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Symposium: Niggling bureaucrats shouldn't be telling us what's "disparaging"

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Lee v. Tam asks whether an Asian-American rock band called The Slants can trademark and own their own name. The Slants are a group of artists, led by Simon Shiao Tam, who have formed an identity "**to take on these stereotypes that people have about us, like the slanted eyes, and own them.**" Some agree with The Slants' approach and some disagree, as is normal in a robust artistic marketplace. What's not normal is that the government has chosen sides in this debate, punishing The Slants for their choice of name by denying them federal trademark registration.

This punishment is the result of the "**disparagement clause**" in the federal trademark statute, the Lanham Act, which bars the registration of "matter which may disparage …. persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute." As artists know, the denial of trademark registration comes with severe negative consequences, because, to quote the Supreme Court in **a 2015 case,** the "benefits of registration are substantial." Faced with this potential punishment, many artists, advocacy groups and businesses will simply choose a different name. The government's rule thus discourages some names and encourages others.

The court should make the jobs of the employees at the U.S. Patent and Trademark Office much easier and put an end to the disparagement clause. Trying to stamp out "disparaging" speech is both misguided and unconstitutional. No public official can be trusted to neutrally identify speech that "disparages." Moreover, disparaging speech has been central to political debate, cultural discourse, and personal identity for as long as this country has existed. For example, we recently concluded a presidential campaign in large part defined by **pronouncements** that large groups of people found to be **personally disparaging.**

Indeed, disparaging epithets long ago entered our political vocabulary, encapsulating criticisms more succinctly than any polite term ever could. Schoolchildren today learn that Millard Fillmore ran for president in 1856 as the candidate of the "Know-Nothing" Party; few adults could tell you the party's "real" name. Yet a hypothetical 1856 PTO would likely have denied

registration to a group called "Defeat the Know-Nothings" (disparaging to American Party members), just as the real PTO has denied registration to "Abort the Republicans" (disparaging to Republicans), "Democrats Shouldn't Breed" (disparaging to Democrats), and a logo consisting of the communist hammer-and-sickle with a slash through it (disparaging to Soviets).

Political speech, including the right to criticize parties and politicians without government punishment, has been recognized **by the Supreme Court** as "at the core of our electoral process and of the First Amendment freedoms." Questioning the character of our politicians is such a cherished American tradition that a member of the court recently **engaged in it herself.** Accordingly, denial of a statutory trademark right represents particularly egregious government action that violates the First Amendment.

But the suppression of political speech isn't the only problem arising from the disparagement clause. As this case shows, supposedly "disparaging" speech is often part of an effort to reclaim a word from its pejorative meaning; efforts like this have already had a profound influence on the development of many groups' identities. **Jesuits, Methodists, Mormons,** and **Quakers** owe their popular names to terms that were originally given to them in a disparaging context, and that have since been reclaimed. Without disparaging epithets, our vocabulary would be deprived of such terms as "**cavalier," "yankee,"** "**impressionist"** (Renoir, not Rich Little), and "**suffragette."** How did a donkey become the Democratic Party symbol? A political opponent labeled Andrew Jackson a "jackass," so Jackson put the anima**lon campaign posters**. An 1820s PTO might have stopped him.

More recently, the author of the bestselling "Hillbilly Elegy" narrated his escape from the hollows of Kentucky to help explain our populist political moment. Part memoir, part pop-sociology, J.D. Vance's 2016 book does for "hillbillies" – a term **even Wikipedia** considers to be derogatory – what David Brooks did for "bobos" (bourgeois bohemians) in the run-up to the 2000 election: explain in conversational, example-ridden terms an important yet disturbing slice of Americana.

Musical groups, in particular, often choose names exactly because they are "disparaging." The Slits, the Queers, Queen, Pansy Division, N.W.A. (Niggaz Wit Attitudes), and the Hillbilly Hellcats – there's that word again – are just a few examples. Other bands, looking to push the envelope both musically and culturally, have chosen names such as the Sex Pistols, the Dead Kennedys, the Butthole Surfers, Rapeman, Snatch and the Poontangs, Pussy Galore, Dying Fetus, and many, many more.

Band names are also chosen to convey information about the music the group plays. It should come as no surprise that the Queers are not a Lawrence Welk cover band, the Revolting Cocks are not a string quartet, Dying Fetus does not play jazz standards, and Gay Witch Abortion would never open for Paul Anka. People who showed up to watch a band called Anal Cunt – yes it's real, but **now defunct** – knew they were probably not getting a cover of "Careless Whisper."

Similarly, The Slants picked a name that, through its insouciance, expresses something about their music – and the government's jejune label of "disparaging" fails to capture the many levels of communication inherent in that name. Think about what would have happened had The Slants chosen a less controversial name, as the government apparently wishes they had? Suppose instead of calling themselves "The Slants," the band had played it safe and called themselves

"Four Asian-American Men Who Are Very Respectful of Our Diversity as a Nation." Someone attending a show by such a band might well find it especially "destabilizing" to only then discover that the band's songs contain such lyrics as (in reference to a schoolyard taunt) "Chinese, Japanese, dirty knees, look at these."

Further, the disparagement clause is unconstitutionally vague. Its application will always be unpredictable, because nearly any brand or term could be taken as disparaging by some portion of some group. Take the low-hanging fruit of Aunt Jemima, Uncle Ben, the Cleveland Indians' Chief Wahoo, the women in La Tortilla Factory, or even the Keebler Elves. Determining whether a term should be seen as disparaging is an incredibly complex endeavor that the government can't possibly be equipped to handle.

For example, one of the co-authors of my brief in this case 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. (But he only moved to Atlanta when he was ten and doesn't have a southern accent – and modern Atlanta isn't really part of the South anyway – so maybe we can't.) Another contributor is an Italian-American honky who's always wanted to play in a band called the Dagos, which of course would close every set with "That's Amore" from "Lady and the Tramp." But, with only his great grandparents having come from Italy, is he dago enough to "take back" the term? I myself am a Russian-Jewish émigré who's now a dual U.S-Canadian citizen. Can I make borscht-belt jokes about Canuck frostbacks even though the first time I went to shul was while clerking in Jackson, Mississippi?

It gets complicated. And that's exactly the point.

The disparagement clause is a simple case of an unconstitutional condition placed on those who are considering the use of an edgy or taboo phrase as part of their brand identity. None of the government's justifications for an exception to this simple doctrine carries weight: Registering a trademark is not a public subsidy from limited funds or a government endorsement proudly displayed to the public.

The Supreme Court should recognize that trademarks are in no way official speech and reaffirm that the government may not put its thumb on the scale to push controversial viewpoints out of the public square. Everyone who sometimes finds himself lumped into a "basket of deplorables" – now, that's a great band name! – should hope that the court lets the people judge for themselves what's derogatory.

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