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Preventing Tam's "Proudest Boast" from Protecting the Proud Boys: A Response to Free Speech Absolutism in Trademark Law

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PREVENTING TAM’S “PROUDEST BOAST” FROM PROTECTING THE PROUD BOYS: A RESPONSE TO FREE SPEECH ABSOLUTISM IN TRADEMARK LAW

ABSTRACT

Recent events, including the infamous Unite the Right rally in Charlottesville in 2017 and the attack on the U.S. Capitol on January 6, 2021, have brought the First Amendment, hate speech, and the resurgence of white nationalist rhetoric into the public eye. Throughout the twentieth and twenty-first centuries, while much of the Western World and the United Nations worked to restrict hate speech, the U.S. Supreme Court increasingly expanded protections for speech and expression under the First Amendment and narrowed the exceptions under which speech is not protected. In particular, under the near-absolutist interpretation of the First Amendment, hate speech is protected unless it falls within the exceedingly narrow exceptions to First Amendment protection, such as the “fighting words” or “incitement to imminent violence” exceptions. Critics of the absolutist approach and the protection it affords hateful and racist speech argue that this approach to the First Amendment is inconsistent with, and in fact denies to minorities, other constitutional guarantees, namely the Fourteenth Amendment right to equal protection.

*Through an exploration of the evolution of the absolutist interpretation of the First Amendment, this Comment joins that argument and seeks to further examine the place of hate speech in First Amendment jurisprudence within the context of federal trademark law, particularly through *Matal v. Tam*. In *Tam*, the landmark trademark case in which the Supreme Court struck down the disparagement clause of the Lanham Act as violative of the First Amendment, the Court furthered its current absolutist interpretation of the First Amendment and firmly stated that the “proudest boast” of the First Amendment is protection for the thought that we hate. In the context of *Tam*, this meant that Simon Tam’s Asian American band *The Slants*—which, in choosing that name, engaged in reappropriation of the traditionally disparaging term “slant”—could obtain the federal trademark registration for a band name that it had been denied under the disparagement clause. However, under *Tam*’s holding and the holding of its companion case, *Iancu v. Brunetti*, others with intentions less pure and tolerant than reappropriation may now also obtain federal trademark registrations for and profit from the most hateful and offensive marks.*

This Comment proposes a solution—an anti-hate speech amendment to the Lanham Act—to the double-edged sword created by Tam and Brunetti. Under this solution, marks that would constitute hate speech would be presumptively barred from registration. However, the amendment would also include a reappropriation exception by which applicants could obtain registration of an otherwise hateful or disparaging mark by successfully demonstrating that they are using the mark to engage in reappropriation to reclaim the disparaging mark and empower their community.

INTRODUCTION	611
I. THE FIRST AMENDMENT	616
A. <i>It Wasn't Always So: The Evolution of the Absolutist Interpretation of the First Amendment</i>	616
B. <i>Exceptions to First Amendment Protection</i>	621
1. <i>The "Fighting Words" Exception</i>	622
2. <i>The "Incitement to Imminent Violence" Exception</i>	624
II. HATE SPEECH AND THE POWER OF REAPPROPRIATION	625
A. <i>Defining Hate Speech and Identifying Its Harms</i>	625
B. <i>Reappropriation</i>	628
III. TRADEMARKS AND THE LANHAM ACT	630
A. <i>The Lanham Act: Codifying Common Law Trademark Rights</i> .	630
B. <i>Why Register? Benefits of Federal Registration on the Principal Register</i>	631
IV. FREE SPEECH ABSOLUTISM COMES TO TRADEMARK LAW	632
A. <i>Matal v. Tam</i>	632
1. <i>The Road to the Supreme Court</i>	632
2. <i>The Slants's Success at the Supreme Court</i>	635
3. <i>Reactions and Ramifications to Tam: A Double-Edged Sword</i>	639
B. <i>The Companion Case: Iancu v. Brunetti</i>	640
V. A SOLUTION TO TAM'S DOUBLE-EDGED SWORD	643
A. <i>The Problems with Protecting Hate Speech</i>	643
B. <i>A Solution Within Trademark Law</i>	646
C. <i>Distinguishing from Other Solutions</i>	647
D. <i>A Response to Arguments Against a Hate Speech Exception to First Amendment Protection</i>	649
1. <i>The "Slippery Slope" Argument</i>	649
2. <i>The Marketplace Argument</i>	651
CONCLUSION	652

INTRODUCTION

On June 19, 2017, the U.S. Supreme Court decided *Matal v. Tam*, a landmark case for trademark law and the First Amendment.¹ Less than two months later, on August 11, 2017, a horde of white supremacists marched through the streets of Charlottesville, Virginia, bearing “tiki torches, swastikas, and semi-automatic rifles and chanting slogans like ‘White lives matter’ and ‘Jews will not replace us!’” in the Unite the Right rally.² At first glance, the connection between an intellectual property decision from the Supreme Court and a white supremacist rally may not be apparent, but the two are more closely related than they appear.

Since the rally in Charlottesville, white supremacist groups spewing hate speech have continued to operate with increasing frequency and visibility. In August 2018, the weekend before the first anniversary of the Charlottesville rally, groups led by the Proud Boys, “a white nationalist fight club,” arrived in Portland to “brawl in the name of ‘free speech.’”³ Even more recently, the summer of 2020 “brought eerie echoes” of 2017.⁴ In response to the unprecedented surge of support for the Black Lives Matter movement,⁵ right-wing, white-supremacist paramilitary groups rallied in communities across the country, often with the intention of escalating their rallies to open conflict with government officials and Black Lives Matter activists.⁶

Many brands, influenced by the Black Lives Matter movement, have changed, or announced plans to change, their trademarked brand names and logos,⁷ many of which have been criticized as racially insensitive since long before the summer of 2020.⁸ However, from a legal standpoint, when it comes

¹ See *Matal v. Tam*, 137 S. Ct. 1744 (2017) (plurality opinion); U.S. CONST. amend. I (“Congress shall make no law respecting an 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.”).

² Politico Mag., *What Charlottesville Changed*, POLITICO MAG. (Aug. 12, 2018), <https://www.politico.com/magazine/story/2018/08/12/charlottesville-anniversary-supremacists-protests-dc-virginia-219353>.

³ *Id.* (quoting investigative reporter Ryan Lenz).

⁴ Michael Signer, *Charlottesville Keeps Happening, All Over America*, WASH. POST (Aug. 11, 2020), <https://www.washingtonpost.com/outlook/2020/08/11/charlottesville-lessons-cities-provocations/>.

