Exploitation of American Indian Symbols

A First Amendment Analysis

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American Indian symbols are used extensively as logos, mascots, nicknames, and trademarks. These images identify postsecondary as well as secondary academic institutions, professional sports franchises, commercial products, and geographic locations. Over the past few decades, efforts have been directed at eliminating or at least reducing the use of American Indian images and terms.

Several colleges stopped using American Indian symbols after receiving complaints. For example, Stanford University changed its name from Indians to Cardinal, the University of Massachusetts changed its mascot from the Indian to the Minuteman, the St. John's University Redmen became the Red Storm, the Miami University (Ohio) Redskins became the Red Hawks, the Springfield College (Massachusetts) Chiefs are now the Pride, Dartmouth College's Indians are the Big Green, and the Marquette University Warriors changed to the Golden Eagles.[1] Yet while several institutions dropped the symbols, eighty-eight colleges and universities continued to use these labels.[2] Recently, the National Collegiate Athletic Association (NCAA) banned from tournament competition any team mascots deemed "hostile or abusive" to American Indians. This threatening posture convinced some schools to drop their offensive images. For example, the Southeastern Oklahoma State University Savages took the label Savage Storm, and the University of Illinois discontinued use of the Chief Illiniwek mascot.[3] Yet, following pressure from powerful lobbies, the NCAA permitted Florida State University to retain Seminoles, the University of Utah to keep Utes, and Central Michigan University to be known as the Chippewas.[4] And, in spite of continued NCAA opposition, the University of North Dakota retains the

label of the Fighting Sioux, Alcorn State University remains the Braves, and Arkansas State University continues to use the nickname Indians.[5]

Throughout the country, numerous high schools are known by Indian labels; the states with the largest number of symbols are Illinois (266), Ohio (228), Texas (197), California (184), and Indiana (178).[6] In my home state of Wisconsin 43 high schools use such terms: Indians (15), Warriors (7), Chiefs (4), Blackhawks (4), Raiders (3), Chieftains (3), Redmen (2), Red Raiders (1), Hatchets (1), Warhawks (1), Braves (1), and Apaches (1).[7] In Wisconsin eighteen schools employ a chieftain head logo, and four schools use various caricatures of American Indians as their school logo.[8] Secondary academic institutions have been the focus of efforts to restrict use of Indian symbols. In 1999 the United States Justice Department launched an investigation into whether a North Carolina high school violated the civil rights of American Indians by creating a "racially hostile environment" while using the names Warriors for boy and Squaws for girl athletic teams. The school board decided that the girls' nickname was especially offensive because the term "squaw" means "prostitute" in some Indian languages and is a term for female genitalia in others. The board dropped that term but kept Warriors.[9] The Wisconsin Indian Education Association (WIEA) Indian Mascots and Logos Taskforce put pressure on secondary schools to drop Indian labels. In the past few years sixteen have done so. A survey of Wisconsin high school principals revealed that school administrators felt pressure from the task force and from the Department of Public Instruction.[10] Some attempts to instill political correctness have met opposition. For example, shortly after the Onteora (New York) school board voted to discontinue their tomahawk-wielding mascot, the community voted to remove most of the board. The new board restored the mascot. When the Marquette (Michigan) board discontinued their stoic Indian logo, the community, including several American Indians, protested the decision. Yanking "the Chief" from school-related functions did not sit well with the locals.[11] In 2004 the California legislature passed the Racial Mascots Act, banning the use of the term "Redskins" by athletic teams in public middle and high schools. Nevertheless, Governor Arnold Schwarzenegger vetoed the bill.[12] Similar controversies have erupted amongst New York, Texas, New Jersey, and Vermont high schools.[13]

Professional sports teams also feature American Indian symbols. Some examples include the Cleveland Indians and Atlanta Braves (base-

