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Appearance Discrimination, Title VII, and the BFOQ: A Cross-Circuit Analysis of Sexually Discriminatory Appearance Policies

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I. Introduction

Darlene Jespersen was a bartender at a Harrah's casino in Reno, Nevada for twenty years before she was abruptly fired in 2000. She had worked her way up the ranks, starting out as a dishwasher in 1979 before becoming a barback and finally a bartender in the casino's sports bar.[1] By all accounts, she was an outstanding employee. Not only did she receive high marks from her supervisors, but customers consistently applauded her positive attitude and excellent service in employee feedback forms.[2]

All that changed in 2000, when Harrah's began enforcing its new "Personal Best" program of grooming and appearance policies. Although both men and women were required to wear the same uniform (black pants, white shirt, black vest, and black bow tie), the company applied sex-differentiated standards for hair, nails, and makeup. Specifically, women were required to wear their hair "teased, curled, or styled" every day and apply "face powder, blush, and mascara" as well as lip color.[3] In addition, female employees had to meet with "Personal Best Image Facilitators" who would ensure that their makeup was applied appropriately.[4] Men, meanwhile, were prohibited from wearing makeup or nail polish and had to cut their hair short.

Jespersen took issue with the makeup requirement because wearing makeup made her feel "very degraded and very demeaned."[5] She had tried wearing makeup back in the 1980s but stopped after only a few weeks because she felt so uncomfortable. At the time, Harrah's did not formally require female

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1: Nicole Anzuoni, *Gender Non-Conformists Under Title VII: A Confusing Jurisprudence in Need of Legislative Remedy*, 3 Geo. J. Gender & L. 871, 873 (2001).

2: *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1077-79 (9th Cir. 2004).

3: *Id.* at 1077. See Appendix B for Harrah's complete "Personal Best" policy.

4: *Id.* at 1078.

5: *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1108 (9th Cir. 2006) (en banc).

beverage servers to wear makeup, although doing so was highly encouraged. Given that bartenders often have to deal with disruptive and intoxicated customers, Jespersen felt that looking like a sex object "took away [her] credibility as an individual and as a person" and interfered with her ability to do her job effectively.[6] When she refused to comply with the new "Personal Best" policy, Harrah's issued Jespersen an ultimatum: apply for a position that did not require wearing makeup within thirty days, or be fired. She chose not to apply for a new job and was terminated at the end of the period.

Outraged, Jespersen sought administrative relief through the Equal Employment Opportunity Commission before filing a lawsuit against Harrah's on the grounds that its makeup requirement amounted to sex discrimination and violated Title VII of the 1964 Civil Rights Act. The case made its way to the Ninth Circuit Court of Appeals, which affirmed the district court's decision in favor of Harrah's.[7] According to the Circuit Court, Jespersen failed to demonstrate either that the makeup policy imposed an unequal burden on women, or that the policy was motivated by offensive sex stereotypes.

A remarkably similar turn of events transpired in 2005. The plaintiff, Brenna Lewis, alleged that she was fired from her job as a hotel front desk worker because she failed to conform to sex stereotypes. Much like Jespersen, Lewis received favorable reviews from her manager and customers, but Director of Operations Barbara Cullinan thought she was not a "good fit" for the front desk because she lacked the "Midwestern girl look."[8] Lewis admitted that her appearance was "slightly more masculine" in that she preferred to wear loose fitting clothing and avoided makeup.[9] The job description in Heartland's personnel manual did not mention appearance as a requirement for the position, but Cullinan nonetheless thought that being "pretty" was essential for women working the front desk.[10]

After observing Lewis on the job, Cullinan ordered Lewis's supervisor to put her back on the overnight shift. Heartland then informed its general managers that all applicants for the front desk position would have to complete a second interview. Lewis heard from her manager that Cullinan disapproved of her appearance, and she protested that other employees in the same position had not been required to undergo a second interview to keep their jobs. In a tense meeting with Cullinan, Lewis questioned whether

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6: *Jespersen*, 392 F.3d at 1077.
7: *Jespersen*, 444 F.3d at 1106.
8: *Lewis v. Heartland Inns of America, L.L.C.*, 591 F.3d 1033, 1036 (8th Circ. 2010).
9: *Id.*
10: *Id.*

the second interview was lawful and criticized the company's new policies. She was fired three days later, despite never having received any customer complaints or disciplinary action from Heartland.[11]

In her lawsuit against Heartland, Lewis chose not challenge the company's official dress code, which mandated similar standards of professional dress for both men and women. Rather, she argued that Heartland "enforced a *de facto* requirement that a female employee conform to gender stereotypes" in order to work the prime daytime shift.[12] The case was decided in favor of Heartland at the district level, but the Eighth Circuit Court of Appeals reversed and remanded their decision in favor of Lewis. A jury later awarded her both compensatory and punitive damages because of her retaliation claim against Heartland.[13]

At first glance, the two cases seem nearly indistinguishable. Much like Darlene Jespersen, Brenna Lewis was fired essentially for not wearing makeup. Also like Jespersen, Lewis was a well-liked and respected employee. Although Heartland's appearance code was not as strict as Harrah's, both Lewis and Jespersen preferred to adopt a more masculine look by avoiding makeup in their professional and private lives. The biggest difference between the two cases, however, is their outcomes. Lewis won a relative victory when the district court's decision was reversed and remanded, but Jespersen lost her appeal. Why did the Eighth and Ninth Circuits rule differently on such similar cases? This study will examine what the cross-circuit split between the Eighth and Ninth Circuits reveals about the limitations of Title VII to combat appearance discrimination in the workplace.

Part of the confusion surrounding appearance discrimination litigation stems from the controversial manner in which *sex* was included in Title VII of the 1964 Civil Rights Act.[14] In earlier drafts of the bill, Title VII was intended to ban employment discrimination only on the basis of race, color, religion, and national origin, not sex. Southern Democrats, who opposed civil rights legislation, hoped to weaken the bill by adding superfluous amendments that would make it cumbersome to enforce and difficult to pass. Thus, when Representative Howard Smith of Virginia, a conservative Democrat, suggested adding "sex" to the list of prohibited forms of discrimination, the proposal was met with laughter.[15] Two days after the debate over the gender

11: *Id.* at 1037.

12: *Id.*

13: *Lewis v. Heartland Inns of America, L.L.C.*, 764 F. Supp. 2d 1037, 1039 (2011).

14: See Appendix A for excerpts from relevant sections of 42 USCS § 2000e-2 ("Title VII").

15: Cynthia Deitch, *Gender, Race, and Class Politics and the Inclusion of Women in Title VII*, 7 Gender & Soc'y 183, 186 (1993).

amendment, the bill nonetheless passed in the House, and the new provision was largely overshadowed by the historic civil rights victory that the rest of the bill represented. In this way, Joan Hoff argues that, "the word *sex* was added to the 1964 Civil Rights Act more by accident than by design, and there is every indication that Congress did not act with full knowledge of what it was doing."[16]

Because "sex" was included in the bill largely as a joke rather than in response to popular demand, federal judges have struggled to determine the legislative intent behind Title VII's gender discrimination provision. In the absence of a statutory definition of "sex" in the Act itself, courts have been forced interpret the bill's "because of … sex" language on their own.[17] At the very least, federal courts have agreed that Title VII was intended to provide economic opportunity for women, but the problem of defining sexually discriminatory employment practices has proven much more complex.[18] How courts choose to construe this simple phrase has serious implications for women and men alike because Title VII has become the legal basis for the vast majority of gender discrimination policy in the United States.[19]

Price Waterhouse v. Hopkins[20] dealt with precisely this problem. Ann Hopkins was a senior manager at Price Waterhouse, a professional accounting firm, when she was recommended for partnership in 1982. As part of the nomination process, current partners were asked to submit written comments about each candidate. Although Hopkins was generally perceived as extremely qualified, several partners complained that she was overly aggressive and lacked interpersonal skills. One partner described her as "macho", while another suggested that she should "take a course at charm school."[21] These negative opinions about her personality ultimately doomed her bid for partnership, and Price Waterhouse decided to put her application on hold for a year. Hopkins was told that in order to improve her chances of making

16: Joan Hoff, *Law, Gender, and Injustice: a Legal History of U.S. Women* at 233 (New York 1994).

17: Anzuoni, 3 Geo. J. Gender & L. at 881 (cited in note 1). See also Appendix A.

18: As Elizabeth Malcolm writes, "In the absence of Supreme Court guidance, circuit courts have developed multiple, often conflicting tests to determine whether an employer runs afoul of Title VII when it imposes different appearance requirements upon male and female employees," such as the mutability doctrine, offensive stereotype analysis, and the unequal burdens test. Elizabeth Malcolm, '*Looking and Feeling Your Best': A Comprehensive Approach to Groom and Dress Policies Under Title VII*, 46 San Diego L. Rev. 506 (2009).

19: Deitch, 7 Gender & Soc'y at 183 (cited in note 15).

20: 490 U.S. 228 (1989).

21: *Id.* at 235.

partner, she should learn to "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry."[22] When the partners failed to nominate her the following year, Hopkins resigned and sued Price Waterhouse for sex discrimination under Title VII, believing that the firm's evaluations of her had been marred by sex stereotypes.

Although *Price Waterhouse* is widely recognized as the case that established a Supreme Court precedent for sex stereotyping, much of the Court's plurality, concurring, and dissenting opinions actually focused on the semantics of Title VII's "because of… sex" language and the respective burdens of proof that defendants and plaintiffs are required to provide in mixed-motive suits. Most of the justices agreed with the D.C. Circuit's conclusion that Hopkins was a victim of sex-stereotyping; they disagreed only about what standards employers should be held to when employees demonstrate that sex discrimination may have played a role in an adverse employment action.[23] In his plurality opinion, Justice Brennan argued that the words "because of" do not mean "solely because of," and therefore "Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations."[24] In other words, even if an employer had some legitimate reasons for making an employment decision that would negatively impact an employee, if sex discrimination was a significant factor in that decision, then the employer is in violation of Title VII.

By contrast, Justice Kennedy's dissenting opinion advocated a much narrower interpretation of Title VII. He believed that the Act's "because of" language could be understood only in the context of a "'but-for' standard of causation."[25] According to Kennedy, "Congress could not have chosen a clearer way to indicate that proof of liability under Title VII requires a showing that race, color, religion, sex or national origin caused the decision at issue."[26] The mere presence of impermissible motives, such as sex stereotyping, is not enough to prove that an employer has sexually discriminated against an employee. Rather, by this line of thinking, Title VII was intended to ban only

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22: *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.C. Cir. 1985).

23: Justices Marshall, Blackmun, and Stevens joined Justice Brennan's plurality opinion, while Justices White and O'Connor wrote their own concurring opinions. All agreed that the circuit court had incorrectly ruled that defendants must be held to a "clear and convincing" standard of proof. Instead, defendants need only meet the less stringent "preponderance of evidence" standard, which is traditionally applied in civil cases. See *Price Waterhouse*, 490 U.S. at 252-53; *Id*. at 260 (White, J., concurring); and *Id.* at 261 (O'Connor, J., concurring).

24: *Id.* at 241.

25: *Id*. at 281.

26: *Id.* at 281-82.

those employment decisions that result directly from discrimination.

The Supreme Court's internal debate over the precise meaning of Title VII still bears significance for sex discrimination cases today. As this study will demonstrate, the Eight and Ninth Circuits' divergent understandings of *Price Waterhouse* account in large part for the contradictory outcomes of *Jespersen v. Harrah's* and *Lewis v. Heartland*. In the majority opinion for *Jespersen*, the Ninth Circuit claimed that *Price Waterhouse* did not apply because Harrah's makeup requirement was not based on sex stereotyping. The Eighth Circuit, however, argued that Lewis's situation was analogous to Hopkins's in *Price Waterhouse*.

Further complicating matters is the question of whether sex-differentiated grooming and appearance codes fall under *Price Waterhouse*'s definition of sex stereotyping. As Joel Friedman observes, "Cases like *Jespersen* remind us that employers readily have imposed a wide range of appearance, behavior, and dress standards on their employees, many of which derive directly from traditional conceptions of how men and women should appear, dress, and behave."[27] Indeed, Courts have generally allowed companies to apply different grooming rules to men and women, arguing that Title VII protects "equality of employment opportunities" rather than absolving employees' responsibility to adhere to "generally accepted community standards."[28] Yet these "community standards" become particularly problematic for certain groups, such as women of color, because they often reflect white ideals of beauty. For example, many grooming codes specify that employees cannot wear their hair in braids, dreadlocks, or cornrows–hairstyles that are relatively common among African American women.[29] Some dress codes, particularly those that require women to wear high heels, even pose health hazards over the long-term.[30] Thus, despite court rulings against employer requirements for women to be thin or wear provocative uniforms that invite sexual harassment, further reforms are necessary.[31]

Another important aspect of Title VII relevant to both *Jespersen* and *Lewis* is the bona fide occupational qualification (BFOQ). Section 703(e)(1) grants employers the ability to discriminate, "in those certain instances where religion, sex, or national origin is a *bona fide occupational qualification*

27: Joel Friedman, *Gender Nonconformity and the Unfulfilled Promise of* Price Waterhouse v. Hopkins, 14 Duke J. Gender L. & Pol'y 205, 217 (2007).

28: Deborah Rhode, *The Beauty Bias: the Injustice of Appearance in Life and Law* at 120 (Oxford 2010).

29: Angela Onwuachi-Willig, *Another Hair Piece,* 98 Geo. L.J. 1079, 1080 (2010).

30: Marc Linder, *Smart Women, Stupid Shoes, and Cynical Employers*, 22 J. Corp. L. 295 (1996).

31: Rhode, *The Beauty Bias* at 120 (cited in note 28).

reasonably necessary to the normal operation of that particular business or enterprise."[32] At first, it was unclear whether this loophole would prove so large as to render sex discrimination litigation meaningless.[33] Congress created the Equal Employment Opportunity Commission (EEOC) specifically to enforce Title VII, but sex discrimination claims were not seriously considered for over a decade. According to EEOC guidelines, the bona fide occupational qualification (BFOQ) is usually limited to occupations like modeling and acting, in which physical attributes are considered essential to job performance and authenticity. In practice, however, "a heavy burden of persuasion is placed on the individual litigant to overturn a BFOQ exception claimed by an employer."[34] Therefore, although federal courts significantly narrowed acceptable uses of the BFOQ defense by the 1980s, serious inequalities endure today.[35]

In light of *Jespersen* and *Lewis*'s contradictory rulings, this study analyzes the cross-circuit split between the Eighth and Ninth Circuits in order to determine Title VII's capacity to fight appearance discrimination in the workplace. In Part II, I outline the existing literature on appearance discrimination, Title VII, and the BFOQ. I then provide a brief description of my methodology in Part III, followed by a cross-circuit analysis of the *Jespersen* and *Lewis* opinions in Part IV. Finally, in Part V, I explore the implications of this study for appearance discrimination litigation, discuss the need for greater guidance from the Supreme Court and Congress, and suggest avenues for further research.

32: Quoted by Susan Gluck Mezey, *In Pursuit of Equality: Women, Public Policy, and the Federal Courts* at 43 (St. Martin's 1992) (emphasis added).

33: Hoff, *Law, Gender, and Injustice* at 484 (cited in note 16).

34: *Id.*

35: Mezey, *In Pursuit of Equality* at 51 (cited in note 32). See also Rachel Cantor, *Consumer Preferences for Sex and Title VII*, 1999 U. Chi. Legal F. 493 (1999) and Katie Manley, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 Duke J. Gender L. & Pol'y 169 (2009), for history of the BFOQ defense. For example, in *Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971), the court ruled that sex was not a BFOQ for flight attendants because "the primary function of an airline is to transport passengers safely from one point to another," and women's supposedly unique talent for reassuring nervous passengers was not "reasonably necessary to the normal operation" of an airline.

II. Literature Review

Considerable debate exists among legal scholars about the BFOQ as it relates to sex-dependent dress and grooming codes.[36] While some identify appearance discrimination as the final frontier of gender oppression, others insist that it is either unrealistic or unnecessary to outlaw such discrimination. This discussion has become particularly heated in the wake of *Jespersen v. Harrah's Operating Co.*, in which the Ninth Circuit Court of Appeals ruled in favor of Harrah's that female employees could be fired for not wearing makeup in compliance with the company's grooming code.[37] The case attracted national attention because it appeared to undermine the ability of employees to challenge sexually stereotypical appearance codes mandated by their employers. Despite intense scrutiny of the Ninth Circuit's decision, there has been little research since then regarding either the impact of *Jespersen* on subsequent appearance discrimination cases, or how such cases are decided differently across circuits. My study will attempt to fill this gap in the existing scholarship.

Legal scholars have examined many aspects of Title VII's sex discrimination provision, from its impact on protective laws to its role in the shift towards gender equality under the law. Protective legislation is based on the theory of essential difference between the sexes, and it assumes that women should not be held to the same standards or face the same risks as men on the job. Susan Mezey argues that Title VII effectively doomed state protective labor laws once the Equal Employment Opportunity Commission decided that Title VII superseded such laws.[38] Leslie Goldstein agrees, adding that this shift away from protective legislation was part of the broader egalitarian women's

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36: See Jennifer Levi, *Some Modest Proposals for Challenging Established Dress Code Jurisprudence,* 14 Duke J. Gender L. & Pol'y 243 (2007); Michael Selmi, *The Many Faces of Darlene Jespersen*, 14 Duke J. Gender L. & Pol'y 467 (2007); Patrick Shin, *Vive la Difference—A Critical Analysis of the Justification of Sex-Defendant Workplace Restrictions on Dress and Grooming*, 14 Duke J. Gender L. & Pol'y 491 (2007); Avery, *The Great American Makeover: the Sexing up and Dumbing Down of Women's Work After* Jespersen v. Harrah's Operating Company, Inc, 42 USF L. Rev. 299 (2007); and Ann McGinley, *Babes & Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes*, 14 Duke J. Gender L. & Pol'y 257 (2007). For a cross-circuit analysis of grooming and appearance policies under Title VII, see Malcolm, 46 San Diego L. Rev. at 506 (cited in note 18).

37: *Jespersen*, 444 F.3d 1104.

38: Mezey, *In Pursuit of Equality* at 45 (cited in note 32).

movement of the 1970s.[39] After the tide turned in favor of egalitarianism, scholars like Catherine MacKinnon and Deborah Rhode articulated two alternative paths to legal equality for women: one that emphasizes sameness with men, and another that emphasizes difference.[40] Patricia Cain, however, suggests that equality itself is a social construct, and that utopian ideals of sexual neutrality under the law are unrealistic.[41]

Other scholars have questioned whether the BFOQ is even necessary today. Katie Manley's 2009 study compares successful and unsuccessful uses of the BFOQ defense and highlights inconsistencies in recent court rulings. Ultimately, she argues that although the BFOQ is theoretically problematic, it remains an essential part of Title VII.[42] Rachel Cantor applies economic analysis to the BFOQ, arguing that, "Despite a presumption in the law against permitting BFOQ defenses based on consumer preferences, courts applying the 'essence of the business' test often rule in favor of such defenses."[43] In this way, a restaurant chain like Hooters can avoid charges of sex discrimination by demonstrating that attractive female employees are essential to its business model.

Appearance discrimination in employment has come under intense scrutiny from feminist critics who argue that women should be evaluated solely on the basis of their job performance, not how they look. In her book *The Beauty Bias*, Deborah Rhode observes that appearance discrimination is particularly hard on career women, who face a sex-based double standard that men do not.[44] Specifically, women who are too attractive are often perceived as incompetent, while those who are not attractive enough can be stigmatized as inadequately feminine.[45] Naomi Wolf mockingly coined the phrase "Professional Beauty

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39: Leslie Friedman Goldstein, *Contemporary Cases in Women's Rights* at 207 (Wisconsin 1994).

40: Catharine MacKinnon, *Toward a Feminist Theory of the State* at 221 (Harvard 1989).

41: Patricia Cain, *Feminism and the Limits of Equality*, 24 Ga. L. Rev. 803, 805 (1989), and Deborah Rhode, *Feminist Critical Theories,* 42 Stan. L. Rev. 617 (1989).

42: Manley, 16 Duke J. Gender L. & Pol'y at 170 (cited in note 35).

43: Cantor, 1999 U. Chi. Legal F. at 494 (cited in note 35). According to EEOC guidelines, consumer preferences for one sex over another cannot justify BFOQ defenses, see 29 § CFR 1604.2(a)(1)(iii) (quoted in Cantor).

44: Rhode, *Beauty Bias* at 96 (cited in note 28).

45: See Peter Glick, et. al., *Evaluations of Sexy Women in Low and High Status Jobs*, 29 Psych. Women Q. 389 (2005), and Megumi Hosoda, Eugene Stone-Romero, & Gwen Coats, *The Effects of Physical Attractiveness on Job-Related Outcomes*: *a Meta-Analysis of Experimental Studies,* 56 Personnel Psych. 431

Quotient," or PBQ, to describe the fine line that women walk between appearing professional and overly sexual.[46] Much like the BFOQ, Wolf argues that, "The actual function of the PBQ in the workplace is to provide a risk-free way to discriminate against women."[47] Similarly, Rhode observes that, "Although women have been moving into upper level professions in greater numbers, they have not attained the positions of greatest power, prestige, and economic reward," because of lingering informal barriers against them.[48]

For legal scholars who agree that appearance discrimination should be remedied by law, the *Jespersen* decision threatens the ability of employees to bring legal challenges against sex-dependent dress and grooming codes in the future. Dianne Avery bemoans the Ninth Circuit's opinion, writing, "the case insulates most employers from all but the most determined (and well-financed) challenges to sex-based dress, grooming, and appearance codes under Title VII of the Civil Rights Act of 1964."[49] Similarly, Jennifer Levi exasperatedly asks, "Why are the courts so seemingly entrenched in their rejection of dress-code challenges?" in her comparative analysis of *Schroer v. Library of Congress* (D.D.C. 2006) and *Jespersen*.[50] Ann McGinley is somewhat more optimistic. After arguing that being a woman should not constitute a BFOQ for being a cocktail server in Las Vegas casinos, she observes that, "*Jespersen* raises the question of whether casinos may legally hire both men and women, and dress both in sexy costumes, which in essence, sexually stereotypes both men and women."[51] Finally, Gretchen Myers draws upon Judith Butler's theory of gender performativity to argue that sex-based appearance standards are not trivial at all because they "highlight the personal and cultural impact of sex stereotypes on gender performance."[52]

Other scholars, however, claim that appearance discrimination is not a

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(2003).

46: Naomi Wolf, *Beauty Myth* at 27 (HarperCollins 2009).

47: *Id.* at 28.

48: Deborah Rhode, *Perspectives on Professional Women,* 40 Stan. L. Rev. 1163 (1988).

49: Avery, 42 USF L. Rev. at 300 (cited in note 36).

50: Levi, 14 Duke J. Gender L. & Pol'y at 246 (cited in note 36). See also *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006).

51: McGinley, 14 Duke J. Gender L. & Pol'y at 259 (cited in note 36).

52: Gretchen Adel Myers, *Why Personal Presentation in the Workplace is Not Trivial: Performativity Theory Applied to Title VII Sex-Dependent Appearance Standard Cases,* 7 Dukeminier Awards: Best Sexual Orientation & Gender Identity L. Rev. 173, 175 (2008). See also Jutih Butler, "Imitation and Gender Insubordination," in *The Lesbian and Gay Studies Reader* at 314-18 (Routledge 1993) (Henry Abelove, ed.).

serious problem and that the law is not a viable means to solve it. Michael Selmi, for example, believes that the *Jespersen* decision was correct, calling Jespersen's sexual stereotype argument a slippery slope. He suggests, "A better approach to issues of identity in the workplace might be to conceive of our work selves as separate from our authentic selves, acknowledging that at work, we all perform and act out of character."[53] Patrick Shin goes even further, claiming, "[There is a] positive value of preserving a social state of affairs in which men and women enjoy economic equality but adhere to sex-dependent social norms in respect of the outward presentation of their bodies to others."[54] In other words, women should settle for achieving economic parity with men even if appearance codes impose a greater burden on them than men. William Corbett is more sympathetic to the injustice of appearance discrimination, but he nonetheless predicts that, "federal employment discrimination law will never prohibit appearance-based discrimination, and few if any state discrimination laws will add appearance as a protected characteristic."[55] In this way, despite their ideological and methodological differences, scholars like Avery, Cain, Rhode, and Corbett agree that the current body of federal sex discrimination law is too weak to combat effectively appearance discrimination in the workplace.

Surprisingly little research has been done on the *Lewis v. Heartland* decision, particularly given the intense scholarly attention that *Jespersen* attracted. A few commentators, such as Maritza Gómez, have noted inconsistencies in circuit courts' application of *Price Waterhouse v. Hopkins*, of which *Jespersen* and *Lewis* were two examples, but no one has undertaken an extensive cross-circuit analysis of these cases.[56] Friedman also offers important observations about gender nonconformity and *Price Waterhouse* post-*Jespersen*, yet he focuses primarily on whether Title VII's ban on sex discrimination extends to gay, lesbian, and transsexual individuals.[57] Therefore, my study will attempt to provide new insight about circuit courts' conflicting applications of Title VII and Supreme Court precedent in appearance discrimination suits.

53: Selmi, 14 Duke J. Gender L. & Pol'y at 469 (cited in note 36).

54: Shin, 14 Duke J. Gender L. & Pol'y at 493 (cited in note 36).

55: William Corbett, *The Ugly Truth about Appearance Discrimination and the Beauty of Our Employment Discrimination Law*, 14 Duke J. Gender L. & Pol'y 153, 158 (2007).

56: Maritza Gómez, *Gender Stereotyping Discrimination under Title VII: Alive and Well After More than 20 Years of* Price Waterhouse v. Hopkins *(but Applied Somewhat Differently Among the Circuits*, 58 Fed. Lawyer 30-31 (2011).

57: Friedman, 14 Duke J. Gender L. & Pol'y at 205 (cited in note 27).

III. Methodology

In this study, I conducted a cross-circuit analysis of *Jespersen v. Harrah's* and *Lewis v. Heartland Inns of America, L.L.C.* Specifically, I compared the majority and dissenting opinions from both cases in order to determine how the Eighth and Ninth Circuits reached such different decisions. Circuit Courts of Appeal are not legally bound to abide by decisions made in other circuits, but in theory they should all be applying the same Supreme Court precedent. For this reason, I paid particular attention to any and all references to *Price Waterhouse v. Hopkins* in the *Jespersen* and *Lewis* opinions because *Price* set the federal standard for sex stereotyping claims under Title VII. When relevant, I also examined district-level stages of *Jespersen* and *Lewis* for more detailed information about the facts of each case.

IV. A Cross-Circuit Analysis Of *Jespersen* And *Lewis*

I begin my analysis by examining the Ninth Circuit's rationale for affirming the District Court of Nevada's decision. In her lawsuit against Harrah's, Jespersen argued (1) that the "Personal Best" policy imposed *unequal burdens* on male and female employees and (2) that the makeup requirement forced women to adhere to a *sex-based stereotype*. The unequal burdens test compares the relative burdens that an appearance policy imposes on women and men. If the court determines that the policy unfairly impacts one group of employees more than another, then the policy violates Title VII.[58] By contrast, under offensive stereotype analysis, an appearance policy violates Title VII if it is based on offensive or degrading sex stereotypes.[59] The Ninth Circuit affirmed the district court's summary judgment in favor of Harrah's on both counts.

With respect to Jespersen's claim that the makeup requirement placed unequal burdens on women and men, the majority opinion rejected her argument. According to Chief Judge Mary Schroeder, although Harrah's "Personal Best" policy imposed sex-differentiated grooming standards for employees' hair, fingernails, and faces, "Grooming standards that appropriately differentiate between the genders are not facially discriminatory."[60] She added that, "While those individual requirements differ according to gender, none

58: Malcolm, 46 San Diego L. Rev. at 528 (cited in note 18). See also *Jespersen*, 444 F.3d at 1110: "Under established equal burden analysis, when an employer's grooming and appearance policy does not unreasonably burden one gender more than the other, that policy will not violate Title VII."

59: Malcolm, 46 San Diego L. Rev. at 523.

60: *Jespersen*, 444 F.3d at 1109-10.

on its face places a greater burden on one gender than another."[61] Schroeder further justified her opinion by pointing to precedent in the Ninth Circuit and other circuit courts. She writes, "We have long recognized that companies may differentiate between men and women in appearance and grooming policies, and *so have other circuits*."[62] Thus, although Harrah's required female employees to wear makeup, this burden was supposedly balanced out by other requirements for men, such as the need to get regular haircuts.[63]

The Ninth Circuit also dismissed Jespersen's suggestion that wearing makeup necessitates a much greater investment of time and money than the comparable requirements for male employees. "Jespersen asks us to take judicial notice of the fact that it costs more money and takes more time for a woman to comply with the makeup requirement than it takes for a man to comply with the requirement that he keep his hair short," but according to Schroeder, "these are not matters appropriate for judicial notice."[64] Because Jespersen failed to submit any documentary evidence that applying makeup is significantly more costly for women, she was unable to prove that Harrah's makeup requirement imposed an unequal burden on women.[65]

Jespersen's inability to convince the Ninth Circuit that Harrah's makeup requirement violated the unequal burdens test bodes ill for employees hoping to use this strategy to challenge sex-differentiated grooming codes. Joel Friedman agrees, noting that, "the Ninth Circuit's recent *en banc* opinion in *Jespersen v. Harrah's Operating Co., Inc.,* forcefully demonstrates [that] the presence of the "undue burden" operation proves to be of marginal utility" for plaintiffs.[66] Elizabeth Malcolm adds that courts often overlook the emotional costs of discriminatory policies.[67] She argues that courts should examine

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61: *Id.*

62: *Id.* at 1110. (emphasis added).

63: See Appendix B for the full text of Harrah's "Personal Best" policy.

64: *Jespersen*, 444 F.3d at 1110. Schroeder defines *judicial notice* as being "reserved for matters 'generally known within the territorial jurisdiction of the trial court' or 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" *Id.* (citing FRE 201).

65: In his dissent, Circuit Judge Alex Kozinski vehemently disagrees with the notion that Jespersen should have been expected to provide such evidence: "It is true that Jespersen failed to present evidence about what it costs to buy makeup and how long it takes to apply it. But is there any doubt that putting on makeup costs money and takes time?" See *Jespersen*, 444 F.3d at 1117 (Kozinski, J., dissenting). Incidentally, Kozinski replaced Schroeder as Chief Judge of the Ninth Circuit in 2007.

66: Friedman, 14 Duke J. Gender L. & Pol'y at 209 (cited in note 27).

67: Malcolm, 46 San Diego L. Rev. at 529 (cited in note 18).

requirements for men and women individually, rather than evaluating an appearance policy in its totality, as the Ninth Circuit does. "Once the individual requirements are broken down, it becomes apparent that the Personal Best policy imposed a heavier burden upon female employees."[68] In other words, courts should consider not only whether employers have the same number of restrictions for male and female employees, but also whether any of those requirements places a qualitatively greater burden on one gender than another.

In terms of sex stereotyping, the Ninth Circuit was slightly more sympathetic to Jespersen, but ultimately sided with Harrah's. The court pointed out that the bartenders' uniforms were unisex and thus did not force women to dress in a sexually provocative way.[69] Chief Judge Schroeder wrote, "We respect Jespersen's resolve to be true to herself and to the image that she wishes to project to the world," but warned that if makeup requirements could be considered sex stereotyping under Title VII, "we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination."[70] In other words, Jespersen's argument was a slippery slope and did not amount to impermissible stereotyping.[71]

However, the Ninth Circuit remained open to the possibility that sex-differentiated appearance policies could be challenged under Title VII. Schroeder conceded, "We do not preclude, as a matter of law, a claim of sex-stereotyping on the basis of dress or appearance codes."[72] In this way, the court admitted the plausibility of such claims, but nonetheless maintained

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68: *Id.* at 530. In his dissent, Judge Pregerson takes precisely this approach: "By refusing to consider the makeup requirement separately… the majority's approach would permit otherwise impermissible gender stereotypes to be neutralized by the presence of a stereotype or burden that affects people of the opposite gender, or by some separate non-discriminatory requirement that applies to both men and women." *Jespersen*, 444 F.3d at 1116 (Pregerson, J., dissenting).

