

Harvard Law Review
February, 1999

Note

***904 A PUBLIC ACCOMMODATIONS CHALLENGE TO THE USE OF INDIAN TEAM NAMES AND MASCOTS IN PROFESSIONAL SPORTS**

Copyright © 1999 Harvard Law Review Association

Five professional sports teams currently have American Indian [\[FN1\]](#) names and mascots: the Atlanta Braves, Chicago Blackhawks, Cleveland Indians, Kansas City Chiefs, and Washington Redskins. [\[FN2\]](#) The accompanying mascots, such as the Cleveland Indians' Chief Wahoo, [\[FN3\]](#) represent stereotypical and racist depictions of American Indians. [\[FN4\]](#) In addition, team mascots, players, and cheerleaders engage in "sham rituals" [\[FN5\]](#)--war songs, dances, and actions like the "tomahawk chop" [\[FN6\]](#)--that not only manifest blatant racism, but also constitute direct attacks on American Indian religious practices. [\[FN7\]](#) In each team's home community, paraphernalia bearing offensive logos and slogans is ubiquitous. [\[FN8\]](#) It is clear that the analogous use of any other racial or ethnic group as a sports team mascot would be considered "socially repugnant" [\[FN9\]](#) and reprehensible. [\[FN10\]](#)

***905** A mounting chorus of protest denounces the use of Indian mascots and team names as a "virulently racist practice," [\[FN11\]](#) and the public acknowledgment of impropriety is growing. [\[FN12\]](#) Several major newspapers, for example, have announced that they will no longer publish team names that are racially or ethnically offensive. [\[FN13\]](#) The District of Columbia City Council has passed a resolution requesting that the Washington Redskins change their name. [\[FN14\]](#) Dozens of high schools [\[FN15\]](#) and colleges [\[FN16\]](#) have already replaced Indian nicknames and mascots. Despite this emergence of public sympathies in favor of change, professional sports team owners have refused to abandon discriminatory nicknames and mascots. [\[FN17\]](#)

In addition to these political responses, several legal challenges have been brought against Indian team names and mascots, including attacks under trademark law, [\[FN18\]](#) Title VI of the Civil Rights Act (prohibiting ***906** discrimination in federally funded programs), [\[FN19\]](#) and a state pupil anti-discrimination law, [\[FN20\]](#) as well as attempts to enact statutes denying stadium funding. [\[FN21\]](#) To date, none of these efforts has been successful, although the trademark action is still pending.

This Note offers a new legal approach and proposes using the federal public accommodations law, Title II of the Civil Rights Act of 1964, [\[FN22\]](#) to challenge professional sports teams' use of Indian nicknames and mascots. Title II guarantees all persons the right to the "full and equal enjoyment" of places of public accommodation without regard to race, color, religion, or national origin. [\[FN23\]](#) Indian team names and mascots deter a substantial number of American Indians from patronizing places of public accommodation, and therefore cause a denial of the full and equal enjoyment of those facilities. The appropriate remedy pursuant to Title II would be an injunction prohibiting the use of discriminatory names and mascots. Although a sports team name is a form of commercial speech that receives limited protection under the First Amendment, this Note argues that prohibition under Title II would not infringe on the free speech rights of the sports teams involved.

(Cite as: 112 Harv. L. Rev. 904)

Part I of this Note introduces the relevant provisions of the Civil Rights Act of 1964. Part II outlines how public accommodations law can be applied against professional sports teams. Part III addresses potential objections to this proposal. This Note concludes that a Title II challenge should succeed if a claimant can make a factual showing that the name or mascot of a sports team deters the patronage of a substantial number of American Indians.

*907 I. Title II of the Civil Rights Act of 1964

Title II provides for the "full and equal enjoyment" of all places of public accommodation without regard to race, color, religion, or national origin. [\[FN24\]](#) An establishment such as a "sports arena, stadium, or other place of exhibition and entertainment" [\[FN25\]](#) is considered a place of public accommodation if its operations affect interstate commerce or if discrimination is supported by state action. According to the statute, the operations of a sports arena or stadium affect commerce if the facility "customarily presents" athletic teams that move in commerce. [\[FN26\]](#) Although Title II does not contain a damages provision, a "person aggrieved" can bring an action for injunctive relief [\[FN27\]](#) and reasonable attorney's fees. [\[FN28\]](#)

The overriding purpose of Title II of the Civil Rights Act is to remove "the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." [\[FN29\]](#) Courts have emphasized the necessity of reading Title II broadly, "with open minds attuned to the clear and strong purpose of the Act, namely, to secure for all citizens the full enjoyment of facilities described in the Act." [\[FN30\]](#) The Supreme Court has approved this view, [\[FN31\]](#) and lower courts have consistently applied it. [\[FN32\]](#)

II. The Application of Title II to Professional Sports Teams

Title II should apply to professional sports teams because of the close link between a team and its home stadium. Indian team names deny full and equal enjoyment on the basis of race by discouraging American Indian patronage, thereby effectively creating unequal access to the sports facilities. Empirical evidence confirms the magnitude of this deterrent effect. Furthermore, even if there is no discriminatory *908 intent to exclude, Title II also prohibits unintentional discrimination.

A. Places of Public Accommodation

The nexus between a sports team and its home stadium or arena is so close and so complete that if the stadium cannot bar an individual or a class, neither can the sports team that uses the stadium--however that barrier is created. Congressional intent to eliminate discrimination in sports arenas and stadiums is clearly expressed in the statutory text. This intent should not be subverted by permitting a sports team to discriminate in a stadium.

Title II prohibits discrimination or segregation by "any motion picture house, theatre, concert hall, sports arena, stadium or other place of exhibition or entertainment." [\[FN33\]](#) Consistent with the broad purpose of the Civil Rights Act, the Supreme Court has liberally interpreted what constitutes a place of public accommodation. [\[FN34\]](#) In determining whether an entity is a place of public accommodation, courts look to "the practical consequences of the existing situation," not to formalistic "artifices." [\[FN35\]](#) Thus, Title II has been held to govern membership organizations that are closely connected to a facility or structure. A sufficiently close connection has been established by an organization's operation of facilities open to the public, like swimming pools, [\[FN36\]](#) gyms, [\[FN37\]](#) sports fields, [\[FN38\]](#) and golf courses. [\[FN39\]](#) The requisite connection has also been met by a private organization's use of a place of public accommodation to "carry out its discriminatory practices." [\[FN40\]](#) Similarly, an organization's use of public facilities for public purposes--such as a *909 Little League's use of baseball fields [\[FN41\]](#)--has triggered the protection of state statutes that closely parallel Title II. [\[FN42\]](#)

This "close connection" theory has led to the application of Title II to entities that are neither expressly enumerated in the statute's list of covered facilities, nor even within the common understanding of the term "place" as a semi-permanent structure or a fixed location. Thus, a YMCA, [\[FN43\]](#) a teacher's association, [\[FN44\]](#) and a boating club [\[FN45\]](#) have all been held subject to the strictures of public accommodations law because of their intimate connections with facilities that were undoubtedly covered. By the same reasoning, the Boy Scouts of America has been held immune from Title II because its members meet in private homes, in churches, and in the outdoors, [\[FN46\]](#) and the Boy Scouts do not manifest a tight link with any place of public accommodation. [\[FN47\]](#)

Thus, to trigger Title II, the entity at issue--for example, a professional sports team--need not itself be a "place of

(Cite as: 112 Harv. L. Rev. 904)

public accommodation," as long as it is integrally connected with some facility that is. [\[FN48\]](#) Even if the word "place" is to be limited to fixed structures, a relationship of "functional interdependence" or symbiosis [\[FN49\]](#) will bring entities that otherwise might not be covered within the purview of public accommodations law. If a covered entity and an uncovered entity are factually determined to have an "integral relationship of mutual benefit," [\[FN50\]](#) the otherwise uncovered entity will be subject to Title II whether or not it would independently be determined a "place" under the Act.

