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The Last Breakfast with Aunt Jemima and Its Impact on Trademark Theory

Deborah R. Gerhardt*

ABSTRACT

The generally-accepted law and economics theory of trademarks fails to explain why a brand owner would ever walk away from a trademark that generates financially lucrative returns. In 2020, that is exactly what happened again and again as brand owners pledged to abandon racially explicit marks in the weeks following George Floyd's murder. As citizens became more attuned to the experiences of those depicted in racial marks, the owners of Aunt Jemima, Uncle Ben's, the Cleveland Indians, the Redskins, the Dixie Chicks, Lady Antebellum and others announced these brands' days were numbered. By evoking racist stereotypes, they became a moral liability. They could not be authentically unifying if they promoted values inconsistent with contemporary notions of equality and anti-racism. This Article situates the adoption of racially explicit brands in a historic context and explores the reactions of the targeted communities. It then explains why multiple legal challenges to these federal trademark registrations failed. The traditional law and economics paradigm used to justify and explain trademark law does not account for strategic trademark decisions driven by values and expressive community connections. While law and economics captures the essential message a symbol must communicate to function as a mark, it neglects to explain why some marks fail or, in spite of spectacular success, may be abandoned. When a theory cannot account for what is happening in practice, it is time to reach for new tools to help explain the significant role trademarks play in reflecting and leading cultural dynamics.

The consumer investment framework is ideally suited to fill this theoretical gap. It accounts for expressive and value driven decision making. It embraces the many ways we engage with marks apart from the point of purchase. In addition to

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purchasing trademarked products, people invest trademarks with time, meaning, and money. Open dialogue between brand managers, influencers, and fans facilitates connections through shared values. By accounting for brand meaning, communities, and values, the consumer investment theory provides a better framework for understanding the abandonment of racist imagery in a way that traditional law and economics cannot. Where law and economics fails to function as an explanatory paradigm, the consumer investment model provides a theoretical framework for understanding how trademarks function if they are to succeed and what qualities make them resilient enough to remain resonant in a constantly changing cultural environment.

INTRODUCTION

You know a theory is in trouble when it holds less descriptive force than a five-minute Saturday Night Live skit. That is where the law and economics theory of trademark law sat in November 2020, when Alec Baldwin called “Aunt Jemima” and “Uncle Ben” into a conference room and fired them. When Maya Rudolph (playing Aunt Jemima) asked, “What did I do?” Baldwin’s character responded, “It’s not what you did, it’s how you make us feel about what we did.”¹ This skit marked an unprecedented chapter in American advertising history² and a need to rethink trademark theory.

According to traditional law and economics thinking, trademarks are information shorthand, helping us find what we need efficiently. If a symbol tells consumers that a product comes from a distinctive source, the source will be incentivized to create quality products. When a symbol functions as a mark, consumers may know what to look for to find the same quality product they purchased in the past. The theory mirrors the basic requirement for trademark protection under federal law. Before a symbol can be protected as a trademark, the Lanham Act requires the symbol to signal that any product or service used with the symbol comes from a single distinct source. To economists, the spillover benefits of incentivizing quality and providing information efficiencies to consumers justify legal protection of the symbol.

Although the law and economics theory sets a floor for what a symbol must do to earn trademark protection, it does not explain why some brands succeed while others fail. It also cannot account for the abandonment of so many famous and lucrative marks. This unprecedented moment in branding history calls for a rethinking of trademark theory.

This Article proposes a paradigm shift away from law and economics and towards the consumer investment theory, informed by research from behavioral economics, marketing, and psychology. The consumer investment theory is an important tool

1. Saturday Night Live, *Uncle Ben—SNL*, YOUTUBE (Nov. 7, 2020), <https://perma.cc/Y9BV-8DTL>.

2. See Kevin D. Thomas et al., *Roundtable on Race and Brand Mascots*, 21 ADVERT. & SOC’Y Q. (2020), <https://perma.cc/VU46-UVP6> (“A blurring of the lines between producers and consumers allows people to speak back to what companies are doing. We are in a moment where it is not just civil rights organizations and activists that are calling out companies. Everyday consumers are, too.”).

for understanding modern trademarks because it accounts for expressive and value-driven decisions made by third parties, in addition to brand owners, thereby creating a feedback loop that influences brand strategy.³ The consumer investment model embraces the idea that voices outside brand management influence trademark meaning. Although we may or may not make purchases, we all invest brands with meaning. The consumer investment model reflects this dynamic by defining consumer investment as the contributions everyone, in addition to the trademark owner, contributes to brand meaning and value.⁴ Since the theory was first proposed in 2010, the rise of consumer brand communities on social media have increased the force of its descriptive power.⁵ Although law and economics remains an entrenched theoretical approach, a leading treatise and numerous articles cite the consumer investment theory, validating the growing trend of recognizing its utility.⁶ Strategic

3. See Deborah R. Gerhardt, *Consumer Investment in Trademarks*, 88 N.C. L. REV. 427, 449–50 (2010).

4. *Id.* at 464.

5. See Deborah R. Gerhardt, *Social Media Amplify Consumer Investment in Trademarks*, 90 N.C. L. REV. 1491, 1507–08 (2012).

6. See, e.g., LOUIS ALTMAN & MALLA POLLACK, *CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* §§ 17:5, 17:13 (4th ed. 2021); Rebecca Tushnet, *Registering Disagreement: Registration in Modern American Trademark Law*, 130 HARV. L. REV. 867, 869 (2017) (“Trademark scholars widely agree that our current system for evaluating what rights a trademark owner should have over others’ uses of their (or similar) marks is broken.”); Barton Beebe & C. Scott Hemphill, *The Scope of Strong Marks: Should Trademark Law Protect the Strong More Than the Weak?*, 92 N.Y.U. L. REV. 1339, 1384 (2017) (discussing how consumers participate in creating trademark value); Sonia K. Katyal & Leah Chan Grinvald, *Platform Law and the Brand Enterprise*, 32 BERKELEY TECH. L.J. 1135, 1144 (2017); Jessica M. Kiser, *Brandright*, 70 ARK. L. REV. 489, 550 (2017) (“Thus, allowing similar revenues of non-confusing passive revenue could be beneficial to the brand owner, as it may encourage more consumers to invest time and energy into the development of the owner’s brand.”); Matthew A. Alsberg, *I’ll Be Your Mirror: Broadening the Concept of Trademark Joint Ownership To Reflect the Developing Collaborative Economy*, 44 SW. L. REV. 59, 72 (2014) (“In exercising their growing power, consumers have mobilized, via actions ranging from call-in campaigns to boycotts and Facebook protests, to affect corporate policy at every level.”); Mario Biagioli, Anupam Chander & Madhavi Sunder, *Brand New World: Distinguishing Oneself in the Global Flow*, 47 U.C. DAVIS L. REV. 455, 463 (2013) (“It thus makes sense, as Deborah Gerhardt suggests, that consumer investment in trademarks facilitates the rise of brands, a practice that has grown with the rise of social media.”); Jake Linford, *Trademark Owner As Adverse Possessor: Productive Use and Property Acquisition*, 63 CASE W. RES. L. REV. 703, 721 n.83 (2013) (“noting the important role consumers play in determining which brands succeed in a world where eight out of ten brands fail”); Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 141 (2012); Michael J. Gerhardt, *Constitutional Branding*, 40 HOFSTRA L. REV. 655, 665 (2012) (citing the theory for the proposition that consumers “are instrumental in investing a particular brand with meaning before it can reflect pervasive cultural salience”); Llewellyn Joseph Gibbons, *Crowdsourcing a Trademark: What the Public Giveth, the Courts May Taketh Away*, 35 HASTINGS COMM. & ENT. L.J. 35, 43 (2012) (“Empowered by Internet technology, consumers can infuse a brand with buzz, investing it with magnetism and economic value, or they can force a trademark into oblivion even against the wealthiest content owners. One commentator observed that ‘the separate nature of many brand relationships—the ‘them’ and ‘us’—is obsolete.”); Laura A. Heymann, Response, *The Scope of Trademark Law in the Age of the Brand Persona*, 98 VA. L. REV. BRIEF 61, 68 (2012) (“Trademarks today are simply one part of an overall brand experience that aims to transform the brand into a persona, engaging consumers at an emotional level. Consumers, for their part, use trademarks not just as a shorthand for the physical qualities of a product but as a way of

decisions to drop brands with embedded racial stereotypes during periods of wider social change have confirmed that it has become a necessary tool for understanding the dynamic course of trademark development, use, success, and public impact.

The Article proceeds as follows. Part I enumerates the deficiencies in applying traditional law and economics theory to trademark law and practice. Part II identifies multiple iconic brands that incorporated racial imagery and situates their adoption and development into historical context. The discussion focuses on the history of the Aunt Jemima mark to illustrate how cultural influences the building, revising, and abandoning of a brand created to animate a particular racial stereotype. After revealing how the depicted communities have viewed racially explicit branding, this Part explains why legal challenges failed to bring down many economically successful but racially disparaging marks. Next, it shows how culture shifted towards a tipping point that led brand owners to simultaneously abandon many racially explicit marks. Part III explains how this unprecedented moment in advertising history reaffirms that the consumer investment model is a theory well equipped for explaining how trademarks function, and what qualities make them resilient enough to succeed in a constantly changing cultural environment. Instead of a tight two-way connection between seller and buyer, trademarks are better thought of as symbolic centers of brand communities. By accounting for broader and more open expressive patterns, and for the significance of brands as symbols of authentic values, the consumer investment theory explains the dropping of racist imagery in a way that traditional law and economics theory cannot.

I. CONTEMPORARY TRADEMARK STRATEGY EXPOSES THE NEED FOR A THEORETICAL PARADIGM SHIFT

The law and economics view of trademarks has been the predominant theoretical lens through which trademark law is justified and applied.⁷ Leading trademark scholars have long accepted the view that “trademarks contribute to economic efficiency by reducing consumer search costs.”⁸ Courts have also adopted this view

signaling their own emotional participation and identity, which then feeds back into the meaning of the brand in a continuous loop.”); Greg Lastowka, *Trademark’s Daemons*, 48 HOUS. L. REV. 779, 782 (2011) (“Trademark law’s solicitude for consumers makes it discordant with the remainder of the intellectual property troika.”).

7. Stacey Dogan, *Bounded Rationality, Paternalism, and Trademark Law*, 56 HOUS. L. REV. 269, 274 (2018) [hereinafter Dogan, *Bounded Rationality*] (“[T]he economic explanation for trademark law has dominated both judicial and scholarly accounts of the law in recent decades.”).

8. Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 786 (2004); see also Pratheepan Gulasekaram, *Policing the Border Between Trademarks and Free Speech: Protecting Unauthorized Trademark Use in Expressive Works*, 80 WASH. L. REV. 887, 921 (2005) (relying in part on economic analysis); Brian A. Jacobs, *Trademark Dilution on the Constitutional Edge*, 104 COLUM. L. REV. 161, 164 (2004) (noting search costs rationale); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 167–68 (2003) [hereinafter LANDES & POSNER, *ECONOMIC STRUCTURE*]; Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1690–94 (1999) (explaining the economic justification for trademarks and their informational benefits); Nicholas S. Economides,

that trademark law is necessary to create fair competition by providing consumers with truthful information, and to establish a means to minimize and punish deceptive advertising.⁹

Traditional law and economics theorists William Landes and Richard Posner claim that it makes sense for the law to protect trademarks as private islands of expressive monopolization in order to incentivize brand owners to make better quality products and services.¹⁰ Thanks to these incentives, consumers can use brands as informational shorthand to increase efficiency when searching for quality products and services.¹¹ Landes and Posner contend that “[i]f the law does not prevent it, free riding will eventually destroy the information capital embodied in a trademark, and the prospect of free riding may therefore eliminate the incentive to develop a valuable trademark in the first place.”¹²

Many scholars have observed the limitations inherent in the law and economics approach. They have claimed that the theory fails to account for the idea that a mark’s persuasive power may be more impactful than merely its informational punch, and that product loyalty may result in the creation of network effects that help grow brand popularity irrespective of efficiency and price.¹³ Stacy Dogan succinctly

Trademarks, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 602 (Peter Newman ed., 1998) (asserting that the value of trademarks as search tools is one of “[t]he primary reasons for the existence and protection of trademarks”); I. P. L. Png & David Reitman, *Why Are Some Products Branded and Others Not?*, 38 J.L. & ECON. 207, 208–11, 218 (1995) (noting that “consumers of products subject to performance uncertainty will pay for brand-name assurance”); Nicholas S. Economides, *The Economics of Trademarks*, 78 TRADEMARK REP. 523, 525–27 (1988) (observing the economic benefits of marks that communicate unobservable features); William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 268–70 (1987) [hereinafter Landes & Posner, *Trademark Law*] (identifying the lowering of brand recognition costs to consumers as the justification for trademark law); John F. Coverdale, Comment, *Trademarks and Generic Words: An Effect-on-Competition Test*, 51 U. CHI. L. REV. 868, 869–70 (1984) (observing that by encouraging competition, trademark law may decrease costs to consumers).

9. See, e.g., *Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159, 163–64 (1995) (stating that trademark law “reduce[s] the customer’s costs of shopping and making purchasing decisions,” and “helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product” (internal quotation marks omitted) (alteration in original); *Union Nat’l Bank of Tex., Laredo v. Union Nat’l Bank of Tex.*, Austin, 909 F.2d 839, 844 (5th Cir. 1990) (stating that trademarks “lower consumer search costs and encourage higher quality production by discouraging free-riders”); see also Chad J. Doellinger, *A New Theory of Trademarks*, 111 PENN. ST. L. REV. 823, 834–35 (2007) (lamenting that a “2006 search of federal cases on Westlaw did not reveal a single judicial decision expressly rejecting, or even questioning, the economic approach to trademarks”).

10. See Landes & Posner, *Trademark Law*, *supra* note 8, at 269.

11. Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2108 (2004) (asserting that without trademark protection, consumers would lose “the ability to distinguish one brand from another, [and] firms would have no reason to create brands with more costly but higher quality characteristics”).

12. LANDES & POSNER, *ECONOMIC STRUCTURE*, *supra* note 8, at 1668.

13. See, e.g., Deven R. Desai, *Bounded by Brands: An Information Network Approach To Trademarks*, 47 U.C. DAVIS L. REV. 821, 826 (2014); Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 74–75 (2012); Jeremy N. Sheff, *Veblen Brands*, 96 MINN. L. REV. 769, 794 (2012) (explaining that the economic theory of trademark law is an incomplete explanation of the policy underlying status confusion cases); Ariel Katz, *Beyond Search Costs: The*

sums up why law and economics should not be embraced as the primary justification for trademark law:

The economic model of trademark law depends on two truths and a lie. The model assumes that trademarks convey information (TRUE) that can save consumers time and money in finding the products they want (TRUE). The model errs, however, when it assumes that consumers consume all available information and act on it rationally (LIE).¹⁴

Despite much recent work showing its shortcomings, even the theory's critics acknowledge that the "economic approach to trademark law became the dominant and largely unquestioned structural and operational paradigm."¹⁵

Due to decades of entrenchment, a narrow law and economic approach remains a primary driver of trademark analysis. Traditional law and economics scholars assume that when we interact with brands, we are consumers at the point of purchase, proceeding rationally to get the best quality at the lowest price while investing the smallest amount of time. They believe that if I like the way a chicken sandwich tastes, I will remember the company who sold it to me and look for that brand next time I am hungry. Because companies know I want to buy something I liked before, they will remind me where I can go to repeat the delicious experience.

While law and economics captures one angle of brand reality, it does not speak to the many expressive and value-oriented ways that we engage with trademarks. While these traditional economists are not wrong, their theory is descriptively incomplete and fails to account for recent developments in their field. It assumes I only care about the tasty sandwich and its price. It fails to account for many other variables. For example, I may forgo the delicious sandwich altogether if I care more about an idea than the taste. I may not buy the sandwich if I become a vegetarian, decide not to support the environmental and animal welfare harms of factory farming, or refuse to support a company that offends my religious or political beliefs. Traditional law and economics theory fails to account for the fact that I am not just an efficient buyer with a great memory of a sandwich. I am not merely someone who buys and consumes and buys again.¹⁶ I carry a moral compass, and I use it. And I may be willing to pay more for a sandwich that tastes different but affirms my values.

Linguistic and Trust Functions of Trademarks, 2010 BYUL. REV. 1555, 1607–08 (asserting that the economic model should be revised to distinguish between the "linguistic function" and the "trust function" of trademarks); Mark P. McKenna, *Testing Modern Trademark Law's Theory of Harm*, 95 IOWA L. REV. 63, 75 (2009) (stating that trademarks' persuasive power often dominates their informational function); Chad J. Doellinger, *A New Theory of Trademarks*, 111 DICK. L. REV. 823, 860 (2007) (arguing that the economic approach to trademark law has "undermined and unsettled what was once a rich and normatively-driven body of law"); Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367, 429–30 (1999) (explaining that a dominant brand enjoys network effects and natural monopoly characteristics inherent in its popularity).

14. Dogan, *Bounded Rationality*, *supra* note 7, at 292–93.

15. Doellinger, *supra* note 13, at 834.

16. Dustin Marlan, *Is the Word "Consumer" Biasing Trademark Law?*, 8 TEX. A&M L. REV. 367, 378 (2021).

For all its utility, traditional economic theory misses another major dimension of how trademarks function in practice. It does not account for the fact that successful trademarks engage their brand community apart from the point of purchase, and it offers no insight that differentiates successful brands from those that fail to gain a following. Because it ignores values and has a blinkered view of the frequency and modes in which consumers engage with brands expressively, it could not have been used to explain or foresee so many abandonments in reaction to cultural pressures. Therefore, the utility of traditional law and economics as both an overarching descriptive justification and a predictive tool is now in question.

Behavioral economists have shown that human behavior cannot be explained as a neat process of gathering an optimal amount of information and acting rationally to maximize utility.¹⁷ Human decision making is not so neatly ordered. Amos Tversky and Daniel Kahneman founded the field of behavioral economics after proving through multiple experiments that people do not rely on all available information but instead habitually recruit “a limited number of heuristic principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations.”¹⁸ Tversky and Kahneman won the Nobel Prize in Economics for demonstrating that prospect theory describes human behavior more accurately than utility theory.¹⁹ According to prospect theory, instead of making rational choices based on all available information, we generally take sensible shortcuts (known in the field as “heuristics”) in selecting information that influences our decision making.²⁰ As Dan Ariely titled his book on the subject, people are “predictably irrational” in that we routinely rely on patterns of thinking that save us time.²¹ This work continues to evolve with studies that document multiple heuristic patterns.²²

In 1998, Christine Jolls, Cass Sunstein, and Richard Thaler applied behavioral economics to law and showed that consumers display “bounded rationality, bounded willpower, and bounded self-interest.”²³ Instead of navigating our world as described in classical economic theory, we repeatedly make choices that cannot be explained as rational efficiency-maximizing.²⁴ While economists view the rational decision maker as unitary, self-interested and motivated solely by efficiency,

17. See GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 14 (U. Chi. Press ed. 1976) (“[A]ll human behavior can be viewed as involving participants who maximize their utility from a stable set of preferences and accumulate an optimal amount of information and other inputs in a variety of markets.”).

18. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *SCIENCE* 1124, 1124 (Sept. 27, 1974) (stating that people rely on heuristics to simplify decision-making).

19. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 263 (1979).

20. *Id.* at 274.

21. See generally DAN ARIELY, *PREDICTABLY IRRATIONAL, REVISED AND EXPANDED EDITION: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* (2009).

22. Dogan, *Bounded Rationality*, *supra* note 7, at 282.

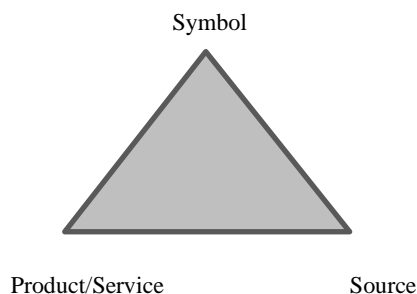
23. Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach To Law and Economics*, 50 *STAN. L. REV.* 1471, 1474–76 (1998) (emphasis omitted).

24. *Id.* at 1476–78.

behavioral economists assert that human decision making is influenced by shared social values, such as fairness.²⁵ If loyalty and path dependence are our only heuristics, our mental “shortcuts can result in substantial and enduring over-payment by consumers.”²⁶

A brand owner who wants to connect with an audience has an incentive to understand our shortcuts and consider whether something may cut deeper than path dependence. If trademark owners understand the heuristics we rely on to navigate the vast amount of information we encounter in everyday life, they will have a competitive edge. They may take chances to determine the hierarchy of our heuristics. Brand owners who want to connect with consumers on a deeper level may reach for other patterns. If they believe we will pay more for a brand that reinforces values important to our identity over a brand that is merely familiar, they will invest time and creative attention to the values associated with their brands.

The Lanham Act sets a floor for protection that mirrors the law and economics definition of how brands function. It defines a trademark as “any word, name, symbol, or device . . . used . . . to identify and distinguish . . . goods . . . from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”²⁷ This definition creates a three-part messaging structure as illustrated below:



Marks will only be protected if they identify a product as coming from a particular source, even if the source is unknown to consumers, so long as the brand distinguishes its products from those offered by the competition.²⁸ While the legal definition filters out symbols that cannot perform this three-part function, it does not do much more.²⁹

The consumer investment perspective acknowledges that a trademark begins with the triangle but adds that the mark succeeds only if consumers assign meaning to it.

25. *Id.* at 1493–94.

26. Dogan, *Bounded Rationality*, *supra* note 7, at 286.

27. 15 U.S.C. § 1127.

28. *Id.*

29. Some scholars note that consumers may have no idea of the identity of the corporate source, and often care more about the mark than the product. Barton Beebe has observed that the products or services linked with brands have receded in importance so much that, sometimes, they are completely absent. See Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 625 (2004).

If a community invests in a brand, it becomes more like a three-dimensional prism, gaining volume filled with meaning and taking on a specific identity as it grows to reflect resonant values. Its expressive power increases only when consumers invest it with meaning, time, attention, and money. Like light through a prism, feedback from the surrounding environment feeds into and out of the brand, refracting back how the brand filters, reinforces, or alters what it takes in from contemporary culture and the brand community. In this way, consumer investment theory explains why trademarks change over time as culture and public understandings evolve and respond to feedback from many sources, including the arts, media, celebrity influencers, friends, and family, as well as brand managers.

The consumer investment model fills the gap in law and economics theory by encouraging reflection on how consumers invest in brands not just with their money but also with their time, attention, and loyalty. By viewing trademarks as repositories of meaning, not merely signals of source and quality, the consumer investment model does a better job explaining how and why consumers contribute to the success of brands. It embraces the idea that individual decision making is informed by community values, and that trademarks function expressively. For a brand to succeed, consumers must invest it with shared meaning based on specific enduring values that consumers will want to affirm through brand engagement. Informed by numerous studies from marketing literature affirming that successful trademarks symbolize enduring core values,³⁰ the consumer investment model acknowledges that Apple is a successful brand not just because it tells us where to buy another computer or phone similar to the high quality version we purchased before but also because its products affirm specific shared values such as the appreciation of bold creativity, innovative design, and user-friendliness.³¹ Nike is not just a source for quality shoes, but a motivator for empowering the athlete in all of us.³² Coca-Cola is “the Real Thing,” “the Pause that Refreshes,” and a reminder that in political, polarizing times, there are symbols that unite Americans through shared values and experiences.³³

Successful brands tell stories in which we can participate. In exchange, individuals who identify with a brand gain expressive capital and a sense of belonging to a community of shared ideas. To succeed as culture evolves, brand

30. See, e.g., DOUGLAS B. HOLT, *HOW BRANDS BECOME ICONS: THE PRINCIPLES OF CULTURAL BRANDING I* (2004) (arguing that a brand becomes an icon when it serves as a “representative symbol, especially of a culture or a movement”).

