

TRIBAL (DE)TERMINATION? COMMERCIAL SPEECH, NATIVE AMERICAN IMAGERY AND CULTURAL SOVEREIGNTY

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The U.S. Supreme Court ruled in Matal v. Tam that the disparagement clause in the Lanham Act was unconstitutional. This case was just another in a line of commercial speech cases to expand the rights of corporations. This ruling also further limits the legal options for tribes to protect their cultural identity from exploitation. In response, this paper forwards a legal argument applying the tenets of federal Indian law and commercial speech doctrine to assist tribes in protecting their cultural sovereignty. First, the paper examines prominent cases of cultural misappropriation in sports, fashion and sin advertising. Next, the paper outlines the foundations of commercial speech law and federal Indian law. Finally, the paper argues that pursuant to the federal trust responsibility—Central Hudson and Montana—tribal cultural property should receive special protection against unauthorized use in the commercial sphere.

“Just as our traditional homelands were stolen and expropriated without regard, so too has our very cultural identity.”
Sasha Houston Brown (Santee Sioux Nation)
- Letter to Urban Outfitters (2011)¹

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1. Tansy Hoskins, *Fake Native American Clothing Ranges Show the Darker Side of Fashion*, THE GUARDIAN (Aug. 22, 2013, 12:26 PM), <https://www.theguardian.com/sustainable-business/fake-native-american-clothing-dark-side-fashion>.

I. INTRODUCTION

Stereotypes of Native American culture is not new. American children have mimicked the depictions of cowboys and Indians seen in film for over a century with the Indian characters being the ‘bad guys.’ More recently, the stereotype of the ‘noble savage’ has permeated our pop culture.² But today, the stereotypes of American Indian culture may be most prevalent in commercial speech.³ The Cigar Store Indians, Spirit Cigarettes, Land O’Lakes, Calumet Baking Powder, and Crazy Horse Strip Club are just a few of the examples of American Indian imagery used for commercial purposes.⁴ Some may argue that we live in a politically correct world and corporations are more aware of such offensive uses.⁵ This may be true in other offensive depictions,⁶ but misappropriation of Native American imagery still lingers and there is little movement on the part of these corporations to remove such images.⁷ So, American Indian tribes must continue to fight to have such imagery removed from advertising.⁸ But the question remains: is there any legal remedy for Native American tribes when it comes to such cultural misappropriation?

Over the last couple of decades, tribes and tribal organizations have brought political and legal actions in an attempt to take back the names, customs and image of the tribes.⁹ The tribes have had some political success, but the legal barriers are much too high for them to create permanent

2. See 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) (outlining the depictions of Native Americans in American pop culture).

3. See Debra Merskin, *How Many More Indians? An Argument for a Representational Ethics of Native Americans*, 38 J. OF COMM. INQUIRY 184, 186-190 (2014) (arguing that Native American imagery in branding is a part of “commodified racism”).

4. William O’Barr, *Images of Native Americans in Advertising*, 14 ADVERT. & SOC’Y REV. 1, 10 (2013).

5. See generally CATHERINE R. SQUIRES, *THE POST-RACIAL MYSTIQUE: MEDIA AND RACE IN THE TWENTY-FIRST CENTURY* (2014).

6. See, e.g., E.J. Schultz, *Ram Apologizes for Ad, Says MLK Estate Approved It*, AD AGE (Feb. 4, 2018), <http://adage.com/article/special-report-super-bowl/ram-defends-mlk-super-bowl-ad-estate-approved/312251/>; Nicola Slawson, *Dove Apologizes for Ad Showing Black Woman turning into White One*, THE GUARDIAN (Oct. 8, 2017, 1:31 PM), <https://www.theguardian.com/world/2017/oct/08/dove-apologises-for-ad-showing-black-woman-turning-into-white-one>.

7. See, e.g., *Redskins President says Team won’t Change Name even if it Hinders New Stadium Options*, USA TODAY (Aug. 17, 2015, 9:32 AM), <https://www.usatoday.com/story/sports/nfl/redskins/2015/08/17/redskins-president-dismisses-name-change--dc-stadium/31842361/>.

8. See, e.g., Camila Domonoske, *Cleveland Indians Will Remove ‘Chief Wahoo’ From Uniforms in 2019*, NPR (Jan. 29, 2018, 3:00 PM), <https://www.npr.org/sections/thetwo-way/2018/01/29/581590453/cleveland-indians-will-remove-chief-wahoo-from-uniforms-in-2019>.

9. See *infra* Part II.

change.¹⁰ Despite the tribes being sovereign nations who are outside the reach of the U.S. Constitution,¹¹ the First Amendment has barred most attempts to stop outsiders from using stereotypes or misappropriating their cultures for commercial gain.¹²

This article outlines legal battles over cultural sovereignty and offers an argument as to why the law should be changed to protect against the exploitation of Native American imagery for commercial purposes.¹³ First, the paper details several legal battles between Native Americans and corporations. Next, the paper outlines commercial speech doctrine and federal Indian law and examines how each is steeped in Western legal history thus making it difficult for tribes to prevail. Finally, the paper argues that the foundations of commercial speech doctrine can be combined with some of the tenets of federal Indian law in order to protect cultural sovereignty.

II. TWO WORLDS COLLIDE: COMMERCIAL SPEECH AND CULTURAL SOVEREIGNTY

A. *Sports Trademarks: Chief Wahoo, Tomahawk Chop and Redskins*

In the world of professional and collegiate sports in the U.S., the use of Native American imagery goes back to its earliest days.¹⁴ The long-standing use of such imagery by non-Indians has little to do with respect, as the imagery most often used stereotypes that represent the monolithic vision of the American Indian.¹⁵ As a result, in 2001, the U.S. Commission on Civil

10. See *infra* Part II.

11. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (holding that ICRA did not remove tribes' sovereign immunity bar to being sued in federal court).

12. See, e.g., *Matal v. Tam*, 137 S. Ct. 174 (2017) (holding that disparagement clause in Lanham Act was an unconstitutional content-based regulation).

13. The paper uses the term 'cultural sovereignty' in a holistic manner to include all outside uses of indigenous culture that would affect the identity of tribes. This includes traditional notions of intellectual property (e.g. names, customs, clothing, artifacts, etc.) as well as other imagery that impacts cultural identity (e.g. stereotypes, disparaging names, appropriated images, etc.) that may not be covered by Western IP law. See generally Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 892 (2016) (using the term 'intangible property').

14. ELIZABETH HOFFMAN, *AMERICAN INDIANS AND POPULAR CULTURE: MEDIA, SPORTS AND POLITICS* (2012).

15. Carolina A. Miranda, *It's Not Just Chief Wahoo. Why Native American Images became Potent, Cartoonish Advertising Symbols*, L.A. TIMES (Jan. 29, 2018, 5:00 PM), <http://www.latimes.com/entertainment/arts/miranda/la-et-cam-americans-nmai-indians-in-pop-culture-20180122-htmlstory.html>.

Rights called for the end of the use of Native American imagery in sports.¹⁶ Despite the call, the practice is still common in all levels of sports.¹⁷ The NCAA has made a concerted effort to stop the use of such names.¹⁸ Teams like the North Dakota Fighting Sioux changed its name to the Fighting Hawks and St. John's changed from the Red Man to the Red Storm, while the Florida State Seminoles kept their name with the approval of the Seminole Tribe.¹⁹

Two current MLB teams, the Atlanta Braves and the Cleveland Indians, trace the origins of their names back to 1910s.²⁰ Up until 2019, the Cleveland Indians used the Chief Wahoo mascot, a stereotypical cartoon with red skin, a large nose and a giant grin.²¹ But, Cleveland's fans still use the cheer of wooing with their hands slapping their mouths (an unhistorical chant found in classic television westerns like *Gunsmoke*),²² while Atlanta's fans still use the chant called the Tomahawk Chop.²³

The most controversial use of Native American imagery in professional sports is the Washington Redskins.²⁴ The team's history dates back to the Great Depression.²⁵ The team started as the Boston Braves Football Club in 1932 and became the Boston Redskins a year later when it moved into Fenway Park, which was the home of the Boston Red Sox.²⁶ The football team often argues today that the name was chosen by a coach who was half-

16. U.S. Commission on Civil Rights, *News Release: U.S. Commission on Civil Rights on the Use of Native American Images and Nicknames as Sports Symbol*, (Apr. 16, 2001), <http://aistm.org/fr.usccr.htm>.

