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COMMENTARY

BRANDS BEHAVING BADLY*

By Sonia K. Katyal**

In June of 2017, the United States Supreme Court handed a little-known Asian rock band, The Slants, a huge win when it found that a ban on registering disparaging marks was an unconstitutional interference with the band’s First Amendment rights. In justifying the Court’s conclusion, Justice Alito observed that the disparagement bar “offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.”1 In an interview, the band’s leader, Simon Tam, reflected on being called “gook” and “Jap” by his fellow schoolmates. One day, he explained, he had enough. He said to the boys, “You know what? I’m a chink. Like, if you’re going to be racist, at least do it correctly.”2 For Tam, the ability to register the trademark for his band The Slants was linked to the transformational power of reclaiming a marginalized identity through reappropriation. Just after the ruling, Tam triumphantly proclaimed the decision “a win for all marginalized groups. It can’t be a win for free speech if some people benefit and others don’t.”3

I get it. As someone who has taught trademark law for more than fifteen years, I have a particularly strong affinity with Tam’s project. Indeed, the drive to reclaim disparaging terms can only begin with the disparaging history of branding itself. Back in the early 1900s (and even before), companies routinely relied on caricatured images of racial and ethnic minorities in their advertising. This disturbing tradition, while waning, continues, even today (think Aunt Jemima, whose brand owners once hired a former slave to impersonate her, or a certain Washington football team).

* Adapted and/or reprinted from Sonia K. Katyal, The sudden rush of vulgar trademarks, Boston Globe, June 23, 2018. Copyright 2018 Sonia K. Katyal. All rights reserved.
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3 Joe Coscarelli, Why the Slants Took a Fight Over Their Band Name to the Supreme Court, N.Y. Times (June 19, 2017), https://www.nytimes.com/2017/06/19/arts/music/slants-name-supreme-court-ruling.html.
But for as long as the advertising industry has relied on using minorities to sell their brands, those minorities have been reclaiming and recoding them, to excise them of their prejudicial power. The artist Betye Saar, in 1972, drew on her collection of racist kitchen bric-a-brac, culled from neighborhood flea markets, to create an iconic image of a gun-wielding mammy figure, aptly titled “The Liberation of Aunt Jemima.” Native American artists like Charlene Teters and Jason Lujan have used racialized mascots in their own multimedia projects, laying bare their underlying stereotypes, as a way of excising them of their dehumanizing power.

The power of reclamation extends beyond racial borders as well. The queer community has had a long-standing romance with reappropriation. More than fifteen years after Saar created her iconic work, when the gay community was in the depths of first facing the challenges of the AIDS epidemic, a group of artists reappropriated the symbol of the black triangle that the Nazi regime had forced upon gay people.

That same triangle, a symbol of death, became recast as ACT UP’s symbol of LGBTQ liberation, transformed into a pink triangle that still remains an unforgettable icon for advocacy. “Silence,” ACT UP’s logo said, “= death.”

Avram Finkelstein, one of the creators of the logo, explained in his memoir that the design represented “perfect branding shorthand.” “In advertising,” he writes, “all images are coded, but the image we sought needed to act as a signal beacon to its lesbian and gay audience without excluding other audiences.” Finkelstein continued:

An icon would not only liberate us from the complexities of representation but also enable us to draw on existing queer codes. . . . So we resigned ourselves to the use of the pink triangle, convincing ourselves that the codes activated by the triangle were open-ended enough to be useful, signifying lesbian and gay identity to some audience members, maleness to others, and referencing the historical meanings of genocide to audiences familiar with that history.4

As Finkelstein’s words show, an iconic image becomes iconic precisely because of its ability to evoke multiple meanings, and multiple recodings, depending upon the viewer’s identity and response.5 By recoding a historical icon, such activism, in one sense, gives life to the historical meanings behind the symbol, but also recontextualizes them for a new modern era. The symbol of the pink triangle, an appropriation culled from a symbol for death and punishment, was meant to start a conversation; “the first in a

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5 Id. at 47-49.
series,” Finkelstein explained, “calling for escalating political responses.”

