

Teaching the Race of Testamentary Freedom

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Those who ask “is the law male”² might consider as part of their evidence state probate codes. For much of the subject of the wills course implicates meta-issues of gender and race.³ While wills doctrine may seem to the casual observer as concerned only with a set of highly complex and rather arbitrary rules, wills law is shaped by a series of underlying decisions by

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² Sylvia A. Law & Patricia Hennessey, *Is the Law Male?: The Case of Family Law*, 69 CHI.-KENT L. REV. 345, 351; Leslie Bender, *Is Tort Law Male?: Foreseeability Analysis and Property Managers’ Liability for Third-Party Rapes of Residents*, 69 CHI.-KENT L. REV. 313 (1993); Lynn Hecht Schafran, *Is the Law Male? Let Me Count the Ways*, 69 CHI.-KENT L. REV. 397 (1993); Judith S. Kaye, *Is The Law Male? Welcome Address*, 69 CHI.-KENT. L. REV. 301, 301 (1993); Judith A. Baer, *How is Law Male? A Feminist Perspective on Constitutional Interpretation*, in FEMINIST JURISPRUDENCE: THE DIFFERENCE DEBATE 147, 148 (Leslie Friedman Goldstein ed., 1992). Much scholarship addresses those topics from a historical perspective. See, e.g., Lisa R. Pruitt, *“On the Chastity of Women All Property in the World Depends”: Injury from Sexual Slander in the Nineteenth Century*, 78 IND. L.J. 965, 984 (2003); Jane E. Larson, *“Women Understand So Little, They Call My Good Nature ‘Deceit’”: A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374 (1993).

³ See, e.g., Lawrence Friedman, *The Role of Wills in the Modern Curriculum*, 13 J. LEGAL ED. 196 (1960); Lawrence Friedman, *The Law of the Living, The Law of the Dead: Property, Succession, and Society*, 1966 WISC. L. REV. 340; Adrienne Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999).

legislators and judges regarding intergenerational transmission of wealth.⁴ There are, moreover, many policy choices implicit in the estate taxation regime.⁵

Both intestate distribution and testate elective share statutes have important impacts on distribution of wealth between men and women.⁶ The marital elective share, which typically provides the surviving spouse (which is most often the wife) with the right to elect a significant share of the decedent spouse's estate, is an important way of redistributing wealth between men and women. The different ways states have of computing the elective share illustrate the competing interests at stake, from protection of testator's freedom to the partnership theory of marriage, which is based on the idea that each spouse contributed to the acquisition of family

⁴ Lawrence Friedman, *Book Review*, 6 L. & HIST. REV. 499, 502 (1988) (reviewing CAROLE SHAMMAS, MARYLYNN SALMON, & MICHAEL DAHLIN, *INHERITANCE IN AMERICA: FROM COLONIAL TIMES TO THE PRESENT* (1987)) ("And in the last century or so, the main engine of reform was fueled by certain subtle, and massively powerful trends in what one might call the inner politics of family life.")

⁵ See, e.g., See Carolyn Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 L. & HIST. REV. 259-310 (1988). Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465 (2000); Patricia A. Cain, *Death Taxes: A Critique from the Margin*, 48 CLEV. ST. L. REV. 677 (2000); Mitchell M. Gans, *Federal Transfer Taxation and the Role of State Law: Does the Marital Deduction Strike the Proper Balance?*, 48 EMORY L.J. 871 (1999).

⁶ See, e.g., Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers,"* 10 LAW & INEQUALITY 137 (1991); Wendy C. Gerzog, *Solutions to the Sexist QTIP Provisions*, 35 REAL PROP. PROB. & TR. J. 97 (2000); Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83 (1994); Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73 (2003). On intestate succession, one might compare the Kentucky intestate real estate statute, Kentucky Code § 391.010 (providing for share of parents, as well as surviving spouse, if there is are no surviving issue) with Alabama Code § 48-8-70 (providing that surviving spouse takes entire estate when there are no surviving issue); Steven M. Wyatt, *Understanding the Advantages of Having a Will*, TUSCALOOSA NEWS 7A (May 5, 2005) ("While . . . most people assume that state law provides that all assets would pass to a surviving spouse at death, this is simply not the case.").

wealth.⁷ The 1990 Uniform Probate Code, for instance, determines the surviving spouse's share of the decedent spouse's "augmented estate" according to a sliding scale based on the length of the marriage. The share begins at 3% for one year of marriage and increases to a maximum of 50% after fifteen years.⁸ States frequently provide for a fixed-share, such as one-third of the augmented estate.⁹ One state, Alabama, provides for a share once the elective share is reduced by the surviving spouse's separate estate.¹⁰ Georgia provides for no elective share, only support for a year.¹¹

⁷ MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 131 (1989). *See also* Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199 (2001) (contending that wills law employs a "family paradigm," which focuses on traditional families).

⁸ Uniform Probate Code § 2-202. Spouses married less than one year are entitled to limited maintenance only.

⁹ N.Y. EPTL sec. 5-1.1-A(a)(4)–(5) (providing for elective share of \$50,000 or one-third of decedent spouse's estate). *Compare* S.C. Code Ann. sec. 62-2-207 (providing that elective share is satisfied by transferring property into trust that satisfies the federal marital estate tax deduction). *See generally* LAWRENCE W. WAGGONER, GREGORY S. ALEXANDER, MARY LOUISE FELLOWS & THOMAS P. GALLANIS, *FAMILY PROPERTY LAW* 592-94 (3rd ed. 2002).