69: Schroeder pointed to *EEOC v. Sage Realty Corp.* 507 F.Supp. 599 (S.D.N.Y. 1981), in which a female hotel lobby attendant was forced to wear a revealing uniform that invited sexual harassment. Schroeder argues that Harrah's uniforms were unisex and thus did not demonstrate sexually stereotypical intent. Jespersen, however, did not actually challenge this part of the "Personal Best" policy.

70: *Jespersen*, 444 F.3d at 1112.

71: See *Price Waterhouse*, 490 U.S. at 228.

72: *Jespersen,* 444 F.3d at 1113.

that Harrah's makeup requirement fell within the bounds of reasonableness for workplace grooming standards.[73] Commenting on the inconsistency with which lower courts accept sex-stereotyping charges under Title VII, Friedman cynically remarks:

> While giving lip service to the notion that any plaintiff can fall within Title VII's protective umbrella when alleging a case of sex-based discrimination, the lower courts typically reject claims by plaintiffs whose unconventional behavior or presentation of self can be seen to implicate their sexual orientation or transgendered identity.[74]

Thus, it appears that circuit courts, while agreeing in principle that sex-differentiated appearance codes may violate Title VII, are often reluctant to declare such policies discriminatory.[75]

The Ninth Circuit also drew a sharp distinction between *Price Waterhouse* and *Jespersen*. In the case of Ann Hopkins, "Impermissible sex stereotyping was clear because the very traits that she was asked to hide were the same traits considered praiseworthy in men."[76] By contrast, "Jespersen's claim

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73: Schroeder compared Jespersen's claim to *Nichols v. Azteca Restaurant Enters., Inc.,* 256 F.3d 864 (9th Cir. 2001), in which a male waiter was sexually harassed by his coworkers for failing to conform to gender stereotypes. Unlike *Nichols*, Jespersen was not subjected to sexual harassment as a result of Harrah's policies.

74: Friedman, 14 Duke J. Gender L. & Pol'y at 218 (cited in note 27). He adds, "Moreover, they ignore the fact of the imperfect linkage between sexual orientation or transgendered status and nonconforming behavior. The courts do not acknowledge that there are straight men and women who do not conform to gendered behavior or appearance norms and gay men and women who do." *Id.* Although Jespersen did not publically identify herself as lesbian during the case, she was represented by Lambda Legal, a legal organization that promotes civil rights for gay men and lesbians. Jennifer C. Pizer represented Jespersen on behalf of Lambda Legal before the Ninth Circuit. See Jennifer Pizer, *Facial Discrimination: Darlene Jespersen's Fight Against the Barbie-Fication of Bartenders*, 14 Duke J. Gender L. & Pol'y 285 (2007).

75: For example, "With respect to sex stereotyping, we hold that appearance standards, including makeup requirements, may well be the subject of a Title VII claim for sexual stereotyping, but that on this record Jespersen has failed to create any triable issue of fact that the challenged policy was part of a policy motivated by sex stereotyping." *Jespersen*, 444 F.3d at 1106.

76: *Jespersen*, 444 F.3d at 1111. Also see *Price*, 490 U.S. at 251, where the plurality notes: "An employer who objects to aggressiveness in women but whose

here differs materially from Hopkins' claim in *Price Waterhouse* because Harrah's grooming standards do not require Jespersen to conform to a stereotypical image that would objectively impede her ability to perform her job requirements as a bartender."[77] Aside from Jespersen's "subjective reaction to the makeup requirement," the court record was insufficient to prove that Harrah's "Personal Best" policy fell under *Price*'s definition of sex stereotyping.[78]

The Ninth Circuit's narrow interpretation of *Price Waterhouse* contrasts markedly with the Eighth Circuit's decision in *Lewis v. Heartland*. Circuit Judge Diana Murphy's majority opinion openly acknowledged the similarities between Lewis and Hopkins, in that, "Like the plaintiff in *Price Waterhouse*, Lewis alleges that her employer found her unsuited for her job not because of her qualifications or her performance on the job, but because her appearance did not comport with its preferred feminine stereotype."[79] Murphy believed that Lewis's argument was compelling, writing, "Cullinan's criticism of Lewis for lack of 'prettiness' and the 'Midwestern girl look' before terminating her may also be found by a reasonable factfinder to be evidence of wrongful sex stereotyping."[80] Hence, she concluded, "Lewis has presented sufficient evidence to make out a *prima facie* case on her claims for sex discrimination and retaliation and a sufficient showing at this stage that Heartland's proffered reason for her termination was pretextual."[81]

One major similarity between *Jespersen* and *Lewis* is that neither plaintiff challenged the dress code requirement. For Lewis, "The theory of her case

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positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind."

77: *Jespersen*, 444 F.3d at 1113.

78: *Id.* at 1112. According to Ninth Circuit precedent, *Price Waterhouse* does not apply to grooming standards: "The district court further observed that the Supreme Court's decision in *Price Waterhouse v. Hopkins* … did not apply to this case because in the district court's view, the Ninth Circuit had excluded grooming standards from the reach of *Price Waterhouse*." *Id.* at 1106.

79: *Lewis*, 591 F.3d at 1038.

80: *Id.* at 1039.

81: *Id.* at 1043. According to Rachel Cantor, "Under Title VII, once a plaintiff proves a *prima facie* case of employment discrimination, the burden shifts to the employer to show a legitimate, nondiscriminatory reason for the employment practices at issue." See Cantor, 1999 U. Chi. Legal F. at 496 (cited in note 35) and *McDonnell Douglas Corp. v. Green,* 411 US 792, 802-04 (1973) for necessary elements of *prima facie* cases under Title VII.

is that the evidence shows Heartland enforced a *de facto* requirement that a female employee conform to gender stereotypes in order to work the A shift. There was no such requirement in the company's written policies."[82] Indeed, Cullinan apparently bragged about the appearance of female employees at Heartland and even told a hotel manager not to hire a potential employee because she was not "pretty" enough.[83] In Jespersen's case, Harrah's did in fact have an explicit dress code, yet Jespersen raised no objection to it because it imposed unisex standards on women and men.[84] Despite employing a similar legal approach, Lewis was successful where Jespersen failed. This inconsistency suggests that courts may view *de facto* appearance requirements as more arbitrary than written policies and thus unfair. As a result, courts may be more inclined to condemn *de facto* standards as sexually discriminatory, while formal appearance codes merely reflect community standards.

Another important parallel between the two cases is their treatment of the BFOQ. Jespersen claimed that, "the makeup requirement itself establishes a *prima facie* case of discriminatory intent and must be justified by Harrah's as a bona fide occupational qualification."[85] The Ninth Circuit countered, "Our settled law in this circuit, however, does not support Jespersen's position that a sex-based difference in appearance standards alone, without any further showing of disparate effects, creates a *prima facie* case."[86] Moreover, Jennifer Pizer, Jespersen's attorney, points out that, "the court did not consider the needs a casino might assert because it held that Jespersen did not make out a *prima facie* case of sex-based disparate treatment and, therefore, the burden never shifted to Harrah's to justify its appearance policy."[87] For this reason, Harrah's was not required to mount a BFOQ defense for its "Personal Best" policy, nor did it attempt to do so.

Similarly, in *Lewis*, Heartland did not bother to offer a BFOQ defense

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82: *Lewis,* 591 F.3d at 1037. "The front desk job description in Heartland's personnel manual does not mention appearance. It states only that a guest service representative '[c]reates a warm, inviting atmosphere' and performs tasks such as relaying information and receiving reservations." *Id*. at 1036.

83: *Id.* at 1036.

84: *Jespersen*, 444 F.3d at 1107. "The program contained certain appearance standards that applied equally to both sexes, including a standard uniform of black pants, white shirt, black vest, and black bow tie. Jespersen has never objected to any of these policies." *Id.*

85: *Id*. at 1109.

86: *Jespersen,* 444 F.3d at 1109.

87: Pizer, 14 Duke J. Gender L. & Pol'y at 289 (cited in note 74). See also the burden shifting framework described in *McDonnell Douglas Corp. v. Green,* 411 US 792 (1973).

for its decision to fire Lewis. The Eight Circuit noted, "Heartland has not tried to suggest that the 'Midwestern girl look' or prettiness were bona fide occupational qualifications for its clerk job… Such an affirmative defense requires proof that the qualification is 'necessary to the normal operation of that particular business or enterprise.'" [88] Director of Operations Cullinan may have personally believed that prettiness was essential to work at the hotel front desk, but as a corporation, Heartland chose not to pursue this legal strategy.[89] In this way, much like Harrah's, Heartland did not claim that attractiveness was a BFOQ for female employees.

On the one hand, Harrah's and Heartland's reluctance to assert the BFOQ exception may be a sign of progress. As old stereotypes that segregate jobs by sex break down, the BFOQ defense should become less common.[90] Yet this trend is also disconcerting for plaintiffs because it may signal that employers are moving away from *de jure* BFOQs to *de facto* appearance requirements, as in *Lewis*.[91] Jespersen's experience demonstrates the difficulty of challenging sexually stereotypical grooming policies, and for every Darlene Jespersen or Brenna Lewis willing to bring her case to court, who knows how many other employees stay silent in the face of sex discrimination.

Interestingly, the *Lewis* decision makes no reference whatsoever to *Jespersen*. In light of the fact that *Jespersen* attracted such widespread attention in the media and within the legal community, it seems unlikely that the Eighth Circuit panel was completely unaware of the case. Certainly, circuit courts are under no obligation to follow precedents from other circuits, but given that the *Jespersen* and *Lewis* opinions frequently referenced notable cases from other circuits, the absence of any mention of *Jespersen* in *Lewis* seems even more jarring.[92] Two scenarios seem plausible: either the Eighth Circuit mistakenly

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88: *Lewis,* 591 F.3d at 1043 (footnote). 42 U.S.C. § 2000e-2(e)(1). The Eight Circuit also points to *Wilson v. Southwest Airlines Co.,* 517 F.Supp. 292 (N.D. Tex. 1981), which determined that "female sex appeal" is not a BFOQ to be a flight attendant or ticket agent.

89: *Lewis,* 591 F.3d at 1036.

90: Ann McGinley argues that there are only three remaining acceptable uses of the BFOQ: (1) in situations where consumers' right to privacy is at stake, (2) if selling sex is essential to a company's business model, or (3) to ensure authenticity in dramatic productions. McGinley, 14 Duke J. Gender L. & Pol'y at 258 (cited in note 36).

91: See *Lewis,* 591 F.3d at 1037, in which Lewis argued that Heartland "enforced a *de facto* requirement that a female employee conform to gender stereotypes in order to work the A shift."

92: For example, both *Jespersen* and *Lewis* cite *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). In that case, a transsexual firefighter alleged that city officials

overlooked the many similarities between the two cases, or it intentionally omitted references to *Jespersen* because it disagreed with the Ninth Circuit's ruling. The latter seems more likely, particularly because the circuits offered such different interpretations of *Price Waterhouse*.

As a case in point, Judge Harry Pregerson's dissent in the Ninth Circuit draws upon some of the very same language in *Price Waterhouse* as the Eighth Circuit majority opinion. Pregerson described Harrah's makeup policy as a "facial uniform" that applied only to female bartenders.[93] He then claimed that, "Such discrimination is clearly and unambiguously impermissible under Title VII, which requires that 'gender must be *irrelevant* to employment decisions.'"[94] Hence, Pregerson argued, "I believe that Jespersen articulated a classic case of *Price Waterhouse* discrimination and presented undisputed, material facts sufficient to avoid summary judgment."[95]

Evidently, however, the language of *Price Waterhouse* is not as clear-cut as Pregerson assumed. Just as Pregerson claimed that the Ninth Circuit misapplied the precedent of *Price Waterhouse*, Chief Judge James Loken declared that the Eighth Circuit's opinion was "an unwarranted misreading of the plurality and concurring opinions in *Price Waterhouse v. Hopkins*."[96] He continued, "Apparently the majority would hold that an employer violates Title VII if it declines to hire a female cheerleader because she is not pretty enough, or a male fashion model because he is not handsome enough, unless the employer proves the affirmative defense that physical appearance is a bona fide occupational qualification."[97] According to Loken's understanding of Title VII's "because of…sex" provision, an adverse employment action based on appearance should qualify as sexually discriminatory only if the employer disadvantages all female candidates, not women as individuals.[98]

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forced him to resign after he began presenting himself as a woman at work. The Sixth Circuit held that the plaintiff had satisfied the requirements for a *prima facie* case of sex discrimination under Title VII.

93: *Jespersen,* 444 F.3d at 1114 (Pregerson, J., dissenting).

94: *Id.* (emphasis in original) (citing *Price Waterhouse*, 490 U.S. at 240). Pregerson adds, "Moreover, *Price Waterhouse* recognizes that gender discrimination may manifest itself in stereotypical notions as to how women should dress and present themselves, not only as to how they should behave." *Jespersen,* 444 F.3d at 1115.

95: *Id.* at 1115-16 (Pregerson, J., dissenting).

96: *Lewis,* 591 F.3d at 1043 (Loken, Chief J., dissenting).

97: *Id*.

98: In response, the majority opinion countered, "The focus of [Loken's] decision was the mistaken view that a Title VII plaintiff must produce evidence that she was treated differently than similarly suited males. Our court has explicitly

Thus, serious disagreement about the language and intent of Title VII, as well as *Price Waterhouse*, seems to persist both among and within federal circuit courts.

V. Conclusion

This study demonstrates the limited efficacy of using Title VII as a weapon against appearance discrimination. Although *Lewis* won in the Eighth Circuit, when her case returned to the district level for trial, the jury's verdict was in favor of her retaliation claim only, not her sex-stereotype discrimination claim.[99] Meanwhile, *Jespersen* lost her appeal under both the unequal burdens test and offensive sex stereotype analysis.[100] In light of these facts, the current body of case law surrounding appearance discrimination is not encouraging for plaintiffs.

Several scholars have already identified the need for legislative reforms to Title VII so that it can more effectively handle sex-stereotype discrimination claims. In her analysis of consumer preferences and Title VII, Cantor proposes an economic model in which, "Ultimately, if the defendant can prove that sex defines the market in which the defendant competes—by examining the specific product's pricing structure and the cross-elasticities of demand to other products—then the defendant can properly assert that sex is a BFOQ for employment."[101] This strategy would place a higher burden of proof on employers seeking to use a BFOQ defense. Similarly, Anzuoni suggests that Title VII's "because of…sex" clause should be defined as broadly as possibly to protect gender non-conformists. "Specifically, I believe language that gives legislative backing to the decision in *Price Waterhouse* would be highly useful."[102] In fact, some lawyers have already drawn up potential amendments to Title VII in response to cases like *Jespersen*.[103] Other scholars have emphasized the need for additional Supreme Court precedent to clarify

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rejected that premise." See *Lewis,* 591 F.3d at 1039.

99: *Lewis*, 764 F. Supp. 2d at 1039 (2011).

100: After the Ninth Circuit's ruling, Harrah's actually offered Jespersen her job back (with an exemption from the makeup requirement), but Jespersen declined. Unfortunately, the cost of her legal battle was a huge financial burden, and according to her attorney, she now works three part-time jobs after being effectively blacklisted from other casinos in Reno. See Pizer, 14 Duke J. Gender L. & Pol'y at 317 (cited in note 74).

101: Cantor, 1999 U. Chi. Legal F. at 495 (cited in note 35).

102: Anzuoni, 3 Geo. J. Gender & L. at 892 (cited in note 1).

103: *Id.* at 892-893. Anzuoni profiles an amendment by Dana Priesing, an attorney for Gender PAC who advocates for labor and employment issues.

the issue of sex discrimination as it applies to appearance codes.[104]

In addition to these reforms, further research is necessary on the topic of appearance discrimination claims and Title VII. Future projects could expand upon the cross-circuit analysis offered in this study by incorporating additional circuits. Other studies could examine the correlation between a plaintiff's occupation and his or her ability to win a sex discrimination lawsuit. For example, are women in service sector jobs, such as waitresses and hotel clerks, positioned differently than professional women like Ann Hopkins in *Price Waterhouse*?[105] Finally, scholars should continue to study the impact of *Jespersen*, both within the Ninth Circuit and nationwide, to see if the case has in fact made it more difficult for employees to bring Title VII charges against their employers.

104: See Gómez, 58 Fed. Lawyer at 31 (cited in note 56) and Malcolm, 46 San Diego L. Rev. at 506 (cited in note 18).

105: Amy Lifson-Leu also proposes this line of analysis in Amy Lifson-Leu, *Enforcing Femininity: How* Jespersen v. Harrah's Operating Co. *Leaves Women in Typically Female Jobs Vulnerable to Workplace Sex Discrimination*, 42 USF L. Rev. 849 (2007). Yet, further research is necessary.

Appendix A:
Excerpts from Title VII

42 USCS § 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or other wise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin (emphasis added); or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee, *because of* such an individual's race, color, religion, sex, or national origin (emphasis added).

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion. Notwithstanding any other provision of this title [42 USCS § 2000e et seq.]:

> (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin *in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise* (emphasis added), and
>
> (2) it shall not be an unlawful practice for a school, college,

university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Appendix B:
Harrah's "Personal Best" Policy

All Beverage Service Personnel, in addition to being friendly, polite, courteous and responsive to our customer's needs, must possess the ability to physically perform the essential factors of the job as set forth in the standard job descriptions. They must be well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform. Additional factors to be considered include, but are not limited to, hair styles, overall body contour, and degree of comfort the employee projects while wearing the uniform.

Beverage Bartenders and Barbacks will adhere to these additional guidelines:

- Overall Guidelines (applied equally to male/ female):

    - Appearance: Must maintain Personal Best image portrayed at time of hire.
    - Jewelry, if issued, must be worn. Otherwise, tasteful and simple jewelry is permitted; no large chokers, chains or bracelets.
    - No faddish hairstyles or unnatural colors are permitted.

- Males:

    - Hair must not extend below top of shirt collar. Ponytails are prohibited.
    - Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted.
    - Eye and facial makeup is not permitted.
    - Shoes will be solid black leather or leather type with rubber (non skid) soles.

- Females:

    - Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions.
    - Stockings are to be of nude or natural color consistent with employee's skin tone. No runs.
    - Nail polish can be clear, white, pink or red color only. No

exotic nail art or length.

• Shoes will be solid black leather or leather type with rubber (non skid) soles.

• *Make up (face powder, blush and mascara) must be worn and applied neatly in complimentary [sic] colors. Lip color must be worn at all times* (emphasis added).

The Work of Art in the Age of Bureaucratic Taxation: Revisiting Problems in Art Valuation Concerning Rauschenberg's *Canyon*

Miranda Means†

I. Introduction

Like many of his more famous pieces, Robert Rauschenberg's 1959 'combine' called *Canyon* is a mixed-medium collage of oils, photographs, and newsprints—tubes of paint are squeezed across its surface, a flattened metal box and other found-objects are affixed to its canvas, and a small wooden ledge runs along the bottom of the work on which the source of its main controversy sits adamantly perched.[1] When Rauschenberg first appended a taxidermied bald eagle to the base of *Canyon,* the Bald and Golden Eagle Protection Act (1940)[2] prohibiting the sale, export, import, and transport of bald eagles, had been in effect for more than a decade.[3] Despite the law, Ileana Sonnabend purchased the work from Leo Castelli's gallery in 1959, a move that went unnoticed until 1981, when Sonnabend attempted to bring the work back into the United States after an exhibition in Europe. Sonnabend was given a permit to retain the piece, under the condition that she never sell or export it.[4]

In 1998, Sonnabend attempted to lend the piece to a retrospective in Europe and faced another challenge. The Department of the Interior argued that Sonnabend never should have been allowed to retain the piece in the first place. Unless Sonnabend could prove the bird was taken prior to 1940,

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1: Materials are listed in the Museum of Modern Art's listing of the work, available in their online catalogue. See Rauschenberg's *Canyon*, Museum of Modern Art, online at http://www.moma.org/collection/object.php?object_id=165011. I use the word 'combine' here to mean a "a hybrid …incorporating painting, collage, and found objects." *Id.*

2: Bald and Golden Eagle Protection Act, 1940, Ch. 278, § 1, 54 Stat. 250; Pub. L. 86-70, 73 Stat. 143; Pub. L. 87-884, (1962).

3: 16 U.S. Code §668a.

4: Eileen Kinsella, *Rauschenberg Eagle Ruffles Feathers*, Art News (May 1, 2014), online at http://www.artnews.com/2012/05/01/rauschenberg-eagle-ruffles-feathers/.

she was asked to relinquish the work to the U.S. Fish and Wildlife Service.[5] Rauschenberg's eagle ultimately met this condition—in 1998, Rauschenberg testified that the bird was taken by one of Roosevelt's Rough Riders and was left for trash before the artist got his hands on it.[6] Thus, Sonnabend was allowed to retain her permit—but she was still unable to export the piece, and she certainly couldn't sell it.

In 2007, Ileana Sonnabend died, leaving her estate and formidable collection of art, including Rauschenberg's *Canyon,* to her children. Her estate was subject to valuation by the Internal Revenue Service (IRS).[7] Sonnabend's property was valued pursuant to the IRS Code Section 1014, which provides guidelines for the valuation of an inherited estate for the purposes of taxation.[8] While the IRS noted the unsellability of the work, for selling *Canyon* would surely violate the Bald and Golden Eagle Protection Act (BGEPA), the IRS and its Art Advisory Panel valued it at $65 million and taxable at $29.2 million, 44.9% of the work's purported value. Added on to this sum was $11.7 million dollars that had accrued in penalties for a "gross valuation misstatement," making the taxes on the 'combine' equivalent to 62.9% of the work's purported value.[9] The Art Advisory Panel's valuation contradicted various appraisals obtained by the taxpayer–from Christie's and other auction houses–that consistently appraised *Canyon* at $0; even a Rauschenberg wasn't worth a dime if Christie's wasn't able to sell it legally.[10]

The Sonnabend estate, represented by Ralph Lerner, subsequently sued the IRS, on the grounds that the work is impossible to sell and is, therefore, valueless.[11] Ultimately, the IRS and Sonnabend's estate reached a settlement in November 2012. As part of the settlement, *Canyon* was "donated" to the Museum of Modern Art (MoMA) under the condition that the work be

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5: "Taken" in this context refers to any method in which a bald eagle is captured or killed. The BGEPA specifically allows for the possession and transport of eagles legally taken prior to the act's passage. See 16 U.S. Code §668a.

6: Anne Marie Rhodes, *Valuing Art in an Estate: New Concerns*, 31 Cardozo Arts & Ent. L.J. 45 (2012).

7: See 26 U.S.C. § 2031 for a definition of gross estate.

8: Dianne L., Mutolo, *Valuation of Artwork for Federal Estate Tax Purposes*, Lexis Nexis Legal Newsroom (Apr. 23, 2013), online at http://www.lexisnexis.com/legalnewsroom/tax-law/b/federaltaxation/archive/2013/04/23/valuation-of-artwork-for-federal-estate-tax-purposes.aspx.

9: Patricia Cohen, *A Catch 22 of Art and Taxes*, NY Times (Jul. 22, 2012), online at http://nyti.ms/1jOY8jR.

10: *Id.*

11: Janet Novack, *The IRS Art Advisory Panel Has Its Head in the Clouds*, Forbes (Jul. 22, 2012), online at http://onforb.es/TnT94W.

permanently displayed. In exchange for *Canyon*'s donation, the IRS agreed to drop its tax assessment.[12]

This paper examines problems in art valuation, using Rauschenberg's *Canyon* as its primary case study. I identify two major problems that *Canyon*'s case brings to light: (1) Does art have intrinsic value separate from its desirability within a market (hypothetical or real) and (2) how should the IRS value illegal assets? In order to address these considerations, I begin by reviewing the relevant law and processes by which value, in this particular case, was determined. I then examine the merits of the two arguments posed by the IRS and the Sonnabend estate, describing how the discrepancy between the two valuations brings to light major problems with the way art is valued by the Art Advisory Panel.

II. The Bald and Golden Eagle Protection Act (1940) and the Migratory Bird Act (1918)

The bald eagle fastened to Rauschenberg's *Canyon* is protected by two different acts prohibiting the sale and exchange of endangered birds: the Bald Eagle Protection Act and the Migratory Bird Treaty Act.[13] The Bald Eagle Protection Act was passed in 1940 and amended three times, in 1959 to include Alaska, in 1962 to extend the act to both bald eagles and golden eagles, and in 1972 to increase penalties for violation of the act from a $5,000 fine and imprisonment of not more than one year to a $10,000 fine and imprisonment of not more than two years. The Migratory Bird Treaty Act more broadly prohibits hunting, selling, purchasing, possessing, or transporting migratory birds, nests, and eggs native to the United States, a list of which is included in 50 CFR 10.13. The bald eagle is amongst the species protected on this list.

Thus, under both acts, sale, offer of sale, purchase, and offer of purchase of a bald eagle, dead or alive, is prohibited—each violation has possible jail time and fines attached. *Canyon* is illegal to sell pursuant to these two acts because it incorporates the carcass of a bird protected by both. Note that the sale of *Canyon* no longer violates the Endangered Species Act, for the bald eagle was removed from the Federal List of Endangered and Threatened Wildlife and Plants in the summer on July 9, 2007, and was effectively delisted on August 8, 2007.[14] Despite this delisting, the United States continues to protect the

12: Patricia Cohen, *MoMA Gains Treasure that Met Also Coveted*, NY Times (Nov. 28, 2012), online at http://nyti.ms/1e5m3Ns.

13: 16 U.S.C §668 and 16 U.S.C. 703-712; Ch. 128; July 13, 1918; 40 Stat. 755.

14: 50 CFR Part 17.

bald eagle pursuant to these two acts, in part because of its symbolic significance as an emblem of American patriotism.

III. Art Valuation and Fair Market Value

How do these facts factor into the valuation of a work like *Canyon,* that is, a legally unsellable object? In order to reach a proper valuation for the purposes of taxation, *Canyon* was valued by two channels: first, it was valued by an independent art appraiser retained by the taxpayer, in this case Christie's and several other auction houses, and then it was valued by the IRS's Art Advisory Panel. When a work is brought to an appraiser or auction house, the appraiser has legal incentives not to substantially overvalue or undervalue a work, for both the appraiser and his client can be liable for negligent valuations and can even face civil and criminal prosecution.[15] This means, of course, that for the purposes of estate taxation, independent appraisers adhere to the IRS's own standards. Indeed, according to Christie's own description of its estate valuation service, the auction house follows standards laid out by the IRS itself.[16] Of course, in *Canyon*'s case, there was an enormous discrepancy between the appraisal produced by Christie's and that produced by the IRS's Art Advisory Panel. In order to locate the source of this discrepancy, given the two channels' supposed adherence to identical standards, I begin by reviewing these processes of valuation in detail.

The IRS values art pursuant to the Internal Revenue Manual (IRM) 4.48.3, Tangible Personal Property Valuation Guidelines. Generally, works of art are valued by the Art Appraisal Services (AAS) unit of the IRS. However, cases involving more than one item of art or art valued at greater than $50,000, as in Ileana Sonnabend's case, are automatically audited and sent to the Art Advisory Panel (the Panel) for review.[17] The Panel is comprised of experts in art, including museum directors, scholars, curators, and art dealers, with expertise in art authentication. In order to avoid inaccurate valuations and bias, these panelists are not informed of the tax consequences of their valuations.[18] Further, the IRS also makes an effort to conceal the taxpayer's identity from the

15: Peter Karlen, *Appraiser's Responsibility For Determining Fair Market Value: A Question of Economics, Aesthetics, and Ethics*, 13 Colum.-VLA J.L. & Arts 185 (1989).

16: *Estates, Appraisals, and Valuations,* Christie's (last visited May 10, 2014), online at http://www.christies.com/services/estates-appraisals/estates-overview/.

17: See IRM 4.48.3.1, *Tangible Personal Property*, and IRM 4.48.2, *Valuation Assistance for Cases Involving Works of Art.*

18: Alan Breus, *Valuing Art for Tax Purposes*, J. Accountancy (Jul. 2010), online at http://www.journalofaccountancy.com/issues/2010/jul/20092096.

Panel, so as to avoid bias or conflicts of interest. The Panel's job is to review information provided by the AAS and determine whether the claimed value of the work needs to be adjusted. The findings of the Panel do not become the official position of the IRS until they are reviewed and approved by the AAS.

Both the taxpayer's and the IRS's appraisers consider qualities specific to art, such as medium, quality, history, and signature, among other factors in determining a work of art's authenticity and subsequent value.[19] Authentication, while integral to many art valuations, was less of an issue in *Canyon*'s case. IRM Section 4.48.3.2.3, Part 5, importantly delineates the factors necessary in proper valuation of any kind of tangible property, including art. This section states that valuation of property takes into account the following:

1) The valuation date
2) The cost, date, and manner of acquisition
3) The appraised fair market value
4) The date (or dates) on which the property was appraised
5) Information of any agreements or understandings entered into (or expected to be entered into) that relates to the use, sale or other disposition of the property, including for example the sales of property since the valuation date
6) The economic outlook of the market in general and the outlook of the specific property in particular
7) Such other factors, which, in the opinion of the valuator, are appropriate for consideration.

One of the most important facets on this list, a facet essential for proper art appraisal by both the IRS and an independent appraiser, is the determination of Fair Market Value (FMV). Under U.S. Treasury Regulations, the FMV is defined as the "price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge or the relevant facts."[20] IRS Publication 561, a publication designed to help appraisers "determine the value of property" includes the above description of FMV, adding that the FMV is "the price that property would sell for on the open market."[21] This publication also appends a series of additional factors appraisers should use to

19: IRM 4.48.3.2.

20: Treas. Reg. §1.170-1(c) (1) (1972).

21: *Determining the Value of Donated Property*, 561 IRS (Apr. 2007), online at http://www.irs.gov/pub/irs-pdf/p561.pdf.

determine value, including:

1) The cost or selling price of an item
2) Sales of comparable properties
3) Replacement cost
4) Opinions of experts
5) FMV thus involves a variety of criteria, not just the price at which a hypothetical buyer would purchase a work.[22]

Art poses unique challenges to those determining FMV. This is, in part, because it isn't obvious how art is endowed with value—it doesn't have a clear use value, for instance. Indeed, according to the court in *Estate of O'Keefe v. Commissioner*[23] and *Ithaca Trust Co. v. United States*,[24] a work of art does not have any intrinsic value. Rather, the value of a work depends on its "social desirability," how much individuals are willing to pay for it. For example, Félix González-Torres's work "Untitled," a 174-pound pile of candy displayed in the corner of a gallery, has value not because the mound of candy was itself endowed with value when the artist handled it. Rather, it has value because of Torres's desirability—because the pile of candy created by Torres is, in fact, a desirable object amongst collectors in the art world. Value is not intrinsic to the art itself—a work's beauty alone doesn't give it value. Rather, value is in art's status as a desirable, special object within our society.

When determining the FMV of a work of art, considerations specific to the work, such as the "artist's identity, creation date, condition, restoration, subject matter, medium, physical dimensions, authenticity, rarity, and artistic or aesthetic value" are also particularly important.[25] A few of these criteria seem subjective—indeed, artistic and aesthetic value both seem to be subjective categories. It seems that the subjectivity of these criteria contradicts the notion that art does not have intrinsic value, as established by the two cases above, for both criteria imply that the object's status as an art object, a "quality" intrinsic to it, impacts its value. Doesn't this mean that a work deemed "more beautiful" should thus be considered "more valuable"? Peter Karlen, in an essay on questions of valuation and aesthetics, argues that, on the contrary, determination of FMV is always essentially an objective

22: Lance Hall, *Tax Valuation*, 11 J. Pract. Est. Plan. 15 (2009).

23: 1992 Tax Ct. Memo LEXIS 228, 11 (1992), which notes that, "A work of art usually has no intrinsic financial value beyond its desirability as art and lacks external indicia of return prior to resale."

24: 279 U.S. 151 (1929).

25: Vanessa Ellermann, *An Attorney's Guide to the Valuation of Art and Antiques,* 11 J. Contemp. Legal Issues 275 (2000).

process.[26] Even considerations that seem subjective, like aesthetic and artistic judgments are in fact rooted in objective observations of both the work and its relationship to market conditions. Karlen writes, "The appraiser is judging aesthetic value not from the vantage point of a culture or group that cannot appreciate it, but within a marketplace populated by persons who can…the facts used to support these values (aesthetic and artistic) must be perceived as important within the target market."[27] The thickness of a brushstroke may make a work aesthetically more valuable if this quality is perceived as important within the relevant market.

