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THE INDIANS' CHIEF PROBLEM: CHIEF WAHOO AS
STATE SPONSORED DISCRIMINATION AND A
DISPARAGING MARK

JACK ACHIEZER GUGGENHEIM¹

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I. INTRODUCTION

Chief Wahoo, the Cleveland Indians' perennial mascot, is seen by many in the Native American community as a discriminatory emblem which parodies and denigrates Native Americans and their culture.² While other Native American team names, emblems and mascots have been defended as celebrating Native American bravery and heroism, the grinning idiot vestige of Chief Wahoo with his exaggerated features is harder to justify.³ This article traces the history of the Cleveland Indians and Chief Wahoo. It then suggests and assesses two methods by which the Chief Wahoo emblem may be legally challenged. The first method is to assert that Chief Wahoo, as used in Jacob's Field, is state sponsored discrimination. As such it could be challenged as a violation of equal protection or as racist speech. This first challenge would have some significant hurdles. To begin with, it must be asserted that even though the Indians are privately owned, the teams' actions in Jacob's Field may be deemed state actions. Next, it would have to be shown that there was sufficient discriminatory intent behind the creation of Chief Wahoo such that the emblem is a violation of the Equal Protection Clause. Alternatively, in addition to proving that the teams' actions should be deemed state actions, a new theory asserting that discriminatory state speech is a violation of the First Amendment could be advanced.

Another method by which the Chief Wahoo emblem may be legally challenged is by asserting it is a disparaging trademark and therefore invalidly registered. Trademark registration is governed by the Lanham Act which

²For a further discussion of how artwork may express national discrimination and an effort to alienate a nationality and culture, see Jack Achiezer Guggenheim, *Art & Atrocity: Cultural Depravity Justifies Cultural Deprivation*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. (1998) (arguing that based on a recommended international cultural forfeiture standard Nazi cultural depravity justified Russia's appropriation of German national artwork seized at the end of World War II).

³In addition to the Cleveland Indians, a small sampling of teams that use Indian names include: the Washington Redskins, the Atlanta Braves, the Kansas City Chiefs, and the Florida State University Seminoles. Some teams have stopped using Indian names after receiving complaints that such names were offensive. In 1972, Stanford University changed its name from the Indians to the Cardinal, and the University of Massachusetts changed its mascot from the Indian to the Minuteman. David Arnold, *Minutemen Comes Under '90s-Style Fire*, BOSTON GLOBE, Oct. 14, 1993, at 1; Karen Goldberg, *Ethnic Team Names Draw New Attacks*, WASH. TIMES, July 10, 1993, at D1. In 1974, Dartmouth also stopped using "Indians" as a team name. See MICHIGAN DEPARTMENT OF CIVIL RIGHTS, MICHIGAN CIVIL RIGHTS COMMISSION REPORT ON THE USE OF NICKNAMES, LOGOS, AND MASCOTS DEPICTING NATIVE AMERICAN PEOPLE IN MICHIGAN EDUCATION INSTITUTIONS (1988). In 1994, St. Johns decided to change its teams' name from the "Redmen" to the "Red Storm." St. Johns had already removed its logo depicting an Indian brave in 1991. Despite the Indian logo, the school claimed the name "Redmen" emanated from the red jerseys the team used to wear, and not from a Native American derivation. Michael Shain, *Lauder St. Johns' Tradition "Redmen" may be Ousted*, NEWSDAY, Nov. 4, 1993, at 172. In addition, the Boards of Education of Wisconsin and Minnesota almost banned all Indian mascots in public schools. Keith Ervin, *Debate on Dropping School Mascots*, SEATTLE TIMES, Sept. 22, 1993, at B1.

prohibits the registration of scandalous or disparaging marks. In order to successfully assert that the Chief Wahoo emblem should not enjoy federal trademark registration protection, it must be shown that the mark is either scandalous or disparaging as the courts have interpreted such terms under section 1052(a) of the Lanham Act. A bell weather of the strength of such a challenge is a case currently before the Patent and Trademark Office (hereinafter PTO) challenging the trademark of the Redskins, the National Football League (hereinafter NFL) team that plays in Washington, D.C. While the Redskins suit has not yet been resolved, the implications of such challenge may be instructive as to the success of challenging Chief Wahoo's registration rights.

While many see the Cleveland Indians' Chief Wahoo emblem as innocuous, a great many others see the mark as blatantly offensive. Given the number of people who find the Chief Wahoo mark offensive, hopefully the Cleveland Indians will change the mark themselves. If not, the action contemplated in this article might provide valid grounds for legal challenge.

II. THE CLEVELAND INDIANS

A. History of the Cleveland Indians

The Cleveland Indians were one of the four charter members of the American League.⁴ The team started as the Forest Citys in 1869.⁵ In 1889, the name was changed to the Spiders because there were a number of tall, thin players.⁶ In 1900, the name changed to the Blues, because of the team's striking blue uniforms.⁷ Looking for a more forceful name, the team became the Broncos in 1902.⁸ In 1903 the name was changed to the Naps in honor of a player named Napoleon Lajoie.⁹ Finally, in 1914, in honor of Louis Sockalexis, Cleveland's professional baseball team became known as the Indians, the name it enjoys today.¹⁰

Louis Sockalexis was a Penobscot Indian from Old Town, Maine and the first Native American to play major league baseball.¹¹ His career was short lived as

⁴*Cleveland Indians Web Page* (visited June 17, 1998) <<http://www.indians.com/history/index.html>>.

⁵*Id.*

⁶*Id.*

⁷*Id.*

⁸*Id.*

⁹*Cleveland Indians Web Page* (visited June 17, 1998) <<http://www.indians.com/history/index.html>>.

¹⁰*Id.*

¹¹*Id.*

Sockalexis only played three seasons.¹² In 1914, a Cleveland newspaper held a contest to rename Cleveland's baseball team.¹³ The winning entry was the "Indians." The fan who sent in the entry said the name was in honor of Sockalexis.¹⁴ However, some Native Americans believe that Native American team names and mascots, such as Cleveland's, are used not to honor Native American bravery but to portray Native Americans as a spectacle to be ridiculed.¹⁵ They note that Louis Sockalexis was frequently insulted in newspapers and subjected to war whoops and other racist slurs by fans.¹⁶ They assert that Sockalexis was not a hailed sports hero, but the victim of intense discrimination and bigotry, which contributed to his alcoholism and early retirement.¹⁷ Therefore, Native American team names and mascots can be viewed as a source of parody and satire and as a preservation of stereotypes as opposed to a celebration of positive attributes.

B. History of Chief Wahoo

The Chief Wahoo mascot was created by Walter Golbach, a 17-year-old artist, for the owner of the Indians in 1948.¹⁸ Goldbach gave the chief an orange tinged face, a prominent nose, and huge teeth.¹⁹ Goldbach, however, has said he never intended to offend anyone with his work.²⁰ Since Goldbach's version, the Chief Wahoo image has undergone at least five transformations.²¹ Dr. Robert Bane of John Carroll University has analyzed the Chief Wahoo image and found that the feather on Chief Wahoo's head is a denigration of a sacred symbol, and the grinning buck teeth and hook nose to be caricatures of real people.²² This corroborates the idea that Native American mascots are used not to honor

¹²*Id.*

¹³*Id.*

¹⁴*Cleveland Indians Web Page* (visited June 17, 1998) <<http://www.indians.com/history/index.html>>.

¹⁵*Chief Wahoo is Likely on Extinction Path*, THE VICTORIA SUN PRESS ENTERPRISE, Oct. 21, 1997, at C01.

¹⁶COMMITTEE OF 500 YEARS OF DIGNITY AND RESISTANCE, RACISM & CLEVELAND BASEBALL (Cleveland, Ohio 1997).

¹⁷*Id.*

¹⁸Eric Sandstorm, *History Smiles on the Many Faces of Chief Wahoo*, BEACON JOURNAL EXTRA, July 26, 1995.

¹⁹*Id.*

²⁰*Id.*

²¹*Id.*

²²Gary Axlerod, *Controversy Over Chief Wahoo Continues*, BLACK & GOLD (last modified Jan. 25, 1996) <<http://tiger.chuh.cleveland-heights.k12.oh.us/BlackGold/81-04/controversy-over-chief-w.html>>.

