Trademark Law in the Time of *Kulturkampf*: The Poirean Perspective

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This Article explores what is termed the "Poirean Perspective," which is an examination of Professor Marc Poirier's seminal work in the relationship of property theory to the formation of social identity. The Poirean Perspective offers three key insights on the relationship of property and intellectual property law to conflicts over social identity. First, the Poirean Perspective suggests how theoretical conceptions of community in property theory need to capture how different theoretical and practical contingencies impact doctrinal formation in property law. Second, the Poirean Perspective suggests that legal and social conflict over property rights in group identity may ripen into Kulturkampf, *given the disruptions in social status such conflicts generate. Finally, the Poirean Perspective explores how a type of group-identity in trademarks, called community brands, is likely to lead to* Kulturkampf *controversies in intellectual property law. This Article concludes by applying the Poirean Perspective to the current controversy over racially stigmatized trademarks such as the Washington Redskins.*

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INTRODUCTION

Marc Poirier was a generous man. It was always a relief to see Marc at an academic conference. Marc would interrupt you with a chuckle to tell you to sharpen that thesis or huddle with you in a corner to laugh at all sorts of academic tomfoolery.

Once, Marc came to speak at my invitation at Marquette. This lecture was intended to be a short one-day visit. It was, however, February in Milwaukee and so inevitably, it snowed. I, for once, was delighted by the snow in Milwaukee as this meant that Marc would have to stay for an additional three days. At leisure, Marc and I conversed about so many topics: the availability of a decent pho in Milwaukee, the false boundaries between the academic communities of property law and intellectual property law, and the futility of faculty politics. One conversation between Marc and I stands out amongst our many conversations that week. In this conversation, we spoke about how his practice of Buddhism grounded him during a long fight with cancer. This last conversation revealed to me a different Marc, comfortable in the spiritual practice that provided him with the strength of his last years.

Indeed, my truest insight into the source of Marc's generosity came on the day of his lecture. Somewhat unexpectedly, Marc requested that I show him our chapel. He then asked for some time to sit there without sound. My fondest memory of Marc is walking away as he sat in solitude, still. It is a memory that I return to again and again as I confront his death and our loss.

This Symposium, albeit in a small way, allows us to celebrate the lasting generosity of his ideas. Marc was a creative, omnivorous scholar, who wrote in environmental law, property law, intellectual property law, critical race theory, and critical gender theory. He infused this legal scholarship with critical perspectives drawn from political philosophy, gender and sexual orientation studies, critical geography, history and sociology, just to name a few. This Symposium with many different voices is a fine way to celebrate Marc's legacy, given his contributions to numerous scholarly fields.

This Article will focus on Marc's contributions to the fields of property and intellectual property theory, which I refer to collectively as the Poirean Perspective. The Poirean Perspective, in sum, contends the doctrinal formation[1] of property and intellectual property law

[1] The term "doctrinal formation" refers to two key concepts. First, it refers specifically to the doctrinal content of an area and its constituent elements, including constitutional law, statutory law, and common law. Second, it refers to the ways in such a doctrine is formed, whether through administrative, legislative, judicial, or social

occurs through a series of historically and contingent dialogues between a range of actors that implicate deeply held ideological norms, cultural beliefs, and communicative actions.[2]

Two normative claims are key to the Poirean Perspective. Initially, the Poirean Perspective argues that a thick conception of "community" is necessary when we contemplate the interaction of property doctrine, institutions, and actors. For Marc, property law was made in, on, and around the ground, and consequently then, property law and its legal institutions need to be flexible and agile to be responsive to these contingent events. A true insight of the Poirean Perspective is that property law is always reacting to the choices made by actors confronted by significant moral dilemmas over the best allocation of limited resources.

Additionally, the Poirean Perspective claims that certain conflicts in property law are often heightened as these conflicts reflect the participants' beliefs in competing moral claims that might be difficult to resolve in a clear-cut manner. Marc referred to this process as *Kulturkampf*[3] and his use of *Kulturkampf* emerged out of the ongoing legal conflicts that occurred within the last twenty years as to the legal status associated with sexual orientation. These controversies—which included whether free-speech claims should be applied to the discriminatory exclusion of individuals based on sexual orientation and whether state sanctioned marital relationships should be available to any individual, regardless of sexual orientation[4]—provided Marc a

activism. Kali Murray, *Constitutional Patent Law: Principles and Institutions*, 93 NEB. L. REV. 901, 911 (2015) (discussing the concept of doctrinal formation within the context of patent law).

[2] *Id.* at 911.

[3] *See* Marc R. Poirier, *Hastening the* Kulturkampf*:* Boy Scouts of America v. Dale *and the Politics of American Masculinity*, 12 L. & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 271, 299 (2003) [hereinafter Poirier, *Hastening the* Kulturkampf].

[4] *Id.* at 299; *see also* Marc R. Poirier, *Same-Sex Marriage, Identity Processes, and the* Kulturkampf*: Why Federalism is Not The Main Event*, 17 TEMP. POL. & C.R. L. REV. 387 (2008) [hereinafter Poirier, *Same-Sex Marriage*]; Marc R. Poirier, *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 3 (2008) [hereinafter Poirier, *Microperformances of Identity*]; Marc R. Poirier, *Gender, Place, Discursive Space: Where is Same-Sex Marriage?*, 3 FIU L. REV. 307 (2008) [hereinafter Poirier, *Gender, Place, Discursive Space*]; Marc R. Poirier, *The Cultural Property Claim Within the Same-Sex Marriage Controversy*, 17 COLUM. J. GENDER & L. 343 (2008) [hereinafter Poirier, *The Cultural Property Claim*]; Marc R. Poirier, *Name Calling: Identifying Stigma and the "Civil Union"/"Marriage" Distinction*, 41 CONN. L. REV. 1425 (2009); Marc R. Poirier, *Piecemeal and Wholesale Approaches Towards Marriage Equality in New Jersey: Is Lewis v. Harris A Dead-End or Just A Detour*, 59 RUTGERS L. REV. 291 (2006) [hereinafter Poirier, *Piecemeal and Wholesale Approaches Towards Marriage Equality*]; Marc R. Poirier, "*Whiffs of Federalism" in* United States v. Windsor*: Power,*

way to explore how both sides used the vocabulary of property law to articulate profoundly different moral visions of social change in this area.

Both of these concepts, contingent community and *Kulturkampf*, by themselves would be innovative. The concepts, when coupled together, are powerful. Each allows us to examine why certain conflicts over property resources can develop into seemingly unresolvable controversies, while simultaneously suggesting how legal doctrine can provide tentative methods for solving these seemingly unresolvable crises. Marc's primary claim that questions raised by an ongoing *Kulturkampf* in our political discourse is salient as we address what appears to be a nation deeply divided over numerous moral questions, prompted by questions of shifting status of groups, including the civil and political rights granted to those individuals on the basis of sexual orientation and the status of immigrants-citizen in a globalized economy.

This Article undertakes two tasks. Part I will first review the basic premises of the Poirean Perspective. Part II will then describe how Marc applied the Poirean Perspective to a current controversy: the use of potentially disparaging trademarks under Section 2(a) of the Lanham Act of 1946,[5] which has been implicated in a number of naming controversies involving racial identities and now is the subject of a constitutional challenge at the United States Supreme Court.[6] Specifically, Part III uses Marc's insights on what he terms community brands to emphasize the ways in which these racially stigmatized trademarks show the interrelationship of property and intellectual property theory.

From this analysis, the Article concludes with three primary claims. First, the Poirean Perspective suggests that a "thick conception" of community offers a systematic method of analyzing the doctrinal formation of property and intellectual property law. Second, the Poirean Perspective offers insight on how *Kulturkampf* crises emerge over the emergent group-identity claims to social status property. Finally, the Article concludes that the Poirean Perspective is useful in tackling how intellectual property law may address questions of race and community in trademark law in a more intelligible manner.

Localism, and Kulturkampf, 85 U. COLO. L. REV. 935 (2014).

[5] 15 U.S.C. § 1125(a) (2016).

[6] Lee v. Tam, __ U.S. __, 137 S. Ct. 30 (No. 15-1293) (writ of certiorari granted).

I. THE POIREAN PERSPECTIVE IN PROPERTY LAW

In this Part, the Article considers two concepts which, taken together, can be said to constitute the Poirean Perspective. First, this section will explore Marc's "thick" conception of community and its impact on property theory, with a particular focus on its relationship to progressive property theory. Community in the Poirean Perspective serves as the "medium through which any property and/or natural resources is conceptualized and approached."[7] Community, consequently, is a "thick" concept in Poirean theory, serving to explain three interlocking concepts: ideas, frames, and mediums. Community, for Marc, was an ongoing dialogue between potentially competing theoretical conceptions of rights.[8] This ongoing dialogue over ideas could be complicated by the fact that different social, cultural and economic groups could have very different "frames" by which they could view property resources.[9] Managing the dialogue between ideas, or the conflict over diverse frames, however, could be resolved by use of communicative mediums—law and other strategies—that could be used to achieve imperfect, but socially vital outcomes.[10]

Second, this section will explore Marc's reliance on a theory of *Kulturkampf* to explain how change can occur within the context of property law. For Marc, *Kulturkampf*, the "unrestrained political and cultural combat motivated by moral righteousness[] with the understanding that something vital for the survival of society is at stake,"[11] offered a compelling normative claim as to why particular conflicts over property resources such as real property, environmental goods, intellectual property, and cultural property are subject to intense political, social, and legal controversy. The innovation of Marc's attention is not simply his reliance on *Kulturkampf*, a concept explored by other legal theorists. Rather, Marc detailed specific mechanisms that demonstrate how *Kulturkampf* is driven by visibility conflicts over specific places and spaces. In this way, the process of *Kulturkampf* impacts property law and its institutions.

