

George Will - The Patent and Trademark Office's assault on free speech

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In 1929, Chief Justice William Howard Taft convinced Congress to finance construction of “a building of dignity and importance” for the Supreme Court. He could not have imagined what the court will ponder during oral arguments this Wednesday. The case concerns the name of an Asian-American rock band: The Slants. And surely Taft never read a friend-of-the-court brief as amusing as one filed in this case. It is titled “Brief of the Cato Institute and a Basket of Deplorable People and Organizations.”

The U.S. Patent and Trademark Office is empowered, by the so-called “disparagement clause” of a 1946 law, to protect American sensitivities by denying trademark protection to “immoral, deceptive or scandalous” trademarks. These have included those that a substantial portion of a particular group perceive as disparaging that group — an ethnic, religious, national or other cohort. The PTO has canceled the trademark registrations of entities named Mormon Whiskey, Abort the Republicans, Democrats Shouldn’t Breed, Marriage Is For Fags, and many more.

The Cato/Deplorables brief urges compassionate libertarianism: “This Court should make the jobs of the employees at the ... [PTO] much easier and put an end to the disparagement clause.” Government officials cannot be trusted to “neutrally” identify speech that disparages. Besides, “disparaging speech has been central to political debate, cultural discourse, and personal identity” throughout American history. The brief notes that a donkey became the Democratic Party’s symbol because someone called Andrew Jackson a “jackass” and he, whose default mode was defiance, put the creature on campaign posters. Entire American professions — e.g., newspaper columnists — exist in part to disparage.

Many rock bands pick names obviously intended to disparage or shock: Dead Kennedys, Dying Fetus, Sex Pistols, etc. Does the title of the best-selling book “Hillbilly Elegy” disparage a group? The Cato/Deplorables brief says: “One of this brief’s authors is a cracker (as distinct from a hillbilly) who grew up near Atlanta, but he wrote this sentence, so we can get away with saying that.” Then comes a footnote: “But he only moved to Atlanta when he was 10 and doesn’t have a Southern accent — and modern Atlanta isn’t really part of the South — so maybe we can’t.” Furthermore, the lead counsel on the brief “is a Russian-Jewish emigre who’s now a dual U.S.-Canadian citizen. Can he make borscht-belt jokes about Canuck frostbacks even though the first time he went to shul was while clerking in Jackson, Mississippi?”

When the government registers a trademark, it is not endorsing or subsidizing a product. It should not be allowed to use its power to deny registration in order to discourage or punish the adoption of controversial expressions. By registering trademarks, government confers a benefit — a legal right — on those who hold them. Trademarks are speech. The disparagement clause empowers the PTO to deny a benefit because of the viewpoint of the speech. This is unconstitutional.

Trademarks are not commercial speech — essentially, advertising — which is accorded less robust protection than that given to other speech. Eugene Volokh, a UCLA law professor and one of The Slants’ lawyers, correctly says the band’s name is expressive speech. The Asian-Americans of The Slants agree. They say they adopted this name “to take on these stereotypes that people have about us, like the slanted eyes, and own them.”

The PTO applies the disparagement clause by assessing “what message the referenced group takes from the applicant’s [trade]mark in the context of the applicant’s use” and denies registration “only if the message received is a negative one.” The PTO, which has denied trademark protection for The Slants, has given it to a band named N.W.A. which stands for [a version of the N-word] Wit Attitudes.

The PTO’s decisions are unpredictable because they depend on the agency speculating about what might be the feelings of others in hypothetical circumstances. This vague and arbitrarily enforced law, if such it can be called, chills speech by encouraging blandness.

The PTO last earned the nation’s attention, if not its approbation, in 2014, when it denied protection to the name of the Washington Redskins, in spite of polls showing that 90 percent of Native Americans were not offended by the name and only 18 percent of “nonwhite football fans” favored changing it. Now the PTO sees a national problem in provocative, naughty, childish or tasteless band names. By doing this the PTO encourages something of which there already is an annoying surfeit — the belief that speech should be regulated hither and yon in order to preserve the serenity of those Americans who are most easily upset.