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TRADITION IS A TRAP

Jessica M. Kiser*

INTRODUCTION

Native Americans seem to be implicated in a disproportionate share of trademark and branding disputes.¹ From a branding perspective, Native Americans are often subjected to corporate marketing missteps that may cross the line into cultural appropriation. There are plenty of examples that likely spring to mind: Karlie Kloss wearing a floor-length war bonnet on the Victoria's Secret catwalk, Navajo-inspired hipster panties sold by Urban Outfitters, or maybe the plethora of "Sexy Indian Maiden" costumes available for sale every October.² Then, there are the numerous calls to retire sports mascots and trademarks that mock or denigrate Native Americans.³ On the legal front, most lawyers are likely familiar with the lengthy

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¹ In this Article, "Native American" will primarily be used by the author when referring to individuals claiming ancestral ties to the indigenous peoples who resided in the lands now contained within the United States. However, numerous other scholars and entities, like the U.S. Bureau of Indian Affairs, refer to those same peoples as "American Indians" or just "Indians" so that terminology may arise in the context of quotes and references to outside resources. "Indigenous Peoples" is used to refer more generally to the native or indigenous populations worldwide without reference to a specific country.

² See, e.g., *Fashion & Music Should Also Stop its Native American Cultural Appropriation*, HIGHSNOBIETY (Feb. 1, 2018), <https://www.highsnobiety.com/p/native-american-cultural-appropriation/>; Marisa Page, *That Indian Princess Costume is Not Honoring Native Culture*, FIRST NATIONS DEV. INST. (Oct. 28, 2022), <https://www.firstnations.org/news/that-indian-princess-costume-is-not-honoring-native-culture/>.

³ See Gillian R. Brassil, Giulia McDonnell Nieto del Rio, Billy Witz & David Waldstein, *In Campaign Against Racism, Team Names Get New Scrutiny*, N.Y. TIMES (July 12, 2020), <https://www.nytimes.com/2020/07/10/sports/football/washington-redskins-name-change-mascots.html?action=click&module=RelatedLinks&pgtype=Article>; Kevin Draper, *Washington and the N.F.L. Might Change the Redskins*

litigation attempting to cancel the REDSKINS⁴ trademark registrations owned by the Washington, D.C. football team.⁵

However, only trademark attorneys and professors may have taken note of the number of more mundane trademark registration disputes questioning whether the use of a trademark containing the name of a tribe refers simply to a geographic location or otherwise “falsely suggest[s] a connection” with such tribe.⁶ At the heart of such a question is a determination of whether American consumers would even recognize the name of a tribe at all.⁷ Rosemary Coombe once astutely noted:

It is, for example, inconceivable that a vehicle could be marketed as “a wandering Jew,” but North Americans rarely bat an eyelash when a Jeep Cherokee® passes them on the road or an advertisement for a Pontiac® flashes across their television screens. More people may know Oneida® as a brand of silverware than as the name of a people and a nation.⁸

Name. Why Now?, N.Y. TIMES (July 16, 2020), <https://www.nytimes.com/2020/07/03/sports/football/washington-redskins-nickname-nfl.html?action=click&module=RelatedLinks&pgtype=Article>.

⁴ While some authors prefer to acknowledge that the term “redskin” is a racial slur by refusing to use the term at all or by truncating it as “r-skin” or the “r-word,” this Article includes the term in its entirety. As trademark disputes often depend on the specifics of the spelling, appearance, and connotation of words contained within a mark, the mark is presented in its entirety throughout this Article.

⁵ See *Pro Football, Inc. v. Harjo*, 565 F.3d 880 (D.C. Cir. 2009), *denied cert* by *Harjo v. Pro Football, Inc.*, 558 U.S. 1025 (2009), concluding litigation first brought in *Harjo v. Pro-Football*, 50 U.S.P.Q. 2d 1705 (T.T.A.B. 1999); *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015), concluding litigation first brought in *Blackhorse v. Pro Football, Inc.* 111 U.S.P.Q. 2d 1080 (T.T.A.B. 2014).

⁶ 15 U.S.C. § 1052(a); 15 U.S.C. § 1052(e).

⁷ See FIRST NATIONS DEV. INST., RECLAIMING NATIVE TRUTH; RESEARCH FINDINGS: COMPILATION OF ALL RESEARCH (June 2018), <https://www.firstnations.org/wp-content/uploads/2018/12/FullFindingsReport-screen.pdf> (results of surveys conducted illustrate that most Americans know very little about modern Native American people and tribes).

⁸ Rosemary J. Coombe, *The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination*, in *BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION* 74, 78 (Bruce Ziff & Pratima V. Rao eds., 1997).

Why is this the case? The answer to that question involves the sad truth that while Native American populations were declining due to disease,⁹ forced relocation¹⁰ and starvation,¹¹ and government policies of forced cultural assimilation,¹² American advertising executives claimed ownership over tribal names and imagery. The “myth of the vanishing Indian”¹³ was adopted as truth, which opened the door to the adoption of Native American names, words, culture, and images as free for the taking in the name of commerce.

Native Americans—due to their complicated history with the federal recognition of tribes,¹⁴ government imposition of blood quantum and other membership rules,¹⁵ and the unique mix of pre- and post-colonial cultural touchstones—have an incredibly complicated understanding of what makes for an authentic Native American, tribal member, and cultural tradition. For this reason, Native Americans offer an evocative example to show how trademark law’s reliance on stereotypes is not simply a glitch in the system caused by the speed at which consumer perceptions change. Instead, the entire trademark system is built on a Eurocentric, imperialist framework with ideas of “tradition” and “authenticity” at its foundation.¹⁶ A trademark system that prioritizes authenticity and tradition

⁹ See Jamie E. Ehrenpreis & Eli D. Ehrenpreis, *A Historical Perspective of Healthcare Disparity and Infectious Disease in the Native American Population*, 363 AM. J. MED. SCIS. 288 (2022).

¹⁰ See, e.g., Gloria Hillard, *Urban American Indians Rewrite Relocation’s Legacy*, NPR (Jan 7, 2012, 9:06 AM), <https://www.npr.org/2012/01/07/143800287/urban-american-indians-rewrite-relocations-legacy>.

¹¹ See Sara Usha Maillacheruvu, *The Historical Determinants of Food Insecurity in Native Communities*, CTR. FOR BUDGET & POL’Y PRIORITIES (Oct. 4, 2022), <https://www.cbpp.org/research/food-assistance/the-historical-determinants-of-food-insecurity-in-native-communities>.

¹² See Giulia Marchiò, *Cultural Assimilation of Native Americans*, HUM. RTS. PULSE (Mar. 23, 2022), <https://www.humanrightspulse.com/mastercontentblog/cultural-assimilation-of-native-americans>.

¹³ See Sarah Fling, *The Myth of the Vanishing Indian*, THE WHITE HOUSE HIST. ASS’N, <https://www.whitehousehistory.org/the-myth-of-the-vanishing-indian> (last visited Dec. 20, 2023) (“By depicting Native Americans as a disappearing race, Americans came to believe that the extinction of Indigenous groups was unavoidable and nearly complete.”).

¹⁴ See *Federal Recognition—An Uphill Battle for Hundreds of Native American Tribes*, MUWEKMA OHLONE TRIBE (Jan. 2022), <https://www.muwekma.org/blog/2022/january/federal-recognition-an-uphill-battle-for-hundreds-of-native-american-tribes.html>.

¹⁵ See, e.g., Kat Chow, *What Exactly Is ‘Blood Quantum’?*, NPR (Feb. 9, 2018, 6:00 AM), <https://www.npr.org/sections/codeswitch/2018/02/09/583987261/so-what-exactly-is-blood-quantum>.

¹⁶ Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 SING. J. INT’L & COMPAR. L. 315, 324 (2003) (providing a historical account of the relationship between IP law and international law in the developing

necessarily privileges those in the majority, those in power. Conversely, it traps the minority groups in their disadvantaged “traditional” positions and imagines that authenticity is static, existing only in the past.

The focus of this Article will be on Section 2(a) of the Lanham Act. This provision of the Lanham Act contains the prohibition on the registration of disparaging marks that was struck down as unconstitutional by the Supreme Court in 2017 in *Matal v. Tam*.¹⁷ It also includes the prohibition on scandalous and immoral marks that was struck down as unconstitutional by *Iancu v. Brunetti* in 2019.¹⁸ These now-defunct statutory prohibitions provide a helpful foil for understanding how the remaining portions of Section 2(a) still impact Native American tribes and create a false impression that racial equity plays any part at all in American trademark law.

Section 2(a) of the Lanham Act still prohibits the registration of trademarks that “falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols”¹⁹ In theory, this provision serves to protect consumers from being deceived or confused about the applied-for-mark’s association with, or sponsorship or endorsement by an unrelated third party, of the applied-for-trademark.²⁰ However, the Trademark Manual of Examining Procedure currently clarifies that this prohibition should not be seen as duplicative of Section 2(d)—which protects consumers from a likelihood of confusion between two marks—and is instead concerned with protecting individuals and institutions from unauthorized use of their “persona.”²¹ According to a leading treatise on trademark law, the rejection of a trademark application under this standard should consider the following elements:

- (i) that the defendant’s mark is the same or a close approximation of plaintiff’s previously used name or identity (not its mark) or of some national symbol;

world to explore the challenges faced by developing countries in their efforts to effect change in the global IP system).

¹⁷ *Matal v. Tam*, 582 U.S. 218 (2017).

¹⁸ *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019).

¹⁹ 15 U.S.C. § 1052(a).

²⁰ See David G. Barker, *The Lanham Act’s “Living Individual” Restriction & the First Amendment*, BL: PRAC. GUIDANCE (Mar. 2022), <https://www.bloomberglaw.com/external/document/X6PK249C000000/trademarks-professional-perspective-the-lanham-act-s-living-indi>.

²¹ U.S. PAT. & TRADEMARK OFF., TMEP § 1203.03 (Nov. 2023).

- (ii) that the mark would be recognized as such, in that it points uniquely and unmistakably to that person or institution;
- (iii) that the plaintiff is not connected with the activities performed by the defendant under the mark; and
- (iv) that the plaintiff's name or identity is of sufficient fame or reputation that, when the defendant's mark is used for the goods or services, a connection with the plaintiff would be presumed.²²

This analysis considers the public's general awareness of the individual or institution and considers whether an association would be presumed based on the type of goods or services being sold by the party seeking to register the trademark.²³ Several United States Patent and Trademark Office (USPTO) decisions and related cases have made clear that Native American tribes should be evaluated as either "juristic persons" or "institutions" for the purposes of Section 2(a).²⁴ Thus, courts and the USPTO are tasked with estimating the public's awareness of entire groups of people and evaluating whether those people would/could/should engage in sales of the goods or products at issue. This system is highly susceptible to the imputation of stereotypes and outright racism.

In this Article, I argue that the "false connection" provision is actually a gilded cage that reinforces stereotypes of Native Americans while offering platitudes about protecting their interests. My argument herein proceeds in two parts. In Part I, Section 2(a) is explored in more detail, including through examples of how the "false connection" prohibition has been applied in the past. This section also explores the history of Native American names and imagery being used as trademarks and in marketing in the United States. That history directly impacts Native Americans in the present day and forms a basis for the background understanding of the "reasonable consumer" when it comes to Section 2(a) determinations. In Part II, the interaction of history and trademark law is analyzed through the lens of Critical Race

²² LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 26:21 (4th ed.), Westlaw (database updated Dec. 2023) (footnotes omitted).

²³ *Id.* ("In a petition to cancel, public awareness and association are judged as of the date the registration issued. The clarity of the association is judged in relation to the goods or services for which the mark is registered. Thus Twigg for clothing was cancelled as suggesting an association with the fashion model Twigg, but the mark would not have been cancelled if it were registered for plant food.")

²⁴ *See, e.g., In re White*, 73 U.S.P.Q. 2d 1713 (T.T.A.B. 2004); *In re Pederson*, 109 U.S.P.Q. 2d 1185 (T.T.A.B. 2013); *In re G&R Brands, LLC*, No. 77011920, 2008 WL 5078730 (T.T.A.B. 2008); *In re Shinnecock Smoke Shop*, Nos. 78918061, 78918500, 2008 WL 4354159 (T.T.A.B. 2008), *aff'd*, 571 F.3d 1171 (Fed. Cir. 2009).