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[7] Poirier, *Hastening the* Kulturkampf, *supra* note 3, at 298.

[8] Marc R. Poirier, *Property, Environment, Community*, 12 J. ENVTL. L. & LITIG. 43, 66 (1997) [hereinafter Poirier, *Property, Environment, Community*]. This is an early work in the Poirean Perspective, but it contains the most complete description of the role of community as a normative concept in Marc's scholarly works.

[9] *Id.* at 66.

[10] *Id.* at 68.

[11] Poirier, *Hastening the* Kulturkampf, *supra* note 3, at 299.

A. *Community in the Poirean Perspective*

Initially, Marc used the term "community" as a vehicle to address how normative ideas function in property law and theory. For Marc, property law and theory, in its theoretical dimensions, often devolved into arguments over two sharply binary "theor[ies] of the particular rights"[12] associated with a given property claim: the claim of the individual property owner measured against the claim made by the broader community, a set of claims that could be invoked in different ways, including "the human values" of the progressive property movement[13] or the "environmental jeremiad" (a key trope of the environmental law movement that emphasized the overarching regulatory necessity of protecting the environment in light of its potential disappearance).[14]

The Poirean Perspective, however, rejected this rigid binary between these definitions of property rights. Instead, Marc claimed that these two formative conceptions were always in a dialogue with each other within a legal discourse. For instance, discussing the specific conflict between individual property owners' claims and communal claims in environmental law, Marc noted that:

> [W]e must also seek to understand how the ideas reflected in the property encomium and the environmental jeremiad interact, express, and reproduce themselves in our culture. Although the property encomium and the environmental jeremiad often employ static, quasi-Platonic figures of private ownership and government regulation, in reality they are dynamic. Students of property law as it is put into practice will often find a lability, a dialectic, between its individual-regarding and social-good oriented modes of operation.[15]

Property law, according to Marc, can work effectively when it seeks "the cracks" between these different conceptions of property rights.

Consequently, the Poirean Perspective suggests that it is important to pay attention to those legal doctrines that attempt to manage these binary theoretical norms. To develop his thesis, Marc examined one particular factual scenario: determining what the best legal approach for addressing those circumstances in which a

[12] LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 19 (2003). Laura Underkuffler defines an important dimension of property as the theoretical dimension. The theoretical dimension of rights "describes the theory of the particular rights that is used for any particular conception of property." *Id.*

[13] Gregory Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743–44 (2008).

[14] Poirier, *Property, Environment, Community*, *supra* note 8, at 45.

[15] *Id.* at 45.

landowner is denied entirely the ability to use a portion of his or her property by a regulation, and whether such denial is a constitutional taking under the Fifth Amendment.[16] For Marc, the two predominant approaches failed to fully mediate between the competing claims of the owner and the regulatory actor. Neither the regulatory oriented approach embodied by the United States Supreme Court ("the Supreme Court") in *Pennsylvania Central Transportation Company v. City of New York*[17] or the individual property oriented approach, embodied by the United States in *Lucas v. South Carolina Coastal Council*[18] would have solved the problem. *Penn Central* claimed that taking jurisprudence did not apply at all to different segments of the property, while *Lucas* did not resolve exactly how to determine the economic value of the segmented portions.[19] Rather, Marc claimed that "the test ought to be whether the private property owner on the one hand and the regulatory agency on the other have acted reasonably in negotiating the transition in use. *Either* side can, in the words of Justice Holmes, go 'too far.'"[20]

The Poirean Perspective, thus, seeks a dialogical balance between binary conceptions of property law. While the aims of the Poirean Perspective are consistent with the progressive property movement, which sought to restore what it perceived to be an imbalance between the claims of the individual property owner and competing communal demands, it is also surprising in its innovations. First, the Poirean Perspective grants a surprisingly sympathetic view to the demands of the individual property owner insofar as it grants such claims equal weight in the dialogue. Second, the Poirean Perspective suggests that the law's task was not to definitely resolve this dialogic tension between the claims of the individual property owner and competing demands, but instead to serve to mediate these claims. This claim, of course, implies that legal institutions themselves could be reformed in different ways to encourage an ongoing mediation process. For instance, Marc suggested the legal test which examined the parties' "reasonable negotiations" within the takings context shifted the judicial decision-maker's focus from the competing demands of the respective parties, to whether the taking process itself was conducted in an appropriate manner.[21]

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[16] *Id.* at 76–77.

[17] *Id.* at 77 (citing Penn. Cent. Trans. Co. v. N.Y.C., 438 U.S. 104 (1978)).

[18] *Id.* (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992)).

[19] *Id.*

[20] Poirier, *Property, Environment, Community*, *supra* note 8, at 80.

[21] *Id.*

Community has a second meaning in the Poirean Perspective in addition to its description of the dialogic tension between diverse ideological norms. In its second meaning, the term "community" for Marc offered a way to describe how property conflicts over intangible and tangible resources are "framed" by different cultural conceptions of property.[22] The Poirean Perspective insists that different social, cultural, and ethnic groups could view property law, in its basic forms, rules, and institutions, in radically different ways. Specifically, for example, Marc pointed to how in colonial New England, English colonists and Native Americans brought very different views to the appropriate uses of land, with the accompanying negative consequence that these two different cultural groups failed to understand each other's behavior.[23]

For Marc, recognizing the importance of cultural frames served two key purposes in the Poirean Perspective. Initially, the existence of different cultural frames may complicate unitary understandings of a theory of rights in property law. The Poirean Perspective sees that different cultural frames may be necessary to interrogate what is "private property" or "community regulation" in any given circumstance. How slaves in the southern United States viewed private property ownership is an interesting example of how the question of "cultural frames" can aid in the interrogation of the dominant theory of rights. Although slaves were not able to legally own property within the formal legal system, historians such as Dylan Penningroth[24] have noted how informal practices permitted slaves to maintain and trade a range of different properties. Penningroth, for instance, has noted, "[t]he fact that slaves owned property opens up new perspectives on American history. It broadens our attention beyond the master-slave relationship to consider how relations among the slaves might have shaped what slaves did with their property, how they earned it, and how they were able to own it."[25] The unsettling paradox of whether slaves

[22] The literature on "frames" and their relationship to social relationships is extensive. *See, e.g.*, Robert Benford & David Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOCIOL. 611, 614–615 (2000). Here, I adopt a definition advanced by Dennis Chong who defines a "common frame of reference" as an interpretation of an issue that has been popularized through discussion. Dennis Chong, *Creating Common Frames of Reference*, *in* POLITICAL PERSUASION AND ATTITUDE CHANGES 196 (Diana Motz et al. eds., 1996). The definition captures, in particular, how the Poirean Perspective "cultural frames" mix formal elements of legal understanding with more informal attitudes towards property acquisition and ownership.

[23] *Id.* at 67.

[24] DYLAN PENNINGROTH, THE CLAIMS OF KINFOLK 78 (2003).

[25] *Id.*

could be said to "own" property when they had no legal personality suggests the ways in which understanding the relevant cultural frame for any given set of circumstances complicates further how we understand what are the "rights of the property holder" or what is the relevant "communal" claim.

Additionally, Marc's initial insight into the importance of distinct cultural frames in property debates was furthered by his later insistence on the theoretical importance of *Kulturkampf*. *Kulturkampf* posits a moment in property interactions during which more diffuse cultural frames have hardened into distinct moral positions. A concrete example of this process has occurred with the dispute over building a pipeline through the Standing Rock reservation.[26] What may have begun as a relatively local dispute over whether a company could build a pipeline on a reservation, has generated conflict because it involves very different cultural frames as to the appropriate use of the property, and thus, consequently has hardened into a property conflict that invokes distinct moral positions.[27]

Finally, the Poirean Perspective utilizes the term "community" to describe the ways in which law can perform to mediate the dialogic tensions posed by the different ideological and cultural tensions posed in property law. For Marc, law served an important function as a communicative medium, given its ability to serve as a common vocabulary within a dynamic environment.[28] Throughout his scholarship, Marc outlined different types of legal frameworks, which enabled law to serve as a communicative medium. A useful example of law serving its function of communicative medium is the balanced negotiations between landowners and communities under the Endangered Species Act.[29]

Two themes emerge from this third meaning of community in the Poirean Perspective. First, the claim that law serves as a communicative medium bears a close resemblance to noted German philosopher, Jürgen Habermas' claim that legal norms can serve a socially integrative function in reconciling diverse ideological and cultural names.[30] The relationship of the Poirean Perspective to the works of

[26] Carla Javier, *A Timeline of the Year of Resistance at Standing Rock*, FUSION (Dec. 21, 2016), http://fusion.net/story/372387/timeline-nodapl-protests-standing-rock/.

[27] Jack Healy, *The View from Two Sides of the Standing Rock Front Lines*, N.Y. TIMES (Nov. 1, 2016), https://www.nytimes.com/2016/11/02/us/standing-rock-front-lines.html?_r=0.

[28] Poirier, *Property, Environment, Community*, *supra* note 8, at 68–69.

