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Constitutional Law as Trademark

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Important debates in constitutional law often turn on, or founder over, disagreements about nomenclature. Constitutional law is not, of course, the only area of law where labels matter. This Essay suggests that perhaps we can gain useful traction on several contemporary constitutional controversies by drawing some lessons from an area of law that has long concerned itself with legal policy regarding valuable labels: the law of trademarks.

*The evolution of originalism over the last generation from a discrete theory of constitutional interpretation into nearly meaningless boilerplate mirrors trademark law's concept of genericide, a phenomenon in which a brand name loses its distinctiveness. Partisans of various constitutional theories, like producers whose trademark has been genericized, should therefore look for new ways to distinguish their theories and compete in the marketplace of ideas. In a related vein, struggles over the meaning of the Supreme Court's foundational decision in *Brown v. Board of**

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Education have recently reflected a form of what trademark law calls “source confusion,” as conservatives have sought to seize the mantle of the civil rights lawyers who represented the plaintiffs. Finally, opponents of same-sex marriage have recently begun to invoke an argument that sounds in what trademark law refers to as dilution by tarnishment. Trademark’s resistance to extending tarnishment claims to noncommercial and political settings provides insight into why we should reject traditionalist defenses of marriage that invoke ideas of dilution as well.

TABLE OF CONTENTS

INTRODUCTION	387
I. TRADEMARK’S LESSONS	389
A. <i>Genericide</i>	390
B. <i>Source Confusion</i>	392
C. <i>Tarnishment</i>	393
II. TRADEMARK’S RESONANCE IN CONSTITUTIONAL LAW	394
A. <i>The Rise and Fall of Originalism as an Interpretive Brand: Genericide in Constitutional Law</i>	395
B. <i>The Fading of Brown</i>	401
C. <i>The Dilution of Marriage?</i>	405
CONCLUSION.....	409

INTRODUCTION

“What’s in a name?” Juliet asks herself standing on the balcony. “[T]hat which we call a rose / By any other name would smell as sweet; / So Romeo would, were he not Romeo call’d, / Retain that dear perfection which he owes / Without that title.”¹

Well, maybe. But important debates in constitutional law often turn on, or founder over, disagreements about nomenclature. Consider three prominent contemporary controversies. The first concerns constitutional interpretation: how should judges, policymakers, citizens, and scholars determine the meaning of constitutional provisions? The second concerns race and government decisionmaking: does the Equal Protection Clause of the Fourteenth Amendment demand, permit, or prohibit taking race into account to integrate public schools and other civic institutions? The third concerns the legal status of same-sex couples: should the law recognize or refuse to recognize their relationships, and if it does recognize them, what sort of recognition should it provide?

Although these controversies have enormous practical consequences, they have become bogged down in competition over valuable labels: “originalism,” “*Brown v. Board of Education*,” and “marriage,” respectively.² Adherents of competing substantive positions each try to wrap themselves in the mantle of these iconic terms. Take originalism. The modern version of originalism has its roots in a conservative legal movement, but in recent years there has been an outpouring of scholarship across the political spectrum locating diametrically opposed constitutional interpretations in some variant of originalism. In light of this ascendance of originalism, invocations of *Brown v. Board of Education* become significant in a striking way: when it comes to interpreting the Equal Protection Clause, much of the disagreement on the Supreme Court turns not on the Reconstruction-era origins of the Fourteenth Amendment but rather on “which side is more faithful to the heritage of *Brown*.”³ Finally, as for marriage, there seems to be an emerging consensus that same-sex couples should enjoy equivalent legal benefits and obligations to opposite-sex couples; the flashpoint seems to center on

¹ WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2.

² In the remainder of this Essay, I do not enclose these words in quotation marks, which I find visually disruptive.

³ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007).

whether equality can be satisfied by the creation of new institutions such as “civil unions” or “registered domestic partnerships” or whether only access to marriage will do.

Constitutional law is not, of course, the only area of law where labels matter. In this Essay, I suggest that perhaps we can gain useful traction on these controversies by drawing some lessons from an area of law that has long concerned itself with legal policy regarding valuable labels: the law of trademarks. In trademark law, scholars and courts have developed a set of concepts and doctrines responsive to the complex ways in which legal recognition and protection of brand names affect the public good.⁴

Part I of this Essay describes briefly three aspects of trademark law that can provide insight into constitutional controversies. Trademark law recognizes that consumers often rely on brand names to make decisions involving products whose qualities they cannot easily determine directly. This dynamic may be particularly powerful with respect to intangible qualities. Thus, trademark law responds vigorously to claims that a defendant has tried to “pass off” or “palm off” his goods as the plaintiff’s because the ensuing confusion may threaten consumer welfare.⁵ At the same time, trademark law recognizes a variety of rationales for limiting trademark protection. For example, it recognizes that a once-distinctive brand name can, “through a change of meaning in the public mind, become an unprotectible generic name.”⁶ At that point, removing trademark protection enhances competition and public welfare. Finally, trademark law wrestles with the particular rewards and risks that come from protecting a trademark against dilution unconnected to the confusion that provided the initial impetus for trademark protection. The value trademark law brings to thinking about constitutional controversies comes from its sensitivity to the way claims to the ownership of words can both enhance and detract from beneficial competition.

Part II of this Essay then discusses how these insights from trademark law can illuminate the debates over constitutional

⁴ See 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:1 (4th ed. 2009) (describing how “[t]he law of unfair competition has traditionally been a battleground for competing policies”).

⁵ See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 27 n.1 (2003) (defining “passing off”); 4 MCCARTHY, *supra* note 4, §§ 25:1-9 (discussing “palming off”). Until relatively recently, “passing off” was the core of the law of unfair competition. See Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 558 (2006).

⁶ 1 JEROME GILSON, TRADEMARK PROTECTION AND PRACTICE § 2.02, at 2-19 (1991).

interpretation, the meaning of the Equal Protection Clause, and the definition of marriage. Each of these controversies has its counterpart in trademark law. Originalism has become genericized and, as with brand names that have experienced genericide, it would be better if arguments over interpretive theory stopped trying to invoke this now-meaningless brand name. The Supreme Court's recent decision in *Parents Involved in Community Schools v. Seattle School District No. 1*⁷ tries to pass off a conservative, colorblind approach to the Equal Protection Clause as the legacy of the civil rights movement, and the civil rights community should resist that attempt for the same reason that the law of trademark condemns source confusion. Finally, the arguments being made in support of restrictive definitions of marriage sound in tarnishment theory, and that theory is as unjustified when it comes to marriage as it is with respect to other claims of tarnishment involving critical expression.

