Design and Deviance: Patent as Symbol, Rhetoric as Metric (Parts 1 and 2)

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DESIGN AND DEVIANCE:
PATENT AS SYMBOL, RHETORIC AS METRIC
PART 1

Charles E. Colman*

ABSTRACT: This project reveals the unrecognized power of gender and sexuality norms in the deep discourse of pivotal American case law on design patents. In Part 1, I show that late nineteenth-century cultural developments in the urban Northeast gave rise to a stigma surrounding the “ornamental” and “decorative” works under the then-exclusive legal purview of design-patent protection. Among the politically dominant segments of American society, the creation, appreciation, and consumption of design “for its own sake” grew increasingly intertwined with notions of frivolity, effeminacy, and sexual “deviance.” In Part 2, I will examine influential design-patent decisions from the 1870s through the 1930s against this cultural backdrop. My close reading of these decisions will demonstrate that federal judges, particularly in leading cases decided by the Second Circuit, increasingly used design-patent disputes as a vehicle for the performance and endorsement of prevailing gender norms. The resulting doctrine relegated design patents to near-total irrelevance as a viable form of intellectual property protection for a large and crucial portion of the twentieth century.


The most you can say of the long skirt is, it conceals ugly feet, crooked legs, and awkward attitudes. But we look upon these things as diseases, unnatural conditions. It is the violation of some law that makes people crooked and ugly, and some false state of mind that makes them awkward.

—Elizabeth Cady Stanton

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The “design patent” should, by any traditional measure, be a staple of the American IP regime. Yet it has long been dismissed as a trivial anomaly—as (to invoke one attorney’s recent, fraught characterization) “the red-headed stepchild of the intellectual property world.”2 Created by Congress at a time when the appearance of consumer goods was rapidly gaining in importance, design-patent protection provided for exclusive rights in “any new and original shape or configuration of any article of manufacture”—rights different from, and complementary to, those available for “useful inventions” through so-called “utility” patents.4 Just a few decades after the birth of design patents, however, their power in litigation was eviscerated through disparaging judicial rhetoric, doctrinal distortions, and increasingly frequent findings of invalidity. As a result, design patents languished in obscurity for decades, to be rescued from oblivion only in recent years.5

On a superficial level, the marginalization of design patents can be largely traced to decisions of the Second Circuit between 1900 and 1930.6 To date, however, no one has provided a satisfactory account about why the influential


5. See Du Mont & Janis, supra note 4, at 842 n.26 (discussing the “design patent renaissance” over the past decade). Of course, it is not possible to pinpoint a single moment at which design patents became an effective nullity in litigation. As discussed below, most designers had likely come to view design patents as an unpromising vehicle for the assertion of rights in litigation at least a decade before the beginning of the Second Circuit’s 33-year refusal to uphold the validity of any challenged design patent. At the same time, design patents had regained some of their power even as informed commentators continued to characterize them as “meaningless.” See Mark P. McKenna & Katherine J. Strandberg, Progress and Competition in Design, 17 STAN. TECH. L. REV. 1, 47 n.234 (2013) (noting Ralph Brown’s 1987 characterization of design patents as “meaningless” and remarking that by the 2010s, “[t]imes have obviously changed”) (citing Ralph S. Brown, Design Protection: An Overview, 34 UCLA L. REV. 1341 (1987)). It warrants mention that the “irrelevance” and “meaninglessness” of design patents discussed by McKenna and Strandberg, and (for the most part) in this article, is limited to the litigation context. I do not address, for example, the procurement or licensing of design patents during the period under examination. Nor do I take any position on the (extra-doctrinal) repercussions of judicial invalidation of design patents—either on the quality or quantity output of designers, see id. at 48, or on the perpetuation of social norms via judicial endorsement. Such issues are secondary to this article’s primary objective: to shed light on unrecognized, and perhaps surprising, reasons for federal judges’ early evisceration of design-patent protection in the early twentieth century.

6. The key role of the Second Circuit (and thus my focus on its decisions over those of other courts) is explained below. In brief, the court’s leading role in design-patent jurisprudence in the early 1900s resulted in large part from its location in the U.S. design capital and the Supreme Court’s refusal to grant certiorari in a case squarely posing an issue of design-patent law after 1893. See discussion Charles E. Colman, Design and Deviance: Patent as Symbol, Rhetoric as Metric—Part 2, 56 JURIMETRICS 1 (forthcoming Fall 2015) [hereinafter Colman, Part 2].
American appellate-court judges presiding over pivotal disputes concerning design patents relegated them to a multi-decade-long period of near-total irrelevance in litigation. With this project, I seek to provide a historically, socially, and cognitively grounded explanation of why design patents were left out in the cold of the American intellectual property landscape for so many years.

This article argues, in brief, that turn-of-the-century federal appellate courts used design-patent cases as a way to implement, or “perform,” shifting norms and values implicating sex, morality, and ornament, marginalizing design patents in the process. Destabilizing phenomena in nineteenth-century American society, including women’s newly visible assertions of agency in the public sphere, the scientific “discovery” of homosexuality, and the outing of high-profile design advocates as sexual “deviants,” conspired to produce a powerful stigma surrounding design in the minds of politically dominant populations in large cities on the American East Coast.

Such associations indelibly impacted not only perceptions of design—especially among men—but also the main body of law governing exclusive rights available therein: design patent law. Early twentieth-century federal judges effectively used their decisions in design-patent disputes as a vehicle for the endorsement and implementation of sociocultural norms, distancing themselves from design in various ways. In doing so, these judges steered design-patent law away from its original legislative purpose, “the progress of the decorative arts”—a policy that, by the turn of the twentieth century, stood in tension with mainstream normative notions of American masculinity. The decisions in question had the cumulative effect of rendering design patents moot in federal-court litigation by 1930, which, in turn, produced distortions in other areas of American IP law.  

7. The only other in-depth scholarly treatment of this topic of which I am aware is Jason J. Du Mont’s A Non-Obvious Design: Reexamining the Origins of the Design Patent Standard, 45 Gonzaga L. Rev. 531, 532 (2010) (arguing that “design patent protection has witnessed dramatic pendulum swings between under and overprotection with more frequency than any other area of intellectual property law” because of courts “blindly forcing or tweaking substantive and procedural laws from the utility patent context to fit the peculiar nature of designs”); id. at 535 (contending that design patent’s idiosyncratic trajectory resulted from utility patent’s “nonobviousness requirement [being] forced on design patents through an odd series of administrative, legislative, and judicial mishaps”). While Du Mont’s work is illuminating in certain respects, I must depart from his analysis and conclusions for the reasons identified below.

8. See Lawrence Rosen, Law as Culture: An Invitation 4 (2006) (“As a kind of categorizing imperative, cultural concepts traverse the numerous domains of our lives—economic, kinship, political, legal—binding them to one another . . . . Features that may not seem to be linked are [in fact] crucially related to one another: Our ideas of time inform our understanding of kinship and contract, our concepts of causation are entwined with the categories of persons we encounter, [and] the ways we imagine our bodies and our interior states affect the powers we ascribe to the state . . . .”); Law, Society, and History 3 (Robert W. Gordon & Morton J. Horwitz eds., 2011) (“Law has little autonomy . . . . Law cannot consistently or for long periods remain out of sync with the interests of the powerful in society. The historian or social scientists looking for explanations of legal change will most likely find them in the study of social interests, forces, and demands—not in the doctrines, principles, or internal structures of the legal system.”).

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Of course, the suggestion that historical contexts and social norms influence the way judges think and adjudicate disputes is not new; indeed, the proposition has found substantial empirical support. Yet most legal scholars who have set out to reveal the political views, conceptual frameworks, and social norms undergirding and influencing rulings and doctrine have completely ignored patent law—and, in particular, design-patent law. To date, only a single scholar, Jason Du Mont, has tried to explain the multi-decade-long obsolescence of design patents, but his analysis does not take into account the timing of judicial marginalization of design-patent protection and emergence of “separability” principle in copyright jurisprudence is unlikely to be a coincidence. Over the past few decades, design patents have risen from the ashes, yet they remain decidedly marginalized. See Dan Hunter, Intellectual Property 118 (2012) (containing only one paragraph, in a 228-page book, specifically addressing design patents); Paul J. Sutton, The Underappreciated Design Patent, World Intell. Prop. Rev. (Feb. 16, 2015), http://www.worldipreview.com/contributed-article/the-underappreciated-design-patent (“[F]ar too little attention is afforded to the US design patent.”).

10. See Duncan Kennedy, Toward a Critical Phenomenology of Judging, in The Rule of Law: Ideal or Ideology (Allan C. Hutchinson & Patrick Monahan eds., 1987); Adam Samaha, On the Problem of Legal Change, 103 Geo. L.J. 97, 109–10 (2014) (“A recognizable label for this perspective is ‘law and society.’ It moves our attention further upstream by adding antecedent processes distinguishable from legal institutions but that influence their presentation, such as the roles of organized interests and popular opinion; it also moves our attention further downstream by adding the effects of legal institutions on nonlegal actors, such as how people react to rules and results delivered by officials.”).

11. See, e.g., Cass Sunstein et al., Are Judges Political?: An Empirical Analysis of the Federal Judiciary 15–16 (2006) (presenting findings “highly supportive” of “what is probably the most influential method for explaining judicial voting: the ‘attitudinal model,’” which posits that “judges have certain ‘attitudes’ toward areas of the law, and these attitudes are good predictors of judicial votes in difficult cases”); Lee Epstein et al., The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice 8 (2013) (amassing statistics that “support the realist understanding” that both Supreme Court Justices and circuit-court judges often “fall back on their priors—which often have an ideological component” to reach rulings).


Professor Kara Swanson has compiled an invaluable bibliography of scholarly works on intellectual property law and gender, many first presented at American University Washington College of Law’s annual IP/Gender: Mapping the Connections symposium, where the manuscript of this article was first distributed. See IP/Gender—Mapping the Connections, Am. U. Wash. C. L., http://www.pijip.org/ip-gender/ (last visited Aug. 10, 2015).

13. See generally Du Mont, supra note 7. Du Mont’s account of design patent’s trajectory provides useful data points, but it would be a mistake to assume that policymakers’ particular methods of plotting and connecting those data points are mere “mishaps.” Where it appears there is not a rational order in actors’ application of “rules,” we can—and should—look more closely. See Mary Douglas, A History of Grid and Group Cultural Theory, Workshop on Complexity and
powerful cultural associations with design that occupied a central place in the social and cognitive landscape against which judges issued their rulings.\textsuperscript{14}

This project exposes the heretofore unrecognized influence of design’s moral and sexual semiotics\textsuperscript{15} in foundational decisions on design patents issued by turn-of-the-century courts. Following this introduction, I proceed, in Part I of a two-article series, to examine the historical, cultural, and cognitive dynamics shaping popular thinking about “design” (and particularly, design taking the form of “ornament” and “decoration”) among the politically dominant segments of American society over the course of the nineteenth century. In Part 2, I will engage in a close reading of influential decisions from a pivotal period in design-patent history, which collectively reveal the footprint of the powerful confluence of events, ideas, personalities and objects explored in Part I.\textsuperscript{16} The decisions under examination, particularly a series of Second Cir-

\textsuperscript{14} Du Mont is far from alone in focusing primarily on the doctrinal and the economic. See, e.g., F. Scott Kieff, \textit{Property Rights and Property Rules for Commercializing Inventions}, 85 MINN. L. REV. 697, 698 (2001) (noting “consensus among those studying the American patent system [in their] focus on utilitarian approaches”); accord Madhavi Sunder, \textit{IP}, 59 STAN. L. REV. 257, 257 (2006) (“Unlike its cousins property law and the First Amendment, which bear the weight of values such as autonomy, culture, equality, and democracy, in the United States intellectual property is understood almost exclusively as being about incentives. To put it bluntly, [under conventional scholarly wisdom,] there are no ‘giant-sized’ intellectual property values.”) But see Larry Owens, \textit{Patents, the “Frontiers” of American Invention, and the Monopoly Committee of 1939: Anatomy of a Discourse}, 32 TECH. & CULTURE 1076, 1077–78 (1991) (“[I]nvoking, as they do, fundamental beliefs about progress and invention, patent systems . . . rest on more than economic calculation. Patents can be cultural icons as well as commercial tokens.”); Maurizio Vitta, \textit{The Meaning of Design, in DESIGN DISCOURSE: HISTORI, THEORY, CRITICISM} 31, 36 (Victor Margolin ed., 1989) (“[E]ach cultural system indeed puts itself into a dialectical relationship with the society that has expressed it; design is no exception to the rule.”).

\textsuperscript{15} My previous work has noted the lack of nuanced scholarly and judicial engagement with the complexities of design, and fashion design, in particular. See Charles E. Colman, \textit{Trademark Law and the Prickly Ambivalence of Post-Parodies}, 163 U. PA. L. REV. ONLINE 11, 27 (2014), http://www.pennlawreview.com/online/163-U-Pa-L-Rev-Online-11.pdf (“multidimensional accounts of fashion are almost entirely absent from (the decidedly sparse) legal scholarship and (the more voluminous, but often dismissive) case law on the subject in the United States”); Charles E. Colman, “\textit{A Female Thing”: Fashion, Sexism, and the United States Federal Judiciary}, 4 \textit{VESTOJ: J. SARTORIAL MATTERS} 53, 58–60 (2013) (“[I]t seems that fashion’s inferior status as ‘a female thing’ continues to haunt its treatment in litigation, with inevitable, if unquantifiable, effects on the outcome of disputes of great consequence for the parties—and by extension, for the evolution of US law more generally.”).

\textsuperscript{16} This project arguably shares certain key features with the work of Pierre Bourdieu, who mined anthropology, sociology, and linguistics to shed light on “the play of symbolic violence, or ‘misrecognition’ and ‘recognition’ of linguistic-communicative resources [by focusing not on] their ‘linguistic’ features but [on] the sociohistorical load they carry within a given social field.” Jan Blommaert, \textit{Pierre Bourdieu: Perspectives on Language in Society, in HANDBOOK OF
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cuits rulings in the 1910s and 1920s, had the cumulative effect of marginalizing design patents as a viable form of IP protection for decades to come.

This is an empirical argument, which requires drawing on the findings of cognitive scientists, linguists, anthropologists, and other scholars outside of traditional institutional lines drawn around “law.” Their work has yielded valuable insights into the way people (including judges) reason. Foremost among those insights, for present purposes, are the following principles:

(1) People do not always say precisely what they mean; further, reasoning occurs on both conscious and subconscious levels. As a result, the text of legal decisions cannot be taken at face value; judges, like everyone else, often reveal their reasoning both intentionally and inadvertently.

PRAGMATICS 6 (Jan-Ola Östman & Jef Verschueren eds., 2015). The project is also somewhat similar in spirit to more recent scholarly endeavors in “cognitive sociology.” See EVIATAR ZERUBAVEL, SOCIAL MINDSCAPES: AN INVITATION TO COGNITIVE SOCIOLOGY 65 (1997) (“the lines we envision separating one ‘thing’ from another are not as natural as they may seem, despite our tendency to break up the world into sharply delineated islands of meaning”); Wayne H. Brekhus et al., On the Contributions of Cognitive Sociology to the Sociological Study of Race, 4 SOC. COMPASS 61, 62 (2010). Additionally, this project sits at the intersection of law and visual culture studies. See DAVID MORGAN, THE SACRED GAZE: RELIGIOUS AND VISUAL CULTURE IN THEORY AND PRACTICE 25 (2005) (“Put succinctly, the study of visual culture consists of asking how images as well as the rituals, epistemologies, tastes, sensibilities, and cognitive frameworks that inform visual experience help construct the worlds people live in and care about.”). See also id. at 29 (“The study of visual culture concentrates on the cultural work that images do in constructing and maintaining (as well as challenging, destroying, and replacing) a sense of order in a particular place and time.”). For an early example of intellectual-property law scholarship sounding in anthropology, cognitive sociology, and visual culture studies, see Rosemary J. Coombe, Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue, 69 TEX. L. REV. 1853 (1991).

17. Though some have suggested otherwise, the quantitative is not exhaustive of the empirical. There are many useful metrics for determining the motivations of legal actors apart from the statistical analysis of case outcomes. While the “case-coding” method of analyzing judicial behavior can yield valuable insights, see, e.g., Barton Beebe, An Empirical Study of the Multifactor Tests for Trademark Infringement, 94 CAL. L. REV. 1581 (2006), it sometimes fails to tell the whole story. That risk is particularly acute where, as here, (1) the body of relevant case law is relatively small, and (2) and a complex diachronic relationship exists between the rhetoric used by courts and the formal dispositions of the cases at issue.

18. See David Cohen & Allan C. Hutchinson, Of Persons and Property: The Politics of Legal Taxonomy, 13 DALHOUSIE L.J. 20, 20 (1990) (“To talk of law without politics or history is nonsensical. All lawyers must concede that what they do takes place in historical circumstances and has political consequences. . . . To understand fully the operation of law, it is necessary to come to grips with turbulent questions of metaphysics, ethics, sociology and ideology.”). See also supra note 19, at 134 (“[I]mplicatures are wholly external to, and distinct from, the linguistic meaning [of a] proposition explicitly communicated . . . .”).

19. See Robyn Carston, Linguistic Meaning, Communicated Meaning and Cognitive Pragmatics, 17 MIND & LANGUAGE 127, 133 (2002) (“[T]he unconscious inferential processes internal to the modular mental systems, which mediate input and output representations, are very likely to be quite distinct from the conscious, normative rationalisations of personal-level thinking . . . . Linguistically decoded information is usually very incomplete and that pragmatic inference plays an essential role in the derivation of the proposition explicitly communicated.”).


21. The degree of explicit engagement varies greatly. See Carston, supra note 19, at 134 (“[I]mplicatures are wholly external to, and distinct from, the linguistic meaning [of a] proposition explicitly communicated . . . .”).
(2) Part of that reasoning occurs on a subconscious level, and is grounded in the values and biases of the communities of which one is (and wishes to remain) a member.\textsuperscript{22}

(3) These values and biases are conceptually organized through “structuring principles” like categorization and “metaphoric” and “metonymic” mappings,\textsuperscript{25} though which ideas originating in one domain of human experience are transferred to other domains.\textsuperscript{25} When cross-domain experiences crystallize into a set of common associations, I describe the resulting cognitive construct as a “connotative cluster.”

(4) Because “linguistic categories have the same character as other conceptual categories,”\textsuperscript{25} people’s words and phrasing provides a window into the mechanics and substance of the deep discourse\textsuperscript{26} undergirding explicit reasoning.\textsuperscript{27}

\textsuperscript{22} See, e.g., ROSEN, supra note 8, at 7 (“Lawn is so intricately entwined in culture that, for all its specialized capabilities, it may, indeed, best be seen not simply as a mechanism for attending to disputes or enforcing decisions, not solely as articulated rules or as evidence of differential power, and not even as the reification of personal values or superordinate beliefs, but as a framework for ordered relationships, an orderliness that is itself dependent on its attachment to all the other realms of its adherents’ lives.”).

\textsuperscript{23} See GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND 68 et seq. (1987); STEVEN L. WINTER, A CLEARING IN THE FOREST: LIFE, LAW, AND MIND 4–6 (2001) (“It is the essence of our [traditional] concept of law that it operates as an external constraint, much like the impenetrable vegetation of a forest. Yet this very conception already places law in the domain of metaphor and imagination, which is to say in the internal realm of the human mind . . . . [Because of recent discoveries, however,] it is now possible to describe the structures of imagination. These mechanisms . . . . include mental operations such as basic-level categorization, conceptual metaphor, metonymy, image-schemas, idealized cognitive models, and radical categories . . . . Together, they transform our understanding of reasoning and categorization.”).

\textsuperscript{24} See GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 246 (The Univ. of Chic. Press ed., rev. ed. 2003) (“Do we systematically use inference patterns from one conceptual domain to reason about another conceptual domain? The empirically established answer is ‘yes.’ We call that phenomenon conceptual metaphor, and we call the systematic correspondence across such domains metaphorical mappings.”).

\textsuperscript{25} LAKOFF, supra note 23, at 67. See also id. at 69 (“In general, any element of a cognitive model can correspond to a conceptual category . . . . Each schema is a network of nodes and links. Every node [mirrors] a conceptual category.”).

\textsuperscript{26} The term “deep discourse” has idiosyncratic meanings in other disciplines; I do not allude to these concepts unless noted otherwise. In general, I use the term to refer to the patterns of subconscious reasoning that tracks the habitus of a set of social actors. See Blommaert, supra note 16, at 9 (“A concept such as habitus is an attempt at ‘macro’ generalization at the level of what we would call ‘micro’ practices—let us call it a ‘nexus concept’ in which different scale-levels of social behavior are shown to be dialectically connected. Habitus shows itself in every social activity—we always embody the sociohistorical realities that formed us as individuals who take specific (nonrandom) positions in a social field . . . .”).

\textsuperscript{27} See CHRIS HUTTON, LANGUAGE, MEANING AND THE LAW 34 (2009) (“[A]s we speak, write and listen, we are not constantly aware of contested labeling and the normativity of language . . . . [A]ll language use is potentially or latently monitored, contested or regulated by virtue of the fact that it can be represented as a form of behaviour, a judgment, ‘making a statement.’ Law is in this respect no different in essence from any other form of language . . . .”).
Periods of perceived instability often lead to efforts to preserve “order” by “shoring up” conventional “islands of meaning.” The implementation of binaries, like “masculine/feminine,” is a common cognitive and rhetorical technique for those seeking to preserve a particular conception of the status quo during periods of social change.

These principles will serve as useful lenses and tools for gaining an understanding of the cultural context in which design patents were situated and evaluated, and for parsing judicial rhetoric with the aim of shedding light on the courts’ deep discourse on design. With that said, the analysis offered in this piece is neither an exhaustive nor self-contained alternative to doctrinal, economic, or other factors contributing to the development of design-patent doctrine. Indeed, anyone attempting to reveal the multiple layers of meaning of historical materials must make peace with the fact that the “probable and the speculative will coexist.” But for reasons identified in this article, it is very probable indeed that turn-of-the-century gender and sexuality norms influenced leading federal appellate decisions on design patents, depriving them of substantive power in litigation by 1930. While these decisions are just one “move in a complicated dance of interpretation engaged in by people acting in many different times and contexts, from many different positions of authority and influence,” they were, as I will show, a pivotal part of the dance surrounding the rights available in works of decorative design under U.S. law.

28. See discussion ZERUBAVEL, supra note 16, at 64 et seq.
30. For example, many of the factors identified as causal by Du Mont, see generally supra note 7, likely played some role in the path of design-patent doctrine. However, Du Mont’s methodological approach largely treats the law as a culturally closed-off system; the extrinsic factors he does identify as potentially influencing the behavior of key actors are conventionally political and economic in nature. Here, by contrast, I examine the broader sociocultural context informing the complex cognitive dynamics at work in judicial “interpretation” of statutory language and courts’ proffered reasoning for their rulings. My methodology is thus akin to that of ROSEN, supra note 8, at 12 (“to consider the styles of legal reasoning or the structure of cultural assumptions built into many legal concepts is to offer both a window into the larger culture and, no less importantly, to gain an often undervalued window into legal processes themselves”); perhaps unsurprisingly, the conclusions I reach differ markedly from those reached by Du Mont.
31. C.G. Bateman, Method and Metaphysics: A Legal Historian’s Canon, 23 J. JURIS. 255, 278 n.90 (2014) (citing S.R. ELTON, THE PRACTICE OF HISTORY 87 (1967)). See also Samaha, supra note 10, at 111 (“[A] law-and-society perspective has an attenuated relationship to law as it is conventionally understood. What it gains in practical relevance is partly offset by what it loses in simplicity, tractability, and connection with ordinary ideas about law. As with legal textualism, this loss is beneficial for some purposes. [One] should investigate the relationship between legal institutions and the rest of society, partly because of the difficulty in establishing causation.”).
32. I speak of design patents’ lack of substantive power because even after their evisceration, they retained some procedural value. Some parties sought them to obtain federal subject-matter jurisdiction to litigate unfair-competition claims. See discussion Colman, Part 2, supra note 6.

In the early decades of the nineteenth century, most industrial objects in the United States were valued primarily for their “functional” characteristics. The iron stove provides a helpful example.34 As historian Howell John Harris explains, “Stoves began to evolve from the traditional types in the early 1800s and particularly after the end of the War of 1812.”35 While “[a] trickle of stove patents turned into a steady stream in the 1830s,” the bulk of “inventors, designers, and makers concentrat[ed] their efforts on increasing stoves’ usefulness as heating and particularly as cooking devices.”36

Given this early focus on “utility,” Harris notes, “[p]atent drawings, particularly for cooking stoves, were generally undecorated or displayed a few applied decorative motifs on otherwise plain surfaces.”37 This began to change in the 1830s. In 1835, for example, the New York Mechanics’ Institute first provided an official commendation to stove makers “for their ‘beautiful’ or ‘very handsome’ or ‘very neat’ products, as well as for their serviceability.”38 At roughly the same time, the New York stove industry saw its first independent industrial-design firms, which soon cropped up in other cities.39

Design-patent protection would follow soon thereafter. Once the United States, like England, could claim its own contingent of tradesmen whose livelihood depended entirely on the appearance of consumer objects,40 Congress unsurprisingly found itself in receipt of pleas for the creation of intellectual-property protection better suited to decorative objects than conventional utility patents or copyright.41

Stove manufacturer Jordan L. Mott led the charge for design protection, authoring and submitting to the Senate in 1841 a document entitled “Petition of a Number of Manufacturers and Mechanics of the United States, Praying

34. See Howell John Harris, “The Stove Trade Needs Change Continually”: Designing the First Mass-Market Consumer Durables, ca. 1810–1930, in WINTERTHUR PORTFOLIO 365, 366 (2009) (calling stoves “an industry where design was critically important,” making it “unusually dependent on the patent system—at first just for ‘improvements’ but after 1842, when the law began to permit it, for designs, too”). For an example of an early ornamented stove for which a design patent was obtained, see id. at 376 (Figure 11), reproduced as Figure 1, below.
35. Id. at 368.
36. Id.
37. Id.
38. Id. at 370 (internal footnote omitted).
39. Id. at 371.
40. See Ellen Marie Snyder, Victory over Nature: Victorian Cast-Iron Seating Furniture, in WINTERTHUR PORTFOLIO 221, 223 (1985) (“By midcentury, American ironmaking assumed the technological capabilities the British had acquired years before, and American manufacturing grew rapidly.”). See also Du Mont & Janis, supra note 4, at 854–55 (“By the early 1800s, an active debate in England about expanding the Act culminated in a radical new design protection system beginning in 1839 [later] used as a model for American law.”) (internal citations omitted).
the Adoption of Measures to Secure to Them Their Rights in Patterns and Designs.\textsuperscript{42} The coalition’s petition was concerned primarily with “new designs for manufactures in metals,” but it also noted that its arguments about free riding and progress applied with equal force to “designs or patterns for woven or other fabrics, and of ornaments on any articles of manufacture.”\textsuperscript{43}

The petitioners thus requested of Congress “the passage of an act, by which the rights of proprietors of new designs and patterns may be protected from piracy,” so that “the manufacturers and mechanics of the United States may be enabled fully to compete with those of any other country”—that is, so the “articles manufactured by them would equal others in beauty.”\textsuperscript{44} Congress obliged: the lobbying efforts of Mott and his coalition, facilitated and transformed by a series of political tactics and twists,\textsuperscript{45} eventually yielded the enactment of the first American design patent law, in 1842.\textsuperscript{46}

\textsuperscript{42} S. Doc. No. 154 (1841).
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Du Mont & Janis, supra note 4, at 856 et seq.
\textsuperscript{46} Act of Aug. 29, 1842, 5 Stat. 543.
The few commentators to study this topic have offered differing explanations of both the reasons for the bill’s passage and legislators’ codification of design-patent protection within the existing utility-patent regime. But all would likely agree that mainstream American legal rhetoric in the years after the enactment of design-patent law described these new rights as a vehicle for “promoting the progress of the decorative arts.” Indeed, the Supreme Court would recite this orthodoxy in its first ruling, in 1871, on design-patent law:

The acts of Congress which authorize the grant of patents for designs were plainly intended to give encouragement to the decorative arts. They contemplate not so much utility as appearance, and that, not an abstract impression, or picture, but an aspect given to those objects mentioned in the acts . . . . The law manifestly contemplates that giving certain new and original appearances to a manufactured article may enhance its salable value, may enlarge the demand for it, and may be a meritorious service to the public. It therefore proposes to secure for a limited time to the ingenious producer of those appearances the advantages flowing from them.

The picture would soon grow complicated, however, for the decades after Congress passed its 1842 design-patent law saw the growth of a host of (largely negative) connotations surrounding “decoration” and “ornament,” whose creators could claim exclusive rights in their work primarily or solely through design-patent protection. This dramatic semiotic evolution in the minds of the politically dominant segments of American society would have surprisingly far-reaching effects.

II. SEX-ROLE ANXIETY AND MATERIAL CULTURE IN THE NINETEENTH-CENTURY UNITED STATES

The nineteenth century was a time of unusually rapid cultural change for urban communities on the East Coast of the United States. Middle- and upper-class white Anglo-Americans in the mid-nineteenth century were char-

47. Compare Du Mont & Janis, supra note 4, at 847, with Hudson, supra note 41, at 383.
48. See id. at 845 (“The most venerable comments—those of the Supreme Court in 1870 in Gorham Co. v. White—assert . . . that the design patent provisions ‘were plainly intended to give encouragement to the decorative arts,’ a reference to the Constitution’s intellectual property clause, with a slight adaptation for designs.”).
49. Gorham Mfg. Co. v. White, 81 U.S. 511, 524–25 (1871). See also Glen Raven Knitting Mills v. Sanson Hosiery Mills, 189 F.2d 845, 850 (4th Cir. 1951) (“Gorham Co. v. White . . . sets forth the salient features of the statute and the purpose which it was designed to serve; but the court was concerned with the infringement and not the validity of the patent in suit.”).
50. When I speak of “Anglo-American culture” or “American society” in this piece, I am using such terms to refer to “the largely middle- and upper-class members of the public who held certain characteristic ideas and tried to govern their lives by them.” LOUISE L. STEVENSON, THE VICTORIAN HOMEFRONT: AMERICAN THOUGHT & CULTURE, 1860–1880, xxviii (Cornell Univ. Press 2001) (1991).
characterized by, among other qualities, their “cherish[ing of] a belief in the separate spheres of femininity and masculinity that amounted almost to religious faith.” The stakes of keeping the categories of male and female separate struck many as very high, indeed, and would only rise as the turn of the century approached.

As the decades passed, nineteenth-century Americans’ notions of the “feminine” grew ever more strongly associated with “mutability of identity, distractability, [and] a continuous search for the new and fashionable,” all of which purportedly illustrated the “instability, unreliability, compulsiveness, and superficiality” of the female sex. The archetypal man of comparable social station, by contrast, was often imagined and represented as honest (in both behavior and appearance), industrious, and restrained in consum-

52. Id. at 150. Accord ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 211–12 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1972) (“[Americans] admit that as nature has appointed such wide differences between the physical and moral constitution of man and woman, her manifest design was to give a distinct employment to their various faculties. . . . In no country has such constant care been taken as in America to trace two clearly distinct lines of action for the two sexes and to make them keep pace one with the other, but in two pathways that are always different. American women never manage the outward concerns of the family or conduct a business or take a part in political life; nor are they, on the other hand, ever compelled to perform the rough labor of the fields or to make any of those laborious efforts which demand the exertion of physical strength.”).