[29] *Id.* at 69–70.

[30] *See generally* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996). A

Jürgen Habermas is an interesting one insofar as Marc's early scholarship did not rely on his philosophical framework. His later scholarship, however, utilized two primary concepts derived from Habermas: the relationship between the private sphere and the public sphere in the constitution of social identity, as well as the claim that discursive spaces are necessary for the emerging visibility of social minorities.[31]

Second, the claim that law functions to reconcile the clashing ideological norms and cultural frames once again emphasizes the Poirean Perspective's normative reliance on institutions and rules that permit flexible, contingent reasoning to resolve conflict. For Marc, legal rules that can manage to incorporate significant geographical information as to a property dispute, or how different communities experience the social change associated with the increased visibility of same-sex marriage, could be successful in reconciling the strains such rules may cause within in a given local community.

In such a way, the Poirean Perspective stresses that sympathy over why a "losing side" in a conflict that disrupts property rules should be taken seriously in the judicial and legislative arena. Sympathy is an unusual element of legal theory. For Marc, sympathy, for instance, as to why a traditionalist may want to assert that same-sex marriage was disruptive[32] to the historical meaning of marriage was as necessary as any legal solution was created. While this sympathy should, perhaps, not extend to preventing the suggested change, such sympathy increased the political legitimacy of any judicial or legislative action taken in regard to the disruption in property rights at issue.

Ultimately, the Poirean Perspective offers a rich, thick conception of community that is useful to property theory, generally, and progressive property theory, specifically. Progressive property theory, and its ideological commitments, has been interested in interrogating the idea of "community" to complicate the relationship of the private property owner to larger social interests, contending that property law and its institutions should be shaped by an awareness of "the underlying human values that property serves and the social relationships it shapes and reflects."[33] The Poirean Perspective of

fundamental insight of Habermasian theory is that law serves as a communicative, a kind of "transmission belt" that transforms the resemblance of everyday social interaction into an abstracted binding form. *Id.* at 278–79. Notably, Marc did not directly reference Habermas in this instance, but it is clear that Marc in his later works did rely substantially on Habermasian discourse theory, and so I note his theory.

[31] *See, e.g.*, Poirier, *Same-Sex Marriage*, *supra* note 4, at 402–03.

[32] Poirier, *The Cultural Property Claim*, *supra* note 4, at 361–68.

[33] *See generally* Alexander et al., *supra* note 13.

community is unique, however, in the way that it complicates the progressive property claim, by focusing on how the contingent acts of specific actors "on the ground" are necessary for the evolution of property law.

Specifically, by focusing on contingent motivation behind individual actions, the Poirean Perspective complicates the relatively unitary claim of community in progressive property theory, by exploring certain historical, social, and geographical circumstances. While other progressive property theorists have been interested in this as a dimension of property decision-making, the Poirean Perspective contends that legal reasoning in property law should incorporate contingency as a key element that shapes legal rules and related institutions. A focus on contingency necessarily shifts normative debate as to, for instance, why exclusion is the central motivation for the construction of property ownership. Accounting for contingency in property theory, then, leads us not only to, as Carol Rose discusses it, "mud"[34] in our legal rules, but our legal theory as well.

B. *Kulturkampf in the Poirean Perspective*

The second key element, *Kulturkampf*, in the Poirean Perspective, is a further elaboration on the deeply contextual approach in the Poirean conception of community. *Kulturkampf*, in its shorthand, refers to a potentially unresolvable "cultural war" between two competing perspectives.

The Poirean Perspective introduced two key innovations in the theory of *Kulturkampf*. First, the Poirean Perspective linked the concept of *Kulturkampf* to debates over the relationship of status of a type of property category. Second, the Poirean Perspective specifically outlined diverse *mechanisms* that prompted the emergence of *Kulturkampf* in property disputes. Marc's innovations in applying the theory of *Kulturkampf* to legal conflicts over property resources form a core element of the Poirean Perspective, and furthers the relevance of the Poirean Perspective to property theory.

The term *Kulturkampf* originated as a way to describe cultural conflict between conservative reaction and liberal politics during the Bismarck regime in late nineteenth-century Germany.[35] Its use,

[34] Carol Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577–78 (1988) (outlining the distinction between "crystal" rules in property law and "mud" rules in property law). Mud rules are "fuzzy, ambiguous rules of decision" that take into account contextual circumstances. *Id.* at 578.

[35] *See* HELMUT WALSER SMITH, THE CONTINUITIES OF GERMAN HISTORY: NATION, RELIGION, RACE ALONG THE LONG NINETEENTH CENTURY (2008) (analyzing historical

however, has moved beyond historical debates to describe a normative claim that there exists in modern political democracy a clash between conservative and liberal perspectives on a range of issues, including the structure of gender roles in the family, the proper use of sexuality in social relationships, and the role of religion in public life.[36]

Prominent legal reliance on the term *Kulturkampf* (and the ironic inspiration of a key element of the Poirean Perspective) emerged out of Justice Antonin Scalia's dissent in *Romer v. Evans*,[37] in which the Supreme Court invalidated a statute that prohibited governmental entities from passing non-discrimination laws related to sexual orientation. In dissent to a majority opinion, Justice Scalia stated:

> The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a "bare . . . desire to harm" homosexuals, *ante*, at 1628, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.[38]

Scalia's invocation of *Kulturkampf* provided Marc with a rich vocabulary that could be used to describe the underlying cultural tensions that animated the ongoing constitutional controversies associated with sexual orientation, including the relationship of speech and discrimination laws[39] and same-sex marriage.[40]

This initial descriptive use of *Kulturkampf* gradually gave way to

debate over *Kulturkampf* in the twentieth century). Notably, the question of whether *Kulturkampf* actually occurred during the Bismarck Era is itself contested. *See* Margaret Lavinia Anderson & Kenneth Barkin, *The Myth of the Puttkamer Purge and the Reality of the Kulturkampf: Some Reflections of the Histography of Imperial Germany*, 54 J. MOD. HIST. 647–86 (1982).

[36] Poirier, *Hastening the* Kulturkampf, *supra* note 3, at 297–99. Marc's treatment of *Kulturkampf* appears to rely on two potential theoretical origins. First, Marc referenced the work of constitutional scholars such as Jay Michealson, Jack Balkin and William Eskridge in their use of *Kulturkampf*. *See, e.g.*, Jay Michealson, *On Listening to the Kulturkampf, or How America Overuled Bowers v. Hardwick, Even Though Romers v. Evans Didn't*, 49 DUKE L.J. 1599 (2001); Jack Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997); William Eskridge, *Democracy, Kulturkampf and the Apartheid of the Closet*, 50 VAND. L. REV. 419 (1997). Second, Marc referenced the literature related to political science to explore how *Kulturkampf* was used to describe cultural disagreements in the United States. Poirier, *Hastening the* Kulturkampf, *supra* note 3, at 299. *See, e.g.*, JAMES DAVIDSON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991).

[37] Romer v. Evans, 517 U.S. 620, 636 (1996).

[38] *Id.* at 636 (Scalia, J., dissenting); *see also* Jeffrey Shaman, *Justice Scalia and the Art of the Rhetoric*, 28 CONST. COMMENT. 290 (2012) (discussing Justice Scalia's use of foreign phrases as a rhetorical device).

[39] *See generally* Poirier, *Hastening the* Kulturkampf, *supra* note 3.

[40] *See generally* Poirier, *Same-Sex Marriage*, *supra* note 4.

the Poirean Perspective's addition of an innovative normative component. Marc's central innovation in this area was to embed a theory of *Kulturkampf* into basic property law and its related theory. Specifically, Marc modified the theory of *Kulturkampf* in three key ways: tying the theory of *Kulturkampf* to a theory of property law that emphasized how social status itself can be classified as a type of property; outlining how specific mechanisms of *Kulturkampf* are tied to real and intangible property concepts; and finally, by emphasizing how certain visible actions serve to heighten moral conflicts over property resources.

The Poirean Perspective contends that *Kulturkampf* conflicts may be heightened if the maintenance of "group identity" intertwined with a specific property status. For example, Marc contended that a primary motivation for supporters of traditional marriage was to protect the status of marriage as a type of property, namely an "intangible sacred cultural resource."[41] Cultural property is a "specific form of property that enhances identity, understanding, and appreciation for the culture that produced the particular property."[42] What if, Marc posited, we would recognize that for traditional marriage proponents, the status of marriage is a type of cultural property? If so, in asserting that the traditional marriage should be limited to heterosexual couples, traditionalists were simply acting as property owners, asserting their "right to exclude others" acting so as "to protect sacred objects, places, and rituals."[43] Acting as property owners in this regard had the ability "to preserve and perpetuate group identity over time."[44] Marc concluded that if we understood marriage as a type of property that reinforced group identity, a corresponding claim of access would provoke a *Kulturkampf* because such claims of access would likely "pollute" the resource of "marital property" itself.[45]

The Poirean Perspective's view that *Kulturkampf* may intensify where social status is granted a property status is consistent with other perspectives in critical legal theory that social status can be a type of property. The Poirean Perspective should be read in light of Cheryl Harris's groundbreaking claim in *Whiteness as Property*, that the racial category of whiteness enjoys property status, even under the most limited definition of property, since the law "accorded 'holders' of

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[41] Poirier, *The Cultural Property Claim*, *supra* note 4, at 347.

[42] Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 569 (1995).

