REDSKINS: THE PROPERTY RIGHT TO RACISM

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"Property rights serve human values. They are recognized to that end, and are limited by it."[1]

—Chief Justice Joseph Weintraub

Everyone has an opinion, from President Obama to Matthew McConaughey, about the Washington football team name. This Article comprehensively analyzes the legal and social issues surrounding the mascot controversy. I focus my inquiry on the interaction of trademark law and Indian law. I offer three primary contributions in this Article. First, the current mainstream conception of harm caused by the team name is subjective, and I argue that the harm caused by the team name and logo is objective, testable, and demonstrable. Psychological research shows that these images harm Native people. Second, the remedies offered by the Lanham Act are wholly inadequate. Under section 2(a) of the Act, "disparaging" trademarks are subject to cancellation of federal registration benefits. This does little to economically affect the value of the trademark, thereby having no bearing on changing the name. Finally, I suggest a legislative solution that applies real economic pressure to change the team name. Utilizing the tool of express federal preemption, I suggest an approach that directly undermines the economic value of the trademark by precluding trademark infringement suits against unlicensed users of the trademark. This creates real pressure to change the name. Ultimately, this issue directly confronts the doctrinal inquiry into the extent of property rights in intellectual property forms.

† Associate Professor of Law, Texas Tech University School of Law. Enrolled citizen of the Chickasaw Nation of Oklahoma. My thanks to Tracy Pearl, Howard Wasserman, Cassie Christopher, Robert Sherwin, Robert Killian, Keirsten Hamilton, and David Miles. Since I am opposed to the name and support the immediate removal of the name, I will not use it in this Article. Where it is used, it will be appropriately edited, e.g., "Redsk*n." I do use the full spelling in the title of the Article in order to aid researchers attempting to locate relevant articles on this issue.

1 State v. Shack, 277 A.2d 369, 372 (N.J. 1971).

TABLE OF CONTENTS

INTRODUCTION

Lily Faye Ollali[2] is five years old. She loves the color purple, ballet, her beaded butterfly barrette, and learning about wild animals. Especially cheetahs. She is my daughter. Wyatt Edwin Kilimpi,[3] my son, is two and a half. He loves to drum—on anything. Most of the time, he can be found running or drumming. Or both. When we are stationary, he cuddles in the nook of my left arm and gazes into the pages of the book we are reading. Right now, his favorite song is "Electric Pow Wow

2 Ollali is a Chickasaw word that means "laughter." It is her legal middle name. *Ollali*, CHICKASAW: AN ANALYTICAL DICTIONARY (1994).

3 Kilimpi is also a Chickasaw word meaning "strong." It is his legal middle name. *Kilimpi*, CHICKASAW: AN ANALYTICAL DICTIONARY (1994).

Drum" performed by A Tribe Called Red.[4] When played, he dances, drums, runs, and repeats.

One day, when I came home from work, Lily Faye bounded over to me, her dark blonde hair streaming through the air. As the excited hug ebbed, she took my hand and lead me over to show me what she did at school that day. I could see the pride welling up in the dark brown eyes she gets from her mother. It was November 20, 2015—the week before Thanksgiving. "Daddy! Look what I made at school!" she said, holding a piece of paper up to me. With a wide grin, I picked it up and saw a pre-drawn outline of a stereotypical Indian-looking woman. Long hair in braids, already inked black. Eagle feathers adorn parts of her clothing. Ears of corn and pottery lie around her bare feet. Tipis dot the landscape in the background. "It's an Indian girl! I colored her shirt purple, because I love purple, and I did the pants blue because you like blue." I noticed immediately that she had colored the skin of the paper Indian girl dark brown. Lily Faye's skin is not dark brown.

Since the day she was born, she has heard about her people and has lived as a modern Chickasaw little girl. Throughout the year, we head to southern Oklahoma to visit her relatives, attend stomp dances and pow wows, and eat traditional pashofa[5]—okay, not eating but *trying* it. We, as a family, walk through the land allotted to her great-great-grandmother decades after her ancestors were removed there in the 1830s.[6] At night, we say, "I love you" in our Chickasaw language. But, when she colors an Indian girl at her school, she creates something that is not herself. I wonder—and worry—what she sees when she looks in the mirror.

The same thing happens at the grocery store. She points to the Land 'O Lakes butter packaging, "Look! An Indian princess!" It happens again when we are looking for a movie to watch on Netflix, "Let's watch that one," she says, pointing excitedly to the animated movie about Pocahontas, "because there's an Indian in it!" Then, on Sunday morning, when the laundry is strewn across the living room floor, we are watching football. The television announces, "Welcome everybody. Thanks for joining us this Sunday morning. It's time for Redsk*ns versus the Saints." Then, "Daddy! Look! An Indian!" On the screen is the logo for the Washington football team, with the braid, black hair,

4 A TRIBE CALLED RED, ELECTRIC POW WOW DRUM (Radicalized Records 2013).

5 Pashofa is a traditional Chickasaw and Choctaw dish made from cracked corn, or hominy, and stewed pork. *See The Timeless Dish of Pashofa*, CHICKASAW NATION VIDEO NETWORK, https://www.chickasaw.tv/health/video/the-timeless-dish-of-pashofa/list/traditional-chickasaw-recipes-videos (last visited July 20, 2014).

6 *See* Indian Removal Act of 1830, ch. 148, 4 Stat. 411, 411–12 (1830); Treaty with the Chickasaw art. 2–8, 14, Oct. 20, 1832, 7 Stat. 381, 1832 WL 3593.

dark red skin, and eagle feathers. Again, I wonder—and worry—what she thinks about herself when she sees that image.

For me, a Chickasaw citizen and father of two blonde-haired citizens of the Chickasaw Nation, the mascot controversy is about the well-being of my children. It is about the way the world sees them—or does not see them. What this is not about is hurt feelings or how "words can never hurt me." These images, and the absence of other images of Native people in mainstream media, define Lily Faye, Wyatt, and me in fictional terms. They construct a box around who we are and what we are capable of doing and being. The worst part is that the law of property and trademark reinforces that box, to our collective detriment and sustained harm.

The controversy over the Washington professional football team name and logo reached a high point in 2014. Never before has the debate reached mainstream media and stayed there for such a sustained period of time. This is likely due, in part, to the significant popularity and presence of football in mainstream American culture, but other factors must have contributed. Social media-driven stories, movements, and media attention have certainly resulted in wider distribution of the debate. Also, it must be due to the personalities and sides involved.

The owner of the Washington football team, Dan Snyder, once famously stated that he will "NEVER" change the name—and "you can use caps."[7] Given the prominence of the name change issue in mainstream culture, opinions on the matter are not difficult to find. High profile cultural icons and political leaders have weighed in. President Obama expressed concern over the name,[8] while forty-nine senators signed their names to a letter expressing support for changing it.[9] Advocates for a name change have appeared on *The Daily Show* with a significant amount of fanfare created simply by filming Washington football team fans interacting with actual Indians.[10] A number of

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7 Erik Brady, *Daniel Snyder Says Redskins Will Never Change Name*, USA TODAY (May 10, 2013, 8:14 AM), http://www.usatoday.com/story/sports/nfl/redskins/2013/05/09/washington-redskins-daniel-snyder/2148127.

8 *See* David Jackson, *Obama Again Urges Redskins Name Change*, USA TODAY (Nov. 6, 2015, 7:11 AM), http://www.usatoday.com/story/theoval/2015/11/06/obama-washington-redskins-adidas-tribal-nations-conference/75281088; Theresa Vargas & Annys Shin, *President Obama Says, 'I'd Think About Changing' Name of Washington Redskins*, WASH. POST (Oct. 5, 2013), https://www.washingtonpost.com/local/president-obama-says-id-think-about-changing-name-of-washington-redskins/2013/10/05/e170b914-2b70-11e3-8ade-a1f23cda135e_story.html.

9 *See* Mark Maske, *Senate Democrats Urge NFL to Endorse Name Change for Redskins*, WASH. POST (May 22, 2014), https://www.washingtonpost.com/sports/senate-democrats-urge-nfl-to-endorse-name-change-for-redskins/2014/05/22/f87e1a4c-e1f1-11e3-810f-764fe508b82d_story.html.

10 *See, e.g.*, Comedy Central, *The Daily Show - The Redskins' Name - Catching Racism*, YOUTUBE (Sept. 26, 2014), https://www.youtube.com/watch?v=loK2DRBnk24; Ian Shapira, *'Daily Show' Airs Segment Pitting Redskins Fans Against Native Americans*, WASH. POST (Sept. 26, 2014), https://www.washingtonpost.com/local/daily-show-airs-segment-pitting-redskins-

prominent journalists also have refused to use the team name,[11] while on-air broadcasters of Washington games have expressed a variety of opinions concerning their own usage of the name during telecasts.[12] Noted athletes, actors, coaches, and individuals from all walks of life have expressed commentary on the matter.[13]

But, the team name and logo are trademarked. Now, the federal statute regulating trademarks, the Lanham Act, provides for the cancellation of trademark *registration* if the mark is disparaging.[14] A mark is considered disparaging when it identifies a certain group of people and a substantial composite of that group feels that the mark is disparaging.[15] I have written elsewhere about my view of the name.[16] This Article, however, presents a very different approach to thinking about the dispute. I offer three primary contributions in this article. First, the current mainstream conception of harm caused by the team name is that the harm is subjective, and I argue that the harm caused by the team name and logo is objective, testable, and demonstrable. Second, the remedies offered by the Lanham Act are wholly inadequate. Finally, I suggest a legislative solution that applies real economic pressure to change the team name.

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fans-against-native-americans/2014/09/25/f5d082da-44e3-11e4-b437-1a7368204804_story.html; Mary Elizabeth Williams, *What "The Daily Show's" Redskins Segment Didn't Show*, SALON (Sept. 29, 2014, 2:45 PM), http://www.salon.com/2014/09/29/what_the_daily_shows_redskins_segment_didnt_show.

11 *See, e.g.*, Chris Lingebach, *Peter King's 'The MMQB' No Longer to Use 'Redskins' Nickname*, CBS DC (Aug. 29, 2013, 8:04 PM), http://washington.cbslocal.com/2013/08/29/peter-kings-mmqb-will-no-longer-use-redskins-nickname-in-writing.

12 *See, e.g.*, Scott Allen, *Phil Simms Will Try to Avoid Saying Redskins, But Says 'It's Not the Easiest Habit to Break'*, WASH. POST: D.C. SPORTS BOG (Sept. 25, 2014), https://www.washingtonpost.com/news/dc-sports-bog/wp/2014/09/25/phil-simms-will-try-to-avoid-saying-redskins-but-says-its-not-the-easiest-habit-to-break; *Two Major NFL Announcers Say They Won't Use Term 'Redskins' on the Air*, BLAZE (Aug. 18, 2014, 8:30 PM), http://www.theblaze.com/stories/2014/08/18/two-major-nfl-announcers-say-they-wont-use-term-redskins-on-the-air.