Native American bravery but to portray Native Americans as a spectacle to be ridiculed.²³

Native American groups have found Chief Wahoo so offensive that during the 1997 World Series a group of Native Americans burned an effigy of Chief Wahoo in protest.²⁴ On April 9, 1998, Chief Wahoo was again burned in effigy, this time resulting in five people being arrested outside the Indians' stadium, Jacobs Field.²⁵

Other groups have not been blind to the insult Native Americans feel the Chief Wahoo emblem represents. Recently the Interfaith Center on Corporate Responsibility, a network of 275 Protestant, Catholic and Jewish institutional investors with an estimated \$70 billion in combined assets, asked companies it invests in to stop licensing the Chief Wahoo mark because it believes such use is a corporate endorsement of the denigration of Native Americans.²⁶

Meanwhile, the team has stated that "The Cleveland Indians organization is very aware of the sensitivities involved in this issue. We have gone to great lengths to respect those sensitivities. In no way do we intend to demean any group, especially one as proud as Native Americans."²⁷ While Native American groups have complained that the cartoon Chief Wahoo emblem is a denigrating caricature of Native Americans, the team believes the mascot is not offensive because it is not an image of an actual human.²⁸

III. CHIEF WAHOO AS STATE SPONSORED DISCRIMINATION

A. Chief Wahoo as State Action

A challenge to the Chief Wahoo mark might viably argue that the Cleveland Indians' use of the mark constitutes discriminatory state action. First, such a challenge would need to show that the actions of the Cleveland Indians can be equated with, or attributed to, government action. Although the Cleveland Indians are a private entity, the team's actions in Jacobs Field could possibly be equated with, or attributed to, government action under the *Burton v. Wilmington Parking Authority*²⁹ symbiotic relationship test. As the Supreme

²³*Chief Wahoo is Likely on Extinction Path*, THE VICTORIA SUN PRESS ENTERPRISE, Oct. 21, 1997, at C01.

²⁴Wally Guenther, *Five in Chief Wahoo Protest Freed From Jail*, THE PLAIN DEALER, Apr. 12, 1998, 2B.

²⁵*Id.*

²⁶*Chief Wahoo Canned Money Talks Louder Than History*, SYRACUSE HERALD-JOURNAL, July 14, 1997, at A8, available in 1997 WL 5752127.

²⁷Gary Axlerod, *Controversy Over Chief Wahoo Continues*, BLACK & GOLD (last modified Jan. 25, 1996) <<http://tiger.chuh.cleveland-heights.k12.oh.us/BlackGold/81-04/controversy-over-chief-w.html>>.

²⁸*Id.*

²⁹365 U.S. 715 (1961).

Court has noted, "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."³⁰ Arguably, the City of Cleveland's sponsorship and endorsement of the Cleveland Indians has made the team so entwined with governmental policies, or so impregnated with a governmental character, that the team is subject to the constitutional limitations placed upon government action.

There are two approaches that the Supreme Court has outlined for determining whether a defendant's conduct represents state action: the "public function approach"³¹ and the "nexus approach."³² A challenge to Chief Wahoo as a state endorsed emblem would probably have a greater likelihood of success under the nexus approach. Under the nexus approach, private conduct comes under constitutional scrutiny when it is intertwined with the government.³³ The nexus approach's "symbiotic relationship test" was developed by the Supreme Court in *Burton v. Wilmington Parking Authority*.³⁴

In *Burton v. Wilmington Parking Authority*, a parking garage was owned and operated by a state agency.³⁵ The state leased some commercial space in the garage to a private restaurant operator who refused to serve the plaintiff because he was black.³⁶ The plaintiff brought suit under the Equal Protection Clause of the Fourteenth Amendment.³⁷ The United States Supreme Court found the requisite state action present and held that the restaurant's actions violated the Fourteenth Amendment.³⁸ In reaching this conclusion, the Court noted that the relationship between the restaurant and the parking facility conferred mutual benefits.³⁹ As a result of this symbiotic relationship, the Supreme Court held that the restaurant operator was a state actor.⁴⁰ The Court stated:

By its inaction, . . . the State has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far

³⁰*Evans v. Newton*, 382 U.S. 296, 299 (1966).

³¹See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 18-1 at 1690 (2d ed. 1988).

³²*Id.*

³³See *Burton*, 365 U.S. at 715.

³⁴*Id.*

³⁵*Id.* at 716.

³⁶*Id.*

³⁷*Id.*

³⁸*Burton*, 365 U.S. at 726.

³⁹*Id.* at 724.

⁴⁰*Id.* at 725.

insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private'⁴¹

The Supreme Court subsequently refined and supplemented the state action doctrine in *Lugar v. Edmondson Oil Co.*,⁴² describing a two part approach for determining when a plaintiff may attribute the actions of a private party to the state.⁴³ First, the deprivation of a constitutional right must occur under color of state law or via a privilege created by the state.⁴⁴ Second, the party charged with the deprivation must be a state actor.⁴⁵ A plaintiff may satisfy part two by using previously articulated state action tests, such as the *Burton* nexus test.⁴⁶ Therefore, *Lugar* only added another requirement to the state action test; it did not overrule previous tests.⁴⁷ Furthermore, recent Supreme Court decisions imply that the Court no longer supports the analysis set forth in *Lugar*, and therefore will simply use the pre-*Lugar* state action tests.⁴⁸

Based on the *Burton* nexus test, it could be argued that the Cleveland Indians' use of an emblem or mascot in Jacobs Field is subject to constitutional review. A court might find that the requisite state action exists when the Cleveland Indians use, display and promote the Chief Wahoo visage in Jacobs Field. The symbiotic relationship between the Cleveland Indians and the government of the City of Cleveland might very well satisfy the nexus test. A challenge to the Chief Wahoo emblem could satisfy the state action requirement under the *Burton* test by demonstrating sufficient government involvement in the conduct of the Cleveland Indians and in the operation of Jacobs Field. Such sufficient government involvement could be shown by demonstrating that the City of Cleveland, by its action, or even inaction, has elected to place its power, property and prestige behind the Cleveland Indians, and thereby behind the team's use of the Chief Wahoo emblem.

It is possible that a court could find that the City of Cleveland "[h]as so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity, which,

⁴¹*Id.*

⁴²457 U.S. 922 (1982).

⁴³*Id.* at 937.

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶*Id.* at 939.

⁴⁷Mitchell L. Beckloff, Note, *State Action in San Francisco Arts & Athletics, Inc. v. United States Olympic Committee: Let the Games Begin*, 22 LOY. L.A. L. REV. 635 (1989).

⁴⁸*Id.* at 663; see *West v. Atkins*, 487 U.S. 42 (1988) (holding that a doctor under contract with the state to provide medical care in a prison was a state actor); see also *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987) (holding that the United States Olympic Committee was not a state actor).

on that account, cannot be considered to have been so 'purely private'"⁴⁹ That is, a symbiotic relationship arguably exists between a privately owned sports franchise and the city in which it plays its games sufficient to satisfy the nexus test.

Certainly a symbiotic relationship exists to some degree between a privately owned sports team and its host city.⁵⁰ After all, a city and its baseball team reap considerable benefits from each other. A professional sports franchise usually receives the use of modern facilities, including a stadium, parking areas and luxury seating boxes, as well as tax incentives and a discharge from stadium maintenance responsibilities.⁵¹ In addition, the team secures the use of the city's name, which enhances the team's image and its ability to attract fans and corporate sponsors.⁵² In turn, the city obtains marquee exposure, a source of entertainment, a source of civic pride, and an enterprise that can draw fans as well as businesses that compliment such a stadium. The city benefits from the media attention and tourism that a team can draw.⁵³ The local economy expands through the sale of souvenirs and bookings in hotels to accommodate the visiting team, press and fans.⁵⁴ Also, teams bring cities revenues from the use of highways, subways, buses and commuter rails.⁵⁵

⁴⁹Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).

⁵⁰For example, upon the return of the Raiders to the City of Oakland in March, 1990, a public official of Oakland described the relationship of the team and the city as a "unique partnership." Leonard Koppett, *In Bay Area, Not All Is Joy in Raiders' Deal*, N.Y. TIMES, Mar. 14, 1990, at D28; see also *Federal Baseball Club v. National League of Prof'l Baseball Clubs*, 259 U.S. 200, 20102 (1922), in which the plaintiff argued "[e]ach team of each club in the league carries with it, and it is essential to the profit of the enterprise that it should carry with it, its representative character; it symbolizes the great city that it represents to those assembled to witness the contest."

⁵¹See Koppett, *supra* note 50, at D28; Roberts, *It's Extra Innings for the Yankees and New York*, N.Y. TIMES, Nov. 3, 1988, at B1; see also *Lease on Stadium Approved for Colts By Indianapolis*, N.Y. TIMES, April 1, 1984, at 3.

⁵²For example, in *City of San Francisco v. National Exhibition Co.*, No. 700534, slip op. (Super. Ct. Cal. Jan. 12, 1976), the plaintiff, in its complaint to enjoin the San Francisco Giants baseball team from breaking its lease with the city for the use of Candlestick Park Stadium and relocating to Toronto, noted that the lease required "[a]ll such Major League Baseball games shall be exhibited by the Tenant under the name and style 'San Francisco Giants' (which name it is agreed possesses commercial value as goodwill and has a peculiar value to the Landlord), or under such other name as may be approved by the Landlord. . . ." *Id.* at 3.