[43] Poirier, *The Cultural Property Claim*, *supra* note 4, at 344.

[44] *Id.*

[45] *Id.* at 364.

whiteness the same privileges and benefits accorded holders of other types of property," including "the right to transfer or alienability, the right to use and enjoyment, and the right to exclude others."[46] Indeed, scholarship exists that invokes *Kulturkampf* in disputes over questions of racial identity. For example, Carla Pratt utilizes *Kulturkampf* to explore the experience of the Seminole Tribe in Florida during the 1840s over whether to include black slaves as citizens within its claim of nationhood.[47]

The Poirean Perspective, in this aspect, answers the question of *why*, which has been haunting a coastal elite shocked at the recent election of Donald Trump. Marc's insight is a simple one: counter-reaction will be intense if you lose a property right in a group status that was once enjoyed by one group over another competing group within a given society.[48] Indeed, as Daniel Sharfstein has noted that social groups may act in violent ways to preserve group-property claims or property acquired through status.[49] Consequently, counter-reaction should be anticipated when social movements, such as those advocating for civil and political rights associated with sexual orientation, advocate for a change in group-identity generates property claims. For instance, a *Kulterkampf* crisis was likely in light of the expansion of the right to marry as heterosexual couples acquired significant property rights through civil recognition of their marriages, including property forms, such as joint tenancy by entirety, or community property forms.

Examining the Poirean Perspective, with its emphasis on *Kulturkampf* triggered by sexual orientation, along with this co-existing scholarship on race, adds to property theory, and as this Article discusses, *supra*, intellectual property theory. To begin with, the Poirean Perspective adds to our perspectives regarding how *things become property*, as it tells us that group-identity can acquire certain types of property rights. Adding *status* to the litany of *things* like real property, intellectual property, and chattel that can be subject to property claims is important as we consider the scope and function of property law and institutions. Furthermore, it suggests the ways in which progressive property theory can be reformed to accommodate

[46] Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1731 (1993).

[47] *See* Carla D. Pratt, *Tribal Kulturkampf: The Role of Race Ideology in Constructing Native American Identity*, 35 SETON HALL L. REV. 1241 (2005).

[48] Poirier, *The Cultural Property Claim*, *supra* note 4, at 368.

[49] *See generally* Daniel J. Sharfstein, *Atrocity, Entitlement, and Personhood in Property*, 98 VA. L. REV. 635, 639–40 (2012) (analyzing how claims of property entitlement may lead to acts of violence).

questions about how social statuses, like race, poverty, gender, and sexual orientation, impact the doctrinal formation in property law.

In many respects, the Poirean Perspective also points to the importance of social impact of property re-classification in property law. In other works,[50] I have studied what I have termed the disruptive origins of property regimes. The disruptive origin of property regimes theory argues that an important origin of individual rights can occur when a property regime goes through a radical re-classification of property interests within a society.[51] An example of such a reclassification is the way in which the 13th Amendment can be seen as a disruptive moment in American property because this Amendment reclassified property—slaves—into citizens.[52] The Poirean Perspective adds to this story of the disruptive origins of property law in its suggestion that significant changes to property are likely to prompt significant counter-reactions, particularly if those changes within property regimes are accompanied by a reclassification of status property. *Kulturkampf* becomes a shorthand way of capturing the cyclical nature of reaction and counter-reaction in a period of significant property reclassification.

If the Poirean Perspective adds to the theory of *Kulturkampf* by explaining *why* intra-group conflict exists over a potentially sacred group resource, it also deepens the theory of *Kulturkampf*, by explaining *where and how* such conflicts can emerge and impact property law and its respective institutions. Marc used property theory to identify the mechanisms of *Kulturkampf*. The mechanisms of place and space answer the question of *where* the politics of *Kulturkampf* emerged, and the mechanisms of visibility and naming explain why *Kulturkampf* creates such intense emotions in its participation.

The mechanisms of place and space offered Marc a way to describe how *Kulturkampf* emerged at specific times within specific political moments. *Place*, as defined by Marc, was a physical location such as "a building, a beach, a mall, a highway, or an entire town."[53] The key quality of *place*, for Marc, was its "ubiety" or more easily said, its "whereness."[54] The possibility of ubiety often generates *Kulturkampf*

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[50] Kali Murray, *Dispossession at the Center of Property Law*, 2 SAVANNAH L. REV. 201, 207 (2015).

[51] *Id.*

[52] George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1382 (2008).

[53] Poirier, *Same-Sex Marriage*, *supra* note 4, at 401.

[54] *Id.* "Ubiety" is "the quality or state of being in a place: such as, the abstract quality of being in position: whereness." *Ubiety*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/ubiety (last visited Feb. 11, 2017).

because:

> With ubiety come possibilities for proximity and distance, possibilities for access and exclusion, and—importantly for an understanding of *Kulturkampf*—possibilities for the control of visibility and choices about ways of being less visible or invisible. Also important is that, in a specific place, people will encounter their neighbors and the landscape, whether they want to or not. To one extent or another, whatever a geographic place contains in public, whatever occurs in a public place, is inescapably visible to others present in the place. So that a place is a particularly important kind of arena for engaging potentially unwilling others in civic discourse.[55]

The experience of place was influenced by the scale of conflict. Scale describes the way in which places themselves could range from "biggest to small, from worldwide to state-by-state to local to small and private."[56]

We can consider the importance of the ubiety of *Kulturkampf* on the intersection of property law and civil rights law in the late nineteenth century[57] by highlighting the ongoing battles over railroad cars in the growing segregation of the United States. According to James Cobb,[58] first-class railroad cars served as the crucible of limiting public accommodations because it was a location in which "whites had little control over their contact with and proximity to blacks." Therefore, first-class railcars became the place of *Kulturkampf* because "white passengers who objected vociferously and sometimes violently to sharing the limited confines of the first-class coach with blacks and black passengers whose numerous protests and lawsuits reflected their refusal to accept anything less than first-class accommodations after purchasing a first-class ticket."[59]

All of the primary elements that foster a crisis of *Kulturkampf* presented themselves in the railcar: the presence of a propertied space (the privately owned railcar) as well as the disruption caused by the visible shifts in the social status of one group that prompted counter reaction. The railroad car, with its jostling of the indignant whites and defiant blacks in one physical location, stood in some respects, for the

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[55] Poirier, *Same-Sex Marriage*, *supra* note 4, at 401.

[56] *Id.* at 404.

[57] *See generally* Joseph Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996) (discussing the battle over public accommodations law and its relationship to property law and the right to exclude).

[58] JAMES COBB, THE BROWN DECISION, JIM CROW, AND SOUTHERN IDENTITY 19 (2005).

[59] *Id.*

moral claims associated with multi-racial democracy after the Civil War. Equally important, these were conflicts that were both national in scale, as individuals traveled through different states, and local in scale, insofar as the laws that addressed these questions could differ from state to state. The dialogical mechanism of the law could create a uniform policy, however, because of the differences in the scalar function of railroad cars.

Space serves as the second "where" mechanism of *Kulturkampf*. After defining *space* "as a field within which humans interact,"[60] Marc identified three different types of space: place/space, aterritorial space, and discursive space.[61] Like place, space operates on a range of scales, as different types of place/space, aterritorial space, discursive space can be experienced from "biggest to small, from universal fields of discourse to fields that encompass only a limited number of interacting humans to fields that only encompass a few, then two, then just one person."[62]

Place/space is a term Marc used to describe those places that hosted formalized, interactive rituals, such as a courtroom, which is a physical place in which a trial is conducted.[63] For Marc, including a definition of place/space encompassed the fact that a physical location could also serve a spatial role. The term "space" could also capture those physical locations that served multiple, interactive roles. For instance, in the morning a classroom could serve as teaching space, but in the afternoon could serve as a meeting place for a social organization such as the Boy Scouts.[64] Space could capture the fact that "one space can involve numerous places—the space of the Little League or the Boy Scouts is wherever the Little League or the Boy Scouts meet."[65]

Beyond its meaning embodied in the place/space distinction, the term "space" could refer to a non-physical space, what Marc termed the "aterritorial field of communicative interaction."[66] A common example of such an aterritorial field of communicative interactions might be "an Internet dating service as a space without a place, or an Internet auction."[67] A less common example of an aterritorial field

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[60] Poirier, *Same-Sex Marriage*, *supra* note 4, at 402.
[61] *Id.*
[62] *Id.* at 404–05.
[63] *Id.* at 402.
[64] *Id.*
[65] *Id.*
[66] Poirier, *Same-Sex Marriage*, *supra* note 4, at 402.
[67] *Id.*

might be a body of individuals that share a set of common religious beliefs.[68] These aterritorial fields of communicative interactions can pose challenges for the Poirean Perspective insofar as such spaces can be multi-scalar, since they are simultaneously local, national, and international.[69] The multi-scalar nature of such aterritorial space scrambles the ways in which *Kulturkampf* might be experienced. While different individuals in a religious community may disagree about whether to expand the church membership, Marc noted that *Kulturkampf* conflict may be lessened because exit from the religious community may be simpler in those situations in which an actual physical space is at issue.[70]

Finally, space can refer to what Marc defined as "discursive space."[71] Drawing on the work of Madhavi Sunder,[72] Marc defined discursive space as a space in which ongoing cultural identities are formed through active discourse over discourse texts.[73] Marc did not refer to a specific example of discursive space; however, a paradigmatic example of a discursive space is the cultural community that could be formed around the publication of a discourse text, such as a book or a movie.[74] These discursive spaces suggest imagined communities connected through the shared experience of reading a book or watching a movie.[75] The other types of space, place/space, and aterritorial communicative space, can reinforce these discursive spaces. A book can be read in a coffeehouse or religious text can be shared online. Discursive space, however, differs because such space is organized through the circulation of discourse text, whether in physical or non-physical space.

