

# RESPONSE

## Go West, Young Woman! The Mercer Girls and Legal Historiography

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In the mid-1860s, Washington Territory’s entrepreneurial Asa Shinn Mercer endeavored to bring hundreds of young women from the East Coast to the tiny frontier town of Seattle as prospective brides for men who had settled there as fishermen, fur traders, and miners. The much-mythologized “Mercer Girls” story was a natural fit for the romantic-comedy genre, and was most famously memorialized in the 1954 musical film *Seven Brides for Seven Brothers* and the television sitcom series of the late 1960s *Here Come the Brides*. A few popular histories have been written about the Mercer Girls, but until now their experiences have received little serious attention as a subject of legal or historical significance.

Professor Kerry Abrams’s article *The Hidden Dimension of Nineteenth-Century Immigration Law* has changed that. Likely to the surprise of immigration law scholars, Abrams frames her account of Asa Mercer’s venture as a story about immigration law history. In so doing, she offers us a capacious conception of immigration law’s form and function—one that contemplates the many ways that federal, state, and territorial law was used in the nineteenth century to encourage the production of a particular kind of citizenry.<sup>1</sup> By reconstructing the Mercer Girls’ westward migration as a story about immigration law, Abrams acknowledges that she risks anachronism: it is not clear that easterners who moved to the western territories in

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1. Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1356 (2009).

the nineteenth century, such as the Mercer Girls, understood themselves as “immigrants” in the sense that term is used today.<sup>2</sup> Nevertheless, Abrams’s approach sheds important light on the historical record, enabling her to usefully connect ostensibly unrelated strands of the law’s operation on the nineteenth-century American “frontier.” It is those insights that I focus on in this Response.

The primary goal of this Response is to locate *The Hidden Dimension* within American legal historiography, and particularly that branch of American legal historiography traceable to the work of Willard Hurst. American legal historians need no introduction to Hurst’s intellectual legacy. But I hazard a guess that many readers of *The Hidden Dimension*—a significant number of whom will come to Abrams’s article from the field of immigration or citizenship law—will lack such background. What is to be gained from such a reading? There is certainly no imperative that modern legal scholars writing in any field continually pay homage to Hurst.<sup>3</sup> Indeed, it is a welcome sign that, in certain respects, the field of legal history has moved beyond many of the concerns that animated Hurst’s important work, or has come to see them in a different light. Nevertheless, reading *The Hidden Dimension* in light of Hurst’s intellectual legacy is instructive. Hurst and Abrams both analyze the law’s operation on the same sociolegal terrain—the nineteenth-century “American frontier”—and wrestle with many of the same fundamental questions about law’s relationship to society.

However, Abrams has produced an account of the Mercer Girls story that is most un-Hurstian in a fundamental respect. Hurst is often identified with the Cold War-era consensus school—a group of scholars who, in varying degrees, predicated their study of American history on the existence of a shared national vision and purpose.<sup>4</sup> By recounting the tale of the Mercer Girls as a story about immigration and nation building, Abrams denaturalizes such assumptions. Instead, she uncovers a microhistory that speaks volumes regarding

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2. *Id.* at 1362.

3. Hurst is possibly the most celebrated American legal historian, living or dead, if judged purely by the number of law review volumes and articles dedicated to his work. For law review volumes, see *Law & Society in American History: Essays in Honor of J. Willard Hurst*, 10 L. & SOC’Y REV. 5 (1975); *Tributes to James Willard Hurst*, 1997 WIS. L. REV. 1123; *Engaging Willard Hurst: A Symposium*, 18 LAW & HIST. REV. 1 (2000). The freestanding articles written specifically about or in response to Hurst’s scholarship are too numerous to list. The University of Wisconsin Law School, where Hurst was a law professor for his entire academic career, maintains a list of such articles on its website. See University of Wisconsin Law School, Works about J. Willard Hurst, [http://www.law.wisc.edu/ils/works\\_about\\_hurst.htm](http://www.law.wisc.edu/ils/works_about_hurst.htm) (last visited May 4, 2010).

