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NOTE

Tribal Trademark Law

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Abstract. Native American tribes are increasingly creating their own intellectual and cultural property statutes. Of all the new legislation, tribal trademark law in particular is an engaging yet understudied area. By studying tribal trademark law, it becomes possible to evaluate the nature and scope of tribal sovereignty. And studying tribal trademark law provides an opportunity to consider how federal trademark law might incorporate tribal innovations. Situated at the intersection of tribal law, intellectual property, and tribal sovereignty, this Note asks whether the federal government is prepared to incorporate and recognize tribal trademark law in the same way that it has done for states' laws.

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Introduction

Tribal sovereignty—tribes' inherent authority to self-govern—is typically associated with core governmental functions like the operation of court systems,[1] the definition of political membership,[2] and the collection of governmental revenue.[3] These functions are considered to be prototypical exercises of tribal sovereignty.[4]

Less obviously, the regulation of intellectual property is equally integral to tribal sovereignty: "Indigenous communities' political, economic and cultural self-determination" are directly tied to "the ownership and circulation of expression."[5]

Consider the following examples. When the Ho-Chunk Nation passed a tribal code providing trademark protection for tribally created Hoocąk language materials, the nation not only legislated a substantive legal right, but it also reaffirmed its commitment to language preservation.[6] When Crazy Horse's estate sued a liquor brand that used his name and image, the existence of a tribal court system allowed the estate to pair federal causes of action with culturally appropriate requests for relief.[7] And when the Menominee passed a tribal law

1. *See* TRIBAL JUSTICE, at 10:31-11:37, 30:27-32:06, 45:20-48:10 (Anne Makepeace dir., 2017).

2. *See* Mathew Holding Eagle III, *Red Lake Considers a Future Without Blood Quantum*, MPR NEWS (updated Jan. 4, 2023, 11:15 AM), https://perma.cc/86XX-QMC5.

3. *See* Meghan Brink, *New York Cannabis Regulations Are in Limbo. But the Pot Industry Is Booming on Reservations.*, POLITICO (Mar. 19 2022, 7:01 AM EDT), https://perma.cc/3QWD-3W5F.

4. The leading federal Indian law treatise lists the power to administer justice, the power to determine membership, and the power to tax as prototypical exercises of tribal sovereignty. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[2][b]-[d] (LexisNexis 2023) [hereinafter COHEN'S HANDBOOK]; *see also* Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 327 (2008) ("As part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation, including certain activities by nonmembers, to determine tribal membership, and to regulate domestic relations among members." (citations omitted)).

5. Trevor Reed, *Creative Sovereignties: Should Copyright Apply on Tribal Lands?*, 67 J. COPYRIGHT SOC'Y U.S.A. 313, 372 (2020). The connection between intellectual property and sovereignty is not unique to Native American tribes. As Trevor Reed observes, the power to regulate "temporary ownership rights over individuals' expressions [was] fundamental enough" that the Founders included the Intellectual Property Clause in Article I of the United States Constitution. *Id.* at 373; *see* U.S. CONST. art. I, § 8, cl. 8.

6. *See infra* Part I.C.1.

7. *See In re* Estate of Tasunke Witko v. G. Heileman Brewing Co., 23 Indian L. Rep. 6104, 6106, 6113 (Rosebud Sioux Sup. Ct. 1996) (en banc) (finding personal jurisdiction over the liquor company to adjudicate claims under the Lanham Act seeking, inter alia, "culturally appropriate compensation"). *See generally* Frank Pommersheim, *The Crazy Horse Malt Liquor Case: From Tradition to Modernity and Halfway Back*, 57 S.D. L. REV. 42 (2012). The "culturally appropriate compensation" included one braid of tobacco, one four-point Pendleton blanket, and one racehorse for each state in which the infringing

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that defined cultural resources as "belonging to no specific individual,"[8] they joined a growing movement of tribes legislating collective ownership of intellectual property.[9] In each instance, a tribe exercised its sovereignty by creating its own legal framework to protect cultural expression.[10]

Studying the confluence of intellectual property and tribal lawmaking is increasingly important. Over the last two decades, there has been a "striking increase" in the number of tribes enacting their own intellectual and cultural property laws.[11] In 2005, only twenty-seven tribes had laws that protected cultural property.[12] By 2020, 134 tribes had legislated in this area,[13] and the trend is likely to continue.[14]

At the outset, it is important to define "cultural property." As a counterpart to Anglo-American intellectual property, cultural property includes those "Indian cultural resources—such as sacred lands, religious artifacts, rituals, and songs—[that] may traverse established legal doctrines defined by bounded definitions as real, personal, or intellectual property, respectively."[15] The United Nations Declaration on the Rights of Indigenous Peoples includes the

products were sold. *In re Estate of Tasunke Witko*, 23 Indian L. Rep. at 6106. Although the Eighth Circuit ultimately found that the tribal court lacked jurisdiction, the tribe asserted an element of self-determination in hearing the dispute in its own judiciary in the first instance. *See* Hornell Brewing Co. v. Rosebud Sioux Tribal Ct., 133 F.3d 1087, 1093 (8th Cir. 1998).

8. *See* Angela R. Riley, *The Ascension of Indigenous Cultural Property Law*, 121 MICH. L. REV. 75, 126-27 (2022) (quoting MENOMINEE INDIAN TRIBE OF WIS. TRIBAL CODE pt. 2, ch. 293, § 293-1(F), https://perma.cc/YWK5-E7KR [hereinafter, MENOMINEE CODE]).

9. *See id.* at 79-80, 95.

10. *See also infra* Part I.A.

11. Riley, *supra* note 8, at 80. Riley surveyed the codes of the United States' 574 federally recognized tribes. *Id.* at 97-98. She used one set of search terms to find laws focused on cultural property, which she organized into four subcategories: (1) "burial sites, funerary objects, and repatriation"; (2) "sacred sites and ceremonial locations"; (3) "intangible property"; and (4) "data sovereignty." *Id.* at 99. She used another set of search terms to find references to federal statutory laws, including the Lanham Act (federal trademark law) and Copyright Act (federal copyright law), and federal patent law. *Id.* Riley categorized most references to federal intellectual property laws within the subcategory of "Intangible Property." *Id.* at 100. Her conclusions about the increase in tribal cultural property laws include those tribes that are legislating trademark, copyright, and patent laws.

12. *Id.* at 106.

13. *Id.* at 107.

14. *See id.* at 102; Angela R. Riley, *Native Nations and Tribal Cultural Property Law*, LANDSLIDE (Sept./Oct. 2023), at 22, 61 ("Monumental changes have taken place in tribal cultural property law in the last 15 years, and my sense is that tribes are just getting started.").

15. Angela R. Riley & Kristen A. Carpenter, *Owning* Red*: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 865 (2016).

right to develop intellectual property in Indigenous peoples' "cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts."[16]

The fact that federal law often fails to protect indigenous cultural property[17] is another reason why the study of tribal intellectual and cultural property lawmaking is an important and interesting endeavor. Although some tribes legislate intellectual property protections that replicate core elements of federal statutes, others act as laboratories of legal innovation, experimenting with intellectual and cultural property lawmaking in ways that deserve attention.[18]

Yet there is little academic literature at the intersection of tribal law, tribal sovereignty, and intellectual property.[19] Legal academia largely ignores and marginalizes tribal law.[20] Even though "[t]ribal governments are American governments that struggle with the same kinds of pressing legal questions that the other American sovereigns face,"[21] the innovative cultural and intellectual property lawmaking happening across the 574 federally recognized tribes is understudied and underappreciated.

Existing literature usually focuses on the ability of *federal* law to adequately protect Native American cultural property. For example, before the Washington Commanders football team adopted its new name,[22] legal scholarship focused on whether the federal trademark statute could be used to cancel the team's prior racist name and if the First Amendment protected the

16. G.A Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples, art. 31 (Sept. 13, 2007).

17. *See* Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1098 (2009) ("The dominant intellectual property regimes . . . often fail to protect the intangible property of indigenous groups."); Riley, *supra* note 8, at 114-15 (describing how shortcomings in the Native American Graves Protection and Repatriation Act led some tribes to pass laws that more broadly define "burial sites").

18. See *infra* Part I.C.

19. *See* Dalindyebo Bafana Shabalala, *Intellectual Property, Traditional Knowledge, and Traditional Cultural Expressions in Native American Tribal Codes*, 51 AKRON L. REV. 1126, 1160 (2017) ("The issue of the protection of [traditional knowledge] and [traditional cultural expressions] has yet to find significant purchase in IP discourse in the United States. Part of this may be due to a general isolation of Indian Law from issues surrounding IP.").

20. *See* Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 560 (2021).

21. *Id.* at 563.

22. *See* Ken Belson & Kevin Draper, *Washington N.F.L. Team to Drop Name*, N.Y. TIMES (updated Aug. 19, 2021), https://perma.cc/32HW-X2XH.

team.[23] Other scholarship has analyzed the applicability of federal law on tribal lands,[24] argued for new interpretations of federal law,[25] or recommended different federal agency practices.[26]

Studying the ways in which tribes interact with federal intellectual property law is certainly important. Because most of American intellectual property law is federal law,[27] tribes' ability to protect their intellectual and cultural property requires an understanding of federal laws like the Lanham Act, the Copyright Act, and patent laws.[28] However, the focal point of this interaction need not be federal law.

As tribes increasingly legislate their own intellectual and cultural property laws, there is a pressing need to understand how *tribal* law will interact with

23. *See, e.g.*, Mark Conrad, Matal v. Tam—*A Victory for* the Slants*, a Touchdown for* the Redskins*, but an Ambiguous Journey for the First Amendment and Trademark Law*, 36 CARDOZO ARTS & ENT. L.J. 83, 88-90 (2018); Russ VerSteeg, *Blackhawk Down or Blackhorse Down? The Lanham Act's Prohibition of Trademarks that "May Disparage" & the First Amendment*, 68 OKLA. L. REV. 677, 680-81 (2016); Sonia K. Katyal, *Trademark Intersectionality*, 57 UCLA L. REV. 1601 (2010) (examining the intersection of the First Amendment, Section 2(a) of the Lanham Act (which refuses registration to "immoral, deceptive, or scandalous matter"), and offensive marks like the old Washington football team name); M. Alexander Pearl, *Redskins: The Property Right to Racism*, 38 CARDOZO L. REV. 231, 263 (2016) (arguing for legislative changes that would "encourage[e] a name change through minimizing the revenue generated by the trademark"); Jeffrey Lefstin, Note, *Does the First Amendment Bar Cancellation of Redskins?*, 52 STAN. L. REV. 665, 666-68 (2000); Justin G. Blankenship, Note, *The Cancellation of Redskins as a Disparaging Trademark: Is Federal Trademark Law an Appropriate Solution for Words That Offend?*, 72 U. COLO. L. REV. 415, 417-19 (2001); Dustin Osborne, Note, *Varying Vernaculars: How to Fix the Lanham Act's Weakness Exposed by the Washington Redskins*, 20 U. DENV. SPORTS & ENT. L.J. 45, 49 (2017); Doori Song, Comment, *Blackhorse's Last Stand?: The First Amendment Battle Against the Washington "Redskins" Trademark After Matal v. Tam*, 19 WAKE FOREST J. BUS. & INTELL. PROP. L. 173, 177 (2019).

24. *See, e.g.*, Reed, *supra* note 5, at 325-28.

25. *See, e.g.*, Nancy Kremers, *Speaking with a Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources: Are U.S. Intellectual Property Law and Policy Really Aimed at Meaningful Protection for Native American Cultures?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 102-06 (2004) (arguing for a broader interpretation of Section 2(a) of the Lanham Act to protect Indigenous peoples).

26. *See, e.g.*, Brian Zark, Note, *Use of Native American Tribal Names as Marks*, 3 AM. INDIAN L.J. 537, 555-57 (2015) (arguing for new practices and greater funding for the Indian Arts and Crafts Board).

27. *See infra* notes 111-14 and accompanying text; *see also* Reed, *supra* note 5, at 315 (discussing the dominance of federal copyright law over state laws); Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 152 (1989) ("Thus our past decisions have made clear that state regulation of intellectual property must yield to the extent that it clashes with the balance struck by Congress in our patent laws.").

28. Lanham Act, ch. 540, 60 Stat. 427 (1946) (codified as amended in scattered sections of 15 U.S.C.); Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of the U.S. Code); U.S. Code tit. 35.

the intellectual property law of America's other sovereigns.[29] On occasion, non-tribal courts acknowledge, recognize, or apply tribal law.[30] But that form of interaction, especially in state and federal court, is rare.[31]

This Note addresses that gap in the literature by considering one area of intellectual property—trademarks—and analyzing the implications of tribes' trademark legislation on tribal sovereignty. Part I begins by explaining why tribal law is a powerful assertion of tribal sovereignty. It then sets out the notable connections between trademark law and tribal sovereignty. Part I ends by examining four tribal codes that explicitly address trademark law.

Part II then evaluates the nature and scope of tribal sovereignty in trademark law by asking two questions. First, is Congress prepared to incorporate innovations in tribal trademark law as it has done for analogous state innovations? Second, will the federal trademark statute's lack of preemption allow non-tribal courts to recognize tribal trademark laws that are broader than federal law? In both instances, this Note argues that Congress and non-tribal courts should incorporate and acknowledge tribal trademark innovations.

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29. *See* Shabalala, *supra* note 19, at 1161 (stressing the importance of "[d]escribing the exact nature and scope of Native American tribal sovereignty to regulate and legislate on IP" and noting a scarcity of relevant scholarship); *see also* Reese, *supra* note 20, at 579 ("Tribal law articles, by contrast, are rare.").

30. *See, e.g.*, Chilkat Indian Village v. Johnson, 870 F.2d 1469, 1474-75 (9th Cir. 1989) (analyzing a tribal ordinance to evaluate federal question jurisdiction). Some federal courts have dealt recently with tribal law in the context of arbitration clauses in payday lending suits. *See, e.g.*, Hengle v. Treppa, 19 F.4th 324, 343-44 (4th Cir. 2021) (finding an arbitration agreement unenforceable, in part, because the tribe's Consumer Financial Services Ordinance improperly burdened federal statutory rights).