***910** Professional sports teams have a sufficiently close connection with their home stadiums to trigger the protections of Title II, and therefore a sports team cannot by its policies deny the access of a protected class. [\[FN51\]](#) Professional sports teams hold themselves out as serving patrons and fans at the stadium, and the stadium identifies itself as hosting the games and serving the teams. For Title II purposes, the stadium and the team are one and the same--linked financially and conceptually. [\[FN52\]](#) The Seventh Circuit declared that the Boy Scouts of America was not a place of public accommodation because it "can and does function apart from any connection to a physical facility." [\[FN53\]](#) A professional sports team, however, cannot function without a physical facility. A stadium and team are mutually interdependent.

Sports teams are currently using stadiums to "carry out [their] discriminatory practices." [\[FN54\]](#) Because a sports team presents public entertainment in a public facility, it cannot exclude potential patrons from that facility on the basis of race. Prohibiting discrimination in sports arenas and stadiums while permitting the sports teams that use those stadiums to discriminate would violate the clear purpose and intent of Title II.

B. Denial of Full and Equal Enjoyment

The use of Indian team names and mascots denies American Indians the full and equal enjoyment of a place of public accommodation. Although Indians are not physically barred or denied service, the manner in which they are served is nonetheless discriminatory because team names and mascots cause harm and lead to exclusion by maintaining an intimidating environment. This race-based abuse prevents Indians from attending sporting events, thereby violating Title II.

Nothing on the face of Title II indicates that it only encompasses barriers to entry or outright refusals to deal. Instead, the plain text of the statute is expansive and guarantees "full and equal enjoyment . . . without discrimination or segregation." [\[FN55\]](#) Title II therefore prohibits not only the denial of services but disparate service as well; [\[FN56\]](#) otherwise, ***911** the statutory language "full and equal enjoyment" would be superfluous. This interpretation of Title II has been applied to find public accommodations violations in the absence of a denial of service. [\[FN57\]](#) Subjecting a patron to even a single racial slur has been held to constitute a denial of "full and equal enjoyment." [\[FN58\]](#)

Racial insults are documented to cause psychological and physical harms. [\[FN59\]](#) Indian team names and mascots in particular have been charged with fostering "racial stereotyping," [\[FN60\]](#) causing low self-esteem among American Indians, [\[FN61\]](#) and setting up Indian children as targets for physical harassment by their peers. [\[FN62\]](#) The racial epithet "nigger" has been held to be so intimidating that its use against a patron of a place of public accommodation constitutes a denial of full and equal enjoyment; [\[FN63\]](#) the word "redskin" is similarly indicative of racial ***912** animus [\[FN64\]](#) and comparable in vituperative force. [\[FN65\]](#) Even a seemingly innocuous team name--like the Blackhawks--is as discriminatory as the most obviously offensive team name--the Redskins. A logo presenting a "noble" portrait of an Indian is as discriminatory as a cartoon caricature like Chief Wahoo. Any use of Indians as mascots or nicknames for sports teams presents and maintains harmful stereotypes. [\[FN66\]](#) Even "positive" imaging of Indian mascots is objectifying and objectionable because "the use of any stereotype in the portrayal of Indians is considered . . . to be contributory to their dehumanization and deracination." [\[FN67\]](#)

The patron of a professional sports event is bombarded with racial imagery and epithets in the form of the team name, signs, slogans, logos, mascots, souvenirs, celebratory dances, chants, and songs. Although the racial epithets and imagery are not specifically directed at an individual patron, the impact is not thereby lessened and the end result of exclusion is not diminished. [\[FN68\]](#)

The text of Title II further indicates that its protection is not limited to incidents of intentional discrimination. Title

(Cite as: 112 Harv. L. Rev. 904)

II provides: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation." [FN69] This phrasing focuses on the individual's enjoyment of a place of public accommodation, not on the actions or mindset of the offending actor. [FN70] This textual focus suggests that Congress, in passing Title II, intended to remove all barriers to *913 equal access to public accommodations, not merely to eliminate intentional discrimination. It would contravene Title II's broad remedial purpose to impose the additional burden, beyond that required by the statute's text, of showing discriminatory intent to establish a prima facie case of discrimination. Facially neutral barriers to equal access violate Title II whenever they have a disproportionate impact on protected persons.

Although the issue has been addressed infrequently, [FN71] no court has required a showing of discriminatory intent under Title II. Furthermore, at least one court has affirmatively held that a disparate impact showing is sufficient to establish a prima facie case under Title II and "does not require a showing of discriminatory intent." [FN72] The Second Circuit appeared to reach a similar conclusion in remanding a decision with instructions to determine whether a facially neutral rule nevertheless "had the effect of discriminating against blacks." [FN73]

Even a discriminatory intent requirement, however, would not be fatal to a challenge to a sports team's name or mascot. "Intent," in this context, does not mean "motive." Discrimination on the basis of race is prohibited by Title II "regardless of the presence or absence of racial prejudice in the minds of the defendants." [FN74] The appropriate inquiry would not be: "Are sports team owners racist?" but instead: "Do these sports teams intentionally use a discriminatory team name?" Teams may deny any racist motivation by asserting that their names are intended to honor American Indians or that an Indian mascot is a dignified symbol of strength, pride, and courage. The proper focus for Title II purposes, however, is not on this assertedly "benign" motive, but on the intentional use of ethnically charged words, images, and characterizations.

*914 C. Requirement of an Empirical Showing

A Title II argument hinges on establishing as a factual matter that Indian team names and mascots effectively exclude American Indians and thus deny the full and equal enjoyment of a place of public accommodation. A successful Title II challenge must therefore present empirical evidence of an actual deterrent effect.