4. See discussion accompanying *infra* notes 12 - 18.

the law's role in constituting a white, Christian American citizenry in the West—one that included white women as subordinated but fundamental participants in that nation-building project. Seen in this light, the Mercer Girls story that Abrams excavates is not only a chapter in immigration law history; it is also a part of the history of law's colonizing function in the American West.

#### I. "INTO A SPACE BEYOND THE BOUNDS OF CIVILIZATION"

Willard Hurst's famed monograph, *Law and the Conditions of Freedom in the Nineteenth-Century United States*, famously opens with the story of Jason Lothrop and the Pike River Claimants' Union. Lothrop was a settler in Wisconsin Territory in 1836, just after Wisconsin became a territory but several years before the federal government's Land Office surveyed the territory for orderly allocation. Hurst tells us that Lothrop "set up on a stump a rude press of his own construction and with ink which he had made himself printed a handbill setting forth the record of the organizational meeting of 'The Pike River Claimants Union . . . for the attainment and security of titles to claims on Government lands.'"<sup>5</sup> In that document, members of the union purportedly declared themselves to be "well meaning inhabitants" of the territory who had "advance[d] into a space beyond the bounds of civilization," and who now had a shared interest in "regulating the manner of making and sustaining claims" on the lands they occupied. They further declared their interest in protecting their homes and property from "unprincipled and avarice men," and to that end "solemnly pledg[ed] ourselves to render each other our mutual assistance in the protection of our just rights."<sup>6</sup>

For Hurst, the Pike River Claimants' Union's constitution, and the circumstances of its production, "reflect[ed] in miniature" important aspects of the operation of law in nineteenth-century America. One of the central tenets of the Hurstian approach was that, in the hands of men like Lothrop, the law was not a force of regulatory oppression, as many of his Cold War-era contemporaries contended. Responding to the "myth of the Golden Age" of the nineteenth century, in which "our ancestors" made do without elaborate regulatory regimes, Hurst explained that "legal regulation [or] compulsion" was a fundamental part of nineteenth-century society. In a now-famous sentence, Hurst declared the importance of law to socioeconomic

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5. JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 3 (1956).

6. *Id.* at 4.

development in the nineteenth century: “Not the jealous limitation of the power of the state, but the release of individual creative energy was the dominant value.”<sup>7</sup> Men like Lothrop *used* law to their material advantage, and it was that instrumental function of law that captivated Hurst’s critical attention.

Abandoning the doctrinal, court-focused nature of early twentieth-century legal historiography, Hurst radically expanded legal historians’ institutional focus. “[T]here is more danger,” he observed, “that we shall exaggerate than that we shall underestimate, the place of the courts in United States legal history.”<sup>8</sup> He insisted that the study of legal history should instead encompass “lawmakers” in all branches of government—legislative, executive, and judicial. Hurst was also interested in understanding the law “as it had meaning for workaday people and was shaped by them to their wants and vision.”<sup>9</sup> This led him to stretch well beyond legal sources generated by official legal institutions to include documents like the constitution of the Pike River Claimants’ Union.

In short, Hurst advocated, and developed a program for, the sociological study of law in all of its manifestations—federal and local, legislative and administrative, in-the-books and on-the-street. Thanks to Hurst, legal history came to be viewed as central to the understanding of American history more generally.<sup>10</sup> As Aviam Soifer and others rightly insist, “[O]ur basic approach to legal history still builds on the background theory initially sketched and then realized by Hurst.”<sup>11</sup> Whether consciously or not, Abrams writes legal history in an intellectual world at least partly crafted by Hurst.

But not completely so. There has been considerable debate concerning whether Hurst was part of the consensus school of American history—a group of midcentury historians credited with perpetuating the notion that American society was united by values and norms widely shared among the population.<sup>12</sup> One need not

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7. *Id.* at 7.

8. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 86 (1950).

9. HURST, *supra* note 5, at 5.

10. For example, in the first footnote to her important 1986 book *Women and the Law of Property in Early America*, Marylynn Salmon—writing from an appointment in a history department—noted that “the move to study law and social forces together began, of course, under the direction of Willard Hurst at the University of Wisconsin Law School.” MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* 195 n.1 (1986).

11. Aviam Soifer, *Reflections on the 40th Anniversary of Hurst’s Growth of American Law*, 17 *LAW & SOC. INQUIRY* 167, 172 (1992).