31. *See* Katherine J. Florey, *Choosing Tribal Law: Why State Choice-of-Law Principles Should Apply to Disputes with Tribal Contacts*, 55 AM. U. L. REV. 1627, 1650-51 (2006) ("Some state courts have, in fact, experimented with applying tribal law. Other state courts, however, have hesitated to do so for a variety of reasons. . . . Far more frequently, however, state courts have, with little explanation, neglected to engage in choice-of-law analysis at all, simply assuming that state law will apply to cases involving tribes that are brought in state court." (footnote omitted)); Jackie Gardina, *Federal Preemption: A Roadmap for the Application of Tribal Law in State Courts*, 35 AM. INDIAN L. REV. 1, 6 (2011) ("The state courts' failure to apply tribal law is perhaps unsurprising given the warped jurisdictional landscape created in the Indian law context."); Julie A. Pace, Comment, *Enforcement of Tribal Law in Federal Court: Affirmation of Indian Sovereignty or A Step Backward Towards Assimilation?*, 24 ARIZ. ST. L.J. 435, 454 (1992) (observing that, outside of the Ninth and Tenth Circuits, circuit courts "have not expanded jurisdiction to include enforcement of tribal law").

I. Tribal Lawmaking and Trademark Law

A. The Importance of Tribal Lawmaking

For thousands of years,[32] "tribes were self-governing sovereign political communities."[33] Then, in 1831, the Supreme Court declared that Native nations were "domestic dependent nations."[34] Tribes lost some sovereign powers and retained others, so long as those powers were not "abrogated by treaty [or] removed via federal statute."[35] One retained power was the "inherent power to prescribe laws for their members,"[36] allowing tribes to pass laws "govern[ing] everything from their citizens' fundamental rights to mundane matters like garbage pickup."[37]

Today, "tribes function as governments qua governments, living their sovereignty and not seeking permission or validation from colonial governments to do so."[38] Yet, at the same time, tribes—just like the fifty states—are "subnational sovereigns whose powers are limited and shaped by federal law."[39] That tension makes tribal lawmaking an interesting and important area of study.[40]

The current development of tribal intellectual and cultural property lawmaking showcases why tribal law deserves mainstream attention. First, tribes' intellectual and cultural property laws draw inspiration from ancient, modern, internal, and external sources in a way that is unique in American law. Tribes today "borrow, reject, or reinvent federal and state legal ideas or

32. *See* Reese, *supra* note 20, at 584.

33. United States v. Wheeler, 435 U.S. 313, 322-23 (1978).

34. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

35. *See* Reese, *supra* note 20, at 567.

36. *See Wheeler*, 435 U.S. at 323; *see also id.* at 329-30 (holding that a federal prosecution following a tribal prosecution does not violate the Double Jeopardy Clause because a tribe prosecutes "as an independent sovereign, and not as an arm of the Federal Government").

37. Reese, *supra* note 20, at 569.

38. Riley, *supra* note 8, at 93.

39. Reese, *supra* note 20, at 559.

40. *But see id.* at 561-62 (arguing that "tribes should not need to prove their value to warrant mainstream attention"). Reese writes:

> Rather than assuming that tribal governments have nothing to offer or are simply too different or small to belong in the mainstream of American law, I propose we do the opposite. We assume that tribal governments are simply governments like any other. We engage with tribal governments and tribal law with minds open to previously impossible ideas and observations.

Id. at 578.

structures" in order to protect their cultural property.[41] Tribes can look outward to state or federal law,[42] inward to ancient customs and traditions,[43] or a combination of the two.[44]

Some tribes "selectively embrac[e] Western intellectual property laws."[45] As of 2020, thirty-one tribes protect burial grounds as cultural property by integrating the federal Native American Graves Protection and Repatriation Act into tribal code,[46] seven tribes include a "tribal variation of copyright law,"[47] and four tribes "reference 'trademark' law in their tribal codes."[48] By contrast, other tribes "maintain aboriginal intellectual property laws and policies, many of which likely predate the United States."[49] For example, in a land use code governing tribal burial grounds, the Little Traverse Bay Band of Odawa Indians incorporated the traditional concept of "the Circle of Life" to

41. *Id.* at 584; *see* Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1031 (1995) (noting that some legal structures, like tribal courts, "originated as social control mechanisms imposed by the [Bureau of Indian Affairs] to force tribal people to assimilate as part of the policy of detribalization of the late nineteenth and early twentieth centuries").

42. *See, e.g.*, COLO. RIVER INDIAN TRIBES HUM. & CULTURAL RSCH. CODE ch. 7, § 1-702 (2020), https://perma.cc/4JU7-29BU [hereinafter CRIT CODE] ("CRIT shall enforce federal trademark rights afforded under the Lanham Act, 15 U.S.C. §§ 1051-1127, and common law trademark rights.").

43. *See* Riley, *supra* note 8, at 83.

44. *Id.* at 83-84 (explaining that, in addition to looking to their own customs, "[tribes] may look, for example, to other tribes, to international human rights or Indigenous rights law, to federal law, to states, or elsewhere in developing their tribal laws" (footnotes omitted)).

45. *Id.* at 123 (noting that tribes "still ensur[e] that they center tribal custom and tradition"). Riley's research "revealed many cases of tribal intangible property protection based entirely on tribal custom and tradition, but with similar numbers of references to places where tribes draw from or even implement Western intellectual property law." *Id.*

46. *Id.* at 107, 113 n.186; *see* Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified as amended at 18 U.S.C. § 1170 and 25 U.S.C. §§ 3001-3013).

47. *Id.* at 127 (Cherokee Nation, Colorado River Indian Tribes (CRIT), Ho-Chunk, Mohegan Tribe, Pascua Yaqui, Pueblo of Acoma, and Yurok Tribe). The Yurok Tribe references the Copyright Act. YUROK TRIBE TRIBAL CODE tit. 14, ch. 14.20, § 14.20.020 (2023), https://perma.cc/XB9P-367V (citing Copyright Act of 1976, 17 U.S.C. § 101).

48. *Id.* at 127-28 (CRIT, Ho-Chunk, Mohegan, and Pascua Yaqui). Of those four, only CRIT explicitly references the Lanham Act. CRIT CODE, *supra* note 42, ch. 7, § 1-702 (citing Lanham Act, 15 U.S.C. §§ 1051-1127).

49. Reed, *supra* note 5, at 316; *see also id.* at 373 ("Indigenous communities have—often since time immemorial—maintained and exercised their fundamental powers to determine when and how expression should be owned and circulated.").

govern decisions about how to construct new grave sites.[50] The Pueblo of Pojoaque "devised its policies around repatriation to align with tribal culture and religion"[51] and prohibited repatriated ancestors from being exhibited, photographed, or physically numbered.[52]

Second, tribal law innovates by crafting solutions to problems facing America's other sovereigns.[53] Tribes experiment in jury selection,[54] separation-of-powers law,[55] absentee balloting,[56] consumer finance protection, child welfare, criminal justice, and environmental law.[57] The states have long been viewed as policy laboratories,[58] and it is time for tribes to be viewed in the same light. Accordingly, the study of tribal law would "add hundreds of additional laboratories for American governance."[59] Indeed, as Part II explains, tribal innovations in intellectual and cultural property already suggest solutions to at least two unanswered questions at the federal level.

Tribal lawmaking, therefore, is tribal sovereignty in action.[60] The exercise of that fundamental power is worthy of study, especially in the domains of intellectual and cultural property.

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50. Riley, *supra* note 8, at 115 (quoting LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS WAGANAKISING ODAWAK TRIBAL CODE OF L. tit. 8, ch. 7, § 8.702(D) (2022), https://perma.cc/8GWZ-XDA4).

51. *Id.*

52. *Id.* at 115-16 (citing PUEBLO OF POJOAQUE L. & ORD. CODE § U-4(l)(2)(A) (2019), https://perma.cc/SYD8-VHVY).

53. *See* Reese, *supra* note 20, at 584 ("Tribal laws innovate, maintain precolonial laws, and also borrow, reject, or reinvent federal and state legal ideas or structures.").

54. *See id.* at 586-94 (noting that the states may benefit from implementing similar innovations).

55. *See id.* at 595-612 (discussing the Navajo Nation's innovative approach).

56. *See id.* at 612-17. For example, because two-thirds of the Citizen Potawatomi Nation resides outside of Oklahoma, the Nation created a legislature with eight of its sixteen members "chosen from new legislative districts drawn to represent citizens who live outside the state of Oklahoma." *Id.* at 613-14. This innovation improved overall voting turnout and led to "geographic participation parity, with out-of-state voters composing approximately two thirds of the vote." *Id.* at 615-16. The Nation's experimentation offers a solution to low voter turnout in the United States: Only 6.9% of U.S. citizens living abroad voted in the 2016 presidential election. *Id.* at 618.

57. *See id.* at 571-72.

58. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

59. Reese, *supra* note 20, at 621.

60. Riley, *supra* note 8, at 144 ("The development, implementation, and enforcement of tribal law are not merely academic. They are acts of living sovereignty . . . .").

B. The Connection Between Trademarks and Tribal Sovereignty

Tribal sovereignty likely does not call trademarks to mind.[61] But trademark law implicates tribal sovereignty in three important ways. First, trademark law fosters economic development. Second, trademarks help tribes control the usage of Native names and imagery, which aids their ability to preserve and promote their cultural values. Third, the lack of federal preemption in trademark law enables tribes to broadly legislate and experiment.

A trademark is a "word, name, symbol, or device, or any combination thereof" used "to identify and distinguish" an entity's goods "from those manufactured or sold by others" and "to indicate the source of the goods."[62] Beyond words or logos, trademark law also protects colors, shapes, sounds, fragrances, and flavors.[63] As long as a mark identifies source, "nearly *anything* can be the subject of a trademark registration."[64] Trademarks can also "signify that all goods bearing the trademark are of an equal level of quality" and function as a form of advertising.[65]

In other words, trademarks allow a consumer to make informed buying decisions.[66] When a consumer sees the name Tylenol or a Nike swoosh, those marks enable her to make certain assumptions about the product's origin and quality.

Three Native-owned marks demonstrate the core functions of trademarks.

- The Navajo Nation, in its role as a federally recognized tribe and via its tribal enterprises, currently owns more than one hundred federal trademarks.[67] The marks represent the breadth of the Nation's

61. *See supra* notes 1-5 and accompanying text (noting that the concept of tribal sovereignty usually brings to mind core governmental functions, such as courts systems and political membership, rather than intellectual property).

62. 15 U.S.C. § 1127.

63. 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 3:1 (West 2023).

64. Lisa Greenwald-Swire, *Branding Social Movements: Why Attempts to Trademark #MeToo, Black Lives Matter, and Other Movements Are Likely to Fail and Could Harm Core Brands*, FISH & RICHARDSON: BLOG (Feb. 5, 2018), https://perma.cc/XVL8-VP9L.

65. 1 MCCARTHY, *supra* note 63, § 3:2.

66. *See* Christopher Buccafusco & Mark A. Lemley, *Functionality Screens*, 103 VA. L. REV. 1293, 1341 (2017) ("Trademark law . . . [is designed] to protect consumers from confusion by cementing the source-identifying function of marks. Allowing consumers to be comfortable in identifying brands as associated with specific products in turn allows for a functioning market free of deception." (footnote omitted)).

67. A January 2024 search using the Patent and Trademark Office's Trademark Electronic Search System with the owner name "Navajo Nation" found 148 live registered and pending marks that have the Nation as their owner, either in its role as a federally recognized tribe or via one of the Nation's tribal enterprises (e.g., Navajo Nation Gaming

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economic ventures, ranging from Navajo Petroleum[68] to Fire Rock Casino.[69] Moreover, the Nation's trademarks allow it to preserve its tribal identity. For instance, when the retailer Urban Outfitters began selling clothes branded as "Navajo," the Nation sued for trademark infringement.[70] The Nation argued that because the term "Navajo" was "immediately recognized and associated with the Navajo Nation," the name was "an identifier of source."[71] Consequently, it argued that Urban Outfitters' "sale of products with significantly lower quality than [the Nation's] own authentic products will likely harm the reputation of the NAVAJO name and mark."[72]

- Choctaw Defense, a wholly owned corporation of the Choctaw Nation of Oklahoma, manufactures military equipment.[73] By obtaining federal trademark protection, the Nation ensured that the name "Choctaw Defense" would be associated with high quality workmanship,[74] which aligns with the quality control function of trademarks.[75]
- The Intertribal Agricultural Council promotes the "Made/Produced by American Indians" mark for Indian-made food products[76] that range from wild rice to beef to smoked fish.[77] The Council's label is a "certification mark," a particular kind of trademark indicating that the goods satisfy third-party standards.[78] The "Made/Produced by

Enterprise). *See Trademark Search*, U.S. PAT. & TRADEMARK OFF., https://perma.cc/VCD9-WYAQ (archived Jan. 14, 2024) (to locate, select "View the live page").

68. NAVAJO PETROLEUM, Registration No. 2,328,690, https://perma.cc/3N9C-6P84 (archived Feb. 19, 2024).

69. FIRE ROCK CASINO, Registration No. 5,064,457, https://perma.cc/PF5E-3VRK (archived Feb. 19, 2024).

70. *See* Navajo Nation v. Urb. Outfitters, Inc., 935 F. Supp. 2d 1147, 1153-55 (D.N.M. 2013).

71. *Id.* at 1153.

72. *Id.* at 1155. The Nation also argued that the retailer's use of the term "Navajo" on various items, such as hip flasks, was "contrary to Navajo Nation's principles because it has long banned the sale and consumption of alcohol within its borders" and "does not use its mark in conjunction with alcohol." *Id.* at 1154-55. In this way, the Nation also sought to protect its cultural identity and norms.

73. *See* Zark, *supra* note 26, at 544; CHOCTAW DEFENSE, Registration No. 4,583,831, https://perma.cc/DAX7-BCZY (archived Feb. 19, 2024).