31. See Gráinne M. Fitzsimons, Tanya L. Chartrand & Gavan J. Fitzsimons, *Automatic Effects of Brand Exposure on Motivated Behavior: How Apple Makes You “Think Different,”* 35 J. CONSUMER RSCH. 21, 24 (2008) (“Apple has labored to cultivate a strong brand personality based on the ideas of nonconformity, innovation, and creativity.”); see also Claire Falloon, *Leading Brands Wield Words To Thrive*, INTERBRAND, <https://perma.cc/456C-6SCK> (last visited Jan. 21, 2017).

32. See Paula Andruss, *Secrets of the 10 Most-Trusted Brands*, ENTREPRENEUR (Mar. 20, 2012), <https://perma.cc/26DL-ZQ9W>; *Nike Aims to Unleash Human Potential*, NIKE, <https://perma.cc/B4RP-XKF8> (last visited Mar. 8, 2017) (stating Nike’s mission “to bring inspiration and innovation to every athlete in the world”).

33. See *A History of Coca-Cola Advertising Slogans*, COCA-COLA JOURNEY (Jan. 1, 2012), <https://perma.cc/s9AM-GGDD>.

strategies must be flexible enough to change if they are to resonate with the times and speak to the contemporary moment. Empirical support for this theory resounds as companies choose to drop iconic brands in response to the nation's evolving views of racist words and imagery.

II. THE RISE AND FALL OF RACIALLY EXPLICIT BRANDS

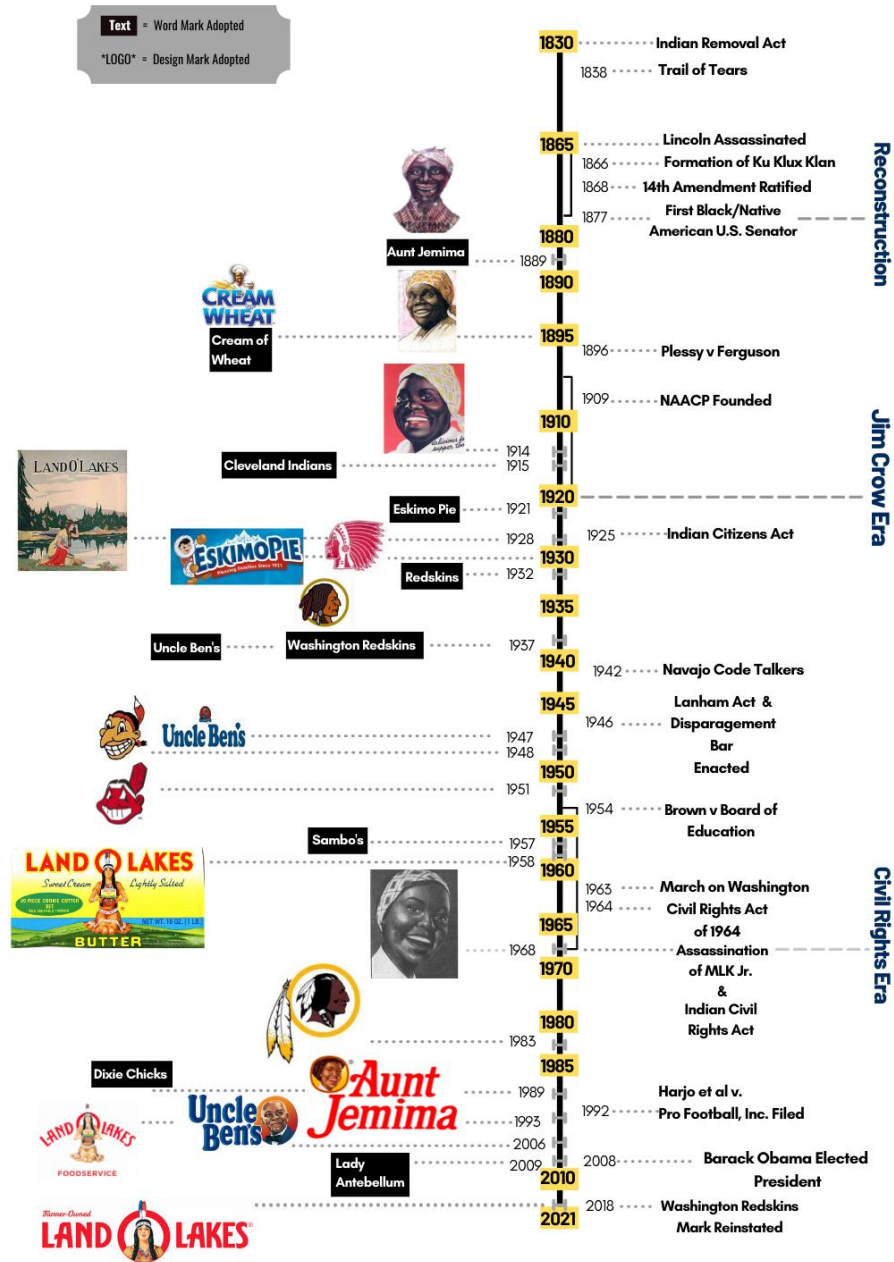
The adoption, revising, and abandonment of brands that reinforce racial stereotypes show how evolving cultural norms can influence trademark strategy. The Internet transformed advertising from performances before silent audiences into symbols of dynamic shared values that are reinforced or abandoned by engaged communities of company marketing departments, advertising creatives, influencers, consumers, and fans.³⁴ From adoption to success to abandonment, they reflect evolving cultural responses to racial imagery.

Decades after the end of the Civil War, in the early 1900s, Confederate monuments were elevated in public spaces, public lynching of black citizens occurred in broad daylight, and Jim Crow laws created separate rules and public spaces for Black Americans.³⁵ Two timelines below show the evolution of racially explicit marks from adoption to abandonment. Both timelines focus on a sample of marks that depict racial images of Black and Native American people. The Adoption Timeline shows the introduction and development of the racially explicit marks in historic context by displaying a parallel timeline of events significant to the groups of people depicted in the marks. In Part III, the Abandonment Timeline reflects the same parallel structure of historic events adjacent to the moments when brand owners abandoned marks containing racial imagery. The following Adoption Timeline illustrates the adoption and revision of marks that will be abandoned.

34. Deborah R. Gerhardt, *Social Media Amplify Consumer Investment in Trademarks*, 90 N.C. L. REV. 1491 (2012).

35. KAREN COX, *NO COMMON GROUND* 20 (2021); Deborah R. Gerhardt, *Law in the Shadows of Confederate Monuments*, MICH. J. RACE & L. (forthcoming 2022).

ADOPTION TIMELINE



When brands like Aunt Jemima and Uncle Ben were adopted, they reflected a view of Black Americans that defied racial equality. Throughout the twentieth century, television programming and advertisements depicted America as a nation of white heterosexual couples with white children. With few exceptions, they portrayed a world that did not look like America. Race appeared not to be an issue. Almost everyone was white, and if people of color did appear in television programs, they were usually cast as servants or criminals, wholly ignoring positive interracial relationships and the many minority citizens who achieved financial and professional success in spite of discriminatory barriers. In advertisements, people of color were generally collapsed into stereotypes like Aunt Jemima and Uncle Ben or turned into cartoonish mascots like the Eskimo Pie kid or Chief Wahoo of the Cleveland Indians. Because Internet technology had not yet given consumers a meaningful platform to respond, the ads played to a silent audience. Advertisements were routinely designed not to mirror the American experience more authentically.

The Adoption timeline shows that in the middle of the twentieth century, the cultural tide began to shift. Between 1954 and 1964, *Brown v. Board of Education* was decided, the Civil Rights movement gained momentum, and Congress enacted federal Civil Rights legislation. Congress passed additional civil rights laws directed towards Native Americans four years later. The Adoption timeline illustrates that after the Civil Rights Movement gained momentum, Aunt Jemima's brand owners made her look more like a working mom than a servant. The history of the Aunt Jemima mark provides an ideal case study in how dynamic perceptions of racial equality can influence a brand's creation, revisions and demise.

A. HOW AUNT JEMIMA MADE US FEEL ABOUT BLACK WOMEN

Aunt Jemima was inspired by a white drag queen.³⁶ Contrary to the benevolent mythology invented by her white male creators, Aunt Jemima was created by white American men to reflect the social order they thought America wanted to see at their breakfast table. While searching for a name for his instant pancake mix, Chris Rutt wandered into a minstrel show where he watched a white man in drag and blackface perform the song "Aunt Jemima." Written in 1875 by the Black minstrel performer Billy Kersands, one version of the song included this verse:

My old missus promise me,
Old Aunt Jemima, oh! oh! oh!
When she died she-d set me free,
Old Aunt Jemima, oh! oh! oh!
She lived so long her head got bald,
Old Aunt Jemima, oh! oh! oh!
She swore she would not die at all,

36. M. M. MANRING, *SLAVE IN A BOX: THE STRANGE CAREER OF AUNT JEMIMA* 61 (1998).

Old Aunt Jemima, oh! oh! oh!³⁷

Rutt took the name from the song for his pancake mix and designed a brand character who looked like the drag queen, in a dress and apron with a bandana as a headscarf. The mix was first sold by the Pearl Milling Company in 1889.³⁸ After R.T. Davis bought the brand, he made it a success by bringing “Aunt Jemima” to life. He hired Nancy Green, a Black cook for a Chicago judge, to dress as Aunt Jemima and make pancakes in his booth at the at the 1893 World’s Fair.³⁹ In 1925, Quaker Oats bought the brand and employed the advertising agency JWT to promote it.⁴⁰ A white male account manager grew the myth of Aunt Jemima as a Southern “Mammy” that happily devoted all of her energy to raising white children so that Southern men could be served and their belles could live a life of fashionable leisure.⁴¹

This stereotypical construct of Black women was not unique to Aunt Jemima. Francesca Sobande observes that, “Due to intersecting power relations related to race, gender, and sexuality, since the early days of the creation of media representations Black women have often been objectified and exoticized in images of them created by, and, for, others.”⁴² The Aunt Jemima example is especially instructive because she was intentionally created by white men to embody the “Lost Cause” stereotype of Black women.⁴³

Artists and historians have long observed that Aunt Jemima is the quintessential “Mammy” character, “the most well-known and enduring distortion of African American women.”⁴⁴ She represents “Old South plantation nostalgia and romance grounded in an idea about the ‘mammy,’ a devoted and submissive servant who eagerly nurtured the children of her white master and mistress while neglecting her own.”⁴⁵ The myth was meant to soothe white guilt over the history of slavery and contemporary racist practices by affirming a racial order in which black women were acceptable as long as they were plump, asexual helpers.⁴⁶ Aunt Jemima “uplifted white womanhood through sheer contrast and by keeping white women out of the kitchen. She saved them from work but also from worry and seemingly cleared up

37. *Id.* at 69.

38. *Aunt Jemima Rebrands as Pearl Milling Company*, PRNEWswire (Feb. 9, 2021), <https://perma.cc/YW2S-4992>.