53. See BRAM DIJKSTRA, IDOLS OF PERVERSITY 64 (1986).

54. See SHOWALTER, supra note 51, at 4 (“[Panic in the face of supposed ‘sexual anarchy’ was typical of the fin de siècle. In periods of cultural insecurity, when there are fears or regression and degeneration, the longing for strict border controls around the definition of gender, as well as race, class, and nationality, becomes especially intense.”). In nineteenth-century Anglo-American culture, just as today, notions of race were inextricably linked with ideas about gender. See discussion CELIA ROBERTS, MESSENGERS OF SEX: HORMONES, BIOMEDICINE AND FEMINISM 118–19 (2007) (“Numerous historians have suggested that [Victorian] understandings of the sexes as opposite and/or complementary were intertwined with discourses on racial differences.”). These discourses are always difficult to untangle, let alone in a single piece of IP scholarship. See Sally Markowitz, Pelvic Politics: Sexual Dimorphism and Racial Difference, 26 SIGNS: J. WOMEN CULTURE & SOC’Y 389, 389 (2001) (“[T]he logic of the race/sex/gender connection in the modern West is so tangled and opaque that even the best-intentioned analysis is likely to come up short.”). However, I do briefly discuss race and nationality. See infra notes 90–96.

55. See LIZ CONOR, THE SPECTACULAR MODERN WOMAN: FEMININE VISIBILITY IN THE 1920s 27 (2004); see also id. (“[M]odern feminine visibility harbored meanings of artifice superficiality, standardization, and mechanization: Mack’s Modern Girl is ‘made up,’ with dress and cosmetics, to represent the image of modern femininity . . . .”)

56. See SHOWALTER, supra note 51, at 25 (“Contrast was the essence of the matrimonial relation: feminine weakness contrasted with masculine strength: masculine egotism with feminine self-devotion.”) (emphasis added) (citation omitted); ALAN SINFIELD, THE WILDE CENTURY: EFFEMINACY, OSCAR WILDE, AND THE QUEER MOMENT 149–50 (1994) (“Of course, sexual relations cannot be isolated from the social hierarchies in which they are embedded . . . .”)

57. See CHRISTOPHER BREWARD, THE CULTURE OF FASHION 176 (1995) (highlighting 1860s social commentary objecting to “sartorial affectations” and, indeed, “any sort of adopted style or manner,” on the basis that “[a] man’s bearing should be a natural expression of his own mind and body” (quoting BRUCE HALEY, THE HEALTHY BODY AND VICTORIAN CULTURE 206 (1978)). See also id. at 173 (emphasizing, through nineteenth-century illustrations, that “[m]en’s dress of the 1830s and ‘40s allowed for a fair degree of self-expression, especially in terms of pattern and cut,”

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The web of associations surrounding the central axis of “manly” sobriety/candor and “feminine” frivolity/artifice gradually grew more elaborate and emphatic; by the turn of the century, fashionable women were widely assumed to be dishonest, lascivious, idle, and/or depraved. To combat this trend, the “moral” woman was repeatedly instructed to devote her entire existence to family and the home in which that family resided, an imagined “haven” from the perceived immorality of urban life.

The expanding scope and vigor of stigmatized characteristics of the woman of fashionable tastes and habits can be attributed in part to what many perceived as her challenge to the comfortable foundation of the male/female duality on which much of Anglo-American culture was imagined to rest. While the causes for this phenomenon are complex, it is clear reactionaries were motivated in part by a challenge to cultural infrastructure by a confluence of events and developments, including women’s large-scale entry into the realms of higher education, the workforce, the political sphere, and the realm of public consumption.

As the decades of the second half of the nineteenth century passed, “[t]he sexual borderline between the masculine and feminine [increasingly] represented the dangerous vanishing point of sexual difference.” The onslaught of destabilizing cultural changes engendered a fierce response in social purity campaigns, a renewed sense of public moral concern, while “[t]he 1860s present the archetypal image of nineteenth century masculinity: dark, dour, and domineering.”

58. See id. at 176 (highlighting same 1860s social commentary distinguishing virtuous man from “that lounging semi-swaggering, confoundedly lackadaisical manner which [some] have adopted in compliment . . . to the real swell, and the man of fashion”) (quoting HALEY, supra note 57, at 206).
59. See id. at 175 (highlighting 1859 social commentary making “muscular Christian exhortations to celibacy and self-denial”).
60. DUKSTRA, supra note 53, at 64.
61. RICHARD SENNERT, THE FALL OF PUBLIC MAN 19–20 (1974) (“[P]eople put more emphasis on protecting themselves from [large-scale social changes]. The family became one of these shields. During the 19th Century the family came to appear less and less the center of a particular, nonpublic region, more an idealized refuge, a world all its own, with higher moral value than the public realm. The bourgeois family was idealized as life wherein order and authority were unchallenged, security of material existence could be a concomitant of real marital love, and the transactions between members of the family would brook no outside scrutiny. As the family became a refuge from the terrors of society, it gradually became also a moral yardstick. . . .”).
62. See SHOWALTER, supra note 51, at 8–9 (“The nineteenth century had cherished a belief in the separate spheres of femininity and masculinity that amount almost to religious faith . . . . What was most alarming to the fin de siécle was that sexuality and sexual roles might no longer be contained within the neat and permanent borderlines of gender categories.”).
and demands, often successful, for restrictive legislation and censorship.”

Increasingly, gender roles were “publicly, even spectacularly, encoded and enforced” (including in the courtroom).

No aspect of behavior, human endeavor, or material object, no matter how seemingly “trivial” or semiotically blank, was immune from the increasingly intensive sex-norm-policing that took place in the urban United States of the late nineteenth century. The advent of the American Industrial Revolution meant there were far more designed objects, at far more affordable prices, than ever before. Over the course of the nineteenth century, the large-scale technological and labor developments facilitated the acquisition, by the American “middle class,” of an ever-wider variety of consumer objects for purely aesthetic and pleasurable ends.

66. SHOWALTER, supra note 51, at 5.
67. Id. (quoting RICHARD DELLAMORA, MASCULINE DESIRE 194 (1990); see also HOLLIS CLAYSON, PAINTED LOVE: PROSTITUTION IN FRENCH ART OF THE IMPRESSIONIST ERA 58 (1991) (“Self-admiration and sexual allure were closely connected in the latter half of the nineteenth century because dress had come to distinguish gender in more exaggerated ways.”)).
68. State supreme courts’ rulings on marriage promises are instructive. See Boigneres v. Boulon, 54 Cal. 146, 147 (1880) (mistress sued over repudiated marriage promise, but “such promise [of sexual] surrender on the part of the woman is not sufficient consideration for a promise of marriage, because immoral, illegal, and against public policy.”); cf. Kurtz v. Frank, 76 Ind. 594, 598 (1881) (“It does not appear that the illicit intercourse entered into the consideration of the marriage contract, but [rather that] the appellant, having agreed to marry the appellee at a time then in the future, obtained the intercourse upon an assurance that, if pregnancy resulted, the contract already made should be performed at once.”).
69. Chris Fowler, From Identity and Material Culture to Personhood and Materiality, in MARY C. BEAUDRY & DAN HICKS, THE OXFORD HANDBOOK OF MATERIAL CULTURE STUDIES 352, 359–60 (2010) (“Identities are produced out of the ongoing interactions between people and things, not just different groups of people . . . . [T]he ability to consider this mutual constitution of people and things, materials and cultures, is a prerequisite for any sophisticated analysis of material culture and identity. At the same time, the co-emergence of material worlds and types of identities needs to be placed in the context of social and political interactions.”).
70. See generally WILLIAM LEACH, LAND OF DESIRE (1993).
71. See SCHLERETH, supra note 51, at 121 (describing the late nineteenth-century American “compulsion to purchase, accumulate, and display possessions”); COLIN SPENCER, HOMOSEXUALITY IN HISTORY 194, 194–95 (1995) ("The beginnings of the Industrial Revolution meant a little more money for the lower classes [and] the beginnings of a new social obsession . . . . By the eighteenth century [in England—and the mid-nineteenth century in the United States] almost everyone had a money income and was prepared to spend it. A huge increase in small rural factories producing non-essential goods occurred at this time. . . ."); STEVENSON, supra note 50, at xxxi ("[T]he Victorian social world of the 1860s and 1870s was, by and large, the world of the middle class. Still, being Victorian was a matter of values and beliefs; belonging to the middle class had more to do with economic position. People could be Victorian without belonging to the middle class, or they could belong to the middle class without being Victorian." Nevertheless, the members of the group under examination “all shared one vocabulary and one set of key assumptions about life," even as historical evidence reveals “different ways that different Victorians drew upon and used them.”). To be sure, not everyone was able to partake in this new bounty. See Susan Porter Benson, Living on the Margin: Working Class Marriages and Family Survival Strategies in the United States, 1919–1941, in THE SEX OF THINGS: GENDER AND CONSUMPTION IN HISTORICAL PERSPECTIVE, supra note 13, at 212 (noting that many “American working-class families remained on the margins of the emerging world of consumptions because their incomes were neither large enough nor steady enough to allow the wide range of discretionary spending usually associated with mass consumption”). Further, as Benson recounts, the gendered divisions that pervaded middle-class mores and imagination were often absent—or complicated—
This included an explosion in the availability of fashionable apparel, which proved to be one of the most powerful tools for ensuring compliance with gender roles and associated notions of morality. For one thing, dress was the most immediate, visually recognizable, nonbiological demarcation between the sexes. But dress was also strongly linked with myriad normative notions about gender, for women could only engage in certain public activities to the extent their attire did not make it impractical to do so. Fashionable apparel design thus carried with it multifaceted political and moral notions of women’s “proper” role and place.

Many commentators of the time period wrote tracts making clear that fashionable dress, as the most marked component of personal presentation, carried increasingly strong normative overtones about the proper roles and characteristics of women. “Social reformers” announced that female vanity—closely linked in the popular imagination with artifice, imitation, excess—working-class culture. See generally id. I acknowledge this plurality of experiences during the relevant time period, even as I focus on the middle-class ideology that proved influential in the worldviews and self-policing of public figures.

72. Ed Cohen, The Double Lives of Man: Narration and Identification in Late Nineteenth-Century Representations of Ex-centric Masculinities, in CULTURAL POLITICS AT THE FIN DE SIÈCLE 99 (Sally Ledger & Scott McCracken eds., 1995) (characterizing nineteenth-century dress as “a metonym for socially inscribed forms of femininity”); Kate Haulman, Fashion and the Culture Wars of Revolutionary Philadelphia, 62 WILLIAM AND MARY QUARTERLY 625, 627 (2005) (“There seemed no way to bring the logic of power based on personal display and distinction into line with patriot prescriptions of homespun simplicity and conformity.”).

73. See ANNE HOLLANDER, SEX AND SUITS 136 (1994) (“Only men’s clothing, with suits being the last version, expressed the idea of a man’s body as a visibly working, self-aware and unified instrument.”); SHOWALTER, supra note 51, at 24 (“It was an easier explanation [for nineteenth-century Anglo-American men] to see women’s desire for emancipation as a form of imbalance in the reproductive system and mind that to take it seriously; and the argument was doubly useful because it also showed how dangerous to the public would be ‘the incorporation of these instabilities into the structures of political life.’”); STEVENSON, supra note 50, at 15 (discussing activities and spaces that were “safe” for middle-class women in the mid-nineteenth century). Some scholars have gone so far as to argue that “fashion and, for that matter, ... the clothing code of the West generally, [constitutes] a principle means, as much actual as symbolic by which the institutions of patriarchy have managed over the centuries to oppress women and to relegate them to inferior social status.” FRED DAVIS, FASHION, CULTURE, AND IDENTITY 81 (1994).

74. See generally CHRISTINE STANSELL, CITY OF WOMEN: SEX AND CLASS IN NEW YORK, 1789–1860 (rev. ed. 1987). Working-class men in early 1800s New York City, for example, could engage in various activities, from working outside the home to drinking at pubs, that—if undertaken by women, could easily suggest a “determination to serve herself at the expense of others,” or worse. Id. at 80. Perhaps the most innocuous meaning of such behavior was that the offending women were “bad housekeepers who disregarded men’s domestic needs,” thereby breaching “the customary deference due to men.” Id. See also SENNETT, supra note 61, at 178–83.

75. See, e.g., THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS 110 (Dover 1994) (1899) (“It grates painfully on our nerves to contemplate the necessity of any well-bred woman’s earning a livelihood by useful work. It is not ‘woman’s sphere.’ Her sphere is within the household, which she should ‘beautify,’ and of which she should be the chief ornament.”). See also CLAYSON, supra note 67, at 79 (noting that 1880s Impressionist paintings frequently “display[ed] female sexuality a something of a threat, and [located] this threat specifically in the realm of modern fashion”).
sive consumption, moral decay, and even prostitution—unless discouraged, would ultimately lead women to opt out of bearing children.77

Figure 2. “P. Pry,” that is, W. Heath, “The Fashion Behind but not Behind the Fashion” (1829)

ure 2, above, has been characterized thus: “The artist pokes fun both at the huge ribboned hat, the vast balloon-like sleeves, and the wide skirts lined with horsehair (or a similar stiffening) which immodestly reveal so much of the ankle.” AILEEN RIBEIRO, DRESS AND MORALITY 127 (1986). 77. See CLAYSON, supra note 67, at 60 (“A decent woman for whom shopping was an obsession rather than a simple devoir was in danger of falling from the path of respectability and manageability, whereas the deviant woman who dressed to the nines was ipso facto immoral and could also inflict societal damage by infecting the lady with an uncontrollable taste for extravagant clothes.”); DIJKSTRA, supra note 53, at 94 (on paintings of “nasty women, with nonexistent children gnawing like an evil conscious at their uselessly voluptuous breasts” portrayed as “mere empty shells of what they might have been had they not forsaken the sacred duties of motherhood to pursue their lascivious private pleasures.”); RIBEIRO, supra note 76, at 127–28 (the “perfect lady” was praised as displaying “refinement and gentility,” while women “showing off in public in unsuitably expensive and luxurious dress” were denounced as “vulgar”—displaying what commentators of the time decried as “indulgence in personal luxury in women [to] injurious effect on the moral tone, [that is] the first symptom, if not the cause, of a relaxation in virtue.”).
Figure 3. “The Fast Smoking Girl of the Period” (1867) 78

78. See RIBEIRO, supra note 76, at 138–43 (image and its caption provided as an example of “fast” girl, a figure depicted “frequently in journalism of the late 1860s” by those professing concern about the purported risk of women abandoning family and virtue for the “world of men”).
The pursuit of overtly “materialistic” interests by women struck many as presenting a “central contradiction” between woman-as-insatiable-consumer and “the transcendental innocence of the model wife and mother.”

This trope gained newfound momentum in the United States in the 1830s and exerted an increasingly powerful grip on the popular consciousness. To illustrate, the November 1861 issue of a leading women’s magazine, *Godey’s Lady’s Book* drew an explicit connection between female fashionability and dangers to the health of both mothers and children:

We have before warned our readers against the “most pernicious practice,” the dire effects of which are so forcibly presented [earlier in the magazine]; but so prevalent is this evil, and such is the bending power of fashion, that the subject cannot be too often or too strongly urged upon the attention of mothers. The above remarks are as applicable to every part of our country as to the city of Paris, for from Paris we receive our fashions, and with Paris we must suffer the dreadful consequences of following the senseless requisitions of vanity and folly in preference to the plain dictates of reason, physiology, and common sense. Mothers can never expect health for themselves and their children until they make the laws of health their guide, instead of the decrees of fashion; until they study physiology and hygiene more, and French fashions plates less.

Thus, attacks on the “immodesty” of fashionable dress increasingly gave way to allegations of “moral degeneracy in women of all ages who copy the fashionable ideal, the woman of the demi-monde.” Whereas “[i]n the time of crinoline” the fashionable woman had “sacrificed decency,” by 1870 (“the times of trains”), the same woman now “sacrifice[d] cleanliness” through her “false and fatal brilliancy.” By the last decades of the nineteenth century, fashionable design in women’s dress had accrued myriad negative associations in middle-class American culture.

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80. Jno. Stainback Wilson, Health Department, *Godey’s Lady’s Book*, Nov. 1861, at 444  


82. See Ribeiro, supra note 76, at 135 (quoting E. Lynn Linton, *The Fast Smoking Girl of the Period* 4 (1868)).

83. The symbolic power of fashion was due, in part, to the explosion of popularity in the latter half of the nineteenth century, of the (pseudo-)scientific practice alternately referred to as “phrenology,” “ethology,” or “physiognomy,” which purported to make legible to the careful...
These stigmas bespoke far more than mere misogyny; they evinced a general anxiety among large segments of nineteenth-century American society concerning the blurring of traditionally imagined gender roles. Thus, it should come as little surprise that the visual policing described above was a two-way street: even as a desire for fashionable dress was increasingly stigmatized a moral failing of women, would-be “respectable” men displaying an affinity for decoration in their appearance were charged with ever-greater failings. In a cultural shift described as “The Great Masculine Renunciation,” the second and third decades of the nineteenth century saw “the last gasp of the male peacock before the ensuing triumph of middle-class sobriety in dress which is still, to a large extent, with us today.” Individuals purportedly failed in their role as men by falling prey to the vices typically associated with “the weaker sex.”

Historian Kate Haulman elaborates on these new beliefs:

[Men in dominant social positions] projected [fashion’s] morally questionable elements onto women and other feminized figures such as fops and the French. Ideally, attire established gender identity and the distinction between male and female. But sometimes a fashion confused those designations, either by failing to be appropriately masculine or feminine enough for its wearer, who (according to detractors) mimicked the effect therby failing to be appropriately masculine or feminine enough for its wearer, who (according to detractors) mimicked the effect and usurped the prerogatives of the other gender, or by bespeaking an excess of feminine traits such as vanity . . . .

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observer of physical appearance an individual’s temperament, moral fiber, motivations and desires, and other aspects of (the relatively new concept of) “personality.” See Sennett, supra note 61, at 171; id. at 167 (“As people’s personalities came to be seen in their appearances, facts of class and sex thus became matters of real anxiety . . . . A man might or might not be what his clothes proclaimed, but the proclamation was [purportedly] clear.”). See also MARY DOUGLAS & BARON ISHERWOOD, THE WORLD OF GOODS: TOWARDS AN ANTHROPOLOGY OF CONSUMPTION xxiv (Routledge 2001) (1979).

84. See Showalter, supra note 51, at 3–9.

85. See Breward, supra note 57, at 170–71 (“[A] discourse of separate spheres, whilst constructing display and dress as innately feminine pursuits, enforced a model of masculinity in which overt interest in clothing and appearance automatically implied a tendency toward unmanliness and effeminacy.”).

86. The term “The Great Masculine Renunciation,” while subsequently critiqued, modified, and discredited by certain cultural theorists and historians of dress and visual culture, is widely believed to have been coined by J.C. Flügel, THE PSYCHOLOGY OF CLOTHES 111 et seq. (1930) (section on “The Great Masculine Renunciation and Its Causes” in ch. VII).

87. Ribeiro, supra note 76, at 122.

88. See Veblen, supra note 75, at 112 (“There are of course also free men, and not a few of them, who, in their blind zeal for faultlessly reputable attire, transgress the theoretical line between man’s and woman’s dress, to the extent of arraying themselves in apparel that is obviously designed to vex the mortal frame; but everyone recognizes without hesitation that such apparel for men is a departure from the normal. We are in the habit of saying that such dress is ‘effeminate’ . . . .”); Elizabeth Wilson, Adorned in Dreams: Fashion and Modernity 179 (I.B. Tauris 2013) (“Before 1960s, ‘only tarts or homosexuals wore clothes which reflected what they were.’”) (quoting George Melly, Revolt Into Style: The Pop Arts in Britain (1972)).

89. Haulman, supra note 72, at 627. See Ribeiro, supra note 76, at 125 (“[From the 1830s onward in Anglo-American culture,] ‘the merest hint of femininity in a man’s wardrobe was regarded with deep visceral aversion.’ Among the upper and middle classes, the only acceptable touch of colour was the waistcoat until the 1860s; from then onwards even that was abandoned and men wore a dark three-piece suit on most occasions, except for evening wear when a white
Failure “to be appropriately masculine,” by the mid-nineteenth century, meant more than vulnerability to social ridicule. (As explained below, however, “effeminacy” was not decisively linked with identity-based conceptions of “homosexuality” until the final years of the 1800s.\(^9\)) Through a complex matrix of political, economic, and scientific developments, normative Anglo-American masculinity had come to carry with it a particular set of values and priorities—one undergirded, by the latter half of the nineteenth century, by the often-intermingled theories of “utilitarianism” and “evolutionary science.”\(^9\)

American economist Thorstein Veblen captured a key aspect of the new middle-class orthodoxy with his philosophy of an “ideal world [that had] no place for the irrational or the non-utilitarian” in which “the stylistic oddities of fashion were manifestly futile.”\(^9\) Writer and public intellectual H.G. Wells explicitly linked fashionable trimmings to the female sex, “backward” civilizations, and failures of intellectual development, declaring: “Women, disarmed of their distinctive barbaric adornments, the feathers, beads, lace, and trimmings [would be able share in] the counsels and intellectual development of men.”\(^9\) English psychologist J.C. Flügel would later reflect that it was “perhaps no mere chance that a period of unexampled scientific progress should have followed the abandonment of ornamental clothing on the part of men at the beginning of the last century.”\(^9\) Less measured nineteenth-century com-

\(^9\) See discussion infra at text accompanying notes 145–49; accord Ribeiro, supra note 76, at 125–26 (noting, based on 1847 text The Natural History of the Gent, that men dressed in bright colors, “load cravats and tie-pins, and bright yellow kid gloves over which are worn lots of rings”—though likely to be described as “effeminate” even at that time—were infamous for “star[ing] at women bathers” and “accost[ing] respectable women in the street”).

\(^9\) See also Thomas Hodgskin, Popular Political Economy: Four Lectures Delivered at the London Mechanics’ Institution 240–41 (1827) (emphasis added).


\(^9\) Flugel, supra note 86, at 118. Social theorist Georg Simmel’s 1904 condemnation of fashionable individuals is telling: “The fact that the demi-monde is so frequently a pioneer in matters of fashion is due to its peculiarly uprooted form of life. The pariah existence to which society condemns the demi-monde produces an open or latent hatred against [social rules and law, which takes] aesthetic expression in the striving for ever new forms of appearance.” Georg Simmel, Fashion, in Georg Simmel: On Individuality and Social Forms 311 (Daniel N. Levine ed., 1971). See also Adolf Loos, Ornament and Crime, in Programs and Manifestoes on 20th-Century Architecture 24 (Ulrich Conrads ed., Michael Bullock Trans., 1970) (“Absence of ornament has brought the other arts to unsuspected heights. Beethoven’s symphonies would never have been written by a man who had to walk about in silk, satin, and lace.”) As the Loos excerpt illustrates, “fashion” was positioned in opposition to legitimate and valuable cultural innovation. Cf. Edward Sapir, Fashion, in Encyclopedia of the Social Sciences 6, 139 (Edwin R. A. Seligman ed., 1931) (asserting that a short-lived fashion is likely to have “something unexpected, irresponsible or bizarre about it,” and predicting that “[a]ny fashion which sins against one’s sense of style and one’s feeling for the historical continuity of style is likely to be
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mentators casually extrapolated Darwinian ideas about the survival of particular species to the fate of society at large, explicitly blaming “effeminacy” for “the decline and fall of states.”\(^6\) Even Teddy Roosevelt opined: “There is no place in the world for nations who have become enervated by the soft and easy life, or who have lost their fibre of vigorous hardness and masculinity.”\(^6\)

By the turn of the twentieth century, mainstream middle-class ideology in the United States held that the sort of people who invested time and money in fashionable dress were by and large “idle, parasitical, artificial, vicious, and frivolous.”\(^7\) (At the same time, women who discarded dresses in favor of outfits made up of a “jacket and skirt based on the male suit” found that their new, ostensibly more “natural” and “useful” apparel was immediately decried as “unbecoming and unseemly . . . , as any imitation of man’s attire must be for a woman.”\(^8\) Virtue, apparently, was the exclusive province of men.)

Thus, fashionable dress was an enormously important symbolic medium at the fin de siècle; however, it was by no means alone in its gendered, socio-political resonance. A wide variety of designed objects, especially “accessories” displaying increasingly “rich trimming,” carried powerful symbolic connotations about one’s true character and appropriate role in American so-

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^6: cf. Harmon Paper Co. v. Prager, 287 F. 841, 846–47 (2d Cir. 1923) (Manton, J., dissenting) (“[The] demand [for plaintiff’s wallpaper design] was not brought about through an advertising campaign. Apparently the paper sold on its merit. Nor can it be said that it was due to a fashion or caprice of the public. It has continued and increased during a period of four years. It is more than a fashion, for fashions are not likely to last that long. I regard this as persuasive evidence of invention.”).

^7: See SHOWALTER, supra note 51, at 5 (sexual difference was one of the “threatened borders of the fin de siècle,” and “fears of degeneration and collapse” meant that “England was often compared [unfavorably] to decadent Greece and Rome”). See ROBERTS, supra note 54, at 118–19 (“[Historian Nancy Leys Stepan argues] that the nineteenth-century focus on binary sexual difference and racial difference was partially enabled by an analogy between sexual difference and racial difference, whereby supposed deficiencies were found in both [white] women and non-European people of both sexes. The analogy between sex and race . . . was supported by evolutionary discourse in which [white] women’s inferior position in relation to [white] men was explained by their retention of features of ‘primitive races.’”).

^8: See SHOWALTER, supra note 51, at 10. Cf. DAVID KUCHTA, THE THREE-PIECE SUIT AND MODERN MASCULINITY: ENGLAND, 1550–1850, 3 (2002) (“Understanding the importance of ideals of masculinity to notions of politics, economics, and the social order, then, allows us to understand the basis for the birth and continued relevance of [the] three-piece suit.”) (internal footnotes omitted). See also EDWIN G. BURROWS & MIKE WALLACE, GOTHAM: A HISTORY OF NEW YORK CITY TO 1898, 1192–93 (1999) (discussing various reform movements in New York City starting in the 1880s, in which powerful coalitions sought “moral and political reform” declared necessary to rebuild decaying city infrastructure by, among other things, ensuring government decisions were made “solely in the interests of efficiency and economy,” thereby “ending extravagance and corruption”).

^9: KUCHTA, supra note 96, at 148 (citing BARBARA TAYLOR, EVE AND THE NEW JERUSALEM: SOCIALISM AND FEMINISM IN THE NINETEENTH CENTURY 3–5 (1983)). See also BURROWS & WALLACE, supra note 96, at 1151 (highlighting direct connection between the New York theater world’s “public sensuality” and “commercialization of sex” and popular—even national—trends concerning women’s “choice of clothes, jewelry, and millinery”).

^10: See VICTORIAN FASHIONS AND COSTUMES, supra note 80, at vii (“All accessories—gloves, handkerchiefs, hair ornaments, jewelry, aprons, shoes and stockings—provided surfaces to be decorated. None escaped the love of rich trimming.”).
ciety. Such designed objects ranged from handkerchiefs to parlor furniture, all of which were increasingly gender-coded and scrutinized for gender conformity as the century wore on.

“Decorative” furnishings for the home, in particular, proved powerfully complementary to fashionable dress in the surveillance of gender norms through aesthetics. As the nineteenth century progressed, increasing...
numbers of Anglo-American individuals and families had sufficient disposable income to spend money on so-called “nonessential” objects. Historian Thomas Schlereth notes that in “an economy of expanding consumer choice, home furnishings”—like fashionable dress—“came and went as never before.” This new dynamics can be observed in the appearance of the typical Anglo-American middle-class parlor, a “densely draped, ornamented, and furnished space that symbolized the Victorian compulsion to accumulate and display possessions.”

![Figure 4. Robert Slingsby, Domestic Interior (1889)](image)

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consumer goods increased” dramatically. STEVENSON, supra note 50, at 10. Many people selected “home decorations [that] nurtured the Christian development of family members,” and mothers sought to instill values in children “through their choice of parlor decorations.” Id. at 8, 9.


103. SCHLERETH, supra note 51, at 260, 261 (“Church membership and attendance increased steadily from 1870 to 1920 . . . . American Protestants, led by the Methodists, Baptists, Presbyterians, and the Disciples of Christ, acted as a semiofficial American religious establishment—a fairly unified coalition . . . . Together they formed . . . a ‘righteous empire’ of local congregations and evangelical agencies.”); see also PALLISTER, supra note 100, at 292 (noting apparent inconsistency between the erstwhile popularity of lace and “Puritan simplicity”).

104. Id. at 121.
Colman

It was primarily women who “curated these collections [of home goods], as well as other parlor artifacts.”105 Middle-class men, by contrast, were generally expected to show “restraint”—if not a complete lack of interest—in these components of the domestic sphere.106 Designed objects were thus well positioned to serve as another important locus for the convergence of “political, economic, religious, social, and aesthetic ideologies” in the late nineteenth century.107

As lavish decoration in dress,108 personal accessories,109 and objects decorating home interiors110 became available to larger swaths of American society, the variety and volume of objections to “ostentatious display” grew correspondingly.111 By the final decades of the nineteenth century, middle- and upper-class white Americans displaying an affinity for the “ornamental” were vulnerable to accusations of immorality—whether because of the purportedly self-glorifying, frivolous, or “effeminate” nature of such ornament, or (by the 1890s, for reasons discussed below) through an emergent symbolic association with so-called sexual “deviants.”112

105. SCHLERETH, supra note 51, at 119.
106. BEDERMAN, supra note 63, at 13. One such specimen is provided in Figure 4. Note not only the differences in dress among the family members in this 1889 photograph, but also the father’s distinct—and quite possibly affected—lack of interest in his physical surroundings.
107. ROCHA, supra note 96, at 4. See also SENNETT, supra note 61, at 166–67 (“[In the latter half of the Nineteenth Century] inanimate objects which surrounded [a] person could in their details be suggestive in such a way that the human being using or seeing them felt personally compromised. Some readers may remember the piano-leg covers in their grandfather’s homes, or the dining-room table-leg covers; it was considered improper for the legs of anything to show . . . . All appearances have personal meanings: if you believe that little gestures with the eyes may involuntarily betray feeling of sexual license, it becomes equally rational to feel that the exposed legs of a piano are provocative . . . . [This type of] cultural change, leading to the covering of piano legs, has its roots in the very notion that all appearances speak, that human meanings are immanent in all phenomena.”).
108. The greater the proximity of decorative objects to the body, the closer the apparent correlation between these objects’ intended consumers and the aesthetics of the feminine and the domestic; the cultural connotations varied accordingly in their power. See Foltyn, supra note 76, at 323. (“According to JOHN BERGER, WAYS OF SEEING 50–51 (1972), a long tradition exists of painting woman looking at herself in a mirror, joining the spectators of herself. The mirror is a symbol of the beautiful woman’s vanity, of her conniving in treating herself as ‘first and foremost, a sight.’”). Wilson, supra note 88, at 123 (“The dress of the nineteenth-century virgin on the marriage market had . . . . to convey family status as well as personal desirability . . . . This ideology extended beyond dress to the home in which the woman reigned. Appearance became more and more mixed up with identity. It was the beginnings of the idea of the Self as a Work of Art, the ‘personality’ as something that extended to dress, scent and surroundings, all of which made an essential contribution to the formation of ‘self’—at least for women.”).
110. See SCHLERETH, supra note 51, at 121.
111. See CLAYSON, supra note 67, at 79 (“Not every shopper was improper but a marked enthusiasm for shopping—synonymous with vanity—on the part of an otherwise respectable woman suggested a dubious character and an exaggerated and unhealthy concern for her own personal appearance, which in turn suggested her attempt at sexual attractiveness.”).
112. See SENNETT, supra note 61, at 190 (“The physical appearance of women emancipating themselves from sexual roles and the physical appearance of women trying to make themselves more sexual led to the same end: they appeared to others to be engaging in illicit activity.”). See also id. (“In the 1890s makeup was being mass-produced and discreetly advertised in women’s

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The declarations and endeavors of the so-called “New Woman,” who enjoyed education, occupational skills, and disposable income for aesthetic novelties from fashionable dress to parlor curiosities, provoked anxiety among a large swath of late-nineteenth-century American society—especially men.113 The existence of a normative heterosexuality. “Sexual behaviour predicated upon the presumed existence of a normative heterosexuality” in Freud’s publications of 1905).