An analogous case provides a blueprint for the type of evidence that must be established to support a finding of a denial of full and equal enjoyment in this context. In *Urban League of Rhode Island v. Sambo's of Rhode Island, Inc.*, [FN75] the Rhode Island Human Rights Commission relied on factual findings that advertisements and signs for restaurants named "Sambo's" had a strong negative impact on blacks in Rhode Island and held that the mere use of the name violated the Rhode Island public accommodations statute. [FN76] The commission reasoned that the offensiveness of the name discouraged black patronage and therefore promoted unequal access to public accommodations. [FN77] In light of the factual findings, [FN78] the commission concluded that "the use of the name 'Sambo's' denie[d] black citizens full and equal accommodations" and therefore violated the state public accommodations law. [FN79]

*915 Similarly, the best evidence of the deterrent effect of Indian mascots and nicknames is the collective response of American Indians. Over five hundred Indian Nations have voiced their unified opposition through such representative organizations as the National Congress of American Indians (NCAI), [FN80] the National Indian Education Association, [FN81] the Great Lakes Inter-Tribal Council, [FN82] and the Oneida Tribe of Indians of Wisconsin. [FN83] The number of protestors at sporting events also illustrates the deterrent effect: police reported five hundred protestors at the 1991 World Series in which the Atlanta Braves participated, and three thousand protestors at the 1992 Super Bowl in which the Washington Redskins participated. [FN84] Anecdotal evidence reveals specific instances of discriminatory impact. [FN85] In a litigation setting, parties challenging a certain team name or mascot could produce more location-specific evidence of exclusion in violation of Title II. [FN86]

III. Potential Objections to a Title II Challenge

A. Slippery Slope Concerns

A public accommodations challenge may raise slippery slope concerns that soon every team will be challenged by

(Cite as: 112 Harv. L. Rev. 904)

hypersensitive plaintiffs*916 who are offended by a team name or mascot. [FN87] However, Title II protects only the listed classes of race, color, religion, and national origin. Therefore, its application would not lead to the forced change of team names that "discriminate" against short people who may challenge the New York Giants, [FN88] or southerners who may challenge the New York Yankees, [FN89] or animal lovers who may challenge the Baltimore Orioles. Furthermore, a broader historical context is critical to distinguishing Indian team names from others that also refer to national origin (like the Boston Celtics or the Minnesota Vikings) or religion (like the New Orleans Saints or the California Angels). Unlike American Indians, Celtics, Vikings, Saints, and Angels "have not been widely disrespected and abused in this country." [FN90] Given the near genocide of Indians by Euro-Americans over the course of several centuries [FN91] --a period of oppression that has been called the "conquest of America" [FN92] --the practice of naming sports teams "Indians," "Chiefs," and "Redskins" has been compared to "contemporary Germans naming their soccer teams the 'Jews,' 'Hebrews,' and 'Yids.'" [FN93]

There might also be concerns about the application of this interpretation of Title II in non-sport contexts--for example, to regulate museum displays or movies that allegedly discriminate by offending a particular protected group. As discussed below, because political and artistic expression merit significantly stronger First Amendment protection than does the commercial speech of a sports team name, prohibitions of political or artistic speech under Title II would be deemed unconstitutional. Furthermore, a public accommodations challenge asks that Indian team names be changed not because they are "offensive," but because they deny equal enjoyment of a place of public accommodation on the basis of race, as proscribed by the Civil Rights Act.

*917 B. First Amendment Challenge

Teams could argue that the application of public accommodations law to prohibit certain team names would violate the First Amendment right to freedom of speech. [FN94] Courts would evaluate the regulation of team names under the commercial speech doctrine.

The Supreme Court has defined commercial speech as "speech which does 'no more than propose a commercial transaction,'" [FN95] and as "expression related solely to the economic interests of the speaker and its audience." [FN96] Although the precise boundary distinguishing commercial from non-commercial speech may sometimes be difficult to draw, [FN97] certain types of speech are clearly within the undisputed core of commercial speech. [FN98]

Sports team names can be characterized as trade names, which the Supreme Court has determined to be a type of commercial speech. Trade names propose a commercial transaction by identifying the source of a product or service; they do not convey any intrinsic idea. A trade name's basic invitation to engage in a commercial transaction [FN99] has been deemed sufficient to trigger First Amendment protection from regulation. [FN100]

The Supreme Court has developed a categorical analysis that affords significantly less First Amendment protection to commercial *918 speech than to other categories of speech. [FN101] To regulate commercial speech, the government must satisfy the four-prong intermediate scrutiny test established by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*. [FN102] A court must first determine whether the regulated speech is protected by the First Amendment; speech that is misleading or that concerns unlawful activity receives no protection at all. [FN103] Second, the government must show that it has a substantial interest in regulation. [FN104] Third, the regulation must directly advance the asserted government interest. [FN105] Finally, the regulation must be reasonably tailored to achieve that interest, [FN106] although it need not be the least restrictive alternative available. [FN107] A Title II challenge to Indian team names and mascots would survive First Amendment scrutiny under this analysis.

1. Misleading or unlawful activity.--First Amendment protection of commercial speech does not extend to "forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity." [FN108] The Supreme Court has held that the inherent risk of deception in certain types of commercial speech strips that speech of First Amendment protection. [FN109] Because the use of trade names by sports teams does not relate to unlawful activity and is not inherently likely to mislead, however, the remaining three steps of *Central Hudson* apply. [FN110]

(Cite as: 112 Harv. L. Rev. 904)

2. Substantial government interest.--Courts have generally applied the substantial government interest requirement liberally. [\[FN111\]](#) Clearly, the government may not regulate commercial speech merely to prohibit perceived offensiveness. [\[FN112\]](#) However, no other proffered justification has been rejected by a reviewing court. The elimination of racial discrimination in places of public accommodation should suffice as a substantial government interest for the application of Title II to sports team names. [\[FN113\]](#) Because both Congress [\[FN114\]](#) and the Supreme Court [\[FN115\]](#) have declared that this interest is one of utmost importance, it would undoubtedly be deemed "substantial" for purposes of the Central Hudson test's second step.

3. Direct advancement.--The government's regulation must directly advance its substantial interest; the regulation will therefore fail if it "provides only ineffective or remote support for the government purpose." [\[FN116\]](#) The government must show that its regulation will significantly alleviate real harms, [\[FN117\]](#) and its support for this showing cannot be "mere speculation or conjecture." [\[FN118\]](#)

The application of Title II to sports team names directly advances the substantial state interest in remedying racial discrimination in places of public accommodation. The Supreme Court has stated that this step of the Central Hudson test does not ask whether there is direct advancement as applied to the entity challenging the regulation, but instead whether the statute on its face demonstrates direct advancement. [\[FN119\]](#) Nevertheless, even if Title II must directly advance a substantial state interest in its application to sports team names, sufficient evidence can still be provided to meet that burden. If the regulation of racially discriminatory sports team names were held to be a valid implementation of Title II, it would by definition be a valid restriction on commercial speech. The very factual findings required to show a denial of "full and equal enjoyment" would suffice to show direct *920 advancement of the objective of eliminating racial discrimination. [\[FN120\]](#)

4. Reasonable tailoring.--The fourth step of the Supreme Court's commercial speech doctrine requires a "fit between the restriction and the government interest that is not necessarily perfect, but reasonable." [\[FN121\]](#) Those regulations that have failed the "reasonable fit" requirement have either ignored preferable and equally effective alternative means of achieving the same state interest, [\[FN122\]](#) restricted far more speech than necessary, [\[FN123\]](#) or failed to meet a minimum threshold of reasonable relation. [\[FN124\]](#)

The application of Title II to Indian team names is reasonably tailored to the state interest of preventing racial discrimination. No alternative forms of regulation are available to achieve the desired end, and the use of Title II restricts only as much commercial speech as is necessary. The success of a Title II challenge would only marginally upset the general values of a sports team name and mascot--such as identifying the team, serving as a focus for fan loyalty, and equating the team with positive attributes thought to be associated with the name and mascot--and would cease to do so once a replacement name and mascot were chosen.

