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The Homesteading Rights of Deserted Wives: A History

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ABSTRACT

During the late nineteenth and early twentieth centuries, the federal government of the United States distributed 270 million acres of land to homesteaders. The federal land-grant legislation allowed single women, but not married women, to partake in homesteading. Existing in a "legal netherworld" between single and married, deserted wives did not have clear rights under the federal legislation, much like deserted wives did not have clear rights in American marital law. During the homesteading period, many deserted wives litigated claims in front of the Department of the Interior, arguing they had the right to homestead. This is the first article to collect and analyze the administrative decisions regarding the homesteading rights of deserted wives, offering a unique view of American marriage. After documenting the history of homesteading rights of deserted wives, this Article explores how these unique administrative decisions adopted or rejected the prevailing marital norms in America and how understanding these administrative decisions can aid in our understanding of marriage in American history.

* Associate Professor of Law, University of South Dakota School of Law. First, I thank Hendrik Hartog, Serena Mayeri, Sean Kammer, and Emily Prifogle—all legal historians who reviewed this Article and provided meaningful and helpful feedback. Second, I thank Albertina Antognini, Emily Stolzenberg, and the other legal scholars who read and commented on this Article at various workshops, including a junior faculty workshop at the University of South Dakota School of Law, the Family Law Scholars and Teachers Conference, and the Law Faculty Exchange at Drake University Law School. Finally, I thank the law students who helped bring the details of this Article into existence. My research assistants Jordyn Bangasser and Brianna Haugen willingly jumped into dense historical research and the members of the *Nebraska Law Review* provided dedicated and beneficial editing.

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I. INTRODUCTION

Women played a critical role in homesteading the American West. The women profiled in this Article settled homesteads alongside their husbands or moved onto their husbands' homesteads after marriage. Once a husband and wife were residing on the homestead, the husband might leave, sometimes permanently and sometimes for a number of years. Husbands left for various reasons: some left to pursue other economic activities;[1] others were imprisoned[2] or fled for fear of imprisonment;[3] and one dramatically left the state, leaving no sign of his destination, after being "charged with the crime of larceny, [and] shot by the sheriff."[4] In each of the cases profiled, the deserted wife[5]

1. Gates, 7 Pub. Lands Dec. 35 (1888).
2. Sugden, 22 Pub. Lands Dec. 356, 357 (1896).
3. Kamanski, 9 Pub. Lands Dec. 186, 187 (1889).
4. Crosby, 21 Pub. Lands Dec. 152, 153 (1895).
5. In this Article, I choose to describe women who were married but had been deserted by their husbands as "deserted wives." This rhetorical decision was made in spite of fears that referring to these women as "wives" leaves the impression that their only identity is wrapped up in marital status. However, this language is the most precise and provides the best descriptor for these women. During this time period, the term "deserted wife" was a semi-legal term, although close to a legal fiction because some women may have been characterized as a deserted wife regardless of their personal circumstances. The deserted wives in this Article held a special status under the law *precisely because* they were married. Their rights must be distinguished from married but un-abandoned women and single women. Additionally, this language is consistent with terminology used in the

was left on her husband's homestead, a piece of government-owned land to which the wife had no direct legal claim. Thus, a vexing problem arose for the Land Department: Should the wife deserted by her husband—but still residing on his homestead—be able to make a claim to that homestead?[6] Although the federal laws were first interpreted to bar homestead claims by deserted wives, a special exception developed that allowed a deserted wife to claim rights to the marital homestead and ultimately come to own the homestead in fee simple in her own name.

The deserting husbands and deserted wives profiled in this Article are, in many ways, emblematic of American mobility during the years of westward expansion. Husbands, wives, and children moved west across an expanding America.[7] But families also dissolved with a higher frequency once on the American Frontier.[8] Some desertions were purposeful—men might move to escape an unhappy marriage.[9] Some desertions were not purposeful—men might move intending to return but simply never did.[10] In all, the "restlessness of American life" and the movement of individuals and families west as new homesteading areas were opened contributed to marital desertions during the homesteading period.[11]

Yet, even though marital desertions were more common in the homesteading West, I argue those desertions were not as troubling in the homesteading context. A deserted wife could actually have better

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reviewed administrative decisions. *See, e.g.*, Herwig, 28 Pub. Lands Dec. 482, 482 (1899) (using language of "deserted wife" to define a particular group of women with certain rights). It is also worth noting that there was no equivalent "deserted husband" in this context because if a wife did desert the land stayed under the name of the husband.

6. *See* James Muhn, *Women and the Homestead Act: Land Department Administration of a Legal Imbroglio, 1863–1934*, 7 W. LEGAL HIST. 283, 301 (1994) (posing the same question).
7. HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 20 (2000) ("Families mov[ed] together across the great American wilderness.").
8. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 144–45 (3d ed. 2005) ("More marriages seemed to be cracking under the strains of nineteenth-century life. This increased the demand for divorce—or for legal separation. . . . [I]n the restless, mobile society of nineteenth-century America, absconding husbands were far from rare.").
9. HARTOG, *supra* note 7.
10. *See id.*; *see also* LILIAN BRANDT, FIVE HUNDRED AND SEVENTY-FOUR DESERTERS AND THEIR FAMILIES: A DESCRIPTIVE STUDY OF THEIR CHARACTERISTICS AND CIRCUMSTANCES 42 (1905) (finding that wanderlust was not a common reason for desertion; in fact, of the 574 subjects studied, "there were only five men who had 'always roamed over the country' or 'never been satisfied anywhere long at a time'").
11. *See* BRANDT, *supra* note 10, at 7, 36 ("Only seventeen [of the 574 men in the study] left in discouragement about work or with the avowed purpose of looking for work and one of these had given up his job voluntarily to go to Alaska at the time of the Klondyke [sic] excitement.").

support (because she could become a landowner) than if her husband had not deserted her (and only her husband became the landowner). This observation is particularly important because—looking at the legal mechanism of coverture that still governed marital relationships—one would predict that a deserted wife would have no legal claim to the property. However, the patriarchal logic of coverture reasoned that women needed support, and in the case of a deserted wife it was clear a husband was failing to provide that support. Thus, following the support rationale for coverture, the government—through the homesteading laws—had the rare opportunity to provide women property so they could support themselves. Coverture and support can only partly explain the outcomes of the cases I analyze. I also argue that unwritten assumptions about the roles of husbands and wives governed the homesteading rights of deserted wives, even when the federal statutes did not clearly—or actually—support those outcomes.

In this Article I focus only on deserted wives: women who were legally married but whose husbands had abandoned them. This Article primarily describes the *legal* rights of deserted wives under the homesteading regime—a topic that has not been discussed in legal scholarship and has barely been discussed in history scholarship, including the study of memoirs and letters by literary historians.[12] Importantly, this Article also informs understandings of the meaning of marriage and what it meant to be a wife or husband during the settlement of America. In doing so, it contributes to a rich area of scholarship about marriage in early America. Much like the work of legal historian Hendrik Hartog, this Article turns to marital separations to make sense of marriage.[13] In particular, this Article makes two new

12. These cases have never been cited in a work of legal scholarship. I found only two secondary sources that discussed any cases about deserted wives. One work that collected and analyzed some of these cases (but not all of these cases) is by James Muhn. Muhn, *supra* note 6. Muhn, writing more generally about the rights of female homesteaders, devotes seven pages of his article to the discussion of deserted wives. *Id.* at 301–07. This analysis provides an important starting point for understanding the rights of deserted wives but does not provide a complete picture of the legal meaning of the changes in rights over time. In fact, Muhn skips over the critical time period of precedential development between *Bray*, 2 Pub. Lands Dec. 78 (1884), and the 1914 Act that provided additional rights to deserted wives, Act of Oct. 22, 1914, ch. 335, 38 Stat. 766. *See* Muhn, *supra* note 6, at 305. The second work I found that discusses deserted wives using cases is an 1893 treatise. RUFUS WAPLES, A TREATISE ON HOMESTEAD AND EXEMPTION 927 (Chicago, T.H. Flood & Co. 1893). Under the heading "Married applicants," Waples dedicated a single paragraph to deserted wives. *Id.* But most of the cases Waples cited are not about deserted wives; they are cases with general statements of laws that were applicable to deserted wives as well as other homesteaders.

13. Hendrik Hartog uses marital separations to "make sense of marriage in American law during the generations prior to our own" and to come to "a historical understanding of core legal concepts: of wife, of husband, of unity." HARTOG,

contributions. This Article is the first to collect and analyze the administrative decisions on the legal status of deserted wives attempting to exercise the right to homestead. The existing sources generally fail to acknowledge the important role that the law played in the way that homesteaders—both men and women—conducted themselves.[14]

In addition, this Article builds on the important work of legal historians about marital separation in the late nineteenth and early twentieth centuries. Legal historians, most notably Hendrik Hartog, have recognized the importance of the law and social roles of separated spouses in understanding historical family law.[15] No one, however, has ever studied separated spouses in the context of the homesteading of America.[16] Studying this particular type of marital separation is important because the law of marriage needed to work differently in the settlement of the American West. Specifically, the law of marriage needed to prop up a system of land settlement, which, as I demonstrate, meant that sometimes women were given more property and land rights than otherwise expected. Through collecting and analyzing these administrative cases for the first time, this Article also builds on and provides additional support for work by other legal historians. For example, my analysis complements Laurel Thatcher Ulrich's discussion of Colonial women as "deputy husbands,"[17] Ariela Dubler's study of unmarried women and their relationship to the State,[18] and Reva Siegel's studies of women's earnings.[19]

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supra note 7, at 1. Today, one can look to divorce to understand marriage, but in early America, divorces were difficult or impossible to obtain. *See* FRIEDMAN, *supra* note 8, at 141–45.

14. *But see* H. ELAINE LINDGREN, LAND IN HER OWN NAME: WOMEN AS HOMESTEADERS IN NORTH DAKOTA 57–81 (1991) (discussing how the law impacted female homesteaders in North Dakota).

15. HARTOG, *supra* note 7; *see also* MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 58–80 (1986) (analyzing divorce and separation in America from 1750 until 1830).

16. In his main work on the marital relationship, Hartog mentions federal land policy once. HARTOG, *supra* note 7, at 261 (discussing Maynard v. Hill, 125 U.S. 190 (1888)). One commentator described Hartog's take on marital policy as "dismiss[ing] federal interest in marriage as public policy." Beverly J. Schwartzberg, *Untangling Marriage's Hidden History: Two Views*, 11 UCLA WOMEN'S L.J. 281, 294 (2001) (reviewing NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000)); HARTOG, *supra* note 7. Nancy Cott, in her important work on the history of American marriage, fails to mention public land policy except in a discussion of Indian land. COTT, *supra*, at 123 (discussing the Dawes Act and the federal policy of forcing monogamy on Native Americans).

17. LAUREL THATCHER ULRICH, GOOD WIVES: IMAGE AND REALITY IN THE LIVES OF WOMEN IN NORTHERN NEW ENGLAND 1650–1750, at 35–50 (1982).

18. 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 (2003).

19. Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L.J. 1073 (1994) [hereinafter

This Article lays out the history and analysis of the homesteading rights of deserted wives in five Parts. Part II examines the structure of the various homesteading laws and addresses women's legal rights to homestead. Congress drafted the homestead laws in an attempt to settle the American West with American citizens and American families.[20] But not every adult American citizen was able to homestead—the homesteading laws only allowed women to homestead in limited circumstances. Accordingly, Part II also examines the status of deserted wives in American law during the homesteading period. Understanding the role and status of deserted wives in the broader American context helps to set apart the status of deserted wives under the homesteading laws. Part III discusses this Article's methodology and also notes the limited nature of this topic. Part IV provides a general overview of the historical changes in the homesteading rights of deserted wives. Notably, Part IV covers federal law—congressional actions and key decisions from the Secretary of the Department of the Interior. Although states were, and still are, the main regulators of the family, the homesteading rights of deserted wives were governed by federal law, with state law operating only at the margins.

Part V provides more details about the homesteading rights of deserted wives, focusing on three highly litigated issues: the determination of marital residence, how and when women could establish homestead residency separate from their husbands, and the time restraints on alleging desertion. Because Part V focuses on the trends and changes in administrative jurisprudence, it also includes a rich factual description of numerous cases. Although the stories told through the cases are compelling, it is worth remembering that husbands and wives likely framed their stories to craft legally compelling narratives.[21] Yet the decisions and their factual background provide substantial insight into the trajectory of women's property and marital rights during the homesteading period.

Finally, Part VI analyzes the special status of deserted wives under the homesteading laws and compares deserted wives claiming homestead rights to deserted wives in broader American law. In Part VI, I make several important arguments about women's rights and the

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Siegel, *Home as Work*]; Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127 (1994) [hereinafter Siegel, *Marital Status Law*].

20. *See* WAPLES, *supra* note 12, at 928 (noting the "qualification of citizenship, or of application therefor," was required and that "[w]hen a foreigner has made homestead entry, it must be cancelled for illegality if he did not declare his intention of becoming naturalized prior to the entry").

21. Schwartzberg, *supra* note 16, at 292 (noting that when spouses litigated against each other "the narratives created by wives and husbands [were] less unmediated truths than performances couched in terms that lawyers, judges, and communities might recognize and reward").

marital relationship during the homesteading period. Part VI also examines three trends that appear in the homesteading context and also in other litigation about marriage and separation: the role of fault, the government's interest in privatizing dependency, and the protection of the marital relationship. I examine these trends in depth for their relevance to the homesteading rights of deserted wives, and I also contextualize them with the law of marriage and separation in the rest of America during the same timeframe. Although the law of homesteading was distinctly different than normal marital laws in some ways, deserted wives were not treated substantially different in the homesteading context compared to other legal contexts. In other words, unwritten assumptions about the roles of husbands and wives governed the homesteading rights of deserted wives even when there was no federal statutory basis to do so.

II. THE LEGAL ABILITY OF DESERTED WIVES TO HOMESTEAD

Although women's property rights were long governed by the common law, federal and state legislation began to tweak those rights in the late nineteenth and early twentieth centuries.[22] For the purposes of this Article, the relevant statutory scheme is the various federal laws governing land grants from the federal government to individual citizens. The common law, of course, continued to operate in the background of the drafting, meaning, and application of these laws. Throughout this Article, I collectively refer to the numerous laws governing homesteading in America as the "homesteading laws,"[23] but I do note where material differences existed between the various statutes. A full account of the laws and regulations governing the distribution of public lands through homesteading is beyond the scope of this Article.[24] Still, understanding the basic structure of the American homesteading system is a critical first step to understanding the im-

22. *See generally* Siegel, *Home as Work*, *supra* note 19 (discussing women's claims to the output of household labor); Siegel, *Marital Status Law*, *supra* note 19 (discussing women's rights to their own earnings).

23. "Homestead" has two distinct legal meanings relevant to the time period at issue. This Article is about grants of public land to citizens in exchange for their settlement in new territories. Homestead can also refer to a set of state laws that protect the real property on which a family resides from various outside interventions. Thomas E. Simmons, *Homestead: A (New) Hope*, 63 S.D. L. REV. 75, 81 (2018). These homestead laws, although with roots in the mid-nineteenth century, continue to protect homesteads (the primary residence type) today. *See* Thomas E. Simmons, *Prequel to Homestead*, 62 S.D. L. REV. 332, 345–70 (2017) (overviewing contemporary protections for homesteads).

24. *See* FRIEDMAN, *supra* note 8, at 168 ("The disposition of the public domain is a story of staggering detail.").

portance of why and how deserted wives exercised their homestead rights.[25]

The Homestead Act of 1862 was the primary law operating during the settlement of the American West and, in many ways, it provided the basis for the other homestead laws.[26] Importantly, the Act did not completely prohibit women from filing on homesteads.[27] The Homestead Act of 1862 gave homesteading eligibility to "any person who is the head of a family, or who has arrived at the age of twenty-one years."[28] "Any person" included women; in fact, the remainder of the statute used the language of "his or her" to discuss the rights and obligations of homesteaders.[29] As such, there was immediate recognition that single women—including widows, divorced women, and never-

25. The majority of the cases about deserted wives come from two pieces of land-grant legislation: the Preemption Act of 1841 and the Homestead Act of 1862. The Preemption Act formalized the rights of settlers who squatted on land without a previous purchase. Preemption Act of 1841, ch. 16, 5 Stat. 453 (repealed 1891); *see also* FRIEDMAN, *supra* note 8, at 169–70 (discussing history leading up to the Preemption Act of 1841 and how the law allowed "squatters" rights to purchase land on which they already lived); Lee Ann Potter & Wynell Schamel, *The Homestead Act of 1862*, 61 SOC. EDUC. 359, 360 (1997) ("Prior to the war with Mexico (1846–1848), people settling in the West demanded 'pre-emption'—an individual's right to settle land first and pay later."). Under the Preemption Act, "[t]he head of a family who had settled 'in person' on land and 'improved' it had first choice or claim to buy the land, up to 160 acres, at the minimum government price." FRIEDMAN, *supra* note 8, at 170. The Preemption Act was ultimately merged into the later homesteading laws, and the judicial and administrative interpretations of either act governed both. Charles R. Pierce, *The Land Department as an Administrative Tribunal*, 10 AM. POL. SCI. REV. 271, 272 (1916).

26. Homestead Act of 1862, ch. 75, 12 Stat. 392 (codified at 43 U.S.C. § 175) (repealed 1976). With few exceptions, the other homestead laws followed the same general requirements for, and limitations on, women homesteaders as the Homestead Act of 1862.