⁵ Colleen Long, Kat Stafford & R.J. Rico, *Summer of Protest: Chance for Change, but Obstacles Exposed*, AP NEWS (Sept. 6, 2020), <https://apnews.com/article/9035ecd58d5dba755185666ac0ed6d>.

⁶ Signer, *supra* note 4.

⁷ See Jemima McEvoy, *Eskimo Pie Becomes Edy’s Pie: Here Are All the Brands that Are Changing Racist Names and Packaging*, FORBES (Oct. 26, 2020), <https://www.forbes.com/sites/jemimamcevoy/2020/10/06/eskimo-pie-becomes-edys-pie-here-are-all-the-brands-that-are-changing-racist-names-and-packaging/#2521274956a7>.

⁸ See, e.g., Riché Richardson, *Can We Please, Finally, Get Rid of ‘Aunt Jemima’?*, N.Y. TIMES (June 24, 2015), <https://www.nytimes.com/roomfordebate/2015/06/24/besides-the-confederate-flag-what-other-symbols->

to the hate speech spouted by white supremacist groups, “rigid First Amendment doctrines [protecting hate speech] . . . can tie the hands of . . . leaders trying to keep [citizens] safe.”⁹ After *Tam*, the First Amendment now also ties the hands of those wishing to keep hate speech and disparagement out of the federal trademark registry.

In *Tam*, the Supreme Court struck down the “disparagement clause,” a provision of Section 2(a) of the Lanham Act, as a violation of the Free Speech Clause of the First Amendment.¹⁰ The Lanham Act governs federal trademark law in the United States, including federal trademark registration.¹¹ Prior to *Tam*, the disparagement clause barred federal registration of marks that “[c]onsist[ed] of or comprise[d] . . . matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols.”¹² *Tam* concerned Simon Tam’s Portland-based dance-rock band and their quest to obtain federal trademark registration for their band name.¹³ The Asian American band chose the name “The Slants” in an effort to reclaim and reappropriate “slant”—a racial slur used to disparage people of Asian ethnicity—by using the term in a way that would make a social commentary on and provoke conversation about discrimination.¹⁴ Despite the band’s intent to reclaim the term for the Asian American community through this reappropriation—a tactic minority groups commonly employ to empower themselves and fight discrimination¹⁵—the U.S. Patent and Trademark Office (USPTO) denied the band’s application for federal registration twice on the grounds that “The Slants” was disparaging to people of Asian ethnicity.¹⁶

should-go/can-we-please-finally-get-rid-of-aunt-jemima (“[A] host of products . . . [are] linked to Southern racism. . . . It is about time for there to be some honest conversation about what is at stake in continuing to market products . . . under [such] names as ‘Aunt Jemima.’”); Vonnie Williams, *Food Brands Are Finally Changing Their Racist Mascots—But Is It Enough?*, DELISH (July 21, 2020), <https://www.delish.com/food/a33313212/food-brands-racist-mascots-logos/> (noting that, prior to 2020, “[i]n response to previous and frequent outcries over racially charged [brand] mascots, brands ha[d] done little”).

⁹ Signer, *supra* note 4.

¹⁰ *Matal v. Tam*, 137 S. Ct. 1744, 1753, 1765 (2017) (plurality opinion).

¹¹ *Id.* at 1752.

¹² Lanham Act § 2(a), 15 U.S.C. § 1052(a).

¹³ Sarah Jeong, *Should We Be Able to Reclaim a Racist Insult—As a Registered Trademark?*, N.Y. TIMES MAG. (Jan. 17, 2017), https://www.nytimes.com/2017/01/17/magazine/should-we-be-able-to-reclaim-a-racist-insult-as-a-registered-trademark.html?_r=0.

¹⁴ *Id.* (“The Slants, [Tam] said, are hardly the first rock band to reclaim ‘stigmatizing labels’ . . . : ‘I grew up with bands like The Queers [and] Pansy Division – groups who take [slurs] and flip these assumptions on their heads.’”).

¹⁵ Sonia K. Katyal, Commentary, *Brands Behaving Badly*, 109 TRADEMARK REP. 819, 820 (2019) (“[F]or 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.”).

¹⁶ Simon Tam, *First Amendment, Trademarks, and “The Slants”*: *Our Journey to the Supreme Court*, 12 BUFF. INTELL. PROP. L.J. 1, 7, 9 (2018). To the contrary, as journalist Sarah Jeong wrote, “in [Tam’s] experience,

Ultimately, the disparagement clause was struck down as violative of the First Amendment, and The Slants got their federal registration.¹⁷

While there is a moral intuition that *Tam* saw justice done for The Slants, and while the result was legally correct under current First Amendment doctrine,¹⁸ much of the commentary surrounding the case has focused on the room the decision created for hate speech in trademark law¹⁹ and alternative ways the Court could have decided the case without voiding the disparagement clause in its entirety.²⁰ Further, for some, *Tam* constitutes one of the more recent steps the Court has taken in its absolutist interpretation of the Free Speech Clause of the First Amendment.²¹

The absolutist approach to free speech provides remarkably broad protection for freedom of expression—including “the most hateful, offensive, illiberal, and dangerous ideas”—to an extent that “is unusual around the world, even among other constitutional democracies.”²² This position was affirmed in Justice Alito’s plurality opinion in *Tam* by his declaration that it is a “bedrock First Amendment principle” that “[s]peech may not be banned on the ground that it

‘Asian-Americans generally get [the name]. . . . They think it’s funny. Sly.’ It was white people who sometimes choked on it—but that, for Tam, was what made it such a great conversation starter.” Jeong, *supra* note 13.

¹⁷ *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (plurality opinion) (“[T]his provision . . . offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.”).

¹⁸ Harvard law professor and former U.S. Supreme Court clerk Noah Feldman noted that the concept of a right to offend, which Justice Alito’s plurality expressed, “is a contentious position in the broader culture over what discourse should be allowed in public. But, it correctly states Supreme Court doctrine.” Noah Feldman, *Supreme Court Doesn’t Care What You Say on the Internet*, BLOOMBERG: OP. (June 19, 2017, 3:20 PM), <https://www.bloomberg.com/opinion/articles/2017-06-19/supreme-court-doesn-t-care-what-you-say-on-the-internet>.