IV. Conclusion

The fundamental purpose of remedial civil rights legislation is to alter the majority group's actions and notions of social propriety to conform to a legislatively prescribed code of conduct. With sufficient factual findings of a deterrent effect, Title II should succeed in prohibiting discriminatory Indian team names and mascots. Despite the relative *921 paucity of Title II case law, [\[FN125\]](#) the text of the statute itself indicates a broad conception of the rights attendant to "full and equal enjoyment."

In addition, many state public accommodations statutes include more expansive or explicit definitions of prohibited discriminatory practices, [\[FN126\]](#) and many also include damages provisions. [\[FN127\]](#) State public accommodations laws could therefore also be used to challenge team names and mascots, especially because provisions for damages provide a greater incentive to litigate under these statutes than under Title II.

Although there have been a number of legal challenges to team names and mascots, the Title II approach represents a new angle, and its aggressive implementation may well provide the elusive legal remedy for a continuing societal wrong. Only by expansive interpretation of this remedial legislation will the objective of equal access be forwarded. Former Assistant Attorney General for Civil Rights Drew Days has observed that "overt forms of discrimination ha[ve] been replaced in many respects by subtle and sophisticated techniques of discrimination which are often difficult to detect and prove in a court of law." [\[FN128\]](#) The application of Title II must correspondingly evolve when necessary to address more subtle, yet equally reprehensible, forms of discrimination.

[FN1]. This Note uses the terms "American Indians" and "Indians" interchangeably.

[FN2]. Dozens of colleges and thousands of high schools also use such team names. See, e.g., Bill Dunn, Indians: We Are People, Not Mascots, *Cap. Times*, Apr. 6, 1998, at 1A (stating that 54 school districts in Wisconsin have Indian nicknames); Dave Neese, Name Droppers: Native Americans Seek Ban on School Monikers (last modified May 21, 1998) <<http://www.geocities.com/CapitolHill/Lobby/6581/980521name.html>> (stating that 71 schools in New Jersey have Indian nicknames or team mascots).

[FN3]. Chief Wahoo is a grinning caricature of an American Indian "nearly always painted bright red with overly huge front teeth, shifty eyes, and headband with a feather protruding from behind." James V. Fenelon, *Wahoo: Window into the World of Racism 2* (Aug. 1997) (unpublished manuscript, on file with the Harvard Law School Library); see also Lawrence R. Baca, *What About the Indian Country "N" Word? 2* (Nov. 17, 1998) (unpublished manuscript, on file with the Harvard Law School Library) ("The Cleveland Indians' logo/mascot is a big-toothed, silly-grinning, hooked-nosed, caricature of an American Indian.").

[FN4]. Chief Wahoo is "an unambiguous racial icon meant to symbolize stereotypical and usually negative images of Native people" Fenelon, *supra* note 3, at 2 (citations omitted).

[FN5]. Leonard Shapiro, *Offensive Penalty Is Called on 'Redskins'; Native Americans Protest the Name*, *Wash. Post*, Nov. 3, 1991, at D1 (quoting Tim Giago, publisher of the *Lakota Times*).

[FN6]. The tomahawk chop "involves moving one's hand in an up and down chopping motion. Some fans hold foam tomahawks in their hand, others act as if they are holding a tomahawk." Paul E. Loving, [Native American Team Names in Athletics: It's Time to Trade These Marks](#), 13 *Loy. L.A. Ent. L.J.* 1, 2 n.4 (1992).

[FN7]. See Shapiro, *supra* note 5, at D1 (quoting Tim Giago).

[FN8]. See Fenelon, *supra* note 3, at 4 (noting that Chief Wahoo flags "are found virtually everywhere in the Cleveland area" and are often flown "from private and public flagpoles, including directly under the flag of the United States").

[FN9]. Kimberly A. Pace, [The Washington Redskins Case and the Doctrine of Disparagement: How Politically Correct Must a Trademark Be?](#), 22 *Pepp. L. Rev.* 7, 7 (1994).

[FN10]. See Ward Churchill, *Let's Spread the "Fun" Around: The Issue of Sports Team Names and Mascots*, in *From a Native Son: Selected Essays on Indigenism, 1985-1995*, at 439, 440-42 (1996) (proposing analogous team names-- such as the "San Diego 'Spics,'" "Detroit 'Dykes,'" and "Kansas City 'Kikes'"-- to highlight the offensiveness of Indian team names).

[FN11]. *Id.* at 439.

[FN12]. For example, President Clinton refused to wear a cap with the Chief Wahoo logo while tossing the first pitch on Opening Day of the 1994 baseball season. See John B. Rhode, [The Mascot Name Change Controversy: A Lesson in Hypersensitivity](#), 5 *Marq. Sports L.J.* 141, 141 (1994).

[FN13]. See Julie Engebrecht & Tim A. McGuire, *To Our Readers*, *Minneapolis Star Trib.*, Feb. 5, 1994, at 2C; Michael R. Fancher, *Policy of Avoiding Use of Cleveland Team's Logo Sparks Protest by Reader*, *Seattle Times*, Feb. 15, 1998, at A19; William A. Hilliard, *To Our Readers*, *Portland Oregonian*, Feb. 16, 1992, at D1.

[FN14]. See 139 Cong. Rec. S8493 (1993) (statement of Sen. Campbell).

[FN15]. See, e.g., Duke Helfand, *Suit Targets Schools' Ban on Indian Mascots Education: Booster from Birmingham High in Van Nuys Argues that Policy Suppresses Free Speech*, *L.A. Times*, Jan. 8, 1998, at B5; *Petitioners Fight for Team's Name*, *Boston Globe*, Feb. 13, 1998, at B5; Linda K. Wertheimer, *Dallas Schools*

Asked to Drop Indian-Related Mascots, Dallas Morning News, Mar. 27, 1998, at 36A.

[FN16]. Over 100 colleges and universities have replaced Indian team names and Indian mascots. See Lyn Riddle, Sensitivity Training Doesn't Take: N.C. School Keeping Its Mascots, *Atlanta J. & Const.*, May 27, 1998, at A12. Dartmouth, Stanford, and Marquette, among other universities, have made high-profile and highly controversial team name and mascot changes. See Michigan Dep't of Civil Rights, Michigan Civil Rights Commission Report on Use of Nicknames, Logos and Mascots Depicting Native American People in Michigan Education Institutions 2-4 (1988) [hereinafter Michigan Civil Rights Commission Report].

[FN17]. See, e.g., 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, 538 (1994); Pace, supra note 9, at 15.

[FN18]. A lawsuit pending before the Patent and Trademark Office (PTO) seeks to strip trademark protection from the Washington Redskins' name and logo for a violation of section 2A of the Lanham Act. See [Harjo v. Pro Football, Inc.](#), 45 U.S.P.Q.2d 1789 (1998); [Harjo v. Pro Football, Inc.](#), 30 U.S.P.Q.2d 1828 (1994). Section 2A of the Lanham Act, 15 U.S.C. § 1052(a) (1994), allows the PTO to refuse registration of a mark if it "[c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs or national symbols, or bring them into contempt, or disrepute." The theory behind the trademark challenge is that the loss of trademark protection will deprive teams of licensing revenues, thereby providing a powerful economic incentive to change Indian team names. See generally Kelber, supra note 17; Pace, supra note 9.