27. *Id.* at 392; *see also* MONTANA WOMEN HOMESTEADERS: A FIELD OF ONE'S OWN 19 (Sarah Carter ed., 2009) (stating that the Homestead Act of 1862 had "gender-neutral wording").

28. 12 Stat. at 392. The law also required that a homesteader be a citizen of the United States or have filed a declaration to become a citizen and barred from homesteading any individual who had ever "borne arms against the United States Government or given aid and comfort to its enemies." *Id.*

29. *Id.* The Homestead Act of 1862 required that an application be "made for his or her exclusive use and benefit" and described separately what happened to a homestead "if he be dead" or "in case of her death." *Id.* The same subsection of the statute, however, does use "he" to discuss the bar on homesteaders who had borne arms against the United States. *Id.* Congress was concerned about granting land to Confederate Civil War soldiers who were all officially men, although in actuality some women fought on both sides in the Civil War. *See generally* DEANNE BLANTON & LAUREN M. COOK, THEY FOUGHT LIKE DEMONS: WOMEN SOLDIERS IN THE AMERICAN CIVIL WAR (2002) (describing roles, histories, and disguise strategies of female soldiers in the American Civil War).

married women—were qualified to homestead.[30] Although the Homestead Act of 1862 clearly allowed some women to homestead, the Department of the Interior interpreted the act to exclude married women because of the role of coverture in determining the legal rights of women.[31] In 1864, the Land Department reasoned that a married woman was qualified neither as "any person" nor as a "head of a family" because "a married wom[a]n has no legal existence."[32] This lack of legal existence came from coverture, which held that a woman's legal identity merged into that of her husband at the time of marriage. Accordingly, a married woman did not have a separate legal identity during the duration of her marriage.[33] Without a legal existence of her own, a married woman could not homestead—nor gain rights in her own name—because those rights would necessarily belong to her husband, and her husband could not homestead more than once.[34] A married woman was also unable to homestead under the "head of a family" provision because a woman's husband was necessarily the "head of a family" and therefore the qualified homesteader.[35] Around 90% of homesteaders were men; however, the official records do not make clear the number of single men versus married men.[36] Before 1900, fewer than 10% of all entries were made by women, but the percentage of female homesteaders increased over time.[37]

The homestead laws imposed a general three-step process for homesteaders to become landowners and receive fee simple title to land.[38] The first step was for a qualified homesteader to "make entry"

30. Muhn, *supra* note 6, at 285 ("The ability of unmarried women to make entry under the Homestead Act did not, in itself, pose any particular dilemma to the Land Department.").

31. *Id.* at 285, 287.

32. *Id.* (quoting James H. Edmunds, Comm'r of the General Land Office).

33. COTT, *supra* note 16, at 11–12.

34. Muhn, *supra* note 6, at 287; WAPLES, *supra* note 12, at 927 ("[T]wo homesteads cannot be taken by a married couple . . . .").

35. Muhn, *supra* note 6, at 287.

36. *Id.* at 283–84.

37. *Id.*; Elizabeth Jameson, *Foreword* to LINDGREN, *supra* note 14, at v, vii ("More women, proportionately, homesteaded after 1900 than before."); *see also* Nat'l Park Serv., *The Homestead Act of 1862*, MUSEUM GAZETTE, Aug. 2000, at 1, 2, https://www.nps.gov/jeff/learn/historyculture/upload/homestead.pdf [https://perma.unl.edu/SZ24-D4GC] ("Single women were eligible to claim homesteads, and many did. Depending on time and place, approximately five to twenty per cent of homesteaders were women.").

38. *See* Homestead Act of 1862, ch. 75, 12 Stat. 392, 392–93 (codified at 43 U.S.C. § 175) (repealed 1976) (listing requirements of homesteaders applying for entry). Like many things in unsettled America, it took a while for the federal government and its officers to get control over the land-grant system. For a discussion of vigilantism used to protect land claims around Omaha, Nebraska, see Sean M. Kammer, *Public Opinion Is More than Law: Popular Sovereignty and Vigilantism in the Nebraska Territory*, 31 GREAT PLAINS Q. 309 (2011).

or "file" on a piece of land.[39] The filing of an application for entry vested jurisdiction over the application in the Land Department of the federal government.[40] The individuals who filed for homesteads were called "entrymen"—a widely used generic term that I adopt in this Article to refer to both male and female homesteaders. Once a settler became an entryman, he or she became the equitable owner of the homestead and, although the federal government retained title, was entitled to exclusive possession.[41] In the second step of the homesteading process, an entryman had to reside on and improve the homestead for at least five years (later reduced to three years).[42] At the third step—after the homesteader had filed on a piece of land and met the requirements of improvement and residency—the homesteader could apply for title without paying any money for the land.[43]

39. 12 Stat. at 392–93.

40. Pierce, *supra* note 25, at 281. The application was also "known as a selection, a sworn statement, a declaration, or a proffer." *Id.* Once a homesteader filed the required affidavit about qualifications and paid ten dollars, the local land office approved or denied the entry. *Id.* If approved, "he or she [would] thereupon be permitted to enter the quantity of land specified." 12 Stat. at 392. Settlers often entered land even prior to the General Land Office surveying the land and opening a land office.

41. Pierce, *supra* note 25, at 282. The homesteader was treated by the state or territory as the real owner of the land who had the right to sell the land but also an obligation to pay taxes. *Id.* As an equitable owner during the proving-up period, the entryman's right to the land remained under the jurisdiction of the Department of the Interior, and the federal government continued to hold title. *Id.*

42. *See* 12 Stat. at 392 ("[N]o certificate shall be given or patent issued therefor until the expiration of five years from the date of such entry."). The Homestead Act of 1912 decreased the proving-up period to three years and allowed homesteaders to meet residency requirements while being absent from the homestead for five months a year. Homestead Act of 1912, ch. 153, 37 Stat. 123, 123 (repealed 1976). Improving a homestead required an entryman to reside on the land, cultivate the land, and build a habitable home. 12 Stat. at 392; Potter & Schamel, *supra* note 25, at 359. An 1881 case provides just one example of what a homesteader put forth for proof of improvements. Mary Mahoney alleged the following had been done on her Kansas homestead: "[S]he and her children had a comfortable house fourteen by twenty-eight feet upon said tract, also had a stable, a well and corral and had about forty-five acres of said land in cultivation." Thrasher, 8 Pub. Lands Dec. 626, 627 (1889). If a homesteader did not intend to permanently inhabit the land, he or she could be denied entry or title; residency credit would not be given to someone not intending to stay permanently. The good faith requirement applied during the proving-up period. "A settler who [went] upon public land with the intention of remaining just long enough to secure title by colorable compliance with the law" was not in compliance with the residency requirements of the homestead laws. Spalding, 8 Pub. Lands Dec. 615, 618 (1889) (citing Van Ostrum, 6 Pub. Lands Dec. 25 (1887)).

43. 12 Stat. at 392. Once becoming qualified to apply for title—by building a habitable home, residing on the homestead, and cultivating the homestead—the homesteader applied for title by having two neighbors vouch for the truth of his or her statements that the requirements had been met. *Id.* The local land offices collected the documentation for homesteaders who filed and proved up. *Id.* at 393.

Applying for title was termed "proving up" or "applying for patent" to the land.[44] This entire process was subject to a good faith requirement.[45]

III. LIMITATIONS AND METHODOLOGY

The scope of this Article is limited in two particular ways. First, I only analyze a single category of homesteaders—married women abandoned by their husbands while residing on a homestead during the proving-up period. There is much to be said about all solo female homesteaders—whether never-married, divorced, or widowed—but those women are outside the scope of this Article because their legal status was very different than the legal status of deserted wives. Single women were given the right to homestead in the text of the Homestead Act, and, although those single female homesteaders faced interesting legal and practical hurdles, their paths to becoming landowners through the homestead laws were fundamentally different than the paths available to deserted wives. The special status of deserted wives deserves to be studied separately—as I do here—because desertion is unique from other marital statuses. Ultimately, the status of deserted wives demonstrates something unique about the ways in

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Those documents were sent to the General Land Office, located in Washington, D.C., and eventually a patent would be issued from the federal government. Potter & Schamel, *supra* note 25, at 360. Once a patent was issued, the administrative powers of the Department of the Interior ceased. United States v. Schurz, 102 U.S. 378, 378 (1880).

44. As an alternative to proving up after five years of residence, homesteaders could take advantage of the commutation clause, which allowed an entryman to live on the land for six months and then buy the land. 12 Stat. at 393. The cost was $1.25 an acre. The commutation clause allowed settlers to cut short the homesteading period and also incentivized those with no intention of permanently farming or ranching the land to file on a homestead, purchase the land under the commutation clause, and immediately sell to neighbors or investors. FRIEDMAN, *supra* note 8, at 146. No cases profiled in this Article arose under the commutation clause.

45. In light of the federal government's liberal land-grant policies, fraud was a major concern. Perhaps the highest concern for fraud came with commutation clause purchase because the homestead could immediately be alienated. But, other forms of fraud were also of concern to the government. *See* Pierce, *supra* note 25, at 273. The good faith requirement required homesteaders to aver they were making entry with the intent to permanently reside on the land. WAPLES, *supra* note 12, at 932 (explaining that an entryman had to swear under oath his or her intent to actually settle the land). Lack of good faith was a valid reason to deny patent to an entryman. In the 1889 case of *Edward C. Ballew*, 8 Pub. Lands Dec. 508, 508 (1889), the local commissioner found a homesteader lacked the necessary good faith to receive patent because he intended to remove his family from the land after receiving patent. The Department of the Interior reversed this holding, not on an error of law, but because the entryman had good faith intent to maintain his residence on the land at the time of entry and only intervening changes (e.g., the entryman getting a job which required him to live off the homestead) altered his intentions. *Id.* at 509.

which married women's property rights worked in the late nineteenth and early twentieth centuries.

This Article's focused analysis of the homestead rights of deserted wives also means that I do not address the property rights of Native American women. The history of homesteading is nothing if not a part of the history of conquest and the appropriation of Native American land. First, Native Americans were excluded from homesteading.[46] Further, at the same time that the federal government was granting agricultural land to white women and requiring that they cultivate that land, the federal government was trying to restructure the society of various Native American tribes to prevent women from doing agricultural work.[47] That history is important but is not included in this Article because of the narrow scope of the laws and decisions that I study.

Second, I analyze only administrative decisions about deserted wives and their legal right to homestead under the federal homestead laws. Although I do not profile any state court decisions, the Article is largely about how homesteading laws related to other laws of marriage. In Part VI, I discuss these relationships in detail. The legal rules governing marriage interacted with homesteading rights in various ways including, for example, through bigamy prohibitions, property allocation through married women's property rights, the role of fault in marital breakdown, husbands' support obligations, and even marital privacy.[48] The interaction with state marriage laws is critical to understanding the uniqueness of federal homesteading laws, but this Article also suggests that future research should focus on state court decisions about property ownership after a single person or married couple received patent.[49]

Instead of trying to encompass state law cases or cases about anyone except white female homesteaders abandoned by their husbands, this Article narrowly focuses on federal administrative decisions about deserted wives who attempted to take over a homestead claim from a deserting husband. The studied cases can be generally categorized into two groups. The first type of case arose where a wife made a direct claim on the homestead. In other words, her husband had deserted and she decided to seek to homestead in her own name. The

46. Although the language of the Homestead Act did not specifically prohibit entry by Native Americans, the Act required homesteaders be citizens, and Native Americans were not granted citizenship until 1924. Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253.

47. For a case study of Native American women and agricultural work, see Joan M. Jensen, *Native American Women and Agriculture: A Seneca Case Study*, 3 SEX ROLES 423 (1977).

48. *See infra* Part VI.

49. Some work has been done on this topic, including Alvin E. Evans, *Community Property in Public Lands*, 9 CALIF. L. REV. 267 (1921).

deserted wives in this first type of case sought entry on the homestead and/or proved up the homestead. These cases pitted a wife in direct litigation against her husband because it was her homesteading claim against his homesteading claim. Like other litigation between spouses during this time period, the administrative records show women "airing their grievances" about their husbands' actions or inactions.[50]

The second type of case arose when a third party sought to make a claim on the homestead, and the deserted wife contested that third-party claim. These claims arose because when a homesteader abandoned the homestead, it reverted to the government and the entryman lost all rights to the land.[51] Once that happened, a new entryman could claim the homestead. Accordingly, cases arose where a third party who wanted to make entry and a deserted wife already living on the land disputed who should be able to make entry on the abandoned homestead. These cases—where a deserted wife was litigating against a third party—only involved making entry on the homestead; none of them were about the right to prove up after the three- to five-year residency period. To complicate this second type of case further, Congress, in an attempt to combat fraud, allowed other citizens to challenge the good faith and qualifications of homesteaders.[52] As an incentive, Congress allowed a challenger who filed a "contest" to receive the right to make entry as a reward for securing the cancellation of the fraudulent homesteader's entry.[53] Accordingly, a would-be entryman might allege that a husband had abandoned the homestead because making that allegation would give the challenger a protected right to make entry. Although eventually the Department of the Interior disallowed this practice when a deserted wife was left behind, several early cases arose under this situation.

Both types of cases went through the same administrative process. This process was, in many ways, born out of the government's concern with controlling fraud.[54] The implementation of the homestead laws, including the issuance of regulations and the adjudications of chal-

50. *See* Jaunita John, Note, *Wives' Lawsuits Addressing Husband Drunkenness: Tempered by Gender Standards, 1850–1910*, 27 YALE J.L. & FEMINISM 141, 149 (2015) (noting that in litigation between wives and drunkard husbands "one can find proof in court dockets of women airing their grievances regarding male drunkenness").

51. WAPLES, *supra* note 12, at 934 (explaining that the entryman "forfeit[ed] all his present and prospective rights").

52. *See, e.g.*, Act of Mar. 3, 1891, ch. 561, 26 Stat. 1095, 1096 (amending law providing for the sale of deserted lands); Act of May 14, 1880, ch. 89, 21 Stat. 140, 141 (providing notification by register to persons who procured the cancellation of any entry).

53. Pierce, *supra* note 25, at 283.

54. Without concerns of fraud, "the disposal of the public lands [could have been] accomplished through officials and inspectors without the intermediary of hearings and arguments." *Id.* at 273. Fraud, however, was a concern—particularly

lenges, was governed by the Department of the Interior.[55] The appeals system of the Land Department was established to determine whether homesteaders qualified under the governing statutes, including whether they met statutory requirements and did so in good faith.[56]

Procedurally, contests went first to a local land office where local land officers made an initial decision on whether a homesteader was qualified to prove up under the relevant homestead law. The local land officers making these decisions were registers or receivers, official posts appointed by the President.[57] Because registers and receivers were appointed by the President, they were replaced at each change in presidential administration.[58] The register was the manager of an individual land office, and the receiver handled monetary receipts along with other duties.[59] A homesteader, or a challenger to a homesteading claim, could then appeal to a commissioner of the General Land Office. After a commissioner issued a decision, the homesteader or the challenger had a final appeal available to the Secretary of the Department of the Interior.[60] Although commissioners issued most final decisions, those decisions were never published and are not

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because of the great value of the land given away and the importance of that land to individual settlers. *Id.*

55. Muhn, *supra* note 6, at 284; *see also* Pierce, *supra* note 25, at 276 ("[T]he secretary of the interior is vested with full authority to prescribe regulations by which the provisions of the law can be taken advantage of . . . ."). For a description of the early administration of public lands, see PATRICIA NELSON LIMERICK, THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST 59–62 (1987).

56. *See* Pierce, *supra* note 25, at 274–75 (listing three objectives of the Land Department tribunals). The Land Department of the Department of the Interior was "constituted [as] a special tribunal" to decide questions of settlement on public lands, and "their decisions [we]re final to the same extent that those of other judicial or quasi-judicial tribunals are." Vance v. Burbank, 101 U.S. 514, 519 (1879) (discussing, specifically, the Land Department's authority in contests under the Donation Act). *But see* United States v. Schurz, 102 U.S. 378 (1880) (discussing limits on the jurisdiction of the Secretary of the Interior).

57. CHAMP CLARK VAUGHAN, A HISTORY OF THE UNITED STATES GENERAL LAND OFFICE IN OREGON 19 (2014), https://www.blm.gov/or/landsrealty/glo200/files/globook.pdf [https://perma.unl.edu/QWC3-TE7A].

58. *Id.* at 21.

59. *Id.* at 19.

60. *See, e.g.*, Jennie P. Musser, 44 Pub. Lands Dec. 494 (1915) (describing procedurally how claim was denied by local land officer, appealed to the Commissioner (who denied the claim), and further appealed to the Secretary (who reversed)). A Westlaw search indicates that the Department of the Interior issued 576 opinions about the Homestead Act of 1862 before 1920. In addition to this appeal to the Secretary, a losing party had thirty days to file for rehearing. Henry L. McClintock, *The Administrative Determination of Public Land Controversies*, 9 MINN. L. REV. 638, 642–43 (1924). For a time, a losing party at rehearing even had the opportunity to apply for rereview after the initial rehearing. *Id.* at 642. The right to apply for a second rehearing, however, was abolished. *Id.*

included in this Article.[61] Instead, I mainly draw on the published opinions of the Secretary or an assistant secretary writing on behalf of the Secretary.[62] Throughout this Article, I refer to these final opinions of the Department of the Interior as issued by the "Secretary," whether it was the Secretary or an assistant secretary writing on behalf of the Secretary.[63]

Because the federal circuit courts were never given a right to judicial review of the administrative decisions, very few court cases about homesteading rights exist.[64] State courts could review administrative decisions but only on equitable grounds.[65] State courts would also protect homesteaders' possessory interests, including prosecuting for

61. Pierce, *supra* note 25, at 279 ("[I]n the vast bulk of the cases the commissioner's action and decision [were] final.").