Market, therefore, is an essential component in the proper determination of FMV. When considering FMV, appraisers take into account market conditions, including impediments to sale, such as customs laws and joint ownership.[28] Because market considerations played an important role in the valuation of *Canyon,* this particular aspect of valuation deserves some attention. For the purposes of determining FMV, the relevant market is the work's "best market," that is, the market in which the work is usually or best sold.[29] Karlen concedes that in many cases, there is no market for a work. Works with extremely low demand or by artists who have never been sold before often face such difficulty, for in these cases there is little evidence to go on. All that remains, in such cases, is an evaluation the artwork's aesthetic value. Karlen mentions that in these cases, "intrinsic" value is, in fact, assessed and then considered within a hypothetical market.[30]

However, while this method may work for objects that *have* intrinsic value, it does not seem that art does, at least not according to *O'Keefe.* Any value art has is related to its unique societal status as a work of art. Consider the following situation: suppose I am a member of the Art Advisory Panel. I am tasked with valuing a painting by an artist whose work has no market precedent. The work is an exemplary cubist piece and, in my professional, cubism-loving eyes, is better than any of its fellow cubist works on the market. Since there is no precedent for the work, I may assign the work value based on the beauty and aesthetic value I detect in it, but such value would be based on my own, personal, critical attitude and knowledge of cubism. Suppose, while I may love cubism, the movement is no longer considered art historically important or desirable. It would be grossly inaccurate to value the

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26: Karlen, 13 Colum.-VLA J.L. & Arts at 188 (cited in note 15).
27: *Id.* at 198.
28: *Id.* at 187-189.
29: *Id.* at 203.
30: S. Alfred, *Fair Market Value Concept: General Considerations,* 14 W. Res. L. Rev. 173 (1963).

work based on my subjective opinion alone. To avoid subjectively assigning intrinsic value to a piece, even a hypothetical market must consider real world desirability, critical movements, and social desirability. These are the factors that, legally speaking, endow an object with this peculiar status called "art."

Regardless of whether the IRS is properly following precedent when it considers a work's intrinsic value in these cases, the courts have consistently found that lack of an existing market is no barrier to valuation; this was the finding in both *Publicker v. Commissioner of Internal Revenue*[31] and *Guggenheim v. Rasquin*.[32] In the latter, the Court held that the "absence of market price is no barrier to valuation."[33] In *Heiner v. Crosby*[34] the court held that, "sales in a restricted market, may [not] signify a fair market price or value,"[35] an assessment upheld later in *Jarre v. Commissioner of Internal Revenue*,[36] which again affirms that, "the fact that there may be a limited market does not, in our opinion, prevent the contributed property from having substantial value."[37] At the same time as the lack of an existing market does not, according to precedent, preclude valuation of a work, impediments within the market are considered both by appraisers and by the IRS Art Advisory Panel. For example, import and export restrictions on a work of art, as are in place for looted artworks, may affect the value of a particular work, particularly if the very government that determines the work's value implements these restrictions, as in *Canyon*'s case.[38]

IV. Illegal Incentives

While a description of Christie's reasons for appraising *Canyon* at $0 is unavailable, for *Estate of Sonnabend v. Commissioner*[39] was settled before going to tax court, certain criteria clearly did not contribute to the low valuation. For example, aesthetic and artistic value can definitively be ignored; Rauschenberg is an established and highly regarded artist amongst connoisseurs and collectors alike. Authentication is also certainly not at issue in this case, for Rauschenberg verified *Canyon*'s authenticity himself in 1998. Further, works of similar caliber have sold in the millions—notably his work,

31: 206 F.2d. 250 (1953).
32: 312 U.S. 254 (1941).
33: *Id.* at 258.
34: 24 F.2d 191 (1928).
35: *Id.* at 193.
36: 64 TC 183 (1975).
37: *Id.* at 190.
38: Karlen, 13 Colum.-VLA J.L. & Arts at 205 (cited in note 15).
39: 46 T.C. 382 (1966).

"Rebus," also a 'combine,' of about the same period, sold at Sotheby's in 1991 for $6.3 million.[40] Then, comparable art, by Neo-Dadaists like Jasper Jones, is currently immensely popular. Clearly, neither low demand nor novelty in the art market decreased *Canyon*'s value. Instead Christie's and the appraisers involved in valuing Sonnabend's estate based their $0 appraisal on the market impediments, imposed by the United States government, that make sale of the work impossible—illegal.

Two questions arise from this claim: first, is illegality enough of an impediment to, alone, warrant Christie's $0 valuation? Second, even if it is not, is the illegal market in this case *so* difficult to enter that Christie's low valuation is still warranted? To answer this first question it is helpful to look at the IRS's previous decisions on cases of illegal assets—Private Letter Ruling 9152005 is particularly useful, for it deals directly with an instance of stolen art. Though PLRs cannot be used to establish precedent, since they are the IRS' response to a request submitted by the taxpayer, this particular PLR is helpful because it links a variety of precedent to a case of illegal artwork and illustrates what was likely the IRS's reasoning in *Canyon*'s case. Here, the IRS, citing *Publicker v. Commissioner*, determined that several works illegally obtained during World War II should be valued based on "the value given to goods by individuals willing to pay for" them. Further, the IRS determined that the market's illegality does not, in itself, "obviate the existence of that market for estate valuation purposes."[41] To back up this claim, the IRS cites *Jones v. Commissioner*.[42] *Jones* deals with a case of a narcotics dealer, who was taxed on sales of cocaine. In another case, *Caffery v. Commissioner*, the FMV of a batch of marijuana was determined based on its street value, and therefore the value of the property was considered based on its illegal (best) market.[43] Further, the IRS cites *Browning v. Commissioner*, another case in which marijuana was valued based on its "wholesale street market," as an example in which an object's best market was an illegal one.[44]

From these three cases, the IRS determines the following general principles of valuation:

> 1) The fair market value of such property is based on the price that a willing buyer would pay in the relevant illicit

40: Rita Reif, *Rauschenberg Work Brings Sales Record*, NY Times (May 1, 1991), online at http://www.nytimes.com/1991/05/01/arts/rauschenberg-work-brings-sale-record.html.

41: Private Letter Ruling 9152005, IRC Sec(s). 2033, IRS 9 (Aug. 30, 1991).

42: *Jones v. Commissioner,* T.C. Memo 1991-20 (1991).

43: *Caffery v. Commissioner,* T.C. Memo. 1990-498 (1990).

44: *Browning v. Commissioner,* T.C. Memo. 1991-93 (1991).

> market and,
> 2) The relevant illicit market is determined by the particular illicit market in which such property is generally sold, and that market is equally applicable to the estate tax.[45]

Indeed, in *Canyon*'s case, according to limited interviews conducted with the IRS in the fallout of its controversial valuation, it argued just this—that *Canyon* has an illegal market, and therefore should be valued according to the price a willing buyer would pay within this illegal market. When Ralph Lerner, attorney for Sonnabend's estate, called the head of the Art Advisory Panel, Joseph Bothwell, he purportedly explained that the work could be purchased by a "recluse billionaire" who planned hide it.[46]

While generally the IRS has a good case, based upon precedent, to value a work even if that work is barred from the legal market, Christie's valuation may still be warranted. I identify two problems with (1) the way this precedent was applied to *Canyon*'s case and (2) the negative consequences of this kind of valuation. There are major differences between *Canyon*'s case and the cases described above that make their applicability questionable. *Jarre* and *Publicker* dealt with works that were not illegal to sell, but merely had small or limited markets. In *Canyon*'s case, its legal market was completely eliminated by the government's own laws prohibiting its sale. *Caffery*, *Jones*, and *Browning* each involved illegal drugs, items that were illegally obtained, possessed, and sold. This makes them different from *Canyon* in two ways: first, the individuals in these cases had clear and provable access to an easy to enter illegal market, in which each drug has high domestic demand and is easy to transport and conceal. The marijuana business is a $35.8 billion business and is pervasive across the United States.[47] Further, these cases involved the sale of drugs, not just their possession, and therefore the individuals in these cases were already a part of the illegal market. Ultimately, each case involved illegal goods that have a large and easy to access illegal market and further, were already involved in that market.

In contrast, the illegal market for *Canyon* is nearly impossible to enter, not only because it is illegal, but because it requires highly specialized knowledge. Individuals wishing to sell illegal art must locate a potential buyer, with knowledge of the piece, willing to break the law to obtain it. Such markets often involve other illicit trades, like drugs, arms, and terrorism, and art is

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45: Private Letter Ruling 9152005 at § 2031 (cited in note 41).

46: Kinsella, *Rauschenberg Eagle Ruffles Feathers* (cited in note 4).

47: See Jon Gettman, *Marijuana Production in the United States,* Bul. Cannabis Ref. (2006).

often used as a way of laundering criminal proceeds. In other words, one can't head to a local nightclub and sell an illegal work of art like one can sell cocaine—the illegal art market involves impediments to sale besides illegality.[48] Sonnabend, a prominent art collector, purchased and possessed *Canyon* legally—even if these barriers to entry don't warrant a valuation of $0, they are extraordinary enough to warrant some reduction in the valuation, factoring in the risk (fines and jail time) and difficultly to entry within the market. For, even though impediments to sale don't obviate valuation, they are factors that the IRS should consider in the valuation of a work of art.

Even if these impediments are not substantial enough to warrant a reduction in the value of the work, there is a larger problem with the use of the precedent described above. As I pointed out, each of the above cases involved goods that were already illegal to possess, and were purchased or produced within an illegal market. *Canyon* is not illegal to possess—considering the government simultaneously valued it highly *and* imposes laws to prohibit its sale, such valuation actually pushes an object that is legal to possess into an illegal market. The taxes levied on the Sonnabend estate actually encourage Sonnabend's heirs to break the law in order to pay the taxes to the very country that imposes this law.

V. Priceless?

The existence of an illegal market is not the only reason the IRS's Art Advisory Panel valued *Canyon* so highly. One member reported that the group valued *Canyon* on its artistic merit alone, without regarding its legal restrictions. Stephanie Barron, a member of the Panel, who spoke to the New York Times, remarked, "It's a stunning work of art and we all just cringed at the idea of saying that this had zero value. It just didn't make any sense."[49] Here, the Panel seems to have equated artistic merit with value—that is, the Panel ascribed it intrinsic value rather than value relating to its social desirability within a market. As I described above, there are cases in which the IRS values work based on its intrinsic value, but only in cases in which a market is nonexistent. In this case, the IRS has insisted that a market for *Canyon,* while illegal, does in fact exist. Therefore, the Panel should have considered *Canyon* in relation to this market, its conditions and barriers to entry, rather than

48: For more details on the illicit art market, see Siobhán Ní Chonaill, Anaïs Reding, & Lorenzo Valeri, *Accessing the Illegal Trade in Cultural Property From a Public Policy Perspective*, RAND (2011), online at http://www.rand.org/content/dam/rand/pubs/documented_briefings/2011/RAND_DB602.pdf.

49: Cohen, *A Catch 22 of Art and Taxes* (cited in note 9).

on its artistic merit alone. Thus, the Panel's valuation disregarded the IRS's procedures for valuing art laid out in its publications and in the IRM.

There are two problems that could have contributed to such blatant misvaluation. First, the Panel is comprised of art experts, curators, museum directors, and gallery owners—given this composition and the statement from Ms. Barron quoted above, such a panel seems to privilege questions of aesthetic value over questions of market viability. Not only was this aspect, aesthetics, privileged in this case, any other aspects of the work's value were disregarded in its favor. Second, of the nineteen individuals on the 2012 Panel, seven were directors or curators from national museums.[50] Barron herself is the Senior Curator of Twentieth Century Art at the Los Angeles County Museum of Art. While the identity of the individual involved was protected in this case, Sonnabend and her collection were extremely well known in the art community. Further, while the Panel did not factor in *Canyon*'s illegality, they were certainly aware of it, and perhaps even aware of Sonnabend's death. Thus, it seems difficult to conceive of a circumstance in which the Panel was not aware of the taxation outcome of their decision, a decision that ultimately *forced* the donation of the piece to a national museum. This raises questions of bias—bias in two realms, a bias to privilege aesthetic value over legal considerations of value, which a panel of art-lovers and curators is, perhaps, prone to do, and a bias to force a valuable work of art into the hands of a national museum.

Ultimately then, while the Panel is an important part of the IRS's system for appraising valuable art, conflicts of interest in this case as well as an unclear understanding of proper valuation according to the IRS's own tax code were possible factors in the valuation of *Canyon* at $65 million.

Likewise, Christie's and other auction houses seem to have swayed too radically in the opposite direction. While impediments to sale certainly diminish *Canyon*'s value, it does seem to have *some* value within an illegal market. Its illegality doesn't preclude the determination of FMV entirely. Therefore, while these impediments should have decreased *Canyon*'s value, $0 was too radically low a number. The discrepancy between these two appraisals seems to be the result both of a failure to properly follow the IRS's guidelines for valuation and precedent for such a case, coupled with a desire to see value (or lack of value) in a work where such a valuation was beneficial.

Canyon thus brings to light the extensive problems associated with valuing works of art as well as the problems with valuing *potentially* illegal assets—

50: *The Art Advisory Panel of the Commissioner of Internal Revenue: Annual Summary Report for Fiscal Year 2012*, IRS (2012), online at http://www.irs.gov/pub/irs-utl/annrep2012.pdf.

assets that only have an illegal market, but are legal to possess. The mistake may have benefited the public, but such gross misvaluation ultimately sets negative precedent, particularly in a world in which forced donations are not uncommon. For now though, *Canyon* sits hostage in the MoMA, a testament to a great artist, a piece of interesting legal history, and, for some, a monument to an instance of bureaucratic extortion.

Against the New Equal Protection

Adam Swingle†

> "The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society."[1]
>
> -Justice Sotomayor
> *Schuette v. Bamn* (dissenting)

I. Introduction

The genius of the Fourteenth Amendment's equal protection clause is that it legally requires frequent and vigorous public debate regarding the relationship been American democracy and equality. Recently, however, Kenji Yoshino has argued that the popular use of this clause should be scaled back.[2] He advocates instead for a "new equal protection" that is based, not in the equal protection clause, but, rather, in the due process clause. According to him, equality can be better served by replacing traditional group-based equality claims with a liberty-based universal human rights paradigm. After drawing on the political theory of Melissa Williams, this article argues against Yoshino's contentions.[3] He misapprehends the work the group-focused, equal protection inquiry is capable of performing and overstates its balkanizing effects. If this democracy's dual commitments to equality and non-discrimination are not to ring hollow, Yoshino's enthusiastic embrace of the "new equal protection" must remain confined within the journal pages from which it attempts to spring.

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†: Adam Swingle is a third-year in the College, majoring in History.

1: *Schuette v. Bamn*, 134 S. Ct. 1623, 1677 (2014) (Sotomayor, J., dissenting).

2: Kenji Yoshino, *The New Equal Protection,* 124 Harv. L. Rev. 747 (2011).

3: Melissa Williams, "Memory: The Claims of History in Group Recognition," in *Voice, Trust, and Memory: Marginalized Groups and the Failings of Liberal Representation* 176-202 (Princeton 1998).

II. Kenji Yoshino's New Equal Protection

Kenji Yoshino's "new equal protection"[4] emerges as a response to recent changes in the Supreme Court's equal protection doctrine. Centrally, he notes that the Court, in recent decades, has brought about the "closure of the heightened scrutiny canon."[5] That canon, which originates from the equal protection clause of the Fourteenth Amendment, determines whether or not legislation that classifies against a specific group should have its validity reviewed through a deferential or critical lens. In short, beginning in the 1940s, the Court held that the equal protection clause forbids caste legislation.[6] It noted that the Clause must invalidate legislation that is merely enacted out of the majority's prejudices against minority groups.[7] To give teeth to this interpretation, the Court later declared that particularly vulnerable groups should be deemed "suspect classes."[8] Now, any legislation that specifically targets a suspect class can only be sustained if the government provides objective, compelling justifications for its enactment, and if such justifications are reasonably, or, in some cases, narrowly, tailored to a plausible state interest.[9] In this doctrinal terrain, the Court does not simply presume that legislation affecting suspect classes is constitutional. Rather, such legislation is subjected to a form of heightened scrutiny that has often proved "fatal in fact."[10]

Once this doctrine achieved orthodoxy, the Court declared numerous minority groups to be suspect classes. Specifically, the Court "formally accorded heightened scrutiny to classifications based on five characteristics–race, national origin, alienage, sex, and non-marital parentage."[11] The Court's expansion of this doctrine occurred at a rapid pace: classifications based on race were the first to be subjected to heightened scrutiny in 1967;[12] a mere ten years later, in 1977, the Court extended protection to the last classification

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4: Yoshino, 124 Harv. L. Rev. at 802 (cited in note 2).

5: *Id*. at 758.

6: *United States v. Carolene Products,* 304 US 144 (1938).

7: *Id.* at 152, n. 4.

8: The doctrine is summarized in *Cleburne v. City of Cleburne Living Center,* 473 US 432, 440-41 (1985).

9: *Id.*

10: Gerald Gunther, *Foreword: The Supreme Court, 1971 Term,* 86 Harv. L. Rev. 1, 8 (1972) (arguing that a decision that heightened scrutiny should apply, in most cases, itself determines that a challenged law is unconstitutional).

11: Yoshino, 124 Harv. L. Rev. at 756 (collecting cases) (cited in note 2).

12: *Loving v. Virginia,* 388 US 1, 11 (1967) (requiring heightened scrutiny for laws classifying upon the basis of race).

noted above—non-marital parentage.[13] Despite the quick expansion of this doctrine in the 1960s and 1970s, in the four decades that have since passed the Court has not afforded suspect classification protections to any new groups. The ambit of the heightened scrutiny canon has remained static. Yet it has done so in spite of the fact that numerous groups–which prominently include the LGBT community, the elderly, and the mentally and physically disabled–have continually petitioned the Court for protection.[14] The doctrine's rapid shift in course–from liberal expansion to rigid invariability–requires explanation.

Yoshino claims that the "closure of the heightened scrutiny canon can be fairly attributed to pluralism anxiety."[15] What he means, simply, is that American society has been beset with worries stemming from the increasing diversity of the country. The proliferation of different groups–whether they are ethnic, religious, sexual, etc.–has resulted in the "balkanization" of America.[16] On this view, when American citizens look around, they discover that they no longer see themselves in their peers; rather, they see 'Americans' who appear increasingly different. This recognition results in pluralism anxiety, in a discomfort with an American society that appears to be ever more heterogeneous, ever more socially divided. Pluralist anxieties inevitably feed into calls for a return "to the ideals of integration and assimilation."[17]

Yoshino claims that such pluralism anxieties have afflicted the Justices themselves–an observation that, he argues, explains the closure of the heightened scrutiny canon. These anxieties are on clearest display in *City of Cleburne v. Cleburne Living Center.*[18] In that case, in 1985, the Court rejected the request that it deem the mentally ill a suspect class.[19] The majority noted:

13: *Trimble v. Gordon,* 430 US 762, 766-67 (1977) (requiring heightened scrutiny for laws classifying upon the basis of illegitimacy).
14: Yoshino, 124 Harv. L. Rev. at 757 (collecting cases) (cited in note 2).
15: *Id.* at 758.
16: *Id.* at 748.
17: *Id.*
18: 473 U.S. 432 (1985).
19: *Id.* at 442-43.

> "If the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large."[20]

In other words, the Court denied the mentally ill suspect classification not necessarily because this group did not deserve such protection; rather, the Court refused the request because it worried that such a course would inspire *too many* other groups to seek similar treatment. A majority of the Court now shared a concern that Justice Rehnquist had articulated a decade earlier: due to the incredible diversity of American society, it "would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road…[A willing Court could thus] choose a 'minority' it 'feels' deserves 'solicitude' and thereafter prohibit the States from classifying that 'minority' different from the 'majority.'"[21] In both instances, members of the Supreme Court explicitly worried that if equal protection doctrine remained upon its expansionary path, it would eventually have no meaningful bounds. Soon, they stressed, the protections heightened scrutiny afforded would become meaningless, their value fatally diluted, as such protections would apply to an infinitely large number of groups.[22] And so the heightened scrutiny canon closed.

Yoshino is correct to argue that pluralist anxieties are responsible for the Court's refusal, since 1977, to accord suspect classification status to any new groups. His claim is persuasive, as it is supported clearly by the words of the Justices themselves. They allowed concerns about America's increasing pluralism and heterogeneity to influence the equal protection doctrine they developed. But, after providing this justified descriptive account, Yoshino moves more dubiously into normative terrain.

Specifically, he argues that the Court's closure of the heightened scrutiny canon is "in many ways desirable."[23] To make this argument, he turns to the

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20: *Id.* at 445-46.

21: *Sugarman v. Doull,* 413 US 634, 657 (1973) (Rehnquist, J., dissenting).

22: The language of dilution is borrowed from Yoshino: "But the Court can never give heightened scrutiny to classifications of, say, twenty groups without *diluting* the meaning of that scrutiny." Yoshino, 124 Harv. L. Rev. at 762 (emphasis added).

23: *Id.* at 803.

Court's reasoning in *Lawrence v. Texas,*[24] a case involving a facial challenge to Texas' criminal anti-sodomy statute.[25] The petitioner, a male who had been tried and convicted of having sex with another man, challenged the law on both equal protection and due process grounds.[26] The equal protection claim requested that the Court strike down the law as an unconstitutional classification based upon sexual orientation.[27] Considering that the statute only banned sodomy between individuals of the same-sex, the petitioner contended it was caste legislation of the sort the equal protection clause had been interpreted to prohibit.[28] If the Court went this route, it would have likely had to deem sexual orientation a suspect classification, thus requiring heightened scrutiny of legislation that classifies upon that basis.[29] On the other hand, the plaintiff's due process claim requested that the Court declare sexual intimacy a fundamental right with which the state could not interfere.[30] Despite the fact that this second argument required the Court to directly overrule its contrary decision in *Bowers v. Hardwick,*[31] the Court did end up invalidating the law on due process as opposed to equal protection grounds.[32]

Yoshino lauds this choice on the part of the Court, even though it marked another instance in which the Court ensured that the gates to the heightened scrutiny canon remained resolutely closed. He notes an important distinction between liberty-based due process claims and equality-based equal protection claims. He writes, "the liberty claim is more persuasive because it performs the empathy it seeks. It frames the right at a high enough level of generality that opposite-sex couples are urged to imagine a world in which they were denied the right."[33] What he is arguing is that the due process route transformed *Lawrence* from a case that simply affected the rights of gays–a specific minority group–into one that affected all American citizens–as most, if not all, adults have an interest in remaining sexually autonomous from the state. Yoshino argues that, by framing the right at issue as one that all Americans hold in common, the Court diminished differences and highlighted similarities between citizens.

24: 539 US 558 (2003).
25: See Yoshino, 124 Harv. L. Rev. at 776-81 (cited in note 2) for his comprehensive discussion of the case.
26: *Id.* at 776-77.
27: *Id.* at 776, 778.
28: *Id.* at 777.
29: *Id.* at 778.
30: *Id.* at 778-79.
31: 478 US 186 (1986).
32: Yoshino, 124 Harv. L. Rev. at 777 (cited in note 2).
33: *Id.* at 794.

The equal protection route would have done the opposite, according to Yoshino. Rather than framing rights at a high level of generality such that they are commonly held by all, equal protection claims request that the Court bestow special protections to minority groups who claim to be uniquely disfavored. Yoshino sees a fatal flaw in this approach: it requires courts to stress "the demographic differences that drive us apart" instead of the "interests we have in common as human beings."[34] He regards equal protection doctrine's focus on group-identity as ultimately debilitating. It ensures that the attempts of equal protection claims to block discrimination will only further enhance social discord within America. To him, such claims will only further entrench pluralism anxieties, anxieties that have surely been responsible for discriminatory laws historically enacted.[35]

Accordingly, he argues that the closure of the heightened scrutiny canon should not inspire despair. Rather, he believes that abandoning group-based equal protection claims will allow us to work toward "fashion[ing] a new, more inclusive sense of 'we.'"[36] In the mold of *Lawrence*, if we focus on a project of protecting "universal human rights," as opposed to balancing the competing interests of minority groups who struggle for greater judicial protection, Yoshino maintains that we, as a national community, will focus more on our similarities instead of our differences. And through this new focus we will be able to construct an ever more socially harmonious Union in which to live. This move away from group equality claims in favor of universal liberty claims is what Yoshino describes as a desirable "new equal protection."[37]

III. Williams and the Merits of Group-Focused Adjudication

The dubiousness of Yoshino's normative claim is revealed when it is placed into conversation with the political theory of Melissa Williams. Three aspects of her work are particularly relevant here: her claims regarding (1) the manner in which discrimination is initially propagated, (2) the methods through which its effects are continuously perpetuated, and (3) the procedures through which individuals and institutions may viably combat discrimination and the repercussions it wreaks. To each of these arguments I will now turn.

34: *Id.* at 793.

35: He also claims that the equal protection claim is itself logically deficient: "equal protection claims tend to stress distinctions among us, even as they ask us to overcome those distinctions. That exhortation is a performative contradiction. It asks us to transcend a distinction that the entity urging transcendence is unable itself to achieve." *Id.* at 794.

36: *Id.* at 797.

37: *Id.* at 802.

Williams adopts a surprisingly simple, yet still cogent, view of the manner in which discrimination proceeds. For her, discrimination occurs when individuals, likely within the majority, ascribe negative characteristics to groups against which they, consciously or subconsciously, hold prejudice.[38] As an example, they might ascribe an intellectual inferiority to blackness, a physical inferiority to femininity, or a moral inferiority to homosexuality. They disparage what they view as the essential trait of a minority group. And so, by attaching a "negative meaning" to these minority groups' supposedly essential traits, they provide themselves a "justification for the subordinate status of those who do possess [such traits]."[39] Most centrally, then, people discriminate on the basis of a targeted individual's perceived *group identity.*

Because discrimination is *group* based, Williams maintains that it has effects far beyond the individual against whom the initial act of discrimination is directed. She argues:

> "negative social meanings that members of dominant groups ascribe to marginalized groups have functioned to legitimize marginalization; the subordinate social position of marginalized groups in turn reinforces the negative social meanings that others attach to them. Both dynamics reproduce patterns of cultural and material inequality over time."[40]

Because individual acts of discrimination inherently involve the negative treatment of an entire group identity, these individual acts of discrimination contribute to a social order in which all members of a negatively understood minority group are marginalized. Structural inequalities then flow, as acts of discrimination work cyclically to increasingly diminish the social standing of those against whom discrimination works.

Williams thus argues that discrimination can never be understood as the vestige of a more barbaric past. She believes, rather, that the "history of discrimination is a residue deposited within and among the structures of social life."[41] Because discrimination is founded upon social constructions of group identity, it is not simply limited to the positive acts taken by individuals who give effect to their prejudices. Rather, discriminatory treatment is furthered

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38: Williams, *Memory* at 182 (cited in note 3). She argues: "a negative social meaning is ascribed to those characteristics by persons who do not possess them, and that negative meaning makes the traits a justification for the subordinate status of those who do possess them."

39: *Id.*

40: *Id.* at 177.

41: *Id.* at 182.

so long as the negative characteristics once ascribed to the essential traits of minority groups are never forcefully and clearly expunged from the public understanding. To use an example, the effects of racial discrimination were not excised from the American experience simply when segregation was outlawed, or when the Supreme Court began talking in the language of a "color-blind Constitution."[42] Although we live in an age where positive programs aimed at securing greater racial equality have replaced explicitly discriminatory practices, there are still broad questions as to whether or not racial minorities are–*de facto*–politically, socially, and economically equal with their white peers. More direct measures need to be taken.

To conclude, Williams argues that discrimination and the inequality it engenders can only be capably eradicated by way of an open examination of the manners in which group identity is understood publicly. She notes: this process moves "recursively, through a movement back and forth between the fact of *group-structured* inequality and an equality-driven inquiry into its causes."[43] Her focus on group identity is paramount. Without engaging in an inquiry as to whether not individuals still negatively ascribe certain characteristics to the essential traits of minority groups, those minority groups will never escape the marginalization such discriminating actors effect. Because discrimination springs from a prejudicial construction of group identity, only an explicit rehabilitation of that group identity will forestall discrimination and inequality in the future.

IV. Critiquing the New Equal Protection

This understanding of the process of discrimination and its effects directly disputes Yoshino's normative claim. Remember, he articulates that a move away of group-based equality claims is desirable. He argues that by focusing on protecting universal human rights, as opposed to protecting minority groups who claim to have been marginalized, this country can move past discrimination and forge a more harmonious, cohesive whole. On his view, focusing on the existence of groups only perpetuates social discord and discrimination, as it highlights sectarian differences amongst us all, vitiating any common regard we might hold for our peers. By contrast, Williams provides

42: *Parents Involved in Community Schools v. Seattle,* 551 US 701, 772 (2007) (Thomas, J., concurring) (citing *Plessy v. Ferguson,* 163 US 537, 559 (1896) (Harlan, J., dissenting)). Chief Justice Roberts expressed a similar sentiment in his plurality opinion. He noted: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved,* 551 US at 748.

43: Williams, *Memory* at 194 (emphasis added) (cited in note 3).

that group-focused adjudications are absolutely necessary. For her, ignoring the presence of groups is tantamount to ignoring the causes of discrimination itself. She thus maintains that setting aside the causes of discrimination, as opposed to actively and openly combatting them, will not engender greater social unity but will only further perpetuate marginalization, discrimination, and inequality itself.

It is my opinion that Williams' position proves more persuasive than Yoshino's claims, and that she illustrates that the closure of the heightened scrutiny canon is not a development that we should celebrate. When reading her arguments in conversation with Yoshino, it becomes clear that he fundamentally misapprehends the work that the universal human rights paradigm is actually able to perform. He also undervalues the group-based framework and overvalues any negative effects its use might have. These deficiencies of Yoshino's argument will be discussed individually.

As stated, Yoshino believes the universal human rights paradigm can bridge social gulfs between different individuals within our pluralist society. He locates this remarkable ability in the paradigm's rhetorical orientation: it rests on the fact that the paradigm talks in tones of "we", not "you" or "they." But Yoshino overstates the value of this linguistic framework. It is surely pleasant to argue that moving from the second- and third-person cases to the first-person plural reinforces community and harmony by highlighting that we are, in fact, a "we", not, instead, a disassociated set of individuals constituted by disparate backgrounds, motivations, and understandings. Yet, this argument is problematic insofar as it implies that social discord can simply be imagined away. On this view, we need not ask why acts of discrimination occur; rather, we must simply determine how many more times we need to use the word "we", as if by using that term we might simply forget what has historically justified social division and rancor. The naiveté of this position is startling.

Moreover, the case-by-case nature of the universal human rights paradigm, by focusing on the singular, discrete set of facts in each case, fails to meaningfully combat the attitudes, understandings, and behaviors that contribute to the denial of rights in the first place. It is only concerned with invalidating such denials once they have occurred. Look to *Lawrence*. The universal human rights paradigm simply required that the Court declare that sexual intimacy is a right with which the state cannot interfere. After such a declaration, the Court's work was done. No longer would the judiciary sanction any denial of that right. But that did nothing to ensure that the particular attitudes that gave rise to the unconstitutional law at issue would not rise again and sanction the violation of other, collateral rights.

To put it more strongly, the universal human rights paradigm appears to suggest that human actors only deny other people their rights out of a *per se*

interest in the act of denying rights. But, as Williams makes clear, that is not a sound understanding of human behavior. Individuals and institutions do not deny people their rights solely because of an interest in restricting the numbers of those who hold rights; rather, people are denied rights because they hold certain characteristics to which the majority ascribes negative reputations. Therefore, gays and lesbians are denied a right to marry not simply because the majority believes the marriage right should be closely guarded. In addition, they are denied that right because, as gays, they are viewed as ostensibly morally bankrupt. Within that determination is the notion that their homosexuality renders them unworthy of the marriage right. And so the denial of right comes, in part, as a result of their minority status. Then, blacks were not denied the formal right to vote simply due to the majority's interest in narrowly delineating the bounds of the franchise. In addition, blacks were denied the right to vote because they were black, because their status as a racial minority was correlated with negative imputations regarding their supposed moral and intellectual inferiority to the white majority. Finally, women have consistently been denied equality of treatment in the workplace not simply because the allocation of professional jobs is extremely competitive. In addition, they experience such inequality because they are in fact women, because predominantly male professional elites negatively ascribe to women an understanding that they are relatively ineffective professional actors. In short, each of these cases involve the denial of a fundamental right–to marry, to vote, and to work–due, in part, to the majority's negative view of those individuals whose rights are denied.

