INCLUDING UNMARRIED WOMEN IN THE HOMESTEAD ACT OF 1862

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ABSTRACT

When Congress passed the Homestead Act of 1862, it decided to distribute land to single, unmarried women. Most Congressional members who supported including unmarried women did so because women were a necessary part of empire building—women were expected to marry, bear children, and engage in building permanent communities. Few

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Congressional members cared about women's equality or the progressive goals of the women's rights movements, although some Congressional members thought women would be incapable of successfully homesteading. This Article presents the fascinating history of including unmarried women in the Homestead Act of 1862 by conducting an intensive study of the Act's statutory history, beginning in 1843. Building on the work of historians, this Article analyzes how the lived experiences of female homesteaders matched up with the expectations of the Congressional members who included them, on such topics as women's willingness and ability to homestead, women's equality, and women's role in marriage and reproduction. Throughout, this Article explores how this statutory history can influence our understanding of antebellum unmarried women's rights.

I. INTRODUCTION

"Adventure beckoned" for Catharine Calk who, as an unmarried woman, claimed a homestead in Montana under the Homestead Act of 1862.[1] After successfully meeting the requirements of the Homestead Act of 1862 and receiving fee simple title to her homestead, Calk continued to live on her homestead, married, had children, and contributed to the development of her local community.[2] Although homesteading was one of the most consequential decisions of Calk's life, for many of the congressmen that voted to allow unmarried women to homestead, it was a laughing matter. Several times, across multiple years, Congress erupted into laughter when members suggested that unmarried women be allowed to claim homesteads in their individual capacities.[3] Yet, when President Abraham Lincoln finally signed the Homestead Act into law in 1862,

1. SARAH CARTER, MONTANA WOMEN HOMESTEADERS: A FIELD OF ONE'S OWN 247 (2009).

2. *Id.* at 248.

3. *E.g.,* CONG. GLOBE, 32d Cong., 1st Sess. 1280 (1852) (indicating laughter when Representative John Allison of Pennsylvania suggested unmarried women receive the right to claim homesteads); CONG. GLOBE, 33d Cong., 1st Sess. 503 (1854) (indicating laughter during a discussion of including unmarried women receiving homestead rights); CONG. GLOBE, 33d Cong., 1st Sess. 503 (1854) (indicating laughter in reference to a "motion to insert females with males"); CONG. GLOBE, 33d Cong., 1st Sess. app. 1106 (1854) (indicating laughter when discussing unmarried women being qualified as heads of families); CONG. GLOBE, 35th Cong., 1st Sess. 2425 (1858) (indicating laughter when discussing prior suggestions to provide homesteads for "every man, matron, and maid" who is the head of a household).

unmarried women were allowed to homestead.[4] This was a striking departure from earlier legislation distributing public lands—the Homestead Act of 1862 was the first law allowing unmarried women to receive free land from the government.

The Homestead Act of 1862—largely understood as the most important land distribution statute in American history[5]—was a monumental shift in the legal status of unmarried women. Despite this drastic shift, a cursory look at the passage of the Homestead Act makes it look like nothing special happened for the legal status of women.[6] Congress debated homestead bills for decades, but only occasionally discussed whether to include unmarried women. The credit for including unmarried women cannot be given to one individual, one group, or even one session of Congress. Rather, Congress gradually refined the Act's "qualification clause," which eventually led to the inclusion of unmarried women in the 1862 law. At every moment leading up to the final passage, there was a large contingency of Congress that felt unmarried women should not be included. Yet through the persistence of legislators proposing homestead bills, unmarried women remained part of the conversation throughout the decades of debate. A main point of this Article is to demonstrate that this persistence reflects a "considered judgment"[7] by Congress to include unmarried women. I argue that including unmarried women was not an error, a last-minute change, or a

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4. *See* 12 Stat. 392 § 1 (1855–1863), codified as 43 U.S.C. § 175 (repealed) ("[A]ny person who is the head of a family, or who has arrived at the age of twenty-one years . . . shall, from and after the first January, eighteen hundred and sixty-three, be entitled to enter one quarter section or a less quantity of unappropriated public lands . . . .").

5. *See, e.g.*, BENJAMIN HORACE HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 409 (1924) ("With all its shortcomings the Homestead Act clearly has more to its credit than any other one land act passed by the federal government."). The Homestead Act is famous for being the first expansive law providing *free* land to a broad population. Although it did not require settlers to purchase their land, the Homestead Act did require certain things, such as residing on the land for five years (later reduced to three), cultivating the land, building a habitable home, and exercising the homestead rights in good faith. John C. Lacy, *Original Land Titles in Tucson*, 56 J. ARIZ. HIST. 323, 328 (2015); Roger D. Billings, *The Homestead Act, Pacific Railroad Act and Morrill Act*, 39 N. KY. L. REV. 699, 714–15 (2012); William R. Draper, *Homes for the Asking*, 231 N. AM. REV. 508, 512 (1931); Thus, a settler had to intend to settle on his or her land and continue to farm even after receiving title.

6. More happened for women than can be included in this Article. The most comprehensive overview of how women were treated by the Homestead Act of 1862 is James Muhn, *Women and the Homestead Act: Land Department Administration of a Legal Imbroglio, 1863–1934*, 7 W. LEGAL HIST. 283 (1994). Muhn discusses all categories of women: single, married, widowed, divorced, and deserted. *Id.* at 285–307.

7. Arizona v. United States, 567 U.S. 387, 405 (2012) (using the "considered judgment" terminology to refer to statutory meaning after examining the statutory history of a law).

historical anomaly. Instead, it reflects decades of persistence in the face of substantial opposition.

Beyond simply proving that Congress was intentional in its decision to include unmarried women, I argue that the statutory history of including unmarried women in the Homestead Act of 1862 is relevant to understanding female homesteaders' lived experiences, the broader statutory history of the Act, and women's legal rights at the time. While the Act's statutory history is highly significant, little has been written on it. Historical literary works have illustrated the compelling stories of female homesteaders and recognized that the Homestead Act of 1862 greatly expanded opportunities for women. However, these works mostly do not explain *why* unmarried women were included.[8] The sole exception to this is unpublished work by historian Tonia Compton, although her research focuses only on legislative statements and does not include the language of proposed bills that is so central to this Article.[9] From another

8. *See, e.g.*, KATHERINE HARRIS, LONG VISTAS: WOMEN AND FAMILIES ON COLORADO HOMESTEADS 1–2 (1993) (noting that fewer women qualified under the Preemption Act but that the Homestead Act was more expansive). Other scholars have misstated the coverage of the Homestead Act of 1862. *See, e.g.*, DEBORAH FINK, AGRARIAN WOMEN: WIVES AND MOTHERS IN RURAL NEBRASKA, 1880–1940 17 (1992) (asserting that the Homestead Act provided "160 acres of free land to any head of family" but failing to mention single women).

9. The only existing research on this appears to come from Tonia Compton's work on her dissertation. Tonia Compton produced at least two papers about this topic. I was able to locate a paper presented at a graduate student conference and her later dissertation. Tonia M. Compton, Uncle Sam's Farm: Congress and Free Land Policies in the Nineteenth Century, (Apr. 12, 2008) (presented at 3rd Annual James A. Rawley Graduate Conference in the Humanities, University of Nebraska-Lincoln) (on file at the University of Nebraska-Lincoln) [hereinafter Compton, *Uncle Sam's Farm*]. Tonia M. Compton, Proper Women/Propertied Women: Federal Land Laws and Gender Order(s) in the Nineteenth-Century Imperial American West, 78–90 (2009) (Ph.D. dissertation, University of Nebraska-Lincoln) (on file with the History Department at the University of Nebraska-Lincoln) [hereinafter Compton, *Proper Women*]. While some of our research overlaps, there are two significant differences between Compton's work and this Article. First, in her history research, Compton focused almost exclusively on Congressional debates and the comments given by legislators. *See generally* Compton, *Uncle Sam's Farm*; Compton, *Proper Women*. In comparison, my research tracks the language of proposed qualification clauses in addition to analyzing the Congressional debates. Second, Compton looked at *all* women and compared the Congressional debates on women to debates on immigration and slavery, using unmarried women as only a small part of her thesis. *Id.* With everything else Compton studies, she dedicates only two pages to women in her paper and thirteen pages in her dissertation. Compton, *Uncle Sam's Farm*, at 4–5 (discussing the statutory history of including women in the Homestead Act of 1862); Compton, *Proper Women*, at 78–90 (same). Compton cites some, but not all, of the statutory history I cover in this paper. Although Compton and I ultimately cite to much of the same congressional record, I completed my research without reference to Compton's work. Only after I had found the

scholarly perspective, extensive legislative histories of the Homestead Act—such as those penned by George Malcolm Stephenson,[10] Benjamin M. Hibbard,[11] and Roy M. Robbins[12]—fail to discuss unmarried women at all, even though many consider these works to be the leading statutory history texts about the Homestead Act of 1862.[13] In fact, Robbins incorrectly explained that the Homestead Act of 1862 extended rights to "the same classes of persons included in the Preemption Act of 1841"[14] even though an entirely new class of persons—unmarried women—had been added. Even a more recent historian, Patricia Nelson Limerick, referred to the inclusion of unmarried women as a "spinster's" right,[15] demonstrating a lack of understanding that Congress assumed these women would marry and reproduce.

From yet another perspective, legal historians, with a few notable exceptions, have focused their analysis on married women, not unmarried women.[16] Even those that do focus on unmarried women—most notably, Ariela Dubler—have not incorporated the Homestead Act of 1862 into their research.[17] The only legal scholar who has discussed unmarried women in the Homestead Act of 1862 is Richard Chused, who did so in

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following statutory history did I cross-check my work against what Compton found. As expected, we identified much of the same Congressional debates.

10. *See generally* GEORGE M. STEPHENSON, THE POLITICAL HISTORY OF THE PUBLIC LANDS FROM 1840 TO 1862: FROM PRE-EMPTION TO HOMESTEAD (1917).

11. HIBBARD, *supra* note 5, at 347–85. Hibbard, the author of a 650-page book on the history of land distribution policy in the United States, does not address women. In his chapter that details the statutory history of the Homestead Act, he never mentions unmarried women. *Id.*

12. *See generally* ROY M. ROBBINS, OUR LANDED HERITAGE: THE PUBLIC DOMAIN, 1776–1936 (1942). In a 400-page book about the statutory history of laws distributing public lands, historian Robbins never discusses unmarried women. *Id.*

13. PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 393 (1968), https://www.google.com/books/edition/History_of_Public_Land_Law_Development/uNe5AAAAIAAJ?hl=en&gbpv=1[http://web.archive.org/web/20211104165213/https://www.google.com/books/edition/History_of_Public_Land_Law_Development/uNe5AAAAIAAJ?hl=en&gbpv=1] ("George Malcolm Stephenson, Benjamin H. Hibbard, and Roy M. Robbins have traced the discussions in Congress of free homesteads"). Like the authors he references, Gates also fails to discuss the inclusion of unmarried women. *Id.* at 387–99.

14. ROBBINS, *supra* note 12, at 206.

15. PATRICIA NELSON LIMERICK, THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST 53 (1987).

16. Ariela R. Dubler, *Exceptions to the General Rule: Unmarried Women and the Constitution of the Family*, 4 THEORETICAL INQ. L. 797, 800 (2003) ("As such, although the past two decades have witnessed the creation of a robust legal historiography of marriage and married women, the legal regulation of women living outside marriage has remained virtually unexamined."). Dubler stands out as the exception to this, although her focus is largely on widows, not women who had never been married.

17. *Id.* (discussing several legal issues surrounding the lives of single women, but not addressing the Homestead Act of 1862).

passing when writing about the treatment of married women under a different federal land law.[18]

As Ariela Dubler has persuasively argued, much of the legal treatment of women during this time period was governed by "proximate relationships with the institution of marriage."[19] Richard Chused has demonstrated that these proximate relationships generally determined how the federal government distributed land to women.[20] Yet, in the Homestead Act of 1862, Congress provided land directly to unmarried women without requiring a relationship to a man. This law, then, might appear at first glance to be a rare example where marriage did not directly mediate the relationship between women and the state.[21] However, Congress assumed these unmarried women would eventually marry, and therefore, the decision to allocate homesteads to unmarried women was a marriage-promotion policy for most lawmakers.[22] Although Congress was willing to create a direct legal relationship between unmarried women and the state, they also assumed a husband would eventually take on an intermediary role.

The debate on including unmarried women did not happen in a vacuum. Although the legislative history included in this Article is focused on unmarried women—issues of sex, family status, immigration status, citizenship, race, and Federal Indian policy were all intimately connected in the Congressional debates.[23] This is especially true for those debates about the "qualification clause" — the highly contested clause that defined

18. Richard H. Chused, *The Oregon Donation Act of 1850 and Nineteenth Century Federal Married Women's Property Law*, 2 L. & HIST. REV. 44, 55 (1984). Although not focused on the Homestead Act of 1862, Chused did observe how the Homestead Act differed from earlier acts in its treatment of women. *Id.*

19. 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, 1656 (2003).

20. Chused, *supra* note 18, at 48 (noting that early legislation only permitted women to receive land through their relationship to men).

21. *Cf.* Ariela Dubler, Anika Rahman, Kathy Rodgers & Jane Spinak, *Women's Rights: Reframing the Issues for the Future*, 12 COLUM. J. GENDER & L. 333, 339–40 (2003) (including comments by Ariela Dubler about "the idea that all women's relationships to the state were mediated through the legal institution of marriage").

22. *See, e.g.*, CONG. GLOBE, 32d Cong., 1st Sess. app. 298 (1852) (including statements of Representative Joseph Cable of Ohio supporting the inclusion of unmarried women because they would ultimately marry); *see also* Dubler, *supra* note 19, at 1644 (using the phrase "marriage-promotion policies" to describe much of the law governing women).

23. Compton, *Uncle Sam's Farm*, *supra* note 9, at 3 (observing that there are "numerous similarities in discussions about gender," race, and citizenship with how Congress debated the Homestead Act of 1862).

who could obtain land.[24] To provide context to the detailed statutory history later in the Article, Part II provides an overview of American land distribution policy and the rights of unmarried women during the relevant time period.

Part III provides extensive details on the statutory history of the Homestead Act of 1862, focusing on how Congress came to include unmarried women in the Act's qualification clause. Prior works have made various claims about why Congress included unmarried women. In her study of Colorado homesteaders, Katherine Harris argues that "[c]ongressional supporters of the Homestead Act had practical reasons for granting unmarried women the chance to claim land. Such women, they assumed, would become wives for the single young men drawn west by homesteading opportunities. Together these young men and women would create families . . . ."[25] In their study of Nebraska homesteaders, Richard Edwards, Jacob K. Friefeld, and Rebecca S. Wingo argue that "[t]he gender-neutral Homestead Act of 1862 was part of a contemporary movement toward recognition and acceptance of a range of increased rights for women, including the right to own land."[26] The conflicting claims in existing literature prompted the research in Part III.

Part III conducts a close reading of the official Congressional record in debates leading up to the passage of the Homestead Act of 1862. While primarily relying on the Congressional record, I also use secondary sources, such as biographies of the Congressional members[27] and political

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24. *See, e.g.*, ROBERT D. ILISEVICH, GALUSHA A. GROW: THE PEOPLE'S CANDIDATE 77 (1988) (calling the qualification clause "the most provocative section" of a proposed homestead bill).

25. HARRIS, *supra* note 8, at 2. Harris never further explores *why* Congress created "a new class of propertied women through the provisions of the Homestead Act" and instead—like most historians who have written about homesteading—focuses on the how women's lives were impacted by the change. *Id.*

26. RICHARD EDWARDS, JACOB K. FRIEFELD & REBECCA S. WINGO, HOMESTEADING THE PLAINS: TOWARD A NEW HISTORY 130–31 (2017). This argument is similar to Richard Chused's findings about the Congressional reason for providing separate land for married women in the Donation Land Act of 1850. Chused, *supra* note 18. Tonia Compton similarly examines the focus on women in the congressional debates preceding the Donation Land Claim Act. Compton, *Proper Women*, *supra* note 9, at 40–48. Chused discusses why Congress provided twice as much land for married men with the Oregon Donation Act of 1850 and, more notably, why Congress established that the additional land belonged to the wife. Chused focuses much of his analysis on the married women's property acts prevalent in states at the time and how Congress, through the Act, reacted to those state law rights as well as the need to attract women to the Oregon frontier. Chused, *supra* note 18, at 45 (listing factors that influenced Congress to enact the Act).

27. For example, I cite Representative Galusha Grow's biography throughout because it contains details on the progress of homestead laws. *See generally* JAMES T. DUBOIS & GERTRUDE S. MATHEWS, GALUSHA A. GROW: FATHER OF THE HOMESTEAD LAW (1917).

and social histories of the Homestead Act.[28] Taking the view that statutory history is cumulative,[29] I cover twenty years of debate on the homestead bill, starting with the Twenty-Eighth Congress in 1843 and ending with the Thirty-Seventh Congress, which passed the Homestead Bill in 1862. Legislative intent is hard to identify and rarely clear-cut; the statutory history in this Article is no different. Looking only at the Homestead Act's passage in 1862 fails to account for Congressional views on including unmarried women. Very little debate occurred in 1862, and none included unmarried women.[30] The proposals and debates about unmarried women happened in the Congressional sessions in the years preceding passage of the law. Part III does not identify a single moment that changed the trajectory of including unmarried women. Instead, it collects many small arguments and proposals, demonstrating the trajectory of the qualification clause over twenty years.

Finally, Part IV analyzes how well the articulated Congressional predictions of including unmarried women match up with the lived experiences of unmarried female homesteaders. Some legislators predicted unmarried women would have no interest in homesteading[31] or that they would fail to meet the statutory requirements.[32] Those legislators were wrong—unmarried women participated in homesteading and were rather successful.[33] While some Congressional members made equality arguments on behalf of including single women,[34] the idea that unmarried women should be included often led to laughter.[35] Even more prominent was the idea that unmarried women should be included based on their future ability to marry, bear children, and form stable communities.[36] This

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28. *See, e.g.*, ROBBINS, *supra* note 12 (providing extensive political history of federal land distribution laws and policies).