¹⁹ See, e.g., Katyal, *supra* note 15, at 824 (“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.”); Ilhyung Lee, Tam *Through the Lens of Brunetti: The Slants, Fuct*, 69 EMORY L.J. ONLINE 2002, 2004 (2019) (critiquing Tam’s “pronouncement of a fundamental right to register a racial epithet as a mark under the federal trademark system”); Esther H. Sohn, *Countering the “Thought We Hate” with Reappropriation Use Under Trademark Law*, 94 N.Y.U. L. REV. 1729, 1730–31 (2019); Mark Conrad, *Matal v. Tam—A Victory for the Slants, A Touchdown for the Redskins, but an Ambiguous Journey for the First Amendment and Trademark Law*, 36 CARDOZO ARTS & ENT. L.J. 83, 123 (2018); Tam, *supra* note 16, at 11; Matthew Nelles, *Did the Supreme Court Open the Floodgate to Offensive Trademarks?*, THE HILL (June 20, 2017), <https://thehill.com/blogs/pundits-blog/the-judiciary/338570-did-the-supreme-court-open-the-floodgate-to-offensive>; Feldman, *supra* note 18; Jeong, *supra* note 13.

²⁰ See Meaghan Annett, *When Trademark Law Met Constitutional Law: How A Commercial Speech Theory Can Save the Lanham Act*, 61 B.C. L. REV. 253, 258–59 (2020).

²¹ Feldman, *supra* note 18 (discussing Tam as “display[ing] the free speech absolutism that has become judicial orthodoxy in recent years”); Noah Feldman, *You Can Trademark Whatever Words You Want Now*, BLOOMBERG: POL. & POL’Y (June 24, 2019), <https://www.bloomberg.com/opinion/articles/2019-06-24/supreme-court-vulgar-trademark-case-is-absolute-on-free-speech>.

²² Zachary S. Price, *Our Imperiled Absolutist First Amendment*, 20 U. PA. J. CONST. L. 817, 818 (2018).

expresses ideas that offend.”²³ Instead of banning speech that offends, the absolutist approach responds that the remedy for such speech is more speech.²⁴ This response stems from nineteenth-century English philosopher John Stuart Mill’s “traditional rationale for freedom of speech: if we cannot socially parse out the false information, and instead suppress what is false, we deny others the ability to reason and learn. Additionally, suppression could potentially censor a truth clouded in falsehood.”²⁵ As articulated by Justice Holmes in *Abrams v. United States*, this process of socially parsing out false information takes place via the marketplace of ideas,²⁶ in which “truth reveals itself” through discourse and the exchange of ideas and becomes the dominant and accepted doctrine in the society.²⁷ Historically, however, not everyone has “bought in” to Mill’s marketplace of ideas,²⁸ particularly with regard to hate speech.²⁹ Among those who are unpersuaded are legal scholars, critical race theorists, and several philosophers of language.³⁰ For those who have bought into Mill’s marketplace of ideas, recent events and developments, including “the rise of the alt-right, protests, Charlottesville, . . . the Myanmar Genocide,”³¹ and the phenomenon of

²³ *Matal v. Tam*, 137 S. Ct. 1744, 1751, 1763 (2017) (plurality opinion).

²⁴ Kevin Boyle, *Hate Speech—The United States Versus the Rest of the World?*, 53 ME. L. REV. 487, 502 (2001).

²⁵ Spencer Bradley, *Whose Market Is It Anyway? A Philosophy and Law Critique of the Supreme Court’s Free-Speech Absolutism*, 123 DICK. L. REV. 517, 533–34 (2019) (citing JOHN STUART MILL, ON LIBERTY 36 (Andrew UK Ltd. 2011) (1859)).

²⁶ 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”). The phrasing “marketplace of ideas” came into use in the 1960s. Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1161 n.3 (2015).

²⁷ Bradley, *supra* note 25, at 533–34.

²⁸ See, e.g., *id.* at 520 (arguing “the First Amendment entrenches and legitimizes ideas that deny others their humanity” because Mill’s theory accords “all perspectives . . . equivalent truth value” and assumes they can compete equally in the market but fails to recognize the power dynamics of speech that prevent equal competition).

²⁹ Boyle, *supra* note 24, at 489; see also Price, *supra* note 22, at 824 (pointing out that the First Amendment currently provides “near-absolute protection” for speech, regardless of how “hateful, offensive, indecent, or illiberal” it may be). Hate speech is a problematic category because it illustrates a “conflict between two rights in a democratic society—freedom of speech and freedom from discrimination. . . . A society that aims at democracy must [protect] both.” Boyle, *supra* note 24, at 490.

³⁰ See, e.g., MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLÈ WILLIAMS CRENSHAW, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 10 (1993); STANLEY FISH, THERE’S NO SUCH THING AS FREE SPEECH AND IT’S A GOOD THING, TOO 115 (1994); cf. The Philosopher’s Arms, *Hate Speech*, BBC RADIO 4, at 06:54 (Dec. 21, 2015), <https://www.bbc.co.uk/programmes/b06s8bq4> (quoting philosopher Rae Langton); James Bohman & William Rehg, *Jürgen Habermas*, THE STAN. ENCYC. OF PHIL. 3.1 (Edward N. Zalta ed., 2014), <https://plato.stanford.edu/entries/habermas/#HabDisThe> (explaining German philosopher of language Jürgen Habermas’ theory of communicative action, in which speech must have “sincerity, rightness, and truth” to constitute speech that could be considered actual communication or discourse—and therefore be entitled to protection).

³¹ Bradley, *supra* note 25, at 519.

social media,³² “have forced a reconsideration of the First Amendment’s power, limitations, and value to society.”³³ These reconsiderations lead to the question of “whether the First Amendment, in an increasingly diverse society with multiple group identities that have historically lacked power, is compatible with other Constitutional guarantees and norms,”³⁴ like the right to equal protection under the law.³⁵

This Comment joins the body of scholarship arguing against the protection of hate speech under the First Amendment. As a facet of that argument, it proposes an amendment to the Lanham Act to resolve the double-edged sword that *Tam*’s holding presents: allowing federal registration for all manner of hateful marks, regardless of whether they are intended to be used for reappropriation. This solution includes an anti-hate speech clause prohibiting the registration of marks that would constitute hate speech, as well as an exception to that prohibition to allow registration of such marks when they are used to engage in reappropriation—such as the band name “The Slants.”