74. *See* Zark, *supra* note 26, at 543-44.

75. *See* 1 MCCARTHY, *supra* note 63, § 2:4.

76. *IAC American Indian Foods Producer Directory*, INTERTRIBAL AGRIC. COUNCIL (Sept. 4, 2020), https://perma.cc/96GY-TKBS.

77. INTERTRIBAL AGRIC. COUNCIL, OFFICIAL GUIDE ON THE USE OF THE CERTIFIED AUTHENTIC MADE/PRODUCED BY AMERICAN INDIANS TRADEMARK 9 (n.d.), https://perma.cc/YAW2-DFC9.

78. *See* 3 MCCARTHY, *supra* note 63, § 19:91 ("One who sees such a certification mark on a product or in connection with a service is entitled to assume that that product or

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American Indians" mark originated in the early 1990s because of concerns that non-Indian producers were falsely labeling products "Indian-made."[79] The Council describes the mark as a way to grow market share and reach more consumers,[80] thereby serving many functions of trademarks: advertising, distinguishing goods, and signifying quality.

The first connection between trademarks and tribal sovereignty is economic. Trademarks are key to economic development, which in turn is key to tribal sovereignty.[81] Tribes rarely decide to tax their own members and have limited authority to tax non-Indians, so tribal governments often rely on other sources of revenue.[82] And because trademarks are important to brand protection[83]—which can aid market growth[84]—businesses operated by tribes must know how to use trademark law to their economic advantage. Indeed, tribes are adept at registering and defending their marks:

- Tribes federally register the names of their businesses. Examples include "Choctaw Ranches," owned by the Choctaw Nation of Oklahoma, for agricultural products;[85] "Talking Cedar," a pending mark owned by the Confederated Tribes of the Chehalis Reservation[86] for the first tribal-owned distillery in the United

service in fact meets whatever standards of safety or quality have been set up and advertised by the certifier."). Items bearing the "Made/Produced by American Indians" trademark are certified by the Intertribal Agriculture Council. *See* INTERTRIBAL AGRIC. COUNCIL, *supra* note 77, at 7.

79. *IAC American Indian Foods Producer Directory*, *supra* note 76.

80. *Id.* The trademark is also meant to "serve as an expression of the tradition, culture, and pride found in Indian Country for the Native American products" that bear it. INTERTRIBAL AGRIC. COUNCIL, *supra* note 77, at 6.

81. *See* COHEN'S HANDBOOK, *supra* note 4, § 21.01 ("This linkage between self-determination and economic development echoes recent thinking on development generally, which recognizes the importance of developing sovereigns directing their own development."); *see also* Riley, *supra* note 8, at 129 (noting the "deep interest" tribes have in protecting their tribal names for commercial purposes, as evidenced by increasing litigation in this area).

82. Reese, *supra* note 20, at 568 n.63 ("Though tribes are able to tax members, they rarely do, and instead rely on tribal economic ventures."); *id.* at 591 ("[T]ribes' taxing authority over non-Indians is limited (and rarely exercised) . . . ."); COHEN'S HANDBOOK, *supra* note 4, § 8.04[2][b].

83. *See* Kathryn Park, *The Path to Protection—Good Trademark Strategies Start at the Beginning*, WIPO MAG., Dec. 2020, at 45, 45, https://perma.cc/NT23-KCGS.

84. *See* INTERTRIBAL AGRIC. COUNCIL, *supra* note 77, at 6.

85. CHOCTAW RANCHES, Registration No. 7,255,312, https://perma.cc/PH9D-TFH9 (archived Feb. 19, 2024).

86. U.S. Trademark Application Serial No. 97/595,021 (filed Sept. 16, 2022), https://perma.cc/MH3Z-H3GD (archived Feb. 19, 2024).

States;[87] and "Native Nations Cannabis," a pending mark owned by the Flandreau Santee Sioux Tribe[88] for the first tribal-owned cannabis dispensary in South Dakota.[89]

- Tribes that depend on casino revenue use trademark law to offensively protect the brand names of their casinos. In Minnesota, the Shakopee Mdewakanton Sioux Community, which operates Mystic Lake Casino, successfully opposed the trademark registration of "Mystique" for a nearby Iowa-based casino.[90] In Arizona, counsel for the Pascua Yaqui Tribe actively monitors whether other businesses might infringe on its Casino Del Sol brand.[91]
- Alternatively, tribal businesses occasionally defend against trademark infringement claims. For example, Philip Morris sued the Yakama Nation-owned King Mountain Tobacco Company, alleging trademark infringement and dilution.[92] Similarly, the Picayune Rancheria of the Chukchansi Indians of California defended against trademark infringement claims stemming from a dispute with a business vendor.[93]

Second, trademark law has the potential to give tribes greater control over their own names and iconographies. Trademarks have both "expressive and economic dimensions."[94] For instance, Nike's "Just Do It" and Gillette's "The Best a Man Can Get" aim to evoke certain emotions that will in turn motivate

87. *About the Spirits*, TALKING CEDAR DISTILLERY, https://perma.cc/NYD3-YBGU (archived Feb. 19, 2024).

88. U.S. Trademark Application Serial No. 97/419,333 (filed May 19, 2022), https://perma.cc/M2WE-6TT9 (archived Feb. 19, 2024).

89. *See* Jordyn Henderson, *Tribe Becomes South Dakota's First Medical-Marijuana Seller*, SDPB RADIO (July 1, 2021, 6:03 PM CDT), https://perma.cc/X2CR-QBJY.

90. Shakopee Mdewakanton Sioux Community v. Dubuque Racing Ass'n, 2016 WL 4140923, at *1, *10-11 (T.T.A.B. July 11, 2016). Another example is *Mohegan Tribe of Indians of Connecticut v. Mohegan Tribe & Nation, Inc.*, 769 A.2d 34 (Conn. 2001). Although the Connecticut Supreme Court eventually rejected the trade name infringement claims made by the federally recognized Mohegan Tribe of Indians of Connecticut (which operated the Mohegan Sun casino) against the Mohegan Tribe and Nation, Inc. (which derived most of its revenue from the sale of arts and crafts), *id.* at 36-37, 39, the suit is an example a tribe's proactive use of litigation to protect the name of its casino.

91. Telephone Interview with Virjinya Torrez, Assistant Att'y Gen., Pascua Yaqui Tribe (Nov. 4, 2023); Telephone Interview with Amanda Sampson Lomayesva, Gen. Couns., Casino Del Sol Resort (Dec. 20, 2023).

92. Philip Morris USA, Inc. v. King Mountain Tobacco Co., 569 F.3d 932, 934-35 (9th Cir. 2009) (finding that the tribal court did not have jurisdiction over the trademark dispute beyond the reservation).

93. Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1177-78 (10th Cir. 2010).

94. Katyal, *supra* note 23, at 1606.

a consumer to buy a certain product.[95] But the expressive power of trademarks has also been wielded at the expense of Indigenous communities.[96] Car companies, cigarette brands, and sports teams have long profited off of racist and exploitative trademarks,[97] "perpetuat[ing] inaccurate misconceptions about American Indian culture."[98] Such marks dehumanized Native Americans by reinforcing an ahistorical and contextless narrative of Indigenous people.[99] Despite their recent progress to eliminate some blatantly offensive brand names,[100] tribes still face uphill battles to regain control over non-Indigenous uses of their names and iconography.[101]

The story surrounding the Zia Pueblo's sun symbol demonstrates the ways in which a tribe's reclaiming of imagery through trademark implicates tribal sovereignty. The symbol—"a circle with groups of rays pointing in the four

95. *See* Miranda D. Means & Jeanne M. Heffernan, *What's in a Name? Trademarks as Expressive Works*, N.Y.L.J. (Nov. 29, 2019, 11:30 AM), https://perma.cc/7JTJ-D6WU.

96. *See* Newton, *supra* note 41, at 1008 ("But Indian people are not only subject to degrading images that would be unacceptable if applied to other minority groups; their cultural and religious symbols and names are also mined by commerce for images to evoke emotions that will sell products and services.").

97. Angela R. Riley, *"Straight Stealing": Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 76 (2005) (listing Jeep Cherokee, Crazy Horse Malt Liquor, and the former Washington football team as examples of how "commonplace [it is] to commodify Indian culture"). Riley and Carpenter add further context by chronicling how "U.S. law and policy has long facilitated . . . the widespread practice by which non-Indians claim and use Indian resources for themselves, often without attribution, compensation, or permission, causing harm and loss to Indian people." *See* Riley & Carpenter, *supra* note 15, at 869-91.

98. *Summary of the APA Resolution Recommending Retirement of American Indian Mascots*, AM. PSYCH. ASS'N, https://perma.cc/USY5-JPWZ (last updated July 2021).

99. *See* Newton, *supra* note 41, at 1004.

100. *See, e.g.*, David Waldstein, *For Opponents of Native American Nicknames, 2020 Has Brought Hope*, N.Y. TIMES (Dec. 18, 2020), https://perma.cc/2WPS-W35F; Christine Hauser, *Maine Just Banned Native American Mascots. It's a Movement That's Inching Forward.*, N.Y. TIMES (May 22, 2019), https://perma.cc/BY75-NZG6; Christine Hauser, *Land O'Lakes Removes Native American Woman from Its Products*, N.Y. TIMES (updated Sept. 27, 2020), https://perma.cc/KJX3-8VTC; *see also* Riley, *supra* note 8, at 77-78 (noting Indigenous peoples' recent efforts to challenge "marks seemingly indelibly ingrained in the American fabric").

101. *See, e.g.*, Angela R. Riley, Sonia K. Katyal & Rachel Lim, Opinion, *The Jeep Cherokee Is Not a Tribute to Indians. Change the Name.*, WASH. POST (Mar. 7, 2021, 7:00 AM EST), https://perma.cc/PD8V-XP5H (explaining that Jeep's "modest gesture" of considering the Cherokee Nation's request to change the name of its Cherokee vehicle brand is a notable shift following years of the Nation's protest); Taylor Telford, *Cherokee Nation to Jeep: Stop Using the Tribe's Name*, WASH. POST (Feb. 22, 2021, 3:41 PM EST), https://perma.cc/Q9EU-Q3C4 ("The Cherokee Nation has repeatedly expressed frustration with Jeep's use of its name, but [its request that Jeep rename the vehicle] marks its first direct request for a change.").

cardinal directions"—is sacred to the Zia.[102] Yet the symbol appears across New Mexico, from the state flag to license plates to local businesses, almost always without the Zia's consent.[103] The Zia fought to reclaim the symbol throughout the 1990s.[104] After formally opposing trademark applications in front of the Trademark Trial and Appeal Board,[105] the Zia tribe reevaluated its strategy and decided to adopt an informal licensing scheme.[106] Companies like Southwest Airlines would approach the Zia, ask for permission to use the sun symbol, and, in exchange for using the symbol, the company would contribute to the tribe's scholarship fund.[107] Instead of fighting for a total ban on external uses of the symbol, the Zia ultimately decided to permit some conditional uses.[108] With each strategic choice, the tribe, as a sovereign government, made decisions about how and when to use trademark law to reclaim its sacred imagery.

Third, because federal trademark law generally does not preempt state trademark law,[109] tribes can legislate tribal trademark rights broader than federal ones.[110] This legislative capability serves as a potentially powerful assertion of tribal sovereignty.

102. Stephanie B. Turner, Note, *The Case of the Zia: Looking Beyond Trademark Law to Protect Sacred Symbols*, 11 CHI.-KENT J. INTELL. PROP. 116, 116 (2012).

103. *Id.* at 116-17.

104. *Id.* at 128-31.

105. *Id.* at 128-29; *see also id.* at 124-25 (explaining that, although the Zia are unable to "obtain a registered trademark in their symbol, because it appears in the New Mexico flag and Section 2(b) [of the Lanham Act] prohibits the registration of such symbols," the tribe can "defensively block [New Mexico] from registering a symbol or . . . cancel an already registered trademark").

106. *Id.* at 142.

107. *Id.* at 138-39.

108. *Id.* at 142. The Pueblo also engaged in sovereign-to-sovereign negotiations with the state of New Mexico, asking for reparations for the state's decades-long, non-consensual use of the sun symbol on the state flag. *Id.* at 141.

109. 3 MCCARTHY, *supra* note 63, § 22:2 ("In almost all cases, the federal Lanham Act and state statutory and common law trademark law can peacefully co-exist. Only in rare cases will the federal Lanham Act preempt state law.").

110. *See infra* Part II.B.

To be sure, trademark law, like patent and copyright law,[111] is dominated by federal law.[112] The Lanham Act "shift[ed] what would otherwise be common law litigation to the federal sphere"[113] and made federal trademark registration so dominant that state registration now carries little value.[114] Yet the Act developed, in part, from state law.[115]

In the nineteenth century, trademarks were acquired under state common law and were subsequently fortified by state statute.[116] Before Congress passed the Act in 1946, trademarks were much more a species of state statutory law and judge-made common law than federal statutory law.[117] Consequently, several core concepts of the Act—such as the idea that use, not registration, determines trademark rights—originated in state common law.[118]

Federal trademark law, due to its lack of preemptory power, affords tribes a unique opportunity to experiment.[119] And such experimentation could be

111. *See, e.g.*, Paul R. Gugliuzza, *Patent Law Federalism*, 2014 WIS. L. REV. 11, 12 (2014) (noting that "[p]atents are usually thought to be a concern of the federal government, not state governments" and discussing Congress's extension of "exclusive federal jurisdiction" to patent disputes); 1 HOWARD B. ABRAMS & TYLER T. OCHOA, LAW OF COPYRIGHT § 6:1 (West 2023) ("One of the principal purposes of the 1976 Copyright Act was to establish a uniform regime of federal protection for copyrightable works, replacing the prior system of having federal protection for published works and state law protection for most unpublished works.").

112. *See* Lee Ann W. Lockridge, *Abolishing State Trademark Registrations*, 29 CARDOZO ARTS & ENT. L.J. 597, 604 (2011) ("Federal law finally ascended to prominence with the passage of the Lanham Act in 1946, and it assumed its modern, (almost)-all-encompassing status in the 1970s simply through increased practical reliance rather than statutory revision." (footnote omitted)).