29. John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 L. LIBR. J. 131, 135 (2013) (arguing that statutory history is greater than a bill's passage by "a particular Congress" and that each failed attempt to pass a law "generates its own legislative history").

30. *See infra*, Part III.J. The Thirty-Seventh Congress: 1861–1863 (discussing the legislative debate and ultimate passage of the Homestead Act).

31. *See, e.g.*, CONG. GLOBE, 32d Cong., 1st Sess. 1316 (1852) (statement of Representative Thompson Campbell of Illinois).

32. *See, e.g.*, CONG. GLOBE, 36th Cong., 1st Sess. 1510 (1860) (statement of Senator Morton S. Wilkinson of Minnesota).

33. EDWARDS, FRIEFELD & WINGO, *supra* note 26, at 134–37.

34. CONG. GLOBE, 32d Cong., 1st Sess. 1316 (1852) (statement by Representative James M. Gaylord of Ohio); CONG. GLOBE, 33d Cong., 1st Sess. 503 (1854) (statement by Representative William T.S. Barry of Mississippi).

35. *See supra* note 3 and accompanying text.

36. *See, e.g.*, CONG. GLOBE, 33d Cong., 1st Sess. 1669 (1854) (including exchange between Senator William C. Dawson of Georgia and Senator Albert G. Brown of Mississippi).

Article concludes by reflecting on these disparate Congressional views and the Homestead Act's ultimate impact on the rights of unmarried women, including unmarried women's inclusion in future land laws and how women's presence on the American frontier[37] influenced the progression of women's rights.

II. THE CONTEXT FOR THE DEBATE

A. American Policy on the Distribution of Public Lands

When the first Europeans arrived on North American soil, they "discovered" an "unsettled" continent rich in land and natural resources. But of course, what those European explorers actually found were Native Americans inhabiting and using the land. Over the course of early American settlement by Europeans, land was claimed by different governments and land was distributed between those governments and from those governments to white men.[38] Settler colonialism existed from the beginning of America's history and, very quickly, governments started distributing land to settlers to meet political ends. This can be seen as early as 1630 when land grants were given to individual European settlers if they would "settle near the dangerous Pamunkey tribe in Virginia, and serve as a buffer against attacks."[39] To incentivize settlement, Colonial North Carolina provided "50 acres for men and 30 acres for women" for freed servants.[40] As the United States transitioned from colonies to country, targeted land grants continued. On September 16, 1776, only two

37. Throughout this Article, I largely use the word "frontier" instead of the more common "the West" because, although homesteading was concentrated in the western part of the United States, it was not limited only to the western part of the country. I have not edited out references to "the West" in quotations and find myself sometimes talking about the western part of the United States. It is also true that reducing a description of America's frontier to "the West" merely reflects the history of American conquest. Elizabeth Jameson, *Toward a Multicultural History of Women in the Western United States*, *in* THE AMERICAN WEST: INTERACTIONS, INTERSECTIONS, AND INJUNCTIONS 177, 178 (Gordon Morris Bakken & Brenda Farrington eds., 2001).

38. *See* RAYNOR G. WELLINGTON, THE POLITICAL AND SECTIONAL INFLUENCE OF THE PUBLIC LANDS 1828–1842 1 (1914) (introducing the long history of American land distribution); HIBBARD, *supra* note 5, at 347 ("To find the origin of free grants of land by the government to the settlers, it is necessary to go back far beyond the time of the adoption of the Constitution.").

39. James W. Covington, *The Armed Occupation Act of 1842*, 40 FLA. HIST. Q. 41, 41 (1961).

40. GATES, *supra* note 13, at 39.

months after the Declaration of Independence, the Continental Congress passed legislation promising free land to soldiers.[41]

After winning independence, the United States of America took ownership of great swaths of North America, and the expansion of European settlement turned into American imperialism under the name of manifest destiny.[42] The federal government took charge of distributing the new American territory and started with a policy of selling land for profit.[43] The federal government used settlers to secure new territories, while simultaneously justifying territorial expansion to provide for settlers.[44] Many of these early American land laws provided rights for widows and women who were heads of families,[45] but did not provide rights for unmarried women. It was only when women "were part of a family whose male head was dead but still the object of national thanks" that they received land distributions from the government.[46] For example, Congress used land bounties to support military widows.[47] That Congress focused on providing land to widows is unsurprising: "[f]rom 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."[48]

Most American public land distribution laws excluded both married and unmarried women. A number of times, Congress debated whether to provide more land to men who were married, but Congress only adopted

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41. Lura E. Headle, *Grants of Land by the United States to Our Soldiers of Past Wars*, 84 ADVOC. PEACE THROUGH JUST. 176, 176 (1922) (noting legislation provided 100 acres for soldiers and non-commissioned officers with the amounts increasing according to rank, with the highest amount in the original legislation being 500 for colonels, but a later amendment allowed major generals 1,100 acres and brigadier generals 850 acres).

42. Julius W. Pratt, *The Origin of "Manifest Destiny"*, 32 AM. HIST. REV. 795, 795–98 (1927) (discussing origin and meaning of the phrase "manifest destiny").

43. Headle, *supra* note 41, at 177 ("The original policy of Congress in the disposition of the public domain was the sale of the land for cash, for profit, or in extinguishment of debts.").

44. As then-Senator (and future Supreme Court Justice) Levi Woodbury explained to the Senate in 1843, "[i]t is the duty of Congress to extend its territorial laws for the benefit of those remotely-settled citizens." CONG. GLOBE, 27th Cong., 3d Sess. 193 (1843) (discussing the potential settlement of Oregon territory).

45. Chused, *supra* note 18, at 48 (discussing land distribution laws passed by the Continental Congress and the United States Congress).

46. *Id.*

47. Kristin A. Collins, *Administering Marriage: Marriage-Based Entitlements, Bureaucracy, and the Legal Construction of the Family*, 62 VAND. L. REV. 1085, 1104 (2009) ("[T]he national legislators . . . tapped into the country's significant but contested land holdings to award land bounties to military widows—both traditional war widows and widows of veterans.").

48. Dubler, *supra* note 16, at 802.

that policy once.[49] While debating the Homestead Act of 1862, Congress never seriously considered whether the presence of a wife would double a husband's land amount. Instead, Congress focused its debate on whether any women should be able to claim land, and, if so, whether that would be limited to widows. Congress ultimately decided to include unmarried women for the first time, creating a major shift in federal land policy.

Although the inclusion of women shifted over time, during the many years of federal land distribution, women's rights were never central to the public or Congressional debates on distributing the public lands. My focus on the inclusion of unmarried women is not meant to suggest that other issues were not more central to the land distribution debates: Federal Indian policy, slavery, states' rights, and immigration were consistently at issue during Congressional debates on land policy. However, Congress debated the inclusion of unmarried women in the context of these issues, including how unmarried women would influence or shape the development of frontier communities facing these issues. Accordingly, it is worth starting with the broader context of the multiple political issues influencing the debate on free homesteads.

Federal Indian policy greatly influenced laws distributing public lands. For over two centuries, the federal government repeatedly used public land distribution to settle white Americans on or near established Native American territory in order to control and assert dominance over Native Americans.[50] Although much of the legislation was justified in part to remove Native Americans from their land,[51] laws distributing lands to

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49. That policy was adopted in the Oregon Donation Land Claim Act of 1850. Chused, *supra* note 18, at 67–68. The Oregon Donation Land Claim Act of 1850, which provided free land to settlers in Oregon, provided twice as much land to married men as single men. Most notably, however, it also specified that married women would receive title to this extra land. *Id.* at 68.

50. Without a doubt, land distribution laws followed the pattern established by the 1630 grants that were meant to control the Pamunkey tribe of Virginia. Covington, *supra* note 39, at 41. For example, the Armed Occupation Act of 1842 was designed to bring armed settlers to Florida after years of war with the Seminole Tribes, and the Act "resulted in the removal from Florida of most of the Seminole Indians." *Id.* at 52. The same pattern played out numerous other times across the United States. As Kerry Abrams explains, "the federal government made strategic use of property law through homestead acts to encourage the westward immigration of whites and, in particular, women." Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1403 (2009) (discussing the Mercer trips and their stated purpose of "bringing brides to the pioneers"). *Id.* at 1358.

51. For example, on February 29, 1860, Representative Galusha A. Grow of Pennsylvania gave a speech in favor of his Homestead Bill where he argued that "the pioneer who expel[led] the savage and the wild beast, and open[ed] in the wilderness a home for science and pathway for civilization" was "deserving" of free land. CONG. GLOBE, 36th Cong., 1st Sess. app. 128 (1860).

white settlers were also justified as *benefiting* Native Americans by "civilizing" them.[52] The government considered women—particularly married women—necessary to "civilize" the unsettled parts of the United States, and including women was therefore critical to settler colonialism[53] and the broader goals of federal land legislation. As with all expansion into the United States by European settlers, unmarried women's opportunities came at the expense of dispossession of traditional Native American lands.

Slavery, racism, and states' rights were also influential in the development of land distribution legislation, including during the debates on the Homestead Act of 1862.[54] While debating homestead legislation, Congress mostly agreed that the Act's benefits would only extend to white people. Slaves would certainly be excluded, and because only citizens—or those on the path to citizenship—could claim homesteads, the general assumption was that free African Americans would not qualify even though most proposed legislation had no racial limitations.[55] The slavery debate was larger than whether there would be racial restrictions on receiving homesteads. In fact, proposed homestead bills were caught up in America's battle about whether slavery would be a permanent institution in the country and to what extent it would spread into new territories. Studying the statutory history of statutes distributing public lands make "dramatically clear how inextricably land and slavery issues were

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52. *See, e.g.*, CONG. GLOBE, 27th Cong., 3d Sess. 193 (1843) (including speech by Senator Levi Woodbury in which he said that it was the duty of the United States to "introduce . . . the arts of civilization, and the lights of the gospel"). *Cf.* WALTER L. HIXSON, AMERICAN SETTLER COLONIALISM: A HISTORY 117 (2013) ("Even Americans who expressed an ambivalent desire to see Indians 'domesticated, improved, and elevated' at the same time had their eyes on the 'large surplus' of 'fine agricultural lands' that would be freed up for sale.").

53. Settler colonialism occurred in the United States across time and place and was facilitated in large part by the Homestead Act of 1862. As Walter L. Hixson describes, "under settler colonialism the colonizer means to occupy the land permanently." HIXSON, *supra* note 52, at 5. With a goal of reproducing their own cultures, white settlers created communities, and women were critical to creating and sustaining those communities.

54. *See, e.g.*, ILISEVICH, *supra* note 24, at 57 (noting that "[a]s a single face on the many-sided public domain question, the homestead bill was on a collision course with territorialism and sectionalism"). A broad homestead act was also seen to threaten existing states by drawing away its citizens. CONG. GLOBE, 33d Cong., 1st Sess. 505 (1854) (recounting statements of Representative John S. Millson of Virginia saying the homestead bill was "infinitely more injurious to the old States . . . [because] you take from the old States the most enterprising portion of their population . . . [and thereby] increase the strength and wealth of the new States").

55. At various points during the debates detailed below, Congress discussed whether to limit homesteading rights to white people. MICHAEL L. LANZA, AGRARIANISM AND RECONSTRUCTION POLITICS: THE SOUTHERN HOMESTEAD ACT 2–3 (1990) (overviewing how Congress addressed "the question of how black people would fare" under various homestead proposals).

interwoven" during this time period.[56] Southern politicians repeatedly fought against distributing public lands in a way that would lead to new states because those new states may have been anti-slavery.[57] In 1860, "the *Charleston Mercury* denounced the homestead bill as the 'most dangerous abolition bill which has ever indirectly been pressed in Congress.'"[58] The southern opposition to the expansion of free territory was strong,[59] although it is notable that despite the general sectional lines in whether Congressional members supported homestead policies, such sectional differences did not exist in the debate about including unmarried women.[60] It is no mere coincidence that the Homestead Act of 1862 was passed after the southern states seceded and went into effect the same day as the Emancipation Proclamation.[61] Of course, not all homestead proponents were anti-slavery, and some argued that slavery was compatible with a broad homestead policy.[62] Undoubtedly, when Congress was deciding whether to include unmarried women in the Homestead Act, Congress was contemplating unmarried white women. However, Congress ultimately

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56. DUBOIS & MATHEWS, *supra* note 27, at 203.

57. *See, e.g.*, ILISEVICH, *supra* note 24, at 62 (noting how certain proposals "conjured up so many fears that southern nationalists became defensive and believed that any legislation that encouraged immigration and, at the same time, populated the Northwest with antislavery settlers had to be defeated"). Southern politicians also fought to give land to specific states rather than individuals, again to limit the chance of new free states being added to the union.

58. ILISEVICH, *supra* note 24, at 64.

59. While the southern opposition was strong later in the homestead debates, early supporters of settlement and free homesteads were not so clearly aligned on the slavery issue. For example, "Thomas Hart Benton, the most powerful Missouri politician and a champion of Western settlement, labeled Indians 'a palpable evil.' He called for their prompt removal from the land to 'make room for the spread of slaves.'" HIXSON, *supra* note 52, at 115.

60. *See infra* Part IV.A. (demonstrating that both northern and southern politicians argued against including unmarried women because they would not want to claim land); *see also infra* Part IV.B. (showing that both northern and southern politicians argued for including unmarried women because of sex equality).

61. Both laws went into effect on January 1, 1863. Abraham Lincoln, A Proclamation (Jan. 1, 1863), *reprinted in* 12 Stat. app. 1268, 1269; 12 Stat. 392 § 1 (1855–1863), codified as 43 U.S.C. § 175 (repealed).

62. For example, before he was president, Andrew Johnson was a slaveholder while simultaneously supporting the Homestead Bill as both a U.S. Representative and Senator. Shortly before the Civil War—when tensions were high about slavery expansion—he gave a speech to try to convince other Southerners that the Homestead Bill was compatible with slavery. HANS L. TREFOUSSE, ANDREW JOHNSON: A BIOGRAPHY 112 (1989) ("But [Johnson] refused to give up. Attempting to mollify his Southern critics, on May 20 he delivered a long speech seeking to demonstrate the compatibility of his ideas with the existence of slavery."). Senator Albert Gallatin Brown of Mississippi also "combined his support for homesteads with a defense of slavery, insisting that homesteading did not mean the extinction of slavery." LANZA, *supra* note 55, at 8.

passed a Homestead Act with no racial restrictions,[63] and African American women successfully claimed homesteads.[64]

The qualification clause saw debate about limiting land allocations to white individuals, but it saw even more debate about limiting land allocations to citizens for fear of encouraging too much European immigration. The immigration question was a sticking point in land distribution legislation[65] and generated substantial debate in Congress.[66] Ultimately, Congress reached a compromise for the Homestead Act of 1862—the qualification clause allowed homesteaders to claim land so long as they were on the path to citizenship.[67]

B. Unmarried Women's Legal Rights

The Homestead Act of 1862 was passed during a transition period in the rights of women. The women's rights movement was progressing[68] and many changes to whether and how women could own and control property occurred while Congress spent twenty years debating whether to grant homesteads to unmarried women. State legislatures were gradually and piecemeal dismantling aspects of coverture beginning in the 1830s and

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63. Richard Edwards, *Changing Perceptions of Homesteading as a Policy of Public Domain Disposal*, 29 GREAT PLAINS Q. 179, 182 (2009) ("[The Homestead Act] contained no racial restriction[s]."); Billings, *supra* note 5, at 714 (noting "even former slaves were eligible" to claim homesteads).

64. Compton, *Proper Women*, *supra* note 9, at 176–231 (providing a comprehensive discussion of homesteading in a few Kansas communities with a particular focus on African American women).

65. DUBOIS & MATHEWS, *supra* note 27, at 70 (discussing the 1850 legislative session and how immigration status was a sticking point in legislation). *Id.* at 61–62 (noting that by the 1840s "we had begun to recognize the immigrant as a sufficient national asset to permit him in principle to occupy and buy land with the rest of us from the Government, on decent terms!").

66. For an example of Congressional debate about the inclusion of immigrants, *see* CONG. GLOBE, 32d Cong., 1st Sess. 1275–80 (1852). One reason for Congressional objection to free land was "fear that a homestead bill would increase immigration." ILISEVICH, *supra* note 24, at 57. *See also* CONG. GLOBE, 33d Cong., 1st Sess. 534–35 (1854) (recording debate about whether to allow immigrants to claim homesteads and how allowing that might incentivize immigration).

67. 12 Stat. 392 § 1 (1855–1863), codified as 43 U.S.C. § 175 (repealed) ("[A]ny person who . . . is a citizen of the United States, or who shall have filed his declaration of intention to become such, as required by the naturalization laws of the United States . . . shall . . . be entitled to enter one quarter section or a less quantity of unappropriated public lands . . . .").

68. LISA TETRAULT, THE MYTH OF SENECA FALLS: MEMORY AND THE WOMEN'S SUFFRAGE MOVEMENT, 1848–1898 5 (2014) (noting that there is no one starting point to the women's rights movement and identifying a number of events in the mid-1800s as important to the movement).

continuing into the twentieth century.[69] The most well-known change was the advent of married women's property acts, which states enacted from the 1830s through the 1870s.[70] Other important changes were happening as well. By the 1850s, all but two separate property states had replaced dower with intestacy schemes that gave gender-neutral shares to husbands and wives upon the death of their spouse.[71] As dower waned, states passed homestead exemptions that protected family homes—these homestead laws protected the family home from creditors, ensured a widow could remain in a family home after one spouse died, and prevented a husband from unilaterally alienating the family home.[72] With regards to women's work, courts started to recognize women's rights to their labor and earnings.[73]

Despite these areas of progress, women's rights were still very limited in 1862 when Congress enacted the Homestead Act. Women would not gain the vote at the national level for another sixty years.[74] In 1872, ten years after the act passed, Justice Bradley famously penned his concurrence in *Bradwell v. Illinois* where he justified limiting women's employment rights because of women's role in the family.[75] In Justice Bradley's view, unmarried women were not exempt from the limitations imposed by marriage.[76] Although he acknowledged that "many women are unmarried and not affected by any of the duties, complications, and

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69. Coverture is the "application of the common law doctrine that merged a married woman's interests with those of her husband for the duration of the marriage and gave the husband actual control of her interests. It did not obliterate her rights, but it suspended independent action during the marriage." Joan R. Gundersen, *Women and Inheritance in America, in* INHERITANCE AND WEALTH IN AMERICA, 116 n.1 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998). For a discussion of changes in women's property rights up until 1830, *see* MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA (1986) (discussing women's property rights from 1750–1830).

70. NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 52 (2000).

71. CAROLE SHAMMAS ET. AL., INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT 85 (1987).

72. Hannah Haksgaard, *Defining "Home" Through Homestead Laws*, 33 BERKELEY J. GENDER L. & JUST. 169, 171–72 (2018).

73. *E.g.,* Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor*, 1850–1880, 103 YALE L.J. 1073, 1084–85 (1994); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127, 2130 (1994).

74. U.S. CONST. amend. XIX (constitutionally establishing women's voting rights in 1920).

75. Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) ("The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.").

76. *Id.*

incapacities arising out of the married state," those unmarried women received no more rights than married women because unmarried women were the "exceptions to the general rule," and the general rule should not be changed because of them.[77] Justice Bradley was wrong about the capabilities of women but correct that unmarried women received little separate attention.[78]

These well-known legal changes focused on wives and widows, not unmarried women. The women's movement focused its attention on the husband-wife relationship, not on expanding the rights of unmarried women.[79] Unmarried women received neither individual advocacy nor distinct legal treatment. It was assumed that unmarried women would eventually marry, and legislative bodies worried little about direct regulation of unmarried women.[80] Ariela Dubler argues that legislators treated single women—including unmarried women, widows, and divorcées—as living in "the shadow of marriage."[81] In Dubler's analysis, "single women's rights were regulated by the normative framework of marriage, even as single women formally inhabited the legal terrain outside of marriage's borders."[82] Yet the lives of single women changed during this time period, and in some ways, those lives were diverging from the lives of married women. By the 1830s, it was becoming more common for single women to work outside of the home. Wages for single women "rose rapidly" between 1820 and 1850.[83] By the end of the Nineteenth Century, about 40% of unmarried women were in the labor force—a substantially higher percentage than the 5% of married women in the labor force.[84] Unmarried women's ability to earn income influenced the law governing family relationships because many of those unmarried women earning money would eventually marry.[85]

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77. *Id.* at 141–42.

78. Dubler, *supra* note 16, at 799.

79. Dubler et al., *supra* note 21, at 338 (comments by Ariela Dubler).

80. *See id.* (comments by Ariela Dubler) ("Into the twentieth century, though, *women* as a group were understood in public discussions to be married.").

81. Dubler, *supra* note 19, at 1645–46 ("If marriage has formally governed the legal rights and status of some women, other women have lived in *the shadow of marriage*, regulated by marriage's normative framework even as they have inhabited terrain outside of its formal boundaries."); Dubler, *supra* note 16, at 809 ("These common law doctrines of female support pushed single women into what I have called the *shadow of marriage*.").

82. Dubler et al., *supra* note 21, at 339 (comments by Ariela Dubler).

83. Richard H. Chused, *Married Women's Property Law: 1800–1850*, 71 GEO. L.J. 1359, 1363 (1983).

84. *Id.* at 1396 n.192.

85. Chused, *supra* note 83, at 1412 (listing "development of income by unmarried women" as one factor that led to "the domestic sphere and the separate equitable estate [being] stretched to accommodate the presence of money and women's new role in the family").

In debating whether to grant homesteads to women, Congress took what Dubler described as a normal view at the time: Congress assumed that a single woman was "on her way to marriage, or acting married, or formerly married."[86] Congress had long provided land to widows, providing them rights through their former relationships to men. What was new in the Homestead Act of 1862 was that Congress provided land to women who had never been married, largely because it believed those women would be on the "way to marriage" once settled on the frontier. What distinguished this treatment of unmarried women from the patterns that Dubler identified is that instead of "reinforc[ing] the idea that all women's relationships to the state were mediated through the legal institution of marriage,"[87] Congress allowed unmarried women to obtain land rights directly. Congress also did this at a time—during the Civil War—when much of the women's rights advocacy had stalled.[88]

Through the Homestead Act of 1862, Congress established a direct relationship between unmarried women and the Federal Government: unmarried women complied with the statutory homestead requirements and the Federal Government gave them fee simple title to land. Strikingly, then, the Homestead Act of 1862 stands apart from most nineteenth-century legislation because it did not "insert[] marriage . . . as a necessary part of women's public legal identities."[89] It was also ahead of its time—remember that ten years later Justice Bradley was able to erase the legal identities of unmarried women because they were simply "exceptions to the general rule" of marriage.[90] Dubler argues Justice Bradley's comments on single women were "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."[91]

It was not until the first half of the twentieth century that unmarried women received real attention beyond the Homestead Act of 1862.[92] Thus, the inclusion of unmarried women in the Homestead Act stands out as an early recognition of the legal rights and social contributions of unmarried women. But the Congressional debate about including unmarried women also largely reinforces Dubler's theory that singlehood was viewed as a temporary state for women and that the government used policies to

86. Dubler et al., *supra* note 21, at 339 (comments by Ariela Dubler).

87. *Id.* at 339–40 (comments by Ariela Dubler).

88. COTT, *supra* note 70, at 64 ("[T]he Civil War interrupted [the women's rights advocacy movement's] momentum.").

89. Dubler et al., *supra* note 21, at 350 (comments by Ariela Dubler).

90. Bradwell v. Illinois, 83 U.S. 130, 141 (1872).

91. Dubler, *supra* note 16, at 799.

92. *See id.*

encourage marriage. The statutory history detailed below adds complexity to these articulations.

III. CONGRESSIONAL DEBATE LEADING TO THE HOMESTEAD ACT OF 1862

The keystone of American public land distribution is the Homestead Act of 1862, which distributed vast stretches of American land to settlers without cost. Over the course of decades, various homestead bills were introduced, debated, and rejected before one finally passed in 1862. Looking only at the Congressional debates of 1862 provides no explanation or context for the inclusion of unmarried women. Instead, to understand the 1862 Act, it is necessary to look back many years at prior legislation, especially at failed legislation. As John Cannan argues, "failure to pass legislation does not signify a failure to generate legislative history."[93] By the time Congress voted on the Homestead Act in 1862, the qualification clause was set: unmarried women were already included in the draft bill long before the 1862 Congressional session.[94] It is the many failed legislative attempts in earlier sessions that tell the story of *why* Congress included unmarried women. Accordingly, this section treats the history of the Homestead Act of 1862 as "a tapestry of many histories woven together" through debates in prior Congresses.[95]

Because homestead legislation—and the idea of free land for settlers—had long been percolating in Congress, it is difficult to choose a starting point to track the statutory history of the Homestead Act of 1862. I have chosen to start detailing legislative proposals in 1845, when calls for free homesteads became a part of national politics. But, as explored more thoroughly in Part II, there is a much longer history of American land distribution legislation, including a long history of different treatment of women under the qualification clauses of various laws.[96] The longer trajectory of women's rights under land distribution laws shows progress towards broader property rights for women. But there is no indication that Congress provided these property rights to women for their benefit or to recognize women's individual rights. Rather, the Congressional focus was always on empire building through settlement and a stable population[97]—an activity that required women to bear a new generation of children. The

93. Cannan, *supra* note 29, at 135.

94. ROBBINS, *supra* note 12, at 206 (describing how the homestead bill passed in 1862 "was an almost exact replica of Grow's House bill of 1859").

95. Cannan, *supra* note 29, at 135.

96. *Supra,* Part II: The Context for the Debate.

97. *See, e.g.*, CONG. GLOBE, 36th Cong., 1st Sess. 1654 (1860) (statement by Senator Andrew Johnson of Tennessee).

goal for Congress was to provide "a home, an abiding place for a man, his wife and children."[98] That goal led to frequent discussion of how to include women in public domain distribution.

As early as 1826, unmarried women were mentioned in relation to land distribution rights: Senator Thomas Hart Benton of Missouri argued on behalf of homesteads and argued that governments historically had provided land to their citizens, including women. Benton noted that "[t]he 'promised land' was divided among the children of Israel—the women getting a share where there was no man at the head of the family—as with the daughters of Manasseh."[99] Benton's biblical view of providing free land to unmarried women was not adopted for another thirty-six years.

The federal land laws passed between 1826 and 1862 were either limited to men or included only certain women, most commonly widows. For example, the Preemption Act of 1841,[100] which permitted squatters who had resided on and improved federal land to purchase up to 160 acres,[101] only allowed "every person being the head of a family, or widow, or single man, over the age of twenty-one years" to take advantage of the law.[102] The Armed Occupation Act of 1842[103] enabled "any person, being the head of a family, or single man over eighteen years of age, able to bear arms," to claim a quarter section of land in certain parts of Florida.[104] The act included "his or her" and "he or she" language, demonstrating an intent to allow women to obtain land under the "head of household" provision.[105] These statutes were typical in excluding unmarried women—instead allowing only widows or women with children to obtain land. Despite the early bans on unmarried women, there was at least some ability to circumvent this rule. Sometimes unmarried, childless women managed to

98. *Id.* at 1651 (statement by Senator Andrew Johnson of Tennessee).

99. Gales & Seaton's Register 744 (May 16, 1826); 1 THOMAS HART BENTON, THIRTY YEARS' VIEW; OR, A HISTORY OF THE WORKING OF THE AMERICAN GOVERNMENT FOR THIRTY YEARS, FROM 1820 TO 1850 106 (1883)), https://www.gutenberg.org/files/44851/44851-h/44851-h.htm [http://web.archive.org/web/20211105163011/https://www.gutenberg.org/files/44851/44851-h/44851-h.htm]..

100. Preemption Act of 1841, ch. 16, 5 Stat. 453.

101. *Id.* §10; Thomas Le Duc, *History and Appraisal of U.S. Land Policy to 1862*, *in* LAND USE POLICY AND PROBLEMS IN THE UNITED STATES 13 (Howard W. Ottoson ed., 1963).

102. 5 Stat. 453 §10.

103. Armed Occupation Act of 1842, 5 Stat. 502 (officially titled, "An Act to provide for the armed occupation and settlement of the unsettled part of the peninsula of East Florida").

104. *Id.*; *see also* Glenn Boggs, *Free Florida Land: Homesteading for Good Title*, 83 FLA. BAR J. 11, 16 (2009) (quoting Covington, *supra* note 39, at 42).

105. 5 Stat. 502.

"adopt" children for a brief period of time in order to be considered a head of household to qualify for land, returning the child after claiming land.[106]

A departure from most land distribution laws, the Donation Land Claim Act of 1850, which provided land grants to settlers arriving in Oregon,[107] allowed only men to claim land but granted a married man twice as much land as a single man.[108] Notably, the Donation Land Claim Act gave title of this extra land to the wife.[109] As Richard Chused has demonstrated, this decision was influenced by state laws on married women's property rights.[110] The rights of female settlers were unique under the Donation Land Claim Act, but the reasons for including women were not. Congressional debates about settling Oregon "addressed the familial nature of the settlement pattern, recognizing that as part of a family, women were indispensable to the imperial project."[111] A number of bills intended to distribute the land of Oregon were introduced in Congress over several decades before the ultimate passage of the Donation Land Claim Act.[112] The proposed bills were consistent in their desire to encourage families, and therefore women, to take part in settling Oregon.[113]

And then came the Homestead Act of 1862, which broke all precedent by giving unmarried women the right to receive free government land. For the first time, no relationship to a man was required. The remainder of this section provides a detailed description of the Congressional debate about unmarried women in the qualification clause for the twenty-year period between 1843 and 1863.[114] In many of the Congressional sessions, there

106. ELAINE LINDGREN, LAND IN HER OWN NAME: WOMEN AS HOMESTEADERS IN NORTH DAKOTA 61 (1991).

107. Donation Land Claim Act of 1850, ch. 76–79 Stat. 496. *See also* LIMERICK, *supra* note 15, at 45.

108. Stat. 496 §4.

109. *Id.* (providing qualifying married settlers "the quantity of one section, or six hundred and forty acres, one half to himself and the other half to his wife, to be held by her in her own right").

110. Chused, *supra* note 18, at 45 (listing various influences, including developing state trends in women's property rights).

111. Compton, *Proper Women*, *supra* note 9, at 40.

112. At the same time, there was corresponding legislative action in the territorial government of Oregon. That statutory history is beyond the scope of this Article, but is discussed in Chused, *supra* note 18, at 57–59.

113. *See* Chused, *supra* note 18, at 60 ("[T]he old legislative proposals for larger grants to married couples were framed to attract women to the territory rather than to embody state-level women's property reforms . . . .").

114. Of course, the debate on unmarried women in the qualification clause was only a small portion of the Congressional debate. A much longer statutory history would be required to tell the full story of the homestead debates, and others have attempted to write

was no explicit debate about including unmarried women. Rather, all that exists is the text of the proposed qualification clauses. Those proposed qualification clauses, however, show a great deal about what Congress valued in terms of homestead policy.

A. The Twenty-Eighth Congress: 1843–1845

The homestead laws proposed during the Twenty-Eighth Congress were limited to heads of families, excluding unmarried women and unmarried men. On January 4, 1844, Representative Robert Smith of Illinois introduced a homestead resolution for "every actual settler, being the head of a family."[115] On February 4, 1845, Representative William P. Thomasson of Kentucky argued for a free forty acres for "every actual settler, being the head of a family."[116] No proposals for free land came to a vote during the Twenty-Eighth Congress,[117] but the groundwork was established for the next twenty years of legislative debate on the topic.

B. The Twenty-Ninth Congress: 1845–1847

Multiple bills were proposed during the Twenty-Ninth Congress. On March 9, 1846, Representative Felix G. McConnell of Alabama introduced a bill that included unmarried women—it would have provided homesteads to "any man, maid, or widow, being the head of a family."[118] Three days later, Representative Andrew Johnson of Tennessee proposed a homestead bill limited to "every poor man . . . who is the head of a

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those comprehensive histories. *See, e.g.*, ROBBINS, *supra* note 12. In addition to much debate about Federal Indian policy, slavery, states' rights, and immigration, Congress also spent significant time rejecting homestead proposals on procedural grounds. *See, e.g.*, CONG. GLOBE, 31st Cong. 1st Sess. 408 (1850) (noting that a homestead bill introduced by Representative Andrew Johnson "was not received" in the House because it originated in the wrong committee).

115. CONG. GLOBE, 28th Cong., 1st Sess. 103 (1844); *see also* ROBBINS, *supra* note 12, at 105 (mentioning this proposal).

116. CONG. GLOBE, 28th Cong., 2d Sess. 241 (1845) (articulating his proposal for free land as an alternative to a graduation bill under debate).

117. HIBBARD, *supra* note 5, at 356.

118. H.R. 294, 29th Cong. (1846) (bill proposed by Representative Felix G. McConnell of Alabama on March 9, 1846); *see also* CONG. GLOBE, 29th Cong., 1st Sess. 473 (1846) (same). That same day, Representative Richard P. Herrick of New York also introduced a homestead proposal. This proposal originated from the National Reform Association. CONG. GLOBE, 29th Cong., 1st Sess. 471 (1846); *see also* Roy Marvin Robbins, *Horace Greeley: Land Reform and Unemployment, 1837–1862*, 7 AGRIC. HIST. 18, 27 (1933) ("Greeley watched the progress of the homestead bill introduced in Congress by Representative Herrick of New York on March 9, 1846. This bill was backed by the National Reform Association. The House of Representatives refused to print it.").

family."[119] Later that month on March 27, 1846, Representative Orlando Ficklin of Illinois introduced a bill to provide homesteads "to each head of a family."[120]

In July 1848, the House of Representatives spent several days debating whether homesteaders should have to pay for land. On July 8, Representative Cornelius Darragh of Pennsylvania made the first proposal to include unmarried women. Darragh's amendment would have allowed "any citizen of the United States, and any female, the widow or daughter of any citizen of the United States" to receive land.[121] Another amendment would have only allowed "each head of a family" to claim land.[122] On July 9, the House returned to debate on the bill, but did not return to the issue of whether to include women.[123] On July 10, the House again considered the bill.[124] This time, several amendments were proposed and rejected—one amendment used the "every person, who is the head of a family" language in its qualification clause.[125] Another amendment once again sought to allow claims by "any citizen of the United States, and any female, the widow or daughter of any citizen of the United States."[126] None of these proposals gained real traction, and the Twenty-Ninth Congress failed to pass any homestead legislation.[127] However, "[t]he campaign for homesteads was on."[128]

C. The Thirtieth Congress: 1847–1849

During the Thirtieth Congress, "not much was done on the homestead program."[129] Although they did not engender serious consideration or debate, several homestead bills were proposed. In July 1848, Senator John P. Hale of New Hampshire introduced a homestead bill,[130] which would

119. H.R. 319, 29th Cong. (1846); CONG. GLOBE, 29th Cong., 1st Sess. 492 (1846) (bill proposed by Representative Andrew Johnson of Tennessee on March 12, 1846).

120. CONG. GLOBE, 29th Cong., 1st Sess. 562 (1846) (bill proposed by Representative Orlando Ficklin of Illinois on March 27, 1846).

121. *Id.* at 1071 (amendment proposed by Representative Cornelius Darragh of Pennsylvania).

122. *Id.* (amendment proposed by Representative George S. Houston of Alabama). This proposal also would have required a "statement" to "set forth the number of persons in the family, giving names and ages." *Id.*

123. *Id.* at 1074–75.

124. *Id.* at 1076.