As Finkelstein’s observations suggest, much of the lingua franca of activism, either consciously or otherwise, relies on the role of branding and advertising. However, when it comes to reappropriated symbols or terms, trademark law has often provided a far less protective response for such semiotic disobedience than one might imagine. Tam’s story is just one example of the U.S. Patent and Trademark Office (USPTO) refusing to permit marks that are self-disparaging—that is, marks where an owner’s reappropriation aims to anesthetize its impact through changing its social meaning. Before Matal v. Tam, disparaging marks were governed by a clause in the Lanham Act that barred registration for a mark that “consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.”

The ban, however, led to serious inconsistencies, at both the judicial and administrative level. Instead of filtering to clean up trademark registrations, the ban was applied in practice with subjective and unpredictable methods. For example, the trademark BLACK TAIL for an adult magazine featuring “naked and scantily-clad” African American women was deemed not “immoral” or “scandalous,” and thus registrable as a trademark. Meanwhile, the mark COCK SUCKER for rooster-shaped lollipops was determined to be too “vulgar,” and thus not registrable.

As Megan Carpenter and Kathryn Murphy have explained, since the Lanham Act failed to define terms like “scandalous,” “immoral,” or “disparaging,” interpretation was left up to the trademark examiner, with very little direction from the courts. Even the Trademark Trial and Appeal Board (TTAB) noted the “highly subjective” nature of the determinations, calling them “somewhat vague” in nature. As a result, self-disparaging marks, such as

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6 Id. at 49.
10 In re Mavety Media Grp. Ltd., 33 F.3d 1367, 1368-69 (Fed. Cir. 1994).
11 In re Fox, 702 F.3d 633, 640 (Fed. Cir. 2012).
Tam’s registration of THE SLANTS, were particularly vulnerable because they fell into these banned categories irrespective of their intended significance. For example, in 2008, the TTAB refused to register the term “HEEB” as a trademark for a magazine aimed at the younger Jewish community, finding that the term was disparaging to people of Jewish descent, noting, “While applicant may intend to transform this word, the best that can be said is that it is still in transition.”

In another example, in 2004, the USPTO initially denied registration to the mark DYKES ON BIKES for a group of lesbian women who lead gay pride parades throughout the world, finding that the term “dyke” was disparaging. Three years later, after reviewing hundreds of pages demonstrating that the name had been successfully reclaimed by the lesbian community, the USPTO eventually reversed its decision. Yet confusingly, in 2009, when the group tried to register its logo (integrating its word mark within a visual symbol), its application was met again with the same resistance, again on the grounds of disparagement. Meanwhile, around this time, TECHNODYKE, DIRTY BITCH, DRUNK ASS BITCHES, and FLEA MARKET HOOKERS were successfully registered, but DYKESINTHECITY and the toy brand DYKEDOLLS were not.

To put it mildly, the USPTO, up until _Matal v. Tam_, had its share of inconsistent outcomes, a point that was not lost on the Supreme Court, which found that the Lanham Act’s disparagement bar unequivocally violated the First Amendment’s protection of freedom of expression. Writing for a unanimous Court, Alito observed that the Lanham Act provisions offend “a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.”

In its opinion, the Supreme Court began by rejecting a number of arguments put forth by the government. It refused, for example, to consider a trademark registration as a form of government speech, which would have allowed the disparagement clause to be exempt from traditional First Amendment scrutiny. It further rejected the argument that trademark registration served as a form...
of a government subsidy, which also would have permitted the
government to avoid subsidizing activities (here, certain kinds of
speech) that it did not want to promote.21 Finally, after finding that
the disparagement clause did not enjoy these government
protections, the Court found that the clause could not survive even
a relaxed standard of review under the First Amendment, because
it neither served a substantial interest nor was narrowly drawn.

Underlying the reasoning, however, was a striking defense of
trademark neutrality in the face of speech-related considerations.
The Court rejected the purported interest of protecting minority
groups from “demeaning messages in commercial advertising.”22
The goal of shielding minority groups from harm, it reasoned, was
simply incompatible with the fundamental protections underscored
by the First Amendment, noting that “our free speech jurisprudence
is that we protect the freedom to express the thought that we
hate.”23 But even assuming that the interest at issue was to prevent
disruptions to commerce by disparaging marks, it reasoned that the
clause was not sufficiently narrowly drawn to “drive out trademarks
that support invidious discrimination.”24 Specifically, the Court
notes that the clause would deny registration to even anti-
discriminatory messages such as “Down with racists” or “Down with
homophobes.” Given the inconsistencies, the Court reasoned that
the clause was thus “not an anti-discrimination clause; [but] . . . a
happy-talk clause.”25 Because the clause was too broad to
accomplish its purported goal of preventing hateful speech, the
Court concluded that it was summarily unconstitutional.