39. MANRING, *supra* note 36, at 75; *see also Bird’s-Eye View of the World’s Columbian Exposition, Chicago, 1893*, WORLD DIGIT. LIBR., <https://perma.cc/G6JL-Z8EB> (last visited July 8, 2021) (explaining that the 1893 Fair was known as the “Columbian Exposition” to mark the 400th anniversary of Columbus arriving in the Americas).

40. MANRING, *supra* note 36, at 77, 91.

41. *Id.* at 24, 91, 112.

42. Francesca Sobande, *Spectacularized and Branded Digital (Re)presentations of Black People and Blackness*, 22 TELEVISION & NEW MEDIA 131, 137 (2021).

43. *See* DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 38, 83, 255–56 (2001).

44. Joseph C. Miller, Michael A. Stanko & Mariam D. Diallo, *Reckoning with Jemima: Can the Brand Be Remade for Good?*, IVY PUBL’G 1, 4 (Aug. 12, 2020), <https://perma.cc/RJ6Y-45HY>.

45. Riché Richardson, Opinion, *Can We Please, Finally, Get Rid of “Aunt Jemima”?*, N.Y. TIMES (June 24, 2015), <https://perma.cc/VTL2-JQS5>.

46. *Id.*; Miller, Stanko & Diallo, *supra* note 44, at 4–5.

tensions between white men and white women, between masters and servants, by clarifying sexual and work roles as well as racial lines.⁴⁷ Aunt Jemima—like Confederate monuments, Jim Crow practices, and other racist brands—gave white Americans “somebody to look down on,” as “these images were staring right back at them in the kitchen, serving them with a smile and supporting the societal order. . . .”⁴⁸ Through meticulous observation of the brand’s history, M. M. Manring observed in *Slave in a Box: The Strange Career of Aunt Jemima* that throughout the twentieth century, the Aunt Jemima advertising campaign

told white women they could approximate the lifestyle of hoop-skirted southern belles, complete with a complement of slaves, if they purchased Aunt Jemima brand pancake mix. . . . That is what being southern meant . . . appropriating a life of leisure with racial and sexual harmony, seemingly more free but inherently dependent on a black laborer. . . . white men were gallant, women were unburdened by the kitchen, and children played happily around cheerful black servants who would never leave.⁴⁹

Black people saw Aunt Jemima for the racist construct that she was. When they read the mythic tales written about Aunt Jemima in women’s magazines, Black observers “recognized her as a symbol of submissiveness, demanded that the trademark’s owners quit using her, and called on black consumers to boycott the product.”⁵⁰ As early as 1918, a writer for *Crusader* (a journal dedicated to Black readers) fumed that, after seeing Aunt Jemima ads

in the subway and ‘L,’ . . . [Black people] have burned red hot with impotent rage, no doubt. [These ads] are part of the white man’s propaganda to demean, ridicule and insult the Race. They are malicious targets aimed at what he considers a powerless people.”⁵¹

In the early twentieth century, not much marketing research focused on minority views, but a handful of surveys did report that people of color were deeply offended and repelled by such imagery.⁵² Surveys conducted in the 1930s show that Black consumers overwhelmingly disapproved of Aunt Jemima ads, although they responded more positively when actual Black people appeared in the ads, albeit in subservient roles.⁵³

As the Civil Rights movement gained momentum in the 1960s, the NAACP called for a boycott of the brand, but Quaker Oats continued to send Black actresses out to play Aunt Jemima.⁵⁴ To quiet the criticism, Quaker Oats made cosmetic changes. As illustrated in the Adoption Timeline, they removed her bandana, made her look

47. MANRING, *supra* note 36, at 23.

48. Brent Schrottenboer, *Does It Really Matter If Aunt Jemima and Uncle Ben Get Retired?*, USA TODAY (June 22, 2020), <https://perma.cc/48BV-CBWK>.

49. MANRING, *supra* note 36, at 112.

50. *Id.* at 151.

51. *Id.* at 153.

52. *Id.* at 13.

53. *Id.* at 155–57.

54. *Id.* at 165–66.

thinner and younger, and gave her pearl earrings.⁵⁵ James Baldwin wrote in his *Notes of a Native Son*, “Before our joy at the demise of Aunt Jemima and Uncle Tom approaches the indecent, we had better ask when they sprang, how they lived?”⁵⁶ In explaining why it was important to consider Baldwin’s question, Manring wrote, “The things we see and use every day—and even more to the point, ignore—tell us much about ourselves.”⁵⁷

In the mid-1990s, seeing the ubiquitous image on so many food products, in stores, and, one day, in an airport on a cookbook written by a white man, Alice Walker wrote that she “felt insulted by the image and by a white person’s appropriation of it.”⁵⁸ Walker’s mother was a large woman who worked as a maid for a white family, and perhaps because of that similarity, Walker struggled with the image of Aunt Jemima.⁵⁹ “For generations in the South it was the only image of a black woman that was acceptable. You could be ‘Aunt’ Jemima, sexless and white-loving, or you could be unseen.”⁶⁰ Walker observed that because the word “mammy” was derived from “mammary,” one cannot ignore the name as a reference to breasts.⁶¹ She wrote:

[W]hen white people had an Aunt Jemima around the house and called her “Mammy,” it was the same as calling her “Tits.” Go ask Tits to give you a drink of milk, they were saying to their children. Go ask Tits for a sip of water or a piece of bread. Tits. It was Tits who wet-nursed these people as infants because their own mothers, not desirous of ruining their stick figures, refused.⁶²

Despite boycotts from the Black community, Aunt Jemima was a successful brand. *Ad Age* ranked her seventh in its list of the top ten most iconic brand “mascots” of the twentieth century.⁶³ Even as the financial return on Aunt Jemima products remained high, Quaker Oats repeatedly had to navigate the disconnect between the brand’s racist connotations and evolving social values of equality and visual representation. Scott Buckley, who worked as an advertising account manager for Quaker Oats in the 1980s and 1990s, said that “the company was often reluctant to spend heavily to market Aunt Jemima, believing ‘it wasn’t worth the blowback.’”⁶⁴

In the years leading up to the brand’s retirement, Quaker Oats had already abandoned aggressive advertising of Aunt Jemima products. In 2019, Quaker Oats

55. *Id.* at 169, 172.

56. JAMES BALDWIN, *Many Thousands Gone*, in *NOTES OF A NATIVE SON* 24, 27 (1955).

57. MANRING, *supra* note 36, at 16.

58. Alice Walker, *Giving the Party: Aunt Jemima, Mammy, and the Goddess Within*, MS., May–June 1994, at 22.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Kirsten Chang, *Top Ad Icons of the 20th Century*, CNBC (Aug. 12, 2011), <https://perma.cc/E42Z-6GYV>.

64. Tiffany Hsu, *Aunt Jemima Brand to Change Name and Image Over “Racial Stereotype,”* N.Y. TIMES (June 17, 2020), <https://perma.cc/VB98-5K9T>.

spent \$6.2 million marketing Life Cereal (not counting what it spent on social media) and only \$245,000 on marketing the entire Aunt Jemima line of breakfast products.⁶⁵ A former member of the advertising team reported that

“the company tried to avoid heavily promoting Aunt Jemima.” “They were constantly being told, ‘Let’s not over-promote it or do a lot of partnerships’—nobody wanted to call attention to it . . . [but] Aunt Jemima was a category leader, and nobody wanted to mess with that stream of revenue.”⁶⁶

Messing with an iconic brand is so costly that the company avoided the expense until it saw the cost of doing nothing as potentially more damaging. In 2014, the cost to rebrand and promote Aunt Jemima products was estimated to be between \$20 million and \$50 million.⁶⁷ Yet brand loyalty led to such a robust financial return that the company kept the product on store shelves and in our kitchens.⁶⁸ Long after Quaker Oats stopped aggressively marketing the brand, Aunt Jemima continued to sell herself.⁶⁹ In 2020, the brand yielded \$350 million in sales.⁷⁰ Her racially-charged message persisted despite efforts to professionalize her image.

B. THE END OF THE LANHAM ACT’S DISPARAGEMENT BAR

The United States Patent and Trademark Office (“USPTO”) has not always been willing to register marks referencing the stereotypical “Mammy” of Lost Cause mythology. While the USPTO registered multiple versions of Aunt Jemima’s image over the course of a century, it sometimes refused to put its seal on applications seeking to register word marks containing the term “Mammy.”⁷¹ The refusals were based on Section 2(a) of the Lanham Act, designed to bar registrations of marks that “may disparage . . . persons, living or dead, institutions, beliefs, or national symbols,

65. *Id.*

66. *Id.*

67. Miller, Stanko & Diallo, *supra* note 44 (citing Claire Zillman, *Why It’s So Hard for Aunt Jemima To Ditch Her Unsavory Past*, FORTUNE (Aug. 12, 2014), <https://perma.cc/9LJX-QUYW>).

68. *See id.* (“US annual retail sales of Aunt Jemima pancake syrup were estimated at \$144m in 2018, showing slight growth from 2017. Statista reports that in 2019, 131 million Americans used Aunt Jemima syrup, making it the pancake syrup used most often in the United States, more than doubling competitors such as Mrs. Butterworth’s (52m), Log Cabin (48m) and Hungry Jack (36m). In the smaller pancake/waffle mix category, Aunt Jemima was alone the market share leader, with a 32% share in the U.S. as of 2017, representing retail revenue of \$125m . . . PepsiCo’s total annual worldwide revenue derived from Aunt Jemima products was estimated at \$350m.”).

69. *See* Jessica Wohl, *As Aunt Jemima Becomes Pearl Milling Company, Here’s What Should Happen Next*, AD AGE (Feb. 16, 2021), <https://perma.cc/B3EB-LFJ4> (reporting that even after Quaker Oats’ media spending for Aunt Jemima in 2019 totaled only \$19,000, the brand had \$353 million in sales in 2020 and led other brands in the pancake mix market).

70. Beth Kowitt, *The Inside Story Behind Aunt Jemima’s New Name*, FORTUNE (Feb. 11, 2021), <https://perma.cc/2HD9-L2N9>.

71. Vicki T. Huang, *Trademarks, Race and Slur-Appropriation: An Interdisciplinary and Empirical Study*, 5 U. ILL. L. REV. 1605, 1639–40 (2021) (finding that the bar was applied inconsistently, but nonetheless identifying five applications filed in 2015 that were denied registration based on the Section 2(a) disparagement bar).

or bring them into contempt, or disrepute.”⁷² As the Adoption Timeline indicates, many marks considered demeaning by the groups they depicted were widely used and registered before the disparagement bar was enacted in 1946.⁷³ Some of these marks—like Aunt Jemima, Uncle Ben’s, Sambo’s, the Washington Redskins, the Atlanta Braves, and the Cleveland Indians—remained in use and on the Principal Register for decades.

In theory, the Lanham Act may have been used to cancel existing disparaging brands and block the registration of additional racist brands. To the extent the USPTO did employ the bar, it was used rarely⁷⁴ and inconsistently.⁷⁵ The Adoption Timeline shows the USPTO continued to register marks viewed as disparaging by the targeted communities. Their owners sometimes made modest design alterations to reduce their offensive connotations, but within the twentieth century, none were dropped. They became such accepted parts of the American experience that many people outside the referenced groups did not question whether these marks were grounded in a racist foundation.⁷⁶ Just like a white person might walk by a Confederate monument without giving it much thought—apart from a passing impression that it was placed by someone else long ago—many white consumers failed to see brands like Aunt Jemima and Uncle Ben’s as anything other than iconic kitchen staples.⁷⁷ Many in the targeted communities saw them very differently.