125. *Id.* at 1077 (amendment proposed by Representative Andrew Johnson of Tennessee).

126. *Id.* (amendment proposed by Representative Cornelius Darragh of Pennsylvania).

127. HIBBARD, *supra* note 5, at 356.

128. *Id.*

129. *Id.* at 365.

130. CONG. GLOBE, 30th Cong., 1st Sess. 916 (1848).

have provided homesteads only to male citizens.[131] In December 1848, Representative Horace Greeley of New York introduced a partial homestead bill[132] that provided 40 acres of free land to a single person, whether male or female, and 80 acres of free land to a married man.[133] Greeley's bill was tabled and never saw any Congressional discussion.[134] Historian Roy M. Robbins explained that after Greeley's bill was tabled, discussion of land reform ceased for that Congress because "[n]either party, for the time being, wanted to sponsor a measure so close to the dangerous slavery issue."[135] This departure from homestead legislation occurred even though the Free Soil Party was gaining traction and campaigning in 1848 with a platform in favor of free land.[136]

D. The Thirty-First Congress: 1849–1851

Despite continuing to be embroiled with the issue of slavery, the Thirty-First Congress did not shy away from the homestead issue, introducing several homestead proposals. In the Senate, the homestead bill received its "first prominent attention"[137] with a proposal by Senator Stephen Douglas of Illinois in 1849.[138] In 1850, one Senate resolution called for homesteads for "each family;"[139] another resolution called for

131. ROBBINS, *supra* note 12, at 111 (providing details on Senator Hale's proposal).

132. CONG. GLOBE, 30th Cong., 2d Sess. 13 (1848) (noting that Greeley—misspelled as "Greely"—provided notice of motion for leave to introduce "[a] bill to discourage speculation in public lands, and to secure homes thereon to actual settlers and cultivators"); *Id.* at 38 (noting that Greeley introduced his proposed homestead bill).

133. *Id.* at 605; *cf.* DUBOIS & MATHEWS, *supra* note 27, at 65 (describing the law as only applying to men). Greeley's proposal allowed up to 160 acres per settler but required settlers pay for acreage beyond what was provided for free. CONG. GLOBE, 30th Cong., 2d Sess. 605 (1848); *see also* ROBBINS, *supra* note 12, at 31 (explaining Greeley's short tenure in the House of Representatives and his attempt at a homestead bill).

134. CONG. GLOBE, 30th Cong., 2d Sess. 605 (1848) (noting "the bill, by a *viva voce* vote, was laid on the table"); *see also* ROBBINS, *supra* note 12, at 112 (noting the same).

135. ROBBINS, *supra* note 12, at 112; *see also* Robbins, *supra* note 118, at 31 ("Neither party wanted to sponsor a measure so akin to the dangerous slavery issue. With the conservatives of both parties in control, there was little hope for Land Reform.").

136. HIBBARD, *supra* note 5, at 356–57.

137. ROBBINS, *supra* note 12, at 112.

138. CONG. GLOBE, 31st Cong., 1st Sess. 87 (1850) (discussing bill by Senator Stephen Douglas of Illinois titled "A bill granting 160 acres of the public lands to the actual settlers who shall reside thereon and cultivate a portion thereof for a period of four years"); *see also Id.* at 75 (including Senator Stephen Douglas giving notice he plans to introduce the homestead bill soon). Douglas's bill has been described as a "straight bill for free grants." DUBOIS & MATHEWS, *supra* note 27, at 70. Later that session, Douglas explained his bill by talking about *men* settling the frontier. CONG. GLOBE, 31st Cong., 1st Sess. 263 (1850).

139. CONG. GLOBE, 31st Cong., 1st Sess. 262 (1850) (resolution by Senator Sam Houston of Texas on January 30, 1850).

homesteads for male citizens.[140] The Senate, in discussing the various proposed qualification clauses, largely focused on immigrants.[141] At one point during Senate debate, a homestead bill was criticized for failing to provide for "the lonely widow,"[142] and Douglas responded by explaining that his bill provided land "for the females and widows."[143]

As a Representative from Tennessee, future-president Andrew Johnson proposed a bill that would have made a homestead available "to every man who is the head of a family and citizen of the United States, or every widow who is the mother of a minor child or children."[144] Only after several attempts by Johnson did the House finally take up his bill, but even then, the inclusion of women was not discussed.[145] Johnson was consistently inconsistent with including women in his proposed homestead laws.[146] The next year, in the second session of the Thirty-First Congress, Johnson tried again—this time excluding all women with a bill that would have provided homesteads to "every man who is the head of a family."[147] Johnson explained that his goal was to "give[] land to every man that ought to have land."[148] The homestead measure did not pass and again failed to generate discussion about women.[149]

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140. *Id.* at 210 (resolution by Senator Daniel Webster of Massachusetts on January 22, 1850, calling for free land for "every male citizen of the United States, and every male person who has declared his intention of becoming a citizen"); *id.* at 616 (Senate taking up Webster's resolution and immediately postponing discussion); *see also* DUBOIS & MATHEWS, *supra* note 27, at 70 (noting resolution by Daniel Webster limited to "every male who had declared his intention of citizenship").

141. CONG. GLOBE, 31st Cong., 1st Sess. 264 (1850); *see also* DUBOIS & MATHEWS, *supra* note 27, at 70 (noting differences between Senate proposals based on treatment of immigrants).

142. CONG. GLOBE, 31st Cong., 1st Sess. 265 (1850) (statement by Senator William C. Dawson of Georgia).

143. *Id.* (including statement by Senator Stephen Douglas of Illinois comparing his bill to other homestead proposals and stating that "[i]n my bill…provision is made for the widow.").

144. *Id.* at 408, 423–24; *see also id.* at 131 (notice of Representative Johnson planning to introduce the bill); *and* DUBOIS & MATHEWS, *supra* note 27, at 75–76 (discussing Johnson's bill).

145. ROBBINS, *supra* note 12, at 113; CONG. GLOBE, 31st Cong., 1st Sess. 1449–50 (1850). Representative Andrew Johnson gave a speech on behalf of his proposal on July 25, 1850, which did not discuss female settlers. CONG. GLOBE, 31st Cong., 1st Sess. app. 950–52 (1850).

146. Compton, *Uncle Sam's Farm*, *supra* note 9, at 12 n.6 ("Over the course of his legislative career, Johnson waffled in his attitude toward women homesteaders, at times introducing legislation that specifically excluded women, and at others extending the benefit of free land to widows with children.").

147. CONG. GLOBE, 31st Cong., 2d Sess. 312 (1851).

148. *Id.*

149. *Id.* at 312–15.

E. The Thirty-Second Congress: 1851–1853

The Thirty-Second Congress saw several important proposals and debates on homestead bills in the House of Representatives[150] but very little action in the Senate.[151] Importantly, the Thirty-Second Congress saw the first real discussion of including unmarried women in homestead legislation.

On December 10, 1851, Representative Andrew Johnson again introduced a homestead bill, which would have provided a homestead "to any man or widow . . . who is the head of a family."[152] In January 1852, Senator Isaac Walker of Wisconsin introduced a homestead proposal which would have provided free land to "any person . . . being of the age of twenty-one years or upwards, or the head of a family."[153] Because Walker used "his or her" and "he or she" in this proposal, there is little doubt that "any person" included women.[154]

The House debated Johnson's bill in March of 1852, but the initial discussion did not address women.[155] The only comments on unmarried women came on March 10, when Representative Joseph Cable of Ohio advocated for the bill saying that "young men and maidens . . . would be benefitted by the privilege of locating and cultivating one hundred and sixty acres."[156] Representative Orin Fowler of Massachusetts interjected, and this exchange followed:

> Mr. FOWLER. . . . I notice he spoke of this bill as providing for men and maidens. I would like to know whether the gentleman intends to propose a clause, providing for all the old maids in the country?

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150. HIBBARD, *supra* note 5, at 366 ("As it developed, the session of 1851 and 1852 gave much time and attention to homestead consideration.").

151. ROBBINS, *supra* note 12, at 114 (noting the Senate's hostility to the homestead principle and its quick rejection of a homestead bill proposed by Senator Isaac Walker of Wisconsin).

152. CONG. GLOBE, 32d Cong., 1st Sess. 58 (1852) (noting the introduction of the bill H.R. 84, 32d Cong. (1852)); *see also* ILISEVICH, *supra* note 24, at 63.

153. CONG. GLOBE, 32d Cong., 1st Sess. 303 (1852) (Walker's proposal offered as an amendment).

154. *Id.*

155. *See, e.g.*, CONG. GLOBE, 32d Cong., 1st Sess. app. 258–61 (1852) (speech by Representative John L. Dawson of Pennsylvania on March 3, 1852); *id.* at app. 285–89 (speech by Representative Hiram Bell of Ohio on March 11, 1852); *id.* at app. 386–90 (speech by Representative Thomas Fuller of Maine on March 30, 1852).

156. *Id.* at app. 298 (speech by Representative Joseph Cable on March 10, 1852).

> Mr. CABLE. If I were a bachelor, I would certainly propose such a provision.
>
> Mr. FOWLER. I do not happen to be a bachelor, and therefore do not ask the provision for myself.
>
> Mr. CABLE. I had reference to maidens now, but who shall become wedded hereafter, for they could not conveniently till the soil.[157]

Cable then transitioned to advocating for the benefits of homesteads for families.[158]

On March 30, 1852, Johnson introduced an amendment to change the qualification clause language in several ways, including from "every man or widow who is the head of a family" to "any person who is the head of a family."[159] That change was not discussed, but on the same day, the House discussed unmarried women when Representative Charles Skelton of New Jersey spoke in favor of the bill.[160] Skelton gave a speech advocating for the homestead bill because it would alleviate poverty in America's cities.[161] In criticizing the problems with city poverty, Skelton noted that "twenty thousand females in the city of New York were earning their living by their needles."[162] An unidentified member asked Skelton, "Why not give the land to them?"[163] The Congressional Globe does not convey whether this question was asked in jest or with serious contemplation.[164] Skelton did not engage with the possibility of providing homesteads directly to women, instead merely answering that "I tell that gentleman, that had we given the land to their fathers and grandfathers, they would not have been found [working in New York City]."[165] Like many northerners, Skelton seemingly viewed public land distribution "as a safety valve for oppressed urban workers"[166]—perhaps even for women.

On April 29, lawmakers discussed widows but did not address unmarried women. Johnson spoke of a biblical justification for providing

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157. *Id.*
158. *Id.*
159. *Id.* at 926 (amendment proposed by Representative Andrew Johnson of Tennessee).
160. *Id.* at app. 380–83 (speech by Representative Charles Skelton of New Jersey on March 30, 1852).
161. *Id.*
162. *Id.* at app. 381.
163. *Id.*
164. Neither the appendix nor the main record of the Congressional Globe indicates who asked this question or whether it was meant to be serious. *Id.* at app. 381; *id.* at 926.
165. *Id.* at app. 381.
166. *See* FINK, *supra* note 8, at 17.

homesteads for widows and orphans.[167] Representative LaFayette McMullen of Virginia advocated in favor of including widows, saying, "Oh, I can see her now in my imagination, wending her way to the far West, with her little helpless sons and daughters, and settling down upon her home at the West."[168] Unlike many Congressmen who doubted women's ability to homestead, McMullen pictured a widowed homesteader "rearing up a log cabin to shelter [herself and her children] from the pitiless storm, and digging up a few hills of corn, from which she can derive sustenance for her orphan children."[169] Speeches given in early 1852 also discussed the need to provide for families.[170]

The idea of including unmarried women reappeared on May 6, 1852, when the House engaged in a lengthy debate about the homestead bill, largely focusing on the qualification clause.[171] One proposed amendment would have removed even single men and restricted free land to "any person who is the head of a family."[172] Then Representative John Allison of Pennsylvania offered an amendment to strike out the requirement of being the head of a family "for the purpose of preventing invidious distinctions being made" against single men.[173] Allison continued:

> It is wrong to make such a distinction [against single men]. I hope, further, that if this amendment I have proposed shall be adopted, some of the gallant gentlemen who occupy the positions I have indicated, will have the gallantry to further amend the bill, so as to provide that one hundred and sixty acres of land shall also be given to persons of the opposite sex. [Laughter]. I believe this

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167. CONG. GLOBE, 32d Cong., 1st Sess. app. 530 (1852) (speech by Representative Andrew Johnson of Tennessee explaining that including widows is based on biblical directives).

168. *Id.* at app. 520 (with McMullen misspelled as McMullin).

169. *Id.*

170. *See, e.g.*, *id.* at app. 427 (speech by Representative Galusha A. Grow of Pennsylvania on March 30, 1852 arguing against allowing speculation by noting the difficulty of a man who "comes to seek a home for himself and his family"); *id.* at app. 437–38 (speech by Representative Willard P. Hall of Missouri on April 20, 1852) (arguing that an individual gives value to the public domain by "subjecting himself and his family to the toils and exposures of a first settlement" and will later be "secured in an abundance for himself and family").

171. *Id.* at 1275. Congressional debate was not limited to the qualification clause. Much of it was about economics. ILISEVICH, *supra* note 24, at 63–64.

172. CONG. GLOBE, 32d Cong., 1st Sess. 1280 (1852). This amendment, to limit homesteads to heads of families, was discussed in the context of the qualification clause and whether immigrants should be included. *Id.*

173. *Id*. (quoting Representative John Allison of Pennsylvania).

> amendment would be favorably received, and particularly by those bachelor gentlemen who are the most deeply interested.[174]

Allison's proposal, after generating laughter, was soundly rejected.[175]

Six days later, on May 12, 1852, the House once again returned to a discussion of unmarried women. On that day, the House debated whether to include widows, including whether to include all widows or only those who were heads of household.[176] Representative William A. Sackett of New York proposed an amendment that would include unmarried men but not unmarried women.[177] Proposing to include unmarried women, Representative James M. Gaylord of Ohio offered an amendment to Sackett's amendment.[178]

> Mr. GAYLORD. I move to amend the last amendment by inserting "and women over twenty-one years of age."
>
> Mr. CAMPBELL, of Illinois. They will never settle there.
>
> Mr. GAYLORD. They have as much right there as bachelors.
>
> Mr. JOHNSON, of Tennessee. I hope the House will vote down the amendment. It makes the range of discussion too wide.
>
> Mr. GAYLORD. If the amendment endangers the passage of the bill, I withdraw it, if there be no objection.

No objection was made, and the amendment was withdrawn.[179]

Unmarried women were not added to the qualification clause, and the House passed the bill on May 12, 1852.[180] However, the Senate refused to

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174. *Id.*

175. *Id.* (indicating laughter in the middle of Allison's speech and noting that Allison's amendment was rejected).

176. *Compare id.* at 1315 (noting that the qualification clause under discussion read, "[t]hat every man or widow who is the head of a family") *with id.* at 1316 (Representative William A. Sackett of New York proposing a qualification clause with the language, "[t]hat every person being the head of a family, or widow, or single man").

177. *Id.* at 1316.

178. *Id.* (Representative James M. Gaylord of Ohio).

179. *Id.* (exchange between Representative James M. Gaylord of Ohio and Representative Thompson Campbell of Illinois).

180. *Id.* at 1351; *see also* ILISEVICH, *supra* note 24, at 68 (noting the bill passed in the House on May 12, 1852); ROBBINS, *supra* note 12, at 116 ("The homestead bill passed the House on May 12 by a vote of 107 to 56. Obviously it was not a party division, but a

consider the homestead bill that year[181] and the next.[182] The Thirty-Second Congress had failed to pass a homestead bill, but the conversation about including unmarried women had finally begun.

F. The Thirty-Third Congress 1853–1855

In the first session of the Thirty-Third Congress, several homestead laws were proposed in the House,[183] and they all started with limited or no rights for unmarried women. Of the two bills that Congress seriously considered, one was offered by William L. Dawson of Pennsylvania and was limited to non-immigrant men.[184] The other was offered by Galusha A. Grow of Pennsylvania and would have allowed any head of family over the age of 21 to obtain a homestead.[185]

In early 1854, the House of Representatives debated in detail whether to include unmarried women in the proposed homestead bills.[186] The debate started when Representative Williamson R.W. Cobb of Alabama proposed an amendment to add single white men.[187] Shifting his focus to unmarried women, Cobb explained:

> I did hope that my friend from Tennessee, [Mr. JONES,] who is a bachelor, would have brought forward an amendment proposing to extend the privileges of the bill to unmarried females who shall have arrived at the age of twenty-one years. I advocated that policy in committee, but I was overruled. I hope, however, that my bachelor friend from the State of Tennessee, if he will not entitle himself to enjoy the privileges of the bill by sharing them

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sectional one."); HIBBARD, *supra* note 5, at 366 ("The bill eventually passed the House by a vote of 108 to 57."); TREFOUSSE, *supra* note 62, at 80 ("[Andrew] Johnson finally realized his dream of passing the Homestead Bill, at least in the House.").

181. HIBBARD, *supra* note 5, at 366 ("In the Senate the bill fared badly."); ILISEVICH, *supra* note 24, at 68–71 (describing the homestead bill's failure in the Senate); ROBBINS, *supra* note 12, at 116 (same).

182. ROBBINS, *supra* note 12, at 116 ("In the second session of the thirty-second Congress the Senate still persistently refused to take up the House bill.").

183. ILISEVICH, *supra* note 24, at 75 (noting proposed laws).

184. DUBOIS & MATHEWS, *supra* note 27, at 106 (discussing Dawson's proposed bill).

185. *Id.* at 106–07 (discussing Grow's proposed bill); *see also* CONG. GLOBE, 33d Cong., 1st Sess. app. 240–44 (1854) (speech by Galusha A. Grow promoting his bill).

186. CONG. GLOBE, 33d Cong., 1st Sess. 500–06 (1854).

187. *Id.* at 500–01 (amendment proposed by Representative Williamson R.W. Cobb of Alabama).