To reach this solution, Part I explores the origins of First Amendment doctrine and the narrow exceptions to its near absolute protection of speech. Part II examines the problem of hate speech and the use of reappropriation by minority communities as a tool to combat it. Part III outlines the essential elements of the Lanham Act and the benefits of the federal trademark registration framework that it provides. Part IV then discusses *Matal v. Tam* and its companion case, *Iancu v. Brunetti*.³⁶ Lastly, Part V presents a summary of some of the arguments against protecting hate speech and proposes an amendment to the Lanham Act to address the problem of hate speech in trademark law. It then addresses the inadequacy of alternative solutions for trademark law and, finally, arguments against banning hate speech that oppose this Comment’s proposed amendment on a broader scale.³⁷

³² Richard Stengel, *Why America Needs a Hate Speech Law*, WASH. POST (Oct. 29, 2019), <https://www.washingtonpost.com/opinions/2019/10/29/why-america-needs-hate-speech-law/> (“The presumption has always been that the marketplace [of ideas] would offer a level playing field. But in the age of social media, that landscape is neither level nor fair. . . . On the Web, it’s not enough to battle falsehood with truth: the truth doesn’t always win.”).

³³ Bradley, *supra* note 25, at 519.

³⁴ *Id.*

³⁵ MATSUDA ET AL., *supra* note 30, at 15.

³⁶ *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019).

³⁷ It is beyond the scope of this Comment to discuss how a ban on hate speech should be designed or function in every aspect of American life. This Comment is restricted to a consideration of what such a ban might look like in the context of the Lanham Act.

I. THE FIRST AMENDMENT

This Part first traces the evolution of the Supreme Court's interpretation of the First Amendment and its emerging absolutism amidst the historical forces that motivated, justified, and at times, challenged the evolution of the doctrine throughout the twentieth century. It then discusses two exceptions to First Amendment protection of speech that the Court has articulated and continued to limit since their respective inceptions: the fighting words exception and the incitement to imminent violence exception.

A. It Wasn't Always So: The Evolution of the Absolutist Interpretation of the First Amendment

When discussing the First Amendment and its importance in American democracy, many Americans will say it is “first for a reason.”³⁸ While this attributed significance is misplaced, as the First Amendment was actually the third amendment in the original proposal for the Bill of Rights, the First Amendment is “first in the hearts and minds . . . of most Americans. Free speech . . . [is a] core part[] of what it means to be an American.”³⁹ The contemporary understanding of the First Amendment and freedom of speech emphasizes Americans' right to free speech, regardless of the content, value, or effect of the speech.⁴⁰ The justification for this expansive protection is the notion that freedom of expression is an essential element of democratic self-government.⁴¹

But the First Amendment was not always understood to provide such robust protection.⁴² In fact, “as a matter of judicial enforcement, the First Amendment largely lay dormant until the late 1930s and 1940s,”⁴³ years after the First Amendment was incorporated against the states through the Due Process Clause of the Fourteenth Amendment in *Gitlow v. New York*.⁴⁴ The Court's current absolutist interpretation did not begin to emerge until the mid-twentieth century⁴⁵ and did not take on “its now-familiar absolutist cast . . . [until] the 1960s and 1970s, against the backdrop of the Civil Rights Movement.”⁴⁶

³⁸ Constitutional, *The First Amendment*, WASH. POST, at 08:07 (Jan. 29, 2018), <https://www.washingtonpost.com/podcasts/constitutional/episode-16-the-first-amendment/>.

³⁹ *Id.* at 08:09.

⁴⁰ See Bradley, *supra* note 25, at 517.

⁴¹ Price, *supra* note 22, at 818.

⁴² Constitutional, *supra* note 38, at 05:35.

⁴³ Price, *supra* note 22, at 820.

⁴⁴ 268 U.S. 652, 666 (1925).

⁴⁵ Price, *supra* note 22, at 820; Constitutional, *supra* note 38, at 06:45.

⁴⁶ Price, *supra* note 22, at 820.

Throughout the twentieth century, the nature of First Amendment protections for speech was largely political and was influenced and, to an extent, catalyzed by minority groups fighting for their rights, as well as by political developments in the United States and abroad.⁴⁷

In the period immediately following World War I, the Supreme Court heard a number of First Amendment cases involving political speech and upheld government suppression of speech under the Espionage Act, which, among other things, prohibited government criticism and criminalized speech that had the potential to disrupt military duties or recruitment.⁴⁸ These cases established and explored the “clear and present danger” test, which justified the suppression of speech when “the words used [were] used in such circumstances and [were] of such a nature as to create a clear and present danger that . . . [would] bring about the substantive evils that Congress has a right to prevent.”⁴⁹ Initially, the test was applied to uphold the suppression of (often Socialist) speech, which the Court held would ordinarily be permissible but needed to be suppressed in wartime to promote national security and military recruitment.⁵⁰ However, the Court also applied the test in non-wartime cases based on speech by “dangerous and unpatriotic” speakers⁵¹ and speech that posed a threat to the State.⁵² This trend of government suppression of allegedly unpatriotic expression was part of the motivation for another wave of First Amendment cases, this time brought by the Jehovah’s Witnesses.

Between 1938 and 1946, the Jehovah’s Witnesses argued twenty-three cases before the Supreme Court to enforce their rights, “forc[ing] the Court to define—and ultimately to strengthen—the role of the First Amendment in the United States.”⁵³ Of these appearances before the Court, three cases were perhaps the most significant in shaping First Amendment doctrine: *Minersville School*

⁴⁷ See, e.g., *id.* at 820, 828–29 (noting the influence of the Civil Rights Movement and the weakening of the Ku Klux Klan on the expansion of freedom of speech protections in the 1960s and 1970s); Constitutional, *supra* note 38, at 23:00 (discussing the influence of World War II on First Amendment doctrine).

⁴⁸ See Bradley, *supra* note 25, at 521–26.

⁴⁹ *Schenck v. United States*, 249 U.S. 47, 52 (1919) (illustrating the “clear and present danger” test with the now iconic example of falsely shouting “Fire!” in a crowded theater).

⁵⁰ See Bradley, *supra* note 25, at 521–26 (discussing the application of the “clear and present danger” test to Socialist speech in wartime in *Schenck*, 249 U.S. 47 and *Debs v. United States*, 249 U.S. 211 (1919), and to Russian radicals in *Abrams v. United States*, 250 U.S. 616 (1919)).

⁵¹ See *id.* In *Abrams v. United States*, however, the country was not at war, a distinction Justice Holmes highlighted, foreshadowing the “market of ideas” rationale the Court would later apply as it moved toward absolutism. *Id.* at 523 (citing *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)).

⁵² *Id.* at 524–25 (discussing the conviction of a member of the Communist Party in *Whitney v. California*, 274 U.S. 357 (1927), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

⁵³ Constitutional, *supra* note 38, at 06:45.