Discursive space, for Marc, prompted significant *Kulturkampf* conflict for two key reasons.[76] First, it permits the formation of alternative cultural identities outside of the mainstream norm. Marc directly referenced the pioneering work of Michael Warner in his

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[68] Poirier, *Gender, Place, Discursive Space*, *supra* note 4, at 324.

[69] *Id.* at 325.

[70] *Id.* at 326.

[71] Poirier, *Same-Sex Marriage*, *supra* note 4, at 402.

[72] *Id.* (discussing Madhavi Sunder, Note, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertization of Free Speech in Hurley v. Irish-American Gay-Lesbian and Bisexual Group of Boston*, 49 STAN. L. REV. 143, 144 (1995)).

[73] Poirier, *Same-Sex Marriage*, *supra* note 4, at 402.

[74] *See* MICHAEL WARNER, PUBLICS AND COUNTERPUBLICS 11–12 (2005) ("[T]he notion of a public enables a reflexivity in the circulation of texts among strangers who become, by virtue of their reflexively circulating discourse, a social entity.").

[75] *Id.*

[76] Poirier, *Same-Sex Marriage*, *supra* note 4, at 402.

treatment of the relationship between *Kulturkampf* and discursive space. Expanding on the work of Jürgen Habermas,[77] Warner introduced the ideas of "publics and counterpublics" into discussion of discursive space, by claiming that mainstream publics, a public that comes "into being only in relation to texts and their circulation," was central in forming the primary norms of discursive space.[78] These mainstream publics, according to Warner, are often opposed by counterpublics, which are publics that maintain awareness that they are subordinate to dominant publics.[79] Thus, counterpublics organize themselves against a dominant "cultural horizon" in ways that not only extend to different ideas or policy outcomes, but also to "the speech genres and modes of address that constitute the public or the hierarchy among the medium."[80] For Marc, these counterpublics were vital to prompting *Kulturkampf* because such counterpublics provided a "horizon of opinion and exchange" which remained "distinct from authority, and could create alternative group identity that could challenge the status of the mainstream discursive public."[81] Second, these counterpublics served as important markers of community for the marginalized community and thus could reinforce the newly empowered social identity.[82]

The relationship between the mechanisms of place and space and their relationship to *Kulturkampf* has several consequences for property theory. First, Marc's focus on the mechanisms of place, space, and to a lesser extent, scale, is consistent with his "thick" conception of community insofar as *Kulturkampf* crises in property law emerge from an attempt to reconcile binary property norm, as well as conflicting cultural frames. Bearing down on place and space conflicts furthers this project of understanding how context is a necessary element of property theory. Second, it suggests why *Kulturkampf* conflicts differ, perhaps, in their intensity. The disputes become so devastating in the construction of social identities because such disputes are tied to the

[77] The basic definition for "public sphere" was initially outlined by Jürgen Habermas. *See* Jürgen Habermas, *The Public Sphere: An Encyclopedia Article*, 3 NEW GER. CRITIQUE 49 (1964).

[78] WARNER, *supra* note 74, at 66.

[79] *Id.* at 119.

[80] *Id.* An example of a counterpublic is the movement of the Riot Grrls, which not only opposed dominant norms of female identity, but also created alternative spaces of communication such as handmade magazines (often referred to as 'zines) to create different mediums of communication. Catherine Driscoll, *Girl Culture, Revenge and Global Capitalism: Cybergirls, Riot Grrls, Spice Girls*, 14 AUSTL. FEMINIST STUD. 173, 177–80 (1999).

[81] Poirier, *Same-Sex Marriage*, *supra* note 4, at 403.

[82] *Id.*

"very ground" of the dispute. Finally, the mechanisms of space and place explain why property law and theory was so central to Marc's treatment of *Kulturkampf*. Property law is where law attempts to manage how we interact with local, neighborly space, and moreover, property law encourages on-the-ground, social institutions that can manage social conflict.

The Poirean Perspective also addresses *how Kulturkampf* can occur around property resources. The Poirean Perspective suggests that *Kulturkampf* emerges out of a process where formerly marginalized groups become "visible" in specific places and spaces. Marc noted that "visibility is key to the process of changing informal social norms, and thus, eventually being able to address and change legal norms."[83] Marc claimed that increased visibility for formerly marginalized groups occurred through what he termed "microperformances of identity."[84] Adopted from the pioneering work of Erving Goffman on presentation of self through microinteractions,[85] Marc argued that microperformances of identity occur when an individual undertakes small interpersonal interactions, "everyday performances of self" directed towards social audience.[86] In engaging in these microperformances of identity, an individual and the respective social audience engage in mutually reinforcing behavioral cues around these everyday performances of self.[87]

Visibility for formerly marginalized groups becomes possible when such groups begin to challenge and even misappropriate these behavioral cues. Marc contended that the "misappropriation" of these visual cues "has the potential to shift the significance and therefore the identity-revealing and reproducing potential of specific behaviors and traits, and thus eventually to shift and restructure the larger system of socially-relevant identity categories to which identity-representing and (re) producing behaviors refer."[88] In his scholarly work, Marc traced how microperformances of identity engaged in by the LGBT community in New Jersey in a variety of different contexts, including opening gay bars, ordering sexual literature, and challenging public accommodations and employment discrimination, led to successive

[83] *Id.* at 405.

[84] Poirier, *Microperformances of Identity*, *supra* note 4, at 5.

[85] Marc reviewed a number of works in development of the theory of the microperformances of identity. *See id.* at 5 n.6.

[86] *Id.* at 5.

[87] *Id.*

[88] *Id.* at 5–6.

legal challenges.[89] These successive legal challenges, then, served as the primary basis for a successful challenge to ensure marital benefits for this community.[90] *Kulturkampf*, however, is generated in these circumstances because while disruptive microperformances of identity were necessary strategies for more visibility of marginalized communities, these disruptive microperformances implicate long-standing moral and cultural norms, thus prompting a likely counter-reaction.

Place and space provide a crucial forum for these microperformances since, as Marc noted,

> [A]ny gathering place—a bar or hotel or barracks—can become a space of interactions that create, support and reaffirm a certain kind of identity, or that, on the other hand, suppress it. Communications in the press—a space without a place—become another kind of field of recognition and interaction.[91]

The centrality of place and space in providing forums for visibility challenges means that property law in the Poirean Perspective, then, becomes a crucial mediation tool for managing these fraught interactions. Trespass becomes a vehicle to manage unwanted access claims by marginalized groups. Public and private nuisance actions can be brought against place/space such as African-American churches or gay bars. Covenants become a way to manage an increase in the presence of a marginalized community in a particular neighborhood. These doctrines become vehicles for managing the ways in which place and space form the *Kulturkampf*.

II. TRADEMARK LAW IN THE TIME OF KULTURKAMPF

This Part considers the pragmatic impact of the Poirean Perspective by applying it to one factual scenario: the existence of racially stigmatizing trademarks such as the Washington Redskins. While a live controversy is before Supreme Court as to whether Section (2)(a) of the Lanham Act of 1946 can bar such marks under the First Amendment, this Article will consider the controversies in light of the Poirean Perspective, as outlined *infra*. While the scholarly debate over the validity of racially disparaging trademarks is an intense one,[92] the

[89] Poirier, *Piecemeal and Wholesale Approaches Towards Marriage Equality*, *supra* note 4, at 300–09.

[90] *Id.* at 321–27 (discussing marital litigation in New Jersey).

[91] Poirier, *Same-Sex Marriage*, *supra* note 4, at 406.

[92] Regan Smith, *Trademark Law and Free Speech: Protection for Scandalous and Disparaging Marks*, 42 HARV. C.R.-C.L. L. REV. 451, 452 (2007) (arguing "the current

Poirean Perspective is useful because it helps explain *why* the relationships between trademarks, place, and social conflict generates moments of *Kulturkampf*.