ball), the Chicago Blackhawks (hockey), and the Kansas City Chiefs and Washington Redskins (football). Pressure has been directed at these franchises. In 1999 Suzan Harjo, a member of the Cheyenne tribe, initiated court action against the Washington Redskins football team on the grounds that the term "redskins is offensive, humiliating, and degrading." The action sought to cancel the trademark "REDSKINS" under the Lanham Act. According to the act, a trademark should not be scandalous or disparaging. It should identify a product and differentiate that product from others. The plaintiff cited evidence that the word "redskin" is equated with "uncivilized" and "savage" and is considered offensive by 47 percent of the general population (only "injun" is more offensive, at 50 percent). The federal government's Trademark Trial and Appeals Board found the term degrading and canceled the trademark.[14] The decision was appealed to the district court, which found no substantial evidence supporting the board's finding. The district court declared summary judgment for Pro-Football, Inc.[15] In 2005 the U.S. Court of Appeals for the District of Columbia reversed the district court's ruling and remanded the case for review. Litigation is still ongoing.[16] Another initiative began in 2003 when the Native American Journalists Association urged news organizations to cease using sports nicknames and mascots that depict American Indians. The *Portland (ME) Press Herald*, the *Lincoln (NE) Journal Star*, the *Oregonian*, the *St. Cloud (MN) Times*, the *Minneapolis Star Tribune*, and the *Kansas City Star* have limited publication of such images.[17]

Commercial corporations employ American Indian labels for product identification. Justin Blankenship reports that 59 federally registered trademarks use the word "Navajo," 154 use "Cherokee," and 481 use "Sioux," "Dakota," or "Lakota."[18] Many other tribal labels are used as product designations, for example, Indian Motorcycles, Mohawk Carpet, Red Man Tobacco. In addition, companies that employ American Indian caricatures to promote their products include Land O' Lakes Butter's image of an Indian maiden and Pemmican Beef Jerky's use of a noble Indian in headdress. Commercial products have not escaped the pressure. In 1998 the family of Crazy Horse brought suit against the Hornell Brewing Company over a product called the Original Crazy Horse Malt Liquor. The family argued that the use of this spiritual and military leader in association with alcohol misrepresents history because Crazy Horse urged his Native people not to drink alcohol. Currently, his name

and image are used as a source of influence in American Indian drug and alcohol rehab programs. The family argued that this use was especially offensive in light of the high rates of alcoholism among American Indians.[19] A tribal court banned the drink from the Rosebud Reservation, and shortly thereafter Congress passed a resolution banning the use of that name in association with alcohol. But the case was appealed, and the ban was overturned by federal courts.[20]

Geographic locations also carry American Indian references. The word "squaw" is used to identify thirteen creeks, eleven lakes, three bays, one island, one mound, and one waterfowl area in the state of Wisconsin. Other terms include Chippewa Falls, Blackhawk Island, Lake Winnebago, Indianford, Lake Tomahawk, and Menomonie. Restrictions have been placed on the use of American Indian terminology to identify geographic places. In response to complaints from various protesting groups, locations bearing the name "squaw" have been changed in the states of Massachusetts, Maine, and Minnesota, while a similar movement is currently under way in Wisconsin.[21] There has also been legislative pressure to restrict American Indian labels. Senator Ben Nighthorse Campbell, the only American Indian in the U.S. Senate, introduced a bill that would prohibit the nation's capital from leasing property to any organization that uses nomenclature that includes a reference to physical characteristics of American Indians.[22]

This article examines the current controversy regarding use of American Indian symbols. It considers arguments offered by both critics and defenders of symbol use and explores whether such customs may be regulated under First Amendment doctrines. The study is divided into two sections: (1) arguments that frame both sides of the controversy and (2) First Amendment analysis in light of six established doctrines: offensive words, fighting words, hate speech, group libel, significant governmental interest, and commercial speech. I conclude that these standards provide little relief to those who would regulate use of American Indian symbols.

ARGUMENTS THAT FRAME THE CONTROVERSY

Heated public debate continues concerning whether there is merit in the use of an American Indian symbol as a team mascot or as a product or place designation. Credible arguments are offered by critics as well as defenders.

Criticism of Use of American Indian Symbols

Two principal criticisms—the distortion of history and culture and the demeaning nature of the images—have been offered by critics who seek to eliminate the use of American Indian symbols. First, critics claim that symbol use misrepresents culture; the use of these labels often presents a stereotype of a bloodthirsty savage. They note that some mascots are associated with wild, aggressive, and brave fighting spirits that are valued in sports; but, they argue, the notion of American Indian as "aggressor" is more myth than reality.[23] Protestors particularly object to the warlike behaviors; they take issue with the chants, tomahawk chops, and pretend scalping motions of fans because they picture American Indian culture as being savage, a very derogatory stereotype.[24] Critics argue that history is being distorted when the meanings behind spiritual ceremonies are trivialized, that dancing, drumming, and singing have precise and tribe-specific meanings that are ignored. This practice disregards the true essence of American Indian culture.[25] Gavin Clarkson claims that Indian-based symbols "give a distorted view of the past," "prevent non-Native Americans from understanding the true historical and cultural experiences," and "encourage biases and prejudices that have a negative effect on contemporary Indian people."[26] Fred Veilleux describes the offensive impact of historical misrepresentation:

> One part of the offensiveness is religious desecration. Both Indians and non-Indians have cultural and religious symbols that are important to them. Whites, for example, generally exhibit great respect for their national flags, witness the role of the flag in parades and in battle, and the furor that results when protestors try to burn the flag. Indians exhibit and demand similar respect for their special symbols, such as the eagle feather. In Indian culture, the headdress of eagle feathers was and continues to be reserved for our most revered and respected chiefs and spiritual leaders. Each feather is earned through a lifetime of service and sacrifice. The markings on the face are an important part of the spiritual ceremonies of most Indian nations, such as reaching adulthood, wedding ceremonies, and that time when one is returned to the bosom of Mother Earth and starts the journey into the spirit world. . . . When a white person sees someone in feathered costume, he sees innocent fun and wonders what is making the Indian people so upset. . . . The

> Indian reacts as the white man would react to someone burning the American flag.[27]

Critics argue that the labels further the notion of the glorious West, of cowboy and pioneer heroes who tamed the territory for democracy. These images were used historically to justify policies of genocidal extinguishment of the Native race.[28] Ellen Staurowsky of Ithaca College describes the reinforcing impact of this use on contemporary society:

> Whereas the average American tends to view these images as benign or innocuous, scholars suggest that this imagery taps into deep-seated Eurocentric cultural forms that enact and replay old conflicts between Indians and non-Indians. It is the case that the prevailing stereotypes of warring, wild Indians in paint, feathers, and buckskins or loin cloths replicate images popularized by Wild West Shows and Worlds Fair Exhibitions from nearly a century ago and the more recent Western film genre of the latter part of the 20th Century. . . . As signifiers of the superior level of sophistication and accomplishment achieved by the "colonizers" then and now, the "primitive" images of American Indians have marked the growth of a capitalist consumer culture and in the process have created a degree of "cultural saturation" that does not encourage racial sensitivity. . . . Americans are more comfortable with fictional Indians than with real Indians.[29]

Charles Springwood and Richard King suggest that "such images, by flattening conceptions of American Indians into mythological terms, obscure the complex histories and misrepresent the identities of indigenous people." Moreover, the images "literally erase from public memory the regnant terror that so clearly marked the encounter between indigenous Americans and the colonists from Europe."[30] Stacie Nicholson suggests that such "stereotypical, racist, and discriminating" images "cause the general public to have negative opinions toward American Indians."[31]

Second, critics argue that the use is demeaning and derogatory and results in a loss of self-esteem. The practice of symbol attribution denies American Indians the right of self-definition.[32] Instead, it continues the practice of labeling by the dominant white culture, for example, using the words Winnebago for Ho Chunk, Chippewa for Ojibway, Navajo for Dine. Furthermore, contrary to the common claim that the sym-

bols are intended to convey honor, critics argue that their use has a contrary effect. Barbara Munson, a member of the Oneida tribe, points out that Indian people do not pay tribute to one another by the use of logos, portraits, or statues. American Indian people do not feel honored by this symbolism: "We experience it as no less than a mockery of our cultures."[33] Michael Yellow Bird, an associate professor of social work at Arizona State University, suggests that it is impossible to honor someone who does not feel honored.

> This is no honor. . . . We lost our land, we lost our languages, we lost our children. Proportionately speaking, indigenous peoples [in the United States] are incarcerated more than any other group, we have more racial violence perpetrated upon us, and we are forgotten. If people think this is how to honor us, then colonization has really taken hold.[34]

The ultimate effect is loss of self-esteem. Critics contend that the use of logos and mascots leads to a de facto exclusion of American Indians from many sports events "simply because they may wish to avoid exposure to a misuse of their culture."[35] They also point to the suicide rate as being three times greater for American Indians than for the general public and being five times greater for American Indian children than for the general public. While it is difficult to draw a direct link between suicide and the symbols, the American Indian Mental Health Association of Minnesota has concluded that American Indians "are particularly vulnerable and have difficulty reconciling their culture with the modern world" and that the use of mascots and logos is "damaging to the self-identity, self-concept, and self-esteem of our people."[36]