District v. Gobitis,⁵⁴ *West Virginia State Board of Education v. Barnette*,⁵⁵ and *Chaplinsky v. State of New Hampshire*.⁵⁶

Gobitis concerned the expulsion from a public school of two siblings who, on the basis of their religious beliefs as devout Jehovah's Witnesses, refused to salute the American flag or recite the Pledge of Allegiance at school.⁵⁷ Though there was no explicit school policy or state law compelling participation in these patriotic exercises,⁵⁸ the siblings were expelled.⁵⁹

In an 8–1 decision, the Supreme Court ruled against the siblings, holding that it is constitutional for a public school to compel its students to say the Pledge of Allegiance and salute the American flag in the interest of promoting national unity and cohesion.⁶⁰ The Court acknowledged the importance of religious liberty but stated that, in some circumstances, individual liberties must give way to measures taken to promote and preserve the very society that provides those liberties.⁶¹

While this decision may seem surprising given current First Amendment doctrine—and was surprising to *Gobitis*'s lone dissenter, Justice Stone⁶²—it can largely be explained by the historical context of 1940. Notably, the majority opinion was written by Justice Frankfurter, an Austrian immigrant, against the backdrop of World War II (and the Nazi annexation of his birthplace of Austria).⁶³ His opinion signaled a view of “the United States as a critical player in stopping the spread of Nazism and fascism globally” and, accordingly, the perspective that cultivating—or compelling—patriotism was integral to that global goal and to American national security.⁶⁴

In the three years following *Gobitis*, a number of developments challenged the wisdom of the *Gobitis* decision. Domestically, the decision was viewed as an endorsement of “the snuffing out of religious freedom”—at least insofar as it pertained to the Jehovah's Witnesses, a controversial religious minority group

⁵⁴ 310 U.S. 586 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁵⁵ 319 U.S. 624.

⁵⁶ 315 U.S. 568 (1942).

⁵⁷ *Gobitis*, 310 U.S. at 591.

⁵⁸ Constitutional, *supra* note 38, at 13:45.

⁵⁹ *Gobitis*, 310 U.S. at 591.

⁶⁰ *Id.* at 600.

⁶¹ *Id.* at 595.

⁶² *Id.* at 601–07 (Stone, J., dissenting).

⁶³ Constitutional, *supra* note 38, at 23:00.

⁶⁴ *Id.*

that was already persecuted and experienced horrific attacks after *Gobitis*.⁶⁵ Internationally, the United States officially entered World War II, which inspired patriotism and fueled the persecution of the Witnesses due to their more provocative style of proselytizing, their rejection of traditionally patriotic rituals like saluting the American flag, and the mistaken notion that the Witnesses were working covertly for the Nazi Party.⁶⁶ However, as victory over Germany and Japan neared, American sentiment toward tolerance changed.⁶⁷ With “less anxiety” over the war, Americans had the time “to reflect on the meaning of the war and the meaning of the principles,” like religious liberty, for which the United States was fighting.⁶⁸ Additionally, the Supreme Court’s composition shifted in 1941 with the addition of Justice Jackson and the promotion of Justice Stone, the lone *Gobitis* dissenter, to Chief Justice.⁶⁹ All of these factors further motivated the Jehovah’s Witnesses’ search for the perfect test case to overturn *Gobitis*.⁷⁰

Factually, *West Virginia Board of Education v. Barnette* was nearly identical to *Gobitis*, but it resulted in a drastically different holding. In the midst of World War II, Justice Jackson’s majority opinion overruled *Gobitis* and emphasized the value of *voluntary* patriotism as opposed to efforts to compel unity through nationalism.⁷¹ Such efforts, he wrote, are ultimately futile, as evidenced by the failure of “every such effort from the Roman drive to stamp out Christianity . . . to the fast failing efforts of our present totalitarian enemies,” in reference to the Nazi Party across the Atlantic.⁷²

In addition, the *Barnette* decision included Justice Jackson’s now-famous meditation on the First Amendment:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to

⁶⁵ *Id.* at 28:03 (noting more than one thousand Jehovah’s Witnesses around the United States were the victims of violent attacks, which the ACLU in 1941 compared to the mob violence of the Ku Klux Klan in the 1920s).

⁶⁶ Make No Law: The First Amendment Podcast, *Fighting Words*, LEGAL TALK NETWORK, at 08:55 (Jan. 31, 2018), <https://legaltalknetwork.com/podcasts/make-no-law/2018/01/fighting-words/>.

⁶⁷ *Id.* at 16:10.

⁶⁸ *Id.*

⁶⁹ *Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Dec. 18, 2021).

⁷⁰ Constitutional, *supra* note 38, at 35:25.

⁷¹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) (“To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.”).

⁷² *Id.*

confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.⁷³

And yet, while the Court moved firmly toward its current absolutist position on free speech in *Barnette*, when the next perceived threat to national security presented itself in the McCarthy era and the Cold War, the Court resumed its practice of sanctioning government suppression of Communist (or perceived-as-Communist) speech and acts.⁷⁴ The principles of First Amendment absolutism, however, remained present in the dissents in several of these cases.⁷⁵ Though the Supreme Court's decisions with respect to the scope of First Amendment protection were inconsistent from the 1930s to 1950s for controversial groups,⁷⁶ the Court moved further toward more robust protections for expression as the country confronted the Civil Rights Movement of the 1950s and 1960s.⁷⁷

During the Civil Rights Movement, the Court expanded protections for speech under the First Amendment in response to the racial injustices of Jim Crow.⁷⁸ In fact, many cases that are considered foundational First Amendment cases were also civil rights decisions, including *New York Times Co. v. Sullivan*.⁷⁹ These cases offered a platform upon which the Supreme Court further developed its First Amendment jurisprudence, broadly interpreting the phrase "to protect an open 'interchange of ideas'"⁸⁰ to mean that "the public expression of ideas may not be prohibited merely because the ideas themselves are offensive to some of their hearers"⁸¹ and to require strict scrutiny when the government imposes content-based limitations on expression.⁸² Since this period, "[c]ategories of unprotected speech have shrunk down or disappeared, while the

⁷³ *Id.* at 642.

⁷⁴ Bradley, *supra* note 25, at 526–27. In fact, the Court expanded the clear and present danger test to address even the *potential* for a government overthrow by the Communist Party. *Id.* at 527 (citing *Dennis v. United States*, 341 U.S. 494, 511 (1951)).