113. *Id.* at 605.

114. *Id.* at 641-42 (noting that "trademark owners obtain virtually no substantive or remedial benefit in litigation by virtue of the vast majority of state registrations").

115. *Id.* at 599 ("Trademark protection developed in the United States from state common law.").

116. *See id.* at 615 ("State statutory rights began bolstering common law rights in the latter half of the nineteenth century."); *see also* Am. Trading Co. v. H.E. Heacock Co., 285 U.S. 247, 258 (1932) ("[The Federal Trade-Mark Act of 1905] did not attempt to create exclusive substantive rights in marks . . . [because] [t]he acquisition of such property rights in trade-marks rested upon the laws of the several States.").

117. *See* Mark P. McKenna, *Trademark Law's Faux Federalism*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW 288, 290-95 (Shyamkrishna Balganesh ed., 2013).

118. *See, e.g.*, *id.* at 302, 305-06 (noting the substantive overlap between state and federal trademark law).

119. By contrast, federal patent law and federal copyright law generally *do* preempt state law, leaving much less room for tribal law experimentation. *See* PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 17.1 (Wolters Kluwer 2023) (explaining how Section 301(a) of the 1976 Copyright Act preempts state law); Gugliuzza, *supra* note 111, at 12 ("The federal Patent Act preempts state laws offering patent-like rights for inventions not

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sovereignty-affirming if it causes America's other sovereigns to notice, interact with, or adopt tribal innovations.

Trademark law, therefore, gives tribes space to govern in areas of particular importance, like economic development and the use of tribal names and iconography. Those economic and expressive functions, as well as a lack of federal preemption, render tribal trademark law a powerful assertion of tribal sovereignty.

C. Four Examples of Tribal Trademark Law

In order to "ensure [a] continued Indigenous existence," tribes are increasingly legislating their own intellectual and cultural property laws.[120] This Note introduces four tribes with references to trademark rights in their laws: the Ho-Chunk Nation, the Pascua Yaqui Tribe, the Colorado River Indian Tribes (CRIT), and the Mohegan Tribe.[121] Even though they are a small subset of all 574 federally recognized tribes,[122] and even if the references to trademark rights are brief, the following four laws show the connection between trademarks and tribal sovereignty and illustrate how America's other sovereigns should interact with tribal legal innovations.

1. Ho-Chunk Nation

With its administrative center in Black River Falls, Wisconsin, the Ho-Chunk Nation has more than 7,800 members.[123] The Nation has four branches

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patentable under federal law." (citing Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 156-57 (1989))).

120. *See* Riley, *supra* note 8, at 80. Between 2005 and 2020, the number of tribes with such laws grew from 27 to 134. *Id.* at 102.

121. *See id.* at 127-28. Compared to Riley, Shabalala conducted a more limited survey of tribal intellectual property laws in 2018. *See* Shabalala, *supra* note 19, at 1135. His results identified a different subset of tribes using trademark law than Riley's 2020 results. *Id.* at 1139-44. I choose to rely on Riley's study because she examined all 574 federally recognized tribes, built upon her past work—namely, her original 2005 survey—and identified the four tribes with explicit trademark protections. *See* Riley, *supra* note 8, at 97-98, 127-28.

122. While these are the only tribes with explicit references to "trademark," Riley, *supra* note 8, at 127-28, it is possible other tribes have legislated protections that replicate trademark law. For example, the Cherokee Nation has its own "Truth in Advertising for Native Art" law that creates penalties for nonmember artists who label their work as affiliated with the tribe. CHEROKEE NATION TRIBAL CODE tit. 31, ch. 4 (2019), https://perma.cc/97UU-4GQN. Although not framed as trademark legislation, the law replicates the source-identifying functionality of trademarks. *See also* Riley, *supra* note 8, at 129.

123. Jonathan Shipley, *Ho-Chunk Seek to Preserve Endangered Language Through Recordings of Elders*, WIS. STATE J. (Aug. 1, 2023), https://perma.cc/32W7-RR36.

of government—executive, legislative, judicial, and general council—as well as a separate traditional government based on a chief and clan system.[124] The legislature has four legislative districts: three inside Wisconsin and one outside Wisconsin.[125]

By the early 2020s, there were only approximately fifty native speakers of Hoocąk, the Nation's original language.[126] The Department of Heritage Preservation leads the Nation's language preservation efforts,[127] including publishing hard-copy dictionaries, digital dictionaries, and e-learning apps.[128]

In 2015, the Ho-Chunk Nation enacted its Language and Culture Code.[129] The Preamble illustrates the importance of the legislation: "[T]his Code shall . . . reaffirm our constitutionally mandated commitment to the promotion, preservation, [and] enhancement of our language, culture and traditions as a blessing for our future generations."[130] Drawing from international law, the Code creates a right to mother-tongue education and commits to funding Hoocąk immersion programs for both children and adults.[131] The Code also aims to raise the prestige of Hoocąk and ensure that it is passed down to future generations.[132]

As part of its preservation efforts, the Nation legislated trademark protection for Hoocąk language materials. The Nation defines a trademark as any "recognizable and registered sign, design or expression which identifies products or services of the Ho-Chunk Nation."[133] Although phrased differently than the Lanham Act's definition of a trademark, the Nation's definition contains the same core elements: (1) a tangible symbol, (2) use by the

124. *About Ho-Chunk Nation*, HO-CHUNK NATION, https://perma.cc/9HNY-6NR5 (archived Jan. 13, 2024).

125. *Id.*

126. The Language Conservancy, *Rapid Word Project—Ho-Chunk Language*, at 00:15-00:22, YOUTUBE (Dec. 8, 2022), https://perma.cc/24YF-EFUM (to locate, select "View the live page"). *See also* Shipley, *supra* note 123.

127. *See Heritage Preservation*, HO-CHUNK NATION, https://perma.cc/3E8B-KZM9 (archived Jan. 13, 2024).

128. *See* Sarah Volpenhein, *Ho-Chunk Nation Launches Online Dictionary to Breathe New Life into Endangered Ho-Chunk Language*, MILWAUKEE J. SENTINEL (Aug. 30, 2022, 6:00 AM CT), https://perma.cc/SMT4-HTW2; Katrina Lim, *Ho-Chunk Nation Creating App to Preserve Language*, WXOW (updated Oct. 9, 2023), https://perma.cc/PS4J-ECK3.

129. HO-CHUNK NATION CODE tit. 7, sec. 4 (2022), https://perma.cc/NGT7-DSWD [hereinafter HO-CHUNK CODE].

130. *Id.* ch. I, § 2.

131. *See id.* ch. I, § 3.

132. *See id.*

133. *Id.* ch. III, § 6(32).

manufacturer or source of the good or service, and (3) purpose of identifying the source.[134]

The Code expresses the intention for the Ho-Chunk Nation Legislature to "obtain and maintain all legal trademark[s] and copyrights" in:

> a. All printed publications and documents including books, photographs, photo collections, oral history collections, orthographies, language/grammar guides, teacher guides, curriculum materials, and, masters and doctoral theses obtained from the scattered regions where Ho-Chunk Nation tribal members reside.
>
> b. Film, video, audio and photography productions.[135]

A search of the Trademark Electronic Search System in December 2023 indicates that the Nation owns five live trademarks—none of which involve language materials.[136]

Alternatively, the Nation could choose to operate its own tribal trademark registry. Like the states, tribes are equipped to run their own governmental registries.[137] Indeed, a tribal trademark registry would be a notable exercise of

134. *See supra* note 62 and accompanying text; 1 MCCARTHY, *supra* note 63, § 3:1 ("The requirements for qualification of a word or symbol as a trademark can be broken down into three elements: (1) *the tangible symbol*: a word, name, symbol or device or any combination of these; (2) *the type of use*: actual use in trade of the symbol as a mark by a seller of goods or services; (3) *the purpose*: to identify and distinguish the seller's goods from goods made or sold by others.").

135. HO-CHUNK CODE, *supra* note 129, tit. 7, sec. 4, ch. IX, § 28.

136. The Nation's five live marks cover casino services, the tribal seal, convenience stores, and campground facilities. HO-CHUNK, Registration No. 2,741,327, https://perma.cc/7M8Z-CVK4 (archived Feb. 19, 2024); THE GREAT SEAL OF THE HO-CHUNK NATION, Registration No. 2,666,349, https://perma.cc/XB4E-NTC6 (archived Feb. 19, 2024); WHITETAIL CROSSING, Registration No. 3,850,283, https://perma.cc/L984-6LCM (archived Feb. 19, 2024); HO-CHUNK GAMING, Registration No. 4,016,141, https://perma.cc/J25N-TQG4 (archived Feb. 19, 2024); HO-CHUNK RV RESORT & CAMPGROUND, Registration No. 4,933,986, https://perma.cc/9T4G-SNAZ (archived Feb. 19, 2024). Except for HO-CHUNK RV RESORT & CAMPGROUND, all of the Nation's trademarks predate the passage of the Code.

137. *See, e.g.*, *2023 Tribal Election Guide*, CHOCTAW NATION (June 1, 2023), https://perma.cc/EZ6A-UC25 (voting registry); Susan Stanich, *As Tribes Assert Their Sovereignty with License Plates, Some States Resist*, WASH. POST (Nov. 25, 1990), https://perma.cc/G8BM-YBLB (license plate registries); *see also* Donovan Quintero, *Firearm Registration Bill Stirs Controversy*, NAVAJO TIMES (Apr. 20, 2017), https://perma.cc/H89W-536T (describing the Navajo Nation's effort to have people living on the reservation register guns with the Nation's police).

sovereignty.[138] Even so, any such registry—just like state trademark registries—would have to contend with the dominance of federal registration.[139]

* * *

The next three tribes—Pascua Yaqui, CRIT, and Mohegan—all legislated trademark rights in the realm of data sovereignty, which is the concept that tribes should be able to control the collection, ownership, and use of data about themselves and their members.[140] To that end, each of the aforementioned tribes passed their own research protection laws to govern how and when outside researchers can collect data from tribal members.

2. Pascua Yaqui

Based near Tucson, Arizona, the Pascua Yaqui Tribe has approximately 21,000 members and an eleven-person tribal council.[141] The Tribe maintains a robust government, with more than twenty administrative and legal departments ranging from the Office of the Attorney General to a Social Services Department.[142]

Trademarks are important to the Pascua Yaqui Tribe. Economically, the Tribe actively protects the marks of its various businesses, notably its Casino Del Sol brand.[143] Counsel for the Tribe sees a unique connection between a well-managed trademark and brand portfolio and partnerships with other sovereigns.[144] For example, the Tribe's innovative Enhanced Tribal Card partnership with the Department of Homeland Security was made possible, in

138. *Cf.* Stanich, *supra* note 137 ("The greater value of tribal [license] plates, however, is that they are a public declaration and practical exercise of tribal government sovereignty, said Roger Jourdain, former Red Lake tribal chairman who developed the license-plate idea in the 1950s.").

139. *See* Lockridge, *supra* note 112, at 605 (arguing that the "dominance of federal trademark law over state law" means federal, not state, registration "is the only rational choice"); *see also id.* at 641-42 ("[T]rademark owners obtain virtually no substantive or remedial benefit in litigation by virtue of the vast majority of state registrations."); Telephone Interview with Virjinya Torrez, *supra* note 91 (observing that it might be difficult for non-tribal entities to recognize a tribal trademark registry).

140. *See* Rebecca Tsosie, Essay, *Tribal Data Governance and Informational Privacy: Constructing "Indigenous Data Sovereignty,"* 80 MONT. L. REV. 229, 230 (2019).

141. *Enrollment*, PASCUA YAQUI TRIBE, https://perma.cc/T4HY-97RK (archived Jan. 13, 2024); *Council & Administration*, PASCUA YAQUI TRIBE, https://perma.cc/5J4U-LQR8 (archived Jan. 13, 2024).

142. *Departments*, PASCUA YAQUI TRIBE, https://perma.cc/4DVB-9J5Z (archived Jan. 13, 2024).

143. Telephone Interview with Virjinya Torrez, *supra* note 91; Telephone Interview with Amanda Sampson Lomayesva, *supra* note 91.

144. Telephone Interview with Virjinya Torrez, *supra* note 91.

part, by the Tribe's reliable brand.[145] The Tribe encountered new trademark considerations as a result of their recent partnership with the University of Arizona. The University opened a "microcampus" adjacent to the Tribe's reservation and used the phrase "Huya Misiim" (the Yaqui translation of "Wildcats," the University's mascot) on the University's signage and merchandise.[146] Hoping to maintain control over that branding and to protect future revenue streams, the Tribe pursued trademark registration of the translation.[147]

Despite the import of trademarks to the Tribe, the only reference to trademark in Pascua Yaqui law appears in their 2008 Research Protection Ordinance.[148] The Ordinance aims "[t]o ensure that researchers recognize Tribal control of research activities and that the Tribe owns all data and information generated or produced by such research."[149] Under the Ordinance, any research proposal must "demonstrate how the participants and the Tribe will be given a fair and appropriate return for cooperation in the research."[150] "[F]air and appropriate return" includes royalties, monetary compensation, and copyright, patent, and trademark rights.[151]

To date, the Tribe has yet to enter into a research agreement where trademark rights constitute "fair and appropriate return for cooperation in the research."[152] But counsel for the Tribe acknowledges that the Ordinance would allow for trademark rights to vest with the tribe in the right circumstance.[153]

145. *Id.*; *see* Mark Fogarty, *Enhanced Tribal Card Can Be Used Instead of Passport*, ICT NEWS (updated Sept. 13, 2018), https://perma.cc/8XM3-XRJ7; Press Release, Off. of the Press Sec'y, U.S. Dep't of Homeland Sec., Department of Homeland Security and the Pascua Yaqui Tribe Announce a Historic Enhanced Tribal Card (July 30, 2010), https://perma.cc/X5ZZ-KDD7.

