Second-Class Female Citizenship and the American Quest for Community," *Yale Journal of Law and Humanities* 1 (1989), 236-239; J.R. Pole, *The Pursuit of Equality in American History* (Berkeley, 1978), 36-37.

<sup>2</sup> Rogers M. Smith, "One United People," 234.

<sup>3</sup> David Thelen, Introduction to "Part II: Rights Consciousness in American History," *Journal of American History* 74 (Dec. 1987), 797.

<sup>4</sup> Lawrence Friedman, *History of American Law* (New York, 1973), Ch. 4; Joan Hoff, *Law, Gender and Injustice: A Legal History of U.S. Women* (New York, 1991), Ch. 4; and Linda Kerber, "The Legal Status of Women in the Early Nineteenth Century," *Human Rights* 6 (Winter, 1977).

<sup>5</sup> Contrast, for example, Mary Blewett, *Men, Women and Work: A Study of Class, Gender and Protest* (Urbana, IL, 1988), with Alan Dawley, *Class and Community: The Industrial Revolution in Lynn* (Cambridge, MA, 1976)

<sup>6</sup> Marjorie S. Turner, *The Early American Labor Conspiracy Cases: Their Place in Labor Law* (San Diego: San Diego State College Press, 1967), Ch. 2-4; Sean Wilentz, *Chants Democratic: New York City and the Rise of the American Working Class, 1788-1850* (New York, 1984), 97-99.

<sup>7</sup> An extended discussion of these cases is in Christopher Tomlins, *Law, Labor and Ideology in the Early American Republic* (New York, 1993), 128-152; See also, John R. Commons et al., eds. *A Documentary History of American Industrial Society*, volume III (Cleveland, 1910), 251-385.

<sup>8</sup> For the pre-civil war notion, cf. Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War* (New York: Oxford, 1970); for legal development in the gilded age see William Forbath, "The Ambiguities of Free Labor: Labor and the Law in the Gilded Age," *Wisconsin Law Review* (1985), 767-817.

<sup>9</sup> As Sean Wilentz notes the transition to independence was constrained by a sense of the "community's good." Wilentz, *Chants Democratic*, 76-77; 92-93.

<sup>10</sup> The patriarchal assumptions of free labor have yet to be fully explored, but for a start, see Jonathan A. Glickstein, *Concepts of Free Labor in Antebellum America* (New Haven, 1991), 11–16.

<sup>11</sup> These ideas are developed in Alice Kessler-Harris, *A Woman's Wage: Historical Meaning and Social Consequences* (Lexington, KY, 1990), 37ff. and see also, Amy Dru Stanley, "Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation," *The Journal of American History* 75 (September, 1988), 471–500; and Rogers Smith, "One United People."

<sup>12</sup> Wendy Gamber, "A Precarious Independence: Milliners and Dressmakers in Boston, 1860–1890," *Journal of Women's History*, 4 (Spring, 1992), 60–88.

<sup>13</sup> Linda Kerber, *Women of the Republic: Intellect and Ideology in Revolutionary America* (Chapel Hill, NC, 1980); Norma Basch, *In the Eyes of the Law: Women, Marriage and Property in Nineteenth Century America* (Ithaca, 1982), 26–27.

<sup>14</sup> Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill, NC, 1985), 300–302 and ff.

<sup>15</sup> Basch, *In the Eyes of the Law*, 30; Basch continues, "Nevertheless they did not effect an enormous, radical change in . . . the family."

<sup>16</sup> Friedman, *A History of American Law*, 186.

<sup>17</sup> Additional evidence that poor women looked to the state comes from their efforts to persuade it to provide housing. See Alice Kessler-Harris, *Out to Work: A History of Wage Earning Women in the U.S.* (New York, 1982), 80–81.

<sup>18</sup> The phrase is from David L. Kirp, Mark G. Yudof, and Marlene Strong Franks, *Gender Justice* (Chicago, 1986), 224.

<sup>19</sup> This allegiance has now been contested, especially as historians have come to question the existence of boundaries between the private and public. For access to the debate see especially Christine Stansell, *City of Women: Sex and Class in New York, 1789–1860* (Urbana, IL, 1987); Mary P. Ryan, *Women in Public: Between Banners and Ballots, 1825–1880* (Baltimore, 1990); Nancy A. Hewitt, "Beyond the Search for Sisterhood: American Women's History in the 1980s," *Social History* 10 (October, 1985), 299–321.