Theory and Decolonial (or Post-Colonial) Theory to clarify the ways in which trademark law's focus on the past and on "imagined traditions" harms Native American communities by holding them in a historically-frozen, disadvantaged, colonial context. As it is used in this Article, "tradition" refers not to the anthropological understanding of cultural practices embraced by a particular community of people; instead, tradition in a trademark sense refers to the marketplace's projections of imagined cultural practices packaged in a commoditized fashion. Viewed in this light, tradition is a trap in which marginalized communities are frozen in a historical, disadvantaged economic and political context. While the focus of this Article is on Section 2(a), future projects could apply a similar lens to the Lanham Act's treatment of marks that are "primarily geographically descriptive"²⁵ and to the international debate over the protection of geographical indications²⁶ since both concepts are directly tied to tradition and colonialism.

I. NATIVE AMERICANS, TRADEMARKS, AND BRANDING

First, it is important to clarify that Native Americans (individually or in a tribal capacity) have the same right to file trademark applications and obtain federal trademark registrations as any other American. As noted in Section II.B of this Article, a brief empirical review of trademark applications and registrations found on the USPTO website using "tribe" as a portion of the registrant's name uncovered 148 applications and registrations owned by entities claiming to be a federally recognized Native American tribe. Additionally, tribes may take advantage of the USPTO's Native American Tribal Insignia Database, a system initiated by the USPTO in 2001 in response to a 1998 congressional study on whether more should be done to protect official tribal insignia.²⁷ This database was created to allow tribes to register their official insignias to aid the USPTO's Examining Attorneys in determining whether subsequent trademark applications are falsely suggesting a connection with the tribe or otherwise engaging in commercial activity that would otherwise create a likelihood of consumer confusion.²⁸ However, this database is only used for official insignia of the tribe, such as a flag, coat of arms, or other

²⁵ 15 U.S.C. § 1052(e).

²⁶ See Emily Nation, *Geographical Indications: The International Debate Over Intellectual Property Rights for Local Producers*, 82 U. COLO. L. REV. 959 (2011).

²⁷ *Infringement of the Official Insignia of Native Indian Tribes*, 3 McCarthy on Trademarks and Unfair Competition § 25:68 (5th ed.); see also 66 Fed. Reg. 44603, 2001 WL 957050 (Aug. 24, 2001).

²⁸ *Id.*

emblem, and is not applicable to words without imagery.²⁹ The database does not grant any legal rights to the tribes that use it, and the USPTO expressly clarifies that filing an insignia with the database does not create a trademark registration or convey any trademark rights.³⁰ The congressional study that recommended this database declined to recommend a complete prohibition on the registration of the names of tribes (by someone other than the tribes themselves) because doing so “could create gross unfairness to trademark owners using names that happen to intersect with those of Native American tribes.”³¹ Instead, it determined that the database would provide sufficient protection to Native American tribes when used to assist the USPTO in analyzing trademark applications in light of the prohibitions already contained in Section 2(a).³²

Consequently, Section 2(a) might seem harmless—or even helpful to racial minorities—on its face. When intellectual property scholar Fady Aoun conducted an extensive historical and empirical investigation into the registration of racist trademarks in the United States, United Kingdom, and Australia, he found that language very similar to the Lanham Act’s Section 2(a) was enacted in all of these countries with very little discussion or debate.³³ Such language may have been thought necessary to protect the registry of trademarks from indecent or offensive registrations.³⁴ Many of the earliest Section 2(a) “false connection” rejections in the United States involved marks that could mistakenly lead a consumer to see the good or service as officially endorsed by the United States government. For example, an applicant in 1963 was refused registration for U.S. AQUA (for a logo including white letters in a red, white, and blue shield). It was found to falsely suggest a connection to the United States government because of official water standards promulgated by

²⁹ *Native American Tribal Insignia*, U.S. PAT. AND TRADEMARK OFF., <https://www.uspto.gov/trademarks/laws/native-american-tribal-insignia> (last visited June 25, 2024).

³⁰ *Id.*

³¹ *Infringement of the Official Insignia of Native Indian Tribes*, 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:68 (5th ed.).

³² *Id.*

³³ Fady J.G. Aoun, *The Belated Awakening of the Public Sphere to Racist Branding and Racist Stereotypes in Trademarks*, 61 IDEA: L. REV. FRANKLIN PIERCE CTR. FOR INTELL. PROP. 545, 566–69 (2021). See also Jasmine Abdel-khalik, *Disparaging Trademarks: Who Matters*, 20 MICH. J. RACE & L. 287, 298–301 (2015); Megan M. Carpenter & Kathryn T. Murphy, *Calling Bullshit on the Lanham Act: The 2(a) Bar for Immoral, Scandalous, and Disparaging Marks Symposium: On Intellectual Property Law*, 49 U. LOUISVILLE L. REV. 465, 467–68 (2010).

³⁴ Aoun, *supra* note 33, at 568.

the government for the purpose of stocking water provisions in fallout shelters.³⁵ In 1966, an applicant applied to register NATIONAL COLLECTION & CREDIT CONTROL (with a design including an eagle over the map of the United States) for financial services.³⁶ That application was refused because the combination of the word “national” with the eagle imagery might falsely suggest a connection between the company and the United States government.³⁷ Similarly, in 1978, an applicant was refused registration for U.S. BICENTENNIAL SOCIETY for ceremonial swords based on the mark falsely suggesting a connection with the United States government and potentially the Government Mint or official Bicentennial Commission.³⁸ These early decisions might suggest that the courts perceived the drafters’ intention of Section 2(a) to be that it should protect government symbols that might not otherwise receive trademark protection on their own while also reinforcing the other statutory protections for consumers related to deceptive uses of trademarks. In any event, it is doubtful that the “false connection” grounds for refusal was intended to protect the rights of Native American tribes explicitly.

Now, it is safe to say that a significant number of Section 2(a) “false connection” refusals are based on the applicant’s use of a trademark that contains the name of a Native American tribe or group. A trademark application filed for APACHE for use on cigarettes was refused based on a false connection with the Apache Indian tribes.³⁹ LAKOTA was denied registration for use in connection with medicinal herbs based on an association with the Indigenous people referred to colloquially as the Lakota.⁴⁰ MOJAVE, for use with smoking paraphernalia, was denied registration due to the Fort Mojave Tribe of Arizona, California, and Nevada.⁴¹ SHINNECOCK BRAND FULL FLAVOR and SHINNECOCK BRAND LIGHTS were both denied registration for cigarettes due to a false connection with the Shinnecock Indian Nation.⁴²

³⁵ *In re Teasdale Packing Co.*, 137 U.S.P.Q. 482 (T.T.A.B. 1963).

³⁶ *In re Nat’l Collection & Credit Control, Inc.*, 152 U.S.P.Q. 200 (T.T.A.B. 1966).

³⁷ *Id.*

³⁸ *In re U.S. Bicentennial Soc’y*, 197 U.S.P.Q. 905 (T.T.A.B. 1978).

³⁹ *In re White*, 73 U.S.P.Q. 2d 1713 (T.T.A.B. 2004).

⁴⁰ *In re Pederson*, 109 U.S.P.Q. 2d 1185 (T.T.A.B. 2013).

⁴¹ *In re G&R Brands, LLC*, No. 77011920, 2008 WL 5078730 (T.T.A.B. 2008).

⁴² *In re Shinnecock Smoke Shop*, Nos. 78918061, 78918500, 2008 WL 4354159 (T.T.A.B. 2008), *aff’d*, 571 F.3d 1171 (Fed. Cir. 2009).

In a 2002 Office Action refusing registration of CHEROKEE (with a design) for use in connection with jewelry, an examining attorney argued that the USPTO has an extra duty to deny registrations based on false connections to Native American tribes due to the “extensive history of trust obligation to Indian Nations which has been codified in Supreme Court decisions beginning in 1831.”⁴³ The examining attorney further explained: “As a result of its federal trust obligation, the Trademark Office is bound to resolve any doubt in favor of the Cherokee Indians and disallow appropriation of their tribal name.”⁴⁴ Such a proclamation seems disingenuous given that numerous tribal names are in use as trademarks, both with federal registrations and without. Even this trademark application for CHEROKEE in connection with jewelry was eventually permitted to proceed to registration based on the applicant’s argument that no false connection could possibly be presumed since the applicant possessed numerous other CHEROKEE trademark registrations for other types of goods and had been using them for sixty years.⁴⁵

There is an extensive history of companies adopting the names of tribes or famous Native Americans, as well as tribal imagery, as part of trademarks and marketing efforts in the United States. The automotive industry is replete with examples. The JEEP CHEROKEE brand of cars is a prime example of the problematic history of this issue. The first Jeep Cherokee model was introduced to the market in 1974.⁴⁶ The company sold millions of vehicles under the CHEROKEE and GRAND CHEROKEE marks until it retired the name in the early 2000s.⁴⁷ From the mark’s retirement until 2014, the car manufacturer sold these vehicles under the rebranded name JEEP LIBERTY.⁴⁸ However, the company resurrected the

⁴³ U.S. Trademark Application Serial No. 76/337,800 (filed Apr. 23, 2002).

⁴⁴ *Id.*

⁴⁵ U.S. Trademark Application Serial No. 76/337,800 (filed Nov. 13, 2001), Resp. to Office Action Dated Apr. 23, 2002, mailed Sept. 20, 2002.

⁴⁶ Jenny Gross, *Chief of Cherokee Nation Asks Jeep to Stop Using Tribe’s Name*, N.Y. TIMES (Feb. 25, 2021), <https://www.nytimes.com/2021/02/25/business/jeep-grand-chokeee.html>; William Roberson, *Iconic Jeep Cherokee Heads for Retirement After Almost 50 Years in Production*, FORBES (Mar. 25, 2023, 11:00 AM), <https://www.forbes.com/sites/billroberson/2023/03/25/iconic-jeep-chokeee-heads-for-retirement-after-almost-50-years-in-production/?sh=5d97571dc8ae>.

⁴⁷ Kristen Lee, *Jeep’s Facing the First Official Requests to Drop the Cherokee Name Nearly 50 Years After Launching the SUV*, BUS. INSIDER (Mar. 9, 2021, 9:21 AM), <https://www.businessinsider.com/jeep-chokeee-name-change-2021-controversy-nation-history-grand-suv-2021-3>.

⁴⁸ *Id.*

CHEROKEE brand in 2014.⁴⁹ FCA Inc. (Jeep’s current parent company)⁵⁰ owns several federal trademark registrations for CHEROKEE and GRAND CHEROKEE, and none of the applications for these registrations appear to have received even an initial refusal due to a potential false suggestion of a connection with the Cherokee tribe.⁵¹

What explains this difference in treatment for the various “CHEROKEE” trademark applications (especially in light of the alleged trust obligation to decide ambiguous cases in favor of tribes)?⁵² Section 2(a) has been in place since the enactment of the Lanham Act in 1946, and the APACHE and SHINNECOCK false connection refusals illustrate that the USPTO is aware of the potential for false connections with Native American tribes.⁵³ The short answer is that this system is premised on stereotypes and actively reinforces those stereotypes rather than protecting the identity or persona rights of Native American tribes.

A. *Use of Native Americans in American Marketing*

Native Americans as an idea, as well as their imagined culture and rituals, have been exoticized and co-opted by those with power and resources since the start of the European colonization of this continent. Historian Philip Deloria explains, “Indian ‘Others’ have been constructed at the intersection of real and imagined Indians. Colonists (mis)perceived real Indian people through a variety of European cultural lenses. Religion, gender relations, subsistence, technology—these and many other perspectives defined and distorted the ways Europeans saw Indians.”⁵⁴ Aside from the idealized version of Native Americans as friends and helpers for European settlers that inspired our modern Thanksgiving traditions, historical accounts of Native Americans typically focus on either Native Americans as savage, uncivilized people constantly fighting and killing helpless, white, settler families or noble

⁴⁹ *Id.*

⁵⁰ *Who Makes Jeep?*, CORNERSTONE CHRYSLER DODGE JEEP RAM, <https://www.cornerstonechrysler.com/manufacture-information/who-makes-jeep> (last visited Apr. 15, 2024).