In the 1890s, dramatic, unanticipated developments in the realm of gender and sexuality further contributed to the perception among many that the fundamental structure of society—which, of course, largely corresponded with “the system of patriarchy”—was “under attack.”114

The final twenty years of the nineteenth century witnessed the emerging scientific and popular awareness of the “homosexual,” or “invert.”115 With unprecedented clarity, beginning in the 1880s,116 the notion of “effeminacy” became increasingly linked with an innately “deviant” sexuality among certain men.117 The scientific “discovery” of homosexuality supplanted the popular magazines. What is correct is that using such devices to make the body attractive seemed [sic] like the woman was committing some kind of crime.”

113. See BEDERMAN, supra note 63, at 13–14; SHOWALTER, supra note 51, at 8–11.

114. See SPENCER, supra note 71, at 196 (“Sodomites were reviled [in part because they] struck at the new driving force within society which brought comfort and security to the masses and helped them to rise above thousands of years of abject poverty. The sodomite could not procreate in his sexual act and his sterility also affected his role in the new consumer society.”).

115. See George Chauncey, Jr., From Sexual Inversion to Homosexuality: Medicine and the Changing Conceptualization of Female Deviance, 58–59 SALMAGUNDI 114, 114 (1982) (discussing the emergence of the term “homosexual”); Cohen, supra note 72, at 108 (“[In Sigmund Freud’s 1905 Three Essays on the Theory of Sexuality,] he highlights what he perceives as the problems with earlier sexological discussions of male inversion produced by Ulrichs and Kraft-Ebing which (like [John Addington] Symonds) he lumps together as roughly asserting that ‘male inverts [possess] a feminine brain in a masculine body’ . . . .”); Kevin Floyd, Making History: Marxism, Queer Theory, and Contradiction in the Future of American Studies, 40 CULTURAL CRITIQUE [THE FUTURE OF AMERICAN STUDIES] 167, 174 (Autumn 1998) (“The trope of gender ‘inversion,’ which registered increasing and unmistakable contradictions in sexual ideology in the residual terms of the Victorian logic of gender, emerged relatively early in [the previously described] process. This trope took the form, for example, of the widespread assumption that men who love other men are in some fundamental (e.g., biological or spiritual) sense feminized objects . . . .”).

116. See SHOWALTER, supra note 51, at 14 (“The concept of homosexuality began to take shape in the 1880s in the work of John Addington Symonds. Richard von Krafft-Ebing and in the research of Victorian sexologists such as Havelock Ellis.”). See also Laura Doan & Chris Waters, Introduction to Part II, Homosexualities, in SEXOLOGY UNCENSORED: THE DOCUMENTS OF SEXUAL SCIENCE 41–42 (Lucy Bland & Laura Doan, eds., 1998) (“The early work of sexologists gradually began to familiarize the European and North American public with the existence of a new species of being variously labeled the Uning, Uranian, intermediate type, invert or homosexual . . . . By the time the sensational trials of Oscar Wilde took place in 1895, male homosexuality was extensively debated, and its various manifestations and etiology subject to intensive scrutiny.”). See also Cohen, supra note 72, at 86 (noting “first psychoanalytic theorization of male homosexuality” in Freud’s publications of 1905).

117. See Doan & Waters, supra note 116, at 41 (“In the late nineteenth century a series of distinct ‘scientific,’ clinical and discursive practices established a new taxonomy of ‘deviant’ sexual behaviour predicated upon the presumed existence of a normative heterosexuality. ‘Sexual
understanding of “sodomy” as an episodic moral failing with the notion of a “pathology, even a disease” that warped the “degenerate’s” body and mind.

A pressing question, of course, was how to ascertain whether someone was an “invert.” Given this terminology, it is unsurprising that it “was widely assumed that a man who felt sexual desire for another man must be in some way female and that the signs of his femininity could be detected.” Such reasoning opened the door to even more intense scrutiny of individuals’ aesthetic choices than had occurred earlier in the century—which meant that everything from one’s dress to one’s style of writing was potential evidence of the “hotchpotch of moral, mental, and physical traits” that lurked behind the (more or less effective) “disguises” employed by the male homosexual.

The most readily available suspects among men were the fashion- and design-obsessed figures of the “dandy” and the “Aesthete.” Each had long been linked in the Anglo-American imagination with “effeminacy,” and

inversion” was initially the umbrella term for any activity that deviated from this norm; however, by the early twentieth century, the phrase became synonymous with homosexuality.

118. See Sinfield, supra note 56, at 99 (previously, morality and law had targeted not a certain type of person but a certain type of sexual act).


121. Id. at 45. See also Magnus Hirschfeld, Transvestities, in Sexology Uncensored: The Documents of Sexual Science, supra note 116, at 97, 99 (excerpt of Hirschfeld’s 1910 essay showing how adoption of feminine accoutrements had become pathologized by “scientists” and other “intellectuals” by the early twentieth century).

122. While this article focuses primarily on male homosexuality, a separate literature and conventional wisdom developed concerning his female counterpart. Notably, the “New Woman” was often accused not only of “degeneracy,” but of lesbianism as well. Angus McLaren, The Trials of Masculinity 32 (1997). For many, the male homosexual and the New Woman were effectively “mirrors” of each other. See Franz Meier, Oscar Wilde and the Myth of the Femme Fatale in Fin-de-Siècle Culture, in The Importance of Reinventing Oscar: Versions of Wilde During the Last 100 Years 117, 119 (Uwe Böker et al. eds., 2002).


124. See Sinfield, supra note 56, at 25–26 (“Effeminacy is founded in misogyny. Certain manners and behaviors are stigmatized by associating them with ‘the feminine’—which is perceived as weak, ineffectual and unsuited for the world of affairs. The terms were set by Aristotle who, in his discussion of continence and incontinence, opposes endurance and softness. ‘Now the man who is defective in respect of resistance to the things which most men both resist and resist successfully is soft and effeminate; for effeminacy too is a kind of softness; such a man trails his clock to avoid the pain of lifting it. The connotations in the Oxford English Dictionary are: ‘Womanish, unmanly, enervated, feeble; self-indulgent, voluptuous; unbecomingly delicate or over-refined’ (OED). The root idea is a man falling away from the purposeful reasonableness that is supposed to constitute manliness, into the laxity and weakness conventionally attributed to women. It is a way of stigmatizing deviation from proper manly and womanly stereotypes. The effeminate male is (1) ‘wrong’ and (2) inferior (female). The ‘masculine’ woman, conversely, is (1) ‘wrong’ and (2) impertinent (aspiring to manliness). The function of effeminacy, as a concept is to police sexual categories keeping them pure. The effects of such policing extend vastly beyond lesbians and gay men. As various recent commentators have shown, the whole order of sexuality

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even with potential acts of “sodomy,” but had not been widely associated with homosexuality as a more permanent and dangerous biological phenomenon. However, when scientific discourse on “sexual inversion” made its way into the popular American consciousness in the 1880s, the dandy, the aesthete, and the homosexual would effectively merge—due in no small part to the personas of famous individuals displaying traits supposedly common to each category.

Such individuals could be readily found among the leaders of the well-known 1880s art-appreciation advocacy movement known as “Aestheticism.” Because the figures associated with Aestheticism constitute a crucial link in the connotative cluster stigmatizing design (and, by association, design patents), it is necessary to discuss the ideology and its proponents in some detail. The overarching tenet of Aestheticism was “art for art’s sake,” the significance of which was to emphasize[] the autonomous value of art and regards preoccupations with morality, utility, realism and didacticism as irrelevant or inimical to artistic quality . . . . [The movement’s] paintings therefore aimed at a decorative effect through composition and harmonious colour and frequently through the depiction of richly patterned surfaces and luxurious objects.

The movement’s leaders were essentially self-appointed experts who disparaged what they considered to be insufficient appreciation among the public of the visual arrangement and effect of the elements of dress, interior design, and art. Aesthetes urged the Anglo-American public to make such decisions based solely on aesthetic considerations—a view that struck many as unorthodox, if not radical. After all, most middle- and upper-middle-class Americans in East Coast cities had selected the objects decorating their parlors with objects “that depended on [recent] technological developments, . . . expressing[] their sense of beauty and comfort in the styles of past times and places.” Indeed, widespread social norms had for decades dictated that “objects on the parlor table,” whatever their style, were appropriate only to the

and gender is pinioned by the fears and excitements that gather around the allegedly inappropriate distribution of gender categories.”).

125. See SINFIELD, supra note 56 at 27 (“Up to the time of the Wilde trials—far later than is widely supposed—it is unsafe to interpret effeminacy as defining of, or a signal of, same-sex passion.”) Consider this description of the sort of men who favored the use of cologne, published in 1830: “A man that is wrapped up in perfumes is surely a pitiable creature. This fashion which was once disgustingly prevalent, is now confined, in a great measure, to persons of vulgar and mean habits, who are not only heedless of their religious obligations, but ignorant of the customs of good society. Still, however, the folly is not wholly banished from even the better informed classes of mankind; and it is a hideous cruelty, that a gentleman of moderate fortune will keep in his desk, for the purpose of perfuming note-paper, a vial of perfume, the price of which would pay the house-rent of a poor peasant, in our provinces for a whole year.” THE AUTHOR OF “THE COLLEGIANS,” & C. [i.e., GERALD GRIFFIN], TALES ILLUSTRATIVE OF THE FIVE SENSES THEIR MECHANISM, USES AND GOVERNMENT, WITH MORAL AND EXPLANATORY INTRODUCTIONS 209 (London, Edward Bull, 1830). Among the many flaws listed, a penchant for “unnatural” acts is (tellingly) absent in this early era.


127. See STEVENSON, supra note 50, at 4.
extent they “reflected the seriousness Victorians brought to their entertainments.” As “many advice book authors cautioned,” parlors not conforming to conventional morality might “degenerate into scenes of ‘cheap and vulgar’ display.” Parlor decoration was appropriate only “if it had a serious purpose” and did not evoke a “period known for its immorality.”

However, Aestheticism and other forces were beginning to change the status quo, as “changes in thought and the material world were beginning to dilute the emulsifying power of seriousness”; by the 1880s, ideological and commercial publications alike “showed readers how they could disavow the popular taste” through reflective approaches to their acquisition of material possessions. English designer and early Aesthete Charles Eastlake, for example, received substantial notoriety for his widely circulated tracts calling for the public “to develop the artistic sense” in various ways. He recommended “that people look for quality objects in all lands,” as the “display of an Indian ginger jar or a Japanese fan could educate the eye by showing ‘good design and skillful workmanship’.”

Such exoticism carried many negative associations for many middle- and upper-middle-class Americans of the time period. But perhaps more difficult for these individuals to accept was Eastlake’s dictate that the public concern itself “with aestheticism [rather] than with Victorian-style seriousness.” Eastlake “never mentioned serious purpose” because “to him, an appreciation of art was good in itself.” And the Aesthetes’ conception of “art” was broad, indeed: “The term ‘art’ was self-consciously prefixed to ranges of furniture, pottery, and other household goods influenced by Aesthetic ideals, blurring distinctions between the fine arts and decorative arts”; “furniture, carpets, wall

128. Id. at 13.
129. Id. at 4.
130. Id. at 5, 7.
131. Id. at 25, 26.
132. Id. at 26.
133. See discussion SCHLERETH, supra note 51, at 123.
134. STEVENSON, supra note 50, at 26 (reciting one critic’s denouncing of homes he described as “shrines cluttered with French and German miracles of ugliness.”). The reference to “French and German” ugliness is notable for various reasons. More “exotic,” non-Western objects and design motifs typically found their way to the United States through countries like France and Germany, as did much pornography of the day. See id. at 15 (“No U.S. trade catalog offered suggestive or sexually teasing stereographs, but they were available on the street—most often imported from France and Germany for clandestine purpose.”). This dovetails with other stigmatized aspects of continental culture. See, e.g., PALLISTER, supra note 100, at 375–76 (“The entry of all foreign laces [into England] was excluded by law. ‘400,000 [pounds] have been sent out of the country during the last year,’ writes the ‘Edinburgh Advertiser’ of 1764, ‘to support our exiled countrymen in France, where they learn nothing but folly and extravagance.’”). Popular condemnation of foreign people and customs would take a sinister turn in the decades to come, as the U.S. economy and political landscape experienced turbulence that many sought to blame on immigration, see BEDERMAN, supra note 63, at 13, and public discourse on “nationalism” and “statecraft” became increasingly intertwined with xenophobic strains of eugenic thought. See Carolyn Burdett, Introduction to Part VI, Eugenics, in SEXOLOGY UNCENSORED: THE DOCUMENTS OF SEXUAL SCIENCE, supra note 116, at 165, 165–67.
135. STEVENSON, supra note 50, at 26–27.
136. Id. at 26–27.
coverings, pictures, and decorative items [should be] placed deliberately to enshrine the 'cult of beauty.'

Oscar Wilde was often described as “the supreme aesthete.” He would become associated on both sides of the Atlantic with (initially) a distinct philosophy on dress and design and (subsequently) a scandalous sexual deviance that would indelibly stamp the “decorative arts” with the stigma of “moral decay,” “degeneracy,” and “perversion.” Wilde achieved great fame in the United States during his 140-stop North American lecture tour in 1882, advertised as a campaign for the promotion of Aestheticism. The popular perception of his mission is reflected in the headlines of articles announcing his arrival in major East Coast cities, which include “The Aesthetic Bard” (Philadelphia Inquirer), “The Science of the Beautiful” (New York World), and “The Aesthetic Apostle” (Boston Globe).

This journalistic coverage of Wilde’s American speaking tour reveals widespread discussion—and even controversy—concerning the “supreme aesthete’s” unconventionally colorful and dramatic manner of dress and taste in décor. As social theorist Richard Sennett recounts: “When people commented on Oscar Wilde’s tastes in scarves and cravats, in the years before his homosexuality trial, they were wont to acknowledge his individuality and at the same time to remark that such tastes were a clear definition of how the ordinary gentleman ought not to appear.”

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139. Roy Morris, Jr., *Declaring His Genius: Oscar Wilde in North America* 2–3 (2013) (describing Wilde’s existing fame throughout North America when the celebrity writer arrived for his 140-lecture speaking tour in 1882, as well as their new “vision of [Wilde’s] intentionally affected preciosity in satin knee breeches. . . ”); *Oscar Wilde in America: The Interviews* 86 (Matthew Hofer & Gary Scharnhorst eds., 2010).

140. See Oscar Wilde in America: The Interviews, supra note 139, at 22, 31, 47.

141. See id. at 83, 88.

142. Sennett, supra note 61, at 191.
Figure 5. Napoleon Sarony, *Oscar Wilde* (1882) [cropped for fit]
To be sure, Eastlake and Wilde were not the only “Aesthetes,” nor were all Aesthetes from across the Atlantic. One prominent American-born Aesthete, for example, was Edward “Ned” Warren, the younger brother of prominent Boston lawyer Samuel Warren (whose firm partner was future Supreme Court Justice Louis Brandeis.) The Warren family’s biographer writes: “The 1870s and 1880s were a time when ‘aestheticism’ was an issue for everyone, and one that affected more than one’s experience of art and beauty. [In the United States, Ned Warren] was a figure in the aesthetic movement, indeed deserves to be considered one of its key examples.”143 The biographer goes on to assert, notably, that Ned Warren “illustrates a philistine cliche of the times, that Catholicism, aestheticism, paganism, and homosexuality were interdependent.”144

Aesthetes like Wilde and Warren were the target of jokes (and their sexual proclivities the subject of speculation) even before Wilde was tried and convicted of “gross indecency” in England in the mid-1890s.145 As art historians Pat Kirkham and Amy Ogata have recounted, even before the trials, the press had often “lampooned [Aesthetes] for an excessive and effeminate concern with taste and home decoration, self-absorption at the expense of wider issues, and associations with decadence.”146

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144. Id. at 49. See also id. at 72 (“[While at Harvard, Ned’s] chief desire was to get into the Porcellian Club, because Sam [his brother, the law-firm partner of future Supreme Court Justice Louis Brandeis] had done so; but Ned was an unlikely candidate because of his eccentric[ities]. . . . (‘Ned was known for his neckties.’”).
145. Thomas Prasch, Clashing Greeks and Victorian Culture Wars: Euripides vs. Aristophanes in Late-Victorian Discourse, 54 VICTORIAN STUDIES 464, 467 (2012) (“[I]n 1894, before Wilde’s arrest and trials, he was at the height of his fame . . . . [T]he homosexual ‘panic’ . . . was already beginning to operate before Wilde’s arrests . . . with male homosexuality firmly coalescing into an image of the decadent aristocrat . . . .”) (emphasis added); accord ROSY AINDOW, DRESS AND IDENTITY IN BRITISH LITERARY CULTURE, 1870–1914, 60 (2010) (“Where men do appear in [elaborate] fashions in the late nineteenth century, they are critiqued for being effeminate.”) Wilde was technically charged only with “indecency,” carrying a two-year prison sentence (perhaps because of problems obtaining proof of “sodomy,” which carried a penalty of lifetime imprisonment.) However, the widespread understanding that he had effectively been accused of homosexual conduct is reflected in commentary both during and after the trial. See, e.g., CHARLES GROLLEAU, THE TRIAL OF OSCAR WILDE 13–14 (1906) (“Oscar Wilde, bon vivant, man of letters, arbiter of literary fashion, stood at the bar of public opinion, a wretch guilty of crimes against which the body recoils and the mind revolts.”).
146. Kirkham & Ogata, supra note 137, at 429–31. See also WILSON, supra note 88, at 6 (“To [act] fashionably is both to stand out and to merge with the crowd, to lay claim to the exclusive and to follow the herd . . . . [D]espite its apparent irrationality, fashion cements social solidarity and imposes group norms, while deviations in dress are usually experienced as shocking and disturbing.”).
Not until Wilde’s 1895 internationally followed trials, however, did “male homosexuality firmly coalesce[e] into an image of the decadent aristocrat . . . ”.147 It was through the Wilde trials that the “homosexual undercurrent of the Aesthetic Movement was cruelly exposed.”148 This linking of Wilde’s professional, artistic, and sexual undertakings was a major driving force in the formation, in the middle-class-centered Anglo-American consciousness, of a perceived “nexus of effeminacy, leisure, idleness, immorality, luxury, insouciance, decadence and aestheticism.”149

Men’s aesthetic affinities and their sexual proclivities were henceforth linked in the public imagination. With surprising speed and rhetorical vigor, the values held dear by the Aestheticism movement—in broad strokes, an appreciation of the beauty of everyday design—were rebuked.150 One commentator, publishing in 1906 a cautionary tale-cum-amateur psychological analysis of Wilde, drew an explicit connection between the playwright’s penchant for the unusual in apparel and decoration, his vanity, and his “wretched” sexuality.151 Wilde’s love of novelty served as a metaphor for his popularly imagined physical, moral, and spiritual “disease.”152 His “pin[ing] for strange pas-

147. Prasch, supra note 145, at 467.
148. See ROBB, supra note 120, at 36.
149. SINFIELD, supra note 51, at 3.
150. See Kirkham & Ogata, supra note 137, at 429–31 (appreciation of design “lost much of its fashionability in the mid-1890s with the sensationalist media coverage of Wilde’s trial for gross indecency, in which he was found guilty”).
151. GROLLEAU, supra note 145, at xii.
152. See id. at 5.
sions, new sensations” purportedly reflected the “whole awful truth”—that “[p]erverted passions consumed the fire of his being.”

Even before Wilde’s prosecution in 1895, few city-dwelling adults on the East Coast of the United States had been unfamiliar with “the supreme aesthete’s” tastes, artistic philosophies, and flamboyant persona. After 1895, large segments of the American public quite easily “mapped” Wilde’s “depravity” of body and spirit onto the aesthetic and types of designed objects already associated with him. As Regenia Gagnier writes:

In Wilde’s trials in 1895, his perceived position as both spokesperson for art and example of sexual deviant resulted in a remarkable elision in the public domain of art and sexuality and thus in the creation of a new category of aestheticism . . . . As his works were given equal time with his sexual practices during the trials, aestheticism came to represent a distinct and private realm of art and sexuality . . . . Thus aestheticism came to mean the irrational in both productive (art) and reproductive (sexuality) realms: an indication of the art world’s divorce from middle-class life.

153. Id. at 5.

Rumour had been busy with the name of Oscar Wilde for a long time before the whole awful truth became known . . . . But even those who were still proud to rank him among their friends did know not how far he had wilfully drawn himself into the web of disgrace. Much that seemed strange and unaccountable was attributed to his well-known love of pose. Men shrugged their shoulders and declared that ‘Wilde meant no harm.’ . . . Men of such parts could not be judged by ordinary standards.

Id. at 6–7.

154. See Prasch, supra note 145, at 467.

155. See RUSSETT, supra note 29, at 5–6, 7 (“Finding ‘manifestations of a universal law’ had become ‘the intellectual pastime of the nineteenth century.’ Reformers and conservatives alike searched for a new foundation for social and political action in the face of the weakening of religious belief and the growth of social unrest . . . . Anatomists, physiologists, and psychologists grew increasingly concerned to classify individuals according to types with sharply differing constitutions and aptitudes.”). See also McLAREN, supra note 122, at 29–31 (discussing turn-of-the-century public paranoia concerning the figure of the male homosexual as “both the cause and effect of the growing fear of the male ‘other’ ”).

156. See generally GROLLEAU, supra note 145 (retroactively “feminizing” the artistic creations of Oscar Wilde in book providing inaccurate and incomplete account of the trial it purports to recount); cf. LOOS, supra note 94, at 22 ("[O]rmament is no longer a natural product of our culture, so that it is a phenomenon either of backwardness or degeneration . . . . [T]he modern ornamentalist is a straggler or a pathological phenomenon.")

In this manner, the prevailing connotative cluster surrounding ornament and decoration, championed by Aestheticism and Wilde in particular, decisively expanded in mid-1890s America to include “moral decay” and “perversion.” Both perceived homosexuals and the activities and objects associates.

158. See SHOWALTER, supra note 51, at 150 (quoting letter from Romain Rolland to Richard Strauss) (“Oscar Wilde’s Salome is not worthy of you. Wilde’s Salome and all who surround her, save only that brute of a Jochanan, are unhealthy, unclean, hysterical or alcoholic, oozing with a perfumed and mundane corruption. . . .”); Ruth Robbins, “A Very Curious Construction”: Masculinity and the Poetry of A. E. Housman and Oscar Wilde, in CULTURAL POLITICS AT THE FIN DE SIÈCLE 137, 146 (Sally Ledger & Scott McCracken eds., 1995) (“Wilde did dare to speak the name of sexual pleasure [in his works], and got away with it until the point where the word and the deed were ‘proved’ by a court of law to be intimately connected.”) (internal citations omitted).

159. DOUGLAS & ISHERWOOD, supra note 83, at xxiv (“Social life is a matter of alignments, for and against, and for signaling alignments goods are like flags . . . . It turns out that everything depends on how the people are organized, the whole community being the signal box.”)
Design and Deviance: Patent as Symbol, Rhetoric as Metric

ated with them were henceforth subjected to aesthetic surveillance and legal consequences. Any man who, like Wilde, evinced an appreciation for “phatic” forms of beauty—especially decoration, adornment, and ornamentation, especially in dress, items of home décor, and related objects and materials—might be condemned and persecuted as a “deviant.”

160. See Robbins, supra note 158, at 137 (“Wilde’s trial may be understood as the end of an era”). See also ROBB, supra note 120, at 39 (“[Conventional notions about homosexuality] have little to tell us about the Victorian age. They belong, not to the maligned 19th century, but to the more openly repressive age that began with the death of Oscar Wilde in 1900.”).

161. See HOWALTER, supra note 51, at 3 (quoting RICHARD DELLAMORE, MASCULINE DESIRE 133 (1990)) (men in power responded to this “crisis of masculinity” in part by seizing “occasions when gender roles [could be] ‘publicly, even spectacularly, encoded and enforced.’”); see also Robbins, supra note 158, at 138 (“The fear of an ending aroused by the term fin de siècle is intimately related to notions of multiplicity: above all the fear that the anarchy of multiple interpretations will replace the safety of one view of the world. The events of 1895 were of crucial importance here. Wilde’s downfall dramatized the conflict between those who were prepared to live at the margins, to live simultaneously several different versions of life, and those who wished to use the full ideological weight of church and state to enforce nineteenth-century sexual norms.”).

162. See Yvette Greslé, Strategies of Veiling Same-Sex Desire and Its Public Consumption: Aubrey Beardsley’s Illustration of Oscar Wilde’s 1894 Salome, 70 DE ARTE 22, 35 (“[P]erceptions of Wilde as a homosexual archetype are so pervasive that almost any interpretation of his work invites the scholar to confront the issues surrounding the construction of this identity. Wilde’s trials took place at a particularly significant moment for constructs of male same-sex identity. Historians working within Foucauldian and feminist frameworks perceive the late nineteenth century as a period crucial for the definition and conceptualisation of male same-sex practices. They argue that burgeoning scientific, legal, social, cultural and popular discourses attempted to define and categorise sexual behaviour and roles around what was perceived to be appropriate and normal. The canon was heterosexual reproductive intercourse constituted as ‘normal’ and ‘natural’ and validated because of its procreative function. Within this canon a binary was established within the hegemonic infrastructure which constructed men as the superior sex intellectually, morally, socially, politically and physically. In the last two decades of the nineteenth century the emergence of the categories ‘New Woman’ and ‘homosexual’ explicitly threatened to disrupt the cohesiveness of this binary.”) 163. See Robbins, supra note 158, at 143 (explaining that “for Wilde, ‘all art is essentially useless’”—and that based on the mores of the time, “an effeminate use of language would be one which preferred the phatic to the functional.”).

164. SINFIELD, supra note 56, at 41.


166. See LOOS, supra note 94, at 22 (“[T]he modern ornamentalist is a straggler or a pathological phenomenon.”).

167. See ELIZABETH E. GUFEY, RETRO: THE CULTURE OF REVIVAL 34 (2006) (“In Britain, the [flowery Art Nouveau] style was increasingly associated with aestheticism and particularly with Oscar Wilde, who had been imprisoned for homosexuality in 1895. ‘Pillory, L’Art Nouveau at South Kensington,’ an article published in 1901 in the Architectural Review, dubbed the style a ‘fantastic malady.’ Interviewed in a Magazine of Art article in 1904, architect Charles Voysey identified Art Nouveau with ‘a debauch of sensuous feeling,’ calling the style ‘distinctly unhealthy and revolting.’ By 1930 the American historian Lewis Mumford recalled Art Nouveau as dominated by a ‘meaningless stylistic exuberance.’ When John Betjeman surveyed the style in the same year he admitted that it had produced ‘many a hideous little side table, many a sickly front door.’”); see also Greslé, supra note 162, at 34 (“It is significant that, at the time of Wilde’s trials, [famous Art Nouveau illustrator Aubrey] Beardsley and Wilde were conflated in the popular imagination . . .”); TREASURY OF ART NOUVEAU DESIGN & ORNAMENT (Dover 1980) (illustrations selected by Carol Belanger Grafton) (“Ornament is the essence of Art Nouveau,” which “conce-
trated on the ornamental and decorative potential of the flowing line in painting, printing, wallpaper, and [other] applied arts. Hundreds of thousands of carefully wrought designs embellished books, bookplates, furniture, and appliances.” (quoted from the publisher’s description on the back cover). While the associations among Wilde, Aestheticism, and ornament gave rise to rapid changes in the normative contours of Anglo-American masculinity, they did not immediately affect the output of the designed domestic goods, which were purchased primarily by women, a group far less vulnerable to the sexuality-focused scrutiny of the post-1895 era. Further, one would not expect to see Art Nouveau’s stigma exerting a strong influence outside the realm of the “decorative arts”—for example, in material covered by copyright law, as opposed to design-patent law—as “the impact of Art Nouveau on the fine arts was ambiguous and often only peripheral.” ALASTAIR DUNCAN, ART NOUVEAU 79 (1994). This is because Art Nouveau “was largely a way of designing, rather than painting per se, and was therefore more readily expressed by plastic treatment” than on flat surfaces like canvas. Id.
Figure 9. Closing Scene at the Old Bailey: Trial of Oscar Wilde (1895)
Colman

In short, by the turn of the twentieth century, ornament, appearance, aesthetics, morality, gender, sexuality, health, and social order had grown inextricably intertwined in the cultural imagination of the politically dominant segments of American society. At that point, it struck many members of society as appropriate, if not imperative, for the law to step in—and it did, employing various tools to acknowledge and endorse values aligned with this newly crystallized connotative cluster. Among those tools, we will see, was design-patent doctrine, as litigation over decorative and ornamental design provided both a cognitive lens and a public platform for judges to implement prevailing social norms through their adjudication of disputes over material carrying enormous symbolic power.168

IV. FEDERAL JUDGES AND GENDERED NOTIONS OF MORALITY

Judges, no less than laypeople, are susceptible to the conceptual structures and social norms governing most aspects of our day-to-day reasoning and behavior.169 Indeed, the members of the judiciary preserve their institutional legitimacy in part by implementing prevailing norms and values through their rulings.170 As Cass Sunstein explains, judicial decisions invariably reflect biases mediating the interpretation and application of legal "rules":

168. See De Grazia, supra note 13, at 4 ("[The period in question witnessed] the transformation of goods from being relatively static symbols around which hierarchies were ordered to being more directly constitutive of class, social status, and personal identity . . . . [G]ender roles have inflected this dynamic of change and have been significantly inflected by it."); Robbins, supra note 158, at 137 ("[When addressing] cultural boundaries and their enforcement in binary oppositions [at the fin de siècle,] masculinity [is an appropriate] focus, because masculinity’s dominant ideological position means that the boundaries which define it are most in need of policing."). See also De Grazia, supra note 13, at 9 ("[There has long been] a bias in Anglo-American studies that consumption is generally construed as individual rather than social, to the neglect of the numerous ways in which ruling institutions define practices and standards of consumption [as when] they define appropriate standards of consumption with statistics and property laws . . . . Indeed, it could be said that the state, in the process of allocating resources, legitimating property, and defining social obligations, establishes the very notion of private as opposed to public consumption. By the same token, the state is central to the activity of gendering consumption.").

169. See WINTER, supra note 23; Hutchinson & Cohen, supra note 18, at 21–22. To be sure, there are certain widespread conventions in the American legal system that could potentially preclude a “perfect mapping” of social and cultural circumstances onto judicial behavior—the institutional practice of stare decisis being the most obvious example of an intervening-con-deflecting mechanism. However, the real-life impact of such constraints may—and, as shown below, do—vary wildly. See Jeremy Waldron, Stare Decisis and the Rule of Law: A Layered Approach, 111 Mich. L. Rev. 1, 2, 12 (2012) ("How much uncertainty [remains despite the convention of stare decisis—how much damage it does to the basis of predictability—is a matter of degree and depends on all sorts of surrounding circumstances . . . .").