<sup>20</sup> In *Bradwell v. Illinois*, 83 U.S. 130 (1873), the Court decided that the constitution did not prohibit states from restricting the occupations in which women could engage. In *Minor v. Happersett*, 88 U.S. 162 (1875), the Supreme Court refused to confront the issue of whether a classification by sex violated the equal protection clause of the amendment and thus tacitly sanctioned the assumption that women constituted a legal "class." Finally, in *In re Lockwood*, 154 U.S. 116 (1894), the Court turned down Belva Lockwood's efforts to be admitted to the Virginia Bar on the ground that states had the right to define a "person," and could, if they wished, define the word as male. For some discussion of these cases, see Nancy S. Erickson, "Muller v. Oregon Reconsidered: The Origins of a Sex-Based Doctrine of Liberty of Contract," *Labor History* 30 (Spring, 1989), 230–231; Hoff, *Law, Gender, and Justice*, 183–184; Michael Grossberg, "Institutionalizing Masculinity: The Law as a Masculine Profession," in Mark C. Carnes and Clyde Griffen, eds., *Meanings for Manhood: Constructions of Masculinity in Victorian America* (Chicago, 1990); and Kirp, Yudof and Franks, *Gender Justice*, 225.

<sup>21</sup> For the expansion of women's individual rights with relation to the family as a consequence of judicial discretion, see Grossberg, *Governing the Hearth*, 300–301; For a succinct summary of the legal changes, see Eileen Boris and Peter Bardaglio, "The Transformation of Patriarchy: The Historic Role of the State," in *Families, Politics and Public Policy: A Feminist Dialogue on Women and the State*, ed. Irene Diamond

(New York, 1983), 70–93.

<sup>22</sup> See, for example, the Slaughter-House Cases, 16 Wall 36 (1883), and *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383 (1876); as well as *Bradwell v. Illinois* and *Minor v. Happersett*, cited above; and see the discussion in Kirp, Yudof and Franks, *Gender Justice*, 85–87, 225, who point out that these decisions about women contrasted sharply with the court's insistence that classifications by race were not "protected."

<sup>23</sup> The struggle is chronicled in such books as Leon Fink, *Workingmen's Democracy: The Knights of Labor and American Politics* (Urbana, IL, 1983), and Brian Greenberg, *Worker and Community: Response to Industrialization in a Nineteenth Century American City, Albany and New York, 1850–1884* (Albany, NY, 1985).

<sup>24</sup> See Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law and the Organized Labor Movement in America, 1880–1960* (New York, 1985), 61–63 for elaboration of this argument.

<sup>25</sup> Exceptions to a worker's right to freedom of contract generally included only such occupations as railroad workers, miners, and seamen where public health and safety was at risk. Where private health was concerned, as in the case of bakers and cigar makers, courts generally refused to support state intervention.

<sup>26</sup> Martha May, "Bread Before Roses: American Workingmen, Labor Unions and the Family Wage," in *Women, Work and Protest: A Century of U.S. Women's Labor History* ed., Ruth Milkman (Boston, 1985), 1–21; Kessler-Harris, *A Woman's Wage*, Ch. 1.

<sup>27</sup> Stanley, "Conjugal Bonds and Wage Labor," 471–500; between 1860 and 1880, women's demands for equal rights shifted their rationale from an insistence on workplace rights to their 1880s focus on the home. cf. Blewett, *Men, Women and Work*; and Susan Levine, *Labor's True Woman: Carpet Weavers, Industrialization and Labor Reform in the Gilded Age* (Philadelphia, 1984).

<sup>28</sup> Joy Parr, *The Gender of Breadwinners: Women, Men, and Change in Two Industrial Towns, 1880–1950* (Toronto, 1990), 150; and see Jean Boydston's formulation of the relationship between economic independence and citizenship in *Home and Work: Housework, Wages and Ideology of Labor in the Early Republic* (New York, 1990), 43.

<sup>29</sup> David Montgomery, *Workers Control in America: Studies in the History of Work, Technology, and Labor Struggles* (Cambridge, 1979), Ch. 1.