This Part first explores the existence of what Marc termed the community brand and why such brands embody the dialogical tension described in his scholarship. Next, this Part examines how the current controversy over racially stigmatizing marks derives from the relationship of community brands to the overall mechanism of

prohibition on registering scandalous trademarks largely serves no purpose and represents a challenge to First Amendment considerations"); Mark S. Nagel & Daniel A. Rascher, *Washington "Redskins" – Disparaging Term or Valuable Tradition?: Legal and Economic Issues Concerning* Harjo v. Pro-Football, Inc., 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 789, 803 (2006) (reasoning that the failure of the Washington Redskins to change their trademark might be due to how economically valuable it is, therefore the best recourse might be to compensate the team for a potential name change); Gavin Clarkson, *Racial Imagery and Native Americans: A First Look at the Empirical Evidence Behind the Indian Mascot Controversy*, 11 CARDOZO J. INT'L & COMP. L. 393, 401 (2003) (proposing that all racial Indian mascots be eliminated and allow tribes to trademark their identities and license them when the tribe feels it is culturally appropriate to do so); Rachel Clark Hughey, *The Impact of* Pro-Football, Inc. v. Harjo *on Trademark Protection of Other Marks*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 327, 365 (2003) ("Although it is debatable whether a majority of Native Americans find the use of Native American mascots, logos, and names offensive within the necessary definition for trademark law, it is a fact that many Native Americans, and other non-Native Americans, do find the uses insulting."); Justin G. Blankenship, *The Cancellation of the Redskins as a Disparaging Trademark: Is Federal Trademark Law an Appropriate Solution for Words that Offend?*, 72 U. COLO. L. REV. 415, 438 (2001) (arguing that Section 2(a) of the Lanham Act "does not represent an unconstitutional condition" and that it is appropriate for the government to protect minorities from disparaging trademarks); Jack Achiezer Guggenheim, *Renaming the Redskins (and the Florida State Seminoles?): The Trademark Registration Decision and Alternative Remedies*, 27 FLA. ST. U. L. REV. 287, 304–08 (1999) (offering alternative legal remedies to pursue for trademarks that Native Americans would consider disparaging and recommending the Washington Redskins change their name to recapture the goodwill of Native Americans); Kristin E. Behrendt, *Cancellation of the Washington Redskins' Federal Trademark Registrations: Should Sports Team Names, Mascots and Logos Contain Native American Symbolism?*, 10 SETON HALL J. SPORT L. 389, 414 (2000) ("A nationwide movement to abolish racially discriminatory team symbols will help both professional and nonprofessional sports to promote team players, positive attitudes, team talent and athletic ability."); Jeffrey Lefstin, Note, *Does the First Amendment Bar Cancellation of REDSKINS?*, 52 STAN. L. REV. 665, 707–08 (2000) (arguing that commercial free speech protection for the use of the Washington Redskins trademark does not apply because an affiliatory mark has little to no informational content); Kimberly A. Pace, *The Washington Redskins Case and The Doctrine of Disparagement: How Politically Correct Must a Trademark Be?*, 22 PEPP. L. REV. 7, 12–14 (1994) (describing that Native American groups have long claimed that the Washington Redskins' trademark is a racial epithet and have made many legal and non-legal attempts to alter the name of the team); Bruce C. Kelber, *"Scalping the Redskins:" Can Trademark Law Start Athletic Teams Bearing Native American Nicknames And Images On The Road To Racial Reform?*, 17 HAMLINE L. REV. 533, 536 (1994) (arguing that Section 2(a) of the Lanham Act can provide protection for Native American groups who are offended by disparaging marks).

Kulturkampf. This Part concludes by analyzing how the Poirean Perspective will yield pragmatic solutions that could resolve these conflicts.

A. *Community Brands and Kulturkampf*

Trademarks, unlike patents and copyrights, are not protected under the Intellectual Property Clause of the United States Constitution[93] since nominally trademarks do not have a creator such as an author or inventor.[94] One could potentially assign creative credit to the designer of the mark but such creative credit does not extend to the intangible association ("goodwill"), which associates the mark with a source of product.[95] Modern trademark law has typically assigned the claim of creativity to the trademark owner, arguably to its detriment. This creativity, notes Keith Aoki, typically rests upon justification that seeks to protect the labor-effect of the trademark owner.[96]

A reading of the Poirean Perspective suggests that imprecision in trademark law occurs because the law seeks a dialogical balance between the labor-creation effort of the trademark owner and the consuming public's effort in giving associative meaning to the trademark. The Poirean Perspective is consistent with other scholarship in this area. For instance, Stephen Wilf has emphasized that trademark creation should be considered an act of joint authorship between the trademark owner and the public.[97] Wilf suggests that:

> Trademark creation is a two-step process. First, a producer affixes a symbol to the product. Second, the public associates the symbol with the product. The producer affixing a symbol

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[93] U.S. CONST. art. I, § 8, cl. 8.

[94] Trade-Mark Cases, 100 U.S. 82, 93–94 (1879) ("Any attempt, however, to identify the essential characteristics of a trade-mark with inventions and discoveries in the arts and sciences, or with the writings of authors, will show that the effort is surrounded with insurmountable difficulties. The ordinary trade-mark has no necessary relation to invention or discovery. It is often the result of accident rather than design, and when under the act of Congress it is sought to establish it by registration, neither originality, invention, discovery, science, nor art is in any way essential to the right conferred by that act.").

[95] Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain—Part II*, 18 COLUM. J.L. & ARTS 191, 242 (1994).

[96] *Id.* at 242 ("Precisely because traditionally there has been no authorial, inventive figure in trademark to justify the grant of intellectual property rights, aspects of author—and inventor—reasoning have surreptitiously seeped into trademark law. Traces of authorship have been ascribed to the trademark owner who has invested her 'sweat of the brow' to 'create' value in a mark, so that she is looked upon as being legally entitled and justified in 'reaping what she has sown.'").

[97] Steven Wilf, *Who Authors Trademarks?*, 17 CARDOZO ARTS & ENT. L.J. 1, 33 (1999).

> might be called primary meaning while secondary meaning embodies the idea of public association. This association takes place in the midst of a market where linguistic exchange parallels the transfer of goods. Both the producer and the consuming public are joint authors.[98]

This joint act, however, is not simply authorship in the traditional sense. In a previous work,[99] I have argued that the text which accompanies the disclosure of a patent as an intermediated text serves as a representative of an imagined social world from which an invention derived.

Arguably, the trademark serves an equally representative effect, but in a different way. Unlike patents, trademarks have a representative effect insofar as trademarks are representative of the actual shared social worlds between the producer and the consuming public.[100] If we extend the Poirean Perspective to the representative effect of trademark, we can see the constant dialogical tension between production and association in trademark as a constant thematic element of this area of law. This shared public creativity is at the heart of a functional trademark law.

Typically, modern trademark law has ascribed a relatively narrow definition to the type of shared worlds in which we see the representative effect of trademarks applied to the shared worlds of consumers and producers in the modern marketplace. Initially, trademark law sought to be responsive to how different consumers reacted to specific functions of the trademarks.[101] Recently, however, scholars have claimed individuals may have a different relationship to the act of trademark creativity, thus shifting the trademark's relationship to shared worlds of cultural meaning. The shifting social meanings of trademarks in a variety of different shared social worlds have prompted scholars to reevaluate the functions of trademark law. For instance, Sonia Katyal has recently referred to the intersectional demands placed on trademark law,[102] given its joint role in regulating

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[98] *Id.*

[99] KALI MURRAY, THE POLITICS OF PATENT LAW: CRAFTING THE PARTICIPATORY PATENT BARGAIN 22–25 (2013).

[100] Charles Lemert defines a shared social world, including "everything obviously includes everything that constitutes the collective life of groups of people, up to and including societies—their economies, their politics, their shared mental things, their culture, and more." CHARLES LEMERT, SOCIAL THINGS: AN INTRODUCTION TO THE SOCIOLOGICAL LIFE 118 (2d ed. 2002).

[101] Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 818 (1927).

[102] *See* Sonia K. Katyal, *Trademark Intersectionality*, 57 UCLA L. REV. 1601 (2010).

what she terms a marketplace of goods and a marketplace of ideas.[103] For Katyal, trademark's intersectionality is key to its functional nature as an area of legal analysis because while trademarks are "commodities in one sense, they are also expressions in another, to both the markholder that owns them and to the public that perceives them, and the law inherits the responsibility of navigating a trademark's potential contradiction between its status as corporate property and as cultural icon."[104]

The Poirean Perspective adds to this dialogue about the representative effect of trademarks, by exploring how trademarks and associated brands that had particularly rich connections to cultural conflicts over group identities such as sexual orientation and race. In his own work, Marc advanced an understanding of trademark law and its application to one specific set of brands, which he termed *community brands*. As defined by Marc, community brands are brands that use "[t]rademark (and other exclusion mechanisms) to serve (sometimes) to manage the personal and community identity traits that consumption of the brand confers on consumers."[105] The community brand represents an intense form the dialogical function of a trademark. The producer of the trademark has created the symbol or set of marks ("the brand") that is associated with a particular image of a group identity, and the mark acquires a significant public association with those values, since the public itself engages in the separate identity-producing activities that reinforce the meaning of the mark.[106] The consumption of the community brand is the source of the group-identity and an independent social identity emerges from that consumption.[107]

As an initial matter, Marc likely intended that the term "community brand" be distinguishable from mainstream trademark law, which does protect some categories of group identity. For instance, Section 1127 of the Lanham Act permits "group-identity" to be protected through collective marks, which are those marks used by the "the members of a cooperative, an association, or other collective

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[103] *Id.* at 1606.

[104] *Id.* at 1612.

[105] Marc R. Poirier, Why the Boy Scouts Can't Jump: Trademark, Identity, Localism, and the Governance of an Anti-Gay Brand, Slide 51 (Feb. 12, 2014) (unpublished manuscript) (on file with the Seton Hall Law Review) [hereinafter Why the Boy Scouts Can't Jump]. I have reconstructed my discussion of community brands from this unpublished manuscript of the speech Marc delivered at Marquette University Law School in 2014, as well as personal discussions with Marc.

[106] *Id.* at Slide 81.