⁵¹ *See, e.g.*, GRAND CHEROKEE, Registration No. 2,704,632; U.S. Trademark Application Serial No. 78,244,219 (filed May 1, 2003); CHEROKEE, Registration No. 4,518,178; GRAND CHEROKEE SUMMIT, Registration No. 4,441,441; GRAND CHEROKEE SUMMIT (and Design) Registration No. 4,441,441.

⁵² U.S. Trademark Application Serial No. 76/337,800 (filed Nov. 13, 2001).

⁵³ 15 U.S.C. § 1052(a) (original version at ch. 540, § 2(a), 60 Stat. 427, 428 (1946)); *see In re White*, 73 U.S.P.Q. 2d 1713 (T.T.A.B. 2004); *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 1172 (Fed. Cir. 2009).

⁵⁴ PHILIP J. DELORIA, *PLAYING INDIAN* 20 (Yale Univ. Press 1998).

outdoorsmen who, while still savage, are in balance with their natural environment and possessing of ancient wisdoms lost to modern cultures.⁵⁵

After the American Revolution, the male, propertied white settlers who were now new American citizens began to embrace these romanticized images of Native Americans as a cultural commodity that was uniquely “American” and thus free for the taking by all Americans.⁵⁶ This was made possible in part by the fact that the overall Native American population was reduced by as much as 95% in the time between first European contact and America’s independence.⁵⁷ By the late 1700s, America saw fraternal societies form that took on Native American names and dressed up in stylized “Indian” costumes as part of initiation and camaraderie-building activities.⁵⁸ This occurred at the same time that federal Indian policy was intent on removing Native American communities from the East Coast to the reservations on the west side of the Mississippi River.⁵⁹ This culminated in Andrew Jackson’s Trail of Tears in the 1830s that forcibly removed the Cherokee from their ancestral homelands and onto midwestern reservations.⁶⁰ Due to dwindling numbers of Native Americans in urban centers and the forced isolation of removed tribes, it became much easier for white America to begin to believe in the idea of Native Americans as a “vanishing” people relegated to history.

As Native Americans were physically and culturally eradicated from the country, white Americans responded by treating Natives as a historical concept, as “artifacts rather than as peoples.”⁶¹ During the 1800s and early 1900s, “playing Indian” continued through organized private clubs and children’s groups like the Woodcraft Indians, Campfire Girls, and even the Boy Scouts, who adopted certain Native-inspired terminology and ceremonial dances as part of its efforts to instill a cultural component to its program of training boys in patriotism and wilderness

⁵⁵ See Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859 (2016) (situating intangible cultural property disputes in a historical context to better analyze legal doctrine regarding Indian appropriation).

⁵⁶ *Id.* at 873.

⁵⁷ RUSSELL THORTON, *AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1492*, at 42–43 (1987).

⁵⁸ Riley & Carpenter, *supra* note 55, at 873–74.

⁵⁹ DELORIA, *supra* note 54, at 62–64.

⁶⁰ *Id.* at 63–64.

⁶¹ Riley & Carpenter, *supra* note 55, at 877–82; Coombe, *supra* note 8, at 88.

skills.⁶² During this time period, the Cleveland baseball team adopted the name “Indians,” and colleges began selecting Native-inspired mascots and team names.⁶³

This history is relevant to the discussion of Native Americans in modern trademarks and marketing because it illustrates how Native Americans changed in the American perception from living individuals to romanticized concepts. Essentially, all of the imagery, history, and culture of Native American peoples were converted into an “early America” cultural tableau—a mix of fact and *scènes-à-faire* in the public domain for use by all Americans.⁶⁴ Danielle Conway has argued that this is intentional because “cultures are constantly under attack from politically-oriented societies bent on exterminating, exploiting, or commercializing any culture that is different.”⁶⁵ The cultural differences of minority groups are exoticized and thus can be commercialized and commoditized by consumers in the majority who are seeking something “unique” or “authentic” to adopt as their own.

Numerous scholars have written about how the structures and consequences of U.S. Intellectual Property (IP) law result in the works of racial minorities and other subordinated groups being treated as part of the public domain.⁶⁶ In her work discussing African Americans in American advertising, Ariela Gross clarifies that the “[t]wentieth-century white identity was forged in the crucible of Jim Crow iconography, from Aunt Jemima and Uncle Ben to blackface minstrels.”⁶⁷ Similarly, some have argued that “in the sports context, playing Indian is so much a part of

⁶² Riley & Carpenter, *supra* note 55, at 881–82.

⁶³ *Id.* at 882.

⁶⁴ See Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 49 (2004) (“[T]he public domain . . . can most broadly be defined as ‘material that is unprotected by intellectual property rights, either as a whole or in a particular context, and is thus ‘free’ for all to use.’”).

⁶⁵ Danielle M. Conway, *Indigenizing Intellectual Property Law: Customary Law, Legal Pluralism, and the Protection of Indigenous Peoples’ Rights, Identity, and Resources*, 15 TEX. WESLEYAN L. REV. 207, 208 (2009) (arguing that legal pluralism justifies the importation of Indigenous law as a primary source of law to begin to provide essential protections to the intellectual property and traditional knowledge of Indigenous peoples).

⁶⁶ See, e.g., K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 J. GENDER, SOC. POL’Y & L. 365 (2008) (examining inequality under IP law as it pertains to African-American, female, and indigenous artists); Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277 (2006) (arguing for new standards that would allow for more equitable musical borrowing under copyright law).

⁶⁷ Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 675 (2001) (surveying the field of cultural-legal history to explore its potential for the study of race and slavery).

American life that Indians and Indian imagery now actually belong to white America.”⁶⁸ American companies and advertisers drew from that well of Black and Native “public domain” imagery to build many of the country’s top brands.

Additionally, throughout the twentieth century, most television programming was explicitly whitewashed—presenting idealized images of white families that could come across as aspirational to the white viewing public.⁶⁹ If people of color appeared, it was typically as part of advertisements that traded in stereotypes that reinforced ideas of white supremacy. For example, Aunt Jemima, the now infamous mascot and trademark used to sell pancake mix and syrups, has been described as having served an explicit role in setting racial and gender expectations:

Aunt Jemima “uplifted white womanhood through sheer contrast and by keeping white women out of the kitchen. She saved them from work but also from worry and seemingly cleared up tensions between white men and white women, between masters and servants, by clarifying sexual and work roles as well as racial lines.”⁷⁰

Advertising executives created Aunt Jemima “to reflect the social order they thought America wanted to see at their breakfast table.”⁷¹

Deseriee Kennedy argues that advertising is “a highly influential means of public discourse” because it is “instrumental in affecting viewers’ perceptions of their world and their interactions with others.”⁷² It reflects the current power dynamics in place in society and illustrates what those in the majority view to be

⁶⁸ Riley & Carpenter, *supra* note 55, at 909; *see also* Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004, 2005 (2007).

⁶⁹ Deborah R. Gerhardt, *The Last Breakfast With Aunt Jemima and Its Impact on Trademark Theory*, 45 COLUM. J.L. & ARTS 231, 242 (2022) (“Throughout the twentieth century, television programming and advertisements depicted America as a nation of white heterosexual couples with white children Race appeared not to be an issue In advertisements, people of color were generally collapsed into stereotypes like Aunt Jemima and Uncle Ben or turned into cartoonish mascots like the Eskimo Pie kid or Chief Wahoo of the Cleveland Indians.”).

⁷⁰ *Id.* at 243–44.

⁷¹ *Id.* at 242.

⁷² Deseriee A. Kennedy, *Marketing Goods, Marketing Images: The Impact of Advertising on Race*, 32 ARIZ. ST. L.J. 615, 617 (2000) (analyzing how advertising has historically supported a racial hierarchy and arguing that advertising should be removed from First Amendment protection to allow for the prohibition of discriminatory advertisements).

aspirational goals.⁷³ The use of racist imagery in advertising and in trademarks therefore plays an “enormously influential role in shaping public perceptions of race.”⁷⁴ For white Americans, racist advertising utilizing Native Americans can result in a belief that Native Americans are either long extinct or otherwise frozen in time.⁷⁵ For the actual living Native Americans viewing this advertising, the effect may be to believe that this is what society wants, or even demands, of them: die or “play Indian.”

B. *Modern Consequences of this Historical Interaction*

The modern prevalence of Native Americans in United States trademark disputes is a direct result of this history of both real and imagined eradication of actual Native American communities. In Aoun’s empirical study of racist trademark registrations in the United States, United Kingdom, and Australia, “Native Americans were by far the most commoditized Other, followed by Black people, and other ‘Othered’ people.”⁷⁶ Further, racist trademark registrations involving Native Americans in the early twentieth century were most common in connection with goods like tobacco and medicinal products.⁷⁷ This results in a commercial marketplace that inundates white consumers with images of Native Americans that are monolithic, frozen in time, and based largely on stereotypes.⁷⁸ Those consumers likely have very little contact with actual living Native American communities. As such, the stereotypes are remembered not as marketing embellishments but instead as objective truths. Consumers are not aware of the fact that there are over 500 federally recognized Native American tribes in the United States today.⁷⁹ The marketplace for cultural appropriation typically lumps them all into a single stereotypical Indian identity tied to headdresses, war bonnets, and dreamcatchers;

⁷³ *Id.* at 617, 619.

⁷⁴ K.J. Greene, *Trademark Law and Racial Subordination: From Marketing of Stereotypes to Norms of Authorship*, 58 SYRACUSE L. REV. 431, 436 (2008); see also Alex M. Johnson Jr., *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CAL. L. REV. 887 (1996).

⁷⁵ Riley & Carpenter, *supra* note 55, at 881 (describing the ascent of Western movies as reflecting the allure by non-Native Americans of Native Americans as a “vanishing race”).

⁷⁶ Aoun, *supra* note 33, at 568.

⁷⁷ See ERIC BAKER & TYLER BLIK, TRADEMARKS OF THE 20’S AND 30’S 77–89 (1985).

⁷⁸ See *id.*

⁷⁹ *Tribal Leaders Directory*, U.S. DEP’T INTERIOR INDIAN AFFS., <https://www.bia.gov/service/tribal-leaders-directory#:~:text=There%20are%20currently%20574%20Federally,Would%20You%20Like%20to%20Do%3F>.

that identity belongs to a historical concept and not a living people—so it is free for cultural appropriation.⁸⁰

It was in this historical context that Jeep began selling the JEEP CHEROKEE in the 1970s.⁸¹ The company now claims that the name was selected “to honor and celebrate Native American people for their nobility, prowess and pride.”⁸² However, early advertising for the car rarely referenced the Native American people directly and instead seemed to focus on images of the car traversing the rocky terrain of the American Southwest.⁸³ It is safe to speculate that the “Cherokee” name was likely selected as more of a public domain concept that ties the car to an idea of rugged patriotism (much like many uses of Native American imagery in the 1800s and 1900s). This is further supported by the fact that the car was renamed the JEEP LIBERTY when the CHEROKEE name was retired for about a decade starting in 2002.⁸⁴ This idea of using Native American tribal names to tie your car brand to ideas of patriotism and American geography and history was shared by other companies during the same time period. Chevrolet sold the APACHE and the CHEYENNE.⁸⁵ Mazda had the NAVAJO, and Dodge sold a car called the DAKOTA.⁸⁶ Pontiac sold their car under the mark AZTEK, a slightly stylized misspelling of Aztec.⁸⁷

The owners of the Washington Redskins football team similarly claimed that the REDSKINS trademark was chosen in the 1930s to honor Native Americans.⁸⁸ In particular, the team “alleged in proceedings in connection with a cancellation action brought against the team’s trademarks by a group of Native Americans that

⁸⁰ See BAKER & BLIK, *supra* note 77.

⁸¹ Gross, *supra* note 46. 1970–1979, JEEP, <https://www.jeep.com/history/1970s.html#willys-overlands> (last visited Feb. 8, 2024).