I. TRADEMARK'S LESSONS

At its core, trademark law is about the scope of protection the law should give to words and symbols that influence consumers' choices in the commercial marketplace.⁸ Trademark doctrine recognizes two primary rationales for providing such protection.⁹ The first focuses directly on consumers. Buyers use brand information to help them make decisions about their purchases, particularly with respect to goods whose qualities cannot be easily or accurately assessed through direct observation.¹⁰ Thus, buyers will be injured if they are confused about the source of goods and therefore make mistaken purchases. For example, a consumer who has learned — either through direct experience or through word of mouth or, more controversially, through advertising — that “Shimano Nexus[®]” bicycle parts are especially durable and particularly efficient may be willing to pay a premium to purchase them rather than components about which he or she knows nothing. But if similar names or packaging mislead consumers into buying another company's goods instead, and these

⁷ 551 U.S. 701.

⁸ Cf. *Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co.*, 316 U.S. 203, 205 (1942) (“The protection of trade-marks is the law's recognition of the psychological function of symbols.”).

⁹ For discussion of these rationales, see 1 MCCARTHY, *supra* note 4, §§ 2:1-9; Michael Grynberg, *Trademark Litigation as Consumer Conflict*, 83 N.Y.U. L. REV. 60, 64-65 (2008).

¹⁰ See Symposium, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1690-91 (1999) (summarizing literature on this point).

prove not to have Nexus's attributes, the consumers may end up unhappily stranded by the side of the road on a dark and stormy night.

The second rationale for trademark law focuses on its influence on producers' choices. Producers will invest more in product quality and innovation if they are able to recoup these investments through customer loyalty (often reflected in a price premium over non-brand name goods).¹¹ Trademark holders can therefore be injured in a variety of ways. They can be harmed by competitors who pass off their goods as the holder's and divert consumers away from the holder's products (regardless of whether those goods are of equal or superior quality).¹² And they can be damaged by merchants who dilute the value of the mark by attaching it to unattractive merchandise (regardless of whether that merchandise competes with the mark holder's goods).¹³ While trademark law has developed a host of concepts to flesh out the ways in which brand names operate, three have particular salience for the controversies over constitutional interpretation: genericide; source confusion through palming off; and dilution through tarnishment.

A. *Genericide*

Aspirin. Thermos. Cellophane. What do these words have in common? Originally, they were all trademarks that referred to a single product — an analgesic, a vacuum bottle that kept your coffee hot or your juice cold, and a flexible transparent packaging material. A single company made the product, protected it for some period of time by a patent, and had the right to deny potential competitors the right to describe their rival goods with the particular appellation. But over time, through a process trademark scholars refer to as “genericide”¹⁴ (but that might more accurately be called either “generigenesis” or “brandicide”), each of these words came to refer to an entire category

¹¹ See 1 MCCARTHY, *supra* note 4, § 2:4 (discussing consumer willingness to pay more for high-quality brand-name products).

¹² Note, in this sense, that consumers' and producers' interests may diverge: consumers are injured only to the extent that the goods they actually purchase provide them with less utility than the mark holder's goods would have provided, while producers are injured even if consumers actually ended up with superior goods. See Grynberg, *supra* note 9, at 92-95, 118-19 (arguing that trademark law should better account for interests of consumers who benefit from new entries into market).

¹³ See 4 MCCARTHY, *supra* note 4, §§ 24:67-70 (discussing these two theories of dilution through “blurring” and dilution through “tarnishment”).

¹⁴ See generally 2 MCCARTHY, *supra* note 4, §§ 12:1-25; John Dwight Ingram, *The Genericide of Trademarks*, 2 BUFF. INTELL. PROP. L.J. 154 (2004).

of products regardless of their source.¹⁵ The original manufacturer was no longer able to exclude other producers from using the word to describe their goods.

There are at least two explanations for how genericide occurs. First, a product may become so dominant in its market — either because of a patent or its intrinsic quality — that consumers start to associate the product's name with the entire category.¹⁶ If Thermos-brand vacuum bottles do a better job than their competitors at preserving beverages' temperatures, over time consumers may come to think of the Thermos brand as referring to the entire class of products, rather than just one maker's version.

Second, and relatedly, the trademarked word itself may be a useful shorthand for a product that would otherwise take a lot of words to describe.¹⁷ For example, when you have a headache, would you rather ask for an aspirin or for an acetylsalicylic acid tablet? The irony is that when *every* member of the category is described by the trademarked name, then the mark holder's products lose their distinctiveness, and courts will no longer enforce the trademark. The word no longer provides information that distinguishes one maker's products from those of others. So producers have to compete along some other dimension. Thus today, for example, consumers can choose from regular aspirin, buffered aspirin, aspergum, children's aspirin, aspirin caplets, aspirin tablets, and aspirin gel caps. There are lots of choices to be made, but talking about "aspirin" does not actually tell us much. If the sellers of pain medications want to compete for consumers' support, they will need to do so along some other dimension than claiming that their product is "aspirin."

¹⁵ See *King-Seeley Thermos Co. v. Aladdin Indus., Inc.*, 321 F.2d 577, 581 (2d Cir. 1963) (thermos bottles); *DuPont Cellophane Co. v. Waxed Prods. Co.*, 85 F.2d 75 (2d Cir. 1936) (cellophane); *Bayer Co., Inc. v. United Drug Co.*, 272 F. 505 (S.D.N.Y. 1921) (aspirin).

¹⁶ See 3 MCCARTHY, *supra* note 4, § 17:8.

¹⁷ Cf. 2 MCCARTHY, *supra* note 4, § 12:26 (discussing how producers who want to protect their trademark should be sure to use generic word along with their trademark — such as "Radon brand Personal Communicator" — rather than calling their product "Radon"); *id.* § 12:8 (noting how, in common usage, consumers often drop generic word and use only brand — e.g., ordering hamburger and "Coke," rather than "Coke brand cola").

B. Source Confusion

The most basic form of trademark infringement occurs when the seller of a product passes off his product as his competitor's.¹⁸ This practice is often referred to as "palming off."¹⁹

Consumers who purchase a product that has been palmed off can be injured in two ways. The more obvious injury occurs when consumers end up with an inferior item — a good that lacks the features or quality of the trademarked product.²⁰

But there is a second, subtler kind of injury. Even if the infringing product is identical in all physical respects to the trademarked good, consumers can still be injured if they sought out the trademarked good because of its intangible qualities.²¹ For example, consumers might choose to buy a particular brand of a relatively standardized product because of the manufacturer's labor or environmental policies.²² A consumer who prefers to buy her strawberries from Swanton Berry Farm because they are picked by unionized workers²³ will be injured if she is misled into choosing berries from a nonunion source even if she is unable to discern any difference when she bites into one. To the extent that their choices involve considerations of morality or social welfare, consumers will be injured if they are misled

¹⁸ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 21 cmt. b (1995) ("The oldest and simplest form of trademark infringement occurs when a seller identifies its goods by a designation that is identical to a designation previously used by a competitor marketing similar goods."); Symposium, *supra* note 10, at 1695 ("We give protection to trademarks for one basic reason: to enable the public to identify easily a particular product from a particular source.").

¹⁹ See 4 MCCARTHY, *supra* note 4, §§ 25:1-9 (discussing "palming off").

