

Found in the Archive

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Richard Chused and Wendy Williams, [Gendered Law in American History](#) (2016).

Every major dimension of contemporary American family law underwent transformation in the 19th Century. Indeed, I have argued at considerable length that American family law was *invented* in the 19th Century. Janet Halley, *What is Family Law?: A Genealogy, Part I*, 23 *Yale J. L. & Human.* 1 (2011) and Janet Halley, *What is Family Law?: A Genealogy, Part II*, 23 *Yale J. L. & Human.* 189 (2011). Many of the most difficult and intractable legal issues in the field carry 19th Century legal rules, doctrines, ideologies, debates, and practices forward to the present. Some of these vestigial aspects of 19th Century family law emerge in a slurry of semi-congealed elements that took shape then and have stayed in play despite major transformations in the field since; others persist in their 19th Century form, albeit with more contemporary contents. It's impossible to work in contemporary American family law without asking oneself, again and again, what *did* happen with this issue or that in the transformative-yet-reactionary 19th Century?

But for those of us who are not legal historians, answering that question is very hard work. There are plenty of classics to turn to, from Michael Grossberg's *Governing the Hearth* to Hendrik Hartog's *Some Day All This Will Be Yours*. Michael Grossberg, **Governing the Hearth: Law and the Family in Nineteenth-Century America** (1988); Hendrik Hartog, **Some Day All This Will Be Yours: A History of Inheritance and Old Age** (2012). But a new resource offers a comprehensive, elegantly curated collection of primary documents that shed light on a range of the most important themes: *Gendered Law in American History* by Richard Chused and Wendy Williams. This rich resource—more than 1200 pages—is ideal summer reading for family law enthusiasts!

The book has the look and the price of a casebook, but in lieu of “cases and materials” it presents primary documents in chronological sequence and in ample excerpts. The topics are all chosen and framed with care. We find a review of women's frustrated claims to full citizenship and suffrage in the Revolutionary period and early Republic, followed by successive major efforts of organized feminists to engage public debate and demand suffrage. The tumultuous conflicts over feminist demands for female suffrage and their relationship to emancipation of enslaved blacks after the Civil War unfold in painful detail. Indeed, the authors' careful attention to the connections that may be drawn between seemingly disparate events is one of the volume's core strengths. For example, rather than presenting them as disconnected and separate historical moments, Chused and Williams frame the eventual success of the Suffrage and Prohibition Amendments as inextricably intertwined. Their chapter on women's campaigns for temperance and moral purity is followed by a chapter detailing the suffrage effort from the middle years of the Civil War to its eventual success in 1919-20. Together, the two chapters reveal a single, long, immensely complex story of progressive change fostered not only by feminist leftist radicals but also by feminist appeals to profoundly conservative values.

Equally rich are the materials on feminist efforts to emancipate wives, mothers, and widows in family law. As Chused and Williams show, contemporary divorce law rests, to an unrecognized degree, on the very partial success of 19th Century feminists in reforming the common-law rules governing property relations between husband and wife. The Married Women's Property Acts (MWPAs) and the partial emancipation of wives to contract and to sue and be sued had complex ramifications, giving wives and widows some of the powers and some of the liabilities associated with participation in an increasingly wage- and commodity-based economy, while according them some of the burdens and some of the advantages of joint property rules. Chused and Williams' chapter makes this complex “law in action” story lucid.

The rise of divorce, the rise of a best-interests-based legal motive for bestowing custody on separated and divorced

mothers, turbulent conflicts between feminists and moral conservatives over abortion and birth control, are all detailed in expansive chapters that vividly present important historical social conflicts over family law and family roles that undergirded these questions today. Moreover, each chapter is richly documented, with amazing intensity and minute details, in terms that will be eerily familiar to readers who follow American post-war repositioning of all these issues.

Though many chapters – most notably the ones in the MWPAs and on suffrage – repeatedly exemplify the possibility of convergence and conflict over the relative posture of racial and female emancipation, the chapter devoted to this divisive comparative justice process is a major single accomplishment in its own right and well worth the price of admission. Chused and Williams note that the “domestic relations” included both the law of husband and wife *and* master and servant, and they provide a comparison of the law of justified and unjustified violence against wives and both enslaved and free blacks that demonstrates how deeply linked the institutions of marriage and slavery were to 19th Century jurists and political players, including feminists. They also explain how differently the two bodies of law were structured and applied. Their comparison of the rise of Jim Crow with the feminist denunciation of women’s retro social status as “Jane Crow” focuses on the co-evolution of segregated transportation facilities for women and for blacks, and almost graphically shows how the regulation of intimate relations (marriage and, specifically, racial intermarriage) and the law governing train cars were imbricated. The gradual obsolescence of the “ladies car” was, they suggest, made possible by the cementing of racial segregation in the social and legal order that culminated in *Plessy v. Ferguson*, suggesting that racial segregation of what we would now call public transportation was in part a way of managing white women’s increasing social mobility while protecting and preserving their stature as paragons of moral virtue.

The book ends with two fascinating chapters that point directly to modern relevancies. A chapter on protective labor legislation is a case study in the tension in gender equality law (and aspiration) between equal and “special” treatment. The next and last chapter, which focuses on the uses of history in the notorious *Equal Employment Opportunity Commission v. Sears Roebuck and Company* litigation, shows how sharply this issue can divide contemporary feminists, and also how images of gendered law in the 19th Century can become consequential rhetorical tools in modern political struggles. See Vicki Schultz, *Life’s Work*, 100 **Colum. L. Rev.** 1881 (2000).

One of the achievements of this monumental book is its constant probing of the relationship between the private law and the public law dimensions of gender rules and debates in 19th Century America. Sometimes these links seem pretty attenuated, but they are always worth asking about, in part because the law school curriculum divides the public law and private law dimensions of the family into separate topics, courses, and bodies of law. The unique collaboration of Chused and Williams, over twenty years of teaching a seminar on Gender and American Legal History at Georgetown together, doubtless made this inquiry possible. We are all the richer for the massive labor they and their students have put into this highly valuable contribution.¹

1. The archive of student papers, *Gender and Legal History in America Papers*, is available at <https://www.law.georgetown.edu/library/collections/gender-legal-history/>.

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