Justification for Use of American Indian Symbols

Those who support the use of American Indian symbols offer justification for their position. First, they maintain that such use does not misrepresent but instead accurately portrays history. Christian Dennie cites examples of high schools with tribal nicknames that provide curricular instruction in the history and culture of that tribe. He concludes that "the use of Native American mascots and team names has served as an educational tool for high school students across the country."[37] Furthermore, several schools have direct historical ties to their nicknames. A survey

revealed that numerous Wisconsin cities were named after Indian leaders in the area; Tomah and Oshkosh were named after chiefs of the Ho Chunk tribe, and Stockbridge High School, founded as an Indian school, was named after one of the tribes of Wisconsin Indians.[38]

Second, they claim that the labels constitute a symbol of honor. Jack Guggenheim contends: "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 [professional] 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."[39] The majority of respondents in a survey of Wisconsin schools cited "meant to honor Indians" as the reason for using the symbol.[40] Supporters contend that the practice is not viewed as offensive by a majority of American Indians. A poll conducted by *Sports Illustrated* indicates that while American Indian activists are united in opposition to the use of Indian symbols, the overall Indian population sees the matter differently. Eighty-one percent of American Indian respondents opposed curtailment of the use of American Indian symbols by academic institutions, while 83 percent claimed that pro sports teams should not stop using Indian nicknames. When the same questions were asked of reservation Indians, "a majority [67 percent] said the usage by pro teams should not cease."[41] It is also argued that the labels are not representative of any individual. Therefore, the use is not demeaning because it depicts no real human being. It is a caricature and a parody. Throughout the 1990s the Cleveland Indian mascot Chief Wahoo, with his single feather, buckteeth, big smile, and hooked nose, came under attack as offensive. The team argues that it is not the image of any actual person or tribe. Furthermore, the Cleveland Indian organization emphatically refers to Wahoo "as a caricature rather than a cartoon because of the implication that a cartoon might be meant to poke fun."[42] The same argument is offered by the Atlanta Braves regarding their mascot, Chief Noc-a-homa. Finally, the defenders suggest that, over time, meanings have changed. Meanings that may have been demeaning have come to stand for acceptable connotations. For example, Washington Redskins owners and fans argue that the word "redskin" has come to mean the team—the Washington Redskins football team.[43] "Redskin" is no longer associated with American Indian culture; it cannot demean if it does not convey that meaning.

Scholarly critics offer varied solutions to the controversy. Some critics demand the elimination of American Indian symbol use.[44] Others support a more flexible approach. For example, Gavin Clarkson, Olin Fellow in Law and Economics at Harvard University, would eliminate "racial Indian mascots, except for tribal schools that choose to self-identify with an Indian motif" and for those tribes that "trademark" and "license" their identities.[45] A literature review reveals that two writers offer suggestions in light of First Amendment concerns. Lauren Brock provides analysis of the term "redskin" in light of the commercial speech and hate speech standards and concludes that legislation "closely tailored to legitimate state interests" would withstand "constitutional challenge by supporters of Native American mascots."[46] Brian Moushegian devotes a few brief paragraphs to First Amendment rights before noting that "First Amendment protection is a difficult barrier to overcome."[47] A more extensive application of First Amendment doctrine seems warranted. In the following section American Indian symbol use is examined in light of six established First Amendment doctrines: offensive words, fighting words, hate speech, group libel, substantial governmental interest, and commercial speech. Each concept is described and then applied to the issue of symbol use to determine whether that standard may be used as a basis for regulation.

Offensive Words

The offensive words doctrine was established by the Supreme Court in *Cohen v. California* (1971). In 1968 Paul Cohen entered the Los Angeles County courthouse wearing a jacket bearing the words "Fuck the Draft." Cohen claimed that he wished to inform the public of his feelings against the Vietnam War. He was arrested and convicted of violating a statute that prohibits "offensive conduct" that disturbs "the peace or quiet of any neighborhood or person."[48] He was sentenced to thirty days' imprisonment. Cohen appealed the verdict.