¹⁰ *See* Ala. Code § 43-8-70 (providing the surviving spouse with the lesser of (1) one-third of the decedent spouse's probate estate or (2) the decedent spouse's probate estate minus the surviving spouse's "separate" estate). *See also* Reynolds v. Reynolds, 837 So.2d 847 (Ala.Civ.App., 2002) (electing one-third interest in probate estate of \$6 million).

¹¹ *See* Ga. Code § 53-3-1 (c). And apparently, the Georgia courts mean to interpret that rigorously. *See, e.g.,* Allgood v. Allgood, 587 S.E.2d 377 (Ga.App. 2003) (overturning jury verdict awarding surviving spouse property worth \$147,000, given the husband's arrangements to pass \$128,000 to wife outside of probate); Angela M. Vallari, *Spousal Election: Suggested Equitable Reform for the Division of Property at Death*, 52 CATH. U. L. REV. 519 (2003).

While some may criticize the elective share for failing to protect the surviving spouse, others may see it as requiring substantial transfers to women, just as tax scholars debate the racialized and gendered nature of federal tax policy. *Compare* Nancy E. Shurtz, *Critical Tax Theory: Still Not Taken Seriously*, 76 N.C. L. REV. 1837 (1998) with Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521, 1542-49 (1998) and James D. Bryce, *A Critical Evaluation of the Tax Critics*, 76 N.C. L. REV. 1687 (1998).

Elective share restrictions on the testators' freedom are somewhat unusual. For we hear much about the rights of testamentary freedom, of the right of testators to decide what to do with their property, with the rights to be free from legislative control, especially from taxation. The dramatic reduction of the estate tax in 2001 is one good example of that change, which seems to be driven in part by the affluence of baby boomers, who are looking forward to devising billions of dollars to their issue.¹² Changes in attitudes towards wealth more generally are also illustrated by the gradual abolition of the rule against perpetuities.¹³ Another example appears in the recognition of the constitutional right to devise property.¹⁴ The extension of the copyright term, which met little resistance in Congress, illustrates the changing attitudes.¹⁵ Once, however, there was vigorous debate over vested rights. In the nineteenth century, for instance, there was heated dispute over how far we should protect inherited rights to real property. New York state was gripped from 1839 through the Civil War by the anti-rent movement, in which farmers who

¹² See generally Sarah E. Waldeck, *An Appeal to Charity: Using Philanthropy to Revitalize the Estate Tax*, 24 VA. TAX REV. 667 (2005); James Repetti, *Democracy, Taxes and Wealth*, 76 N.Y.U. L. REV. 825-873 (2001).

¹³ See, e.g., EUGENE F. SCOLES, EDWARD C. HALBACH, RONALD C. LINK, & PATRICIA GILCHRIST ROBERTS, PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 1122-30 (2000) (discussing perpetuities reforms).

¹⁴ *Hodel v. Irving*, 481 U.S. 704 (1987). See also Ronald Chester, *Is the Right to Devise Property Constitutionally Protected? The Strange Case of Hodel v. Irving*, 24 SW. U. L. REV. 1195 (1995). To which the answer ought, it appears, be yes. See *Babbitt v. Youpee*, 519 U.S. 234 (1997).

¹⁵ See *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (upholding Copyright Term Extension Act, 17 U.S.C. § 302(a)). See also *id.* at 257 (Breyer, dissenting) (comparing Copyright extension to the common law rule against perpetuities and noting that it extends protection beyond what is typically permitted by the rule).

owed yearly feudal payments to their patrons challenged their obligation to pay them.¹⁶

Public attitudes towards intergenerational wealth transmission have shifted in recent years.¹⁷ So as we speak about testamentary freedom, it may be useful to ask how much freedom have courts typically given testators and how have considerations of gender and race affected that freedom? There are certain well-recognized limitations, such as the elective share, limitations on restraints on alienation (such as the rule against perpetuities and limitations on spendthrift trusts), and even special restraints (like prohibitions of conditioning gifts on marriage). But there are also a series of cases, rarely written about or studied, that illustrate restraints that courts have sometimes placed on testamentary freedom of interracial gifts.

One studying the role of race in wills law, thus, is led to ask a similar question to the one

¹⁶ See, e.g., CHARLES MCCURDY, *THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS* (2002). For an opinion limiting the patroons' rights, see *Overbagh v. Patrie*, 8 Barb. 28 (N.Y. Sup. 1850).

¹⁷ Even some of the more recent suggestions about curtailing testators' power (or at least taxing it) sound remarkably dated today. I was struck upon reading Professor Mark L. Ascher's thoughtful article, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 69-76 (1990), how far we are from the world he described. We are substantially further even from the world President Roosevelt described in 1935 when he introduced progressive inheritance tax legislation:

People know that vast personal incomes come not only through the effort or ability or luck of those who receive them, but also because of the opportunities for advantage which Government itself contributes. Therefore, the duty rests upon the Government to restrict such incomes by very high taxes.

MESSAGE TO CONGRESS ON TAX REVISION (June 19, 1935). See also Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 275-76 (1983).