The universal human rights paradigm does not recognize this commonsensical description of human behavior. Accordingly, it maintains that rights are protected simply when their denial is rendered illegal. But maintaining the illegality of certain active behavior does not require changes in the social understandings of group identity that give rise to deprivations of rights in the first place. Without actively challenging privately held prejudices, those prejudices will continue to find expression. It is simply a question of how individuals will adapt, consciously or subconsciously, so as to give effect to their antipathies in a form not yet outlawed. When nothing is done to change the underlying negative views that individuals hold about their peers in society, social division will be perpetuated, not minimized. We should thus reject Yoshino's claim that his "new equal protection" should be desired due to its ability to excise social discord and difference from the American experience. His theory ignores such discord and difference; it does not mend it.

By contrast, Williams makes absolutely clear that a doctrine attentive to group-based equality claims will minimize discrimination, inequality, and discord within the American populace. When the Court announces that a

minority group qualifies as a suspect class and thus receives heightened judicial protection, the Court engages in the sort of direct and open inquiry about group identity that Williams argues is necessary for combatting discrimination and inequality. Implicit in such a declaration is that the group at issue should be valued as equally as other groups within America. But that is directly at odds with the beliefs and prejudices that, historically, have allowed negative and harmful characteristics to be ascribed to that group's public identity. Accordingly, by affording marginalized groups heightened judicial protection, the Court strikes directly at the notion that the subordination of these groups is legitimate.

As a result, group-based equality claims, at least when they are successful, directly do harm to the ideological seeds that lead to the outgrowth of discrimination and inequality. Surely, such claims might not effect fatal harm. I do not assert that discrimination against a certain group will be eradicated simply upon that group's designation as a suspect class. To the contrary, I recognize that an egregious amount of work must be done to dismantle the supporting beliefs that provide the foundation for group-based animus. But still, although affording heightened scrutiny to marginalized groups will likely not, in and of itself, end such animus, successful designations of suspect classifications will at least provide greater authority to those seeking to eliminate modern forms of discrimination. Yoshino would have done well to recognize, instead of deny, this capacity of group-based equal protection claims.

Finally, Yoshino's notion that a group-based focus is socially divisive is far overblown. Yes, he is certainly right that, to a certain extent, discussing the groups present in America will highlight the differences that exist between distinct people. But, as noted above, Yoshino's universal human rights paradigm will do nothing to ensure an America where group difference is minimized. In actuality, the only manner in which to minimize group difference is to eradicate the privately held negative prejudices that serve to distance different groups and their members from one another. The beauty of the group-based equal protection framework is that, if adhered to genuinely, it allows the rehabilitation of group identities such that a future America will be composed of far fewer groups whose public identity is laden with externally imposed, harmful characteristics and imputations. Thus, the group-based equal protection might highlight differences now; but it only does so with the hope that by directly confronting such differences in the present, we might construct a future in which such difference, animosity, and antipathy does not exist.

V. Conclusion

The "new equal protection" should be rejected. We cannot, as Yoshino would suggest, hope to eradicate pernicious discrimination and structural inequalities by merely ignoring that they exist. To the contrary, such social ills will only be eradicated if we, as Williams suggests, directly, openly, and actively combat the negative characteristics that have been ascribed to marginalized groups. The group-based equality claim emerges as a prime candidate through which to do that work. Accordingly, as a nation ostensibly committed to equality, our focus should be placed upon restoring group-based equality claims to their former position of prominence. We should therefore mourn the "closure of the heightened scrutiny canon" instead of celebrating it.[44] We must actively move for its re-opening. By doing so, we will take one step toward ensuring that this nation's dual commitments to equality and non-discrimination do not ring hollow.

Thankfully enough, prospects for change of this sort are in the air. While the Court has balked at its most recent opportunities to re-open the heightened scrutiny canon,[45] some members of the Court have adopted a Williams-esque analytic orientation when it comes to questions of discrimination and inequality. They recognize the value of rehabilitating popular conceptions of minorities' group identities. If they were to command a majority of the Court, and if the heightened scrutiny canon were to be eventually reinvigorated, they would be more than capable of doing the therapeutic work that Yoshino's new equal protection is unable to perform.

The leader of this contingent of the Court is indisputably Justice Sotomayor. Her dissent in *Schuette v. Bamn* offers the clearest window into her views regarding how the courts should review group-based animus. In the context of racial discrimination, she argues simply that "Race matters."[46] It matters, she continues, because "of the long history of racial minorities being denied access to the political process"; "because of persistent racial inequality in society–inequality that cannot be ignored and that has produced stark socioeconomic disparities"; and because of "reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away."[47] She concludes with a veritable shot across the bow at her colleagues[48]

44: Yoshino, 124 Harv. L. Rev. at 758 (cited in note 2).

45: See *US v. Windsor,* 133 S. Ct. 2675 (2013) (evading the question of whether or not sexual orientation should be deemed a suspect classification).

46: *Schuette,* 134 S. Ct. at 1676 (Sotomayor, J., dissenting).

47: *Id*.

48: *Id.* at 1638-39 (Roberts, C.J., concurring) and at 1643-45 (Scalia, J., concurring).

who opt to view race and race-based animus more abstractly, and thus less critically, than she:

> "The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race does matter."[49]

Justice Sotomayor thus argues that the courts should take an active role in examining the values that have been associated with minority group identities. By placing those values into the searing crucible of judicial review, she hopes that she and her fellow judges will be able to contribute to a discourse in which socially constructed group identities are meaningfully reviewed and emphatically rehabilitated if necessary. It is precisely this process of intensive examination that will ensure that negatively constituted group identities will not exist in perpetuity. It is through this process that we might begin the work of ensuring that group-based animus and inequalities become relics of an increasingly distant past.

While Justice Sotomayor's assertion that prejudice and discrimination should be combatted openly is laudable, it is still the case that her position does not yet command a majority of the Court. Her dissent in *Schuette* was only joined by Justice Ginsburg, although it is likely that Justice Kagan would also have signed on if she had not recused herself from the case. Sotomayor's position, the Williams-esque articulation of group-based animus, is still a minority view. A number of her colleagues cling to the notion that "No good can come" from the inquiries of the sort Sotomayor and Williams propose.[50] They argue that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[51] They suggest, in effect, omitting any discussion of race and its social construction during discussions of alleged race-based animus and inequality. Serious ground must be covered if the So-

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49: *Id.* at 1676 (Sotomayor, J., dissenting).

50: *Id.* at 1643 (Scalia, J., concurring).

51: *Id.* at 1675 (Sotomayor, J., dissenting) (quoting *Parents Involved,* 551 US at 748).

tomayor-Williams position is going to become orthodoxy on the Court.

Yet, despite the ground the must still be covered, the work that still must be done, the number of justices who still need convinced, there is a significance to Sotomayor's *Schuette* dissent that must be noted. Namely, no justice of our nation's highest court has discussed race in commonsensical, realistic terms like these since Justice Thurgood Marshall sat on the bench.[52] In the over twenty years that have passed since his retirement and *Schuette*, a somewhat sterile formalism has typically afflicted the Court's treatment of issues of racial discrimination specifically and group-based equal protection claims more generally.[53] So Justice Sotomayor's dissent detailed here should provide some comfort to those who desire their courts to recognize the group-based nature of discrimination and the attendant imperative to rehabilitate public understandings of marginalized groups if discrimination against such groups is ever going to cease.

The day of this method's orthodoxy might still be far off. But its distance in time might have never been minimized if not for the initial work Sotomayor's *Schuette* dissent performs. Her argument there should provide a glimmer of hope, no matter how faint in the current constitutional moment, that group-based equal protection claims might eventually be restored their previous position of prominence, that the heightened scrutiny canon might just be embraced once more. With luck, Sotomayor's increasing leadership on the bench will revitalize that doctrine and thereby contribute to efforts to candidly combat forms of group-based animus that have afflicted our society for far too long.

52: For his similar treatment of the issues surrounding race-based animus, see *University of California Regents v. Bakke,* 438 US 265, 387 (1978) (Marshall, J., concurring in part and dissenting in part).

53: This phrase is borrowed from Justice Blackmun's dissent in *DeShaney v. Winnebago County Department of Social Services,* 489 US 189, 212 (1989) (Blackmun, J., dissenting) (castigating the Court for "retreat[ing] into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts").

Economic and Legal Aspects of the Failing Firm Defense

Graeme O'Meara†

Abstract: This article outlines the application of the failing firm defense in cases of merger policy. The first section outlines the economic consequences of allowing a merger where one party to the merger is struggling financially. This is followed by a discussion of the failing firm defense from the perspective of U.S. and E.C. competition law, including key cases where it was invoked. The final section examines its use in the context of an economic downturn and whether it was influential in the outcome of the *Musgrave-Superquinn* case.

On 28 September 2011, the Irish Competition Authority approved the proposed merger between Musgrave Group and Superquinn Ltd on the basis of substantive evidence from both parties which showed that the proposed acquisition was unlikely to impede effective competition in the domestic marketplace.[1] Despite several objections from third parties, the authority ruled out any anticompetitive concerns that could arise from unilateral effects, strategic blocking of entry, waterbed effects and coordinated behaviour. However, the economic climate in which this analysis took place and the consequences of a contrary ruling are undoubtedly prescient factors which may have influenced the authority's decision. This poses the question: was the decision predicated on a failing firm defense? Would the merger have been approved had Superquinn not been going into receivership? In this essay, I outline the economic and legal analysis behind the failing firm defense, how it has evolved from landmark cases, its applicability in the current economic crisis and finally, the effect this argument may have had on the *Musgrave-Superquinn* case.

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1: *Determination of Merger Notification M/11/022–Musgrave/Superquinn*, Comp. Authority (Sep.28, 2011), online at http://www.tca.ie/images/uploaded/documents/M-11-022%20Musgrave-Superquinn.pdf.

I. Economics Underlying a Failing Firm

If the target firm is failing, a merger prone to create or strengthen a dominant position may be accepted under the so called failing firm defense ("FFD"): an escape route for a merger involving a firm facing an otherwise inevitable liquidation. Conn highlights three motivations for an acquiring firm to employ the FFD: short term benefits (e.g.absorption of the failing firm's tax loss carry forward or appreciation of reported earnings per share), use of the merger as a vehicle for entering more profitable/growth orientated industries, and to block entry or impede development in the market so as to reap monopoly rents.[2] Competition authorities face a trade-off between endorsing a potentially anticompetitive merger and forcing liquidation of productive assets, each of which pose threats to consumer welfare. If the failing firm is acquired by a competitor, this might create or strengthen a dominant position and in turn lead to reduced output from the social optimum, higher prices, and consequently lower consumer welfare.Likewise, if the failing firm and its assets exit the market, the loss of a competitor may lead to greater concentration and reduced output. Persson highlights a further complication with the FFD: if the failing firm's assets exit the market and enter another market, should the authority examine the effect on this market or focus on the original market?[3] Boukaert et.al show that in almost all cases, adopting the FFD increases consumer welfare and when the failing firm remains in the market, product variety is maintained which consumers value more than increased prices.[4] Analysis shows that when product differentiation is sufficiently high, the post merger outcome benefits consumer and producer surplus compared to the market outcome when the failing firm exits the market.[5] Persson shows that selling the failing firm's assets to a smaller or non competitor buyer may not be the socially preferred outcome and calls for an improvement of the auction selling procedure.[6] The FFD rule does not ensure that the socially preferred buyer obtains the assets, since the rule is only based on firms' bids and their market shares rather than their underlying technology.Persson's analysis also proves that the FFD rule can be inefficient from a total surplus (consumer and producer) point of view: small firms can pre-empt acquisition

2: Robert Conn, *The Failing Firm/Industry Doctrines in Conglomerate Mergers,* 24 J. Industrial Econ.181 (1976).

3: Lars Persson, *The Failing Firm Defense*, 53 J.Industrial Econ.175 (2005).

4: Jan Boukaert, Peter Kort, & Stefka Petrova, *The Failing Firm Defense in Declining Markets,* presented at the Cresse European Conference on Competition and Regulation (2011).

5: *Id.*

6: Persson, 53 J.Industrial Econ.at 175 (cited in note 3).

that would lead to a higher total surplus due to a least danger to competition (LDC) condition which favours small, inefficient firms.

Welfare

If a failing firm is acquired by a dominant firm, then it produces fewer goods at a higher price than a similarly situated firm in a competitive market.[7] At the other end of the continuum, when a failing firm departs from the market, the resources it had employed are devoted to their next best use, which could be either scrap or the manufacture of a completely different product.This also represents an economic loss in the market of interest. In addition, any technical or productive achievements of the failing firm will be lost.Quantifying the exact economic loss is tedious but nonetheless aided by reaching comparative conclusions. The shaded area in Figure 1[8] illustrates the total surplus arising in a competitive market; if a failing firm departs from this market and the effect is a reduced output, Figure 2 presents the lost surplus.[9]

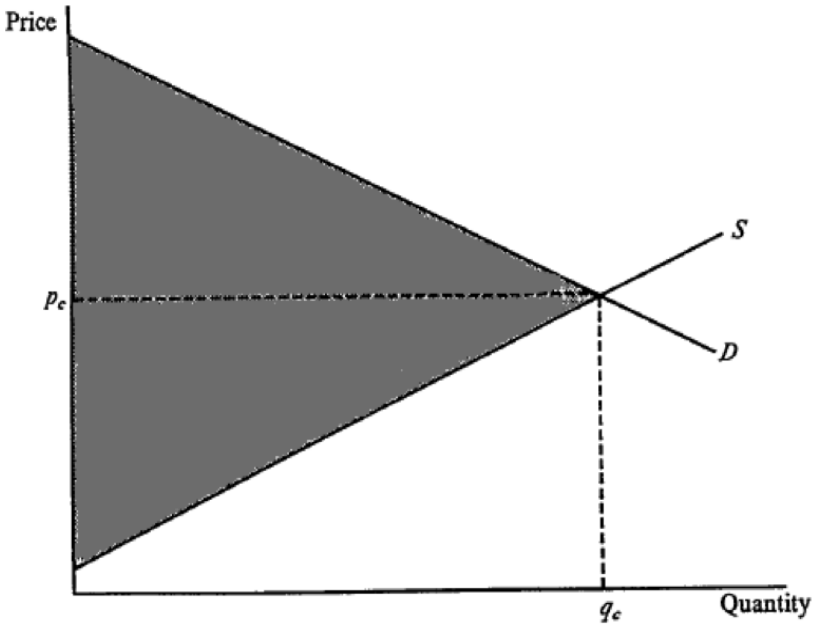

Figure 1

7: Thomas Campbell, *The Efficiency of the Failing Firm Defense,* 63 Tex.L.Rev.251 (1984).
8: *Id.*at 259.
9: *Id.*at 260.

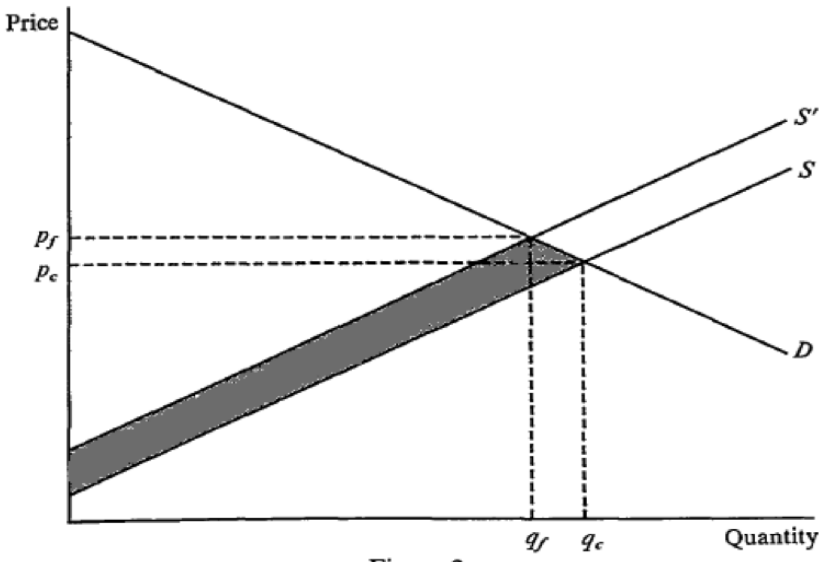

Figure 2

If the failing firm is acquired through a merger which leads to the acquiring firm becoming a monopolist, the loss of surplus is illustrated in Figure 3.[10] It is clear that the welfare loss from the failing firm exiting the market far outweighs that from monopoly pricing and although the loss from increased concentration and prices is hard to quantify, we can be certain that the loss from the firm exiting the market is substantial.

10: *Id.*at 261.

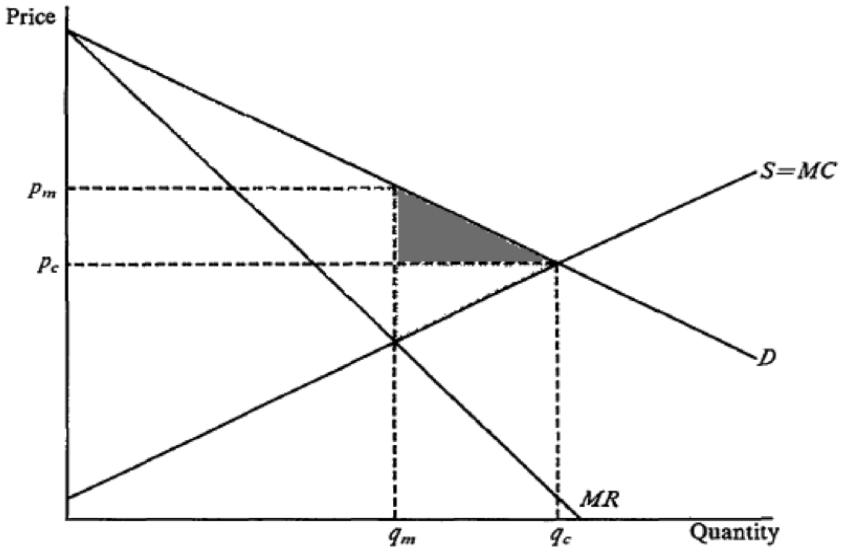

Figure 3

Campbell presents a test for ascertaining the economic efficiency of a merger for the indeterminate situation where the failing firm's assets may not leave the market if the merger is blocked. The test advocates case by case analysis to determine if the merger is economically justified.[11] Friedman divides the FFD into two strands, a competitive strand and a hardship strand, and suggests that courts ought to apply only the competitive strand if the firm's assets are likely to exit the industry.[12] Only then, much like the efficiency consideration in merger analysis, may they consider the hardship strand.

Predatory Pricing

Saloner emphasises the effects of the FFD on incentives for predation: if firms in an oligopolistic environment know that if a competitor falls into financial distress it can acquire that firm or at least its assets under the veil of the FFD, then the sheer existence of the FFD may incentivise predatory behaviour.[13] Predation is further likely if the failing firm's assets are industry

11: *Id.*at 268-69.

12: Richard Friedman, *Untangling The Failing Company Doctrine*, 64 Tex.L.Rev. 1375 (1985).

13: Garth Saloner, *Predation, Mergers and Incomplete Information*, RAND J.Econ. 165 (1987).

specific and yield a low value outside the industry.For a firm to engage in predatory pricing, it must have market power in more than one market.This way it can reduce short run prices below cost in one market, while being sustained by its operations in other markets. Once competitors have exited, market power will be regained and economic profits restored via price hikes. Predation will only be considered viable if the present value of profits earned after rivals have exited is greater than the present value of losses from predation. Selten's chain-store paradox model shows that predation (like limit pricing) does not work if there is complete and perfect information and the dominant firm cannot commit to an aggressive strategy.[14] The Chicago School argues that if the targeted firm knows that profits will be made after it leaves (stage 2), resources will be provided by capital markets to fund resistance to predation.

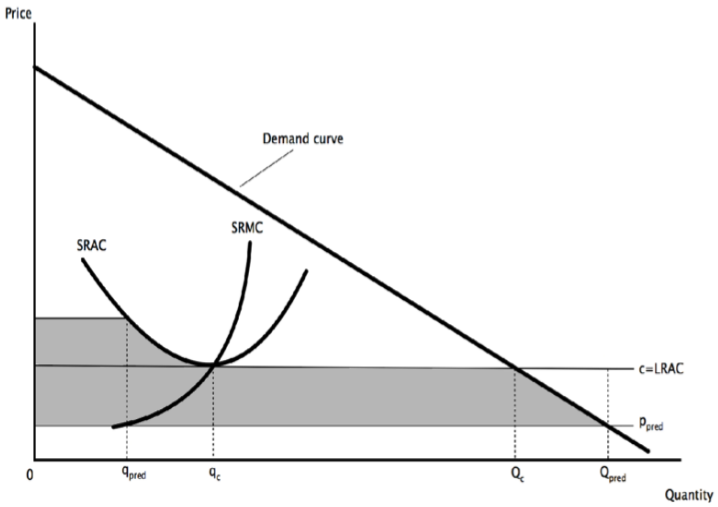

Figure 4: Predatory Pricing: Stage 1 - Losses[15]

14: Reinhard Selten, *The Chain Store Paradox*, 9 Theory & Decision 127 (1978).

15: Stephen Martin, *Economics: Economic Analysis and Public Policy* 455 (MacMillan 1994).

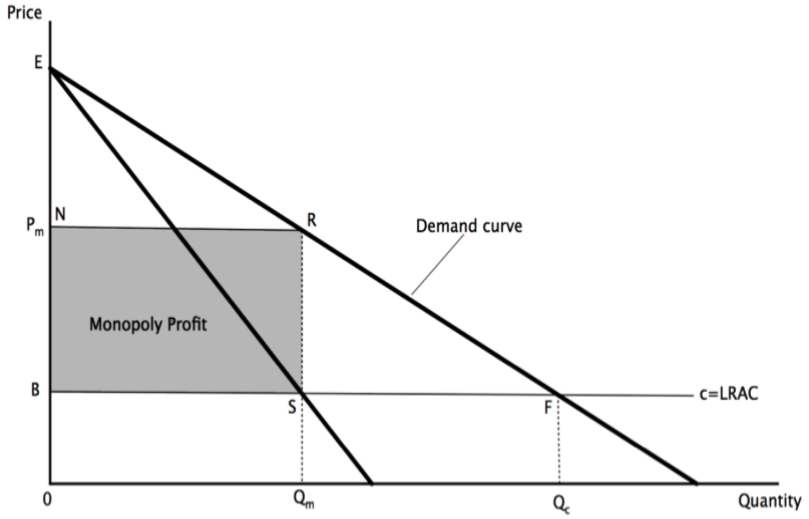

Figure 5: Predatory Pricing: Stage 2 - Profits[16]

If a merger between two firms is legal and anticipated, it may still be preceded by a price cutting episode, serving two purposes: first, it convinces the prey to sell out on favourable terms and second, it signals to potential entrants that entry is unprofitable. In this instance, a merger under the FFD would inevitably lead to market dominance. It is therefore imperative that the authorities ensure that predatory behaviour is not the reason that the target firm is failing.[17]

Entry Deterrence

Fedele and Tognoni contend that myopic application of the legal requirement that "absent the merger the [failing firm's assets] would exit the market" can lead to long term anticompetitive effects.[18] In their opinion, the trade-off facing competition authorities is between preservation of assets and entry deterrence; they argue that an incumbent could acquire the failing

16: *Id.*at 460.
17: Saloner, RAND J.Econ.at 165 (cited in note 13).
18: Alessandro Fedele & Massimo Tognoni, *The Failing Firm Defense with Entry Deterrence,* 62 Bul.Econ.Res.365, 365 (2010).

firm, exploit its assets for cost efficiency and thereby erect barriers to entry, producing harmful effects on consumer welfare. In this way the efficiency gain from merger has both positive and negative implications: it can avoid wasteful duplication of resources, but at the risk of dominating the market in the long run by virtue of those efficiencies (a hypothesis attributed to Alchian and Demsetz).[19] Fedele and Tognoni believe a myopic antitrust authority may ignore the fact that total welfare could be greater if the merger is blocked (and *ex post* entry is freer) than when it is allowed because long run gains due to lower concentration can outweigh short run losses due to shortage of output.[20] In contrast, Mason and Weeds view the FFD as a device which lowers barriers to entry: the very possibility of merging with a competitor in the event that the investment turns sour should entice greater entry into the market.[21] If the risk of failing and liquidation can be cushioned by the FFD, firms are more likely to enter a market; this would reduce concentration and augment consumer welfare. Mason and Weeds contend that a more lenient policy, which would be characterised as permitting the defense to be used by "flailing" as well as imminently failing firms, may yield social benefits through its beneficial impact on entry, producing more effective competition in the long run.[22] Prior to entry, the incumbent would like to threaten never to merge with the entrant.In the absence of any means of committing to this strategy, however, this threat is not credible following the fact of entry since merger benefits the incumbent more than continued duopoly.Thus, from a game theoretic perspective, "entry followed by merger (when permitted) is a subgame perfect equilibrium."[23] By preventing anticompetitive mergers, even in situations of financial distress, strict merger control provides the incumbent with the commitment power it needs to prevent, or at least delay, entry.A more lenient merger policy weakens this commitment, reducing its deterrent effect.However, this argument is not perfectly watertight as ease of entry may encourage predation: if potential entrants view the FFD as an easy means of expansion, they may enter the market specifically to engage in predatory behaviour and acquire a competitor.

19: Armen Alchian & Harold Demsetz, *Production, Information Costs and Economic Organisation*, 62 Amer.Econ.Rev.777 (1972).

20: Fedele & Tognoni, 62 Bul.Econ.Res at 369, 377 (cited in note 18).

21: Robin Mason & Helen Weeds, *The Failing Firm Defense: Merger Policy and Entry* (Centre for Economic Policy Research Discuss Paper No 3,664, Jan. 2003), online at http://eprints.soton.ac.uk/33428/1/merger9.pdf.

22: *Id.*at *1-2, *33.

23: *Id.*at *30.

II. FFD and Competition Law

United States

The US Department of Justice and Federal Trade Commission 2010 Horizontal Merger Guidelines state that an otherwise anticompetitive merger may be permitted on failing firm grounds when three requisites are satisfied:

1) The allegedly failing firm would be unable to meet its financial obligations in the near future;
2) It would not be able to reorganise successfully under Ch. 11 of the Bankruptcy Act;
3) It has made unsuccessful good faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would both keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger.

The 2010 guidelines dropped a fourth requirement contained in the 1992 guidelines that 'absent the acquisition, the assets of the failing firm would exit the market.' The burden of proof generally lies with the merging parties to show that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger. It is also important to note that the FFD is applicable only if the failing firm's productive assets will exit the market without the merger; if the assets remain in the market under different ownership, the FFD is an invalid defense.

In the US, the FFD was first used in International Shoe's acquisition of a financially troubled competitor.The Court, in *International Shoe v.Federal Trade Commission*,[24] held that the acquired company was faced with "financial ruin" and that the only alternative was liquidation.[25] This judgement laid down the cornerstone for the FFD and *International Shoe* was also the basis for the amendment of the Clayton Act by the Celler Kefauver Act of 1950.[26]The FFD was developed further in the case of *Citizen Publishing Co.v.US*[27] when the Supreme Court rejected a merger with a distressed newspaper company and upheld findings of antitrust violation.This led to its setting

24: 280 U.S.291 (1930).
25: *Id*.at 299.
26: Ioannis Kokkoris, *Failing Firm Defense Under the Clayton Act,* 28 Euro.Comp. L.Rev.158 (2007).
27: 394 U.S.131 (1969).

out stringent conditions for the FFD: (1) the failing company must be about to liquidate, and a joint operating agreement must be its last chance to survive; (2) the acquiring company must be the only available purchaser; and (3) reorganisation prospects in bankruptcy must be dim or nonexistent.[28] In *US v.General Dynamics*,[29] the Supreme Court evaluated the probable anticompetitive effects of the merger of a firm which was neither failing nor a strong competitor. The merger allowed acquisition of a coalmining company producing a high market share in a concentrated industry despite the target firm not being in immediate danger of bankruptcy.This raised suspicions of a '*flailing* firm defense' but the Court upheld that three stakeholders benefit from the merging of a failing firm – private parties, shareholders (if the merger is profitable) and creditors (retaining contracts/rights against the debtor).[30] As the preceding case illustrates, given adequate proof, the defense is attainable in certain circumstances. To overcome the propagation of the FFD on alleged unprofitable grounds, it is suggested that proof of the lack of causality of the deterioration of the competitive structure would be of paramount importance.[31]

The wording of the US guidelines is mirrored in paragraph 5.17 of the 2002 Irish Competition Authority's Merger Guidelines, with the addition of the fourth requirement contained in the 1992 guidelines. It is thus clear that if the Musgrave-Superquinn case was under scrutiny by the Federal Trade Commission, the outcome is likely to have been the same.

Europe

In the EU, neither Article 101/102 of the TFEU nor Article 2 of the Merger Regulation 139/2004 contains explicit reference to the FFD, but paragraph 90 of the Horizontal Merger Guidelines 2004/C 31/03 provides some guidance on how the Commission assesses mergers under the Regulation and sets out the criteria for the failing firm defense as follows:

> 1) The acquired undertaking would in the near future be forced out of the market if not taken over by another

28: *Id*.at 137-39.Also see Carl Shapiro, *Competition in Distressed Industries*, Remarks as Prepared for Delivery to ABA Antitrust Symposium: Competition as Public Policy (2009).

29: 415 U.S.486 (1974).

30: *Id*.at 507-08.And see Kokkoris, 28 Euro.Comp.L.Rev at 158 (cited in note 26).

31: Ioannis Kokkoris, *Failing Firm Defense in the European Union: A Panacea for Mergers?*, 27 Euro.Comp.L.Rev.494 (2006).

undertaking
2) There is no less anticompetitive alternative purchase
3) Assets to be acquired would inevitably exit the market if not taken over by another undertaking.

Prior to regulation 139/2004, the 1989 'one stop shop' Merger Regulation did not contain any reference to the FFD, but it had been invoked through a number of controversial cases. It first arose in *Aerospatiale-Alenia/de Havilland v.Commission*, the latter wishing to acquire de Havilland (Boeing's regional aircraft division).[32] Aerospatiale and Alenia were already active in the market for regional turbo-prop aircrafts and the merger would give the new entity a 64% market share in the market for medium size turbo prop where both parties' activities overlapped. By invoking the FFD, the parties argued that Boeing would shut down de Havilland; the Commission believed however that even if de Havilland exited the market, the parties were not the only potential purchasers and the net selling price of its aircraft had increased deeming it still profitable but in need of productivity increases.[33]

In Kali und Salz/Mdk/Treuhand the FFD was greatly elaborated upon.[34] The case concerned a joint venture between Kali and Salz and Treuhand and the concentration of the rock salt and potash activities of Kali and Salz, a subsidiary of BASF and MdK. After a 30% fall in demand for potash (fertiliser) over the previous five years, MdK was facing the prospect of bankruptcy, surviving only due to support from Treuhand, which could not be continued due to EC Treaty provisions on state aid. Despite generating almost 100% and 98% market shares in the potash and magnesium markets respectively, the Commission approved the merger, as most of MdK's market share would go to Kali und Salz.The Commission took the stance that even if prohibiting the merger would lead to dominance, then the merger cannot be said to be anticompetitive. In this case, there existed a lack of causality between the concentration and deterioration of the competitive structure.The case led to the sketching of criteria upon which to identify a failing firm, similar to what it would issue in 2004.