12. The question of whether Hurst was a consensus historian has generated considerable debate. Compare Mark Tushnet, *Lumber and the Legal Process*, 1972 *WIS. L. REV.* 114, 118 (discussing Hurst as a consensus historian), and Carl Landauer, *Social Science on a Lawyer’s*

resolve this debate to recognize that, at the very least on the level of rhetoric and style, Hurst's writing is characterized by his curious and, today, distracting use of the pronouns "we" and "our": "[W]e had no hesitancy in making affirmative use of law."<sup>13</sup> "We were concerned with protecting private property chiefly for what it could do."<sup>14</sup> "Our prime inheritance was a middle-class way of thinking."<sup>15</sup> "We were a people going places in a hurry. Men in that frame of mind are not likely to be thinking only of the condition of their breaks."<sup>16</sup> As the last quotation suggests, Hurst's legal subjects—those "workaday people" who harnessed law's potential in maximizing "material productivity"—were generally men. More precisely, they were white men operating to a considerable degree in the condition of freedom.

As Barbara Welke and others have observed, the conditions of "unfreedom" that were the lived reality of the law for many early nineteenth-century "workaday people"—especially women and people of color—were not central to Hurst's project.<sup>17</sup> Women, African Americans, Native Americans, and Asian Americans play extremely minor roles in his historiographical legal drama.<sup>18</sup> On the one hand, this is hardly surprising given that Hurst's formative intellectual years were spent in a legal academic culture dominated by white men, many of whom were preoccupied with the New Deal and the economic disaster that precipitated it.<sup>19</sup> On the other hand, the seismic sociolegal contests and transformations that occurred over the course

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*Bookshelf: Willard Hurst's Law and the Conditions of Freedom in the Nineteenth-Century United States*, 18 LAW & HIST. REV. 59, 67 (2000) ("Hurst writes not to illuminate class, racial, gender, or other conflict but to depict a shared culture."), with William Novak, *Law, Capitalism, and the Liberal State: The Historical Sociology of James Willard Hurst*, 18 LAW & HIST. REV. 97, 109 (2000) ("When Hurst talked about shared values and institutions, he was not talking about the absence of conscious and willed contest and struggle . . ."), and Soifer, *supra* note 11, at 168 (challenging the characterization of Hurst as a consensus historian and urging instead that "Hurst tells a tale of dissensus"). My goal in this Response is not to resolve this debate. It is sufficient for present purposes to recognize the strands of consensus-school rhetoric and reasoning that are present in Hurst's work.

13. HURST, *supra* note 5, at 7.

14. *Id.* at 24.

15. *Id.* at 7.

16. *Id.* at 9.

17. Barbara Y. Welke, *Willard Hurst and the Archipelago of American Legal Historiography*, *Archipelago*, 18 LAW & HIST. REV. 197, 201 (2000); Mary Frances Berry, *New Directions for the Children of Hurst*, 18 LAW & HIST. REV. 177, 178-80 (2000).

18. This is not to suggest that Hurst completely ignored such concerns. Nevertheless, Hurst did go so far as to suggest that women's legal rights, as well as the rights of slaves and freedmen, were marginal to the central operation of law in the nineteenth century. See Hurst, *supra* note 5, at 29, 97. For a similar observation, see Stephen Diamond, *Legal Realism and Historical Method: J. Willard Hurst and American Legal History*, 77 MICH. L. REV. 784, 786 (1978).

19. Welke, *supra* note 17, at 199-200.

of Hurst's very productive legal academic career included, most prominently, the civil rights movement and the women's rights movement. By the 1970s, while Hurst was still actively writing, the culture in the academy was rapidly changing. Writing about the "frontier" as a world of "unclaimed natural abundance" that men like Jason Lothrop harnessed using law's entrepreneurial potential was already dated and suspect.

## II. "BRING A SUITABLE WIFE"

Abrams also writes about the law's operation in the nineteenth-century American West. And, writing in an intellectual tradition shaped not in small part by Hurst, she tells a story that illuminates the sometimes invisible ways that law shapes and is shaped by social and ideological norms. She mines a historical record that would make Hurst proud, dominated as it is by territorial, state, and federal legislative reports, newspaper articles, letters, diary entries, and contracts. (Judicial opinions constitute a relatively small portion of Abrams's evidence.) She, like Hurst, is sensitive to the law's long shadow, and the myriad ways that law's power—both regulatory and rhetorical—is captured in "workaday" documents.