²⁰ See Laura R. Bradford, *Emotion, Dilution, and the Trademark Consumer*, 23 BERKELEY TECH. L.J. 1227, 1241 (2008) (explaining that "[s]ymbols that deceive consumers reduce the efficiency of the market by causing consumers to unwittingly purchase a different good" than one they thought they were buying).

²¹ This idea is explored extensively in Shahar J. Dilbary, *Famous Trademarks and the Rational Basis for Protecting "Irrational Beliefs"*, 14 GEO. MASON L. REV. 605, 622-28 (2007).

²² See Omari Scott Simmons, *Branding the Small Wonder: Delaware's Dominance and the Market for Corporate Law*, 42 U. RICH. L. REV. 1129, 1148-49 (2008) (describing consumers who choose to buy groceries from Whole Foods Markets or to drive hybrid automobile "because of the intangible psychological aspects of the brand" that "reinforc[e] one's sense of health, environmental, and social consciousness" and "eradicat[e] a sense of 'green guilt'"); see also NAOMI KLEIN, *NO LOGO* (2002) (describing consumer activism directed against brands on basis of their labor, environmental, and political policies); Graeme Austin, *Trademarks and the Burdened Imagination*, 69 BROOK. L. REV. 827, 911-12 (2004) (same).

²³ See The Union, <http://www.swantonberryfarm.com/pages/union.html> (last visited July 4, 2009).

into buying goods that come from a source that does not share their ethical concerns.

C. Tarnishment

While the historical basis of trademark law focused on the risk of consumer confusion over the source of goods they were considering buying, in recent years much attention has also focused on a distinct issue: the problem of trademark dilution.²⁴ If a producer is allowed to use another manufacturer's mark, even for goods that do not compete with the mark holder's products, the producer can "dilute the selling power of the brand at issue, either by making the brand seem commonplace rather than unique (dilution by 'blurring') or by creating negative or unwholesome associations for a famous brand (dilution by 'tarnishment')." ²⁵ For example, even though the upscale jewelry merchant Tiffany & Co. does not sell sex toys, it might suffer dilution by tarnishment if a rogue merchant were to slap a label reading "TiffFanny & Co." on sterling silver whips and package them in robins' egg blue boxes with white ribbons: some consumers would associate Tiffany with a product they find unsavory and thus be less likely to purchase Tiffany's own products in the future.²⁶

Many scholars and courts have expressed skepticism about the "fundamental shift in the nature of trademark protection" that underlies dilution claims.²⁷ In particular, when it comes to dilution-by-tarnishment claims, these skeptics have identified serious countervailing First Amendment concerns.²⁸ The First Amendment interest is especially strong when the alleged infringer is using the trademark in a noncommercial setting as an aspect of political speech

²⁴ The antecedents of dilution theory go back at least to Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927). See 4 MCCARTHY, *supra* note 4, § 24:67. But federal law did not recognize dilution as a trigger for liability until the Federal Trademark Dilution Act of 1995, 15 U.S.C. § 1125 (2006). See Bradford, *supra* note 20, at 1231.

²⁵ Laura A. Heymann, *Metabranding and Intermediation: A Response to Professor Fleischer*, 12 HARV. NEGOT. L. REV. 201, 216 (2007). For an extensive discussion of dilution in trademark law, see 4 MCCARTHY, *supra* note 4, §§ 24:67-134.

²⁶ See 4 MCCARTHY, *supra* note 4, § 24:89 (discussing dilution by tarnishment cases).

²⁷ Symposium, *supra* note 10, at 1698; see, e.g., 4 MCCARTHY, *supra* note 4, § 24:68 (discussing criticisms of dilution as basis for trademark liability); David S. Welkowitz, *Reexamining Trademark Dilution*, 44 VAND. L. REV. 531, 538-44 (1991) (same).

²⁸ See Robert N. Kravitz, *Trademarks, Speech, and the Gay Olympics Case*, 69 B.U. L. REV. 131, 144-84 (1989) (criticizing courts for failing to recognize impact on political speech of expansive view of trademark protection); Welkowitz, *supra* note 27, at 553-58 (discussing issue and collecting cases).

or is using the trademark in the course of criticizing “the products or policies of the mark owner.”²⁹ Under those circumstances, there is a serious problem with letting a mark holder squelch criticism by denying critics the ability to make their case using the most effective possible language. Here, as with genericide, trademark doctrine and scholarship recognize a constellation of competing concerns. Taken together, concepts such as source confusion, genericide, and dilution-by-tarnishment reflect the fact that restrictions on how language gets used can both enhance and undercut how markets function.

II. TRADEMARK’S RESONANCE IN CONSTITUTIONAL LAW

While the commercial marketplace within which trademark law operates obviously differs from the more metaphorical marketplace of ideas, the two arenas are not entirely dissimilar. Consider one well-known example. Citizens and voters, like consumers, face a dizzying array of choices, and ideological “brand names” may play an important role in lowering the cost of acquiring information. Perhaps the most obvious illustration of this point involves the political party. As Justice Scalia’s opinion for the Court in *Tashjian v. Republican Party*³⁰ explained, “[P]arty labels provide a shorthand designation of the views of party candidates on matters of public concern, [and thus] the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise.”³¹ The risk that voters will be misled about a candidate’s actual party affiliation may justify legal restrictions on how candidates choose to identify themselves.³² So, too, critiques of political campaigns and political advertising often echo critiques of commercial

²⁹ 4 MCCARTHY, *supra* note 4, § 24:90; see Kravitz, *supra* note 28.

³⁰ 479 U.S. 208 (1986).

³¹ *Id.* at 220. See generally ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 265-66 (1957) (describing how party labels can help voters); Michael A. Fitts, *Can Ignorance Be Bliss?: Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917 (1990) (discussing voter information and role of parties).

³² See *Wash. State Grange v. Wash. Republican Party*, 128 S. Ct. 1184, 1194-95 (2008) (recognizing that voter confusion would undermine state’s decision to permit candidates to indicate their self-identified affiliation on ballot, but finding that there had been no showing in this case of such confusion). Indeed, Justice Scalia’s dissent in *Grange* drew quite directly on trademark theory in his discussions of how the Washington law was like allowing Oscar the Grouch (garbage can-dwelling denizen of Sesame Street) to endorse Campbell’s soup and thereby tarnish the brand name. See *id.* at 1201 (Scalia, J., dissenting). In *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 217 (1989), the Court noted the problem that can occur when a candidate somehow wins a party’s nomination despite holding views antithetical to the party.

advertising made long ago by Ralph Brown in his foundational article, *Advertising and the Public Interest: Legal Protections of Trade Symbols*³³ — for example, that most advertising is “designed not to inform, but to persuade and influence,”³⁴ particularly through “appeals to sex, fear, . . . and patriotism, regardless of the relevance of those drives to the transaction at hand.”³⁵

How labels operate in constitutional arguments also has interesting parallels with trademark law. The controversy over constitutional interpretation — in particular, the recent dominance of originalism — shares interesting features with genericide. Similarly, the struggle over the meaning of the equal protection clause and *Brown* reveals some elements of source confusion. Finally, opposition to same-sex couples’ access to the institution of marriage shares some critical features with the idea of dilution by tarnishment.