⁸² *Id.*

⁸³ See Aaron Robinson, *The Controversy Over Native American Names Engulfs the Jeep Cherokee*, HAGERTY MEDIA (Sept. 21, 2021), <https://www.hagerty.com/media/opinion/the-controversy-over-native-american-names-engulfs-the-jeep-cherokee/>.

⁸⁴ Gross, *supra* note 46.

⁸⁵ Taylor Telford, *Cherokee Nation to Jeep: Stop Using the Tribe’s Name*, WASH. POST (Feb. 22, 2021), <https://www.washingtonpost.com/business/2021/02/22/cherokee-nation-new-jeep-name>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 104 (D.D.C. 2003).

Mr. Marshall changed the name of the team to honor the team's head coach, William 'Lone Star' Dietz, who was a Native American."⁸⁹ However, it is noteworthy that the team was previously called the BOSTON BRAVES prior to the move to the District of Columbia and that William Dietz's poor performance led to him being fired from the team after only a few years as head coach.⁹⁰ On September 10, 1992, a group of seven Native Americans filed a cancellation action against six of the team's REDSKINS trademark registrations, which were then owned by Pro Football, Inc., on the grounds that the term "redskin" was disparaging to Native Americans in violation of Section 2(a) of the Lanham Act.⁹¹ Over the next seventeen years and numerous appeals and remands, *Pro Football, Inc. v. Harjo* was eventually dismissed by the United States Court of Appeals for the District of Columbia Circuit based on the finding that the plaintiffs' delay in bringing suit after reaching the age of majority constituted laches.⁹² A new set of young adult Native American plaintiffs then promptly brought essentially the same suit for cancellation of the REDSKINS trademark registrations in *Blackhorse v. Pro Football, Inc.*⁹³ While the *Blackhorse* cancellation action ultimately resulted in the cancellation of the REDSKINS trademark registrations—based on "redskin" being disparaging to Native Americans—in decisions by the Trademark Trial and Appeal Board and the United States District Court for the Eastern District of Virginia, the point was moot.⁹⁴ These holdings in favor of Native Americans were eventually vacated when *Matal v. Tam* held that Section 2(a)'s bar on the registration of disparaging trademarks was unconstitutional.⁹⁵

⁸⁹ Jessica M. Kiser, *How Dykes on Bikes Got It Right: Procedural Inequities Inherent in the Trademark Office's Review of Disparaging Trademarks*, 46 UNIV. S.F. L. REV. 1, 12 (2011).

⁹⁰ BRUCE STAPLETON, REDSKINS: RACIAL SLUR OR SYMBOL OF SUCCESS? 1 (2001).

⁹¹ *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q. 2d 1705, 1707–09 (T.T.A.B. 1999); see also Aoun, *supra* note 33, at 646–47 ("Evidence was presented in *Blackhorse* and *Harjo* to prove that various Native American counterpublics (such as the American Indian Movement and National Congress of American Indians) and individuals have long demanded an end to these stigmatizing trademarks. According to the National Congress of American Indians, the REDSKINS mark perpetuates a centuries-old stereotype of Native Americans as 'blood-thirsty savages,' 'noble warriors,' and an ethnic group 'frozen in history.'").

⁹² *Pro Football, Inc. v. Harjo*, 565 F.3d 880, 881–85 (2009).

⁹³ *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q. 2d 1080 (T.T.A.B. 2014).

⁹⁴ *Id.*; see *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439, 447–48 (E.D. Va. 2015).

⁹⁵ *Matal v. Tam*, 582 U.S. 218, 223 (2017); *Pro-Football, Inc. v. Blackhorse*, 709 F. App'x 182, 183 (E.D. Va. 2018).

Ultimately, these examples are highlighted to show the prevalence of cultural appropriation that exists in the realm of United States trademark law as well as the near impossibility of remedying it using the legal system. Dan Snyder, the former owner of the Washington Commanders (formerly the Washington Redskins) football team, once declared to reporters that “[w]e’ll never change the name[.] It’s that simple . . .”⁹⁶ because “it’s who we are.”⁹⁷ That statement really gets to the heart of the problem: the American marketplace has adopted Native American imagery so thoroughly and transformed it into something so unmoored from real Native Americans that it may be hard for the white majority to disentangle it from American culture generally. Aoun noted the circular absurdity of Snyder’s pronouncement:

Think about that for a moment: non-Native Americans claim that a pejorative slur adopted as a team name defines them and may speak to mythical identities they forged with the help of trademark registration, which, save for bad faith, traditionally awarded trademark ownership on a “first come, first served” basis.⁹⁸

However, in light of the large amount of “playing Indian” that has historically taken place in white America, perhaps it makes sense that white consumers feel an ownership over these Native American stereotypes. Some Boy Scouts performed “rain dances” in Boy Scouts⁹⁹ and they dressed up as generic “Indians” when they took part in public school plays about Thanksgiving.¹⁰⁰ They may have read self-help books written by spiritual leaders advocating that they commune with a spirit

⁹⁶ Erik Brady, *Daniel Snyder Says Redskins Will Never Change Name*, USA TODAY (May 9, 2013), <http://www.usatoday.com/story/sports/nfl/redskins/2013/05/09/washington-redskins-daniel-snyder/2148127>.

⁹⁷ Dan Snyder, *Letter from Washington Redskins Owner Dan Snyder to Fans*, WASH. POST (Oct. 9, 2013, 12:37 PM), https://www.washingtonpost.com/local/letter-from-washington-redskins-owner-dan-snyder-to-fans/2013/10/09/e7670ba0-30fe-11e3-8627-c5d7de0a046b_story.html.

⁹⁸ Aoun, *supra* note 33, at 643.

⁹⁹ DELORIA, *supra* note 54, at 135–36, 152.

¹⁰⁰ See *Native American Is Not a Costume*, Nat’l Museum Am. Indian, <https://americanindian.si.edu/nk360/pdf/Native-American-Cultures-Clothing-Native%20American-Not-Costume-2020.pdf> (last visited Apr. 15, 2024).

animal and live more “authentically” with nature.¹⁰¹ Perhaps, they “smudged” their new home with sage to ward off evil energy or bad spirits before moving in.¹⁰²

Cultural appropriation is always about relationships among people and about potentially conflicting meanings for symbols.¹⁰³ Even within Native American communities, there are differing views about when actions rise to the level of cultural appropriation and which forms of cultural appropriation should be stopped.¹⁰⁴ However, that decision should not be left to the whims of the white consumer majority. That is especially true when it is clear that the use of Native American images and culture as trademarks or in branding can rise to the level of causing real harm to individual Native Americans and to entire Native communities. For example, the *Harjo* plaintiffs

tendered extensive evidence that stigmatizing Native American trademarks and imagery perpetuate negative ethnic stereotypes, causing lasting psychological damage such as anxiety, depression, and low self-esteem . . . reflected in the suicide rate of adult Native Americans, which is three times that of the American general population, and the suicide rate of Native American children, which is five times that of the general population.¹⁰⁵

While the harm is real, it is unclear whether the law provides any true path towards a remedy for that harm. One might ask whether that lack of a solution is a bug in the system—or a feature.

¹⁰¹ See, e.g., Books, DR. STEVEN FARMER, <https://drstevenfarmer.com/product-category/books> (last visited Apr. 15, 2024).

¹⁰² See, e.g., Anjie Cho, *Top 6 Feng Shui Space Clearing Must-Haves*, THE SPRUCE (Oct. 12, 2023), <https://www.thespruce.com/top-feng-shui-space-clearing-must-haves-1275059>.

¹⁰³ Bruce Ziff & Pratima V. Rao, *Introduction to Cultural Appropriation: A Framework for Analysis*, in *BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION* 1, 3 (Bruce Ziff & Pratima V. Rao eds., 1997) (“The meaning of ‘appropriation’ is also open-ended. The examples bear this out. However, from among that array three general points emerge: (1) appropriation concerns relationships among people, (2) there is wide range of modes through which it occurs, and (3) it is widely practiced.”).

¹⁰⁴ Riley & Carpenter, *supra* note 55, at 900 (“American Indian tribes and Indian people are not monolithic. There remains a wide range of views on all issues involving cultural appropriation within Indian communities. To suggest otherwise is to essentialize Indian people in a way that is neither accurate nor useful.”) (footnote omitted).

¹⁰⁵ Aoun, *supra* note 33, at 648 (footnotes omitted).

II. TRADITION IS NOT A NEUTRAL CONCEPT

Because American trademark law is a legal framework that developed using a European model adopted from America's colonial past, trademark law is inherently built in a way that supports majoritarian (colonizer) interests over those who lacked economic or legal power at the time of the development of such systems. This is a logical result of the fact that IP rights were originally created

to facilitate commercial relations among colonial powers as trade between European powers occurred on and among the various territories on behalf of foreign sovereigns.

Intellectual property law was not merely an incidental part of the colonial legal apparatus, but a central technique in the commercial superiority sought by European powers in their interactions with *each other* in regions beyond Europe.¹⁰⁶

Fighting to maintain power is built into the foundation of such a system, and that history continues in the modern day. Much like early colonists were leery of the taxation and other commercial restraints imposed on the American colonies by European colonialist governments, even seemingly neutral laws for the protection of trade were established in part to protect the interest of those governments and the established holders of economic power.¹⁰⁷

Decolonial theorists have explored this idea in much more detail than it can be afforded in this Article. Decolonial theory examines intellectual property law as an approach to IP “as part of a larger system of advancing particularly Western development agendas under the aegis of protecting knowledge as a valuable commodity, in ways that definitionally marginalize people of color and their capacity to think original thoughts.”¹⁰⁸ Much of the scholarship on this topic has focused on the devaluation of the intelligence and creativity of colonial subjects.¹⁰⁹ Laws were

¹⁰⁶ Okediji, *supra* note 16, at 324.

¹⁰⁷ ANJALI VATS, THE COLOR OF CREATORSHIP: INTELLECTUAL PROPERTY, RACE, AND THE MAKING OF AMERICANS 195, 196 (2020) (“Intellectual property law was thus not simply an incidental means of protecting creators; it was an important element of colonial structural power and domination.”).

¹⁰⁸ *Id.* at 197.

¹⁰⁹ *See, e.g., id.* at 195–96 (“Through the simultaneous denigration of non-European Others and the valorization of Western ideals of modernity and progress, Enlightenment thinkers represented colonial subjects as inferior non-humans to be civilized. Otherness connoted deviance, not difference. Given the

explicitly written or interpreted to exclude colonized subjects, and Indigenous peoples in particular, from possessing rights capable of IP protection. Danielle Conway has argued that this disparity was an intentional one used to wrest property in all of its forms from the Indigenous Peoples.¹¹⁰ Native American songs were too communal for any one Native American to possess IP rights in them.¹¹¹ American slaves were held to lack the citizenship necessary to receive patent protection for inventions that they created.¹¹² In essence, IP law was created and still functions to maintain the rights of the powerful majority resulting in “what Indigenous peoples have intuited for centuries—that cultural appropriation functions as an extension of European-settler conquest, which has systematically dispossessed Indigenous communities of their lands, natural resources, family relationships, identities, and even their own bodies.”¹¹³

One way in which trademark law protects the established power structures is through its focus on the past as a basis for rights. Trademark law that follows the British model awards trademark protection based on use of a mark in commerce.¹¹⁴ Therefore, evidence of prior use is built into these systems. Trademark common law does not ask who uses a mark most efficiently, who uses the mark better, or whose use of the mark most benefits society; it asks who used the mark first.¹¹⁵ While that may seem like a neutral basis for rights, there has been a significant portion of United States history (and even European history) where people of color, and women, did not have the legal and economic rights necessary to make a first use of a trademark in commerce. Thus, their “use” cannot have the lengthy history of many of the

fundamentally European character of American intellectual property law, those racially informed tenets have come to shape the contours of the nation’s copyright, patent, and trademark policies . . .”).

¹¹⁰ Conway, *supra* note 65, at 224 (“Often intellectual property laws have been used by dominant settler societies against Indigenous Peoples to dispossess the latter of their culture, identity, and assets in the same fashion that the former perfected the art of land dispossession.”).