Amplifying this view, Justice Kennedy recognized Tam’s
attempt to reclaim an offensive term for the purposes of
recuperating a celebration of diversity: “While thoughtful persons
can agree or disagree with this approach,” Kennedy concluded, “the
dissonance between the trademark’s potential to teach and the
Government’s insistence on its own, opposite, and negative
interpretation confirms the constitutional vice of the statute.”26
Over and over again, the risk of inconsistency just seemed far too
great to overlook. In a footnote, for example, the Federal Circuit’s In
re Tam opinion notes that the USPTO refused to allow HAVE YOU
HEARD SATAN IS A REPUBLICAN? but allowed THE DEVIL IS
A DEMOCRAT.27 As another example, it refused to register the

21 Id. at 1761.
22 Id. at 1764.
23 Id. (internal quotations and citations omitted).
24 Id. at 1764-65.
25 Id.
26 Id. at 1767 (Kennedy, J., concurring).
27 In re Tam, 808 F.3d 1321, 1342 n.7 (en banc), vacating 785 F.3d 567 (Fed. Cir. 2015).
marks FAG FOREVER A GENIUS! and MARRIAGE IS FOR FAGS, but permitted the mark F·A·G FABULOUS AND GAY.28

Reactions to the Matal v. Tam opinion from intellectual property lawyers and scholars were mixed. While some lawyers predicted that the decision would “free the USPTO from its impossible burden and bring some consistency to the examination process,”29 others were less sanguine. Hugh Hansen, professor of law and director, Fordham Intellectual Property Law Institute, lauded the decision, claiming that “[f]ree speech up until now has been a hothouse flower . . . beautiful to look at in its protected state, but out in the elements it rarely survived, let alone thrived. Matal v. Tam creates the possibility of breaking down those glass walls.”30 Christine Farley observed that Matal v. Tam raised more questions than it answered regarding the relationship between trademark law and the First Amendment, pointing out that “it does not explain the relationship between the two or how the burdens that trademark law place on speech can survive.”31 Lisa Ramsey, another trademark scholar, argued that the opinion—and the commentary surrounding the opinion—overlooked the fact that unlike other First Amendment doctrines disfavoring laws that ban, prohibit, or suppress expression, an absence of federal registration does not actually ban use of the expression at all, making the Court’s analogies far less salient to a trademark expert.32

In my view, the Supreme Court, even as it aimed to harmonize trademark law with the First Amendment, produced a curious irony. Just as it empowered individuals like Simon Tam to reclaim and reappropriate historically derogatory terms, it also now extends protection to the most entrepreneurial of haters, too. In just a couple of years, the triumph that Tam celebrated has revealed itself to be far from a landscape of empowering reappropriation. Our branded world, instead, could soon look more like an endless epithetic enterprise, a virtual Insult-o-Mart of the most flagrant terms for derision.

28 Id.


Consider the evidence. The same day the opinion was handed down, at least two applicants filed applications for NIGGA, and one for NIGGER PLEASE.33 Five weeks after the opinion, trademark lawyer Ed Timberlake reported to National Public Radio (NPR) that applications had been filed for GUTTER SLUTS, CHINK, DAMN VEGANS, NIGGADEMUS, and at least five applications with the term “NIGGA.”34 There’s even an application for a swastika in the mix, for use on “fabric, apparel, upholstery, and flags.”35

Indeed, after the decision, we see at least three different kinds of marks that can now seemingly be registered without challenge.

The first category of marks that can now be registered are the ones that fall into Tam’s context, self-referential marks. (Think about DYKES ON BIKES, for example, or HEEB). All of those marks, whether disparaging or not, are now open for registration by a trademark owner. After the opinion, for example, one entrepreneur named Mike Lin explained that he had filed applications for both CHINK and NIGGA in order to “take back” the slur that had been used against him as a child of Chinese descent.36 (Of course, despite the worthy nature of Lin’s reasoning, it bears mentioning that elsewhere Lin has claimed to be the “Banksy of trademarks” who has registered a trove of non-racially oriented trademarks, often culled from popular media or borrowed directly from other brands.37)


36 Andrew Chung, U.S. Supreme Court ruling leads to offensive trademark requests, Reuters (July 23, 2017), https://uk.reuters.com/article/uk-usa-court-slur/us-supreme-court-ruling-leads-to-offensive-trademark-requests-idUKKBN1A80KX.