146. Telephone Interview with Virjinya Torrez, *supra* note 91; Kyle Mittan, *UArizona Opens Its First Tribal Microcampus to Serve the Pascua Yaqui Tribe*, UNIV. OF ARIZ.: NEWS (Sept. 7, 2022) https://perma.cc/Y7SJ-R8Y5; *see also Wilbur and Wilma*, UNIV. OF ARIZ.: ALUMNI, https://perma.cc/N72G-GWWQ (archived Jan. 19, 2024).

147. Telephone Interview with Virjinya Torrez, *supra* note 91; U.S. Trademark Application Serial No. 97/709,776 (filed Dec. 8, 2022), https://perma.cc/FLP2-VNDC (archived Feb. 19, 2024).

148. PASCUA YAQUI TRIBE TRIBAL CODE tit. 8, pt. VII, ch. 7-1, § 80(C)(8) (2024), https://perma.cc/YW4V-CVFS [hereinafter PASCUA YAQUI CODE].

149. *Id.* § 30(A)(3).

150. *Id.* § 80(C)(8).

151. *Id.*

152. Telephone Interview with Virjinya Torrez, *supra* note 91.

153. *Id.*

3. Colorado River Indian Tribes

Located along the Colorado River, CRIT has approximately 4,300 members, who primarily reside in Parker, Arizona.[154] The federal government established the reservation in 1865 for the Mohave and Chemehuevi people who had lived in the area for hundreds of years.[155] In 1945, some Hopi and Navajo communities were relocated to the CRIT Reservation.[156] Today, "the four Tribes share the Reservation and function as one political unit," with each "observ[ing] its own unique traditions, religions, and customs."[157]

In 2009, the Tribes adopted a Human and Cultural Research Code.[158] The purpose of the Code was to "create a uniform standard in how research on the [CRIT Reservation] is to be conducted," including "protect[ing] all persons within the territorial jurisdiction of the Reservation from unreasonable, harmful, intrusive, ill-conceived or otherwise offensive research and investigation procedures."[159] The code (1) created an Ethics Review Board (ERB) to approve research proposals,[160] (2) defined informed consent,[161] and (3) laid out requirements for recordkeeping and research permitting.[162]

The Code also clarifies who owns any intellectual property that results from ERB-approved research: "CRIT shall retain all ownership, property, trademark, copyright, and other rights to cultural, linguistic, and historic information that is not the intellectual property of Researcher."[163] Specific to trademarks, the Code continues:

> Use of CRIT's trademark(s) such as words, phrases, symbols or designs, or a combination of words, phrases, symbols or designs, that identifies CRIT as the source may be granted on a case by case basis. CRIT shall enforce federal trademark rights afforded under the Lanham Act, 15 U.S.C. §§ 1051-1127, and common law trademark rights.[164]

154. *About the Mohave, Chemehuevi, Hopi and Navajo Tribes*, COLO. RIVER INDIAN TRIBES, https://perma.cc/2XEU-M3VE (archived Jan. 13, 2024).

155. *Colorado River Indians Tribes Community Profile*, UNIV. OF ARIZ.: NATIVE AM. ADVANCEMENT, INITIATIVES & RSCH., https://perma.cc/G9J7-YXJ4 (archived Jan. 13, 2024).

156. *Id.*

157. *Id.*

158. CRIT CODE, *supra* note 42, art. 1.

159. *Id.* ch. 1, § 1-101.

160. *Id.* ch. 1, § 1-102(b); ch. 2, §§ 1-201, 1-205.

161. *Id.* ch. 3, § 1-302.

162. *Id.* ch. 3, §§ 1-303, 1-304; ch. 4, § 1-402.

163. *Id.* ch. 6, § 1-601.

164. *Id.* ch. 7, § 1-702.

The Code allows for the enforcement of both federal and "common law trademark rights."[165] As noted above, federal trademark law developed from state common law,[166] so the Code's reference to "common law trademark rights" could mean Arizona state common law, as CRIT's primary community is within that state. Alternatively, that language could encompass *tribal* common law, which is common law generated from "traditional customs and practices" and infused with an "indigenous cultural perspective."[167]

If the CRIT Code allows for the enforcement of tribal common law, it could empower tribal court litigants to bring trademark-related claims that do not fit neatly within federal or state causes of action. Recall the Crazy Horse malt liquor litigation, where Crazy Horse's estate sued a liquor brand for its offensive use of his name and likeness.[168] The lawyers for the estate struggled to create "legal claims that would resonate with the dominant society's vision of law and yet be consistent with the traditions of Lakota people."[169] Defamation was an imperfect fit because "American law does not generally permit an action for defamation of the dead,"[170] and claiming a right of publicity felt "perverse" for "a man who never permitted his likeness to be made."[171] If Rosebud Sioux law had allowed for the enforcement of "common law trademark rights," the lawyers in the Crazy Horse litigation could have brought causes of action that were attuned to tribal custom and tradition, i.e., tribal common law.[172]

165. *Id.*

166. *See supra* notes 115-18 and accompanying text.

167. Riley, *supra* note 97, at 98 ("When tribal courts affirm and sustain cultural values, they generate a body of tribal common law, which has survived the 500-year encounter with Anglo-American culture.").

168. *See supra* note 7 and accompanying text.

169. Newton, *supra* note 41, at 1045; *see also id.* at 1020-24, 1045-46.

170. *Id.* at 1046.

171. *Id.* at 1047.

172. Tribal courts, of course, are well versed in applying tribal common law. *See, e.g.*, Taypayosatum v. Fort Peck Tribes, 16 Am. Tribal Law 224, 228 (Fort Peck 2020) (looking to tribal customary law to hold that habeas petitioner is "Indian" under the Indian Civil Rights Act, despite being an enrolled member of a Canadian First Nation); *In re* Saunooke, 15 Am. Tribal Law 176, 182-83 (E. Band of Cherokee Indians 2018) (looking to customary tribal practice to adjudicate a dispute over an attorney's appearance pro hac vice).

4. Mohegan Tribe

Based in Connecticut, the Mohegan Tribe has more than 2,200 tribal citizens.[173] The tribal government has a three-part structure: a Tribal Council, a Council of Elders, and a Tribal Court.[174]

The Mohegan Tribe's research protection statute uses similar language to CRIT's statute:

> The Mohegan Tribe shall retain all ownership, property, trademark, copyright, and other rights to cultural, linguistic, and historic information that is not the intellectual property of the Researcher.
>
> . . .
>
> The use of the Mohegan Tribe's trademark(s), such as words, phrases, symbols or designs, or a combination of words, phrases, symbols or designs, that identify the Mohegan Tribe as the source, may not be utilized absent express written permission of the Board and any other governmental entity which the Board deems necessary.[175]

There are, however, a few differences. The Mohegan statute enumerates specifically which governmental entity can formally enforce trademark rights—the Mohegan Data Governance Board and "any other governmental entity the Board deems necessary."[176] And unlike the CRIT law, the Mohegan statute lacks a reference to "common law."

* * *

Part I.B argued that trademark law implicates tribal sovereignty because trademarks are tied to economic development. Yet it is worth noting that each of the tribes profiled refer to trademarks to protect deep cultural values rather than to protect traditional commercial interests. The Ho-Chunk legislated trademark protection for Hoocąk language materials.[177] The Pascua Yaqui included trademark rights to its legal code in its effort to "[p]rotect the people, culture and natural resources of the Tribe and the Tribe's future generations from unauthorized research."[178] And the CRIT and Mohegan Tribe provided

173. *See The Tribal Council*, MOHEGAN TRIBE, https://perma.cc/G425-8M5W (archived Jan. 13, 2024).

174. *Our Government*, MOHEGAN TRIBE, https://perma.cc/VWT6-Z2FZ (archived Jan. 20, 2024).

175. MOHEGAN TRIBE OF INDIANS OF CONN. CODE OF ORDINANCES pt. IV, ch. 31, art. 2, §§ 31-26(q)(1)(i), (q)(3) (2024), https://perma.cc/J6H9-LYUL [hereinafter MOHEGAN CODE].

176. *Id.* §§ 31-26(f), (q).

177. *See supra* notes 129-35 and accompanying text.

178. PASCUA YAQUI CODE, *supra* note 148, tit. 8, pt. VII, ch. 7-1, § 30(A)(1); *see supra* notes 143-51 and accompanying text.

trademark rights to protect their respective "cultural, linguistic, and historic information" from outside researchers.[179]

Perhaps the importance of language, history, and tradition is so foundational—and so vulnerable to exploitation—that tribes seek to create robust legal safeguards, especially in areas where existing federal intellectual property law is perceived inadequate.[180] For example, the Ho-Chunk Nation may have such a deep desire to protect its original language that it deemed it reasonable to legislate a host of intellectual property protections,[181] even at the risk of being coextensive with federal law.[182]

Still, there is an argument that these four tribal codes do protect economic interests. The Pascua Yaqui legislation creates a legal entitlement for their members to receive "fair monetary compensation" for their participation in research.[183] Likewise, by establishing trademark rights in Hoocąk language materials, the Ho-Chunk Nation could be said to have protected its revenue streams over future publishing opportunities.[184]

The four tribal codes demonstrate the ways in which "rules and policies governing ownership and circulation of cultural expressions often go to the heart of a Tribe's modes of existence and self-governance."[185] This sets the stage for Part II, which considers whether dominant legal institutions, such as Congress and non-tribal courts, are prepared to incorporate and recognize tribal trademark law.

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179. CRIT CODE, *supra* note 42, ch. 6, § 1-601; MOHEGAN CODE, *supra* note 175, pt. IV, ch. 31, art. 2, § 31-26(q)(1)(i); *see supra* notes 158-64, 175-76 and accompanying text.

180. *See* Riley & Carpenter, *supra* note 15, at 931 ("In these instances where [existing intellectual property] legal doctrine presents a poor fit, we are inspired by the thoughtfulness, passion, and activism of Indians, tribes, and allies who continue to push the bounds of international, domestic, and tribal law . . . .").

181. *See* Shabalala, *supra* note 19, at 1144 (noting that when tribes legislate intellectual property protections, those laws "appear focused on solving very specific issues").

182. The Ho-Chunk Code's definition of trademark mirrors the federal definition. *See supra* note 134 and accompanying text. But that definition is governed by the Language and Culture Code's Preamble which, as noted above, commits the Nation to language preservation for future generations. *See supra* note 130 and accompanying text. So even if the Code replicates the federal definition, its proximity to the Preamble might be one way to ensure that any trademark dispute has a statutory connection to the Nation's deeply held language commitments.

183. PASCUA YAQUI CODE, *supra* note 148, tit. 8, pt. VII, ch. 7-1, § 80(C)(8)(c).

184. *See supra* Part I.C.1.

185. Reed, *supra* note 5, at 356; *cf. id.* at 372-73 (explaining how the Hopi Tribe's intellectual property policy decisions reflect its "political integrity, economic security, and overall health and welfare").

II. Analyzing Tribal Trademark Law Innovations

Tribal experimentation in trademark law is possible because, "[u]nlike federal patent and copyright laws, federal trademark law does not preempt state trademark law."[186] Apart from two express preemption provisions in the Lanham Act,[187] the overall lack of preemption means that states and tribes—being "comingled American sovereigns"[188]—have the power to legislate trademark rights beyond the Lanham Act's strictures.

Indeed, states have taken advantage of this lack of preemption, and Congress has drawn inspiration from those state innovations. The prime example is anti-dilution law. Dilution involves two trademark holders—the owner of a "famous" mark and a "junior user" who subsequently uses a similar mark—and "theorizes that a junior user's unpermitted use of a famous mark on unrelated goods or services that are not likely to cause confusion can still cause a weakening or reduction in the ability of a famous mark to distinguish only one source."[189] By the time Congress passed the Federal Trademark Dilution Act in 1995,[190] years of state experimentation meant that Congress could incorporate best practices from across the country into its new anti-dilution law.[191] Accordingly, the states fulfilled their traditional role as laboratories for legal experimentation.[192]

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186. 3 MCCARTHY, *supra* note 63, § 22:1. State innovation is usually constrained by the preemption doctrine. *Cf.* Alexandra B. Klass, *State Innovation and Preemption: Lessons from State Climate Change Efforts*, 41 LOY. L.A. L. REV. 1653, 1673-74 (2008) (discussing the ways in which Congress and federal agencies can hamper states' legal innovation).

187. 3 MCCARTHY, *supra* note 63, § 22:2 ("To the author's knowledge, there are only two minor parts of the Lanham Act that contain express preemption language: (1) a federal trademark registration is a complete defense to a charge under a state anti-dilution law; and (2) the so-called 'Century 21' amendment that limits state power as to the display of additional marks or names in a mark as different from the federally registered format." (footnote omitted)).

188. Reese, *supra* note 20, at 557.

189. 3 MCCARTHY, *supra* note 63, § 24:67. Dilution, according to the International Trademark Association, seeks to "protect[] marks that are so well-known, highly reputable, or famous that . . . they deserve protection whether or not their unauthorized use is likely to cause consumer confusion." *Fact Sheet: Protecting a Trademark: Trademark Dilution (Intended for a Non-Legal Audience)*, INT'L TRADEMARK ASS'N (updated Nov. 9, 2020), https://perma.cc/GT93-VWUH.

190. McKenna, *supra* note 117, at 303; Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (1996) (codified as amended at 15 U.S.C. §§ 1125, 1127).

191. *See* John T. Cross, *The Role of the States in United States Trademark Law*, 49 U. LOUISVILLE L. REV. 485, 514 (2011).

192. *See supra* note 58 and accompanying text; *see also* Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 576 U.S. 787, 817 (2015) ("This Court has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems.'" (quoting Oregon v. Ice, 555 U.S. 160, 171 (2009))); Cross, *supra* note 192, at 514.