⁵³Andrew H. Malcolm, *The Colts Move: For Indianapolis it's a Boon But in Baltimore, it Leaves a Void in the Hearts*, N.Y. TIMES, Apr. 8, 1984, at A22; *Los Angeles Gets Big League Glow*, N.Y. TIMES, Oct. 13, 1957, at 67.

⁵⁴See, e.g., *City of San Francisco*, No. 700534, slip op. at 67; Koppett, *supra* note 52, at D28; Litsky, *supra* note 51, at 3.

⁵⁵See, e.g., *Subways to Lose By Teams' Moves*, N.Y. TIMES, Oct. 9, 1957, at 37; see also *City of San Francisco*, No. 700534, slip op. at 67. In its complaint the plaintiff stated:

Indeed, the symbiotic relationship between a city and its baseball team has already been found to constitute state action where the relationship between the city and its team was similar to the relationship between the City of Cleveland and the Cleveland Indians. In *Ludtke v. Kuhn*,⁵⁶ the United States District Court for the Southern District of New York used the nexus approach to find that New York City's involvement with the New York Yankees and Yankee Stadium, and the city's lease arrangement with the Yankees, transformed Major League Baseball Commissioner Bowie Kuhn's policy of excluding female reporters from the team's locker room into state action subject to review under the Fourteenth Amendment.⁵⁷ The court, relying heavily on *Burton*, held that a symbiotic relationship existed between New York City and the Yankees due to the extensive use of public funds in the renovation and maintenance of Yankee Stadium.⁵⁸

The court further noted that the Yankees had to obey all federal, state and local laws affecting operations at Yankee Stadium, and that New York City had the right to enforce and assure compliance not only with local but also state and federal laws.⁵⁹ Therefore, the *Ludtke* court concluded that the City's failure to step in and stop the Yankees' discriminatory conduct was sufficient to support a finding of state action.⁶⁰

This reasoning in *Ludtke* should equally apply to support a finding of a symbiotic relationship between the City of Cleveland and the Cleveland Indians, and likewise equate the Cleveland Indians' actions in Jacobs Field with state actions. Like Yankee stadium, Jacobs Field was built through taxes for the benefit of Cleveland residents, and the City of Cleveland in effect owns and

[The city] will suffer substantial and irreparable harm if the defendants are not restrained from transferring the franchise in breach of the agreement. Not only will there be a loss of revenue by reason of the payments called for under the agreement for the use of the Stadium by the Giants and the revenue from the parking while spectators attend games, but, in addition, the plaintiff will suffer immeasurable damages in terms of the loss to its citizens of the opportunity to witness major league baseball in San Francisco, loss of revenue from tourists and professional teams visiting the community to attend major league baseball games with the associated loss to the local restaurants, hotels, motels, taxicabs and various other consumer-oriented establishments, resulting in a direct reduction in tax revenue to the City itself.

Id.; see also *State v. Milwaukee Braves, Inc.*, 144 N.W.2d 1, 22 (Wis. 1966) (Heffernan, Hallows & Beilfuss, JJ., dissenting). "It is not contradicted that as a result of the Braves' presence in Wisconsin, transportation facilities were expanded, municipal services were augmented, and industries of various types were created or expanded to support organized baseball in Milwaukee." *Id.*

⁵⁶461 F. Supp. 86 (S.D.N.Y. 1978).

⁵⁷*Id.* at 96.

⁵⁸*Id.* at 9394.

⁵⁹*Id.* at 92.

⁶⁰*Id.* at 94.

operates the stadium.⁶¹ The ballpark was built in 1994 at a cost of \$180 million and was financed through heavy public subsidies.⁶² The Indians lease Jacobs Field from Gateway Corporation ("Gateway"), a nonprofit organization formed by the City of Cleveland and Cuyahoga County to oversee the ballpark.⁶³ The Indians pay an annual rent which is tied to stadium attendance.⁶⁴ As of 1998, the team had paid \$4.6 million.⁶⁵ Gateway also earns one-third of the revenue from scoreboard advertisement sales if such amount exceeds \$1.5 million per year.⁶⁶ In 1998, this brought Gateway over \$400,000.⁶⁷ In addition, it has been recognized that Jacobs Field has helped anchor the south side of downtown Cleveland and helped transform it into a magnate.⁶⁸ Therefore, the criteria present in *Ludtke* that make actions by the Yankees equivalent to state actions are also present in the relationship between the City of Cleveland and the Cleveland Indians.

While the *Ludtke* court found that a symbiotic relationship existed between a city and its baseball team, it must be noted that there is Ohio precedent to the contrary. In *City of Cleveland v. Bregar*,⁶⁹ the court found that the property owned by Gateway, a Cleveland nonprofit corporation formed to operate Cleveland's sports complex, was private property for purposes of First Amendment analysis, and therefore upheld the conviction of criminal trespass against an individual protesting greed in professional sports. The court explicitly rejected the argument that Gateway should be considered a government actor.⁷⁰ In *Northeast Ohio Chapter of Associated Builders & Contrs., Inc. v. Gateway Elec. Dev. Corp. of Greater Cleveland*,⁷¹ the court likewise found that Gateway was a private entity for purposes of the Fourteenth Amendment and application of alleged federal law violations. While the *Bregar* and *Northeast Ohio Chapter* cases are certainly harmful, however, the challenge suggested herein would be brought against the Cleveland Indians, not Gateway. Arguably, a baseball team which

⁶¹James Ewinger, *Judge Clears Chief Wahoo Protesters*, THE PLAIN DEALER, Apr. 8, 1998, at 1B.

⁶²Bill Lubinger, *Cleveland's New Ballpark a Financial Home Run*, AUSTIN AMERICAN-STATESMAN, Apr. 19, 1998, at J1.

⁶³*Id.*

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷Bill Lubinger, *Cleveland's New Ballpark a Financial Home Run*, AUSTIN AMERICAN-STATESMAN, Apr. 19, 1998, at J1.

⁶⁸*Id.*

⁶⁹*City of Cleveland v. Bregar*, 667 N.E.2d 42 (Ohio Ct. App. 1995).

⁷⁰*Id.*

⁷¹No. 1:92 CV 0649, 1992 WL 119375, at *1 (N.D. Ohio May 12, 1992).

is in the public limelight is more representative of a city than is an uncelebrated nonprofit corporation formed to run a city's stadium.

Since *Ludtke* provides that there may be sufficient symbiosis between the City of Cleveland and the Cleveland Indians to satisfy the *Burton* nexus test, the Cleveland Indians' use, display, and promotion of the Chief Wahoo emblem in Jacobs Field may constitute state action. It therefore may be argued that the City of Cleveland endorses the Chief Wahoo emblem and thereby is guilty of government discrimination which is prohibited by the Equal Protection clause of the Fourteenth Amendment and a novel theory of the First Amendment's protection of speech.

B. Equal Protection Under the Fourteenth Amendment

The Equal Protection Clause of the Fourteenth Amendment provides that no state may "deny to any person within its jurisdiction the equal protection of the laws."⁷² In *Washington v. Davis*, however, the Supreme Court ruled that establishing an equal protection violation requires a showing of discriminatory intent; evidence of discriminatory impact alone does not suffice.⁷³ The Court reaffirmed this holding in *Hunter v. Underwood*,⁷⁴ when it stated that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."⁷⁵

The Supreme Court has provided guidelines by which courts can analyze discriminatory intent claims. A plaintiff challenging government policy under the Equal Protection Clause bears the burden of demonstrating, by a preponderance of the evidence, that racial discrimination was a substantial or motivating factor in the adoption of the policy.⁷⁶ Since determining the "motivation behind official action is often a problematic undertaking,"⁷⁷ courts often look to the context in which actions were taken in order to evaluate the discriminatory intent claim. "[D]etermining whether invidious discriminatory

⁷²U.S. CONST. amend. XIV, § 1.

⁷³426 U.S. 229, 242 (1976). Although *Washington v. Davis* was a Fifth Amendment case, the analysis is identical for the Equal Protection Clauses under the Fifth and Fourteenth Amendments.

⁷⁴471 U.S. 222 (1985).

⁷⁵*Id.* at 227-28 (quoting *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65). In *Hunter*, two Alabama citizens, one black and one white, were barred from county voting rolls pursuant to the Alabama Constitution, which provided for the disenfranchisement of persons convicted of crimes involving "moral turpitude." 471 U.S. at 223. Each of the disenfranchised voters had been convicted of presenting a worthless check. The Supreme Court unanimously held the statute unconstitutional, on the grounds that the law disproportionately hurt blacks and was enacted with discriminatory intent. *Id.*

⁷⁶*Id.* at 228.