But there’s an important caveat that deserves noting, based on the above example. While we might celebrate the first category of reclaimed marks like Tam’s, those very same marks occupy a category of marks that also comprise, at times, well, hate speech. And as Mike Lin’s example—seeking to register both CHINK\textsuperscript{38} and FEAR THE HIJAB\textsuperscript{39}—readily demonstrates, it is often hard to tell the difference between them; context means everything. Three months after the decision, in September 2017, for example, an applicant filed to claim KIKE for its brand.\textsuperscript{40} But it’s difficult to tell why. One of my students, in her research, echoed these findings after \textit{Matal v. Tam}, finding nine applications filed relating to the term “NIGGER” or “NIGGA” and the swastika.\textsuperscript{41} (Indeed, on the

\begin{itemize}
  \item Application Serial No. 87/016,337, http://tsdr.uspto.gov/#caseNumber=87016337&caseType=SERIAL_NO&searchType=statusSearch; COPS SHOOT FIRST, U.S. Trademark Application Serial No. 87/001,504, http://tsdr.uspto.gov/#caseNumber=87001504&caseType=SERIAL_NO&searchType=statusSearch; and FEAR THE HIJAB, U.S. Trademark Application Serial No. 87/000,856, http://tsdr.uspto.gov/#caseNumber=87000856&caseType=SERIAL_NO&searchType=statusSearch).
  \item U.S. Trademark Application Serial No. 87/499,767, http://tsdr.uspto.gov/#caseNumber=87499767&caseType=SERIAL_NO&searchType=statusSearch.
  \item U.S. Trademark Application Serial No. 87/000,856, http://tsdr.uspto.gov/#caseNumber=87000856&caseType=SERIAL_NO&searchType=statusSearch (abandoned).
  \item U.S. Trademark Application Serial No. 87/602,520, http://tsdr.uspto.gov/#caseNumber=87602520&caseType=SERIAL_NO&searchType=statusSearch.
  \item Notably, out of the nine applications identified, one application has been abandoned, and eight are suspended because of other similar prior applications that are attempting to register the same N-word. They were also suspended pending the U.S. Supreme Court review of the “immoral or scandalous” ban of trademark applications, and now presumably can be registered due to its outcome. See Iancu v. Brunetti, 139 S. Ct. 782, 202 L. Ed. 2d 510 (2019), granting certiorari \textit{In re Brunetti}, 877 F.3d 1330, 1335 (Fed. Cir. 2017) (finding that, after \textit{Matal v. Tam}, a ban of “immoral or scandalous” marks is also an “unconstitutional restriction of free speech”).
  \begin{enumerate}
    \item NIGGER PLEASE, U.S. Trademark Application Serial No. 87/495,357, http://tsdr.uspto.gov/#caseNumber=87495357&caseType=SERIAL_NO&searchType=statusSearch (abandoned Sept. 5, 2018).
    \item NIGGA, U.S. Trademark Application Serial No. 87/499,736, http://tsdr.uspto.gov/#caseNumber=87499736&caseType=SERIAL_NO&searchType=statusSearch (suspended Feb. 28, 2018, because of other prior applications and pending the decision in \textit{Iancu v. Brunetti} on scandalous marks).
    \item STILL NIGGA, U.S. Application Serial No. 87/534,946, http://tsdr.uspto.gov/#caseNumber=87534946&caseSearchType=US_APPLICATION&caseType=DEFULT&searchType=statusSearch (suspended Mar. 8, 2018, same as above).
    \item NIGGA, U.S. Trademark Application Serial No. 87/507,483, http://tsdr.uspto.gov/#caseNumber=87507483&caseType=SERIAL_NO&searchType=statusSearch (suspended Dec. 6, 2018, same as above).
    \item NIGGA, U.S. Trademark Application Serial No. 87/507,414, http://tsdr.uspto.gov/#caseNumber=87507414&caseType=SERIAL_NO&searchType=statusSearch (suspended Dec. 6, 2018, same as above).
  \end{enumerate}
\end{itemize}
This brings us to yet another irony. While it’s natural to predict that these two groups above would benefit, the third group is perhaps the most surprising. Like a team playing defense, in perhaps the most unexpected result of the Court’s ruling, the applicants for several of the most offensive terms sought to register marks not to sell merchandise, but to stop others from doing so. One applicant for the N-word, Curtis Bordenave, explained to NPR that he raced to register the term in order to protect the word, to secure it “and to make sure that it’s used in a way that I think would not disparage people.” The person who sought registration of the swastika did so for exactly the same reason—to block others from having access to the mark, even though the registrant claimed no actual relationship to a Jewish or African-American background. But ironically, in order to keep his trademark registered, he has to actually sell products with them. He told NPR, “If you want to buy that swastika flag, you’ve got to buy it through us. And it’s going to be a thousand dollars each.” Elsewhere, he explained that the idea is to spark discussion and turn “hate into hope,” he said. “If you suppress it, you give it power.”