13 *See, e.g.*, Sean Gregory, *Richard Sherman: The NFL Would Not Have Banned A Donald Sterling for Life*, TIME (May 7, 2014), http://time.com/91291/richard-sherman-the-nfl-would-not-have-banned-a-donald-sterling-for-life; Jonathan Lehman, *Phil Jackson Rips Dan Snyder, Backs Redskins Name Protest*, N.Y. POST (Nov. 4, 2014, 1:25 PM), http://nypost.com/2014/11/04/phil-jackson-rips-dan-snyder-backs-redskins-name-protest; Dan Steinberg, *Sarah Palin Backs Mike Ditka's Defense of the Redskins*, WASH. POST: D.C. SPORTS BOG (Aug. 25, 2014), https://www.washingtonpost.com/news/dc-sports-bog/wp/2014/08/25/sarah-palin-backs-mike-ditkas-defense-of-the-redskins; Mike Wise, *Mike Carey, Longtime NFL Referee, Avoided Washington's Games Because of the Name*, WASH. POST (Aug. 20, 2014), https://www.washingtonpost.com/sports/redskins/mike-carey-longtime-nfl-referee-avoided-washingtons-games-because-of-the-name/2014/08/20/d6dae602-27b2-11e4-86ca-6f03cbd15c1a_story.html.

14 Lanham Act, § 2(a), 15 U.S.C. § 1052 (2012).

15 *See* Pro-Football, Inc. v. Harjo, 284 F. Supp. 2d 96, 124 (D.D.C. 2003).

16 M. Alexander Pearl, *How to Be an Authentic Indian*, 5 CALIF. L. REV. CIR. 392 (2014).

This Article proceeds in four parts. Part I lays the background of the mascot controversy by going through the major talking points of the respective sides, and relevant sociological and psychological studies on the demonstrably harmful effects of mascots. Next, Part II focuses on the statutory disparagement framework under the Lanham Act and briefly examines the history of the two pieces of litigation seeking cancellation of federal trademark registration pursuant to that provision. Here, I contend that even a successful disparagement claim—while symbolically very important and groundbreaking—is an inadequate judicial remedy and insufficient to compel a change in the name. In Part III, I consider the legislative options by analyzing the two bases for congressional authority to enact the legislation: the Commerce Clause (relating to trademark regulation) and Indian Plenary Power. This Part also examines previous unsuccessful attempts to legislate the team's trademark rights. At the conclusion of Part III, I propose an improved legislative approach that creates pressure to change the team's name. Finally, I conclude with a critical deconstruction of the inadequacy of legislative and judicial remedies in the larger framework of property's operation in contemporary American life as experienced by marginalized groups, including Native people.

I. THE MASCOT CONTROVERSY

Everyone has an opinion about the nature of the mascot and name of the professional football team in Washington, D.C. When I make a new acquaintance, and they find out that I am an Indian, they typically ask my view of the name early on in our interaction. In no way do I begrudge this inquiry—I welcome it. It provides an opportunity for exchange and perhaps a rare opportunity for someone to actually hear from an Indian on the matter. In fact, the test developed by the federal court to determine whether a trademark is disparaging actually involves, or could involve, my subjective opinion. In other words, my view could be legally relevant. This is misguided and needlessly subjects the legal issue to improper and unnecessary subjectivity. Before addressing that claim, it is necessary to unpack the arguments pertaining to mascot critics and mascot defenders. The most heartfelt defense of the name comes from the owner of the team, Dan Snyder.

A. *Defending a Name and Image*

Snyder, the owner of the Washington, D.C. professional football team, has explained his reasoning in keeping the name in this way.[17] In his 2013 letter to fans, Snyder develops a two-pronged narrative to defend the name: (1) history, and (2) family.[18] He begins by focusing on the time-honored tradition of the team name and his childhood memories of attending his first game.[19] The letter describes the nostalgia that most of us feel when remembering a moment early on in our lives where we felt joy and connection. In it, he also references his father and their bond born out of the experience of those football games and the community embedded in cheering for that team.[20] As a piece of rhetoric, these are ideal narrative themes: (a) nostalgic childhood joy, and (b) the father-son connection rising from sport-watching. Then, to end the first movement of his letter, he clearly sets forth a thesis: "Our past isn't just where we came from—it's who we are."[21] An immediate interpretation of this statement suggests that Snyder's love of the Washington team (name) is fundamental to his identity as a person. A generalized point can be drawn from his statement. For example, in my own life, as a graduate of the University of Oklahoma,[22] I come from a long line of family members who have attended and graduated from that institution. That history and lineage not only connects us as a family, but we embrace it as a part of our individual identities as graduates of that University. There is an immediate connection based in my family's history with the University, but also in those University traditions, longevity, and community that stretches beyond both blood and distance.

Snyder calls upon this community of Washington fans by equating his own experience with their own touchstone memories of the team.[23] The story of watching his first game with his father is a replicated memory for fans throughout the country—even for fans of other teams. It impliedly asks the question of how the reader would be impacted by those memories being erased through a team name change while simultaneously being called a racist for having simply attended games

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17 Letter from Washington Redskins Owner Dan Snyder to Fans, WASH. POST (Oct. 9, 2013) [hereinafter Letter], https://www.washingtonpost.com/local/letter-from-washington-redskins-owner-dan-snyder-to-fans/2013/10/09/e7670ba0-30fe-11e3-8627-c5d7de0a046b_story.html.

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 Boomer Sooner!! *See What is a Sooner?*, U. OKLA., http://www.soonersports.com/ViewArticle.dbml?ATCLID=208806115 (last visited July 23, 2016).

23 Letter, *supra* note 17.

with your father. Change is always hard when it requires self-reflection and critique—even more so when the demand for change is based on an allegation that the person is racist, offensive, or harmful to others.

Snyder then engages in the other primary narrative theme: history. He lays out a historical basis for the name and states that Indians created and supported it from the outset.[24] This idea employs a type of rhetorical estoppel that since Indians developed the name and logo, we are unable to now critique or complain about its existence. In addition, it creates an impression that the name and logo *does* speak for or represent Native people. From the historical perspective, Snyder moves to "empirical data" on the current opinions of Indians and non-Indians regarding the team name.[25] He cites to two surveys (both of which were utilized in the litigation brought by Native American plaintiffs challenging the trademark under Section 2(a) of the Lanham Act) in order to prove that no one really finds the name offensive—including Native people.[26] In addition, Snyder directly quotes from the opinion of Robert Green, a "recently retired Chief of the Fredericksburg-area Patawomeck Tribe," in order to confirm that *real* Indians do not find the name offensive.[27]

To close the letter, Snyder returns to the two primary narrative themes of history and family by reiterating the age of the franchise (eighty-one years) and the joy he feels when sharing his love of the team with his own daughters.[28] Throughout the letter, Snyder appealed to family, tradition, and identity in order to broaden his message and develop support. Of course, Snyder's defense of the name is not the lone voice—the team name has myriad advocates from all walks of life.

A frequent opening critique of this debate over a football team name is that it is a consequence of an emerging overly politically correct society.[29] This political correctness has the effect of softening one's emotional and psychological fortitude by coddling them. In other words, the world is a cold and harsh place, and that reality should not be concealed from people. This idea of creating an artificially pleasant existence for young people resonates in an era of "helicopter parenting"—where parents make the world encountered by their

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24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *See, e.g.*, Robert McCartney, *Despite Redskins' Claims, Concern Over Name Isn't Political Correctness Run Wild*, WASH. POST (Feb. 16, 2013), https://www.washingtonpost.com/local/despite-redskins-claims-concern-over-name-isnt-political-correctness-run-wild/2013/02/16/cee9225a-77d8-11e2-8f84-3e4b513b1a13_story.html.

children perpetually pleasant and harmless.[30] Doing this conveys a false sense of security, creating an expectation in children that is not experienced when the child is beyond the reach of the parent.[31] In addition, this line of thinking parallels the debate over the rise of "micro-aggressions" and the extent to which unintentional comments may be construed as offensive, prejudicial, discriminatory, racist, or sexist.[32] This line of argument can be summarized as, "Toughen up."[33]

Another line of argument is the idea that there are bigger problems in Indian Country that warrant greater attention.[34] Without question, Indian Country faces a variety of grave issues. The national statistics on Native American populations are staggering. In 2013, almost thirty percent of all Indians live in poverty—nearly twice the national average.[35] Unemployment rates in Indian Country have stayed in double digits since 2008, reaching fifteen percent in 2010.[36] In comparison, the national unemployment rate in 2016 is about five percent.[37] High school graduation rates are far lower for Indians than other groups.[38] A 2008 study commissioned by the United States Department of Education found that Indians make up little more than one percent of students enrolled in post-secondary educational institutions, despite making up more than four percent of the population.[39] The most chilling statistics

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30 *See* Patt Morrison, *How 'Helicopter Parenting' Is Ruining America's Children*, L.A. TIMES (Oct. 28, 2015, 5:00 AM), http://www.latimes.com/opinion/op-ed/la-oe-morrison-lythcott-haims-20151028-column.html.

31 *Id.*

32 *See* Conor Friedersdorf, *The Rise of Victimhood Culture*, ATLANTIC (Sept. 11, 2015), http://www.theatlantic.com/politics/archive/2015/09/the-rise-of-victimhood-culture/404794.

33 My thanks to Professor Cassie Christopher for summarizing this line of argumentation so succinctly.

34 *See, e.g.*, Chuck Carroll, *Redskins: Doesn't Congress Have More Important Issues to Worry About than Our Name?*, CBS DC (Feb. 10, 2014, 11:34 AM), http://washington.cbslocal.com/2014/02/10/redskins-doesnt-congress-have-more-important-issues-to-worry-about-than-our-name; Travis Waldron, *Should We Focus on Bigger Issues Facing Native Americans Than the 'Redskins' Name?*, THINK PROGRESS (Oct. 18, 2013), http://thinkprogress.org/sports/2013/10/18/2803261/focus-bigger-issues-facing-native-americans-redskins.

35 *Facts for Features: American Indian and Alaska Native Heritage Month: November 2014*, U.S. CENSUS BUREAU (Nov. 12, 2014), http://www.census.gov/newsroom/facts-for-features/2014/cb14-ff26.html.

