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Ballership

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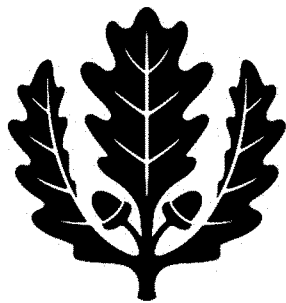
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Essay

Ballership

KIEL BRENNAN-MARQUEZ



Ballership

KIEL BRENNAN-MARQUEZ *

One hallmark of influential scholarship is good labeling.

“Property rules” and “liability rules.”¹

“Nudges.”²

“Sexual harassment.”³

“Originalism.”⁴

This is no accident. Scholarship trades in abstraction; its efficacy depends on the efficient transmission of complex ideas across space and time. Scholars cull the world’s messiness into digestible insights,⁵ and they package those insights in easily-remembered, reproducible form.

I don’t mean this pejoratively. As much as labels can seem glib or reductive,⁶ it’s hard to imagine doing coordinated intellectual work without them. A well-conceived label can be worth hundreds of pages of cautious, finely-wrought prose. Labels slash through the noise.⁷ They say to the reader: *trust me, I’ve done the hard work—now all that remains is spreading the word.*

* Freelance intellectual; Associate Professor, University of Connecticut School of Law. I would like to thank Peter Lindseth for his trenchant feedback, almost bordering on co-authorship, throughout the drafting process.

¹ See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

² See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2009).

³ See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979).

⁴ See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

⁵ See W. Bradley Wendel, *Explanation in Legal Scholarship: The Inferential Structure of Doctrinal Legal Analysis*, 96 CORNELL L. REV. 1035 (2011). See also Kieran Healy, *Fuck Nuance*, 35 SOCIO. THEORY 118 (2017).

⁶ See Kiel Brennan-Marquez, *Magic Words*, 23 WM. & MARY BILL RTS. J. 759 (2015) (criticizing the overemphasis on labels in equal protection jurisprudence).

⁷ Cf. Pamela S. Karlan, *Constitutional Law as Trademark*, 43 U.C. DAVIS L. REV. 385, 387–88 (2009) (exploring the role of labels and branding in constitutional litigation).

Mindful of these dynamics, I wish to anoint the sub-category of scholarship that yields especially useful labels with a laudatory label of its own: “ballership.” I selected this neologism for a few reasons, all of which reflect broader trends in the enterprise of scholarly labeling.

First, it’s catchy. You’re unlikely to forget it, even if—perhaps *especially* if—you find it ridiculous or loathsome. This is important, because most labels don’t get very far. For every label that manages to proliferate to the point of widespread use, many, many more are proposed. They just wither into obscurity. So catchiness is paramount, even if accompanied by negative emotions. For instance, you may be thinking: *Ballership? Is this intellectual vandalism? Why did anyone publish this essay? Why am I still reading it?* And you’re probably not alone. Bad news, though: the label has already grafted its way into your brain. You’re much more likely to transmit it further—perhaps to explain to a friend or colleague how catastrophically silly you found the idea—than you’d be to transmit a less-catchy alternative. For example, the label “x6skT8a” would not be likely to travel much at all.⁸ Nor would the label “scholarship with a pronounced moniker-salience quotient,” because—well, you get it.

Second, the label’s content telegraphs its meaning. There’s still room for ambiguity, of course. Hearing the word out of context, one might think: *scholarship about sports*. Or likewise, if it were pronounced in a slow drawl: *a seafaring vessel of an especially hip and fancy variety*. But in most settings, bound by normal patterns of late twentieth- and early twenty-first-century U.S. English, the (rough) significance of the label will be inferable from the word itself. To wit: it rhymes with scholarship, and it riffs on the idea of being a “baller.”⁹ Put those two things together, and it is at least clear that the label intends praise, even if the exact nature of the praise is unclear. Much like, in its own day, “antidisestablishmentarianism”—now *there’s a label*—clearly intended some sort of critique.¹⁰

Third, the label identifies a phenomenon that, if the enterprise succeeds, will seem to have “been there all along.” Although it’s certainly true that some scholarship—and some corresponding scholarly labels—purport to deliver genuine novelty, the more common ambition is humbler. It’s to name an aspect of the world that most domain-experts will already find familiar, and to clarify its nature or operation. For instance, when Paul Brest coined the term “originalism” in the early 1980’s, he was explicit about intending to describe, in snappy form, “the familiar approach to constitutional

⁸ At least among human interlocutors. For machine correspondence, a hash-string like this would presumably pose few difficulties. Relative to a natural language label, it may even be more wieldy.