For some trademark experts, however, there is something deeply paradoxical about using the power of intellectual property rights to do things (like protecting minorities from slurs) when our classic coterie of civil rights protections has failed to do the same thing. When we launder our desire for civil rights and equality through the

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6) NIGGA, U.S. Trademark Application Serial No. 87/496,454, http://tsdr.uspto.gov/#caseNumber=87496454&caseType=SERIAL_NO&searchType=statusSearch (suspended Dec. 6, 2018, same as above).
7) NIGGA X BRAND, U.S. Trademark Application Serial No. 87/541,664, http://tsdr.uspto.gov/#caseNumber=87541664&caseType=SERIAL_NO&searchType=statusSearch (suspended Dec. 6, 2018, same as above).
8) NIGGA, U.S. Trademark Application Serial No. 87/496,567, http://tsdr.uspto.gov/#caseNumber=87496567&caseType=SERIAL_NO&searchType=statusSearch (suspended Dec. 4, 2018, same as above).
9) NIGGA, U.S. Trademark Application Serial No. 87/495,358, http://tsdr.uspto.gov/#caseNumber=87495358&caseType=SERIAL_NO&searchType=statusSearch (suspended Dec. 4, 2018, same as above).
42 U.S. Application Serial No. 87/534,946, http://tsdr.uspto.gov/#caseNumber=87534946&caseType=SERIAL_NO&searchType=statusSearch.
43 People Race to Trademark, supra note 34.
44 Id.
45 Id.
46 Andrew Chung, U.S. Supreme Court ruling leads to offensive trademark requests, supra note 36.
lens of branding culture, everything, even resistance, becomes commodified. The marketplace of ideas becomes a battleground of brands, trademarks, images, and sardonic hashtags. Even though the Supreme Court assured us, time and again, in Tam that trademarks are private speech, not government speech, there is an inescapable difference between a word and a brand. Brands are more than just private speech. They are commodified, commercial speech with public implications.

So while it is important to note Tam’s win (after all, because of the case, the Dykes on Bikes finally get to register their logo, and who wouldn’t love a logo featuring motorcycle-riding lesbians?), it is also important to ask what happens to the rest of us when those words—and images—play into the wrong hands. One lawyer commenting on the case, Mark Conrad, asked, “[W]hat if I wish to trademark the name ‘Blackfaces’ for my band, with a design of a person in blackface? Or . . . what if I would want to sing the praises of restrictions on immigrants from Mexico by creating a band with the name of ‘Wet Backs’?”

It has always been true that the First Amendment protects your right to say offensive things, but now it turns out you can register, advertise, and brand them as well.

Indeed, less than six months after Matal v. Tam, the Court of Appeals for the Federal Circuit handed down another win for free speech when it ruled that Erik Brunetti, an artist and designer, could register the four-letter word “FUCT” as a trademark for his clothing (standing for FRIENDS U CAN’T TRUST) and related fashion merchandise.

And in a surprise to probably no one, the Supreme Court also upheld the Federal Circuit in its own opinion in the case, concluding that the ban on “immoral and scandalous” marks comprised unconstitutional discrimination based on viewpoint. In its opinion, the Court noted a bevy of contradictory decisions by the USPTO (why refuse to register BONG HITS 4 JESUS but not JESUS DIED FOR YOU?, or refuse BABY AL QAEDA but permit WAR ON TERROR MEMORIAL?, the opinion asked), noting that a ban on “‘ideas that offend’ discriminates based on viewpoint.”