A. *The Rise and Fall of Originalism as an Interpretive Brand: Genericide in Constitutional Law*

It used to be that there were many brands of constitutional interpretation. Phillip Bobbitt famously identified six “modalities” of constitutional argument: (1) the historical, which looks to the intentions of the drafters or ratifiers; (2) the textual, which teases the meaning out of the ordinary meaning of the words; (3) the structural, which discerns meaning from the overall architecture of the document; (4) the doctrinal, which accords heavy weight to precedent; (5) the ethical, which relies on broad principles; and (6) the prudential, which does a cost-benefit analysis.³⁶ Thirty years ago, there was actually a lively battle between scholars and jurists who rested their interpretations on invocations of original meaning, understanding, or intent and others who forthrightly identified themselves as noninterpretivists.³⁷ To identify just a few of the brand names that now seem as oldfangled as the Studebaker, the Rambler,

³³ 57 YALE L.J. 1165 (1948). I found Professor Brown’s article and another foundational piece of trademark scholarship, Frank I. Schechter, *supra* note 24, tremendously helpful in thinking through the issues I address in this Essay.

³⁴ Brown, *supra* note 33, at 1169.

³⁵ *Id.* at 1182.

³⁶ See PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 9-119 (1982) (describing each modality in some detail); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13 (1991).

³⁷ See, e.g., MICHAEL PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS (1982) (taking nonoriginalist position); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) (criticizing originalism).

and the Oldsmobile, there was the “living constitutionalism” of Justice William Brennan;³⁸ the “process theory” of John Hart Ely;³⁹ and the “Neutral Principles” position of Herbert Wechsler.⁴⁰

Today, much of what remains in the way of constitutional theory assembles itself under the banner of originalism. But the originalism of today is not the original originalism. Originalism as a primary theory of constitutional interpretation had its origins in the conservative attack on various Warren Court decisions.⁴¹ Then-Attorney General Edwin Meese famously argued for what he called “a Jurisprudence of Original Intention.”⁴² Initially, one might have thought that this jurisprudence would ask what could be called the WWJMD question: What would James Madison do? That is, a jurisprudence of original intention would ask how the drafters of a constitutional provision — its originators — would answer the question being posed.⁴³

³⁸ See *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) (“The document that the plurality construes today [in a case raising claims under the Fourteenth Amendment] is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. *This* Constitution does not recognize that times change, does not see that sometimes a practice or rule outlives its foundations. I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold.”); William J. Brennan, Jr., *What the Constitution Requires*, N.Y. TIMES, Apr. 28, 1996, at E13 (“Our Constitution is a charter of human rights, dignity and self-determination. I approached my responsibility of interpreting it as a 20th-century American, for the genius of the Constitution rests not in any static meaning it may have had in a world dead and gone but in its evolving character.”).

³⁹ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 105-79 (1980).

⁴⁰ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

⁴¹ See James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1347 (1997) (“Originalism is an *ism*, a conservative ideology that emerged in reaction against the Warren Court. Before Richard Nixon and Robert Bork launched their attacks on the Warren Court, originalism as we know it did not exist.”); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 601 (2004) (describing originalism as “a reactive theory motivated by substantive disagreement with the recent and then-current Warren and Burger Courts”).

⁴² See, e.g., Edwin Meese, III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL’Y 5 (1988) (setting out his theory); Address of Attorney General Edwin Meese III Before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), available at <http://www.fed-soc.org/resources/id.52/default.asp> [hereinafter Meese Address] (same); Office of Legal Policy, U.S. Dep’t of Justice, *Guidelines on Constitutional Litigation* (1988) (describing originalist approach for government to take in litigating constitutional questions).

⁴³ See, e.g., Meese Address, *supra* note 42 (quoting with approval as guide to constitutional interpretation Justice Joseph Story’s directive that “[t]he first and

But originalism soon shifted gears, perhaps because of the impossibility of actually discerning a collective intent with regard to a lot of constitutional questions, or perhaps because the answers one was likely to get were so unpalatable. For example, only by heroic acts of imagination — sometimes called “translation,” but translation only in the way that *Clueless* can be said to be a translation of Jane Austen’s *Emma* — can one even begin to argue that the framers of the Fourteenth Amendment would themselves have subjected discrimination on the basis of gender to heightened scrutiny.⁴⁴ Similarly, scholars across the ideological spectrum have long agreed that the Supreme Court’s condemnation of de jure segregation in *Brown v. Board of Education*⁴⁵ cannot plausibly be explained on originalist grounds; after all, the Congress that proposed the Equal Protection Clause segregated the public schools in the District of Columbia, and many of the states that ratified the amendment segregated their schools as well.⁴⁶ This dissonance posed a serious problem for originalism, as Robert Bork noted, because any constitutional theory “that seeks acceptance must, as a matter of psychological fact, if not of logical necessity, account for the result in *Brown*.”⁴⁷ Only quite recently did any scholar seriously attempt to

fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties”). For a recent judicial example of this approach, consider Justice Thomas’s solo concurrence in *Morse v. Frederick*, 551 U.S. 393 (2007), suggesting that students in public schools have no First Amendment-based right to freedom of speech because no such right existed at the time of the framing or the ratification of the Fourteenth Amendment. See *id.* at 410-13.

⁴⁴ See GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, KEEPING FAITH WITH THE CONSTITUTION 51-57 (2009). One powerful piece of evidence to the contrary is the opposition suffragists expressed to the amendment because they thought its reduction-of-representation clause enshrined sexism in the Constitution. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 18-19 (3d ed. 2007).

⁴⁵ 347 U.S. 483 (1954).

⁴⁶ For representative expressions of this point, see, for example, RAOUL BERGER, GOVERNMENT BY JUDICIARY 117-33, 241-45 (1977); ROBERT H. BORK, THE TEMPTING OF AMERICA 75-76 (1990); LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 12-13 (1991); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 712 (1975); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 252 (1991); Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1374-76 (1990); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 790, 800 (1983).

⁴⁷ BORK, *supra* note 46, at 77.

ground *Brown* in an originalist understanding,⁴⁸ and that attempt was largely unpersuasive.⁴⁹

On a more fundamental level, scholars identified a serious theoretical problem with “original intention” originalism: if one were to apply the Framers’ intentions to contemporary controversies, is it clear that the Framers intended for later generations to decide those controversies as the Framers would have done had they been granted perpetual life? If the ratifiers of the Fourteenth Amendment, for example, foresaw an evolution in the understanding of equality, then it would betray, rather than adhere to, their original intention if the government were to segregate schools in 1954 simply because the ratifiers did so in 1868. What if, put simply, the original intention was that the Constitution be interpreted in a nonoriginalist fashion?⁵⁰

Given the difficulties with “original intent” originalism, supporters of originalism developed what has come to be called “original public meaning” or “original expected application” originalism.⁵¹ Here, interpreters ask not what was in the minds of the Framers or ratifiers, but what the words they used meant at the time. The results here are perhaps less determinate but more palatable, at least to its practitioners.⁵² Justice Scalia, for example, is perhaps the leading

⁴⁸ See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1092-1101 (1995) (claiming that *Brown* is consistent with original understanding of Equal Protection Clause).