Such language is unimaginable today. Professor Langbein comes closer to capturing the now-dominant ethos, which was already gathering great strength in the 1980s, even as he remarks on the forms of transmission of wealth beyond wills. See John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 736-37 (1988). For a recent statement of the issues, see Jeffrey A. Schoenblum, *Myth of Ownership/Myth of Government*, 22 VA. TAX REV. 555 (2003) (reviewing LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* (2002)).

that feminist scholars have asked: was the law of testamentary freedom white? That is, did the law have a preference for devises to white people? This paper suggests a few ways that a wills teacher might use cases from the nineteenth and early twentieth century to address that topic. This line of inquiry is important for several reasons. It illustrates themes in wills theory and in legal theory more generally, such as how much have courts and legislatures interfered with testamentary freedom? How have courts contorted doctrine to achieve results that are in keeping with their social thought? How important is race in the shaping of legal doctrine and practice?¹⁸

The Rhetoric of Testamentary Freedom

We hear much about the importance of testamentary freedom.¹⁹ Yet, in recent years, much scholarship has questioned whether testamentary freedom is as great as many courts seem to suggest.²⁰ Some scholarship questions how much courts actually use such substitute doctrines. For undue influence is flexible; standards vary as to what is undue influence, which

¹⁸ The cases discussed here are part of a larger project, regarding ways to integrate legal history into the property and wills curriculum. See Alfred L. Brophy, *Integrating Spaces: New Perspectives on Race in the Property Curriculum*, forthcoming J. LEGAL ED. (2006).

¹⁹ See, e.g., Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of its Context*, 73 FORDHAM L. REV. 1031 (2004); Mary L. Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 321, 323. For older commentaries on testamentary freedom, see Edmund Cahn, *Restraints on Disinheritance*, 85 U. PENN. L. REV. 139 (1936) (noting the then recent trends in favor of elective shares for surviving widows); Joseph Dainow, *Limitations on Testamentary Freedom in England*, 25 CORNELL L.Q. 337, 338 (1940); Joseph Laufer, *Flexible Restraint on Testamentary Freedom*, 69 HARV. L. REV. 277 (1955); Saul Touster, *Testamentary Freedom and Social Control--After-Born Children*, 6 BUFFALO L. REV. 251, 255-59 (1957). See also *Burrett v. Smith*, 47 So. 117 (Miss. 1905) (“A man of sound mind may execute a will or a deed from any sort of motive satisfactory to him whether that would be love, affection, gratitude, partiality, prejudice, or even a whim or caprice.”).

²⁰ Ray Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 576 (1997) (“the undue influence doctrine denies freedom of testation for people who deviate from judicially imposed testamentary norms”).

allows courts to strike unnatural bequests. Nevertheless, there are a series of widely discussed cases that suggest that when testators leave their property to unusual people, that courts will find undue influence. Casebooks frequently suggest the ways that testators who depart significantly from what we might find to be “traditional” or “expected” devises are overturned. Thus, casebooks reprint cases overturning devises by a gay man to his lover;²¹ by an older woman to a younger man whom she had a sexual relationship with;²² and by a woman to a political party

²¹ See *In re Kaufman*, 247 N.Y.S.2d 664 (N.Y. App. Div. 1964), *aff'd*, 205 N.E.2d 864 (1965) (finding undue influence when wealthy gay testator, heir to the Kay Jewelry fortune, left his estate to his lover). See also Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225 (1981). The law has changed quickly in this area. See Joseph W. deFuria, Jr., *The Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence?*, 1989 NOTRE DAME L. REV. 200. Calvin Massey, writing in 2003, suggested designation of heirs as one solution to the problem. See Calvin Massey, *Designation of Heirs: A Modest Proposal to Diminish Will Contests*, 37 REAL PROPERTY, PROBATE & TRUST J. 577, 588-89 (2003).

In more recent years, devises to gay lovers have been treated more generously by the courts. Now the problems seem to be more around intestate presumptions, such as Washington state’s presumption that participants in a meretricious relationship are entitled to a share of instate estates. Gays, however, are not entitled to that presumption. See Amy D. Ronner, *Homophobia: In the Closet and in the Coffin*, 21 LAW & INEQ. 65 (2003). See also E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator From Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275 (1999) (warning that majoritarian cultural norms are often pressed upon non-conforming testators).

²² *In re Will of Moses*, 227 So.2d 829 (Miss. 1969) (declaring, apparently disingenuously, that “sexual morality of the personal relationship is not an issue” in invalidating a will leaving estate to man fifteen years younger than testator). For a more recent example, see *Riddell v. Edwards*, 32 P.3d 4 (Alaska 2001) (finding lack of testamentary capacity by female testator, in her nineties, who married man in his sixties and left her estate to him). Georgia O’Keeffe’s will was challenged on a similar basis. See James Auer, *Fate twists; landscape of art alters; O’Keeffe’s grand-nephew key in ensuring a wide audience*, Milwaukee Journal Sentinel (April 27, 2001). For an older, counter-example, also involving marriage, see *Monroe v. Barclay*, 17 Ohio St. 302 (1867). *Monroe* upheld the will devising the property of the fifty-seven year old decedent wife, who was “deformed, filthy, drunken, profane, and lewd” to her thirty-five year old husband. See generally Jane B. Baron, *Empathy, Subjectivity, and Testamentary Capacity*, 24 SAN DIEGO L. REV. 1043, 1045-63 (1987). See generally Jeffrey A. Schoenblum, *Will Contests: An Empirical Study*, 22 REAL PROP., PROB. & TR. J. 607, 647-49 (1987).