If there is one document that reflects in miniature the role of law in Abrams's account of the Mercer Girls story it is Asa Mercer's 1864 contract with an unknown number of men in Seattle:

I, Asa Mercer, of Seattle, Washington Territory, hereby agree to bring a suitable wife, of good moral character and reputation from the East to Seattle on or before September 1865, for each of the parties whose signatures are hereunto attached, they first paying me or my agent the sum of three hundred dollars, with which to pay the passage of said ladies from the East and to compensate me for my trouble.<sup>20</sup>

Like the founding document of the Pike River Claimants' Union, Mercer's contract with the brideless men of Seattle serves as a lens into the ways that nineteenth-century Americans attempted to harness law's power in an effort to "realize their creative energy."<sup>21</sup> And, like Lothrop's handpress-printed constitution of the Claimants' Union, Mercer's contract for the delivery of marriageable women "from the East to Seattle" is part of a larger project of legal settlement: the use of law to "civilize" the frontier. Finally, like Lothrop's constitution, which memorialized the vigilante intentions of a group of settler-squatters operating at the margin of lawfulness, Mercer's contract-for-

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20. Clarence B. Bagley, "The Mercer Immigration:" *Two Cargoes of Maidens for the Sound Country*, 5 OR. HIST. SOC'Y Q. 1, 23-24 (1904) (quoted in Abrams, *supra* note 1, at 1367).

21. HURST, *supra* note 5, at 6.

wives also pushed the boundaries of contemporary legal norms. While Abrams carefully notes that the trafficking of women would not become a subject of criminal proscription for several decades, there was certainly some concern that the Mercer Girls were being transported to Seattle for less-than-respectable purposes.<sup>22</sup>

Although Hurst and Abrams both focus on early nineteenth-century legal entrepreneurs who made “affirmative use of law” to create a “new kind of society,” their subjects and their projects part company in significant ways. Lothrop and the workaday people who were the focus of Hurst’s attention were white men bent on using law to exploit natural resources for profit. Mercer was certainly interested in maximizing his individual wealth and material well-being through opportunistic use of law, but his project capitalized on a set of social imperatives and legal regulations that occupied little of Hurst’s attention: the sociolegal regulation of women. Hurst considered in passing married women’s property acts, women’s suffrage, and the laws regulating women’s working conditions,<sup>23</sup> but women’s lived experience of the law would not figure prominently in the work of historians until the 1970s and 1980s. Working largely from academic appointments in history departments, historians—including Linda Kerber, Nancy Cott, Marylynn Salmon, Joan Hoff Wilson, and Norma Basch—brought much needed attention to the legal status of women in American history.<sup>24</sup> Legal historians writing from appointments in law schools soon joined in, and mainstream law reviews slowly began publishing articles that focused on the various ways that the law had

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22. Abrams, *supra* note 1, at 1379.

23. See, e.g., HURST, *supra* note 5, at 14, 24, 30; HURST, *supra* note 8, at 186, 238, 255, 358. This is not to suggest, however, that Hurst was uninterested in the history of the legal regulation of women and women’s rights. In the mid-1960s, he supervised a LLM thesis on the married women’s property acts. See Kay Ellen Thurman, *The Married Women’s Property Acts* (1966) (unpublished LLM Thesis, Univ. of Wisc. School of Law).