Like Black citizens who were appalled by Aunt Jemima’s stereotypical depiction, leaders of indigenous nations challenged the use of their national identities as trademarks, most notably as sports mascots. Although fans and the ball clubs touted the brands as a source of pride in Native American heritage,⁷⁸ others argued that the

72. 15 U.S.C. § 1052(a); see also Stephen R. Baird, *Moral Intervention in the Trademark Arena: Banning the Registration of Scandalous and Immoral Trademarks*, 83 TRADEMARK REP. 661, 663 & n.5 (1993).

73. *Matal v. Tam*, 137 S. Ct. 1744, 1753, 1757 (2017); see also Rosemary J. Coombe, *Marking Difference in American Commerce: Trademarks and Alterity at Century’s End*, 19 POL. & LEGAL ANTHROPOLOGY REV. 105, 109–11 (1996).

74. Huang, *Trademarks*, *supra* note 71, at 1639–40 (showing that racially explicit brands form a tiny and diminishing percentage of trademarks filed over time between 2010 and 2020, that racial slurs were never incorporated in more than 0.01% of the total number of trademark applications, and that while this small number has held relatively steady since 2011, the percentage has decreased relative to the universe of applications filed overall).

75. Barton Beebe & Jeanne C. Fromer, *Immoral or Scandalous Marks: An Empirical Analysis*, 8 N.Y.U. J. INTELL. PROP. & ENT. L. 169, 182, Fig. 4 (after reviewing over three million marks, the authors found that only 101 marks were barred by Section 2(a)’s immoral or scandalous bar but were also found to be derogatory to a group, and of that set, fourteen overcame the refusal); Anne Gilson LaLonde & Jerome Gilson, *Trademarks Laid Bare: Marks That May Be Scandalous or Immoral*, 101 TRADEMARK REP. 1476, 1478 (2011) (finding that the USPTO barred marks containing “MILF” as frequently as it permitted them to register).

76. MANRING, *supra* note 36, at 16.

77. *Id.*

78. Paul Hoynes, *Name Game: Why the Cleveland Indians Changed Their Name and Why the Atlanta Braves Didn’t*, CLEVELAND (Oct. 27, 2021), <https://perma.cc/NXE3-SQ2H> (indicating that despite the League’s claims to have support from the Cherokee Nation, Chuck Hoskin Jr., Principal Chief of the Cherokee Nation, told *The Athletic*, “We appreciate that the Atlanta Braves are trying to honor the Native community, but the best way to honor us, is to stop the use of Native American depictions across sports.”).

misappropriation of cultural identity and imagery for use as a trademark can constitute an injury to personal and community dignity.⁷⁹

Suzan Shown Harjo, a writer and prominent policy activist for indigenous people, led a group of plaintiffs in asserting a now-defunct legal tool to challenge disparaging trademarks. In 1992, Harjo and other citizens of indigenous nations petitioned the Trademark Trial and Appeal Board (TTAB) to cancel six trademarks used by Washington, D.C.'s football team on the ground that "Redskins" is a racial slur.⁸⁰ The team owner insisted that the term was meant to honor indigenous Americans.⁸¹ Social scientists have observed that his assertion "cannot be disentangled from the larger history of Native American land dispossession, in which European newcomers idealized a myth of a fearless, primitive warrior, using it to justify war, removal and even genocide."⁸²

After years of litigation, the USPTO granted the cancellation petition; and after multiple appeals, the decision was upheld.⁸³ Although the football team claimed the mark was celebratory, Suzan Harjo explained that in the eyes of her people, the "Redskins" name

is the worst word that is used about us in the English language. And I do mean worst. It harks back to the days when colonies, trade companies and some states issued bounty proclamations for exterminating Native American people and providing the bloody "red skins" as proof of "Indian kill." In 1863, for example, the *Daily Republican* in Winona, Minn., carried the following notice: "The State reward for dead Indians has been increased to \$200 for every red-skin sent to Purgatory. This sum is more than the dead bodies of all the Indians east of the Red River are worth."⁸⁴

Harjo will leave behind an extraordinary legacy of teaching how demeaning it is when trademarks for commercial products and sports teams portray indigenous people as mascots that reinforce racial stereotypes. Her hard-fought battles achieved much success, but only after decades of hard work and a significant investment of time and money. In 2014, she reported:

79. See Victoria Phillips, *Beyond Trademark: The Washington Redskins Case and the Search for Dignity*, 92 CHI.-KENT L. REV. 1061, 1061 (2017).

80. *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d 1705, 1999 WL 375907 at *2 (T.T.A.B. Apr. 2, 1999), *rev'd*, 284 F. Supp. 2d 96, 99 (D.D.C. 2003), *remanded by* 415 F.3d 44 (D.C. Cir. 2005) (*per curiam*).

81. Ned Snow, *Free Speech & Disparaging Trademarks*, 57 B.C. L. REV. 1639, 1651 (2016).

82. Angela R. Riley & Sonia K. Katyal, Opinion, *Aunt Jemima Is Gone. Can We Finally End All Racist Branding?*, N.Y. TIMES (June 19, 2020), <https://perma.cc/AFZ6-2L66>.

83. *Pro-Football, Inc. v. Harjo*, 567 F. Supp. 2d 46, 48 (D.C. Cir. 2008). In a second case with different plaintiffs, the "Redskins" mark was challenged again. *Blackhorse v. Pro-Football, Inc.*, 2014 WL 2757516, at *1 (T.T.A.B. 2014). The Trademark Trial and Appeal Board (TTAB) canceled six trademark registrations held by the football team as disparaging to a substantial composite of Native Americans. On appeal, the district court affirmed the TTAB's decision and the USPTO canceled the federal registration. *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015), *vacated*, 709 F. App'x 182 (4th Cir. 2018) (*per curiam*).

84. Susan Shown Harjo, *The R-Word Is Even Worse Than You Think*, POLITICO MAG. (June 23, 2014), <https://perma.cc/778E-MY5P>.

We have already had tremendous success at the local and college level, where governing bodies are less concerned about dollars and more sensitive to their communities. Since 1970, when the University of Oklahoma retired its mascot “Little Red,” colleges and elementary, middle and high schools nationwide have dropped more than 2,000 such “Indian” stereotypes from their athletic programs. By our count that’s more than two-thirds of all such names, meaning we have a little more than 900 to go.⁸⁵

Some of what Harjo achieved was temporarily undone after the Supreme Court found the Lanham Act’s disparagement bar (used to achieve cancelation of the “Redskins” mark) unconstitutional.

The disparagement bar fell after Simon Tam sought to register the “The Slants” as a trademark for his Asian-American electronic dance band, hoping to infuse the term with a positive connotation.⁸⁶ The USPTO denied Tam’s application to register the mark on the ground that the term “slants” is widely understood as disparaging to people of Asian descent and therefore violated Section 2(a).⁸⁷ Tam appealed on First Amendment grounds, and his claim ultimately wound its way to the Supreme Court.⁸⁸ Throughout the litigation, the USPTO defended the bar so it would not have to put its seal of approval on marks that contained racist speech.⁸⁹ Despite this intent, the USPTO lost. In a unanimous opinion, the Court held that the disparagement bar violated Tam’s First Amendment right to free expression.⁹⁰ In doing so, the Court recognized the expressive power of trademarks and made it clear that more than source identification was in play in the trademark landscape. Despite fears that *Tam* would lead to a tidal wave of applications to register racist marks, Victoria Huang found no noticeable increase in racially explicit trademark applications immediately following the decision in *Tam*.⁹¹

After the Lanham Act’s disparagement bar was declared unconstitutional,⁹² the “Redskins” marks were reinstated on the Principal Register.⁹³ The renewal would be short-lived. Notwithstanding the owner’s enormous investment over decades in defending the mark, the team would soon abandon it.

85. *Id.*

86. *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017).

87. *In re Tam*, 108 U.S.P.Q.2d 1305, 2013 WL 5498164, at *5 (T.T.A.B. Sept. 26, 2013).

88. *In re Tam*, 785 F.3d 567, 570–71 (Fed. Cir. 2015), *reh’g en banc granted*, 808 F.3d 1321, 1332 (Fed. Cir. 2016), *cert. granted, aff’d sub nom., Matal*, 137 S. Ct. at 1751.

89. En Banc Brief for the Director of the U.S. Patent and Trademark Office, *In re Simon Shiao Tam*, 2015 WL 4400893, at *44 (Fed. Cir. 2015) (“Although the USPTO does not endorse any particular product, service, mark, or registrant, the government’s publication of disparaging marks on its Principal Register would convey to the public that the United States regards racial slurs as appropriate source identifiers for goods and services in commerce. As discussed above, registrants are entitled and encouraged to mark their products (for example, with an ®) to show that they have been registered in the U.S. Patent and Trademark Office. ‘When the symbol for a federally registered trademark, ®, is affixed to a mark, it is a declaration by the federal government that it has *approved* that mark.’”).

90. *Matal*, 137 S. Ct. at 1751.

91. Huang, *Trademarks*, *supra* note 71, at 1632.

92. *Pro-Football, Inc. v. Blackhorse*, 709 F. App’x 182, 183 (4th Cir. 2018) (per curiam); Erik Brady, *Appeals Court Vacates Decision That Canceled Redskins Trademark Registrations*, USA TODAY (Jan. 18, 2018), <https://perma.cc/46FD-9XPL>.

93. *See, e.g.*, Reg. No. 978824.

C. HARMS LINKED TO RACIST IMAGERY

For individuals in the targeted communities, the constant barrage of negative stereotyping can be hard to bear.⁹⁴ Multiple studies report that stereotypes in advertising can be devastating to self-esteem.⁹⁵ Because “[s]elf-esteem is an important ingredient in resiliency and positive mental health adjustment,” its impairment “can contribute to negative behaviors such as substance use and abuse, self-harming, and interpersonal violence.”⁹⁶

If someone of the depicted race accurately senses that negative stereotypes create yet another obstacle to success, that person must overcome additional mental barriers to push past these images. As Jesse A. Steinfeldt, Jacqueline Hyman, and M. Clint Steinfeldt explain:

If others see me as a member of an inherently flawed group—an impending failure or irredeemable burden on society—then it becomes harder to see through that clouded lens of negativity, particularly when there is a general absence of positive images of people who look like me in society. As a result, that reflected and limited view of oneself can become readily more internalized, negatively impacting one’s developmental trajectory and subsequent psychological functioning.⁹⁷

The fact that the majority may not see the harm these images cause heightens their impact and exacerbates the different ways that race affects views of culture. Gaynelle Grant, a New York sociologist, remembers that when she was a young girl:

[W]hite kids in my school would say things to me like, “Hey, Aunt Jemima, make me some pancakes,” or, “Where’s your red bandanna, Aunt Jemima?” . . . They equated Aunt Jemima with every black female they saw. The very nature of advertising is to alter how we look at ourselves and the things in our environment . . . advertising that perpetrates negativity—like blacks as smiling, simple-minded servants—affects the way our culture regards black people.⁹⁸

94. See Huang, *Trademarks*, *supra* note 71, at 1632. (reviewing studies that document harms from racist slurs and other acts of negative racial stereotyping).