devoted to advancing gender equality.²³ Frequently such “abnormal” devises are struck through a finding that the testator was subject to undue influence or that she lacked testamentary capacity; another vehicle for overturning testators’ desires are courts’ strict adherence to requirements of will formalities.²⁴ In fact, though, courts seem to be suspicious of actions that lead to unusual results, across a broad spectrum of claimants.²⁵ Yet, courts are less suspicious of

²³ In re Strittmater, 53 A.2d 205 (N.J. Eq. 1947) (finding will of woman who left property to National Women’s Party was product of insane delusion because she said, among other things, “It remains for feministic organizations like the National Women’s Party, to make exposure of women’s ‘protector’ and ‘lovers’ for what their vicious and contemptible selves are.”). See also Latham v. Father Devine, 85 N.E.2d 168 (N.Y. 1949) (finding that allegations that people working for Father Devine prevented testator from changing her will would support a challenge to testator’s will, if proved).

²⁴ Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 239-41 (1996). For formalism and its uses more generally, see Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033 (1994); James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1010 (1992).

²⁵ At times courts employ legal fictions to reach more usual results, even when there are not issues of race, gender or sexual orientation at stake. For example, *Mayer v. Cianciolo*, 463 So. 2d 1219 (Fla. 1985) dealt with a claim by a son to property that owned in joint tenancy with his mother, which they wanted to sell. To facilitate sale, the son quit-claimed his interest to his mother, but they apparently planned to convert the proceeds of the property into another joint-tenancy. Before the sale was completed, the mother died; her will left her property to a church. The court imposed a constructive trust, which converted the property back into a joint tenancy and the son received the entire property. I would like to thank Michael Forton of Florida Legal Aide for suggesting *Mayer*.

There is a growing body of work on the ways that constructive trusts can be used to correct mistakes in wills, though *Mayer* represents a rather extreme case (and one in which the constructive trust is used to correct more than a problem with wills formalities). See generally Leigh A. Shipp, Note, *Equitable Remedies for Nonconforming Wills: New Choices for Probate Courts in the United States*, 79 TUL. L. REV. 723 (2005); Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387 (2001); Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 456 (2002).

testators' devises when they employ a more natural distribution.²⁶ Casebooks have paid substantially less attention to the ways that judges have limited testamentary freedom when white male testators leave property to black men and women.²⁷

This paper suggests three places where testamentary freedom has been challenged along racial lines in American legal history. It discusses the limitations that courts sometimes imposed on wills that emancipate slaves and that left property to them. It then turns to post-Civil War devises, where white men left property to black women and the children they had with them. Finally, it turns to cases near the end of the "Jim Crow" era - the period between the Civil War and the beginning of the modern Civil Rights era - to suggest that sometimes the courts upheld

²⁶ See, e.g., *In re Hall's Estate*, 195 P.2d 612 (Kan.1948), discussed in Friedman, *Law of Wills in the Modern Curriculum*, *supra* note 3, at 203 n.18.

²⁷ All of the cases I analyze here deal with white male testators. A more comprehensive article would explore devises from black testators and how they were challenged. See, e.g., *Burnham v. Bennison*, 253 N.W. 88 (Neb. 1934) (interpreting devise from black man to unidentified people who would claim kinship with him).

Race appears sometimes in wills casebooks in discussion of equitable adoption. See, e.g., *O'Neal v. Wilkes*, 439 S.E.2d 490 (Ga. 1994), reprinted in JESSE DUKEMINIER & STANLEY JOHANSEN, *WILLS, TRUSTS, AND ESTATES* 108 (6th ed. 2002). Dukeminier and Johanson note that the person claiming equitable adoption - and therefore an intestate share of her father's estate - was from a small, rural Georgia town, with no lawyer. *Id.* at 114 n. 3. Racial considerations also appear in discussion of charitable trusts. See, e.g., *id.* at 873-83 (discussing Barnes Foundation Trust).

One might expect more discussion of cases like Girard College, in which a charitable trust providing for the education of orphaned white boys was reformed to provide for education of all children. See *Pennsylvania v. Board of Directors*, 353 U.S. 230, 231 (1957). That led to a series of litigation in the Pennsylvania courts. See *In re Girard College Trusteeship*, 138 A.2d 844 (Pa. 1958); Elias Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979 (1957). See also Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J.1111, 1117 n.20 (1993); Mary Kay Lundwall, *Inconsistency and Uncertainty in the Charitable Purposes Doctrine*, 41 WAYNE L. REV. 1341, 1377 (1995); Florence Wagman Roisman, *The Impact of the Civil Rights Act of 1866 on Racially Discriminatory Donative Transfers*, 53 ALA. L. REV. 463, 488-90 (2002).

the right of testamentary freedom.²⁸ These examples are presented in hopes that wills teachers will consider adding cases or notes to their classes. But they are also presented with the knowledge that adding new material is difficult. So I hope these examples illuminate the role of racial considerations in the development of wills doctrine. They convey a sense of the ways that doctrine develops and how judges' (and jurors') understanding shapes their approaches to testamentary freedom.