24. See, e.g., Linda K. Kerber, *The Republican Mother-Women and the Enlightenment: An American Perspective*, 28 AM. Q. 1987 (1976); Nancy F. Cott, *Divorce and the Changing Status of Women in Eighteenth-Century Massachusetts*, 33 WM. & MARY Q. 586 (1976); Norma Basch, *Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America*, 5 FEMINIST STUD. 346 (1979); Joan Hoff Wilson, *The Legal Status of Women in the Late Nineteenth and Early Twentieth Centuries*, 6 HUM. RTS. 125 (1977); Marylynn Salmon, *The Legal Status of Women in Early America: A Reappraisal*, 1 LAW & HIST. REV. 129 (1983). This list is illustrative, not exhaustive. Certainly historians were writing about law’s role in shaping women’s lives before the 1970s, but not with regularity and not always in published form. For example, Elizabeth Warbasse’s widely cited pathbreaking PhD dissertation at Radcliffe College, *The Changing Legal Rights of Married Women 1800-1861* (Radcliffe, 1960), remained unpublished until 1987, when it was published in its original typescript format after having become an “underground classic.” ELIZABETH BOWLES WARBASSE, *THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN, 1800-1861*, np (1987).

regulated women's lives.<sup>25</sup> By the late 1990s, "the woman question" had become "the gender question" and had animated an extremely fruitful line of legal historical inquiry.<sup>26</sup>

What this enormous body of scholarship has revealed is not just that legal historians of earlier generations missed out on an important dimension of the sociological operation of law in nineteenth-century America. It has also revealed that a full account of the law's role in the boom of material growth and productivity of the nineteenth century—that aspect of laws' regulatory force and potential that captured Hurst's attention—cannot be rendered without understanding the sociolegal construction of gender. In this regard, recent scholarship—including John Witt on nineteenth-century developments in tort law and workmen's compensation, Barbara Welke on gender and railroad regulation, Amy Dru Stanley on the marriage contract and contract law more generally, and Reva Siegel on married women's claims to their own earnings—has demonstrated the various ways that the sociolegal construction of gender and family was not separate from, but rather was integral to, nineteenth-century America's explosive political and economic development.<sup>27</sup>

Abrams's account of the Mercer Girls story continues in that tradition, demonstrating in concrete ways that the laws and policies governing the interstate (and state-to-territory) movement of persons, marriage, and marital property were shaped by a perceived need for white women's civilizing influence in the West. Drawing together

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25. See, e.g., Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994) [hereinafter "Siegel, *Home as Work*"]; Carolyn C. Jones, *Dollars and Selves: Women's Tax Criticism and Resistance in the 1870s*, 1994 U. ILL. L. REV. 265; Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374, 381-412 (1993); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L.J. 775 (1992); Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983).

26. See, e.g., Michael Grossberg, *Institutionalizing Masculinity: The Law as a Masculine Profession*, in MEANINGS FOR MANHOOD: CONSTRUCTIONS OF MASCULINITY IN VICTORIAN AMERICA (Carnes & Griffin, eds., 1990); Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999); Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957 (2000); Rogers M. Smith, "One United People": *Second-Class Female Citizenship and the American Quest for Community*, 1 YALE J.L. & HUMAN. 229 (1989). Again, this list is illustrative, not exhaustive.

27. See JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* (2004); BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865-1920* (2001); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998); Siegel, *Home as Work*, *supra* note 25.

seemingly unrelated episodes, Abrams shows how Mercer's entrepreneurial effort to bring white women to Seattle was part of a larger sociolegal trend. For example, the federal government promoted the settlement of white women through two significant mid-nineteenth-century land-donation statutes, the Donation Land Act and the Homestead Act.<sup>28</sup> State and territorial woman suffrage laws, as well as acts proscribing certain forms of sex discrimination, were enacted at least in part to induce white women to move west.<sup>29</sup> In other words, at least a small portion of the "conditions of freedom" that had been granted to white men in the early nineteenth century became part of white women's bundle of rights in the West, at least in certain states and territories.<sup>30</sup>

Abrams's account of the various ways that the law was used to encourage migration to the West is completely consistent with Hurst's insistence that there was nothing "lawless" about the American frontier in the nineteenth century.<sup>31</sup> Indeed, Abrams's emphasis on "the productive role of law" could be drawn straight from a volume penned by Hurst, except that Abrams is concerned not with the law's role facilitating material production but, rather, its role facilitating the production and reproduction of a particular kind of citizenry. In this regard, the adjective "white" in the foregoing paragraph deserves emphasis. Not all women were given access (albeit limited) to government allocations of property and suffrage, and not all women were targeted as future wives, mothers, and teachers. Abrams properly focuses on the law's role as a tool to encourage *white* women's westward migration and, in so doing, illuminates the important role of race in the immigration story she tells. As Abrams makes very clear, Mercer's entrepreneurial motivations were racially preconditioned. Mercer responded to, and capitalized on, the fear among white settlers that white men in Seattle were marrying Native American women, becoming "Kloutchman lovers."<sup>32</sup>

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28. Abrams, *supra* note 1, at 1404-05 (discussing the Oregon Donation Act and the Homestead Act, both of which required land claimants to be "white").