BASF/Eurodiol/Pantochim marked a significant advance in the development of the FFD.[35] Firstly, the Commission confirmed that both Eurodial and Pantochim would have to be declared bankrupt if no buyer was found; second, no other firm was interested in bidding – the Commission stated that "as

32: Aerospatiale-Alenia/de Havilland v.Commission, 1991 O.J.(L 334/42) (1991).
33: Kokkoris, 27 Euro.Comp.L.Rev.at 494 (cited in note 31).
34: *Kali und Salz/MdK/Treuhand*, 1994 O.J.(L 186/30) (1994).
35: *BASF/Pantochem/Eurodial,* 2002 O.J.(L 132/45) (2002).

parts of the (necessary) qualified workforce have already left and others will certainly do so after bankruptcy is declared, the incentives for any investor to take up business after bankruptcy are fairly low"; and third, the assets would definitely have exited the market if the transaction was blocked because "a shutdown of the production would have caused additional costs for new catalysts if the plant was restarted" thereby making unlikely an immediate takeover by a third party.[36] BASF was thus permitted to acquire Eurodiol and Pantochim although this would result in a market share in excess of 70% in a number of solvents markets; the Commission felt that without the merger, the reduced capacity would result in supply shortages under already tight capacity constraints and higher prices bolstered by inelastic demand.[37] Finally, in departing slightly from the *Kali und Salz* criteria, the Commission mentioned that it could not be expected that BASF would absorb Eurodiol's entire market share since their main competitors would likely gain significant parts of the share also.[38]

III. Use of the FFD in a Downturn

Given the sluggish state of the global economy, the relevance of the FFD has become more apparent as a greater volume of companies face insolvency.It is inevitable that during a recession parties to a merger are also likely to abuse the FFD, justified by the current state of the economy. Shapiro quips that "keeping markets competitive is no less important during times of economic hardship than during normal times."[39] In *Brown Shoe v.US*[40] the Court made clear that antitrust law does not protect the survival of firms for their own sake; it seeks to protect "competition, not competitors."[41] While there is no theoretical or empirical basis for departing from principles of competition policy during downturns, financial distress at the industry or firm level is certainly relevant to antitrust analysis.[42] There is hence a need to distinguish between transitory and long term decline, financial distress and underlying lack of competitiveness.Certain conditions of the failing firm defense may also be difficult to prove in troubled times; credit restrictions on bank lending may exclude alternative less anticompetitive buyers.The OECD argue

36: *Id.*at 29.
37: Alison Jones & Brenda Sufrin, *EU Competition Law: Text, Cases and Materials* 1220-21 (Oxford 2014).
38: Kokkoris, 27 Euro.Comp.L.Rev.at 494 (cited in note 31).
39: Shapiro, *Competition in Distressed Industries* at 17 (cited in note 28).
40: 370 U.S.294 (1962).
41: *Id.*at 320.
42: Shapiro, *Competition in Distressed Industries* (cited in note 28).

against relaxing the criteria in times of crisis; a 2009 roundtable discussion concluded that loosening of criteria is not justified as other policy instruments (e.g.bankruptcy law and state aid) are available to help failing firms through the crisis.It conceded however that "nevertheless, competition authorities recognise that FFD investigations may be too lengthy, which is problematic given that the position of firms in distress may rapidly deteriorate, which in turn may cause inefficient liquidations.This may justify procedural changes to ensure a speedier review of mergers involving failing firms."[43]

When assessing the relevant counterfactual, the pre merger conditions may not prevail, even if the merger is prohibited.In these circumstances, the counterfactual might need to be adjusted to reflect the likely failure of one of the parties and the resulting loss of competition.It could be argued that in a financial crisis, the appropriate substitute counterfactual is not firm failure but government intervention.[44] It is interesting to note an early application of the FFD in *US v.Philadelphia Bank*,[45] which approved the merger under the FFD because of the likely harm to consumers of a bank failure. In the takeover of Halifax Bank of Scotland (HBOS) by Lloyds TSB, the OFT (UK) considered the application of the FFD to be inappropriate given that it is not realistic to consider that HBOS would have been allowed to fail and therefore ruled out failure/exit as a possible substitute counterfactual.[46] Often, there is no alternative to the proposed merger – allowing the failing firm to fail is not an option, as was evident following the collapse of Lehman Brothers and the perilous repercussions it had on financial markets. In the subsequent acquisition of Merrill Lynch by Bank of America, there is no doubt the FTC were reluctant to dispute the merger.However, bank mergers and traditional antitrust enforcement represents a myriad of complexities in which the FFD may not be directly applicable.

IV. *Musgrave-Superquinn* (2011)

Having examined the economic and legal properties underpinning the FFD, it would appear that the authority's decision in relation to the Musgrave-Superquinn case was not predicated on failing firm grounds. Superquinn faced imminent bankruptcy and its sale was necessary to secure its existence as a going concern. The company's financial difficulties arose not from underperformance of the business, rather from leveraging property

43: *The Failing Firm Defense,* OECD Pol.Roundtables 13 (2009).
44: Boukaert, et al, *The Failing Firm Defense in Declining Markets* (cited in note 4).
45: 374 U.S.321 (1963).
46: Boukaert, et al, *The Failing Firm Defense in Declining Markets* (cited in note 4).

investments against the assets of the business and consequent obligations to buy or lease properties including those not directly related to the supermarket business.The parties maintained that absent the merger, "it would not be appropriate to assume the presence of a stand alone, independent, and financially healthy Superquinn."[47] Its continued operation amid financial distress was propped up by bank credit, which ultimately led to its falling into receivership.

The parties asserted that Superquinn constituted a failing firm and satisfied the criteria for determining a failing firm as contained in paragraph 5.17 of the Merger Guidelines. They claimed that the presence of Joint Receivers confirmed that the entity could not fulfil its financial obligations; a viable alternative to the proposed acquisition would have been achieved in line with the preferences of credit banks and Joint Receivers through an "all or nothing sale"; there were just two bidders for Superquinn, of which Musgrave was the higher of the two and finally, in relation to the assets exiting the market requirement, the parties were somewhat indeterminate, stating that the goodwill associated with Superquinn would be lost to the market, and were uncertain with respect to the assets.[48]

However, the authority dismissed the FFD due to the third and fourth criterion of eliciting reasonable alternative offers and all the assets otherwise exiting the market not being adequately proven. Several third parties would have been interested in purchasing parts if not all of Superquinn, and without the merger, the assets would have stayed in the market – being distributed between some competitors and some new entrants. Furthermore, the authority stated that while receiverships may signal the end of Superquinn in its current form, it does not imply that Superquinn assets will no longer be productive in grocery retailing. This makes it clear that absent the merger, all of the assets would not have exited the market.This significantly reduces the welfare impact that would be assumed had the merger been blocked: the productive assets would be taken over by several competitors and potential entrants, which would likely procure more effective competition in the long run. Finally, it is plausible to suggest that Musgrave was a feasible buyer for Superquinn given the need for a hasty merger and was able to deploy its industry knowledge quickly to integrate Superquinn into the group. If a bidder from outside the groceries market was a 'less anticompetitive' alternative purchaser, it is possible that the time taken to restructure Superquinn under such inexperienced management may have deemed the merger unviable. Similarly, if the buyer

47: *Determination of Merger Notification M/11/022–Musgrave/Superquinn* at 10 (cited in note 1).

48: *Id.*at 11.

was a significantly smaller competitor, it may not produce the socially efficient outcome as suggested by Persson.[49]

V. Conclusion

The application of the failing firm defense is a complicated issue engulfed with legal as well as economic and social ramifications."The idea that an anticompetitive merger is better than a company closing its doors certainly has intuitive appeal.Compared to the abstract and distant possibility of higher prices, the vision of workers losing their jobs, communities losing their economic base, and stockholders losing their shirts may be positively frightening."[50] According to Posner, however, the FFD is one of the clearest examples in antitrust law of a desire to subordinate competition to other values.[51] Approving a merger on failing firm grounds could give rise to reduced welfare via lower output and higher prices in the short run, followed by entry deterrence and increased concentration in the long run. On the other hand, an overly lenient merger policy may facilitate ease of exit but incentivise predatory behaviour. During a weakened economy, large market players may be thinking that this creates a ripe opportunity to acquire a financially distressed competitor by invoking the defense. It is therefore of vital importance that the existence of a failing firm does not attenuate the true objective of competition policy. That being said, there is scope for considering the 'hardship strand' when the merger is unlikely to impede effective competition.The FFD is thus intertwined with economic, social and public policy issues and the relative weight of each will determine the outcome of the assessment.[52] In the case of Musgrave and Superquinn, blocking the merger would have spurred economic and social ramifications affecting a host of stakeholders.

49: Persson, 53 J.Industrial Econ.at 175 (cited in note 3).

50: Edward Correia, *Re-examining the Failing Company Defense,* 64 Antitrust L.J. 683 (1995).

51: Kokkoris, 27 Euro.Comp.L.Rev.at 494 (cited in note 31).

52: *Id.*

The Concept of Private Property in European Legal History: the Aristotelian and Belgian Cases

Darius Bergkamp†

I. Introduction

The property law of Belgium has a long history. This article attempts to trace current Belgian property law back to Aristotle's philosophy. The scope of the argument to be developed, however, is limited: rather than attempting to establish hard, direct links between the two, the focus is on conceptual similarities, which may be taken to suggest an indirect influence of Aristotle's ideas on Belgian property law.

Five parts comprise this essay. In this introduction, a general background of Aristotle's Greece is provided. Part 2 discusses Aristotle's ideas on property, and part 3 presents the key concepts of modern Belgian property law. In part 4, Aristotle's ideas are compared to Belgian property law concepts to identify similarities. Part 5 sets forth conclusions.

Turning to the historical background, the ancient Greeks did not have a fully developed legal system and their laws, especially their property laws, were rudimentary from the perspective of the modern day. This, however, does not mean that the Greek philosophers failed to make important contributions to legal philosophy concerning the definition and status of property. Legislation on property—which must address key issues such as whether property, in principle, is private or public—is by necessity closely linked with the political views regarding the role of the state and property's position within the state. On this key issue the main Greek political philosophers have developed important ideas.[1] Of all political-philosophical works from the ancient Greek era, those of Aristotle have been among the most influential.[2] A main reason

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1: The most important Greek political philosophers were Plato and Aristotle. In addition, Strauss and Cropsey discuss Thucydides and Xenophon, who were both a historians and philosophers. See Leo Strauss & Joseph Cropsey, *History of Political Philosophy* at *v* (Chicago 1987).

2: See Moses Finley, *The Legacy of Greece* (Clarendon 1981).

for Aristotle's enduring influence is that his ideas, unlike those of Plato,[3] accommodate individual freedom and individual rights, and are arguably consistent with Western Europe's contemporary societies and constitutional orders.

In two of his seminal works, *Politics* and the *Nicomachean Ethics*, Aristotle discusses property, including the ownership and possession of land, buildings (real estate), and moveable property. Aristotle did not give much consideration to the precise delineation of the scope of ownership rights, which makes an extremely detailed comparison with any contemporary property law regime futile. There is, however, enough of an indication in his works to reconstruct how he viewed property in broad conceptual terms.[4]

In comparing Aristotle's ideas to current Belgian property law concepts, this essay does not presuppose that Belgian law is clearly based on Aristotle's opinions, or that Belgium has cleanly transposed some of his ideas. As discussed further below, there is no direct link between Greek political theory and Belgian law, which is understandable given the distance in time. In addition, social understandings of property and property law are elements of a broader political theory, and classical Greek and modern European political theories diverge substantially. As R.I. Winton and Peter Garnsey have observed, this "in turn reflects the differences between ancient and modern society."[5] Admittedly, the social differences are vast, but this does not mean that the ideas developed by Aristotle may not have found their way into modern legal thinking and legal systems. The influence of his ideas is simply likely to be subtle and complex. Because, as noted above, a hard direct link between Aristotle's ideas and Belgian property law is implausible,[6] this article will consider how the relevant provisions of Belgian property law compare to Aristotle's ideas, as well as explore a possible pathway through which his ideas may have indirectly influenced Belgian property law.

II. Aristotle on Property

The Role of Property in the Greek Polis

3: In *The Republic*, Plato puts forth his conception of the 'just state.' Plato, *Republic* (Oxford 1993) (Robin Waterfield, trans.). Karl Popper has argued that Plato's ideal state is totalitarian and restrictive of individual freedom. Karl Popper, *The Open Society and Its Enemies, Volume 1: The Spell of Plato* (Routledge 1947).

4: Robert Mayhew, *Aristotle on Property*, 46 Rev. of Metaphysics 803 (1993).

5: R.I. Winton & P. Garnsey, "Political Theory" in Moses Finley, *The Legacy of Greece* (cited in note 2).

6: This is due not just to the lapse of time but also to the enormous social, economic, and cultural developments that have occurred since the Greek era.

In the Greek polis in which Aristotle lived, the main type of property, and the economically most relevant property, was property of land. This was particularly true before money came into existence, but it remained true in the period thereafter. Property of land also included property of all buildings erected on the land as well as the crops growing on the land. The owner could transfer his property to certain other persons through a consensual transaction.[7]

In addition to land and buildings, other objects could be owned and subjected to ownership rights. Thus, Greek law recognized ownership of animals and of objects such as vessels, vehicles, jewelry, clothes, and similar personal belongings. Slaves also fell within property's scope. Legally, if individuals maltreated their slaves, they merely damaged property.[8]

The transfer of property was greatly facilitated in the sixth century BC when the Greeks started using currency in the form of coins. Only citizens of Attica could be lawful owners of property. In Attica a non-citizen could not own land or buildings, unless he was granted the right of 'ἔγκτησις'—which can be translated as "tenure of land or estate."[9] Slaves could not own or possess anything; they were subjects of property rights, not their holders.[10]

Property in Attica was economically very important. Owners of land could rent it out to others, for instance, for agricultural purposes, and could even claim the harvest–and, by contract, individuals could transfer their right to the harvest. For property of a parcel of land included the right to everything built on the land or growing on it. The owner of land generally could do with his land as he deemed fit; so he could construct a building, or destroy it, plant trees or cut them down. There were some limits on his behavior, though. For instance, there was a ban on the felling of certain olive trees, which were protected by the state because they were considered holy and were also a significant source of revenue.[11]

Aristotle's Views

The main work of Aristotle in which he explains his ideas about property is *Politica*,[12] although related thoughts can be found in his *Nicomachean*

7: Douglas MacDowell, *The Law in Classical Athens* at 133 (Cornell 1978).
8: See note 2.
9: *Id.*
10: *Id.*
11: At the time, olives were the main export product of Greece. The state therefore claimed the fruits of trees and sold them. Also see Winton & Garnsey, "Political Theory" at 134 (cited in note 5).
12: Aristotle, *The Politics* (Penguin 1981).

Ethics.[13] In a long chapter on property in *Politica*, Aristotle contests the ideas of Plato, who criticized private property regimes because, ostensibly, they would result in self-interested activity to the detriment of the common good. Plato believed that collective ownership was necessary to promote a pursuit of the common interest as well as avoid the social divisiveness that he believed was the inevitable corollary of private property. He therefore insisted on strict limits on the growth of a person's possessions.[14] In articulating his thoughts on property, Aristotle could use Plato's clear position on the key issues as a point of reference.[15] Aristotle principally questions what the best system for property is, whether property should be owned collectively, and, if so, which property should be collective.[16]

Because land, a source of food and livelihood, was such an important object of property, Aristotle discusses in particular the property of land. Should the property and, as a related matter, the use of land be entirely public, or entirely private, or should a mixed public and private system apply? In Aristotle's times, several states neighboring Attica had established a collective property system, in which land was held and worked in common and the harvest was distributed among the people according to their needs. Aristotle had observed that this system caused serious problems: there were quarrels between those who received the best share without working for it and those who worked very hard but received nothing extra in return.[17] To avoid this problem, Aristotle recommended a private property system. Initially, the state would allocate land to individual citizens, but, thereafter, private initiative would do the rest.[18]

Although Aristotle contemplated a leading role for private property of land,[19] he did not exclude common use. To him, however, common use was

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13: Aristotle, *The Nicomachean Ethics* (Penguin 1976).

14: Plato, *Republic*, at 462b-c (cited in note 3). Also see *Property and Ownership*, Stanford Encyclopedia of Philosophy (2004), online at http://plato.stanford.edu/entries/property/.

15: Aristotle, *The Politics* at 1262 b37—1263 b15 (cited in note 12).

16: At the outset of the discussion, Aristotle appears to assume that women and children should in any event be private, not collective, but he leaves open whether they are property. "But if he means to make wives shared and property privately owned, who will look after the house, as men tend the fields?" *Id.* at 1264 a36.

17: *Id.* at 1262 b37.

18: *Id.* at 1262 b37—1264 b25.

19: Aristotle's opinions on property have been discussed in many English language publications. See Terence Irwin, "Aristotle's Defense of Private Property," in *A Companion to Aristotle's Politics* (Oxford 1991) (David Keyt &

not an obligation, but a favor that friends would allow each other. "Friends hold everything in community," he wrote, citing a contemporary saying.[20] Although every man has his own personal possessions, he will make some things available to his friends, while sharing the use of some other things with them. Aristotle gives the example of the Lacedaemonians, who used each other's slaves, horses, and dogs as if they belonged to all. And when they were traveling and needed food, they took what they needed from another person's land.[21] Aristotle concluded that property should be private and that the legislature should encourage the citizens to allow common use of their property. The legislature could do so, Aristotle contemplated, by imposing educational dogma that would teach citizens to be virtuous and benevolent.[22]

Aristotle based his ideas about property on a careful analysis and balancing of the advantages and disadvantages of collective versus private property, contrasting the two systems and presenting a series of arguments to support his choice for private property. As further discussed below, Aristotle's reasoning is largely of an economic nature as it focuses on the relative costs and benefits of alternative policy options.[23]

Aristotle's first argument is that private property increases productivity. Land that is commonly owned will receive little attention because everybody will tend to wait for others to do the work and gravitate towards working as little as possible.[24] Because one also receives his share without putting in much effort, and one receives no—or just a bit—more if one works hard,[25] common property tends to discourage hard work. On the other hand, where land is private property, the owner has everything to gain from maximizing

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Fred D. Miller, Jr., eds.) at 200-25; Darrell Dobbs, *Aristotle's Anticommunism*, 29 Amer. J. Poli. Sci. 29 (1985); Moses Finley "Aristotle and Economic Analysis" in *Articles on Aristotle* (Duckworth 1977) (Jonathan Barnes, ed.) at 140-58; Mayhew, 46 Rev. of Metaphysics at 803 (cited in note 4); Fred Miller, "Property Rights in Aristotle" in *Aristotle's Politics: Critical Essays* (Rowman & Littlefield 2005) (Richard Kraut & Steven Skultety, eds.) at 121-44.

20: Aristotle, *The Politics* at 1263 a21 (cited in note 12).

21: *Id.* at 1263 a30.

22: *Id*. at 1263 a30–40.

23: On this ground, it has been suggested that Aristotle was the world's first economist. See Fred Miller, *Was Aristotle the First Economist?* 31 Apeiron 387 (1998). Indeed, Aristotle's analysis of property shows significant similarities to Demsetz's economic theory of property rights. Harold Demsetz. *Toward A Theory of Property Rights,* 57 Amer. Econ. Rev. 347 (1967).

24: Aristotle, *The Politics* at 1263 a8 (cited in note 12).

25: *Id.*

the produce from his land, because the benefits thereof accrue directly to him.[26]

Second, Aristotle refuted Plato's main arguments in favor of collective property. According to Plato, collective property would bring social peace, because no one would be jealous and inclined to misappropriate somebody else's property.[27] But collective property would tend to result in disputes, argued Aristotle, because there would be a constant tension between those who work hard and those who work less and still receive the same reward.[28] Collective property fails to create the logical connection between labor and reward,[29] which is why Aristotle rejected communal ownership.[30] He stated that "if the work done and the benefit accrued are equal, well and good; but if not, there will inevitably be ill-feeling between those who get a good income without doing much work and those who work harder but get no corresponding extra benefit."[31] Thus, Aristotle identified several reasons for the superior incentive structure of private over common property.

Third, Aristotle asserted that private property is part of man's nature. The love for oneself, for one's own money and property, by necessity, requires exclusive private property.[32] Similarly, Aristotle could not see how men and women deprived of the normal and "natural" satisfactions—i.e., private property—could possibly be anything but miserable.[33] Private property provides "an immense amount of pleasure," Aristotle argues, and men typically desire a lot of it.[34] There are limits to acquisitiveness, he acknowledges, but these limits are quite wide. "Selfishness," he says, "is not simply to be fond of oneself, but to be *excessively* fond."[35] Thus, according to Aristotle, it is inherent

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26: *Id*.

27: *Id.*

28: *Id*.

29: Dr. Vercruysse has pointed out that the differences between the 'idealist' Plato and the 'realist' Aristotle are nicely illustrated in their respective ideas about property. Marc Vercruysse, personal communication, May 2011.

30: In his seminal 1967 article on property, Demsetz makes a similar argument when he states that "the owner of a communal right cannot exclude others from enjoying the fruits of his efforts." Demsetz, 57 Amer. Econ. Rev. at 356 (cited in note 23).

31: Aristotle, *The Politics* at 1263 a8 (cited in note 12).

32: *Id.* at 1263 a40.

33: Demsetz has argued that "[a]n owner expects the community to prevent others from interfering with his actions." Demsetz. 57 Amer. Econ. Rev. at 347 (cited in note 23).

34: Aristotle, *The Politics* at 1263 a40 (cited in note 12).

35: *Id.*

in the reasonably selfish nature of man that he develops a desire for property. Imposing collective property on mankind would completely neglect human nature and represent a leap into new and unexplored territory. Even stronger, Aristotle suggests that communal ownership would be so inconsistent with human nature as to be "really impossible."[36]

Fourth, Aristotle argues that private ownership and the corresponding absence of common property are not the cause of the problems of his time. Common property, he states, may well sound "attractive and humane," and has a particular appeal for those who blame "the present evils" on the absence of it.[37] These evils include "broken contracts, trials for false witnesses, and sucking up to wealthy owners."[38] None of these problems, Aristotle argues, are due to the absence of communal property; rather, they are due to the "depravity of human character."[39] In fact, he continues, "we find more disputes arising between those who own and share property in common than we do between separate holders of possessions."[40] Replacing private property with collective property would therefore create more problems than it would solve.

The final argument of Aristotle integrates his economic and moral theories. According to Aristotle, private property enables people to give and thus to act morally, to do good, and to be virtuous, benevolent and philanthropic.[41] The imposition of common property would eliminate these possibilities. After all, he who owns nothing has nothing to give away. "The abolition of private property," Aristotle argues, "will mean that no man will be seen to be liberal and no man will ever do an act of liberality; for it is in the use of articles of property that liberality is practiced."[42] Liberality is important because "there is very great pleasure in helping and doing favours to friends and strangers."[43] For men to be able to enjoy the pleasures of liberality, private property is a prerequisite.[44]

Based on these arguments, Aristotle rejected restrictions concerning the growth of a person's possessions, as proposed by Plato. He felt that Plato's fallacy lay in his "incorrect principle" of "excessive state unification." Plato's

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36: *Id.* at 1263 b15.
37: *Id.*
38: *Id.*
39: *Id.*
40: *Id.*
41: *Id* at 1263 b7.
42: *Id.*
43: *Id.* at 1263 a40.
44: Discussing the issue of 'externalities' associated with private ownership, Demsetz identifies voluntary transactions as a solution. Demsetz, 57 Amer. Econ. Rev. at 357. Aristotle's liberality could result in some sort of voluntary transaction.

concept of unification imposes obligations on individuals towards the community to ensure a harmonious society.[45] There must be "some unity in a state," but "not an absolutely total unity."[46] Nevertheless, Aristotle was contemptuous of 'money makers.' His solution was to teach people through education to limit their greed. "A state is a plurality," Aristotle argued, which "must depend on education to bring about its common unity."[47] Aristotle thus presented a reasoned economic, psychological, and moral argument[48] in favor of private property and against the collectivist ideas of Plato. The next parts of this essay explore whether and how these arguments may have influenced the main concepts of Belgian property law.

III. Belgian Property Law

The Constitution and Basic Principles of Law

The Belgian legal system assumes that most goods are privately owned. This flows from the fact that Belgium has a market-based economy that depends on private property. The legal system's default position is that private ownership must be protected by law, and that interference with an owner's rights by the state or third parties must be prohibited in most cases, and, where permissible, subjected to strict limiting conditions.[49]

The centerpiece of Belgian property law is Title 1-3 of Book 2 of the Civil Code. This statute first describes the distinction between immovable property—real estate—and movable property—personal property[50]—which are subject to different property law regimes.[51] It then deals with the definition and scope of a property right, and covers in particular the right to a good's

45: See Chris Wright,*Plato's Just State*, Philosophy Now, online at http://philosophynow.org/issues/90/Platos_Just_State.

46: Aristotle, *The Politics* at 1263–b29 & 1263–b7 (cited in note 12).

47: *Id*. at 1263 b29.

48: Aristotle suggested also that communal property is an implausible system, because it had remained undiscovered for a long period of time, "as it surely would not have remained if it were really good." *Id*. at 1264 a1.

49: Baudewijn Bouckaert & Marc Van Hoecke. *Inleiding tot het recht* (Leuven 2009).

50: Title I, Chapters I and II, Civil Code (Burgerlijk wetboek van 21 maart 1804).

51: The main differences between these two regimes relate to issues such as (i) how title can be acquired, transferred, and proven, (ii) whether and, if so, under which conditions third parties that acquire a good from a non-owner are protected, and (iii) whether and, if so, under which conditions, limited in rem rights to a good can be established. Rogier de Corte & Bertel De Groote, *Handboek Civiel Recht* (Larcie 2011).

produce and the right to what becomes part of a good.[52] The final section of Title 1-3 of Book 2 discusses the rules governing co-ownership.

There are more laws relevant to property and property rights, however. The Belgian Constitution, for instance, provides that nobody may be deprived of his property except in cases specified by statute and with reasonable prior compensation.[53] It stipulates also that the sanction of the forfeiture of goods may not be imposed.[54] The legislation regarding expropriation, i.e. a taking of private property by the government for a purpose deemed to be in the public interest,[55] deals with the substantive standards and procedure for taking a person's property for public use.[56] Under this legislation, the owner of the good that is subject to expropriation has rights to fair compensation and to seek judicial review in the first instance and on appeal.

For purposes of this analysis the focus will be on the Belgian civil law regarding property, which defines the nature and scope of property rights. The constitutional and expropriation laws will not be discussed in detail. As noted above, these laws are important but should be regarded as laws supporting and defending the civil property regime; they ensure that the government cannot take private property except in limited situations and under strict conditions.

Civil Law on Property

Property is an in-rem right, because it is attached to the good, and can be exercised against anybody. In this respect a property right is fundamentally different from a personal right, such as a contractual right, which can be exercised only against one or more specific persons. Article 544 of the Belgian Civil Code defines property as "the right to enjoy a good in the most complete manner and to use it, provided that one does not use it in a way that conflicts with laws or regulations."[57] A landowner may plant or build on his land, dig or mine, as long as he does so in accordance with the law.[58] Thus, property is the most complete right to use a good that is available under Belgian law.

The owner's property right in a good also extends to its fruits. Article 546

52: Title II, Chapters I and II, Civil Code (Burgerlijk wetboek van 21 maart 1804).

53: Art. 16, Belgian Constitution (Grondwet, gecoordineerde tekst van 17 februari 1994, als gewijzigd), online at http://www.senate.be/doc/const_nl.html.

54: Art. 17, Belgian Constitution.

55: Jacobus C. Creutz, *De onteigening in de grondwetten van 1848 en 1887* (Somerwil 1889).

56: The most important law is the Act of 16 June 1962.

57: Art. 544, Civil Code (Burgerlijk wetboek van 21 maart 1804).

58: Art. 552, Civil Code.

of the Civil Code stipulates that the ownership of a movable or immovable good grants a right to "all that it produces." This is called the "right to what the good produces" or the "right of suit." Thus, the owner of land has a right to "the natural fruits," "the fruits of labor of the soil," the "civil fruits" (such as rent) and the "young of the animals."[59] The right of suit applies even if the fruits of the land are the results of somebody else's labor, but in that case the owner must reimburse the third party's expenses for plowing, treating, and sowing.[60] If a person is not the owner but a mere possessor, he may keep the fruits only if he possesses "in good faith."[61] Possession is "in good faith" if the possessor acts without knowledge of the defects in a deed of transfer that ostensibly established his ownership.[62] The provisions of Belgian property law appear to establish a fair system that creates incentives for productive activities.

The owner of a good also becomes the owner of any accessory that is united with the good. Where goods are united and become one good, it is therefore important to determine what the main good and what the accessory is. If a conflict emerges, the owner of the accessory will lose his ownership of that item to the person who owns the main good. In the case of land, it is always the owner of the land who becomes the owner of anything that is adjoined to the land. In the case of movable property, there is no 'hard and fast' rule; the Civil Code provides that any disputes are to be decided on the basis of fairness.[63]

Related to the "right of suit" discussed above, the owner of land is also the owner of everything on the land, subject to any limited in–rem rights (such as the right to establish and own a building) that the land owner may have granted.[64] All buildings and works on or under a parcel of land are presumed to be have been established by the owner at his expense, unless the opposite has been proven. If the owner established buildings using materials owned by a third party, he must reimburse the value of these materials to the third party owner. But if the land owner fails to compensate the owner of the materials, the latter does not have the right to remove them from the land.[65] If buildings or works have been created on land by a third party using its own materials, the owner of the land has a right to keep them for himself or require that the

59: Art. 547, Civil Code.
60: Art. 548, Civil Code.
61: Art. 549, Civil Code.
62: Art. 550, Civil Code.
63: Art. 565, Civil Code. Part 2, Chapter 2, Title 2 of the Civil Code, by way of guidance, sets out a series of more detailed rules.
64: Art. 552, Civil Code.
65: Art. 554, Civil Code.

third party remove them. If the owner keeps the buildings or works, he must pay the third party for the value of the materials and labor, disregarding the increase in value of the land.[66]

Finally, co-ownership can be voluntary or involuntary, which applies chiefly to apartment buildings and land. Co–owners have a right to use and enjoy the co-owned good in accordance with its intended purpose and to the extent compatible with the rights of the other co-owners. They are free to encumber, sell, or otherwise dispose of their share in the co-owned good, subject to any statutory or contractual restrictions (such as the other co-owners' right of first refusal). Unless an agreement provides otherwise, all co-owners are presumed to own equal shares, and they must contribute proportionally to the cost of maintaining the co-owned good, paying any taxes levied on it, and the costs of any repairs.[67]

These are the key concepts of the Belgian property law. Back in Part II, Aristotle's ideas on property were presented. In the next part, they are compared with this exegesis of Belgian property law.

IV. Relating Aristotle to Belgian Law

This section reviews the relationship between the ideas of Aristotle discussed in part 2 and Belgian property law discussed in part 3. Aristotle's ideas may have had an influence in at least two ways: directly and indirectly. A direct influence could exist if Aristotle's ideas were reflected in laws or other legal texts that served as the basis for Belgian property law. Since this is not the case, a direct influence cannot possibly be established. Indirectly, however, Aristotle's philosophy may have influenced Belgian law through shaping the ideas—in both political and legal theory—that in turn have influenced the relevant Belgian law. At bottom, such indirect influence is based upon the power of ideas, upon the ability to shape the thinking of others, instead of upon a direct reception of the theory. This form of influence is difficult to prove because ideas are often without attribution acquired by other persons and they oftentimes appear to lead their own lives. On the other hand, indirect influence would appear to be plausible because Aristotle was such an important political philosopher. In this section, I explore the pathway that may have enabled Aristotle's ideas to influence Belgian property law, in particular through other laws or legal texts that may have been influenced by his thoughts.

As far as such a possible indirect influence is concerned, a general theme

66: Art. 555, Civil Code.
67: Art. 577-2, Civil Code.

should be noted. When Aristotle wrote the chapter on property in *Politica*, in a few places he could already refer to developing practices regarding property in Attica and the adjacent states. Some states had opted for a private property system and Aristotle provided a sound theoretical and political basis for such a system. Inasmuch as Aristotle was an authoritative author, the support he provided for private property may have helped this system become the dominant system in many of his other contemporary states. Despite its appeal, over time, the institution of private property tends to lead to political tensions because some people are able to acquire more property than others. Consequently, it is subject to political attacks and collectivist pressures and must be constantly defended. In defending the private property system, the arguments that Aristotle first formulated continue to be the cornerstones. Thus, Aristotle's ideas may have helped politicians to establish, support, and reestablish the institute of private property through the years. If this is so, Aristotle may have had an indirect influence on property regimes in Europe and elsewhere. In the analysis below, this possible influence will be traced from ancient Greece to Rome, from Rome via the Middle Ages to the Napoleonic Code, and from the Napoleonic Code to Belgian law.