[107] *Id.* at Slide 83.

group or organization,"[108] or certification marks, which are those marks that certify that the "work or labor on the goods or services was performed by members of a union or other organization, or collective marks."[109] The community brand is distinct from these protected "group-identity" marks. A "community brand" builds a distinct identity, whereas collective or certification marks actually protect pre-existing social identities, such as a fraternity or a trade association. Thus, the community brand builds itself through an associative bond with its consuming public. The consumption of the community brand is the source of the group-identity and an independent social identity emerges from that consumption.[110]

Furthermore, the community brand fosters an intense bond with the public, generally, and its members because the brand owner can practice exclusion mechanisms that operate in tandem with the activities of the organization that are strengthening the independent social identity of the group. For instance, the brand owner can exclude other types of individuals from group-reproducing activities, such as parades, or can exclude members who do not meet the relevant social identity of the brand.[111] Marc theorized that these exclusion mechanisms, in addition to the existence of the trademark itself, operated to increase the intensity of the group-identity bond formed by the community brand in three key ways. First, the community brand becomes more than a consumer consumption decision; rather, it "becomes a life-long, sometimes generations-long, identity and affiliation."[112] Second, the community brand itself is often the only alternative in the respective market.[113] Finally, the community band is a particularly powerful brand, since while an individual may want to reject association with discriminatory elements of the community brand, to do so would to be to reject a larger social identity.[114]

The Boy Scouts of America, for Marc, served as a paradigmatic example of community brand.[115] The official organization, the Boy Scouts of America, created and managed its brand through a series of acquired trademarks, while simultaneously its membership developed an intense public affiliation with the brand fostered most

[108] 15 U.S.C. § 1127 (2016) (definition of "collective mark").
[109] *Id.* (definition of certification mark).
[110] Marc Poirier, Why the Boy Scouts Can't Jump, *supra* note 105, at Slide 66.
[111] *Id.* at Slide 67.
[112] *Id.* at Slide 81.
[113] *Id.* at Slide 80.
[114] *Id.* at Slide 81.
[115] *Id.* at Slides 52–53.

fundamentally through its youth education programs, as well as its branded materials (which included uniforms, outdoor gear and brand indicia). These branded materials worked to create an independent social identity that emerged from that consumption.

For Marc, the independent social identity of the Boy Scouts of America emerged primarily as a homo-social, heteronormative group identity due to substantial changes in traditional masculinity in late nineteenth-century United States. In *Hastening the Kulturkampf*,[116] Marc noted:

> The issue of masculinity was at the heart of the BSA from its founding. As explored by Jeffrey Hantover, the period from 1880 to World War I was one in which opportunities for the development and expression of a traditional masculinity were being limited by widespread social changes. The causes included urbanization, the increased emphasis on the connection between mother and son due to changes in family size and structure (including absence of servants), the absence of fathers from the home, the expansion of the public high school, the increasing sedentariness and feminization of many jobs, and the development of a new age category of adolescence marked by dependency and inactivity.[117]

In response to these societal changes, the Boy Scouts, over the course of the twentieth century, emphasized activities, uniforms, and social activities that fostered an ideal masculine social identity.[118] The community brand of the Boys Scouts of America, thus fostered a crucial group-identity. Consequently, it made challenge to the meaning of the community brand difficult as it deemed a rejection of the social identity represented by the Boy Scouts of America. Furthermore, no equivalent alternative program existed as competition for the Boy Scouts of America since this affinitive group was a "national symbol, a tradition" and consequently, had the status of a "shared, intangible[,] cultural property."[119]

Moreover, as Marc further suggested, the official organization of the Boy Scouts engaged in other exclusionary actions as an element of maintaining this homo-social, heteronormative group identity. For instance, the organization prohibited gay male individuals from serving as Scout Leaders for individual local organizations and

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[116] Poirier, *Hastening the* Kulturkampf, *supra* note 3, at 314–15.

[117] *Id.* at 313.

[118] *See* Poirier, Why the Boy Scouts Can't Jump, *supra* note 105, at Slide 55.

[119] *Id.* at Slide 80.

furthermore, acted to exclude former members, who later revealed a homosexual orientation.[120] This exclusion served to reinforce the harms that might emerge from a perceived pollution of the social identity of this community brand.[121]

A second conclusion to be drawn as to community brands, consistent with the Poirean Perspective, is that the intensity of the associative bond may engender a *Kulturkampf* over maintaining the social identity created through the consumption of the brand. The mechanisms that engender *Kulturkampf* are more likely to be present with regard to a community brand. Initially, community brands may implicate the physical locations of a place or the diverse types of spaces (place/space, aterritorial, or discursive spaces) identified within the Poirean Perspective. Likewise, the development of alternative social identities that engage in the shared world of the brand may engender internal and later, external critiques of the community fostered by the trademark owner and the dominant social identity associated with the brand.

Again, the Boys Scouts of America offer a rich example of this process of *Kulturkampf*. The Boy Scouts of America are organized in a series of local chapters, and such chapters meet in a variety of physical locations, including churches, schools, and local neighborhoods. Thus, it was likely to cause significant disruption if such identity was challenged since the social identity of the brand was strengthened by its locational ties to particular neighborhoods and places. The process of change after the Boy Scouts of America explicitly affirmed its anti-gay exclusion in the early 1990s, was, as Marc noted, "local and, most importantly, personal. Individual parents must confront the implications of their membership decisions, provoking what could be thought of as a household-by-household reflection on the antigay exclusion."[122] The type of moral calculus that prompts *Kulturkampf* is further intensified given these deeply personal, localized decisions.

Additionally, the emergence of visible alternative social identities is facilitated by the ability of local chapters to undertake external critiques of the social identity consumed through the community brand. For instance, after the Boy Scouts of America's explicit endorsement of the anti-gay exclusion, local chapters across the country challenged the exclusion. This local ferment led the Boy Scouts of America to change its anti-gay policy in May 2015.[123]

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[120] *Id.* at Slide 82.

[121] *Id.* at Slide 78.

[122] Poirier, *Hastening the* Kulturkampf, *supra* note 3, at 322.

[123] Robert Gates, *National Business Meeting Remarks*, BOY SCOUTS OF AM. (May 21,

Significant internal critique by the local chapters appears to be a crucial determination in the decision to modify the policies. As noted by Robert Gates, the then-volunteer President of the Boy Scouts:

> We cannot ignore growing internal challenges to our current membership policy, from some councils—like the greater New York Council, the Denver Area Council, and others—in open defiance of the policy, to more and more councils taking a position in their mission statements and public documents contrary to national policy.[124]

The critique of the brand was fostered through access to discursive spaces, such as mission statements. This local critique undermined the singular message of the national brand, thus the national brand—and resulting social identity—had to be reconstituted in new ways.

The existing community brand offers significant lessons for both intellectual property and property theory. The first lesson is the way that property and intellectual property claims are intertwined in the relationship of the community brand. An almost mystical concept in trademark theory is how the public begins to associate the source of the product with a specific brand. The community brand, much like the dissolution of meaning that occurs when a mark becomes generic, provides an opportunity to examine why individuals attached social meaning to a signifying mark. What has become apparent through the Poirean Perspective are the ways in which the markers of the shared world—the physical locations or the consumed discourse of an organization—offer us a way to see in which a brand is built and sustains meaning. The Poirean Perspective's emphasis on the *ubiety* of brand brings a necessary element of tangibility to how we see a brand being built over time. The second lesson offered by the Poirean Perspective is its relationship to the disruptive origins of property law. A key disruptive origin of property rights is a change in social status of a formerly marginalized community. A *Kulturkampf* crisis in a community brand offers us a way to think about how to effectively approach resolution of *Kulturkampf* process. For instance, in the case of the Boy Scouts of America, we can see how managing the brand itself provided a communicative medium to think through a reformed social identity.

2015), http://scoutingnewsroom.org/wp-content/uploads/2015/05/DR-GATES-REMARKS.pdf.

[124] *Id.* at 12–13.

B. *A Kulturkampf Brand: The Washington Redskins*

Contemplating a sports brand such as the Washington Redskins, it could be said that all sports brands are nominally community brands. Sports fandom is consistent with Marc's claim of how community brands are formed. As C. Christopher King notes, the shared social worlds of sports of "pleasure and longing," formed through "the [community] of the crowd," are "ubiquitous features of everyday life" that are "uniquely meaningful and powerful" for its participants.[125] Moreover, such a fan affiliation can be a social identity that consumption of the brand conferred on consumers and their respective communities. The primary marks of communities are present since fan affiliation is often a long-term commitment, a perception may exist that little or no alternative option exists, and rejecting that social identity may be painful in the long term.

I suspect, however, that Marc would suggest that the term community brand should be understood in a narrower manner. Specifically, community brands are those brands that are subject to a lack of consensus over the meaning of a particular social identity that is attached to a particular brand. Analyzing a community brand such as the Washington Redskins suggests the ways community brands differ from other comparable brands that also foster affinity bonds. Indeed, the evolution of Washington Redskins brand highlights the way it was distinguished from other sports brands, including even those sports brands that used Native American imagery.[126]

The legal and historical literature on the Washington Redskins is extensive,[127] and this Part will not review it in length; instead, it will focus on the ways in which the Washington Redskins are consistent

[125] C. Richard King, *Preoccupations and Prejudices: Reflections on the Study of Sports Imagery*, 46 ANTHROPOLOGICA 29, 31–32 (2004).

[126] J. Gordon Hylton, *Before the Redskins Were the Redskins: The Use of Native American Team Names in the Formative Era of American Sports, 1857–1933*, 86 N.D. L. REV. 879, 902 (2010) (comparing previous use of Native American team imagery to the racialized use of the Washington Redskins).