29. Abrams, *supra* note 1, 1406-07.

30. Let there be no confusion here—Abrams makes very clear that the careful regulation and limitation of married women's rights through coverture were alive and well in the West, and that the default common-law regime was one of the conditions that made the Mercer Girls venture possible. Precisely because the Mercer Girls were understood as "wives"—wives whose husbands would be legally liable for their support and for the support of their offspring—they need not be excluded through the then standard means of immigrant exclusion. *See id.* at 1390-91.

31. HURST, *supra* note 5, at 4.

32. Abrams, *supra* note 1, at 1363, 1391, 1401, 1409-11.

Lest one think the story of race in the Mercer Girls story is a tale of how the law of contract could be harnessed to further the ends of private racial bias and preference, Abrams's account quickly dispels any such misunderstanding by weaving the Mercer Girls story into a larger historical narrative concerning the western territories' quests for statehood. In order to qualify for statehood, a territory had to demonstrate that its inhabitants were predisposed toward "the principles of democracy as exemplified in the American form of government."<sup>33</sup> That official policy promoted the proliferation of statutes banning interracial marriage,<sup>34</sup> while also setting the stage for Asa Mercer's travels east to Massachusetts to recruit white women for his westward migration. As with gender, race was not marginal to the story of nineteenth-century development of the American West. Rather, it was part of the fabric of law that permeated the kinds of social and economic enterprises that were the focus of Hurst's work—a point that has been thoroughly illustrated over the last several decades by legal historians writing about the experiences of nonwhites in America.<sup>35</sup>

As the foregoing account shows, gender and race are intertwined in Abrams's sociolegal history of the Mercer Girls, and they are intertwined in ways that lead us back to Abrams's central organizing themes: immigration and how law was used to create a "nation by design."<sup>36</sup> In this respect, *The Hidden Dimension* is part of a body of scholarship focused on the legal history of immigration and citizenship in the United States that began to take shape in the 1950s and 1960s, and the much more recent body of historiography that focuses on the law's particular role in shaping women's claims to citizenship. Historians have been keenly interested in immigration and citizenship for many decades,<sup>37</sup> but in the late 1980s the relatively

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33. Northwest Territory Ordinance of 1787, art. V, in Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (1789) (cited in Abrams, *supra* note 1, at 1401 n.241).

34. Abrams, *supra* note 1, at 1411-12 (noting that "in all cases but Oregon, an anti-miscegenation law was passed within three years of obtaining territorial status, often in conjunction with the territory's organic act").

35. See Berry, *supra* note 17, at 178 (noting that the problem is not simply that Hurst overlooked slavery, but that "Hurst could not validly ignore the impact of slavery as an economic institution in an analysis of any aspect of the antebellum economy"). Two very recent examples of such scholarship are LEA VANDERVELDE, *MRS. DRED SCOTT: A LIFE ON SLAVERY'S FRONTIER* (2009); LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (2005).

36. Abrams, *supra* note 1, at 1357 (quoting ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* (2006)).

37. See, e.g., OSCAR HANDLIN, *BOSTON'S IMMIGRANTS, 1790-1865: A STUDY IN ACCULTURATION* (1941); OSCAR HANDLIN, *THE NEWCOMERS: NEGROES AND PUERTO RICANS IN A*

young field of women's history consciously embraced citizenship as an important focus. In 1989, a star-studded cast of historians convened at a roundtable discussion to consider new directions for the study of gender as a historical phenomenon. In their remarks, both Linda Kerber and Nancy Cott noted the importance of the concept of citizenship as a framework—legal and rhetorical—through which men and women negotiated their relationships with the state in the eighteenth and nineteenth centuries.<sup>38</sup> Soon after that roundtable, Kerber and Cott each produced important articles and books illuminating the paradoxes of women's citizenship, and the central role of marriage to the production of “the people.”<sup>39</sup> In the same period, scholars from different disciplines—including, but by no means limited to, Candice Bredbenner, Mae Ngai, Rogers Smith, and Martha Gardner—made clear that women's experience as both tools for, and as participants in, the creation of a particular kind of American polity deserved far more attention than it had received from earlier generations of historians.<sup>40</sup>