[FN19]. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in any federally funded program. See [42 U.S.C. § 2000d-2000d-7](#) (1994). A Title VI challenge would be directed at school districts and federally funded universities. As of March 10, 1994, the Department of Education Office for Civil Rights has interpreted Title VI to prohibit schools from creating, encouraging, or tolerating a "racially hostile environment." [Racial Incidents and Harassment Against Students at Educational Institutions](#), 59 *Fed. Reg.* 11,448, 11,448 (1994). See generally [Daniel J. Trainor, Native American Mascots, Schools, and the Title VI Hostile Environment Analysis](#), 1995 *U. Ill. L. Rev.* 971.

[FN20]. See [Munson v. State Superintendent of Pub. Instruction, No. 97- 145097-1450](#), 1998 WL 61018 (Wis. Ct. App. Feb. 17, 1998).

[FN21]. United States Senator Ben Nighthorse Campbell introduced legislation to ensure that a proposed new football stadium in the District of Columbia "not be used to demean any racial group." 139 Cong. Rec. S8493 (1993) (statement of Sen. Campbell). Senator Campbell stated: "The bill, if enacted, would prohibit the use of the new stadium by any person or organization exploiting any racial or ethnic group or using nomenclature that includes a reference to real or alleged physical characteristics of native Americans or other group of human beings." *Id.* at S8494. Proposed, but ultimately unsuccessful, state legislation in Missouri and Ohio similarly would have prohibited stadium funding in an attempt to prompt the Kansas City Chiefs and Cleveland Indians, respectively, to change their team names. See Cathryn L. Claussen, [Ethnic Team Names and Logos--Is There a Legal Solution?](#), 6 *Marq. Sports L.J.* 409, 414 & n.20; Kelber, supra note 17, at 542; Loving, supra note 6, at 12 & nn.54, 55.

[FN22]. [42 U.S.C. § 2000a](#) (1994).

[FN23]. *Id.* [§ 2000a\(a\)](#).

[FN24]. *Id.* The section provides in full: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." *Id.*

[FN25]. *Id.* [§ 2000a\(b\)\(3\)](#).

[FN26]. *Id.* [§ 2000a\(c\)\(3\)](#).

[FN27]. [Id.](#) § 2000a-3(a). The Attorney General can also bring an action to enforce Title II. See [id.](#) § 2000a-5(a).

[FN28]. See [id.](#) § 2000a-3(b).

[FN29]. [Daniel v. Paul](#), 395 U.S. 298, 307-08 (1969) (quoting [H.R. Rep. No. 88-914](#), at 18 (1964), reprinted in 1964 U.S.C.C.A.N. 2391, 2393-94) (internal quotation marks omitted).

[FN30]. [Miller v. Amusement Enters., Inc.](#), 394 F.2d 342, 349 (5th Cir. 1968); see also [United States v. Medical Soc'y](#), 298 F. Supp. 145, 151-52 (D.S.C. 1969); [United States v. Beach Assocs., Inc.](#), 286 F. Supp. 801, 808- 09 (D. Md. 1968).

[FN31]. See [Daniel](#), 395 U.S. at 307-08.

[FN32]. See, e.g., [Boyle v. Jerome Country Club](#), 883 F. Supp. 1422, 1428 (D. Idaho 1995); [Durham v. Red Lake Fishing & Hunting Club, Inc.](#), 666 F. Supp. 954, 959 (W.D. Tex. 1987).

[FN33]. [42 U.S.C. § 2000a\(b\)\(3\)](#) (1994).

[FN34]. See, e.g., [Daniel](#), 395 U.S. at 304-05 (holding that a snack bar that was part of a recreational facility affected interstate commerce because it sold three food items that contained ingredients that originated outside the state).

[FN35]. [Beach Assocs.](#), 286 F. Supp. at 807.

[FN36]. See [Smith v. YMCA](#), 462 F.2d 634, 636, 648 (5th Cir. 1972) (holding that the YMCA was a place of public accommodation because it operated swimming pools, gymnasiums, and a health club).

[FN37]. See [id.](#)

[FN38]. See [United States v. Slidell Youth Football Ass'n](#), 387 F. Supp. 474, 486 (E.D. La. 1974) (holding that a youth football league was subject to Title II because the recreational facility that it operated was a place of public accommodation).

[FN39]. See [Wesley v. City of Savannah](#), 294 F. Supp. 698, 701-02 (S.D. Ga. 1969) (holding that Title II prohibited a private golf association from discriminating on the basis of race when sponsoring a tournament at a golf course that was concededly a place of public accommodation under the Act).

[FN40]. [Auerbach v. African-American Teachers Ass'n, Inc.](#), 356 F. Supp. 1046, 1048 (E.D.N.Y. 1973) (holding that Title II applied to a private organization, the African-American Teachers Association, that excluded whites from a meeting held in a school auditorium); cf. [Franklin v. Order of United Commercial Travelers](#), 590 F. Supp. 255, 260 (D. Mass. 1984) (holding that an otherwise private fraternal benefit society was not exempt from state anti-discrimination law because its close affiliation with a city police department deprived it of private status).

[FN41]. See [National Org. for Women v. Little League Baseball, Inc.](#), 328 A.2d 33, 37 (N.J. Super. 1974).

[FN42]. See [United States Power Squadrons v. State Human Rights Appeals Bd.](#), 452 N.E.2d 1199, 1205 (N.Y. 1983) (holding that an organization that trained men in boating skills constituted a place of public accommodation because it conducted its activities in public facilities). Both Power Squadrons and Little League Baseball interpreted state public accommodations laws that are similar to Title II. See [Welsh v. Boy Scouts](#), 993 F.2d 1267, 1271 (7th Cir. 1993).

[FN43]. See [Smith v. YMCA](#), 462 F.2d 634, 648 (5th Cir. 1972).

[FN44]. See [Auerbach](#), 356 F. Supp. at 1048.

[FN45]. See [Power Squadrons, 452 N.E.2d at 1203-04.](#)

[FN46]. See [Welsh, 993 F.2d at 1275.](#)

[FN47]. See [id. at 1269](#) (stating that "Congress when enacting § 2000a(b) never intended to include membership organizations that do not maintain a close connection to a structural facility within the meaning of 'place of public accommodation'").

[FN48]. See [Frank v. Ivy Club, 576 A.2d 241, 256 \(N.J. 1990\)](#). This distinction seems to cause some confusion in cases that discuss the proper interpretation of the word "place" and whether it is to be read as a "term of convenience" or a "term of limitation." Compare [National Org. for Women v. Little League Baseball, Inc., 328 A.2d 33, 37 \(N.J. Super. 1974\)](#) ("The statutory noun 'place' (of public accommodation) is a term of convenience, not of limitation. It is employed to reflect the fact that public accommodations are commonly provided at fixed 'places' ..."), and [Power Squadrons, 452 N.E.2d at 1203](#) ("Public accommodations are customarily supplied at fixed places, but not necessarily so."), with [Welsh, 993 F.2d at 1272](#) (arguing that interpreting the word "place" as a term of convenience and not of limitation would render the word mere surplusage).