Congress should take similar inspiration from tribal experimentation. Tribes are innovating policy solutions to challenges that also plague the federal government.[193] More importantly, however, if Congress incorporates tribal innovations, it would "increase[] the likelihood that the dominant legal system will accept the important role tribal law can play in the adjudication of issues that go to the essence of tribal life."[194] That, in turn, could bolster the authority of tribal law in non-tribal courts.[195]

This Part describes two ways in which America's other sovereigns could recognize tribal law and incorporate tribal innovations. First, Part II.A explores how Congress might incorporate innovations in tribal trademark law in two particular areas: the collective ownership of intellectual property and data sovereignty. Then, considering the Lanham Act's lack of preemption, Part II.B argues that non-tribal courts should uphold and recognize tribal laws that afford greater trademark rights than the Lanham Act.

A. Congressional Incorporation of Tribal Trademark Law Innovations

1. Collective ownership of trademark

Social movements like #MeToo and Black Lives Matter raised interesting legal questions after individuals tried to register the movements' names as trademarks.

For example, after George Floyd's murder, dozens of applicants tried to register "Black Lives Matter."[196] Although some trademark commentators acknowledged a social movement's need to control its name, the names of

193. *See, e.g.*, Reese, *supra* note 20, at 564 ("[T]he Citizen Potawatomi Nation provides a unique example of institutional design to further democratic representation. Frustrated with low voter turnout resulting from a citizen diaspora, the Nation redesigned its legislative districts to exceed the boundaries of its land base, creating a map based on where its citizens lived. The United States faces a similar problem of low turnout among overseas voters and could implement the Potawatomi model to create a new electoral district with a fascinating demographic mix: highly educated Americans living abroad and active military serving overseas."); *id.* (noting that tribal innovations in jury selection "may prove particularly valuable because America remains residentially segregated, and constitutional law recognizes the shortcomings of racially homogenous juries").

194. Riley, *supra* note 97, at 125.

195. *Id.* at 123-24 ("Even where Anglo-American courts do not rely specifically on tribal law, the mere acknowledgment of tribal law in federal and state courts lends increased legitimacy and respect to tribal law systems.").

196. Tim Lince, *Controlling Black Lives Matter: The Battle to Trademark a Movement*, WORLD TRADEMARK REV. (Sept. 8, 2020), https://perma.cc/4MS5-VEEF (identifying at least fifty-one attempts to register trademarks related to "Black Lives Matter" within the three months following George Floyd's murder).

social movements primarily signal a political message.[197] Accordingly, the phrase "Black Lives Matter" "fail[s] to fulfill [the] important source indicator role" of trademarks and therefore "do[es] not attain the status of being protectable in a traditional trademark sense."[198] As a result, the Patent and Trademark Office denied almost every application for "Black Lives Matter."[199]

An inability to trademark the names of social movements leaves them vulnerable "to appropriation by those who have little interest in the objectives of the movement."[200] At least one aspect of the Lanham Act—its "first to file," or "first-in-time," priority system[201]—creates opportunities for applicants "not affiliated with the movement" to "exploit it for monetary gain."[202] In 2020, donors hoping to support the Black Lives Matter movement unwittingly donated to the "Black Lives Matter Foundation," an organization which, despite the name, had a law-enforcement friendly mission contrary to that of the mainstream Black Lives Matter movement.[203]

On the one hand, social movements have an interest in controlling the use of their name and brand recognition—two goals broadly served by

197. *See, e.g.*, Z. Peter Sawicki & James L. Young, *BLM & MeToo: Can You Trademark the Name of a Movement?*, ATT'Y AT LAW MAG. (Nov. 11, 2020), https://perma.cc/PP9Y-XHFE (arguing that the names of social movements are ineligible for trademark protection); Lince, *supra* note 197; Greenwald-Swire, *supra* note 64 (arguing that trademarking the name of a social movement is both "a textbook example of the kind of informational, social, or political message that would lead to a failure-to-function as a trademark refusal").

198. Sawicki & Young, *supra* note 198.

199. *See* Lince, *supra* note 197 (noting that, of all the trademark applications for "Black Lives Matter," "[n]early all have been refused or abandoned"). The only approved trademark was filed before 2020. *Id.*

200. Nicole Gaither, *Trademarking a Movement: The Branding of Black Lives Matter*, LANDSLIDE (Sept./Oct. 2021), at 40, 44; *see* Roger Stronach, *Trademarking Social Change: An Ironic Commodification*, 96 J. PAT. & TRADEMARK OFF. SOC'Y 567, 569, 595 (2014) (noting instances of "opportunism" by individuals seeking to trademark phrases associated with the Occupy Wall Street movement).

201. 2 MCCARTHY, *supra* note 63, § 16:1 ("The basic rule of trademark ownership in the United States is priority of use. For inherently distinctive marks, ownership goes to the first entity to use the designation as a mark. Because non-inherently distinctive marks require secondary meaning, ownership generally goes to the first entity to acquire secondary meaning." (footnote omitted)).

202. *See* MaKenna Rogers & Brittany Wages, Comment, *Trademarking Social Movements Matter*, 17 WAKE FOREST J. BUS. & INTELL. PROP. L. 372, 375-76 (2017) ("Typically, the USPTO grants trademark rights to the first filer of a mark."); *see, e.g.*, *id.* at 377 ("[A]n Arizona based investment company, not affiliated with the [Occupy Wall Street] movement, was granted a trademark right for merchandise although they, admittedly, wanted the trademark for business and monetary gain.").

203. Gaither, *supra* note 201, at 42; All Things Considered, *A Company That Profits Off of the Black Lives Matter Movement*, NPR (June 16, 2020, 4:03 PM ET), https://perma.cc/ESL4-FV7F.

trademarks.[204] On the other hand, because many social movements use a "decentralized approach and rel[y] on local organizers rather than national leaders"[205]—that is, there is no single "source" with which to identify the name—federal trademark law offers little protection.

Tribes face similar tensions when trying to protect group cultural property with federal law.[206] For example, among the Hopi people, musicians will occasionally compose a song for a *povoltiikivi*, or butterfly dance.[207] Once that song is shared in the community, the "composer is no longer the exclusive owner" of the song, "and others may use it without their permission."[208] The Copyright Act, by contrast, "does not necessarily recognize these sorts of implied transfers," putting Hopi tradition at odds with federal law.[209] Additionally, the Zia Pueblo determined that federal protection for its sacred sun symbol was a poor fit, in part because "trademark law vests ownership rights in individual entities" while the Zia "believe that their property belongs to the group and not to an individual."[210]

Tribes have innovated one possible solution: collective ownership of intellectual property. While Anglo-American legal systems prioritize the

204. Gaither, *supra* note 201, at 43 ("Businesses create and use brands for commerce. Social movements like Black Lives Matter create brands for the people, the community, and their supporters."); *id.* at 42 ("The BLM Global Foundation itself filed its application for a stylized yellow logo mark featuring the words BLACK LIVES MATTER for . . . 'charitable fund raising' [among other reasons]."); *see also* Stronach, *supra* note 201, at 586 ("Not only can a trademarked logo or slogan strengthen the social movement's identity to consumers, but . . . such a logo can also increase the ease with which a social movement is recognized and spread.").

205. Gaither, supra note 201, at 42.

206. *See* Reese, *supra* note 20, at 557-58 ("Indian tribes are now comingled American sovereigns struggling with similar problems and often playing in the same sandbox of legal ideas as the other American governments."); Reed, *supra* note 5, at 370 ("With all the potential problems disembodiment, abstraction and privatization of creativity impose on Indigenous communities, it may be surprising that many Tribes continue to advocate for American intellectual and cultural property protections for their creative works. Some even adopt copyright as their own."); Carpenter et al., *supra* note 17, at 1086 ("Tribes have long been active in enacting regulations to protect their cultural resources from market incursions, often creating a conflict between the high-priced art market for antiquities and cultural goods and the incommensurability and nonfungibility of those goods to the tribe.").

207. Reed, *supra* note 5, at 354.

208. *Id.*

209. *Id.*

210. *See* Turner, *supra* note 102, at 125 (quoting Alexis A. Lury, *Official Insignia, Culture, and Native Americans: An Analysis of Whether Current United States Trademark Law Should Be Changed to Prevent the Registration of Official Tribal Insignia*, 1 CHI-KENT J. INTELL. PROP. 137, 152 (1999)).

individual,[211] Indigenous conceptions of property are foregrounded in group rights[212] and group ownership.[213] This is not to say that tribal intellectual and cultural property law disregards individual ownership. Many tribes incorporate both group and individual ownership of intellectual and cultural property. For example, the Pascua Yaqui defines its "Traditional Indigenous Intellectual Property" as a "communal right held by the Tribe."[214] And the Sisseton-Wahpeton Oyate Tribe ensures "communal" ownership of cultural property.[215] But both tribes also allow for individual ownership of cultural property "in some instances."[216]

One of the shortcomings of the Lanham Act is its inability to protect social movements via trademark. Accordingly, "it might be time for the [U.S. Patent and Trademark Office (USPTO)] to find a way to protect social movements for the sake of public policy."[217] The Lanham Act could ensure that any social movement "registrant is a member of the social movement and [is] attempting to use the mark to further the universal purpose and goal of the movement."[218]

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211. *See* Terence Dougherty, Note, *Group Rights to Cultural Survival: Intellectual Property Rights in Native American Cultural Symbols*, 29 COLUM. HUM. RTS. L. REV. 355, 356 (1998) ("The liberal conception of rights embraced by U.S. political and legal systems was inherited from Western European liberalism and derives in large part from the Kantian notion of the individual. Kant's individual is a subject that is at its core a free agent.").

212. *See* COHEN'S HANDBOOK, *supra* note 4, § 14.03[1] ("[M]ost [constitutional] rights offer a form of protection that is too individually focused to capture most constitutional claims associated with tribal cultural practices and collective interests.").

213. *Id.* § 15.02 ("Tribal property is a form of ownership in common. It is not analogous to tenancy in common, however, or other collective forms of ownership known to Anglo-American private property law, because an individual tribal member has no alienable or inheritable interest in the communal holding.").

214. PASCUA YAQUI CODE, *supra* note 148, tit. 8, pt. VII, ch. 7-1, § 40(A)(13).

215. SISSETON-WAHPETON OYATE OF THE LAKE TRAVERSE RSRV. TRIBAL CODE ch. 73, tit. 2 (2005), https://perma.cc/FA6T-Y8H3.

216. *Id.*; PASCUA YAQUI CODE, *supra* note 148, tit. 8, pt. VII, ch. 7-1, § 40(A)(13); *see also* Riley, *supra* note 8, at 126 (discussing how the Sisseton-Wahpeton Oyate's Cultural Resource Protection Act deems Indigenous intellectual property rights as "typically 'communal'" while also noting "that knowledge is held in some cases by individuals"); *id.* at 95 (explaining that, although "tribes are by nature more collective and communitarian than Western cultures," tribal cultures have some "aspects of individuality").

217. Gaither, *supra* note 201, at 44; *see also* Stephanie L. Mahin & Victoria S. Ekstrand, *Old Law, New Tech, and Citizen-Created Hashtags: #BlackLivesMatter and the Case for Provisional Hashtag Marks*, 98 JOURNALISM & MASS COMMC'N Q. 13, 30 (2021) (arguing that "a reimagining of trademark law is necessary" to protect the names of social movements); Lily Liermann, *Justice for Social Movement Trademarks*, LOYOLA U. CHI. SCH. OF L.: IP BYTES (Feb. 5, 2021), https://perma.cc/6BXK-KXBM (arguing that "entities formally associated with a social movement should be permitted a trademark even when it does not clearly indicate source").

218. Rogers & Wages, *supra* note 203, at 392-93. Rogers and Wages analogize religious groups to social movements more closely than Native American tribes because the

footnote continued on next page

Some social movement leaders might oppose federal registration.[219] But greater control over the use of a movement's name could win over skeptics.[220]

A hypothetical based on a real-world example illustrates how collective ownership of trademarks might operate. To celebrate Native American Heritage Month, the University of Arizona designed a special edition "cultural logo"—a variation of its traditional Wildcat mascot that incorporated Native American imagery.[221] The logo is a collage of forty-three cultural objects (e.g., a gourd rattle, an arrowhead), natural elements (e.g., yucca plants, a river, lightning), and other symbols (e.g., an earth symbol, a four directions symbol, and a spiral symbol with "various cultural meanings").[222] Some of the objects are used to identify a particular tribe, like the "Hopi Rain Cloud" or "Yaqui Flower," while others are generic, like vegetation and mountains.[223]

Now imagine that one of Arizona's twenty-two tribes had one of their sacred symbols incorporated into the University's "cultural logo." Assume that, as part of its tribal trademark law, the tribe had legislated communal trademark rights which meant that no individual could register the sacred

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former are based on chosen affiliation whereas the latter are based on family relationships and/or biological lineage. *Id.* at 382, 391. I argue, however, that we should look to Native American tribes' collective and communal ownership because they have already developed innovative solutions to recognizing shared cultural and intellectual property. *See id.* at 383; *supra* notes 212-15 and accompanying text.

219. *See, e.g.*, Diana Budds, *Black Lives Matter, the Brand*, FAST CO. (Sept. 14, 2016), https://perma.cc/UUN9-LMXG (describing the Black Lives Matter co-founder's reluctance to use legal action, what she deems "a broken system to hold people accountable," to protect the name "Black Lives Matter" (quoting Alicia Garza)). Garza expressed concern that relying on trademarks—though helpful to protect the integrity of the Movement—could impede accessibility to organizers. *Id.*; *see also* Stronach, *supra* note 201, at 597 ("Moreover, other social movements will have to choose whether trademarking their logos, symbols, or rallying cries are [sic] worth the possibility that such trademarking will stiffen the fluid nature of their groups.").

220. *See, e.g.*, Gaither, *supra* note 201, at 43 (describing Garza's comments explaining how the organization spends a lot of time attempting to stop unsanctioned use of its logo and name).