From Greece to the Roman Empire

Aristotle lived in ancient Greece from approximately 384 to 322 BC, and is believed to have authored *Politica* from 335 until 323 BC.[68] Greek thinkers such as Aristotle contributed much to political science, but the Greeks never developed a full legal property regime. Despite this deficiency, Greek thinking influenced concepts of Roman property law.[69] As early as 450 BC, Greek laws and Greek philosophy found their way into the Twelve Tables, the first codex of the Roman Empire.[70] As recommended by a Greek exile called Hermodorus, the Romans sent a commission to Greece to study the laws of the various Greek city-states. Their objective was to draft a good codex for the Romans based on the experience and laws of these Greek city-states, in particular Athens. Once returned home, the commission, in cooperation with a few Roman officials, designed a codex that was the beginning of the Roman law.[71] There is good cause to believe that the commission consulted

68: T.J. Saunders, "Introduction," in *The Politics* at 30 (cited in note 12).

69: Peter Stein, *Roman Law in European History* (Cambridge 2009).

70: *Id.*

71: This Codex was first called the Ten Tables, but was later renamed the Twelve Tables. It was first written on ten tables, large flat stones, but the Codex was subsequently expanded.

Aristotle's *Politica*, which sets forth his ideas on property.[72]. Further, expanded or improved codices, such as the Codex of Justinian and the 'Corpus Juris Civilis,' which was created around 530 AD, may well have been receptive to Aristotle's ideas.

Roman law, the Middle Ages, and the 'Napoleonic Code'

After the Roman Empire collapsed, the Middle Ages arrived. In that period, the influence of Aristotle was indisputably great.[73] The thinkers in the Middle Ages regarded themselves as Aristotelian, which has contributed to the survival and legacy of his ideas. In addition, Aristotle had a major influence on the socio-economic doctrine of the Catholic Church, in particular through the philosopher and theologian Thomas Aquinas (1225-1274), who was an Aristotelian scholar. The influence of Aristotle's *Politica* increased in the thirteenth century due to Aquinas, who probably agreed with Aristotle on questions of property.[74]

The Aristotelian tradition of the Middle Ages was receptive to both Greek and Roman law and political thought. For instance, it is well known that Roman law exercised a strong influence on continental European law.[75] At this point, this influence was substantial, but not necessarily enduring. It became enduring with Napoleon and the code that is named after him.[76]

Napoleon had a high opinion of the Roman Empire and saw Rome as an important example.[77] In the pre-Napoleon period there were no real national laws in France and beyond, apart from a few territorial sets of rules. After the French Revolution had established new ideals, the new constitution of 1793 required legal unity in civil and criminal matters in all of France.[78] This meant

72: Saunders, "Introduction," at 15 (cited in note 68).

73: "The views of the great philosopher Aristotle are particularly important because the entire structure of his thought had an enormous and even dominant influence on the economic and social thought of the high and late Middle Ages, which considered itself Aristotelian." See Murray Rothbard, *An Austrian Perspective on the History of Economic Thought, Volume I: Economic Thought Before Adam Smith* at 14-18 (Ludwig von Mises Inst. 1995).

74: Saunders, "Introduction," at 16 (cited in note 68).

75: Stein, *Roman Law in European History* (cited in note 69).

76: *Id*. Also see A.S. Hartkamp, *Towards a European Civil Code* (Kluwer Law Inst. 1998.

77: From 1799 to 1804, Napoleon's title was 'consul,' and from 1804 he held himself as 'emperor.' Both of these terms, of course, have Roman roots.

78: "The Constitution of 1793 contained, in the 85th article, a provision which, literally translated, was in the words, 'The code of the civil and criminal

that a code for the entire French nation had to be drafted, reflecting the ideals of the French Revolution and eliminating the privileges that formed the basis of the old system.[79]

Napoleon charged a committee with the task of drafting a new code, and ensured that the actual draftsmen of the civil code were well educated in and imbued with the Roman law tradition.[80] When the first draft of the civil code was submitted to the Tribunate for its consideration, many of its provisions were criticized, and some of its titles were rejected. Then Napoleon stepped in and decided to deprive the Tribunate of its power to amend the proposal; on resubmission of the draft, they could only adopt the code as a whole, or reject it altogether. The code passed.[81] This new 'Napoleonic Code' contained two titles on property: one on possessions and the limitations of property, the other one on how property could be acquired.[82] The end product can be accurately described as "a compendium of the rules of Roman law then practiced in France, cleared of all feudal admixture."[83]

The Napoleonic Code and the Belgian law

Napoleon built a large empire where he introduced his legal system and laws, which created significant efficiencies. Napoleon's legal and administrative systems[84] were perceived as establishing equality and limiting the risks of excessive liberty. This may explain why the resistance to the Napoleonic laws was limited; as Napoleon said, "[w]hat the French people want is equality, not liberty."[85]

Although Napoleon's empire fell apart, much of the system he introduced survived. Many of the countries that emerged from the remains of Napoleon's empire initially wanted to revert back to their own pre-Napoleon local law,

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jurisprudence is uniform for the whole republic,' meaning, shall be uniform." *The Code Napoleon*, 3 Amer. L. Reg. 641, 644 (1855).

79: Norman Davies *Europe: A History* at 720 (Oxford 1996).

80: Maurice Amos, *The Code Napoléon and the Modern World*, 10 J. Comp. Leg. & Int'l. L. 222 (1928).

81: Charles Wheeler, *The Code Napoleon and its Framers*, 10 Amer. Bar Assoc. J. 202, 204 (1924).

82: These two titles of the code Napoleon correspond to Books 2 and 3 of the Belgian Civil Code.

83: Charles Sumner Lobingier, *Napoleon and His Code*, 32 Harv. L. Rev. 114, 119 (1918) (citing Henry Maine, *Village–Communities in the East and West* at 356-58 (Holt 7th ed. 1876)).

84: Amos, 10 J. Comp. Leg. & Int'l. L. at 222 (cited in note 80).

85: Charles Wheeler, 10 Amer. Bar Assoc. J. at 204 (cited in note 81).

but their people revolted as they valued the Napoleonic Code "as the most precious of possessions."[86] In response, most of these countries decided to retain the Napoleonic Code and even introduced it in their colonies and overseas territories. Likewise, in 1830, when the kingdom of Belgium was established, it adopted the Napoleonic Code as Belgian law almost in its entirety.[87] As a result, the provisions on property of the Belgian civil code are very similar, and in some cases even identical, to the corresponding provisions of the French civil code; the text of the provisions on property is virtually identical.[88] Both reflect the Napoleonic Code, and have not changed much since then.[89] Through the Napoleonic Code, the Roman legal heritage has been reflected in contemporary European legal systems, including Belgian property law.

A Political-Philosophical Comparison between Aristotle's Ideas and Belgian Property Law

As the discussion in the previous sections suggests, there is possible pathway along which Aristotle's ideas on property may have come to be reflected in Belgian property law. In this section, the focus is on the substantive conceptual similarities between the basic principles of Belgian property law and Aristotle's ideas.

First, in accordance with Aristotle's ideas, the Belgian legal system is based on the concept of private property, as opposed to public or collective property. This also applies to land. Like Aristotle, Belgian law provides that the owner

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86: Charles Sumner Lobingier, 32 Harv. L. Rev. at 132 (cited in note 83).

87: J.H.A. Lokin, "Die Rezeption des Code Civil in den nördlichen Niederlanden," in Verlag C.H. Beck, *Zeitschrift fur Europaisches Privatrecht,* at 932-46 (2004).

88: For instance, art. 544 of the French Code civil reads as follows: "544 La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements, online at http://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006070721&idArticle=LEGIARTI000006428859&dateTexte=20140401. The corresponding Belgian provisions reads "La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements" , online at http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1804032131&table_name=loi. Note that even the article numbers are identical.

89: Over time, the civil law has been supplemented by special statutes dealing with social and economic issues, such as consumer protection and the leasing of real estate.

of the land also owns the buildings on the land and the crops growing on it. The Belgian state is, *de facto*, the owner of a small part of the total Belgian possessions. The vast majority of the property is in private ownership. Like Aristotle, Belgium saw the advantages of private property over communal property in terms of economic efficiency and individual freedom. It realized that even in socialist democracies private property provides the incentives that are necessary to drive productive activity.

Second, like Aristotle, Belgian laws treat sharing the uses of property primarily as a matter of the individual decision of the owner (subject to limited exceptions such as easements and rights of way over land). If the owner so wishes, sharing the use or fruits of property will come about. Not the law but the free choice of the owner determines whether property or any part thereof is collectivized. Consistent with the Christian–democratic tradition, this enables people, as Aristotle contemplated, to perform altruistic deeds and give to those in need, rather than being forced to hand their property over to a collectivity.

Furthermore, Belgian law imposes serious restrictions on expropriation. Although Aristotle does not explicitly require such restrictions, his ardent and well-reasoned support of private property necessitates strong protection against expropriation. Aristotle would therefore support serious restrictions on expropriation as laid down in Belgian law. Belgium realized that such restrictions are important if private property is to stay private very long. Absent an overriding public interest, private property may not be taken. Seizures of property are only justified if reasonable compensation is paid and if the process is validated by judicial review.[90]

Of course, there are also differences between Aristotle and contemporary Belgian property law. Belgium is a modern democracy based on principles of freedom and equality. Unlike the situation in ancient Greece, each individual can be an owner under the law. On the other hand, the Belgian law does not permit that a person be the object of property rights as it outlaws slavery.

Since Aristotle did not discuss the technical details of property law's operation, it is not possible to compare the more specific provisions on property of the Belgian civil code to the ideas of Aristotle. Aristotle discussed his ideas at a prohibitively high level of generality. It can be safely concluded, however, that the detailed Belgian law provisions are consistent with Aristotle's concept of property, although they are not required or prompted by it.

90: See: "Wet betreffende de rechtspleging bij hoogdringende omstandigheden inzake onteigening ten algemenen nutte, 26 juli 1962."

IV. Conclusion

"It all began, as usual, with the Greeks."[91]

The analysis presented above has shown that the fundamental concepts of Belgian property law are similar to Aristotle's ideas. In Aristotle's thinking and under Belgian property law, private property is a key element of the social and economic system. Like Aristotle, Belgian law does not defend absolute property rights,[92] but the exceptions to private property's hegemony are limited.[93] The reasons provided by Aristotle for his defense of private property against the communal system proposed by Plato sound remarkably fresh even today. The very same reasons are invoked nowadays when Belgians defend their system of private property: the incentives arising from property rights, the "natural" character of private property, which is consistent with (or even required by) human nature, and the moral opportunities and responsibilities associated with private property.[94] These similarities might be interpreted to indicate that Aristotle's ideas on property have had an influence on contemporary Belgian property law. This applies in particular to the basic principles of property law, not the more detailed, technical rules, which are mainly motivated by practical considerations and the demands of the market economy.

As discussed, a direct influence is implausible, since the Belgian legislature did not openly adopt Aristotle's ideas or Greek or other legislation embodying his ideas. Indeed, such a direct and decisive influence almost never occurs in law. A more subtle and indirect influence on the theory and philosophy of property law and its basic principles, on the other hand, may well have occurred. Such an influence could have materialized along a pathway through the Roman property laws, the Middle Ages, the Napoleonic Code, and, eventually, the Belgian civil code. A comparison between Aristotle's ideas and the basic principles and key provisions of Belgian property law provide

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91: Rothbard, *An Austrian Perspective on the History of Economic Thought* (cited in note 73).

92: Belgian law recognizes the doctrine of "abuse of property right." See Koenraad Raes, "Recht En Ethiek in Rechtstatelijk Perspectief," in Flamée, *Liber Amicorum* at 1131-62 (1994).

93: Mayhew observes that "[w]e know that Aristotle believes private property must exist and it must be respected. Although Aristotle does not defend absolute property rights, the limits to the use of property are few, especially when considered in their historical context." Mayhew, 46 Rev. of Metaphysics at 831 (cited in note 4).

94: Bouckaert & Van Hoecke (cited in note 49).

further support for the proposition that such an influence is possible.[95] Thus, even the modern fascination with private property may have roots in the philosophy of classical Greece.[96]

Maybe more importantly, Aristotle's ideas about private property could be viewed as providing a framework for a harmonious social system. The elements of a happy life, Aristotle has argued are external goods, goods of the body, and goods of the soul.[97] In this constellation, private property provides the external goods. But in addition to individual life, there is social life. Aristotle anticipated that private owners need to become sensitive to the needs of society, i.e. they need to become virtuous. He understood that virtue can only arise at a personal level, aided by proper education. Thus understood, Aristotle's ideas about private property and the Belgian property system might be seen as enabling virtue.[98]

Given the pervasive role played by private property, the question posed in this essay may even be relevant to understanding Belgian society itself. The possible Aristotelian roots of the Belgian property system may help to explain how property could become the cornerstone of both the market economy[99] and of the Belgian social-democratic society; as Aristotle explained, property could play the first role through its incentive function, and the second role through the virtues and sense of community it instilled in owners. If that is true, Aristotle's ideas may represent one of the most important elements of the legacy of ancient Greece.[100]

95: See Parts II, III, and IV of this article.

96: One should be careful, however, not to exaggerate this influence. "After the Renaissance, *The Politics* can be assumed to have been widely read, but to have had little direct influence on the development of modern political philosophy." Winton & Garnsey, "Political Theory" at 62-63 (cited in note 5).

97: Aristotle, *The Politics* at 1323 a21 (cited in note 12).

98: William K. Wright, *Private Property and Social Justice*, 25 Int'l. J. Ethics 498, 513 (1915).

99: Milton Friedman, *Capitalism and Freedom* (Chicago 2002).

100: Mayhew compares Aristotle's views to the views of John Locke, whose influence on the US legal tradition is well known. "Aristotle is no classical liberal—he is no Lockean—but he is much closer to this than many believe." Mayhew, 46 Rev. of Metaphysics at 831 (cited in note 4).

Federal Voting Doctrine

By: Evan Zimmerman†

I. Introduction

The United States was founded on the basis of governance by representative system. There are elections for local, state, and federal officials for posts including governors, congressmen, judges, sheriffs, and the President. Municipalities and states generally determine the laws surrounding these elections without federal intervention. This is because the United States, in addition to being founded on republicanism, is based on a federalist system in which there are different domains of law, each with its own legislative bodies that write rules for themselves but are also governed by predefined standards structuring their interactions. That is, no legislature is entitled to write law in place of another.

With the notable exception of the Voting Rights Act of 1965, for the entirety of the history of the United States the regulation of federal elections has mostly been considered the domain of the states. The notion that the Congress of one domain might legislate for another is a direct violation of the concept of separate legal domains, which forms the bedrock of any federalist system. Yet, that is exactly the way the United States operates right now. There is vast historical precedent favoring this regime, but the precedent is wrong. Federal elections are a case of federal law.

One must then undeniably conclude that state regulations regarding federal elections violate the concept of a federalist system and are thus unconstitutional. This article will argue that there is a better way, which I will call Federal Voting Doctrine ("FVD"). Simply put, FVD is a doctrine of election law in which the federal government reclaims its sovereignty over federal election law and asserts its right to be its sole author. Federal Voting Doctrine is the natural progression of federal voting law and corrects a horrendous misstep in the history of American law, a misstep perhaps unmatched in the length of time it has gone without being addressed and in the effect it has had on the nation's history.

II. History

The United States was founded on the familiar cry, "No taxation without representation!" Therefore, it is not surprising that there is a litany of elections in the U.S., even for judges.[1] There are basic guidelines for federal elections in the U.S. Constitution, such as the length of the term of Congressmen (2 years),[2] the minimum age of a senator (30 years),[3] and the method of the selection of the President of the United States (the electoral college).[4] In general, however, the particulars of governing are not laid out in the Constitution. Why would they be? There is no reason that the American Constitution, which embodies the nation's highest ideals in abstract but powerful terms, should be concerned with, say, the logistical minutiae of election procedure.

That said, the Constitution does introduce the concept of voting, outlining its importance and firmly establishing its presence in American society. Although no one is required to vote, members of Congress can only be elected, not appointed; in effect, the federal government requires the input of its citizens to operate. This puts serious power in the hands of citizens but it also creates a waypoint to this power: the election itself.

In addition to outlining the institution of voting, the Constitution embodies the spirit of federalism. Federalism is the familiar concept of state and federal offices occupying different legal jurisdictions. In a federalist system, each domain has its own legal apparatus for creating laws, along with the concomitant authority to enforce such laws. Considering that each domain is a self-governing entity, there are limits on the power that any domain might exert over another. For instance, in the American system, states may not supersede federal law.[5] However, the federal government cannot bully the

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1: Considering the strong history of an independent judiciary in the U.S., this may come across as surprising and open to abuse. The election of judges, though common (87% of state judges stand for election today), only occurs for state and local judgeships; federal judges are always appointed. See *Guilty, Your Honour?*, The Economist (2004), online at http://www.economist.com/node/2946978.

2: See U.S. Const. art. I, § 2.

3: *Id.* § 3.

4: *Id.* art. II, § 1.

5: U.S. Const. art. VI. The Supremacy Clause states that the "Laws of the United States…shall be the supreme Law of the Land." To specify that there may be another type of law demonstrates that a federalist system is envisioned in the Constitution.

states.[6] In fact, the federal government is forbidden to even legislate within entire spheres of law, as such subject matters are considered the domain of the states.[7] Indeed, the Constitution specifically declares that any "powers not delegated" to the federal government are to be the exclusive province of the states themselves.[8] In this way, one can think of each domain of law in the entire system as a sphere in space: each is self-contained and legislates for itself,[9] interacting with other spheres only through predefined bridges.[10]

The federal government, of course, is not the only government with a constitution. Each and every state in the Union has a constitution or charter, and each of them demand some sort of voting while setting out their own unique conditions for elections. Unlike the federal Constitution, the state constitutions are concerned not with the elections for federal positions but for state officers: for such positions as governors, state cabinet members, state assemblymen, and others. Laws pertaining to state elections are

6: See *National Federation of Independent Business v. Sibelius*, 132 S. Ct. 2566, 2601-02 (2012). See also *New York v. United States*, 505 U.S. 144, 188 (1992), where the Court states that the "Federal Government may not compel the States to enact or administer a federal regulatory program."

7: See *McCulloch v Maryland*, 4 Wheat. 159, 199 (1819). There, the Court determined that "This government is acknowledged by all, to be one of enumerated powers…the principle, that it may exercise only the powers granted to it…is now universally admitted."

8: U.S. Const. amend. X. The Amendment also reserves unenumerated powers to the People. Although theoretically intended to limit the federal government's power, in practice the scope of federal legislation has increased over time.

9: This is to say nothing of enforcement. State governments may contract the FBI for assistance in enforcing their laws. For example, see *Cooperation Among Federal, State, and Local Law Enforcement Results in Crackdown on Sex Offenders Throughout Eastern District of North Carolina*, Federal Bureau of Investigation (2013), online at http://www.fbi.gov/charlotte/press-releases/2013/cooperation-among-federal-state-and-local-law-enforcement-results-in-crackdown-on-sex-offenders-throughout-the-eastern-district-of-north-carolina. Additionally, the Army may strike a contract with private companies, which are not even government entities. In sum, there is nothing which says that the different domains of government cannot form contracts to perform favors for each other. Federalism, however, does imply that each domain write its own laws and regulations to avoid being subsumed by a greater power. The right to write federal laws is in fact exclusively reserved for Congress in the U.S. Constitution, much like how state charters reserve the analogous right for state laws to state legislatures. See U.S. Const. art. I, §1: "All legislative Powers herein granted shall be vested in a Congress of the United States."

10: One old but poignant example is the fact that, rather than being chosen by federal election, senators used to be chosen by state legislatures.

considered state election laws and are thus considered purely a state issue. In addition to voting for state offices, many states have chosen to institute other permutations of voting as well, including recalls of elected officials, referenda on laws submitted by the legislature, and polls instituted on citizen-proposed laws. These state-conceived ballot add-ons reflect and affect state law exclusively. The federal government does not legislate regarding these state voting events except in the most extreme circumstances, and even then such action is mostly unheard of.

Accordingly, if state laws are a state issue, then federal elections should clearly be considered a federal issue. After all, federal elections determine who federal legislators are, and federal legislators determine which federal laws are enacted. Moreover, as federal laws affect every citizen, the effects of federal elections can be said to cross state lines, thus placing such elections and the regulations that govern them squarely within the ambit of federal jurisdiction.[11] Yet, despite the fact that this criterion classifies federal elections as subject to federal law, it is the states that continue to write the regulations at issue. In fact, this is the only area of federal law that is dictated by the states.

This surprising feature of the American political order is not without any sort of reason. The Constitution explicitly provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State and by the Legislature thereof."[12] That is to say, the Constitution explicitly provides for states to write federal election law. This passage is the basis for the current *status quo*.

In general, this doctrine has been respected since the ratification of the U.S. Constitution.[13] The consequence is vast differences across states in voting laws. For example, eligibility laws can vary greatly across state lines.[14] Additionally,

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11: Although there are laws passed by the federal government that do not affect every citizen (for example, building a bridge in Ohio), each Congress necessarily enacts laws that do affect everyone, such as the federal budget.

12: See U.S. Const. art. I §4.

13: And, in general, this is how it remained, with the exception of 1965, when the Civil Rights Act was signed. Even then, though, it was considered "decisive action" that was only permissible due to "unique circumstances" with the hope that the Act would eventually be weakened or even expire. See *South Carolina v. Katzenbach*, 383 U.S. 301, 334-35 (1966).

14: Some states are currently attempting to require official identification for citizens to actually vote at the place of polling. See Bill Mears, Jessica Yellin & Ashley Killough, *After Supreme Court Ruling, States See Green Light for Voter ID Laws*, CNN (2013), online at http://politicalticker.blogs.cnn.com/2013/06/25/after-supreme-court-ruling-states-see-green-light-for-voter-id-laws/. Some states bar felons from voting. See *State Felon Voting Rights*, ProCon (2013), online at

"American elections are conducted using a hodge-podge of different voting technologies".[15] This tapestry of technology can cause disenfranchisement of voters. A famous example is the 2000 presidential election, in which faulty technology in Florida caused a "hanging chads" scandal and cries for a recount, eventually ending in a federal lawsuit[16] that handed George W Bush victory over Al Gore. The fact that this scandal only happened in one state makes it a special type of injury to other Americans, as it allowed the citizens of Florida to harm the citizens of, say, New York without any form of recourse. It is here that the harmful consequences of current policy are seen most clearly. And, it is here that Federal Voting Doctrine may make meaningful contributions to American election procedure and legal doctrine.

III. Suggested Policy and Theoretical Basis

It is a very difficult task to attempt to undermine a multi-century doctrine of voting law. That said, this section will show that there is a very strong theoretical argument against the established system, and Section IV will demonstrate powerful, desirable, and practical outcomes that will flow from the abandonment of the current voting regime. Despite the profuse historical precedent in favor of the current practice, it is perfectly constitutional for the federal government to write its own laws regarding federal elections, supersede existing state laws by which it cannot abide, and preserve a crucial balance of powers by leaving implementation to the states on a limited basis. This is a sharp departure from current practice, but, as this section explains, such actions are constitutional.

Before I demonstrate that FVD is sensible, I must argue for its legality. Ostensibly, it fails to pass this threshold. As the Constitution states, the "Times, Places and Manner" of federal elections are to be prescribed by state legislatures. But, the Constitution also provides that "the Congress may at any time by Law make or alter such [electoral] Regulations,"[17] which means that the Constitution has explicitly provided for the federal government to

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http://felonvoting.procon.org/view.resource.php?resourceID=286. Either way, these laws are controversial and can affect the outcome of a federal election. They should be subject to more than just the whims of a state's government.

15: See *Residual Votes Attributable to Technology*, Caltech/MIT Voting Project 1 (2001), online at http://www.hss.caltech.edu/~voting/CalTech_MIT_Report_Version2.pdf.

16: See *Bush v. Gore*, 531 U.S. 98 (2000). Although I take no position in this article on who became President, I will often reference this election to discuss the problems with how it was conducted because it is so well known and recent.

17: See U.S. Const. art. I, § 4, cl. 1.

write law it deems prudent. It would thus be constitutional for the federal government to write its own legislation on any matter of federal elections and be within the bounds of this passage. Why does this not end the discussion? The debate continues because the "Place" where elections occur is expressly protected.[18] Namely, the federal government may not alter "the Places of chusing Senators."[19] However, this problem goes away with a small amount of reasoning.

At the time of the Constitution's ratification, Senators were not elected but were appointed by state governments.[20] So, this provision, as written, essentially provides that the federal government cannot determine where state legislatures are to conduct their business.[21] But, considering that today's senators are popularly elected,[22] this clause appears now to be a non-issue, a moot and antiquated vestige of a different age whose literal interpretation is no longer relevant.

Of course, some may be uncomfortable with such a loose reading of this section. But, even if one assumes for the sake of argument that this clause still has modern applicability, it is clear that the Constitution nevertheless bestows broad power on the federal government to regulate all federal elections. Specifically, to return to the language, the federal government is only bound

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18: Although this may seem trivial, the placement of polling stations is actually a very significant issue. There are serious equality of access issues relating to the density of polling stations throughout the various states. See Scott Powers & David Damron, *Analysis: 201,000 in Florida Didn't Vote Because of Long Lines,* Orlando Sentinel (2013), online at http://articles.orlandosentinel.com/2013-01-29/business/os-voter-lines-statewide-20130118_1_long-lines-sentinel-analysis-state-ken-detzner.

19: U.S. Const. art. I, § 4, cl. 1.

20: See *Id.* art. I, § 3, cl. 1. This changed with the passage of Amendment XVII, which established the direct election of senators. This amendment was enacted to break up the "millionaires club" of the Senate during a time in which a millionaire meant a very different thing than it did now (Goldman Sachs CEO Lloyd Blankfein's $18 million salary would not qualify). Today, Senators are elected in much same way that House members are. Although, instead of being elected for a portion of the population every 2 years, they are elected every 6 years in a statewide election.

21: This is a wonderful example of a federalist system restricting the right of impingements on the rights of the legislature to write law for its own domain. Since, when the Constitution was written, it could take days to weeks to travel to a different town, allowing the federal Congress to determine the location of state legislatures could create a serious impediment to any legislation. Even today, it would be a serious hassle for time-sensitive legislation.

22: U.S. Const. amend. XVII.

insofar as it may not regulate "the Places of chusing Senators."[23] This section simply means that the federal government may not write laws that alter other laws regarding where Senators are chosen, but the federal government is under no obligation based on these words to be otherwise bound by the states. As an example, since states place House and Senate elections on the same ballot, the federal government is free to make laws that affect the polling stations for these ballots, considering that state legislatures are free to respond by separating the elections for the House and Senate. The federal government could choose to pass laws governing most aspects of a federal election and still truly be within its Constitutional bounds.

Now, the final task concerns proving that FVD is wise doctrine. Federalism provides the strongest theoretical defense of FVD. To link voting law and federalism, we must realize that federal voting laws are a federal issue. Federalism, as explained before, has its crucial element in the legislating apparatus rather than the judicial or enforcement means of the domain of law in question. That is, federal judges may rule on states' laws, and state police may be authorized to make arrests for federal infractions, but no state legislator is entitled to vote on federal law. The states' laws must not be able to dictate the outcome of a federal election and, as a result, federal law. Federal voting law very clearly affects the outcome of federal elections.[24] Thus, allowing states to write federal voting law gives them an effective voice in who the legislators are, which should be considered undue influence over federal legislation not permitted by federalism. Furthermore, the fact that these elections have effects across state lines makes them governed by federal rather than state law, as shown earlier. For these two reasons, state control of regulations for federal elections is a blatant violation of federalism. Therefore, at least for the sake of intellectual consistency, it is appealing to adopt FVD.

In addition to being appealing from an intellectual, abstract perspective of fitting with the federalist philosophy, Federal Voting Doctrine is practically likely to reduce the chance for political abuse and minimize the possibility of states harming other states. It is very difficult to actually launch a suit regarding voting rights abuses by the state. Commonly in such lawsuits, over six thousand man hours are spent acquiring documents, and state voting officials exhaust ample opportunities to slow down the process.[25] For a citizen, this makes it prohibitively expensive and time-consuming to seek

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23: *Id.* art. I, § 4, cl. 1.

24: In fact, it cannot even be argued that it is insignificant in its scale; often, such laws, such as the density of polling stations, can be the difference between victory and loss for a candidate.

25: See *South Carolina v. Katzenbach*, 383 U.S. at 313.

judicial redress, ensuring he has no reasonable form of recourse for a political harm that may be inflicted upon him by a state. Let there be no question; historically, states have engaged in such abuses.[26] With FVD, federal election laws are standardized. Any rights violations will be much easier to detect, prove, and litigate because they will necessarily be more widespread and the laws governing such violations, by being more common, will be more widely understood. Furthermore, because any problematic law would affect every state, there will be people detecting problems and solving them with the resources of multiple states rather than just one. This increases the chances that such problems will be fixed, let alone identified.

Additionally, considering that state oversight has been notoriously unsatisfactory, entrusting meaningful enforcement and review to, say, the generally competent Justice Department, which has almost 50 years of experience managing elections due to its civil rights obligations, cannot make the situation worse.[27] Additionally, the DOJ has significantly more resources than any state's Attorney General, which would provide additional support to citizens who are currently harmed. Combined with the previous effects generated above, it is clear that there are practical benefits to states and citizens that stem from the adoption of FVD.

Finally, there is one additional intellectually appealing benefit to FVD. As mentioned before, if election law is odious in one state and not another, then one state can be said to be harming another, as well as its own citizens. However, states cannot sue each other on the basis that they do not like each other's laws or doubt their constitutionality.[28] Therefore, there is no recourse

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26: See *Shelby County v. Holder*, 133 S. Ct. 2612, 2651-52 (2013) (Ginsburg, J., dissenting).

27: Examples of mismanagement by states abound. For example, in recent years Florida attempted to erase hundreds of thousands of voters from its rolls; in Ohio some counties claim to have a voting population greater than their actual population; in the 2012 election some counties had over 5-hour waits for the ballot; in the first half of the 20th century racist states instituted poll taxes or literacy tests; and more are easily found. In fact, state mishandling of elections is so widespread that there is a limited federal bureaucracy dedicated to handling these complaints: the Election Assistance Commission, online at http://www.eac.gov/inspector_general/report_fraud_waste__abuse.aspx.

28: 28 U.S.C. § 1251 provides that controversies involving multiple states fall within the Supreme Court's original and exclusive jurisdiction. However, states may not successfully initiate such actions simply because they disagree with the laws that another state has on its books. Rather, such suits must meet the standing requirements of Article III. See *Warth v. Seldin*, 422 U.S. 490, 501 (1974). The claimant state must show that it "is immediately in danger of sustaining a direct injury." That is, it may not sue based on an abstract interest

for the type of harm these states suffer. Yet, if it is recognized that states cannot write federal law, then they would not be able to write the type of law that would harm another state by unduly influencing federal elections. Therefore, FVD eliminates an entire avenue of harm and adds an extra layer of protection to federalism.

IV. Corollaries: Practical Application of Federal Voting Doctrine

This section will outline how current voting laws established by states violate FVD and what the effects will be of terminating and replacing these laws. More concretely, FVD will be applied here in a less abstract sense to give the reader a greater sense of FVD in practice. The result is that many potential laws become trivial[29] applications of the federal Congress' power to regulate elections. They would no longer be laws that, as traditionally has been the case, carry presumptive marks of constitutional infirmity for meddling with states' election regulations. For example, if FVD is adopted, any new lawsuits attacking the Voting Rights Act of 1965[30] could not be lawsuits challenging the government's right to legislate elections, as that power will already be clearly established and asserted.[31] This section takes the form of a "before-and-after," examining a current problem and how FVD provides the solution.

Felons: In some states, felons are not allowed to vote. This would change substantially if FVD is adopted.[32] Most obviously, either felons will be

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in constitutional law or in hopes of proving an imagined, distant, or speculative form of injury that has not even happened yet.

29: By trivial, I mean that there is no pressing legal question. These laws become just routine regulations, like BPA laws concerning water bottles.

30: This statement does not apply to Section IV, which has faced legal challenges and was stricken down due to its arbitrariness. See, generally, *Shelby County v. Holder*, 133 S. Ct. at 2612. In truth, FVD could make the Civil Rights Act of 1965 apply to every state, as it would be the supreme law of the land: federal law.

31: This is not to say that the Voting Rights Act of 1965 could not face legal challenges; like any law, there could be lawsuits regarding the arbitrariness of the law or whether the technical aspects have a constitutionality issue, for example. However, disentangling these challenges from the issue of the right to regulate an election makes any legal question much more straightforward and interesting, as well as possibly more broad.