62. *See generally* Tyler, 12 Pub. Lands Dec. 94 (1891) (containing signature of "First Assistant Secretary Chandler to the Commissioner of the General Land Office"); Porter, 5 Pub. Lands Dec. 42 (1886) (containing signature of "Secretary Lamar to Commissioner Sparks").

63. The Secretary was, of course, the head of the Department of the Interior. "The secretary, however, d[id] not, except in a few selected cases involving matters of great public policy, attempt actually to adjudicate appeals himself." Pierce, *supra* note 25, at 280. The Secretary generally delegated decision-making to the first assistant secretary, but of course the bureaucracy was more complicated: "Under the first assistant secretary [wa]s the solicitor of the department, the board of appeals of the interior department, the first assistant attorney and a large number of assistant attorneys." *Id.*

64. *See* McClintock, *supra* note 60, at 650 ("Congress has never provided for review by the courts of the decisions of the Land Department, though there has been some demand for such review, and that demand was supported at one time by President Taft." (footnote omitted)).

65. The Supreme Court described the jurisdiction over appeals from the Land Department in this way:

> 3. The general proposition is recognized that when a special tribunal is authorized to hear and determine certain matters arising in the course of its duties, its decisions within the scope of its authority are conclusive.
>
> 4. Under this principle the action of the Land Department in issuing a patent is conclusive in all courts and in all proceedings, where by the rules of law the legal title must prevail.
>
> 5. But courts of equity, both in England and in this country, have always had the power in certain classes of cases to inquire into and correct injustice and wrong, in both judicial and executive action, founded in fraud, mistake, or other special ground of equity, when private rights are invaded.

Johnson v. Towsley, 80 U.S. 72, 72 (1871); *see also* Corbett v. Wood, 21 N.W. 734, 735 (Minn. 1884) ("The adjudications of the officers of the land department of the government are subject to review by the courts, and after the issuance of a patent to one party, a hostile claimant may come into a court of equity and show that the same has been fraudulently procured, and that in equity he is entitled to the land." (citation omitted)).

trespass during the proving-up period.[66] The Supreme Court occasionally weighed in on legal questions, but nearly every decision impacting homesteading rights came from the Department of the Interior. This Article, drawing mostly on Secretary decisions, covers legal questions about every step of the homesteading process until the final issuance of patent. My analysis—much like the jurisdiction of the Secretary and the Department of the Interior—ends once patent was issued to a settler.[67] This is not to say that the story always ended once patent was issued. Jurisdiction over fraud or mistake could remain with the federal government,[68] and litigation about ownership and marital property rights fell under state or territorial law.[69] Post-patent issues about the marital property and ownership might exist but are outside the scope of this Article.

Before turning to the administrative rulings about deserted wives, a review of the legal rights and status of deserted wives is necessary. Because the homesteading laws allowed limited categories of women to homestead, some women were able to homestead in their own names. In fact, solo female homesteaders had substantial success in homesteading.[70] However, the Department of the Interior interpreted the homestead laws to prohibit married women from homesteading. As the Supreme Court explained in 1879: "The wife could not be a settler. She got nothing except through her husband."[71] In reality,

66. *See, e.g.*, Michaelis v. Michaelis, 44 N.W. 1149, 1150 (Minn. 1890) ("But in the mean time [sic] the law will protect her in her possession and property, and restore it if forcibly taken from her, and will interfere to punish trespassers who seek to turn her out of possession by force or violence.").

67. *See generally* United States v. Schurz, 102 U.S. 378 (1880) (holding the Secretary was without jurisdiction to revoke a patent once issued).

68. *See, e.g.*, *Johnson*, 80 U.S. at 91 (Clifford, J., dissenting) ("[T]he case is controlled by the act of Congress which provides that the decision of the Commissioner of the General Land Office shall be final unless an appeal is taken to the Secretary of the Interior. In my judgment the decree of the commissioner is final if no appeal is taken, and in case of appeal that the decision of the appellate tribunal created by the act of Congress is equally final and conclusive, except in cases of fraud or mistake not known at the time of the investigation by the land department.").

69. The granting of a patent passed legal title to the homestead and ended jurisdiction of the Land Department. "[T]he patent is conclusive as to his ownership of the land in all actions at law." McClintock, *supra* note 60, at 652. Although legal title was passed, a "court of equity c[ould] require the holder of the patent, as it c[ould] the holder of any legal title, to convey it to another who has a better equitable right to the land or can declare the holder a trustee." *Id.*

70. *See generally* Carter, *supra* note 27 (discussing solo female homesteaders in Montana); LINDGREN, *supra* note 14 (discussing solo female homesteaders in North Dakota).

71. Vance v. Burbank, 101 U.S. 514, 521 (1879). This general legal understanding of the rights in marriage was not unique to married homesteaders. As a general matter, it was understood that "to the extent that wives and husbands bargained and worked together toward cooperative ends—for example, wealth, children,

married women homesteaded alongside husbands; however, those women never filed on land or proved up land in their own names. One exception existed to the general bar on married women being able to homestead: deserted wives. Unlike single women who were qualified to homestead as individuals, deserted wives were qualified to homestead "in the statutory privilege accorded to the 'head of a family.'"[72] Understanding why deserted wives were given this statutory privilege, and understanding the importance of this designation, requires understanding the general standing of deserted wives in America during the homesteading period.

This Article builds on and adds to the analysis done by Hendrik Hartog in *Man and Wife in America: A History*.[73] Hartog analyzed the meaning and status of separation in early American family law. Hartog's analysis covers marital relationships and separations from early settlement until after World War II, but this Article covers the shorter homesteading period from 1862-1935.[74] And, unlike Hartog, I

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survival, happiness—they did so in the context of an unequal and coercive institution, one in which women were systematically deprived of rights that men gained." HARTOG, *supra* note 7, at 167.

72. Porter, 5 Pub. Lands Dec. 42, 42 (1886); *see also* Pawley, 15 Pub. Lands Dec. 596, 596 (1892) ("A married woman, who is actually deserted by her husband, is entitled, as the head of a family, to make homestead entry . . . ."); WAPLES, *supra* note 12, at 927 ("A deserted wife is treated as the head of her family when she is in possession of land entered by her husband."). This rule applied to the homesteading laws in general, such as the Homestead Act of 1862, including its later amendments and modifications, and other land-grant statutes. *See Pawley*, 15 Pub. Lands Dec. at 598 ("[I]f it is shown by competent testimony that the wife was actually deserted and left to take care of herself, then she is competent, as the head of a family, to make the entry in question regardless of time that intervenes before it is made."); Glaze, 2 Pub. Lands Dec. 311, 313 (1884) (holding intact deserted wife's entry under the Timber Culture Act of 1862); *cf. Porter*, 5 Pub. Lands Dec. at 43 (cancelling wife's filing for entry for failure to show competent evidence on final proof of desertion).

73. HARTOG, *supra* note 7 (examining cases of marital separation to help understand the meaning of marriage).

74. I end my analysis in 1935 for two reasons. First, 1935 is the year when President Franklin Roosevelt functionally ended homesteading by withdrawing the remaining federally owned land from the public domain. Nat'l Park Serv., *supra* note 37, at 3. Although homesteading in the continental United States did not officially end until 1976, homesteading had drastically slowed down by the 1920s and functionally ended in 1935. *Id.*; Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 703(a), 90 Stat. 2743, 2787–89 (1976). Homesteading stayed open in Alaska until 1986, but no Alaska cases are featured in this Article. *Id.* at § 702(a); *see also* NORMA COBB & CHARLES W. SASSER, ARCTIC HOMESTEAD: THE TRUE STORY OF ONE FAMILY'S SURVIVAL AND COURAGE IN THE ALASKA WILDS (2000) (telling a family's story of homesteading in Alaska beginning in 1973). Second, by the 1930s, the legal status of women, including their property rights, had changed drastically. *See* COTT, *supra* note 16, at 168 (describing changes to women's legal status in the 1930s). The homesteading period began soon after a sea change occurred in American law: "Between 1845 and 1860, nearly every state in the union, new and old, held a convention to draft a new constitution." HARTOG,

focus on only one type of marital separation: women who were deserted by their husbands.[75] But Hartog's description of marital separations, and especially his observation that the spouses existed in "a complex legal netherworld," are true for the deserted wives in the homesteading context.[76] Under the homestead laws, mutual separation or a wife's desertion of her husband did not make the wife eligible to homestead. Only when a wife was deserted by a husband was she considered a qualifying homesteader.[77] Accordingly, one fundamental question in all of the cases is whether a wife was deserted (and thus qualified to homestead as the head of household) or whether she took part in the decision to separate (in which case she was not qualified to homestead).[78] Of course, the couple may have mutually separated but, understanding the legal rules of homesteading, strategically constructed the husband's desertion so the wife could make a federal homestead claim.[79]

Family law is generally governed by state, not federal, law. Particularly in the late nineteenth and early twentieth centuries, states con-

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supra note 7, at 110. The new constitutions, and the accompanying legislation, moved America away from the common law and changed many legal obligations "including private law areas like the law of husband and wife." *Id.* For example, a number of states thoroughly debated whether to include property rights for wives in their constitutions. *Id.* at 111. The homesteading period also overlapped with a period of great change in the legal rights and status of women, whether married or single. FRIEDMAN, *supra* note 8, at 373; *see also infra* Part VI (comparing women's rights in homesteading to American society at large).

75. HARTOG, *supra* note 7, at 36. Hartog identified the following five varieties of separations, listed from most formal to least formal:

> 1. divorces á mensa et thoro (that is, judicially ordered separations, sometimes also called limited divorces from bed and board);
> 2. separations founded on equitable agreements (separate maintenance agreements) or enforceable contracts between husband and wife;
> 3. informal separations of a variety of sorts, including separations founded on legally unenforceable contracts, abandonments, desertions, and bigamies.

In addition there were two other categories that did not exist legally at all, but that still had an important presence in the legal culture:

> 4. "temporary" separations, not founded on marital conflict;
> 5. divorces in one jurisdiction, unrecognized in another.

Id.

76. *See id.* at 29 ("A separated couple was something close to an oxymoron, a wife without a husband and a husband without a wife, a site of moral danger.").

77. Roberts, 36 Pub. Lands Dec. 258, 260 (1908) ("There is a clear distinction between separation by mutual agreement and desertion or abandonment. Only in the latter event is the wife recognized as the head of a family."). Even when after an agreed upon separation the husband failed to support the wife, he continued to be the head of the household and the separated wife could make no homestead claim. Brown, 14 Pub. Lands Dec. 459, 460–61 (1892).

78. *See, e.g.*, Porter, 5 Pub. Lands Dec. 42, 42 (1886) (finding wife not deserted because she had colluded with her husband to arrange the desertion).

79. *See, e.g.*, *id.*

trolled the laws governing marriage, children, and the family.[80] The administrative decisions interpreting the homesteading laws are unique for the time period because federal courts and agencies rarely had the opportunity to rule on marriage issues during the homesteading period.[81] Although some federal laws (for example, immigration laws) implicated the marriage relationship, "throughout the first 175 years of national government, marriage law was not the business of Washington."[82] And as a general matter, "the agencies of the federal government claimed little . . . interest over the law of marriage."[83] State law determined who could marry and how those marriages could end. In almost all situations, state law also determined the property rights and support obligations between married, separated, and divorced spouses. But homesteading rights were different; it was federal law—as interpreted by a federal agency—that determined whether a wife could homestead, when she became "deserted," and what rights she had in contrast to her husband and to strangers. Even though various states and territories defined marriage and marital rights in different ways during the homesteading period,[84] the administrative decisions do not reference state-specific laws on marriage. Rather, those decisions refer to the body of developing federal administrative law to determine when a wife was sufficiently deserted to gain her own legal right to homestead.[85]

The "complex legal netherworld" of separation that Hartog describes was no simpler under the homesteading laws than in normal American law and society.[86] The administrative decisions I study

80. In the last half century, the federal government has made inroads into state control of family law. These interventions have come from the Supreme Court and Congress. Starting with *Loving v. Virginia*, 388 U.S. 1, 6 (1967), which overturned anti-miscegenation statutes in sixteen states, the Supreme Court has decided a number of constitutional cases about the right to marriage. Most recently, the Supreme Court overturned thirteen state definitions of marriage in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Congressional intervention in the family has also increased, including through the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–63 (2012) and the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (2012).

81. *See* HARTOG, *supra* note 7, at 16 ("For the better part of two centuries, the agencies of the federal government claimed little constitutional responsibility or interest over the law of marriage.").

82. *Id.* at 17.

83. Hendrik Hartog, *The Scene of a Marriage:* McGuire v. McGuire, *in* FAMILY LAW STORIES 219, 229 (Carol Sanger ed., 2008).

84. *Id.* ("The United States of America was a huge country, defined, at least for the purposes of marriage, by its absence of central norms or directions. Its distinguishing characteristic as a nation was the multiple jurisdictions that described its legal terms.").

85. Accordingly, the development of administrative law was much like the development of federal common law as allowed in *Swift v. Tyson*, 41 U.S. 1 (1842), *overruled by* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

86. HARTOG, *supra* note 7, at 29.

show both circumstances where the default rules of marriage and desertion aided women in gaining homesteading rights and circumstances where the default rules of marriage hampered the ability of women to homestead. Although the federal administrative decisionmakers were not bound by state law in determining what constituted desertion, the rules adopted by the Department of the Interior showed a general deference to the general understanding of marriage. This complex tangle of the common law, state and federal law, and administrative precedent put deserted wives in complicated legal situations. The following thorough review of administrative decisions unwraps the homesteading rights of deserted wives and allows for a comprehensive analysis. Because the rights changed over time, I start by describing the general rules and trajectory of the homesteading rights of deserted wives in Part IV before turning to a more in-depth discussion of highly litigated issues in Part V.

IV. A BRIEF HISTORY OF THE HOMESTEADING RIGHTS OF DESERTED WIVES

Much has been written about female homesteaders; however, most of that historical literature focuses on the stories of individual women without contemplating the laws that governed and influenced how women acted.[87] This Article adds a legal perspective to the existing historical literature on solo female homesteaders as I review and analyze the laws and regulatory decisions that governed the homesteading rights of deserted wives. The cases chronicled here are about deserted wives who lived, at least for a time, with their husbands on what I term the "marital homesteads."[88] The legal developments, particularly developments created by administrative decisions, provide evidence of the legal status of women and the legal meaning of marriage.[89] The laws and regulatory decisions tell several stories: That women's rights to gain ownership of homesteads were progress-

87. *See, e.g.*, Carter, *supra* note 27 (focusing on the stories of individual women). *But see* LINDGREN, *supra* note 14, at 57–81 (discussing individual stories and also describing the relevant laws).

88. Another category of deserted wives, those who settled homesteads for the first time after desertion, are outside the bounds of this Article. As a general matter, the only legal issue confronted by those women was whether they were sufficiently abandoned before filing in order to qualify as a homesteader. *See, e.g.*, Bayliss, 28 Pub. Lands Dec. 503, 509 (1899) (discussing a solo female homesteader's legal qualifications to homestead and noting "[s]he was clearly at th[e time of entry] a deserted wife, and as such entitled to make a homestead entry").

89. This is not to say that the civil servants determining the homesteading rights of deserted wives were attempting to change the status of women or the meaning of marriage. *See* HARTOG, *supra* note 7, at 4 (criticizing legal history scholarship that treats "the opinions of nineteenth-century appellate judges[ ] as covert political theory"). Because these civil servants were dealing with "concrete lives, odd patterns of behavior, [and] failed marriages," they had to "improvise[ ] solutions

ing, albeit slowly, during the homesteading era; that deserted wives held a special place in American marital law; that marriage was treated differently in homesteading disputes compared to other places in American law; and that individual women were willing to fight husbands and strangers for ownership of land.

Calling these women "deserted wives" does not mean they had no agency in deciding whether to continue or terminate their marital relationships. In some instances, these women may have been without choice in the marital breakdowns, but frequently, these women took part in the decision to remain married but be separated.[90] The administrative decisions include transitioning rules on women's rights and rich language about the expectations of husbands and wives—both during marriage and once separated. This section lays out the basic chronology of deserted wives' homesteading rights. Additional details and context follow in Part V, which deviates from a chronological timeline to address three highly litigated issues.

The Land Department, through the Secretary, formally adopted a policy of stare decisis as early as 1883.[91] Absent a statutory change or "cogent reasons," the Secretary would look to rules articulated in prior cases.[92] Despite a stated policy on stare decisis, the Secretary was a political appointee and, unsurprisingly, the administrative decisions shifted based on who served as the leader of the Land Department.[93] The cases tend to follow established rules; however, the Secretary did change the administrative interpretation of the statutes over time, and those changes more often than not expanded the homesteading rights of deserted wives.

Although the Homestead Act of 1862 allowed certain limited categories of women to homestead and the early interpretations of the act were clear that single women could homestead and married women could not, the law was silent as to the homesteading rights of deserted wives. The General Land Office first confronted the rights of deserted

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to the situations before them from legal rules and from tacit assumptions they drew out of the larger culture." *Id.*

90. *See, e.g.*, *id.* at 48 (telling of a 1790 separation and noting that the wife negotiated the husband's departure and "packed his belongings" to aid him in his departure from the marital home but described herself as a "deserted wife").