17. David Carl Wahlberg, *Strategies for Making Team Identity Change*, in *THE NATIVE AMERICAN MASCOT CONTROVERSY: A HANDBOOK* 117, 122 (C. Richard King ed., 2010).

18. *Id.*

19. See Brian Zark, *Use of Native American Tribal Names as Marks*, 3 *AM. INDIAN L. J.* 537, 555 (2015) (explaining uses of Native American names that have tribal approval).

20. Ingrid Messbauer, *Beyond "Redskins": A Source-Based Framework for Analyzing Disparaging Trademarks and Native American Sports Logos*, 25 *FED. CIR. B.J.* 241, 244-45 (2016).

21. Domonoske, *supra* note 8.

22. Messbauer, *supra* note 20, at 250-51.

23. See *supra* text accompanying note 21.

24. See generally *Redskins Name Controversy*, HUFFINGTON POST, <https://www.huffingtonpost.com/topic/washington-redskins-name-controversy> (a list of the dozens of stories on the topic) (last visited June 30, 2018).

25. Ian Shapira, *A Brief History of the Word 'Redskin' and how it Became a Source of Controversy*, WASH. POST (May 19, 2016), https://www.washingtonpost.com/local/a-brief-history-of-the-word-redskin-and-how-it-became-a-source-of-controversy/2016/05/19/062cd618-187f-11e6-9e16-2e5a123aac62_story.html?utm_term=.ca5482bce9e0.

26. Jesse Witten, *Time to Retire the 'R' Reference? Challenging the Trademark Registrations of the Washington Professional Football Team.*, 28 *WASH. LAW.* 31, 32 (2014), <https://www.dcbbar.org/bar-resources/publications/washington-lawyer/articles/june-2014-taking-the-stand.cfm>.

Sioux,²⁷ but history tells us that the coach was not there at the time of the naming.²⁸ In fact, the owner at that time announced that the new name was adopted so the football team would be related with the Red Sox, yet still allowing them to use the original Braves' imagery.²⁹ In 1937, the team moved to the nation's capital and became the Washington Redskins.³⁰

The Redskins name has been controversial since its inception, with the earliest official boycott beginning in 1944 with the Native Congress of American Indians.³¹ But in the last few decades, there has been a significant political movement to have the name changed, either through boycotts or legal actions, culminating in 1999, with the Trademark Trial and Appeal Board (TTAB) canceling the Redskins' trademark for being disparaging.³² But the case was eventually overturned on procedural grounds.³³ In 2014, the TTAB once again canceled the Redskins' trademark³⁴ and this time the Fourth Circuit upheld the TTAB's decision.³⁵

In 2009, the U.S. Supreme Court refused to take the football team's appeal.³⁶ But several years later, the Court did decide to hear a similar case dealing with an alt-rock band named The Slants, who had their trademark denied because the name was a derogatory term for Asian-Americans.³⁷ In 2017, the U.S. Supreme Court ruled in favor of The Slants and held that the disparagement clause was unconstitutional,³⁸ thus making the Redskins Trademark case moot.³⁹

27. *Id.*

28. *Id.*

29. *Id.*

30. *See id.*

31. J. Gordon Hylton, *Before the Redskins Were the Redskins: The Use of Native American Team Names in the Formative Era of American Sports, 1857-1933*, 86 N.D. L. REV. 879, 879-80 (2010).

32. *Harjo. v. Pro-Football, Inc.*, 50 U.S.P.Q.2d 1705 (T.T.A.B. 1999).

33. *Pro-Football, Inc. v. Harjo*, 415 F.3d 44 (D.C. Cir. 2005).

34. *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d 1080, 2014 WL 2757516 (T.T.A.B. 2014); *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015), *vacated*, 709 F. App'x 182 (4th Cir. 2018).

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

36. *Pro-Football, Inc. v. Harjo*, 415 F.3d 44 (D.C. Cir. 2005), *cert. denied*, 558 U.S. 2015 (2009).

37. *Matal v. Tam*, 137 S. Ct. 1744 (2017). The difference in this case is that the band is made up of all Asian-Americans who also named the band and they are primarily involved with artistic expression. *See* Simon Tam, *The Difference Between "The Redskins" Case and Ours*, THE SLANTS (Apr. 26, 2016), <http://www.theslants.com/the-difference-between-the-redskins-case-and-ours/>.

38. *Matal v. Tam*, 137 S. Ct. 1744 (2017). The "disparagement clause cannot withstand even *Central Hudson* review." *Id.* at 1764.

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

B. Fashion: Navajo Flasks and Models in Headdresses

Indigenous cultures have been an inspiration for many fashion designers.⁴⁰ The use of generic patterns, styles and colors cannot be trademarked,⁴¹ but under the Indian Arts and Crafts Act, any product that claims to be made by tribal members must be authentic.⁴² Yet, much of the apparel industry has co-opted Native American culture without giving any claim to being authentic,⁴³ leaving tribes unable to control how their cultural heritage is being used.⁴⁴

For example, in 2015, Ralph Lauren ran an advertisement campaign using 19th century photos of American Indians, including one that was photoshopped to show a tribal member in a western style suit-coat and tie.⁴⁵ In 2012, Victoria Secret models wore headdresses, which are considered to be sacred, in its live television show (it was eventually edited out).⁴⁶ This was offensive because, for example, in the Lakota Sioux tribes, headdresses can only be worn by those who earned the privilege through acts of bravery or compassion.⁴⁷

With the above incidents, there was no legal recourse, but in 2013, the Navajo Nation did bring an action against Urban Outfitters.⁴⁸ The claim arose from the retail chain's use of the Navajo name, which the tribe had

40. Peter Shand, *Scenes from the Colonial Catwalk: Cultural Appropriation, Intellectual Property Rights, and Fashion*, 3 CULTURAL ANALYSIS 47 (2002) (giving history of misappropriation of indigenous culture in fashion industry).

41. 15 U.S.C. §1127 (2006). See generally John Dwight Ingram, *The Genericide of Trademarks*, 2 BUFF. INTELL. PROP. L.J. 154, 154-163 (2004).

42. Indian Arts and Crafts Act of 1990 § 105; 25 U.S.C. § 305e (2012).

43. See Shand, *supra* note 40; see also *Navajo Nation v. Urban Outfitters, Inc.*, 935 F. Supp. 2d 1147 (D.N.M. 2013).

44. Riley & Carpenter, *supra* note 13 (analyzing examples of appropriation of real and cultural property).

45. Kim Bhasin, *Ralph Lauren's Native American Ads Reveal Sad Truth About The Fashion World*, HUFFINGTON POST (Jan. 13, 2015, 11:25 AM), http://www.huffingtonpost.com/2015/01/13/ralph-lauren-native-american_n_6444366.html.

46. *Victoria's Secret Apologizes for Use of Headdress*, CBC NEWS (Nov. 13, 2012, 7:18 PM), <https://www.cbc.ca/news/world/victoria-s-secret-apologizes-for-use-of-headdress-1.1130549>; see also George Nicholas, *Victoria's Secret Does It Again: Cultural Appropriation*, THE CONVERSATION (Nov. 12, 2017, 7:18 PM), <http://theconversation.com/victorias-secret-does-it-again-cultural-appropriation-87987> (detailing Victoria's Secret use of African indigenous culture).

47. Peter Gicas, *Victoria's Secret Apologizes for Native American Headdress in Fashion Show, Pulls From Broadcast*, E! NEWS (Nov. 13, 2012, 8:32 AM), <http://www.eonline.com/ca/news/362640/victoria-s-secret-apologizes-for-native-american-headdress-in-fashion-show-pulls-from-broadcast>. “[T]he Sioux headdress is only worn in ceremonies by persons who have earned the honor of doing so. Current use of the feather trivializes and degrades the significance placed on the feather by Indian people.” Quoted in Paul E. Loving, *Native American Team Names in Athletics: It's Time to Trade These Marks*, 13 LOY. L.A. ENT. L.J. 1, 42 (1992).