32: In general, the case against taking away felons' rights to vote are many, and in my view most of them are correct. The phrase "right to vote" appears five times in the Constitution, as well as in the various amendments, implying that voting is a constitutional right. See U.S. Const. amend. XIV, XV, XIX, XXIV,

able to vote in every state or in no states. Currently, only *two* states, Maine and Vermont, permit felons to vote by absentee ballot. Only 13 states and Washington, D.C. allow felons to vote again once they have served their term. 23 states do not allow felons to vote after they have been incarcerated if they still have some restriction, like parole. And a full 12 states may take away a felon's right to vote permanently.[33] Considering that Florida is one of the states that restricts felon voting, that George W. Bush defeated Al Gore in the state by approximately 900 votes, and that there are more than 900 felons in that state, it is possible that this policy affected the outcome of that particular election.[34] This is clear evidence that federal election law is consequential and that differences across state lines allow states to harm other states.

For FVD, the primary concern here is that the states have no right to decide whether felons should vote in federal elections. Since voter eligibility is one of the most basic building blocks of an election, one's qualifications should be secured logically and transparently.[35] And it should not be up to the states to decide who is entitled to pick the electors of a different legislative domain; after all, the federal government has no right to say who may vote for governor. Moreover, as the solution to this problem would be federal law, the solution would have to be universally applied.[36] FVD makes each state

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& XXVI. This would imply that it cannot be taken away from felons, much like how due process rights of felons might still be impinged by state actors. Additionally, there are disparate impact and political corruption concerns. See *Should Felons Have The Right To Vote?*, NPR (2012), online at http://www.npr.org/2012/07/16/156855043/should-ex-felons-have-the-right-to-vote. Also, consult *Felony Disenfranchisement Laws in the United States*, The Sentencing Project (2013), online at http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinus_Jun2013.pdf. That said, here I am merely showing how the current regime is contradicted by FVD, and hope that the offense against the federal government by these policies is made obvious.

33: See *State Felon Voting Rights* (cited in note 14).

34: At the time, there were 827,000 felons denied their right to vote. See Jeff Manza & Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (2006).

35: As I explained in Part II, the Constitution clearly outlines that voting is a crucial part of the character of the United States and is the effective route to power. It should therefore be very greatly considered before a person's right to vote is taken away. Making the issue of who can vote a federal one may make it more difficult to pass any such law in the first place, which is a positive outcome.

36: By this I do not mean that either felons could vote in every state or no state. What I mean is that every standard applies to the same state, such as with the Section IV of the Voting Rights Act.

and voter equal by creating uniform rules so that a person's right to vote is the same no matter where she may be. The enactment of a single set of regulations will make the system simpler, resulting in greater efficiency stemming from less confusion from a myriad of eligibility laws.

Technology: Technology varies greatly across state lines. There is a vast and separate debate on whether votes should be submitted electronically or via pen and paper. Some believe that indelible ink should be used as well. Although I take no position in this debate, some technologies are clearly flawed and open to abuse, such as the infamous "hanging chads" of the 2000 Presidential election. More importantly, differences in technology cause confusion and make the vote counts of some states unreliable compared to others. In the process, citizens are harmed, as they face the possibility that voting may be complicated and confusing or that their vote may be voided due to a technological error.

FVD addresses this issue by allowing the federal government to establish guidelines or even demand the use or abolition of specific voting technologies, allowing voters to be familiar with how to vote no matter where they are and ensuring voters that their votes bear the same risks as those of their peers. Ensuring uniform risk is essential for creating fairness for American voters, and one very important way to do that is to standardize voting technology.

Redistricting: Every 10 years, the federal government takes a census.[37] Based on that census, the number of Congressional seats are redistributed based on population, although no state may have less than a single Representative.[38] In order to decide who votes for which representative, the state map is cut up into districts in a process called "redistricting." This task is left to the states to address in a manner of their choosing.[39] Redistricting is highly flawed and open to abuse as Congressmen curry favor to redraw district lines so that their neck of the woods is filled with as many of their own supporters as possible, locking out competitors structurally, in a process called "gerrymandering."[40]

37: See U.S. Const. art. I, § 1, cl. 3.

38: Originally, the Constitution provided that there would be one representative for every 30,000 people. See U.S. Const. art. I, § 2, cl. 3. This ratio has changed over time as the population has grown ever larger. Today, the House has only 435 seats. But, with a population of 313.9 million, there would be 10,463 house members with the old system. See Reapportionment Act of 1929, 2 U.S.C. § 2(a).

39: See *Census Redistricting Data Program*, Census Bureau (2013), online at http://www.census.gov/rdo/.

40: See *Gerrymandering, Pure and Corrupt*, New York Times (2009), online at

A full 34 states allow their own state-level legislatures, with their party politics and pro-incumbency tendencies, to draw the map themselves. Furthermore, state legislators tend to favor their own party, redistricting in a way that makes it difficult for a would-be Congressman of a different—or even no—party to be elected, regardless of the will of the community. This is a practical problem that cannot be ignored and that makes elections less free and unambiguously more unfair. The federal government, if empowered through the adoption of FVD, could easily set up an independent commission to make sure that no Congressman could cheat the system for his or her own benefit.[41]

In truth, the Voting Rights Act of 1965 addresses this issue without any more intervention necessary from FVD.[42] The VRA establishes a "preclearance" mechanism by which "trouble states" with a history of racial discrimination must have the Justice Department approve any federal election law prior to its implementation. Preclearance could address the issue of redistricting broadly and generally, although most likely either every state or no states would have to be precleared. The only input from FVD is to free the DOJ from the civil rights imperative of preclearance.[43] Redistricting, like felon voting rights, happens to be an issue of eligibility; in this case, at issue is not who is eligible to vote in a federal election, but which federal election one is eligible to vote in. That makes redistricting an issue of the highest importance, which explains why the process is so contested. The adoption of FVD creates an opportunity to avoid arbitrary redistricting and adopt a consistent, equitable, rules-based system that limits untoward political influence.

To implement these measures and any others that may arise, it would be wise to establish a U.S. Department of Voting. The new USDV would relate to FVD as the EPA does to the Clear Air Act; it would be a bureaucracy with more flexible powers to address additional issues related to its subject matter as they arise in an unpredictable future. Simply, there ought to be some bureaucracy that deals with this matter. The USDV fulfills this role. The importance of individual voting rights justifies the creation of a specific

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http://www.nytimes.com/2009/11/12/opinion/12thu1.html?_r=0. Gerrymandering is named after Massachusetts governor Elbridge Gerry, who drew a district to favor his party that was so absurd that it looked like a salamander.

41: California, for example, has adopted such a system, and it is widely acclaimed. See Voters FIRST Act, Cal. Gov. Code. § 8251. The fact that so few states do this is another example of how "hodge-podge" policies hurt voters. Only seven other states have such a system.

42: See Voting Rights Act of 1965, 42 U.S.C § 1973.

43: There is no reason, of course, that removing the civil rights mission of the Voting Rights Act would bar any civil rights case regarding voting policy.

new agency charged with their explicit protection. In fact, the USDV could also free the DOJ from the tedious job of managing the details of elections to focus on its primary mandate: to pursue the interests of the United States, as a national community, in enforcing the substantive goals of federal criminal and civil laws.

V. Conclusion

There are many, many issues relating to voting law. I did not discuss such issues like absentee voting, for example, or whether there should be a national day off of work during elections; those are issues of optimal voting policy. But again, the 2000 Presidential Election is the perfect example that fair voting policy still needs to be addressed too. In this case, the laws regarding voter eligibility and technology determined the outcome of a national election. One candidate was defeated by a slim margin, a margin close enough that Florida alone determined the outcome. That outcome was highly consequential. The nation's forty-third President faced the 9/11 terror attacks, Hurricane Katrina, and the Great Recession and, among other milestones, led the nation into the Iraq and Afghanistan Wars, aided Israel during the Second Intifada, enacted TARP and the auto bailout, and passed No Child Left Behind. It is a matter of opinion whether these actions were good; it is a matter of fact that they affected everyone in the United States and will continue to affect them for the foreseeable future. An electoral lead of 900 votes and a refusal to recount 70,000 more should not have determined who led the country during such trying and consequential times. Reforming election doctrine and implementing FVD will remove an entire mode for such degradations of the democratic process to occur ever again.

The federal government should implement the FVD and establish a Department of Voting in order to properly regulate federal elections. That the citizens of, say, Connecticut should be affected by what, say, Mississippi has decided to do for its citizens gives undue influence to a single state over the affairs of another. It violates federalism. The current scope states are given to write federal election law ought to be greatly narrowed. The effects will allow a great number of issues to be tackled, including voting rights of felons; technology discrepancies across states; absentee balloting rules; redistricting after the census; equality of access regarding polling station density and hours across districts; and more. FVD opens up the possibility of a fairer and intellectually satisfying division of legislative powers. The regime it faces is old and established, but it is also outdated, illogical, and harmful, making it choice for replacement.

Married Women, Property, and the Law in South Carolina, 1744 – 1834

Alida Miranda-Wolff†

I. Introduction

By primarily focusing on the ways married women either outmaneuvered or succumbed to the laws governing their property, historians have overlooked the variability and nuance of American coverture. The laws of coverture functioned as guidelines for the division of property and responsibilities within a marriage, and they were implemented, ignored, and altered depending on the local interests, ideologies, and demographics of distinct areas during specific periods of time. Moreover, independent individuals saw coverture differently based on their class, sex, and economic standing, as well as their own unique personal circumstances. Consequently, to truly understand coverture's effects, social implications, and most importantly, reception by married female property holders, it must be contextualized within a concrete place and time and viewed from the perspective of those who experienced it.

This article will examine South Carolina from 1744 – 1834, focusing particularly on the cases of Eliza Lucas Pinckney, Martha Laurens Ramsay, and Ann Heatly Reid Lovell. These three women all occupied the upper echelons of South Carolinian society and brought significant estates to their marriages, which they respectively chose to manage, cede, and restrict through legal mechanisms for proprietary, religious, and social reasons. Their actions were informed by their individual relationships with their husbands and self-constructions as much as South Carolina's unique socioeconomic and cultural environment. A close analysis of these high society women coupled with a brief investigation into South Carolina's wealthy economy and its population's commitment to Anglicanism, stable family life, and public perception will demonstrate that married women enjoyed more autonomy over their property than some of their counterparts in other geographic locations, but exercised that autonomy discretionally.

II. Definitions and Discussions of Coverture

In her 1703 poem, "To the Ladies," Lady Mary Chudleigh asserts, "Wife and servant are the same/But only differ in the name/For when that fatal

knot is tied.../Man by law supreme has made."[1] These lines suggest that upon marriage, wives became legally subordinate to their husbands. This attitude towards coverture, the specific set of laws governing married women and their property throughout Great Britain, was shared amongst English female activists throughout the 18th century who viewed the practice as a form of enslavement.[2] However, neither the British judicial system nor the general public adopted this view of coverture.

The most commonly cited definition of coverture comes from the famed jurist, judge, and legal scholar William Blackstone's *Commentaries on the Laws of England*, and details:

> "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called...a femme-covert."[3]

According to Blackstone's definition, while a single free woman, a feme sole in Law French, may have enjoyed the same legal rights as any free man, a married woman, a feme covert, did not. Namely, upon marriage, she lost her right to contract, and her legal affairs were to be settled by her husband. While to some extent this characterization is accurate, the definition is nevertheless more representative of the ideology behind coverture than the laws themselves, especially in the United States.[4] Married women retained

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1: Mary Lee Chudleigh, "To the Ladies," in *The Poems and Prose of Mary, Lady Chudleigh* 83-84 (Oxford 1993).

2: Most notably Mary Wollstonecraft's 1799 *The Wrongs of Woman, or Maria* suggests that marriage is a form of enslavement for women. The story profiles a married woman whose husband puts her in an asylum in order to steal her property. When she finally appeals to the courts for a separation from her husband, the reinstatement of her property, and custody of her daughter, she is told that she has no rights to any of her claims because she is at the mercy of her husband. Wollstonecraft modeled the story after her own sister's experiences.

3: William Blackstone, *Commentaries on the Laws of England* 343 (Chicago rpt. 1979).

4: As Hendrik Hartog points out, that does not mean the definition should be discounted. There is considerable evidence that "Blackstonian coverture described governing principles of the American law of husband and wife," in the 18th

a legal existence throughout the 18th and early 19th centuries, signing contracts, appearing in the courts, and in some cases, even selling property.

In fact, Connecticut lawyer and law educator, Tapping Reeve, revised and refined Blackstone's definition in *The Law of Baron and Femme* for this very reason. He clarified:

> The husband, by marriage, acquires an absolute title to all the personal property of the wife, which she had in possession at the time of the marriage; such as money, goods, or chattels personal of any kind. These, by marriage, become his property, as completely as the property which he purchases with his money; and such property can never again belong to wife, upon the happening of any event, unless it be given to her by his will.[5]

This definition demonstrates that upon marriage, a woman ceded her property to her husband, rather than her entire existence, legal or otherwise. In neither Blackstone's nor Reeve's explanation is coverture established as a form of enslavement. Instead, their rhetoric, whether ideological or technically precise, suggests that it was a series of guidelines for married persons merging estates, chattels, and families. Precisely for this reason, the laws of coverture often varied in different regions amongst different judicial bodies.

For example, the laws respecting married women and property in Connecticut and South Carolina did not always resemble each other. The divide between these laws can be attributed to many factors such as the motivations for their establishments, religion, mortality rates, social and economic structures, and legal idiosyncrasies. Moreover, the ways in which the two interpreted and enforced the laws of coverture also engendered differences.

The New Haven and Connecticut colonies were established by reform-minded Puritans who actively sought to transform the flaws they perceived in England's legal and governmental systems. Consequently, the laws followed a markedly moral bent. Women could file for absolute divorce from both the

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and 19th centuries whether interpretation and implementation were consistent or formalized, see Hartog, *Man and Wife in America: a History* 121 (Harvard 2000). In other words, the standard legal language and expectations surrounding marriage resembled Blackstone's framework even if the laws themselves varied across regions.

5: Tapping Reeve, *The Law of Baron and Femme*; *of Parent and Child; of Guardian and Ward; of Master and Servant, and of the Powers of the Courts of Chancery* 49 (New Haven 1816).

courts and the legislature with the right to remarry for "adultery, desertion, fraudulent contract, and seven years absence without a word"[6] and reclaim properties they brought to the marriage throughout the colonial period. Other than Massachusetts, Connecticut was the only colony that provided absolute divorces and enforced them on a regular basis.[7] The courts and legislatures took such a radical stance on the issue that they outlawed bed and board separations, which allowed couples to live apart while legally married, demonstrating a radical departure from English law. Specifically, in England, absolute divorce could only be acquired by an act of legislature for cases of extreme violence or fraud. Bed and board separations, however, were more easily obtained. Connecticut's departure from precedent stemmed from a belief that dissolving dysfunctional unions would strengthen family units, thus creating a peaceful and cohesive society.[8] Even after Connecticut succumbed to the influence of commercialization, Anglicization, and legal formalism in the early 1720s[9] the colony continued to grant absolute divorces into the 19th century and only legalized bed and board separations after public needs in the early 1800s required the change.

Conversely, South Carolina refused to permit absolute divorces. Wives could never remarry, regardless of adultery, violence, fraud, or desertion. Moreover, they could not reclaim their properties if they sought to live apart from their husbands without a postnuptial separation agreement.[10] However, if they filed for and received a postnuptial separation agreement, which functioned like a bed and board separation, they were allowed to retain separate estates and relative control over personal property, slaves, and bills of exchange after marriage. This contrast between Connecticut laws and South Carolina laws can again be attributed to social and economic factors. While women who had the financial means and social clout to file for a postnuptial agreement that allowed them to retain and use property they brought to their marriages even after separating from their husbands, divorce and remarriage were strictly prohibited because of the tragic sexual dynamics particular to slaveholding South Carolina families. Specifically, lawmakers navigating the complex issues of race, weak family ties, and sexual misconduct were wary of the consequences of introducing these rights.[11]

6: Marylynn Salmon, *Women and the Law of Property in Early America* 61 (University of North Carolina 1986).

7: *Id.*

8: *Id.*

9: Cornelia Dayton, *Women Before the Bar* 8-9 (University of North Carolina 1995).

10: Salmon, *Women and the Law of Property in Early America* at 79 (cited in note 6).

11: *Id.*

Divorce and separation were not the only areas in which South Carolina and Connecticut laws differed. For example, South Carolina featured very lenient feme sole trader laws, which granted women the opportunity to trade and retain goods as if they were unmarried, while Connecticut rarely issued the necessary permissions for this commercial action. Additionally, Connecticut lawmakers rarely hesitated to reduce married women's property rights to reach economic or social goals.[12] They restricted widow's dower rights to their husband's estates because the process hampered the partitioning of property, and consequently, the payment of creditors.[13] The South Carolina judiciary, however, supported women's rights to dower, and even reinterpreted English precedent to include slaves as part of the one-third real property guaranteed to widows. Nevertheless, while the comparison between South Carolina and Connecticut underscores the differences between definitions and discussions of coverture in the American colonies, the main focus of this study is the unique situation of propertied wives in South Carolina.

III. The Establishment, Settlement, and Development of South Carolina

The social, economic, and legal makeup of individual colonies impacted the institution, interpretation, and implementation of the laws of coverture. Resultantly, the impact of coverture on married, propertied women in 18th century South Carolina directly relates to its early history, demographic profile, and religious doctrines. Specifically, the relationship between the population of landed gentry, Anglicanism, and high mortality rates helped foster a unique situation for South Carolinian feme coverts.

Though the Spanish and French had tried to settle the area that was to become South Carolina well before the English in the 1600s, the colony was not established until Charles II granted the land to eight proprietors in 1663. Unlike the founders of Connecticut, these men neither sought religious freedom nor had a reformist attitude. Their primary motivation was to acquire wealth, and since Barbados and the other sugar colonies had quickly become too crowded, they turned their attention to South Carolina.[14]

From the very beginning, the South Carolinian population was largely

12: For example, in the 1791 case, *Crocker vs. Fox and Wife*, Connecticut ruled that the widow, Mrs. Fox, had no right to clear her own dower lands of trees, and established the precedent that widows could not have dower in timber lands. This allowed creditors more ready access to land termed "waste," while also decreasing the share of dower widows received.

13: Salmon, *Women and the Law of Property in Early America* at 81 (cited in note 6).

14: Robert M. Weir, *Colonial South Carolina: A History* 49 (KTO 1983).

made up of young, ambitious men seeking their fortunes through the accumulation of land and the cultivation of the cash crops like tobacco. They tended to be unmarried, though many left their wives and families behind in England, which they deemed their true home. Unfortunately, due to the endemic malarial environment, the majority of these men died in their mid-40s before ever returning.[15] As the mortality rates remained extremely high over time, South Carolina settlers began to readjust their attitudes towards long held English customs like primogeniture and entail. Since the married men expected to die seven or eight years into their marriages and long before their children could manage the family estates, they entrusted their wives with real and personal property through their wills. This was a practical line of thinking, especially since men often had no other kin in the colony, and women enjoyed higher life expectancies.[16]

This move reflected the widely held social belief that women were responsible for preserving and maintaining the family. It also helped foster a "widowarchy,"[17] in which widows controlled significant portions of the colony's wealth and were therefore courted by young bachelors looking to use coverture to build their fortunes. It is important to note that white South Carolinians enjoyed the highest per capita income and wealth of any of the North American colonists from the early 1700s through the Revolution, and the economic growth rate was estimated as the highest in the British empire during that time.[18] The richest 10 percent of taxpayers owned about 40 percent of the wealth, mainly because they owned vast expanses of land used to grow tobacco, rice, and eventually cotton and already had preexisting wealth as a result of their aristocratic blood lines and strong ties to the most prominent families in England.[19] This combination of identification with the mother country and land interests led to the retention of the Court of Chancery, which proved extremely beneficial to propertied women who could resolve coverture-related dower, conveyance, and trust issues in a court specifically designed to mitigate the harshness of the common law.[20]

15: Daniel Blake Smith, "In Search of the Family," in *Race and Family in the Colonial South* 23 (Mississippi 1986).

16: *Id.* at 24.

17: Edmund S. Morgan, *American Slavery, American Freedom: the Ordeal of Colonial Virginia* (W.W. Norton 1975), 165-67; Lois G. Carr & Lorena S. Walsh, *The Planter's Wife: the Experience of White Women in Seventeenth Century Maryland*, 34 Wm. & Mary Q. 542 (1977).

18: Robert M. Weir, *Colonial South Carolina: A History* at 141 (cited in note 14).

19: *Id.* at 209-210.

20: Connecticut and Massachusetts never established courts of chancery during settlement because they viewed them as a waste of resources, especially because

In the 18th and early 19th centuries, lengthened life-spans, a native-born society, and the entrenchment of slave labor shifted the role of the propertied married woman in South Carolina. Primogeniture gradually became customary once more, and women were less frequently entrusted with the management of estates upon the deaths of their husbands.[21] Nevertheless, the colony's historical attitude towards female property holders combined with the continued existence of the Court of Chancery contributed to leniency decades later. As Marylynn Salmon has noted, propertied married women in South Carolina enjoyed more community support and legal protections for their estates than women in any other region of the United States.[22]

Still, married women and widows enjoyed less economic freedom after the early years of settlement. However, there are few records of their dissatisfaction with this turn of events. In part, this can be attributed to the fact that both sexes embraced the ideology behind coverture – that men were providers who protected their wives in exchange for obedience and domestic support.[23] Anglicanism, the primary religion of the South Carolinian elite, contributed to the perpetuation of this ideology. Although historians often refer to South Carolinians as secular or nonreligious, especially when compared with their Quaker and Puritan counterparts farther north, there is evidence to show the contrary.[24] S. Charles Bolton has demonstrated that South Carolina laity enjoyed a much closer relationship with the Anglican Church than English laity, gentry relied on religious values as models for social conduct, and

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trusts were not necessary in areas were no one person controlled vast amounts of wealth and land grant issues could be resolved communally rather than legally.

21: Smith, "In Search of the Family" at 29 (cited in note 15).

22: Salmon, *Women and the Law of Property in Early America* (cited in note 6).

23: This attitude is illustrated by the most widely read English novel of the 18th century, *Pamela* by Samuel Richardson. While the text was controversial for suggesting that a woman could transcend class boundaries by behaving virtuously, its message of female humility and obedience was idealized. The story centers on the young maidservant, Pamela, who is preyed upon by her master, Mr. B. Though he attempts to seduce her repeatedly, she resists his advances, all the while remaining faithful to him. When he finally declares his love for her and marries her, she becomes a dutiful wife committed to managing the domestic affairs and following his list of predetermined rules for good wifely behavior. In exchange, Pamela reaps the benefits of living in a grand estate and occupying high society.

24: Daniel Blake Smith suggests that religious values counted for little in planter households in his essay "In Search of the Family," but concedes that the conjecture has not been deeply explored. He adds that the orality of the Southern culture may explain why less religious materials have been found and documented.

while the geography of the area hampered some efforts to attend church, private services and religious reflections were not uncommon.[25] His study suggests what the diaries of Eliza Lucas Pinckney and Martha Laurens Ramsay demonstrate – wives viewed serving their husbands as not just a socially mandated act, but a pious one. Consequently, the idea that a woman's property would transfer to her husband leaving her financially dependent was not abhorrent or unusual, but expected.

IV. The Mandates of High Society

If Anglicanism reinforced propertied married women's acceptance of coverture, then social codes all but mandated it. For South Carolinians, stable family life was the prevailing ideal by which they structured their lives, acting much like community did for New Englanders.[26] As a result, marriages were expected to follow the standard British ideal of the companionate marriage. The guiding principle for husbands and wives was "where there was mutual love there could be no bondage; that there was but one interest, one aim, one design, and all conspired to make both very happy," and though economic and social pressures may affect courtships and proposals, love must serve as a foundation for marriage.[27]

Clearly, this line of thinking informed Blackstone's definition of coverture, which essentially codified the companionate marriage by explaining man and wife as one in the same. It also appeared in the widely read primers of the day such as the by-then historical *A Godly Form of Household Government*, a text that delineated how husbands and wives should behave in marriage to create a more perfect union. Among its rules, the primer advised that wives dress and speak modestly, skillfully perform household duties, and serve their husbands who in turn should guide them spiritually and morally, defend them from tangible and intangible dangers, and provide for them.[28] Since

25: S. Charles Bolton, *Southern Anglicanism: The Church of England in Colonial South Carolina* (Greenwood 1982).

26: Robert Weir, Daniel Blake Smith, and Julia Cherry Spruill have also shown the ways in which family took center stage for both individual South Carolinians and society itself, regardless of class. However, it is essential to remember that while backcountry immigrants felt as strongly about maintaining close kinship networks and upholding family values as lowcountry planters, the latter group focused more on maintaining the appearance of a peaceful and stable family environment because of their public-facing role.

27: Lawrence Stone, *The Family, Sex, and Marriage in England 1500–1800* 399 (Weidenfeld & Nicolson 1977).

28: John Dod & Robert Cleaver, *A Godly Form of Household Government* (London:

South Carolinian elites viewed family not just as a private circle of close kin contained within the immediate home, but also as an essentially public phenomenon, wives made sure to adhere to these codes as visibly as possible.[29]

Above all else, adhering to these codes required a wife to ignore her husband's infidelities while never committing them herself. An article in the *Lady's Magazine* perfectly illustrates this socially mandated double standard:

> A licentious commerce between the sexes…may be carried on by the men without contaminating the mind, so as to render them unworthy of the marriage bed, and incapable of discharging the virtuous and honorable duties of husband, father, friend…[However] the contamination of the female mind is the necessary and inseparable consequence of an illicit intercourse with men.[30]

There are many reasons for the existence of this double standard, including issues of paternity, but in the primers, magazines, and newspapers from this era, the discussion is unilaterally framed in terms of private versus public space. As Julia Cherry Spruill notes, the argument was that if a husband kept his extramarital affairs private, a wife had no right to search for evidence of his infidelity because doing so would be an invasion of his privacy. On the other hand, if a wife had an affair and was discovered, she could compromise her husband's name and good honor publicly.[31] Needless to say, husbandly extramarital affairs were common in South Carolina, to the point that a law was enacted limiting the amount of estate a husband and father of lawful children might leave to his mistress and illegitimate offspring.[32] While absolute divorces were not granted and wives were expected to tolerate infidelities, the colony's longstanding emphasis on widow's property rights allowed them some legal protections even in this difficult arena.

Of course, these legal protections afforded to widows also related to the colony's obsession with public appearances. Signification governed every aspect of South Carolinian behavior. For example, natives cemented their relationship with England by recreating the same political and legal structures, education systems, and recreational activities enjoyed abroad.

1603).

29: Smith, "In Search of the Family" at 33 (cited in note 15).

30: The Lady's Magazine 541 (London Aug. 1771).

31:Julia Cherry Spruill, *Women's Life and Work in the Southern Colonies* 174 (Norton 1937; Norton rpt 1998).

32: *Digest of the Laws of South-Carolina, Containing the Public Statute Law of the State, Down to the Year 1822* 66 (Columbia, S.C. 1822).

This meant private schools flourished, Courts of Chancery were relied upon, and politicians retained close connections with their counterparts England. Similarly, their preoccupation with appearances also meant that public forums were an effective means of social policing.

In one such case, an unnamed but "distinguished correspondent" for the *South Carolina Weekly Gazette* wrote an open letter to any man who had either deserted or considered deserting his wife, writing, "the villain who has reduced a Woman to a fate of disgrace and infamy, and then left her to reproach and insult, to want and beggary, and to strive for herself in a manner more dreaded than death itself deserves a punishment words are wanting to describe."[33] This reproach reiterates the importance of the companionate marriage and demonstrates how men were coaxed into behaving appropriately or shamed for their misdeeds.

One advantage of the public forum for wives with husbands who failed to hold up their end of the companionate marriage was that they could rely on this form of targeted vitriol to draw community support when coverture put their property at stake. Hannah Smith, a South Carolinian woman deserted by her husband, ran a page-long advertisement in the *South Carolina Weekly Gazette* for this purpose. It read:

> The Subscriber begs leave to inform the public, that, from cruel, unjust and ungenerous treatment she received from her husband, John Smith, who left her definite upwards of nine months past, without any assistance from him or the maintenance of herself and children, and who has returned to the city a few days past, and who wanted to take and possess himself of the little property she made since his departure, [advertises] that no person should buy or purchase a female slave and child, which she earned during his absence. She likewise informs those who were so kind as to give her credit, that a due regard will be paid to give them ample satisfaction."[34]

By listing her husband's offenses for the public, Hannah claimed the slaves as her property and warned others against purchasing them. Moreover, Hannah's advertisement signals that she had support from members of the community because credit had already been extended to her.[35] This form of

33: *A Defense of the Fair Sex*, S.C. Weekly Gazette (Jan. 2, 1784).
34: *Supplement to the City Gazette & Daily Advertiser* (Charleston Nov. 20, 1795).
35: Elites often took it upon themselves to financially provide for abandoned

controlling property – asking the public not to purchase chattels or real estate from a husband who could legally sell it – was not uncommon. Though there were legal protections for married women with property in place, sometimes the appeal of using social pressure outweighed that of turning to the courts.

V. Married Women, Property, and the Law

South Carolina's fixation on upholding British models extended to their courts, which privileged theatricality and procedural formalism. Despite their best efforts, however, modifications to the mother country's legal system were inevitable, especially given the social and demographic differences between the two regions. The presence of a slave population that outnumbered the landed class three times over resulted in the development of two codes of law, one for slaves, and one for free South Carolinians. Similarly, high mortality rates and the focus on preserving wealth by keeping families stable led to the enactment of laws privileging propertied married women and widows. Moreover, the small number of lawyers, judges, and legal texts made it impossible for anyone to have a thorough knowledge of South Carolina law.[36] Consequently, "the bar was small, justice highly personal, and procedure... irregular,"[37] and having good relationships with legal influencers could be more important than actually understanding the law.

The combination of a strong propensity to follow British standards and the proliferation of community-specific legal modifications created a uniquely advantageous situation for married female property holders. They enjoyed protections before, during, and after marriage on everything from their family wealth to their independent business ventures and dower claims. In fact, only after the 1840s did married women see the same restrictions on their estates as their sisters in other areas of the United States.

Before marriage, elite South Carolina women could institute prenuptial agreements and trusts to protect their property interests. Prenuptial agreements allowed married women to retain the right to dispose of property

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women, especially those who once belonged to their ranks. Taking responsibility for them was one way of establishing their links to the community and high social standing.

36: Robert Weir suggests that the only guide to South Carolina's laws lawyers had at their disposal for much of the 18th century was Nicholas Trott's *Laws of the Province of South Carolina* (1736). Then Blackstone's *Commentaries on the Laws of England* became available in the 1760s, and it became one of the principle guidebooks for legal professionals and laity. Weir, *Colonial South Carolina* at 256–258 (cited in note 14).

37: *Id.* at 259.

through a will, ensuring their children would inherit their property instead of their husbands or step-children. Clearly, low life expectancies and high incidences of remarriage influenced the propagation of such agreements. Similarly, wealthy families looking to keep their land and slave holdings within their bloodlines created trusts for their daughters that were managed by male relatives like cousins or uncles. These trusts restricted son-in-laws from squandering assets intended for predetermined beneficiaries.

During marriage, propertied women enjoyed liberal laws regarding their ability to conduct business, enter into contracts, and convey their dower lands to their husbands. Although William Blackstone's definition of coverture specified that wives could not contract during marriage, but must act through their husbands, this was demonstrably not the case in the United States, particularly in South Carolina. The principle of "tacit consent" said that if a husband knew of his wife's actions and did not protest or interfere with them, he gave his consent for her to engage in them.[38] For example, in the case *Willingham v. Simons*[39] the chancellor ruled that a wife could accept payment for slaves sold by her husband, even though the acceptance of the payment was "to all intents illegal" under coverture.[40] He supported the payment because the husband's actions seemingly attested to his consent, which was the key to South Carolinian decisions on feme covert contracts. This was also the key to decisions on feme sole traders, married women who acted as single women when conducting business.[41] In *Magrath v. Robinson*[42] the issue at hand was that Ann Robinson had acted as a feme sole trader without written consent from her husband before passing away and subsequently leaving the property she earned independently to her mother. There was no statute governing the issue, but testimony from witnesses demonstrated that her husband, John Robinson, knew of and sanctioned his wife's activities. As a result, the court ruled her property should be treated as separate from her husband's and issued to her mother.