⁷⁷*Id.*

purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."⁷⁸ If there is the possibility of discriminatory intent, whether the government also had legitimate, nondiscriminatory reasons for its decision must also be examined. To defeat a Fourteenth Amendment challenge where there is the possibility of discrimination, the government must "demonstrate that the law would have been enacted without this [racially discriminatory] factor."⁷⁹

C. Chief Wahoo as a Violation of the Fourteenth Amendment

It may be argued that the selection of a symbol for use in the classic American pastime that is denigrating to a minority of the population is a violation of that minority's Fourteenth Amendment right to be free from laws which treat it unequally. Chief Wahoo, an emblem which arguably parodies and denigrates Native Americans, is pervasively used at Cleveland Indians games, on Cleveland Indian paraphernalia, and throughout Major League Baseball ("MLB"). The selection of an exclusionary symbol is potentially harmful because of the effect it may have on the desire and ability of the excluded to participate in mainstream society.⁸⁰ Additionally, the choice of a discriminatory symbol stigmatizes those parodied individuals. The knowledge that mainstream society, as reflected by a professional multi-hundred million dollar state sponsored enterprise has knowingly and willfully chosen an exclusionary, denigrating symbol has a damaging effect. The injury produced by discriminatory state action is more than the denial of a certain benefit; it is also "the thought and message of inferiority, of hatred and contempt, that is communicated by the discriminatory act and that afflicts the human spirit of the victim."⁸¹

It may be argued that Chief Wahoo symbolizes Cleveland's endorsement of discrimination by private parties. The Supreme Court has prohibited such government approval of private discrimination. In *Reitman v. Mulkey*,⁸² the Court held that California could not repeal its prohibition of housing discrimination by enacting a constitutional amendment prohibiting state interference with land transfers between private parties. The United States Supreme Court reasoned that the constitutional amendment would

⁷⁸*Arlington Heights*, 429 U.S. at 266.

⁷⁹*Hunter*, 471 U.S. at 228.

⁸⁰For a further discussion of how artwork may express national discrimination and an effort to alienate a nationality and culture, see Jack Achiezer Guggenheim, *Art & Atrocity: Cultural Depravity Justifies Cultural Deprivation*, *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.*, 699 (1998) (arguing that based on a recommended international cultural forfeiture standard Nazi cultural depravity justified Russia's appropriation of German national artwork seized at the end of World War II).

⁸¹Lee Bollinger, *The Tolerant Society: A Response to Critics*, 90 *COLUM. L. REV.* 979, 980 (1990).

⁸²387 U.S. 369 (1967).

"significantly encourage . . . private discrimination" and therefore violated the Equal Protection Clause.⁸³

As noted above, to show a violation of the Fourteenth Amendment, the challenger must show that racial discrimination was a substantial or motivating factor in the adoption of the challenged policy or action, and such motivation may be determined by assessing whatever circumstantial and direct evidence is available.⁸⁴ There seems to be little evidence available to suggest that the Cleveland Indians' adoption of the Chief Wahoo mascot was motivated by discriminatory intent. Challengers to the Chief Wahoo mascot may assert, however, that the mark is so blatantly and facially offensive to Native Americans that there must have implicitly been a racially discriminatory intent to the creation of the mark. It can be further argued that the mark was adopted and enjoyed popularity because it implicitly provides an opportunity to denigrate and ridicule a minority.

If implicit discrimination motivated the adoption of the Chief Wahoo emblem, and if the symbiotic relationship and government funding of the Cleveland Indians' actions at Jacob's Field are considered state actions, the Cleveland Indians' Chief Wahoo mascot may be seen as a violation of equal protection. Chief Wahoo is arguably an emblem whose creation was inspired by (perhaps unconsciously) bigotry and racism. Furthermore, by continuing the use of Chief Wahoo, the Cleveland Indians and the City of Cleveland have excluded and stigmatized their Native American citizens and Native Americans in general.

D. Chief Wahoo as Racist Speech

It has been suggested that First Amendment protection should be broadened to prohibit state endorsed hate speech.⁸⁵ Under this theory, it may be argued that Chief Wahoo violates the First Amendment by chilling the desire and ability of Native Americans to exercise fully their First Amendment rights. Central to this argument is the understanding that the racist speech at issue here takes a particularly objectionable form: as argued above, it is racist government endorsed speech. The fact that the government endorses the speaker both increases the extent of the harm that the speech produces and allows for a remedy plainly consistent with the First Amendment.

⁸³*Id.* at 381. In his concurrence, Justice Douglas noted that California's policy "is a form of sophisticated discrimination whereby the people of California harness the energies of private groups to do indirectly what they cannot under our decisions allow their government to do." *Id.* at 383.

⁸⁴471 U.S. at 228.

⁸⁵James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag From Southern State Capitols*, 101 *YALE L.J.* 505 (1991).

1. Theory of First Amendment Prohibiting Government Endorsed Racist Speech

It has been argued that the Bill of Rights, including the First Amendment, should be read in the context of the fight to overcome discrimination against minorities.⁸⁶ Traditionally, group defamation and racial harassment cases have produced a tension between constitutional values. On one side, it is argued that racist speech is a form of hate speech that impinges on the rights to free speech and equality. On the other side, it is argued that the First Amendment protects the right to engage in racist speech.⁸⁷ This tension, however, does not exist when the government is the speaker, for the First Amendment protects an individual's right to speak, not the government's.

As James Madison said, "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people."⁸⁸ Justice Stewart agreed when he wrote, "The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government."⁸⁹ The common understanding of the First Amendment as a limit on government, rather than a license for it to speak, is natural given the language of the amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."⁹⁰ To transform a restriction on government into a positive right vested in the state would twist the Amendment's language.⁹¹

The past twenty years have seen a growing number of scholars arguing that the First Amendment also limits the government's ability to speak. "[S]trange as it must sound in appraising an amendment which explicitly forbids abridging the freedom of speech, it is nonetheless arguable that the function of that amendment implicitly requires some silencing of the government itself."⁹² While the Supreme Court has yet to squarely address the problem presented

⁸⁶See Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1201-02 (1991).

⁸⁷See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

⁸⁸4 ANNALS OF CONG. 934 (1794) (quoted in Forman, *supra* note 85, at 518).

⁸⁹*CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1972) (Stewart, J., concurring).

⁹⁰U.S. CONST. amend I. The limitation on Congress is also a limitation on the states. The Court held in *Gitlow v. New York*, 268 U.S. 652 (1925) that the First Amendment applied via the Fourteenth Amendment to state governments.

⁹¹Forman, *supra* note 85.

⁹²*Id.* at 520 (quoting William W. Van Alstyne, *The First Amendment and the Suppression of Warmongering Propoganda in the United States: Comments and Footnotes*, 31 LAW & CONTEMP. PROBS. 530, 535 (1966)).

by discriminatory government speech, the Court has recognized that "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."⁹³

The core values of the First Amendment are particularly threatened by government speech that encourages discrimination against, and subordination of, disadvantaged social groups. "[T]olerance of hate speech is not tolerance borne by the community at large. Rather, it is a psychic tax imposed on those least able to pay."⁹⁴ Such speech serves no legitimate government function and, indeed, may inhibit a portion of the citizenry from fully participating in the process of governing.⁹⁵ Discriminatory speech by the government directly undermines both the commitment to autonomous expression and democratic self-governance by intimidating certain social groups into refraining from expression, thereby vitiating their autonomous expression rights and impoverishing public discourse.⁹⁶ In addition, racist government speech violates the First Amendment precisely because such speech makes it that much more difficult for those who oppose government policy to give voice to their opposition. Accordingly, a theory of government speech that would prohibit such discriminatory speech by the government has previously been suggested.⁹⁷

2. The Theory as Applied to Chief Wahoo

It may be argued that the City of Cleveland's decision to endorse and support the Cleveland Indians and its Chief Wahoo emblem, arguably a symbol denigrating Native Americans has excluded and stigmatized Native Americans and thereby chilled their ability to speak freely and openly. As a result of offensive mascots such as Chief Wahoo, Native Americans feel that they experience discrimination and are ignored when they attempt to call attention to greater social problems including poverty, alcoholism, and suicide.⁹⁸ Native American mascots that belittle culture and traditions chal-

⁹³Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988) (quoting FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978)).

⁹⁴Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, at 2323 (1989).

⁹⁵Forman, *supra* note 85, at 524-25.

⁹⁶As the Court recognized in NAACP v. Button, 371 U.S. 415, 435-36 (1963), the force, and the potential discriminatory implications, of a particular government policy cannot be comprehended without examining its relationship to other government policies. In the case of the Chief Wahoo emblem, the arguably discriminatory government speech achieves its silencing power from the understanding on the part of victims that mainstream society endorses the alienation of the targeted group.

⁹⁷Forman, *supra* note 85 at 522.

⁹⁸Daniel J. Trainor, *Native American Mascots, Schools, and the Title VI Hostile Environment Analysis*, 1995 U. ILL. L. REV. 971, 971-72 (1995).

lenge Native American self-esteem and pride in their cultural identities.⁹⁹ As a result of this stigmatization, it may be argued that the opportunity for Native Americans, already a small minority of the American populace, to speak freely and openly, is chilled.