> with a female, will at least allow her to take to herself the farm and enjoy it in loneliness.[188]

Dawson argued against including single men,[189] then Representative George W. Jones of Tennessee took up the invitation to offer an amendment that would include unmarried women.[190] Jones's amendment proposed changing the qualification clause to allow "any person who is the head of a family, or who is eighteen years of age" to obtain a free homestead.[191] Jones did not immediately explain whether "any person" included unmarried women.[192] After a few other comments, this exchange occurred:

> Mr. DENT. I would inquire of the gentleman from Tennessee, if, when he says "any person," he means female as well as male?
>
> Mr. JONES. I suppose that is what it means.
>
> The question was put upon the adoption of the amendment; and, upon a division, there were—ayes 60, noes 20; no quorum voting . . .
>
> Mr. MCMULLIN. I move to insert the words "any male citizen over twenty-one years of age."
>
> [Cries of "Oh, no."]
>
> Mr. RICHARDSON. Oh, I hope the gentleman will make it females instead of males. These bachelors ought not to be given land. [A laugh.]
>
> Mr. MCMULLIN. Several gentlemen around me insist that I must withdraw my amendment, and I will do so.[193]

Biographers of a different house member describe these moments on the House floor as follows:

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188. *Id.* at 501 (comments by Representative Williamson R.W. Cobb of Alabama).
189. *Id.* (comments by Representative William L. Dawson of Pennsylvania).
190. *Id.* (amendment by Representative George W. Jones of Tennessee).
191. *Id.* (amendment by Representative George W. Jones of Tennessee).
192. *Id.* (statement by Representative George W. Jones of Tennessee).
193. *Id.* at 502 (speaking Representatives were Representative William B. W. Dent of Georgia, Representative George W. Jones of Tennessee, Representative LaFayette McMullen of Virginia, and Representative William A. Richardson of Illinois).

> Cobb, however, in a mood of chivalric jocularity and sly badinage, insisted that he had been hoping that his friend Jones, of Tennessee, a bachelor (distinguished as the "Cerberus of the Treasury"), would have done even better than he did by bringing forward an amendment proposing to extend the privileges of the bill to unmarried females. Jones thereupon came in for many pleasantries upon his lone state, and created much laughter by taking up Cobb's dare. He moved to change the phrase to read, "any head of a family or eighteen years of age." This passed.[194]

There was one more immediate attempt to amend the language. Representative John L. Taylor of Ohio suggested amending the qualification clause to allow "any male person who is twenty-one years of age, and any female person who is eighteen years of age" because "a young lady is, by law, of age at eighteen years" and therefore Jones's amendment "seems to imply some invidious distinction between the sexes" because it set the age of qualification at eighteen for both women and men.[195] When Taylor then got off topic by talking about a prior session, the chairman responded "that it is not in order for the gentleman to give reasons why he voted against the bill at the last session on a motion to insert females with males."[196] That statement caused laughter in the House.[197]

Representative William A. Richardson of Illinois spoke in favor of the amendment to the amendment, noting he "can very cheerfully vote for that portion of the amendment which proposes to give the land to the young lady of eighteen, and the young gentlemen of twenty-one. If he is not married, it is his fault. If it is not his fault, he is not entitled to any land."[198] The amendment to the amendment—which would have created an age differential for women and men—was then rejected.[199]

Offering another amendment to the qualification clause, Representative William T.S. Barry of Mississippi moved to allow either heads of families or anyone "who has arrived at the age of twenty-one years" to be qualified.[200] Barry explained the purpose of the homestead bill

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194. DUBOIS & MATHEWS, *supra* note 27, at 109 (biography of Representative Galusha A. Grow, a homestead proponent).

195. CONG. GLOBE, 33d Cong., 1st Sess. 502–03 (1854) (statement of Representative John L. Taylor of Ohio).

196. *Id.* at 503.

197. *Id.* Even more laughter came a few moments later as the House discussed the age single men should be qualified and there was a joke about Representative Jones—a bachelor—being qualified. *Id.*

198. *Id.* (comments by Representative William A. Richardson of Illinois).

199. *Id.*

200. *Id.* (proposal of Representative William T.S. Barry of Mississippi).

was to "give homes to the homeless" and should be written broadly.[201] Barry continued:

> Nor is there reason to limit the extension of this act to males only. If a female desires to possess a home, and is willing to conform to the requirements of the law, there is no reason why she should be an alien to the justice or the charity of her country. If she is unfettered by marriage ties she has the same natural right to be provided a home from the public domain that the unmarried man of the same age has. And if she is a widow, though under the age of twenty-one, the reason is still stronger in her favor.[202]

Barry's proposed amendment passed the House and created the language that would ultimately find its way into the Homestead Act of 1862: "any person who is the head of a family, or who has arrived at the age of twenty-one years."[203] However, the qualification clause was far from finalized.

Even during the Thirty-Third Congress, debate continued on whether to include unmarried women. William B.W. Dent of Georgia argued for setting the age for single men at nineteen, arguing that many young single men "are capable of going into our western wilderness" onto homesteads and those men "would provide themselves with wives afterwards."[204] Speaking to the inclusion of women, Dent said,

> Now, I suppose that there are hundreds of young ladies in your western country, in destitute circumstances, perhaps widows, who would, probably, gladly avail themselves of the opportunity of securing one hundred and sixty acres of land by settling upon it; and I have no doubt but that their lovers would accompany them, and help them to build shanties thereon[.][205]

Dent's amendment was rejected,[206] and the House concluded that day's discussion of the homestead bill without further discussion of women.[207]

When discussion of the homestead bill resumed on March 2, 1854, little was said about women, although Representative Galusha A. Grow of

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201. *Id.*
202. *Id.*
203. *Id.* (language from 1854 debates); 12 Stat. 392 (1855–1863), codified as 43 U.S.C. § 175 (repealed) (language included in final bill).
204. CONG. GLOBE, 33d Cong., 1st Sess. 505 (1854).
205. *Id.*
206. *Id.*
207. *Id.* at 505–06.

Pennsylvania did speak in support of keeping the qualification clause as adopted on February 28 in part because it "provided for the females [and] I am anxious that they should be provided for."[208] On March 6, Representative Williamson R.W. Cobb introduced a replacement homestead bill that still included unmarried women.[209] Cobb advocated for his replacement bill saying, "I like it best because it provides for females . . . ."[210] That replacement bill was rejected and ultimately a highly-modified version of Dawson's bill passed the House in early 1854.[211]

The Senate considered the House bill, but the initial qualification clause debate focused on immigration.[212] On July 10, 1854, the Senate took up the bill again, this time with at least a mention of unmarried women.[213] Proposing a broad qualification clause, Senator William C. Dawson of Georgia said:

> [H]ence, I say, give it to every citizen, native or adopted, for the purpose of encouragement; and a still more important thing, to increase population by reproduction; give to every girl over the age of eighteen or twenty-one, one hundred and sixty acres of land.
>
> Mr. BROWN. How would that affect reproduction?
>
> Mr. DAWSON. By inducing some one to unite with her. Now, I want to know is this not right? Is it not just?[214]

The debate immediately moved on from unmarried women, but the Senate returned to the topic on July 20, 1854,[215] when Dawson spoke in

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208. *Id.* at 529. The only other mention of women was a brief question of whether the amendment previously approved actually included women. *Id.* at 526.

209. *Id.* at 546.

210. *Id.* (statement of Representative Williamson R.W. Cobb of Alabama); *see also* ILISEVICH, *supra* note 24, at 78 ("His earlier attempt to amend the bill having failed, Cobb now offered another substitute that combined elements of graduation with those of the homestead bill and also extended the benefits to women.").

211. CONG. GLOBE, 33d Cong., 1st Sess. 549 (1854) ("So the bill was passed."); DUBOIS & MATHEWS, *supra* note 27, at 115; ILISEVICH, *supra* note 24, at 79.

212. CONG. GLOBE, 33d Cong., 1st Sess. 944–49 (1854) (Senate debate on April 19, 1854); *see also* HIBBARD, *supra* note 5, at 370 (noting that "[o]ne of the main subjects of debate at this session was whether or not the homestead privilege should be restricted to citizens, or 'native citizens,' or whether it should be extended freely to immigrants as well.").

213. CONG. GLOBE, 33d Cong., 1st Sess. 1661–70 (1854).

214. *Id.* at 1669 (exchange between Senator William C. Dawson of Georgia and Senator Albert G. Brown of Mississippi).

215. *Id.* at app. 1097–1123.

favor of including unmarried women using an equality argument.[216] This time his comments about unmarried women sparked laughter.[217] Pivoting from an equality debate that focused on whether to limit homesteads to landless men, Dawson argued:

> [T]here is another class of people legislated against by the bill. A widow is the head of a family. She, of course, will be provided for under this bill. A maiden daughter over the age of twenty-one residing with the mother will not be entitled to anything, unless she could by some accident be the head of a family. [Laughter.]
>
> Mr. PETTIT. That would be utterly impossible. [Renewed laughter.]
>
> Mr. DAWSON. It is an utter impossibility. [Renewed laughter.] There is no amusement in this kind of legislation.[218]

Nothing more was said about unmarried women. Political maneuvering ended the hope for free homesteads during the Thirty-Third Congress.[219]

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216. *Id.* at app. 1106.

217. *Id.* (indicating laughter).

218. *Id.* (exchange between Senator William Dawson of Georgia and Senator John Pettit of Indiana). The reason this was labeled an "impossibility" is that "maid" meant a virgin unmarried woman, who, by definition, would not have had children and therefore could not be a head of household. The only potential workaround to this rule was through some sort of subterfuge. For example, Elaine Lindgren noted how sometimes unmarried, childless women would temporarily "adopt" children to meet head-of-household requirements. LINDGREN, *supra* note 106, at 61.

219. DUBOIS & MATHEWS, *supra* note 27, at 132–33; *see also* ILISEVICH, *supra* note 24, at 87–90 (discussing how the homestead bill was impacted by the Kansas-Nebraska bill). For an example of a Senate debate where the homestead bill was discussed with the Kansas-Nebraska bill, *see* CONG. GLOBE, 33d Cong., 1st Sess. 1124–1128 (1854) (Senate debate on May 8, 1854). Although no homestead act passed that year, there was major land legislation passed by the Thirty-Third Congress in the form of the Graduation Act. The Senate passed the Graduation Act on July 22, 1854, after little debate and no discussion of female settlers. *Id.* at 1844. It met final approval on August 4, 1854. *Id.* at 2261–62. Basically, the Graduation Act allowed for individuals to use their preemption rights to purchase the land at the lower prices. *Id*. In doing so, it did not explicitly include unmarried women. Instead, it referred back to the qualification clause in the governing preemption law. *Id.*

G. The Thirty-Fourth Congress: 1855–1857

The Thirty-Fourth Congress paid very little attention to the homestead issue.[220] Representative Galusha A. Grow proposed a homestead bill for "any person who is the head of a family, or who has arrived at the age of twenty-one years,"[221] but the House did not even take up the bill for debate.[222] Two political roadblocks prevented any real legislative action. First, the politics of slavery had infiltrated the discussion of land policy, making a homestead law politically dangerous. Second, President Franklin Pierce had made clear he was against changes to federal land policy.[223]

H. The Thirty-Fifth Congress: 1857–1859

James Buchanan assumed the presidency in 1857 and, much like his predecessor, was opposed to any major changes to federal land policy, including a homestead bill.[224] President Buchanan made clear his intention to veto homestead bills,[225] but that did not stop the Thirty-Fifth Congress from acting on homestead legislation. A number of bills were proposed, although nothing became law. [226]

On December 17, 1857, Senator Solomon Foot of Vermont introduced a homestead bill that used the qualification clause language first adopted in 1854 and that was ultimately adopted in 1862: "any person who is the head of a family, or who has arrived at the age of twenty-one years."[227] On December 22, 1857, Senator Andrew Johnson introduced a Senate bill which would have provided homesteads to "any person who is the head of a family."[228] Representative Galusha A. Grow continued his mission for

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220. ROBBINS, *supra* note 12, at 178 ("The homestead bill received very little attention in the period from 1855 to 1858.").

221. H.R. 18, 34th Cong. (1856).

222. CONG. GLOBE, 34 Cong., 1st Sess. 1915 (1856).

223. ROBBINS, *supra* note 12, at 178 (noting Pierce had "taken the stand against all departures from existing land policy" in 1854).

224. *Id.*

225. *Id.* ("[I]t was well known that [Buchanan] would veto any land measures which displeased the South, whether they provided subsidies for railroads, for agricultural colleges, or for homesteaders.").

226. ILISEVICH, *supra* note 24, at 160; HIBBARD, *supra* note 5, at 373 ("During the session of 1857 and 1858, two homesteads bills were introduced in the Senate and two more in the House.").

227. S. 2, 35th Cong. (1857); (homestead bill introduced by Senator Solomon Foot of Vermont).

228. *Id.*; CONG. GLOBE, 35th Cong., 1st Sess. 135 (1858) (homestead bill introduced by Senator Andrew Johnson of Tennessee). Senator Johnson's bill was referred to the Committee on Public Lands. CONG. GLOBE, 35th Cong., 1st Sess. 136 (1858); *see also*

free homesteads and proposed a homestead bill in the House,[229] as did Representative John Kelly of New York.[230] On March 15, 1858, Representative Augustus Wright of Georgia introduced a homestead bill for "citizens above the age of twenty-one years, male and female."[231]

On May 27, 1858, the Senate briefly discussed Johnson's bill before postponing debate.[232] The idea of including unmarried women—even if the head of a family—once again garnered laughter. This time, Senator Clement Clay of Alabama argued that public opinion did not support a homestead bill.[233] Clay noted that

> Felix G. McConnell, of the State of Alabama, was in the habit, I believe, on all occasions when he rose to address the Speaker of the House of Representatives, of suggesting his proposition for a homestead for every man, matron, and maid in the United States, who was the head of a family. [Laughter.]
>
> Mr. HAMLIN. And widow.
>
> Mr. CLAY. Then [his proposal] was treated with derision.[234]

The Senate was not interested in providing homesteads to anyone, let alone unmarried women.

The next year, during the second session of the Thirty-Fifth Congress, the House again took up the homestead issue.[235] On December 23, 1858,

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TREFOUSSE, *supra* note 62, at 109 (discussing Johnson proposing the homestead bill as a new Senator).

229. CONG. GLOBE, 35th Cong., 1st Sess. 181 (1858). Representative Grow's bill was referred to the Committee on Public Lands. *Id.*

230. *Id.* at 324. Representative Kelly's bill was referred to the Committee on Agriculture against the untimely objections of Grow. *Id.* That same day, Representative Grow introduced a bill "to prevent the future sale of the public lands . . . until the same shall have been surveyed for at least fifteen years." *Id.* "His intent was to give the actual settler a propitious start over the land grabbers and perhaps to accomplish by other means the good results contemplated in the homestead bill." ILISEVICH, *supra* note 24, at 160.

231. CONG. GLOBE, 35th Cong., 1st Sess. 1130 (1858) (proposal by Representative August Wright of Georgia on March 15, 1858).

232. *Id.* at 2424.

233. *Id.* at 2425.

234. *Id.* Clay was referring to McConnell's proposals in 1846. *See* H.R. 294, 29th Cong. (1846) (bill proposed by Representative Felix G. McConnell of Alabama on March 9, 1846, allowing "any man, maid, or widow, being the head of a family" to claim land); CONG. GLOBE, 29th Cong., 1st Sess. 473 (1846) (same).

235. ILISEVICH, *supra* note 24, at 175 ("During the second session of the Thirty-fifth Congress, which began on December 6, 1858, most of the homestead struggle took place

Fenner Ferguson of Nebraska Territory, a non-voting member of the House of Representatives, introduced a homestead bill for "every person who is the head of a family."[236] Representative Galusha A. Grow introduced his same homestead proposal with the qualification clause that would ultimately be passed into law: "any person who is the head of a family, or who has arrived at the age of twenty-one years."[237] Grow's bill passed the House on February 1, 1859.[238] There was relatively little debate in the House because, "as Mr. Grow put it, the debate had already been on for years, and why prolong it?"[239] Despite optimism by the homestead proponents,[240] Grow's bill was tabled in the Senate without any discussion of unmarried women.[241] No homestead law passed that session[242] and the issue of free homesteads became even more politicized with slavery, viewed by some as an "'abolition' measure conceived and designed to destroy the South."[243]

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in the lower house."); *see also* CONG. GLOBE, 35th Cong., 2d Sess. 612–13 (1859) (speech by Representative Galusha A. Grow on January 26, 1859).

236. CONG. GLOBE, 35th Cong., 2d Sess. 201 (1858) (proposal by Fenner Ferguson of Nebraska Territory on December 23, 1858).

237. H.R. 72, 35th Cong. (1859); CONG. GLOBE, 35th Cong., 2d Sess. 726 (1859) (bill proposed by Representative Galusha A. Grow of Pennsylvania).

238. CONG. GLOBE, 35th Cong., 2d Sess. 727 (1859); *see also* ILISEVICH, *supra* note 24, at 176 ("Despite frantic moves by the opposition, on February 1, 1859, Grow's homestead bill passed the House by an impressive 120-76 decision.").

239. HIBBARD, *supra* note 5, at 375. What little debate that did occur in the House about the qualification clause centered on the inclusion of immigrants, not on the inclusion of unmarried women. ILISEVICH, *supra* note 24, at 176 (calling the immigration provision "the most controversial" part of the bill); *see also* CONG. GLOBE, 35th Cong., 2d Sess. 726 (1859) (statement by Representative John Atkins of Tennessee that he objected to the bill because "it gives the benefits of its provisions to unnaturalized persons").