[127] *See supra* note 92. *See also* Cameron Smith, *Squeezing the Juice Out of the Washington Redskins: Intellectual Property Rights in "Scandalous" and "Disparaging" Trademarks After Harjo v. Pro-Football Inc.*, 77 WASH. L. REV. 1295, 1296–97 (2002) (arguing "that the liberal standing requirements for opposition and cancellation proceedings, combined with *Harjo*'s expansive disparagement doctrine, impermissibly conflict with the protections afforded commercial speech and the policies underlying federal trademark regulation"); André Douglas Pond Cummings, *"Lions and Tigers and Bears, Oh My" or "Redskins and Braves and Indians, Oh Why": Ruminations on* McBride v. Utah State Tax Commission*, Political Correctness, and the Reasonable Person*, 36 CAL. W. L. REV. 11, 26–31 (1999) (arguing that when determining if a mark is offensive and disparaging it is improper to use the reasonable person standard because it draws from the general public and no the offended minority).

with the Poirean Perspective's interest in community brands. A key marker of the community brand is its connection to a deeply constructed, yet contested, social identity that is generated through the consumption of a trademark and corresponding affiliative brands. Pro Football, Inc., the current owner of the Washington Redskins, has a number of assigned trademarks in the term and related image of a Native American itself[128] as well as a number of affiliated marks.

Moreover, this trademark ownership was accompanied by a number of exclusionary mechanisms that fostered a contested social identity in the brand. For example, the Redskins were early innovators in professional football in fostering the intense affiliation experience, including adding cheerleaders, a team band, and a fight song.[129] This affiliation, notably, intersected with explicit, racialized imagery of Native Americans that was, *even* for its time, unusual.[130] C. Christopher King[131] notes that George Marshall, the founder of the Redskins, created an intense affiliative experience:

> He did this in part by making game day a spectacle, bigger than a contest between two football teams, with every element saturated with an Indian motif. His initial logo featured the profile of an Indian warrior, inspired by the Indian Head nickel, which was still in circulation. He also choose [sic] team colors, burgundy and gold, meant to accentuate the redness of the moniker. And as noted above, he created a band to attract a wider audience, dressing them in feathers. Late in his tenure as owners, the Redskinettes, attaching to its tableau the perpetuation of sexualized stereotypes of American Indian women.[132]

Here, the racialized imagery of the Washington Redskins, as well as the affiliated brand itself, worked to cement the bond between the predominately white audience and its owner, thus evoking nostalgia for a "glorified white order" that served as a key element of the early social identity that generated through the Redskins brand.[133]

Such a creation of a social identity was deliberate, insofar as it

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[128] The current owner of the Washington Redskins, Pro Football Inc., is the assignee of numerous trademarks that reference the term or image of the Redskins. *See, e.g.*, DREAM WORLD SERIES, Registration No. 836,112; WASHINGTON REDSKINS, Registration No. 978,824; WASHINGTON REDSKINS, Registration No. 986,668.

[129] C. RICHARD KING, REDSKINS: INSULT AND BRAND 34 (2015).

[130] *Id.*

[131] *Id.* at 34.

[132] *Id.*

[133] *Id.*

sought to exclude groups outside of that racialized white order.[134] Throughout the era of late segregation from the 1950s until 1970s, the Redskins fostered a brand identity that explicitly appealed to white Southerners during segregation. For instance, the Redskins were the last team to integrate its team and only did so in response to federal governmental pressure.[135] Over time, the racialized appeal of the Redskins became more complicated when Congress granted Washington, D.C, democratic autonomy in the late 1970s and 1980s.[136] This shift permitted the Redskins to become a symbol of unified racial order between black and white citizens in the city.[137] This racial reconciliation was complicated by the use of the racialized image of the Redskin itself.

Understanding the Redskins as a community brand is different from discussing it as a trademark. The community brand, as discussed in the Poirean Perspective, occurs where the brand's construction of social identity is reinforced through its relationship to specific places, both in their physical and social characteristics. The community brand of the Redskins is amplified through its ongoing relationship to a specific place. Preliminarily, the social identity of the brand is fortified through the experience of the stadium as place. As John Bale and Christian Gaffney note, the experience of attending a game in the physical location is a deeply sensory experience that implicates sound, sight, smell and memory.[138] Bale and Gaffney note that "the sense of historical continuity as well as the sense of participating in history is a powerful component of the stadium experience. The stadium can be read as a historical text, not only in terms of the events that have transpired there but in architectural terms as well."[139]

This deeply sensory experience deepens the affinitive bond of the consuming public to the community brand. Moreover, the stadium operates as a place/space because of the ritualized elements of games

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[134] *Id.*

[135] *See, e.g.*, ANDREW O'TOOLE, FIGHT FOR OLD DC: GEORGE PRESTON MARSHALL, THE INTEGRATION OF THE WASHINGTON REDSKINS, AND THE RISE OF A NEW NFL (2016) (discussing the integration of the Washington Redskins); THOMAS G. SMITH, SHOWDOWN: JFK AND THE INTEGRATION OF THE WASHINGTON REDSKINS (2011) (discussing the integration of the Washington Redskins).

[136] *See generally* HARRY S. JAFFE & TOM SHERWOOD, DREAM CITY: RACE, POWER AND THE DECLINE OF WASHINGTON D.C. (20th ed. 2014) (discussing the aftermath of the grant of "home rule" in the politics of Washington, D.C.).

[137] Brett Williams, *The South in the City*, 16 J. POPULAR CULTURE 30, 30–41 (1982) (discussing the role of the Redskins in common culture).

[138] John Bale & Christian Gaffney, *Sensing the Stadium*, *in* SITES OF SPORTS: SPACE, PLACE AND EXPERIENCE 25–37 (Patricia Vertinsky & John Bale eds., 2004).

[139] *Id.* at 37.

that take place in its environs, thus involving fans in another affinitive bond.[140] This socialized relationship to brand makes it difficult to break the affinitive bond with the mark itself, and indeed, produces a reaction that is likely to lead to a Kulturkampf conflict.

In addition, a community brand can be distinguished from a trademark insofar as its associative meaning is subject to significant cultural contest within a discursive space. Discursive space is particularly relevant to the community brand since a trademark, like a patent or copyright, is a text that circulates through a public.[141] Destabilizing the shared meaning of a text itself, consequently, can function as a particularly effective tool in a Kulturkampf conflict. For example, in 2014, the National Congress of American Indians produced and circulated an advertisement, entitled "Proud to Be Indian" that sought to portray a series of Native Americans in their everyday professional lives in an implicit critique of the racialized image of the Redskins.[142]

Notably, in offering visual counter-images to the racialized image of the Redskins, this advertisement is a particularly complex use of a visibility strategy identified by the Poirean Perspective as the microperformance of identity. Marc stressed that formerly marginalized groups acted to shift cultural and legal mores, by performing small, interpersonal interactions that challenged the dominant behavioral cues. The "Proud to be Indian" advertisement is itself is a dramatized performance of a series of everyday performances of self. We have, in the ad, a powerful performance of what Marc referred to as visibility, an act that prompts a reevaluation of social status. This doubling of performance embeds the moral critique of the Redskins's community brand because it attacks the social identity that is represented by the brand: it fights the claim of representativeness offered by the trademark and its associated exclusionary mechanisms.

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[140] Patricia Anne Masters, *Play Theory, Playing, and Culture*, 2 SOC. COMPASS 856–69 (2008) (assessing different theoretical frameworks related to the claim that games contain ritualized elements).

[141] It should be pointed out that while it is not intuitive to discern the text status of a trademark in the ways identifiable by the patent specification, 35 U.S.C. § 111 (2016), or a work of authorship in copyright law, 17 U.S.C. § 102 (2016), it is clear from its definition in the Lanham Act that a trademark has the characteristics of a text. 15 U.S.C. § 1127 (2016) (defining a trademark as a "word, name, symbol or device or any combination thereof"); Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 646 (2004) ("The trademark must take the form of a 'tangible symbol.'").

[142] Kyle Wagner, *Watch the Anti-Redskins Commercial That Will Run During the NBA Finals*, DEADSPIN (June 10, 2014), http://deadspin.com/heres-the-anti-redskins-commercial-that-will-run-during-1588597037.

CONCLUSION

Reconstructing the Poirean Perspective's specific meaning from Marc's published and unpublished writings has been a bittersweet experience for me. However, I am confident that the lasting lessons of the Poirean Perspective suggest that I will always be talking in some sense to Marc as I consider the ways in which his ideas will provide me with so many ways to think about three key ideas in property and intellectual property theory.

First, the Poirean Perspective helps us to understand the ways in which social identity can become a "property" thing that generates a corresponding set of property rights. The Poirean Perspective, along with the work of critical race theorists, such as Cheryl Harris, suggests that we must consistently include identity in the taxonomy of property "things" such as real property and chattels. Second, the insights of the Poirean Perspective reinforce the relationship between the intellectual property and intellectual property law. The community brand draws its power from the ways in which the experience of place and space is reinforced by the intangible qualities of the trademark. Finally, the Poirean Perspective adds to our understanding of how social change impacts the development of property law. The crisis of *Kulturkampf* is linked intimately to the ways in which conflicts over social identity result in corresponding shifts in the development of property law.

These three key ideas, in many respects, do not even fully capture what I have even discussed in this Article. Perhaps, this suggests the enduring effect of generosity of Marc's scholarly idea; I am grateful that you have given us so many more ideas to pursue, my friend.