The Court, per Justice John Harlan, made two significant points. First, any offended individual "could effectively avoid further bombardment of their sensibilities simply by averting their eyes." Second, while the litigation was directed at a particular four-letter word that was "perhaps more distasteful than most others of its genre, it is nevertheless often true that

one man's vulgarity is another's lyric." The Court could not "indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."[49]

The main thrust of the *Cohen* decision is that terms cannot be banned simply because they are offensive. In applying the doctrine to American Indian symbols, it can be noted that it is often difficult to avoid offensive symbols simply by averting one's eyes. In particular, schoolchildren are required to attend sessions in which such images are prominently displayed. But to ban a particular symbol (a chieftain logo or the Redskin nickname) runs the risk of banning ideas as well as words that convey important educational or ceremonial meaning. On balance, it seems that the *Cohen* decision requires the offended party to avoid the symbol; placing a ban on the symbol runs the risk of losing the right to convey an idea.

Fighting Words

An utterance that stirs another to anger but has little if any social utility may be considered fighting words. This doctrine was outlined in *Chaplinsky v. New Hampshire* (1942). Walter Chaplinsky, a Jehovah's Witness, was passing out literature in Rochester, New Hampshire, when citizens complained to the police chief that Chaplinsky was denouncing all religion as a "racket." The chief warned Chaplinsky that the crowd was getting unruly. Chaplinsky then said to the chief: "You are a God-damned racketeer" and "a damned Fascist." Chaplinsky was convicted for violating a law that banned "addressing any offensive, derisive or annoying word to any other person."[50] When the case reached the New Hampshire Supreme Court, the justices created the fighting words doctrine. In their opinion,

> the test is what men of common intelligence could understand to be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are "fighting words" when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight.[51]

The United States Supreme Court, in a unanimous opinion written by Justice Frank Murphy, agreed. The words used by Chaplinsky "are epithets likely to provoke the average person to retaliation and thereby

cause a breach of the peace." Furthermore, the words possess low social usefulness; "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by social interest in order and morality."[52] The words did not warrant First Amendment protection.

According to the *Chaplinsky* decision, two components are required to satisfy fighting words. First, the words must offend, but that alone is insufficient to warrant restriction of expression. Second, the words also must be capable of producing fisticuffs. This is not likely with the use of American Indian symbols. While the symbols may offend, they are not directed at a specific individual. In most instances they are not instigated by a single person. They simply do not precipitate a physical response.

Hate Speech

The latter half of the 1980s witnessed an increase in discriminatory harassing behavior on college campuses throughout the United States. In response, several institutions adopted hate speech policies. The University of Michigan restricted persons from "stigmatizing," "victimizing," "threatening," or "interfering with" several categories of individuals or groups. In *Doe v. University of Michigan* (1989) the federal court determined that the policy was unconstitutional for two reasons. First, it was vague; the words "stigmatize" and "victimize" are general terms that "elude precise definitions," and the words "threaten" and "interfere" were not clarified as to their impact. Second, the policy was overbroad; it "swept within its scope" a significant amount of "verbal conduct" that was protected by the First Amendment.[53]

The University of Wisconsin adopted a narrower policy that disciplined "racist or discriminatory comments, epithets, or other expressive behavior" directed at an individual(s). The behavior had to occur "intentionally" and had to "create an intimidating, hostile, or demeaning environment for education." In *UW-M Post v. Board of Regents of the University of Wisconsin* (1991) the federal court overturned the policy. First, it was overbroad, punishing words that were merely offensive. Second, it was vague; the term "intentionally" posed problems for implementation.[54]

The *University of Michigan* and the *University of Wisconsin* decisions demonstrate the legislative difficulty of defining "intentionality" and

proving "effect." These problems, which reflect the difficulty of writing constitutionally acceptable hate speech codes, would likewise hamper efforts to restrict the use of American Indian symbols. The causal link between symbol use and negative effect is simply not there, and the intent for using symbols is often to convey honor.

Efforts by colleges and universities to restrict hate speech were dealt another damaging blow in *R.A.V. v. St. Paul, Minnesota* (1992). The case arose when a young man who burned a cross on a black family's lawn was charged under an ordinance that prohibits the display of a symbol that "arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender." The Supreme Court, per Justice Antonin Scalia, found the law to be "facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[55]

The *R.A.V.* decision reinforces the long-standing First Amendment principle that restrictions on speech may not be based on content, subject matter, or viewpoint. In the case of American Indian logos, nicknames, mascots, and trademarks, the key problem is with placing a restriction on any subject matter or topic related to "American Indians." Such a limiting content-based ban violates the First Amendment.