91. Rancho Corte de Madera del Presidio, 1 Pub. Lands Dec. 232, 239 (1882) ("But the rule of *stare decisis* is well known and recognized in this Department, and it is not necessary to restate the fact that a review of its decision will not be entered upon, except in accordance with the general principles governing rehearings, new trials, and bills of review in the courts.").

92. McClintock, *supra* note 60, at 639.

93. *See, e.g.*, Sean M. Kammer, *"No Trespassing": Railroad Land Grants, the Right of Exclusion, and the Origins of Federal Forest Conservation*, 90 N.D. L. REV. 87, 112–13 (2014) (noting how President Grover Cleveland created a "major shift in the [General Land Office's] stance toward land and timber depredations" by appointing "land reformers" to leadership positions).

wives in 1864 when it held that deserted wives could maintain the homesteading rights of their deserting husbands in certain circumstances.[94] The General Land Office's first rule allowed a wife to allege the desertion of her husband and make entry on the land in her own name; however, she could only do so if she first provided notice to her husband.[95] The notice requirement frustrated the attempts of many deserted wives to gain homesteads in their own names.

Early congressional intervention to further protect the rights of deserted wives was unsuccessful,[96] and an 1875 Commissioner opinion halted all homestead claims by deserted wives.[97] Keziah Card, a deserted wife, wrote to the Litchfield, Minnesota Register and Receiver expressing her interest in proving up her husband's homestead in her own name and inquiring whether she could obtain residency credit for her husband's military service.[98] The Commissioner reversed prior rulings explaining he was "convinced that the rule permitting a wife to attack the entry of her husband is in violation of the fundamental principles governing the relation of husband and wife in the matter of property rights."[99] Accordingly, Keziah Card could not "at any time make final proof in her own name on the entry made by her husband, nor c[ould] she whilst the marriage remain[ed] legally valid be permitted to contest the existing entry of her husband."[100] Although a major setback for deserted wives, this rule did not last long. While a congressional fix was again tried and again failed,[101] a solution developed in the Board of Equitable Adjudication.[102]

The Board of Equitable Adjudication was a congressional creation that allowed the General Land Office to grant homestead rights (including fee simple title) to settlers who had failed to comply with a technical aspect of the homestead laws but evinced good faith to homestead.[103] In 1877, the Board of Equitable Adjudication adopted Rule 27, which established that "[i]n all homestead entries where the husband has deserted his wife and children, if he have any, who have in good faith complied with the homestead law by residence upon and cultivation of the land," the wife could obtain patent to the home-

94. Muhn, *supra* note 6, at 301–02.
95. *Id.* at 302.
96. *Id.* at 303.
97. *Mrs. Keziah Card*, COPP'S LAND OWNER, July 1875, at 50 (setting forth the Commissioner's opinion).
98. *Id.* at 50–51.
99. *Id.* at 51.
100. *Id.* The Commissioner also declared the deserted wife could not "under any circumstances relating to any entry of the public lands . . . become entitled to credit for the military services of her husband during the late war." *Id.*
101. Muhn, *supra* note 6, at 303.
102. *Id.*
103. *Id.* at 302–03.

stead.[104] Thus, Rule 27 reversed the 1864 notice requirements and the 1875 prohibition on deserted wives claiming homesteads and was immediately used to provide homesteading rights to deserted wives.[105] After the issuance of Rule 27, the homesteading rights of deserted wives were relatively settled, and several decades of administrative adjudication proceeded before another major rule change.

Finally, in 1884, a new announcement of the homesteading rights of deserted wives was provided. The Department of the Interior set out the following five main rules governing deserted wives in the 1884 case of *Bray v. Colby*.[106] Rule 1 established that *only* the deserted wife (if she was living on the homestead) could allege the desertion of her husband.[107] Rule 2 allowed a deserted wife to cancel her husband's entry and make entry in her own name.[108] Rule 3 allowed a deserted wife to prove up her husband's claim as his agent and in his name.[109] Rule 4 allowed a deserted wife to use the commutation clause to gain title to the homestead.[110] Rule 5 applied the preceding four rules to a child under the age of twenty-one if the deserted wife was deceased.[111] The important implications of these five rules are discussed in detail in Part VI. These five rules set forth in *Bray v. Colby* generally governed the homesteading rights of deserted wives for the next thirty years.

In 1913—deciding who had claim to a homestead where the original entryman abandoned his homestead, illegally arranged for someone else to file on the homestead, deserted his wife, and fled the country on the same day—the Department of the Interior articulated a much more liberal view of the rights of deserted wives.[112] In that case, the Commissioner of the General Land Office found the wife had no recourse because "a homestead entryman ha[d] the right to relinquish a homestead entry without the knowledge of his wife."[113] The Department of the Interior disagreed, stating the rights of deserted wives in this broad language:

> The law grants the right of homestead to the head of a family. Ordinarily, the wife, not being the head of the family, is denied the right of homestead, but to compensate, in a measure, for this, the entry devolves upon the wife in the event of the death of the husband entryman. The Department has uniformly held that where a family is domiciled upon the land under a homestead entry,

104. *Thompson v. Anderson*, COPP'S LAND OWNER, Nov. 1879, at 125, 126 (quoting Rule 27); *see also* Muhn, *supra* note 6, at 304 (same).
105. Muhn, *supra* note 6, at 304.
106. Bray, 2 Pub. Lands Dec. 78 (1884).
107. *Id.* at 81.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. Inman, 42 Pub. Lands Dec. 507 (1913).
113. *Id.* at 509.

> it is not within the power of the husband to relinquish the entry, abandon his family and deliver a relinquishment of entry to another with the view of dispossessing his abandoned family. Under such conditions, it is held that upon the filing of the relinquishment, the wife, domiciled upon the land, has the right in her own behalf as a deserted wife to make entry for the land.[114]

The Department, of course, had not "uniformly" protected deserted wives in such situations; however, by 1913, the law had shifted to provide greater rights to deserted wives.

Then in 1914, Congress intervened in the homesteading rights of deserted wives by passing "An Act To provide for issuing of patents for public lands claimed under the homestead laws by deserted wives."[115] The 1914 Act was "spurred by"[116] a letter written by Register, John F. Armstrong, and Receiver, Samuel Butler, of the Sacramento Land Office to Congressman John E. Raker of California.[117] Armstrong and Butler explained that they "ha[d] reason to believe that many poor and hardworking women who ha[d] been deserted by their husbands ha[d] abandoned their homesteads because of their financial inability" to secure title.[118] If a woman made final proof in her husband's name, the husband received patent and could "sell the homestead and improvements over the heads of his wife and children if he [was] so inclined."[119] Armstrong and Butler argued that the other option from *Bray v. Colby*—allowing a deserted wife to file in her own name—was not any better for deserted wives because many deserted wives were "very poor" and therefore unable to contest their husband's entry or even pay the filing fee.[120] They concluded that the rules "work[ed] a hardship on such women who would like to perfect title and gain a homestead for their own and their children's benefit," and they advocated that Congress allow women to more easily obtain title in their own names.[121]

Based on these concerns, the 1914 Act made a number of changes, including imposing a specific time limitation and allowing deserted wives to claim residency credit through their husband's residency.[122]

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114. *Id.* The "sole question" presented in the case was whether the wife consented or participated in the sale. The burden was on the new entryman to show the wife had participated or consented; he failed to meet that burden and the wife was given the right to make entry on the homestead. *Id.*
115. Act of Oct. 22, 1914, ch. 335, 38 Stat. 766.
116. Muhn, *supra* note 6, at 305.
117. Letter from John F. Armstrong, Register, U.S. Dep't of the Interior, and Samuel Butler, Receiver, U.S. Dep't of the Interior, to John E. Raker, Congressman, U.S. House of Representatives (Apr. 29, 1914) (on file with the U.S. National Archives at Record Group 48, Entry A1 753).
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *See infra* section V.B (discussing residency credit); section V.C (discussing time constraints).

The 1914 Act made it easier for deserted wives to meet the residency credit of their own accord, meaning fewer had to exercise the *Bray v. Colby* option of proving up as agents of their husbands. Additionally, the 1914 Act reinvigorated the notice and due process requirements which had gone away after Rule 27.[123] The 1914 Act was the last major change to the homesteading rights of deserted wives, and the last case profiled in this Article was issued in 1925.[124] Although parts of the United States remained open for homesteading for another fifty years,[125] by the 1920s, most homesteading had finished and the homesteading rights of deserted wives were settled. But, of course, more legal issues arose than appear in this brief history.

V. HIGHLY LITIGATED ISSUES

Beyond the basic rules—first allowing deserted wives to homestead after notice, then prohibiting all homesteading by deserted wives, then allowing homesteading without notice—a number of other issues were highly contested by deserted wives. This Part discusses the three issues that appeared most frequently in administrative decisions. Section A discusses how residence—of both husbands and wives—was determined when a married couple was living apart. Section B examines another residency issue: when a deserted wife's residency credit began to accrue. Section C discusses various time restraints on wives alleging desertion. These issues did not necessarily arise in cases where the litigation concerned what constituted a legally recognizable desertion, but the way the Department of the Interior decided these cases reflects an understanding of what qualified as a desertion.

A. Determining Residency when Husband and Wife Lived Apart

A critical part of the homesteading process was residing on the homestead for the minimum number of years—first five years, then three.[126] If an entryman did not show residency during that time pe-

123. Act of Oct. 22, 1914, ch. 335, 38 Stat. 766 (providing issuance of patents for public lands claimed under the homestead laws by deserted wives). The Act required that the "posted notices of intention to submit final proof . . . recite the fact that the proof is to be offered and patent sought by applicant as a deserted wife" and that this notice be served upon the husband before an application for patent be submitted. *Id.*

124. *See* Elizabeth J. Vaughn, 51 Pub. Lands Dec. 189 (1925) (discussed *infra* section V.C).

125. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 703(a), 90 Stat. 2743, 2787–89 (1976) (ending homesteading in the continental United States in 1976); *id.* at § 702(a) (ending homesteading in Alaska in 1986).

126. *See supra* Part II.

riod, patent would not be issued.[127] Accordingly, the General Land Office frequently had to determine whether the residency requirement had been met. Although residency issues abounded, one is relevant to this Article: How should the residency of a married entryman be determined when that entryman and his wife lived apart?

During the nineteenth century, a wife's domicile followed that of her husband's.[128] This had major legal implications in nineteenth-century America—for example, divorce actions had to be filed in the state where the husband was domiciled.[129] If a wife refused to relocate with her husband, that refusal could be grounds for divorce by the husband based on the wife's abandonment.[130] But of course, the homestead laws did not require entrymen to make the homestead their domicile, but instead, just their residence, and the rules of residency were not the same as the rules of domicile.[131] In the context of homesteading, both husbands and wives had reason to argue that a wife's residency should necessarily follow her husband's.

One type of residency dispute case was as follows. Husband and wife settle on a homestead with husband as the entryman. The husband abandons the homestead and deserts the wife, but the wife continues to reside on the homestead.[132] In these circumstances, "[t]he homestead [was] not necessarily abandoned" so long as the wife continued to reside on it.[133] But even if a husband's abandonment did not forfeit the homestead right,[134] a dispute might arise if the wife sought

127. WAPLES, *supra* note 12, at 932 (noting requirements for receiving patent).

128. Note, *The Domicile of a Wife*, 26 HARV. L. REV. 447, 447 (1913); *see also* Comment, *Capacity of a Married Woman to Acquire Separate Domicil*, 38 YALE L.J. 381, 381 (1929) ("The domicil of the wife, both in England and in the United States, is, in general, determined by that of the husband, even though the wife has never lived at her husband's domicil." (footnotes omitted)).

129. Note, *The Domicile of a Wife*, *supra* note 128, at 447.

130. *See generally* Annotation, *Divorce—Failure to Follow Husband*, 29 A.L.R.2d 474, 476 (1953) ("The husband may choose and fix the domicile of himself and his wife, if, in doing so, he acts reasonably, and when he properly exercises his right to select a new domicile, her unjustifiable failure or refusal to accompany or follow him to the new domicile constitutes desertion or abandonment of him by her which, if continued for the statutory period, is ground for a divorce against her." (footnote omitted)).

131. WAPLES, *supra* note 12, at 932 (explaining that "[a] claimant must actually and personally make a settlement upon the land, to avail himself of the law" but not noting any requirement of actual domicile).

132. *See, e.g.*, Thrasher, 8 Pub. Lands Dec. 626 (1889); Gates, 7 Pub. Lands Dec. 35 (1888).

133. WAPLES, *supra* note 12, at 934 ("The homestead is not necessarily abandoned by the husband's desertion of it and his wife and family who reside thereon. She becomes the head of the family under such a circumstance, and the entry will not be canceled to her injury.").

134. *But see id.* (noting that "[a]bandonment of the land for a period of six months or more, after filing the affidavit and making entry," results in forfeiture of the homestead right).

to make entry in her own name. The husband could contest her entry, arguing that—despite his physical absence—he maintained residency as required by the homestead laws because his wife resided on the homestead. The administrative decisions are uniform in this factual scenario—so long as the husband's absence was in good faith, the residency of his wife counted toward *his* residency.[135] In fact, the Department of the Interior adopted the general rule that "the residence of a settler is presumed to be where his family resides."[136] This rule follows early American understandings of the marital relationship. In Colonial America, although men were considered the head of household in interaction with the outside world, a wife could "stand in his place" if the husband was unavailable.[137] Described as a "deputy husband" by Laurel Thatcher Ulrich, a Colonial wife in this situation could potentially act as a surrogate to the husband,[138] much like a homesteading wife acted as a surrogate for the purpose of accruing her husband's residency requirement.

The rule giving husbands credit for wives' residency allowed married men more freedom to move around the country—and perhaps engage in economic activity elsewhere[139]—than single men or women who were more strictly held to the residency requirement. Take for example the contest between husband and wife in *Gates v. Gates*. The entryman husband, Alonzo Gates, left the homestead in Dakota Territory from October 1882 until summer 1885 for the "business necessity" of operating his saw mill business at a profit in Montana.[140] Although

135. *See, e.g.*, Harold Paul, 54 Pub. Lands Dec. 426, 427 (1934) ("[W]here the entryman is a single person without family, the physical occupation and personal presence must be that of himself; but this Department has repeatedly held that the home of an entryman is presumptively where his family resides, and absence from the entry of the entryman for the purpose of maintaining his family, though in some instances covering several unbroken years, is excusable and does not break the continuity of residence where his family continued to reside upon the homestead."); *Thrasher*, 8 Pub. Lands Dec. at 629 (finding entryman had not abandoned homestead during six-year absence because of wife's presence); Edward C. Ballew, 8 Pub. Lands Dec. 508, 509 (1889) (allowing entryman who lived and worked off the homestead to receive patent based on his family's residence on the homestead); Morris, 9 Pub. Lands Dec. 52 (1889) (finding entryman had not abandoned his homestead because his two sons, likely illegitimate, lived on the homestead while the entryman worked in a nearby town); *Gates*, 7 Pub. Lands Dec. at 37 (finding entryman had not abandoned homestead during three-year absence to take care of a business in another state because of wife's presence).

136. *Thrasher*, 8 Pub. Lands Dec. at 629.

137. ULRICH, *supra* note 17, at 36.

138. *Id.* at 42. A good example from Colonial America is that the wives of fishermen would conduct business during the extended absences of their husbands. *Id.* at 41.

139. *See, e.g.*, *Gates*, 7 Pub. Lands Dec. at 37 (finding residency requirement met where husband left the South Dakota homestead to take care of a business in Montana).

140. *Id.* at 36.

the wife, Frances Gates, successfully obtained a divorce based on the nearly three-year desertion of her husband,[141] the secretary found that Alonzo had not abandoned the homestead or his wife for purposes of federal homestead law.[142]

Treating the wife's residence as the husband's residence meant that a deserted wife—like Frances Gates—could live alone on a homestead for years, but her husband got credit for her residency.[143] Although the ability of a wife to accrue credit for her husband appears to give her some power and rights, her ability to do so was derived solely from her status as the entryman's wife.[144] But wives were not uniformly disadvantaged by the rule giving credit to their husbands—remember that the rule established in *Bray v. Colby* prevented anyone other than the wife from alleging the husband's abandonment of the homestead, protecting the marriage from outside intervention and protecting the wife's ability to control meeting the residency requirement.[145] In other words, a wife had superior rights to her husband's homestead against everyone except her husband.

A slight variation was the situation where a husband disappeared for a period of time, but at his return, the wife was willing to resume the marital relationship. One such situation appeared in the 1889 case of *Thrasher v. Mahoney*.[146] There, the husband was absent for six years after making entry on a homestead, but his wife and children resided on and improved the homestead during his absence.[147] Shortly before the husband returned, the wife, believing her husband dead, attempted to prove up the homestead.[148] Before the wife's application could be processed, the husband returned and tried to prove up. Initially, the husband was denied this right, but on appeal, the husband was allowed to proceed in proving up his land.[149] In order to find the husband met the residency credit, the Secretary focused on the husband's good faith in his absence of six years: during the first two

141. *Id.* at 35.
142. *Id.* at 37.
143. *See, e.g.*, *id.* (deciding between homestead claims of then-divorced husband and wife).
144. Compare the situation of deserted wives to that described by Ulrich in her book about women in Colonial America. She says: "Colonial women might appear to be independent, even aggressive, by modern standards, yet still have derived their status primarily from their relationship to their husbands." ULRICH, *supra* note 17, at 42.
145. *See, e.g.*, Thrasher, 8 Pub. Lands Dec. 626, 629 (1889).
146. *Id.* at 626.
147. *Id.* at 627.
148. *Id.*
149. *Id.* at 629 (allowing Florence Mahoney to proceed through the Board of Equitable Adjudication to determine whether an exception should be made for his tardiness in filing the documents to prove up the homestead outside of the seven-year maximum).

years, the husband maintained some contact.[150] Even more important, perhaps, was that the marriage appeared likely to continue: the husband deeded his interest in the land to his wife.[151] It was the husband's actions *after* returning to the homestead that "indicate[d] good faith, and [seemed] to show that he had not intended leaving his family without making provision for their maintenance and support."[152] And those actions were enough to find he had adequately maintained residence during his six-year absence.