170. See discussion MARY DOUGLAS, HOW INSTITUTIONS THINK 46 (1986) (theorizing behavior of “legitimating individuals” within institutions, including “judges,” based on view that “most established institutions, if challenged, are able to rest their claims to legitimacy on their fit with the nature of the universe.”).
We might be tempted to suppose that people can avoid expressive concerns entirely and that it is possible to assess law solely on the basis of consequences—that an open-ended, ‘all things considered’ inquiry into consequences is a feasible way of evaluating legal rules. But this is not actually possible. The effects of any legal rule can be described in an infinite number of ways. Any particular characterization or accounting of consequences will rest not on some depiction of the brute facts; instead it will be mediated by a set of (often tacit) norms determining how to describe or conceive of consequences.\(^{171}\)

One way legal actors give effect to prevailing social norms is through the symbolic, metaphorical treatment of the subject matter in the disputes before them.\(^{172}\) Such symbolism is effectuated through—and can be reconstructed through an examination of—word choice, thematic focus, and other rhetorical techniques.\(^{173}\) Thus, as an affinity for design, particularly fashion(able) design, grew increasingly feminized and morally stigmatized in the mid-to-late nineteenth century, federal-court judges in major cities on the East Coast of the United States would take note and modify their personal and professional conduct accordingly.\(^ {174}\)

No white adult male of turn-of-the-century America was immune from the pressures exerted by the gendered connotative clusters discussed above; however, federal judges were under particular—and particularly visible—pressure to endorse and implement this value system. The educated and moneyed, especially in major East Coast cities like Boston and New York, were those most likely to be appointed to prestigious judgships on the Supreme Court and the

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172. \textit{See} discussion LAKOFF & JOHNSON, \textit{ supra} note 24, at 115–16 ("[M]etaphor pervades our normal conceptual system. Because so many of the concepts that are important to use are either abstract or not clearly delineated in our experience (the emotions, ideas, time, etc.), we need to get a grasp on them by means of other concepts that we understand in clearer terms (spatial orientations, objects, etc.) This need leads to metaphorical definitions in our conceptual system [and indeed, metaphor plays an ‘extensive role’] in the way we function, the way we conceptualize our experience, and the way we speak. Most of [the relevant] evidence comes from language—from the meanings of words and phrases and from the way humans make sense of their experiences . . . . [Thus, h]ints of the existence of such general metaphors may be given in the secondary or tertiary senses of other words . . . . [Language thus provides] data that can lead to general principles of understanding . . . . The principal issue for such an account of definition is what gets defined and what does the defining?").
173. \textit{See} Austin Sarat et al., \textit{Introduction: On the Origins and Prospects of the Humanistic Study of Law, in LAW AND THE HUMANITIES: AN INTRODUCTION} 1, 4 (Austin Sarat et al. eds., 2010) ("Law is a language and language matters. [It is] a rhetorical practice—not just in the sense of an art of persuasion, but of a disciplined, textured, self-directed habit of reading, speaking and above all, writing, that has at its root a critical understanding of the links among language, consciousness, and power . . . . [In short, w]hat we say matters and is indissociably bound up with the forms in which we say it.").
174. \textit{See}, e.g., Lawrence Baum, \textit{Case Selection and Decisionmaking in the U.S. Supreme Court}, 27 LAW & SOC’Y Rev. 443, 446 (1993) ("[S]cholars have shown a strong relationship between the policy positions justices take in cases and external evidence of their preferences.")
then-newly formed federal circuit courts of appeals. These same individuals’ education and financial success rendered them more vulnerable to charges of “deviance” from championed middle-class values—including, but not limited to, normative sexual practices—in part because of the strong class component of turn-of-the-century conceptions of masculinity. Judges’ emphatic implementation of prevailing social norms both affirmed and perpetuated—or at least, conveyed that the performer was the sort of man who would make decisions most likely to perpetuate—prevailing social norms and values, simultaneously maximizing the likelihood that the ruling(s) in question would preserve or even bolster the institutional legitimacy and apparent moral integrity of the federal judiciary. While one might initially write off patents—and specifically, design patents—as an area of law in which gendered social norms and notions of sexual morality are unlikely to play a substantial role, a close study of federal appellate decisions will reveal the contrary.

Design patents, like “utility” patents, were and are an exclusively federal matter, making the Supreme Court the (theoretical) court of last resort on questions of design-patent doctrine. Until roughly the turn of the century, the Court did play that role—until it effectively abdicated it to the Second Circuit, as discussed below. Thus, it makes sense to start with a portrait of the Justices

175. See Lawrence M. Friedman, A History of American Law 306 et seq. (3d ed. 2004) (noting that U.S. legal profession at the turn of the twentieth century was “stratified more by social class and training than along geographical lines”).

176. See Chauncey, supra note 119, at 60.

177. McClaren, supra note 122, at 29 (noting popular perception that much of the purported “erosion of the natural gender boundaries was attributed to the ‘decadence’ of the upper classes”).

178. See Sinfield, supra note 56, at 63 (“[T]he more precarious the actuality, the more assertive the ideology; manliness was always fragile. ‘Its existence,’ William Acton wrote in 1857, ‘seems necessary to give a man that consciousness of his dignity, of his character as head and ruler, and of his importance, which is absolutely essential to the well-being of the family, and through it, society itself.’ With so much hanging upon it, manliness was continually at issue.”) (internal footnote omitted).

179. This dynamic is especially pronounced in late nineteenth-century Supreme Court decisions in which judges implicitly claimed the moral high ground through the vilification of legislatures as immoral or derelict or both in their duties to the public. See, e.g., Boston Beer Co. v. State of Massachusetts, 97 U.S. 25, 33 (1877) (“Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects.”); Boyd v. Alabama, 94 U.S. 645, 650 (1876) (Field, J.) (no legislative body can “restrain the power of a subsequent legislature to legislate for the public welfare, and to that end to suppress any and all practices tending to corrupt the public morals”).

180. See discussion Charles Goodwin & Marjorie Harness Goodwin, Seeing as Situated Activity: Formulating Places, in Cognition and Communication at Work 61, 90 (Yrjo Engeström & David Middleton eds., 1996) (“The mundane routine work of large organizations as strategic a site as rituals in traditional societies for the anthropological analysis of culture.”) (internal citations omitted.); Kuchta, supra note 96, at 9 (“Studying masculinity in political culture . . . means looking at the ways in which political legitimacy [has been] defined in part by issues of character—by the personal integrity and manliness of those claiming a place in the political arena.”).
who laid the foundational precedent of design-patent jurisprudence. Legal historian Lawrence Friedman paints the following picture of the judges on the Supreme Court—similar in demographic respects and ideological inclinations to most federal judges:

What sort of men sat on [the Supreme] Court? And the answer is: middle-aged men, fairly conservative; churchgoing men who believed in traditional values and clean living; honorable men, according to their lights, men who worried about the fate of their country, and who were frightened of the tidal waves of social change that they saw washing over the United States.181

As Friedman recounts, when Justices at the turn-of-the-century upheld progressive economic legislation, it was where such laws “stood for decency and traditional values,” including “family values, domesticity, and motherhood,” and where such legislation represented a bulwark “against decay” and “vice.”182 When the Court upheld a women’s labor law in its 1908 decision in Muller v. Oregon, for example, the Justices reasoned—based in large part on their reliance on “widespread and long-continued belief” and “judicial cognizance of all matters of general knowledge,” that “woman has always been dependent on man,” and that “healthy mothers are essential to vigorous offspring, the physical wellbeing of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.”183

Such statements were far more normative than descriptive; the Supreme Court in Muller was in fact painting a picture of a society that was rapidly disappearing. Their stubbornly retrograde view of “the public good” was that of Justices who were, in Friedman’s words, “terrified of radical winds blowing in from across the Atlantic.”184 The members of the Court were a “soundly upper middle class” group, and “[w]hat they feared the most, it seems, was excess.”185

The Justices of the Supreme Court were not anomalous in this respect. Muller reflects an ideology “representative of [that held by judges] in both the state and federal courts that positioned the legal rights of individuals as a bar-

182. Id. at 22.
183. 208 U.S. 412 (1908). (These quotations are taken from various parts of Muller.)
184. See FRIEDMAN, 20TH CENTURY, supra note 181, at 23. Judicial fear and stigmatizing of the “foreign” has been a recurring theme in American jurisprudence. For the notion of “falsity” associated with the Orient, see W.A. Sheaffer Pen Co. v. Worth Featherweight Pen Co., 41 F.2d 820, 821 (S.D.N.Y. 1930) (Woolsey, J.) (referring to knockoff of popular pen as a “Chinese copy”). Consider also the 2003 Supreme Court case of Lawrence v. Texas, 539 U.S. 558, in which a majority of the Court struck down as unconstitutional a Texas “sodomy” prohibition insofar as it purported to regulate the private sexual conduct of consenting adults. Justice Scalia dissented vehemently, arguing (perhaps unaware of the longue durée of the relevant themes in Anglo-American cultural history) that the Court “should not impose foreign moods, fads, or fashions on Americans.” Id. at 598 (internal citation omitted).
185. See FRIEDMAN, 20TH CENTURY, supra note 181, at 23. This fear likely stemmed in part from the traditional association between class, ornament, and decadence. See discussion supra Part II.
rier to efforts by state and federal government to promote the public good.”

And, importantly, the degree of federal courts’ “say” over the “public good” was broader than ever before, encompassing the regulation of sexuality. Indeed, even in the patent arena, federal judges saw no substantive or jurisdictional obstacle to deciding cases in a manner that promoted “the morals, health, or good order of society.”

Friedman sums up the landscape by explaining that American federal judges of the turn-of-the-century “simply reacted [to the cases before them] in the way that respectable, moderate conservatives of their day would naturally react.”

This included policing the law, through their decisions, for the preservation of the “clean and wholesome,” for any “motive dominating the legislature than the purpose to [serve] the public health or welfare,” and for anything that would “pervert . . . the natural outcome of a dominant opinion” or otherwise controvert “traditions of our people and law.” In many cases, it was simply “self-evident”—and not only to Supreme Court Justices—that particular outcomes in disputes raising “moral” questions followed from “the nature of things.”


187. See id. at 148–50 (developments in post-Civil War era reflected widespread “notion that the federal courts could intervene” in a broader range of cases than ever before). Cf. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, 1 (1977) (“What dramatically distinguished nineteenth century law from its eighteenth century counterpart from the extent to which common law judges came to play a central role in directing the source of social change.”); id. at 2 (“It was as clear to laymen as it was to lawyers that the nature of American institutions, whether economic, social, or political, was largely to be determined by the judges. In such a period, questions of private law were seen and considered as questions of social policy. Indeed, judges gradually began to shape common law doctrine with an increasing awareness that the impact of a decision extended far beyond the case before them [and] . . . . were led to frame general doctrines based on a conscious consideration of social and economic policies.”)

188. See generally JESSICA R. PILEY, POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI (2015) (arguing that the Court’s upholding of the Mann Act reinforced traditional conservative views of sex such as chastity before marriage for women and faithfulness for husbands and fathers).

189. See Nat’l Automatic Device v. Lloyd, 40 F. 89, 89–90 (N.D. Ill. 1889) (“The machine in question is only used for gambling purposes. The law of the United States only authorizes the issue of a patent for a new and useful invention, and in an early case on that subject (Bedford v. Brut., 1 Mason, 302) it was held that the word ‘useful,’ as used in this statute, means such an invention as may be applied to some beneficial use in society, in contrast to an invention which is injurious to the morals, health, or good order of society, and the principle thus enunciated has been uniformly applied ever since.”) (emphasis added); Scott & Williams v. Aristo Hosiery Co., 7 F.2d 1003, 1004 (2d Cir. 1925) (IP rights not enforced because product deemed deceptive).

190. See FRIEDMAN, 20TH CENTURY, supra note 181, at 24.


192. See, e.g., People v. Abbot, 19 Wend. 192, 196 (N.Y. Sup. Ct. 1838) (Cowen, J.) (“No court can overrule the law of human nature, which declares that one who has already started on the road of prostitution, would be less reluctant to pursue her way, than another who yet remains at her home of innocence and looks upon such a career with horror.”)

193. Coppage v. Kansas, 236 U.S. 1, 17 (1914) (emphasis added). Even Justice Holmes, in his 1918 critique of those he disparaged as “naïve” proponents of “natural law,” carved out certain
Thus, male judges of the time, making use of the substantial moral discretion they possessed in shaping the law, could—and did—distance themselves from design patents, and by extension, design, thereby confirming their own normatively desirable identity and helping to avoid (real or imagined) scrutiny in an era of growing suspicion about the sexuality of—potentially—any man. Leading decisions in turn-of-the-century design-patent cases reveal that the sociocultural dynamics described above played a significant role in judicial thinking and behavior. While not the only (or even the most direct or effective) means of “performing” prevailing gender and sexuality norms, opinions issued in design-patent disputes issued by leading federal judges between roughly aspects of civilization—including, most notably for present purposes, “some form of permanent association between the sexes,” as part of the inherent order of societies rather than culturally contingent. See Oliver Wendell Holmes, Natural Law, 32 HARV. L. REV. 40, 41 (1918) (“The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere. No doubt it is true that, so far as we can see ahead, some arrangements and the rudiments of familiar institutions seem to be necessary elements in any society that may spring from our own and that would seem to us to be civilized [including] some form of permanent association between the sexes.”) (emphasis added.) Notably, a commentator praising Holmes’ article the following year linked the Justice’s view to the “philosophy of revolution based upon the biological law of Natural Selection.” Boyd E. Boyd, Justice Holmes on Natural Law and the Moral Ideal, 29 INT’L J. ETHICS 397, 397 (1919). Accord Russett, supra note 29 (on Victorian use of “scientism”).

194. See, e.g., Champion v. Ames, 188 U.S. 321 (1903) (shaping Commerce Clause doctrine based in part on the purported moral damage inflicted by gambling); Rosen v. United States, 161 U.S. 29 (1896) (reflecting outcome consistent with majority’s hostility toward “obscene” material); Holy Trinity Church v. United States, 143 U.S. 457 (1892) (giving effect to Court’s strong religious impulses, in contravention of plain language of statute in question).

195. See Robbins, supra note 158, at 141–42 (“How does a man write in such a way as to ensure that his audience is in no doubt about his ‘manliness’? There is no precise formula, but the choices of form and matter, the how and the what in writing, and the context in which the writing takes place, provide some clues. They must be chosen in order to reflect the expected virtues of masculinity, now [as of the fin de siècle] being defined not as adult qualities, but in opposition to femininity.”).

196. See Kuchta, supra note 96, at 7 (“Manners and material culture gave shape to ideological processes; material signs formed and informed systems of power, rather than standing outside them in some exterior symbolic realm. . . . Thus while ideas of masculine character were constructed by changing political ideologies, political ideologies in turn were constructed around changing notions of character.”).

197. As historian George Chauncey recounts: “A sympathetic and unusually well informed doctor writing in 1918 confirmed the validity of such concerns, noting that in respectable society, ‘the accusation of perversity [homosexuality] . . . means ruin.’” Chauncey, supra note 119, at 385 n.29 (quoting E.S. Shepherd, Contribution to the Study of Intermediacy, 14 AM. J. UROLOGY & SEXOLOGY 242 (1918)). This stigma certainly applied long before 1918, as illustrated by numerous primary sources collected by Chauncey. See id. at 44. Whether the nature of such “ruin” was legal (as in the case of Oscar Wilde) or merely “social” mattered little, for the result was the same: loss of status and power in mainstream society. Those deemed homosexual effectively “forfeited their privileged status as men.” Id. at 58; 59. Further, being married did not shield one from scrutiny; Oscar Wilde himself was widely known married and even fathered multiple children, as did many homosexuals of the era. See Cohen, supra note 72, at 94–96.
1870 and 1930 made increasing use of symbolic, allegorical, lexical, and other techniques to visibly endorse the values of the politically dominant segments of American society. Judges could thereby—whether consciously or not—contribute to a desirable construction of others’ perceptions of them and simultaneously rule in a manner that would ostensibly promote a specific vision of “public order,” the “public interest,” and “the good of the community.”

In Part 2 of this series, I will engage in a close reading of influential judicial decisions on issues of critical importance to design-patent law—particularly, in appeals decided by the judges of the Second Circuit, who sat in the American design capital of New York City, and whose rhetoric and manipulation of design-patent doctrine strongly influenced the direction of the law in other circuit courts when they eventually came to rule on the same or similar issues. As my examination will reveal, these judges implemented social norms concerning design, along with judicial concerns about personal and institutional legitimacy, in a manner that strongly influenced both doctrine and outcomes, and gradually eliminated design patents as a viable tool for advancing claims of intellectual property infringement.

198. JERRY D. MOORE, VISIONS OF CULTURE: AN INTRODUCTION TO ANTHROPOLOGICAL THEORIES AND THEORISTS 285 (4th ed. 2012) (“[C]ulture is symbolic and meaningful, symbolic systems provide guidelines for action, and the action is often directed to central contradictions of social life . . . . Rituals are a class of symbolic systems.”).
199. See GARY WATT, DRESS, LAW, AND NAKED TRUTH: A CULTURAL STUDY OF FASHION AND FORM 5 (2013) (“[W]ithin civil society, dress and adornment mediate between the bare human individual and the social group in a way that parallels law’s function as a mediator between the individual and society. It is therefore plausible to argue that dress is not merely an image of law’s functions of social communication and social regulation, but that it might occupy a cultural locus identical with law, so that dress becomes not merely correspondent with law but potentially cooperative and competitive with law.”
200. See Sarat et al., supra note 173, at 4 (“[W]hat we say matters and is indissociably bound up with the forms in which we say it.”).
201. See MARY DOUGLAS, PURITY AND DANGER 123 (rev. ed. Routledge 2002) (1966) (“Some powers are exerted on behalf of the social structure; they protect society from malefactors against whom their danger is directed. Their use must be approved by all good men . . . . [W]here the social system explicitly recognizes positions of authority, those holding such positions are endowed with explicit spiritual power, controlled, conscious, external and approved—powers to bless or curse.”)
202. See MOORE, supra note 198, at 288 (“Most importantly, key scenarios are not invariant codes because they are employed by social actors who—sometimes in a calculated fashion, other times unthinkingly—may emphasize some cultural schemes, downplay others, or actively modify the key scenarios. This entire dynamic realm comprises practice.”) (emphasis added) (internal citations omitted).
203. See CHAUncEY, supra note 119, at 100 (“[N]ormal’ men began to define their difference from queers on the basis of their renunciation of any sentiments or behavior that might be marked as homosexual.”)
204. The word “order” was rich in semantic content during the relevant time period, linked to notions of both efficiency and morality. See, e.g., Kenyon v. People, 26 N.Y. 203, 209 (1863) (“The character of the house [as a brothel] could not be shown by general reputation. That a house is disorderly, is to be proven by particular facts.”) (emphasis added).
205. FRIEDMAN, 20TH CENTURY, supra note 181, at 17.
206. Id. at 24.
207. Colman, Part 2, supra note 6.
ABSTRACT: This project reveals the unrecognized power of gender and sexuality norms in the deep discourse of pivotal American case law on design patents. In Part 1, I showed that late nineteenth-century cultural developments in the urban Northeast gave rise to a stigma surrounding the “ornamental” and “decorative” works under the then-exclusive purview of design-patent protection. Among the politically dominant segments of American society, the creation, appreciation, and consumption of design “for its own sake” grew increasingly intertwined with notions of decadence, effeminacy, and sexual “deviance.” In Part 2, I now examine influential design-patent decisions from the 1870s through the 1930s against that cultural backdrop. My close reading of these decisions will demonstrate that federal judges, particularly in pivotal cases decided by the Second Circuit, increasingly used design-patent disputes as a vehicle for the performance and endorsement of gendered values. The resulting doctrine relegated design patents to near-total irrelevance as a viable form of intellectual property protection for a large and crucial portion of the twentieth century.


[In cases of extreme sexual “abnormality” of the “contrary” or “inverted” variety,] men are females in feeling; . . . The [“abnormal”] boy . . . likes to cook, sew, knit, and develops taste in female toilettes . . . As he grows older he eschews smoking, drinking, and manly sports, and, on the contrary, finds pleasure in adornment of person, art, belles-lettres, etc., even to the extent of giving himself entirely to the cultivation of the beautiful.”

—Dr. Richard von Krafft-Ebing

Colman

Most intellectual property scholars will readily agree that the American design patent, “[l]ong neglected in practice and academic scholarship,” has recently “exploded in importance as a result both of recent changes in the law and high-profile cases.” But while commentators have begun to pay attention to the reemergence of design patents, there remains surprisingly little scholarship on their multi-decade period of neglect—and virtually no literature situating design patent law’s temporary but severe decline in its sociocultural context. Parts 1 and 2 of this two-article series, to be followed by a scholarly monograph, take much-needed steps toward remedying this curious omission.

As recounted in Part 1, Congress created design-patent protection in 1842, providing for exclusive rights in “any new and original shape or configuration of any article of manufacture.” The years that followed saw the maturation of both American design itself and formal guidance on the rights available therein, with the publication in the 1870s and 1880s of specialized legal treatises and Supreme Court decisions addressing myriad questions of design-patent doctrine. Then something happened. Federal courts increasingly wove into design-patent decisions patterns of reasoning that served to symbolically distance the presiding judges from the endeavor and products of design and the patents dedicated thereto. The Supreme Court grew reluctant to hear appeals in cases hinging on substantive questions of design-patent law—and, after 1895, essentially “opted out” of the area altogether. Circuit-court judges, first tentatively and then zealously (as it became apparent that the Supreme Court would not intervene), played fast and loose with controlling precedent, issuing numerous decisions characterized by rhetoric disparaging “ornament” and doctrinal modifications stacking the deck against design patents. Accordingly, between 1926 and 1959, the Second Circuit did not uphold the validity of a single challenged design patent. Other circuits followed suit. As a result, an entire branch of IP law was relegated to near-total irrelevance for decades, reemerging only in recent years—and finding itself in a world where contemporary copyright and trademark doctrine reflect distortions that have both arisen from design patents’ longtime marginalization and purportedly called into question the latter’s “raison d’être.”


4. See discussion infra. The assertions made in this paragraph are discussed in detail below.

5. See Jason J. Du Mont & Mark D. Janis, The Origins of American Design Patent Protection, 88 IND. L. J. 836, 837, 841 (2013) (Despite “design patent renaissance” over the past decade, “some view the design patent system as having never developed a distinct identity, a raison d’être.”); see also id. at 843 (“Is [the design patent], and should it be, a real patent?”); cf. Charles Boldt Co. v. Turner Bros. Co., 199 F. 139, 142 (7th Cir. 1912) (setting up rhetorical opposition between designs and “real” inventions). For an introduction to the respective chronologies of the initial decline of design patents and the rise of copyright protection for certain “separable” components of fashion design, see Charles E. Colman, The History and Doctrine of Copyright Protection for Fashion: A Strange Centennial, 6 HARV. J. SPORTS & ENT. L. 224 (2015)
In Part 2 of this series, I will review the trajectory and content of design-patent decisions issued by the federal judiciary during the time period in question, paying particular attention to notable opinions of the Second Circuit authored between 1891 and 1930. Reading these decisions against the detailed cultural backdrop provided in Part 1, I will show that the judges in question used design-patent cases as a vehicle for implementing and displaying their adherence to shifting social norms implicating sex, morality, and ornament. I urge readers to consult Part 1 for my analysis of the social milieu in which judges authored the decisions examined in this piece; for the sake of convenience, however, I will briefly summarize that cultural narrative here. As I demonstrated in Part 1, the “connotative cluster”—the set of popular associations in American middle-class ideology—surrounding design experienced a dramatic transformation over the course of the nineteenth century. The notion of “design” gradually drifted away from the industry that had advocated for design-patent protection, the iron stove industry, and was increasingly linked with fashionable goods—especially apparel, accessories, and home furnishings. Part 1 revealed that such objects, the most prominent representatives of the “decorative arts” by the last decades of the nineteenth century, had be-

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[hereinafter Colman, Copyright for Fashion]. In PATENTS AND PERVERTS, supra star footnote, I analyze in greater detail the interaction between the marginalization of design patents and the rise of “separability” doctrine (in copyright) and product-design trade-dress rights (in trademark law).

6. The key role of the Second Circuit (and thus my focus on its decisions over those of other courts) is explained in detail below. See discussion infra at notes 83–99 and accompanying text. The court’s leading role in design-patent jurisprudence in the early 1900s stemmed in large part from its location in the design capital of the United States, New York City (it published between three and ten times as many decisions on design-patent law as any other circuit during the pivotal twenty-year period starting in 1902) and the Supreme Court’s refusal to grant certiorari in a case squarely posing an issue of design-patent law after 1893. See discussion infra at notes 68–73 and accompanying text.


8. Colman, Part 1, supra note 2, at 455. See LINES D. UNDERWOOD, A LIST OF ADJUDICATED PATENTS 217–19 (1907) (providing “Alphabetical Index to Adjudicated Design Patents” disproportionately reflecting “female-coded” nature of objects, under cultural logic discussed at length in Part 1 of the present study); KRAFFT-EBING, supra note 1, at 16 (“As long as this personal adornment has a purpose only in itself, or the true psychological reason of the desire to please remains unknown to the woman, nothing can be said against it. When it is done with knowledge, the effort is called flirting. Under all circumstances a dandified man is ridiculous. We are accustomed to this slight weakness in a woman, and find no fault with it, so long as it is but a subordinate manifestation.”) The objects whose corresponding design patents were increasingly invalidated were also associated with industries in which women were disproportionately employed, and in which the famed “Aestheticism” movement of the 1880s—“outed” in the 1890s with Oscar Wilde’s internationally followed trial for “indecency”—was most visible and influential. See discussion Colman, Part 1, supra note 2, at 450–53; accord infra note 10.

9. During this time period, popular design in the United States was arguably at the peak of its ornamentality—and more affordable and widely available than ever before. The chronology of the popularity and stigma of various decorative styles is complex. See discussion ELIZABETH E. GUFFEY, RETRO: THE CULTURE OF REVIVAL 34 (2006) (“In Britain, the [rowery Art Nouveau] style was increasingly associated with aestheticism and particularly with Oscar Wilde, who had
come semiotically linked with figures like the “New Woman” and, by the 1890s, the newly “discovered” homosexual.\textsuperscript{11} Both groups were secondarily stigmatized for an “excessive and effeminate concern with taste and home decoration, self-absorption at the expense of wider issues, and associations with decadence.”\textsuperscript{12}

Meanwhile, as I recounted, turn-of-the-century federal judges set out to police the law “for decency and traditional values,” including “family values, domesticity, and motherhood,” and used their substantial discretion in adjudi-

been imprisoned for homosexuality in 1895. ‘Pillory, L’Art Nouveau at South Kensington,’’ an article published in 1901 in the Architectural Review, dubbed the style a ‘fantastic malady.’ Interviewed in a Magazine of Art article in 1904, architect Charles Voysey identified Art Nouveau with ‘a debauch of sensuous feeling,’ calling the style ‘distinctly unhealthy and revolting.’ By 1930 the American historian Lewis Mumford recalled Art Nouveau as dominated by a ‘meaningless stylistic excess.’ When John Betjeman surveyed the style in the same year he admitted that it had produced ‘many a hideous little side table, many a sickly front door.’ See also Yvette Greslé, Strategies of Veiling Same-Sex Desire and Its Public Consumption: Aubrey Beardsley’s Illustration of Oscar Wilde’s 1894 Salome, 70 De Arte 22, 34 (2004) (‘It is significant that, at the time of Wilde’s trials, [famous Art Nouveau illustrator Aubrey] Beardsley and Wilde were conflated in the popular imagination’); TREASURY OF ART NOUVEAU DESIGN & ORNAMENT (Dover 1980) (illustrations selected by Carol Belanger Grafton) (‘Ornament is the essence of Art Nouveau,’ which “concentrated on the ornamental and decorative potential of the flowing line in painting, printing, wallpaper, and [other] applied arts. Hundreds of thousands of carefully wrought designs embellished books, bookplates, furniture, and appliances.” (quoted from the publisher’s description on the back cover)). See also COLIN MOORE, PROPAGANDA PRINTS: A HISTORY OF ART IN THE SERVICE OF SOCIAL AND POLITICAL CHANGE 94, 98 (2010) (“Art Nouveau proved to be [adaptable] for many purposes—the design of furniture, jewellery or book illustration, for example—but the graphic artists involved in commercial advertising, particularly the advertising of new products, struggled to find an appropriate graphic context for things like electric light bulbs within its timeless vegetable world . . . . In 1907 AEG, the German electrical corporation, retained architect Peter Behrens as its artistic consultant. The new turbine factory that he built three years later in a spare and rational neo-classical style is considered to be one of the first Modernist buildings. Subsequently, he designed a range of items for AEG in a coherent style—products, advertising, graphics—all of which taken together demonstrated the potential of a comprehensive approach to design in the modern context, and showed for the first time that it was not only commodities that could benefit from a branded and managed identity. The project also served as an emphatic rejection of Art Nouveau . . . . [Gravitation toward a modernist aesthetic can be understood as part of the] widespread reaction to the social miseries of industrialisation [that] had given rise to a new movement which sought to use art and architecture as instruments of social and political as well as aesthetic change.”). However, as discussed in Part I, the movement away from adornment and ornamentality in the United States in the early twentieth century must also be understood as part of a broader racist, colonialist, sexist, and heteronormative ideology.

11. See Colman, Part I, supra note 2, at 443, 450; Elizabeth Wilson, Adorned in Dreams: Fashion and Modernity 179 (L.B. Tauris 2013) (“Before 1960s, ‘only tarts or homosexuals wore clothes which reflected what they were.’”); (quoting George Milly, Revolt Into Style: The Pop Arts in Britain (1972)); see also Krafft-Ebing, supra note 1, at 16, 279 (discussing purported aesthetic proclivities of men with “contrary” sexual feeling, quoted in part in epigram and note 9, supra).

12. Pat Kirkham & Amy F. Ogata, Europe 1830–1900, in HISTORY OF DESIGN: DECORATIVE ARTS AND MATERIAL CULTURE, 1400–2000, at 429 (Pat Kirkham & Susan Weber eds., 2013). See also Wilson, supra note 11, at 6 (“To [act] fashionably is both to stand out and to merge with the crowd, to lay claim to the exclusive and to follow the herd . . . . [D]espite its apparent irrationality, fashion cements social solidarity and imposes group norms, while deviations in dress are usually experienced as shocking and disturbing.”).
cation to position the law as a bulwark “against decay” and “vice.”13 Through their decisions, judges sought to preserve what they considered “clean and wholesome,” by interpreting the law in a manner that served “the public health or welfare,” and remaining vigilant for anything that would “pervert[... the natural outcome of a dominant opinion” or otherwise controve “traditions of our people and our law.”14 In many cases, it was simply “self-evident”—and not only to Supreme Court Justices15—that particular outcomes in disputes raising “moral” questions followed from “the nature of things.”16 Such morally charged language tracked with remarkable precision the popular discourse surrounding conventional gender roles, consumption of fashionable objects, and the persona of the sexual “deviant.”17

13. See LAWRENCE FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 22 (2002). When the Supreme Court upheld a woman’s labor law in Curt Muller v. State of Oregon, 208 U.S. 412, 421 (1908), for example, the Justices based their ruling in large part on the “widespread and long-continued belief” and “judicial cognizance of all matters of general knowledge,” that “woman has always been dependent on man,” and that “healthy mothers are essential to vigorous offspring, the physical wellbeing of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.”