What all of these works have illuminated, and what *The Hidden Dimension* further reveals at the level of microhistory, is that there may indeed have been a “we” that spanned the temporal arc from the nineteenth-century America of which Hurst wrote to mid-twentieth-century America during which Hurst wrote. However, the “we” that shared a common understanding of sociolegal norms and values was not an *a priori* natural or social collective that existed separate from law's ordering principles, as Hurst seemed to intimate. Rather, Hurst's “we” was itself a product of the law in both its

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CHANGING METROPOLIS (1959); JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 (1955).

38. Linda K. Kerber, et al., *Forum: Beyond Roles, Beyond Spheres: Thinking About Gender in the Early Republic* 46 WM. & MARY Q. 456 (1989) (forum discussion featuring Linda K. Kerber, Nancy F. Cott, Robert Gross, Lynn Hunt, Carol Smith-Rosenberg, Christine M. Stansell).

39. NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 5 (2000); LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP (1998); Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 AM. HIST. REV. 1440 (1998); Linda K. Kerber, *The Paradox of Women's Citizenship in the Early Republic: The Case of Martin v. Massachusetts, 1805*, 97 AM. HIST. REV. 349 (1992).

40. CANDICE LEWIS BREDBENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP (1998); MARTHA GARDNER: THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP, 1870-1965 (2005); MAE NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004); ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship through Marriage*, 53 UCLA L. REV. 405 (2005). I have also considered some of these issues. See Kristin A. Collins, Note, *When Fathers' Rights Were Mothers' Duties: The Failure of Equal Protection in Miller v. Albright*, 109 YALE L.J. 1669 (2000).

entrepreneurial and its regulatory forms. It was a “we” crafted through law’s various manifestations—violent, coercive, and rhetorical—from the halls of Congress, the Massachusetts state house, and the territorial assembly of Washington, to the extemporaneous constitutions of associations (like the Pike River Claimants’ Union) and the private agreement between Asa Mercer and the brideless men of Seattle. That “we” also engaged in other activities—lawful and at least nominally unlawful—intended to shape the population of the western states and territories by relocating, exploiting, and exterminating existing populations and by importing nonwhites to serve as laborers and prostitutes.

Viewed from this perspective, one can see that by retelling the story of the Mercer Girls as a tale about immigration and immigration law, Abrams also reveals it to be a story about continental expansion and the colonization of the American West.<sup>41</sup> This dual valence of the Mercer Girls venture was cheerfully captured in an 1865 *New York Times* headline: “Female Emigration: Women Colonizing the Far West.”<sup>42</sup> This is the stuff of romantic comedy, to be sure. But there is also a tragic storyline that winds through Abrams’s account of the Mercer Girls. *The Hidden Dimension* is chock-full of evidence of the law’s colonial aspirations and operations in the nineteenth-century American West—the ways in which the law was used to bring vast geographical spaces inhabited by nonwhite others under the control of the United States government, and to create a racialized sociolegal hierarchy among the different groups residing there.<sup>43</sup> Thus, the federal government privileged whites in the allocation of enormous

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41. An enormous body of legal scholarship focuses on law and colonialism. See, e.g., Sally Engle Merry, *Law and Colonialism*, 25 LAW & SOC’Y REV. 889 (1991) (reviewing several books excavating the role of law in colonial regimes). Much of the original law and colonialism scholarship focused on colonialism in Africa, the Middle East and Asia. See Jeffrey R. Dudas, *Law at the American Frontier*, 29 LAW & SOC. INQUIRY 859, 861 (2004) (reviewing Douglas C. Harris, FISH, LAW, & COLONIALISM: THE LEGAL CAPTURE OF SALMON IN BRITISH COLUMBIA (2001)). A more recent wave of law and colonialism scholarship recognizes the history of North American settlement and westward expansion as fundamentally a colonial enterprise. See Christopher Tomlins, *The Many Legalities of Colonization: A Manifesto of Destiny for Early American Legal History*, in THE MANY LEGALITIES OF EARLY AMERICA 1 (Tomlins & Mann, eds., 2001); Dudas, *supra*; Christopher Tomlins, *American Legal History in Retrospect and Prospect: Reflections on the Twenty-fifth Anniversary of Morton Horwitz’s Transformation of American Law*, 28 LAW & SOC. INQUIRY 1135 (2003); Christopher Tomlins, *The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century*, 26 LAW & SOC. INQUIRY 315 (2001).