⁴⁹ See Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995) (responding to McConnell); cf. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 931, n.122 (1996) (noting that “[e]ven if Professor McConnell is right, and there is an originalist defense of *Brown*, it is surely a major difficulty with originalism as an approach to constitutional interpretation that no one was able to discover that defense for forty years — even though the advocates (and the Justices and law clerks) at the time of *Brown* had the strongest incentives to do so”).

⁵⁰ See generally H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). Powell concludes that the originalists’ assumption “that the ‘interpretive intention’ of the Constitution’s framers was that the Constitution would be construed in accordance with what future interpreters could gather of the framers’ own purposes, expectations, and intentions” is “incorrect” and that any “assumption that modern intentionalism was the original presupposition of American constitutional discourse . . . is historically mistaken.” *Id.* at 948.

⁵¹ For a discussion of this development, see Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295-96 (2007).

⁵² See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (acknowledging that “as applied, even as applied in the best of faith, originalism will (as the historical record shows) end up as something of a compromise[.]” and “hasten[ing] to confess that in a crunch I may prove a faint-hearted originalist”).

partisan of interpreting the Constitution by looking to the meaning “known to ordinary citizens in the founding generation.”⁵³ And yet he has written at least two major opinions for the Supreme Court in which he has argued for interpreting constitutional rights in a more expansive way.

In *Kyllo v. United States*,⁵⁴ Justice Scalia interpreted the word “search” in the Fourth Amendment to encompass police use, while standing on public property, of a thermal imaging device. While he recognized that in 1789 a search would have required some physical intrusion into the target’s private property, he relied instead on the general principle of privacy — a nontextual value — to conclude that the Fourth Amendment should protect the quantum of privacy that citizens would have enjoyed at the time of its ratification.⁵⁵

Similarly, in *District of Columbia v. Heller*,⁵⁶ Justice Scalia squarely rejected the idea that “only those arms in existence in the 18th century are protected by the Second Amendment,” concluding instead that “the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”⁵⁷ Having reached that seemingly sweeping conclusion, however, Justice Scalia then scaled it back to protect only handguns — and not, for example, sawed-off shotguns — because handguns are “overwhelmingly chosen by American society” as a means of self-protection.⁵⁸ But of course handguns were not *always* the overwhelming choice of the American people. Rather, they are apparently chosen overwhelmingly *today*, and thus “Arms” has an “evolving” meaning. Once he has recognized that the meaning of the word “Arms” has changed since the eighteenth century, Justice Scalia offers no principled reason to reject the argument advanced by liberal scholars that the “liberty” and “equal protection” guaranteed by the Fourteenth Amendment should also be understood as fluid concepts.

But because originalism seems to offer a principled basis for constitutional interpretation, it has become a tempting brand for scholars and jurists of all stripes to invoke. Douglas Kendall has founded a progressive think tank, the Constitutional Accountability Center, devoted to “honest textualism and principled originalism.”⁵⁹

⁵³ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008).

⁵⁴ 533 U.S. 27 (2001).

⁵⁵ *See id.* at 33-40.

⁵⁶ 128 S. Ct. 2783 (2008).

⁵⁷ *Id.* at 2791-92.

⁵⁸ *Id.* at 2817.

⁵⁹ *See* Constitutional Accountability Ctr., What Is Constitutional Accountability?,

And Jack Balkin's recent article, *Abortion and Original Meaning*, argues for an interpretive method based on "text and principle" that looks to what he calls "original meaning" originalism, which he distinguishes from "original expected application" originalism.⁶⁰ Under this form of text-and-principle originalism, he defends reproductive choice, precisely the liberty that other self-proclaimed originalists claim to be the ultimate betrayal of honest originalism, by arguing that the Fourteenth Amendment embodies an anticaste principle that should be understood to protect women's ability to control their reproductive capacity.⁶¹

So just as law professors in the 1950s gaily declared, "We're all realists now," scholars today might declare that "we're all originalists too." Originalism has become a blanket term describing constitutional interpretation, rather than a distinctive form of a generic practice. It has undergone the equivalent of genericide.

That originalism has now become a generic name for an entire category of constitutional interpretation obscures a very important point: there are dramatically different products being peddled under the banner of originalism. Rather than recognizing that constitutional interpretation demands *judgment* in the application of broad principles as well as specific commands, the invocations of originalism suggest to the public — and, perhaps almost as dangerously, to the practitioners themselves — that constitutional interpretation is a scientific activity. To the contrary, there has never been a single clear-cut, legitimate, and timeless method of interpreting the Constitution. Since the founding of the Republic, arguments about what the Constitution commands and prohibits have always looked to multiple sources of authority: to constitutional language and structure, to the intent of the framers and ratifiers, to the shared (and evolving) popular understanding, to judicial precedent, to the broad principles reflected in the document, and to potential practical consequences.⁶² To the extent that invocations of originalism persuade, they also mislead. And, as the next subpart shows, two of the central concerns that have informed trademark law have their parallels in this methodological

<http://www.theconstitution.org/page.php?id=91> (last visited July 4, 2009). The Center has published a major report, *THE GEM OF THE CONSTITUTION: THE TEXT AND HISTORY OF THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT* (2008), available at http://www.theconstitution.org/upload/filelists/241_Gem_of_the_Constitution.pdf, arguing for an expansive reading of the clause on the basis of an historical account of its original meaning.

⁶⁰ See Balkin, *supra* note 51, at 295-303.

⁶¹ See *id.* at 319-36 (setting out his argument).

⁶² LIU, KARLAN & SCHROEDER, *supra* note 44, at 2-5, 24-33.

competition. First, there is now tremendous public confusion because the very purpose of having a brand name has been lost. Second, there is a lot of wasteful competition among producers, each asserting himself or herself to be a true or honest originalist.⁶³ Thus, it is time for arguments over interpretative methodology, like competition among painkillers, to move beyond assertions of a now-generic brand name and to identify the particular characteristics that render them superior to the competition.

B. *The Fading of Brown*

The prior subpart explained that one of the catalysts for the evolution of originalism was the inability of the theory in its purest form to justify the Supreme Court's decision in *Brown*.⁶⁴ As I have explained elsewhere, *Brown* is "the most 'super-duper,' to use Senator Arlen Specter's phrase, of all the Court's precedents,"⁶⁵ one of the most prestigious brand names in American constitutional law. Riffing off Cole Porter's song, "You're the Top," Justice Scalia once mockingly referred to the "shocks the conscience test" as the "Napoleon Brandy, the Mahatma Gandhi," and, yes, "the Cellophane" of subjectivity.⁶⁶ But *Brown* really is the cellophane, the Bendel bonnet, the Ovaltine, and the Arrow collar of constitutional law — to name just a few of the trademarked "exemplars of excellence"⁶⁷ that Porter invokes. Thus, a constitutional theory that is inconsistent with *Brown* is unlikely to attract much support in the marketplace of ideas.