<sup>30</sup> Ava Baron, "Acquiring Manly Competence: The Demise of Apprenticeship and the Remasculinization of Printers' Work," in *Meanings for Manhood: Constructions of Masculinity in Victorian America*, ed., Mark C. Carnes and Clyde Griffen (Chicago, 1990), 152–163.

<sup>31</sup> Linda Schneider, "The Citizen Striker: Workers' Ideology in the Homestead Strike of 1892," *Labor History*, 23 (Winter, 1982), 52.

<sup>32</sup> Theresa Wolfson, *The Woman Worker and the Trade Union* (New York, 1926), 76.

<sup>33</sup> Quoted in Tomlins, *The State and the Unions*, 63.

<sup>34</sup> Only five states (Massachusetts, Pennsylvania, Nebraska, Washington and Oregon) had successfully passed laws regulating women's working hours and condition before 1908. An Illinois law, upheld by the state, was overturned at the state level.

<sup>35</sup> Evelyn Brooks Higginbotham, "African-American Women's History and the Metalanguage of Race," *Signs: Journal of Women in Culture and Society*, 17 (Winter, 1992), 251–274.

<sup>36</sup> This point is made by Eileen Boris, "The Power of Motherhood: Black and White

Activist Women Redefine the 'Political,' " *Yale Journal of Law and Feminism*, 2 (Fall, 1989), 35.

<sup>37</sup> See especially William Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, MA, 1991), Ch. 5.

<sup>38</sup> Robyn Muncy, *Creating a Female Dominion in American Reform: 1890-1935* (Oxford, 1991); Kathryn Kish Sklar, "Hull House as a Community of Women Reformers in the 1890s," *Signs*, 10 (1985), 657-677; and Linda Gordon, "Social Insurance and Public Assistance: The Influence of Gender in Welfare Thought in the United States, 1890-1935," *Journal of American History*, 97 (February, 1992), 19-54.

<sup>39</sup> Much of the current literature attributes the origins of the American welfare state to "maternalist" legislation promoted and promulgated by networks of women. One interpretation suggests that where states are weak, the role of women in the form of strong, organized movements has been enhanced. But the literature attributes the sources of this legislation to structures of organization, and is contradictory as to its ultimate effect. See for example, Sonya Michel and Seth Koven, "Womanly Duties: Maternalist Politics and the Origins of Welfare States in France, Germany, Great Britain, and the United States, 1880-1920," *American Historical Review*, 95 (October, 1990), 1076-1108; Ann Shola Orloff, "Gender in Early U.S. Social Policy," *Journal of Policy Issues*, 3 (No. 3, 1991) 249-281; and Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge, MA, 1992).

<sup>40</sup> Alice Kessler-Harris, "The Paradox of Motherhood: Protective Labor Legislation in the U.S." in *Comparative Studies in Protective Labor Legislation*, ed., Ulla Wikander (forthcoming, University of Illinois Press). There still exists a lively debate as to whether protective labor legislation for women had long-term harmful effects for women. See Kessler-Harris, *Out to Work*, Ch. 7; and Kathryn Kish Sklar, "'The Greater Part of the Petitioners are Female': The Reduction of Women's Working Hours in the Paid Labor Force, 1840-1917," in *Worktime and Industrialization*, ed., Gary Cross (Philadelphia, 1989). Molly Ladd Taylor argues that mothers's pensions effectively discriminated against women of color and those who violated traditional family norms. Muncy, *Creating a Female Dominion in American Reform* focuses on the positive consequences of this legislation.

<sup>41</sup> For an excellent discussion of how this was stymied in Germany, see Sabine Schmitt, "Protective Labor Legislation for Women in Germany: 1878-1914," in Wikander, ed., *Comparative Studies in Protective Labor Legislation*.

<sup>42</sup> Quoted in Beatrix Hoffman, "Insuring Maternity: Women Reformers and the New York Health Insurance Campaign, 1916-1920," unpublished paper in the author's possession.

<sup>43</sup> The argument here sustains part of that of Heidi Hartmann, "Capitalism, Patriarchy and Job Segregation by Sex," *Signs*, 1 (1976), 137-169.