15. See discussion Lewis A. Grossman, James Coolidge Carter and Mugwump Jurisprudence, 20 LAW & HISTORY REV. 577, 601 (2002) (“Carter listed the preferred traits of an appellate judge as ‘first, what may be called professional qualifications; that is to say, the union of intellectual ability and discipline; and, second, personal character’”); id. at 604 (“Carter believed that the moral foundation of the common law, which he termed ‘unwritten law,’ made it superior to the written law as a way to regulate private relations. He explained that the method of common law decision making, unlike the process of applying statutes, permitted judges to decide each matter on a moral basis, according to the requirements of ‘justice.’”); id. at 611 (“Carter believed that judges, who generally were drawn from the same natural aristocracy as the reformers, recognized these ethical advancements and transposed them into their decisions.”).

16. Coppage v. Kansas, 236 U.S. 1, 17 (1914). Even Justice Holmes, in his 1918 critique of those he disparaged as “naive” proponents of “natural law,” carved out certain aspects of civilization—including, most notably for present purposes, “some form of permanent association between the sexes,” as part of the inherent order of societies rather than culturally contingent. See Oliver Wendell Holmes, Natural Law, 32 HARV. L. REV. 40, 41 (1918) (“The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere. No doubt it is true that, so far as we can see ahead, some arrangements and the rudiments of familiar institutions seem to be necessary elements in any society that may spring from our own and that would seem to us to be civilized [including] some form of permanent association between the sexes. . .”) (emphasis added). One commentator praising Holmes’ article the following year linked the Justice’s view to the “philosophy of revolution based upon the biological law of Natural Selection.” Boyd E. Boyd, Justice Holmes on Natural Law and the Moral Ideal, 29 INT’L J. ETHICS 397, 397 (1919). Cf. CYNTHIA EAGLE RUSSETT, SEXUAL SCIENCE: THE VICTORIAN CONSTRUCTION OF WOMANHOOD (1989) (discussing popular use of scientism to justify policy).

17. Colman, Part 1, supra note 2, at 442–43, 450–53; see KRAFFT-EHRING, supra note 1, at 4–6 (“[A] commonwealth (family or state) cannot exist without a guaranty that the offspring shall flourish physically, morally, and intellectually . . . . When widely separated periods of history are compared, no doubt is left that public morality, in spite of occasional temporary retrogression, makes continuous progress, and that Christianity is one of the most powerful of the forces favoring moral progress. To-day we are far beyond the sexual conditions . . . as shown in the sodomic worship of the gods, in the life of the people, and in the laws and religious practices, [that] existed among the ancient Greeks, to say nothing of the worship of Phallus and Priapus among the Athenians and Babylonians, of the bacchanals of ancient Rome, and the prominent place prostitutes took among these peoples. In the slow and often imperceptible progress which human mo-
In short, the (exclusively male) federal judges of the late nineteenth and early twentieth centuries, making use of the substantial moral discretion they possessed in shaping the law, could, and did, distance themselves from designating people as homosexual—and by extension, designed goods,\textsuperscript{18} with their myriad stigmas—thereby confirming their own normatively desirable masculine identity\textsuperscript{19} and helping to avoid potentially disastrous consequences.\textsuperscript{20} Through the rhetorical

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\textsuperscript{18} See Mary Douglas & Baron Isherwood, The World of Goods: Towards an Anthropology of Consumption xxiv (Routledge 2001) (1979) ("Social life is a matter of alignments, for and against, and for signaling alignments goods are like flags . . . . It turns out that everything depends on how the people are organized, the whole community being the signal box."); David Kuchta, The Three-Piece Suit and Modern Masculinity: England, 1550–1850, at 3 (2002) ("Understanding the importance of ideals of masculinity to notions of politics, economics, and the social order, then, allows us to understand the basis for the birth and continued relevance of [the] three-piece suit.").

\textsuperscript{19} See Robbins, supra note 17, at 141–42 ("How does a man write in such a way as to ensure that his audience is in no doubt about his 'manliness'? There is no precise formula, but the choices of form and matter, the how and the what in writing, and the context in which the writing takes place, provide some clues. They must be chosen in order to reflect the expected virtues of masculinity, now [as of the fin de siècle] being defined not as adult qualities, but in opposition to femininity."); see also Kuchta, supra note 18, at 7 (footnote omitted) ("Manners and material culture gave shape to ideological processes; material signs formed and informed systems of power, rather than standing outside them in some exterior symbolic realm. Thus while ideas of masculine character were constructed by changing political ideologies, political ideologies in turn were constructed around changing notions of character.").

\textsuperscript{20} It was not only homosexual men who were potentially destroyed by suspicions or accusations of "sexual deviance." As historian George Chauncey recounts: "A sympathetic and unusually well informed doctor writing in 1918 confirmed the validity of such concerns, noting that in
Design and Deviance: Patent as Symbol, Rhetoric as Metric—Part 2

...techniques and outcomes of judicial decisions, traditional gender norms were symbolically policed through the adjudication of rights over the objects associated with the effeminate, the wasteful, the immoral, and the deviant. This installment will reveal, through a roughly chronological close reading of influential Second Circuit (and other pivotal) decisions, that these decisions had the cumulative effect of rendering design patents a nullity in federal-court litigation by 1930—leading to distortions throughout American IP law.

I. EARLY DESIGN-PATENT CASES (1842–1870)

As discussed in Part 1, Congress did not pass the first design-patent statute until 1842. For the first few years thereafter, litigation over design patents was relatively infrequent; indeed, there appear to be only three published decisions on design patents issued within the first ten years of the law’s passage. Nevertheless, the early period of design-patent jurisprudence—roughly 1845 to 1885—is notable for its even-handed and often-favorable approach to the subject matter at issue.

In one early case, Booth v. Garelly, a New York federal circuit court judge in 1847 was faced with a dispute over a patent for “a new and ornamental design for figured silk buttons.” Of particular note is the manner in

## Footnotes


22. See DAN HUNTER, INTELLECTUAL PROPERTY 118 (2012) (containing only one paragraph, in 228-page book, specifically addressing design patents); Colman, Copyright for Fashion, supra note 5 (tracing origin of problematic doctrines of “conceptual separability” in copyright law and “aesthetic functionality” in trade-dress law to judicial marginalization of design-patent protection); Paul J. Sutton, The Underappreciated Design Patent, WORLD INTELL. PROP. REV. (Feb. 16, 2015), http://www.worldipreview.com/contributed-article/the-underappreciated-design-patent (“[F]ar too little attention is afforded to the US design patent”).


which the judge characterizes the material before the court—and specifically, his description of the plaintiff’s button design as an “invention”:

The [plaintiff’s] patent is granted under the act of August 29, 1842 (5 Stat. 543, § 3), which authorizes the granting of the same for any new and original design for a manufacture, or any new and useful pattern, or any new and original shape or configuration of any article of manufacture, not before known or used by others. The invention in this case falls within the first clause of the section, if within any, as a ‘new and original design for a manufacture’—a design for the manufacture of an ornamental button. 26

Another early design-patent decision authored by a different New York circuit-court judge, in the 1846 case of Sparkman v. Higgins, 27 likewise characterized the designer-plaintiff as an “inventor”:

To constitute an inventor, it is not necessary he should have the manual skill and dexterity to make the drafts. If the ideas are furnished by him, for producing the result aimed at, he is entitled to avail himself of the mechanical skill of others, to carry out practically his contrivance. Here the devising of the pattern, in this sense, appears to have been by the plaintiffs. 28

There are a handful of additional reported judicial opinions on design patents from the 1850s and 1860s; the presiding judges in those cases, as in the Booth and Sparkman, generally adjudicated design-patent disputes—including disputes over “fashionable” articles of ornament and decoration—without using language that disparaged design. 29 Even the Supreme Court, in its first decision on design patents handed down in 1871, would refer to an ornamental design for silverware handles as an “invention.” 30 (As late as 1889, an important treatise on design-patent law would state that designs were “treated as inventions” under U.S. law. 31)

26. Id. (emphasis added). This use of the word invention was consistent with the expansive definition given to the term by the Supreme Court just a few years earlier, in the 1843 utility-patent case of McClurg v. Kingsland, 42 U.S. 202, 209–10 (1843) (emphasis added) (interpreted the words “such invention,” as used in the Patent Act, synonymously with a “newly-invented machine, manufacture, or composition of matter constituting the thing patented.”).

27. 22 F. Cas. 878 (C.C.S.D.N.Y. 1846).

28. Id. at 879. The third decision in the trio of very early design-patent cases, Root v. Ball, 4 McLean, 181 (Ohio C.C. 1846), expressed a similar idea in explicitly likening a design to the invention of a machine: “The principle of a machine is that combination of mechanical powers which produce a certain result. And in a case like the present, where ornaments are used for a stove, it is an infringement to adopt the design so as to produce, substantially, the same appearance.”


30. See id.

31. See Gorham Mfg. Co. v. White, 81 U.S. 511, 526 (1871) (“[T]he patent is to receive such a construction that the act of Congress will afford . . . protection to a designer against imitations of his invention.”). Accord HECTOR T. FENTON, THE LAW OF PATENTS FOR DESIGNS 7 (Philadelphia, William J. Campbell 1889) (“Designs have been, and are, the subject of statutory protection, not only in the United States, but in the principal European States, though, in the latter, under a wholly different classification. In the former, they are treated as inventions, but in the latter, as a species of trade-mark or copyright property.”).
Soon thereafter, “design” would be subjected to a series of ontological and doctrinal and demotions by the federal courts. These demotions, carefully traced below, correspond with the emergence of the previously discussed stigmas on the ornamental and decorative in American popular culture—as judicial concerns about appearing too interested in, or knowledgeable about, visual beauty and artistic merit in design were reflected not only through explicit reasoning, doctrinal innovations, and case outcomes, but also through rhetorical techniques that shedding on underlying ideology. This judicial distancing took several forms, appearing in roughly the following sequence: (1) evaluation of visual material through an emphatically “commercial”—as opposed to “aesthetic”—lens; (2) disavowal of any ability (as “respectable” men) to make informed or nuanced evaluations of design—except, perhaps, where indisputably “masculine” objects were in dispute; (3) summarily dismissing as uninventive and unappealing most patented designs appearing before the court; and (4) selectively invoking utility-patent principles in a manner that effectively rendered design patents a dead letter.

II. THE VARIED AND INFLUENTIAL DISTANCING TECHNIQUES OF FEDERAL JUDGES IN TURN-OF-THE-CENTURY DESIGN PATENT JURISPRUDENCE (1870–1930)

A. Distancing via Deference to Experts and Reliance on the Indisputably Utilitarian Endeavor of Commerce (1870–1895)

In *Gorham Mfg. Co. v. White*, the Supreme Court was tasked with ruling on a design-patent issue for the first time. The outcome of the case, which was heard before the Court in 1871, hinged on the materiality of differences between fashionable silverware designs—requiring that the Court craft a test for adjudicating infringement in design-patent cases. The Court’s unanimous decision declared that the test would hinge solely on whether “in the eye of an ordinary observer” the designs at issue were “substantially the same”—to the

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32. See *Lawrence Rosen, Law as Culture: An Invitation* 12 (2006) (“Law, as part of [the social] imagination, may help us grasp the world in which . . . we find ourselves so startlingly set down.” Thus to consider the styles of legal reasoning or the structure of cultural assumptions built into many legal concepts is to offer both a window into the larger culture and, no less importantly, to gain an often undervalued window into legal processes themselves.”). For further discussion of certain relevant political aspects of the “larger culture” in which these judges found themselves forced to act, see Catharine R. Stimpson, *Foreword, in Gail Bederman, Manliness and Civilization: A Cultural History of Gender and Race in the United States, 1880–1917*, at xi (1995) (noting “the genesis and growth of a profoundly influential fiction that many Americans began to accept as true in the period between the end of the Civil War and the entrance of the united States into World War I,” which served “to construct and legitimate a vision of the best possible man, the masculine ideal”). *See also Bederman, supra at 170–71* (identifying Teddy Roosevelt’s “masterful use of the discourse of civilization” as a deliberate and effective technique for erasing all traces of his early “effeminate image”—and the comparisons with Oscar Wilde it entailed—that would have destroyed “any chances for his political future”).

33. 81 U.S. 511 (1871).
point that the allegedly infringing design would “deceive such an observer, inducing him to purchase one supposing it to be the other.”

Because this test focuses specifically on an alleged infringer’s effect on the integrity of commerce, it would seem that in every design-patent case going forward, the “ordinary observer” would be the ordinary customer. While the Gorham Court did mention Congress’s declared 1842 objective of promoting the “progress of the decorative arts,” the Justices evaluating this new type of intellectual-property protection some thirty years later made clear that design patents were—or, at least, would be treated by the courts as being—about money, not the increasingly suspicious “decorative arts,” per se.

Such a commerce-centric approach was by no means inevitable, as illustrated by other judicial decisions in both the design-patent and copyright contexts focusing on the aesthetic effect of contested works rather than their commercial effect. Against the historical landscape surveyed in Part I—and standing in otherwise counterintuitive contrast with copyright jurisprudence providing a blueprint for a “substantial similarity” test requiring no examination of commercial context—the Gorham Court’s rhetorical and doctrinal transformation of design-as-decorative-art-form into design-as-tool-for-commercial-integrity appears to represent a deliberate departure from precedent and legislative intent for the sake of adherence to rapidly changing sociocultural norms.

34. Id. at 528.
35. See discussion Du Mont & Janis, supra note 5, at 845 (“The most venerable comments—those of the Supreme Court in 1870 in Gorham Co. v. White—assert . . . that the design patent provisions ‘were plainly intended to give encouragement to the decorative arts,’ a reference to the Constitution’s intellectual property clause, with a slight adaptation for designs.”).
36. In the post-Wilde era, decisions would return to discussing aesthetics, but for an entirely different purpose—disparagement and trivialization—as discussed below.
37. See, e.g., Bolte & Weyer Co. v. Knight Light Co., 180 F. 412, 414 (7th Cir. 1910) (“Design patents are to make that, which otherwise is useful, ornamental as well. Many designs, while differing in detail, may present to the ordinary observer the same appearance. ‘Sameness of appearance’ is ‘identity of design.’ But the object in a design patent is not to identify the article as an article of trade, but to ornament it so as to make it pleasing to the eye, the true rule being, What is the aesthetic effect?”) (emphasis added); Perris v. Hexamer, 99 U.S. 674, 675–76 (1878) (“The question we are to consider is whether the publication of the defendant infringes the copyright of the complainants, and we think it does not. A copyright gives the author or the publisher the exclusive right of multiplying copies of what he has written or printed. It follows that to infringe this right a substantial copy of the whole or of a material part must be produced. It needs no argument to show that the defendant’s maps are not copies, either in whole or in part, of those of the complainants.”) (emphasis added); White-Smith Music Publ’g Co. v. Apollo Co., 209 U.S. 1, 17 (1908) (“What is meant by a copy? We have already referred to the common understanding of it as a reproduction or duplication of a thing. A definition was given by Bailey, J., in West v. Francis, [1822] 5 Barn. & Ald. 743, quoted with approval in Boosey v. Whight, supra [[1899] 1 Ch. 836]. He said: ‘A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original.’”) (emphasis added).
38. Consider, for example, Justice Holmes’ famous majority opinion in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903), which pontificates on the relative importance of aesthetics versus commerce. Holmes wrote, for example: “Certainly works are not unprotected by copyright because their pictorial quality attracts the crowd and therefore gives them a real use—if use means to increase trade and to help to make money.” Id. at 251 (emphasis added). This passage necessarily implies that making purely aesthetic use of an image is tantamount to making a “real” (i.e., productive) use of it. See discussion Colman, Part I, at 438–39 (discussing broader cultural rhetoric concerning the “productive” as the virtuous and virile at the turn of the twentieth
The Supreme Court’s veneration of the commercial to the detriment of the aesthetic, echoed in numerous decisions by the federal courts in the decades to follow, can be understood as a reflection of an emerging logic of gendered utilitarianism with ominous ramifications for works of ornamental art.\footnote{See discussion \textit{In re Koehring}, 37 F.2d 421, 422 (C.C.P.A. 1930) (“In declaring that, by the enactment of the design patent law, Congress expressed a desire to promote more beauty, grace, and ornamentation in things used, observed, and enjoyed by our people, the courts have not omitted on frequent occasions to mention the fact that such ornamentation as was intended was an element in the salability of the article.”). It is important to note that the CCPA, as a specialized court hearing administrative appeals, was largely shielded from public scrutiny in a way the Second Circuit and other federal courts were not.}

Even so, it is important to note that the \textit{Gorham} Court’s endorsement of a commerce-art hierarchy would not, and did not, independently dictate the numerous anti-patentee rulings to come in the early twentieth century.\footnote{Later, the commerce-art distinction would sometimes be wielded in a manner to dispose of design-patent disputes.} (As such, we must examine, in the following sections, the more complex, gendered, and quasi-implicit factors driving the marginalization of design patents.) Consider, for example, the post-\textit{Gorham} case of \textit{Jennings v. Kibbe},\footnote{10 F. 669 (C.C.S.D.N.Y. 1882).} in which a district-court judge in 1882 ruled in favor of a lace designer:

\begin{quote}
In view of the [\textit{Gorham} test for design-patent infringement], as above given, and of the simple character of the designs in the present case, and of the absence of any testimony on the part of the defendants, I am of opinion that the absence of testimony as to identity does not make it improper for the court in this case to compare the defendants’ nubia with the patents, as to design, and determine the question of identity from such comparison.
\end{quote}

The court engaged in the proposed comparison and found that “the defendants’ nubia infringe[d] both of the patents, and a decree in the usual form in favor of the plaintiffs, with costs, [would] be entered.”\footnote{Id. at 670.} (The air of routineness in the \textit{Jennings} court’s conclusion about design-patent infringement and the “usual” corresponding relief stands in stark contrast to later design-patent decisions.)

Similarly, a Pennsylvania district-court judge in the 1891 case of \textit{Anderson v. Saint} stressed both simplicity and commerce in reaching his pro-designer ruling (notably, while still seeking, and finding, the “invention” whose “importation” into design-patent law has been identified—erroneously, in my view—as the primary cause for design patents’ decline):\footnote{46 F. 760 (C.C.W.D. Pa. 1891).}
Keeping in mind the limitations and principles of the cases I have cited, I think the design shows invention. It is necessarily a small invention. The complainant was restricted within narrow limits. His mantel must conform to the general shape and configuration of mantels, to be of any utility. To be marketable, the design must be simple, not elaborate. Remembering this, the design shows invention.  

In contrast to later judicial decisions seizing on the “commercial” or “simple” character of designs to dispose of infringement claims, decisions from this early phase of design-patent law reflect a general understanding that such characteristics provided a justification for a careful, first-hand aesthetic engagement with disputed designs by judges. When courts did so, designer-plaintiffs often prevailed in their claims of infringement.

B. Distancing via the Rhetoric of Reluctance and Skepticism (1870–1912)

The commercial reorientation of judges’ late nineteenth-century design-patent rhetoric bespeaks the increasingly utilitarian ethos of the time period. A related distancing technique, more directly linked with design patents’ fate, appears with increasing frequency as the twentieth century approach: a judicial refusal to make explicit first-hand aesthetic determinations concerning design. In many instances, such distancing made use of the notion that only other men—not the respectable, serious men of the federal judiciary—would notice or care about design (for reasons discussed below).

The Supreme Court’s decision in Gorham v. White represents an early, tentative manifestation of this type of distancing. The Gorham Court’s rhetoric shows a striking absence of detailed first-hand visual evaluation—let alone a direct judgment of aesthetic merit. Instead, the Court went out of its way to emphasize its deference on questions of aesthetics to “experts”—those “men” who . . . would most readily appreciate differences in design that supposedly eluded the Justices:

In all the designs, the ornament is, in part, a rounded moulding or bead along the edge with scrolls at the shoulders and near the top. There are, however, some diversities in this ornament, which are discoverable when attention is called to them. [List of differences.] There are other small differences which it is needless to specify. What we have mentioned are the most prominent. No doubt to the eye of an expert they are all real . . . . A large number of wit-

46. Id. at 764.
47. See, e.g., R.E. Dietz Co. v. Burr & Starkweather Co., 243 F. 592 (2d Cir. 1917) (“It is established as matter of fact that the reasons for making lanterns in the shape exhibited by McArthur are not aesthetic, that ornamentation is not a purpose, nor does the style rest on a desire to please the eye. While some of these objects may be incidentally attained, the business or commercial reason for making McArthur’s style of lantern is to reduce to a minimum the glass employed in lantern construction.”).
48. See, e.g., Strause Gas Iron Co. v. William M. Crane Co., 235 F. 126, 131 (2d Cir. 1916) (“[A]ny one [sic] starting to design sad irons with the art before him, and governed only by considerations of proportion and plan, would have had no difficulty in making the plaintiff’s iron”).
49. See SYMONS, supra note 29.
nesses, familiar with designs, and most of them engaged in the trade, testify that, in their opinion, there is no substantial difference in the three designs, and that ordinary purchasers would be likely to mistake the White designs for the ‘cottage’. . . . This is the testimony of men who, if there were a substantial difference in the appearance, or in the effect, would most readily appreciate it.  

The Justices thus made clear that they would not notice or care about the differences among the designs at issue, if such differences were even “real.”

The men of the Gorham Court appear to have deemed it advisable to emphasize their inability to differentiate between the disputed designs—culturally coded as feminine and thus effectively off-limits for nuanced appreciation, or even detailed evaluation, by normatively masculine men.

In a closing passage, the Gorham Court hedged one last time in ruling that the defendant had infringed the plaintiff’s silverware design:

Unless, therefore, the patent is to receive such a construction that the act of Congress will afford no protection to a designer against imitations of his invention, we must hold that the sale by the defendant of spoons and forks bearing the designs patented to White in 1867 and 1868 is an infringement of the complainants’ rights.

The Justices, in other words, were compelled by statute to reach a result favorable to the designer-plaintiff. Thus, it seems that in the years before the Su-
The Supreme Court could elect not to hear design-patent appeals at all—an option that became available upon passage of the Judiciary Act of 1891—\textsuperscript{55} the Justices sought to increase the apparent “distance” between themselves and the objects in dispute by invoking the opinions of “experts,” stressing the effect that the defendant’s conduct would have on “commerce,” and emphasize that their ruling was dictated by law.

Other federal courts took note of the \textit{Gorham} Court’s self-distancing from design. While lower courts continued—for the time being—to rule that the “amount of the novelty [sufficient to sustain a design patent] may be small” in order for the design-patent statute to have the “reasonable” construction “favorable to its beneficial operation,” emphasized as important by the \textit{Gorham} Court,\textsuperscript{56} many judges in the 1870s and 1880s simultaneously echoed the detached rhetoric of \textit{Gorham} in their own design-patent decisions.

Consider, for example, the language used by a New York federal court in the 1884 case of \textit{Tomkinson v. Willets Mfg. Co.}:\textsuperscript{57}

\begin{quote}
Those who have devoted time and study to the subject, who have spent their lives in dealing in articles similar to those in controversy, may see at a glance features which are wholly unimportant, and unobserved by those whose pursuits are in other directions, and who are attracted only by general appearances. If the resemblance is such that a purchaser would be deceived, it will not aid the infringer to show that he has deviated slightly from a straight line in one place and from a curved line in another, or that he has added or omitted something which an expert can discover . . . . Tested by this rule, I am constrained to say that the defendant infringes.\textsuperscript{58}
\end{quote}

The judge in \textit{Tomkinson}, even more emphatically than had the Justices in \textit{Gorham} (perhaps owing to the thirteen years between the two decisions, during which stigmas surrounding design had grown in scope and force), asserts: (1) that he is not the sort of man who would notice the “wholly unimportant” differences between the disputed designs highlighted by the defendant, and (2) that he has no choice but to rule in favor of the designer, even though he would (his wording suggests) prefer to dispose of the claims.\textsuperscript{59}

By the late 1880s, the Supreme Court found itself tied to the mast of its own rhetoric in \textit{Gorham} that had, in increasingly palpable tension with socio-cultural norms, stressed the judicial duty to give effect to the design-patent ideological direction of the Court’s judgment and the content of the underlying rule may, but need not, coincide”\textsuperscript{ }). However, as time passed, reasoning and rhetoric tended to coalesce into a jurisprudence that increasingly guaranteed a prodefendant ruling in design-patent appeals.

\textsuperscript{55} Act of Mar. 3, 1891, 26 Stat. 826 (commonly known as the “Evarts Act”).

\textsuperscript{56} See, e.g., Redway v. Ohio Stove Co., 38 F. 582, 583 (C.C.S.D. Ohio 1889).

\textsuperscript{57} 23 F. 895 (C.C.S.D.N.Y. 1884).

\textsuperscript{58} Id. at 896 (emphasis added) (citations omitted).

\textsuperscript{59} It was only “appropriate” for women to have more than a “general” appreciation for the design of domestic objects at this time. \textit{See} discussion \textit{Von Falke, supra} note 52, at 314–15; \textit{accord} Charlotte Nicklas, \textit{One Essential Thing to Learn Is Colour: Harmony, Science and Colour Theory in Mid-Nineteenth-Century Fashion Advice}, 27 J. DESIGN HISTORY 218, 225 (2013) (noting that nineteenth-century domestic-advice literature repeatedly conveyed that “the ideal woman’s appearance and home formed part of a harmonious whole, pointing to the conflation of women with their dress and their interior spaces.”).
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laws. While the Court in *Dobson v. Dornan*\(^\text{60}\) thus affirmed a lower court’s finding of design-patent infringement, the Justices nevertheless managed to emphasize their skepticism of and indifference toward design by ruling that damages did not necessarily follow from that ruling:

There was no satisfactory testimony that those who bought the cheap carpets from the defendants would have bought the higher priced ones from the plaintiffs, or that the design added anything to the defendants’ price, or promoted their sale of the particular carpet, and none to show what part of the defendants’ price was to be attributed to the design.\(^{61}\)

This proposition—that a design patent might be valid, yet be of no value when it came to calculating remedies—suggests that the period of design-patent jurisprudence characteristic of the late 1880s and early 1890s was a transitional one, serving as a bridge between the early period of even-handed treatment of design patents (from 1845 to roughly 1885) and the later period (from roughly 1895 to 1930) in which design patents were, with increasing frequency and vigor, invalidated by the Second Circuit and the many courts following its lead.

Notably, this transitional period coincides with the window in which scientists claimed to discover homosexuality, but the Anglo-American public had not yet decisively grafted onto self-proclaimed “aesthetes” like Oscar Wilde. The posture toward design typical of elite East Coast lawyers of the time is reflected in an 1892 *Yale Law Journal* article\(^\text{62}\) by Frederic H. Betts,\(^\text{63}\) which displays the sort of rhetorical distancing “appropriate” for respectable (male) attorneys from the notion—rooted in Aestheticism—that ornamental design was valuable or could/should be appreciated for its own sake:

A design may be wholly insignificant in value and importance as compared with the value of the article to which it is applied.

A design for a piano, for instance, may be beautiful in itself (though not more beautiful than other designs), but may still be very trifling in comparison with the piano.

Many designs of buildings have been patented but the profit derived from the construction of the building could hardly be said to be properly due, except in very small degree, to the particular design used in constructing it.

Indeed, it is quite conceivable that a design may be patented which, when applied in practice, may turn out (owing to changes in fashion) an ab-

\(^{60}\) 118 U.S. 10, 18 (1886).

\(^{61}\) *Id.* Soon after this case was decided, Congress amended the remedies provision of the design-patent statutes—but, tellingly, that provision had received no definitive construction by 2015.


\(^{63}\) See *Charles H. Browning, Americans of Royal Descent; Genealogies Showing the Lineal Descent from Kings of Some American Families* 370 (7th ed. 2000) (Frederic H. Betts was the son of the “Judge Betts” behind the 1847 *Booth v. Garelly* silk-button design-patent decision).
solute detriment to an article, so that any sale effected may be in spite of rather than induced by the design.\textsuperscript{64}

Three years later, in 1895, Oscar Wilde’s internationally reported conviction for engaging in homosexual acts would cement in the Anglo-American consciousness a “nexus of effeminacy, leisure, idleness, immorality, luxury, insouciance, decadence and aestheticism.”\textsuperscript{65} While judicial reluctance toward design like that found in the Tomkinson case and the Betts article had not precluded rulings in favor of design patentees before 1895, the fall of Wilde and his famous valorization of “beautiful objects”\textsuperscript{66} prompted a sharp turn in judicial rhetoric and reasoning in design-patent cases. This turn marked—not quite the beginning, but certainly the acceleration—of a snowball effect in design-patent jurisprudence culminating, by the late 1920s, in the near-total ineffectiveness of design patents as a vehicle for the assertion of rights by designers in numerous industries, for a multi-decade-long period.\textsuperscript{67}

C. Distancing through Dismissal of the Purportedly Low Level of Innovation in, and Broader Irrelevance of, Design (1895–1926)

Design patents’ dramatic post-1895 downfall started at the highest level of the judicial system. The Supreme Court, which had continued to grant certiorari in design-patent cases\textsuperscript{68} even after the Judiciary Act of 1891 had author-

\textsuperscript{64.} Betts, \textit{supra} note 62, at 189.


\textsuperscript{66.} See Colman, \textit{Part 1, supra} note 2, at 447, 450. Federal-court judges of the time (especially those sitting in courts based in large East Coast cities) would certainly have been aware of Wilde, aestheticism, and the values they had championed—which legal actors, especially those whose decisions were most visible to the public and to colleagues, would have felt great pressure to expressly reject. (The relative non-visibility of patent examiners, along with their high degree of systematic and bureaucratic approach to the processing of design patent applications, likely explains why design patents continued to issue at roughly the same rate before and after the Wilde trials. For an in-depth discussion of this phenomenon, see COLMAN, PATENTS AND PERVERTS, \textit{supra} star footnote.) For one instance of the repudiation of the aesthetic mantra by a prominent judge, see U.S. v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705, 711 (2d Cir. 1934) (Manton, J., dissenting) (“Art for art’s sake is heartless and soon grows artless; art for the public market is not art at all, but commerce; art for the people’s service is a noble, vital, and permanent element of human life.”).

\textsuperscript{67.} See discussion \textit{infra} Section IV.