⁹ *Baller*, URBAN DICTIONARY (Feb. 2, 2015), <https://www.urbandictionary.com/define.php?term=baller>.

¹⁰ *No, Antidisestablishmentarianism is Not in the Dictionary*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/no-antidisestablishmentarianism-is-not-in-the-dictionary> (last visited July 29, 2020).

adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters.”¹¹ Likewise, when Catharine MacKinnon pioneered the idea of sexual harassment as an instance of sex discrimination, she was trying to give analytic form—as legal injury—to a horrifyingly widespread experience.¹²

That labels typically pick out already-familiar phenomena does not make labeling easy. Very smart people can, and do, spend large portions of their careers toiling away in the pursuit of (relatively) small insights about (relatively) small corners of the world. But that is part of what makes scholarship, in its best form, at once modest and grand: the idea is to chisel away at problems piece-by-piece. In terms of legal theory, Dworkin’s idea of common law jurisprudence as a “chain novel” comes to mind.¹³ No single commentator, however brilliant, possesses unified insight into everything. Conceptual clarification is a goal we pursue together, in roughly organized concert, building on the work of previous generations.

Fourth, the label is modular. It lends itself to critique and reconstitution—through, among other things, the addition of qualifiers. You can imagine, in the near future, the work of an up-and-coming scholar being described as “proto-ballership,” or, in the case of a veteran crit, “meta-ballership.”¹⁴ It’s also easy to imagine sub-distinctions that mark themselves linguistically. “Normative ballership.” “Formalist ballership.” “Feminist ballership.”¹⁵ And so on.¹⁶ What exactly these categories consist of is, of course, a mystery still to explore—let alone to unravel.¹⁷ But the groundwork is well-lain. Just as “property rules” begot “quasi-property rules,”¹⁸ and originalism spawned an “intentional” variant,¹⁹ a “public meaning” variant,²⁰ and a “living” variant²¹—to name but a few—future generations of scholars will no doubt find many innovative extensions for the “ballership” concept.

¹¹ See Brest, *supra* note 4, at 204.

¹² See MACKINNON, *supra* note 3.

¹³ RONALD DWORKIN, *LAW’S EMPIRE* 228–32 (1986).

¹⁴ In my own view, much of Pierre Schlag’s scholarship (ballership?) fits this bill. See, e.g., Pierre Schlag, *The Law Review Article*, 88 U. COLO. L. REV. 1043 (2017).

¹⁵ See, e.g., Karen Levy, *Notes Toward the Elimination of Patriarchal Ballership* (in progress) (arguing that the very idea of “feminist ballership” may be a contradiction in terms, exploding the foundations of the original elaboration of ballership—in *Ballership*—by “introduc[ing] a subordinated sixth element that, once understood, unsutures the whole”).

¹⁶ One experimental category to consider is “prophetic ballership.” See, e.g., Peter Lindseth, *Ballership Avant La Lettre* (forthcoming, nunc pro tunc).

¹⁷ See Kiel Brennan-Marquez, *Ballership: A Reappraisal* (in progress).

¹⁸ Sally Brown Richardson, *Nonuse and Easements: Creating a Pliability Regime of Private Eminent Domain*, 78 TENN. L. REV. 1, 22 (2010).

¹⁹ See Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 2 (2009).

²⁰ See Eric Berger, *Originalism’s Pretenses*, 16 U. PA. J. CONST. L. 329 (2013).

²¹ JACK M. BALKIN, *LIVING ORIGINALISM* 3 (2011).

Fifth, and finally, there is an element of path-dependence, and more than a modicum of luck, to the widespread adoption of labels. It's impossible to know, *ex ante*, which labels will catch on. Which is to say: the ballership designation—the transmutation of scholarship into ballership—must be retroactive.²² Work that first appears to be mere scholarship may, with time, become more celebrated; and work that first seems promising toward ballership may, on further reflection, prove run-of-the-mill. As it relates to the immediate essay, then, my hope is that the core idea will prevail not just in substance but also in label, such that *Ballership*—the artifact, not the concept—may turn out, not merely going forward but *nunc pro tunc*, to be ballership the concept, too.

²² *Cf.* BERNARD WILLIAMS, MORAL LUCK (1981) (explaining that certain types of success can only be coherently judged in retrospect).