48. *Navajo Nation v. Urban Outfitters, Inc.*, 935 F. Supp. 2d 1147 (D.N.M. 2013).

trademarked.⁴⁹ The retailer used the name on over 20 products, including jewelry and clothing in its Navajo Collection.⁵⁰ The tribe claimed that the Navajo name was distinctive, thus the retailer's use was diluting the mark.⁵¹ Also, the retailer used tribal patterns to mimic the certified products made by Navajo tribal members which arguably violated the Indian Arts and Crafts Act.⁵²

The argument in court was to whether the name "Navajo" was distinctive and famous, or if it was a generic description of a pattern and style that is consistent across apparel.⁵³ Moreover, the tribe claimed that the use of the Navajo name to sell underwear and flasks was derogatory and that the misspelling of Navajo (the retailer used Navaho) was also scandalous.⁵⁴ The court allowed the trademark dilution case to move forward.⁵⁵ But the District Court claimed that the tribe could not show dilution or confusion among customers.⁵⁶ Nonetheless, under public pressure, Urban Outfitters had removed the Navajo name, but it still sold the products.⁵⁷ Finally, in September of 2016, the case was settled and Urban Outfitters agreed to license and market authentic Navajo crafts.⁵⁸

C. Sin Advertising: Red Man Chew, Crazy Horse Saloon and Crazy Horse Malt Liquor

Much of the Native American imagery seen in advertising today comes in the form of so-called sin products, such as cigarettes (Red Man Chew,

49. *Id.* The tribe has used the name since at least 1849. *Id.* at 1153.

50. *Id.* The tribe claimed to have more than 80 registered trademarks. *Id.*

51. *Id.* at 1153-54.

52. *Id.* at 1169-72.

53. *Id.* at 1166-67. The tribe had used the name Navajo as a mark since 1941. *Id.*

54. *Id.* at 1169. The tribal code required the accurate spelling. *Id.*

55. *Id.* at 1178.

56. *Navajo Nation v. Urban Outfitters, Inc.*, No. 12-195 BB/LAM, 2016 WL 3475342 (D.N.M. May 13, 2016).

57. Erin Clements, *Urban Outfitters Removes 'Navajo' from Its Product Descriptions*, HUFFINGTON POST (Dec. 20, 2011, 4:55 PM), https://www.huffingtonpost.com/2011/10/20/urban-outfitters_n_1022663.html.

58. Alys Landry, *Urban Outfitters and Navajo Nation Reach Settlement on Appropriation*, INDIAN COUNTRY TODAY: NEWS MAVEN (Nov. 22, 2016), <https://newsmaven.io/indiancountrytoday/archive/navajo-nation-and-urban-outfitters-reach-agreement-on-appropriation-hmU7yHNu606ffn1OOeFRpw/>.

American Spirit),⁵⁹ alcohol,⁶⁰ and gambling.⁶¹ These products have been strictly regulated in the past due to their social costs.⁶² Historically, such products have been viewed as vile and uncivilized, which has also been a stereotype for Native Americans.⁶³

The use of Native American imagery in alcohol advertising is especially problematic.⁶⁴ Prior to the arrival of European settlers, there was no recreational use of alcohol among tribes.⁶⁵ But European settlers used it in their trade with Indians and introduced higher proof alcohol in copious amounts.⁶⁶ The introduction of alcohol, along with disease, is often cited as a main contributor to the decimation of the tribal population.⁶⁷ Long after the tribes were forced from traditional lands and lifestyles, the abuse of alcohol rose despite the fact that federal law blocked the sale of alcohol on reservations until 1953.⁶⁸

In 1990, the New York based liquor company Hornell Brewing began producing the Crazy Horse Malt Liquor, which it distributed in thirty one states.⁶⁹ The malt liquor was labeled “Crazy Horse” and the bottle included

59. Joanne D’Silva, et al., *Tobacco Industry Misappropriation of American Indian Culture and Traditional Tobacco*, TOBACCO CONTROL (Feb. 19, 2018), <https://tobaccocontrol.bmj.com/content/early/2018/02/19/tobaccocontrol-2017-053950>.

60. See, e.g., MiBePaTeam, *Hamms’ Beer Rain Dance*, YOUTUBE (Apr. 5, 2010), <https://www.youtube.com/watch?v=Y9CAGxjuJ-o>.

61. See, e.g., David Cullier & Susan Dente Ross, *Gambling with Identity: Self-Representation of American Indians on Official Tribal Websites*, 18 HOW. J. COMM. 197 (2007).

62. KATHERINE RUANE, CONG. RESEARCH SERV., FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 14 (2008), <https://fas.org/spp/crs/misc/95-815.pdf>.

63. William O’ Barr, *Images of Native Americans in Advertising*, 14 ADVERT. & SOC’Y REV. 1 (2013).

64. Antonia Novello, *Crazy Horse Malt Liquor Beverage: The Public Outcry to Save the Image of a Native American Hero*, 38 S.D. L. REV. 14 (1993) (detailing the history of the beverage and the criticisms).

65. “Some tribes produced weak beers or other fermented beverages, but these were generally used only for ceremonial purposes.” Fred Bauvais, *American Indians and Alcohol*, 22 ALCOHOL RES. & HEALTH 253, 253 (1998), <https://pubs.niaaa.nih.gov/publications/arh22-4/253.pdf>.

66. *Id.* The tribes did not have customs to regulate personal consumption and the harms that come from abuse. *Id.*

67. “Foreign colonizers brought disease and alcoholism, as well as the Bible, materialism, and a market economy. Those who survived the contamination of disease and alcoholism of the 17th and 18th centuries faced assimilation, acculturation, termination, extermination, and relocation in the 19th and 20th centuries.” Scott Morrison & LeAnne Howe, *The Sewage of Foreigners: An Examination of the Historical Precedent for Modern Waste Disposal on Indian Lands*, 39 FED. B. NEWS & J. 370, 370 (1992).

68. See generally, Jill Martin, “*The Greatest Evil*” *Interpretations of Indian Prohibition Laws, 1832-1953*, GREAT PLAINS QUARTERLY, 2432 (2003) (detailing the history of federal prohibition laws applied to tribes).

69. Frank Pommersheim, *The Crazy Horse Malt Liquor Case: From Tradition to Modernity and Halfway Back*, 57 S.D. L. REV. 42, 45 (2012).

a cartoon of an Indian in a headdress, a bucking horse, as well as the words “Black Hills Ltd.”⁷⁰ The Estate of Tasunke Witko (known by the English name Crazy Horse) and the Brule Lakota of the Rosebud Sioux Tribe, sued the brewing company for, inter alia, negligent infliction of emotional distress, defamation and a violation of right to publicity.⁷¹

The tribe disapproved the use of the name for several reasons, including the long history of alcohol abuse on reservations and the fact that the Crazy Horse himself was an advocate against the consumption of alcohol.⁷² Yet, Crazy Horse, who is revered by the Sioux for his resistance to the U.S. Government, has since become an icon for stereotypical representation of ‘Indian’ for much of American pop culture.⁷³

The name Crazy Horse has adorned hundreds of products including a clothing line, a chain of American strip clubs, and a famous Paris night club known as the Crazy Horse Saloon.⁷⁴ In 1993, in response to *Hornell*, Congress passed a law banning the use of the name Crazy Horse in the alcohol industry.⁷⁵ But, a New York federal court overturned the law.⁷⁶ Though the court did recognize the government’s substantial interest in curtailing the abuse of alcohol,⁷⁷ it held that the law violated the brewer’s First Amendment rights as it was protected commercial speech that was not misleading.⁷⁸

The tribe then brought suit in tribal court asserting similar claims, as well as claims under the Lanham Act and Indian Arts and Crafts Act.⁷⁹ The brewer challenged the tribal court’s jurisdiction over the non-tribal member

70. Estate of Tasunke Witko, 23 Indian L. Rep. at 6109 (Rosebud Sioux Sup. Ct. 1996).

71. Estate of Tasunke Witko (aka Crazy Horse) v. Heileman Brewing Co, No. Civ. 93-204 (Rosebud Sioux Tr. Ct. 1994).

72. Novello, *supra* note 64.

73. See Pommersheim, *supra* note 69, at 43-44 (“Near mythic to his own people, he also became an icon of the Plains’ Indians to society at large. He was the glorious embodiment of mystery and resistance that met his tragic demise at the end of the trail. Such national icons, especially those minted in romantic stereotypes, often become figures that are expropriated by the dominant society to support advertising and to enhance commercial profit. It is, in part, the quintessential American way.”).