Group Libel

The concept of group libel was recognized by the Supreme Court in *Beauharnais v. Illinois* (1952). The libelous material was prepared by Joseph Beauharnais, the president of the White Circle League, a racist "neighborhood improvement group." Beauharnais and his volunteers distributed leaflets in downtown Chicago that called on the mayor "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro." The leaflets warned: "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggression[,] . . . rapes, robberies, knives, guns and marijuana of the Negro surely will." When Beauharnais was convicted of violating an Illinois law by distributing publications that subjected black citizens to contempt and derision, he appealed. The Supreme Court, in the majority opinion written by Justice Felix Frankfurter, supported the law. The Court noted that Illinois had a history of tension between races that had often flared

into violence and destruction. It seemed clear that the Illinois legislature acted within reason in attempting "to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented."[56] The Court upheld Beauharnais' conviction for group libel.

Applying the group libel principle to the symbol use issue reveals that while some of the criteria are relevant, others are not. The issue involves a "racial group"—American Indians. The logos are displayed in "public places" and with the intention of having a "powerful emotional impact" on factors such as purchase decision and school spirit. But it is difficult to show that the material involves "false or malicious" libel. Some critics argue that the images give a false impression of a noble and gentle race of people, presenting them as vicious and savage. Yet the logos themselves do not present clear and specific falsehoods, and perhaps the key notion that is lacking to satisfy the group libel principle is the idea of "maliciousness." The motives for using these symbols seem to be sale of products, promotion of a team concept, and enhancement of school spirit. There is no evidence that the portrayal of Native images is designed to expose citizens to "contempt, derision, obloquy," which is the specific wording of the statute upheld in *Beauharnais*.[57]

Substantial Governmental Interest

The Universal Military Training and Service Act of 1948 stipulated that men, upon reaching eighteen years of age, had to register with a local draft board and be issued a registration certificate. In 1965 Congress made it a crime to mutilate the certificate. In 1966 David O'Brien burned his draft card on the steps of the South Boston Courthouse. At his trial O'Brien said that he burned his certificate publicly in an effort to influence others to adopt his antiwar beliefs. He was convicted. Before the Supreme Court O'Brien argued that the act of burning his draft card was protected "symbolic speech." In *United States v. O'Brien* (1968) the Court established the prevailing test for symbolic speech. The Court clarified the concept of "speech plus" by rejecting the notion that a "limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." Chief Justice Earl Warren noted: "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same conduct, a sufficiently important

governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[58]

In *O'Brien* the Court also established a four-part test to determine the acceptability of the government's draft card policy. First, was the policy within the government's constitutional power? Second, did the policy further a substantial governmental interest? Third, was the interest related to the suppression of free speech? Finally, was any incidental restriction on First Amendment freedoms greater than was essential to further that interest? The Court decided that the power of Congress to classify and conscript manpower for military service was an important governmental interest "beyond question." It was essential for the United States to have a system for raising armies that functioned with maximum efficiency. The requirement that each registrant have access to his card furthered the smooth functioning of the system.[59]

The *O'Brien* decision established two criteria that apply to this analysis. First, it acknowledged that symbolic speech enjoys less protection than pure speech. Logos, mascots, nicknames, and trademarks involve symbolic expression and thereby enjoy limited First Amendment protection. Second, the decision established that expression may be restricted to serve a "substantial governmental interest." Does restricting the use of symbols involve a substantial governmental interest? It might be argued that preventing racial unrest and ensuring the survival of a culture are in the interests of government. But are they *significant* governmental priorities? The government might be more inclined to protect the rights of the communicator. In this instance, protecting free speech may be a more substantial governmental interest.

Commercial Speech

The Supreme Court established the commercial speech doctrine in *Valentine v. Chrestensen* (1942). The case began when F. J. Chrestensen charged a fee to people who visited a submarine that he had moored at a pier on the East River in New York City. When he distributed a printed commercial advertisement on city streets, police officers advised him that he was violating a law that limited handbill distribution to "information of a public protest." Chrestensen subsequently prepared a double-faced handbill: one side depicted a revised commercial advertisement, and the other side outlined a protest against the local ordinance. No commercial

advertising appeared on the protest side of the handbill. Nonetheless, the police informed Chrestensen that distribution of the double-faced bill was prohibited. Chrestensen brought suit. The Supreme Court noted that New York could prohibit its citizens from distributing commercial advertising on the streets. The Court recognized that Chrestensen's protest was attached to the handbill solely to evade the prohibition. If such an evasion were permitted, the law would be rendered ineffective. In *Chrestensen* the Court extended a preferred position to political rather than commercial expression.[60]