36 Algernon Austin, *Native Americans Are Still Waiting for an Economic Recovery*, ECON. POL'Y INST. (Oct. 29, 2013), http://www.epi.org/publication/native-americans-are-still-waiting-for-an-economic-recovery.

37 *Databases, Tables & Calculators by Subject*, BUREAU LAB. STAT., http://data.bls.gov/timeseries/LNS14000000 (last updated Aug. 30, 2016, 10:10:59 PM).

38 EXEC. OFFICE OF THE PRESIDENT, 2014 NATIVE YOUTH REPORT 5 (2014), https://www.whitehouse.gov/sites/default/files/docs/20141129nativeyouthreport_final.pdf

39 JILL FLEURY DEVOE ET AL., U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, STATUS AND TRENDS IN THE EDUCATION OF AMERICAN INDIANS AND ALASKA NATIVES: 2008 126 (2008), http://nces.ed.gov/pubs2008/2008084.pdf; Peter A. Leavitt et al., "*Frozen in Time*": *The Impact of Native American Media Representations on Identity and Self-Understanding*, 71 J. SOC. ISSUES 39, 42 (2015).

deal with public safety and rate of violence for Native people. One in three Native women has reported being raped in her lifetime.[40] Native youth commit suicide at the highest rate among all ethnic groups.[41] Against such a roster of societal problems, the claim that one has hurt feelings from a football logo or name seems insignificant. To be sure, devoting legal, economic, and political resources towards such a cause would appear irrational.

Finally, a prominent and pervasive argument is that the logo and team name actually honor Indians rather than disparage us.[42] This idea finds its origins in the well-worn stereotypical traits of Native people: brave warriors, skilled in battle, intimidating, possessing physical prowess, and fierce in nature.[43] The claim is that the image does not represent an unflattering depiction of an Indian, but instead emphasizes those desirable traits possessed by Native people. For mascot critics, one problematic aspect of this argument is that some colleges and universities have contractual relationships with Native American tribes or groups that allow for the team to use their name or likeness or to simply give their approval for the use of a Native name or logo.

For example, Florida State University has a contractual relationship with the Seminole Tribe of Florida that grants permission to use the name "Seminoles" as the University mascot.[44] The mascot's performance before kickoff of football games is pretty spectacular.[45] A Florida State student, wearing war paint and other items (which may have been selected or suggested through a healthy and cooperative relationship with the Seminole Tribe of Florida) comes riding in on a horse (also bearing paint) and throws a *flaming* spear, lined with feathers, into

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40 *Tribal Communities*, U.S. DEP'T JUST., https://www.justice.gov/ovw/tribal-communities (last updated Dec. 14, 2015).

41 *See* CAROLINE JIANG ET AL., CTR. DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR HEALTH STATISTICS, RACIAL AND GENDER DISPARITIES IN SUICIDE AMONG YOUNG ADULTS AGED 18–24: UNITED STATES, 2009–2013 1 (2015), http://www.cdc.gov/nchs/data/hestat/suicide/racial_and_gender_2009_2013.pdf.

42 *See* Naomi Schaefer Riley, *Pride or Prejudice?*, WALL ST. J. (July 31, 2015, 3:28 PM), http://www.wsj.com/articles/pride-or-prejudice-1438370927.

43 *See* Letter, *supra* note 17.

44 *Relationship with the Seminole Tribe of Florida*, FLA. ST. U., https://unicomm.fsu.edu/messages/relationship-seminole-tribe-florida (last visited Aug. 15, 2016). In addition, it should be noted that the Seminole Nation of Oklahoma adamantly disapproves of the use of the name by Florida State University. *See* Chuck Culpepper, *Florida State's Unusual Bond with Seminole Tribe Puts Mascot Debate in a Different Light*, WASH. POST (Dec. 29, 2014), https://www.washingtonpost.com/sports/colleges/florida-states-unusual-bond-with-seminole-tribe-puts-mascot-debate-in-a-different-light/2014/12/29/5386841a-8eea-11e4-ba53-a477d66580ed_story.html.

45 *See* Florida State Seminoles, *FSU Introduction: Notre Dame Game*, YOUTUBE (Oct. 21, 2014), https://www.youtube.com/watch?v=QQcNEPulVO8; *see also Osceola and Renegade*, WIKIPEDIA, https://en.wikipedia.org/wiki/Osceola_and_Renegade (last updated May 23, 2016, 12:47 PM).

midfield.[46] Although I have never witnessed this in person, it must be an attention-grabbing event that effectively whips the home crowd into a frenzy—it helps that the stadium loudspeakers pump the FSU War Chant at the same time.[47]

To make things more complicated, some Native American high schools—those located on a reservation serving a population of only, or almost all, Indians—use Native names and images as their mascot. For example, Haskell Indian Nations University, a Bureau of Indian Education funded and operated college serving Native students located in Lawrence, Kansas, uses the team name "Indians."[48] Indeed, the logo depicts a stereotypical Plains Indian wearing a headdress.[49] To be clear, a school run by Indians, attended by Indians, elects to use a mascot that is an *Indian*. Understandably, mascot defenders ask whether this too offends and disparages Indians when the Indians are the ones using an allegedly stereotypical and demeaning image.

B. *Defending a People*

Mascot critics speak with general unanimity in responding to these arguments. At the outset, critics suggest that a football team's name, no matter how beloved, should not be elevated over the well-being of actual people.[50] To the extent that harm or offense is caused by such a logo, the usage should yield due to the harm suffered by the subject population. While some characterize this issue as haywire political correctness, critics see this as the dominant culture's perpetuation of problematic stereotypes that harm Indians in the present day.[51] There are historical examples of previous problematic cultural practices being retired because of their insensitivity or offensive nature. For example, blackface—the practice of darkening the skin color of an actress to

46 *See* Florida State Seminoles, *FSU Introduction: Notre Dame Game*, YOUTUBE (Oct. 21, 2014), https://www.youtube.com/watch?v=QQcNEPulVO8.

47 *Id.*

48 HASKELL INDIAN NATIONS U., http://www.haskellathletics.com/f/Quick_Facts.php (last visited Mar. 8, 2016).

49 *Id.*

50 *See, e.g.*, Travis Waldron, *If You Want to Understand Why Mascots like 'Redskins' Are a Problem, Listen to This 15-Year-Old Native American*, THINKPROGRESS (July 23, 2014), https://thinkprogress.org/if-you-want-to-understand-why-mascots-like-redskins-are-a-problem-listen-to-this-15-year-old-native-5cb0bf24751e#.hi1ch3gl2. ("The amount of pain felt by our Native youth outweighs the pain of any dedicated racist mascot fans by an immeasurable amount . . . . It's time for a change.").

51 *See* American Psychological Association, Resolution Recommending the Immediate Retirement of American Indian Mascots, Symbols, Images, and Personalities by Schools, Colleges, Universities, Athletic Teams, and Organizations (June 2001), https://www.apa.org/about/policy/mascots.pdf.

portray an African-American—is no longer tolerated as appropriate—even in satire.[52]

Most of the arguments against the name stem from a moral place, or a variation on the claim that we have had our culture misappropriated and purposefully misconstrued to the benefit of majoritarian white American culture. In this fashion, the argument claims that the logo/name causes harm or is simply wrong. This is the point at which the two sides speak past each other. In essence, the two sides do not exist on the same plane of reality—they disagree about fundamental facts, like the existence of white privilege, misappropriation of marginalized peoples' culture, or any notion that Horatio Alger's story of *Ragged Dick* might not *actually* be an accurate picture of America.[53]

In response to the argument that time, energy, and money should be spent on more important issues in Indian Country, there is no rule that requires problems to be addressed in any particular order. Nor is there any contention that multiple goals cannot be pursued at once—and that they might even complement one another. One cannot avoid the interest and media attention generated by this dispute. Indian Country, with roughly four percent of the American population, would have a difficult time building from scratch a grassroots media campaign to promote this issue. So, since the debate is already of national interest, Indian Country would be remiss in ignoring the attention focused upon this particular issue. Instead, this presents an opportunity—albeit one that was perhaps not contemplated or intended. The fact that the President of the United States, forty-nine senators, and countless other prominent individuals have taken the time to develop and express an opinion on the matter cannot be ignored.

In addition, the critique that there are more important issues in Indian Country presupposes that there is no real harm here. Simply because the harm may be intangible or not directly connected to other ills in Indian Country does not operate as evidence that the mascot is not harmful. That is what progress means; opinions change about things in society that were once viewed as healthy and are now viewed as quite harmful, like smoking cigarettes. As described in the next Section, it is quite clear that the harm done is more than subjectively hurt feelings.

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52 *See* Stereo Williams, *Dear White People: Blackface Is Not OK*, DAILY BEAST (Oct. 28, 2015, 7:37 AM), http://www.thedailybeast.com/articles/2015/10/28/dear-white-people-blackface-is-not-ok.html; *cf.* Stephen Garrett, *Why Robert Downey Jr. Can Get Away with Blackface*, ESQUIRE (Aug. 12, 2008), http://www.esquire.com/entertainment/movies/a4792/tropic-thunder-0808.

53 *See generally* HORATIO ALGER, JR., *Ragged Dick*, *in* RAGGED DICK AND STRUGGLING UPWARD (Carl Bode ed., Penguin Books 1985) (1868).

Finally, critics resoundingly reject the idea that the logo honors Indians.[54] While the logo may not be overtly racist, it cements longstanding biases and problematic associations with Indians. In addition, it misappropriates some Native cultures and encourages fans to do so as well. For example, the headdress is a sacred item for many tribal peoples. For non-Indians to wear fake manifestations of it during a football game desecrates a religion, culture, and worldview. While the team itself may not use headdresses, the use of a Native logo and iconography invites and welcomes fans to do the same.

C. *Objective vs. Subjective Harm*

One purpose of this Article is to directly address one particular aspect of the mascot divide. That disagreement points to the subjectivity of one's perception and the difficulty of seeing the world through someone else's experiences. There is a substantial disconnect in the mascot defenders' argument leading to the conclusion that the mascot critics' claims are wholly subjective. In reality, I contend the harm caused by the mascot is not subjective. The detrimental effects of this mascot/name, and others like it, are significant, and measurable—however, these effects are not necessarily intuitive *or* tangible, which is exactly part of the problem.