\textsuperscript{68.} See, e.g., Smith v. Whitman Saddle Co., 148 U.S. 874, 875 (1893). The Court’s decision in \textit{Whitman Saddle} largely bypasses expert testimony on the design at issue—for a riding saddle—in favor of the Justices’ own evaluation of the product. Unlike in the domestic-furnishing case of \textit{Gorham}, however, a largely off-the-cuff aesthetic assessment of the product at issue in \textit{Whitman Saddle} served to stress the judges’ “masculinity” rather than call it into question. See THE HABITS OF GOOD SOCIETY: A HANDBOOK FOR LADIES AND GENTLEMEN 215–16, 219, 220, 224–25 (Rudd & Carleton, rev. ed., 1860) (“The effect of a want of good, healthy out-door amusements is to make of a man either a carpet-knight, or a hanger about cafés. The life of cities tends to demoralize, and anything which takes a man away from a town for a time has its value. Thus hunting, shooting, riding, driving [and similar activities are encouraged]. Often in the country there is no other conveyance but a horse and saddle to be had . . . . [Indeed,] in the country, riding and driving are such common accomplishments, that besides the inconvenience, our ignorance of them subjects us even to ridicule. What more laughable than a man jolted up and down on his horse, till his hat slips to the back of his head, his hair flies about, his trousers creep up to his knees, and his face
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ized the Justices to ignore such appeals, to never again agreed to hear a single appeal squarely posing an issue of substantive design-patent doctrine after 1895. Notably, the Court adhered to its practice of blanket denials of petitions in design-patent cases even as it continued to hear fairly frequent appeals concerning the validity or infringement of utility patents. The Court’s refusal to “dignify” design patents with its attention thus stood out, especially as

expresses either pitiable misery, or ludicrous discomfort . . . . A man should be able to mount on either side of the horse . . . . Nothing is more graceless than to see a man climb with both hands into his seat . . . . It is certainly desirable that a ‘complete gentleman’ should be able to handle an orn as well as a gun, both that when he has the opportunity he may get health, and that he may be able to take part in [amusements, such as shooting, boating, and so forth]. . . . In fact a man ought to be able to turn his hand to almost everything [physical], and, what is more, should do himself whatever he can.”; Id. at 218 (“A man who rides without ladies requires no groom to follow him, and a young man particularly should never take one, even though he intends to make calls. A lady, on the other hand, should never ride alone, except in quiet parts of the country. In [the city] she would be taken for a demoiselle du cirque, and in the country she would be liable to accidents, with no one to assist her.”). See also Gladys Block Peacock, Dress Reform, and the Fashioning of the Victorian Woman, 30 VICTORIAN LITERATURE AND CULTURE 157, 176 (2002) (identifying similar discourses on women and horses in late Victorian era, with bodies of both to be controlled and reshaped by men). In contrast to the Whitman Saddle case, when the Supreme Court adjudicated a copyright dispute over a wallpaper design in 1914, the otherwise spirit-of-copyright-law-over-formalities-orientated Justice Holmes wrote for a unanimous Court that the designer of (decidedly domestic and thus female-coded material) wallpaper could not obtain relief under copyright law because he had not placed a copyright notice on every square of his wallpaper. See Louis Dejonge & Co. v. Breuker & Kessler Co., 235 U.S. 33, 36 (1914). Notably, the Court—which had not granted certiorari on a substantive issue of design-patent doctrine in the previous twenty years, and would never do so again—used its brief opinion in Louis Dejonge simultaneously to disparage the artistic value of the work in dispute and to indicate that design-patent law would have been a more appropriate vehicle for plaintiff’s wallpaper creation than was copyright law. Id. at 36–37 (noting that plaintiff had urged the Court to recognize the “unity” of the wallpaper as a single work, but “that unity is only the unity of a design that is not patented,” and that “appellant is claiming the same rights as if this work were one of the masterpieces of the world, and he must take them with the same limitations that would apply to a portrait, a Holy Family, or a scene of war”).

69. See James Craig Peacock, Purpose of Certiorari in Supreme Court Practice and Effect of Denial or Allowance, 15 ARIZ. BAR. ASS’N J. 681 (1929).

70. Although the Court has mentioned design patents in passing on rare occasions, it has not, as of this writing, granted certiorari in any case raising a substantive issue of design-patent doctrine since the 1890s. The closest the Court has come in the past 120 years to meaningfully engaging with design patents has been in (1) appeals addressing—and, until roughly the 1950s, rejecting—the possibility of vindicating rights in design under alternative federal causes of action and (2) disputes over federal preemption of state causes of action for the unauthorized copying of designs. 235 U.S. at 35; see Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 141 (1989); Com-pco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 238 (1964); Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964). In each case, a unanimous Court found preemption.

71. See, e.g., Brill v. Peckham Motor Truck & Wheel Co., 189 U.S. 57 (1903) (granting certiorari in utility-patent case, deciding a number of issues, and remanding); Diamond Rubber Co. v. Consol. Tire Co., 220 U.S. 428 (1911) (granting certiorari and affirming validity of utility patent even where, as Court acknowledged, there had been no difference of opinion between the Second Circuit and the Sixth Circuit’s decisions on the central issue in dispute).

72. The notion of the “dignity” of enforceable patents is a recurring one in the judicial decisions and treatises of the time period; most cases in which plaintiffs’ designs were impugned for purportedly failing to do justice of the “dignity” of patents were, notably, those involving décor and dress. See, e.g., Henry C. Thomson, Patents, Trade-Marks, Design Patents 103 (1913) (noting that in the case over lampshade design, “the Court held that the variation from the
practitioners frequently bemoaned the lack of judicial guidance on decidedly basic questions of design-patent doctrine.\footnote{73}{See, e.g., SYMONS, supra note 29, at 2 ("At the present time much doubt and confusion exists as to what is proper subject matter for a design patent; nor is the practice in this class of patents well settled. Whether the specification should contain a description of the design, and whether a patent may be issued for a surface ornamentation are among the questions which have received considerable attention and not altogether satisfactory answers.") As Symons’ 1914 treatise correctly observes, this lack of judicial guidance on design patents was not attributable to lack of use by the public: “That the interest in the subject of design patents has increased during the last few years is indicated by the larger number of applications for patents filed and the amount of litigation on this subject.” Id. (It warrants mention, however, that the Patent Office’s issuance rate for design patents had not shown any pronounced increase over the previous decade.).}

Nor did the Court’s withdrawal from design-patent law go unnoticed among circuit-court judges, who inferred—and, given the powerful behavioral and reputational dynamics discussed in Part 1, were incentivized to infer—from the Supreme Court’s opting out of design-patent law\footnote{74}{See Peacock, supra note 69, at 682 ("Perhaps the whole subject has never been more succinctly set forth than in a single sentence from the opinion rendered by Mr. Justice Pitney in Hamilton Brown Shoe Co. v. Wolf, 240 U. S. 251, where it is said at page 258: ‘As has been many times declared, [a grant of certiorari is proper] only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.’").} that they should distance themselves from this area of law. Indeed, by the early 1910s, appellate courts often flaunted their inclination to dispose of design-patent cases in summary fashion, employing newly dismissive and hostile language.\footnote{75}{Note the Second Circuit’s acknowledgment, in one 1920 decision, of the Supreme Court’s denial of certiorari in a 1911 case that many agreed was “cert-worthy.” Geo. Borgfeldt & Co v. Weiss, 265 F. 268, 272 (2d Cir. 1920) (“After this court decided Ashley v. Tatum [186 F. 339 (2d Cir. 1911)], an attempt was made to get it before the Supreme Court by writ of certiorari; it being alleged that the Patent Office would allow no verbal description in design patents, and that over 30,000 of such patents were imperiled so far as their scope was concerned. The application, however, was denied. 225 U.S. 707 [(1912)].”) In the few instances where lower-court judges could, like the Supreme Court, opt out of design-patent disputes altogether, they employed (sometimes doctrinally questionable) means to do so. See, e.g., Mallinson v. Ryan, 242 F. 951, 953 (S.D.N.Y. 1917) (“Doubtless there are many cases where it is desirable to retain jurisdiction, but there are other cases where the contrary is the case, and such is the suit at bar; for here the parties can litigate their controversy competently in the state court where it belongs, and, the [design] patent question having been determined at the threshold of the litigation, there is no good reason why the United States courts should permit a litigation to continue, and especially where numerous causes properly here are entitled to the attention of the court.”) (emphasis added); accord Lewis v. Vendome Bags, 108 F.2d 16, 18–19 (2d Cir. 1939) (Clark, J., dissenting) (objecting to panel majority’s decision not to reach unfair-competition claim stemming from same set of operative facts as failed design-patent infringement claim—particularly where the majority did go on to dismiss the merits of that claim).}

One technique to which many judges gravitated, as the Supreme Court’s silence on design-patent law grew ever more deafening, was the display of an exaggerated reluctance to engage substantively with the subject matter of
design at all. Even as the Supreme Court continued to hear utility-patent disputes—and affirmed the validity thereof with, for instance, the cautionary statement that “simplicity should not blind us as to [inventive] character”—lower-court judges both seized on and disparaged the purported simplicity of designs, making clear that it was their job, not their preference, to adjudicate disputes concerning the lowly subject matter of design:

_The eyes of the court cannot be closed_ to the fact that in the court room itself are electric light fixtures, placed there long before the date of the patent, which show a sphere with a neck and rim so nearly identical with those of the patent that _the difference is a mere matter of immaterial proportions_. . . _The court must take judicial notice_ of the oblate spheroid and neck common to the whole field of everyday arts, and must hold that this design is merely a double use,—is, at most, the adaptation of an old form to a new purpose. _The defense of want of patentable novelty is sustained._

The Connecticut district-court judge writing this passage in 1902 thus performed a balancing act that would become increasingly common in the years to come, issuing a decision addressing the design in dispute while simultaneously demonstrating adherence to prevailing gender norms. This act would consistently feature not only a newly emphatic and explicit reluctance to adjudicate design disputes, newly disparaging descriptions of contested designs and design more generally, and more or less subtly gendered rhetoric. In this 1902 decision, gender surfaced through judicial selection of the objects highlighted as “prior art” (precluding rights in the patented bell design at issue): “_the andirons_ [metal supports for firewood] _of our grandfathers, the door knobs from time immemorial, [and] the conventional cuspidor [spittoon]._”

The presiding judge, in other words, effectively counterbalanced the act of opining on the subject of design by parading a list of notions, things, and people that were indisputably male-coded: wood-chopping, chewing tobacco, and grandfathers.

As the years passed, and it became clear the Supreme Court had no interest in design patents, the courts’ discussion of design would become more explicitly gendered. The Second Circuit, for example, included the following passage in its 1926 decision resolving a dispute over a patented tie design:

_[Men’s ties] are bought, not only because of their utility to the wearer and their attractiveness to others when worn, but also because of the appeal, as novel, ornamental, and pleasing, that the design makes to

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77. Id. at 363 (emphasis added).
78. Id. (emphasis added). See discussion BARKER & GALASñSK1 supra note 7, at 86 (analyzing “the performance of masculinity as achieved through men’s talk about their fathers”); see also id. at 118 (“Our fathers share aspects of a modernist masculinity forged under specific historical, social, and cultural circumstances. This includes the language of men and the metaphors of masculinity . . . ”).
the aesthetic sense of the purchaser, oftentimes the wife, sweetheart, or female relative of the man who is to wear it.\textsuperscript{80}

At other times, one must read more closely, paying attention to judicial rhetoric and choices that bespeak gendered biases and value judgments arising from the “connotative cluster” previously discussed without explicitly mentioning gender or sexuality. Such close reading requires attention to specific words and examples chosen, judicial performances of ignorance and/or deference, uncharacteristic editorializations, irregular procedural moves and/or evidentiary approaches, and other actions by judges who rarely understand—or even have access to—the “deep discourse” in their rulings.\textsuperscript{81}

\textsuperscript{80} Franklin Knitting Mills v. Gropper Knitting Mills, 15 F.2d 375, 375 (2d Cir.). See also id. (“Of course, in part the design is utilitarian; it is that of a necktie to be worn . . . .”) The misguided intuition that because the tie was part of standard attire for “respectable” men, it must be “utilitarian” (in an apparent failure to understand or recognize that ties served the same purely decorative function as often-criticized components of women’s attire), illustrates that the cultural logic at work for early twentieth-century judges did much of its work below the level of conscious or complete awareness.

\textsuperscript{81} See Colman, Part 1, supra note 2, at 424–26, 456–58; accord GREIG HENDERSON, CREATING LEGAL WORLDS: STORY AND STYLE IN A CULTURE OF ARGUMENT 6 (2015) (“[E]very time judges write decisions, they are faced with rhetorical choices, and by the stories they choose to tell and by the styles in which they choose to tell them, they are creating legal worlds for others to live in as well as fashioning images of themselves as judges.”). Note that threads of the same cultural logic encouraging judges to disfavor design patents run through various decisions expressing disapproval of utility patents claiming rights in processes for the production of designs. See, e.g., Simplex Lithograph Co. v. Renfrew Mfg. Co., 250 F. 863, 863–64 (2d Cir. 1918) (“It is claimed for Stenz that he was the first to produce ‘sample cards which could be used strictly as such, showing in paper the actual fabric.’ In the sense that what is made under this patent creates the optical illusion of seeing on the cardboard back something which, even on close inspection, it seems possible to pluck from its fastening, the assertion is true. The excellent ‘article of manufacture,’ the product, which is described and claimed, is new with Stenz. In one use of the word, its novelty consists wholly in the perfection of imitation. The new ‘product’ is the production of illusion; i.e., making the eye believe that actual pieces of cloth are in view. But patentable novelty must be more than this. Never can the patent law wholly divorce itself from the idea of ‘means’ for that word suggests or implies the meritorious human effort which it is the object of the law to reward.”); Harmon Paper Co. v. Prager, 287 F. 841, 844 (2d Cir. 1923) (“We may assume with plaintiff that the success of this paper is very marked, and that the ‘soft and impressionistic visionary depth’ thereof is most pleasing to the eye; we may further assume (and here also we are agreed) that the prior wall paper art shows no paper made in exactly the same way; yet the question of fact remains whether all this reveals invention, or whether it was no more than the skill of a mechanic plus the taste of a good salesman. . . . We find that the patentee has made an attractive rearrangement of old matter by old means, and such rearrangement has spelled commercial success. This is the best that can be said for the patent, and it is not enough. . . . Of course, that is a question only of fact; but here we can discover nothing but a style, a mode or fashion that caught the public fancy. . . . [M]ere novelty or attractiveness of shape or form needs a substratum of some technical ingenuity to rise to patentable invention.”) Such utility-patent decisions reinforce my assertion that the turn-of-the-century cultural logic detailed in Part 1 did indeed make its way into patent jurisprudence. I will not analyze the long-term effect of such permeation on utility-patent jurisprudence here, however, as judicial decisions of the sort cited immediately above did not eviscerate an entire branch of IP law, as did the design-patent decisions that are the focus of this section. The key difference, I will hypothesize without further elaborating at present, is that stigmatized material made up the majority of subject matter at issue in design-patent cases but only a small portion of the inventions at issue in utility-patent disputes. See generally UNDERWOOD, supra note 9 (containing lists, published in 1907, of adjudicated design and utility
Circuit courts’ rhetoric often suggested that judges were set on invalidating design patents wherever possible. And given the Supreme Court’s absenteeism in the design-patent realm, “whenever possible” increasingly meant—especially for the Second Circuit, sitting in the U.S. design capital of New York—all design-patent cases. In a dynamic that scholars have noted elsewhere, appellate judges appear to have used their newly unfettered discretion in design-patent cases to implement ideology.

Specifically, the circuit courts increasingly approached design in a manner displaying their cognizance of the negative connotative cluster in which (as described in Part I) design had become enmeshed by the turn-of-the-century. Under the operative cultural logic, (1) innovations of value to society were, by definition, something other than design, leaving only disfavored material in patents, alphabetized by subject matter and reflecting a high concentration of female-coded or otherwise stigmatized material in design-patent list but not utility-patent list).

82. See, e.g., Theodore W. Foster & Bro. Co. v. Tilden-Thurber Co., 200 F. 54, 57 (1st Cir. 1912) (“The Court was ‘unable, as was the District Court, to find sufficient reason for disagreeing with [the Patent Examiner’s finding of non-anticipation]’ and was ‘therefore unable to hold the patent void for lack of novelty’”). Such phrasing is hardly what one would expect to find in a decision about a patent supposedly presumed valid by virtue of issuance.

83. As a result of the Supreme Court’s “distancing,” the lower-court judges had a wider berth to disparage and marginalize design. See McGuire et al., supra note 54, at 1307 (“[L]ower court judges act within a judicial hierarchy and, as such, are sensitive to the potential costs of being reversed by the Supreme Court. Among other things, reversals can damage the professional reputation of a judge and add to her workload if a case is remanded.”) (citation omitted). Indeed, the Court’s 1912 denial of certiorari in Ashley v. Tatum, a design-patent case with potentially far-reaching effects that the circuit courts recognized, see id., arguably represents the point at which circuit-court judges abandoned all restraint in their anti-design rhetoric. This dynamic is consistent with Lee Epstein and her coauthors’ findings that contemporary Supreme Court rulings reflect greater ideological bias than do circuit court rulings in part because circuit courts “don’t have the last word . . . in any cases that the Supreme Court might decide to hear if the losing party petitioner for certiorari.” LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 9 (2013). Once circuit-court judges realized in the 1910s that they effectively “had the last word” in design-patent cases, they acted very much like ideologically driven Supreme Court Justices. Compare the First Circuit’s cautious language in its 1912 decision, Tilden-Thurber Co., 200 F. at 56 (“We do not think it can be said of clothes brushes, any more than of many other similar toilet articles, that no artistic configuration given to them, addressed to the eye, can of itself render them more desirable. We are therefore unable to class them among articles incapable of being subject of design patents, or of design patents based on shape or configuration.”). For discussion of a more recent situation in patent law that is arguably analogous to that of the Second Circuit in the early twentieth century, see J. Jonas Anderson, Patent Dialogue, 92 N.C. L. REV. 1049, 1068 (2014) (“Centralized appeals give the Federal Circuit great flexibility in crafting new policy—if judges on the court want to change the law, they will quickly be presented with an opportunity to do so.”); id. at 1083 (“The Federal Circuit has shown itself to be quick to react to both grants of certiorari and [the Supreme Court’s] calls for the views of the Solicitor General”); id. at 1105 (“When the Supreme Court grants certiorari, it sends a clear signal to the Federal Circuit. But it also requires the Supreme Court to make a first attempt at crafting the law.”) (citations omitted).

84. See, e.g., Marvel Co. v. Pearl, 114 F. 946, 946 (C.C.S.D.N.Y. 1902) (“The design patent sued on in this cause is another instance of a perversion of the statute. Patents for designs are intended to apply to matters of ornament, in which the utility depends upon the pleasing effect imparted to the eye, and not upon any new function . . . . Syringes of this sort are not bought because of their artistic beauty, but because they are mechanically useful.”). Note the court’s use of the word perversion for material that did not appear in its proper category, and compare that invocation with the use of the same word for “deviant” sexual acts discussed in Part I.
the realm of design patents; and (2) “design,” so defined, was, at best, imitative and irrelevant—"at worst, pointless, wasteful, self-indulgent, and of particular interest only to individuals who "deviated" from the (utilitarian, gendered) values exalted by the men of the federal judiciary.

Disregarding the Supreme Court’s dictate in Gorham v. White that design-patent law should be interpreted and applied in a manner that gave effect to Congress’s professed 1842 objective of “promoting the progress of the decorative arts,” circuit-court judges in the Second Circuit and elsewhere made clear in their decisions that the (female-coded and otherwise stigmatized) field of design almost categorically reflected an absence of the (male-coded and culturally venerated) “inventive genius” that patents sought to “dignify.” Thus, in the 1916 case of Strause Gas Iron Co. v. William M. Crane Co., for instance, the Second Circuit summarily announced that anyone setting out “to design [the plaintiff’s patented] irons with the art before him, and governed only by considerations of proportion and plan, would have had no difficulty in making the plaintiff’s iron.” The Seventh Circuit—whose rhetorical and doctrinal innovations in design-patent jurisprudence largely echoed those of the Second

85. See, e.g., R.E. Dietz Co. v. Burr & Starkweather Co., 243 F. 592, 594 (2d Cir. 1917) (The patented lantern “represent[ed] nothing more than . . . an article always purchased and used for what it will do—not for its looks.”); Charles Boldt Co. v. Turner Bros. Co., 199 F. 139, 142 (7th Cir. 1912) (Further, the presiding panel of the Seventh Circuit demanded, but purportedly could not locate in the plaintiff’s work, “a spark of genius”—even one that (given the low opinion of design that the court made sure to express) would likely represent nothing more than “the humble luminosity of the glowworm.”).

86. See generally Colman, Part 1, supra note 2.

87. See discussion supra note 35.

88. 235 F. 126, 131 (2d Cir. 1916). Only rarely before design patents’ 1960s reemergence did judges recognize the risk of—let alone overcome—“hindsight bias” in their analysis of designs’ novelty. For an example of later judicial appreciation of this bias, see Rains v. Niaqua, Inc., 406 F.2d 275, 279 (2d Cir. 1969) (“[W]e are mindful that a combination of elements that seems simple in retrospect may not have been so simple at the time it was first produced.”). Even when early twentieth-century judges did recognize that design might have some value to some people, and argued for the recognition of that value in varying respects, they often made sure to disparage design along the way. See, e.g., Harmon Paper Co. v. Prager, 287 F. 841, 847 (2d Cir. 1923) (Manton, J., dissenting) (“To view this [wallpaper] in the light of one not experienced in the art, it may seem trivial and unworthy of the dignity of patent protection, but looking at it with the eyes of one engaged in this trade, the patent represents a large and successful business. To them it is of the utmost importance. No one before satisfied this want and it has been done in simplicity and now has the compliment paid to it of imitation by others . . . . I think that the [utility patent for the process producing the wallpaper design, though not the design patent for the wallpaper itself] is valid unless evidence of the prior art defeats it . . . . [and] I can find nothing in the prior art which anticipated the patent in suit.”). This passage reflects the continued use of rhetorical distancing from design by emphasizing judicial deference to other men—men who, in apparent contrast with the presiding federal judges, would not consider the product at issue “trivial and unworthy of the dignity of patent protection.” That this technique, present in design-patent cases at early as Gorham v. White, supra, surfaces in an opinion from 1923 underscores my earlier point that one can identify different phases of the courts’ marginalization of design patents only in broad strokes. Judicial decisions, like all cultural phenomena, illustrate both trends and exceptions thereto—making it all the more remarkable (and worthy of scrutiny) that the Second Circuit adhered to its practice of invalidated challenged design patents between 1926 and 1959, see infra, and that the Supreme Court has continued its practice of refusing to grant certiorari in cases presenting issues of substantive design-patent doctrine since the mid-1890s.
Circuit—in the 1912 case of Charles Boldt Co. v. Turner Bros. Co., drew an explicit opposition between “designs” and “real” inventions. The Eighth Circuit, in its 1921 decision in Sodemann Heat & Power Co. v. Kauffman, expressed this hierarchy of value in the form of asymmetrical doctrine: a “new combination of old devices” could supply the requisite “invention” for a utility patent, even where a patentee had accomplished nothing beyond “an old result in a more facile, mechanical, useful, or effective way”—while the endeavor of design, consisting of the “adaptation of old devices or forms to new purposes, however convenient, useful, or beautiful they may be in their new role, is not invention.”

Manifestations of the ideologies and sociocultural norms discussed at length in Part 1 sometimes surfaced in the form of judicial editorialization on the aesthetic virtues or flaws of specific designs or styles of design. The Second Circuit in Wilson v. Haber Bros., for example, began its opinion concerning a patented doll design by referring to the plaintiff’s work as a “grotesque figure.” The Seventh Circuit in Charles Boldt Co. rather euphemistically declared in 1912 that it would find valid patents protecting designs whose “suggestions are wholesome and proper.” Works displaying less ornamentation—and thus less evocative of Aestheticism, Art Nouveau, femininity/effeminacy, luxury, decadence, France, East Asia, and sexual deviance—sometimes received praise from the courts. The Second Circuit’s 1912 decision in Ashley v. Samuel C. Tatum Co., for example, praised the patentee’s inkstand design because “it ma[de] no shallow appeal to the senses by any effort at inconsequent ornament”—even though the court ultimately ruled in the alleged infringer’s favor.

89. 199 F. at 142.
91. 275 F. 346, 347 (2d Cir. 1921) (emphasis added). As discussed in Part 1, Art Nouveau, epitomized by a style of décor and dress championed by Wilde and other Aesthetes, had been described by many critics as “‘grotesque,’ ‘unhealthy’ [and] ‘the outcome of diseased minds.’” GUFFEY, supra note 10, at 34. See also E.I. Horsman & Aetna Doll Co. v. Kaufman, 286 F. 372, 373 (2d Cir. 1922) (“This image was a bust, representing, in the white of plaster, the head and shoulders of an infant, wearing the chubby empty smile which for a long time we have associated with dolls’ faces. With some difficulty we assume the bust to have been a work of art, and therefore falling within section 5(g) of the Copyright Act of 1909 (Comp. St. Sec. 9519).”) (emphasis added); id. at 372 (“we prefer to base judgment on what must be decided, not on matters that might be discussed”) (emphasis added).
93. 186 F. 339, 342 (2d Cir. 1911); accord A. C. Gilbert Co. v. Shemitz, 45 F.2d 98, 99 (2d Cir. 1930) (“The absence of any ornamentation, though pleasing, seems dominantly utilitarian, even though it results in an attractive configuration. But, whatever may be thought of the appeal to aesthetic taste, we are satisfied that there was no inventive skill in the slight modification of prior models involved in working out the [juicer] design of the patent in suit.”); In re Stimpson, 24 F.2d 1012, 1012 (D.C. Cir. 1928) (declaring that to be valid, patented designs must have “grace or symmetry of form”); see discussion JONATHAN M. WOODHAM, TWENTIETH-CENTURY DESIGN 34, 35 (1997) (“The modernists’ spiritual affinity for abstract forms [made up of ‘clean, geometric [shapes with] plain surfaces’] was also wedded to a democratic ideal whereby the majority would be able to enjoy an improved quality of life in a hygienic, healthy, modern environment.”). By the time the general American public had acquired a taste for stripped-down, modernist design—well after the conclusion of World War I, more “cutting-edge” design notwithstanding—the anti-design
The circuit courts’ rhetorical and doctrinal hostility toward design was echoed with growing frequency in district courts’ off-the-cuff commentary on “invention” (or purported lack thereof):

How such a design [as the patented textile print in dispute here] involves invention is beyond my comprehension, especially in view of what has been recently said in Steffens v. Steiner, 232 Fed. 862 [(2d Cir. 1916)] and Strause Gas Iron Co. v. William M. Crane Co., 235 Fed. 126, 130 (2d Cir. 1916). Can it conceivably involve patentable novelty to draw a few spaced apart parallel lines on a gown, a parasol, a shirt, a shawl, a rug, or the many other articles made up of textile fabrics? To so hold would undignify the whole theory of invention . . . .

Passages like this reflect the apparent perception of “permission” from the circuit courts to the district courts to pontificate about and put into practice “commonsensical” notions about design’s lack of value. The phenomenon arguably mirrored the process by which the circuit courts themselves, after nearly two decades of nonintervention by the Supreme Court in the design-patent arena, had inferred that they could dispose of design-patent cases however they saw fit. Such unfettered discretion led the circuit courts, and later, district courts, to disregard well-established principles laid down by the Supreme Court without fear of reversal.

Many of the decisions reviewed directly above were, for instance, plainly incompatible with the cautious deference to experts that characterized the Supreme Court’s analysis in its foundational 1871 Gorham v. White decision. The lower courts also increasingly disregarded Supreme Court mandates in more recent decisions making clear that judges should avoid making factual determinations about (1) whether a patented design was novel and (2)
whether a defendant’s material was unlawfully close to a plaintiff’s patented material.96 (Indeed, the Second Circuit later admitted that it had essentially ignored the Supreme Court’s instructions—even as it doubled-down on its commitment not to enforce design patents.97)

The decisions of the Second Circuit and other courts in the 1910s gradually eviscerated design-patent protection by disavowing the Gorham Court’s aesthetic and commercial justifications for applying design-patent doctrine so as to effectuate Congress’s 1842 policy of promoting “the progress of the decorative arts.”98 After the downfall of Wilde and Aestheticism—and, by extension, any appreciation by normatively masculine men of design for its own sake—highly visible judges instead perceived as “controlling” the sociocultural authority99 that seemed to require the men of the federal judiciary to

96. See Mast, Foos, & Co. v. Stover Mfg. Co., 177 U.S. 485, 495 (1900) (“[I]f the case involve a question of fact, as of anticipation or infringement, we think the parties are entitled to put in their evidence in the manner prescribed by the rules of this court for taking testimony in equity causes.”).

97. See, e.g., Kurtz v. Belle Hat Lining Co., 280 F. 277, 279 (2d Cir. 1922) (“Thus is presented the question of invention, admittedly one of fact, yet also one as to which courts, composed of lawyers, have long been anxious to act with uniformity and along lines of thought which will result in precedents, instead of mere incidents. Despite the warning of Justice Brown in McClain v. Ortmayer, 141 U.S. 419, 427 [1981]), that the word ‘invention’ ‘cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involved an exercise of the inventive faculty or not,’ the effort still continues. Prof. Robinson analyzed all of these attempts down to his date of publication (1890), which was but a few months before Brown, J., pronounced the effort futile. Rob. Pat. vol. 1, p. 116 et seq. Yet there remains as always worthy of consideration the learned author’s dictum that ‘the mental faculties involved in the inventive act are the creative and not the imitative.’”); White v. Leanore Frocks, 120 F.2d 113, 114 (2d Cir. 1941) (“Courts have at times held design patents invalid upon their face without any showing of invalidity by the defendant . . . [and] indeed we have done so ourselves [despite the fact that] in the only instance in which the Supreme Court passed upon the question, it reversed a dismissal and sent back the case for trial, although the design was certainly extremely simple.” (citations omitted) (citing New York Belting, 137 U.S. 445.)). The Second Circuit’s gesture at humility in Leanore Frocks did not include an acknowledgement that the court had disregarded the Supreme Court decades-old instruction in Lehnbeuter v. Holthaus, that whether a design “is more graceful or beautiful than older designs is not for [judges] to decide,” as patentability properly turned on novelty. 105 U.S. 94, 96 (1881).

98. On this point, it is illuminating to compare the decisions discussed in this section with a key 1960s appellate-court ruling in which design patents begun to rise from the dead: In re Laverne, 356 F.2d 1003, 1006 (C.C.P.A. 1966) (“The test of ‘obviousness’ must be applied in a way which will implement the legislative intent to promote progress in the field of industrial design by means of the patent incentive. This will not be done by denying patents to everything competent designers produce by the skill of their calling.”). Notably, the Federal Circuit’s decision in Laverne reached back nearly a century to invoke the Gorham Court’s long-ignored rationale for giving effect to design patents.

99. See generally Colman, Part 1, supra note 2. For a judicial recap of the criteria that courts had found to be relevant proxies for “invention” in the utility-patent context, echoing the sociocultural authority in question, see Kurtz, 280 F. at 281 (“[W]hile neither simplicity, cheapness, nor utility—nor all three combined—constitute invention, they have been deemed most potent evidence thereof.”).
favor anti-design outcomes despite Supreme Court precedent seemingly in tension therewith and contrary congressional policy objectives.100

As a result, by the mid-1920s, the Second Circuit (followed on essentially all salient points by other circuit and district courts) had established through both repeated rhetoric and doctrinal innovations that value and “genius” lay only in the functional; the ornamental material comprising the subject matter of design patents, by contrast, was frivolous, ugly, derivative, irrelevant, or all of the above.101 These judges made clear that little or nothing covered by de-

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100. Compare, Charles Boldt Co., 199 F. at 143 (“It is true, as appellant says, that all patents are granted in order to promote the arts or sciences, or both, but the provision of the Constitution was never intended to grant a monopoly just for the purpose of stimulating the natural instincts of mankind to make goods and merchandise attractive . . . and therefore salable . . . Invention calls for more than the exercise of a mere desire to please for mercenary ends.”); Williams Calk Co. v. Neverslip Mfg. Co., 136 F. 210, 215 (Cir. Ct. M.D. Pa. 1905) (“To say that the form into which such articles are cast adds to their attractiveness to a purchaser, and thus enhances their salable value, enlarging the demand, merely obscures the issue. It is true that this is recognized in Gorham Co. v. White, 14 Wall. 511 (1871) as one of the objects, in providing for design-patent protection, but that it thereby made the law applicable to anything and everything, without regard to its character, or whether it was otherwise within the purview of the statute, by no means follows.”); Harmon Paper Co. v. Prager, 287 F. 841, 846–47 (2d Cir. 1923) (Manton, J., dissenting) (“The manufacture of this paper has made a very marked impression upon the trade. To the outsider it may seem trivial, but in the trade, it made for great commercial success . . . . [Unlike the majority,] I regard this as persuasive evidence of invention.”, with Diamond Rubber Co. of N.Y. v. Consol. Rubber Tire Co., 220 U.S. 428, 441 (1911) (“We have [properly] taken for granted in our discussion [finding the requisite ‘invention’ to support a utility patent covering a rubber tire of acknowledged ‘simplicity’] that the Grant tire immediately established and has ever since maintained its supremacy over all other rubber tires, and has been commercially successful while they have been failures. The assumption is justified by the concession of counsel.”).