Restrictions on conveyances and private examinations were also meant to protect married women. Under English law, "a husband could not sell land his wife brought to the marriage without her consent, indicated by her signature on the deed and her declaration in a private examination that she acted of

38: This held until 1823, when a statute required announcement and registration. Salmon, *Women and the Law of Property in Early America* at 46 (cited in note 6).

39: *Willingham v. Simons*, I Desaussure 272 (1792).

40: *Id*. at 273.

41: South Carolina was the only colony in the 18th century that allowed all married women, not just those deserted by their husbands, to act as feme sole traders.

42: *Catherine Magrath v. Administrators of John Robertson and Ann Robertson*, 1 Desaussure 445 (1795).

her own free will and not under the coercion of her husband."[43] Since the northern colonies no longer had chancery courts, the process of obtaining consent quickly became less formal and ceremonial. South Carolina, on the other hand, took the process very seriously. Unless a woman signed and acknowledged a deed of sale or mortgage with her husband and signified her free consent apart in a private examination, she could not convey a legal title to real estate. This practice was eventually eliminated in the early 19th century for practical reasons; mainly, if a wife was being coerced, then she would not admit to coercion in a private examination because if she did, her husband would know when the conveyance was denied and likely punish her. Nevertheless, the sentiment behind private examinations demonstrated the intent to protect a woman's land interests.

Dower was meant to protect widows from destitution. In South Carolina, dower constituted a life interest in one-third of real property. There were various mechanisms in place for women whose husbands sold their dower lands without their consent. By and large, those who purchased dower lands would have to return them to the widow after her husband's passing. Consequently, dower lands were rarely sold. However, despite the fact that dower was the primary legal protection for women, dower renunciation was widespread. This can be attributed to the fact that when husbands drafted their wills, they consulted their wives to make individually tailored arrangements. Over the period of time from settlement to 1795, fourth-fifths of husbands gave their wives property to own rather than hold for life, and two-thirds issued them a share in the estate's residue (generally the most valuable part of the estate).[44] Similarly, trusts and prenuptial agreements were rarely employed, and feme sole traders and feme covert contractors rarely made their way into a courtroom, unless it was to renounce dower or convey land. This can be explained that in their attempts to showcase model familial behavior, they handled complicated and perhaps messy legal and financial affairs privately.

Va. Case Study: Eliza Lucas Pinckney

Eliza Lucas Pinckney is one of the most celebrated figures in South Carolina history. She is best known as a symbol of republican motherhood for raising her two sons, Charles Cotesworth Pinckney and Thomas Pinckney, to become American war heroes and politicians. Charles was one of the few South Carolinian Revolutionary War generals and a signer of the United States Constitution, while Thomas also served as a Revolutionary War officer

43: Salmon, *Women and the Law of Property in Early America* at 7 (cited in note 6).
44: *Id*. at 157.

and then later as the United States Minister to Spain and to Great Britain. However, while the extant literature on Eliza Lucas Pinckney has primarily focused on her sons and to a lesser extent, her contributions to the South Carolinian economy, little attention has been paid to her personal life and her attempts to be a good wife and mother.[45]

In her collection of personal resolutions, which she wrote down and repeated every day, she stressed, "To make a good wife to my dear Husband in all its several branches; to make all my actions Corrispond with that sincere love and Duty I bear him … And next to my God, to make it my Study to please him."[46] By all accounts, Pinckney's feelings of devotion were returned by her husband, Charles Pinckney, who in addition to showing his wife affection, also allowed her significant control of the family's abundant wealth and estates both during his life and after his death. While their seemingly ideal marriage may not have been wholly typical of the time, it still shows that the laws of coverture did not always negatively affect married women.

Eliza Lucas was born in 1722 in Antigua to Elizabeth and George Lucas. Mr. Lucas was one of the wealthiest planters on the island and during her childhood she enjoyed the privileges of belonging to the English elite, including attending boarding school in London. In 1738, her father decided to relocate the family to South Carolina after falling into debt in Antigua and experiencing his wife's steady decline in health.[47] He acquired several properties in South Carolina, including the six-hundred acre plantation Wapoo, the fifteen-hundred acre plantation Garden Hill, and three thousand acres of land along the Waccamaw River near Georgetown, starting his new life unencumbered by debt in the colonies.[48] Though Eliza was just

45: In *The Mind of Eliza Pinckney: An Eighteenth-Century Woman's Construction of Herself*, Darcy R. Fryer begins to address this issue, demonstrating that despite Pinckney's legacy as an ideal "republican mother" and stimulator of the South Carolina economy, she thought of herself as a private civilian rather than a patriot. See Darcy R. Fryer, *The Mind of Eliza Pinckney: An Eighteenth-Century Woman's Construction of Herself,* 99 S.C. Hist. Mag. 215 (1998). Though Constance B. Schulz also addresses this idea in Schulz, "Eliza Lucas Pinckney and Harriott Pinckney Horry: A South Carolina Revolutionary-Era Mother and Daughter," in *South Carolina Women Volume 1: Their Lives and Times* 84 (Georgia 2009). However, her work still reinforces the idea of Eliza Lucas Pinckney as a revolutionary-era patriot above all else.

46: Harriott Horry Ravenel, *Eliza Pinckney* 115-16 (New York 1896).

47: Eliza Lucas Pinckney, Elise Pinckney, & Marvin R. Zahniser, *The Letterbook of Eliza Lucas Pinckney, 1739-1762* xvi-xvii (South Carolina 1997).

48: Schulz, "Eliza Lucas Pinckney and Harriott Pinckney Horry" at 84 (cited in note 45).

fifteen years old, she quickly took to managing her father's plantations and experimenting with agriculture and horticulture. In fact, she introduced indigo into the South Carolina crop rotation, and her first successful batch acted as her dowry upon her marriage to the forty-five year-old widower, landowner, and attorney, Charles Pinckney.

After marrying Charles Pinckney in 1744, Eliza Lucas Pinckney assumed the duties of a plantation mistress, managing their residence, Mansion House, as well as their principal plantation, Belmont. In fact, since Charles Pinckney's career as a lawman and statesman occupied much of his time, he granted his wife the responsibility of managing their personal finances and slaves, issuing bills of exchange, and making decisions about crop planting and cultivation.[49] As a result, she was able to continue in the pursuits of agriculture and horticulture, cultivating rice, indigo, hemp, and flax while also launching the silk industry in the Carolinas.[50]

In 1746, Eliza birthed her first child, Charles Cotesworth, and in the subsequent four years, another two surviving children, Thomas and Harriott. She embraced motherhood fervently, adding to her list of personal resolutions:

> "to be a good Mother to my children, to pray for them, to set them good examples, to give them good advice, to be careful both of their souls and bodys, to watch over their tender minds; to carefully root out the first appearing and budings of vice, and to instill piety, Virtue and true religion into them."[51]

This resolution clearly illustrates her commitment to upholding the family values characteristic of the time, and taken together with her resolution to serve her husband as a dutiful wife, suggests that she understood and supported the underlying ideology behind Blackstone's definition of coverture. Mainly, she privileged the importance of a household with a husband and father who provided for the family, and a wife and mother who under his benevolent will, helped morally govern the domestic sphere.

This attitude can also be attributed to her faith – from childhood, she exhibited a strong commitment to Anglicanism. While just a teenager, she wrote to her brother, "God is Truth it self and cant reveal naturally or

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49: *Id.*

50: *Id.* 88.

51: Ravenel, *Eliza Pinckney* at 117 (cited in note 46).

supernaturally contrarieties. The Christian religion is what the wisest men in all ages have assented to."[52] Like the New England wives who saw "coverture [as] hard but necessary work for a distinctively female self that would realize salvation through submission,"[53] Eliza Lucas Pinckney accepted the laws surrounding her marriage as extensions of religious tenets she already embraced. Of course, unlike the majority of those same New England wives, her particular set of circumstances as a South Carolina gentlewoman and beloved wife allowed her to exercise a vast amount of control over her own property and enjoy an active legal existence, though she often underplayed both during her marriage.

Before marrying Charles Pinckney, she had educated herself in the most technical aspects of the law with Thomas Wood's two-volume *Institute of the Laws of England*.[54] She wrote her close friend Miss Bartlett:

> "I have made two wills already. I know I have done no harm for I coned my lesson very perfect and know how to convey by will Estates real and personal and never forget in its property place, him and his heirs for Ever, nor that 'tis to be signed by 3 Witnesses in presence of one another."[55]

There is no question that Eliza Lucas Pinckney relied on this legal knowledge and expanded upon it whiled married to Charles Pinckney, especially because they were known to engage in lively conversations over political and legal matters.[56] However, after bearing three children and temporarily relocating to England with the family from 1753-1757, her letters and diaries rarely feature discussions of the law. This may be the result of her increasing immersion in polite English society, which as texts such as *A Godly Form of Household Government*, *A Looking Glasse for Maried Folks*, and even *Pamela* reveal, required wives to discuss domestic matters over intellectual, political, or legal ones.

Nonetheless, Eliza did not seem to mind these limitations, often urging her

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52: Pinckney, *Letterbook of Eliza Lucas Pinckney* at 53 (cited in note 47).

53: Hartog, *Man and Wife in America: a History* at 44 (cited in note 4).

54: *Institute of the Laws of England*, first published in 1720, was the leading work on English law until superseded by William Blackstone's *Commentaries on the Laws of England* in 1769. The fact that Eliza Lucas had access to such an expensive text while in South Carolina, and that she was able to understand it well enough to draft wills and marriage settlements under its guidance serves as a testament to the extent of her wealth and learning.

55: Pinckney, *Letterbook of Eliza Lucas Pinckney* at 41 (cited in note 47).

56: Darcy R. Fryer, *The Mind of Eliza Pinckney* (cited in note 45).

husband to remain in England, which she viewed as her true home, despite her later revolutionary activities. However, the Pinckneys returned to South Carolina in 1758, where Charles died just one month later of malaria. Eliza was devastated and spent years grieving, writing to her friends and family, "I was for more than 14 year the happiest mortal upon Earth! The Almighty had given every blessing in that dear, that worthy, that valuable man, whose life was one continued course of active virtue. I had not a desire beyond him."[57] Despite her extreme sense of loss, Eliza was well-provided for; her husband, trusting in her economic and legal savvy, not only left her more than the one-third real property in dower required by the laws of coverture, but also made her the executrix of his will and estates.[58]

This proved to be a wise decision on two levels. First, Eliza's devotion to her husband was such that she refused to remarry, emphatically explaining to her good friend Catharine Troye King in England, "I cant conceive how such an improbable piece of news as my going to be married could be invented here and molagated to such a distance as Riply…entering into a second marriage never once came into my head."[59] Consequently, Mr. Pinckney's properties remained within his immediate family rather than transferring to a second husband. Second, his wife's business acumen was so formidable that she managed to singlehandedly improve the profitability of the Pinckney Island group of properties near Hilton Head.[60] Until her death in 1793, Eliza Lucas Pinckney continued to ensure the productiveness of her inherited properties, as well as remain committed to the memory of her husband, the well-being of her family, the upper echelons of South Carolinian Society, and the Anglican church.

Vb. Case Study: Martha Laurens Ramsay

Like Eliza Lucas Pinckney, Martha Laurens Ramsay was a member of the South Carolina elite devoted to serving her husband and children dutifully and piously. However, unlike Eliza Lucas Pinckney, she was not given free reign over her family's estates, and in fact, lived most of her married life in debt

57: Pinckney, *Letterbook of Eliza Lucas Pinckney* at 100 (cited in note 47).

58: Eliza Lucas Pinckney had previously renounced her dower in order to receive a larger portion of the estate in her husband's will. This information, along with several deeds issued by Mrs. Pinckney can be found in *South Carolina Deed Abstracts: 1719-1772* (4th ed, Bks 1-3).

59: Eliza Lucas Pinckney to Wilhelmina-Catherine Troye King, (Mrs. Thomas) (Feb. 27, 1762).

60: Schulz, "Eliza Lucas Pinckney and Harriott Pinckney Horry" at 88-89 (cited in note 45).

after her husband misspent the sizable assets she brought to their marriage. In many ways, Martha experienced the most negative effects of coverture, but she neither lamented her fate nor questioned her husband's domain over her fortune in her letters or diaries. Instead, she supported her husband faithfully until her death, demonstrating that for some propertied women, the laws of coverture merely reinforced socially and religiously prescribed codes of behavior.

Martha Laurens was born in Charleston, South Carolina on November 3, 1759 to Henry Laurens and Eleanor Ball. Henry Laurens was one of the most successful slave traders in the Carolinas and amassed his fortune early on in life, easily providing all of the comforts in life to his wife and six children. Despite her family's wealth and social status, Martha had a difficult childhood, almost dying of smallpox as a young child and then mothering her five brothers and sisters upon the death of her mother in 1770.[61] During this difficult time, Martha turned to religion, developing devout beliefs. She regularly practiced religious exercises and committed them to print, frequently repeating supplications such as "adorable Lord of angels and men, I desire, with the deepest humiliation and abasement of soul, to fall down at this time at thine awful presence, and earnestly pray that thou wilt penetrate my very heart and soul."[62] This Anglican religiosity deepened over time, eventually coming to define her life.[63]

In 1775, Henry Laurens sent Martha to England to nurse his brother, James Laurens. In the meantime, her father became the president of the Continental Congress, American ambassador to Holland, and diplomatic prisoner of war in the Tower of London. Little is known of Martha during the Revolutionary War era except that she deeply mourned the loss of her brother John, who died in 1782 in a skirmish at the end of the war.[64] Martha finally returned to her home in South Carolina in 1785, where she spent the next two years with her father – by then released from the Tower of London and made one of the four negotiators of the peace treaty that concluded the Revolutionary War – before accepting a marriage proposal from David Ramsay.

David Ramsay was a physician and historian who had improved his

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61: David Ramsay, *Memoirs of the Life of Martha Laurens Ramsay* 13-16 (Lexington 1813).

62: *Id.* at 76.

63: In fact, as Joanna Bowen Gillespie points out in *The Life and Times of Martha Laurens Ramsay*, the reason the South Carolinian wife and mother remained a studied historical figure over time was her dedication to her faith and the written religious exercises and supplications she left behind.

64: Joanna Bowen Gillespie, *The Life and Times of Martha Laurens Ramsay* ix-xi (South Carolina 2001).

social and economic standing by marrying two low country heiresses, both of whom died in childbirth.[65] According to Joanna Bowen Gillespie, their marriage comprised "strands of republicanism, marital ideology, and political perspective."[66] In particular, this marital ideology rested on the principle that husbands acted as the moral and material guides of the household while wives helped support them in their endeavors. Martha remained devoted to her husband despite his failed investments and precarious position as a physician, which forced him to reply upon patients who frequently failed to pay him. Her devotion proved admirable since he invested the sum total of her $25,000 legacy in the failed Santee Canal, leaving the family entirely bankrupt. Just one year later, Martha wrote of her David:

> Bless, O bless my dear husband; give him the light and direction which he needs; be though his strong tower of defence in every time of trouble; our joint pilgrimage on earth, and give us finally to be made partakers of those eternal joys, in the hopes of which our lighting and momentary afflictions, may be calmly and steadily borne, so long as thou shalt see meet to continue them.[67]

Martha's support of her husband was such that even when her brother Henry Laurens Jr. sued him for bonds owed in 1803, she refused to question him.[68] In general, she avoided discussing her finances, and sought to live in what she deemed "principled poverty," a state of financial uncertainty (relative to her highly prosperous upbringing) that carried with it the implications of moral duty. She respected her husband for investing in projects meant to better South Carolina like the Santee Canal and the lives of South Carolinians like the patients he treated that he knew they could not afford to pay him for his services.

65: Barbara Orsolits, Review *The Life and Times of Martha Laurens Ramsay by Joanna Bowen Gillespie*, 106 S.C. Hist Mag. 170, 171 (2005).

66: Gillespie, *Life and Times of Martha Laurens Ramsay* at 108 (cited in note 64).

67: Ramsay, *Memoirs of the Life of Martha Laurens Ramsay* at 218 (cited in note 61).

68: Barbara Orsolits has questioned this idea, suggesting that when David Ramsay published her diaries and letters, he may have edited them to memorialize his wife without incriminating himself and his own financial mismanagement. Though he may have omitted or changed passages, it seems unlikely that Martha wrote anything against him, especially because letters to her brother Harry and her dear friend, Harriott Horry Pinckney suggest that she would have seen speaking against or even doubting her husband as antithetical to her religious beliefs.

Though she seems to have deeply admired her husband's moral ideals and forgave his faults, she did not treat herself with as much understanding. In one of her early self-abasements, she wrote, "O, if men knew me as I am known to my God, I should be trampled under foot; the church would disown me; the greatest sinners would abominate me, my husband, that loves and thinks well of me, would mourn, and I should be hated by all men."[69] This self-abasement demonstrates Martha's religious devotion as well as her sense that her husband did not truly know her for the sinner she was, suggesting respect for her loving husband but also an inherent disappointment in herself. Nevertheless, it is important to note that during this time period, statements like Martha's were a common expression of religious fervor rather than personal indictments.

In addition to committing herself to the Anglican faith and her husband, Martha focused on the rearing of her eight surviving children. According to David Ramsay, she studied treatises on education by the likes of Jean Jacques Rousseau in both French and English in order to learn more about her maternal duties and how to best fulfill them.[70] Despite her attentiveness as a mother, Martha did not focus her attention on providing for her children with trusts or by attempting to influence her husband's will, leaving those responsibilities to David, who she felt was more equipped and entitled to handle them.

Martha died in 1811 after a protracted illness that was never identified. When David Ramsay died in 1815 after being shot by a deranged patient, their eight children were left with nothing but the family name, and none of them were able to attain wealth or prominence in Charleston. Still, though Martha lost her fortune through coverture and never had the chance to claim the dower it would have afforded her, it is unlikely she would have ever considered legal protection even necessary as she deeply believed in her wifely duty to stand by her husband no matter the circumstances.

69: Martha Laurens Ramsay, *Diary of Martha Laurens Ramsay* (August 15-16, 1791).

70: Ramsay, *Memoirs of the Life of Martha Laurens Ramsay* at 25-26 (cited in note 61). In *Women's Life and Work in the Southern Colonies*, Julia Cherry Spruill notes that Martha Laurens Ramsay was an unusual case even for a propertied woman because most mothers did not read Rousseau, or at all, for that matter. Spruill adds that of the countless records of republican mothers, the only other known to spend so much time on educating herself and her children was Eliza Lucas Pinckney.

Vc. Case Study: Ann Heatly Reid Lovell

While many wives supported their husbands in the same manner as Martha Laurens Ramsay, some women of considerable fortune used their social standing and personal connections to protect themselves from their financially reckless partners. Ann Heatly Reid Lovell was among this small group, parlaying her friendship with Langdon Cheves, the famed South Carolinian politician, lawyer, businessman, Speaker of the U.S. House of Representatives, and President of the Second Bank of the United States, into direct control over her estate. While her husband James Lovell nevertheless sought to claim her properties for his own, South Carolina's liberal laws surrounding female property holders and tendency to favor those entrenched in high society ultimately rendered his invocations of coverture futile.

Ann Heatly Reid Lovell was born in 1756 to Marie Elise Courtonne, a French immigrant, and William Heatly, a South Carolina native.[71] Little is known about Ann's early life, save for the fact that she was the sixth of nine Heatly children, and remained especially close to her sister Sophia and her brother Andrew throughout her life.[72] Before the War for Independence, Ann married William Reid, a gentleman with strong ties to the South Carolina militia. Together, they had five children, all of whom died before reaching adolescence. In 1782, William suffered a fatal wound during a South Carolina militia battle with the British, leaving Ann in charge of their plantation and vast estate.[73]

In 1788, Ann remarried James Lovell, a newcomer to South Carolina with no significant fortune of his own. It is likely Lovell courted Ann to gain access to her wealth.[74] Needless to say, their marriage was marked by disagreement and strife, with several of Ann's relatives accusing her new husband of running through her fortune and leaving her destitute.[75] However, Ann was one of the largest landholders in Orangeburgh, and both her wealth and property seemed

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71: Ann Heatly Reid Lovell, Ann Heatly Reid Lovell Papers, *South Carolina Historical Society* (SHS) (1786–1854). To be precise, the notes in these personal papers suggest that Ann's father was "the first white child born on the Santee." While records from the U.S Census were not available for the time of William Heatly's birth, there is considerable evidence in the form of letters to and from Ann that the Heatly name was firmly established in South Carolina society long before her birth.

72: Leigh Fought, *Southern Womanhood and Slavery: A Biography of Louisa S. Mccord, 1810-1879* 61-62 (Missouri 2003).

73: *Id*.

74: Notes in Ann Heatly Reid Lovell Papers, SHS.

75: *Id*.

to increase rather than decrease between 1790 and 1810,[76] suggesting that she found ways to protect herself despite her husband's frivolous spending. By 1806, all of her children had passed away, including the two she had with James Lovell. In the meantime, Lovell had left her to become Surveyor of Land Customs in New Orleans.

During her husband's absence, Ann accumulated slaves and properties, maintaining a firm grasp on her plantation business. She also cultivated a relationship with Langdon Cheeves, who had previously married her niece Mary Elizabeth Dulles. This proved to be a fruitful relationship, with Ann acting as a benefactress to the couple and Cheves assisting her in a scheme to keep her estate out of the grasp of James Lovell. Namely, Cheves arranged to put Ann's property in a trust with Edward Richardson, her brother in-law.[77] Richardson, Cheves, and Ann all write in their letters to one another that this arrangement allowed the latter to run her affairs independently of her husband and oversee her property as if she were unmarried.[78]

Though South Carolina was more legally lenient with propertied married women than other states such as Connecticut, James Lovell's allegations in 1811 that the trust was in fact illegal were not unsound. While Lovell was no longer living with Ann during the time the trust was created, he still wrote to her regularly, generally to ask for monies necessary to maintain his lifestyle.[79] However, Ann failed to respond to these letters or provide said monies, resulting in his return in 1811. He demanded she cover the expenses he incurred while living in New Orleans and under the law, this demand should have been honored. After all, the property placed in the trust technically belonged to him in the first place, and he never knew such a trust was being written. Nevertheless, the agreement that created the trust, drafted by Cheves, held that Lovell had no claim to his wife's property because "he did not contribute to her assistance and support," while she "acquired by her sole and separated industry and economy and by inheritance devise or succession, considerable Real and Personal Estate."[80] How this trust was successfully filed and upheld as legal is unknown, though Lovell accused Cheves of using his significant legal and political connections to sway the courts in Ann's favor. Considering that Cheves received a large portion of Ann's estate, valued at the astonishingly large sum of $84,450.50 in 1834, for being a "valued friend

76: Daniel Marchant Culler, *Orangeburgh District, 1768–1868; History and Records,* 437-438.

77: Notes in Ann Heatly Reid Lovell Papers, SHS.

78: *Id*.

79: James Lovell to Ann Lovell (Dec. 6, 1810).

80: Quoted from Fought, *Southern Womanhood and Slavery* at 63 (cited in note 72).

and lawyer through all my trials,"[81] this allegation does not seem far-fetched.

After 1811 Ann continued to operate her plantation free from her husband's interference. Lovell left South Carolina again, though this did not signal an end to his demands for financial support. On two separate occasions in 1820, he wrote to his wife, "let me hear from you by boat or mail about the receipts enclosed"[82] and "I have enclosed the receipt that if they should call over for – the receipt will satisfy them – remember me kindly to our friends."[83] In the latter letter, he indicates that despite their turbulent marriage, he wished to be well-regarded by their mutual friends. This may have been a tacit acknowledgement that his lack of support in Orangesburgh worked against him in his suit to reclaim the property Ann entrusted to her brother-in-law, or perhaps an attempt to dissuade her from revealing too much about his financial dependence to those around her.

Regardless, Lovell did not do much to help his reputation after Ann's brother Andrew died in 1826. Andrew had left one-third of his estate to his sister, and she bought the other two-thirds herself. Lovell immediately returned to South Carolina and attempted to seize the property legally. Once again with the help of Cheves, Ann outmaneuvered him. Together, they drew up a trust nearly identical to the one filed more than a decade earlier, naming Edward Richardson the trustee and citing Lovell's absenteeism as grounds for withholding the inheritance from him. Still, it seems as if Ann and Cheves understood Lovell had legitimate claims to the inheritance, and if taken to court, Ann may be forced to relinquish property to him. As a result, Ann offered her husband six thousand dollars in exchange for his signature and compliance with the following agreement:

> Whereas Andrew Heatly departed this life intestate, no heirs but sisters and sisters children leaving several plantations and tracts of land – some 7,000 scores and 250 slaves; sundry Horses, Cattle, etc., Certain monies, bonds & other choses in action—Ann Lovell one of the heirs—1/4 of above—be settled to her sole and separate use.[84]

It is unclear why Lovell accepted the sum and Ann's terms, especially

81: Will of Ann Lovell (Dec. 12, 1832), *South Carolina Historical Society.*

82: James Lovell to Ann Lovell (Jan. 13, 1820).

83: James Lovell to Ann Lovell (Jan. 12, 1820). The receipt enclosed was for the sum of $52.90 and features an itemized list of expenses including ribbons and bags for cotton.

84: Indenture (Nov. 10 1825), Between James Lovell, Ann Lovell, and Edward Richardson, SHS.

considering he understood his claims to the inheritance. Perhaps his preoccupation with how his friends and estranged neighbors viewed him dissuaded him from taking her to court for an extended period of time, or his experience with the previously successful trust may have reminded him that Ann and Cheves had more influence and support than he did. He still came out of the deal much wealthier than he entered it, though markedly embittered. He wrote to his estranged wife:

> You remember when I left you – you offered that you should get a white woman to live with you–and that if I could not keep from talking to the Servant, I had better not return– and since the settlement of the Estate that I have the six thousand dollars, instead of enjoying the whole which I was entitled to, as much as Edward or his wife.[85]

It seems Lovell, who had a reputation for courting women outside of his marriage, angered his wife by not only attempting to claim her fortune for himself, but also by getting too close to her servant. Nevertheless, for all the righteous indignation in his letter, Lovell stayed away from South Carolina for the remainder of his life.

This did not mean Ann felt her estate was safe from him. In her will, she took steps to protect her fortune, emphasizing their estrangement:

> "I, Anne Lovell of St. Matthews Parish, District of Orangeburgh, Satate aforesaid–wife of James Lovell, but living separate and apart from him, being of sound–and by virtue of sundry powers to me in that industry, but more especially under and by the following deeds or Instruments of writing to wit—(cites Indentures of 1811 and 1825)—also a deed–or writing whereby Joseph Manigault and wife conveyed in trust for my separate use."[86]

Needless to say, the will left nothing to Lovell. The better part of her estate went to Cheves, along with several other female relatives. In fact, the will itself ensured that the line of succession always proceeded from husband to wife or went directly to single women.[87] The goal, ostensibly, was to provide for women with no means of financial support beyond their fathers, husbands,

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85: James Lovell to Ann Lovell (Feb. 4, 1826).
86: Will of Ann Lovell (cited in note 81).
87: *Id.*

and brothers.

The case of Ann Heatly Reid Lovell illustrates that while the laws of coverture were not always embraced by the married women who experienced their effects, in South Carolina, those effects could be mitigated by the well-connected upper echelons of society. Ann was able to use the law against her husband namely because she had an insider to guide her and influence others at her behest. With that said, Ann's own high social standing in comparison to her husband's precarious position as an outsider with little fortune and a relatively unrecognizable name surely aided her in her efforts to retain control over her estate.

VI. Conclusion

At its core, coverture was a legal doctrine that assigned social responsibilities to husbands and wives and legitimated a structure of power within the marriage. Consequently, its interpretation and implementation reflected local social attitudes towards family, sex, and marriage conceived by specific classes of people. This meant that coverture in South Carolina did not necessarily resemble coverture in Connecticut, nor did coverture affect propertyless married women or those of modest property in the same way it affected the economic elite.

Specifically, Connecticut's laws and social attitudes all but eliminated the chances for wives to inherit land from their husbands, especially if the couple had surviving children. Additionally, as Toby Ditz has shown in his study of Connecticut towns, laws regarding conveyances, dower, and marital settlements that greatly reduced married women's property rights allowed testators to neglect the dower claims and maintenance costs of their widows.[88] In the latter half of the 18th century, only six percent of widows of landed men with children received ownership of any land.[89] Elizabeth Olcott's inheritance, which accounted for two percent of the value of her husband's estate in the form of one cow, bedding, and one hundred pounds, was far more representative than Dorothy Kellog's, which consisted of the entirety of her husband's holdings.[90] In comparison, over the period from settlement to 1795, almost two-thirds of South Carolina testators granted their widows a share in the estate's residue (usually the most valuable part of the estate), and four-fifths of them gave their wives at least some land to own outright rather

88: Toby L. Ditz, *Property and Kinship* 110-30 (Princeton 1986).
89: *Id.* at 130.
90: *Id.*

than to hold for life.[91]

This discrepancy can once again be attributed to social and economic differences. In Connecticut, patriarchal family structures, low mortality rates, and a non-slaveholding population merged to create a system where property transferred from fathers to eldest sons. While these sons were granted rights to real property their mothers rarely received, they were expected to provide for them by overseeing and working their land. Widows, however, were considered household domestics rather than heads of household, and therefore did not earn the rights to land ownership but also did not share in the same types of hard manual labor.[92] Despite this specific consideration for the needs and abilities of elderly widows, the laws that limited dower to *net* estate held at death[93] and restricted married women from drafting wills until 1809 were aimed to protect authority relations in households rather than the women they directly affected. This legal attitude stemmed from Connecticut's moral ideology, which both suggested that laws did not need to protect women's property so long because their husbands and sons would inevitably care for them, and even if they did not, family matters should be kept private.

In South Carolina, distant kinship networks coupled with an enormous slave population that maintained estates for its owners created an entirely different legal ecosystem for married women. However, it is important to differentiate between the elites who owned a vast percentage of South Carolina's land and slaves, and those who did not. Subsistence farmers, indentured servants, and of course, slaves, did not benefit from legal protections in the same way Eliza Pinckney did, nor did they leverage strong political ties like Ann Heatly Reid Lovell did to protect themselves. As Julia Cherry Spruill explains, women of modest means rarely appear in the legal record because their participation was next to none.[94]

Nevertheless, for the elite class of married female property holders in South Carolina from the mid-1740s to the mid-1830s, unique legal protections, economic freedoms, and conceptions of family wealth management allowed them to exercise control over their property despite coverture's mandate that their estates transfer to their husbands. Nevertheless, while these women had the option to circumvent many of the effects of coverture through the certain South Carolina laws, they did not always turn to the courts. Eliza Lucas

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91: Salmon, *Women and the Law of Property in Early America* at 157 (cited in note 6).

92: Ditz, *Property and Kinship* at 110 (cited in note 88).

93: Connecticut ruled that there was no special protection for dower against creditors.

94: Spruill, *Women's Life and Work in the Southern Colonies* at 2-7 (cited in 31).

Pinckney never protested her property's cession to her husband because she knew he would entrust her to manage it as she saw fit; Martha Laurens Ramsay supported her husband while he misspent the entirety of her formidable fortune because she believed it was her duty as a wife, mother, and devout Anglican; and, Ann Heatly Reid Lovell, who despite using legal protections to keep her property from her philandering, absentee husband earlier in her marriage, ultimately paid him off because she recognized that the courts would favor him. However, the fact that these women chose not challenge coverture in these instances does not mean they lacked a legal existence. Instead, it supports the idea that the laws surrounding their property did not produce unilateral reactions or require consistent responses. After all, each woman engaged in some legal activity apart from her husband, whether it was renouncing dower, entering into contracts, or establishing a trust.

This study has demonstrated that coverture was a mutable doctrine that was impacted and altered by South Carolina's proprietary interests, demographics, and conceptions of family. Similarly, attitudes towards coverture were also flexible and dependent on independent actors, specific situations, and stakes. Nevertheless, by focusing on the elite class of South Carolinians during the 18th and early 19th centuries and three particular women, it has left several areas open for future study, including the relationship between coverture and backcountry immigrant women, comparisons between South Carolina's laws and attitudes surrounding married women and property and other areas, and the long-term of effects of legal formalization on coverture.

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