[FN49]. [Frank, 576 A.2d at 260.](#)

[FN50]. *Id.*

[FN51]. See [International Soc'y for Krishna Consciousness v. New Jersey Sports & Exposition Auth., 532 F. Supp. 1088, 1102 \(D.N.J. 1981\)](#) (holding that, under both Title II and the New Jersey public accommodations law, neither the Giants professional football team nor the Cosmos professional soccer team "could bar access [to the stadium] to anyone on grounds of religion or creed, since the stadium comes within the definition of both statutes as a 'place of public accommodation'"), *aff'd*, [691 F.2d 155 \(3d Cir. 1982\)](#).

[FN52]. See [id. at 1101-02](#) (discussing the financial connection between the New York Giants professional football team and the Meadowlands stadium).

[FN53]. [Welsh, 993 F.2d at 1274.](#)

[FN54]. [Auerbach v. African-American Teachers Ass'n, Inc., 356 F. Supp. 1046, 1048 \(E.D.N.Y. 1973\).](#)

[FN55]. [42 U.S.C. § 2000a\(a\) \(1994\)](#) (emphasis added).

[FN56]. See Lisa Gabrielle Lerman & Annette K. Sanderson, Project, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. Rev. L. & Soc. Change 215, 220 (1978); cf. [Clarke v. K Mart Corp., 495 N.W.2d 820, 822 \(Mich. Ct. App. 1992\)](#) (holding that a plaintiff does not need to show "an outright denial of access to a defendant's goods, premises, or facilities" to satisfy the "full and equal enjoyment" language of the Michigan state public accommodations act).

[FN57]. See [Black v. Bonds, 308 F. Supp. 774, 776 \(S.D. Ala. 1969\)](#) (prohibiting discrimination in a restaurant and stating that "[w]hether this discrimination is embodied in an absolute denial of service, or a practice of 'delayed service,' is of little import, for both are equally condemned by the Civil Rights Act"). The Bonds court emphasized the words "full and equal" when citing Title II. *Id.*

[FN58]. See [Jones v. City of Boston, 783 F. Supp. 604, 605 \(D. Mass. 1990\)](#) (holding that evidence that a bartender referred to the plaintiff as a "nigger" satisfies the Title II requirement "of showing that he was denied equal access to a place of public accommodation on the basis of race" because "[t]he term 'nigger' is intimidating by its very nature"); [King v. Greyhound Lines, Inc., 656 P.2d 349, 351 \(Or. Ct. App. 1982\)](#) ("To argue that Plaintiff received 'full and equal' accommodations even though he suffered racial slurs and animadversions in the course of the transaction is analogous to arguing that separate accommodations may be equal accommodations.").

(Cite as: 112 Harv. L. Rev. 904)

[FN59]. See Martin Deutsch, Irwin Katz & Arthur R. Jensen, *Social Class, Race and Psychological Development* 175 (1968); Mary Ellen Goodman, *Race Awareness in Young Children* 73, 127-31, 159-60, 163-64 (2d ed. 1964).

[FN60]. Michigan Civil Rights Commission Report, *supra* note 16, at 21.

[FN61]. See HONOR, *Handbook of Indian Logos: HONOR Manual for Advocacy* 10 (1997) [[hereinafter HONOR Manual] (on file with the Harvard Law School Library) ("We believe that much of the low self-esteem [found in Indian teenagers] comes from the constant bombardment of negative imaging and mascotting and stereotyping and other dehumanizing activity that gives our kids an impression that they no longer exist and lead[s] some to the conclusion that they should not." (quoting Suzan Shown Harjo) (internal quotation marks omitted)); Michigan Civil Rights Commission Report, *supra* note 16, at 9 (concluding that the "continued presence of stereotypic images of Native American people" lowers Indian students' self image and negatively affects their achievement in the education setting).

[FN62]. See HONOR Manual, *supra* note 61, at 12 ("Because they are attached by ethnicity to these logos, Native American children are often seen as fierce, stoic fighters to be physically challenged by their peers." (quoting Barbara E. Munson) (internal quotation marks omitted)).

[FN63]. See Jones, 783 F. Supp. at 605; [King, 656 P.2d at 351](#).

[FN64]. See Letter from Lawrence R. Baca, Chairman, Indian Law Section of the Federal Bar Association, to John Hope Franklin, Chairman, President's Advisory Board on Race Relations 2 (June 30, 1997) (on file with the Harvard Law School Library) ("[T]he term 'redskin' was first used as a reference to American Indian people at a time when we were hunted for bounty and a price was paid for a red skin.").

[FN65]. See Baca, *supra* note 3, at 3 ("'Redskin' is to Indian people what 'nigger' is to African Americans--'redskin' is the Indian country 'N' word.").

[FN66]. See HONOR Manual, *supra* note 61, at 11 ("One's culture's sacred symbols, heroes and leaders should not be a part of the halftime entertainment for another culture's game." (quoting Barbara E. Munson) (internal quotation marks omitted)).

[FN67]. Scott B. Vickers, *Native American Identities: From Stereotype to Archetype in Art and Literature* 4-5 (1998); see HONOR Manual, *supra* note 61, at 11 (quoting Suzan Shown Harjo); Michigan Civil Rights Commission Report, *supra* note 16, at 10 ("While some characteristics of Indian people in symbols and names may be obviously negative, characterization of Indian people as 'noble savages' or other efforts to present a 'neutral' image may also result in negative stereotyping.").

[FN68]. Cf. [Sambo's Restaurants, Inc. v. City of Ann Arbor, 663 F.2d 686, 702-03 \(6th Cir. 1981\)](#) (Keith, J., dissenting) (rejecting the argument that the term "Sambo" was less offensive as the name of a restaurant chain than when levied directly against an individual).

[FN69]. [42 U.S.C. § 2000a\(a\) \(1994\)](#) (emphasis added).

[FN70]. In contrast, the text of the Michigan state public accommodations statute focuses on the intent of the actor, and not on the entitlement of the patron. See [Mich. Comp. Laws Ann. § 37.2302](#) (West 1985) ("Except where permitted by law, a person shall not ... deny an individual the full and equal enjoyment ... of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status." (emphasis added)).

[FN71]. See [Boyle v. Jerome Country Club, 883 F. Supp. 1422, 1429 \(D. Idaho 1995\)](#) ("There are few reported [Title II] cases discussing such important issues as the burden of proof, the level of scienter required, and other crucial matters."). The relative scarcity of case law probably results from the unavailability of damages under Title II, which makes litigants more inclined to bring other available challenges that would provide damages.

(Cite as: 112 Harv. L. Rev. 904)

[FN72]. [Robinson v. Power Pizza, Inc.](#), 993 F. Supp. 1462, 1465 (M.D. Fla. 1998) (upholding a Title II challenge to a pizza company's delivery practice of providing door service in white neighborhoods but not in black neighborhoods). The Robinson court further stated that a "lack of racial animus" is both irrelevant and an insufficient defense to a Title II challenge, because "[p]laintiffs need not demonstrate discriminatory intent under a disparate impact theory." *Id.*

[FN73]. [Olzman v. Lake Hills Swim Club, Inc.](#), 495 F.2d 1333, 1340-42 (2d Cir. 1974) (emphasis added) (stating that a lower court's finding that the bylaws of a place of public accommodation were not facially discriminatory was "far short of the analysis we are called upon to make" and, even if true, was insufficient to defeat a Title II challenge). But cf. [Harris v. Capital Growth Investors XIV](#), 805 P.2d 873, 874-75, 892 (Cal. 1991) (stating in dicta that "plaintiffs have cited no case (nor has our research disclosed any) in which a disparate impact test was used in applying" Title II or any state public accommodations statute). The California Supreme Court in Harris apparently overlooked Olzman, and Robinson was decided subsequently.