95. Stephanie A. Fryberg, Hazel Rose Markus, Daphna Oyserman & Joseph A. Stone, *Of Warrior Chiefs and Indian Princesses: The Psychological Consequences of American Indian Mascots*, 30 BASIC & APPLIED SOC. PSYCH. 208, 215–16 (2008); Jesse A. Steinfeldt, Jacqueline Hyman & M. Clint Steinfeldt, *Environmental Microaggressions: Context, Symbols, and Mascots*, in MICROAGGRESSION THEORY: INFLUENCE AND IMPLICATIONS 213, 219–20 (Gina C. Torino et al. eds., 2019); *Justification Statement*, AM. PSYCH. ASS’N 1, 1–2, <https://perma.cc/7TNK-R4ML> (last visited June 14, 2021); see also Melissa L. Greene, Niobe Way & Kerstin Pahl, *Trajectories of Perceived Adult and Peer Discrimination Among Black, Latino, and Asian American Adolescents: Patterns and Psychological Correlates*, 42 DEVELOPMENTAL PSYCH. 218, 230, 234 (2006); Lori S. Hoggard, Christy M. Byrd & Robert M. Sellers, *The Lagged Effects of Racial Discrimination on Depressive Symptomology and Interactions with Racial Identity*, 62 J. COUNSELING PSYCH. 216, 223 (2015); Christopher T. H. Liang, Lisa C. Li & Bryan S. K. Kim, *The Asian American Racism-Related Stress Inventory: Development, Factor Analysis, Reliability, and Validity*, 51 J. COUNSELING PSYCH. 103, 104 (2004).

96. *Justification Statement*, AM. PSYCH. ASS’N, *supra* note 95, at 2.

97. Steinfeldt, Hyman & Steinfeldt, *supra* note 95, at 219.

98. Renee Graham, *Symbol or Stereotype: One Consumer’s Tradition Is Another’s Racial Slur*, BOS. GLOBE, Jan. 6, 1993, at 35.

The depiction of a white boy lashing a Black man in early “Cream of Wheat” ads was unambiguously intended to show that this brand of cereal was superior in the same way the white boy was superior.⁹⁹ Retaining the Black man without the boy or the whip may diminish the racist message, but the unequal power dynamic in the foundation is impossible to erase from the brand history. In a similar way, Frito Bandito and Miss Chiquita reflected demeaning stereotypes of the Hispanic man as bandit (out to steal your snacks) or the notion that someone of Hispanic heritage is exotic (wearing a hat made of fruit) and not fully American.¹⁰⁰ While the majority may easily forget the original reference, the targeted community is more likely to remember. In this way, the symbol cannot possibly evoke a unified message.

Repeated exposure to negative racial stereotypes can have a cumulative effect on both the targeted group and those who think the images are benign.¹⁰¹ Racist imagery can lead to multiple harms. When Black characters are depicted in film, television, and advertising, they are often portrayed as subservient to white characters or unemployed.¹⁰² Multiple studies have shown a correlation between exposure to such media and reduced self-esteem of Black persons.¹⁰³ The Vietnamese-American writer Viet Thanh Nguyen reported a similar reaction, observing that when she saw Asian Americans on television, “It confused me and shamed me to see people who looked like my parents being reduced to wordless masses, condemned to be killed, raped, rescued or silenced.”¹⁰⁴

By reinforcing negative stereotypes, racist imagery may contribute to “unfavorable views on diversity-related policy issues such as affirmative action and policing.”¹⁰⁵ Habitual use of such depictions in mainstream advertising can normalize stereotypes designed to keep persons of color “in their place” through images that perpetuate cultural superiority “by rendering them as inferior through racist advertising images.”¹⁰⁶ Furthermore, “exposure to negative characterizations of blacks in the media can promote unfavorable attitudes and beliefs pertaining to intelligence, criminality, socioeconomic status, work ethic, and values.”¹⁰⁷

No group of people—even if they share a racial identity—will respond identically to any stimulus. Individual trauma and harm to our social fabric have been connected to imagery that reinforces racist stereotypes. Exposure to such images results not just in psychological harm and social degradation for the group depicted,¹⁰⁸ but also

99. Thomas et al., *supra* note 2.

100. *Id.*

101. Steinfeldt, Hyman & Steinfeldt, *supra* note 95, at 220–21.

102. Dana Mastro, *Race and Ethnicity in US Media Content and Effects*, OXFORD RSCH. ENCYCS. COMMUN (Sept. 26, 2017), <https://perma.cc/4RPM-UDRS>.

103. *Id.*

104. Viet Thanh Nguyen, Opinion, *The Beautiful, Flawed Fiction of “Asian American,”* N.Y. TIMES (May 31, 2021), <https://perma.cc/8WKN-A99A>.

105. Mastro, *supra* note 102.

106. Thomas et al., *supra* note 2.

107. *Id.*

108. See, e.g., Fryberg, Markus, Oyserman & Stone, *supra* note 95, at 215–16; Steinfeldt, Hyman & Steinfeldt, *supra* note 95, at 220–21.

in increased racial stereotyping of other minorities as well.¹⁰⁹ For the majority, repeated exposure to racist imagery can activate thoughts of negative stereotypes.¹¹⁰ When white Americans view racial stereotyped branding in a positive light, the disconnect between their perception and those of the depicted groups may contribute to misunderstanding and divisiveness. According to social representation theory, media depictions may lead to negative consequences if they reinforce stereotypes that constrain how the majority sees a relatively invisible group, because these diminished views, if reflected back to the targeted community, may limit the potential they see in themselves.¹¹¹

The enduring racist connotations can be seen in how brands embodying racist stereotypes are used in political speech, often by members of the majority criticizing people in the community depicted by the brand. In the twenty-first century, even after Quaker Oats professionalized Aunt Jemima's image, the name was used by political opponents as a slur to demean powerful Black women including Condoleezza Rice, Stacy Abrams, and Kamala Harris.¹¹²

III. VIEWING IMAGERY THROUGH A CONSUMER INVESTMENT PRISM

Although years of advocacy from the targeted communities and expensive trademark litigation did not convince brand owners to stop using racially contentious marks, cultural shifts in the general population ultimately led to their demise.¹¹³

109. Chu Kim-Prieto, Lizabeth A. Goldstein, Sumie Okazaki & Blake Kirschner, *Effect of Exposure to an American Indian Mascot on the Tendency to Stereotype a Different Minority Group*, 40 J. APPLIED SOC. PSYCH. 534, 534 (2010).

110. Justin W. Angle, Sokiente W. Dagogo-Jack, Mark R. Forehand & Andrew W. Perkins, *Activating Stereotypes with Brand Imagery: The Role of Viewer Political Identity*, 27 J. CONSUMER PSYCH. 84, 89 (2016).

111. Fryberg, Markus, Oyserman & Stone, *supra* note 95, at 211.

112. See Nathan Leaf, *To Aunt Jemima, Not To Condoleezza Rice*, WIS. ST. J., Nov. 20, 2004, at B1 (reporting that a Madison, Wisconsin radio host referred to Condoleezza Rice as "Aunt Jemima" and to Colin Powell as "Uncle Tom" in describing their subservient roles in George W. Bush's administration); Schrottenboer, *supra* note 48 (referencing a Twitter user who mockingly posted that Georgia politician Stacey Abrams could replace Aunt Jemima after Quaker Oats announced the brand's retirement); Janelle Griffith, *Virginia Mayor Urged To Resign After Saying Biden Picked "Aunt Jemima as His VP,"* NBC NEWS (Aug. 13, 2020), <https://perma.cc/57G4-K8VD> (reporting on a Facebook post in which the mayor of Luray, Virginia commented that Joe Biden "just announced Aunt Jemima" [referring to Kamala Harris] as his running mate for 2020's presidential election).

113. See Simon Tam, Note, *First Amendment, Trademarks, and "The Slants": Our Journey To the Supreme Court*, 12 BUFF. INTELL. PROP. L.J. 1, 17 (2018); see also Rebecca Tushnet, *The First Amendment Walks into a Bar: Trademark Registration and Free Speech*, 92 NOTRE DAME L. REV. 381 (2016); Les Carpenter, *Washington's NFL Team to Retire Redskins Name, Following Sponsor Pressure and Calls for Change*, WASH. POST (July 13, 2020), <https://perma.cc/9R44-CVTA>.

A. THE ABANDONMENT OF RACIST BRANDS VALIDATES THE CONSUMER INVESTMENT PARADIGM FOR THEORIZING TRADEMARKS

As the Civil Rights movement gained cultural currency and the nation started to wrestle with its history of racial inequality, some notable exceptions depicted a more aspirational multicultural experience of living in America. In 1971, amid culturally divisive protests against the Vietnam War and just three years after Dr. Martin Luther King, Jr. was assassinated, the Coca-Cola Company launched a television advertisement called “Hilltop” in which a field of young people of many races sang, “I’d like to teach the world to sing in perfect harmony.”¹¹⁴ Coca-Cola was featured as a unifying product in a time of racial divide.¹¹⁵ The ad made hippie culture look open-hearted and unthreatening. Substance abuse, free love, disrespect for authority, and other controversial aspects of the hippie movement were absent from the scene. It depicted a multicultural group that looked like America, wearing the clothing of the moment and singing an uplifting, harmonious folk song about peace. “Hilltop” was so resonant and creative for its time that, in 2015, the Emmy award-winning show *Mad Men* revived it in its final scene of hopefulness for a new era.¹¹⁶

In 1979, the Coca-Cola Company ventured more meaningfully into a depiction of race relations with its “Mean Joe Greene” advertisement.¹¹⁷ The television ad featured a young white boy eager to meet NFL player Joe Greene as he limped off the football field, exhausted and sore from the game. The kid offered Greene his newly opened bottle of cold Coca-Cola. Greene at first refused, but the boy insisted, and Greene finally took the Coke, thanked the kid, and sucked down every drop. The boy started to walk away, looking sad, perhaps because his encounter with his hero was over or perhaps because his Coke was gone. Then Greene said, “Hey, kid—” and tossed the boy his game jersey. The child’s face lit up with joy, and the last shot is of Greene grinning while the words “Have a Coke and a Smile” appear in text and the musical score. The ad was unique in that it portrayed a Black man as a hero to a white child and poked gently at our assumptions of others as the boy thanked “Mean Joe” for his kindness. The advertisement at once acknowledged racial differences and signaled hope that they can be bridged, masterfully portraying the enjoyment of Coca-Cola in its iconic bottle as a shared American experience.¹¹⁸ Both the Hilltop and Greene ads, developed and run long before the age of the Internet, have been viewed millions of times on YouTube.

The consumer investment theory explains why these ads resonate enough to lead consumers to invest time watching them even when they are not forced to do so to get to other content. What is the return on that consumer investment? We all see

114. Project Rebrief, *Coca-Cola, 1971—“Hilltop” | “I’d Like to Buy the World a Coke,”* YOUTUBE (Mar. 6, 2012), <https://perma.cc/5KCJ-VF3U>.

115. HOLT, *supra* note 30, at 23–24 (discussing how the ad “symbolically heal[ed] acute cultural tensions tearing at American society” following the start of the Vietnam War).

116. amc, *The Final Scene of Mad Men*, YOUTUBE (May 18, 2015), <https://perma.cc/4AA3-EYLD>.

117. stiggerpao, *Coca-Cola Classic Ad: Mean Joe Green [Full Version] (1979)*, YOUTUBE (July 17, 2007), <https://perma.cc/EX6V-7335>.

118. HOLT, *supra* note 30, at 25–26.

many more trademarks and ads than we remember. The task of breaking through the barrage of advertising to reach a consumer is a massive challenge. Artful ads that communicate authentic values can create magnetic, expressive resonance that is heard and even sought out through all the other noise.

Consumers expect ads to tout product features and explain why they should buy this and not that. The expected is not memorable. When an advertisement challenges a political or social norm, it can surprise its audience with authenticity and invigorate a brand so that it becomes a symbol of contemporary values and a connection point for a like-minded community. When done well, it may create a transformative entrepreneurial moment that stimulates the Jeffersonian belief in constructive change.¹¹⁹ Proctor & Gamble’s award-winning “Like a Girl” ad campaign for Always feminine hygiene products took a common phrase and invited us to imagine that acting “like a girl” meant moving well, with strength and purpose.¹²⁰ Advertisements that resonate in this way can become timeless cultural touchstones that infuse a brand with enduring values.