On the other hand, the residency of the wife and children could also cut against the homesteading claims of a husband. Starting with the established principle that "in the absence of proof to the contrary, the place where a married man's family resides must be deemed to be his residence,"[153] the Secretary announced, in an 1889 case, that a "strong presumption" was raised against the residency of an entryman when his wife failed to reside upon the homestead.[154] In that case, the husband, an attorney living in town, filed upon a homestead, left his wife and children residing in town, and commuted between the homestead and his office in town during the required period of residency.[155] The husband did not cook, eat, or do laundry on his claim.[156] The Department cancelled his entry because his residence on the homestead was "pretended."[157] Accordingly, in some cases, a wife's location either on or off the homestead—even though she was not an entryman and had no legal interest in the homestead—was critical to whether her husband could meet the residency requirements of the homestead laws.

While a wife's residence could be the legally determinative factor in determining the residence of the husband, this should not be interpreted as a legal right for women. Rather, the entire premise of the rule assumed that a husband decided where the wife lived. The Secretary frequently used language that assumed the husband would always determine the residence of the wife. The governing rule from *Bray v. Colby* gave deserted wives rights "[w]hen the entryman has established a residence and *placed his wife* upon the land."[158] In another case the Secretary explained that after marrying his wife, a

150. *Id.* at 628.
151. *Id.* at 629.
152. *Id.*
153. Stroud, 4 Pub. Lands Dec. 394, 395 (1886).
154. Spalding, 8 Pub. Lands Dec. 615, 618 (1889).
155. *Id.*
156. *Id.*
157. *Compare id.* (finding no bad faith but a mere failure to maintain residence), *with Stroud*, 4 Pub. Lands Dec. at 394 (finding entryman met residency requirements where the husband worked at his store in town but the wife resided, at least in part, on the homestead).
158. Bray, 2 Pub. Lands Dec. 78, 81 (1884) (emphasis added) (discussing Rule 1).

homesteader "*took her* to his homestead."[159] Thus, the wife's residence could be legally determinative, but only because it was assumed the husband dictated where the wife would live.

B. Women Establishing Residency in Their Own Names

While a married woman did not have the legal right to choose her own residence, a woman gained that right once deserted. Because the homesteading laws had a residency requirement,[160] the Department of the Interior had to decide at what point a woman's residence "counted" toward the statutory residency requirement. How a deserted wife's residency counted changed drastically over time. In 1879, a woman could claim no residency credit because her husband's abandonment of the homestead (even if that also included leaving behind a deserted wife) counted as the wife's abandonment.[161] By 1925, a deserted wife not only got credit for her husband's residency prior to her own, but she also benefited from his credit-earning time in the military.[162]

Unless the commutation clause was used, the Homestead Act of 1862 required a five-year residency period between entry and proving up;[163] the Three-Year Homestead Act of 1912 shortened the residency requirement to three years for all homesteads.[164] Regardless of the minimum residency time required, the homesteading laws did impose a maximum time—two years past the minimum time period, so either five or seven years. If an entryman did not prove up the claim within the maximum time, the homesteading right extinguished for that entryman and the homestead became available for another to make entry. When a husband deserted his wife during those seven years, the legal question arose of *when* the deserted wife began "residing" on the homestead.

This legal question can be demonstrated through the case of Jennie Lindsey.[165] Jennie's husband filed entry on a Colorado homestead in 1887, and she joined him in 1888.[166] In 1893, Jennie's husband deserted her and abandoned the homestead.[167] In 1895, Jennie contested the entry of her husband, his entry was cancelled, and Jennie

159. Gates, 7 Pub. Lands Dec. 35, 35 (1888) (emphasis added).
160. *See supra* Part II (discussing the residency requirement, which was most often three or five years).
161. *See* Larsen, 1 Pub. Lands Dec. 401 (1882).
162. *See* Elizabeth J. Vaughn, 51 Pub. Lands Dec. 189, 189 (1925).
163. Homestead Act of 1862, ch. 75, 12 Stat. 392 (codified at 43 U.S.C. § 175) (repealed 1976).
164. Homestead Act of 1912, ch. 153, 37 Stat. 123 (repealed 1976).
165. Jennie W. Lindsey, 24 Pub. Lands Dec. 557 (1897).
166. *Id.*
167. *Id.*

filed on the homestead in her own name as a deserted wife.[168] There are four ways in which the residency could be counted: First, Jennie could get residency credit starting in 1887 when her husband made entry; second, Jenny could get residency credit starting in 1888 when she moved onto the homestead herself; third, Jenny could get residency credit starting in 1893 when her husband abandoned the homestead and deserted her; or, fourth, Jennie could get residency credit starting in 1895 when she made entry in her own name. Deciding when Jennie's residency started implicated the marriage relationship. The first option treats Jennie as a true agent of her husband—stepping into his shoes. The second option treats Jennie as if she had her own legal right to choose her residency during marriage. The third option says Jennie could only legally establish her own residency after desertion. And the fourth option treats Jennie as a complete stranger to her husband's legal right.

The Department of the Interior decided this question in different ways during the fifty years of adjudication covered by this Article. The trajectory of the administrative decisions determining women's residency demonstrates that deserted wives were gaining legal rights over time. The starting position followed an 1879 Supreme Court opinion, which held that only the husband held any rights during the proving-up period.[169] According to the Supreme Court, only once an entryman obtained patent did a wife receive any interest in the land, stating that "up to that time he alone makes the claim. His acts affecting the claim are her acts. His abandonment, her abandonment. His neglect, her neglect."[170] This holding guided early Department of the Interior opinions, including one in 1882 that required women to be divorced before accruing time toward settlement.[171] Using coverture as a legal basis, the Secretary started with the proposition that if a woman was married and under coverture, the actions of her husband were her actions.[172] Accordingly, when a husband abandoned the homestead and deserted his wife, the Secretary held that "his abandonment of the land was her abandonment" and the wife could not obtain patent to the land by relying on any residency time while the couple was married.[173] The wife was required to wait until after her divorce, when she became a "*feme sole*," before she could comply with the statutory

168. *Id.*
169. Vance v. Burbank, 101 U.S. 514, 521 (1879).
170. *Id.*
171. Larsen, 1 Pub. Lands Dec. 401 (1882).
172. *Id.*
173. *Id.* at 403.

requirements.[174] The wife was unable to receive credit for her residency between the abandonment and the divorce.[175]

Shortly thereafter, in 1884, the Department of the Interior issued the main set of administrative rules governing deserted wives in *Bray v. Colby*.[176] In that case, the Department of the Interior reiterated that "[a] deserted wife cannot make final proof or obtain patent in her own right by virtue of her husband's entry."[177] The Department of the Interior interpreted its earlier caselaw as relying on agency law and, thus, created a set of rules based on the fact that "a deserted wife or child [w]as the absent husband's agent."[178] Accordingly, a wife "c[ould] have no greater right than her husband" to receive patent.[179] If a husband had abandoned the claim, he had no right to prove up, and accordingly, neither did his deserted wife. Only a widow, not a wife, could file on a former husband's claim.[180] Accordingly, *Bray v. Colby* prevented land offices from giving deserted wives residency credit for the pendency of the marriage if the woman wanted to gain title in her own name.[181] Still, *Bray v. Colby* offered multiple paths for a deserted wife: one was to prove up as the husband's agent and another was to file in her own name. Under the original *Bray v. Colby* rule, if a woman wanted to file in her own name, her residency started at the time of her new filing.[182]

In the thirty years between *Bray v. Colby* and the 1914 Act, "[t]he basic rules laid out in the *Bray v. Colby* decision" governed the homestead rights of deserted wives,[183] but the Secretary slowly liberalized how deserted wives could claim residency credit. In 1884—only ten months after *Bray v. Colby*—the Department of the Interior softened the residency rules for deserted wives in *Mary Lewis*.[184] Mary and her husband settled on a homestead in Washington Territory in 1879.[185] In 1883, Mary's husband "deserted his wife and abandoned [his]

174. *Id.* Although in this case the wife had a protected right of entry as a deserted wife, the wife did not receive title to the land because her status under coverture prevented the accumulation of residency credit for the time she lived on the land. *Id.*

175. *Id.*

176. Bray, 2 Pub. Lands Dec. 78 (1884); *see supra* Part IV (discussing the five rules set out in *Bray v. Colby* and their importance to the homesteading rights of deserted wives).

177. *Bray*, 2 Pub. Lands Dec. at 78.

178. *Id.* at 78, 82.

179. *Id.* at 78.

180. *Id.* at 79.

181. *See id.* at 78.

182. *Id.* at 81.

183. Muhn, *supra* note 6, at 305.

184. Mary Lewis, 3 Pub. Lands Dec. 187 (1884).

185. *Id.*

land."[186] Mary stayed on the land for a while but ultimately moved to a nearby town to work.[187] Mary's husband filed a relinquishment of the homestead, and, that same day, someone else filed on the land.[188] Mary moved to cancel the newcomer's entry and applied to reinstate her husband's entry.[189] But of course, Mary could not reinstate her husband's entry: his abandonment was her abandonment.[190] Although Mary could not reinstate her husband's entry, the Department of the Interior still ruled in her favor because of "her entire good faith" and allowed her to make entry.[191] Mary's residency period did not start until she filed in her own name, but she was protected against the other filer who was declared a trespasser and whose entry was nullified.[192] After the *Mary Lewis* ruling, a deserted wife was given a protected status in making entry on her husband's former claim. Three years later, in 1886, the Department of the Interior made homesteading rights more difficult to obtain when it established that a deserted wife had to "affirmatively show[ ]" the "fact of desertion" by the husband.[193]

An 1894 ruling by the Department of the Interior, based on equitable principles, helped deserted wives by changing the rules on residency credit.[194] This was a case where the husband abandoned his wife and homestead, and the deserted wife (already having lived on the homestead for seven years) applied to prove up her husband's claim.[195] The local commissioner applied the rules from *Bray v. Colby*, holding that, despite her residency during the preceding seven years, she could not prove up on the land because she had not "resided" on it in her own name.[196] The Department of the Interior, abandoning the rule from *Bray v. Colby*, allowed the deserted wife to claim her entire time of residency toward the requirements of the homestead laws.[197] This case substantially changed the ability of deserted wives to prove up homesteads in a timely fashion because they would have already earned residency credit before even making entry in their own names.

186. *Id.*
187. *Id.* at 187–88.
188. *Id.* ("It has been shown that Gorten filed his declaratory statement February 29, 1884, the very day Lewis's entry was canceled, and that he alleged settlement January 12 preceding.").
189. *Id.* at 188.
190. This rule was established in *Vance v. Burbank*, 101 U.S. 514, 521 (1879), and *Larsen*, 1 Pub. Lands Dec. 401 (1882).
191. *Mary Lewis,* 3 Pub. Lands Dec. at 188.
192. *Id.*
193. Porter, 5 Pub. Lands Dec. 42, 42 (1886).
194. Maggie Adams, 19 Pub. Lands Dec. 242, 242 (1894).
195. *Id.*
196. *Id.*
197. *Id.* at 242–43.

The next major change occurred in 1914 when Congress passed "An Act To provide for issuing of patents for public lands claimed under the homestead laws by deserted wives."[198] The 1914 Act changed the rules on residency because it allowed the "wife of [a qualified] homestead settler or entryman" to obtain patent to the land "in her name" if she, "while residing upon the homestead claim and prior to submission of final proof of residence, cultivation, and improvement as prescribed by law, ha[d] been abandoned and deserted by her husband for a period of more than one year."[199] A one-year period of desertion was a remarkably short time period for Congress to impose and was the first clearly defined length of time needed to claim desertion. The 1914 Act required: "That in such cases the wife shall be required to show residence upon, cultivation, and improvement of the homestead by herself for such time as when, added to the time during which her husband prior to desertion had complied with the law, would aggregate the full amount of residence, improvement, and cultivation required by law . . . ."[200] By allowing a deserted wife to aggregate her residency time with that of her husband, the 1914 Act created a faster path to land ownership for deserted wives. Two cases about the 1914 Act are particularly instructive in how meaningful this change was.

In 1909, Parley Pratt Musser made entry on a homestead in Salt Lake City, Utah.[201] In 1915, Parley's wife Jennie "filed in the local office notice of intent to make final proof, alleging that she had been deserted by her husband for more than one year."[202] Under the 1914 Act, this case should have been simple and Jennie should have been allowed to file. However, Jennie was not residing on the homestead, and the 1914 Act contemplated rights for women who had been abandoned "while residing upon the homestead claim."[203] Although Jennie appears ineligible under a textual reading of the 1914 Act, the Secretary held that the Act was remedial in nature and "showed no purpose of Congress to require more of the wife than would have been required of the husband had he completed the entry."[204] Accordingly, Jennie did not have to show actual residence on the homestead; instead, she only had to show that the residency of her husband was excused.[205] The homesteading laws developed to allow some excuses for non-residency, and Jennie made the showing that her husband's absence was

198. Act of Oct. 22, 1914, ch. 335, 38 Stat. 766.
199. *Id.*
200. *Id.*
201. Jennie P. Musser, 44 Pub. Lands Dec. 494, 494 (1915).
202. *Id.*
203. 38 Stat. at 766.
204. *Jennie P. Musser*, 44 Pub. Lands Dec. at 495.
205. *Id.*

excused.[206] The secretary pointed out that "[t]he intent of the act was to excuse the wife from [the] necessity of waging a contest against her husband and enabling her to make final proof and get patent direct without expense and delay of a contest."[207]

In 1919, Rexford E. Vaughn, a United States Navy veteran, made entry on a homestead in California but did not establish residence until 1920.[208] Rexford and his wife, Elizabeth, lived on the homestead periodically over the next three years until Rexford abandoned Elizabeth on a trip to San Francisco.[209] In 1924, Elizabeth attempted to prove up her husband's entry as a deserted wife under the 1914 Act.[210] Neither Elizabeth nor Rexford had lived on the homestead a sufficient amount of time to meet the normal residency requirements. Rexford, however, as a veteran, was entitled to count his time in military service toward his residency requirement.[211] The Secretary held that Elizabeth was entitled to count her husband's military credit, and, given his prior service in the United States Navy, Elizabeth was able to obtain patent to the land despite her very limited periods of residency on the homestead.[212]

The changes over time are stark. In 1879, a wife could claim no residency credit because her husband's abandonment was considered her own abandonment and she had no recourse.[213] By 1925, a deserted wife had far more rights—not only did she get credit for her husband's residency prior to her own, but she could also claim any time benefit he earned from military service.[214] Women's rights did not advance consistently in every area, but the right to claim residency credit is an area where progress was steady, and occasionally swift. The progress in this area followed a general trend in the liberal-

206. *Id.* Unfortunately, the published case does not reflect why the husband's absence was excused.
207. *Id.*
208. Elizabeth J. Vaughn, 51 Pub. Lands Dec. 189, 189 (1925).
209. *Id.*
210. *Id.*
211. *Id.* Military veterans were given special treatment under the homesteading laws, including that "[t]he time [an entryman] ha[d] spent in the service [wa]s counted as part of that required for residence." WAPLES, *supra* note 12, at 935. The only time requirement for a military veteran was a one-year residency period; the rest of the residency period could be met through time in the military. *Id.* For a discussion of veterans as homesteaders see Kurt Hackemer, *Wartime Trauma and the Lure of the Frontier: Civil War Veterans in Dakota Territory*, 81 J. MIL. HIST. 75 (2017).
212. *Elizabeth J. Vaughn*, 51 Pub. Lands Dec. at 189. *But see Mrs. Keziah Card*, *supra* note 97, at 51 (setting forth the Commissioner's holding that "[i]t is not perceived that under any circumstances relating to any entry of the public lands [a deserted wife] can become entitled to credit for the military services of her husband during the late war").
213. *See* Larsen, 1 Pub. Lands Dec. 401 (1882).
214. *See Elizabeth J. Vaughn*, 51 Pub. Lands Dec. at 189.

ization of women's property ownership over a similar time period,[215] and the swiftness of change can largely be understood as a function of changing administration in the Department of the Interior.

As for Jennie Lindsey—our deserted wife claiming residency credit which could be calculated from four different dates—the local General Land Office only gave her residency credit after her husband's desertion.[216] But the Secretary reversed—Jennie received residency credit from the moment she moved onto the homestead, even though the homestead was then in her husband's name.[217] Practically, this meant that by the time Jennie made entry on the land, she had already met the residency requirement and was able to prove up immediately.[218] Being able to obtain fee simple title to a homestead was of great value to homesteaders, and the progression in this area of law had a definite impact on deserted wives.

C. Time Restraints on Alleging Desertion

Once a wife was deserted, she faced the decision of *when* to allege the marital desertion and her husband's abandonment of the homestead. Only by alleging these two things could she then make entry on the marital homestead under her own name. If a woman filed too quickly (perhaps indicating bad faith) or too slowly (perhaps forfeiting her rights), her claim might be challenged by others wanting to make entry on the land. If a husband abandoned his homestead leaving behind a deserted wife and no one else tried to claim the land, the deserted wife was not forced to allege the abandonment or make entry in her own name until the proving-up period of her husband was at an end—seven years after entry. But of course, a deserted wife had no right to her husband's homestead without further action and her residency did not necessarily counteract her husband's abandonment. Accordingly, complications arose when a third-party settler sought entry on the "abandoned" homestead, even if it was still occupied by a deserted wife.