240. HIBBARD, *supra* note 5, at 375 (noting optimism that the Senate would pass Grow's bill).

241. ILISEVICH, *supra* note 24, at 177–78; ROBBINS, *supra* note 12, at 179. The first Senate discussion appears at CONG. GLOBE, 35th Cong., 2d Sess. 1074–76 (1859). A later attempt to take up the bill failed. CONG. GLOBE, 35th Cong., 2d Sess. 1326 (1859) (noting request by Senator James Doolittle of Wisconsin "to take up the bill called the homestead bill"). Another Senate discussion appears at CONG. GLOBE, 35th Cong., 2d Sess. 1351–63 (1859), where the discussion once again did not mention women—most of the discussion centered on the pending Cuba bill and whether the Senate should even be discussing the homestead bill. *Id.* at 1351–63. One more attempt to discuss the homestead bill was made and rejected, once again without any substantive discussion including with regards to female settlers. *Id.* at 1432–33.

242. ILISEVICH, *supra* note 24, at 178.

243. *Id.* at 181; *see also* LANZA, *supra* note 55, at 7 ("Homestead bills became an ideological focus for increasingly severe sectional division before the Civil War.").

I. The Thirty-Sixth Congress: 1859–1861

The Thirty-Sixth Congress again took up the homestead issue. In the House, Representative Grow introduced a homestead bill, once again using the language of "any person who is the head of a family, or who has arrived at the age of twenty-one years."[244] That bill passed the House,[245] but there was little debate and none on the rights of women.[246] Grow's proposal passed in the House on sectional lines, with support from free states and disapproval from slave states.[247] In the Senate, Senator Andrew Johnson proposed a more limited homestead bill that, among other differences, included a qualification clause limited to heads of families.[248] Senator Andrew Johnson "surmised that the liberal House bill stood little chance in the upper house,"[249] and his prediction proved correct. Ultimately, both houses passed a conservative land bill that required payment by settlers and restricted land claims to heads of families.[250] Johnson, focused on passing a compromise measure that would appease Southerners worried about the security of slavery, "saw to it that only

244. H.R. 24, 36th Cong. (1860) (including the qualification clause language of "any person who is the head of a family, or who has arrived at the age of twenty-one years"); CONG. GLOBE, 36th Cong., 1st Sess. 795 (1860); *see also* ILISEVICH, *supra* note 24, at 185 (discussing the qualification clause of Grow's bill).

245. It passed the House on March 12, 1860. CONG. GLOBE, 36th Cong., 1st Sess. 1115 (1860).

246. For example, Representative Galusha A. Grow of Pennsylvania gave a speech in favor of his Homestead Bill on February 29, 1860, where he mentioned the qualification clause but otherwise did not discuss unmarried women or families. *Id.* at app. 127–29. The politics of slavery had fully infiltrated Congressional workings by the point and "although the merits of the measure were not debated, there was considerable sparring between the pro- and anti-slavery factions." HIBBARD, *supra* note 5, at 376–77.

247. ROBBINS, *supra* note 12, at 179 ("Only one negative vote came from a free state . . . and only one affirmative vote was cast by a member from a slave state."); *see also* HIBBARD, *supra* note 5, at 377 ("In this ballot but one vote from a free state was cast in the negative and but one from a slave state in the affirmative.").

248. S. 1, 36th Cong. (1859) (including qualification clause "any person who is the head of a family"); CONG. GLOBE, 36th Cong., 1st Sess. 190 (1860) (Senator Andrew Johnson introducing Senate Bill No. 1 on December 20, 1859); *id.* at 1293 (noting Senate Bill No. 1 would "grant to any person who is the head of a family" a homestead); *see also* ILISEVICH, *supra* note 24, at 185 (discussing qualification clause differences between the Senate and House versions). The House bill was also more liberal in including immigrants. ILISEVICH, *supra* note 24, at 185; ROBBINS, *supra* note 12, at 179.

249. ILISEVICH, *supra* note 24, at 186. Although Senator Johnson proved correct, the Senate initially took up the House version that included rights for unmarried women. CONG. GLOBE, 36th Cong., 1st Sess. 1508 (1860); *see also* TREFOUSSE, *supra* note 62, at 119–21 (describing Johnson's views and treatment of the two separate homestead bills).

250. HIBBARD, *supra* note 5, at 378 (describing compromise bill); *see also* CONG. GLOBE, 36th Cong., 1st Sess. 1649–50 (1860) (including text of Johnson's compromise amendment).

heads of families" remained eligible.[251] Despite the limited nature of the bill, President Buchanan vetoed it.[252]

On its way to President Buchanan's desk, the homestead bill saw a number of debates regarding which qualification clause to include. Considering that Congress needed to choose between two potential qualification clauses—one that included unmarried women and one that did not—the topic of including unmarried women received relatively little discussion. What little discussion occurred on the qualification clause in the Senate largely focused on the inclusion of unmarried men, not on the inclusion of unmarried women.[253] Senator Morton S. Wilkinson of Minnesota spoke in favor of the House bill's qualification clause, but only because he believed there was value in inducing single men to venture west.[254] He explained that while encouraging matrimony was a laudable goal, "not all women can endure the . . . privations" of early settlement and "the great majority of the women of our country are too frail to join in the struggles and hardships of the early settler."[255] Thus, his support of the more expansive qualification clause was not because it allowed unmarried women to claim homesteads, but rather because it provided homesteads to single men, or as he described them: "boys of all ages who swarm around the streets."[256] Wilkinson also assumed those young men would eventually marry and would be able to do so because "[a]s settlements increase, the facilities for obtaining wives will increase with them."[257]

Fears of land speculation infiltrated much of the congressional debate. Multiple Senators who were opposed to the more expansive qualification clause believed limiting homesteads to heads of families would "prevent fraud" because unmarried men were more likely to claim homesteads just to sell to speculators.[258] Another fraud concern with the expansive qualification clause was that a head of a family could use single family

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251. TREFOUSSE, *supra* note 62, at 121.

252. ILISEVICH, *supra* note 24, at 189.

253. CONG. GLOBE, 36th Cong., 1st Sess. 1296 (1860) (noting comments by Senator Benjamin Wade of Ohio pointing out that the House bill allowed for "any person" to make a claim and using the pronoun "he" to refer to the "any person" who might take advantage of the bill); *id.* at 1991 (noting comments by Senator James Grimes of Iowa that he was concerned about the Senate version that he saw as discriminating against single men); *id.* at 1995 (noting comments by Senator Morton S. Wilkinson of Minnesota in support of allowing single men to claim homesteads). Once again, outside the scope of this Article, it is worth noting that the Senate also discussed the immigration part of the qualification clause. *See, e.g.*, *id.* at 1510 (statement of Senator Morton S. Wilkinson of Minnesota).

254. *Id.* at 1510 (statement of Senator Morton S. Wilkinson of Minnesota).

255. *Id.* (statement of Senator Morton S. Wilkinson of Minnesota).

256. *Id.*

257. *Id.*

258. *Id.* (statement of Senator George E. Pugh of Ohio).

members to claim land and later consolidate that land.[259] A slight twist on that argument was used by Senator Graham Fitch of Indiana to argue against the inclusion of women because doing so:

> [W]ould permit an unmarried female to obtain land, who subsequently might marry an unmarried male, settled by the side of her tract; and then, of course, they would have three hundred and twenty acres instead of one hundred and sixty—a speculation at the expense of heads of families who happen to reside near them.[260]

Senator Fitch had "no objection to voting for an amendment which will allow male citizens over twenty-one years of age to enter the same amount of land," he simply objected to allowing unmarried women to do so.[261]

Senator Robert Johnson of Arkansas made a different argument against allowing claims by unmarried women, explaining:

> Now, as to introducing persons of all classes, (for the Senator's amendment, I believe, embraces females as well as males,) it is a provision that must bring more fraud, from which the females can get no benefit in comparison to the fraud that must be produced. I doubt whether there will be any fair proportion that will ever get a piece of land by virtue of the amendment. They are not able to go out by themselves; they are not heads of families. Young women over the age of twenty-one, are to be brought in the wilderness, make a settlement, build a house, and live in it by themselves, and unmarried. Why, sir, I hope the Senator does not wish to encourage that state of things, even if there are those who will accept it. But few would accept it. But there are those having influences over the minds of such, who would make them parties to fraud and even to perjury. The inducement should not be offered, and I trust that, as far as they are concerned, they may be spared, not so much from the temptation—that I do not believe would affect them—as from the natural influences, and from the improper influences, which would place them in that situation. I

259. *Id.* at 1993 (statement of Senator Robert Johnson of Arkansas).
260. *Id.* at 1991 (statement of Senator Graham Fitch of Indiana).
261. *Id.* (statement of Senator Graham Fitch of Indiana).

> hope very much the Senator will not press the amendment; and if he does press it, I trust the Senate will vote it down entirely.[262]

No one responded to Robert Johnson's speech.[263] Apparently, the various statements against including women were persuasive: when the Senate voted later that day, it did not even consider including unmarried women. Instead, the vote was between a qualification clause limited to heads of families or one that would include rights for a "single male person over the age of twenty-one years."[264] The Senate voted to limit homesteads to heads of families, rejecting even the inclusion of single men.[265] Later, the Senate rejected the broader qualification clause in the House bill.[266] Providing homesteads to unmarried women was never truly considered by the Senate. During the entire Senate debate on the qualification clause options, no Senator ever spoke in favor of unmarried female homesteaders.[267]

After much political volley, both chambers passed a compromise bill.[268] Among other compromises, the bill limited homesteads to heads of families.[269] As expected, President Buchanan vetoed the bill in June of 1860.[270] While a homestead bill saw no further progress during 1860,[271] major political events were shaping its future. During the 1860 election,

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262. *Id.* at 1993 (statement of Senator Robert Johnson of Arkansas).

263. *Id.* Immediately following Senator Robert Johnson's remarks, Senator Louis Wigfall of Texas spoke about federal government powers and did not mention the inclusion of unmarried women. *Id.*

264. *Id.* at 1996 ("The PRESIDING OFFICER. The Amendment, as it has been modified at the suggestion of the Senator from Indiana [Graham Fitch], is in section one, line three, after the word "family," to insert, "or single male person over the age of twenty-one years."). The Senate rejected this amendment. *Id.*

265. *Id.* ("So the amendment was rejected.").

266. *Id.* at 1998–99 (rejecting an amendment that would have inserted the House bill as a substitute with the original language of "any person" who is twenty-one years old).

267. The following Senate debates on the homestead bills failed to include any discussion of the role played by unmarried women. *Id.* at 1551–56, 1649–62, 1748–54, 1991–2011, 2031–44.

268. For more on the political maneuvering, including the conferencing that occurred, *see* ROBBINS, *supra* note 12, at 179–81; ILISEVICH, *supra* note 24, at 188–89.

269. For a full description in the differences between the House and Senate bills at the time of final conferencing, see the comments of Representative Schuyler Colfax of Indiana at CONG. GLOBE, 36th Cong., 1st Sess. 2988 (1860).

270. ROBBINS, *supra* note 12, at 181 ("On June 22, 1860, President Buchanan vetoed this homestead bill."); *see also* HIBBARD, *supra* note 5, at 379–80 (describing why Buchanan vetoed the bill); *cf.* GATES, *supra* note 13, at 939 (portraying Buchanan's veto as unexpected).

271. The Senate lacked votes to override the veto. HIBBARD, *supra* note 5, at 380. In a short session of Congress in December 1860, another attempt to pass the homestead bill failed. ILISEVICH, *supra* note 24, at 196–97.

the Republican Party "declared in favor of homesteads."[272] Abraham Lincoln, a proponent of free homesteads, won the 1860 election.[273] But of course, land policy was not going to be the primary concern of the Lincoln presidency—the first southern state seceded in 1860,[274] and the country moved closer to civil war.

J. The Thirty-Seventh Congress: 1861–1863

When the Thirty-Seventh Congress convened in 1861, all of the Confederate Senators and Representatives were gone, making this the first truly northern Congress and removing many opponents to homestead laws.[275] Representative Galusha A. Grow—a long-time supporter of the homestead bill—became Speaker of the House.[276] Congress spent 1861 on war-related measures without making real progress on a homestead bill.[277]

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272. HIBBARD, *supra* note 5, at 357–58 (quoting the Republican Party as "demand[ing] the passage by Congress of the complete and satisfactory homestead measure which has already passed the House"); *id.* at 381 ("During the political campaign of 1860, the public-land policy became an important issue. The Republicans, as noted above, declared their platform squarely in favor of homesteads.").

273. *See* Michael Burlingame, *Abraham Lincoln: Domestic Affairs*, UNIV. OF VA.: MILLER CTR. OF PUB. AFFS., https://millercenter.org/president/lincoln/domestic-affairs [http://web.archive.org/web/20211106010505/https://millercenter.org/president/lincoln/domestic-affairs] (last visited Jan 31, 2021). Before his inauguration, Lincoln expressed his support of a homestead law. Abraham Lincoln, *Address to Germans at Cincinnati, Ohio, February 12, 1861*, *in* COMPLETE WORKS OF ABRAHAM LINCOLN, VOLUME VI 120 (John G. Nicolay & John Hay eds., 1905), https://hdl.handle.net/2027/nyp.33433081900833?urlappend=%3Bseq=168 [http://web.archive.org/web/20211106010628/https://babel.hathitrust.org/cgi/pt?id=nyp.33433081900833;seq=168+;a=zoom:1] ("In regard to the homestead law, I have to say that in so far as the government lands can be disposed of, I am in favor of cutting up the wild lands into parcels, so that every poor man may have a home.").

274. *See, e.g.*, SOUTH CAROLINA STATE LEGISLATURE, SOUTH CAROLINA ORDINANCE OF SECESSION, S. 131053 (1860), http://www.teachingushistory.org/lessons/Ordinance.htm [https://web.archive.org/web/20220103224658/http://www.teachingushistory.org/lessons/Ordinance.htm]; DECLARATION OF THE IMMEDIATE CAUSES WHICH INDUCE AND JUSTIFY THE SECESSION OF SOUTH CAROLINA FROM THE FEDERAL UNION (1860), AVALON PROJECT, YALE LAW SCHOOL, https://avalon.law.yale.edu/19th_century/csa_scarsec.asp [https://web.archive.org/web/20211106010851/https://avalon.law.yale.edu/19th_century/csa_scarsec.asp].

275. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 312 (3d ed. 2005) ("The outbreak of the Civil War removed many of the opponents [of a homestead bill] from Congress.").

276. DUBOIS & MATHEWS, *supra* note 27, at 248; ILISEVICH, *supra* note 24, at 201–02; HUBERT BRUCE FULLER, THE SPEAKERS OF THE HOUSE 149–51 (1909).

277. ROBBINS, *supra* note 12, at 206 ("[T]he trying problems accompanying the outbreak of the war prevented any immediate fulfillment of the [land] program. Not until

However, with the southern states seceded, there was finally hope of passing a liberal homestead bill.[278] Grow, now as Speaker, continued his push for his homestead bill.[279]

Grow again introduced a homestead bill, and again used the broad qualification clause of "any person who is the head of a family, or who has arrived at the age of twenty-one years."[280] Limited debate occurred in the House, with no debate about the inclusion of unmarried women.[281] The House passed the bill on February 28, 1862.[282] The Senate amended Grow's bill to ensure Confederate soldiers could not claim homesteads.[283] Although some further modifications were made,[284] there was no discussion of unmarried women. With no further debate about unmarried women, the bill passed both chambers in early 1862, and President Lincoln signed the Homestead Act into law on May 20, 1862.[285] The Homestead

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early in 1862 was there any concerted effort to deal with problems other than those of the war."). There was some limited Congressional action early during the Thirty-Seventh Congress. Representative Cyrus Aldrich of Minnesota introduced a homestead bill on Monday, July 8, 1861. CONG. GLOBE, 37th Cong., 1st Sess. 23 (1861). On December 4, 1861, the House referred the bill to committee. CONG. GLOBE, 37th Cong., 2d Sess. 14 (1861).

278. LANZA, *supra* note 55, at 7 ("Until secession, the South's virulent opposition kept Congress from adopting homestead legislation."); HIBBARD, *supra* note 5, at 383 ("It was a foregone conclusion that the Homestead bill, in some form, was to pass."). The Civil War brought other complications, such as managing new expenditures and debt. One concern with giving away large swaths of land was that "[t]he credit of the nation was based on public lands and it might therefore be damaged abroad." DUBOIS & MATHEWS, *supra* note 27, at 256; *see also* ILISEVICH, *supra* note 24, at 209 ("The thirty-seventh Congress was noted for its eagerness to dispose of the public lands.").

279. FULLER, *supra* note 276, at 150–51 ("Grow himself was the first Speaker to descend from the rostrum and take part in the discussion on the floor even when the House was not in Committee of the Whole. In this manner he led the fight for the Homestead Bill whose paternity he proudly boasted.").

280. H.R. 125, 37th Cong. (1981); CONG. GLOBE, 37th Cong., 2d Sess. 132–140 (1862) (third reading of Grow's bill on December 18, 1861); *id.* at 1030; *see also* ROBBINS, *supra* note 12, at 206 (describing Grow's 1862 homestead bill as "an almost exact replica of Grow's House bill of 1859").

281. CONG. GLOBE, 37th Cong., 2d Sess. 909–10 (1862) (noting comments by Representative Grow in favor of the homestead bill on February 21, 1862, but his comments were not about women); *id.* at 1030–36 (noting House passage of the bill on February 28, 1862, without discussion of qualification clause).

282. *Id.* at 1035 (1862); HIBBARD, *supra* note 5, at 384.

283. CONG. GLOBE, 37th Cong., 2d Sess. 1951 (1862) (Senate proceedings and approval); *see also* DUBOIS & MATHEWS, *supra* note 27, at 260 (noting the Senate added language excluding Confederate soldiers), *and* CONG. GLOBE, 37th Cong., 1st Sess. 1915–16 (1862) (Senate discussion with many proposals regarding soldiers on May 2, 1862).

284. HIBBARD, *supra* note 5, at 385 ("[A]fter considerable parleying a compromise was reached by the conferees and promptly accepted by both houses.").

285. ROBBINS, *supra* note 12, at 206; HIBBARD, *supra* note 5, at 385.

Act went into effect on January 1, 1863—the same day as the Emancipation Proclamation.[286] Unmarried women were now qualified to receive 160 free acres of land from the government.