Trademarks mirror cultural perceptions of race, gender, ethnicity, and identity.¹²¹ Historically, advertising and trademarks have been saturated with images that reinforce stereotypes or objectify a group of people as cartoon characters.¹²² If a mark itself expresses a racially insensitive word or image, the parent company’s statements about promoting equity and inclusion will ring hollow. At a time when questions of social justice are prominent in American discourse, organizations with racially charged symbols face an existential choice.

Recognizing the significance of brand values has been more apparent than ever as multiple brands do the unthinkable—abandon iconic money-making names and images that served as their trademarks in the name of equality. The rise of the Black Lives Matter movement in 2013¹²³ and the “Me Too” movement in 2017¹²⁴ increased the resonance of racial and gender equality across multiple demographic groups. The toppling of many disparaging marks occurred after three significant events that brought the connection between white supremacy and systemic racial inequality into sharp focus and changed national views of racist imagery.

119. See Letter from Thomas Jefferson to James Madison (Jan. 30, 1787), in 11 THE PAPERS OF THOMAS JEFFERSON 92, 93 (Julian P. Boyd ed., 1955), <https://perma.cc/LW7K-VY2M>.

120. See Hannah Goldberg, *This Ad Completely Redefines the Phrase “Like a Girl,”* TIME (June 26, 2014), <https://perma.cc/CD9L-W4SK>.

121. See Llewellyn Joseph Gibbons, *Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(a) Trademark Law After Lawrence v. Texas*, 9 MARQ. INTELL. PROP. L. REV. 187, 196 (2005); see also Deseriee A. Kennedy, *Marketing Goods, Marketing Images: The Impact of Advertising on Race*, 32 ARIZ. ST. L.J. 615, 616–17 (2000).

122. See Ross D. Petty, Anne-Marie G. Harris, Toni Broaddus & William M. Boyd III, *Regulating Target Marketing and Other Race-Based Advertising Practices*, 8 MICH. J. RACE & L. 335, 348–49 (2003); see also K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. GENDER SOC. POL’Y & L. 365, 374–77 (2008); Coombe, *supra* note 73, at 111.

123. Black Lives Matter, *About*, <https://blacklivesmatter.com/about/> (last visited June 21, 2021) (“#BlackLivesMatter was founded in 2013 in response to the acquittal of Trayvon Martin’s murderer.”).

124. Me Too, *History & Inception*, <https://metoomvmt.org/get-to-know-us/history-inception/> (last visited Dec. 16, 2021) (describing how sexual violence survivor and activist Tarana Burke began the “Me Too” movement in 2006, it gained global traction by going viral on social media in 2017).

The first event occurred on June 17, 2015, when Dylann Roof joined a Bible study group at the historic Emmanuel A.M.E. Church in Charleston, South Carolina.¹²⁵ The congregants welcomed Roof into their circle, and they prayed together.¹²⁶ At the end of the service, Roof took out a .45-caliber Glock 41 and started shooting, murdering nine people and injuring one other, all of them Black.¹²⁷ Media reports showed how deeply entrenched Roof was in white supremacy. A few weeks earlier, Roof had posed for a photo holding the Glock he would use as a murder weapon in one hand and a Confederate flag in the other.¹²⁸ Roof posted the image on social media as a warning that he intended to start a “race war” with “drastic action.”¹²⁹

Shocked by this incident, the nation was forced to reflect more seriously on the messages sent by symbols that had been adopted by white supremacists. Cities and schools concerned about racist imagery began rethinking the presence of Confederate statues.¹³⁰ On July 8, 2015, less than a month after Roof murdered Black congregants, a federal district court canceled the “Washington Redskins” trademark registrations on the ground that they disparage Native Americans in violation of the statutory bar that was then a part of the Lanham Act.¹³¹ The team chose to continue using the marks anyway.¹³²

The next significant event occurred two years later, after the city council in Charlottesville, Virginia, voted to remove statues of Robert E. Lee and Stonewall Jackson. On August 11–12, 2017, white supremacist groups held one of the largest rallies they had staged in decades to protest the removals and voice racist and anti-Semitic threats to the Charlottesville community.¹³³ On the second day of protests, a white supremacist deliberately sped his car into a group of pedestrians, injuring nineteen and killing Heather Danielle Heyer, a thirty-two-year-old counter-protester who was passionate about equality.¹³⁴

Appalled by the rise of white supremacy and its brazen celebration of Confederate symbols, many communities began to confront whether it made sense to maintain racially divisive imagery in central public spaces. From 1880 to 2015, only twelve

125. Alan Blinder & Kevin Sack, *Dylann Roof Is Sentenced to Death in Charleston Church Massacre*, N.Y. TIMES (Jan. 10, 2017), <https://perma.cc/2JTG-QEQ6>.

126. *Id.*

127. *Id.*; see also Andrew Knapp, *FBI Had Resources to Halt Dylann Roof’s Gun Buy, But It Didn’t Use Them—and Still Doesn’t*, POST & COURIER (Feb. 4, 2018), <https://perma.cc/X5WL-2GVH>.

128. Knapp, *supra* note 127.

129. S. POVERTY L. CTR., WHOSE HERITAGE? PUBLIC SYMBOLS OF THE CONFEDERACY 1, 6, <https://perma.cc/M7EP-69B6> (last visited June 21, 2021).

130. See, e.g., *McMahon v. Fenves*, 323 F. Supp. 3d 874, 877 (W.D. Tex. 2018), *aff’d*, 946 F.3d 268 (5th Cir. 2020).

131. *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439, 447 (E.D. Va. 2015), *vacated*, 709 F. App’x 182 (4th Cir. 2018) (per curiam).

132. Michael McCann, *Why the Redskins Scored a Victory in the Supreme Court’s Ruling in Favor of The Slants*, SPORTS ILLUSTRATED (June 19, 2017), <https://perma.cc/N6YQ-MAPR>.

133. *Sines v. Kessler*, 324 F. Supp. 3d 765, 773–7977 (W.D. Va. 2018); Neil MacFarquhar, *Charlottesville Lawsuit Puts Intolerance on Trial*, N.Y. TIMES (Oct. 28, 2019), <https://perma.cc/QV3H-S3BA>.

134. Christina Caron, *Heather Heyer, Charlottesville Victim, Is Recalled as “a Strong Woman,”* N.Y. TIMES (Aug. 13, 2017), <https://perma.cc/UZ28-R53V>.

Confederate Monuments were removed from public spaces. After the Charleston Church shooting, thirteen were removed or relocated within the next two years, and fifty more were taken down between 2017 and the spring of 2020.¹³⁵

Then, on May 25, 2020, Derek Chauvin, a white Minneapolis police officer, pinned George Floyd to the pavement, pushing his knee into Floyd's neck for over nine minutes.¹³⁶ Floyd, a forty-six-year-old Black father, cried for mercy, pleaded that he could not breathe, and, in his last moments, called to his dead mother.¹³⁷ The officer's partners looked on and did nothing while a seventeen-year-old girl filmed the final moments of George Floyd's life.¹³⁸ When the video circulated on social media the next day, protests erupted against police brutality and in support of equality.¹³⁹

The demonstrations continued throughout the summer of 2020. As citizens across the nation reflected on how much racism had been tolerated, many showed up to protest the practices and symbols that reinforced inequality, despite the Coronavirus pandemic.¹⁴⁰ The nation's empathy for the lived experience of minorities was palpably stronger, and consequently, tolerance for racist imagery reached a tipping point. The percentage of Americans who reported that they support the Black Lives Matter movement increased by fifteen percentage points between the beginning of 2019 and June of 2020.¹⁴¹ The transformative expression of anti-racist projections and graffiti on Confederate monuments altered the meaning of these objects as renewed political efforts to tear them down gained traction.¹⁴² Since the summer of

135. *Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019), <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy> (choose "Download the data" under "In this article"; then click on "Whose Heritage Master" tab within the spreadsheet to see relevant data). This data was sourced on Nov. 15, 2021.

136. *George Floyd: What Happened in the Final Moments of His Life*, BBC NEWS (July 16, 2020), <https://perma.cc/2WQZ-3Y88>.

137. Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://perma.cc/QT87-S78P>.

138. *Id.*

139. *George Floyd: What Happened in the Final Moments of His Life*, *supra* note **Error! Bookmark not defined.**

140. Colleen Long, Kat Stafford & R.J. Rico, *Summer of Protest: Chance for Change, but Obstacles Exposed*, ASSOCIATED PRESS, Sept. 6, 2020, <https://apnews.com/article/election-2020-shootings-race-and-ethnicity-or-state-wire-racial-injustice-9035ecdfc58d5dba755185666ac0ed6d>.

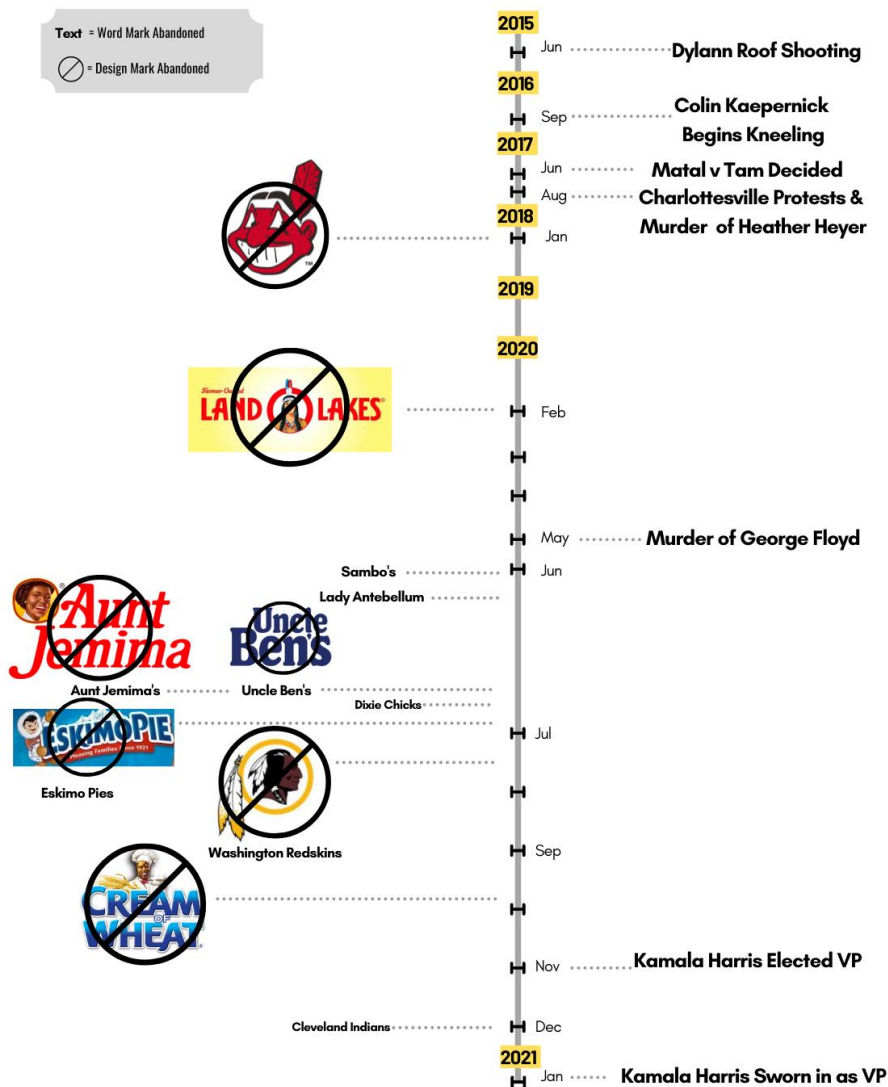
141. Jennifer Chudy & Hakeem Jefferson, Opinion, *Support for Black Lives Matter Surged Last Year. Did It Last?*, N.Y. TIMES (May 22, 2021), <https://perma.cc/NCX9-KM6> (displaying data indicating that support for the movement fell to 2019 levels in the following year).