101. One might wonder why designers continued to apply for design patents in light of growing judicial hostility to that type of intellectual-property protection. This question is discussed at length in Colman, PATENTS AND PERVETS, supra star footnote. For present purposes, it is sufficient to note that (1) many designers did eschew design patents because they considered them unreliable, turning to Congress for remedial legislation; and (2) motivated both by the failures of design-patent litigation and lobbying efforts for reform and/or a substitute for design-patent protection, many designers appear to have secured design patents primarily for the purpose of bringing unfair-competition claims in federal court—especially before the 1946 passage of the Lanham Act. See, e.g., Krem-Ko Co. v. R. G. Miller & Sons, Inc., 68 F.2d 872, 873 (2d Cir. 1934) (“The part of the plaintiff’s case which is grounded on the claim of unfair competition is not, of course, defeated by the holding that its design patent is invalid.”) (emphasis added). The court’s use of the phrase “of course” suggests, correctly, that the plaintiff’s litigation strategy technique had become common—and would continue to rise in popularity as the courts grew more receptive to pro-trade-dress unfair competition claims throughout the 1930s and 1940s. See also Sinko v. Snow-Craggs Corp., 105 F.2d 450 (7th Cir. 1939) (party brought design-patent and unfair competition claims; after district court found design patent invalid but ruled for plaintiff on unfair competition claim, defendant appealed on latter issue; plaintiff did not cross-appeal); Prince Matchabelli, Inc. v. Anhalt & Co., 40 F. Supp. 848, 849–50 (S.D.N.Y. 1941) (plaintiff brought design-patent and unfair competition claims, both premised on defendant’s copying of “purse kit,” but sought injunction based solely on unfair competition claim—with central disagreement between parties on propriety of federal jurisdiction.). It is true that even after the passage of the Lanham Act in 1946, some parties still sought and sued over design patents. One possible reason for this was identified by Judge Giles Rich: “[i]n the 1950s[,] design patents were mostly not upheld by the courts and hence were not respected by competitors; good lawyers advised their clients against bothering with them and other lawyers misled clients into thinking they were obtaining real protection by design patents.” The Industrial Innovation and Technology Act: Hearing on S. 791 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the
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sign patents was (or rather, should be) protected—and ruled accordingly: between 1926 and 1959, the Second Circuit did not uphold the validity of a single challenged design patent.102

III. A DISCUSSION OF THE LEADING ALTERNATIVE ACCOUNT OF DESIGN PATENTS’ MARGINALIZATION

In the only other in-depth analysis seeking to provide a causal account of American design-patent law’s relegation to a multi-decade period of oblivion, legal scholar Jason Du Mont argues that a series of administrative, legislative, and judicial “mishaps” resulted in an inadvertent and ultimately fatal importation of utility-patent concepts into the design-patent context.103 Du Mont places great emphasis, in particular, on the courts’ application of the “invention” requirement arising in utility-patent law as a central factor driving design patents into its multi-decade period of irrelevance. While the administrative, legislative, and doctrinal factors identified by Du Mont were not irrelevant to design patents’ fate in litigation, they can more plausibly be understood as a means by which judges could, and did, implement powerful, gendered socio-cultural norms implicating design.104

Du Mont appears to reason from the unstated premise that the federal judges in question approached utility-patent cases and design-patent cases in a

Judiciary, 100th Cong. 24 (1987) (statement of Hon. Giles S. Rich, Judge, Fed. Cir.) Another possible reason is the potential licensing value, fueled by the risk aversion of would-be defendants, using designs covered by patents of even doubtful enforceability. Other reasons, including shifting attitudes toward design, are discussed in PATENTS AND PERVETS.

102. Cf. White v. Leaore Frocks, 120 F.2d 113, 114–15 (2d Cir. 1941) (“We were told at the bar that this appeal has been taken to clear up doubts remaining after the decision of the Supreme Court in Fashion Originator’s Guild v. Federal Trade Commission, 312 U.S. 457 [(1940)]; it is the latest, and presumably the last, effort of dress designers to get some protection against what they call the ‘piracy’ of their designs. [But] there is little chance that valid design patents can be procured in any such number as to answer their demand . . . . Recourse to the courts, as the law now stands, is not likely to help them. Perhaps, if their grievance is as great as they say, Congress may yet be moved to help them; but short of that, no effective remedy seems open.”) (emphasis added).

103. See Du Mont, supra note 23, at 609 (“[O]nly through a peculiar series of administrative, legislative, and judicial mishaps did we arrive at the modern conclusion that design patents must meet the nonobviousness requirement. As a result, the U.S. has a system where the Patent Office and courts continually rely on the Statute’s legislative intent to try and make up for the harsh effects of its application to designs.”).

104. As noted in Part 1, where it appears there is not a rational order in actors’ application of “rules,” we can—and should—look more closely. See Mary Douglas, A History of Grid and Group Cultural Theory, Workshop on Complexity and Cultural Theory in Honour of Michael Thompson 9–10 (June 27, 2005), http://projects.chass.utoronto.ca/semiotics/cyber/douglas1.pdf (“[A]ctors sometimes] seem to be behaving irrationally. . . . [Such] intransigence is neither irrational nor immoral. It expresses their loyalties and moral principles, and their responsibilities to other members of their society.”). See also Eda Kranakis, Patents and Power: European Patent System Integration in the Context of Globalisation, 48 TECH. & CULTURE 689, 690 (2007) (“Like a gun or a railroad, a patent system can be ‘a potent agent in disciplining and dominating.’ How (and in whose interests) patent systems are [maintained] affects development and the distribution of wealth and power. While scholars often treat intellectual-property regulation as a dry, technical, ‘industrial policy’ issue isolated from the social world, [a worthy] objective is to show that patent-system [modification] is a rich process of social, cultural, and political change . . . .”).
disinterested, bureaucratic manner, mechanically applying statutory language and “doctrine.” Yet this account of adjudication retains little credibility as a description of common-law courts’ behavior, in general— and has still less explanatory power for judicial conduct during the time period in question.

Constrained by this methodological commitment, Du Mont’s “mishap”-based account of the courts’ treatment of design patents cannot provide a satisfactory explanation for design patent law’s trajectory. Among the important facts and developments that a legalistic narrative like Du Mont’s cannot readily explain are (1) the increased rhetorical distancing and pronounced judicial hostility characterizing design-patent decisions of the period; (2) the chronological correspondence of that distancing and hostility with instrumental events in Anglo-American culture and with broad shifts in dominant ideologies implicating gender, sexuality, utilitarianism, morality, and material culture, reviewed in Part 1 of this project; (3) the orthodoxy among federal judges at the turn of the century that they were not only authorized, but obligated, to police “public morality” and promote emphatically utilitarian notions.


106. See supra notes 82–93; cf. MEGAN RICHARDSON & JULIAN THOMAS, FASHIONING INTELLECTUAL PROPERTY: EXHIBITION, ADVERTISING AND THE PRESS, 1789–1918, 145–146 (2012) (“[British and other judges in common-law systems in the first half of the twentieth century generally] represented the legal boundaries of intellectual property as both formal and fixed. They started to represent intellectual property law in a stale historicising way, as about statutory copyright, designs, patents, trade marks and ancillary systems which still took their essential rationales, shape and content from their perceived eighteenth- and nineteenth-century roots, never much changing—even if underneath they refashioned the law from time to time to suit their rather conservative social purposes. In the process, they forgot the utilitarian debates that lay behind their long nineteenth-century fashionings and refashionings, creating the myth of the law as always existing in some narrowly framed ‘historical’ form rather than—as it really was—in a constant state of flux in its efforts to deal with changing social, cultural and economic circumstances.”) (emphasis added) (citation omitted). Notably, when the modern Federal Circuit has resolved utility-patent disputes through the sort of “reasoning” found in the archetypal design-patent decisions issued by the Second Circuit and other courts in the early twentieth century, the court has been called out by scholars. See, e.g., William C. Rooklidge & Matthew F. Weil, JUDICIAL HYPERACTIVITY: THE FEDERAL CIRCUIT’S DISCOMFORT WITH ITS APPELLATE ROLE, 15 BERKELEY TECH. L.J. 724, 742 (2000) (“In one early case the Federal Circuit avoided remand because ‘the record is relatively short and the legal and factual issues are uncomplicated and not difficult to resolve.’ [Baginsky v. United States, 697 F.2d 1070, 1074 (Fed. Cir. 1983).] Clearly, this goes too far and reeks of impermissible fact-finding. That a factual issue is uncomplicated or not difficult to resolve does not mean that that issue could be decided in only one way.”).

107. See generally Colman, Part 1, supra note 2. See also Christine MacLeod & Alessandro Nuvolari, The Pitfalls of Prosopography: Inventors in the Dictionary of National Biography, 47 TCH. AND CULTURE 757, 775 (2006) (“[I]nventions that pertained to home comforts and personal appearance (considered to belong to the feminine sphere) were largely taken for granted [and commentators] downplayed[ed] those major economic activities, no matter how innovative, that did not belong to the nineteenth-century narratives of industrialization and empire.”).
of social “progress” through their disposition of cases, including in the patent context; (4) the Supreme Court’s decisive post-1895 withdrawal from design-patent jurisprudence, and the circuit courts’ strikingly selective and decidedly non-legalistic application of utility-patent case law in design-patent cases ignored by the Court (even as it continued to grant certiorari in utility-patent cases); (5) the systematic and “doctrinally” inexplicable differences between characteristic adjudication techniques and outcomes of the early twentieth-century period of design patents’ marginalization and those of the post-1960 period of their resurrection (where, as discussed below, courts frequently gave their imprimatur to “modernist” designs that featured fewer visual components than the often-ornate designs that the courts had previously dismissed as unpatentable—but which had a new set of sociocultural associations); and (6) relatedly, the nuanced and context-sensitive aesthetic analysis common in decisions of both the “revival” period and the decades before design patents’ downfall, but typically absent from judicial opinions published

108. See Colman, Part 1. supra note 2, nn. 182–93 and accompanying text; accord Reliance Novelty Co. v. Dworkz, 80 F. 902, 903 (Cir. Ct. Cal. 1897) (“It is a general principle, based upon public policy, that the patent laws of the United States do not authorize the issue of a patent for an invention which is injurious to the morals, health, or good order of society.”); Nat’l Automatic Device Co. v. Lloyd, 40 F. 89, 90 (N.D. Ill. 1889) (“The machine in question is only used for gambling purposes. The law of the United States only authorizes the issue of a patent for a new and useful invention, and in an early case on that subject (Bedford v. Hunt, 1 Mason, 302) it was held that the word ‘useful,’ as used in this statute, means such an invention as may be applied to some beneficial use in society, in contradistinction to an invention which is injurious to the morals, health, or good order of society, and the principle thus enunciated has been uniformly applied ever since.”); Scott & Williams, Inc. v. Aristo Hosiery Co., 300 F. 622, 623–24 (S.D.N.Y. 1924) (Hand, J.) (“[The invention in this case highlights women’s failure] to reckon with that principle of our nature which makes [them] wish to appear more affluent than our purses allow . . . [and] welcome whatever will protect them from acknowledging their inability to follow the most elegant. In respect of the back seam [of hose] the art has for long, indeed for over 55 years, come to their relief by providing a mock back seam in the seamless stocking, which can be added without substantial weakening of the fabric and by a simple technical device. So matters stood for many years, the impecunious being contented enough with the subterfuge so provided to buy seamless stockings in great quantities. About 1912 the fashion in women’s skirts changed to a much narrower cut. When the wearer was forced to step up, the lower leg was necessarily exposed much higher than it had been, showing the ‘fashion marks’ of the ‘full-fashioned’ stocking. Thus, observant and invidious members of the same sex had the opportunity to detect the innocent contrivance of the mock seam which had theretofore been successful, but which could now be discovered by the absence of the accompanying ‘fashion marks.’ [The plaintiff’s] patent, which was applied for in November, 1915, was merely to add such ‘fashion marks’ to the seamless stocking, by incorporating into the weave or knit one of several well-known structural irregularities with which the art was entirely familiar. The claims I will not even consider, since the defendant acknowledged infringement. The whole case comes to this: Whether it was invention at that time to contrive the idea and properly to embody it in an actual patent application.”), aff’d, 7 F.2d 1003, 1004 (2d Cir. 1925) (affirming district court’s invalidation of patent on device fulfilling “desired imitative effect in leading the public to believe the better quality and more expensive full-fashioned stocking was being worn”).

109. See discussion infra note 152.

110. See, e.g., In re Laverne, 356 F.2d 1003, 1005–06 (C.C.P.A. 1966) (“What is ‘the art to which the subject matter pertains’ in this case? Is it the molded chair ‘art’ or is it the ornamental design ‘art’? In what field is the ‘inventor’ of the design operating? Since those who create designs are designers, not chair makers, it would seem to follow that he is operating in the field of industrial design and that it is the ‘art’ involved.”); Anderson v. Saint, 46 F. 760, 764 (C.C.W.D. Pa.
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during the intervening, “fatal” period. To make sense of these facts, one
must set aside legalistic accounts of design patent law’s trajectory in favor of a
narrative grounded in both the broader “legal” landscape (for example, shifting
priorities and methodologies in federal-court adjudication) and in a more ro-

bust historical context. As this project shows, the reliability of such a con-
textual inquiry depends in particular on a sensitivity to shifting cultural

associations surrounding design—which, far from a cipher jostled about by
disinterested actors, has consistently carried a morally fraught, highly gen-
dered, and politically charged symbolic load.

As noted above, federal appellate courts have, since about 1960, applied
multiple doctrines originating in utility-patent jurisprudence to design
patents; however, unlike in the early twentieth-century cases examined in
Section II, the courts’ more recent applications of those doctrines have very
often favored designer-plaintiffs. This body of design-patent case law from
CCPA, the circuit courts, and (later) the Federal Circuit places in high relief
that, contrary to the premise undergirding Du Mont’s “doctrinal” account of
design patent’s downfall, legal terms like “invention” and “obviousness” have
not been determinative, or even primary, in the outcome of design-patent
cases—yielding instead to the constitutive assumptions, value judgments,
cultural ideologies, and reputational incentives of the decision maker.

111. See supra text accompanying notes 75–97.

112. The observed changes in judicial rulings cannot easily be explained through reference
to statutory revisions of design-patent law, which Congress had attended to with only marginally
more attention and vigor than that accorded design patents by the post-1895, absentee Supreme
Court. See discussion Schnadig Corp. v. Gaines Mfg. Co., 620 F.2d 1166, 1167 (6th Cir. 1980)
(“The design patent has existed since 1842. Act of August 29, 1842, ch. 263 § 3, 5 Stat. 544. The
1842 statute granted a patent to anyone who by ‘their own industry, genius, efforts, and expense,
may have invented or produced any new and original design for a manufacture . . . .’ The current
design patent statute differs little from its ancestor, providing that a design patent may be obtained
by the inventor of ‘any new, original and ornamental design for an article of manufacture.’ 35
U.S.C. § 171 (1976).”).

113. See, e.g., In re Glavas, 230 F.2d 447, 450–451 (C.C.P.A. 1956) (“As regards the combi-
nation of references in design cases, a different situation is presented [than in the utility-patent
context . . . . Obviously, almost every new design is made up of elements which, individually, are
old somewhere in the prior art, but the fact that the individual elements of a design are old, does
not prove want of invention in assembling them . . . . The appellant has produced a unitary article
having a shape which is not shown in any single reference and, while its component features may
be individually old in the prior art, that art does not suggest combining them as the appellant has
done, and the design claimed here, therefore, involves patentable novelty.”); Durling v. Spectrum
Furniture Co., 101 F.3d 100, 104 (Fed. Cir. 1996) (reversing finding of obviousness because “the
district court’s description merely represents the general concept of a sectional sofa with inte-
grated end tables,” while “the focus in a design patent obviousness inquiry should be on visual
appearances rather than design concepts.”).

114. Consider the evolution discussed below from early judicial opinions casually referring
to designs as “inventions” to turn-of-the-century decisions reserving the privileged title of “inven-
tion” specifically for patentable creations other than designs to recent case law once again using
the word inventor in connection with designed goods. Compare this semantic fluctuation with the
As in other areas of law, the “specialized” terminology of patent jurisprudence provides a vehicle for the accommodation and implementation of judicial intuitions grounded in social norms—norms that often appear “natural” or “inevitable” to decision makers because they are woven into a comprehensive, internalized world view.115 Patent specialist Judge Giles Rich116 acknowledged as much when he wrote: “It is probably true, as the majority says, that all this is just semantics and courts will, with phraseology of their own choosing, continue to find designs patentable or unpatentable according to their judicial ‘hunches’.”117 Such “hunches” draw on deep discourse, which (as reflected in the shifting rhetoric and outcomes of design-patent decisions from one brief period to the next) is dependent on sociocultural and historical context.118

Of course, judges are sometimes constrained in giving effect to their hunches by statutory language—but legislative factors appear to have played a minor role in the story of design-patent law’s slide into multi-decade irrelevance. If, as Du Mont posits, the language of the patent statutes actually dictated particular judicial rulings, Congress’s amendments to design-patent law

certitude of the definition provided in Design Protection—Time to Replace the Design Patent, 51 MINN. L. REV. 942, 942 (1966) (“[D]esigns are not creations which would be attributed to an act of invention . . . .”).

115. See ROSEN, supra note 32, at 7 (“When we hear a court speak of ‘the conscience of the community,’ ‘the reasonable man,’ or ‘the clear meaning of the statute,’ . . . we know that the meaning of these concepts will come not just from the experience of legal officials or some inner propulsion of the law but from those broader assumptions, reinforced across numerous domains, that characterize the culture of which law is a part.”).


117. In re Nalbandian, 661 F.2d 1214, 1218 (C.C.P.A. 1981). Indeed, a Second Circuit judge who presided over numerous foundational design-patent appeals essentially admitted as much in International Silver Co. v. Pomerantz, 271 F.2d 69, 72 (2d Cir. 1959), 271 F.2d at 72 (Swan, J., concurring) (“[W]hat is ‘invention’ in a design is a matter upon which one can seldom reasonably hold a dogmatic opinion.”) Notably, this had not prompted Judge Swan to send the question of validity in design-patent cases to juries, despite the Supreme Court’s instructions to the contrary.

118. The judges presiding over these more recent design-patent cases, of course, had not been alive during (or old enough to be culturally aware of) the downfall of Aestheticism; their understanding of “design” was, accordingly, very different from earlier generations of federal judges. See PAUL CONNERTON, HOW SOCIETIES REMEMBER 3 (1989) (“Concerning social memory in particular, we may note that images of the past commonly legitimate a present social order. It is an implicit rule that participants in any social order must presuppose a shared memory. That the extent that their memories of a society’s past diverse, to that extent its members can share neither experiences nor assumptions. The effect is seen perhaps most obviously when communication across generations is impeded by different sets of memories. Across generations, different sets of memories, frequently in the shape of implicit background narratives, will encounter each other . . . [but] the memories of one generation [will remain] locked irretrievably, as it were, in the brains and bodies of that generation.”); Wiebe E. Bijker, The Social Construction of Fluorescent Lighting, Or How an Artifact Was Invented in Its Diffusion Stage, in ANTITRUST LAW SHAPING TECHNOLOGY/BUILDING SOCIETY: STUDIES IN SOCIOTECHNICAL CHANGE 75, 76 (Wiebe E. Bijker & John Law eds., 1992) (“The interpretative flexibility of an artifact can be demonstrated by showing how, for different social groups [across space or time], the artifact presents itself as essentially different artifacts. The theoretical concept of technological frame of a social group [can be] employed to explain the interactions within and between social groups that shape the artifacts; these technological frames shape and are shaped by these interactions.”).
in 1902 should have liberalized design-patent policy. Instead, it marks the beginning of design-patent law’s evisceration by (primarily) the Second Circuit. Further, if statutory language were responsible for the trajectory of design patents, Congress’s enactment of the Patent Act of 1952 should arguably have been the final nail in the design-patent coffin. Instead, the decades that followed the passage of the 1952 Act represent the period of design patents’ revival, including in the Second Circuit.

Nor can design patents’ downfall be explained through doctrinal dynamics. As noted above, Du Mont argues that design patents suffered on account of courts’ importation of utility-patent principles into the design context. However, after 1895 (if not earlier), that “importation,” when examined in light of the rhetoric actually used by courts, appears far less principled than Du Mont’s account of design patents’ downfall would seem to require. (Of course, I have argued that the courts’ marginalization of design patents was indeed principled, but that the “principles” in question were outside the realm of what we would now understand as “legitimate” policy rationales like the preserv-

119. See discussion of statutory sequence at Colman, Copyright for Fashion, supra note 5, at 945–46. In any event, various post-1902 decisions reveal that the Second Circuit, during the period examined above, was constructing design-patent law to a far greater degree that it was construing the 1902 statute. For a 1904 New Jersey district court decision containing no mention of “sparks of genius” or “invention” in its design-patent obviousness analysis, see Weisgerber v. Clowney, 131 F. 477, 480 (C.C.D.N.J. 1904) (“A design patent is addressed to the eye, and is to be judged by its ability to please. Rowe v. Blodgett & Clapp Co., [103 Fed. 873 (C.C.D. Conn. 1900)] . . . . A design patent, also, the same as any other, must be possessed of novelty. Smith v. Saddle Co., [148 U.S. 679 (1893)]; Paine v. Snowden, [50 F. 776 (3d Cir. 1892)].”). Judge Learned Hand, presiding over a case in the Southern District of New York shortly before his elevation to the Second Circuit (and, notably, writing in 1924, after the marginalization of design was largely a fait accompli) acknowledged in a moment of candor—rare among federal judges of the time, though arguably characteristic of Judge Hand: “I conclude, therefore, that the art already showed all that this simple patent discloses, not, it is true, in exactly this kind of stocking, but so nearly that no one could claim any originality in the change. After all that has been written, and will be, of any tests of invention, there must always remain some latitude which is not susceptible of nice rational analysis. The standard is too impalpable to permit of strictly deductive application; in the end, a judge in this as in many other fields will to some extent reach his conclusions for reasons of which he may not be wholly aware, and which may depend upon his unconscious preference. This patent appears to me to be a trivial variation upon an old theme. One can scarcely expect unanimity as to how substantial it may appear to others, but one must judge as one can, and rightly or wrongly the conclusion seems to me very clear.” Scott & Williams, Inc. v. Aristo Hosiery Co., 300 F. 622, 626–27 (S.D.N.Y. 1924).

120. See In re Laverne, 356 F.2d 1003, 1162–63 (C.C.P.A. 1966) (“The codification of the design law provisions in 1952, continuing as it did the statutory provisions for design patents without change in substance . . . did nothing to alleviate the difficulties.”); accord Nathaniel, 661 F.2d at 1218–19 (Rich, J., concurring) (“When work on revision of the patent statutes began in 1950, a deliberate decision was made not to attempt any solution of the ‘controversial design problem’ but simply to retain the substance of the existing design patent statute and attack the design problem at a later date, after the new Title 35 had been enacted. Thus it was that the patentability of designs came to be subject to the new [35 U.S.C. §] 103 which was written with an eye to the kinds of inventions encompassed by [§] 101 with no thought at all of how it might affect designs. Therefore, the design protection problem was in no way made better; perhaps it was made worse.”).

121. See Pomerantz, 271 F.2d at 72 (affirming validity of a contested design patent, over a very reluctant concurrence by Judge Swan, for the first time in thirty-three years). Other, similar decisions would follow soon thereafter.
tion of vigorous competition in industry through scrutiny of monopolistic rights.\textsuperscript{122}

The Second Circuit’s decision in the 1921 case of \textit{Knapp v. Will & Baumer Co.}\textsuperscript{123} provides an illuminating example of an influential appellate court’s so-called “application” of utility-patent doctrine—specifically, the notion of “invention”—to a work of design, in apparent contravention of prescribed procedure, adherence to relevant precedent, and basic tenets of common-law reasoning. In \textit{Knapp}, the Second Circuit rejected both the Patent Office’s approval of a design patent for an unusually shaped candle and the district court’s finding of validity, which had been grounded in the well-

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\item[122.] See generally Colman, \textit{Part 1}, supra note 2. That early twentieth-century judicial ideology was indeed anti-design, and not an anti-patent more generally, is further highlighted by the sequences of events in American politics in the first half of the twentieth century. \textit{Cf.} \textit{Du Mont}, supra note 23, at 594–95 (explaining perceived abuse and attributing design patent’s downfall in part to the repercussions thereof). The influential Second Circuit decisions examined in this article, invalidating or refusing to enforce design patents, represent the core body of design-patent jurisprudence, separate from the narrower thread of case law explicitly rejecting design-patent protection for industrial goods on the basis of \textit{functionality}. Notably, the legislative and judicial ill will toward the potential abusive monopolies of utility patents, especially in the hands of large corporations, had not gained substantial traction by the first decade of the twentieth century, when courts began to invalidate design patents on a regular basis for the reasons identified in Section II. \textit{See} \textit{Herbert Hovenkamp, Intellectual Property and Competition, in RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY} (Edward Elgar et al. eds., forthcoming 2016) (manuscript at 6), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2569129 (noting that “[p]rior to 1917 the Supreme Court approved virtually every patent practice [that] had been alleged to restrict competition,” and that it was only “[b]eginning in the late 1930s [that] the Supreme Court applied increasingly harsh standards for [utility] patent issuance”). History simply does not support the contention that anti-monopoly sentiment was responsible for design patent’s downfall, as such sentiment did not yet wield significant power in the 1910s, by which point the foundational anti-design patent precedent had crystallized in the Second Circuit. \textit{See} \textit{Davis, supra} note 116, at 10 (“[In his efforts to ‘fix’ patent law, Judge Giles Rich] acknowledged that patent owners and their lawyers ‘went on a spree’ in the early 1900s resulting in practices and court decisions that promoted anticompetitive activity against the public interest. The courts were beginning to get things straightened out by 1940 but had a ways to go in his view.”). It is true that, on occasion, the trope of abusive monopolies appeared in the anti-design patentee decisions of the 1910s. \textit{See, e.g.}, \textit{Bolte & Weyer Co. v. Knight Light Co.}, 180 F. 412, 415 (7th Cir. 1910). However, when examined closely, the rhetoric of the Seventh Circuit in cases like \textit{Bolte & Weyer Co.} actually reinforces this article’s thesis that courts’ gendered sociocultural norms and values—not anti-patent sentiment, abuse of design patents, or statutory language—drove the foundational decisions in this area. \textit{See} \textit{id.} at 415–16 (“While under the older statutes this practice [of regularly finding design patents valid] was justifiable, since Congress is the supreme lawmaker, nevertheless, under the changed language of the statute, it does not seem that the further continuation of that practice can be justified, especially in the absence of the evidence of the touch of the hand of genius. The lamp under consideration utterly lacks in my judgment any approach to this standard. In itself it is no ornament. No person of taste would choose it for house decoration, unless it be to hide something of utility more undesirable in form. Lamps are indispensable. No one may do without their light—whether electric, gasoline, oil, or candle. They have a universal market. New features are constantly being added. Success in trade demands it. The beneficent provisions of the federal statutes were never meant to support contentions such as complainant now urges upon the court.”). The intuitive rhetorical flourishes of the panel do far more analytical work in this passage than does any concrete concern for statutory construction or policy concern.

\item[123.] 273 F. 380 (2d Cir. 1921).
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established “presumption of validity” theoretically accorded to all patents (utility or design):

It is true that invention may reside in a new combination of old elements. Every new combination of old elements, however, is not patentable . . . . In order that there may be novelty, the thing must not have been known to any one before. Mere novelty of form is insufficient.

For the proposition that “mere novelty of form”—the very essence of design—was categorically “insufficient” for the patentability of design, the Second Circuit in Knapp cited an 1853 Supreme Court utility-patent decision, O’Reilly v. Morse, conveniently ignoring the Supreme Court’s multiple decisions specifically addressing design patents between 1871 and 1893.

The Supreme Court’s 1853 decision in O’Reilly could not be credibly read by any attorney, let alone the sophisticated judges sitting on the Second Circuit in 1921, as either explicitly or implicitly addressing the requirements of patentability for designs. For one thing, there had been only a handful of design-patent cases by 1853, and none had reached the Supreme Court; the Court had literally never mentioned design patents at that point in history. What the Court had actually said in O’Reilly was that a would-be inventor’s modification of the form of a functional machine would not suffice to entitle him to a utility patent if the later machine served essentially the same purpose as the preexisting device.

Further, the notion of “novelty of form” was the very type of innovation contemplated by Congress when it had passed the first design-patent statute in 1842 to promote “the progress of the decorative arts.” (The O’Reilly Court’s decision placed great importance of deferring to legislative language—so it was a decidedly ironic opinion for the Second Circuit to twist to its pur-

124. Id. at 382 (“[T]he patent appears to have been granted upon the theory that there is ‘some degree of novelty and invention’ in the combination of the bell-shaped tip with the square form of the candle; that is, in the setting back of the base of the bell shaped cap from the square edges of the square column having flat sides. That was certainly the theory upon which the validity of the patent was sustained in the court below and the theory upon which the patent was granted in the Patent Office. In the court below the District Judge said: ‘While, in view of the prior art, it may be doubted whether there is patentable invention in this combination containing this feature, I am inclined to hold the patent valid as the presumption is in its favor.’”). For a decision taking more seriously the presumption of validity in the design-patent context, see Western Auto Supply Co. v. American-National Co., 114 F.2d 711 (6th Cir. 1940) (acknowledging patentee’s presumption-of-validity argument, but distinguishing presumption-driven decisions as resting on oral, rather than documentary evidence, and proceeding to invalidate design patent).

125. Id. at 385.

126. See supra at text accompanying notes 33–68.

127. See discussion Section I.

128. O’Reilly v. Morse, 56 U.S. 62, 123 (1853) (“It is a well-settled principle of law, that the mere change in the form of the machinery (unless a particular form is specified as the means by which the effect described is produced) or an alteration in some of its unessential parts; or in the use of known equivalent powers, not varying essentially the machine, or its mode of operation or organization, will not make the new machine a new invention. It may be an improvement upon the former; but that will not justify its use without the consent of the first patentee.”).
poses.\footnote{129} If the Second Circuit meant what it said in \textit{Knapp}—that “novelty of form” did not by definition suffice for “novelty” in patent law generally—then the fate of all design patents facing validity challenges was preordained.\footnote{130}

Equally difficult to reconcile with a story of disinterested application of utility-patent principles to design is the Second Circuit’s disparate treatment of a declaredly small degree of “invention,” and “obviousness,” of creations in the utility-patent versus design-patent context in cases like \textit{H.C. White Co. v. Morton E. Converse & Son Co.}\footnote{131} There, Judge Learned Hand summarily rejected the possibility that the plaintiff’s design patent might be valid, but used tropes characteristic of decisions invalidating design patents to \textit{affirm} the validity of the plaintiff’s utility (or, as the court called it, “mechanical”) patent:

\begin{quote}
The plaintiff’s [design patent for a children’s tricycle is invalid because his design] has neither proportion, ornament, nor style, which could in our judgment make the remotest appeal to the eye. If little children at once want to have it, it is because they can see the possibility of play that it opens to them. It can touch their fancy only by what they can do with it, not by the pleasure they get by looking at it. Indeed, as we view it, it is fortunate for the plaintiff that this is true, as will presently appear.