42. N.Y. TIMES, Sept. 30, 1865, at 8 (cited in Abrams, *supra* note 1, at 1360 n.18).

43. There is no single description of law’s role in colonial regimes. However, most law and colonialism scholarship is intent on demonstrating, at base, that law was a means by which “European colonizers exerted control over Native peoples and their resources.” See Dudas, *supra* note 41, at 862.

quantities of land for settlement.<sup>44</sup> Interracial marriage was simply banned in many jurisdictions.<sup>45</sup> Elsewhere, intestacy law was used to invalidate, or at least limit the legal significance of, marriages between whites and nonwhites by cutting off the inheritance rights of children of such unions.<sup>46</sup> The law was used to require cultural and, to a certain extent, religious homogeneity within the new territories and states. New Mexico's statehood was conditioned on the banning of Catholic-controlled public schools and the use of English as the language of instruction. Similarly, Utah's statehood was conditioned on the outlawing of polygamy.<sup>47</sup> In short, the project of colonization was effected through laws that organized the distribution of land to privilege white settlers, endowed white settlers with disproportionate governing power (while also requiring cultural-religious homogeneity), and relegated nonwhites to a second-class status, or far worse.

Of course, it was not just the instrumental operation of the law in the western territories that implicated law in a colonial project. Legal historians and anthropologists who have focused on law's operation in colonial settings, including North America, have rightly noted that colonial law not only allocated property and privilege in a race-based manner and mandated cultural and linguistic conformity; law also helped constitute relations between and among different groups living in colonial societies.<sup>48</sup> Anglo-American legal rules and discourse simultaneously authorized and gave meaning to particular, hierarchical relations between and among whites and nonwhites—and men and women—in the nineteenth-century American West.<sup>49</sup> The resulting colonial legal consciousness provided the circumstances under which men like Mercer and Lothrop could and would harness the law's power in an effort to further the expansionist process for private gain. Mercer and Lothrop used phrases like “a space beyond the bounds of civilization” and “bring a suitable wife” in legal (or quasilegal) documents with the expectation that their import was readily apparent to other participants in the colonial project,

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44. Abrams, *supra* note 1, at 1403.

45. *Id.* at 1412.

46. *Id.*

47. *Id.* at 1402.

48. This point is made repeatedly in the law and colonialism literature, and with far greater nuance than can be accomplished in this short Response. See, e.g., Merry, *supra* note 41, at 892; John L. Comaroff, *Colonialism, Culture, and the Law: A Foreword*, 26 L. & SOC. INQUIRY 305, 309 (2001); Dudas, *supra* note 41, at 864.

49. I focus here on the role of law in North American westward expansion because that is Abrams's focus, but the same can be—and has been—said of the role of law in the colonization of the eastern seaboard in the seventeenth and eighteenth centuries. See Tomlins, *The Legal Cartography of Colonization*, *supra* note 41.

including, of course, the Mercer Girls themselves.<sup>50</sup> In this regard, Abrams builds on and contributes to a robust body of legal historiography that has revealed the “we” of Hurst’s frontier as at least in part the product of law’s colonizing force.

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50. I am by no means the first to observe the intonations of colonialism in the constitution of the Lathrop’s Pike River Claimants’ Union. See Tomlins, *American Legal History*, *supra* note 41, at 1143; Tomlins, *The Many Legalities*, *supra* note 41, at 7-8, 15-17. Notably, at least some of the women who took part in Mercer’s westward migration recorded their approval of the voyage as part of an expansionist project. See Abrams, *supra* note 1, at 1399.