Emancipation of Slaves (and Family Members) By Will and Devises to Them

The first example involves wills granting freedom and property to slaves (or former slaves). In a series of cases, courts in the South in the years before the Civil War interpreted wills that emancipated slaves or gave property to slaves (or former slaves). One particularly poignant case, *Hinds v. Brazealle*, involved the will of a white man, Elisha Brazealle, who took an unnamed slave and their son, John Munroe Brazealle, to Ohio in 1826 and emancipated them there. The three then returned to Mississippi. When Elisha died, his will confirmed again his emancipation of both the woman and their son, John Munroe. His will then left his entire estate to John Munroe. However, Elisha's intestate heirs challenged his emancipation and his will. The Mississippi Supreme Court concluded that the Ohio emancipation was invalid and denied any other attempted emancipation of John Munroe and his mother.

Hinds is constructed around several principles. First, Mississippi allowed emancipation in only limited circumstances. Thus, emancipation of the family in Ohio was contrary to public

²⁸ It is possible that the law retains that preference, although that is beyond the scope of this paper and is a subject that would require much work to demonstrate. At the very least, changes in federal law make it impossible to express those preferences directly.

policy. And the attempted emancipation was void.²⁹ Second, a slave cannot take property. Thus, Brazealle's attempt to leave property to his family is invalid.³⁰ The court coldly concluded, "The consequence is, that the negroes John Munroe and his mother, are still slaves, and a part of the estate of Elisha Brazealle." The decision put Brazealle's family back into slavery and then made them the property of his relatives. *Hinds* caught the attention of abolitionists; Harriet Beecher Stowe made it a part of her 1856 novel, *Dred: A Tale of the Great Dismal Swamp*.³¹ In her novel, she built a story around a light-skinned slave, Cora, who married her former owner and then had a child with him. When the owner died, he left his property to his family. But relatives of the man believed that they should obtain the estate instead. They retained a coldly calculating lawyer, Mr. Jeckyl, who indeed returned Cora to slavery. She killed

²⁹ *Hinds v. Brazealle*, 3 Miss. (2 How.) 837 (1838):

No owner can emancipate his slave, but by a deed or will property attested, or acknowledged in court, and proof to the legislature, that such slave has performed some distinguished service for the state; and the deed or will can have no validity until ratified by special act of the legislature. It is believed that this law and policy are too essentially important to the interests of our citizens, to permit them to be evaded.

See also *Heirn v. Bridault*, 37 Miss. 209 (1859) (limiting devise to slave). For more on *Hinds*, see Christine Macdonald, *Judging Jurisdictions: Geography and Race in Slave Law and Literature of the 1830s*, 71 AM. LIT. 625 (1999).

³⁰ *Hinds v. Brazealle*, 3 Miss. (2 How.) 837 (citing 4 Desaus. Rep. 266). The public's interest in regulation and use of slave property has important analogs in other forms of property. See WILLIAM NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U.CHI. L. REV. 711 (1986).

³¹ See MARK TUSHNET, *SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE* (2004) (discussing *Dred* and *Hinds*); Alfred L. Brophy, *Humanity, Utility, and Logic: Harriet Beecher Stowe's Vision in Dred: A Tale of the Great Dismal Swamp*, 78 B.U. L. REV. 1113, 1119 (1998) (discussing Stowe's use of *Hinds*).

her child and then committed suicide so that her family would not have to face slavery.³²

But the picture from antebellum southern courts was substantially more complex than even *Hinds*. For often southern courts upheld wills emancipating slaves³³ until state policy turned ardently proslavery in the years after 1835 as the South itself became stridently proslavery.³⁴ And even then courts sometimes upheld wills freeing slaves and then devising them property.³⁵

³² HARRIET BEECHER STOWE, *DRED: A TALE OF THE GREAT DISMAL SWAMP* (1856) (Robert S. Levine ed. 2000).

³³ *See, e.g.,* Charles v. Hunnicutt, 5 Call. 311 (Va. 1804) (construing charitable trust purposes broadly, to allow unincorporated body to take title to slaves to free them); Poydras v. Mourain, 9 La. 492 (La. 1836) (upholding restrictions in will that purchaser of plantation may not sell slaves away from the plantation and must free slaves at age sixty). One flexible opinion interpreted a will that bequeathed slaves on the condition that they be freed at age thirty, if the law allowed it. *See* Pleasants v. Pleasants, 2 Call 319 (Va. 1800). The bequest was challenged as a violation of what we now call the rule against perpetuities, for it potentially vested the freedom in slaves at a time more than twenty-one years after a life in being. Justice Spencer Roane upheld the manumission. *See also* TIMOTHY HUEBENER, *THE SOUTHERN LEGAL MIND* 25-26 (1999).

³⁴ For a collection of cases prohibiting manumission by will post-1835, see Alfred L. Brophy, *Foreword to Symposium, Lawyers and Social Change in American History*, 54 ALA. L. REV. 771, 772 n.3 (2003). The law was complex, indeed. The Alabama Supreme Court allowed as evidence that a testator was suffering from a delusion, testimony that the testator believed his legatee was his son, despite evidence that the legatee had “the peculiar marks of the negro.” *See* Florey’s Exec. v. Florey, 24 Ala. 241 (1854). In essence, the court thought it evidence of delusion that a testator believed a black child was his son.