E. Similar Prior Challenge Failed

Clearly, a challenge to the Chief Wahoo emblem as a state sponsored violation of equal protection, or as a state sponsored violation of free speech, faces significant hurdles. Indeed, while such a challenge may be viable, it should be noted that a challenge to a discriminatory symbol raised on similar grounds has already failed. Such challenges were raised in objection to Alabama's use of the Confederate flag in *NAACP v. Hunt*.¹⁰⁰ While the challenged action in *Hunt* was clearly state action, the Eleventh Circuit rejected the National Association for the Advancement of Colored People's ("NAACP") claim that the Constitution of the United States and federal statutes mandate the removal of the flag from the Alabama state capitol.¹⁰¹ The court held that "[t]here is no unequal application of the state policy; all citizens are exposed to the flag. Citizens of all races are offended by its position."¹⁰² The court likewise rejected a First Amendment challenge similar to the one discussed above.¹⁰³ The court found no judicially cognizable chilling effect, noting that even if government speech causes "discomfort," if there "is no statute or ordinance, federal or state, absolutely prohibiting" blacks from exercising a protected First Amendment right, no First Amendment violation has occurred.¹⁰⁴ While Ohio is not in the Eleventh Circuit, if the reasoning of the *Hunt* case is applied by a court hearing a challenge to the use of Chief Wahoo, such challenge would likely be rejected. As in *Hunt*, there is no unequal application of the state policy because all citizens are exposed to the Chief Wahoo emblem, and arguably citizens of all heritages are offended by it. Furthermore, since there is no actual statute or ordinance absolutely prohibiting Native Americans from exercising a protected First Amendment right, under the *Hunt* court's reasoning, no First Amendment violation has occurred.

IV. CHALLENGING THE CHIEF WAHOO TRADEMARK

While the viability of a challenge to the use of the Chief Wahoo mark as state sponsored discrimination faces substantial hurdles, the viability of a challenge to the federal registration of the Chief Wahoo trademark has a fair chance of

⁹⁹*Id.* at 975.

¹⁰⁰891 F.2d 1555 (11th Cir. 1990).

¹⁰¹*Id.* at 1555. A number of other parties joined the NAACP in this suit.

¹⁰²*Id.* at 1562.

¹⁰³Forman, *supra* note 85, at 505.

¹⁰⁴*Hunt*, 891 F.2d at 1565.

success. A trademark may not be federally registered under 15 U.S.C. § 1052(a) if it is disparaging or scandalous. There is valid precedent to sustain an argument that the Chief Wahoo trademark is both disparaging and scandalous as applied to Native Americans. If such a legal challenge to the validity of the federal Chief Wahoo trademark registration was successful, it could seriously undermine the value of the mark. This is because if Chief Wahoo is struck from the federal trademark registry the mark might very well lose common law protection too. In *De Nobili v. Scanda*, the court held that if a mark is not entitled to federal registration because it does not pass content-based registration bars, the mark cannot receive protection at common law.¹⁰⁵ Therefore, while the Cleveland Indians would still be able to use the Chief Wahoo mark even if registration is canceled and it loses common law protection, under *De Nobili*, so will everyone else. Anyone could produce and sell products with the Chief Wahoo mark, which would deprive the Cleveland Indians of a substantial amount of revenue. In order to have the exclusive right to market goods with the Cleveland Indians' mascot, the team would have to choose a new mascot. Furthermore, the loss of trademark registration would create bad publicity as confirmation that the team had been using a disparaging and offensive mark. A successful challenge to the trademark registration of the Chief Wahoo mark could thereby induce the Cleveland Indians to abandon the mark in favor of one that could be registered and from which thereby they could derive greater benefit.

A. Trademark Protection

Trademarks can be protected by common law, state registration and federal registration. Common law protection arises from the simple adoption and use of an identifying mark, even absent any form of registration, and creates an enforceable right of exclusivity in the mark's geographic area of use.¹⁰⁶ In 1946, Congress passed the Lanham Act, which provides for a federal registration system to protect trademarks used in commerce.¹⁰⁷ The term "trademark" includes any "word, name, symbol, or device, or any combination thereof" used by an individual to identify and distinguish his goods, or indicate a specific source of such goods, even if the source is unknown.¹⁰⁸

Trademark registration is governed by the Patent and Trademark Office. The PTO is a non-commercial federal entity and one of the fourteen bureaus in the

¹⁰⁵*De Nobili v. Scanda*, 198 F. Supp. 341 (W.D. Pa. 1912) (public policy prevents mark which could not be registered from receiving common law protection).

¹⁰⁶*Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403 (1916); *Avakoff v. Southern Pac. Co.*, 765 F.2d 1097 (Fed. Cir. 1985).

¹⁰⁷15 U.S.C. § 1127 (1994).

¹⁰⁸*Id.*

Department of Commerce ("DOC").¹⁰⁹ The specific role of the PTO in the trademark context is to examine trademarks for potential registration on the Principal Register. The PTO, however, does not determine rights of use of trademarks.¹¹⁰ The Principal Register provides numerous forms of protection to registrants and provides the mark's owner with significant benefits not granted by common law.¹¹¹ Registration on the Principal Register gives constructive notice to all later users of the trademark or of similar trademarks, which overcomes claims of good faith use.¹¹² Such constructive notice abrogates the existence of any geographical limitation on the knowledge and validity of the trademark.¹¹³ The registrant thereby obtains certain forms of trademark protection even in geographically distant areas in which the registrant is not using the mark.¹¹⁴ Registration on the Principal Register is also accompanied by certain statutory rights, such as a degree of incontestability by others,¹¹⁵ including prima facie evidence of the ownership and validity of such trademark.¹¹⁶ In addition, federal registration provides trademark owners with access to federal courts to litigate issues related to the mark.¹¹⁷ The PTO will register a trademark based on a successful owner application.¹¹⁸

B. "Disparaging" and "Scandalous"

The ban on registration of "immoral" and "scandalous" marks first appeared as part of the 1905 federal trademark statute which preceded the Lanham Act,

¹⁰⁹Section 1511 states that the PTO is under the jurisdiction and supervision of the Department of Commerce.

¹¹⁰*Societe de Conditionnement en Aluminum v. Hunter Engineering Co., Inc.*, 655 F.2d 938 (9th Cir. 1981).

¹¹¹Such protections apply to service marks and collective marks as well. 15 U.S.C. §§ 1053, 1054, 1127.

¹¹²15 U.S.C. § 1072; ARTHUR R. MILLER & MICHAEL H. DAVIS, *INTELLECTUAL PROPERTY: PATENTS, TRADEMARKS, AND COPYRIGHT IN A NUTSHELL* 153-54 (1990).

¹¹³*See Miller, supra* note 112, at 153.

¹¹⁴*Id.*

¹¹⁵15 U.S.C. § 1065; Miller, *supra* note 112, at 153. Because the PTO is only concerned with registration issues, the PTO's analysis will generally only focus on issues of registration, and will generally only compare the information it has immediately before it. This analysis is different from the more extensive marketplace oriented analysis undertaken by the courts. *See* Jack Achiezer Guggenheim, *KOA is A.O.K.: The Second Circuit's Recent Kosher Trademark Decision Further Illustrates That the Patent and Trademark Office Must Answer to a Higher Authority*, COLUMBIA-VLA J.L. & ARTS, Vol. 22, No. 2 (Winter 1998) (arguing that PTO decisions should not have res judicata affect because, as recent case law demonstrates, PTO determinations sometimes lack a thorough marketplace analysis).

¹¹⁶15 U.S.C. § 1057(b) (1994).

¹¹⁷§ 1121.

¹¹⁸§ 1051.

and it is now incorporated into the Lanham Act at 15 U.S.C. § 1052(a).¹¹⁹ The major theories underlying section 2(a) of the Lanham Act and the prohibition on inappropriate trademarks are that the government should not waste its resources on protecting unseemly marks, and that the government should not provide its imprimatur to unseemly marks.¹²⁰ While section 2(a) bars only the registration of scandalous, disparaging, or immoral marks, and not the use thereof, it does deny the statutory protection and benefits that would otherwise result from registration. Article 15 of the United States Code section 1052(a) states that a mark is to be refused registration if it "[c]onsists of or comprises immoral, deceptive, scandalous matter; or matter which may disparage or falsely suggest a connection with persons living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute."