⁷⁵ *Id.* at 529 (referring to the dissents of Justices Black and Douglas in *Dennis*, 341 U.S. 494, and *Yates v. United States*, 354 U.S. 298 (1957), *overruled by* *Burks v. United States*, 437 U.S. 1 (1978), respectively, in which the two argued that the Smith Act, under which Communists and left-wing sympathizers were punished, was unconstitutional).

⁷⁶ Price, *supra* note 22, at 827.

⁷⁷ *Id.* at 820.

⁷⁸ *Id.*

⁷⁹ *Id.* at 828.

⁸⁰ *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964)).

⁸¹ *Street v. New York*, 394 U.S. 576, 592 (1969).

⁸² *See Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972); *see infra* Part IV.A.2 (explaining content and viewpoint discrimination in the First Amendment context).

category of ‘speech’ subject to First Amendment protection . . . has steadily expanded.”⁸³

In sum, many of the Court’s sweeping protections for speech today are the relatively recent result of domestic and international political forces throughout the twentieth century and, in particular, the efforts of minorities to enforce their rights in the courts, rather than imperatives inherited from the founding period. Additionally, as some scholars have noted, “the Court ‘supplied its most robust interpretations of the First Amendment’ only after ‘the complete collapse of the internal [Communist] subversion threat in the 1960s’ and substantial weakening of the Ku Klux Klan.”⁸⁴ In other words, one might argue that the Court only felt secure in establishing such broad protections for speech once the domestic and international threats of Socialist anti-war sentiment, seemingly unpatriotic behavior by Jehovah’s Witnesses, Communism during the Cold War, and the Ku Klux Klan during the Civil Rights Movement—i.e., the speech the government wanted to suppress—were ostensibly no longer a threat. This has resulted in broad protections for expression, subject to only a few narrow exceptions.

B. Exceptions to First Amendment Protection

The Supreme Court has stated that “the right of free speech is not absolute at all times and under all circumstances.”⁸⁵ The narrow exceptions to First Amendment protection include, specifically, child pornography, solicitation to commit crimes, blackmail, perjury, plagiarism, true threats, obscenity, defamation, fighting words, and incitement to imminent violence.⁸⁶ These are “classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”⁸⁷ This section focuses on the latter

⁸³ Price, *supra* note 22, at 829. During the post-World War II period, many European democracies took legislative measures and the United Nations drafted treaties to restrict hate speech while the United States expanded protections for nearly all categories of speech. *See generally* ERIK BLEICH, *THE FREEDOM TO BE RACIST? HOW THE UNITED STATES AND EUROPE STRUGGLE TO PRESERVE FREEDOM AND COMBAT RACISM* 6, 20–23 (Dave McBride ed., 2011) (discussing post-World War II legislation against racist and hateful speech in Germany, England, and France, among other European nations, as well as the United Nations’s Universal Declaration of Human Rights, as reflections of the importance of both freedom of speech and freedom from oppression, and the need to balance the two); Boyle, *supra* note 24, at 493–98; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, in *WORDS THAT WOUND*, *supra* note 30, at 17, 27–31.

⁸⁴ *E.g.*, Price, *supra* note 22, at 829 (quoting Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 36 (1996)).

⁸⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

⁸⁶ *The First Five*, *Unprotected Speech*, FREEDOM F. INSTIT. (Oct. 13, 2017), <https://www.freedomforuminstitute.org/2017/10/13/podcast-unprotected-speech/>; *see Chaplinsky*, 315 U.S. at 571–72.

⁸⁷ *Chaplinsky*, 315 U.S. at 571–72.

two exceptions—fighting words and incitement—which illustrate the difficult and somewhat controversial distinction the Court has attempted to draw between speech and conduct to justify regulation of some speech.⁸⁸

1. The “Fighting Words” Exception

The “fighting words” exception excludes from First Amendment protection words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”⁸⁹ The Supreme Court first articulated the “fighting words” doctrine in *Chaplinsky v. New Hampshire*, in which Chaplinsky, a Jehovah’s Witness, was convicted under a state statute criminalizing offensive, derisive or annoying speech directed at a person in the public square.⁹⁰ The Court upheld the statute, explaining in dicta that “fighting words” like the ones Chaplinsky used could legitimately be punished:⁹¹

[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. “Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.”⁹²

While this phrasing seems to establish a fairly broad exception to free speech protection—which could include racist speech⁹³—the Court implicitly focused on drawing a speech-conduct distinction by allowing the punishment of speech based on its characterization as a “*verbal act*[], rather than [on] the content of the speech.”⁹⁴ Thus, the Court’s narrow holding in *Chaplinsky* applied the fighting words doctrine only to words said in a face-to-face confrontation, which

⁸⁸ Price, *supra* note 22, at 825 (“[M]odern free expression case law thus seeks to balance two central imperatives of democratic self-government—guaranteeing personal and public security, on the one hand, and protecting freedom of opinion, on the other—by drawing a sharp line between expression and action, word and deed.”). This speech-conduct distinction, however, is tenuous and difficult to draw. See BLEICH, *supra* note 83, at 109; FISH, *supra* note 30, at 105–06, 110–11. The problems with the speech-conduct distinction are further highlighted when considered in light of philosophy of language principles, which view speech itself, colloquially, as “*doing things with words to people*.” The Philosopher’s Arms, *supra* note 30, at 6:47 (quoting philosopher Rae Langton) (emphasis added).

⁸⁹ *Chaplinsky*, 315 U.S. at 572.

⁹⁰ *Id.* at 569.

⁹¹ *Id.* at 572–73.

⁹² *Id.* at 572 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309–10 (1940)).

⁹³ Make No Law, *supra* note 66, at 23:05 (stating the fighting words doctrine is “a particularly popular justification for suggestions that we should ban racist or otherwise offensive speech, but . . . [i]t’s very narrow, not nearly as broad as the case’s original language suggests”).