74. *Id.* at n. 4.

75. Alien Species Prevention & Enforcement Act of 1992, Pub. L. No. 102-393, § 633, 106 Stat 1729 (1992), *invalidated* by *Hornell Brewing Co. v. Brady*, 819 F.Supp. 1227, (E.D.N.Y. 1993); *see also* Pommersheim, *supra* note 69, at 46.

76. See *Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227, 1229 (E.D.N.Y. 1993).

77. *Id.* at 1236. The court said that the government does not have an interest in prohibiting speech that may offend some people. *Id.*

78. *Id.* at 1233. The court added that the government did not adequately show that the law advanced the interest in curtailing alcoholism. *Id.* at 1237.

79. Estate of Tasunke Witko (aka Crazy Horse) v. Heileman Brewing Co., No. Civ. 93-204 (Rosebud Sioux Tr. Ct. 1994).

who did not have contact with the reservation.⁸⁰ The *Rosebud* Supreme Court held that tribal courts had jurisdiction as the brewer had advertised in South Dakota and if it needed to obtain permission to use a likeness, it would require the brewer to make contact with the tribe.⁸¹ The court also felt that the use of the Crazy Horse name may create a false association with the Sioux.⁸²

The brewer sought an injunction against tribal jurisdiction in federal court.⁸³ The Eighth Circuit ruled against the tribal court, stating that under the *Montana* exceptions, the tribe did not have jurisdiction as there were no sales on reservation land nor was there a consensual relationship between the tribe and the defendant.⁸⁴ The court stated that the tribe could sue in federal court.⁸⁵

The tribe then brought the case in federal court in South Dakota, and the district court denied the brewer's call for dismissal based on lack of jurisdiction.⁸⁶ Around this time, the brewer was bought out by Stroh's Brewing.⁸⁷ The new company decided to settle the case with the tribe in the Lakota tradition.⁸⁸ The settlement required the brewer to travel to the Rosebud Sioux Reservation and for the owner of Stroh's to read an apology.⁸⁹ He also presented a gift of blankets, braids of sweetgrass, tobacco and seven horses to the administrator of the Crazy Horse estate.⁹⁰ There was no monetary exchange.⁹¹

80. Estate of Tasunke Witko, 23 Indian L. Rep. 6104 (Rosebud Sioux Sup. Ct. 1996).

81. *Id.* at 6111.

82. *Id.*

83. Hornell Brewing Co. v. Rosebud Sioux Tribal Ct., 133 F.3d 1087 (8th Cir. 1998).

84. *Id.* at 1090-1091 (8th Cir. 1998) (overturning district court and remanding).

85. *Id.* at 1093 (8th Cir. 1998).

86. Estate of Witko v. Hornell Brewing Co., 156 F. Supp. 2d 1092 (D.S.D. 2001) (finding that the federal court did have jurisdiction over the company).

87. Pommersheim, *supra* note 69, at 59.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

III. LEGAL IMPEDIMENTS TO PROTECTING CULTURAL SOVEREIGNTY

A. *Commercial Speech Doctrine*

When it comes to protecting intangible cultural property, it is nearly impossible for tribes to win any legal claims.⁹² The images, names and symbols tribes would want to protect are most often part of a collective that have evolved over many generations.⁹³ This is antithetical to American and international intellectual property law which protects the rights of individual persons or entities and gives finite terms of protection.⁹⁴

Commercial speech protection emerged relatively recently in U.S. jurisprudence.⁹⁵ For many years, commercial speech did not have any protection because it was speech used to seek profit and could be used to deceive consumers.⁹⁶ But in a series of cases in the 1970s, the U.S. Supreme Court expanded protection for commercial speech, though it still receives less protection than non-commercial speech.⁹⁷ In *Central Hudson*,⁹⁸ the U.S. Supreme Court created a legal test as to when the government can regulate commercial truthful speech regarding legal products: (1) the government's interest in limiting the speech must be substantial; (2) the government's regulation must directly advance its substantial interest; and (3) the government's regulation cannot be more extensive than necessary to advance the interest.⁹⁹

When it comes to applying the *Central Hudson* test, courts have often found that the government has substantial interests especially when it comes to the advertising of harmful, but legal products¹⁰⁰ and that the regulation

92. See Kelsey Collier-Wise, *Identity Theft: A Search for Legal Protections of Intangible Indigenous Cultural Property*, 13 GREAT PLAINS NAT. RESOURCES J. 85, 85, 90 (2010) (examining legal approaches to protecting cultural property).

93. See *id.* at 85.

94. See Riley & Carpenter, *supra* note 13, at 855-866.

95. See generally Bigelow v. Virginia, 95 U.S. 2222 (1975); see also Jonathan H. Adler, *Persistent Threats to Commercial Speech*, 25 J.L. & POL'Y 289, 316 (2016).

96. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 598 at n. 6 (1980) (“[C]ommercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not ‘particularly susceptible to being crushed by overbroad regulation.’”); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 64-65 (1983).

97. See *supra* note 69; *Cent. Hudson*, 447 U.S. 557, 569-72. (1980) (holding that law requiring utility companies not to advertise during energy crisis did not survive intermediate scrutiny).

98. *Cent. Hudson*, 447 U.S. 557, 566.

99. *Id.* at 561-66.

100. See generally Hugh Campbell, *A First Amendment Look at the Statutory Ban on Tobacco Advertisements and the Self-Regulation of Alcohol Advertisements*, 65 FED. COMM. L. J. 102, 102-106 (2013) (outlining advertising regulations).

directly advances that interest.¹⁰¹ But in fulfilling the third prong, the U.S. Supreme Court has been less willing to go with the government's argument. The Court has said that there may be a less restrictive alternative available, but the government cannot restrict more speech than necessary.¹⁰²

The U.S. Supreme Court has recently struck down several laws attempting to regulate advertising of cigarettes¹⁰³ and alcohol¹⁰⁴ because they were more extensive than necessary. Moreover, in *Sorrell v. IMS Health*,¹⁰⁵ the Court held that a regulation aimed at commercial speech because it is commercial, may be a content-based regulation subject to strict scrutiny, rather than intermediate scrutiny pursuant to *Central Hudson*.¹⁰⁶ In doing so, the Court may have hinted towards more protection of commercial speech in the near future, even paralleling political speech protections.¹⁰⁷

When it comes to applying the *Central Hudson* test to cases of commercial entities using Native American imagery, it seems unlikely that tribes could ever prevail.¹⁰⁸ First, the advertisements are not misleading unless they claim to be products made by a tribe or tribal member.¹⁰⁹ Additionally, the government may have laudable desire to protecting cultural sovereignty, but it cannot place content-based regulation.¹¹⁰ Even if it was a substantial state interest, a complete ban on such speech is never narrowly tailored to achieve that goal.¹¹¹

101. Milena Mikailova, *Advertising and Childhood Obesity: The Role of the Federal Government in Limiting Children's Exposure to Unhealthy Food Advertisements*, 66 FED. COMM. L.J. 327, 349 (2014).

102. *Bd. of Trs. State Univ. of N.Y. v. Fox*, 492 U.S. 469, 478 (1989).

103. *See, e.g., Lorillard v. Reilly*, 533 U.S. 525, 561-563 (2001) (holding that cigarette regulations did not survive intermediate scrutiny).

104. *See, e.g., Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507-508 (1996) (holding that alcohol regulation did not survive intermediate scrutiny).