IV. LEGISLATIVE STATEMENTS AND LIVED EXPERIENCES

Through the Homestead Act, the United States Federal Government distributed more than 270 million acres to over 1.6 million homesteaders[287] who met minimum requirements for improvement, cultivation, and residency.[288] Although unmarried women were only a small percentage of all settlers, they played an important role in American frontier settlement and settler colonialism.[289] In this section, I discuss how including unmarried women in the Homestead Act of 1862 had long-term impacts on the settlement of the American frontier and the rights of women. I also draw themes from statements made in Congress, and I use the work done by historians to analyze whether the legislators' fears—or aspirations—bore out as unmarried women homesteaded. Although these themes overlap to a substantial degree, I break down this analysis into discussion of unmarried women's willingness and ability to homestead, women's equality, and marriage and reproduction.

A. Women's Willingness and Ability to Homestead

One reappearing argument in the Congressional record was that unmarried women would not claim homesteads anyway, so including them in the law was pointless. In 1852, Representative Thompson Campbell argued unmarried women "will never settle" on the frontier.[290] In 1860, Senator Robert Johnson said, "I do not believe that" women would suffer

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286. Abraham Lincoln, A Proclamation (Jan. 1, 1863), *reprinted in* 12 Stat. app. 1268, 1269; 12 Stat. 392 § 1 (1855–1863), codified as 43 U.S.C. § 175 (repealed); *see also* GATES, *supra* note 13, at 394 (noting the Homestead Act "went into operation on January 1, 1863").

287. Lee Ann Potter & Wynell Schamel, *The Homestead Act of 1862*, 61 SOC. EDUC. 359, 360 (1997) ("Before the law was ultimately repealed in 1934, over 1.6 million homestead applications were processed, resulting in more than 270 million acres—10 percent of all U.S. lands—being given by the federal government to individuals."); Edwards, *supra* note 63, at 183 ("Homesteaders received patents to about 17 percent (253 million acres) of all lower-forty-eight public lands.").

288. 12 Stat. 392 (1855–1863), codified as 43 U.S.C. § 175 (repealed).

289. *See generally* HIXSON, *supra* note 52, at 113–44 (discussing Settler Colonialism in the American West, especially after the Civil War and the increased frontier settlement caused by the Homestead Act of 1862).

290. CONG. GLOBE, 32d Cong., 1st Sess. 1316 (1852) (statement of Representative Thompson Campbell of Illinois).

the "temptation" of homesteading.[291] While generally support for broad homestead bills was sectional—northern politicians supported homestead bills and southern politicians did not—this argument was not drawn along sectional lines. Campbell was from Illinois and Johnson was from Arkansas. These men were simply wrong in their predictions—unmarried women showed consistent interest in claiming homesteads.[292] While early scholarship on homesteading portrayed women as reluctant participants,[293] many scholars have since shown that women eagerly took advantage of their homesteading rights. Especially after 1900, the number of unmarried female homesteaders greatly expanded.[294] While no nationwide data exists, scholars have found that single women generally made up more than 10% of the total homesteading population.[295] Congressional beliefs that unmarried women would be unwilling to homestead were proven wrong.

Another reappearing argument in Congress was that unmarried women would be unable to meet the homesteading requirements such as cultivating the land, building a habitable structure, and residing on the

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291. *Id.* at 1993 (statement of Senator Robert Johnson of Arkansas).

292. The mere existence of an entire genre of research on female homesteaders proves him wrong. *See, e.g.*, EDWARDS ET AL., *supra* note 26, at 129–161 (female homesteaders in Nebraska); LINDGREN, *supra* note 106 (female homesteaders in North Dakota); MARCIA MEREDITH HENSLEY, STAKING HER CLAIM: WOMEN HOMESTEADING THE WEST (2008) (female homesteaders in the Mountain West); CARTER, *supra* note 1 (female homesteaders in Montana); KATHERINE BENTON-COHEN, BORDERLINE AMERICANS: RACIAL DIVISION AND LABOR WAR IN THE ARIZONA BORDERLANDS (2009) (female homesteaders in Arizona); *and* Dee Garceau, *Single Women Homesteaders and the Meanings of Independence: Places on the Map, Places in the Mind*, 15 FRONTIERS: J. WOMEN STUD. 1 (1995) (female homesteaders in Wyoming).

293. *See, e.g.*, Everett Dick, *Sunbonnet and Calico, The Homesteader's Consort*, 47 NEB. HIST. 3, 4 (1966) (portraying women as unhappy with the homesteading process, including this description: "[m]any a plucky young woman, faced with stark reality, sat down and had a good cry before she moved her belongings into the unpromising domicile").

294. Muhn, *supra* note 6, at 283–84; Elizabeth Jameson, *Foreword* to H. ELAINE LINDGREN, LAND IN HER OWN NAME: WOMEN AS HOMESTEADERS IN NORTH DAKOTA vii (1996) ("More women, proportionately, homesteaded after 1900 than before."); *see also* EDWARDS ET AL. , *supra* note 26, at 131 ("The number of women moving west increased slowly, but once the forerunners demonstrated their success, more and more women followed suit.").

295. *See, e.g.*, HARRIS, *supra* note 8, at 142 (noting that "[w]omen ultimately accounted for nearly 18 percent of the homestead entrants in northeastern Colorado"); *see also* BENTON-COHEN, *supra* note 292, at 161, 176, 187–88 (noting that few Mexican American women had homesteaded before 1900, but "[a]fter 1900, women made up about one-third of all Mexican American homesteaders—a percentage about twice as high as that of Anglo women during their peak years of homesteading"). Most scholars who have studied solo female homesteaders are counting all single women, including widows and divorcees.

homestead for five years.[296] In 1852, Representative Joseph Cable of Ohio noted "maidens . . . could not conveniently till the soil," a reference to the law's requirement for cultivation.[297] Cable supported including unmarried women, but only because they would marry on the frontier, not because he saw them as capable of homesteading in their own names.[298] In 1860, Senator Morton S. Wilkinson of Minnesota explained that he found encouraging marriage a worthy goal but "the great majority of the women of our country are too frail" for homesteading and "not all women can endure the . . . privations" of early settlement.[299]

Once again, these legislators were simply wrong about women's ability to successfully meet the statutory requirements of homesteading. Representative Joseph Cable was correct that many female homesteaders would not "till the soil."[300] Most solo female homesteaders did not do their own physical farming, but nearly all managed the cultivation of their homesteads.[301] Solo female homesteaders were just as successful as single or married male homesteaders at proving their claims and ultimately gaining fee simple title to the land.[302] Although some Congressional members doubted the ability of unmarried women, Congress gave these women the chance anyway. The unmarried women who successfully gained title to homesteads demonstrated their ability to do what Congress doubted.

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296. 12 Stat. 392 (1855–1863), codified as 43 U.S.C. § 175 (repealed) (listing requirements before being eligible to receive title).

297. CONG. GLOBE, 32d Cong., 1st Sess. app. 298 (1852) (statement of Representative Joseph Cable of Ohio).

298. *Id.* (Cable saying that "maidens . . . shall become wedded hereafter.").

299. CONG. GLOBE, 36th Cong., 1st Sess. 1510 (1860) (statement of Senator Morton S. Wilkinson of Minnesota).

300. CONG. GLOBE, 32d Cong., 1st Sess. app. 298 (1852) (statement of Representative Joseph Cable of Ohio).

301. Jameson, *supra* note 294, at viii (noting that although many women worked in non-farming occupations and hired out their land, "virtually all [female homesteaders] managed their own land, and used it to enlarge their own possibilities"); LINDGREN, *supra* note 106, at 117–19 (noting that ninety-four percent of female homesteaders indicated they managed the land).

302. CARTER, *supra* note 1, at 24 ("Women homesteaders were as successful at 'proving up' as their male counterparts."); LINDGREN, *supra* note 106, at 224 ("Further, women were as likely as men to successfully prove up their claims. I collected data on the cancellation of claims for two counties in North Dakota. The percentages of those canceling or failing to prove up claims were remarkably similar for both genders.").

B. Women's Equality

By the time Congress was debating homestead bills, women's advocates were making sex equality arguments.[303] Sex equality arguments appeared in Congress during the debates on homestead policies. In 1852 Representative James M. Gaylord argued that unmarried women "have as much right [to homestead] as bachelors."[304] In 1854, Representative William T.S. Barry argued that an unmarried woman "has the same natural right to be provided a home from the public domain that the unmarried man of the same age has."[305] The support for sex equality was not drawn along sectional lines. Gaylord was from Ohio while Barry was from Mississippi. Although the statements from Barry and Gaylord show some support for sex equality, there was no extensive support for this position. In fact, some members of Congress found the mere suggestion of including unmarried women to be comical. I count five instances of laughter when legislators discussed including unmarried women.[306] Though apparently a laughing matter for many of its members, Congress did adopt a policy of partial sex equality in the Homestead Act of 1862—unmarried women were treated exactly the same as unmarried men under the law.

The Homestead Act was not fully gender-neutral, however. Even though the Homestead Act declared that "any person" was qualified to claim a homestead and used language of "he or she,"[307] not all women were qualified to claim homesteads. The Land Department—in charge of implementing and interpreting the Homestead Act—quickly, and without dispute, acknowledged that unmarried women over the age of twenty-one were qualified to claim homesteads.[308] Unmarried women under the age of twenty-one were only qualified if they were a head of household.[309] Married women, on the other hand, could not claim homesteads at all.[310] Married women did not qualify under the "head of household" provision

303. Dubler, *supra* note 19, at 1675–77 (collecting equality arguments made between the 1850s and 1870s).

304. CONG. GLOBE, 32d Cong., 1st Sess. 1316 (1852) (statement by Representative James M. Gaylord of Ohio).

305. CONG. GLOBE, 33d Cong., 1st Sess. 503 (1854) (Representative William T.S. Barry of Mississippi).

306. *See supra* note 3 and accompanying text.

307. 12 Stat. 392 (1855–1863), codified as 43 U.S.C. § 175 (repealed). The statute, of course, included limitations on this "any person" language by imposing an age requirement and a citizenship requirement. *Id.*

308. Muhn, *supra* note 6, at 285 ("The gender-neutral wording 'any person . . . over the age of twenty-one' in the act was straight-forward and left no doubt that unmarried women who had reached their majority could make application.").

309. *Id.* at 286.

310. *Id.* at 287.

because their husbands were automatically considered the head of household.[311] In addition, married women did not qualify under the "any person" provision because a married woman lost her legal identity at marriage.[312] While widows and divorced women could claim homesteads, deserted wives had a harder road to proving eligibility.[313] Although commentators have described the homestead act as "gender-neutral,"[314] it really was not—married men had more rights than married women. Nowhere during the congressional debates did any legislator speak about equality for married women, and in that way the Homestead Act did not fully embrace the equal rights of women.

Although the Homestead Act of 1862 did not embrace equal rights for all women, it did create a pivot point in American land distribution for unmarried women because future legislation almost always included land rights for unmarried women. Later land laws mostly referred back to the Homestead Act of 1862 to determine eligibility. For example, the Southern Homestead Act of 1866[315]—passed as part of the flurry of reconstruction legislation[316]—allowed land to be "disposed of according to" the

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311. *Id.* (citing an 1864 statement by James E. Edmunds, commissioner of the General Land Office, where he explained that an "objection arises should she claim as the 'head of the family,' as the husband is the 'head' during the existence of the marital tie").

312. *Id.* (citing an 1864 statement by James E. Edmunds, commissioner of the General Land Office, where he explained:

> [A] married woman has no legal existence, her services and the proceeds of her labor being due and belonging to her husband; hence, although 'arrived at the age of twenty-one years,' she can *per se* do no act that will not enure to the benefit and use of her husband; that if permitted to enter land because of having arrived at twenty-one years of age, the legal restrictions growing out of her matrimonial relations would at once be violated.

Id. at 289 (citing an 1882 ruling by Noah McFarland, commissioner of the General Land Office, where he enforced the "established rule of the Department that a *feme covert* [*sic*] [was] incompetent to make a homestead entry" (emphasis and correction in original)).

313. *See generally*, Hannah Haksgaard, *Homesteading Rights of Deserted Wives: A History*, 99 NEB. L. REV. 419 (2020). As I argued in this prior work, the restrictions on the homesteading rights of deserted wives loosened over time, but a deserted wife still had to prove that she was qualified to homestead by showing the desertion of her husband. *Id.*

314. EDWARDS ET AL., *supra* note 26, at 130 (describing the Homestead Act of 1862 as "gender-neutral"). Muhn, more accurately, only describes the "any person" clause as being "gender-neutral." Muhn, *supra* note 6, at 285.

315. Formally, the Southern Homestead Act was entitled: An Act for the Disposal of Public Lands for Homestead Actual Settlement in the States of Alabama, Mississippi, Louisiana, Arkansas, and Florida. 39th Cong., 1st Sess. 127, Sec. 1 (1866).

316. Neil Canaday, et al., *Race and Local Knowledge: New Evidence from the Southern Homestead Act*, 42 REV. BLACK POLIT. ECON. 399, 400–01 (2015); LANZA, *supra* note 55, at 5–28.

Homestead Act of 1862, including to unmarried women.[317] The Homestead Act itself was expanded or modified several times in ways that continued to include unmarried women. For example, a 1909 law expanding the number of acres was for "any person who is a qualified entryman under the homestead laws of the United States."[318]

The inclusion of unmarried women in future land distribution laws was not universal. For example, the Soldiers' and Sailors' Homestead Act of June 8, 1872[319] was passed to provide benefits to Union soldiers and officers or their surviving family members.[320] This Act created an exception to the requirements of the Homestead Act of 1862 by allowing solders to subtract their time of service from the proving up period, but the Act departed from the prior qualification clause—only male veterans qualified.[321] The Act then used only male pronouns to make the limitation to male soldiers perfectly clear.[322] This Act, however, was an exception to the now-established standard that unmarried women were qualified to claim homesteads.

Over time, the homestead laws were largely interpreted in ways that were generous to women.[323] Although the statements by legislators do not always indicate a belief that unmarried women belonged on the frontier or deserved their own land, the decision to include unmarried women in the Homestead Act of 1862 created long-term benefits for women.

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317. 39th Cong. 1st Sess. 127, Sec. 1 (1866). Although it generally followed the requirements of the Homestead Act of 1862, there were some small differences. For example, the Southern Homestead Act required only five dollars be paid at the time of entry, compared to the ten dollars required by the Homestead Act of 1862. *Id.* Not only did the Southern Homestead Act allow women to homestead, it used the language of "he or she" in describing what was required of homesteaders to obtain fee simple title. *Id.* at Sec. 2.

318. The Enlarged Homestead Act of 1909, 60th Cong., 2d Sess. 160, § 1 (Feb. 19, 1909).

319. 42d Cong., 2d Sess. 85 (1872).

320. Headle, *supra* note 41, at 177.

321. 42d Cong., 2d Sess. 85 (1872). A year minimum of residency was required before proving up even for soldiers that had served longer than the proving up period in the Homestead Act. *Id.* The exclusion of women in a veterans' bill was not unique. Women were not allowed to enlist during the civil war and the women who did fight had to disguise themselves as men. DEANNE BLANTON & LAUREN M. COOK, THEY FOUGHT LIKE DEMONS: WOMEN SOLDIERS IN THE CIVIL WAR 1 (2002). The women who did fight in the Civil War were not included in veterans' benefits and "as a group [female veterans] did not seek the benefits that society provided to Civil War veterans." *Id.* at 183.

322. 42d Cong., 2d Sess. 85 (1872).

323. *See generally* Muhn, *supra* note 6 (discussing changes to women's homesteading rights over time). Congress also later stepped in to liberalize the homesteading laws in a way that benefited women with a 1914 Act meant to aid deserted wives. Haksgaard, *supra* note 313, at 442–43 (discussing Act of Oct. 22, 1914, ch. 335, 38 Stat. 766).

The unmarried women who received land patents from the government broke traditional norms and experienced new-found freedoms. As Kathleen Harris explained in her study of solo female homesteaders in Colorado, unmarried female homesteaders "did not always quickly trade their new-found opportunities for the retiring domesticity [of marriage] that the sponsors of the homestead laws assumed they would prefer."[324] Many of these unmarried homesteaders "enjoyed the excitement and adventure of learning to live on their own, removed from close family scrutiny."[325] These unmarried female homesteaders "pursued a measure of personal and financial independence. And in that pursuit they created a tantalizing example—one that other American women would want to follow."[326] Some scholars have argued that this independence and women's importance to community-building led to early suffrage in the western United States.[327] Other scholars argue that that states used voting rights to "woo" women to the frontier,[328] much like Congress used land rights to woo women to the frontier.[329] Disagreement about what led to early suffrage in the western United States continues,[330] and this Article only proves a lack of Congressional discussion of the topic.

Although the purpose of including unmarried women in the Homestead Act of 1862 was not to promote suffrage, the two legal issues have a unique comparison. The Homestead Act's treatment of unmarried women stands out as a unique opportunity for women's rights at the time, especially compared to women's suffrage. While Congress was debating homestead bills, women's rights advocates were advocating for the right to vote. A major argument against women's suffrage was "virtual representation"—the argument that married women were already

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324. HARRIS, *supra* note 8, at 24.

325. *Id.*

326. *Id.*

327. Emma Silvers, *On the Frontlines: Women Led the Fight Against the 1918 Pandemic*, CAL. MAG. (2020), https://alumni.berkeley.edu/california-magazine/fall-2020/frontlines-women-led-fight-against-1918-pandemic [https://web.archive.org/web/20211106012532/https://alumni.berkeley.edu/california-magazine/fall-2020/frontlines-women-led-fight-against-1918-pandemic] (quoting Catherine Gallagher as saying "One of the reasons you see suffrage happen first in the West is the settler mentality—everybody's on alert, everybody's needed to build a civilization.").

328. Lorianne Updike Toler, *Western Reconstruction and Woman Suffrage*, 28 WM. & MARY BILL RTS. J. 147, 148 (2019).

329. *See, e.g.*, Abrams, *supra* note 50, at 1403 (discussing how Congress used property rights to draw women to the American West).