Dr. Stephanie Fryberg is a professor of Psychology and American Indian Studies.[55] She focuses her research on the effects of social representations on Indians.[56] In *Of Warrior Chiefs and Indian Princesses: The Psychological Consequences of American Indian Mascots*, Dr. Fryberg poses the question simply and clearly: "Are American Indian mascots a positive way to honor and include American Indians or a harmful and negative stereotyping of American Indians?"[57] Fryberg's research is

54 *See, e.g.*, National Congress of American Indians, *Proud To Be (Mascots)*, YOUTUBE (Jan. 27, 2014), https://www.youtube.com/watch?v=mR-tbOxlhvE; *see also* Adrienne K., *10 Examples of Indian Mascots "Honoring" Native Peoples*, NATIVE APPROPRIATIONS (Dec. 8, 2013), http://nativeappropriations.com/2013/12/10-examples-of-indian-mascots-honoring-native-peoples.html; Adrienne K., *WaPo's New Redsk*ns Survey: Faulty Data and Missing the Point*, NATIVE APPROPRIATIONS (May 19, 2016), http://nativeappropriations.com/2016/05/wapos-new-redskns-survey.html; *How 'Indian' Mascots Oppress*, NATIVE CIRCLE, http://www.nativecircle.com/mascots.html (last visited Sept. 23, 2016).

55 *See* University Biographical Page of Stephanie Fryberg, U. WASH., https://ais.washington.edu/people/stephanie-fryberg (last visited Mar. 8, 2016).

56 *Id.*

57 Stephanie A. Fryberg et al., *Of Warrior Chiefs and Indian Princesses: The Psychological Consequences of American Indian Mascots*, 30 BASIC APPLIED SOC. PSYCHOL. 208, 208 (2008).

groundbreaking both in its actual empirical findings as well as the fact that the inquiry into the effects of mascots had never been examined.[58]

One possibility suggested by Fryberg is that Indian mascots could "elicit both positive associations and negative psychological effects for American Indians."[59] She explains that this could be the case where mascots reinforce certain positive traits associated with Indians, i.e., brave, strong, and athletic, while also operating as "reminders of the limited ways in which American Indians are seen by mainstream society."[60] As Fryberg's research shows, Indian representations in mass media are nearly non-existent. My concern, as a Chickasaw citizen and father to two more, is whether these limited representations are harmful to Lily Faye and Wyatt in some intangible fashion. Does it matter that Lily Faye *loves* Pocahontas's beautiful singing voice, compassion for everyone, and ability to commune with animals? Does that positive association render the image neutral, or even good? Or does it remain inherently stereotypical and limiting? Fryberg's discussion of relevant psychological theory and empirical research provides answers to my fears.

1. Stereotype and Invisibility

Fryberg's paper begins with an introduction to the relevant "conceptual framework[s]" that she utilized.[61] The three relevant concepts are: (1) stereotype accessibility and threat, (2) social representation, and (3) social identity. The existence and functioning of stereotypes are instrumental to this paper and understanding Fryberg's research. A stereotype is a "cognitive tool[] that people use to form impressions of others."[62] Prominent American writer and media critic Walter Lippmann puts it succinctly by characterizing stereotypes as the "pictures in [our] head[s] of the world beyond [our] reach."[63] This is particularly applicable to Indians given (a) our low percentage of the

58 *Id.* at 209. Fryberg states that the article "provide[s] the first empirical assessment of whether the use of American Indian mascots by professional sports teams (e.g., Cleveland Indians) or academic institutions (e.g., University of Illinois Fighting Illini) has psychological consequences for American Indian students." *Id.*

59 *Id.* at 208.

60 *Id.* (Dr. Fryberg's article identifies four conceptual frameworks. For the purposes of this Article, I have condensed these to three conceptual frameworks to enhance readability, brevity, and to emphasize the key relationships between her compelling points and the goals of this Article).

61 *See id.* at 209.

62 *Id.*

63 WALTER LIPPMANN, PUBLIC OPINION 21 (Greenbook Publications 2010) (1922), *cited in* Fryberg et al., *supra* note 57, at 209.

overall United States population[64] and (b) the isolated nature of most Indian population centers in the United States.[65] These factors result in the common occurrence of non-Indians having never met an Indian in real life.

Since direct contact with Indians is rare, non-Indians develop stereotypes of Native people through social representations.[66] Stereotypes are even more active in the context of Native people due to the paucity of media representations of Indians. In a given day, or in one single moment, we experience a multitude of media images and messages. In the United States, 98.9% of homes have a television and 92.6% of people watch it regularly.[67] The internet has changed everything and perhaps matters more than television in terms of exposure to mass media. Census data reveals that 78.5% of homes have a computer—with that number above eighty percent for people ages fifteen to sixty-four.[68] When looking specifically at internet use, more than seventy-seven percent of the homes in that same age group have home subscriptions to high-speed internet access.[69] In 2015, the Pew Center determined that eighty-four percent of adults use the internet.[70] Even these numbers do not capture the full extent of mass media's reach given the market permeation and adoption of smartphones. As of 2015, almost two-thirds of all Americans own a smartphone.[71] Media and messages are pervasive, and developing an understanding of the role they play in forming stereotypes is critical to understanding their impact.

Two aspects of mass media are especially relevant for minority groups: (a) the quantity of images, and (b) the quality.[72] The relevance of

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64 *See FFF: American Indian and Alaska Native Heritage Month: November 2015*, U.S. CENSUS BUREAU, https://www.census.gov/newsroom/facts-for-features/2015/cb15-ff22.html (last updated Feb. 9, 2016); *2010 Census Population and Housing Tables (CPH-Ts)*, U.S. CENSUS 2010 (Dec. 19, 2013), http://www.census.gov/population/www/cen2010/cph-t/cph-t-6.html.

65 *See* DEVOE ET AL., *supra* note 39, at 12; Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 39 (1993). In 2000, approximately forty-seven percent of Native people lived on reservations, which are generally isolated from other population centers. *See* DEVOE ET AL., *supra* note 39, at 12–15.

66 *Id.*

67 Leavitt et al., *supra* note 39, at 41 (2015).

68 THOM FILE & CAMILLE RYAN, U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES: 2013 3 (2014), http://www.census.gov/content/dam/Census/library/publications/2014/acs/acs-28.pdf.

69 *Id.*

70 *See* Andrew Perrin & Maeve Duggan, *Americans' Internet Access: 2000–2015*, PEW RES. CTR. (June 26, 2015), http://www.pewinternet.org/2015/06/26/americans-internet-access-2000-2015.

71 *See* Aaron Smith, *Chapter One: A Portrait of Smartphone Ownership*, PEW RES. CTR. (Apr. 1, 2015), http://www.pewinternet.org/2015/04/01/chapter-one-a-portrait-of-smartphone-ownership.

72 *See* Leavitt et al., *supra* note 39, at 40.

the quality of media representations is obvious—the more negative associations portrayed, the more likely it is for members and non-members of the group to have negative stereotypes of that group. In other words, the pictures in our head are already formed and color our future actions and current opinions regarding that person or group of people. The quantity matters for purposes of demonstrating to both members of the minority group depicted, as well as non-members, what characteristics are expected of, or allowed for, that group.

Analysis of mass media content reveals that among primetime television and popular films, appearance of Indian "characters ranges from no representation to 0.4% of characters being Native American."[73] In addition, "less than 1% of children's cartoon characters and 0.09% of video game characters are Native American."[74] Content analysis also demonstrates that those few representations usually depict Indians "as 18th and 19th century figures."[75] If the lone images of Indians presented consistently show us with black hair, dark skin, and living in the 1700s and 1800s, then it will be all the more difficult for someone who has never met an Indian to accept that I am an Indian because I do not fit any of those characteristics. The fact that I wear a suit (as opposed to breach cloth—as is depicted on the covers of romance novels involving us), drive an Infiniti, enjoy a half-caf vanilla cappuccino at Starbucks, and laugh my ass off at *Deadpool*[76] creates a *seriously* confusing experience for people meeting an Indian in real life for the first time. When Indians are shown as only having a few traits or behavioral characteristics, then that only serves to reinforce those very limited stereotypes.[77] The combined effect of the minimal representations and the solely historic nature of the images result in Native people being invisible most of the time and, alternatively, "frozen in time" when visible.[78]

The quantity of images is relevant for more than demonstrating the reinforcement of stereotypes held by individuals. Indeed, it matters in the context of how a person from the minority group develops their self-identity. "Social representations are defined as a substratum of images, assumptions, and public meanings that are taken for granted and widely distributed. Social representations help individuals make sense of their past, present, and future by providing a shared language."[79] Social representation theory eschews the inquiry regarding the

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73 *Id.* at 42.
74 *Id.*
75 *Id.*
76 DEADPOOL (20th Century Fox 2016).
77 *See* Fryberg et al., *supra* note 57, at 210.
78 Leavitt et al., *supra* note 39, at 43.
79 Fryberg et al., *supra* note 57, at 210.

positive/negative associations by images. Instead, it examines the role of the representations in creating and sustaining a common language of culture and a shared understanding of the world.[80] Psychologists have suggested that social representations form the basis of how we develop our self-identity.[81]

Related to the role of social representations is social identity theory. Myriad psychologists claim that people define themselves in relation to their social categories.[82] In addition, individuals are understood by others through the lens of these social categories, which are influenced by the social representations that exist in mass media.[83] For minority groups that are relatively invisible, this is especially important. For example, a person who has a wide range of social representations in mass media has a greater ability to move between those representations and define themselves in a multi-faceted way. In addition, the conception of that person by others is not constrained by the limited portrayal of that person's group representations in mass media. With regard to Native people,

> if an American Indian university student wants to be recognized as a strong and an able student, but others within the university context think about American Indians primarily in terms of images from sports rituals and Hollywood films, then the student may well experience difficulty constructing and maintaining a "good student" identity. The difficulty ensues because "good student" simply does not come to mind when thinking about American Indians.[84]

This research is why, when I look at my daughter and son, I worry and wonder about two things. First, what do they see when they look in the mirror? Do they see an Indian? Or, do they see a non-Indian because all the representations that communicate with them via mass media tell them that Indians do not look like them? Second, what do others see when they look at them? Do they see Indians? Or, when they find out that Lily Faye and Wyatt are Indians, do they respond with, "Really? You don't look Indian," or "How much Indian are you?" Those are the comments that undermine their self-identification and constrain their sense of "achievement-related possible selves."[85] Ultimately, I want what every parent wants—for their children to be safe, happy, and confident people. Dr. Fryberg's empirical research specifically examines this question.

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80 *See id.*
81 *See id.*
82 *See id.*
83 *See id.* at 210–11.
84 *Id.* at 210.
85 *Id.* at 214.

2. Data

Fryberg's empirical research asks two fundamental questions: (1) what associations are triggered when Native students are shown Indian mascots and other media representations, and (2) what are the ramifications of the exposure to these images for Indian students' (a) feelings of self-worth, (b) community worth, and (c) potential "achievement-related possible selves."[86] These questions were addressed through four studies conducted by Fryberg.