1. Standard and Case Law for "Disparaging"

In order to prevail in a challenge to the Chief Wahoo trademark, it would have to be proven that the Chief Wahoo mark was either disparaging or scandalous to Native Americans at the time the mark was registered. The Trademark Trial and Appeal Board ("TTAB") established a test for determining whether a mark was "disparaging" in *Greyhound Corp. v. Both Worlds Inc.*¹²¹ In order to be found disparaging, a mark must (1) be reasonably understood to refer to the plaintiff; and (2) be considered offensive or objectionable to a reasonable person of ordinary sensibilities. Guidance for implementing the *Greyhound* disparaging test may come from the United States Court of Appeals for the Federal Circuit's ("Federal Circuit") decision in *In re Mavety Media Group Ltd.*,¹²² which interpreted section 1052(a)'s prohibition on the registration of scandalous marks.

In *Mavety*, the court vacated and remanded a decision by the TTAB on the grounds that the Board did not have actual evidence that a substantial composite of the general public would find the mark "Black Tail," as applied to an adult magazine featuring African-American women, scandalous.¹²³ *Mavety* is the Federal Circuit's first decision regarding 15 U.S.C. § 1052(a).¹²⁴ In *Mavety*, the Federal Circuit concluded that a determination that a mark is scandalous

¹¹⁹§ 85(a) (1905).

¹²⁰*In re McGinley*, 660 F.2d 481, 486 (C.C.P.A. 1981); *see also* Lee v. Superior Court, 11 Cal. Rptr. 2d 763 (1992) (court denied petition for name change to "Misteri Nigger" because it refused to sanction a racial epithet).

¹²¹6 U.S.P.Q.2d 1635 (T.T.A.B. 1988) (finding that a substantial composite of the general public would find a mark which depicts a defecating dog scandalous).

¹²²*In re Mavety Media Group Ltd.*, 33 F.3d 1367 (Fed. Cir. 1994).

¹²³*Id.* at 1375.

¹²⁴In *Mavety*, the Federal Circuit dealt with an appeal of a refusal to register a mark based on the grounds that the mark was scandalous, not disparaging, but its analysis may still be helpful for implementing the *Greyhound* disparaging test. *Id.*

is a conclusion of law based upon an underlying factual inquiry, and whether the mark is scandalous is to be determined from the viewpoint of a substantial composite of the general public and in the context of contemporary attitudes.¹²⁵ The *Mavety* court accepted dictionary definitions and editorials as authoritative but not definitive, since the court concluded that dictionaries do not necessarily represent the views of a substantial composite of the general public.¹²⁶ The Federal Circuit concluded that questions as to whether a mark is scandalous should be resolved in favor of the applicant because an opposition proceeding can be brought after the mark is published by those who find the mark to be scandalous, and thereby a greater record for determining whether the mark truly is scandalous will be established.¹²⁷

Under *Greyhound* and *Mavety*, a challenge to the Chief Wahoo mark will have to show that Chief Wahoo can be reasonably understood to depict Native Americans and that the Chief Wahoo visage is offensive or objectionable to a reasonable person of ordinary sensibilities. Since a challenge to the Chief Wahoo mark would be an opposition proceeding and not an *ex parte* determination, the Chief Wahoo mark would not enjoy the presumptions in favor of registration discussed by *Mavety*.

Following *Mavety*, in a challenge to the Chief Wahoo mark, the TTAB should determine whether Chief Wahoo was disparaging to Native Americans from the viewpoint of a substantial composite of the general public and in the context of the contemporary attitudes at the time the mark was registered. Unfortunately, even with the guidelines of *Greyhound* and *Mavety*, the outcome of the registration challenge is highly speculative. Past decisions indicate that determinations regarding disparagement are unpredictable and seemingly subjective. The first case to refuse trademark registration on the grounds that the mark was disparaging is *Doughboy Industries, Inc. v. Reese Chem. Co.*¹²⁸ In *Doughboy*, the PTO held that the use of the mark "Dough-Boy" for a prophylactic device for preventing venereal disease was disparaging to American veterans who had served in World War I, and had been referred to as doughboys.¹²⁹ The PTO in *Doughboy* focused on the product to which the mark was being applied.¹³⁰ The TTAB likewise focused on the product to which the mark was being applied in *In re Reemtsma Cigarettenfabriken*.¹³¹ In *Reemtsma*, the TTAB denied registration to the mark "Senussi" for cigarettes, because it found that the application of such mark disparaged members of the Senussi faith, whose

¹²⁵*Id.* at 1371.

¹²⁶*Id.* at 1373.

¹²⁷*Id.*

¹²⁸*Doughboy Indus., Inc. v. Reese Chem. Co.*, 88 U.S.P.Q. 227 (P.T.O. 1951).

¹²⁹*Id.*

¹³⁰*Id.* at 228.

¹³¹*In re Reemtsma Cigarettenfabriken*, 122 U.S.P.Q. 339 (T.T.A.B. 1959).

religion forbids smoking.¹³² *Doughboy* and *Reemtsma* are not dispositive to a challenge to the Chief Wahoo emblem. In *Doughboy* and *Reemtsma* registration was denied. The products the marks were being applied to, however, were arguably more offensive than a baseball team emblem.

In *In re Condas*,¹³³ the TTAB permitted the registration of the mark "Jap" for women's clothing, finding that the use of such mark did not disparage Japanese. Again, this case is not dispositive. In *Condas* the mark was given registration. Arguably, the negative associations in *Condas* are not comparable to the negative characteristics that the Chief Wahoo mark associates with Native Americans.

In *In re In Over Our Heads, Inc.*,¹³⁴ the Board found the mark "MOONIES" did not disparage members of the Unification Church, because it would not be associated with members of the Unification Church as applied to a particular product.¹³⁵ The Cleveland Indians may argue that, likewise, the Chief Wahoo mark does not disparage Native Americans, because it is not associated with Native Americans as applied to a baseball team. A challenger to the Chief Wahoo mark may respond, however, that the mark "MOONIES" is much less likely to be associated with members of the Unification Church when the mark is applied to a novelty item than is the Chief Wahoo mark to be associated with Native Americans when the mark is applied to a baseball team. While the direction of past decisions regarding disparagement challenges under 1052(a) is unclear, those offended by the Chief Wahoo emblem may be able to take comfort in the August 1995 decision by the PTO which refused to register the mark "Crazy Horse," a famous Native American, as applied to a malt liquor, after finding that it violated Section 1052(a).¹³⁶

2. Standard and Case Law for "Scandalous"

The TTAB may also make a determination as to whether the Chief Wahoo mark is "scandalous." The general definition that has been accepted for "scandalous" is "shocking to one's sense of decency or propriety" and "offensive to the conscience or moral feeling."¹³⁷

¹³²See also *In re Waughtel*, 138 U.S.P.Q. 594 (T.T.A.B. 1963) (holding mark "Amish" for cigars did not disparage the Amish, because Amish are not prohibited from smoking).

¹³³*In re Condas*, 188 U.S.P.Q. 544 (T.T.A.B. 1975).

¹³⁴*In re In Over Our Heads, Inc.*, 16 U.S.P.Q.2d 1653 (T.T.A.B. 1990).

¹³⁵*Id.*

¹³⁶Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1028-29 (1995).

¹³⁷*In Re Riverbank Canning Co.*, 95 F.2d 327 (C.C.P.A. 1938) (Court of Customs and Patent Appeals ("CCPA") found that the mark "Madonna" was scandalous as applied to wines); see also *In re P.J. Valckenberg*, 122 U.S.P.Q. 334 (T.T.A.B. 1959) (twenty years later mark was again denied registration because it was scandalous). *But see* Federal Trademark Registration Number 1,473,554 (1988) (Board allowed registration of "Madonna" as stage name for pop singer).

To determine whether a mark is scandalous, the mark is considered as applied to the goods identified in the registration.¹³⁸ In *In re McGinley*,¹³⁹ the CCPA held that whether a mark is scandalous or immoral is to be ascertained from the standpoint of a substantial composite of the general public.¹⁴⁰ Based on such case law, to assess whether the Chief Wahoo mark is scandalous, the TTAB will need to determine if the Chief Wahoo emblem, as applied to a baseball team, is shocking to a substantial composite of the general public's sense of decency or propriety and offensive to a substantial composite of the general public's conscience or moral feeling.

C. Evidence that Chief Wahoo Refers to Native Americans and is Disparaging and Scandalous

To sustain a 1052(a) challenge it will need to be shown that Chief Wahoo is a disparaging or scandalous reference to Native Americans. There is no question that the Chief Wahoo image refers to Native Americans. While the Cleveland Indians argue that the Chief Wahoo emblem is not intended to refer to an actual person or persons, even the team would have to admit the emblem refers to Native Americans.¹⁴¹ The mark is obviously and facially a caricature of stereotypes associated with Native Americans. Further, the fact that it is an emblem for a team named for the first Native American to play professional

¹³⁸*In re Hershey*, 6 U.S.P.Q.2d 1470 (T.T.A.B. 1988) (Board found "Big Pecker" was not scandalous mark because substantial composite of general public would not necessarily associate the term with a penis instead of a bird's beak).