\textit{On the other hand, a majority of us think the mechanical patent valid . . . . Again and again, ad nauseam, courts have been fond of saying that [in the context of utility patents] it is the obvious when discovered and put to use that most often proves invention.} In such matters we look rather to history than to our own powers of divination, if history is at hand. \textit{Kirsch v. Gould, [6 F.2d 793, (2d Cir. 1925)]}. Children have not changed, and would have liked as well to push about astride a little tricycle 200 years ago as to-day. The means have been also always at hand. The end and the means having therefore been for long available, this inventor merely thought to unite them by a fortunate insight which had theretofore escaped the imagination of others. \textit{We see in this an invention just because, being so simple, it had not occurred to any one before. The fact that the changes were so slight is quite irrelevant, so long as they were essential to the purpose, as they were. While the statute grants monopolies only for new structures, and not for new uses, invention is not to be gauged by the necessary physical changes, so long as there are some, but by the directing conception which alone can beget them. \textit{Traitel v. Hungerford, [18 F.2d 66 (2d Cir. 1927)]}. That was certainly absent before it came to [the patentee’s] mind.}\footnote{132}

Judge Hand’s opinion is striking not only because it echoes many of the themes discussed above, but also for the year (1927) in which the court lav-

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\footnote{129. Id. at 130 (“[S]urely we have no right, even if we had the disposition, to curtail or narrow [the patent statutes’] liberal policy [of protecting both ‘machines’ and innovations in the useful ‘arts,’ unlike the British patent statute that only mentioned ‘manufactures’] by astute or fanciful construction.”).}
\footnote{131. See 20 F.2d 311, 312–13 (2d Cir. 1927).}
\footnote{132. Id. at 312 (emphasis added).}
\end{footnotesize}
ished such praise on utility patentees who could claim only “slight” and seemingly “obvious” innovations.\textsuperscript{133} Anti-utility patent hostility would surface in the decisions of the federal judiciary over the course of the 1930s and 1940s, trailing popular and legislative hostility toward monopolies. Importantly, however, decisions reflecting such hostility significantly postdate the pivotal Second Circuit opinions of the 1910s and early 1920s that had already relegated design patents to their decades-long no-man’s-land.

Further underscoring the fact that something other than anti-monopoly sentiment drove the Second Circuit’s (and the other courts’) anti-design patent jurisprudence is the pronounced difference between the type of rhetoric often spouted by New Deal-era courts in invalidating utility patents (emphasizing potentially anticompetitive marketplace effects of utility patent enforcement) and the distinctly disparaging rhetoric that had tended to characterize (and would, for many years, continue to characterize) decisions invalidating design patents during the same time period. A handful of design-patent decisions contain unfavorable, passing mentions of “monopolies” over “basic” or “old” designs; however, the reasoning offered as dispositive in such cases was not grounded primarily in the rhetoric of competition, but rather in the rhetoric of genius (or lack thereof) of the sort described above. Further, the timing of design-patent law’s demotions does not plausibly track broader popular or judicial discourse struggling to reconcile patent—or patent-like—rights and the potential anticompetitive effects thereof: the key design-patent decisions examined above postdate by several decades earlier debates about appropriate judicial treatment of purportedly exclusive “franchise” rights granted by legislatures, while decisively pre-dating the so-called “return to antitrust” in patent jurisprudence during the New Deal era.\textsuperscript{134}

\textsuperscript{133}. Already by this period, it would have been evident to many judges that countless “important” innovations were not the product of a single “genius inventor.” See \textsc{William Greenleaf}, \textsc{Monopoly on Wheels: Henry Ford and the Selden Automobile Patent} 5 (rept. 2011) (“The automobile, more clearly than most mechanical creations, illustrate[d] the fact that any notable invention is seldom if ever one man’s achievement, but rather that of a number of men, each building on the accomplishments of his predecessors. ‘Invention implies research,’ [asserted Waldemar Kaempffert in] \textsc{Systematic Invention and Invention by Wholesale}, 70 Forum 2010, 2015 (1923). ‘The “heroic” theory of invention, the notion that an idea flashes from a brain and gives the world a sudden, fresh impulse must be dismissed.’ The evolution of the automobile industry forcefully [illustrated this phenomenon].”).

\textsuperscript{134}. See \textsc{Morton J. Horwitz}, \textsc{The Transformation of American Law, 1780–1860}, at 128–31 (1977). Notably, the debate of the “monopolies” of franchises predated even the legislative enactment of the first design-patent law, in 1842. By that point, the leaders of the legal profession had been cognizant, for decades, of the notion that the governmental creation of monopolies could adversely affect “the public, whose advantage is always to be regarded, [by depriving it] of the benefit which always attends competition and rivalry.” Palmer v. Mulligan, 3 Cai. R. 307, 314 (N.Y. Sup. Ct. 1805) (Livingston, J.). That Congress nevertheless created exclusive rights in design in 1842 substantially undermines the proposition that procompetitive policies drove the marginalization of design patents (to the extent the disparate treatment of design and utility patents does not demonstrate this, on its own). Perhaps a more illuminating historico-legal development between the first years of the nineteenth century and the decisions examined in this article is that identified by Horwitz at the conclusion of his influential chapter on “The Emergence of an Instrumental Conception of Law”: in the intervening years, “the structure of thought [among judges] had dramatically changed,” whereby they “came to think of [judge-made law] as equally responsible
Notably, the lack-of-genius rhetoric, rather than the threat-to-competition rhetoric persisted into and long after the New Deal era—even as the federal courts began to scrutinize more closely alleged utility-patent “misuse.” In *Berlinger v. Busch Jewelry Co.*, for example, the Second Circuit in the early 1930s invalidated a plaintiff’s patent for the design of a wedding ring because (again, notwithstanding favorable examination by the Patent Office’s Examiners in Chief and the lower court’s finding to the contrary) the plaintiff’s design “clearly disclose[d] want of inventive thought” and lacked “genius,” according to the appellate judges:

A design is not patentable merely because it can be distinguished in appearance from prior designs. Its creation must involve the exercise of inventive faculty. With the prior art, as established at the trial, and with its knowledge over such a period of time, this patentee cannot be said to have shown the degree of genius necessary for invention . . . .

In the absence of novelty and utility or originality in beauty, there was no invention. Mere skill of continuing the hearts around the entire ring rather than part of it did not amount to inventive thought. The adaptation of old forms to new purposes, however convenient and useful or beautiful, may not, in their new role, be regarded as invention.

Even more emphatic is the Second Circuit’s 1941 decision in *White v. Leanore Frocks, Inc.* The court’s brief opinion disposing of that appeal reports, rather remarkably, that the presiding judges had directly asked the

with legislation for governing society and promoting socially desirable conduct.” Horwitz, supra, at 30. Accord Part I at text accompanying notes 185–95. For the general tenor of Supreme Court jurisprudence on alleged anticompetitive context via patents in the mid-1920s, see U.S. v. General Electric Co., 272 U.S. 476, 481, 485 (1926) (Taft, C.J.) (“We do not question that in a suit under the Anti-Trust Act the circumstance that the combination effected secures domination of so large a part of the business affected as to control prices is usually most important in proof of a monopoly violating the act. But under the patent law the patentee is given by statute a monopoly of making, using and selling the patented article . . . . As long as he makes no effort to fasten control of the prices at which his purchaser shall sell, it makes no difference how widespread his monopoly.”) See also Jeffrey L.D. Lewis & Maggie Wittlin, *Entering the Innovation Twilight Zone: How Patent and Antitrust Law Must Work Together*, 17 VAND. J. ENT. & TECH. L. 517, 527 (2015) (“[O]nly gradually, over the first half of the twentieth century, did courts begin to invalidate [utility] patents more frequently. In the first two decades of the twentieth century, the appellate courts upheld a majority of [utility] patents; in the second two decades, the courts of appeals upheld 39.6 percent of patents; but from 1941 to 1950, they held only 24.4 percent of patents valid. The Supreme Court, from 1931 to 1950, upheld only 17 percent of the patents it considered, prompting Justice Jackson’s dissent in *Jungerson v. Ostby & Barton Co.*, 335 U.S. 560, 572 (1949) that the ‘only patent that is valid is one which this Court has not been able to get its hands on.’ The 1940s marked a low point for patent holders . . . .” (citing H.R. Meyers, *The United States Patent System in Historical Perspective*, 3 PAT. TRADEMARK & COPYRIGHT J. RES. & ED. 33, 35 fig.1 (1959); Lawrence Baum, *The Federal Courts and Patent Validity: An Analysis of the Record*, 56 J. PAT. & TRADEMARK OFF. SOC’Y 758, 760 tbl.1 (1974)). For a detailed discussion of the New Deal-era Court’s “return to antitrust” in patent law and elsewhere, see Rudolph J.R. Peritz, *COMPETITION POLICY IN AMERICA* 112 (1996). 135. Berlinger v. Busch Jewelry Co., 48 F.2d 812, 813 (2d Cir. 1931). 136. Id. (emphasis added). 137. Id. 138. 120 F.2d 113 (2d Cir. 1941).
This reprimand came despite the defendant’s failure to make any argument or provide any evidence. That the presiding judges deemed it appropriate to ask a party’s attorney about his client’s rationale for taking an appeal available as of right, where the lower court—as the panel acknowledged—had failed even to go through perfunctory motions to refuse to enforce the client’s design patent, highlights the degree to which design patents had become a dead letter in U.S. litigation by the World War II years. Statistics on design-patent litigation from this time period confirm that this was true not only in the Second Circuit, but across the federal judiciary.

Thus, from 1926 until 1959, the Second Circuit continually reiterated the basic premise of Knapp—a proposition that makes sense primarily, if not exclusively, as social norm-driven implementation of culturally coded anti-design bias—that differences “in appearance from prior designs” were per se insufficient to make a design patentable. If that was so, no design could be patented, as distinction in form from prior designs was, and remains, the very nature of the improvement that defines the endeavor of design. “The law” as laid out in the patent statutes, with its malleable standards and highly subjective terminology, did not dictate with any meaningful specificity the type or level of “novelty” required for design protection. Rather, the generality of the language in the patent laws, along with new terms and concepts affirmatively introduced into the case law by mid-level appellate-court judges (without the input or intervention of the Supreme Court), in decisions seeking to display a bias against or indifference toward design, made it possible for the Second Circuit to decide one case after another in a way that marginalized design-patent protection for decades.

IV. THE LEGACY OF THE COURTS’ MARGINALIZATION OF DESIGN PATENTS

In the three-plus decades following the Second Circuit’s decision over neckties in the 1926 case of Franklin Knitting Mills, the court’s members continued to distance themselves design by summarily dismissing the level of innovation and value of every design patent whose validity was contested
before the appellate court.\textsuperscript{143} Indeed, by 1940 the court essentially conceded that its adjudication of design-patent cases over fashionable goods had rendered this type of IP protection useless for litigants.\textsuperscript{144}

The longtime irrelevance of design patents in the following decades is reflected in, \textit{inter alia}, the 1956 district-court decision in \textit{H. W. Gossard Co. v. Neatform Co.},\textsuperscript{145} which I have also selected as a vivid illustration of the long-term influence, and confluence, of the distancing techniques implemented by the Second Circuit in the early twentieth century. In \textit{Gossard}, Judge Archie Dawson adjudicated the validity of a design patent for what he described as “an ornamental design for a panty girdle, a woman's undergarment.”\textsuperscript{146} (This “clarification” was almost certainly unnecessary; its sole function, it would seem, was to emphasize, if not exaggerate, the judge’s lack of familiarity with the subject matter in question.)

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\item \textsuperscript{143} One might wonder why plaintiffs continued to procure design patents at all, let alone sue over their infringement in the Second Circuit. The explanation lies in various counterintuitive factors, including plaintiffs’ use of design patents (knowing full well they would be invalidated) in order for the New York federal courts to gain jurisdiction over their unfair competition claims for product-design knockoffs, before the passage of the Lanham Act of 1946 created a federal cause of action for a broader range of material, including what would come to be known as “trade dress.” See Bartholomew Diggins, \textit{Federal and State Regulation of Trade-Marks}, 14 LAW & CONTEMP. PROBS. 200, 202 (1949) (noting that the before the passage of the Lanham Act “Trade Mark Act of 1905 . . . fell far short of its objective of remedying ‘the defects in existing law,’” even though it “did give the federal courts jurisdiction in cases involving registered trade-marks, and cases involving such marks were usually brought in the federal courts.”); \textit{accord} Rosenberg Bros & Co v. Elliott, 7 F.2d 962, 966 (3d Cir. 1925) (“The issue of unfair competition is, in our judgment, fraught with less difficulty than that of trade-mark infringement. Such an issue frequently arises where one who has no valid trade-mark nevertheless complains of another who attempts to pass off his own goods as the goods of his rival. Fraud is the basis of his complaint. When fraud is found, a court will frame its action to promote honest and fair dealing, thereby to protect the honest trader, punish the dishonest trader, and protect the public from deception.”). Yet unfair-competition plaintiffs who achieved federal jurisdiction in the pre-Lanham Act era sometimes encountered the same anti-design bias observed in disputes hinging solely on design patents. \textit{See, e.g.}, Lewis v. Vendome Bags, 108 F.2d 16, 21 (2d Cir. 1939) (Clark, J., dissenting) (“I am troubled [by the panel majority’s] decision on the merits made herein . . . . When defendant’s bag is so fitted out, it appears to be, as the court stated, ‘a Chinese [i.e., virtually identical] copy’ of the plaintiff’s product. It is not very clear whether the consumer or the retailer did this; it is obvious that the retailer could do it. We may say that there are not enough facts to show the required ‘passing off,’ but surely there are enough here to call for further findings, rather than final dismissal[, the course taken by the majority in disposing of the case].”).

\item \textsuperscript{144} White v. Leamore Frock, 120 F.2d 113 (2d Cir. 1941) (“We were told at the bar that this appeal has been taken to clear up doubts remaining after the decision of the Supreme Court in Fashion Originators’ Guild v. Federal Trade Commission, 312 U.S. 457 [(1940)]; it is the latest, and presumably the last, effort of dress designers to get some protection against what they call the ‘piracy’ of their designs. We fear that their hope will prove illusory; there is little chance that valid design patents can be procured in any such number as to answer their demand. What they need is rather a statute which will protect them against the plagiarism of their designs; a more limited protection and for that reason easier to obtain if the law recognized copyright in the subject matter at all. Recourse to the courts, as the law now stands, is not likely to help them. Perhaps, if their grievance is as great as they say, Congress may yet be moved to help them; but short of that, no effective remedy seems open.”).

\item \textsuperscript{145} 143 F. Supp. 139, 140 (S.D.N.Y. 1956).

\item \textsuperscript{146} \textit{Id.}
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Judge Dawson began his analysis in *Gossard Co.* by reciting the legal standards for evaluating the “obviousness” of a design, and quoted language from earlier decisions concerning the difficulty of making “prior art” determinations. While he could have proceeded from recounting those principles to evaluating the design under discussion, he instead interrupted his legal analysis to make clear that he had no choice but to engage in an aesthetic assessment of the object at issue. In a passage arguably included to *distance* himself from the stigma of opining on the aesthetic merit of a women’s garment, he wrote: “Congress has made the Judges pass upon the determination of what is ‘ordinary skill in the art.’”¹⁴⁷

Dawson continued, in an analysis that reveals deep tensions arising from gender-related performative pressures. In one passage he wrote: “It is with some trepidation that I venture to determine what is the ‘ordinary skill’ of designers of intimate articles of feminine apparel because such skill, at least to a mere man, seems to have no ordinary limitation.”¹⁴⁸ In the same breath, however, Dawson dismissed the plaintiff’s creative endeavors with the comment that “changes in decoration are made constantly by designers of women’s clothes.”¹⁴⁹

Judge Dawson eventually got around to something resembling doctrinal analysis, but even then, the invocation of the notion of “invention” served as little more than a springboard for the implementation of intuitions about value:

Not every new idea in decorating can be considered an ‘invention’. Each merchandising season produces, in the field of women’s garments, new and varied designs. In fact, it has been said that to invent anything in the way of a new dress design, however temporarily attractive such design may be, becomes almost impossible when one considers the enormous amount of fashion advertising, design service, magazines, and the host of skillful and intelligent dressmakers. [White v. Lombardy Dresses, 40 F. Supp. 216 (S.D.N.Y. 1941).] It may be that it is for reasons similar to this that there has not been a design patent upheld by the Court of Appeals in the Second Cir-

¹⁴⁷. *Id.* at 143. For historical and sociological research on similar rhetoric, see GRAHAM ROBB, STRANGERS: HOMOSEXUAL LOVE IN THE NINETEENTH CENTURY 50 (W.W. Norton & Co, Inc. 2004) (“Even with the introduction of professional tools and terminology, most medical writers still proclaimed their disgust [for same-sex physical intimacy], *if only to create the rhetorical conditions in which the untouchable subject could be discussed*. In 1813, François Fodéré began the ‘Sodomy’ section of his forensic manual with a typical show of revulsion: ‘Oh, that I could avoid sullying my quill with the foul obscenity of [those engaging in sodomy]!’ Later, distaste was conveyed with ugly abstractions.”) (emphasis added); MARY DOUGLAS, PURITY AND DANGER 43 (rev. ed. Routledge 2002) (1966) (“[Social norms prescribe] the kinds of indirect contact which may carry [symbolic] pollution. A Havik, working with his Untouchable servant in his garden, may become severely defiled by touching a rope or bamboo at the same time as the servant.”) (emphasis added).

¹⁴⁸. For a similar 1950s judicial disavowal of knowledge of women’s apparel, see Weinberg v. Edelstein, 110 N.Y.S.2d 806, 809 (Sup. Ct. 1952) (“Sizes, too, may vary—for example, a size twelve blouse may be matched with a size fourteen skirt of the same pattern, which, I am told, is a great advantage to many women . . . .”). For a discussion of the implications of such rhetoric, the reader should (again) consult ROBB, *supra* note 147, at 50 and DOUGLAS, *supra* note 147, at 43.

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held and enforced by courts, threads of the gendered discourse characterizing the earlier case law explored herein continues to find its way into judicial decisions. Further, although design patents might once again provide robust protection against copyists, the effects of the multi-decade doctrinal fallout continue to be felt today. We may never know the full range and degree of the

L.J. 373, 383–84 (1993) (“Industrial design is a major component in the success of a product. Businesses and intellectual property practitioners are becoming more aware of the need for protecting product appearance.”); id. at 380 (“[T]he economic philosophy in the United States now requires prompt protection, to stop pirating and encourage new United States businesses. President Clinton’s policy of encouraging development of more United States jobs should support prompt design protection.”); id. at 373 (“It is an exciting time to be involved in the development of improved industrial design protection. Perhaps one of the most important events is the European Community (‘EC’) work on a design protection system (‘Community Design’) . . . . The Community Design proposal has been a lightning rod and catalyst for industrial design law issues, both legal and political. It has increased the level of interest and activity on industrial design protection around the world.”); William S. Walker, A Living Exhibition: The Smithsonian, Folklife, and the Making of the Modern Museum 109, 109–14 (Aug. 2007) (Ph.D. dissertation, Brandeis University), https://books.google.com/books?id=Ds8p1HhAWiUC (discussing landmark 1967 exhibit

Community (‘EC’) work on a design protection system (‘Community Design’) . . . . The Community Design proposal has been a lightning rod and catalyst for industrial design law issues, both legal and political. It has increased the level of interest and activity on industrial design protection around the world.”); William S. Walker, A Living Exhibition: The Smithsonian, Folklife, and the Making of the Modern Museum 109, 109–14 (Aug. 2007) (Ph.D. dissertation, Brandeis University), https://books.google.com/books?id=Ds8p1HhAWiUC (discussing landmark 1967 exhibit reflecting a move away from teleological narratives, including in the material-culture realm).

153. See Colman, Copyright for Fashion, supra note 5 (identifying continuing bias against design—especially fashion design—in contemporary legal discourse). For one example of a judicial decision that post-dates the Second Circuit’s 1959-60 revival of design patents but reflects rhetorical distancing from design/adornment characteristic of opinions of an earlier era, see Horwitt v. Longines Wittnauer Watch Co., 388 F. Supp. 1257, 1260–61 (S.D.N.Y. 1975) (“As an ‘ordinary observer’—and not as an ‘expert’, by any means—I find that plaintiff’s [watch] design meets [the threshold for design-patent eligibility] . . . . As the defendants introduced no evidence to rebut the testimony or statements of plaintiff’s experts as to the originality of the design, we—in deferring to their expertise—find the design to be original. Our conclusion is supported by the fact that plaintiff’s watch design met with not inconsiderable commercial success.”) For explicit aesthetic value judgments included in the Horwitt decision, see id. at 1262, 1263 (“We would agree with plaintiff’s experts that the startling simplicity of his design is what renders it so esthetically pleasing . . . . Whereas plaintiff’s design is graced with the utmost simplicity, defendants’ watches are highly ornate and elaborate, especially those encrusted with jewels . . . . [A]lthough neither party introduced evidence or elicited testimony as to the ‘eye effect’ of defendants’ watch designs on the ‘ordinary observer’, it seems self-evident that such designs would appeal to a very different type of purchaser than would be attracted to plaintiff’s design. On the one hand, someone looking for an ornate watch would probably select one of defendants’ watches. On the other hand, someone interested in grace and simplicity would prefer plaintiff’s.”) For an illuminating discussion of cultural norms concerning male self-adornment, see Christopher Breward, Modes of Manliness: Reflections on Recent Histories of Masculinities and Fashion, in FASHION HISTORY READER 301, 302–03 (Riello & McNeil, eds., 2010) (discussing “definition of normative male dressing” grounded in “slow moving rate of style change, functional utility and a well-mannered observance of propriety as the defining, indeed the only features of late-modern patterns of masculine fashionability,” whose complex genealogy “provided Modernist aesthetic theory of the twentieth century with its anti-fashion, misogynistic rhetoric.”). Breward reminds readers of Herbert Sussman’s observation that “in spite of the stress [imposed by masculine sartorial ideals], men accepted these formations as a form of self-policing crucial to patriarchal domination.” Id. at 305 (quoting HERBERT SUSSMAN, VICTORIAN MASCUINITIES: MANHOOD AND MASCLINE POETICS IN EARLY VICTORIAN LITERATURE AND ART 8–9 (1995)). See also Cass Sunstein, On the Expressive Function of Law, 144 U. Pa. L. Rev. 2021 (1996) (discussing personal and social “expressive” functions that invariably accompany instrumental effects of judicial rulings).


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discursive, aesthetic or economic repercussions of the judicial marginalization to design patents during their multi-decade period of nonviability in litigation.\footnote{155} We do know that the judicial distancing revealed in this piece has resulted in a paltry body of substantive case law that leaves shockingly basic questions about design-patent doctrine unanswered.\footnote{156} Further, early twentieth-century courts’ marginalization of design patents almost certainly channeled many designers’ infringement claims from their designated area of IP law to the alternative avenues of trademark and copyright law, producing both doctrinal and economic distortions.\footnote{157} In short, the aftershocks of the anti-design ideology explored in this project continue to be felt today,\footnote{158} many decades

\footnote{155} The temporal reach of these effects, however, becomes apparent through a review of quite recent guidance from U.S. practitioners on design protection. \textit{See}, e.g., Valerie Alter, \textit{Couture in the Courts: Intellectual Property Protection for Fashion Designs}, 14 TEX. ENT. \& SPORTS L.J. 4, 5 (2005) (“Obtaining a design patent for a fashion design is unlikely because most fashion designs fail the originality and nonobviousness requirements.”). Only over the past decade has there been a critical mass of guidance revisited design patents.

\footnote{156} \textit{See}, e.g., Sarah Burstein, \textit{The Patented Design}, 83 TENN. L. REV. (forthcoming 2015) (noting that even the simple issue of what a “patented design” is remains unresolved in the case law). The Second Circuit’s (and Supreme Court’s) longtime perpetuation—whether through cursory dispositions or mere nonintervention—of the post-1910s, anti-design patent status quo was likely damaging in multiple respects, though they may be difficult to quantify; \textit{see} Melvin Aron Eisenberg, \textit{Bad Arguments in Corporate Law}, 78 GEO. L.J. 1551, 1553 (1990) (“In the real world, \textit{not} making a change is just as much a decision as making a change: the cost of wrongly \textit{failing} to change a business or government policy or a legal rule can be as great or even greater than the cost of wrongly changing a business or government policy or a legal rule.”) (emphasis in original); \textit{see also id.} at 1552–53 (“[It is a] mistaken argument that a lack of statistically significant quantitative data constitutes a lack of empirical support. I call this the Desktop Fallacy, because it recognizes as relevant to the establishment of legal rules only evidence that can be verified by a scholar working at a computer, and thereby ignores whole classes of other empirical evidence. One expression of the Desktop Fallacy is that only quantitative data can serve as proper empirical support for a \textit{proposition}, so that any unquantified empirical sources, such as first-hand observations of \textit{institutional} operations and insights into \textit{the} psychology \textit{of} individual actors, are inadmissible.”).

\footnote{157} As I argue elsewhere, the chronology and reasoning of relevant judicial decisions suggest that judges gradually came to accept the \textit{rechanneling} of stakeholders’ efforts to assert claims of rights in design through the vehicles of copyright and trademark (or, more precisely, “trade dress”) protection. \textit{See generally} Colman, \textit{Copyright for Fashion}, supra note 5. This, in turn, produced distortions in the doctrine of the latter areas of law, including the perpetually problematic “conceptual separability” and “aesthetic functionality” doctrines, both of which continue to bedevil federal judges, attorneys, professional designers, and the public at large. \textit{See id.} Ironically, even those commentators known for economic analysis have noted the “inefficiency” of designers’ use of copyright and trademark in lieu of design patents—but have not investigated the reasons for parties’ invocation of such “distortion”-prone IP alternatives. \textit{See} William M. Landes \& Richard Posner, \textit{The Economic Structure of Intellectual Property Law} 332–33 (2003).

\footnote{158} \textit{See} R. Jay Magill Jr., \textit{Sincerity} 21 (2013) (“Moral ideals have histories. They come from somewhere and are pushed forward by the winds of religion and politics, by individuals and mass movements. And though people have always made use of ideals and then killed them off when they were no longer useful, some ideals echo into our own time as a sort of philosophical afterimage, their continuing liveliness made apparent by our own lingering moral feelings.”); Charles R. Epp, \textit{Law’s Allure and the Power of Path-Dependent Legal Ideas}, 35 L. \& SOC. INQUIRY 1041, 1046 (2010) (“[In light of recent scholarship like Gordon Silverstein’s \textit{Law’s Allure} (2009), it is no longer] plausible to argue that judicial precedents lack influence. They may not command automatic compliance in the form of the rule of stare decisis or of direct orders to do
after the cultural developments most directly influencing early twentieth-century judges’ performed hostility toward design.

This project has shed light on the surprising degree to which gender norms and anxieties indirectly, yet powerfully, influenced the trajectory of one type of IP protection, not only leading to its marginalization but producing doctrinal distortions in other areas of IP. It suggests that further investigation might well illuminate other cultural and cognitive dynamics—the underappreciated sociocultural dimension—influencing the historical path and modern landscape of IP jurisprudence.

Much of my analysis has focused on judges’ rhetorical implementation of intuitions grounded in shifting “connotative clusters” implicating design. Notions of “invention” and “genius,” for example, came “prepackaged” with powerful, culturally laden meanings. Though most legal scholars—and perhaps most members of the general public—in the twenty-first century, if prompted, will likely reach the conclusion that such terms are context dependent and culturally relative, their absolutist, gendered legacy persists in our everyday uses of such words.

Indeed, terms like “invention” and “genius”—words that purport to guide legal doctrine—consistently serve as vessels into which dominant groups infuse, perhaps even inadvertently, their assumptions, biases, and values.\footnote{159}{See CARYS J. CRAIG, COPYRIGHT, COMMUNICATION, AND CULTURE: TOWARDS A RELATIONAL THEORY OF COPYRIGHT LAW 137 (2011) (“The meaning given to the empty vessel of ‘originality’ has been guided by the notion of copyright as a reward for labour or as the right that flows from the investment of one’s personality in the work . . . . Finding that a work is original is, after all, another way of saying that the would-be author has done enough to warrant the monopoly that copyright grants. This is, in turn, another way of saying that protecting this work will encourage the kind of expressive activity that we hope to stimulate by means of our copyright system.”) (citations omitted).}

Naturalized in this manner, the fiction persists that there are meaningful ontological differences between the “inventions” bestowed upon society through the “genius” of “scientists” and the “trivial” ephemera of “designers” of “ornamental” material. The outcome, if not the purpose, of this normative framework is a potentially invidious division among objects, endeavors, and even people that purportedly have “value,” and those that do not.\footnote{160}{See generally UNGER, supra note 105. As dress theorist Anne Hollander has keenly observed, Western men have long “been riveted on the feminine scheme of varying the same idea in different ways through time,” and this scheme “has been what is meant by ‘Fashion’ when it is despised as woman’s business.” ANNE HOLLANDER, SEX AND SUITS 48 (1994). See also Harmon Paper Co. v. Prager, 287 F. 841, 844 (2d Cir. 1923) (“Of course, [‘invention’] is a question only of fact; but [in the shirt collars at issue] here we can discover nothing but a style, a mode or fashion that caught the public fancy.”); White v. Leanore Frock, 120 F.2d 113, 114 (2d Cir. 1941) (“[Plaintiff’s dress] designs appear to be simple variants upon old themes, such as capable

this or not do that. But precedents set the baselines for policy development, place policies on particular developmental tracks rather than others, and become part of the basic assumptions of policy regimes. These regimes are institutions, understood in the sociological sense: they are held together by shared, mutually reinforcing ideological assumptions; legal rules; and policy structures that are commonly traceable to (or embodied in) lines of legal precedent.”)
This project has sought to reveal the importance of exploring such biases in the social contexts and judicial attitudes exerting influence in areas of law—like patents, and especially design patents—that might initially strike us as a non sequitur to gender, sexuality, and other distinctions entailing power dynamics not strictly economic in nature. Intellectual property law, like so many other areas of jurisprudence, is a means by which actors implement their “ideal social order”—that is, “the boundaries between the privileged, the legitimate, the normal, and the deviant.” As shown above, the subject of design has been seized upon for such implementation to a degree that the vast majority of judges, legal scholars, and others have not yet recognized.

designers can turn out almost by permutation of old elements.”); MacLeod & Nuvolari, supra note 107, at 775 (“What brought an inventor to the attention of the [compilers of the DNB, the most prestigious nineteenth-century Anglo-American compendium of ‘great inventors’]? Gender is quickly dealt with. Our list of 383 inventors comprises only men. It was not that women did not invent . . . . [T]he compilers’ omission of female inventors (itself symptomatic of the gender bias that permeates the DNB) also stems from a bias against inventions produced in specific technological fields . . . . Evidently, in Britain one could become a ‘great inventor’ without obtaining a patent. By contrast, only ten (6.25 percent) of Khan and Sokoloff’s American ‘great inventors’ active between 1790 and 1846 held no patent.”).

161. See Du Mont & Janis, supra note 5, at 837, 841 (“Scholars have written very little about the design patent system . . . , regard[ing] it with ambivalence or written it off as an intellectual property lightweight.”).

162. See Robert W. Gordon, “Critical Legal Histories Revisited”: A Response, 37 LAW & SOCIAL INQUIRY 200, 209 (2012) (“[L]egal doctrine is independently interesting as an inquiry into how the mind structures understandings of social life; what it classifies as similar or different; how it draws the boundaries between the privileged, the legitimate, the normal, and the deviant.”).