“The ‘immoral or scandalous’ bar,” the opinion continued, “does not draw the line at lewd, sexually explicit, or profane marks. Nor does it refer only to marks whose ‘mode of expression,’ independent of viewpoint, is particularly offensive. It covers the universe of immoral or

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50 Id. at 2300-01.
scandalous—or (to use some PTO synonyms) offensive or disreputable—material. Whether or not lewd or profane. Whether the scandal and immorality comes from mode or instead from viewpoint. . . . And once the ‘immoral or scandalous’ bar is interpreted fairly, it must be invalidated.”

Thanks to Brunetti, applications will now likely issue for such colorful marks as FUCKSHITUP, BIG ASS BALLOONS, MR. CHINK, ASIAN AF, IF YOU TEXT AND DRIVE YOU’RE A CUNT!, and FUCK MOUNTAIN. At least three applications, prior to Brunetti’s outcome, included variations on the term “MOTHER FUCKER,” including one that associated itself with Jesus. There’s even an application for SH*T LIKE A MAN. SMELL LIKE A LEGEND. “There are a great many immoral and scandalous ideas in the world (even more than there are swearwords), and the Lanham Act covers them all,” Justice Kagan wrote.

Thanks to Brunetti, all of the immoral and scandalous ideas Kagan hinted at can now become trademarkable brands, relying on the Lanham Act for their enforcement and protection. Suddenly, every slur, insult, and caricature now seems like a golden opportunity to commodify and profit from the most repellent sound

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51 Id. at 2301-02 (citation omitted).
52 U.S. Trademark Application Serial No. 87/827,627, http://tsdr.uspto.gov/#caseNumber=87827627&caseType=SERIAL_NO&searchType=statusSearch (suspended pending challenge of scandalousness ban). The same owner has filed several other applications for the FUCKSHITUP mark.
54 U.S. Trademark Application Serial No. 87/819,515, http://tsdr.uspto.gov/#caseNumber=87819515&caseType=SERIAL_NO&searchType=statusSearch (abandoned).
56 U.S. Trademark Application Serial No. 87/775,851, http://tsdr.uspto.gov/#caseNumber=87775851&caseType=SERIAL_NO&searchType=statusSearch (suspended pending challenge of scandalousness ban).
57 U.S. Trademark Application Serial No. 87/376,621, http://tsdr.uspto.gov/#caseNumber=87376621&caseType=SERIAL_NO&searchType=statusSearch.
58 FATHER’S DAY—A CELEBRATION OF MOTHERFUCKERS!, U.S. Trademark Application Serial No. 87/931,368, http://tsdr.uspto.gov/#caseNumber=87931368&caseType=SERIAL_NO&searchType=statusSearch (suspended); Y’ALL MOTHERFUCKERS NEED JESUS, U.S. Trademark Application Serial No. 87/629,480, http://tsdr.uspto.gov/#caseNumber=87629480&caseType=SERIAL_NO&searchType=statusSearch (suspended); TRAILER TRUCKIN LIKE A MUTHAFUCKA, U.S. Trademark Application Serial No. 87/552,587, http://tsdr.uspto.gov/#caseNumber=87552587&caseType=SERIAL_NO&searchType=statusSearch (abandoned).
59 U.S. Trademark Application Serial No. 87/850,824, http://tsdr.uspto.gov/#caseNumber=87850824&caseType=SERIAL_NO&searchType=statusSearch (asterisk in original).
bites. Could you register a trademark, for example, for GRAB HER BY THE PUSSY for bumper stickers, hats, and t-shirts? The answer is now yes. (Four applications were filed.)

The larger, and more interesting question is what this new trend says about us, as a society. Are the most prurient of perverts just cashing in? Have we always carried a penchant for branded vulgarities, one that was frustrated until Erik Brunetti’s big win? Or is the Supreme Court’s decision NBD (no big deal)? For myself, I suspect that this case demonstrates that today’s marketplace of ideas—the metaphor celebrated by our First Amendment jurisprudence—has morphed into a marketplace of brands instead. Think about it. We talk about social issues through hashtags, abbreviations, and emoticons. So it makes perfect sense that if we want to say something useful or even eye-catching, in this moment, we turn to trademark law to do it for us. We are living in a world where ideas can no longer successfully circulate unless they are branded, reduced into commodifiable sound bites, hashtags, 140 characters or less. If trademark law will no longer serve as the gatekeeper of taste by banning certain brands from registration, maybe it’s up to us to solve the problem by buying them up first.