All of the cases in this section were between a deserted wife trying to claim her husband's abandoned homestead and a claimant who had no prior legal relationship to the land. Procedurally these cases are similar. Once a homestead was abandoned, a new homesteader could make entry. But federal law protected those already residing on the homestead, including a deserted wife. Accordingly, in the cases that follow, the litigation was between a new settler alleging there had been an abandonment and a deserted wife alleging she had priority.

215. *See generally* Siegel, *Marital Status Law*, *supra* note 19; Siegel, *Home as Work*, *supra* note 19.
216. Jennie W. Lindsey, 24 Pub. Lands Dec. 557, 557 (1897).
217. *Id.*
218. *Id.*

Several of the cases concerning time limitations involve situations where the entryman husband "sold" a relinquishment. When an entryman failed to meet the requirements of the proving-up period or otherwise abandoned his or her claim, the claim was considered relinquished and reverted to the control of the federal government. At that point, a new entryman could file on the claim. Some homesteaders illegally "sold" their relinquishment—for a fee—by arranging to relinquish their homestead immediately before a new filer made entry.[219] In these situations, the litigated cases were frequently between the new entryman (the purchaser of the relinquishment) and a wife who had been abandoned but was claiming an interest in the homestead as a deserted wife.

The deserted wives' claims were based on an 1880 law entitled "An act for the relief of settlers on public lands."[220] That law provided a settler who was already living on a piece of public land three months to "file his homestead application and perfect his original entry in the United Stated land-office."[221] During the first three months after settlement, preference was given to the settler currently living on the claim, even if the settler was not the first to make entry. This three-month preference was also given to deserted wives—the three-month clock started at the moment the husband abandoned the homestead.[222] Once a settler made entry, "his right . . . relate[d] back to the date of settlement," meaning the residency requirement period backdated to settlement, not entry.[223] The preference for a current resident expired after the three-month period, and others could then file entry on the land. This law provided some protection for deserted wives. If a wife alleged her husband abandoned the homestead, she was given a preference right for that homestead so long as she acted within three months of his abandonment. But a husband who sold his relinquishment, knowing his wife had a three-month preference period, could stall her from making entry during that time period.

For example, in *Tyler v. Emde*, a case out of Kansas, the husband—after making entry and before proving up—formed a conspiracy with another man where the husband would abandon his homestead, sell the relinquishment rights and improvements, and keep the entire

219. Richard Edwards, *Changing Perceptions of Homesteading as a Policy of Public Domain Disposal*, 29 GREAT PLAINS Q. 179, 197 (2009).

220. Act of May 14, 1880, ch. 89, 21 Stat. 140, 140–41.

221. *Id.*

222. Muhn, *supra* note 6, at 302, n. 90; *see also* Herwig, 28 Pub. Lands Dec. 482, 482 (1899) ("A deserted wife, the head of a family, who is a settler on the land embraced within her husband's homestead entry, at the time of its relinquishment, is entitled to make entry thereof, if she asserts her settlement right within three months after cancellation of her husband's entry.").

223. § 3, 21 Stat. at 141.

agreement secret from his wife.[224] The husband and the conspirator entered into a contract; on that same day the husband relinquished his rights and the new settler filed a declaratory statement for the land, alleging settlement on that date.[225] The contract itself, for the sale of the relinquishment rights, was void as against public policy. But beyond that, the husband and conspirator knew they had to hide the contract from the wife for the three months that she could exercise her preference right. Accordingly, for three months, the husband and conspirator hid the contract, pretending the conspirator had only purchased three acres of the homestead while the wife continued to live on the homestead.[226] Somehow—unfortunately not preserved in the record—the wife discovered the conspiracy in time to file her own entry as a deserted wife on the last day of her three-month protected period, thus gaining her own rights to the homestead.[227] If she had filed entry one day later, the conspiracy would have worked to deprive the wife of any right to the homestead on which she had lived and worked for years.

A similar factual scenario happened in *Sinnett v. Cheek*, where a husband relinquished his Missouri homestead entry on the same day that a new settler made an entry on the homestead.[228] This husband, however, removed the wife from the homestead before his relinquishment by "t[aking] her and their children to her father's house in an adjoining county on a pretended visit, but did not return for them, although he promised to do so."[229] Ten months later the wife made entry in her own name, alleging her rights as a deserted wife.[230] Although recognizing that "her absence from the land while on a visit to her father was enforced by the failure of her husband to take her back to the homestead as he had promised," the Secretary denied the wife's claim—her prior-residency preference had expired.[231] The new settler gained the right to entry, and—although not reflected in the record—

224. Tyler, 12 Pub. Lands Dec. 94, 94–95 (1891).

225. *Id.* at 94.

226. *Id.* at 94–95. It is worth noting that a homesteader could not alienate any or all of the homestead during the proving-up period. WAPLES, *supra* note 12, at 946–47 (discussing limits on alienability during the proving-up period).

227. *Tyler*, 12 Pub. Lands Dec. at 97 ("Excluding the first day, December 19, Mrs. Tyler had all day of March 20, 1886, to place her claim of record, and this without reference to the conspiracy. She made entry on the latter date.").

228. Sinnett, 28 Pub. Lands Dec. 20, 20 (1899).

229. *Id.* at 20–21.

230. *Id.* at 21.

231. *Id.* ("Whatever right she may have had to make entry of this particular land as the deserted wife of Sinnett must have depended upon her settlement upon the land at the date of the cancellation of his entry, and this right could only have been preserved and maintained by proper proceedings in the land office within three months from the initiation of her right, either by making entry of the land or by filing within that period a contest against the entry of Cheek.").

the husband likely profited from an illegal sale of his relinquishment. The only reason for different outcomes in *Tyler v. Emde* and *Sinnett v. Cheek* is the speed with which the wife realized her husband sold the relinquishment and the speed with which she filed entry in her own name. In *Tyler v. Emde*, the wife filed within the three-month protected window; in *Sinnett v. Cheek*, the wife did not.

Although a deserted wife had only three months to make entry with protected status against subsequent settlers, the law initially imposed no minimum time limit for making entry. In *Pawley v. Mackey*, the husband deserted the wife and homestead on May 12, 1888, and the deserted wife made entry just over a month later on June 13, 1888.[232] A contester challenged her right to make entry as a deserted wife, and, after dismissing the contester's other arguments, the Secretary turned to the question of whether the wife had made entry too soon after the desertion.[233] The Commissioner who adjudicated the case found the wife had no homestead interest in the land because of the short period of time between the desertion and her making entry.[234] The Secretary reversed this conclusion, finding that the length of time of desertion was irrelevant to the legal question of whether the wife was deserted and noting that a wife is "as much . . . abandoned . . . in five days as in as many months, where the fact of abandonment is made to appear."[235] Pointing out that "it was but natural that she should make the entry at the earliest opportunity, in order to protect her improvements valued at $1,000, from entry by another party," the Department of the Interior affirmed the rights of the deserted wife to make entry on the homestead.[236] The 1914 Act changed this rule and imposed a one-year waiting period on a deserted wife. In order for a deserted wife to make entry after the 1914 Act, she had to show that the husband had abandoned the homestead and deserted the wife "for a period of more than one year."[237]

Although technical in nature, the time limit cases are relevant to understanding the marital relationship. These cases arose only in situations where a new settler was waiting and ready to challenge the right of a deserted wife to homestead. A short duration between the abandonment and the wife making entry could look suspicious to outsiders and the government—perhaps it showed collusion with the husband—but was not alone a reason to deny the validity of her entry. On the other hand, if a deserted wife waited too long before making entry

232. Pawley, 15 Pub. Lands Dec. 596, 596 (1892).
233. *Id.* at 597–98. One of the arguments dismissed by the Secretary was that the husband and wife had colluded on his abandonment and her entry. *Id.* at 597.
234. *Id.* at 597–98.
235. *Id.* at 598.
236. *Id.* The deserted wife died shortly after making her entry on the homestead but devised all of her property to her brother. *Id.* at 596–97.
237. Act of Oct. 22, 1914, ch. 335, 38 Stat. 766.

in her own name, she could lose her preference right on the homestead. For the vast majority of deserted wives, there was no new entryman trying to claim the homestead, and in those circumstances, a deserted wife had a full seven years from her husband's settlement to allege the desertion and make entry in her own name.

VI. TRENDS AND THEMES IN THE HOMESTEADING RIGHTS OF DESERTED WIVES

Understanding the homesteading rights of deserted wives cannot happen in a vacuum. Those rights were shaped by the legal and social meaning of marriage, the rights of deserted wives outside of the homesteading context, and the simultaneous women's rights movement. The homesteading period profiled in this Article—1862 until 1935—occurred at the same time as many other changes in family law and women's rights. For example, the Seneca Falls convention happened in 1848,[238] and women gained suffrage in 1920.[239] During that period of American history, coverture formally went away and family law was liberalized in other ways.[240] As such, it should not be surprising that the cases profiled in this Article demonstrate a similar trend—a liberalization of the law of marriage and of women's property ownership.[241]

This Part begins by looking at how the rules and norms of marriage interacted with homesteading rights. Then this Part examines three trends that appear in the homesteading context and also in other litigation about marriage and separation. The role of fault, the relationship with privatizing dependency, and the protection of marital privacy are examined in depth for their relevance to the homesteading rights of deserted wives. These three issues are also contextualized with the law of marriage and separation in the rest of America during the same timeframe.

A. Interaction with Other Marital Rules

Although important differences existed between the rights of homesteading wives and the rights of most wives in America, the un-

238. Elizabeth Myette Coughlin & Charles Edward Coughlin, *Convention in Petticoats: The Seneca Falls Declaration of Woman's Rights*, TODAY'S SPEECH, Fall 1973, at 17.

239. U.S. CONST. amend. XIX.

240. *See, e.g.*, Siegel, *Marital Status Law*, *supra* note 19; Siegel, *Home as Work*, *supra* note 19; John, *supra* note 50, at 143–44; Note, *The Domicile of a Wife*, *supra* note 128, at 447 (noting that by 1913 jurisdictions allowed women to sue for divorce in their domicile rather than just in that of their husband).

241. *See generally supra* Part IV (describing the change in homesteading rights over time for deserted wives and noting that the changes concerning women's rights were generally progressive).

derlying assumptions and rules about marriage, separation, and remarriage governed homesteaders as well as the rest of the population. Bigamy statutes, married women's property rights, and husbands' support obligations all interacted with homesteading rights.

Bigamy statutes, which prohibited remarriage during the life of a current spouse, declared as null and void any subsequent marriage entered into while a current spouse—even if separated—was still alive.[242] Although a bigamy statute could easily leave a woman single despite her attempted marriage to an already married man, thus stripping her of any marital property rights, the bigamy prohibition also helped at least some women. One example comes from the case of *Herwig v. Cooper*.[243] Tosha Herwig settled a homestead in New Orleans with her husband, but he deserted Tosha and the homestead before he received patent to the land.[244] Tosha's husband relinquished the homestead at the same time that James Cooper filed to make entry.[245] Tosha filed her own entry within three months of her husband's relinquishment and alleged that the relinquishment sale to James Cooper was illegal.[246] The local land office denied Tosha's claim finding that Tosha had remarried; therefore, she could not benefit from the three-month protected period and had no right as a married woman to homestead.[247] On appeal, the Secretary held that because her second marriage was bigamous—and therefore void—Tosha was able to use the bigamy prohibition to retain her rights as a deserted wife and receive the right to entry on her first husband's homestead.[248]

Laws governing property ownership and spousal support were also highly relevant to the homesteading rights of deserted wives. The historical understanding of marital property starts with understating that husband and wife were considered one person under the law, and that one person was the husband.[249] Elaborate rules about property ownership developed under the common law, in part to protect wives

242. *See generally* 52 AM. JUR. 2D *Marriage* § 57 (2011) ("A person who is already married is incapable of contracting to marry another, and a marriage thus contracted is void." (footnote omitted)).

243. Herwig, 28 Pub. Lands Dec. 482, 482 (1899).

244. *Id.*

245. *Id.*

246. *Id.* at 483.

247. *Id.*

248. *See id.* at 484 ("From all this it sufficiently appears that her marriage to Hays during the lifetime of Herwig, from whom she had not been divorced, was null and void, and consequently, she is yet the legal though deserted wife of Herwig, the head of a family and entitled to make entry on the tract in question by virtue of her settlement thereon at the date of the relinquishment by Herwig.").

249. FRIEDMAN, *supra* note 8, at 146, 322–23; Thomas E. Simmons, *Medicaid as Coverture*, 26 HASTINGS WOMEN'S L.J. 275, 285 (2015).

who, for a time, had no legal rights to own or manage property.[250] During the homesteading period, dower rights, the elective share, and the developing rules of marital property established some property rights for married women.[251] But these protections had little relevance for homesteading settlers because an entryman had no property rights until after receiving patent. Under the homestead laws, the United States passed only a possessory interest in the land until the entryman completed the requirements of the relevant statute and received patent to the land.[252] "The statutory grant was to the settler; but if he was married the donation, when perfected, inured to the benefit of himself and his wife in equal parts."[253] Accordingly, during the proving-up period, a wife held no property rights, accrued no dower rights, and could claim no elective share or marital property rights to the land. Only upon the husband receiving patent to the land did a wife gain any property rights to the homestead.[254] As seen through the cases on relinquishment, this system could incentivize husbands to avoid receiving patent in order to avoid problems of marital property and dower.

Finally, the husband's support obligation intersected with homesteading rights. Under coverture, and extending into the twentieth century, husbands had a duty to support their wives, but wives did not have a reciprocal support obligation. The support obligation of a husband to his wife created a societal interest in keeping marriages intact.[255] To the extent that a deserting husband meant a wife would be on public support, the government was strongly incentivized to prevent desertions, which was done through bigamy prohibitions, civil liability for a wife's necessities, and criminal sanctions for desertion.[256] In the context of homesteading, however, the calculation of risk to society was different. If a husband deserted a wife, a government rule prohibiting her from exercising rights as the head of the household only made her more dependent on the government, not less dependent. The outcome was different (granting women *more* property rights), but the rationale was the same—regardless of whether women were supported through husbands or land ownership, the government did not want to be directly supporting deserted wives. The West, unique in its land resources and unique in its high level of marital desertion, created a unique space where coverture and women's prop-

250. *See* FRIEDMAN, *supra* note 8, at 146.
251. *See id.* at 322.
252. *See, e.g.*, Vance v. Burbank, 101 U.S. 514, 519 (1879) (discussing the Donation Act); WAPLES, *supra* note 12, at 952–53 (describing the title to the homestead at various points of the process).
253. *Vance*, 101 U.S. at 521.
254. *Id.*
255. COTT, *supra* note 16, at 169.
256. *See id.* at 169–70.

erty rights operated differently. When husbands deserted, the government simply gave the "free" land to the deserted wives.

B. The Role of Fault

No rule articulated a fault-based distribution of homesteading rights between spouses, yet the cases show that fault played a role in the allocation of homesteading rights. The confluence of two general legal rules probably led to the focus on fault. First—from the law of homesteading—good faith was required as an element of proving up.[257] Second—from the law of marriage—allocating fault in a failed marriage was critical because "[t]hroughout the United States, the law was dedicated to discouraging separations and divorces and to punishing those responsible."[258] These requirements arose independently out of completely different areas of law—federal versus state and land-grant versus domestic relations—yet the confluence of the good faith requirement in homesteading and the fault analysis in marital relations meant that fault slipped its way into the legal analysis of homesteading rights.

The good faith requirement in the Homesteading Act included, but was not limited to, the following mandates: Settlers were supposed to homestead only for their own purposes, not on behalf of others; speculators were disallowed; and a patent would only be issued if a settler acted in good faith in fulfilling the requirements of the homestead laws. The requirements of residency and improvement were, in large part, about good faith. In fact, the Department of the Interior explained that "[t]he element of good faith [wa]s the essential foundation of all valid claims under the homestead law[s]."[259] The focus on good faith in meeting the requirements of the homesteading laws helps to

257. *See supra* Part II (noting good faith required to obtain patent); *see also* Edward C. Ballew, 8 Pub. Lands Dec. 508 (1889) (reversing the Commissioner's decision that acquisition of title was not in good faith and holding good faith existed at time of entry even though entryman subsequently decided to move his family off of the land after proving up).

258. HARTOG, *supra* note 7, at 63–64; *see also* BRANDT, *supra* note 10, at 25–26, 30–33 (listing bad habits of deserting husbands and deserted wives as a factor to be considered in the cause of marital desertion). "In one sense, therefore, it is always the man's fault [that he deserted]; in another it is always, also, the woman's; in still another, it is the fault of ungentle circumstances. But generally there is a combination of responsibility, with a fairly clear indication of where the burden of it belongs." *Id.* at 39.

259. McGuilvery, 46 Pub. Lands Dec. 492, 492 (1918). The homesteading laws were written with specific requirements in a way that they "provide[d] [their] own evidence of good faith in improvement, cultivation, and residence; if these exist[ed] as facts, the law [wa]s satisfied." Harold Paul, 54 Pub. Lands Dec. 426, 428 (1934). When "things done on the land [we]re sufficient to warrant good faith," the Land Department was required to "infer good faith" on the part of the homesteader. *Id.*

explain why the commissioners of the Land Department and the secretaries of the Department of the Interior were so focused on allocating fault between husbands and wives.