In Study 1, forty-eight Native high school students were given the following: a picture of Chief Wahoo, the mascot for the Cleveland Indians Major League Baseball team,[87] a picture of Disney's animated Pocahontas, and a block of text containing the statistics that fifty percent to fifty-five percent of Indian high school students drop out of high school, suicide rates are highest for Indians among any ethnic group, and the rate of alcoholism is enormous among Indians.[88] After seeing the picture or text, students "were asked to write down the first five words that came to mind."[89] Research assistants then coded the words as positive or negative.[90] After being primed with Chief Wahoo and Pocahontas, eighty percent and 81.8% (respectively) of all associations were positive.[91] In contrast, positive associations amounted to 8.3% of responses to the statistics in the text prompt.[92] The results demonstrate that Indian students do not see Chief Wahoo or Pocahontas (and perhaps other representations) as expressing negative traits about themselves. But the more interesting question centers on the psychological effects of these associations—even positive ones—on Indians.[93]

In Study 2, the text and pictures remained the same. Seventy-one Indian students participated and were asked to complete a "20-item, 5-point Likert scale (from 1 [*not at all true of me*] to 5 [*extremely true of me*]), state self-esteem measure."[94] In essence, the study is designed to assess the images' effects upon an Indian student's self-esteem. When compared with the un-prompted control group, all three prompts "significantly depressed" self-esteem.[95] This result is partially unintuitive

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86 *Id.* at 211.

87 *See Chief Wahoo*, WIKIPEDIA, https://en.wikipedia.org/wiki/Chief_Wahoo (last updated Apr. 16, 2016, 6:43 AM).

88 Fryberg et al., *supra* note 57, at 211.

89 *Id.* at 211–12.

90 *Id.* at 212.

91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.* at 212.

95 *Id.* at 213.

when considered in light of the results of Study 1. It is not surprising that self-esteem decreases in light of the prompt concerning negative statistics about Indians. However, the other two images—Chief Wahoo and Pocahontas—present a more complex issue. Despite the fact that students expressed positive associations with Chief Wahoo and Pocahontas, they nevertheless demonstrated *significantly* depressed self-esteem.[96] Stereotyping does not explain the result—after all, a positive stereotype would not lower one's self-esteem. But it does here. In addition, Study 2 revealed that both "Chief Wahoo and Pocahontas depressed self-esteem more than" the text prompt.[97]

Study 3 changed the variable being examined from an individual's self-esteem to "community worth."[98] Participants responded to a similar 5-item, 5-point Likert scale questionnaire including: "'I respect people in my community.' 'People in my community have a number of good qualities.' 'I care how others think about my community.' 'People in my community can take action to make things better.' 'I feel like I can make a difference in my community.'"[99] The results of Study 3 paralleled those of Study 2—all representations negatively affected an individual's sense of community worth, with Chief Wahoo and Pocahontas having the most significant effects.[100] No statistically significant difference existed between Chief Wahoo and Pocahontas.[101]

Study 4 focuses on the effect of representations upon an Indian's conception of "achievement-related possible selves."[102] The students were asked to think of "four possible selves" for the next year.[103] The instructions asked them to answer the following questions: "What do you expect you will be like? Write down at least 4 ways of describing yourself that will probably be true of you next year. You can write down ways you are now and will probably still be or ways you expect to become."[104] The responses concerning the future possible selves were coded as either achievement-related or not.[105] Some example responses included, "'find a job,' 'working,' 'good grades,' and 'getting my AA degree.'"[106]

The prompts changed for this study. Chief Wahoo was still used, but Pocahontas was removed. Instead, Fryberg used two other

96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.*
100 *Id.*
101 *Id.*
102 *Id.* at 214.
103 *Id.* at 215.
104 *Id.*
105 *Id.*
106 *Id.*

mascots—then University of Illinois mascot Chief Illiniwek,[107] and the Haskell Indian Nations University mascot, the Indians.[108] Finally, one group of students was prompted by an advertisement from the American Indian College Fund. The advertisement specifically depicted an achievement: the image "depicts an attractive young American Indian woman with long dark hair standing in front of microscopes representing the American Indian College Fund. The caption on the advertisement reads, 'Have you ever seen a real Indian?'"[109]

The three mascot prompts, Chief Wahoo, Chief Illiniwek, and the Haskell Indian, all decreased the number and proportion of achievement-related possible selves.[110] Interestingly, there was no difference in effect among the mascots. Chief Wahoo, a red-faced caricature of a Native person, had the same decreased effect on achievement-related possible selves as the non-caricatured Haskell Indians mascot that represents a school whose *entire enrollment* consists of Indians.[111] In contrast, the American Indian College Fund image was indistinguishable from the un-primed group.[112] Despite a presumptively positive trait association—academic achievement—it had no improved effect on students' conceptions of their own achievement-related possible selves.

Mascots are bad. Always. The complexity of the issue stems from the results in Study 1 and the other three studies done by Fryberg. Study 1 confirmed the existence of positive associations between stereotypical images and the conscious opinions of Indians concerning those images. The other three studies determined that those images—despite the conscious positive associations—plainly harm us. It does not matter that the mascot may come from a school only attended by Indians. It does not matter if I think the Haskell Indian looks tough, noble, or brave. It does not matter that my daughter loves Pocahontas and thinks that she is the best thing ever. When Lily Faye asks me to buy her a Pocahontas doll, she does so plainly because she has a positive association with Pocahontas—that she is beautiful, caring, strong, and compassionate. If she had a negative association—for example, anything having to do with guns or weapons—she would not ask me to buy her the doll.

In addition, she may also love all things Indian in mass media, because despite how much Lily Faye and I talk about our Chickasaw culture and visit Chickasaw Country throughout the year, she does not

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107 *See Chief Illiniwek*, WIKIPEDIA, https://en.wikipedia.org/wiki/Chief_Illiniwek (last updated Aug. 2, 2016, 10:50 PM).

108 HASKELL INDIAN NATIONS UNIVERSITY, *supra* note 48.

109 Fryberg et al., *supra* note 57, at 214.

110 *Id.* at 215.

111 *Welcome to Haskell Indian Nations University*, HASKELL INDIAN NATIONS U., http://www.haskell.edu/about/index.php (last visited Mar. 9, 2016).

112 Fryberg et al., *supra* note 57, at 215.

see any of that represented in the world outside of our home in Lubbock, Texas, or on the iPad, television, or in school. The quality is not the only thing that matters, clearly. What does matter is that Indians are statistically *never* represented in mass media. This helps explain Lily Faye's excitement about anything having to do with Indians, and my attendant anxiety about what those images do to her psychologically and emotionally. *All* of these images decrease self-esteem, "community worth", and "achievement-related possible selves".[113] The data demonstrates that unequivocally, consistently, and clearly. The question is whether this information is relevant and what to do with it in the context of the Redsk*ns' trademark rights.

II. SECTION 2(A) OF THE LANHAM ACT AND LITIGATION

A. *Trademarks*

Trademark rights are developed through use in connection with goods and services in the marketplace.[114] An outgrowth of the law of unfair competition, trademark law originates in state common law.[115] Common law trademark rights are created by adopting and using the mark.[116] The first user of a mark in a geographic area is considered senior and may make a claim of trademark infringement against others.[117] In contrast to both copyright and patent, trademark law is supplemented by federal statutes rather than created by them.[118] Both states and the federal government pass statutes conferring additional rights beyond those available at common law.[119] Therefore, trademark rights may stem from both common law and statutory law.

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113 Fryberg et al., *supra* note 57, at 212–14.

114 *See* Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 979 (9th Cir. 2006).

115 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9 cmt. e (AM. LAW INST. 1995).

116 *See* Tally-Ho, Inc. v. Coast Cmty. Coll. Dist., 889 F.2d 1018, 1022–23 (11th Cir. 1989) (explaining that "actual and continuous use is required to acquire and retain a protectible interest in a mark," while the "first to use a mark on a product . . . in a . . . market . . . acquires rights in the mark in that market" (footnote omitted)); Ford Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277, 292 (3d Cir. 1991); Hydro-Dynamics, Inc. v. George Putnam & Co., 811 F.2d 1470, 1473 (Fed. Cir. 1987) ("[T]rademark rights in the United States are acquired by . . . adoption and use, not by registration."); Caesar's World, Inc. v. Caesar's Palace, 490 F. Supp. 818, 822 (D.N.J. 1980) ("Common law rights are acquired in a . . . mark by adopting and using the mark . . . ."); 1 W. MICHAEL GARNER, FRANCHISE AND DISTRIBUTION LAW AND PRACTICE § 7:14 (2016) ("In the United States, rights in trademarks may be acquired at common law through actual use or through application for federal registration, which creates a presumption of actual use.").

117 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9 cmt. e (AM. LAW INST. 1995).

118 *Id.*

119 *See* B & B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293, 1299 (2015); *see also* Lee Ann W. Lockridge, *Abolishing State Trademark Registrations*, 29 CARDOZO ARTS & ENT. L.J.

This Article is more directly focused on the federal statutory framework and benefits created by the Lanham Act.[120] The Lanham Act, passed in 1946, was the second major attempt by Congress to address trademarks. The first, passed in 1870, was short lived and held unconstitutional in 1879 because the statute was grounded in the patent and copyright clause, which the Court found improper.[121] There are two aspects of the Lanham Act that demand attention for purposes of this article: (1) the federal registration system and legal benefits created by it,[122] and (2) the provision for the cancellation of certain disparaging marks.[123]

B. *Disparagement Provision*

Section 1052(a) provides that no trademark "shall be refused registration on the principal register on account of its nature unless it . . . [c]onsists of . . . matter which may disparage . . . persons, living or dead . . . or bring them into contempt, or disrepute."[124] Three words in this section pertain to the type of marks that will not be registered: "disparage," "contempt," and "disrepute." Reviewing dictionary definitions for these terms aids in identifying the underlying purpose of the disparagement provision.

"Disparage" means "to describe (someone or something) as unimportant, weak, bad, etc." or, more fully, "to lower in rank or reputation," or "to depreciate by indirect means."[125] "Contempt" means "the state of being despised" or "a feeling that someone or something is not worthy of any respect."[126] "Disrepute" means "a state of not being respected or trusted by most people" or "a state of being held in low esteem."[127] These words center on the principal idea that a mark cannot render a person disrespectfully such that it induces low, or no, regard for that person. A core value implied by the iteration of these words is that the mark shall not cause harm to the person depicted. "To lower in rank" has the effect of causing harm to that person—be it financial,

597, 599–600 (2011); Charles McManis & Henry Biggs, *Phoenix Rising? On the Fall and Potential New Rise of State Trademark Rights*, 13 CHI.-KENT J. INTELL. PROP. 111 (2012).