But there’s a problem of unintended consequence. The more trademarks we register, the more likely we’ll soon run out of them, as law professors Barton Beebe and Jeanne Fromer just argued in a recent Harvard Law Review article. And then we will have to come up with new ones. Those new registrations, as we’ve seen, may be meant to quickly cash in on the latest catchphrase of the moment. Others might try, however gamely, to reclaim a slur, like Simon Tam. But the more offensive words we register, the more we become desensitized to their hurtful power. It becomes more and more difficult then to tell the difference between a group that wants to reclaim a mark as an offensive slur, to change its social meaning, and those who just want to offend. Even if you might agree that “NIGGA” should be registered, it is still worth noting (as Kendrick Lamar recently gently reminded us at a concert, or Ta-Nehisi Coates before him) that some people think that certain words should really only be used by certain people. Trademark law no longer recognizes a difference. And if trademark law can’t tell the

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difference, then neither will we. And this, I think, hurts all of us in the end.

So as much as these cases seem to level the playing field for trademarks, opening up greater opportunities for speech, not all such speech carries the same types of values. That was largely the observations put forth by Justices Breyer and Sotomayor, both of whom noted the harmful content of certain kinds of speech.\(^{64}\) “Just think,” Breyer wrote, “about how you might react if you saw someone wearing a T-shirt or using a product emblazoned with an odious racial epithet.”\(^{65}\) Sotomayor, for her part, pointed out that the government has a “reasonable interest in refraining from lending its ancillary support to marks that are obscene, vulgar or profane.”\(^{66}\) So while she agreed that the bar on “immoral” marks was unconstitutional, Sotomayor argued that previous case law would uphold a ban on “scandalous” marks in its stead.

Nevertheless, the outcomes of both Tam and Brunetti, while embraced by First Amendment advocates and others, herald a new cacophony of future trademarks—some scandalous, some immoral, some racist, some hilarious, and some downright offensive. But the end result of this new generation of marks, I think, will only further highlight the disparate impact of these marks on vulnerable communities. Put another way, the post-Tam and Brunetti trademark landscape is far from woke. Consider this example. Just a few weeks after the opinion was handed down, the U.S. Department of Justice asked the Fourth Circuit to end a decades-long challenge to the name of the Washington, D.C., football team, led by Amanda Blackhorse, along with five other Native American plaintiffs from various tribes across America. That challenge had been percolating long before Tam had even been born, and because of Tam, they lost the case. “There’s no more challenge to make,” their lawyer, Jesse A. Witten, told the Washington Post.\(^{67}\)

Back in 2013, the team owner, Dan Snyder, told USA Today that he would never change the name. “NEVER—you can use caps,” he said at the time.\(^{68}\) Blackhorse once said that if she met Snyder: “I’d ask him, ‘Would you dare call me a redskin, right here, to my face?’”

\(^{64}\) Both dissenting opinions by Breyer and Sotomayor cited to a previous article by this author, Trademark Intersectionality, 57 UCLA L. Rev. 1601 (2010), that focused on this point.

\(^{65}\) Brunetti, 139 S. Ct. at 2307.

\(^{66}\) Id. at 2317.


\(^{68}\) Erik Brady, Daniel Snyder says Redskins will never change name, USA Today (May 9, 2013), https://www.usatoday.com/story/sports/nfl/redskins/2013/05/09/washington-redskins-daniel-snyder/2148127/.
She continued, “And I suspect that, no, he would not do that.” Her point was astute and insightful: people who would never think of insulting someone with an offensive slur can be led, through the power of marketing, to willingly wear a brand that does exactly the same thing.

Four years later, Snyder’s statement about *Matal v. Tam* read, “I am THRILLED. Hail to the Redskins.”

Brands, like people, don’t exist on a level playing field. The real winners here are the Dan Snyders of the world. The rest of us are probably FUCT.

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