



Supreme Court to Slants: Rock on!

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In a unanimous judgment that splintered on its reasoning, the Supreme Court correctly held that the "disparagement clause" of the Lanham Act (the federal trademark law) violated the Constitution. The ruling boils down to the simple point that bureaucrats shouldn't be deciding what's "disparaging."

Trademarks, even ones that may offend many people—of which plenty are registered by the Patent and Trademark Office—are private speech, which the First Amendment prevents the government from censoring. As Justice Samuel Alito put it in a part of the opinion that all the justices joined (except Neil Gorsuch, who didn't participate in the case), "If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently."

At this point, the Court split. Justice Alito, joined by Chief Justice Roberts and Justices Thomas and Breyer, explained why trademarks don't constitute a subsidy or other type of government program (within which the government can regulate speech), and that the "disparagement clause" doesn't even survive the more deferential scrutiny that courts give "commercial" speech. The remaining four justices, led by Justice Anthony Kennedy, would've ended the discussion after finding that the Patent and Trademark Office here is engaging in viewpoint discrimination among private speech. The end of his opinion is worth quoting in full:

A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.

Fundamentally, this somewhat unusual case brought by an Asian-American electronic-rock band shows that government can't make you choose among your rights. The Lanham Act's disparagement clause placed an unconstitutional condition on those who consider the use of an edgy or taboo phrase to be part of their brand: either change your name or be denied the right to use it effectively. Whether you're a musician, a politician, or a sports team—the Washington Redskins' moniker will now be safe—it's civil society (consumers, voters, fans) who should decide whether you're being too offensive for polite company.

For more, see my previous writings [here](#) and [here](#)—and of course reading Cato's "[funny brief](#)" is all the sweeter after this ruling.

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