120 *See generally* 15 U.S.C. §§ 1051–1141 (2012).

121 *See In re* Trade-Mark Cases, 100 U.S. 82 (1879).

122 *See* §§ 1057(b)–(c), 1065, 1072, 1115(b), 1117, 1121, 1125(d).

123 *See* § 1052(a).

124 *Id.*

125 *Disparage*, MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/disparage (last visited Mar. 9, 2016).

126 *Contempt*, MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/contempt (last visited July 22, 2016).

127 *Disrepute*, MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/disrepute (last visited July 22, 2016).

psychological, emotional, or otherwise. Causing someone to feel that they are "not worthy of respect" is harmful to them; the same goes for "being held in low esteem."

The fundamental purpose of the disparagement provision is the prevention, or at least mitigation, of *harm* done to persons.[128] Congress weighed the value of trademark rights against the value inherent in people being able to live life without being subjected to harmful symbols that undermine their ability to flourish in the world. This connects directly with the research done by Fryberg and the underlying psychological theories about the effect of images and messages on minority groups—particularly Indians.[129] Luckily for Indians across the country, two strong Native women opted to utilize this statutory provision in litigation against the Washington football team: Suzanne Shown Harjo and Amanda Blackhorse.[130]

C. *Disparagement Litigation*

The initial litigation against the Washington team's trademark began in the 1990s.[131] Pursuant to § 1052(a), Ms. Harjo and other plaintiffs sought cancellation of the team's registration and related registration by arguing that the term "Redsk*ns" is a racial slur and is, under the Act, disparaging.[132] In analyzing the legal issue, the Trademark Trial and Appeal Board (TTAB) developed "a two step process of considering, first, the likely meaning of the matter in question and, second, whether that meaning may be disparaging."[133] If the meaning of the trademark in question refers to "identifiable . . . 'persons'" then the TTAB would seek evidence as to whether or not a "substantial composite" of the "referenced group" viewed the trademark as disparaging.[134] The TTAB made clear that the views of the general public are "irrelevant."[135] Among other pieces of evidence, the TTAB examined survey results purporting to ask Native Americans about their views of

128 *See* 15 U.S.C. § 1052(a) (2012). The full provision includes "institutions, beliefs, or national symbols." *Id.*

129 Fryberg et al., *supra* note 57.

130 *See* Blackhorse v. Pro-Football, Inc., 111 U.S.P.Q.2d (BNA) 1080 (T.T.A.B. 2014); Harjo v. Pro-Football, Inc., 50 U.S.P.Q.2d (BNA) 1705 (T.T.A.B. 1999), *rev'd*, 284 F. Supp. 2d 96 (D.D.C. 2003). A number of other plaintiffs were involved in both cases and are no less important. Ms. Harjo and Ms. Blackhorse are the initial named plaintiffs and have both been outspoken in their opposition to Native mascots generally and the Washington football team, specifically. *See Blackhorse*, 111 U.S.P.Q.2d (BNA) at *2–4.

131 *Harjo*, 50 U.S.P.Q. 2d (BNA) 1705 at *1.

132 *Id.* at *2.

133 *Id.* at *35.

134 *Id.* at *36.

135 *Id.* at *37.

the name as well as a review of linguistic expert analysis of the term and its origins.[136]

The *Harjo* plaintiffs prevailed before the TTAB in 1999.[137] Defendant Pro-Football Inc. appealed to the United States District Court for the District of Columbia.[138] The court reviewed the findings by the TTAB and determined that substantial evidence did not exist to support the TTAB's finding of disparagement.[139] In addition, the court found that the equitable defense of laches applied to the claim brought by petitioners and dismissed the case on that ground.[140] Ultimately, the Court of Appeals for the District of Columbia Circuit affirmed the lower court's ruling on the basis of laches.[141]

After the laches issue in *Harjo* appeared, new and younger plaintiffs were preparing for litigation. Ms. Blackhorse and others brought an identical claim as in *Harjo*, with the hope that the laches defense would be resolved differently.[142] Once again, the TTAB heard the *Blackhorse* plaintiffs' claims and cancelled the team's trademark registration.[143] Once again, Defendants appealed to the Federal District Court.[144] This time, the district court affirmed the TTAB's ruling.[145] Now, the case is on appeal before the United States Court of Appeals for the Fourth Circuit.[146]

D. *Disparagement in the Big Picture*

The two-part test utilized by federal courts in determining whether a trademark disparages a person or persons is misguided. It reinforces the idea that disparagement and harm are subjective. It skews the purpose of the provision away from the effect of the trademark towards the subjective opinions of those portrayed. For example, survey evidence was introduced in *Harjo* and *Blackhorse* to support the idea that we think the name is offensive.[147] Survey evidence was admitted as relevant because the second part of the disparagement test asks specifically

136 *See generally id.*

137 *Id.* at *48.

138 *See* Pro-Football, Inc. v. Harjo, 284 F. Supp. 2d 96 (D.D.C. 2003).

139 *Id.* at 144–45.

140 *Id.* at 144.

141 *See* Pro Football, Inc. v. Harjo, 565 F.3d 880 (D.C. Cir. 2009); Pro-Football, Inc. v. Harjo, 415 F.3d 44 (D.C. Cir. 2005).

142 *See* Blackhorse v. Pro-Football, Inc., 111 U.S.P.Q.2d (BNA) 1080, at *1 (T.T.A.B. 2014).

143 *Id.* at *43.

144 *See* Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439 (E.D. Va. 2015).

145 *Id.*

146 *Blackhorse*, 112 F. Supp. 3d 439, *appeal docketed*, No. 15-1874 (4th Cir. Aug. 6, 2015).

147 *See Blackhorse*, 111 U.S.P.Q.2d (BNA) at *16; Harjo v. Pro-Football, Inc., 50 U.S.P.Q.2d (BNA) 1705, at *30 (T.T.A.B. 1999).

whether "a substantial composite" of the referenced group finds the image disparaging.[148]

Surveys like these assess the type of associations that people have with a symbol. They do not assess how the symbol affects them. Fryberg's research is directly on point in this regard.[149] Some Indians may think the name is cool and the image represents them in a positive manner. They may wear Washington team gear (or Chief Wahoo from the Cleveland Indians) despite not being a fan of, or caring about, the team. It does not really matter whether the subjective opinion of the symbol or associations with the symbol are positive or negative. The empirical evidence demonstrates, without question, that the symbol harms us—whether we are conscious of it or not. The legal test reinforces the idea that harm is subjective, which undermines the fundamental purpose of the disparagement provision.

E. *Disparagement Remedies*

At the moment, the *Blackhorse* litigation has resulted—pending a successful appeal by the team—in the cancellation of the team's trademark federal registration rights.[150] While trademark rights are created through use, statutory benefits exist from federal registration. The team can, will, and is still using the name. The relevant inquiry here is the value of those rights created by the Lanham Act and federal registration.

Federal registration serves as "constructive notice of the registrant's claim of ownership" of the mark.[151] A registered trademark is presumptively valid, and after five years of use, the validity of the trademark's ownership becomes incontestable.[152] Owners of registered trademarks may also receive the aid of the U.S. Customs and Border Protection to prevent the importation of goods that infringe upon the trademark.[153] In addition, owners may seek redress in federal court to enforce their trademarks, even absent diversity jurisdiction.[154] Finally, if the owner proves that her trademark was willfully infringed upon, she is entitled to treble damages.[155]

Once a trademark is registered in the principal register, there is "prima facie evidence of the validity of the registered mark and of the

148 *See Blackhorse*, 111 U.S.P.Q.2d (BNA) at *16; *Harjo*, 50 U.S.P.Q.2d (BNA) at *33.
149 Fryberg et al., *supra* note 57.
150 *Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015).
151 15 U.S.C. § 1072 (2012).
152 §§ 1057(b), 1065, 1115(b).
153 § 1125(b).
154 § 1121.
155 § 1117.

registration of the mark, of the owner's ownership of the mark, and of the owner's exclusive right to use the registered mark in commerce."[156] Because federal registration provides prima facie evidence of these elements, an owner of a federally registered trademark is saved from submitting evidence of validity, ownership, and the exclusive right of use.[157] Federal registration also creates nationwide constructive use and constructive notice.[158] Nationwide constructive use also confers priority across the United States.[159] By extending constructive use and priority, the owner of the registered mark has nationwide priority against most people, excluding prior common law users and others whose federal application predates the registrant's.[160]

Again, if the *Blackhorse* plaintiffs prevail, these benefits from registration will be unavailable to the team. There is no doubt that they are valuable to some degree. But they are all, with the exception of two, procedural shortcuts in litigation against an alleged trademark infringer. The value of these benefits will vary from registrant to registrant. For example, the constructive notice, presumption of validity and ownership, and priority are not going to be seriously contested in litigation against the Redsk*ns, even absent federal registration. The trademarks owned by the team are longstanding, have been used throughout the country, and are well known. Therefore, the value of these benefits to the team is relatively low.

In contrast, for a recent startup company or other relatively new business, the benefits of federal registration are comparatively high. First, the startup presumably has less cash on hand than the Redsk*ns, so the legal costs will be more impactful. Second, it would lack the longstanding prior use of the mark and near nationwide recognition of the trademark as belonging to them that the Redsk*ns enjoy. Since the startup would need to prove these elements, the value of not having to do so—because there is less certainty that the trademark is clearly the startup's—is much higher.

In the event that the *Blackhorse* plaintiffs ultimately prevail, the Washington football team will be no more compelled to change its name. It would still have the legal right to use the name and logo. Beyond that, it would have claims available to it under federal common law, state common law, and state statutory law to seek redress from an alleged infringing user of their trademark. Furthermore, since every state has its own statute creating a framework for trademark

156 § 1057(b).
157 *See* Lockridge, *supra* note 119, at 605–06.
158 §§ 1057(c), 1072.
159 *See* Lockridge, *supra* note 119, at 607.
160 *See id.*

registration,[161] the Redsk*ns may have state statutory remedies,[162] such as treble damages, available to it when pursuing a trademark infringement claim under state statutory law. Therefore, the damage done to the Washington football team's trademark exists only on the plane of the imaginary—it is damaged in theory and principle alone.

This legal reality points to the simple fact that the removal of federal registration benefits is a wholly inadequate remedy for the *Blackhorse* plaintiffs, Lily Faye, and me. It does nothing—legally—to move towards a name change. Certainly, a victory in *Blackhorse* would be an important symbol for Indian Country. But, it does nothing to deter the use of "Redsk*ns" for the team name. In order for the team to be deterred in using the name, the lone avenue of redress is in the halls of Congress.