¹¹¹ See Trevor Reed, Note, *Who Owns Our Ancestors’ Voices: Tribal Claims to Pre-1972 Sound Recordings*, 40 COLUM. J.L. & ARTS 275, 287–95 (2016) (using a case study to illustrate feuding ownership interests in pre-1972 sound recordings made on Indian reservations).

¹¹² See Brian L. Frye, *Invention of a Slave*, 68 SYRACUSE L. REV. 181, 194 (2018).

¹¹³ Trevor G. Reed, *Fair Use as Cultural Appropriation*, 109 CALIF. L. REV. 1373, 1377 (2021).

¹¹⁴ 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:108 (5th ed. 2023).

¹¹⁵ *Id.* § 19:3.

world's most profitable brands. In the long history of civilization, lawful "use" of marks by people of color is in its adolescence.

The importance of past use, and time-honed past perceptions packaged as trademark goodwill, cannot be overstated. Thus, the past impacts the analysis of whether a trademark receives any protection, who has the priority in rights, and whether a reasonable consumer is likely to be confused by two similar marks. It also impacts the analysis of whether those reasonable consumers would "falsely suggest a connection"¹¹⁶ between a proposed mark and an institution like a Native American tribe. Whether you call it past practice, goodwill, commercial reputation, or "tradition," stereotypes and historical marginalization will seep into the reality of trademark law in practice.

Additionally, there is a growing movement of scholars that are building upon the foundation provided by Critical Race Theory (CRT) to analyze the ways in which IP law, in both its structure and practice, has been utilized to reinforce the racial caste system that is endemic to the United States as a result of its colonial history. It is increasingly clear that IP laws in the United States (and other countries with similarly European-derived systems) inadequately protect the interests of indigenous communities.¹¹⁷ For example, Madhavi Sunder has argued that the IP system serves "as a legal vehicle for facilitating (or thwarting) recognition of diverse contributors to cultural and scientific discourse."¹¹⁸ Anjali Vats deftly tied together decolonial theory and critical race theory in her book outlining how race, citizenship, and IP rights have evolved together throughout U.S. history.¹¹⁹ Scholars like K.J. Greene and Olufunmilayo Arewa have illustrated how copyright law fails to protect or reward the contributions of African American creators, while Trevor Reed has

¹¹⁶ 15 U.S.C. § 1052(a).

¹¹⁷ See, e.g., Richard A. Guest, *Intellectual Property Rights and Native American Tribes*, 20 AM. INDIAN L. REV. 111, 112 (1996) (exploring the distinction between Native American intellectual and cultural property and discusses the Indian Arts and Crafts Act as a means of protecting both types of property); Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 225 (2000) (arguing for a groups rights model of IP ownership to better protect the rights of indigenous groups); Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 839 (2001) (arguing for modifications to IP law to strike a balance between the rights of the public and those of the original source community that inspired cultural products); Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039, 1041 (2007) (exploring international intellectual property protection through the lens of human rights).

¹¹⁸ Madhavi Sunder, *IP3*, 59 STAN. L. REV. 257, 269 (2006).

¹¹⁹ See generally VATS, *supra* note 107.

provided similar attention to the failure of copyright law to recognize Native Americans.¹²⁰ Given the prevalence of racist imagery in American branding, it should be no surprise that scholars including Deseriee Kennedy, Alex Johnson, Jr., and Deborah Gerhardt have criticized the ways in which trademark law has reinforced and perpetuated white supremacy.¹²¹ Peter Yu and Margaret Chon have expanded this discussion of race and equality into the context of international IP law.¹²² Given the thoughtful work of these other scholars, the background on CRT and Critical Race IP provided herein will be kept to a minimum. This Article accepts the premise that “[i]ntellectual property law is also a ‘racial project,’ that reproduces particular racial orders,”¹²³ so the focus herein is on the consequences of that racial project in light of the unique interaction between Native Americans and American trademark law.

A. *Imagined Traditions in a Racist System*

As previously discussed, trademark law swims in racial and ethnic stereotypes. Anjali Vats astutely notes: “[U]nlike copyright and patent law, trademark law did not explicitly exclude certain groups from protection. Instead, it produced a legal framework through which racial hierarchies could be normalized and managed visually, in consumer spaces.”¹²⁴ In essence, trademark law is plagued by two interconnected issues: the system’s reliance on and reiteration of racist scripts and the impact of the law’s reliance on the “white male consumer gaze” as a proxy for a reasonable consumer.¹²⁵ Racial scripts are “historically grounded and flexible racist logics about racial groups that can be accessed at any time to exclude the original or other people of color.”¹²⁶ This terminology describes many of the stereotypes or

¹²⁰ See Greene, *supra* note 66, at 365; Arewa, *supra* note 66. Reed, *supra* note 111, at 1377.

¹²¹ See, e.g., Kennedy, *supra* note 72; Alex M. Johnson, Jr., *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CALIF. L. REV. 887 (1996); Deborah R. Gerhardt, *supra* note 69.

¹²² See, e.g., Yu, *supra* note 117; Margaret Chon, *Recasting Intellectual Property in Light of the U.N. Sustainable Development Goals: Toward Global Knowledge Governance*, 34 AM. U. INT’L L. REV. 763 (2019).

¹²³ VATS, *supra* note 107, at 3 (quoting MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S*, at 55 (1994)).

¹²⁴ *Id.* at 55; see also Greene, *supra* note 74, at 438 (“If we lived in a race-neutral or ‘colorblind’ society, perhaps we could accept a ‘colorblind’ theory of trademark law. Unfortunately such is not the case.”).

¹²⁵ VATS, *supra* note 107, at 55, 56.

¹²⁶ *Id.* at 3 (“They operate as shorthand mechanisms for calling upon dominant American ideals of national identity, patriotism, political economy, and personhood without necessarily explicitly invoking racial

tropes that were discussed above in terms of the historical uses of Native Americans in American branding: the noble savage, the fierce warrior, the disappearing historical footnote. Racial scripts develop out of the persuasive use of the same derogatory images or messages about a particular racial or ethnic group. Those messages transform over time into a cultural shorthand, “an unspoken but accepted visual order of things, which reflected white, male, settler colonialist understandings of the world.”¹²⁷ Much like a trademark itself provides a symbolic shorthand that asks consumers to reflect on all of the brand-related messages that the trademark owner has tied to that symbol, racial scripts perform a similar function for racist understandings. Placing Aunt Jemima on a package of pancake mix asks consumers to recall racial scripts about subservient, black housekeepers in a time of explicit white supremacy. Simply naming a team REDSKINS connects the product to racial scripts about fierce savages and the triumph of white settlers. Thus, the trademark itself can appear to be race-neutral (or at least less obviously disparaging) because the majority of consumers have already internalized the racial scripts to which the mark is intertwined.

Additionally, racial scripts become reinforced by the grounding of trademark infringement in the “white male consumer gaze.”¹²⁸ This issue arises from the fact that trademark infringement is determined in light of a likelihood of confusion of the “reasonable consumer.”¹²⁹ That consumer is “grounded in the structural realities of a white male judiciary and white male property holders,” so “consumer confusion naturalized white masculinity as the default legal standard for seeing and judging trademark infringement.”¹³⁰ Again, this white, male default is not necessarily intentional. It is a consequence of the fact that white men have possessed most of the economic and legal power in this country since before its founding. Because women and people of color were excluded from many professions and from owning property for much of the country’s history, trademark law developed with the expectation that white men were the ones consuming the goods and services being sold.¹³¹ This focus

categories or colonial logics. In this way, racial scripts can be baked into the seemingly colorblind ideals of American citizenship that, in turn, inform intellectual property law.”).

¹²⁷ *Id.* at 56.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 57 (“In a nation in which white men held most positions of power and most economic assets—including property rights, lawmaking authority, permission to govern, and industrial production—

on white consumers “coupled with the inability of people of color to file claims allowed the Doctrine of Consumer Confusion to become a vehicle for protecting white supremacy and whiteness, even through race-neutral language.”¹³² Nearly all of the judges and USPTO attorneys that decided trademark legitimacy were from the same white, heterosexual male background; thus there was little room for trademark law to develop any other understandings of a reasonable consumer.¹³³

This is not a problem that the drafters of federal trademark law necessarily considered or anticipated as something that needed to be fixed. While racist trademarks may be harmful to minority communities, they can still well serve majoritarian goals that appear to be race neutral. According to K.J. Greene:

Because trademark law, like IP law and theory in general, pretends to operate in a social vacuum, the classic economic view does not take into account that racially stereotypical marks in fact promote the worst kind of misinformation. Indeed, trademarks that promote racial stereotypes, such as Aunt Jemima, can nicely reduce consumer search costs but increase social costs of discrimination that result from negative stereotypes.¹³⁴

Even now, when society purports to be more aware of racial bias and intersectionality, the white male gaze often seems to be at the heart of major trademark decisions.

Matal v. Tam is an excellent example of the white male gaze’s enduring power.¹³⁵ *Matal* is the case that rendered moot the *Harjo* and *Blackhorse* litigation against the Washington Redskins football team by convincing the Supreme Court to strike down the Section 2(a) bar on the registration of disparaging trademarks as an

trademarks visually reflected and constituted their understandings of the world, even when women and people of color were doing the producing/consuming.”).

¹³² *Id.* at 65.

¹³³ *Id.* at 64 (referencing Laura Heymann, *The Reasonable Person in Trademark Law*, 52 ST. LOUIS U. L.J. 781 (2008)) (“However, as feminist intellectual property scholars demonstrate, even those tests were applied by a predominately white, male, middle-class judiciary whose politics in the pre-civil rights era were historically unlikely to align with those of people of color.”).

¹³⁴ Greene, *supra* note 66, at 435.

¹³⁵ *Matal v. Tam*, 582 U.S. 218 (2017).

unconstitutional imposition on free speech.¹³⁶ The case is sometimes described as a victory for people of color as the case was brought by a group of Asian Americans attempting to register a racial slur in order to “reclaim” the word as the name of their band.¹³⁷ However, Anjali Vats argues that the real victor of the case is white libertarianism:

In *Tam*, though Simon Tam earned the right to trademark the band name the Slants, his victory marked a libertarian ethic that reinforced a white, male, consumer gaze. Committing to deregulatory market-based solutions to racism without addressing the underlying racial investments of the capitalism created a Pyrrhic victory in which people of color could trademark freely but came no closer to producing the mythical “level playing field” required for equal opportunity.¹³⁸

In the nearly twenty years of litigation over the REDSKINS marks, the USPTO and various courts were asked to determine whether “redskin” is disparaging to Native Americans.¹³⁹ In making such a determination, those individuals and courts applied the white, male gaze inherent in the reasonable consumer standard to try to disentangle the racial scripts about Native Americans into a single answer. In the end, *Matal v. Tam* provided an easier way to avoid those racial scripts all together: “*Tam* reinforces the white masculinity of the consumer gaze by not only condoning the production of racist trademarks but also rendering invisible the structural whiteness of free speech and market economies.”¹⁴⁰ This Article is not arguing that *Matal v. Tam* was wrongly decided; the decision logically follows the cited First Amendment precedent, and the government made a relatively weak showing on the underlying justification for the prohibition on the registration of disparaging trademarks.¹⁴¹ However, it was not a decision that advanced racial equity. In truth, it

¹³⁶ *Id.* at 223; see also *Pro-Football, Inc. v. Blackhorse*, 709 F. App’x 182, 183–84 (4th Cir. 2018) (vacating and remanding on the basis of the Supreme Court’s ruling in *Tam*).

¹³⁷ See Lee Rowland, *Victory! The Slants Are Officially Rockstars of the First Amendment*, AM. C.L. UNION: NEWS & COMMENT (June 19, 2017), <https://www.aclu.org/news/free-speech/victory-slants-are-officially-rock-stars-first-amendment>.

¹³⁸ VATS, *supra* note 107, at 113.

¹³⁹ See, e.g., *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96 (D.D.C. 2003).

¹⁴⁰ VATS, *supra* note 107, at 120.