105. 564 U.S. 552, 557 (2011) (holding that Vermont law restricting the sale of pharmacy records containing identifiable information for purposes of marketing was unconstitutional).

106. *Id.* at 565-567.

107. *See Isabelle Bibet-Kalinyak, A Critical Analysis of Sorrell v. IMS Health, Inc.: Pandora's Box at Best*, 67 FOOD & DRUG L.J. 191 (2012); Tamara R. Piety, "A Necessary Cost of Freedom"? *The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1 (2012).

108. Jeffrey Lefstin, *Does the First Amendment Bar Cancellation of Redskins?*, 52 STAN. L. REV. 665, 686-690 (2000).

109. Which would also violate the Indian Arts and Crafts Act of 1990 § 105; 25 U.S.C. § 305e (2012).

110. *See, e.g., Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (holding that disparagement clause in Lanham Act was an unconstitutional content-based regulation).

111. *See Sorrell v. IMS Health*, 564 U.S. 552, 557 (2011).

B. *Trademark and the Lanham Act*

Tribes had attempted to use the Lanham Act¹¹² which blocks the registration of disparaging marks.¹¹³ This section of the law had allowed for challenges on two causes of action: 1) a mark that contains “immoral, deceptive, or scandalous matter[;]”¹¹⁴ or 2) a mark that is disparaging or falsely suggests a connection with persons, institutions, or beliefs.¹¹⁵ Scandalous marks were those that would have been considered to offend the public at large, whereas a disparaging remark would offend a particular group of people.¹¹⁶ A challenge pursuant to §1052(a) of the Lanham Act was subject to the defense of laches, which made it difficult for a challenger to stop a mark that has been in existence for many years.¹¹⁷

But in 2017, the U.S. Supreme Court ruled unanimously that §1052 was unconstitutional as it was viewpoint discrimination.¹¹⁸ Moreover, the Court held that the clause did not survive the intermediate scrutiny of *Central Hudson*.¹¹⁹ Though the government may have had a laudable goal in limiting offensive speech that demeans underrepresented groups, the clause was not narrowly drawn to serve such interests as it also blocks speech that is disparaging of any groups, including racists.¹²⁰ The Court labeled the clause a “happy talk clause.”¹²¹ Finally, the Court added that this is another example of how the line between commercial speech and political speech is blurred, once again hinting that commercial speech regulation should not receive lesser scrutiny.¹²²

112. Lanham (Trademark) Act of 1946, Pub.L. 79-489, 60 Stat. 427 (1946) (codified at 15 U.S.C. § 1051 et seq.).

113. Lanham Act, 15 U.S.C. § 1052 (2006) (“No trademark . . . shall be refused registration . . . unless it – (a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute . . .”).

114. Perry J. Viscounty et al., *Watch Your Mark – Navigating the Prohibitions on Immoral, Scandalous and Disparaging Trademarks*, WORLD TRADEMARK REV. (2014).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

119. *Id.* at 1764-65.

120. *Id.* at 1765.

121. *Id.*

122. *Id.* “If affixing the commercial label permits the suppression of any speech that may lead to political or social ‘volatility,’ free speech would be endangered.” *Id.*

C. *Tenets of Federal Indian Law*

Indian Tribes are considered to be extra-constitutional.¹²³ For the first four decades of the Republic, the U.S. Government treated tribes as separate sovereigns with whom they would make treaties and trade agreements.¹²⁴ In the 1830s, the Marshall Trilogy¹²⁵ shaped the contours of the complex relationship between tribes and the U.S. Government. First, under the tenuous legal doctrine of discovery,¹²⁶ the tribes would be seen as domestic dependent nations within the U.S.¹²⁷ Thus, the states could not regulate the tribes, and only the federal government would have plenary powers over the tribes.¹²⁸ In this relationship, the federal government would have a trust responsibility to promote the welfare of the tribes, which was a status the tribes had acquired through treaties in consideration of giving up land and absolute sovereignty.¹²⁹

But for most of U.S. history, the federal government did not fulfill its trust responsibility.¹³⁰ The government consistently and unilaterally violated treaties when the terms no longer suited them.¹³¹ Moreover, the U.S. Supreme Court had held that the plenary powers not only allowed the government to remove tribes from their aboriginal lands,¹³² but also to

123. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-58 (1978) (citing that this has been extended to the Bill of Rights and 14th Amendment).

124. Frank Lawrence, *Reflections on Tribal Sovereignty and Sovereign Immunity*, ASPATORE 2012, at *2, 2012 WL 5898574.

125. The three cases are: *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

126. *See generally* Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 3 (2005).

127. *Johnson*, 21 U.S. at 573-574; *Cherokee Nation*, 30 U.S. (5 Pet.) at 17-18.

128. *See supra* note 118; *see also* *Morton v. Mancari*, 417 U.S. 535, 552-553 (1974) (upholding hiring preferences for tribal members).

129. *See United States v. Mitchell*, 463 U.S. 206, 224-225 (1983) (describing the federal government's fiduciary responsibility to tribes).

130. *See generally* Hansi Lo Wang, *Broken Promises on Display at Native American Treaties Exhibit*, NPR (Jan. 18, 2015, 4:57 PM), <https://www.npr.org/sections/codeswitch/2015/01/18/368559990/broken-promises-on-display-at-native-american-treaties-exhibit>.

131. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (arguing that treaties do not limit Congress' plenary powers over tribes).

132. The Court has claimed that:

The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability.

Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281-82 (1955).

remove tribal members from the reservations for assimilation and to terminate the legal status of many tribes whenever it pleased.¹³³

With the Indian Reorganization Act of 1934,¹³⁴ the remaining tribal nations in the U.S. began to form governments that resembled western government (e.g. three branches, elected leaders, written laws, etc.).¹³⁵ Though the tribal governments had more western-style governments, they still lacked jurisdiction over non-tribal members in most cases.¹³⁶ For example, in criminal cases, the federal government has jurisdiction in most felony cases.¹³⁷ If the perpetrator is non-Indian, then the state has jurisdiction.¹³⁸ Seemingly, the tribes only have criminal jurisdiction when the perpetrator and victim are both tribal members and it is not a felony—in other words—a lesser crime.¹³⁹

In civil cases, the precedent is *Montana v. United States*.¹⁴⁰ This case held that tribes only have civil jurisdiction over non-Indians if the events leading to the case took place on a reservation, there is consensual relationship between the tribe and the defendant, or there is a substantial tribal interest.¹⁴¹ The tribes have “inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”¹⁴² The U.S. Supreme Court has also stated that tribal courts’ remedies should be exhausted before federal courts can review challenges to tribal jurisdiction.¹⁴³ Ultimately, tribes should be able to consider if they have jurisdiction.¹⁴⁴ However, over

133. See Thomas Anthony & Jill Lauderman, *Tribal Court Comity: Settled Areas of the Law*, 63 FED. LAW. 20, 21-22 (2016) (outlining the policy eras in Federal Indian Law).

134. 25 U.S.C. § 461 (2012).

135. See FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 22 (1995).

136. See *supra* notes 131 & 134.

137. Major Crimes Act, 18 U.S.C. § 1153 (2012).

138. See *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978); *United States v. McBratney*, 104 U.S. 621 (1881).

139. See generally Matthew Handler, *Tribal Law and Disorder: A Look at a System of Broken Justice in Indian Country and the Steps Needed to Fix It*, 75 BROOK. L. REV. 261, 276 (2009) (providing chart of jurisdiction over plaintiff, crime and place).

140. 450 U.S. 544 (1981).

141. *Id.* at 565.

142. *Id.* at 566.