Outside of the homesteading context, fault played a role in the continuing support obligations and distribution of property at marital separation.[260] Fault also played a role in other litigation about husbands and wives, such as cases where a wife sued over her husband's drunkenness and was denied damages because she was negligent in not stepping in to stop his drinking.[261] The governing legal rules and their development as discussed in Parts II and III do not, on their face, take into account fault for marital desertion. However, a closer examination of a number of cases shows how fault appears to frequently be the deciding factor in the outcome of the cases. With few exceptions, the desertion cases decided by the Secretary were with regard to deserting husbands and deserted wives.[262] There are two reasons for this: First, if a wife deserted a homestead and husband, there were no legal implications for the homestead; second, husbands—who had better economic opportunities and greater freedom of movement—were more likely to desert than wives.[263] Of course, just because the husband was the deserter does not mean he was necessarily the marital party at "fault" for the marital breakdown.

The role of fault in the administrative decisions is easiest to identify when the challenge was between two spouses. Consider, for example, the litigation between Frances and Alonzo Gates.[264] After Alonzo made entry on a homestead in Dakota Territory and married Frances, who moved onto the homestead, Alonzo left for three years.[265] Frances alleged her husband deserted her and abandoned the homestead, and she sought to make entry in her own name. The Secretary disagreed, portraying Alonzo as an innocent spouse acting in good faith—Alonzo

260. *See* HARTOG, *supra* note 7, at 160–64 (discussing husband's support obligations and wife's property rights after separation). As the law of divorce continues to move toward a no-fault model, fewer jurisdictions use fault to determine property rights and support obligations. However, fault still plays a role in some support obligations. *See, e.g.*, Fausch v. Fausch, 697 N.W.2d 748, 755 (S.D. 2005) ("The factors for a trial court to consider in exercising its discretion [to award spousal support] . . . include . . . (6) the relative fault of the parties in the termination of the marriage." (quoting Guindon v. Guindon, 256 N.W.2d 894, 898 (S.D. 1977))).

261. John, *supra* note 50, at 155.

262. *But see* Kamanski, 9 Pub. Lands Dec. 186, 186 (1889) (adjudicating case with regard to a deserting wife).

263. COTT, *supra* note 16, at 38 ("Because it was so difficult for women to travel alone safely and find a livelihood in a new place, husbands were the main deserters."); BRANDT, *supra* note 10, at 9 (noting that of 591 records of deserting spouses collected, only seventeen were of wives deserting husbands).

264. Gates, 7 Pub. Lands Dec. 35, 35 (1888); *see supra* section V.A (discussing *Gates* as one of many cases about how residency was determined when the husband and wife resided apart).

265. *Gates*, 7 Pub. Lands Dec. at 35.

had a valid reason for being gone, sent some money during his absence, and even paid for land that Frances owned.[266] The Secretary also portrayed Frances as the guilty spouse in the marital breakdown—Frances "forcibly opposed [Alonzo's] entrance to his own house" upon his return to the homestead and divorced him, depriving her of any rights to challenge his residency.[267] The only legally relevant aspect of "good faith" in this context was the reason for Alonzo's absence, yet the Secretary also portrayed Frances as being at fault for refusing to take back her husband after a three-year absence.[268] In a case only a decade earlier, the Commissioner had taken the opposite approach, noting that for purposes of determining whether the deserted wife could make entry in her own name he did "not deem it essential . . . to inquire what part [the deserted wife] took in the matter of her husband leaving her and the land."[269]

The more common scenario in these cases involved a bad-acting husband and an innocent wife, in part because deserting husbands held more power in the relationship. The most atrocious of bad-acting husbands were those who conspired to sell a homestead relinquishment and desert the wife to assure she would receive no right to the homestead. The administrative decisions are uniform in protecting deserted wives in these instances. Husbands attempting to deny women their statutory property rights were not unique to the homesteading context. Men tried various methods of conveying land to deprive women of the marital interest in land.[270] However, deserting husbands exercised a special kind of power over wives in the context of homestead rights.

Unlike holding fee simple title to real estate during marriage, making entry on a homestead did not guarantee any property rights to an entryman's wife. A homestead, before a patent was issued, was not owned by the husband and was not covered by dower or the developing marital property regimes.[271] Husbands could sell their interest in a homestead without fear of a wife claiming any right to the homestead. Accordingly, until patent was issued, a husband's abandonment or relinquishment was also a wife's abandonment or relinquishment unless

266. *Id.* at 36 ("[Alonzo] sent money home to his said wife during his absence, wrote to her, but received no reply, paid her bill for drugs and medicine, and engaged his friends to look after her.").
267. *Id.* at 38 (citing Bray, 2 Pub. Lands Dec. 78 (1884)).
268. *Id.*
269. *Thompson v. Anderson*, COPP'S LAND OWNER, Nov. 1879, at 125 (setting forth the Commissioner's decision).
270. *See, e.g.*, HARTOG, *supra* note 7, at 21 (recounting an 1884 attempted divorce where the husband conveyed his real property to a family member in order to "cheat" his wife out of her marital interest in the land).
271. Vance v. Burbank, 101 U.S. 514, 514 (1879) ("A wife, or her heirs, gets nothing under [the Donation Act] before her husband or some one for him proves up the claim.").

the wife qualified as deserted.[272] Men obviously understood this principle: if planning to desert a wife, a husband could transfer the homestead right before making final proof to avoid dealing with property claims. And husbands did this.

As just one example, in 1884, Moses and Malvina Tyler took up residence on a homestead in Kansas, but by 1885 the marriage was breaking down.[273] Moses threatened to relinquish the homestead and abandon his wife and two children.[274] Thereafter, Moses tried to sell the relinquishment and improvements on three occasions; the first two Malvina was able to thwart by telling the buyers "'that she intended to stay on the land,'" but on his third attempt Moses was successful.[275] Moses "entered into a conspiracy" to sell the relinquishment rights in order to deprive Malvina of any right of entry she would have as a deserted wife.[276] Despite the husband's attempts to deprive Malvina of her rights by hiding the sale from her until the time period for her to file had expired, the Secretary ultimately allowed Malvina to make entry on the homestead.[277] Facing the question of whether Malvina had made entry in a timely fashion, the Secretary concluded she had, in part because Moses had conspired against her.[278] Similar results—insofar as the wife was allowed to make entry—occurred in almost all the conspiring-husband cases.[279]

Although it was clear that Moses Tyler was conspiring to keep his wife from gaining any property rights,[280] it was not always clear in the cases that a husband had illegally arranged to "sell" his homestead rights by arranging a relinquishment. For example, in *Mary Lewis*, the Secretary never found that the deserting husband colluded with the new filer, but the evidence points in that direction—the husband relinquished on the same day the challenger filed on the property.[281] Even without reciting evidence of any malicious intent on behalf of the husband or the new entryman, and although Mary had no legal rights to the entry previously made, the Secretary canceled

272. *Id.* at 521; Larsen, 1 Pub. Lands Dec. 401 (1882).
273. Tyler, 12 Pub. Lands Dec. 94, 94 (1891).
274. *Id.*
275. *Id.* (quoting the findings of the local land officers).
276. *Id.* at 94–95.
277. *Id.* at 97.
278. *Id.* The time limits imposed on Malvina Tyler came from the May 14, 1880 Act entitled "An act for the relief of settlers on public land." Act of May 14, 1880, ch. 89, 21 Stat. 140. See *supra* section V.D for additional discussion of the time limits for deserted wives to file on homesteads in their own names.
279. *See, e.g.*, Michaelis v. Michaelis, 44 N.W. 1149, 1149–50 (Minn. 1890) ("And this right of the deserted wife the department will respect, and will not permit to be defeated by a fraudulent and collusive relinquishment by the husband, in hostility to her rights.").
280. *Tyler*, 12 Pub. Lands Dec. at 95.
281. Mary Lewis, 3 Pub. Lands Dec. 187, 188 (1884).

the entry of the newcomer and allowed Mary to make entry in her own name.[282] The Secretary mentioned Mary's "good faith" twice in justifying its decision—apparently the determinative factor in a close case, or perhaps just the rationalization the Secretary used to justify the ultimate outcome.[283]

That the administrative decisionmakers frequently helped the "innocent" party gain homesteading rights is not surprising. This is not to say that the decisions giving legal victory to deserted wives were attempts to improve the legal status of women because "even intensely patriarchal judges" would have wanted a marriage regime that was stable and condoned permanence and duties—a marriage regime "that distinguished good husbands from . . . bad husbands."[284] In many of the profiled cases, there was no "innocent" spouse, and in others there was no "guilty" spouse. Many desertions in America were not nefarious, particularly in the time and place of homesteading: "The search for work, for land, for economic survival, split couples apart as they moved across the United States."[285]

Yet the moral statements in the cases—including statements about Moses and Malvina Tyler and Mary Lewis—fit within the larger understanding of acceptable separations in American law. Although the husband was necessarily the head of household, "[t]here were situations [in American society] where separation was the morally right thing to do, where a wife had a moral obligation to separate herself from her erring husband."[286] The Department of the Interior, however, showed a propensity to protect deserted wives when their husbands had done something so reprehensible that the marriage was irreparably damaged. For example, in the 1889 case of *Kamanski v. Riggs*, a husband and wife settled a Nebraska homestead together.[287] After two years, the wife left the homestead, but her "departure was caused by her husband's brutal treatment" and adultery with another woman.[288] After the husband left the county, the wife made home-

282. *Compare id.*, *with* Elliott, 28 Pub. Lands Dec. 143, 145 (1899) (finding deserted wife had no interest in property, in part because "[t]here [wa]s not the slightest evidence of any collusion" between the husband and the later entryman).

283. *Mary Lewis*, 3 Pub. Lands Dec. at 188 ("Her allegations evidencing her good faith are uncontroverted . . . . It is true that Mrs. Lewis has not made entry, but, having evidenced her entire good faith, I think . . . [she] should be permitted [to make entry].").

284. HARTOG, *supra* note 7, at 5.

285. *Id.* at 23.

286. *Id.* at 37; *see also* BRANDT, *supra* note 10, at 31 (explaining—but not justifying—husbandly desertion and noting "some indulgence is ready for the man whose wife was both lazy and extravagant or for the one whose wife was accustomed to 'drink, beg, fight and lie,' even though the men were not much better").

287. Kamanski, 9 Pub. Lands Dec. 186, 186 (1889).

288. *Id.*

stead entry on her own behalf as a deserted wife.[289] A potential entryman made challenge to whether the wife was truly deserted. The facts show that the husband did his best to keep her from receiving the protections of a deserted wife—the husband sent two dollars, and then ten dollars, to the wife in an attempt to show he was supporting her.[290] The wife refused the money, believing it was an attempt to undermine her homestead claim as a deserted wife.[291] In litigation between the wife and the challenger, the Secretary agreed, excusing the wife's initial desertion of the husband because "she was driven away by personal violence" and noting that the "trifling remittances" attempted by the husband were merely an attempt to ruin the wife's homestead claim "rather than an effort to support the claimant and children."[292] The Secretary did not hold back in concluding that:

> As I view the facts and circumstances surrounding this case, it would be merciless and unjust that this woman, who, in virtuous indignation, conscious of her injury and suffering; tortured by the shameful conduct of one who should love and cherish her; her soul embittered and her affections dried up by the libidinous conduct of her husband; deserted and abandoned by him as she is for the unlawful embrace of another, while refusing his proffered cankerous two dollars, should still be held to be supported and maintained by him.[293]

James Himsworth, who raped the fifteen-year-old daughter of his wife Hannah while the couple was residing on their Washington homestead, was a similarly sinister husband.[294] Hannah divorced her husband, which should have terminated any rights she had to his homestead.[295] Although Hannah should have had no protected right to make entry on her ex-husband's homestead as a divorced woman, the Secretary treated her as a deserted wife (though she clearly was not) and allowed her to make entry.[296] These two cases feature the most reprehensible men I found in the Secretary's published opinions, and in both instances, the wife received the right to make entry. But

289. *Id.*
290. *Id.* at 187.
291. *Id.*
292. *Id.* Sending such a small amount of money likely would not have protected a husband from a claim of desertion. Intermittent visits and support did not necessarily end a desertion. *See* BRANDT, *supra* note 10, at 58–60 (discussing the later actions of men who deserted and were still considered deserters despite some contact and support of wives and children).
293. *Kamanski*, 9 Pub. Lands Dec. at 188.
294. Sugden, 22 Pub. Lands Dec. 356, 357 (1896) ("That on the 30th day of September, 1892, that said James Himsworth was in the superior court of Spokane county, State of Washington, convicted of the crime of rape committed upon the fifteen year old daughter of this affiant by a former husband, and was upon said conviction duly sentenced to imprisonment in the penitentiary of the State of Washington, located at Walla Walla, for a period of fifteen years, and is now imprisoned in said penitentiary under said sentence.").
295. *Id.* at 359.
296. *Id.* at 359–60; *see also infra* section VI.C (discussing why a divorced wife could not allege desertion and make entry).

an opposite outcome was to be expected if a woman did not appear innocent.

In one case, a new entryman challenged a deserted wife's claim on the grounds that she was not truly a deserted wife, but instead, "had entered into a collusive scheme with her husband" to gain title.[297] Although the Secretary did not publicly decide whether the husband and wife actually colluded, the Secretary held that the wife was unqualified to make entry for failure to prove actual desertion.[298] It appeared the wife schemed to have her husband leave the homestead because he was not a citizen and could not gain title to the land. Because the Secretary likely believed (but did not officially state) that the couple colluded, the Secretary found that the wife was not deserted and could not make entry. Accordingly, the Secretary barred the couple from proving up the homestead.[299]

Fault was not supposed to determine whether a marital desertion had occurred for purposes of homestead rights. Yet, fault frequently became the determinative factor. A wife had no homestead rights unless deserted, and good faith was required to prove up a homestead. Accordingly, the Secretary frequently discussed the good faith of the spouses in their marital relationship in deciding homesteading rights (even though marital good faith was technically irrelevant to the homesteading rights). The confluence of a good faith requirement in the homesteading laws and the general allocation of fault in dissolving marriages created a subtext of allocation of fault in the deserted wife cases. At times, the guilt or innocence of a spouse led the Secretary to bend the governing legal rules to ensure that an innocent spouse received the homestead rights. The intersection of fault between marriage law and land-grant law shows the special confluence of these two areas—land rights were tied up in marital law and assumptions about how married men and women should interact. At the same time, using fault determinations allowed the Land Department to give homesteading rights to deserted wives without it appearing as an act of illegitimate redistribution. The use of fault in determining rights can be understood as a corrective action—the government put the wife back into the position where she would have been absent the misconduct of the husband.

C. Privatizing Dependency

During the profiled timeframe, a husband's desertion of a wife and children was considered a social ill in most of America.[300] In part this

297. Porter, 5 Pub. Lands Dec. 42, 42 (1886).
298. *Id.* at 43.
299. *Id.*
300. *See, e.g.*, WILLIAM H. BALDWIN, FAMILY DESERTION AND NON-SUPPORT LAW 5 (1904) (explaining purpose of collecting and studying state laws was to come up

was because, during the nineteenth century, "marriage was considered a 'necessity'" for much of society and desertions led to the breakdown of marriages.[301] More important even than the protection of marriage was societal concern about public support for deserted wives and children.[302] Husbands were expected, and required by law, to support their wives and children.[303] A focus on the support obligations of a husband is relevant in two ways. First, the hallmark in determining whether there was a desertion tended to be based on a husband's intent to provide continuing support. Second, desertion in the homesteading context was unique because a deserting husband could leave a wife in a *better* economic position.

During the homesteading period, husbands and wives frequently lived apart.[304] Not every instance of living apart qualified as a marital desertion, and the Department of the Interior had to decide on a case-by-case basis whether a husband had deserted a wife and abandoned his homestead. Most often, the determinative factor was whether the absent husband either provided support in his absence or intended to do so after his return. A husband absent for a month could be a deserting husband if he sent no support,[305] but a husband absent for six years was not necessarily a deserting husband so long as he provided support on his return.[306] Sending money during an absence could

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with a solution to problems arising from "family desertion and non-support of family" in Washington, D.C.); BRANDT, *supra* note 10, at 8–9 (discussing the contributions made by groups in various communities in order to study and potentially fix the social problem of deserting husbands).

301. Schwartzberg, *supra* note 16, at 299.

302. *See, e.g.*, BALDWIN, *supra* note 300, at 10 ("Where the family has means of support the absence of the husband is not a matter for public concern . . . . It is where the family applies . . . for assistance . . . [that desertion] becomes a subject of interest to the public."); BRANDT, *supra* note 10, at 11 (arguing that the "public has no concern" with deserting husbands so long as "the absence of the head of the family does not mean destitution"); *see also* FRIEDMAN, *supra* note 8, at 149–54 (discussing, generally, poor laws and social welfare from the American Revolution to the middle of the nineteenth century). Notably, American policymakers also used the enforcement of support obligations to assimilate immigrants into American culture—by "making immigrant working-class men conform to American standards for marriage and the domestic environment"—in the early twentieth century. COTT, *supra* note 16, at 169.

303. BALDWIN, *supra* note 300, at 59–132 (surveying the laws regulating marital support in the states and territories). A husband's failure to provide that support was seen as a "disregard of social obligations." BRANDT, *supra* note 10, at 61; *see also* COTT, *supra* note 16, at 169 ("The laws requiring husbands' support . . . had consequences in . . . marital roles" and "[t]he frequency of men's desertion of their wives and families became a public issue, as charitable societies addressed themselves to the needs of poor mothers and children.").