¹³⁹*In re McGinley*, 660 F.2d 481 (C.C.P.A. 1981).

¹⁴⁰Photograph of nude man and woman kissing with man's genitalia exposed is scandalous and immoral from the standpoint of a substantial composite of the general public. See *In re In Over Our Heads, Inc.*, 16 U.S.P.Q.2d 1653 (T.T.A.B. 1990) (TTAB found mark "MOONIES" not scandalous as applied to novelty item which dropped its pants and revealed its buttocks); *In re Tinseltown, Inc.*, 212 U.S.P.Q. 863 (T.T.A.B. 1981) (use of the mark "bullshit" for accessories was scandalous); *In re Leo Quan Inc.*, 200 U.S.P.Q. 370, 371 (T.T.A.B. 1978) ("Badass," standing for, Benticourt Acoustically Designed Audio Sound Systems, is not scandalous or immoral); *In re Thomas Labs, Inc.*, 189 U.S.P.Q. 50, 52 (T.T.A.B. 1975) (cartoon of melancholy man examining his unseen genitalia was not shocking to society's sense of propriety); *Old Glory*, 26 U.S.P.Q.2d 1219 (American flag design on condoms is not scandalous); *In re Masden*, 180 U.S.P.Q. 334, 335 (T.T.A.B. 1973) ("Week-End Sex" is not scandalous trademark for a magazine); *In re Runsdorf*, 171 U.S.P.Q. 443 (T.T.A.B. 1971) ("Bubby Trap" denied registration as applied to brassieres); *Ex parte Summit Brass & Bronze Works, Inc.*, 59 U.S.P.Q. 22 (Comr. 1943) (PTO refused registration for mark "Agnus Dei" as applied to safes, finding that such application of an emblem sacred to Christian faith would be offensive and scandalous); *Ex parte Martha Maid Mfg.*, 37 U.S.P.Q. 156 (1938) (mark "Queen Mary" for women's underwear was denied registration because it was found to be scandalous).

¹⁴¹Gary Axlerod, *Controversy Over Chief Wahoo Continues*, BLACK & GOLD (updated January 25, 1996) <[http://tiger.chuh.cleveland-heights.k12.oh.us/Black Gold/81-04/controversy-over-chief-w.html](http://tiger.chuh.cleveland-heights.k12.oh.us/Black%20Gold/81-04/controversy-over-chief-w.html)>.

baseball supports the contention that the mark refers to Native Americans.¹⁴² Many Native Americans believe that Native American team names and mascots, such as Cleveland's, are used not to honor Native American bravery but to portray Native Americans as a spectacle to be ridiculed.¹⁴³ Native American team names and mascots have been viewed by Native Americans as a source of parody and satire and as a preservation of stereotypes. Furthermore, many Native American feel that as a result of offensive mascots such as Chief Wahoo, Native Americans experience discrimination and are ignored when they attempt to call attention to greater social problems including poverty, alcoholism, and suicide.¹⁴⁴ In addition, many Native Americans believe that Chief Wahoo and other derisive Native American mascots belittle history and traditions and thereby challenge Native American self-esteem and pride in their cultural identities.¹⁴⁵

D. Evidence that Chief Wahoo is not Disparaging or Scandalous

The Cleveland Indians will be able to argue that the significant support teams with Native American names have received from the Native American community itself shows that the Chief Wahoo mark is not disparaging or scandalous but rather pays tribute to Native Americans, and reflects bravery, courage, pride and a fighting spirit. For example, the chief of the Cherokee tribe in North Carolina has stated that the Redskins name does not bother his tribe, and feels the name gives Native Americans recognition.¹⁴⁶ Indeed, a Cherokee princess, Pale Moon, even sang the National Anthem before a 1991 Redskins game.¹⁴⁷ The tribe also has high regard for the Atlanta Braves, and manufactures fake tomahawks for Braves' fans.¹⁴⁸

Examples of Native American support for other teams with Native American names include the statement of James Billie, chairman of the Seminole Tribe of Florida, who asserts that Florida State's use of the Seminole name for its team reflects a pride in Florida Seminole history and is an ego boost to his tribe.¹⁴⁹

¹⁴²Cleveland Indians Web Page (visited June 17, 1998) <<http://www.indians.com/history/index.html>>.

¹⁴³*Chief Wahoo is Likely on Extinction Path*, THE VICTORIA SUN PRESS ENTERPRISE, Oct. 21, 1997, at C01.

¹⁴⁴Daniel J. Trainor, *Native American Mascots, Schools, and the Title VI Hostile Environment Analysis*, 1995 U. ILL. L. REV. 971, 971-72 (1995).

¹⁴⁵*Id.* at 975.

¹⁴⁶*Offensive Penalty is Called on "Redskins"; Native American Tribes Protest the Name*, WASHINGTON POST, Nov. 3, 1991, at D1.

¹⁴⁷*Id.*

¹⁴⁸*Id.*

¹⁴⁹Jack Wheat, *Real Seminoles Resent the Profits FSU Makes Off Their Tribal Name*, MIAMI HERALD, Feb. 11, 1993, at 7B.

Another example is the Illinois Indians who have come out in support of the University of Illinois football team and its use of Native American imagery.¹⁵⁰

Perhaps the strongest argument that Native American names and images are not intended to be derogatory but rather are intended to be symbolic of strength and bravery is the very fact that teams have chosen to use such names. Arguably, a team's name is chosen to encourage and serve as a rallying point, not to demean the players. This of course does not mean that it is not offensive to members of a group that do not want that group to be popularly associated with violence and savagery. Furthermore, it is hard to extend this argument to the Chief Wahoo emblem which is clearly a caricature and a parody.

E. Challenge to the Redskins Trademark

A current challenge to the Redskins' federal trademark registration may be seen as a bell-weather for the likelihood of success a similar challenge would have to the Chief Wahoo mark. On September 10, 1992, a delegation of Native Americans (hereinafter, referred to alternatively as the "delegation," "Harjo," or the "Harjo Delegation") filed a Petition for Cancellation with the United States Patent and Trademark Office ("PTO") to cancel the federal registration of the Washington Redskins trademark, and related trademarks.¹⁵¹ Pro-Football, Inc. (hereafter "Pro Football" or "Redskins") is the owner of the trademarks being challenged. The delegation represented a wide spectrum of the Native American community.¹⁵² The petition alleged that the term "Redskins" is a "pejorative, derogatory, degrading, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for a Native American person" and therefore violated 15 U.S.C. section 1052(a).¹⁵³ The suit reflects the concern of Native American activists that Indian-related names, logos, mascots, paraphernalia, and related fan activity perpetuate racist stereotypes of Native Americans as wild savages, and preserve the image that Native

¹⁵⁰Jim Parsons, *Indians Say Fight Over Nicknames Isn't Going Away*, MINNEAPOLIS-ST. PAUL STAR TRIBUNE, Oct. 21, 1995, at 1A.

¹⁵¹Related trademarks which the petition seeks to cancel include: "Redskinettes," "Skins," "Redskins," "The Redskins & Design," "Washington Redskins & Design," and "The Redskins with Stylized Letters." *Harjo v. Pro Football, Inc.*, 30 U.S.P.Q.2d 1828 (T.T.A.B. 1994).

¹⁵²The members of the delegation include Suzan Shown Harjo, the President of the Morning Star Foundation; Vine Deloria, Jr., Esq., a citizen of the Standing Rock Sioux Tribe and professor of history at the University of Colorado; Norbert S. Hill, Jr., Esq., a member of the Oneida Tribe of Wisconsin and Executive Director of the American Indian Science and Engineering Society; Manley A. Begay, Jr., of the Navajo Nation; Mateo Romero, member of the Cochiti Pueblo; William A. Means, a member of the Oglala Sioux Tribe; and Raymond D. Apodaca, Governor of the Ysleta del Sur Pueblo, and Area Vice President and Chairman of the Human and Religious Rights Committee of the National Congress of American Indians. *A Case of First Impression: American Indians Seek Cancellation of the Trademarked Term "Redskins,"* 78 J. PAT. & TRADEMARK OFF. SOC'Y 275 (Apr. 1996).

¹⁵³*Harjo*, 30 U.S.P.Q.2d at 1829.

Americans are relics of the past.¹⁵⁴ Such concern also applies to the Cleveland Indians' Chief Wahoo mascot.¹⁵⁵

Harjo v. Pro Football, Inc. is the first cancellation proceeding ever brought under the "disparagement" prohibition of section 2(a) of the Lanham Act.¹⁵⁶ The TTAB found that the Native American delegation had standing because they had demonstrated that they believed the term was disparaging as applied to Native Americans.¹⁵⁷ The TTAB also found that an overriding public interest trumped the failure to challenge the mark over the many years since its registration.¹⁵⁸ The TTAB concluded that since it is an administrative agency empowered by Congress, it does not have the authority to determine if 15 U.S.C. section 1052(a) is unconstitutional as a government infringement on speech.¹⁵⁹ Such constitutional defenses, however, can be raised on appeal.¹⁶⁰

¹⁵⁴Don Pierson, *Redskins Nickname Will Be Protest Target*, CHICAGO TRIBUNE, Jan. 19, 1992, at C2.