143. See *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985).

144. See *Iowa Mut. v. LaPlante*, 480 U.S. 9, 17-20 (1987).

a recent set of cases, the Court has limited the extent of tribal jurisdiction over non-Indians in civil matters.¹⁴⁵

Tribes are still extra-constitutional, but in 1968, Congress passed the Indian Civil Rights Act (ICRA) which mostly mirrored the Bill of Rights, including the protection for the freedom of speech.¹⁴⁶ Nonetheless, Congress created the law with the tribes' special political, cultural and economic needs in mind.¹⁴⁷ Thus, any ICRA case must be tried in tribal court,¹⁴⁸ with the exception of habeas corpus which can be challenged in federal court. Therefore, tribal interpretations of free speech would be authoritative,¹⁴⁹ though at this point most tribes have not put into place laws protecting cultural property.¹⁵⁰

IV. CULTURAL SOVEREIGNTY OVER COMMERCIAL EXPLOITATION

In fulfillment of its trust responsibility, Congress should pass a law that limits the use of Native American imagery in commercial speech, unless the advertiser receives approval from the requisite tribe.¹⁵¹ Congress should also amend intellectual property law in order to give tribes protection of their cultural property for a much longer period of time than traditional IP terms.¹⁵² The following section outlines why such laws are necessary and how they can survive constitutional scrutiny.

A. *Appropriation of Cultural Property is a Threat to the Welfare of Tribes*

As currently constituted, intellectual property law is an economic protection.¹⁵³ It protects the creator of intellectual property from having

145. See *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997); *Nevada v. Hicks*, 533 U.S. 353, 374 (2001); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 647 (2001); cf. *Dollar Gen. v. Miss. Band of Choctaw Indians*, 136 S.Ct. 2159 (2016) (refusing to apply *Oliphant* to civil matters).

146. 25 U.S.C. § 1301-1304 (2012).

147. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1979).

148. 25 U.S.C. § 1301-1304 (2012).

149. *Santa Clara Pueblo*, 436 U.S. at 62. The Equal Protection Clause in ICRA guarantees “the equal protection of [a tribe’s] laws,” rather than of the federal laws. 25 U.S.C. §1302(a)(8) (2012); see also *id.* at § 1303 (“The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.”).

150. See *Collier-Wise*, *supra* note 92, at 90-93 (discussing different approaches to protect cultural property through tribal law).

151. See *Zark*, *supra* note 19, at 554-55 (explaining uses of Native American names that have tribal approval).

152. See Angela R. Riley, “*Straight Stealing*”: *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 86-87 (2005) (discussing an Indian Copyright Act).

153. See Anjali Vats & Deidré A. Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. L.J. 735, 746-47 (2018) (detailing the ‘intellectual property economy’).

others misuse the product for gain or unjust enrichment.¹⁵⁴ But what about property that was created by a distinct culture and then misappropriated by a people who are not of that culture—are there any protections?

Native American tribes were thrust into a political-legal structure that has allowed for the government to take land and sovereignty in the name of civilizing the Indian.¹⁵⁵ U.S. Supreme Court jurisprudence has legitimized the taking of tribes' real property,¹⁵⁶ so it is no surprise that our jurisprudence also allows for corporations to misappropriate tribal cultural property and sovereignty as well.¹⁵⁷

Inspiration can create new artistic expressions, which is a result that intellectual property law strives to protect.¹⁵⁸ But, in the examples above, it seems less like inspiration and more like co-opting or even stealing.¹⁵⁹ Moreover, with uses such as Redskins or Navajo Flask or Crazy Horse Malt Liquor, it is demeaning and disparaging of an underrepresented group.¹⁶⁰ Using a headdress, or applying a tribal name to a flask or liquor, hardly seems like an honoring.¹⁶¹ Most egregious is the Redskins trademark, a term which refers to the scalping of Indians as revenge for the Indians' scalping of U.S. soldiers during the Indian Wars.¹⁶² Unlike the Asian-American rock band The Slants, these commercial entities are not trying to express a political message about their product.¹⁶³

The misappropriation of other 'groups' has been cited as a defense for using Native American imagery.¹⁶⁴ But other disparaging uses do not justify

154. See Molly Torsen, "Anonymous, Untitled, Mixed Media": *Mixing Intellectual Property Law with Other Legal Philosophies to Protect Traditional Cultural Expression*, 54 THE AM. J. OF COMP. L., 173, 178 (2006).

155. See Kathryn Fort, *The (in)equities of Federal Indian Law*, 54 FED. LAW. 32, 37 (2007) (examining land claims cases).

156. See *supra* notes 126-27.

157. See generally ROBERT WILLIAMS, *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005).

158. See Lisa C. DeJaco, *What Use Is Fair? The Line Between Derivative Works and Transformative Use*, 55 FED. LAW. 14 (2008).

159. See Sari Sharoni, *The Mark of A Culture: The Efficacy and Propriety of Using Trademark Law to Deter Cultural Appropriation*, 26 FED. CIRCUIT B.J. 407, 409 (2017) (outlining theories of cultural appropriation).

160. Darryl Fears, *Indian Mascots: Matter Of Pride or Prejudice?*, WASH. POST (Aug. 14, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/13/AR2005081300448.html>.

161. Victoria F. Phillips, *Beyond Trademark: The Washington Redskins Case and the Search for Dignity*, 92 CHI.-KENT L. REV. 1061, 1078-79 (2017) (presenting the arguments of such uses as being dehumanizing or as honoring).

162. Baxter Holmes, *Update: Yes, A 'Redskin' Does, In Fact, Mean the Scalped Head*, ESQUIRE (Jun. 18, 2014), <https://www.esquire.com/news-politics/news/a29318/redskin-name-update/>.

163. See *Matal v. Tam*, 137 S. Ct. 1744 (2017).

164. Messbauer, *supra* note 20, at 250.

this one. Moreover, the other uses are different. Some groups no longer exist (e.g. Vikings).¹⁶⁵ One oft-cited example of peoples who do exist is the Notre Dame Fighting Irish. But the University of Notre Dame was established as an Irish-Catholic school.¹⁶⁶ In most cases of Native American imagery, the producer is not Native American. Each of the above uses cited in this paper resulted from outsiders who seemingly do not belong to the culture nor understand it.¹⁶⁷ Even if they meant to be respectful—the end product is not. A better analogy is the use of mascots like Aunt Jemima and Uncle Ben, which have both been criticized as being racial stereotypes.¹⁶⁸

Many of the uses of Native American imagery are defended as being just an appreciation of the aesthetic or uniqueness of the culture.¹⁶⁹ Other times, the argument is that the uses are tributes to Native Americans and the image of warrior, strength, spirituality, etc.¹⁷⁰ But both of these arguments fail in many regards.¹⁷¹ The stereotype of the noble Indian is just as offensive as the stereotype of the savage Indian, as neither reflect the reality of the past or the current state of tribes in the U.S.¹⁷² The warrior imagery is often associated with the violent past of the tribes without recognition of the wars forced upon them by U.S. government.¹⁷³ Furthermore, because of historical economic-political dynamics, violence is still an issue today on reservations, along with alcohol abuse and high unemployment on many of the Plains reservations.¹⁷⁴ The perpetuity of such stereotypes impacts the “welfare of the tribe”¹⁷⁵ as young tribal members struggle with their own modern identity, leading to issues of depression, alcoholism and suicide.¹⁷⁶

165. *Id.*

166. *Id.*

167. See Jennifer Guiliano, *The Fascination and Frustration with Native American Mascots*, SOC’Y PAGES (Aug. 20, 2013), <http://thesocietypages.org/specials/mascots/> (outlining the sociological effects of using Native American images for mascots).

168. Gritz Rothenberg, *New Racism Museum Reveals the Ugly Truth Behind Aunt Jemima*, ATLANTIC (Apr. 23, 2012), <http://www.theatlantic.com/national/archive/2012/04/new-racism-museum-reveals-the-ugly-truth-behind-aunt-jemima/256185/>.

169. See Torsen, *supra* note 154 at 188-190 (discussing the issues with using cultural symbols).

170. Messbauer, *supra* note 20, at 251.

171. *Id.* at 251-52.

172. See M. Alexander Pearl, *How to Be an Authentic Indian*, 5 CAL. L. REV. CIR. 392, 393 (2014) (a satirical examination of the Native American stereotype).

173. Rebecca Tsosie, *Indigenous Identity and Sports Mascots: The Battlefield of Cultural Production*, 63 FED. LAW. 9, 9-10 (2016) (outlining the contrasting stereotypes of tribes in the 19th century).

