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A Constitutional Test

UNH poli-sci professor explains why SCOTUS sided with The Slants

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IN JUNE, THE SUPREME COURT HANDED DOWN ITS DECISION IN A CASE INVOLVING A ROCK GROUP CALLED THE SLANTS.

This week colleges and universities are celebrating Constitution Day, an annual commemoration of the signing of the U.S. Constitution on Sept. 17, 1787, by the 39 delegates to the Constitutional Convention in Philadelphia. Here, UNH associate professor of political science Susan Siggelakis reflects on the Supreme Court's recent 8-0 decision in Matal v. Tam, which involved the U.S. Patent and Trademark Office's refusal to register the name of a rock band as a trademark.

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The first 10 amendments to the U.S. Constitution, called the Bill of Rights, were ratified on Dec. 15, 1791. Founding Father Alexander Hamilton had argued against including a bill of rights, mainly on the grounds that a wily legislature would always find a way to construe its text to allow it to do whatever it wanted to do anyway. Nevertheless, at the insistence of several of the state ratifying conventions, most notably New York's, these important laws were added to our founding document. The first among the 10 is "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Although it disables Congress from acting on several core, expressive rights, one of these, the freedom of speech, lies at the heart of a 2017 United States Supreme Court case brought by an Asian-American rock group, the Slants.

Handed down at the end of its June 2017 term was the court's opinion resolving the case of the Slants, who had sought and been denied a trademark registration by the U.S. Patent and Trademark Office (PTO). The PTO was established in 1870 by Congress under its express power of Article I, Section 8, to "promote the progress of science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," as well as Congress's power to regulate interstate commerce. As the court has stated numerous times in its precedents, "national protection of trademarks is desirable because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of a good reputation." Trademarks are invaluable to businesses and other organizations because they confer upon the owner legal rights and benefits, including the exclusive right to use the mark in commerce or in its connection with its goods or

services.

The PTO denied the group's request on the basis of the 1946 Lanham Act, a provision of which prohibits the registration of trademarks that may "disparage… or bring into contempt, or disrepute" persons living or dead. Agency examiners ruled that under a two-part test it had long employed, the Slants' application was defective. The first part of the test requires a PTO examiner to decide whether a name has a meaning that refers to identifiable persons, institutions, beliefs or national symbols. If it does, then the examiner asks "whether that meaning may be disparaging to a substantial composite of the referenced group." Unfortunately for the Slants, the PTO did make a finding of disparagement. The evidence it considered relevant was that a) one performance had been canceled because of the band's name and b) several bloggers and commenters to articles on this band have indicated they find this term offensive." As insubstantial and anecdotal as this 'evidence' seemed to be, it was enough for the Slants to be denied their trademark registration.

The Slants chose to appeal this administrative finding. In their briefs as well as in media interviews the leader of the Portland, Oregon-based group, Simon Tam, claimed that the band chose the name "to take on the stereotypes that people have about us, like the slanted eyes, and own them." In this way, the group claims, it aimed to 'reclaim the term' and rob it of any denigrating power when used against Asian persons. Tam criticized the "disparagement" assumptions made by the PTO in denying the registration. "Asians are

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Amendment of the United States Constitution."

not some monolithic group… You can't just say this term offends Asian-Americans. The reality is you can't just put us in one convenient box and shut it down," Tam told the Canadian Broadcasting Corporation. "The cure for hate speech isn't censorship. It's better speech and more nuanced speech," Tam said.

In a unanimous decision (8-0), with the newest associate justice, Neil Gorsuch, not participating, the court ruled the disparagement clause violated the "freedom of speech" clause of the First Amendment of the United States Constitution. Justice Alito delivered the opinion of all eight justices. "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" It is not the freedom to express the non-confrontational, pleasant speech that is necessary; indeed kind, noncontroversial speech is unlikely to spur a majority of legislators or government administrators to pass laws or make decisions banning it. Justice Kennedy, joined by Associate Justices Ginsburg, Kagan and Sotomayor, reminded Americans that, as is well-established under our constitutional system, the only categories of speech that the government can regulate or punish are fraud, defamation or incitement. Aside from these and a few other narrow exceptions, it is a "fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys." He and his associate justices wrote that allowing the disparagement clause to stand would in effect allow government to withhold ideas and or perspectives from a broader societal debate. They wrote, "The danger is all the greater if the ideas or perspectives are ones a particular audience

might think offensive, at least at first hearing. An initial reaction may prompt further reflection, leading to a more reasoned, more tolerant position."

What does this mean for the Slants? They received their trademark registration. Now the marketplace will decide their fate. Should a particular concert promoter or venue operator believe that the "The Slants" moniker is offensive, it's their prerogative not to book them. Individual consumers can choose to download (or not) their songs. Interestingly, a similar legal battle is being fought in Canada, where yet another musician, Hank Bielanski, tried to register his heavy-metal band's name, God Helmet, with the government trademark office. Bielewski said that he hopes this decision will lead to change in the Canadian system, which has always been more restrictive than that of the United States in registering trademarks, and in constitutional speech protections more generally. Bielanski told the CBC: "If I'm not offending someone a little bit, I feel like I'm not totally doing my job. It's about making people think… As musicians (and) artists, we're here to filter what we see in society and put it back into your face."

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