Almost forty years later, in *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York* (1980), the Court established a test for evaluating whether specific instances of commercial expression satisfy First Amendment standards.[61] The case dealt with advertising by public utilities. The Central Hudson Gas and Electric Corporation initiated suit in court to challenge the constitutionality of a New York Public Service Commission policy statement that banned certain advertising by utilities. The statement divided advertising into two categories: promotional, that is, advertising intended to stimulate the purchase of utility services, and informational, that is, advertising not designed to promote sales. The commission banned promotional but permitted informational advertising. The ban was intended as a vehicle for conserving energy. Writing for the Supreme Court, Justice Lewis Powell stressed that the First Amendment's relevance for commercial speech is based on the informational function of advertising—commercial messages that do not inform the public about lawful activity may be suppressed. Powell claimed that a four-stage analysis was appropriate in determining the constitutionality of such expression.

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[62]

The Court then used these four stages to analyze the expression at issue in *Central Hudson Gas*. Powell noted that the advertising was neither

inaccurate nor related to unlawful activity; the expression warranted First Amendment protection. Powell also noted that there was a direct link between New York's interest in energy conservation and the commission's ban on advertising. The Court, however, found the ban to be "more extensive than necessary to further the State's interest in energy conservation."[63] The Court concluded that because the commission's order was overbroad, the ban violated the First Amendment.

The commercial speech doctrine is irrelevant to an analysis of the use of American Indian symbols by academic institutions and by state and local governments that use symbols to name geographic locations. It applies, however, to labels on commercial products and for identification of professional sports teams. These trademarks contain commercial information that enjoys some First Amendment protection even though commercial speech lacks the level of protection awarded to other forms of communication.

Applying the four prongs of *Central Hudson*, it seems obvious, first of all, that the use of American Indian symbols "concerns lawful activity" and is not "misleading." Second, it is possible that regulation of symbols might be perceived as serving "substantial" governmental interests, for example, the prevention of racial disturbances (there have been a few demonstrations) and/or ensuring the survival of American Indian culture (while other minorities sought integration into the dominant culture, American Indians attempted to retain cultural separateness).[64] Yet, on balance, are those interests "substantial" when compared with the First Amendment rights of the symbol user? And, even if the regulation of symbols is determined to be of substantial interest, there may be difficulty in satisfying prongs three and four. It may be decided that limited restriction (a single brand name or a specific geographic location) might not sufficiently further governmental interests. Or it may be decided that the restriction is too extreme, that the interest might be better satisfied by a program of education. Overall, it appears that those who would attempt to regulate the use of American Indian symbols face difficulty meeting the demands of the *Central Hudson* decision.

CONCLUSION

Analysis of the American Indian symbol controversy leads to the conclusion that First Amendment doctrines offer little help to those who

favor restricting the use of various logos, mascots, nicknames, and trademarks. The practice of symbol use fails to meet established free expression tests. Symbol use may not be regulated merely because it is judged to be "offensive" by a segment of society. The fighting words standard is inapplicable because there is no clear individual source of the message, and there is no specific intended victim. Implementation of the hate speech doctrine likewise has problems with identifying "intentionality" and "effect." The group libel principle seems inadequate because of the difficulty with establishing maliciousness on the part of the symbol user. The substantial governmental interest standard may not serve potential regulators; the images are symbolic and thus entitled to less First Amendment protection. In addition, regulation may not serve a substantial governmental interest. Finally, the commercial speech standard faces the same problems regarding the question of what constitutes a substantial governmental interest, and only a limited amount of symbol use involves commercial speech. Cases decided by the Supreme Court suggest that while commercial speech does not enjoy full First Amendment protection, existing First Amendment standards do not permit regulation of American Indian symbols.

Application of six established First Amendment judicial tests—offensive expression, fighting words, hate speech, group libel, substantial governmental interest, and commercial speech—reveals that critics who seek to eliminate or restrict use of American Indian imagery find little recourse in the law. Efforts to limit the use of such symbols might be better served by appeals based on moral and ethical standards, appeals that are directed at the conscience of the symbol user.

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