¹⁴¹ *Matal v. Tam*, 582 U.S. 218, 220, 245 (2017) (“Under *Central Hudson*, a restriction of speech must serve ‘a substantial interest,’ and it must be ‘narrowly drawn’ The disparagement clause fails this requirement.” (The opinion then explains that Section 2(a) is not drawn narrowly enough to justify the

is further evidence that trademark law has never been in the racial justice or equity business. The prohibition on the registration of disparaging marks was window dressing at best. The history of Native Americans in trademark law, and the history of the REDSKINS trademark dispute, illustrate that trademark law has always been an instrument of majoritarian interests. While *Matal* may have appeared to open the floodgates to racist trademark registrations, any semblance of prior protection against such racism was really illusory. The historical use of Section 2(a)'s "false connection" grounds for rejection further illustrates this fact.

The white, male gaze also intersected with Native American racial scripts in the case of *Navajo Nation v. Urban Outfitters, Inc.*¹⁴² In another case with an unsatisfying outcome for Native Americans, the Navajo Nation attempted to use trademark laws available to them to combat cultural appropriation by the clothing retailer Urban Outfitters.¹⁴³ At the time of the suit, Urban Outfitters had made over \$500 million in sales of products sold under the store's "Navajo" or "Navaho" line.¹⁴⁴ The Navajo Nation argued the NAVAJO mark should be considered famous for the purpose of trademark dilution.¹⁴⁵ They supported their assertion by arguing that the Nation has been selling goods under its name for over 150 years and possessed eighty-six trademarks registered with the USPTO at the time of the suit (with some dating back to as early as 1944).¹⁴⁶ The District Court for the District of New Mexico held that the Navajo Nation is not sufficiently famous and therefore dismissed the tribe's federal and state trademark dilution claims.¹⁴⁷ The court determined that niche fame is not sufficient, and the NAVAJO name/mark does not extend beyond niche notoriety in the industry of "arts and crafts" in the minds of the general consuming

government's interest in (a) preventing underrepresented groups from being bombarded with demeaning messages in advertising and (b) protecting the orderly flow of commerce.)

¹⁴² *Navajo Nation v. Urb. Outfitters*, No. 12-195, 2016 U.S. Dist. LEXIS 63599 (D.N.M. May 13, 2016).

¹⁴³ *Id.*

¹⁴⁴ Kathryn Moynihan, *How Navajo Nation v. Urban Outfitters Illustrates the Failure of Intellectual Property Law to Protect Native American Cultural Property*, 19 RUTGERS RACE & L. REV. 51, 65 (2018) (citing Carey Dunne, *Urban Outfitters Wins Partial Victory Over Navajo Nation in Trademark Dispute*, HYPERALLERGIC (May 20, 2016), <http://hyperallergic.com/300457/urban-outfitters-wins-partial-victory-over-navajo-nation-in-trademark-dispute/>).

¹⁴⁵ *Navajo Nation v. Urb. Outfitters, Inc.*, 918 F. Supp. 2d 1245, 1249 (D.N.M. 2013).

¹⁴⁶ *Id.*

¹⁴⁷ *Navajo Nation v. Urb. Outfitters*, No. 12-195, 2016 U.S. Dist. LEXIS 63599, at *14 (D.N.M. May 13, 2016) (noting that claims were dismissed with prejudice).

public.¹⁴⁸ It did not matter that the Navajo Nation is often considered the largest Native American tribe in the United States¹⁴⁹ or that the tribe had an extensive history of selling similar goods under federally registered trademarks;¹⁵⁰ the Navajo Nation was not sufficiently famous according to the white consumer gaze.

Historically, marginalized communities have not been able to share their actual traditions with the marketplace without filtering them through the expectations of white consumers. Because marginalized communities have been denied IP protection for their traditional knowledge and cultural heritage, white artists and businesses have been able to borrow from that knowledge and heritage to inundate the marketplace with bastardized versions of Native American traditions. Those traditions—while commercially salient from the standpoint of trademark law and the white male consumer gaze—are actually racial scripts and not traditions at all.

When viewed through the white male gaze, marks can be refused registration based on a false connection with Native American tribe names when the products or services relate to something like tobacco products,¹⁵¹ because that fits into the established racial scripts. The connection between Native Americans and tobacco may be rooted in some real, historical practices of specific tribes, but the Native American/tobacco racial construct has now morphed into an imagined tradition of all Native peoples in the “mind” of the commercial marketplace and modern trademark law. However, the white male gaze could not imagine a false connection being made between a Native American tribe and a modern clothing company or a car company.¹⁵² The white reasonable consumer therefore gets to determine the goods or services that a Native American tribe could market and what goods or services are simply too far out of reach. Decolonial theory stresses the value of making visible the racial underpinnings of systems and policies with the hope that bringing light to such embedded white supremacy can encourage change.¹⁵³ Change

¹⁴⁸ *Id.* at *12.

¹⁴⁹ Ana I. Sánchez-Rivera, Paul Jacobs & Cody Spence, *A Look at the Largest American Indian and Alaska Native Tribes and Villages in the Nation, Tribal Areas and States*, U.S. CENSUS BUREAU (Oct. 3, 2023), <https://www.census.gov/library/stories/2023/10/2020-census-dhc-a-aian-population.html>.

¹⁵⁰ *Navajo Nation v. Urb. Outfitters*, No. 12-195, 2016 U.S. Dist. LEXIS 63599 (D.N.M. May 13, 2016).

¹⁵¹ See discussion of APACHE and MOJAVE *supra* Part I.

¹⁵² See discussion of CHEROKEE marks *supra* Part I.

¹⁵³ See, e.g., VATS, *supra* note 107, at 199 (“Decolonial theory, like CRT, foregrounds the need to make intellectual property’s racial politics visible and confronts the exclusionary effects of inclusionary politics, through histories of modernity as well as the histories of Americanism and citizenship . . .”).

is long overdue for Native American communities that have struggled in vain for too long to utilize the flawed systems that continue to deny them protection for their IP interests, while also building their modern economies around the systems' biased promises of protection.

B. *Native Americans and the Double Bind*

The intersection of a real history of Native American eradication with the prevalence of Native American racial scripts adopted as truth in the American marketplace has left Native Americans in a unique sort of stalemate. When attempting to grow tribal economies and adapt to the modern marketplace, they are caught in a double bind between embracing modernity or profiting from the “traditional” racial scripts.¹⁵⁴ It is obviously true that “Native peoples are legitimately concerned with the ahistorical representations of ‘Indianness’ that circulate in the public sphere and the manner in which such imagery mediates the capacities of others to recognize their contemporary identities as peoples with specific needs in the late twentieth century.”¹⁵⁵ However, those pervasive racial scripts can also be commercialized by the Native Americans themselves. The Indian Arts and Crafts Act is a perfect example of the double bind at issue. The Indian Arts and Crafts Act prohibits the selling of arts and crafts (or “Indian Products”) that falsely indicate such products are made by “Indians.”¹⁵⁶ While this statute appears to be a helpful way to protect authentic works made by Native Americans and to allow Native Americans to charge a premium for products produced using the traditional knowledge and cultural heritage that may not otherwise be protectable under IP law, the law is inherently paternalistic and limiting. It has been criticized for hindering Native sovereignty and self-determination by defining what it means to be “Indian” and what it means to be a protected “Indian product.”¹⁵⁷ When such definitions are imposed upon a disempowered group, they risk reinforcing racial

¹⁵⁴ The idea of a “double bind” is discussed often in critical legal scholarship as a way of referencing a situation in which all of the options presented are conflicting or untenable. *See, e.g.*, John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 *FORDHAM L. REV.* 1927 (1999) (discussing how oppressive conditions create double binds); Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 *IND. L.J.* 783 (2003) (exploring the double bind between “efficiency” and “redistribution” in regulatory reform).

¹⁵⁵ Coombe, *supra* note 8, at 87.

¹⁵⁶ Indian Arts and Crafts Act, Pub. L. No. 101-644, tit. I, 104 Stat. 4662 (1990).

¹⁵⁷ *See* William J. Hapiuk Jr., *Of Kitsch and Kachinas: A Critical Analysis of the Indian Arts and Crafts Act of 1990*, 53 *STAN. L. REV.* 1009 (2001).

scripts and further limiting the ability of such a group to determine their own priorities.

Philip Deloria once noted: “We construct identity by finding ourselves in relation to an array of people and objects who are not ourselves.”¹⁵⁸ This is a complex and evolving process for Native Americans as they are forced to constantly rearticulate what it means to be an “authentic” Native American. Many tribes have lost elements of their historical culture, language, and even their governing structures due to the eradication and forced removal programs implemented by the United States government.¹⁵⁹ As tribes try to redefine what it means to be authentic to their own cultural traditions and unique historical circumstances, they must wrestle with the economic consequences of embracing modernity by rejecting racial scripts: “Rather than accepting static or monolithic versions of Indian identity, tribes are expressing their right to change and evolve—noting that they have the right to be traditional and modern.”¹⁶⁰

However, the adoption of “modernity” has consequences. Any art or other goods produced with a less stereotypical approach may no longer be protected as “Indian” under laws like the Indian Arts and Crafts Act. Additionally, such evolutions are often met with hostility by white consumers in the larger marketplace. Some authors and artists have been criticized for “not being ‘authentic’ or sufficiently ‘Indian.’”¹⁶¹ Struggles over authenticity are especially burdensome for those in the Indigenous diaspora who may have been further displaced from their tribal roots and further removed from their perceived “traditions.” They face a high level of colonialism-derived scrutiny:

This tactic of deeming some people of aboriginal ancestry to be “real Indians” while denying the ability of others to speak on behalf of Native concerns is reminiscent of the historical policies of colonial authorities who arbitrarily

¹⁵⁸ DELORIA, *supra* note 54, at 21.

¹⁵⁹ Libr. of Cong., *Removing Native Americans from their Land*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/immigration/native-american/removing-native-americans-from-their-land/>.

¹⁶⁰ Riley & Carpenter, *supra* note 55; see also Colleen O’Neill, *Rethinking Modernity and the Discourse of Development in American Indian History, an Introduction*, in *NATIVE PATHWAYS: AMERICAN INDIAN CULTURE AND ECONOMIC DEVELOPMENT IN THE TWENTIETH CENTURY* (Brian Hosmer & Colleen O’Neill eds., 2004) (focusing on the lived realities of American Indians in the modern world).

¹⁶¹ Coombe, *supra* note 8, at 88.

conferred and withheld Indian status on spurious grounds that failed to recognize indigenous practices defining community membership.¹⁶²

Modern anthropologists and sociologists recognize that “such propositions about culture, authenticity, and identity are extremely contentious ones.”¹⁶³ Rosemary Coombe notes that “[i]ntellectually, we have been called upon to resist the siren call of authenticity, the reification of cultures, and the continuity of traditions.”¹⁶⁴ The racial scripts in advertising and trademarks play a role in this debate over authenticity because the white male consumer is not an anthropologist. If “identity is a process of identifying and constructing oneself as a social being through the mediation of images,” then Native Americans are faced with an impossible burden.¹⁶⁵ The commercial images that have been imposed on Native Americans have psychological and economic consequences:

For the majority, repeated exposure to racist imagery can activate thoughts of negative stereotypes. When white Americans view racial stereotyped branding in a positive light, the disconnect between their perception and those of the depicted groups may contribute to misunderstanding and divisiveness. According to social representation theory, media depictions may lead to negative consequences if they reinforce stereotypes that constrain how the majority sees a relatively invisible group, because these diminished views, if reflected back to the targeted community, may limit the potential they see in themselves.¹⁶⁶

Jesse A. Steinfeldt, Jacqueline Hyman, and M. Clint Steinfeldt further explained:

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

¹⁶² *Id.* at 89.

¹⁶³ *Id.* at 79.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 86–87.