Particularly in light of the general ascendance of some form of originalism, one of the striking features of the modern conservative position on race-conscious government decisionmaking is its decided

⁶³ In a recent article, Professor Balkin describes "the most intellectually sound versions" of originalism and living constitutionalism as "two sides of the same coin." Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 549 (2009). To the extent that he is correct, the theories no longer themselves exercise any constraining force.

⁶⁴ See *supra* text accompanying notes 44-49.

⁶⁵ Pamela S. Karlan, *What Can Brown® Do For You?: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1049 (2009) [hereinafter Karlan, *What Can Brown® Do For You?*]; see also Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1752, 1789-90 (2007) (explaining why *Brown* is "superprecedent").

⁶⁶ *County of Sacramento v. Lewis*, 523 U.S. 833, 861 (1998) (Scalia, J., concurring) (claiming that Court's opinion "resuscitates the *ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of subjectivity, th' ol' 'shocks-the-conscience' test" for substantive due process cases).

⁶⁷ *Id.* at 861 n.1.

nonoriginalism. Conservatives seldom pay attention to what either the drafters, the ratifiers, or the public thought about the Equal Protection Clause in the late 1860s. Whatever originalism means with respect to other constitutional issues, when it comes to equal protection and race, the current Court rarely looks back beyond *Brown*.⁶⁸ In this area, the Court has “abandoned ‘Framers’ originalism’ in favor of ‘*Brown* originalism,’ in which Justices claim fidelity, not to what the Equal Protection Clause meant in 1868, but rather to what the Supreme Court meant in 1954.”⁶⁹

But there have long been two accounts of what *Brown* meant. One, the “anticlassification” account, takes *Brown* as a categorical command “that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.”⁷⁰ Thus, all governmental uses of race are equally suspect. By contrast, the “antisubordination” account sees the promise of *Brown* as the full integration of African Americans (and other historically excluded groups) into American society, rather than the abolition of formal racial distinctions.⁷¹

The two accounts point in dramatically different directions when it comes to race-conscious government decisions designed to integrate public institutions. This was the issue before the Supreme Court in a consolidated pair of cases involving public school assignment policies, *Parents Involved in Community Schools v. Seattle School District No. 1*.⁷² By a five-to-four vote, the Court held that two local school boards had

⁶⁸ The one notable exception involves the frequent citations to Justice Harlan’s 1896 dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), which gets invoked largely for a single sentence — “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens” — by folks who would scarcely dare to quote the first three sentences of the paragraph in which that declaration appears. *Id.* at 559 (Harlan, J., dissenting) (“The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.”); see also Goodwin Liu, “History Will Be Heard”: An Appraisal of the Seattle/Louisville Decision, 2 HARV. L. & POL’Y REV. 53, 54-60 (2008) (offering more nuanced discussion of Justice Harlan’s approach to equal protection).

⁶⁹ Karlan, *What Can Brown® Do For You?*, *supra* note 65, at 1052; see also LIU, KARLAN & SCHROEDER, *supra* note 44, at 47-51 (discussing *Brown* and originalism).

⁷⁰ *Miller v. Johnson*, 515 U.S. 900, 911 (1995).

⁷¹ For a fuller discussion of these competing perspectives, which are laid out in Owen Fiss’s foundational article, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976), see Pamela S. Karlan, *The Law of Small Numbers: Gonzales v. Carhart, Parents Involved in Community Schools, and Some Themes from the First Full Term of the Roberts Court*, 86 N.C. L. REV. 1369, 1385-91 (2008).

⁷² 551 U.S. 701 (2007).

violated the Equal Protection Clause when they took students' race into account to create more racially integrated schools. The Court applied strict scrutiny to the school boards' use of race,⁷³ and then held that the school boards' assignment policies were not narrowly tailored to "achieving the educational and social benefits asserted to flow from racial diversity" because the challenged plans were "directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate."⁷⁴ Chief Justice Roberts's opinion (which was joined on this point by three other Justices) identified its fundamental principles as "go[ing] back . . . to *Brown* itself."⁷⁵

For present purposes, the most striking aspect of the various opinions is not simply the disagreement between the Justices in the majority⁷⁶ and those in dissent as to "which side is more faithful to the heritage of *Brown*."⁷⁷ Rather, it is the way in which the Justices in the majority sought to "pass off" the source of their views: they went beyond claiming that their position was more consistent with what the Court said in *Brown*⁷⁸ to claim that they were in fact the true heirs of the *plaintiffs' lawyers*. To support his claim that the Equal Protection Clause forbids the government to take race into account even for purposes of integrating, rather than segregating, public schools, Chief Justice Roberts quoted from the 1953 oral argument:

As counsel who appeared before this Court for the plaintiffs in *Brown* put it: "We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens."⁷⁹

⁷³ *Id.* at 720.

⁷⁴ *Id.* at 726.

⁷⁵ *Id.* at 743.

⁷⁶ Chief Justice Roberts announced the judgment of the Court, but several key parts of his opinion garnered the votes of only three other Justices. Justice Kennedy, who concurred in part and concurred in the judgment, provided the critical fifth vote for the decision to strike down the two school districts' integration plans. Justice Thomas also wrote a concurring opinion.

⁷⁷ *Id.* at 747.

⁷⁸ See Karlan, *What Can Brown® Do For You?*, *supra* note 65, at 1063-64 (describing how Chief Justice's opinion distorts those few fragments of *Brown* opinion that it does quote).

⁷⁹ *Parents Involved*, 551 U.S. at 747 (quoting Transcript of Oral Argument at 7

Chief Justice Roberts thus invoked Thurgood Marshall and Robert Carter — two great heroes of the civil rights movement — to support his view of equal protection. He saw “no ambiguity” in their arguments: “What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?”⁸⁰ Similarly, Justice Thomas in his concurrence quoted at length from the briefs and oral argument transcripts to support his assertion that “my view was the rallying cry for the lawyers who litigated *Brown*.”⁸¹

Put in trademark terms, the Chief Justice and Justice Thomas were engaged in confusing those members of the public who consume their opinions over the provenance or source of their arguments. They were claiming to be the successors in interest to the lawyers from the NAACP Legal Defense Fund who “made” *Brown*.⁸² As the true heirs to the civil rights movement, they would take on the moral authority of those giants.⁸³

Perhaps they acted too hastily. At least one of the attorneys on which the Chief Justice and Justice Thomas relied, Robert L. Carter, is still alive (and is himself a federal judge). Asked for his reaction to the Justices’ use of his words, Judge Carter denied that his words could bear the meaning placed on them. As the *New York Times* reported: “‘All that race was used for at that point in time was to deny equal opportunity to black people,’ Judge Carter said of the 1950s. ‘It’s to stand that argument on its head to use race the way they use [it] now.’”⁸⁴ Jack Greenberg, the other surviving lawyer who had presented oral argument in *Brown* on behalf of the schoolchildren, called Roberts’s position “preposterous.”⁸⁵ And the NAACP Legal Defense Fund itself also filed a brief in the *Parents Involved* litigation arguing that the Court had consistently taken a position (many times

(Dec. 9, 1952), *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 1)); *see also id.* (quoting from briefs filed by plaintiffs’ lawyers).