³⁵ *See, e.g.,* Pool’s Heirs v. Pool’s Ex’r, 35 Ala. 12 (1859) (upholding will directing executor to transport slaves to Ohio and the emancipation of them there and leaving the remainder of testator’s estate to those slaves, against a challenge that one of the slaves exercised undue influence). In the much-discussed opinion of *O’Neill v. Farr*, 30 S.C.L. 80, 1 Rich. 80 (S.C. 1844), a South Carolina court refused to overturn a will of a man emancipating a slave, Fan, and leaving property to her and Harry, a child he had with Fan. The court said of her that she “had ceased, practically, to be a slave” and “shared her master’s bed, and was the mother of his acknowledged child.” The court did not think that at the time of the making of the will there was evidence that Fan’s influence was “so great as, in some degree, to destroy free agency; an influence exercised over the testator to such an extent as to constrain him, from weakness or

The Statutory Law of Devises Outside of the Family

In the years following the Civil War, commonly known as the Jim Crow era, courts again confronted devises by white men to black men and women. Sometimes the devises were from white men to their lovers. In some instances, the devises confronted a statutory bar on devises to people with whom one had an adulterous relationship. Such was the case with *Succession of Filhiol*, a decision of the Louisiana Supreme Court in 1907.³⁶ *Filhoil* applied a Louisiana statute that prohibited men from devising real property to women with whom they live in “concubinage.” (The testator could bequeath up to 10% of his personal property.)³⁷ The court limited the amount of property that the testator could devise and allowed his brother to obtain a larger share than provided under the will.³⁸ South Carolina also had a statutory prohibition limiting the size of a testator’s estate that could be left to someone with whom the testator had an

other cause, to do what is against his will, but what he is unable to refuse.” The court also refused to declare the will invalid as against public policy.

³⁶ 44 So. 843 (La. 1907); *see also* Smith v. DuBose, 3 S.E. 309 (Ga. 1887). *See also* RANDALL KENNEDY, *INTERRACIAL INTIMACY: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 49 (2003).

³⁷ The Louisiana statute, Civil Code sec. 1481, was quoted in *Texada v. Spence* 118 So. 120 (La. 1928):

Those who have lived together in open concubinage are respectively incapable of making to each other, whether inter vivos or mortis causa, any donation of immovables; and if they make a donation of movables, it cannot exceed one-tenth part of the whole value of their estate. Those who afterwards marry are excepted from this rule.

See also JUDITH KELLEHER SCHAFFER, *SLAVERY, CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA* 196 (1994); Mitchell Crusto, *Blackness as Property, forthcoming* STANFORD J. L. & PUB. POL’Y (2005).

³⁸ The act was applied to intra-racial relationships as well. *See* *Succession of Landry* 38 So. 575 (La. 1905) (denying probate to will of African American man, a former slave, who left his property to an African American woman). *See also* *Paxton v. Paxton*, 173 So. 488 (La. 1937) (interpreting Louisiana concubinage statute and limiting devise from white man to African American woman).

adulterous relationship.³⁹

Shifting Attitudes Towards Interracial Devises

By the second decade of the twentieth century, courts were more typically allowing those devises across race lines.⁴⁰ Even some early twentieth century cases permitted interracial devises. In 1920 in *Gathings v. Howard*,⁴¹ the Mississippi Supreme Court upheld the will of a white man who left his property to an elderly African American woman who lived on his estate. The court described their relationship as a close one, using imagery reminiscent of the moonlight and magnolia plantation mythology that was so common in the early twentieth century:⁴²

³⁹ By statute, South Carolina prohibited a testator from leaving more than one-quarter of his estate to a person with whom he had an adulterous relationship. *See Bennett v. Bennett*, 10 S.E.2d 23 (S.C. 1940).

⁴⁰ For more on courts' treatment of Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of Race in Twentieth-Century America*, 83 J. AM. HIST. 44 (1996); Mary Francis Berry, *Judging Morality: Sexual Behavior and Legal Consciousness in the Late-Nineteenth-Century South*, 78 J. AM. HIST. 854 (1991).

⁴¹ 84 So. 240 (Miss. 1920).

⁴² The parallel between *Gathings* and early twentieth-century imagery of the loyal slave is significant. The court's explicit linking of Roxie's cabin and colonial days suggests that the era of slavery was on the mind of the judges. That was a trope common in the literature of the post-bellum South. *See, e.g.,* JOHN DAVID SMITH, *AN OLD CREED FOR THE NEW SOUTH PROSLAVERY IDEOLOGY AND HISTORIOGRAPHY, 1865-1918* (1985); DAVID BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* (2000). One penetrating look at the white image of the loyal servant comes from Micki McElya's exploration of the movement to build a "Mammy" monument in Washington, DC. *See* Micki McElya, *Commemorating the Color Line: The National Mammy Monument Controversy of the 1920s*, in *MONUMENTS TO THE LOST CAUSE: WOMEN, ART AND THE LANDSCAPE OF SOUTHERN MEMORY* 203-218 (Cynthia Mills and Pamela H. Simpson, eds., 2003).

Much like antebellum southern judges dealing with claims by purchasers of slaves that they were not as warranted by their seller, the justices in *Gathings* seemed to evaluate Roxie Howard according to their sense of how a black servant ought to behave - and how she should be rewarded for her behavior. *See* William W. Fisher III, *Ideology and Imagery in the Law of Slavery*, 68 CHI.-KENT L. REV. 1051 (1993); Ariela Gross, *Pandora's Box: Slave Character on Trial in the Antebellum Deep South*, 7 YALE J.L. & HUMAN. 267 (1995).