¹⁵⁵Activism related to the issue of Native American mascots and names has been ongoing for approximately twenty-four years. Clarence Page, *Block that Trademarked Racial Epithet*, ORLANDO SENTINEL, Sept. 23, 1992, at A9. Prior to the recent trademark action two of the most notable Native American protests to team names occurred during the 1992 Super Bowl featuring the Redskins and the 1991 World Series featuring the Atlanta Braves. Protests organized by the American Indian Movement ("AIM") drew nearly three thousand activists to the Super Bowl. Raad Cawthorn, *Baseball Indians Receive Little Sympathy But No Promises*, ATLANTA CONSTITUTION, Nov. 22, 1991 at H8; *NFL Deadline for Plan B Slips to Mar. 1, NFLPA Says Move is Political*, WASHINGTON POST, Jan. 25, 1992, at D7.

¹⁵⁶*Harjo*, 30 U.S.P.Q.2d at 1828.

¹⁵⁷*Id.* at 1830.

¹⁵⁸*Id.* at 1831.

¹⁵⁹*Id.* For further discussion of the constitutionality of section 1052(a) and limiting speech, see Richard Delgado & Jean Stefancic, *Outsiders in American Law and Culture: Can Free Expression Remedy Systematic Social Ills?* 77 CORNELL L. REV. 1258 (1992); see also Jendi B. Reiter, *Redskins and Scarlet Letters: Why "Immoral" and "Scandalous" Trademarks Should be Federally Registrable*, 6 FED. CIRCUIT B.J. 191 (1996); Kimberly A. Pace, *The Washington Redskins Case and the Doctrine of Disparagement: How Politically Correct Must a Trademark Be?*, 22 PEPP. L. REV. 7 (1994). Both articles argue that section 1052(a) unconstitutionally encroaches on free speech. See also *Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227 (E.D.N.Y. 1993) (legislation prohibiting Bureau of Alcohol, Tobacco, and Firearms, from certifying label that uses the name "Crazy Horse" on alcohol found to be unconstitutional prohibition on commercial speech); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (bedrock principle underlying First Amendment is that government cannot prohibit expression of idea simply because society finds idea offensive or disagreeable); *Sambo's of Ohio v. City Council of Toledo*, 466 F. Supp. 177, 180 (N.D. Ohio 1979) (restricting use of term "Sambo's" would violate First Amendment). But see Bruce C. Kelber, *Scalping the Redskins: Can Trademark Law Start Athletic Teams Bearing Native American Nicknames and Images on the Road to Racial Reform?*, 17 HAMLINE L. REV. 533 (1994); Paul E. Loving, *Native American Team Names in Athletics: It's Time to Trade These Marks*, 13 LOY. L.A. ENT. L.J. 1 (1992). Both articles conclude that section 1052(a) is a constitutional and effective tool to advance social goals. See also *In re McGinley*, 660 F.2d 481, 484 (C.C.P.A. 1981) (1052(a) not unconstitutional restriction on free speech because registration is not determinate of usage rights).

Pro Football asserts that through long, substantial and widespread use, the Redskins mark has acquired a secondary meaning such that the term is associated with a professional football team, rather than with Native Americans.¹⁶¹ The TTAB has indicated, however, that the case will be determined by deciding whether, at the time the registration was issued, the mark was scandalous or disparaging.¹⁶² Because a federally registered trademark has a presumption of validity, Harjo will have the burden of proving disparagement as the case moves forward.¹⁶³ Many of the issues raised by the challenge to the Redskins trademark would apply equally to a challenge

Because a trademark is only commercial speech, trademark legislation is subjected to relaxed constitutional requirements. *Friedman v. Rogers*, 440 U.S. 1 (1979). Government regulation of commercial speech must serve a substantial purpose, and not be broader than is necessary to serve such purpose. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980); *see also* Caren Schmulen Sweetland, *The Demise of a Workable Commercial Speech Doctrine: Dangers of Extending First Amendment Protection to Commercial Disclosure Requirements*, 76 TEX L. REV. 2 (1997); Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287 (1990); Robert N. Kravitz, *Trademarks, Speech, and the Gay Olympics Case*, 79 TRADEMARK REP. 604 (1989).

Regardless of whether section 1052(a) is constitutional, it presents serious efficiency problems. What is, or is not, an offensive term is a question open to significant difference of opinion, and may force the Patent and Trademark Office and courts to make determinations which are beyond the proper scope of trademark protection and which may not be purely objective. The value of a trademark is in the goodwill that accrues to the mark, and the associations consumers make with the mark. The marketplace might be a more objective arbiter of what is and is not an offensive mark.

¹⁶⁰A party dissatisfied with a decision by the PTO has the option either to appeal to the Court of Appeals for the Federal Circuit or to appeal through a civil action in federal district court. The appeal is governed by section 21 of the Lanham Act, 15 U.S.C. § 1071. On appeal, a district court provides greater relief, and gives less weight to the fact findings of the PTO, than does the Federal Circuit. *See* 15 U.S.C. § 1071. An appeal that takes the form of a civil action is commenced by the filing of a complaint with a district court, and is governed by Rule 3 of the Federal Rules of Civil Procedure. The complaint indicates the unsuccessful party in the PTO as the plaintiff and the winning party as the defendant and bases federal jurisdiction on section 21(b) of the Lanham Act and 15 U.S.C. § 1071. An appeal to a district court can be expanded to include a prayer for injunctive relief for trademark infringement. *Wells Fargo & Co. v. Stagecoach Properties, Inc.*, 685 F.2d 302 (9th Cir 1982); *Holiday Inns, Inc. v. Holiday Out*, 481 F.2d 445 (5th Cir. 1973). It also allows for counterclaims for federal or commonlaw claims. *Johnson & Johnson v. Colgate-Palmolive Co.*, 345 F. Supp. 1216 (D.N.J. 1972). Thus, in going to a federal district court, rather than to the Federal Circuit, the appellant takes the risk that the adverse party will expand the scope of the litigation beyond the mere appeal from the TTAB's decision.

¹⁶¹*Harjo v. Pro Football, Inc.*, 30 U.S.P.Q.2d 1828 (1994). This is different from the typical secondary meaning defense which argues that the average consumer associates a trademark with a particular source for the product. *See* PAUL GOLDSTEIN, *COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES* (1993).

¹⁶²*Harjo*, 30 U.S.P.Q.2d at 1828.

¹⁶³*Id.*

against the Chief Wahoo trademark. The disposition of the challenge to the Redskins trademark will therefore be highly indicative of the likelihood of success a challenge to the Chief Wahoo mark would have.

V. CONCLUSION

The Cleveland Indians' Chief Wahoo emblem is seen by many as disparaging to the Native American community and as a discriminatory emblem which parodies and denigrates Native Americans and their culture. This article has discussed two methods by which the Chief Wahoo emblem may be legally challenged. The first method requires a finding that the use of the Chief Wahoo emblem by the Cleveland Indians in Jacobs Field may be attributed to the City of Cleveland because of the significant involvement the city has in the financing and regulation of the team. If use of the Chief Wahoo emblem can be viewed as government action, such use is subject to a challenge as a violation of the Equal Protection Clause of the Fourteenth Amendment or as racist speech and as such a violation, under a novel theory, of the First Amendment.

This first challenge faces some very significant hurdles. Even if it could be successfully argued that regardless of the fact that the Indians are privately owned, the teams' actions in Jacobs Field may be deemed state actions, it would still have to be shown that there was sufficient discriminatory intent behind the creation of Chief Wahoo such that the emblem is a violation of the Equal Protection Clause. Alternatively, in addition to proving that the teams' actions should be deemed state actions, a new theory asserting that discriminatory state speech is a violation of the First Amendment would have to be accepted.

A second method of challenging the Chief Wahoo emblem, by asserting it is a disparaging trademark and therefore invalidly registered, may face less obstacles. In order to successfully assert that the Chief Wahoo emblem should not enjoy federal trademark registration protection, it must be shown that the mark is either scandalous or disparaging as the courts have interpreted such terms under section 1052(a) of the Lanham Act. While a similar challenge to the Redskins trademark has not yet been resolved, the implications of such challenge may be instructive as to the success of challenging Chief Wahoo's registration rights.

While many see the Cleveland Indians' Chief Wahoo emblem as non-offensive, many others find it a form of minority derision. Given the obviousness of the reference and the fact that many Native Americans find it highly offensive, hopefully the Cleveland Indians will change the mark themselves. If not, the action contemplated in this article might provide valid grounds for viable legal challenges.