⁸⁰ *Id.* at 747.

⁸¹ *Id.* at 772 (Thomas, J., concurring).

⁸² For accounts of the Legal Defense Fund’s role in the school desegregation litigation culminating in *Brown*, see JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* (1994); RICHARD KLUGER, *SIMPLE JUSTICE* (1977); MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987).

⁸³ This tack was reminiscent of the Court’s reliance in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), on testimony from Congressman John Lewis, the iconic hero of the Selma to Montgomery March, in support of a challenged redistricting plan.

⁸⁴ Adam Liptak, *News Analysis: The Same Words, but Differing Views*, N.Y. TIMES, June 29, 2007, at A24.

⁸⁵ *Id.*

in cases argued by the Fund's lawyers) in favor of voluntary race-conscious efforts to provide integrated public education.⁸⁶

To be sure, as with the struggle over who is an originalist, no one can *actually* trademark *Brown*, or even partially restrict how others can use his or her words in future cases.⁸⁷ But it seems important that critics of the majority's approach to equal protection resist conservatives' attempt to recast themselves as the true heirs of the civil rights movement. The movement has tremendous resonance with the American people: just as many individuals will choose among brands on the basis of their understandings of the manufacturers' labor or environmental policies, so too many Americans will be persuaded that the Court's approach is legitimate if it is in fact what leaders of the movement fought and died to accomplish. Precisely because the law itself cannot combat the "source confusion" created by decisions like *Parents Involved*, scholars and civil rights activists should take on the task of pointing out the ways in which the current Supreme Court is distorting the lessons of the Second Reconstruction.

C. *The Dilution of Marriage?*

When it comes to social institutions, marriage is one of the great brand names. As Justice Douglas described it in *Griswold v. Connecticut*:⁸⁸

[Marriage] is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.⁸⁹

⁸⁶ See Brief of NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae Supporting Respondents at 5-16, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (No. 05-908). In addition, Jack Greenberg filed a brief on behalf of sixty leading American historians, arguing that race-conscious school assignment policies are "fully consistent with the original purpose of the Fourteenth Amendment," in light of actions of the Reconstruction Congress in "enact[ing] a wide range of race-conscious programs and fund[ing] deliberate efforts to integrate schools." Brief of Historians as Amici Curiae Supporting Respondents at 1, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (No. 05-908).

⁸⁷ Cf. 4 MCCARTHY, *supra* note 4, § 24:90 (noting some First Amendment limitations on trademark protection).

⁸⁸ 381 U.S. 479 (1965).

⁸⁹ *Id.* at 486.

In recent years, many traditionalists have described marriage as being under attack.⁹⁰ One striking aspect of their arguments is the extent to which their arguments mirror the arguments made in trademark tarnishment cases.

A number of scholars have considered whether marriage resembles a trademark. For example, David Cruz has written several articles that probe the idea that marriage resembles a form of intellectual property.⁹¹ In the end, he concludes that the very fluidity of marriage and its importance in individuals' lives means that marriage should be treated as "a symbol in the public domain," one that the government should deploy for the public good, rather than to satisfy any one group's vision of what marriage should be.⁹² Similarly, Marc Poirier has recently explained why he rejects a mechanical analogy to trademark law, particularly given the lack of a single original producer who could plausibly claim an entitlement to retain a competitive advantage derived from the fruits of the producer's labor.⁹³

Of course, these trademark skeptics are correct — if one were asking whether marriage in fact *ought* to be treated as if it were the trademarked brand name for a two-person, opposite-sex, ostensibly lifelong pair bond. The history of marriage shows it to be a far more fluid and variable institution than the defenders of today's version of "traditional" marriage assume.⁹⁴ One striking aspect of the contemporary debate is how the ground in the marriage debate has shifted so that the arguments *against* same-sex marriage now fit so neatly into the antidilution framework. At this point, in many parts of the country (and California falls into this category), the opponents of legal protection for same-sex couples have essentially lost the fight. There is widespread, and increasing, support for the idea that same-

⁹⁰ For representative versions of this argument, see Helen M. Alvare, *The Turn Toward the Self in the Law of Marriage and Family: Same-Sex Marriage and Its Predecessors*, 16 STAN. L. & POL'Y REV. 135, 137-55 (2005); Amy L. Wax, *Traditionalism, Pluralism, and Same-Sex Marriage*, 59 RUTGERS L. REV. 377, 379-88 (2007).

⁹¹ See David B. Cruz, "Just Don't Call It Marriage": *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 933-45 (2001); David B. Cruz, *The New "Marital Property": Civil Marriage and the Right to Exclude?*, 30 CAP. U. L. REV. 279, 305-14 (2001) [hereinafter Cruz, *The New "Marital Property"*].

⁹² Cruz, *The New "Marital Property"*, supra note 91, at 315.

⁹³ Marc Poirier, *The Cultural Property Claim Within the Same-Sex Marriage Controversy*, 17 COLUM. J. GENDER & L. 343, 372 (2008).

⁹⁴ For most of human history, marriages served more as economic arrangements between families than as romantic attachments between individuals, and whom one could marry was sharply circumscribed by features such as class, religion, and race. See MARTHA NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW* (2010) (forthcoming).

sex couples should be entitled to a bundle of tangible legal rights and that the bundle is derived from the one that has come to attach to marriage.⁹⁵ As a matter of state law, California has come very close indeed to giving registered domestic partners the same “rights, protections, . . . benefits, . . . responsibilities, obligations, and duties . . . as are granted to and imposed upon spouses,”⁹⁶ and even the proponents of Proposition 8 (the recent initiative restricting marriage to opposite-sex couples) claimed that they were not attempting to take away the rights and benefits gay couples enjoyed under the domestic partnership laws.⁹⁷ So the debate in these jurisdictions turns almost entirely on access to the brand name.⁹⁸

In one sense, even that battle is lost. Precisely because the word “marriage” cannot be trademarked, same-sex couples can — and do — refer to themselves as married regardless of whether states give them access to the legal status. And, of course, in states like Connecticut, Iowa, and Massachusetts that legally recognize same-sex marriages, private individuals can continue to refuse to consider same-sex couples to be married.⁹⁹

⁹⁵ Although a majority of Americans oppose same-sex marriage, an equivalent majority supports “civil unions (which grant gay couples most of the legal rights of marriage without the title of marriage).” David Masci, *A Stable Majority: Most Americans Still Oppose Same-Sex Marriage*, PEW F. ON RELIGION & PUB. LIFE, April 1, 2008, <http://pewforum.org/docs/?DocID=290>.