[FN74]. [United States v. Gulf-State Theatres, Inc.](#), 256 F. Supp. 549, 552 (N.D. Miss. 1966).

[FN75]. File Nos. 79 PRA 074-06/06, 79 ERA 073-06/06, EEOC No. 011790461 (R.I. Comm'n for Human Rights 1981).

[FN76]. See *id.* at 17-18. The Rhode Island public accommodations statute states: "All persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities, and privileges of any place of public accommodation, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons." [R.I. Gen. Laws § 11-24-1 \(1994\)](#).

[FN77]. See Urban League, File Nos. 79 PRA 074-06/06, 79 ERA 073-06/06, at 17-18.

[FN78]. The commission's findings of fact included the following:

More than two-thirds of the black Americans who testified had been called a 'Sambo' or had been present when another black American was called a 'Sambo'. The name-calling was always done in a derogatory [sic] manner. Eleven of the black Americans who testified said that they considered 'Sambo' to be a fighting word. Nine black Americans testified that they had, in the past, physically fought with people who had called them 'Sambo'.

All of the witnesses who were asked about the name 'Sambo' with the exception of respondent's employees ... testified that they thought that the word was offensive and demeaning to black Americans.

Many witnesses testified that respondent's use of the word 'Sambo' in the restaurant name insulted blacks and/or was used to tell blacks that they were not welcome at the restaurant.

The respondent's use of the word 'Sambo' in the name of its restaurants, 'Sambo's Restaurants,' deters a substantial percentage of black persons from patronizing those restaurants.

Id. at 6-7. The complainants presented twenty-three witnesses, nineteen of whom identified themselves as black Americans. See *id.* at 3-4. The commission also conducted an independent survey, in which 214 of the 238 individuals polled stated that they would not patronize "Sambo's" because of the name. See *id.* at 7.

[FN79]. *Id.* at 18.

[FN80]. The NCAI, which represents 520 Indian Nations, is "the oldest and largest national organization representative of and advocate for national, regional, and local tribal concerns." HONOR Manual, *supra* note 61, at 29. In December 1991, the NCAI adopted a resolution "urging educational institutions, businesses and organizations to abandon caricatures of American Indians that promote negative images and racism" and noting that Indian mascots, "symbols that seem innocuous to some, are offensive to Indians." *Id.* at 27-29, 86.

[FN81]. See *id.* at 10.

[FN82]. See Great Lakes Inter-Tribal Council Resolution No. 4-13-2-93 (Apr. 13, 1993), reprinted in HONOR Manual, *supra* note 61, at 25-26.

[FN83]. See Oneida Tribe of Indians of Wisconsin Resolution No. 3-31-93-A (Mar. 31, 1993), reprinted in

HONOR Manual, *supra* note 61, at 16-17.

[FN84]. See Claussen, *supra* note 21, at 413.

[FN85]. One Indian has stated:

I compose memorial songs, I compose burial songs for my grandmothers and my grandfathers, my family. And when people [imitate] that at an athletic event, like at a baseball game, it hurts me, to see that other people are making a monkey of me. We don't do that, what they're doing, this chanting.

HONOR Manual, *supra* note 61, at 6 (alteration in original). Another Indian has described how television coverage of fans at a Kansas City Chiefs game performing the tomahawk chop compelled him to turn off the television. See Shapiro, *supra* note 5, at D1.

[FN86]. Although there is some counter-evidence of Indians who do not object, see Shapiro, *supra* note 5, at D1, a few dissenting voices should not undermine the overwhelming opposition of Indian people, see HONOR Manual, *supra* note 61, at 10 ("It is not a reasonable standard to expect unanimity from any other large group of people on a given issue, there are always a few dissenters." (quoting Barbara E. Munson) (internal quotation marks omitted)); cf. *Urban League v. Sambo's of R.I., Inc.*, File Nos. 79 PRA 074-06/06, 79 ERA 073-06/06, EEOC No. 011790461, at 7 (R.I. Comm'n for Human Rights 1981) (responding to the claim that the "average person" did not have a negative reaction to the name" by emphasizing that "a significant percentage of the black community opposes the use of the name 'Sambo's'").

[FN87]. Cf. Suzanne Fields, Will Snub Patrol Scalp Braves, 'Skins, Indians?', *Atlanta J. & Const.*, Aug. 30, 1993, at A8 ("Possibilities for finding offense are endless.").

[FN88]. See *id.*

[FN89]. See *id.*

[FN90]. See HONOR Manual, *supra* note 61, at 14 (quoting Eric Zorn); see also Trainor, *supra* note 19, at 975 n.20 (distinguishing Indian team names from the Notre Dame Fighting Irish by stating that, although "Irish immigrants in the past suffered discrimination and violence," "the Irish suffered no language or color barrier, and were able in a very short period of time to assimilate into broader society").

[FN91]. See Ward Churchill, Since Predator Came: A Survey of Native North America Since 1492, in *From a Native Son: Selected Essays in Indigenism, 1985- 1995*, *supra* note 10, at 21, 21-26 (chronicling "a degree of decimation extending into the upper ninetieth percentile" by 1890); Joseph P. Gone, Chief Illiniwek: Dignified or Damaging? (last modified Feb. 15, 1995) <<http://fantasia.ncsa.uiuc.edu/~/jayr/GONE.HTML>> ("America's Indigenous Nations have suffered horribly at the hands of displaced Europeans over the centuries. In the continental United States alone, our population declined from at least five million inhabitants at the time of contact to roughly 250,000 by the end of the Indian wars.").

[FN92]. Churchill, *supra* note 10, at 439.

[FN93]. *Id.*

[FN94]. Cf. [Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 573 \(1995\)](#) (holding that applying the Massachusetts state public accommodations law to compel parade organizers to allow certain groups to march in a St. Patrick's Day Parade violated the First Amendment). The constitutionality of state public accommodations laws has been upheld against facial First Amendment challenges. See, e.g., [id. at 572](#); [New York State Club Ass'n v. City of New York, 487 U.S. 1, 14 \(1988\)](#).

[FN95]. [Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 \(1976\)](#) (quoting [Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 \(1973\)](#)).

[FN96]. [Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 \(1980\)](#).

[FN97]. See, e.g., [Bolger v. Youngs Drug Prods. Corp.](#), 463 U.S. 60, 81 (Stevens, J., concurring in the judgment) (addressing the difficulty of classifying speech as either commercial or non-commercial); Steven Shiffrin, [The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment](#), 78 Nw. U. L. Rev. 1212, 1229, 1231-32, 1265-66 (1983) (describing situations in which it is difficult to classify speech as either commercial or non-commercial).

[FN98]. See, e.g., [Zauderer v. Office of Disciplinary Counsel of the Supreme Court](#), 471 U.S. 626, 637 (1985) ("[S]ubject to doubt, perhaps, are the precise bounds of the category of expression that may be termed commercial speech, but it is clear enough that the speech at issue in this case-- advertising pure and simple--falls within those bounds.").