⁹⁴ Bradley, *supra* note 25, at 526.

are “likely to provoke the average person to retaliation,”⁹⁵ and its applications of the doctrine since have only further narrowed the scope.⁹⁶

In particular, the Court has specified that application of the fighting words doctrine must consider the context in which the words are used and that the doctrine only allows the restriction or punishment of speech when the speech (1) is directed to a particular individual, (2) is aroused or was intended to arouse an actual violent reaction, and (3) was such that the actual addressee “would be likely to react in an immediate, violent manner.”⁹⁷ In response to the extremely narrowing effect of this last requirement on the doctrine, Justice Blackmun dissented, “assert[ing] that the Court merely was paying lip service to *Chaplinsky*.”⁹⁸

With regard to hate speech and hate crimes, courts have also refused to apply the exception to speech that is deemed to be entwined with political ideas.⁹⁹ Specifically, in *Village of Skokie v. National Socialist Party of America*, on remand from the U.S. Supreme Court,¹⁰⁰ the Illinois Supreme Court “rejected the circuit court’s injunction against the display of swastikas in the [Nazi] march” through the predominantly Jewish community of Skokie and refused to apply the fighting words doctrine.¹⁰¹ The court limited application of the doctrine to “words which directly cause violence . . . [and] conceptualized the display of the swastika as a political act, divorced from the *effect* of the display of the swastika in a predominantly Jewish Community.”¹⁰² The crafting of this interpretation reflects the Illinois court’s choice that “[i]t is better [for courts] to allow those who preach racial hate to expend their venom in rhetoric rather than

⁹⁵ *Chaplinsky*, 315 U.S. at 574.

⁹⁶ *Make No Law*, *supra* note 66, at 23:30 (“[T]he history of the fighting words doctrine is mostly a history of Court saying that it doesn’t apply . . .”); see Melody L. Hurdle, *R.A.V. v. City of St. Paul: The Continuing Confusion of the Fighting Words Doctrine*, 47 *VAND. L. REV.* 1143, 1151 (1994).

⁹⁷ Hurdle, *supra* note 96, at 1149–53 (discussing the narrowing of the fighting words doctrine through *Terminiello v. Chicago*, 337 U.S. 1 (1949) (setting forth that the Court must consider the context in which the words are said), *Street v. New York*, 394 U.S. 576 (1969) (requiring that the speech be directed to a particular individual), *Cohen v. California*, 403 U.S. 15 (1971) (setting forth that speech must also arouse or be intended to arouse an immediate violent reaction), and *Gooding v. Wilson*, 405 U.S. 518, 528 (1972) (requiring a showing that the actual addressee would be likely to have an immediate violent reaction)).

⁹⁸ *Id.* at 1153 (citing *Gooding*, 405 U.S. at 537 (Blackmun, J., dissenting)).

⁹⁹ Bradley, *supra* note 25, at 531 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992)).

¹⁰⁰ 373 N.E.2d 21 (Ill. 1978); see also *Nat’l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 44 (1977) (*per curiam*) (holding that the Illinois Supreme Court’s affirmation of a denial of a stay of the injunction against the National Socialist Party of America, known as the American Nazi Party, deprived the group of rights protected by the First Amendment and that the group must either be granted immediate appellate review of an injunction of this nature or, instead, allow the stay).

¹⁰¹ Bradley, *supra* note 25, at 531 n.119 (citing *Skokie*, 373 N.E.2d at 22–25).

¹⁰² *Id.*

to be panicked into embarking on the dangerous course of permitting the government to decide what its citizens may say and hear.”¹⁰³

Similarly, in *R.A.V. v. St. Paul*, the U.S. Supreme Court found the fighting words exception did not justify a local ordinance banning swastikas, cross burnings, and other symbols and actions that “one knows or has reasonable grounds to know arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender”¹⁰⁴ because the ordinance “regulated fighting words through their connection with political ideas, resulting in viewpoint discrimination.”¹⁰⁵

Writing for the majority in *R.A.V.*, Justice Scalia also acknowledged but ultimately dismissed the equal protection argument that the ordinance’s discrimination was “justified because it [was] narrowly tailored to serve compelling state interests . . . [of] ensur[ing] the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish.”¹⁰⁶

2. *The “Incitement to Imminent Violence” Exception*

The “incitement to imminent violence” exception to freedom of speech protection, like the fighting words exception, is narrow in scope and application, permitting punishment or regulation of speech that is “directed to inciting or producing imminent lawless action *and* is likely to incite or produce such action.”¹⁰⁷ The Court outlined this exception in *Brandenburg v. Ohio* when it struck down an Ohio criminal syndicalism statute under which a Ku Klux Klan leader had been convicted for his inflammatory words at a Klan rally.¹⁰⁸ Continuing the speech-conduct distinction the Court had followed in

¹⁰³ *Collins v. Smith*, 447 F. Supp. 676, 702 (N.D. Ill. 1978), *aff’d*, 578 F.2d 1197 (7th Cir. 1978).

¹⁰⁴ *St. Paul, Minn.*, Legis. Code § 292.02 (1990), *invalidated by R.A.V.*, 505 U.S. at 391. *R.A.V.* was convicted of burning a cross on a Black family’s lawn. Mari J. Matsuda & Charles R. Lawrence III, *Epilogue: Burning Crosses and the R.A.V. Case*, in *WORDS THAT WOUND*, *supra* note 30, at 133 (discussing *R.A.V.*, 505 U.S. 377). Before the U.S. Supreme Court reviewed the case with an “ahistorical and acontextual” absolutist approach, the Minnesota Supreme Court “adopted the perspective urged by critical race theorists” and upheld the ordinance after considering the “history and context” of cross burnings. *Id.* at 134 (discussing *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991)).

¹⁰⁵ *Bradley*, *supra* note 25, at 531 (citing *R.A.V.*, 505 U.S. at 391).

¹⁰⁶ *R.A.V.*, 505 U.S. at 395–96; *Bradley*, *supra* note 25, at 532.

¹⁰⁷ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*) (emphasis added).

¹⁰⁸ *Id.* at 445. At the Klan rally in question, Clarence Brandenburg, a Klan leader, spoke about the KKK’s plan to march on Congress to take “revengeance” for the “suppress[ion of] the white, Caucasian race” and advocated for the forced relocation of the “n***** . . . to Africa, [and] the Jew . . . to Israel.” *Id.* at 446–47; *see also Bradley*, *supra* note 25, at 529–30 (discussing *Brandenburg*’s place in the evolution of free speech jurisprudence as the Court’s next step toward absolutism).

determining whether speech can be punished or regulated, the *Brandenburg* Court found the Ohio statute overbroad in its failure to distinguish between, on the one hand, mere advocacy that must be permitted and cannot be punished, and, on the other hand, incitement to imminent lawless violence that may be punished.¹⁰⁹

In practice, as seen in *Skokie, R.A.V.*, and *Brandenburg*, the fighting words and incitement exceptions—and, by extension, their speech-conduct distinction—often have the effect of permitting hate speech and hate propaganda, which have never had staying power as an exception to the First Amendment.¹¹⁰ The United States, however, is “alone among the major common law jurisdictions in its complete tolerance of such speech.”¹¹¹ Understanding why that is the case requires a closer look at hate speech—beginning with what it is.