330. Jameson, *supra* note 37, at 180–81 (reviewing historian's arguments about suffrage in the west).

represented by their husbands.[331] Under this view, allowing a married woman to vote would essentially double her political power because she was already represented through her husband.[332] This same reasoning supported excluding married women from the homesteading laws: a married woman's husband had the right to claim a homestead; the married woman did not need her own right. The similarities break down, however, with an unmarried woman who had no husband to claim a homestead or vote on her behalf. In the bans on women's right to vote, lawmakers did not provide an exception for unmarried women,[333] even though the "virtual representation" argument made little sense when a woman did not have a husband.[334] Yet under the Homestead Act of 1862, unmarried women were given rights precisely because they did not have a husband to claim land on their behalf.

In this way, the Homestead Act removed unmarried women from under the "shadow of marriage" by granting them rights unavailable to married women.[335] Including unmarried women planted "disruptive[] seeds in the social order."[336] Most Congressional members "merely wanted to encourage the settlement of western lands by white American families when they gave single women, as well as men, the right to claim government land."[337] Yet Congress encouraged female settlement in a way that started breaking down the theory of "virtual representation" and the idea that all women could be treated as married, even when not.[338] At the same time, Congress also mainly viewed unmarried women as potential wives, thus negating any argument that Congress was trying to give unmarried women equal rights. Congressional members would have known that if women did later marry, many American jurisdictions still gave management rights to a husband for property a wife brought into the

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331. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 981–87 (2002); Dubler, *supra* note 16, at 806.

332. Dubler, *supra* note 16, at 806.

333. *Id.* at 807.

334. Siegel, *supra* note 331, at 986–87 (arguing that even unmarried women "were assumed to depend on male relatives for representation" and providing statements like "unmarried females are too rare to change the general policy" and "all women are alike are made to be married, whether they are or not.").

335. Dubler, *supra* note 19, at 1645–46 (using the phrase "shadow of marriage"); Dubler, *supra* note 16, at 809 (same).

336. HARRIS, *supra* note 8, at 24.

337. *Id.*

338. Virtual representation remained an argument against women's suffrage up until the passage of the Nineteenth Amendment in 1920. It was only the passage of the Nineteenth Amendment that "mark[ed] the death of the virtual representation theory of political citizenship and, with it, of a formal definition of female citizenship tethered to wifehood." Dubler, *supra* note 16, at 811.

marriage.[339] Therefore, the only way for a homesteading woman to retain her full property rights and economic independence was to remain unmarried even after receiving title.

C. Marriage and Reproduction

The most common argument for allowing unmarried women to claim homesteads was because those women were viewed as potential wives and mothers. In 1852, Representative Joseph Cable argued for including "maidens . . . who shall become wedded" once on the frontier.[340] Three times, there were proposals to include unmarried women, not for their own benefit, but for the benefit of bachelors whom they might marry.[341] In 1854, Senator William C. Dawson explicitly framed the issue as one of procreation; he argued for giving land to "every girl" in order to "increase population by reproduction."[342] Marriage and reproduction was seemingly the primary driver for including unmarried women. Related was the goal of taming a wild west filled with single men—hunters, trapper, and soldiers. The desire to bring (white) women to the frontier for the purpose of marriage was not unique to the Homestead Act. For example, Kerry Abrams shows how—on a much smaller scale—a similar justification was used to bring boats including marriageable women to Washington Territory in 1864 and 1866.[343] The congressional members hoping for marriage and reproduction largely got what they wanted: women on the frontier did marry, although they married later than their eastern counterparts.[344]

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339. Richard H. Chused, *Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures*, 29 AM. J. LEGAL HIST. 3, 9 (1985).

340. CONG. GLOBE, 32d Cong., 1st Sess. app. 298 (1852) (Representative Joseph Cable of Ohio on March 10, 1852).

341. CONG. GLOBE, 32d Cong., 1st Sess. 1280 (1852) (comments by Representative John Allison of Pennsylvania suggesting an amendment to include unmarried women "would be favorably received, and particularly by those bachelor gentlemen who are the most deeply interested); CONG. GLOBE, 33d Cong., 1st Sess. 501 (1854) (comments by Representative Williamson R.W. Cobb of Alabama prompted a bachelor Representative to move to include unmarried women); CONG. GLOBE, 32d Cong., 1st Sess. app. 298 (1852) (comments by Representative Joseph Cable of Ohio that bachelors should support including unmarried women).

342. CONG. GLOBE, 33d Cong., 1st Sess. 1669 (1854) (comment by Senator William C. Dawson of Georgia).

343. Abrams, *supra* note 50, at 1358 (discussing the Mercer trips and their stated purpose of "bringing brides to the pioneers").

344. *See, e.g.*, BARBARA HANDY-MARCHELLO, WOMEN OF THE NORTHERN PLAINS: GENDER & SETTLEMENT ON THE HOMESTEAD FRONTIER 1870–1930 31 (2005) (noting later age of marriage for women in the Dakotas).

Even though marriage was desirable, some legislators expressed concern that promoting marriage in this way would lead to fraudulent land claims. Congress, always concerned about land speculation, sought to limit fraud by allowing settlement only by individuals who would settle on the land and stay. Congress included a good faith requirement in the Homestead Act and spent much time debating how to encourage actual settlement and decrease speculation.[345] At various times, congressional members argued that allowing unmarried women to claim homesteads would increase fraud. In 1860, Senator Graham Fitch argued against including unmarried women because if a woman received her own land then married a nearby male homesteader, they would have twice the land and an unfair advantage over families.[346] Graham referred to this as "speculation," expressing a fear that unmarried women could help men consolidate land in unfair ways.[347] That same day, Senator Robert Johnson argued unmarried women would be taken advantage of if allowed to claim homesteads.[348] Robert Johnson believed women would be induced to claim homesteads that would then be transferred to others.[349] Although there is no evidence that unmarried women were unduly influenced like Robert Johnson feared, historians have demonstrated that female homesteaders did oftentimes file claims near male relatives in order to increase land holdings for the family.[350] Certainly not all female homesteaders transferred their land to men after proving up; many women held onto their claims for many years, some actively managing the agricultural work.[351]

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345. 12 Stat. 392 § 2 (1855–1863), codified as 43 U.S.C. § 175 (repealed) (requiring that each "entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person or persons whomsoever").

346. CONG. GLOBE, 36th Cong., 1st Sess. 1991 (1860) (statement of Senator Graham Fitch of Indiana).

347. *Id.*

348. *Id.* at 1993 (statement of Senator Robert Johnson of Arkansas).

349. *Id.*

350. CARTER, *supra* note 1, at 25 ("Families plotted to increase their holdings when they filed for land. Daughters helped expand the family land base by taking out homesteads—filing alongside brothers, sisters, fathers, uncles, aunts, or other relatives."); BENTON-COHEN, *supra* note 292, at 176 (articulating that the increasing number of female homestead filers happened in response to Anglo settlement and was an attempt "to expand family holdings"); Garceau, *supra* note 292, at 1 (providing narrative example of Marie Jordan Bell who homesteaded and transferred land to her father and noting that "many single women filed claims to enlarge their family's property"); LINDGREN, *supra* note 106, at 44 ("Hattie McCombs homesteaded to gain more land for her father.").

351. LINDGREN, *supra* note 106, at 191–94 (describing what solo female homesteaders did with their land after proving up, including that twenty-two percent stayed on their claims at least twenty-five years).

Even though Congress hoped unmarried female homesteaders would marry, Congress failed to specify how marriage would impact land claims. In 1860, while debating the qualification clause, Senator Graham Fitch argued that an issue would arise if two unmarried homesteaders married and tried to double their land holdings.[352] Although Congress had explicitly adopted the approach of double land for married couples in the Oregon Donation Land Claim Act of 1850,[353] during the debates on various homestead bills Congress never considered allowing married couples to obtain double the land. It did not take long for the issue of two single claimants marrying and doubling claims to be presented to the Land Department.[354] Initially, an 1867 ruling declared that newly-married women could continue to prove up their homesteads.[355] This was reversed in 1886 by an "overzealous commissioner, who saw fraud wherever he turned."[356] For fear that this rule would discourage marriage, it was quickly overruled.[357] The Land Department, always cognizant of preventing fraudulent claims, tried to balance the threat of fraud against the goal of encouraging marriage on the frontier.[358] The Land Department settled on a rule that allowed two unmarried adults to claim homesteads and immediately marry, thus doubling the amount of land, despite the clear Congressional intent to provide only one homestead per family.[359] Allowing two claimants to marry and "double" the amount of homestead land did not correspond to the discussions or drafting of the Homestead Act of 1862, but was exactly what the Oregon Donation Land Claim Act did up front,[360] so perhaps the idea was not that strange to Congress or the Land Department.

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352. CONG. GLOBE, 36th Cong., 1st Sess. 1991 (1860) (statement of Senator Graham Fitch of Indiana).

353. Donation Land Claim Act of 1850 (31 Cong., 76–9, Stat. 496).

354. Muhn, *supra* note 6, at 291 ("A more significant issue dealt with the status of an entry made by single women who later married before they had proved up on their homesteads.").

355. *Id.*

356. *Id.*

357. *Id.* at 292.

358. *Id.* at 294–96.

359. Sherry L. Smith, *Single Women Homesteaders: The Perplexing Case of Elinore Pruitt Stewart*, *in* THE AMERICAN WEST: INTERACTIONS, INTERSECTIONS, AND INJUNCTIONS 253, 258 (Gordon Morris Bakken & Brenda Farrington eds., 2001) ("While this kind of arrangement violated the spirit and intention of the homestead laws, it did not appear to violate the letter of the law. Congress intended the Homestead Act to provide one homestead per family.").

360. Donation Land Claim Act of 1850 (31 Cong., 76–9, Stat. 496).

V. CONCLUSION

When the Homestead Act of 1862 was passed it was extraordinary in several ways, one being that it allowed unmarried women to receive 160 acres of land from the federal government. This was in sharp contrast to earlier laws that were limited only to men or, if they included women at all, only to women who qualified as a head of household. During the twenty years of statutory history leading to the passage of the Homestead Act, the rights of women were never the central issue. Even when unmarried women were included in proposed qualification clauses, it was rarely the most contentious issue.[361] Although Congress was clearly more concerned with other elements of the law, the decision to include unmarried women is incredibly important in the history of United States settlement and in the history of women's rights.

It is striking that unmarried women were included, especially because it took persistence to both pass the Homestead Act at all and to include unmarried women. Identifying a single "legislative intent" is rarely possible for any law, and that is true for the Homestead Act as well. The lawmakers who consistently put forth proposals including unmarried women were—whether purposefully or not—moving women's rights forward. This stands out as an exception to the regular treatment unmarried women received. Dubler explains that "[a] willful blindness to single women constituted a critical part of nineteenth-century lawmakers' approach to women's political citizenship."[362] That willful blindness did not exist with homestead legislation. Instead, Congress explicitly debated—many times over many years—whether to include unmarried women.

Although unmarried women received the right to homestead, very little in the statutory history suggests that Congress cared about women's rights or women's equality. With some exceptions, Congress saw unmarried women as potential wives, mothers, and community builders. This Congressional perspective—of unmarried women as future wives—provides supports for Dubler's conclusion that "nineteenth-century lawmakers . . . define[d] all women as wives."[363] Yet, unlike most legislative action that Dubler identifies as "erasing the non-marital

361. Whether to allow immigrants to claim homesteads was perennially more controversial and took up more debate time. *See, e.g.*, ILISEVICH, *supra* note 24, at 176 (noting how Representative Galusha A. Grow proposed a qualification clause that would include unmarried women and immigrants and that the immigrant inclusion "in this provision was the most controversial").

362. Dubler, *supra* note 16, at 805.

363. *Id.* at 801.

identities of single women,"[364] the Homestead Act of 1862 explicitly granted special rights to unmarried women—rights that were not available to married women. Those rights, notably, were the same received by men—unmarried women were not relegated to "sex-specific privileges and responsibilities," they simply had the opportunity to homestead like any man.[365] The inclusion of unmarried women was certainly not guaranteed, as several versions of the law were passed by the Senate or House without provisions for unmarried women.

Even Representative Galusha A. Grow, who consistently introduced homestead bills that included single women, never spoke in support of unmarried women. Over many years of speeches, Grow focused his remarks on men working the land.[366] Although Grow did once comment that he was "anxious that [the females] should be provided for," he did not explain why.[367] The missing focus on the role of women is even more surprising because Grow had personal experience with a landowning settler woman—his own mother purchased a four-hundred acre farm in newly-settled Pennsylvania after being widowed.[368] Later in life, Grow spoke about how his upbringing impacted his view on land policy,[369] but not in terms of a belief that women could successfully homestead. His biographers provide an explanation for this—they say "the essential thing

364. *Id.*

365. Dubler, *supra* note 19, at 1677 (arguing that other laws at the time "sought to craft separate legal worlds for men and women with sex-specific privileges and responsibilities").

366. DUBOIS & MATHEWS, *supra* note 27, at 83–84. (Grow promoted his idea of free land by comparing the service of men who would cultivate homesteads to soldiers and spoke about the farm labor that would be done by men).

367. CONG. GLOBE, 33d Cong., 1st Sess. 529 (1854).

368. DUBOIS & MATHEWS, *supra* note 27, at 11–12; ILISEVICH, *supra* note 24, at 4. Grow was born to married parents in 1823 in Connecticut, and his father died just four years later. DUBOIS & MATHEWS, *supra* note 27, at 1–2; ILISEVICH, *supra* note 24, at 4–5. Grow's mother Elizabeth—a widow with six children—initially moved back home to her father, but during the winter of 1833–34 moved west with her children to the unsettled land of eastern Pennsylvania. DUBOIS & MATHEWS, *supra* note 27, at 2–3, 6–7; ILISEVICH, *supra* note 24, at 5. It was then that Elizabeth—who never remarried—purchased a four-hundred-acre farm. DUBOIS & MATHEWS, *supra* note 27, at 11–12; ILISEVICH, *supra* note 24, at 5. Although Grow and a brother did farming labor, Elizabeth directed the activities of her sons. DUBOIS & MATHEWS, *supra* note 27, at 12–13 (stating that "Galusha's mother assigned him" to scare away pigeons from a particular spot); *id.* at 30 ("Mrs. Grow was the family manager."); ILISEVICH, *supra* note 24, at 5 ("Psychologists might accuse Elizabeth Grow of being an overbearing and possessive mother, and she probably was. She made the major decisions in the household and became a businesswoman. But what were the alternatives for a pioneer widow with six children to raise by herself?"). Elizabeth ultimately opened a general store on her land and conducted other businesses. DUBOIS & MATHEWS, *supra* note 27, at 14–15, 30; ILISEVICH, *supra* note 24, at 6.

369. ILISEVICH, *supra* note 24, at 66.

he wanted" in a homestead act was "'ploughs, babies, homes, and freedom.'"[370] For Grow and many other legislators who voted on various homestead proposals over a twenty-year span, men provided the "ploughs," women provided "babies" and "homes," and the expanding non-slave territory inhabited by yeomen farmers provided the "freedom."[371] For many legislators, including unmarried women was not about women's rights—it was about marriage, childbearing, and community building.[372]

Despite Congress never intending to progress the rights of women, it did so by allowing women to become landowners. The homestead law "fostered a class of independent, landowning women"[373]— a clear departure from the original Jeffersonian ideal of male farmers.[374] These women interacted directly with the federal government, having no male intermediary. This direct government interaction may have led to earlier suffrage for women. On an individual scale, it certainly led to women exercising political rights. Catharine Calk, the unmarried female homesteader in Montana who was seeking adventure, successfully

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370. DUBOIS & MATHEWS, *supra* note 27, at 192 (quoting Emerson Haugh, *Esau in Search of a Home*, SATURDAY EVENING POST (Jan. 21, 1911)).

371. Comments made by Representative William R. Smith of Alabama on April 27, 1852, provide another example of an explicit call for marriage and childbearing as an outcome of a homestead bill. The version being talked about at the time required men to be heads of families in order to qualify, meaning single men would have to marry. Smith explained that

> "If [a homesteader] is not married—this being necessary to perfect his possessions—his neighbor has a daughter whom he will woo and marry. The land will come as a dowry to his young bride. They will go to work with glad hearts and cheerful faces; comforts will spring from the inheritance, and young soldiers will be the results of the alliance. [Laughter.] And the fact that this bill will promote early marriages is no light argument in its favor."

CONG. GLOBE, 32d Cong., 1st Sess. app. 514 (1852).

372. Similar themes appear behind Washington Territory's response to the Mercer immigrants as explained by Kerry Abrams. Washington Territory accepted the white unmarried women because those women "provided a reproductive function, both biologically, by helping to create a white citizenry, and culturally, by bringing civilization to the frontier." Abrams, *supra* note 50, at 1392.

373. HARRIS, *supra* note 8, at 142. It is worth remembering, of course, that many married women also partook in homesteading with their husbands. These women may not have been as progress-minded as the single female homesteaders that Harris studied. For example, Deborah Fink notes—in her study of homesteading wives in Nebraska—that "[s]ome women—including some in my family—disdained a political voice of their own and ridiculed suffragists." FINK, *supra* note 8, at xiv–xv.

374. *See* FINK, *supra* note 8, at 19–22 (discussing how President Thomas Jefferson envisioned only men as the country's farmers).

homesteaded and earned fee simple title to her land.[375] The next year Calk married and soon became pregnant.[376] Two years after proving up her homestead, Calk was elected to the Montana legislature, a position she held for two terms.[377] Calk embodied the legislative goals of the Homestead Act: she settled on the frontier, married, had children, became civically active, and made important and long-term contributions to her adopted community.[378] Whether or not Congress meant to open the doors to increased women's rights, they did so with the Homestead Act of 1862.

375. CARTER, *supra* note 1, at 248.
376. *Id.* at 250.
377. *Id*. at 250–51.
378. *Id.* at 252.