304. HARTOG, *supra* note 7, at 20.

305. *See, e.g.*, Pawley, 15 Pub. Lands Dec. 596, 596 (1892).

306. *See, e.g.*, Thrasher, 8 Pub. Lands Dec. 626, 628–29 (1889). The evidence of intent to continue support was the husband "convey[ing] to his wife all his interest in the [homestead], and his subsequently joining her in a deed" transferring the

guarantee a husband was not considered a deserter.[307] However, sending financial support did not guarantee a husband would be considered a non-deserter. One husband sent a total of twelve dollars during his absence, but the Secretary found it was sent in bad faith only so he could preserve his homestead right and that the wife had been deserted regardless of the meager financial support.[308] However, a husband unable to provide any support—for example, if imprisoned—was considered a deserter even though an absence from a homestead due to imprisonment was generally excused for residency purposes.[309]

While desertion by a husband was generally considered a social ill to be avoided because a wife might need public support, in the context of homesteading a deserted wife could very well be better off financially after the desertion. The trajectory of the decisions involving deserted wives can be read as attempting to counteract the social problems caused by deserting husbands and, thus, caused by marriage. Once a husband had deserted his wife and homestead, if the law considered his abandonment her abandonment,[310] his wife was left with few economic opportunities. But homesteading in her own name gave a deserted wife the chance to be economically independent.[311] During the homesteading period, settler women faced different economic opportunities than most American women. Women living in the American West engaged in various economic activities, including traditional "women's work" like teaching, sewing, cooking, and keeping chickens for eggs. Female homesteaders who did not do their own farming still used homesteads for financial support, for example, by

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land to a third party. *Id.* at 629. These acts subsequent to his six-year absence and return "seem to indicate good faith, and to show that he had not intended leaving his family without making provision for their maintenance and support." *Id.*

307. *See, e.g.*, Gates, 7 Pub. Lands Dec. 35, 35 (1888).

308. Kamanski, 9 Pub. Lands Dec. 186, 187 (1889).

309. *See, e.g.*, Crosby, 21 Pub. Lands Dec. 152, 153 (1895). In *Crosby v. Thompson*, the Department of the Interior stated: "It is very clear that Thompson has deserted both his wife and the land." *Id.* The facts of desertion were that "the husband made entry of the land, and did some work thereon; but he appears soon after to have been charged with the crime of larceny, was shot by the sheriff, and left the State, his whereabouts not being certainly known, not even by his wife." *Id.*

310. This was the initial rule governing the homesteading rights of deserted wives. *See supra* section V.B (citing Vance v. Burbank, 101 U.S. 514, 521 (1879) and Larsen, 1 Pub. Lands Dec. 401, 403 (1882)).

311. LINDGREN, *supra* note 14, at 73 (contrasting the inability of married women to gain title to public lands against the ability of single and deserted women to gain title to such lands); *see also* Karen V. Hansen, *Land Taking at Spirit Lake: The Competing and Converging Logics of Norwegian and Dakota Women, 1900–1930*, *in* NORWEGIAN AMERICAN WOMEN: MIGRATION, COMMUNITIES, AND IDENTITIES 207, 215 (Betty A. Bergland & Lori Ann Lahlum eds., 2011) ("Women homesteaded for a range of reasons, but all sought the economic foothold that landowning provided.").

renting the farmland.[312] Accordingly, a tension developed whereby administrative decisions had to "end" a marriage by declaring a desertion in order to provide support for a deserted wife.

Without homesteading rights, it was difficult for a deserted wife to support herself. Married women were unable to contract, making economic activity exceedingly difficult.[313] Women who had been deserted but were still married continued to suffer from the disabilities associated with marriage but did not have the benefit of a present husband to provide support. Across America, deserted wives were left to find work or seek public assistance.[314] Divorce brought the right to alimony and support. Widowhood brought the right to dower or the elective share and the right to continued residence in the family home.[315] Both death and divorce allowed remarriage. Desertion, however, placed women in a "legal netherworld" where they suffered the disabilities of marriage without any of the support benefits.[316]

Navigating this "legal netherworld" was not easy anywhere in America. In the settled parts of America, particularly the eastern cities, deserted wives tended to seek employment if possible, and public support if not.[317] In order to provide for themselves and their children, "women took in washing or went out to do day's work, or they did sewing at home, or kept boarders, or, rarely, found work in a shop or factory."[318] Having the dual responsibilities of raising children and earning wages tended to keep women, whether married or deserted, from leaving home for work.[319] In the American West, where the primary resource was land, a deserted wife would have been particularly vulnerable if homesteading rights were unavailable. One goal of the homesteading laws was to "provide families with homes upon the public lands," and the policy of allowing a deserted wife to retain possession and make entry after a husband deserted furthered that goal.[320]

Thus, a deserted wife could provide economic support for herself through homesteading, but—because of the structure of the homesteading laws—that right required a government declaration that she was deserted. If a wife was not considered deserted—and thus was

312. *See* LINDGREN, *supra* note 14.
313. Margaret J. Chriss, Note, *Troubling Degrees of Authority: The Continuing Pursuit of Unequal Marital Roles*, 12 LAW & INEQ. 225, 228 (1993) (noting that under coverture "[m]arried women also lost the right to contract and to sue").
314. BRANDT, *supra* note 10, at 45–48 (discussing how deserted wives economically survived immediately after desertion).
315. The homestead right, in this instance, means the right for a widow to continue living in the marital residence. *See supra* note 23.
316. HARTOG, *supra* note 7, at 29.
317. BRANDT, *supra* note 10, at 45–47.
318. *Id.* at 46.
319. *Id.* at 34 (dealing with married women still cohabitating with husbands); *id.* at 46 (dealing with deserted wives).
320. Michaelis v. Michaelis, 44 N.W. 1149, 1149 (Minn. 1890).

prohibited from filing on the homestead—the right to prove up would eventually expire and she would lose any interest in the land, including the value of her improvements. The homestead belonged to the government until proven up,[321] and denying a wife the right to prove up could turn her from an economically independent woman to an impoverished ward of the state. Theoretically, deserted wives were entitled to support from their husbands.[322] In reality, however, courts were limited in their ability to collect that support obligation from a husband, particularly before a divorce was granted.[323] From the government's perspective, then, allowing a deserted wife to homestead and obtain patent to land could provide support for her and obviate the need for government support or government intervention to force support from the deserting husband.

Because deserted wives could homestead—and thus come to own land in their own names—desertion did not raise the same concern of public dependency in the homesteading context as it did in the rest of America. Ariela Dubler argues that marriage—historically and today—has been used as a tool to reduce female poverty.[324] Yet, for deserted wives, it was their marriages that ensured poverty, and it was the end of their marriages that allowed them to obtain land and potential economic self-sufficiency. Desertion was still a social ill, but it was easier to remedy the negative effects in the West. The homesteading laws provided public support for deserted wives in a way that went against the general policy of protecting marriage but also worked toward the important public policy of keeping deserted wives and children off public support.

D. Protecting Marital Privacy

The law—in various ways—protects marriages from outside intervention. In the context of the homesteading rights of deserted wives, marital privacy was implicated in a number of ways. The main protection for marital privacy came from limiting who could allege desertion. However, the entire system of allowing deserted wives to allege desertion and make entry led to litigation between husbands and wives, bringing private marital affairs into the public sphere. The early prohibition on deserted wives claiming a husband's homestead—in effect from 1875 until 1877—was justified on the grounds that allowing a deserted wife to make such a claim would interfere with the marital

321. WAPLES, *supra* note 12, at 925.

322. COTT, *supra* note 16, at 170.

323. *Id.*; *see also* BALDWIN, *supra* note 300, at 13–15 (discussing various ways states tried to collect support from deserting husbands, including civil actions—ineffective because few deserters had land or property to seize—and criminal actions).

324. Dubler, *supra* note 18, at 1644–45.

relationship.[325] This is the exact type of rule that could be expected under the marital privacy protections of the time, yet that rule only lasted for two years.

The doctrine of marital privacy, born from coverture, has long protected intact marriages from outside interference, either from the courts or from private individuals.[326] During the period relevant to this Article, "[f]or most purposes, a husband acted as a husband within a private sphere, without need to explain or justify his conduct by public standards,"[327] and states courts "were hesitant to depart from the public policy expectation that marriage should be protected whenever possible."[328] But once the husband failed at an obligation—whether the husband failed to offer adequate support or exhibited "conjugal unkindness"[329] or excessive drunkenness[330]—the courts would become involved in the marriage, and the husband "became vulnerable to the discretionary judgments of public officials, including judges."[331] And once the legal system was involved, a husband, who generally represented his wife in residency, legal action, and contract, could lose that right of representation.[332]

Congress, in an effort to ensure good-faith compliance with the homestead laws, allowed individual citizens to contest the homesteading rights of others. Earning the right to make entry on the land as a reward for securing the cancellation of another's entry incentivized individuals to contest.[333] Once a contest was filed, evidence was collected, a hearing was held, and a right to appeal attached.[334] This system, of course, lead to public interventions into the private affairs of any challenged homesteaders—including married couples. In the

325. *Mrs. Keziah Card*, *supra* note 97, at 51 (setting forth the Commissioner's holding that deserted wives could not challenge a husband's entry because allowing such challenge would be "in violation of the fundamental principles governing the relation of husband and wife").

326. For a short discussion of how the meaning of marital privacy has changed over time in America, see Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1132–35 (2002).

327. HARTOG, *supra* note 7, at 164.

328. John, *supra* note 50, at 158.

329. HARTOG, *supra* note 7, at 164.

330. John, *supra* note 50, at 142.

331. HARTOG, *supra* note 7, at 164; *see also* Hartog, *supra* note 83, at 226 ("From an early time before the creation of the United States, local governments had intruded whenever a husband refused to support wife and children on the theory that he was thereby making his dependents into public charges.").

332. HARTOG, *supra* note 7, at 164.

333. *See* Pierce, *supra* note 25, at 283 (citing Act of May 14, 1880, ch. 89, § 2, 21 Stat. 140, 141; Act of Mar. 3, 1891, ch. 561, § 2, 26 Stat. 1095, 1096). The right to make entry did not last forever. If a contestant was successful, he or she received a thirty-day period in which his or her right to make entry was given preference over any other potential entryman. *Id.*

334. *Id.* at 284.

early years of the homesteading laws, a challenger might allege that a married homesteader deserted his wife and abandoned the homestead. This strategy made sense when a husband's abandonment was considered a wife's abandonment and the homestead was available for reentry by a new settler.[335] But, in the landmark case of *Bray v. Colby*, the Department of the Interior declared that only the wife of a homesteader could allege his desertion.[336] This rule, widely applied in later cases,[337] protected the rights of husbands and wives and protected marriage as an institution. Because only a wife could allege the desertion of her husband, any outside potential challenger was prohibited from alleging the dissolution of a marriage. In this way, the homestead laws worked in tandem with state laws to protect the integrity of the marital unit.

The rule from *Bray v. Colby*—that only a wife could allege the desertion of her former husband[338]—was also interpreted to prohibit a divorced wife from alleging her former husband had abandoned the homestead during or after the marriage.[339] A divorce turned a married woman into a "*feme sole*," and once divorced "her rights as contestant [to her husband's claim] must rest upon the same ground as that of any other contestant, and can not be either enlarged or abridged by reason of her former marital relation."[340] Accordingly, the law prohibited an ex-wife from alleging the homestead abandonment of her ex-husband.[341] Instead of divorcing and claiming a homestead as a divorced woman, a woman might have wanted to assert her rights as a deserted wife because that would have given her the opportunity to claim her husband's homestead. While divorced women could homestead, they had no right to their former husbands' claims and had to make entry on a pice of land like any other homesteader. In addition, an ex-wife could not allege the abandonment of an ex-husband; however, the Department of the Interior failed to strictly follow this rule. In the litigation between Hannah Sugden and James Himsworth—the couple in Washington where incestuous rape sent James to the peni-

335. *See* Vance v. Burbank, 101 U.S. 514, 521 (1879) (laying out rule that the husband's "acts affecting the claim are her acts. His abandonment, her abandonment. His neglect, her neglect").

336. Bray, 2 Pub. Lands Dec. 78, 81 (1884).

337. *See, e.g.*, Crosby, 21 Pub. Lands Dec. 152, 153 (1895) ("[N]o one but his wife shall be heard to allege the desertion in proof of his change of residence or abandonment during the period of seven years from date of the entry, provided that [the wife] maintains a residence on the land." (citing *Bray*, 2 Pub. Lands Dec. at 81 (1884))).

338. *Bray*, 2 Pub. Lands Dec. at 81.

339. Gates, 7 Pub. Lands Dec. 35, 38 (1888).

340. *Id.*

341. *Id.*

tentiary and Hannah filed for divorce[342]—the Secretary allowed Hannah to cancel her ex-husband's entry and make entry on the homestead under her own name. Rightfully, her claim should have failed because she could not legally allege her ex-husband's desertion.[343] The Secretary, clearly wanting to help Hannah obtain homesteading rights, declared that Hannah "may be regarded as a deserted wife" and allowed her to allege the desertion of her ex-husband.[344] The administrative maneuvering here shows how much of a legal netherworld existed for deserted wives. Women could manipulate the legal system to gain property rights when land-grant or marital property laws would not otherwise grant them property rights. Plus, the underlying goal of coverture—supporting women in a time when they could not financially support themselves—encouraged federal administrators to stretch the law in order to grant women *more* property rights. In Hannah's case, the Secretary moved her from the legal status of divorced (where she had no claim to the land) to the legal status of deserted (where she did have a claim to the land) in order to guarantee her support.

Although outsiders to the marriage were not allowed to allege desertion, marital privacy was not completely protected. *Bray v. Colby* prevented an outsider from alleging desertion, but if a wife alleged desertion, an outsider was allowed to intervene and argue desertion had not occurred.[345] Once a non-desertion was alleged, a wife would end up litigating the facts of her marriage against a third-party settler wanting to make entry on the homestead. In addition, deserted wives initiated claims against their husbands, and the Department of the Interior adjudicated those marital disputes in a public forum, frequently publishing details of the marital relationship. A number of the cases cited in this Article involved husbands and wives litigating against each other, both claiming the right to the same homestead. The 1914 Act that liberalized the rights of deserted wives was passed in part to decrease this litigation between spouses. As the Secretary explained: "The intent of the act was to excuse the wife from necessity of waging a contest against her husband and enabling her to make final proof and get patent direct without expense and delay of a contest."[346]

342. *See supra* section VI.B (discussing facts of the case in depth and discussing the case in the context of allocating fault).

343. *See Gates*, 7 Pub. Lands Dec. at 38.

344. Sugden, 22 Pub. Lands Dec. 356, 359 (1896).

345. Bray, 2 Pub. Lands Dec. 78, 81–82 (1884); *see also, e.g.*, Porter, 5 Pub. Lands Dec. 42, 42–43 (1886) (adjudicating case between a deserted wife and a third party who alleged wife was not deserted and was merely colluding with husband to subvert the citizenship requirements).

346. Jennie P. Musser, 44 Pub. Lands Dec. 494, 495 (1915).

VII. CONCLUSION

Deserted wives existed in a "legal netherworld"—suffering the limitations of marriage without the benefits of support.[347] Deserted wives residing on their husbands' homesteads faced even starker challenges because the homestead belonged to the federal government unless and until the husband or wife proved up.[348] Accordingly, a deserted wife had to take action to preserve her home; inaction in the face of desertion would lead to dispossession of her land and home. These deserted wives sought not only financial security but also household stability.[349]

During the homesteading period, marriage was generally viewed as a permanent relationship, and separation was a way for wives to gain some legal rights while remaining married. In some contexts, being merely separated—as opposed to divorcing—may have been a way for women to continue performing their traditional wifely role of exchanging submissive obedience for the benefits of marriage.[350] But with marital desertion—a type of marital separation—in the homesteading context, a deserted wife was not acting submissively. In fact, by taking legal action, a deserted wife gained the legal benefit of the homestead right. To protect her own legal rights, a deserted wife had to actively take steps to allege the desertion of her husband, and often she had to litigate against her own husband or a third party to protect those rights. The ideal outcome of a wife alleging desertion by her husband was for that wife to gain, in her own name, the legal rights to land her husband had previously settled. Separations with homesteaders, then, neither supported traditional gender roles nor showed the submissiveness of American wives. Although divorce could be seen as a form of liberation for a wife, in the homesteading context divorce took away a woman's rights to the marital homestead. While a divorced woman could make entry on a homestead as a *feme sole*, she could neither assert her husband's abandonment of the homestead nor prove up the marital homestead.[351] This led to the odd incidence where desertion was better than divorce in terms of property rights.

Deserted wives asserting homesteading rights are unique in American law—unique compared to other deserted or separated wives in America and unique compared to other male or female homesteaders. The administrative law cases about deserted wives show a number of tensions and observations that are unique to this particular litigation: differences between land-grant laws and marital relation laws; unique

347. HARTOG, *supra* note 7, at 29.
348. WAPLES, *supra* note 12, at 925.
349. *See* John, *supra* note 50, at 166 ("The early temperance effort was motivated by wives principally attempting to stabilize their households.").
350. Schwartzberg, *supra* note 16, at 295 (discussing HARTOG, *supra* note 7).
351. Massie, 28 Pub. Lands Dec. 406, 407 (1899).

conceptualizations of the marital relationship; the interactions and overlaps between state and federal law; and how homesteading laws perhaps provided support to women who no longer had a husband for support. Common to all of these cases was that deserted wives were willing to publicly litigate—either against third parties or even their own husbands—to claim real property as their own.