He had no child to lean upon. Roxie Howard was his only help. That she was faithful in cooking his meals, attending to the stock, and running the place generally is beyond question. At the time the will was executed Gathings himself was over 60 years of age and Roxie Howard was an aged negro woman. She had her cabin in the yard, much upon the order of colonial days in the South. There is some testimony that if he desired to borrow a horse or to know about anything on the place Mr. Gathings would reply "Ask Roxie"; and that he appeared to leave the management of everything to her.⁴³

There is much to think about in cases like *Gathings*. For *Gathings* recognized that the standard of undue influence was subject to some flexibility in interpretation and application. There was the allegation that the devise to Roxie Howard was unnatural. The court thought influence undue only when "it introduces a transaction which injures someone materially or that is intrinsically unfair or unconscionous."⁴⁴ One wonders if the court upheld the devise because it believed in the right of property owners to leave their property to whomever they wished or because the devisee fit the court's stereotype of a loyal servant who deserved to be taken care

The moonlight and magnolia school had roots in the antebellum era when proslavery thinkers tried to make the institution look benign and beneficial. One also thinks of the sentimental antebellum Southern women writers, like Caroline Hentz, whose work portrayed a world where owners treated their slaves well and the slaves were loyal (if childlike) in return. See, e.g., CAROLINE HENTZ, *THE PLANTER'S NORTHERN BRIDE* (1854). One of Hentz' obscure short stories, "The Stolen Boy," is remarkable in this regard. It is about the efforts a president of a southern university makes to recover a young free boy from a slavetrader who has kidnaped him. The lesson is that some Southerners treat blacks humanely, even when they do not have a pecuniary interest in their well-being.

One might read *Gathings* in light of (and in some ways in opposition to) such contemporary works as Thomas Dixon's *The Clansman* (1905), which portrays the world of post-Civil War South and the loss of power by white Southerners. Dixon's novel is well worth reading for its insights into early twentieth-century images of African Americans. One chapter is entitled "Forty Acres and A Mule." It turns the promise to give freed slaves forty acres and a mule into a sale of forty acres and a mule in exchange for their vote. Compare *id.* at 235-43 with ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED BUSINESS* 70-71 (1988).

⁴³ 84 So. at 246.

⁴⁴ *Id.* at 246.

of?⁴⁵

Courts certainly seemed willing to allow interracial devises to loyal former slaves. One Virginia case from the late nineteenth century construed a will that provided for an annual annuity to a freed slave - what one might now call a private reparation payment. After the end of the Civil War, the annual payments were not made. The court upheld a request for accounting by the freed slave.⁴⁶ That is the only case that I know of that upheld the payment of private reparations to a freed slave.

Perhaps *Gathings* represented at least some sense on the part of judges that testators should be able to dispose of their property as they wished, because other courts were upholding interracial devises to family members. In 1914 in *Allen v. Scruggs*, for instance, the Alabama Supreme Court allowed probate of a lost will of a white man, L. Ryal Noble.⁴⁷ He left a substantial estate to the six children he had with an African American woman, Kit Allen. *Allen* became an important precedent, supporting the probate of a will by a white man that devised property to his African American family members. It was relied upon by the Alabama Supreme Court in 1944 in *Dees v. Metts*.⁴⁸ There the court faced a challenge to a will that left his

⁴⁵ One should not become too confident in the latitude given white testators leaving property to black women and children. In 1921, the Mississippi Supreme Court held overturned a jury verdict upholding such a will. The judge had charged the jury not to consider “whether or not the disposition made by the testator is appropriate, or proper, or just.” The Mississippi court thought it was, indeed, proper to consider appropriateness of the disposition in determining whether to accept the will. See *Maxwell v. Lake*, 88 So. 326 (Miss. 1921) (noting that “Some of the witnesses for the contestant testified that Mr. Smith was crazy about negroes.”).

⁴⁶ *Jones’ Adm’r v. Jones’ Adm’r*, 24 S.E. 255 (Va. 1896).

⁴⁷ 67 So. 301 (Ala. 1914).

⁴⁸ 17 So.2d 137 (Ala. 1944).

substantial estate to an African American women, Nazarine Parker. The man's intestate heirs - with whom he had had few dealings in recent years - challenged the will as the product of undue influence. The court condemned the interracial relationship in harsh terms, yet it upheld the devise:

However boldly he may have defied the laws of our State and its public policy, and the recognized traditional racial distinctions, organized society took no steps to interfere. Freedom of religion, so sacredly guaranteed to us, and which we cherish so highly, is freedom not only to worship according to the dictates of one's own conscience and to follow whatever religion one desires, but it is also a freedom, if one chooses, to have no religion at all. And so far as one's conscience is concerned (and this, of course, is wholly aside from the violation of our State law), there is a freedom also in the moral world for one to choose his own way of life. Ben Watts chose the evil way. But whatever may be said in condemnation of his manner of life, and however disgraceful and reprehensible it may have been, the courts must not lose sight of the fact that his accumulated estate, valued at some \$3,500, was his own; and it is clearly shown from this record, beyond the peradventure of a doubt, that he wanted this estate to go to Nazarine Parker.⁴⁹

The court recognized the power of the testator to dispose of his property as he liked:

The courts are not concerned with the matter to whom this property goes, but we should be greatly concerned lest we destroy the right of free disposal of property, which is inherent in its ownership. However sinful Ben Watts may have been, and however disgraceful his conduct, if he was of sound mind and not unduly influenced, the courts are bound to give respect to his wishes⁵⁰

Several dissenting judges would have found undue influence. They did not argue that the devise violated public policy. Rather they addressed the question whether "a will or gift of his estate by a white man to a negro woman with whom he is living in a state of adultery carries implications peculiar to such situation, which may, in connection with other facts, support a finding of undue influence." The dissenters believed that it did, for interracial relationships brought such stigma

⁴⁹ *Id.* at 142.