¹⁶⁶ Gerhardt, *supra* note 69, at 252 (footnotes omitted).

impacting one's developmental trajectory and subsequent psychological functioning.¹⁶⁷

Given this harm to their communities, Native Americans have taken various steps to try to counter racial scripts and protect their interests within the bounds of trademark law. As discussed herein, those efforts to use the legal system to remedy these harms have been largely unsuccessful. In *Harjo* and *Blackhorse*, Native Americans spent nearly two decades attempting to utilize the law to cancel trademark registrations that were perpetuating racial scripts.¹⁶⁸ Those efforts were essentially in vain once *Tam* made the disparagement bar unconstitutional.¹⁶⁹ The Supreme Court in *Tam* “functionally endorses a hands-off system in which markets—systems largely governed by a predominantly white and male consumer gaze—must regulate brand racism.”¹⁷⁰

In *Navajo Nation v. Urban Outfitters, Inc.*, the Navajo Nation attempted to follow the lead of colonizer companies that formed large American brands.¹⁷¹ They obtained federal registrations for numerous trademarks, invested in developing a reputation for those marks in their categories of goods and services, and then attempted to enforce them by bringing the suit against Urban Outfitters, Inc.¹⁷² Again, the law did not support their efforts.¹⁷³ Instead, their commercial activities may have been too “diverse” in scope and hindered their ability to illustrate the requisite fame for trademark dilution.¹⁷⁴

Even Section 2(a)'s prohibition on the registration of marks that falsely suggest a connection to Native American tribes is of little help. In the instances where a court or the USPTO has prevented registration of marks connected to Native American

¹⁶⁷ Jesse A. Steinfeldt, Jacqueline Hyman & M. Clint Steinfeldt, *Environmental Microaggressions: Context, Symbols, and Mascots*, in MICROAGGRESSION THEORY: INFLUENCE AND IMPLICATIONS 213, 219 (Gina C. Torino et al. eds., 2019).

¹⁶⁸ *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96 (D.D.C. 2003); *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (D.D.C. 2015).

¹⁶⁹ Aoun, *supra* note 33, at 626–26.

¹⁷⁰ VATS, *supra* note 107, at 120.

¹⁷¹ *Navajo Nation v. Urb. Outfitters*, No. 12-195, 2016 U.S. Dist. LEXIS 63599 (D.N.M. May 13, 2016).

¹⁷² *Id.*

¹⁷³ *Id.* at *14.

¹⁷⁴ *Id.*

groups, those actions have reinforced the racial scripts that commerce associated with Native Americans must fall into such stereotypical categories as crafts or tobacco products.¹⁷⁵ There is no record of JEEP CHEROKEE or the other Native American themed automotive trademarks being denied registrations—not even temporarily.¹⁷⁶ Even the CHEROKEE trademark application, discussed earlier in this Article, that was initially denied registration in connection with jewelry on “false connection” grounds was eventually allowed to proceed to registration.¹⁷⁷ That applicant company was able to overcome the initial refusal by simply pointing out that the company had a long history of appropriating the Cherokee name.¹⁷⁸

Moreover, Section 2(a)’s “false connection” prohibition has no power over companies that rely on common law trademark rights.¹⁷⁹ Therefore, a company like Jeep was able to start using CHEROKEE in the 1970s without a federal trademark registration and then use its substantial economic power to build marketing associations between the mark and their vehicles before filing for a trademark application in 2001.¹⁸⁰ This is such an obvious way to work around the Section 2(a) “false connection” hurdle: use your company’s marketing resources to either reinforce racial scripts that work in your favor or build new trademark associations that essentially eclipse the existence of a Native American tribe all together. The Washington football team did much the same thing.¹⁸¹ By failing to file for trademark registrations for decades after they began using the marks, they could direct the associations being made in the mind of target consumers (and thus direct that white male consumer gaze). It is no wonder that Dan Snyder believed the term REDSKINS

¹⁷⁵ See *supra* Part I.

¹⁷⁶ See *supra* note 51 for the CHEROKEE automotive trademark applications; see also U.S. Trademark Application Serial No. 73811145 (filed July 6, 1989); U.S. Trademark Application Serial No. 75602771 (filed Dec. 8, 1998); CHEYENNE, Registration No. 6,674,716; U.S. Trademark Application Serial No. 88,824,134 (filed Mar. 6, 2020); U.S. Trademark Application Serial No. 73687437 (filed Oct. 1, 1987).

¹⁷⁷ See discussion of CHEROKEE & Design application for jewelry *supra* Part I.

¹⁷⁸ U.S. Trademark Application Serial No. 76/337,800 (filed Nov. 13, 2001), Resp. to Office Action Dated Apr. 23, 2002, mailed Sept. 20, 2002.

¹⁷⁹ 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:3 (5th ed. 2023).

¹⁸⁰ U.S. Trademark Application Serial No. 76/337,800 (filed Nov. 13, 2001), Resp. to Office Action Dated Apr. 23, 2002, mailed Sept. 20, 2002.

¹⁸¹ Kiser, *supra* note 89, at 12 (“Despite the fact that the trademark had been in use since the 1930s, federal registration was not sought for THE REDSKINS mark (with a stylized design) until July 14, 1966.”).

to refer more to his football team and its primarily white fans than to the Native Americans that it was allegedly selected to honor in the first place.

Native Americans face the double bind of choosing between making money off of racial scripts or ignoring them entirely to craft a new path without much political or legal support. For this Article, a preliminary search of United States trademark applications and registrations filed or owned by Native American tribes was conducted.¹⁸² These data seem to indicate that most tribes are currently opting for the direct financial benefit of relying on racial scripts of Native American “traditions.” Of the 148 applications and registrations owned by a self-disclosed “tribe,” nearly all of them were registered in connection with tobacco/smoking products, craft and souvenir products, or goods or services that are ancillary to running casinos. Only fourteen of the trademarks were applied for or registered in connection with other industries like banking, investments, horticulture, construction, or software, and even some of those registrations could be tangentially related to casino operations when utilized in practice.¹⁸³ If Native Americans are only offered paternalistic protections for stereotypical economic options—like the tobacco or craft protections afforded to them by the current legal regime—then trademark law offers little more than continued oppression and subordination.¹⁸⁴

¹⁸² To get a general sense of the registrations owned by federally recognized Native American tribes, a search of trademark applications and registrations listed on the USPTO’s registry was conducted in the fall of 2023 using “tribe” as the search term in the “owner” name search field. This is a useful search term as many Native American tribes, expressly list that they are a “federally recognized tribe” on their trademark applications in order to prevent “false connection” problems and to ensure adequate treatment regarding the Indian Arts and Crafts Act. A chart was then created using the resulting entities to compare the goods and services connected with the applications and registrations retrieved. Any irrelevant entries, where “tribe” clearly referred to something other than a federal tribe, were removed. Data available from the author upon request.

¹⁸³ See, e.g., Trademark Application Serial No. 98,120,361 (filed Aug. 10, 2023) (by Cherokee Nation Businesses, LLC for “capital and investment management”); Trademark Application Serial No. 98,110,603 (filed July 31, 2023) (by the Confederated Tribes of Warm Springs Reservation of Oregon for “non-metallic building materials. . . .”); Trademark Application Serial No. 97,925,193 (filed May 8, 2023) (by BlueChip Financial, a wholly owned entity of the Turtle Mountain Band of Chippewa Indians for “software services & licensing of software”).

¹⁸⁴ Riley & Carpenter, *supra* note 55, at 866–67 (Such a choice “makes it difficult for tribes to foster religions, economies, and governance systems that reflect tribal values. All of these experiences diminish both tribal sovereignty and impede the prevailing federal policy of advancing American Indian ‘self-determination’ in socioeconomic, political, and cultural life.”).

CONCLUSION

While trademark law frequently involves Native Americans, rarely does it seem to benefit Native Americans. Even paternalistic protections like the Indian Arts and Crafts Act impose colonialist interpretations of Native American identity upon those “protected” and then reinforce racial scripts in the law’s operation. The potential benefit¹⁸⁵ that may have been received through Section 2(a)’s prohibition on the registration of disparaging marks worked much too slowly to provide real assistance to Native American communities, and that protection is no longer an option after *Matal v. Tam*. While the Trademark Manual of Examining Procedure suggests that Section 2(a)’s false connection provision is intended to protect the identity or persona rights of those being “falsely connected” to a trademark for which an application has been filed, the effect of that provision on Native Americans has been less protective and more oppressive.

While some might refer to such laws as paternalistic, it might be more accurate to view them as a “welfare-based framework” under which Native Americans are forced to rely on the dominant society for the recognition of their intellectual property rights and the protection of their cultural and economic interests.¹⁸⁶ When that recognition is provided, it is under terms that reinforce the racial scripts and power differentials that are embedded in the “traditional” (historical) interactions between Native American communities and the white supremacist power structure that lies at the foundation of the American marketplace.

Given that U.S. trademark law was designed to protect and reinforce majoritarian interests, the best solution for Native Americans may be to resist the formal trademark legal system. Instead of proposing statutory changes or a new interpretation of trademark jurisprudence, the solution for Native Americans may be to opt out of these trademark fights and the rigged system altogether. Making minor changes to the Lanham Act will not correct the colonialist sentiments at the heart of the system.¹⁸⁷ As Audre Lorde once said, “[T]he master’s tools will never dismantle

¹⁸⁵ Aoun, *supra* note 33, at 663 (arguing that the interaction between *Harjo*, *Blackhorse*, and *Tam* illustrate how Native Americans can rarely utilize the law to their benefit: “In other words, the ‘sluices,’ which offered so much promise, were forced shut, raising uncomfortable questions (which cannot be pursued here) about whether engagement in the trademark bureaucratic processes and legal actions reproduced and reinforced the hierarchies that further institutionalized Native American oppression.”).

¹⁸⁶ Conway, *supra* note 65, at 211, 219.

¹⁸⁷ *Id.* at 208 (“Because Indigenous peoples are rarely in a position to exercise rights from a position of power, there is always risk in proposing legal rules or models for protection that may not fully account for the complex legacy of colonization.”).

the master's house."¹⁸⁸ Past practice illustrates that Native Americans cannot rely on U.S. trademark law to fairly and predictably protect their interests with regard to trademarks, whether that be by protecting against infringement of Native-owned marks or by preventing registration and use of marks that falsely suggest a connection to a tribe. Any efforts contributed to the enterprise by Native Americans seem to be a waste of both precious time and money.

Instead, it may be time for Native Americans to recognize that trademark law focuses on the past, on perceived tradition, and authenticity, through a structure that was formed to maintain historical power and wealth disparities. Under this system, tradition is a trap that can be used to limit the protection of Native American economic interests to those trademarks that fit stereotype-laden racist scripts. If American trademark law adheres to such a static view of trademarks, then trademark law will not be able to help Native American communities change those racist representations. By holding Section 2(a)'s bar on disparaging trademark registrations unconstitutional, the Supreme Court essentially tasked the market and individual consumers with the responsibility of regulating racist trademarks. Given the law's poor performance on the regulation of trademarks that falsely suggest a connection to Native American tribes, perhaps the government should be absolved of that responsibility as well.

An earlier draft of this Article received some criticism alleging that not enough credit is being given to the power of the market in protecting Native American interests. One particular Libertarian critic argued the fact that the Washington football team eventually retired the REDSKINS name in 2020 is evidence that the "white male gaze" has less power and that consumers can be trusted to advance these sorts of racial and social issues. However, such arguments miss the point of this Article: trademark law was, and still is, ineffective in protecting the interests of Native Americans. Even when Section 2(a) included both a prohibition on the registration of marks disparaging to Native Americans and a prohibition on the registration of marks that falsely suggested a connection to Native American tribes, neither avenue resulted in predictable legal victories for Native Americans. If there is not a path for redress through the trademark legal system, then there is not really a path for Native Americans to exercise their own autonomy and agency in such disputes. A call to "trust the market" is a call to be passive, to wait for change to come at whatever speed the majority thinks is best.

¹⁸⁸ Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER* 112 (Nancy K. Bereano ed., 2000) (1984).