142. See, e.g., *Boston Removes Christopher Columbus Statue from North End Park*, CBS BOS. (June 11, 2020), <https://perma.cc/FS7N-AT4E>; Phil Davis, *George Washington Monument in Druid Hill Park Spray-Painted with "Destroy Racists," Anti-Police Sentiment*, BALTIMORE SUN (June 21, 2020), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-baltimore-washington-monument-vandalized-20200621-h5tbqr6jazb7dfn645to5wb37a-story.html>; Alex Wigglesworth & Andrew J. Campa, *Junipero Serra Statue Toppled in Downtown L.A.*, L.A. TIMES (June 20, 2020), <https://perma.cc/B2LF-YG98>.

2020, over 100 Confederate monuments were removed from public spaces.¹⁴³ Against this political backdrop, racially explicit brands were confronted with the choice of either responding to the cultural moment and making a change or sticking with their old symbols and risk being held up as a relic of inequality. The timeline below situates the abandonment of these brands in their cultural context:

143. *Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019), <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy> (choose “Download the data” under “In this article”; then click on “Whose Heritage Master” tab within the spreadsheet to see relevant data). This data was sourced on Nov. 15, 2021.

ABANDONMENT TIMELINE



The Abandonment Timeline shows that George Floyd's murder was the tipping point. Two marks depicting Native Americans, the Cleveland Indians' Chief Wahoo and the Land O'Lakes Mia were dropped in 2018 and earlier in 2020.¹⁴⁴ Many more were to follow. Within weeks of George Floyd's death in May 2020, more companies announced they would drop racially divisive names and images in which they had invested millions of dollars and decades of advertising. Many of these trademarks—like Aunt Jemima and Uncle Ben's—were iconic household brands used by generations of families. At this cultural moment, many companies concluded that informational efficiency was not enough to justify maintaining them. With renewed empathy for how differently Black citizens experience life in America, companies began to consider whether the moment called for change. If there was ever an ideal time to drop racist imagery, the summer of 2020 was it. As social consciousness and empathy for those suffering from systemic racism increased among white citizens, many brand owners concluded they could no longer risk losing consumer investments by continuing to trade in racially charged stereotypes. In a contemporary culture sympathetic to the experience of Black citizens, the way a Black person (or anyone empathetic to a Black person's point of view) would see the world became more resonant.

On June 17, 2020, within a month after George Floyd's murder and at the height of public opinion polling that supported the Black Lives Matter movement, Quaker Oats announced it would phase out the Aunt Jemima brand name and images.¹⁴⁵ Quaker's parent company, PepsiCo, acknowledged the brand's racist connotations:

As we work to make progress toward racial equality through several initiatives, we also must take a hard look at our portfolio of brands and ensure they reflect our values and meet our consumers' expectations," said Kristin Kroepfl, Vice President and Chief Marketing Officer, Quaker Foods North America. "We recognize Aunt Jemima's origins are based on a racial stereotype. While work has been done over the years to update the brand in a manner intended to be appropriate and respectful, we realize those changes are not enough."¹⁴⁶

On February 9, 2021, Quaker Oats announced it would rename the brand for its original owner, Pearl Milling Company.¹⁴⁷ In June 2021, the new design, which kept the familiar red and yellow trade dress, first hit groceries stores.

The history of Aunt Jemima shows how critical brand values are to understanding how trademarks function and endure. They are not, as the traditional law and economics model posits, mere information shorthand for quality and source at the point of purchase. They have histories. They tell stories and carry meaning initiated by their owners but ultimately dependent on whether people choose to contribute to participate in the brand community by investing it with time, attention, and money.

144. Kevin Dragseth, *Is the Land O'Lakes Maiden a Racist Trope or Symbol of Native Pride?*, TPT Originals (July 17, 2020), <https://perma.cc/53KZ-C5UZ>.

145. *Aunt Jemima Brand to Remove Image from Packaging and Change Brand Name*, PRNEWswire, June 17, 2020, <https://perma.cc/QYE6-ALLL>.

146. *Id.*

147. *Aunt Jemima Rebrands as Pearl Milling Company*, *supra* note 38.

The demise of Aunt Jemima shows that when a brand's foundation fails to resonate with contemporary values, it may be time to burn the thing down and start over. When citizens became more sensitized to images that fed into racial inequality, Aunt Jemima had to go because of how she makes "us feel about what we did."¹⁴⁸

After George Floyd's murder, brand strategists took unprecedented action. Racist trademarks began toppling like a set of expensive dominoes. Many abandoned racially explicit imagery in the same summer that Black Lives Matter demonstrations were happening weekly in the nation's cities. Some companies attempted to defend their brand with evidence that their initial intention had nothing to do with racist perceptions, but nonetheless, consumer meaning won the day.

On June 11, 2020, the band Lady Antebellum announced its name would be shortened to "Lady A."¹⁴⁹ The band explained that the name originated from the

southern "antebellum" style home where we took our first photos [evoking] . . . the music born in the south that influenced us . . . southern rock, blues, R&B, gospel and of course country. . . . But we are regretful and embarrassed to say that we did not take into account the associations that weigh down this word referring to the period of history before the civil war, which includes slavery. We are deeply sorry for the hurt this has caused and for anyone who has felt unsafe, unseen or unvalued. Causing pain was never our hearts' intention, but it doesn't change the fact that indeed, it did just that. So today, we speak up and make a change. We hope you will dig in and join us.¹⁵⁰

This statement reflects how consumer investment influences brands. With genuine candor, the group admits it did not see allusions to slavery in its name because the band members were looking through a lens of their own experiences. Once they took a more empathetic look through the prism of broader consumer understandings, they could see the unpleasant and divisive meaning many people would invest in their name. Once their viewpoint broadened in this way, they recognized their name evoked harmful connotations and apologized for not seeing sooner how others perceived it.

Others responded with a quick and clean change, making no effort to defend references to lost-cause mythology. On June 17, 2020, the Cream of Wheat and Uncle Ben's brand owners announced their trademarks would be dropped.¹⁵¹ The press releases acknowledged that these marks depicted Black people in stereotypically subservient roles and were viewed as harmful reminders of the history of slavery.¹⁵² Later that week, Dreyer's announced it would rename "Eskimo Pie"

148. Saturday Night Live, *supra* note 1.

149. Ben Beaumont-Thomas, *Country Group Lady Antebellum Change Name to Lady a Due to Slavery Connotations*, *GUARDIAN* (June 11, 2020), <https://perma.cc/R6F7-MMG4>.

150. Lady A (@ladya), *TWITTER* (June 11, 2020, 11:00 AM), <https://perma.cc/35U6-MVK4>.

151. Chauncey Alcorn, *Cream of Wheat Is Reviewing Its Black Mascot After Aunt Jemima and Others Acknowledged Their Racist Roots*, *CNN* (June 18, 2020), <https://perma.cc/69MT-PKZE>.

152. *B&G Foods Statement on Cream of Wheat*, *BUSINESS WIRE*, June 17, 2020, <https://perma.cc/BR8S-RNPN>; Press Release, Mars, Inc., *Uncle Ben's Brand Evolution* (June 17, 2020), <https://perma.cc/TE9Q-98AB>.

ice cream.¹⁵³ Dreyer's head of marketing stated, "We are committed to being a part of the solution on racial equality, and recognize the term is inappropriate This move is . . . to ensure our company and brands reflect our people[']s values."¹⁵⁴ These statements are notable in that they don't make excuses. Instead, they express clear value propositions in response to changing consumer opinions and respond with decisive changes.

On June 25, 2020, the Dixie Chicks dropped "Dixie" from their mark, announcing, "We want to meet this moment."¹⁵⁵ From then on, they would be known as "The Chicks."¹⁵⁶ On July 13, 2020, just five years after the "Redskins" marks were reinstated on the USPTO's Principal Register, Washington, D.C.'s football team announced it would give up the brand it had fought for decades to keep¹⁵⁷

In the fall of 2020, Americans reported that they perceived race relations as more troubled than at any time since polling on the subject began.¹⁵⁸ However, they remained optimistic that things could get better.¹⁵⁹ It is in that space between what is and what is possible that many brands seized the cultural moment and took decisive action. If they could be change agents towards that better future of racial equality, they could align with a hopeful vision and participate in meaningful progress towards realizing constitutional ideals in the public imagination.

IV. CONCLUSION

The traditional law and economics approach does not adequately explain how changing cultural norms led multiple owners to drop lucrative trademarks. Over the spring and summer of 2020, as city streets erupted in protest after George Floyd's murder, trademark owners began abandoning racist words and imagery, even though they were still quite successful as source identifiers.

Social justice culture and contemporary interactive brand strategies have upended the law and economics theory of trademarks as mere tools of information efficiency. While the law and economics theory of marks sets a floor for what symbols must do to function as a trademark, it fails to explain why some brands resonate enough to succeed while others fail, and why an owner might abandon a mark even if it has been financially successful for decades. The key to understanding this phenomenon lies outside the law and economics model.

153. Maria Cramer, *Maker of Eskimo Pie Ice Cream Will Retire "Inappropriate" Name*, N.Y. TIMES (June 20, 2020), <https://perma.cc/D9L7-QB76>.

154. *Id.*

155. Kristin M. Hall, *The Dixie Chicks Officially Change Their Name to The Chicks*, ASSOCIATED PRESS, June 25, 2020, <https://apnews.com/article/music-us-news-ap-top-news-entertainment-natalie-maines-81e0e08498b9acaa5e7f5eb2d85b39f6>.

156. *Id.*

157. Carpenter, *supra* note 113.

158. Lydia Saad, *U.S. Perceptions of White-Black Relations Sink to New Low*, GALLUP (Sep. 2, 2020), <https://perma.cc/CUZA-LR7V>; Jeffery M. Jones & Camille Lloyd, *Larger Majority Says Racism Against Black People Widespread*, GALLUP (July 23, 2021), <https://perma.cc/Z9A4-Y9FS>.

159. Jones & Lloyd, *supra* note 158.

The consumer investment model brings this value-based thinking into trademark law and encourages us to look around at the brands with which we choose (consciously or not) to surround and define ourselves. The choice to end the use of economically successful iconic marks confirms how brands reflect and shape our values. Professor James Boyd White encouraged us to reflect on how law functions as a value-laden persuasive rhetoric.¹⁶⁰ He described the work of lawyers as a creative process of persuasion analogous to advertising.¹⁶¹ Like laws, trademarks reflect value judgments, and through their words and imagery, they can unite like-minded citizens around core beliefs.

The consumer investment theory of trademarks embraces the idea that a brand is a symbol filled with meaning created by many contributors, including but not limited to the brand owners. The model encourages critical thinking about whether consumers associate a brand with specific values, and if so, how those values influence the brand's success and inspire the foundation of brand communities. By accounting for brand meaning and values, the consumer investment theory explains the dropping of racist imagery in a way that traditional law and economics cannot. It accounts for the fact that a company may choose to drop a mark that has been a reliable and economically successful source identifier for decades if it is concerned that consumers will be offended by its brand, embarrassed to wear the brand on a t-shirt or be seen with it in their grocery cart. In a space where authenticity and trust are critical currency, espousing values without living up to them can devastate brand integrity. If brand owners are to remain relevant to their consumers steeped in contemporary culture, they must be open to change as culture and values evolve. In moments of political and cultural upheaval, a brand owner must be prepared to respond, even if an act of creative destruction is the only solution to unconflicted consumer investment.

160. James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 688–92 (1985).

161. *Id.* at 687.