⁵⁰ *Id.* at 142.

that a testator who engaged in one had to be subject to undue influence.⁵¹

Other courts were reaching similar conclusions to *Dees*. In 1942 in *Sporn's Estate v. Herndon*, the Oklahoma Supreme Court commented on the unusual nature of a devise from a white man to several African Americans:

The will is a very unusual one, in that deceased, a white man, left surviving him a brother and sister and descendents of two deceased brothers, but left a substantial portion of an estate, of the value of approximately \$50,000, to Helen Herndon, a negro woman, who had been employed by him as servant and housekeeper, and gave, devised and bequeathed all the residue of said estate to the three trustees named therein (one of them being the said Helen Herndon) in trust for the benefit of said Helen Herndon and Wayne Lee Maxwell, a negro boy then about ten years of age, a son of a sister of said Helen Herndon.

Deceased had been twice married, but no children were born to either marriage. The first wife had died and the second marriage was dissolved by divorce.⁵²

⁵¹ As the dissent said, “keeping up such criminal relations at such a price may be considered by the jury . . . and found to support a reasonable inference that the man has become so infatuated with his negro mistress as to render her the dominant party.” *Id.* at 144.

Several have commented approvingly on the (perhaps surprising) result in *Dees*. See, e.g., Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 622 n.62 (1988); Veena K. Murthy, Note, *Undue Influence and Gender Stereotypes: Legal Doctrine or Indoctrination?*, 4 CARDOZO WOMEN'S L.J. 105, 106 n.9 (1997). Compare Joan R. Tarpley, *Blackwomen, Sexual Myth, and Jurisprudence*, 69 TEMP. L. REV. 1343, 1372-74 (1996) (deconstructing *Dees*' racial assumptions and suggesting that the racial ideology underlying it continues).

The dissent is reminiscent of the portrayal of the radical Republican Representative Stoneman in Dixon's novel *The Clansman*. Stoneman lives with an African American woman, who exercises dominion over him and, through him, the nation. Dixon wrote that following Lincoln's assassination “the seat of Empire had moved from the White House to a little house in Capitol Hill where dwelt an old club-footed man, alone, attended by a strange brown woman of sinister animal beauty and the restless eyes of a leopardess.” DIXON, *supra* note 42, at 79. Dixon's novel, which condenses the racial and social thought of white supremacy, holds a key to understanding much of the judicial mind of the early twentieth century. For, as we begin read early twentieth-century judicial opinions for evidence of the judges' social thought, it is likely that Dixon's novel will provide a convenient companion to that thought.

⁵² *Sporn's Estate v. Herndon*, 121 P.2d 602, 605 (Okla. 1942).

Still, *Herndon* upheld the will, “unusual and strange as [it] may be.”⁵³

So we may be surprised now both by the extraordinary restrictions on testamentary freedom before the Civil War and by the degree of testamentary freedom in the Jim Crow south. This is perhaps another example, as Ralph Ellison spoke about, of the unexpected undoing itself in its power to surprise.⁵⁴ There are multiple explanations for the Jim Crow South. The black women may fit stereotypes of expected behavior.⁵⁵ Or the power of property remains strong, so that judges may remain reluctant to interfere with it, even in the face of compelling reasons.

And so one is led to the conclusion that the law of testamentary freedom was white; it was also complex. Perhaps some of the cases here deserve to be studied in wills courses, to illustrate that complexity and the multiple ways in which considerations of policy, race, and social values have affected wills law.

⁵³ *Id.*

⁵⁴ See Ralph Ellison, *Going to the Territory*, in *THE COLLECTED ESSAYS OF RALPH ELLISON* 591 (John Callahan ed. 1995).

⁵⁵ There are other cases where particularly appealing African Americans - who fit comforting stereotypes held by judges - may obtain relief. In voiding an agreement by an elderly African American woman to dismiss a lawsuit and to convey real estate to the defendants, the Oklahoma Supreme Court observed that:

It is clear that this old, illiterate negro woman was no more capable of dealing with these shrewd business men and protecting her own interests than a mere child would have been. Fair dealing would at least have prompted these men to see that she had the advice of her attorneys in a transaction of so great importance to her. Going around her attorneys and rushing this settlement through, as is shown by this record, is a badge of fraud which cannot appeal to the conscience of any court of equity. She had through her attorneys of record made a timely motion for leave to withdraw the purported dismissal and under the facts as disclosed by this record the motion should have been sustained.

Armstrong v. Coleman, 210 P. 1018 (Okla. 1922). See also *Griffith v. Scott*, 261 P. 371 (Okla. 1927).