III. LEGISLATIVE REMEDIES

A. *Bases for Trademark Legislation*

The authority to enact federal legislation concerning trademarks stems from the Commerce Clause.[163] However, the specific trademark at issue in this Article opens up another possible basis for enacting legislation: Indian plenary power.[164] Those unfamiliar with Federal Indian Law are likely wondering what exactly that is. Scholars and jurists familiar with Federal Indian Law are similarly wondering exactly what it is. In simplistic fashion, the doctrine of plenary power is the idea that the federal government, via a mixture of constitutional provisions and inherent sovereignty, has plenary and exclusive (as against the states) power to regulate Indian tribes.[165]

Two primary questions plague the doctrine. First, since Congress possesses certain enumerated powers, what constitutional provision provides the basis for this authority? Most scholars and jurists point to a variety of constitutional clauses: Commerce, Property, Treaty, and War Powers.[166] Second, what are the metes and bounds of Congress's "plenary

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161 *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 9 cmt. statutory note (AM. LAW INST. 1995).

162 *See id.*

163 *See In re* Trade-Mark Cases, 100 U.S. 82, 86 (1879) (holding that Congress can constitutionally enact federal trademark legislation under the Commerce Clause); *see also* U.S. CONST. art. I, § 8, cl. 3.

164 *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 25–26 (2002).

165 *See id.*

166 *See generally id.*

authority"? How plenary is it? The plain fact is that Congress has enacted a number of statutes specifically pertaining to Indians that would fail under a legal analysis based in other Constitutional authorities. This Article is not focused on adding to the already significant scholarship on the origin, validity, or reach of the doctrine of plenary power over Indian affairs. Instead, I submit that this authority is a sufficient, and preferential, basis to be used by Congress to legislate the issue of trademarks pertaining to Native people.

The doctrine concerning plenary power over Indian affairs has a long history. The late Professor Philip Frickey provides a rich historical, textual, and reasoned analysis of the Indian plenary power doctrine.[167] Frickey's analysis begins with the text most often cited as the basis for the plenary power doctrine: the Commerce Clause. The Commerce Clause provides Congress with the authority to "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[168] Frickey contrasts this constitutional provision with that contained in the Articles of Confederation, providing Congress with the obligation and authority of "managing all affairs with the Indians" while recognizing some undetermined limits to protect state powers.[169] Between the two, Congress's authority is narrower under the Constitution than the Articles of Confederation, thereby implying some limitation based in the textual difference between the two. That limitation focuses on the meaning of the word "commerce."

Ultimately, this could simply be a question of statutory interpretation as to what is meant by "commerce" and how broadly or narrowly that language may be construed. Professor Gregory Ablavsky's 2015 Article, *Beyond the Indian Commerce Clause*, has brought new light to the traditional understandings and current arguments about the doctrine of plenary power over Indian tribes.[170] Instead of focusing on the nuanced question of how we are to interpret "commerce," his article is a meta-critique of traditional scholarly and juridical explanations concerning the doctrine itself.[171] Ablavsky's article is a significant piece of legal history scholarship that informs our current understandings and questions our criticisms.

Beyond the constitutional text of any provision, it is clear that case law has strengthened the doctrine of plenary power. The foundational case is *United States v. Kagama*.[172] Kagama, a Yurok Indian, was alleged

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167 *See generally* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431 (2005).

168 U.S. CONST. art. I, § 8, cl. 3.

169 Frickey, *supra* note 167, at 440.

170 Gregory Ablavsky, *Beyond the Indian Commerce Clause,* 124 YALE L.J. 1012 (2015).

171 *Id.*

172 U.S. v. Kagama, 118 U.S. 375 (1886).

to have murdered another Indian on the Hoopa Valley Reservation in California.[173] The then recently enacted Major Crimes Act created federal jurisdiction over this murder, whereas prior to the Act's passage, no federal jurisdiction existed and the crime was punished by the tribe of jurisdiction pursuant to their laws.[174] At issue in *Kagama* was whether Congress had the authority to enact that law creating federal jurisdiction over certain enumerated felonies occurring in Indian Country and committed by Indians or against Indians.[175]

The Court explained that Federal Indian Law was grounded in the notion of the guardian-ward relationship first developed by Chief Justice John Marshall in *Cherokee Nation v. Georgia*,[176] a central case in the formation of federal Indian law doctrine.[177] Since Indian tribes were a ward of the federal government, reasoned the *Kagama* Court, federal power over them was obvious and a product of the history between the federal government and the Indian tribes. The Court said that "[f]rom their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power."[178] In a bold tautology cloaked in legal rhetoric, the Court explained that

> The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is secessary [sic] to their protection, as well as to the safety of those among whom they dwell. *It must exist in that government, because it never has existed anywhere else*; because the theater of its exercise is within the geographical limits of the United States; *because it has never been denied*; and because it alone can enforce its laws on all the tribes.[179]

This is not exactly the scrutinizing textual analysis employed by many modern jurists. Nonetheless, this holding—that Congress *does* have the authority to enact the Major Crimes Act—remains good law.

Subsequent case law confirms the resilience of the doctrine. In *Morton v. Mancari*, non-Indian employees of the Bureau of Indian Affairs alleged that the agency's hiring and promotion preference for Indians violated Title VII of the Civil Rights Act.[180] The Bureau of

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173 *Id.* at 376.

174 *See generally* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY (1994).

175 *See Kagama*, 118 U.S. at 378; *see also* 18 U.S.C. § 1152 (2012).

176 Cherokee Nation v. Georgia, 30 U.S. 1 (1831). Chief Justice Marshall, in *Cherokee Nation*, stated that the tribal-federal relationship "resemble[s] that of a ward to his guardian." *Id.* at 2; *see also* Frickey, *supra* note 167, at 438.

177 *Kagama,* 118 U.S. at 382–84.

178 *Id.* at 384.

179 *Id.* at 384–85 (emphasis added).

180 Morton v. Mancari, 417 U.S. 535 (1974).

Indian Affairs implemented the employment preference found in section 12 of the Indian Reorganization Act of 1934 providing that "[s]uch qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions [within the Bureau of Indian Affairs]."[181] As in *Kagama*, one question is whether Congress has the authority to establish this preference without regard to constitutional equal protection analysis.

In upholding the preference as valid, the Court explained that:

> Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.[182]

The Court honestly and correctly stated that "[o]n numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment."[183] Finally, the Court develops, albeit loosely, a guidepost in the legal analysis to be employed when determining the metes and bounds of Congress's plenary power over Indians: "[a]s long as the special treatment *can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians*, such legislative judgments will not be disturbed."[184]

There are numerous examples of statutes that meet this criterion and have been upheld as constitutional, but there are two cases wherein the Court has identified a limit to Congress's plenary power. In *Hodel v. Irving*, the Supreme Court considered whether a federal statute, the Indian Land Consolidation Act (ILCA),[185] effectuated an unconstitutional taking of property.[186] The ILCA attempted to address the problem of heavily fractionated lands in Indian Country. Some history is necessary at this point.

After reservations were created in the early and mid-1800s, federal policy changed and Congress enacted allotment acts. An allotment act broke up tribal communal land holdings and parceled out individual fee patents of land to individual Indians,[187] the hope being that private

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181 25 U.S.C.A. § 5116 (Westlaw through Pub. L. No. 114-219).

182 *Morton*, 417 U.S. at 552.

183 *Id.* at 554–55.

184 *Id.* at 555 (emphasis added).

185 Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, 96 Stat. 2517 (codified as amended at 25 U.S.C. §§ 2201–2221 (2012)).

186 Hodel v. Irving, 481 U.S. 704, 706 (1987).

187 *Id.* at 706.

property will aid in the transition of Indians to American citizens.[188] The problem of fractionalization occurs over generations when property is passed by intestate succession (or via will) to multiple owners.[189] The Indian Land Tenure Foundation has suggested that over the course of six generations, one parcel of land initially deeded to one Indian could result in more than 200 individual Indians with ownership interests.[190] Other estimates reveal that single parcel ownership numbered in the thousands.[191] This heavy fractionalization results in, among other ills, decreased marketability, great difficulty in administration, and inefficient land use.

In *Hodel*, the government, through ILCA, sought to stem the further fractionalization of Indian property.[192] The provision at issue automatically escheated certain small fractionated interests in land to the tribe, thereby denying the owner of that interest any compensation as well as the ability to will that property to whomever they saw fit.[193] The Court wrote that while "encouraging the consolidation of Indian lands is a public purpose of high order," this provision was unconstitutional as a violation of the Fifth Amendment because it destroyed the right to transfer—a stick in the bundle of property entitlements.[194] This decision was the first to define an outer limit of Congress's broad authority to regulate Indian affairs.[195]

In light of *Mancari* and *Hodel*, it is clear that (1) the purpose of the statute must be rationally tied to the unique obligations under the federal-tribal relationship, and (2) the statute must not offend any constitutional provision. Other than those limitations, Congress has wide latitude in enacting legislation regarding Indian Affairs.

B. *Recent and Pending Legislation*

Members of Congress have, both in the current legislative session and in recent history, offered legislation addressing the Redsk*ns name

188 Solem v. Bartlett, 465 U.S. 463, 466 (1984).

189 *Hodel*, 481 U.S. at 707–08.

190 *See Fractionated Ownership*, INDIAN LAND TENURE FOUND., https://www.iltf.org/land-issues/fractionated-ownership (last visited July 22, 2016).

191 *See id.*

192 *Hodel*, 481 U.S. at 709.

193 *Id.*

194 *Id.* at 712.

195 In a subsequent decision regarding ILCA, the Supreme Court rendered the same result—that the provision at issue was an unconstitutional taking of private property. This confirmed the previously defined boundary of Congress's power. *See* Babbitt v. Youpee, 519 U.S. 234 (1997).

controversy.[196] While the legislative session may differ, the proposed legislation does not. The current proposed bill, H.R. 684, sponsored and introduced by Representative Mike Honda, is called the "Non-Disparagement of Native American Persons or Peoples in Trademark Registration Act of 2015."[197] While Congress does have plenary power over Indian affairs, there is no indication that it is being called on as a source of authority in this legislation. Instead it appears based in the Commerce Clause, as all trademark legislation must be. Regardless of the source of authority, the effective provision states:

> Notwithstanding any other provision of this Act, the Director *shall cancel a registration of a mark containing the term "redskin"* or any derivation of the term "redskin" if—
>
> (A) the mark has been or is used in commerce in connection with references to or images of one or more Native American persons or peoples, or to Native American persons or peoples in general; or
>
> (B) the Director determines that the term as included in the mark is commonly understood to refer to one or more Native American persons or peoples, or to Native American persons or peoples in general.[198]

The emphasized language should seem familiar. This legislation, if enacted, would exactly replicate the remedy already provided in § 1052(a).[199] Both the *Blackhorse* litigation and this legislation accomplish the same laudable but inadequate goal of canceling the Redsk*ns' federal registration. Therefore, this legislation does little to force or encourage a name change. An alternative approach is necessary, and it calls upon the plenary authority of Congress to legislate with respect to Indian affairs.