174. ROBERT MILLER, RESERVATION “CAPITALISM”: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 2 (2012).

175. *Montana v. United States*, 50 U.S. 544, 566 (1981).

176. See generally Tsosie, *supra* note 173 at 9,11 (outlining how identity is impacted by outside uses of stereotypes); see also Am. Psych. Ass’n, *Summary of the APA Resolution Recommending*

The imagery used is a universal stereotype (headdress, deerskin, war paint etc.) which promotes the belief that tribes are monolithic.¹⁷⁷ Yet there are 573 federally recognized tribes in the U.S. (as well as additional tribes that are not recognized by the federal government).¹⁷⁸ Among them are different histories, language, customs, etc.¹⁷⁹ These universal stereotypes disrespect the culturally significant customs, often reducing them to names and chants in broken English. This undermines the legitimacy of tribal nations in the eyes of outsiders, thus undermining self-determination.¹⁸⁰ Ultimately, the uses of Native American imagery end up being an affront to cultural sovereignty and it is perpetuated by the economic markets and legal structure that supports it.¹⁸¹

B. *Commercial Speech Should Get Less Protection*

Commercial speech should not receive the same level of protection as political speech, thus the government should have more ability to regulate it.¹⁸² Commercial speech doctrine arose from the desire to increase information to consumers and to protect them in the market.¹⁸³ In *Sorrell*¹⁸⁴ and *Tam*,¹⁸⁵ the Court stated its concerns about commercial speech regulations that are seemingly content-based. Nonetheless, speech that is predominantly commercial versus expressive should still be subject to the *Central Hudson* test. Commercial speech does not enjoy the full protection of the First Amendment.¹⁸⁶ Most of the uses of Native American imagery serve no other purpose than to associate the product to a stereotypical reading

Retirement of American Indian Mascots, APA.ORG (2005), <http://www.apa.org/pi/oema/resources/indian-mascots.aspx>.

177. Brian Young, *Why I Won't Wear War Paint and Feathers in a Movie Again*, TIME (Jun. 11, 2015), <http://time.com/3916680/native-american-hollywood-film/>.

178. *Federal and State Recognized Tribes*, NAT'L CONF. OF ST. LEGIS. (Oct. 2016), <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx>.

179. Vince Two Eagles, *What is an Indian? Each Tribe is Different*, PARTNERSHIP WITH NATIVE AM. (Nov. 29, 2011), <http://blog.nativepartnership.org/what-is-an-indian-each-tribe-is-different/>.

180. Messbauer, *supra* note 20, at 251.

181. See, e.g., Neil Greenberg, *How Much It Would Cost to Change the Redskins Name*, WASH. POST (Jun. 18, 2014), https://www.washingtonpost.com/news/fancy-stats/wp/2014/06/18/how-much-it-would-cost-to-change-the-redskins-name/?utm_term=.b5edd12e4ca0.

182. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980); *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 588 (2011) (Breyer, J., dissenting).

183. Alan B. Morrison, *No Regrets (Almost): After Virginia Board of Pharmacy*, 25 WM. & MARY BILL RTS. J. 949, 958-59 (2017) (arguing that commercial speech doctrine has moved away from its original intent).

184. *Sorrell*, 564 U.S. at 564.

185. *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017).

186. *Cent. Hudson*, 447 U.S. at 562 n. 5.

of tribal culture (e.g. Washington Redskins, Spirit Cigarettes, Navajo Flasks, Crazy Horse Liquor, etc.).¹⁸⁷

C. Use of Tribal Cultural Property Can Be False and Misleading

Pursuant to *Central Hudson*, the government can still prohibit any commercial speech that is misleading or false.¹⁸⁸ Thus, any speech that uses the names of tribes or its members and gives the impression that the product is connected to the tribe should be prohibited.¹⁸⁹ In the case of *Navajo Nation v. Urban Outfitters*, there was a strong argument that the use of the Navajo name gave the impression that the tribe sanctioned its use (prior to the license).¹⁹⁰ With Crazy Horse Malt Liquor, the trade dress not only used the Lakota leader's name, it also said "Black Hills" which is the aboriginal land of the Lakota.¹⁹¹ It is arguable that these two facts together give an impression that the Lakota sanctioned the product.¹⁹² It should be noted that any product that makes explicit claims to be connected to tribal producers and is not, is in violation of the Indian Arts and Crafts Act.¹⁹³

D. Trust Responsibility is a Substantial State Interest

The *Central Hudson* test still allows the government to regulate truthful commercial speech when there is a substantial interest and the regulation directly advances that interest.¹⁹⁴ Pursuant to its trust responsibility, the U.S. government has an obligation to promote the welfare of tribes.¹⁹⁵ This would include intrusion by outside governments and entities.¹⁹⁶ The misappropriation of cultural property threatens the integrity and welfare of

187. See *supra* Part II.

188. *Cent. Hudson*, 447 U.S. at 563. See generally Jason Zenor, *A Reckless Disregard for the Truth? The Constitutional Right to Lie in Politics*, 38 CAMPBELL L. REV. 41, 63, 66 (2016) (arguing that the Court has given unwarranted protection to false speech).

189. See Robert J. Miller, *American Indian and Tribal Intellectual Property Rights*, 13 TUL. J. TECH. & INTELL. PROP. 179, 181 (2010); cf. Lefstin, *supra*, note 108 at 686.

190. See *Navajo Nation v. Urban Outfitters, Inc.*, 935 F. Supp. 2d 1147, 1164 (D.N.M. 2013).

191. See *Estate of Tasunke Witko v. G. Heileman Brewing Co., et al.* No. Civ. 93-204, 23 Indian L. Rep. 6104, 6105, 6109 (Rosebud Sioux Sup. Ct. 1996).

192. *Id.*

193. Indian Arts and Crafts Act of 1990 § 105, 25 U.S.C. § 305e (2012).

194. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

195. Miller, *supra* note 189, at 179; see, e.g., *United States v. Mitchell*, 463 U.S. 206, 224-225 (1983).

196. See *supra* notes 118-123 and accompanying text.

tribes, thus it should be considered part of the trust responsibility to protect against misappropriation.¹⁹⁷

The government should not be able to ban all use of Native American names or imagery.¹⁹⁸ For example, in political or artistic speech it should be protected—similar to the use of the derogatory word ‘Slants’ being used by an Asian-American music group.¹⁹⁹ However, since commercial speech receives a lesser level of intermediate scrutiny, there should be a balancing of interests between corporate speakers and the trust responsibility.²⁰⁰ Ultimately, any such regulation cannot be more extensive than necessary to serve this purpose. But with the overwhelming effect that such commercial exploitation has on the tribe, which is outside their control or ability to counter, there is no other—adequately supported and similarly effective—“more limited restriction.”²⁰¹

E. Apply Tribal Law in Tribal Courts

When reviewing the use of Native American imagery in commercial speech, courts should consider the source of the speech.²⁰² Unless the use of such imagery is by a tribe or tribal entity, or is sanctioned by such, then a tribe should be able to seek an injunction in court.²⁰³ A review should be allowed to see if there is consumer confusion as to endorsement of the product.²⁰⁴ Ultimately, when it comes to use of tribal names and imagery, courts should consider the custom and laws of the tribe.²⁰⁵ Most tribes recognize collective property law²⁰⁶ and this concept has been further entrenched in federal Indian law as the federal government holds real

197. Miller, *supra* note 189, at 179; *see, e.g.*, United States v. Mitchell, 463 U.S. 206, 227 (1983). *Cf.* Matal v. Tam, 137 S. Ct. 1744, 1764 (2017). “Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’” *Id.* at 1764.

198. *See Matal*, 137 S. Ct. at 1763.

199. *See id.* at 1751. The Slants had all Asian-American members.

200. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, 447 U.S. 557, 561-2 (1980).

201. *Id.* at 564.

202. Estate of Tasunke Witko v. G. Heileman Brewing Co., et al. No. Civ. 93-204, 23 Indian L. Rep. 6104, 6105 (Rosebud Sioux Sup. Ct. 1996).