221. *See Native American Heritage Month 2023*, UNIV. OF ARIZ.: UNIV. LIBRS. (Nov. 2, 2023), https://perma.cc/3Q5M-ARFU; Andy Ober, *UArizona Celebrates Tribal Communities and Students During Native American Heritage Month*, UNIV. OF ARIZ.: NEWS (Nov. 2, 2022), https://perma.cc/JBS6-GSH3. Each "cultural logo" combines small "icons" to create a collage image of Wilbur the Wildcat, the University's mascot. According to the University, "Every icon has been thoughtfully developed from team input and recognizes the importance of cultural nuance." *Cultural Logos*, UNIV. OF ARIZ.: TRADEMARKS & LICENSING, https://perma.cc/QK3F-4F6X (archived Jan. 22, 2024). Examples include an image of a high heel shoe to represent drag performance for LGBTQ+ Month, jazz drums for Black History Month, and maracas for Hispanic Heritage Month. *Id.*

222. *Cultural Logos*, *supra* note 222.

223. *Id.*

symbol.[224] Instead, the symbol is owned collectively by all tribal members, with external usage decisions vested in the tribal council.[225] Further assume that as part of its collective ownership, the law gives any tribal member a cause of action against non-members who use the mark in a way that offends the symbol's sacredness.[226] That could allow a tribal member to sue the University if, for example, the tribe had legislated that its sacred symbol should not be used in commerce.

Along these lines, federal trademark law could be revised to incorporate social movement trademarks to require verifiable membership and a connection to a shared purpose.[227] This strategy would allow members of the movement to retain access to the mark as part of the collective while maintaining control over the use—or misuse—of their shared property.

2. Data sovereignty

Data sovereignty can permit tribes to "control the collection and use of data by and about them."[228] In light of past instances of documented invasive

224. *Cf.* Riley, *supra* note 8, at 126-27 (describing the Menominee code, which provides that "tribal knowledge and cultural resources 'are the cultural patrimony of the Menominee people, belonging to no specific individual'" (quoting MENOMINEE CODE, *supra* note 8, pt. 2, ch. 293, § 293-1(F).

225. A similar structure is found in the Menominee's Language and Culture Code. Although the Menominee code states that cultural resources "belong[] to no specific individual," MENOMINEE CODE, *supra* note 8, pt. 2, ch. 293, § 293-1(F), the code still delegates to tribal Elders the power to make important decisions regarding cultural resources. *See id.* § 293-3(C)(3)(a) ("The significance of the resource is determined between the technical expert and the appropriate Menominee elders."); *id.* § 293-3(C)(4)(e) ("The method of preservation is determined exclusively by the Menominee elders on the Language and Culture Commission or other appropriate Menominee elders appointed by the Commission."); *cf.* Rogers & Wages, *supra* note 203, at 392-93 ("[T]o protect the integrity of the [social] movement, a special rule should be implemented to ensure that the registrant is a member . . . and [is] attempting to use the mark to further the universal purpose and goal of the movement.").

226. *See* MENOMINEE CODE, *supra* note 8, pt. 2, ch. 293, § 293-8(G) (giving "any tribal member" the right to request a reconsideration of findings when the tribe's Review Board makes findings related to cultural resource protection); *cf.* Turner, *supra* note 102, at 124 ("[W]ith so many outsiders using the [Zia tribe's sun] symbol to convey so many different meanings—some of which may contradict with and/or offend the tribe's beliefs—the Zia lack control over the meanings projected by their symbol." (footnote omitted)).

227. *See* Rogers & Wages, *supra* note 203, at 393; *see also id.* at 382 ("Native American tribes can be analogized to social group movements."); Stephanie L. Mahin & Victoria Smith Ekstrand, *Old Law, New Tech, and Citizen-Created Hashtags: #BlackLivesMatter and the Case for Provisional Hashtag Marks*, 98 JOURNALISM & MASS COMMC'N Q. 13, 31 (2021) (arguing that social movements may be able to use collective marks).

228. Tsosie, *supra* note 140, at 229.

anthropological research practices[229] and non-consensual medical research,[230] Native American tribes are justified in their concerns about data sovereignty.

An example involving the Havasupai Tribe demonstrates the impetus behind tribal data sovereignty legislation.[231] Between 1990 and 1994, researchers at Arizona State University (ASU) collected blood samples from members of the Havasupai, initially to study the Tribe's potential genetic links to diabetes.[232] But then, without the donors' informed consent, the ASU researchers allowed others to use the biological data for purposes beyond diabetes research.[233] Some of the research directly offended the tribe's cultural traditions. For example, one of the articles "suggest[ed] that the tribe's ancestors had crossed the frozen Bering Sea to arrive in North America," which "flew in the face of the tribe's traditional stories that it had originated in the [Grand Canyon]."[234] ASU agreed to return the blood samples in 2010.[235]

229. *See, e.g.*, Reese, *supra* note 20, at 628 (explaining that "[s]cholars have earned a negative reputation in Indian Country" due to their history of improper research practices).

230. *See, e.g.*, Katherine Drabiak-Syed, *Lessons from Havasupai Tribe v. Arizona State University Board of Regents: Recognizing Group, Cultural, and Dignitary Harms as Legitimate Risks Warranting Integration into Research Practice*, 6 J. HEALTH & BIOMEDICAL L. 175, 180-82 (2010).

231. *See id.* at 218-24.

232. *Id.* at 180 (noting that researchers claimed that learning more about diabetes was "the sole purpose behind the research"); Amy Harmon, *Indian Tribe Wins Fight to Limit Research of Its DNA*, N.Y. TIMES (Apr. 21, 2010), https://perma.cc/BMR9-GFPM.

233. *See* Drabiak-Syed, *supra* note 231, at 182-83. Researchers initially collected over one hundred consent forms, which indicated that the project's purpose was "to study the causes of behavioral/medical disorders." *See id.* at 180 (quoting STEPHEN HART & KEITH A. SOBRASKE, INVESTIGATIVE REPORT CONCERNING THE MEDICAL GENETICS PROJECT AT HAVASUPAI 58 (2003), https://perma.cc/8KSE-KXX5). When researchers encountered hesitation from some tribal members to sign, researchers began collecting only oral consent. *Id.* at 181. Ultimately, the lead researchers gave "non-ASU affiliated researchers access to samples for projects that were unrelated to diabetes research." *Id.* at 183. At least fifteen academic papers, on topics unrelated to diabetes, were published using this Havasupai data. Second Amended Complaint para. 49, Havasupai Tribe v. Ariz. Bd. of Regents, No. CV2005-013190, 2007 WL 1891490 (Ariz. Super. Ct. Apr. 30, 2007), *rev'd sub nom.* Havasupai Tribe of Havasupai Rsrv. v. Ariz. Bd. of Regents, 204 P.3d 1063 (Ariz. Ct. App. 2008), 2006 WL 4642880; *see also* Drabiak-Syed, *supra* note 231, at 183.

234. Harmon, *supra* note 233; *see* Tatiana Karafet et al., *Y Chromosome Markers and Trans-Bering Strait Dispersals*, 102 AM. J. PHYSICAL ANTHROPOLOGY 301 (1997); HART & SOBRASKE, *supra* note 234, at 131.

235. Harmon, *supra* note 233; *see also* Drabiak-Syed, *supra* note 231, at 195 (detailing the settlement agreement between ASU and the Havasupai Tribe, which required, among other things, that ASU "pay the Havasupai $700,000" and "return all blood samples in its possession").

Today, forty-nine tribes have some form of data sovereignty statute.[236] Some of these laws "address the issue of who will own the research collected and who will hold the intellectual property rights to the resulting products."[237] Moreover, three of the four tribes that explicitly reference trademark law in their tribal codes, as discussed above, have enumerated trademark rights in their research protection codes.[238]

Tribal data sovereignty laws that reference trademark rights can provide a textual hook for tribes to make legal claims in any subsequently registered marks. For example, imagine that an at-home genetic testing company conducts tribally approved research on the Pascua Yaqui reservation. Because the research was approved, the company must have explained its plan to give "fair and appropriate" compensation to participants as part of its application.[239] If the company launches a new product or brand with a newly registered trademark name, the Tribe's "fair and appropriate return for cooperation in the research" could take several forms. It might be a voice at the table when the company creates a new brand name, an equity stake in the company in return for its use of the Tribe's name, or a veto over any brand name deemed disrespectful.[240]

For Congress, the trademark rights (and other intellectual property rights) created through tribal data sovereignty statutes provide innovative solutions in the field of biospecimen collection regulation.

In 1974, Congress passed the National Research Act.[241] The Act created the National Commission for the Protection of Human Subjects in Biomedical and Behavioral Research,[242] whose research led to the promulgation of the

236. Riley, *supra* note 8, at 107.

237. *Id.* at 133.

238. *See supra* Part I.C.2-.4; *see also* Tsosie, *supra* note 140, at 229-30 (discussing the important link between research protocols and tribal data sovereignty).

239. PASCUA YAQUI CODE, *supra* note 148, tit. 8, pt. VII, ch. 7-1, § 80(C)(8). The Code provides a non-exhaustive list of potential forms of "compensation or fair return." *Id.*

240. *Cf.* Carpenter et al., *supra* note 17, at 1102 ("In pursuing claims to traditional medicinal knowledge, for instance, indigenous groups do not commonly seek the power to prevent access by the rest of the world, but rather a role in the dynamic process of developing, disseminating, and seeking compensation for the good. Commonly, this stewardship role manifests itself in indigenous peoples' desires to participate in the disclosure of sacred or confidential information that may be tied up with the medicinal knowledge. Or the group may simply seek to have access to the decision-making process that will define where and how the information will be obtained, particularly when it might affect their aboriginal territories.").

241. National Research Act, Pub. L. No. 93-348, 88 Stat. 342 (1974) (codified as amended in scattered sections of 42 U.S.C.).

242. *Id.* §§ 201-202, 88 Stat. at 348-50. The Commission's charter expired in 1978, after it published three reports. *See* BIOETHICS RSCH. LIBR., GEORGETOWN UNIV., A GUIDE TO THE ARCHIVAL COLLECTION OF THE NATIONAL COMMISSION FOR THE PROTECTION OF

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Common Rule, a set of regulations that govern the ethics of federally funded scientific research.[243] During the most recent revision to the Common Rule, there was public debate about whether researchers' use of biospecimens—unidentified cells that may be left over from various medical procedures—should require donor consent, and whether such donors should be compensated.[244] The final rule ultimately added a requirement to inform a research subject that "the subject's biospecimens . . . may be used for commercial profit and whether the subject will or will not share in this commercial profit."[245]

Tribes have gone one step further. As noted above, the Pascua Yaqui Tribe *requires* researchers to provide "fair return" and "just compensation," such as royalties, monetary compensation, and any copyrights, patents, and trademark rights that flow from the research.[246] While commentators debate the feasibility of compensating biospecimen donors,[247] tribes had already implemented such a plan. Future revisions of the Common Rule could look to tribal innovations for methods to ensure fairness for donors that participate in research projects that eventually earn profit.

* * *

Tribal trademark lawmaking around collective ownership and data sovereignty clearly has innovative features. Congress should incorporate those tribal innovations into federal trademark law just as it has done for state innovations, like anti-dilution laws.[248] Federal incorporation of tribal legislative innovation would not only address policy problems facing non-

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HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH 5 (2013), https://perma.cc/4QPB-FHH5.

243. 45 C.F.R. pt. 46 (2022); *see* Roger L. Jansson, Comment, *Researcher Liability for Negligence in Human Subject Research: Informed Consent and Researcher Malpractice Actions*, 78 WASH. L. REV. 229, 233 (2003) ("The Federal Policy for the Protection of Human Subjects, known as the Common Rule, is a set of federal regulations . . . [that] applies to all federal departments and agencies that conduct, support, and regulate human subject research.").

244. *See* Rebecca Skloot, Opinion, *Your Cells. Their Research. Your Permission?*, N.Y. TIMES (Dec. 30, 2015), https://perma.cc/8ZMU-E3WM.

245. 45 C.F.R. § 46.116(c)(7) (2022); *see also* Jessica L. Roberts, *Negotiating Commercial Interests in Biospecimens*, 45 J.L. MED. & ETHICS 138, 140 (2017).

246. PASCUA YAQUI CODE, *supra* note 148, tit. 8, pt. VII, ch. 7-1, § 80(C)(8).

247. *See, e.g.*, David S. Wendler, *The Claims of Biospecimen Donors to Credit and Compensation*, 36 TRENDS IN GENETICS 630, 630-31 (2020) (arguing that the standards governing "who deserves to be listed as an author on scientific manuscripts, and in what order" provide a framework for deciding which biospecimen donors, if any, deserve compensation); *see also* Roberts, *supra* note 246, at 141.

248. *See supra* notes 191-92 and accompanying text.

Native communities,[249] but it would also help equalize the status of tribal law in dominant legal systems, like state and federal courts.[250]

The first step to incorporate tribal legal innovations is to find the right time for action. The Common Rule governing research ethics was last revised in 2017.[251] With advances in medical technology and some support for compensation for biospecimen donors,[252] Congress might be incentivized to pass another set of revisions—one that explicitly incorporates data sovereignty—in the near future. The timeframe for collective ownership of trademarks, however, is longer. Congress recently passed the Trademark Modernization Act of 2020,[253] the "most significant trademark legislation" since 1988.[254] While it may be decades before the next big trademark legislation, smaller updates are certainly feasible.

When the time does come to incorporate tribal innovations, the next step is to find a constituency to lobby for these changes. Although collective ownership of intellectual property and data sovereignty impacts tribes uniquely, this topic also impacts non-Native communities.[255] If, for example, current events ever resulted in a bipartisan outcry for stricter biospecimen regulation, multiple constituencies would agitate Congress, without tribes having to lobby Congress alone.

But even if questions of collective intellectual property ownership or data sovereignty do not enter the political mainstream, Congress could still be prompted to act. To be sure, the number of Americans currently governed by tribal trademark law is small—only about 35,300 tribal members,[256] or 0.01% of the U.S. population.[257] Even if the number of tribes with trademark laws

249. *See* Reese, *supra* note 20, at 621 ("The success or failure of tribal innovation or attempts to incorporate other American sovereigns' laws should inform or complicate what we see as the best practices for American governance.").

250. *See* Riley, *supra* note 97, at 123-24 ("Even where Anglo-American courts do not rely specifically on tribal law, the mere acknowledgment of tribal law in federal and state courts lends increased legitimacy and respect to tribal law systems.").