C. *Alternative Legislative Approach*

As discussed previously, the moral arguments for changing the name have proven irrelevant. The same goes for empirical data—it is ineffective. Throughout Snyder's letter, he focuses on those core elements of tradition, family, and identity. The last option for

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196 *See* Respect for Native Americans in Professional Sports Act of 2015, H.R. 3487, 114th Cong. (2015); Non-Disparagement of Native American Persons or Peoples in Trademark Registration Act of 2013, H.R. 1278, 113th Cong. (2013); 159 Cong. Rec. 4,087 (2013).

197 Non-Disparagement of Native American Persons or Peoples in Trademark Registration Act of 2015, H.R. 684, 114th Cong. (2015), https://www.congress.gov/114/bills/hr684/BILLS-114hr684ih.pdf.

198 *Id.*

199 15 U.S.C. § 1052(a) (2012); *see* discussion *supra* Section II.B.

encouraging a name change is through affecting the economics of the team.

1. Purpose and Approach

In developing legislative solutions, the purpose is primary. The objective is to incentivize, or coerce, the Washington football team into changing the name. While previous legislative offerings have attempted to affect the team's economic calculus, they do so only to a marginal effect. In addition, they simply replicate the result that would be obtained in the event that the *Blackhorse* plaintiffs prevail. Any legislative solution designed to actually impact the decision making process of the Redsk*ns must do more than limit federal registration benefits. In addition, it must be careful to not intrude on two likely minefields—infringing on Free Speech[200] or Property.[201]

The approach I propose entails encouraging a name change through minimizing the revenue generated by the trademark. The focus is upon undermining the value of the trademark, thereby incentivizing the team to select a new mascot, logo, and name. It is clear that the range of claims available to the team in the event of trademark infringement by another is plentiful—even without federal registration.[202] Therefore, the legislation should remove the ability of the team to obtain redress for trademark infringement through the power of express federal preemption.

2. Federal Preemption

Express federal preemption is relatively rare.[203] Much more common is implied preemption. Typically, express preemption occurs in regulatory schemes where the federal framework expressly precludes the operation of the state regulatory process under a certain set of circumstances.[204] Federal environmental statutes also can involve express federal preemption, like precluding federal common law actions and instead replacing them with federal statutory actions.[205]

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200 *See, e.g.*, *In re* Tam, 808 F.3d 1321 (Fed. Cir. 2016).

201 *See, e.g.*, Hodel v. Irving, 481 U.S. 704 (1987).

202 *See* discussion *supra* Sections II.D–E.

203 *See* Barbara L. Atwell, *Products Liability and Preemption: A Judicial Framework*, 39 BUFF. L. REV. 181, 183–84 (1991).

204 *See, e.g.*, Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000).

205 *See, e.g.*, Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579 (2008).

The difficulty with express federal preemption is determining the scope of the preemption.[206] How far does it go? The law of preemption, while muddled, has a presumption that state damages remedies will be preserved, unless noted.[207] This is a circumstance where the availability of state statutory and common law remedies is the subject of the express preemption and is purposefully precluded.

Federal common law, state statutory law, and state common law all provide a basis for the team to initiate suit against trademark infringement. If a New Jersey entity is producing Redsk*ns merchandise without license from the team, it may be sued for an injunction and damages pursuant to state statutory or common law. The legislative proposal suggested here would expressly preempt the availability of trademark infringement claims pursuant to state statutory law, state common law, and federal common law. This results in the right of the team to continue using the name, but it would be unable to initiate a claim against the New Jersey entity producing goods bearing the trademark of the team. This has a direct effect on the bottom line of the team. The ability of merchandise producers to use the mascot, image, and name increases supply and decreases price through increased competition.

3. Relativity of Title

The proposed legislative solution would not bar trademark infringement suits against all entities. One of the primary functions of trademark law is to assist consumers in making choices in the marketplace.[208] Trademarks prevent consumer confusion. In order to preserve that important purpose, the legislation could utilize the concept of relativity of title.

The framework of this suggestion mirrors that described in *International News Service v. Associated Press*.[209] There, the Supreme Court held that the Associated Press (AP) had a "quasi property" right in the gathering of news.[210] In that case, the International News Service (INS) was copying the news articles and using them in its own papers.[211] The Court, in identifying this quasi-property right in the AP's labor and investment, limited the AP's causes of action against competitors in the

206 *See* Mary J. Davis, *The "New" Presumption Against Preemption*, 61 HASTINGS L.J. 1217, 1221–22 (2010).

207 *Id.* at 1220.

208 *See generally* Alfred C. Yen, *The Constructive Role of Confusion in Trademark*, 93 N.C. L. REV. 77 (2014).

209 Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918).

210 *Id.* at 236.

211 *Id.* at 231–32.

news industry.[212] A consumer of the AP's newspaper articles could freely post the article on a public bulletin board without any possible suit by the AP against them. The consumer would be doing, in effect, the same thing as INS—but not in the context of a for-profit business. The AP's title to the gathering of news was relative—effective against INS but not consumers.

This circumstance calls for a similar approach. The trademark rights may continue against entities engaged in the same business, i.e. other professional sports teams. This preserves some degree of trademark infringement actions against other copiers of the Redsk*ns' trademark who are involved in the same venture as the team. Doing so ensures that another professional team cannot use the Redsk*ns' trademark for its team name, thereby preserving the goal of trademark law to prevent consumer confusion.

4. Plenary Power over Indian Affairs

This proposed statute is better supported by the plenary power doctrine than the Commerce Clause. The purpose of the statute, to address and prevent the objective harm cause by these symbols, fits squarely within the doctrine of plenary power. Commerce Clause authority would have to be construed broadly in order for it to make sense under that framework. Under the *Mancari* and *Hodel* test, the benefit of the statute is plainly tied to the well-being of Native people in the United States. Given the research from Fryberg, this is plain. Also, chapter and verse of statutes passed for the benefit of Indians could fill this Article, all having been upheld as constitutional. This statute is no outlier in that context.

The difficult legal question centers on the extent to which *Hodel* might give the Washington football team a basis to allege that the right to seek redress from trademark infringement is a property right under the Fifth Amendment of the United States Constitution. During the *Blackhorse* litigation, the team has already argued that a successful disparagement claim would trigger a regulatory taking of the team's property, although the United States District Court for the District of Columbia summarily dismissed that argument.[213] However, this legislative proposal requires a different legal analysis than the disparagement provision in the Lanham Act.

Where a statute expressly preempts certain trademark infringement suits and is purposefully designed to deny a remedy to the economic

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212 *Id.* at 236.

213 *See* Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439, 467 (2015).

harm done to a trademark holder, a court would surely engage in a more searching analysis. At the core of that legal analysis is the simple question: are trademarks property rights under the Constitution of the United States? This inquiry plagues property (and intellectual property) law.[214] Deep consideration of this question is beyond the scope of this Article's thesis.

CONCLUSION

This Article makes three contributions: first, the harm caused by the team name and logo is objective and clear. Second, the remedies offered by the Lanham Act are wholly inadequate. Finally, I propose a legislative solution that applies real economic pressure to change the team name. This Article ends with a simple question to the proposed legislative solution—"Is it constitutional?" My conclusion is previewed here—yes it is—but the more detailed analysis is a central focus of a subsequent article.

The interesting legal analysis exists through the lens of property law. The legal question asked, framed in doctrinal terms, is the extent to which property rights map onto forms of intellectual property—here, trademarks. However, this is the wrong way to frame the question. The proper frame focuses on the rights of my daughter and son, Lily Faye and Wyatt, to live their lives without being demonstrably harmed by property rights in trademarks. That is the question. The question is not simply an abstract doctrinal one. This involves real people, like my children and me. If we pose the question as the extent to which trademarks are property rights, that approach renders this inquiry abstract, attenuated from people—and most importantly—*whitewashed*. Instead, this subsequent inquiry will examine the ways in which people, and in particular marginalized peoples, have become subject to private property, rather than utilizing property to enhance human dignity and flourishing.

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214 *See* J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 2:20 (4th ed. 2016) (property rights are inherent in trademarks). *But cf.* David W. Barnes, *A New Economics of Trademarks*, 5 NW. J. TECH. & INTELL. PROP. 22, 29 (2006) (arguing that trademark law should function to emphasize the referential and customary uses of trademarks as opposed to construing them through the lens of private goods and property rights.); Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 788 (2004) ("First and most generally, trademarks are not property rights in gross, but limited entitlements to protect against uses that diminish the informative value of marks."); Kenneth L. Port, *The Congressional Expansion of American Trademark Law: A Civil Law System in the Making*, 35 WAKE FOREST L. REV. 827, 910 (2000) (commenting upon the judicial and federal legislative shift in viewing trademarks as property rights).

I offer one final hypothetical. If the doctrines of property are to be simply mapped onto trademark, then Lily Faye could bring a suit against the team in nuisance. The argument would be that the team's use of property effectuated a substantial and unreasonable interference with her use and enjoyment of property. However, as any first year property student would point out, Lily Faye lacks any identifiable property right. There is no property right to a non-stereotyped existence as an Indian in America. Think about that. Marginalized people, sexual minorities, and people of color—among countless other groups—exist *subject to* the mass media extravaganza of American culture. Granted, some of this is beyond our control or the control of the law. But, every image, character, and social representation could be trademarked, copyrighted, or protected by its creator. To the extent that those representations involve marginalized peoples, they serve to further denigrate them, and ultimately harm them. Against that onslaught of media, these groups are powerless. They could write letters to the studios, presidents, actors, and owners. But, those pieces of paper are not the ones that matter. The deeds, trademark registration confirmations, and judicial decisions like *In re Tam* are the papers that matter.

The first goal of this Article is simple and straightforward: provide a comprehensive legal analysis of the Redsk*ns mascot controversy. The second goal of this Article is to set up the further examination of the legal policy question of modern trademark rights as property. In essence, we must revisit the famous line from *State v. Shack* and ask whether it still holds true today: "Property rights serve human values. They are recognized to that end, and are limited by it."[215]

215 State v. Shack, 277 A.2d 369, 372 (1971).