203. *See Zark*, *supra* note 19, at 555 (explaining uses of Native American names that have tribal approval).

204. *See generally* Estate of Tasunke Witko v. G. Heileman Brewing Co., et al. No. Civ. 93-204, 23 Indian L. Rep. 6104, 6113 (Rosebud Sioux Sup. Ct. 1996).

205. Pommersheim, *supra* note 69, at 59-66. “The [courts’] [f]indings note that a Lakota person’s name could be passed on, but that Crazy Horse’s name was never passed on.” *Id.* at 65.

206. MILLER, *supra* note 174, at 11.

property in trust status for the tribes.²⁰⁷ Because of this, when it comes to cultural property, courts should consider it as tribal property (even if it has not been trademarked or existed well beyond the standards terms of western intellectual property law).²⁰⁸

Under the *Montana* exceptions, tribal courts should have jurisdiction when the matter involves a substantial tribal interest.²⁰⁹ Misappropriation of cultural property is a substantial tribal interest as it threatens “the political integrity, the economic security, [and] the health or welfare of the tribe.”²¹⁰ Moreover, as the tribal court said in the *Hornell* case, in order for an entity to use such an image, the entity would need to go to the tribe and receive permission, thus creating a consensual relationship—further strengthening the tribe’s claim to jurisdiction under *Montana*.²¹¹ Finally, tribes cannot completely restrict expression as they must provide for free speech protection under ICRA,²¹² but such restrictions can be pursuant to tribal customs and law,²¹³ and claims are not reviewable by a federal court.²¹⁴ Thus, tribes should begin to create laws that answer issues of cultural property, right to publicity, and commercial uses.²¹⁵

Nonetheless, tribes should not wait for the federal government to act. When it comes to protecting cultural property, tribes should move towards registering U.S. trademarks and copyright related to their tribe (as the Navajo Nation did)²¹⁶ in order to protect their cultural sovereignty. In doing this,

207. See generally Angelique EagleWoman (Wambdi A. WasteWin), *Tribal Nations and Tribal Economics: The Historical and Contemporary Impacts of Intergenerational Material Poverty and Cultural Wealth Within the United States*, 49 WASHBURN L.J. 805, 819 (2010) (outlining the rules of tribal lands in trust status).

208. See Terence Dougherty, *Group Rights to Cultural Survival: Intellectual Property Rights in Native American Cultural Symbols*, 29 COLUM. HUM. RTS. L. REV. 355, 374-75 (1998).

209. *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

210. *Id.* at 566; see, e.g., *Estate of Tasunke Witko v. G. Heileman Brewing Co., et al.* No. Civ. 93-204, 23 Indian L. Rep. 6104, 6105-06 (Rosebud Sioux Sup. Ct. 1996); Collier-Wise, *supra* note 92, at 98; *Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 50 (D.C. Cir. 2005).

211. *Estate of Tasunke Witko v. G. Heileman Brewing Co., et al.* No. Civ. 93-204, 23 Indian L. Rep. 6104, 6112 (Rosebud Sioux Sup. Ct. 1996).

212. See 25 U.S.C. § 1302 (2012).

213. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). “[I]ssues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts.” *Id.* at 71.

214. *Id.* at 67.

215. Collier-Wise, *supra* note 92, at 86, 90-93 (discussing different approaches to protect cultural property through tribal law). See generally Jason Scott Zenor, *Gilbert v. Flandreau Santee Sioux Tribe: The South Dakota Supreme Court Assumes Jurisdiction, Overlooks Federal Indian Law, and Misapplies Constitutional Principles to A Tribal Nation*, 54 S.D. L. REV. 333, 335, 363-64 (2009) (arguing that tribes should create laws that answer the void left by federal and state laws).

216. See *Navajo Nation v. Urban Outfitters, Inc.*, 935 F. Supp. 2d 1147 (D.N.M. 2013).

tribes can avoid the uncertain future of *Central Hudson* as the U.S. Supreme Court gives more protection to corporate speech.²¹⁷

V. CONCLUSION

Having distinct categories of ownership for property is “counterintuitive for tribal peoples.”²¹⁸ Tribes often take a more collectivist approach to the ownership of property, both real and intellectual.²¹⁹ But the Western tradition of intellectual property gives power and authority to individuals.²²⁰ Thus, the idea of cultural property has made little advancement in American courts.²²¹ Furthermore, free speech jurisprudence makes it very difficult to curtail the misappropriation of cultural property.²²² Even in commercial speech, where there has been greater scrutiny, courts are unwilling to censor speakers and chill free speech.²²³

But with Native American tribes, there is an argument that the U.S. government has an additional duty to protect tribal cultural sovereignty and balance the interests of the commercial entity with that of a tribe.²²⁴ The government has an interest in protecting the tribes from a loss of their culture, integrity and identity.²²⁵ Commercial entities who desire to use Native American cultural property should have to get permission from whatever tribes are implicated by the use.²²⁶ If a commercial entity does not get permission, then tribal courts should be able to review the use and decide if an injunction is necessary.²²⁷

This could be seen as an affront to the First Amendment.²²⁸ But the First Amendment does not apply to tribes as sovereign nations.²²⁹ Tribes must

217. See Bibet-Kalinyak, *supra* note 107, at 222-224; Piety, *supra* note 107, at 28-30.

218. Riley & Carpenter, *supra* note 13, at 865.

219. MILLER, *supra* note 174, at 15 (though the page actually says prior to European settlement, this was not the case as there was private property ownership except in land).

220. See Suzanne Milchan, *Whose Rights Are These Anyway? – A Rethinking of Our Society’s Intellectual Property Laws in Order to Better Protect Native American Religious Property*, 28 AM. INDIAN L. REV. 157, 166 (2004).

221. See Riley, *supra* note 152, at 79.

222. See, e.g., Matal v. Tam, 137 S. Ct. 1744, 1765 (2017); Hornell Brewing Co. v. Brady, 819 F. Supp. 1227, 1228-29 (E.D.N.Y. 1993).

223. See, e.g., Matal, 137 S. Ct. at 1765; Hornell, 819 F. Supp. at 1228-29.

224. See *supra* Part III.B.

225. See *supra* Part IV.A.

226. See, e.g., Estate of Tasunke Witko v. G. Heileman Brewing Co., et al. No. Civ. 93-204, 23 Indian L. Rep. 6104, 6112 (Rosebud Sioux Sup. Ct. 1996).

227. *Id.* at 6112 (applying United States v. Montana).

228. See Matal v. Tam, 137 S. Ct. 1744, 1769 (2017); Hornell Brewing Co. v. Brady, 819 F. Supp. 1227, 1228-1229 (E.D.N.Y. 1993).

229. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

provide for free speech rights pursuant to ICRA,²³⁰ but any free speech determination would follow tribal law.²³¹ Extending the tribal court's jurisdiction to non-tribal members is worrisome for civil libertarians,²³² but in the *Hornell* case we saw that the Lakota tradition of justice was not punitive.²³³ There was no multi-million dollar award of damages.²³⁴ All the Lakota wanted was a cessation of the misappropriation, an apology and a rather minimal gift.²³⁵ Ultimately, what they wanted was understanding of the sanctity of cultural property and identity.²³⁶

230. Indian Civil Rights Act of 1968, § 202; 25 U.S.C. § 1302 (2012).

231. *See generally id.*

232. *See, e.g.,* Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CAL. L. REV. 1165, 1167 (2010) (outlining the equal protection issue arising from the Duro fix).

233. *See* Pommersheim, *supra* note 69, at 59.

234. *Id.*

235. *Id.*

236. *See* Christopher J. Schneider, *Hornell Brewing Co. v. Rosebud Sioux Tribal Court: Denigrating the Spirit of Crazy Horse to Restrain the Scope of Tribal Court Jurisdiction*, 43 S.D. L. REV. 486, 489 (1998) (“[I]magine the outcry from the black community if a brewer were to market a liquor entitled Martin Luther King Beer, or from the Christian community for a Jesus Christ White Wine.”) (quoting Gregg Bourland, Chairman of the Cheyenne River Sioux Tribe).