⁹⁶ CAL. FAM. CODE § 297.5(a) (West 2009); see *In re Marriage Cases*, 183 P.3d 384, 416 n.24 (Cal. 2008) (identifying few remaining differences between marriage and registered domestic partnerships that involved California, as opposed to federal, law).

⁹⁷ See *Strauss v. Horton*, 207 P.3d 48, 76-77 (Cal. 2009).

⁹⁸ The California Supreme Court’s decision regarding Proposition 8 took precisely this approach:

[A]lthough Proposition 8 eliminates the ability of same-sex couples to enter into an official relationship designated “marriage,” in all other respects those couples continue to possess, under the state constitutional privacy and due process clauses, “the core set of basic *substantive* legal rights and attributes traditionally associated with marriage,” including, “most fundamentally, the opportunity of an individual to establish — with the person with whom the individual has chosen to share his or her life — an *officially recognized and protected family* possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage.”

Strauss, 207 P.3d at 77 (quoting *In re Marriage Cases*, 183 P.3d at 399).

⁹⁹ To be sure, state law somewhat constrains private refusals to consider a couple married: to the extent that state law requires, or prohibits, particular actions on the basis of marital status — for example, requiring employers to provide leave for workers to care for sick “spouses” — private individuals must treat same-sex married couples the same as opposite-sex couples. *Cf.* Act of Apr. 23, 2009, Pub. Act No. 13 §§

That being said, current arguments against providing same-sex couples the legal ability to get married are strikingly similar to the arguments advanced by plaintiffs in trademark tarnishment cases. Until recently, opponents of same-sex marriage argued that same-sex couples did not deserve state protection or approval for their relationships because those relationships were inferior goods. Now, the opposition takes a different tack, looking instead at the effects of legal recognition on the behavior of straight people: if marriage is no longer viewed as a prestigious brand, somehow it will no longer attract opposite-sex couples. In short, if *everyone* can get married, marriage will lose its cachet.¹⁰⁰ It will be, to use the language of trademark, tarnished. And once it has become tarnished, there is the danger that the preexisting “producers” of marriage — in this sense, opposite-sex couples — will cease to invest in the institution.¹⁰¹

But just as trademark scholars have expressed skepticism about permitting tarnishment claims because of the threats to free expression,¹⁰² particularly in cases that involve noncommercial uses of a mark, so too, should one view this tarnishment-of-marriage argument skeptically. The argument depends on treating marriage as essentially a positional good¹⁰³ or an exclusionary institution — a claim deeply at odds with the Supreme Court’s treatment of marriage under the Due Process and Equal Protection Clauses of the Fourteenth Amendment as a freedom that “has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”¹⁰⁴ Courts should reject tarnishment-based arguments here

17-18, 2009 Conn. Legis. Serv. P.A. 09-13 (West) (providing limited exemptions to religious and fraternal organizations to withhold services from same-sex couples if their decision is based on religious reasons).

¹⁰⁰ See, e.g., George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 616-23 (1999); William C. Duncan, *Law and Culture: The State Interests in Marriage*, 2 AVE MARIA L. REV. 153 (2004); Lynne Marie Kohm, *How Will the Proliferation and Recognition of Domestic Partnerships Affect Marriages?*, 4 J.L. & FAM. STUD. 105 (2002).

¹⁰¹ See Dent, *supra* note 100, at 618-27 (making series of arguments that extending marriage to same-sex couples will weaken incentives for and integrity of opposite-sex marriages).

¹⁰² See *supra* text accompanying notes 27-29 (discussing tarnishment).

¹⁰³ Positional goods are goods “whose value depends relatively strongly on how they compare with things owned by others.” Robert H. Frank, *The Demand for Unobservable and Other Nonpositional Goods*, 75 AM. ECON. REV. 101, 101 (1985). For an exploration of how law treats positional goods, see generally Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1 (1992).

¹⁰⁴ *Loving v. Virginia*, 388 U.S. 1, 12 (1967). As a matter of state constitutional law, the California Supreme Court has held that the “liberty” protected by article I, sections 1 and 7 of the California Constitution confers a substantive right “to choose

for the same reason they do so in trademark cases where such recognition trenches on important First Amendment rights. Ironically, the tarnishment argument may itself pose a threat of tarnishing marriage: to the extent that the decision to restrict marriage to opposite-sex couples rests on the need to provide an incentive to domesticate otherwise feckless and irresponsible heterosexual men who will not enter into marriage if it is extended to everyone,¹⁰⁵ marriage surely loses some of its luster.

CONCLUSION

Legal scholarship often draws insights from comparing distinct bodies of law that share significant features.¹⁰⁶ This Essay suggests that trademark law can provide insights into how to approach several particularly contentious issues in constitutional law. Trademark law's recognition of the phenomenon of genericide is mirrored in the evolution of "originalism" over the last generation from a distinctive theory of constitutional interpretation into nearly meaningless boilerplate. In light of this genericide, partisans of various constitutional

one's life partner and enter with that person into a committed, officially recognized, and protected family relationship." *In re Marriage Cases*, 183 P.3d 384, 433-34 (Cal. 2008). For a more extensive discussion of the affirmative right to marry, see Pamela S. Karlan, *Let's Call the Whole Thing Off: Can States Abolish the Institution of Marriage?*, 97 CAL. L. REV. (forthcoming 2009).

¹⁰⁵ See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (explaining that New York could rationally decide to restrict marriage only to opposite-sex couples because "[t]he Legislature could . . . find that [heterosexual] relationships are all too often casual or temporary" and that it would be appropriate "to offer an inducement — in the form of marriage and its attendant benefits — to opposite-sex couples who make a solemn, long-term commitment to each other" in order to protect accidentally conceived children).

¹⁰⁶ See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733 (1991) (comparing questions of new law in habeas corpus and section 1983 actions); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979) (describing how set of economic regulation claims were transformed by being analyzed through lens of First Amendment doctrine); Pamela S. Karlan, *Taking Politics Religiously: Can Free Exercise and Establishment Clause Cases Illuminate the Law of Democracy?*, 83 IND. L.J. 1 (2008) (examining questions of enfranchisement and entrenchment in political process through lens of Supreme Court's religion cases); Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880 (2004) (comparing how Court has treated questions of excessive punishment under Eighth Amendment's Cruel and Unusual Punishment Clause with how it has dealt with issue of limiting punitive damages); Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115 (1991) (examining relationship between habeas corpus and section 1983 suits).

theories, like producers whose trademark has been genericized, need to look for new ways to distinguish their theories and compete in the marketplace of ideas. That being said, trademark law's focus on the costs of source confusion, particularly with respect to the intangible attributes of competing products, suggests why it is important to resist conservatives' attempts to cloak themselves in the mantle of the lawyers who brought *Brown v. Board of Education*. Finally, trademark's resistance to extending tarnishment claims to noncommercial and political settings provides insight into why we should reject traditionalist defenses of marriage that invoke ideas of dilution. In each of these examples, trademark law can reinforce important arguments about how constitutional law ought to be understood.