At present, Native American tribes lack the population and the economic power to change these racial scripts and trademark meanings on their own.¹⁸⁹ Sports teams and corporations refused to change their racist trademarks when faced with decades of protests, at sporting events and through the courts, by Native Americans. The Washington Redskins did not suddenly pay attention to those protests; they finally agreed to change their name in 2020 when the team had to face wider public condemnation in connection with the Black Lives Matter movement (and the resulting threats of corporate sponsors to remove funding for the team).¹⁹⁰

Given the argument made herein that it is not worthwhile to bring trademark disputes involving race-related concerns to court or to the USPTO, Native Americans, and those advocating for minority interests generally, may find strategic advice in the scholarship on trademark bullying because bullied parties are also unlikely to see victory through the court system.¹⁹¹ “Trademark bullies” are trademark owners who aggressively assert rights in their marks against individuals or small businesses where the rights claimed are either weak or overreaching.¹⁹² For example, the company that markets MONSTER energy drinks was called a bully for sending a cease and desist letter to a small Vermont brewery demanding that the brewery cease use of the name VERMONSTER in connection with one of its beers.¹⁹³ One of the most prominent companies allegedly engaging in trademark bullying currently is Adidas. Adidas has earned that reputation in the press by threatening or actually filing litigation against smaller companies that use any type of striped motif in the sportswear industry (regardless of whether actual consumers

¹⁸⁹ However, see the discussion of the 2020 U.S. Census figures below.

¹⁹⁰ Rosa Sanchez, *NFL’s Washington Redskins to Change Name Following Years of Backlash*, ABC NEWS (July 13, 2020, 11:34 AM), <https://abcnews.go.com/US/washington-redskins-change-years-backlash/story?id=71744369>.

¹⁹¹ See, e.g., Leah Chan Grinvald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625 (2011); Irina D. Manta, *Bearing Down on Trademark Bullies*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 853 (2015); Elizabeth L. Rosenblatt, *Fear and Loathing: Shame, Shaming, and Intellectual Property*, 63 DEPAUL L. REV. 1, 8 (2013).

¹⁹² Jessica M. Kiser, *To Bully or Not to Bully: Understanding the Role of Uncertainty in Trademark Enforcement Decisions*, 37 COLUM. J.L. & ARTS 211, 216–17 (arguing that “the aggressive—and potentially very costly and inefficient—actions taken by the trademark holder are the key to labeling such individuals or companies as ‘trademark bullies.’”).

¹⁹³ See Adam Ostrow, *Social Media Users Rally Behind Vermont Brewery vs. Monster Energy Drink*, MASHABLE (Oct. 16, 2009), <https://mashable.com/archive/vermonster>.

are likely to find the use of stripes to be confusing in a trademark sense).¹⁹⁴ Scholars have argued that in such instances, where large brand owners threaten individuals or small businesses under the banner of trademark infringement or dilution, the victim of bullying rarely has the ability or the resources to defend themselves in court.¹⁹⁵ Instead, the bullying victim is sometimes advised to bring the dispute to the public in order to shame the larger company. Shaming is “an external, aggressive action—an appeal to the shame of another, generally before a public audience.”¹⁹⁶ It is an appeal “to community norms and attempts to impose them on someone else.”¹⁹⁷ Using shame as a means of punishment and as a way of deterring similar, undesirable behavior is nothing new. However, its value as a way for members of the public to punish corporations and ensure corporate social responsibility has come to the forefront in both scholarship and popular media in the past decade.¹⁹⁸

Shaming corporations that utilize trademarks representing Native Americans or racial scripts about Native Americans presents a valid option that allows for Native Americans to exercise their own agency while demanding change. This approach also does not rely on the inadequacies of trademark law. Additionally, corporations are valid subjects of shaming because they are likely to be motivated by a desire to avoid reputational harm.¹⁹⁹ A corporation must evaluate the risk of a loss of immediate sales if the shaming involves a threat of a consumer boycott. They must also consider the longer-term impacts to their brand’s reputation. For example, Nike

¹⁹⁴ *How Many Stripes? Aviator Nation Fires Back at Adidas*, TFL (July 2, 2024), <https://www.thefashionlaw.com/how-many-stripes-aviator-nation-fires-back-at-adidas/> (discussing *Adidas America, Inc. v. Aviator Nation, Inc.*, No. 3:24-cv-00740, 2021 WL 91623 (D. Or. Jan. 10, 2021)).

¹⁹⁵ Grinvald, *supra* note 191, at 654 (arguing that the victim of bullying cannot litigate trademark disputes because “small businesses and individuals have neither the infrastructure of large corporations to analyze trademark-infringement claims for validity nor the monetary resources to bluff out would-be bullies.”).

¹⁹⁶ Rosenblatt, *supra* note 191, at 2 (arguing that shame and shaming govern “intellectual property’s liminal spaces, where protection is uncertain or inconsistent with the strictures of formal law.”).

¹⁹⁷ *Id.*

¹⁹⁸ See, e.g., Bradley C. Karkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257 (2001); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001); Sharon Yadin, *Should Regulators Shame Companies into Compliance?*, THE REGUL. REV. (Sept. 18, 2019), <https://www.theregreview.org/2019/09/18/yadin-should-regulators-shame-companies-into-compliance/>; Joe Harpaz, *Public Shaming of Big Companies Not As Big A Deal, But Not Going Away Anytime Soon*, FORBES (June 26, 2017), <https://www.forbes.com/sites/joeharpaz/2017/06/26/public-shaming-of-big-companies-not-as-big-a-deal-as-you-think-but-not-going-away-anytime-soon/>.

¹⁹⁹ See Sharon Yadin, *Regulatory Shaming*, 49 ENV’T L. 407 (2019), for examples of companies being reputationally harmed by shaming.

had to invest substantial resources into correcting its reputation after it was publicly shamed for its use of “sweatshop labor” in the 1990s.²⁰⁰ While Nike has rebounded from that public relations disaster, corporations are now very aware of the repercussions of similar shaming scandals.

However, this approach still suffers from the difficulty of motivating the wider public to Native American causes. As mentioned earlier, the Washington football team did not retire the REDSKINS mark based solely on the decades of protests held by Native Americans at numerous football games (which were essentially an attempt at public shaming of the team’s owners). Instead, it took the Black Lives Matter social movement to create enough public outcry for the shaming to be effective. That example illustrates the fact that shaming may only be effective if there are shared norms or values within a community that form the basis for the corporation’s alleged transgression. This means that Native American advocates will likely face two hurdles in their attempt to use corporate shaming: (1) Native Americans and the wider public may not share norms regarding the use of Native American names and imagery;²⁰¹ and (2) there may be simply too few Native Americans to build the necessary public outcry without the support of other minority groups or the public at large.

The first hurdle will be a persistent one. As discussed herein, many members of the general public have been raised in a cultural environment in which Native American imagery is free for the taking. It may be hard to walk back the idea that Native American names and imagery belong to all Americans, especially when members of this white majority may have been raised in a town named for a Native American tribe, “played Indian” as part of beloved extracurricular activities, and wore branded merchandise using Native words and imagery to support a favored sports team (instead of the tribe or peoples being referenced). The shared norms about ownership of Native American names and imagery simply might not exist. In the case of the REDSKINS mark and team name, the public outcry that spurred the change may have been tied to more vague notions of racism writ large rather than specific norms about the use of Native American names and imagery. Changing the

²⁰⁰ See, e.g., *Business Case Studies: Nike Sweatshop Scandal*, VAIA, <https://www.vaia.com/en-us/explanations/business-studies/business-case-studies/nike-sweatshop-scandal> (last visited Aug. 17, 2024).

²⁰¹ Grinvald, *supra* note 191, at 666–67 (“Therefore, the second condition for successful shaming is that the community shares in the norms that the target has transgressed. If the community does not share a particular norm, the shaming will likely fall on deaf ears.”).

norms about ownership of these words and images might be a slow undertaking that involves a substantial investment in educational campaigns for the public.

As to the second hurdle, coalition building with other minority groups may help to create enough groundswell to support a shaming campaign. Social science and legal scholarship is replete with research on how to build effective coalitions.²⁰² Unfortunately, this is an inherently difficult task. “Although minority group coalitions often trumpet lofty goals such as equality and justice for all, what many coalition members want more than anything, individually and collectively, is their piece of the proverbial pie.”²⁰³ Typically, these coalitions are most effective at countering such self-interested impulses when the various groups can coalesce behind shared ideology, goals, and common threats.²⁰⁴ For example, shared threats of violence from the police and racist members of the public may have helped to unite African Americans with Asian American and Latinx communities to support the Black Lives Matter movement in California.²⁰⁵ This might suggest that a path toward progress could focus on the racist history of advertising and branding in general. An educational campaign that draws parallels between the racist use of Sambo and Mammy imagery with the modern use of Native American names and imagery by white corporate America may help to create a sense of shared ideology and shared injury between Native Americans and African Americans. Obviously, these issues are connected, but coalition building may require making those connections much more explicit in order to draw a direct line between, for example, AUNT JEMIMA and Urban Outfitter’s NAVAJO underwear. Additionally, the 2020 U.S. Census offered an interesting possibility for growing support for Native American issues. The 2020 Census indicated that 2.9% of the United States population claims some degree of Native American ancestry.²⁰⁶ That represents an

²⁰² See, e.g., Victor C. Romero, *Rethinking Minority Coalition Building: Valuing Self-Sacrifice, Stewardship, and Anti-Subordination*, 50 VILL. L. REV. 823 (2005); Kevin R. Johnson, *The Struggle for Civil Rights: The Needs for, and Impediments to, Political Coalitions Among and Within Minority Groups*, 63 LA. L. REV. 759 (2003); Steven W. Bender & Keith Aoki, *Seekin’ the Cause: Social Justice Movements and LatCrit Community*, 81 OR. L. REV. 595 (2002); Maneesh Arora, Sara Sadwani & Sono Shah, *Unpacking Identity: Opportunities and Constraints for Cross-Racial Collaboration*, 7 RSF: THE RUSSELL SAGE FOUND. J. OF THE SOC. SCIS. 93 (2021).

²⁰³ Romero, *supra* note 202.

²⁰⁴ Arora, *supra* note 202, at 95.

²⁰⁵ *Id.*

²⁰⁶ *American Indian, Alaskan Native, and Tribal Population Data*, CONG. RSCH. SERV., <https://crsreports.congress.gov/product/pdf/IF/IF12612#:~:text=OMB%20currently%20defines%20American%20Indian,more%20than%20one%20racial%20group> (last updated Apr. 2, 2024).

85% increase in population, from 5.2 million people in 2010 to 9.6 million people in 2020.²⁰⁷ The increase in population may seem perplexing given that Native Americans have one of the lowest fertility rates of any group measured by the Centers for Disease Control and tribal enrollment did not see a similar exponential increase.²⁰⁸ However, the increase is likely due to a change in how the Census tracks mixed-race individuals.²⁰⁹ This self-reported data on mixed-race individuals with some level of connection to Native American ancestry offers an opportunity to Native American tribes. Offering tribal enrollment to all of these individuals is likely not a valid consideration, but these are still individuals, American consumers, who can be educated and called upon to support Native American issues. Rather than dismiss them for their lack of tribal enrollment, this may be time to welcome them into the movement for wider Native American racial justice. This could be the 85% population increase needed to tip the scales and finally create the consumer movement needed to persuade a company like FCA Inc. to cease use of the CHEROKEE name.

The path forward for Native Americans is not through trademark law; instead, it may be based in public relations efforts to publicize true Native American traditions and commercial endeavors to change some of the racial scripts adopted by the consuming public as truth. It may also necessitate coalition building with other racial and ethnic groups to further tie these Native American concerns to the larger norms about racial equity. If Native Americans decide to resist the false promises of protection under trademark law, they may be better served by investing their time and money into building tribal economies that suit their sovereign interests without concern about whether such economic interests are “authentic” to the minds of white consumers. That concern over what trademark law deems authentic or protectable in a racist marketplace is simply a trap that distracts from real economic and social progress.

²⁰⁷ *Id.*

²⁰⁸ See also Andrew Van Dam, *The Native American Population Exploded, the Census Shows. Here's Why.*, WASH. POST (Oct. 27, 2023), <https://www.washingtonpost.com/business/2023/10/27/native-americans-2020-census/>.

²⁰⁹ *Id.* For the sake of full transparency, the author of this article is one of those mixed race individuals noted in the 2020 Census. I have ancestral ties to the Anishinaabe people through my father, but I am not an enrolled member of a federally-recognized Native American tribe.