251. *See* Rob Stein, *Scientists Needn't Get a Patient's Consent to Study Blood or DNA*, NPR (Jan. 18, 2017, 6:41 PM ET), https://perma.cc/9FW9-H46T.

252. *See* Wendler, *supra* note 248, at 630.

253. Trademark Modernization Act of 2020, Pub. L. No. 116-260, div. Q, tit. II, subtit. B, §§ 221-228, 134 Stat. 1182, 2200-10 (codified in scattered sections of 15 U.S.C.).

254. Christopher P. Bussert & Marc Lieberstein, *What Does the 2020 Trademark Modernization Act Have in Store for Franchising?*, N.Y.L.J. (Feb. 11 2021, 12:30 PM), https://perma.cc/7A33-4WZ4.

255. *See supra* Parts II.A.1.-.2.

256. *See supra* notes 123, 141, 154, 173 and accompanying text.

257. *See id.*; *Quick Facts*, U.S. CENSUS BUREAU, https://perma.cc/MJB9-VGTA (archived Jan. 13, 2024) (showing an estimated national population of approximately 335,000,000).

doubles in the next ten years, it could be difficult for members of Congress to learn about tribal innovations in the first instance.

Yet "[d]espite being a small, relatively disempowered minority among minority cultures," Native American tribes have "become more powerful players in the national legislative process."[258] The 2013 reauthorization of the Violence Against Women Act is one example.[259] Although criminal jurisdiction in Indian Country over domestic violence offenses is a narrow issue, tribes built a powerful coalition leading up to the reauthorization.[260] This successful mobilization of tribes and their allies suggests that if a national coalition of tribes and Native leaders sought to take up trademark innovations or other intellectual property innovations, they could have the political power to get Congress' attention.

In fact, tribes recently helped pass federal legislation that addresses a concern of Indigenous cultural property: the Safeguard Tribal Objects of Patrimony (STOP) Act of 2021.[261] "[D]esigned to prohibit the exportation of sacred Native American items and artifacts from the United States,"[262] the Act owes its origin in part to the Pueblo of Acoma in New Mexico.[263] In 2016, a sacred Acoma shield was listed for sale by an auction house in Paris.[264] This was not a new phenomenon. Between just 2012 and 2017, Parisian auction houses knowingly sold approximately 700 Indigenous cultural objects, mostly from tribes in the Southwest, for a total of nearly $7 million.[265] As the story of the Acoma shield became public, one of New Mexico's senators—with the Acoma's support—introduced the STOP Act.[266] President Biden signed the law in 2022, and today its provisions help "expand[] the ability of native peoples to bring actions to recover cultural items" from abroad.[267]

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258. Riley & Carpenter, *supra* note 15, at 895.

259. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified as amended in scattered sections of the U.S. Code).

260. *See* Riley & Carpenter, *supra* note 15, at 895.

261. Safeguard Tribal Objects of Patrimony Act of 2021, Pub. L. No. 117-258, 136 Stat. 2372 (2022) (codified at 18 U.S.C. § 1170 and 25 U.S.C. §§ 3071-3079).

262. Riley, *supra* note 8, at 142.

263. *See id.*; Elena Saavedra Buckley, *Unraveling the Mystery of a Stolen Ceremonial Shield*, HIGH COUNTRY NEWS (Aug. 1, 2020), https://perma.cc/8SFZ-UZ2G.

264. Buckley, *supra* note 264.

265. *Id.* (citing U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-537, NATIVE AMERICAN CULTURAL PROPERTY: ADDITIONAL AGENCY ACTIONS NEEDED TO ASSIST TRIBES WITH REPATRIATING ITEMS FROM OVERSEAS 6 (2018), https://perma.cc/4H7A-ZMTA).

266. *Id.*

267. B. Stephen Jones, Note, *Strengthening NAGPRA*, 41 CARDOZO ARTS & ENT. L.J. 883, 884, 907 (2023).

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Today, just 4 of the 574 federally registered tribes are experimenting with trademark law, which suggests that tribes have yet to reach a critical mass of tribal trademark law sufficient to garner Congressional attention.[268] Given how new tribal trademark legislation is—all four statutes discussed in Part I.C were first passed in the last fifteen years—America's other sovereigns are unlikely to have had sufficient opportunities to interact with this emerging form of law. Still, Congress knows how to incorporate innovations from other sovereigns, and as tribal trademark lawmaking continues, it should be ready draw equal inspiration from tribal law.

B. Non-Tribal Court Recognition of Broader Tribal Trademark Law Protections

Because federal trademark law does not generally preempt state trademark law, states can and do create laws that go beyond the Lanham Act.[269] In this sense, state trademark law is a "one-way ratchet," able to expand protection but unable to provide less protection than federal law.[270] To understand how tribes might similarly legislate broader trademark laws, it is helpful to first understand what states have done.

New Hampshire trademark law has attorney's fees and enhanced damages provisions more generous than the Lanham Act. In *Attrezzi, LLC v. Maytag*, Attrezzi—an independent kitchen supply store—sued Maytag under New Hampshire law and the Lanham Act after Maytag began promoting a "Jen-Air Attrezzi" line of appliances.[271] A jury trial returned a verdict for the plaintiff, including double damages, as well as attorneys' fees.[272] On appeal, Maytag argued that the Lanham Act's more limited attorneys' fees and damages provisions preempted New Hampshire law.[273] The court rejected that claim.

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268. For a comparison, when Congress incorporated state trademark innovations in its dilution law, over half of the states had passed their own anti-dilution statutes. *See* Natalya Y. Belonozhko, Note, *Famous Trademarks in Fashion: Why Federal Trademark Dilution Law Favors a Monopoly over Small Business Success*, 51 WILLAMETTE L. REV. 365, 385 (2015).

269. 3 MCCARTHY, *supra* note 63, § 22:2. This is in contrast to other areas of intellectual property law, where federal law generally *does* preempt state law. *See, e.g.*, *supra* notes 187-88 and accompanying text (explaining that federal patent and copyright laws preempt most state laws).

270. McKenna, *supra* note 117, at 302, 305.

271. 436 F.3d 32, 35-36 (1st Cir. 2006).

272. *Id.* at 36.

273. *Id.* at 40-41 ("[T]he federal statute provides for attorneys' fees only 'in exceptional cases,' and permits the court in its discretion to award enhanced damages 'subject to principles of equity.' New Hampshire, by contrast, provides attorneys' fees as a matter of course

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Even though "New Hampshire's laxer standard for an award of attorneys' fees" and enhanced damages "create[d] a stronger incentive for plaintiffs" to rely on state law, "it is common practice for federal and state statutes to operate in the same field—anti-discrimination laws are a classic example—even though . . . state law may be more favorable to the plaintiff."[274]

Another example can be found in Utah, which criminalizes the deceptive use of trademarks more broadly than does the Lanham Act.[275] In *State v. Frampton*, the defendant was charged with "criminal simulation," the misrepresentation of the age, rarity, or uniqueness of an object in order to inflate its value.[276] Because the Lanham Act does not criminalize that kind of deceptive trademark use, the defendant argued that it preempted Utah's criminal simulation law.[277] The court rejected that argument: "[O]ur criminal simulation statute merely augments the [Lanham Act] by providing penal sanctions for passing counterfeit goods to which federally registered trademarks are attached."[278]

Currently, no tribe has legislated its own comprehensive trademark statute comparable to the Lanham Act. But if the growth of tribal intellectual property law continues,[279] tribes may be more likely to legislate trademark laws that go beyond federal law.

A recent event in the Pascua Yaqui Tribe may provide an insight to future comprehensive tribal law. Over the past several years, the Pascua Yaqui Tribal Council noticed that online vendors unaffiliated with the Tribe were selling the Tribe's official flag without permission.[280] Although the Council did not take formal action on the matter, it could have addressed this issue by adopting trademark protections broader than those of the Lanham Act.

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and only to plaintiffs, and offers enhanced damages automatically upon a showing that the violation was willful or knowing." (citation omitted) (quoting 15 U.S.C. § 1117(a))).

274. *Id.* at 41; *see also* JCW Invs., Inc. v. Novelty, Inc., 482 F.3d 910, 919 (7th Cir. 2007) ("In light of the fact that the Lanham Act has not been interpreted as a statute with broad preemptive reach, we conclude that Congress would have acted more clearly if it had intended to displace state punitive damage remedies.").

275. UTAH CODE ANN. § 76-6-518 (LexisNexis 2023).

276. 737 P.2d 183, 185-86 (Utah 1987); Fern L. Kletter, Annotation, *Criminal Simulation Under State Laws*, 79 A.L.R. 7th Art. 6 (2023).

277. *Frampton*, 737 P.2d at 189-90.

278. *Id.* at 191.

279. *See* Riley, *supra* note 8, at 80 ("My research findings lead me to a core, central thesis: the data reveal a striking increase in the development of tribal cultural property laws, as Indian tribes seek to advance human and cultural rights in innovative and inspired ways.").

280. Telephone Interview with Amanda Sampson Lomayesva, *supra* note 91.

Section 2(b) of the Lanham Act enumerates special protections for national, state, and even municipal flags, but not for tribal flags.[281] If a trademark application "includes an image that unmistakably depicts a national flag," the USPTO will deny the application.[282] Therefore, an Arizona-based flag manufacturer could not include Arizona's state flag in its trademark.[283] But a manufacturer who specialized in tribal flags could, by contrast, include a tribe's flag in its trademark.

The Pascua Yaqui Tribal Council could pass its own variation of the Lanham Act by appending to the enumerated sovereigns from Section 2(b) ("the United States, or of any State or municipality, or of any foreign nation"[284]) the phrase, "or any tribal government." This language would not necessarily prevent vendors from selling the tribal flag without the Tribe's permission,[285] but it would allow the Tribe to oppose trademark applications that incorporate the Pascua Yaqui flag. Although such legislation is not a radical reimagining of trademark law,[286] it would mirror what New Hampshire and Utah did, as discussed in *Attrezi* and *Frampton*[287]—wield subnational sovereignty to take advantage of the lack of federal preemption and expand the scope of trademark protection.

As is often the case, if a tribe brought suit under this hypothetical tribal law, the litigants would dispute its applicability to the given scenario.[288] At this

281. 15 U.S.C. § 1052(b) ("No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . [c]onsists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof."); *see also* 4 MCCARTHY, *supra* note 63, § 25:68 ("[T]he PTO does not refuse to register the official insignia of Native American tribes under Lanham Act § 2(b). The PTO did not recommend amending § 2(b) so as to include the official insignia of Native American Tribes as being absolutely barred under § 2(b) from registration. Prohibiting tribal insignia exclusively under § 2(b) would prohibit tribes from obtaining federal trademark registration for their official insignia." (footnote omitted)).

282. 3 MCCARTHY, *supra* note 63, § 19:78.

283. *But see* Turner, *supra* note 102, at 122 n.40 ("Indeed, Section 2(b) leaves a loophole of sorts: commercial entities may register trademarks that contain look-a-likes, but not exact replicas, of state or national symbols.").

284. 15 U.S.C. § 1052(b).

285. Turner, *supra* note 102, at 126 n.74.

286. *See* Reese, *supra* note 20, at 621 (arguing that tribes need not be "uniquely brilliant innovators" to warrant including tribal law in the mainstream).

287. *See supra* notes 272-79 and accompanying text.

288. *Cf., e.g.*, Hengle v. Treppa, 19 F.4th 324, 334-38 (4th Cir. 2021) (deciding whether a tribal law was consistent with the Federal Arbitration Act); Confederated Salish & Kootenai Tribes v. Namen, 380 F. Supp. 452, 462-63 (D. Mont. 1974) (deciding whether tribal law or federal law governed a water rights dispute), *aff'd per curiam*, 534 F.2d 1376 (9th Cir. 1976); LaFramboise v. Thompson, 329 F. Supp. 2d 1054, 1055-56 (D.N.D. 2004) (deciding

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juncture, a federal court should afford the same comity towards tribal trademark law as some other courts have done for state trademark law.[289]

If tribes continue to implement innovative legislation, questions like this could become common. To be sure, there are complicated questions of tribal jurisdiction that would arise in trademark disputes originating from tribal trademark law.[290] Still, if state and federal courts have upheld the states' ability to legislate broader trademark protections, those same courts should be prepared to uphold the same broader protections when *tribes* pass analogous laws.

Conclusion

Whenever a tribe legislates its own trademark law, the tribe exercises a fundamental sovereign power—lawmaking—and makes independent choices about what forms of cultural and intellectual property deserve protection.

The number of tribes with their own trademark laws is likely to continue to grow. And the tribes that have already enacted trademark laws are arriving at similar innovative ideas: collective ownership of intellectual property and the incorporation of intellectual property rights into data sovereignty statutes. Such ideas "deserve special consideration"[291] and provide a prime opportunity for the incorporation of tribal law into dominant legal systems. In the same way that the federal government has incorporated state trademark innovations, Congress should incorporate—and non-tribal courts should recognize—tribal innovations in trademark law.

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whether tribal law or state law applies in a Federal Tort Claims Act case), *aff'd sub nom.* LaFromboise v. Leavitt, 439 F.3d 792 (8th Cir. 2006).

289. *See* 3 MCCARTHY, *supra* note 63, § 22:2.

290. *See* COHEN'S HANDBOOK, *supra* note 4, § 7.02[1][a] (noting that the scope of tribal adjudicative jurisdiction is limited by the scope of tribal legislative jurisdiction, and that ascertaining the scope of the latter is "complex" in regard to non-Indigenous or non-tribal members). Understanding tribal court jurisdiction is crucial to deciding any tribal law dispute. *See, e.g.*, Riley & Carpenter, *supra* note 15, at 927-28 (describing the Rosebud Sioux's efforts to bring a quasi-trademark suit against Hornell Brewing Company for its Crazy Horse Malt Liquor brand). In general, a tribe's civil jurisdictional power is most expansive over its own members and more limited over non-members. *See* Reese, *supra* note 20, at 568-69.

291. Reese, *supra* note 20, at 572.