[FN99]. See [Friedman v. Rogers](#), 440 U.S. 1, 11 (1979) ("Once a trade name has been in use for some time, ... [it] is used as part of a proposal of a commercial transaction.").

[FN100]. See [Bad Frog Brewery, Inc. v. New York State Liquor Auth.](#), 134 F.3d 87, 96-97 (2d Cir. 1998) (holding that a beer bottle label identified the source of a product and therefore qualified as commercial speech); [Sambo's Restaurants, Inc. v. City of Ann Arbor](#), 663 F.2d 686, 694 (6th Cir. 1981) (holding that the restaurant name 'Sambo's' "conveys information because of the associations that have grown up over time between the name and the level of price and the quality of food and service," which is the "type of information protected by the First Amendment").

[FN101]. See [Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.](#), 425 U.S. 748, 771 n.24 (1976); see also [Ohralik v. Ohio State Bar Ass'n](#), 436 U.S. 447, 456 (1978) (stating that commercial speech is afforded a "limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values").

[FN102]. [447 U.S. 557 \(1980\)](#).

[FN103]. See [id.](#) at 563-64.

[FN104]. See [id.](#) at 564.

[FN105]. See [id.](#)

[FN106]. See [id.](#); see also [Edenfield v. Fane](#), 507 U.S. 761, 767 (1993) (applying the Central Hudson test).

[FN107]. See [Board of Trustees v. Fox](#), 492 U.S. 469, 476-81 (1989).

[FN108]. [Central Hudson](#), 447 U.S. at 563-64 (citations omitted).

[FN109]. See [In re R.M.J.](#), 455 U.S. 191, 202 (1982) (stating that "regulation--and imposition of discipline--are permissible where the particular advertising is inherently likely to deceive"); [Friedman v. Rogers](#), 440 U.S. 1, 14 (1979) (upholding the prohibition of trade names in optometry because the use of such trade names had led to misleading practices, such as implying standardized care in different facilities); [Ohralik v. Ohio State Bar Ass'n](#), 436 U.S. 447, 464-65 (1978) (upholding a regulation preventing lawyers from engaging in in-person solicitation of clients because of the inherent risk of misconduct).

[FN110]. The Central Hudson analysis has two stages. The first prong of the test is a threshold question and the last three prongs are a unified balancing test.

[FN111]. See, e.g., [Edenfield](#), 507 U.S. at 769 (finding that both "ensuring the accuracy of commercial information in the marketplace" and "the protection of potential clients' privacy" are substantial state interests); [Fox](#), 492 U.S. at 475 (finding that the asserted government interest in "promoting an educational rather than commercial atmosphere" on university campuses was substantial).

[FN112]. See, e.g., [Bolger v. Youngs Drug Prods. Corp.](#), 463 U.S. 60, 71 (1983) (rejecting as insufficient the asserted state interest in shielding individuals from mail that they are likely to find offensive); [Hornell Brewing Co. v. Brady](#), 819 F. Supp. 1227, 1234 (E.D.N.Y. 1993) (stating that the "desire to protect society ... from the purported offensiveness of particular speech is not a substantial interest which justifies its prohibition" (citation omitted)); cf. Kurt Vonnegut, *Fates Worse Than Death* 80 (1991) ("The free-speech provisions of the First Amendment guarantee all of us not only benefits but pain.... Much of what other Americans say or publish hurts me a lot, makes me want to throw up. Tough luck for me.").

[FN113]. Cf. [Sambo's Restaurants, Inc. v. City of Ann Arbor](#), 663 F.2d 686, 695 (6th Cir. 1981) ("Plainly, racial harmony and equality is a substantial state interest.").

[FN114]. See [H.R. Rep. No. 88-914, at 18 \(1964\)](#), reprinted in 1964 U.S.C.C.A.N. 2391, 2393-94.

[FN115]. See [Daniel v. Paul](#), 395 U.S. 298, 307-08 (1969).

[FN116]. [Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n](#), 447 U.S. 557, 564 (1980).

[FN117]. See [Edenfield v. Fane](#), 507 U.S. 761, 770-71 (1993).

[FN118]. *Id.* at 770.

[FN119]. See [United States v. Edge Broad. Co.](#), 509 U.S. 418, 427-29 (1993) ("It is readily apparent that this question [of direct advancement] cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity.").

[FN120]. Cf. *Urban League v. Sambo's of R.I., Inc.*, File Nos. 79 PRA 074- 06/06, 79 ERA 073-06/06, EEOC No. 011790461, at 9-12 (R.I. Comm'n for Human Rights 1981) (holding that there was no First Amendment violation in issuing injunctive relief against the use of a commercial name that had been held to violate public accommodations laws). In *Urban League*, the Rhode Island Commission for Human Rights distinguished the injunction at issue from other types of commercial speech regulation: "In the present case, the complainants have proved that the name 'Sambo's' causes racial discrimination in public accommodations so that the language was prohibited only after it was proved that it caused harm." *Id.* at 11.

[FN121]. [Edge Broad.](#), 509 U.S. at 429.

[FN122]. See, e.g., [44 Liquormart, Inc. v. Rhode Island](#), 517 U.S. 484, 507 (1996) (plurality opinion) (finding a lack of reasonable fit because "alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the state's goal of promoting temperance"); [Rubin v. Coors Brewing Co.](#), 514 U.S. 476, 491 (1995) (invalidating a federal ban on advertising, in part because of "the availability of alternatives[] that would prove less intrusive to the First Amendment's protections for commercial speech").

[FN123]. See [Bolger v. Youngs Drug Prods. Corp.](#), 463 U.S. 60, 73-74 (1983); [Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n](#), 447 U.S. 557, 570 (1980).

[FN124]. See [City of Cincinnati v. Discovery Network, Inc.](#), 507 U.S. 410, 417-18 (1993) (finding no reasonable fit between the required removal of commercial newsracks from city sidewalks and the city's asserted goals of aesthetics and safety because the regulation ordered the removal of only 62 newsracks while leaving as many as 2,000 untouched).

[FN125]. See [Boyle v. Jerome Country Club](#), 883 F. Supp. 1422, 1429 (D. Idaho 1995).

[FN126]. See, e.g., D.C. Code Ann. § 1-2519(a)(2) (1992) ("It shall be an unlawful discriminatory practice ... [t]o print, circulate, post, or mail, or otherwise cause, directly or indirectly, to be published a statement, advertisement, or sign which indicates that ... an individual's patronage of, or presence at, a place of public accommodation is

objectional, unwelcome, unacceptable, or undesirable."); [775 Ill. Comp. Stat. § 5/5-102\(B\)](#) (West 1997) (similar clause). Displaying team signs and banners with Indian nicknames and logos arguably constitutes the unlawful posting of signs indicating that Indians' "patronage of, or presence at, a place of public accommodation" is "unwelcome, unacceptable, or undesirable." D.C. Code Ann. § 1-2519(a)(2).

[FN127]. See, e.g., D.C. Code Ann. § 1-2553(a)(1)(D); [Ohio Rev. Code Ann. § 4112.99](#) (Banks-Baldwin 1994).

[FN128]. Drew S. Days, III, [Vindicating Civil Rights in Changing Times](#), 93 *Yale L.J.* 990, 992 (1984).

END OF DOCUMENT