II. HATE SPEECH AND THE POWER OF REAPPROPRIATION

This Part attempts to offer a working definition of hate speech for this Comment and present perspectives on the harmful effects of hate speech. It then introduces the concept of reappropriation as a tool by which minorities reclaim derogatory devices to empower their communities, challenge assumptions, and inspire meaningful conversation about discrimination.

A. Defining Hate Speech and Identifying Its Harms

Though definitions of hate speech vary somewhat, they generally relay that hate speech consists of communication in the form of speech or expression that targets and is hostile to particular social groups on the basis of characteristics such as race, ethnicity, religion, sex, gender, sexual orientation, age, and disability. The following examples offer context for considering and discussing hate speech, as well as whether, how, and to what extent it should be regulated in the United States.

As described in *Matal v. Tam*, hate speech is “[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar

¹⁰⁹ *Brandenburg*, 395 U.S. at 447–49 (“A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments.”).

¹¹⁰ Price, *supra* note 22, at 824 (noting that “more recent decisions” like *Tam* and *R.A.V.* “have effectively repudiated [the short-lived group libel] exception” created in *Beauharnais v. Illinois*, 343 U.S. 250, 258–59 (1952)).

¹¹¹ Matsuda, *supra* note 83, at 30–31.

ground.”¹¹² The *Max Planck Encyclopedia of Comparative Constitutional Law* defines hate speech as “verbal or non-verbal communication that involves hostility directed towards particular social groups, most often on the grounds of race and ethnicity (racism, xenophobia, anti-Semitism, etc.), gender (sexism, misogyny), sexual orientation (homophobia, transphobia), age . . . , disability[,]” and similar bases.¹¹³

With a focus on action and the effects of speech, critical race theorists define hate speech, or “assaultive speech,” as “words that are used as weapons to ambush, terrorize, wound, humiliate, and degrade.”¹¹⁴ Hate speech has also been approached from the public health perspective, which considers it a form of “hate-motivated behavior,” a category of behavior that has been named “a *public health threat* with structural, interpersonal, and individual antecedents and effects.”¹¹⁵ These effects are the very real and pervasive harms hate speech causes at the individual and societal level.¹¹⁶ These harms include harm to individuals’ physical, mental, and emotional health, as well as social and political harms.¹¹⁷

On the individual level, hate speech victims experience poor overall emotional, mental, and physical health effects, with specific symptoms including anger, shame, fear, depression, anxiety, suicidal behavior, and unhealthy coping mechanisms such as alcohol or drug use.¹¹⁸ These dangers to victims’ health and wellbeing are exacerbated by structural barriers and inequalities that make it more difficult for minority groups to access health care resources, as well as the inadequate care minority group members receive when they do access the resources.¹¹⁹

¹¹² *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (plurality opinion).

¹¹³ ULADZISLAU BELAVUSAU, HATE SPEECH, MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW (Rainer Grote et al. eds., 2017), <https://oxcon-ouplaw-com.proxy.library.emory.edu/view/10.1093/law-mpeccol/law-mpeccol-e130?print=pdf>.

¹¹⁴ MATSUDA ET AL., *supra* note 30, at 1.

¹¹⁵ Robert J. Cramer, Richard C. Fording, Phyllis Gerstenfeld, Andre Kehn, Jason Marsden, Cynthia Deitle, Angela King, Shelley Smart & Matt R. Nobles, *Hate-Motivated Behavior: Impacts, Risk Factors, and Interventions*, HEALTH AFFS. (Nov. 9, 2020), <https://www.healthaffairs.org/doi/10.1377/hpb20200929.601434/full/health-affairs-brief-hate-behavior-public-health-cramer.pdf> (emphasis added).

¹¹⁶ *Id.* at 2; see Matsuda, *supra* note 83, at 24.

¹¹⁷ Cramer et al., *supra* note 115, at 2; see Matsuda, *supra* note 83, at 24.

¹¹⁸ Cramer et al., *supra* note 115, at 2; see Matsuda, *supra* note 83, at 24 (noting additional symptoms such as hypertension, psychosis, and suicide and describing the psychic effect of hate speech on victims as “spirit murder”).

¹¹⁹ See Cramer et al., *supra* note 115, at 5. The U.S. Department of Health and Human Services summarized these structural inequalities in a report, stating that minorities “face a social and economic environment of inequality that includes greater exposure to racism and discrimination, violence, and poverty.” Brief for Asian Americans Advancing Justice et al. as Amici Curiae in Support of Neither Party at 22–23, Lee

Emotionally, hate speech reinforces the exclusion of minority groups from society and has the potential to cause minority group members to internalize that exclusion and reject their identity.¹²⁰ That sense of aloneness and exclusion is heightened by government tolerance of hate speech.¹²¹ For example, “[w]hen hundreds of police officers are called out to protect racist marchers, . . . the victim becomes a stateless person. Target-group members must either identify with a community that promotes racist speech or admit that the community does not include them.”¹²² Professor Monica Bell has termed this statelessness “legal estrangement,” through which “the law and its enforcers signal to marginalized groups that they are not fully part of American society—that they are not imbued with all the freedoms and entitlements that flow to other Americans, such as dignity, safety, dreams, health, and political voice, to name a few.”¹²³

In addition to the physical, mental, and emotional harms, hate speech also harms victims socially and politically by implicitly restricting victims’ personal freedom.¹²⁴ Hate speech victims have had “to quit jobs, forgo education, leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior.”¹²⁵ As to reputation, hate speech creates and reinforces stereotypes that limit expectations in the minds of both minority group members and dominant-group members as to what minority group members can achieve.¹²⁶ Importantly, while some scholars and perspectives concentrate on hate speech as it pertains to racial or ethnic minorities, “[n]o minority group is exempt from these harms,”¹²⁷ and the harm is not limited to minority groups; hate speech also impacts social cohesion on a societal level.¹²⁸

v. Tam, 137 S. Ct. 30 (2016) (No. 15-1293) [hereinafter Amicus Brief], *sub nom.* Matal v. Tam, 137 S. Ct. 1744 (2017) (plurality opinion) (citing U.S. DEP’T OF HEALTH AND HUM. SERVS., MENTAL HEALTH: CULTURE, RACE AND ETHNICITY—A SUPPLEMENT TO MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL (2001)).

¹²⁰ Matsuda, *supra* note 83, at 24–25.

¹²¹ *Id.* at 25.

¹²² *Id.*; see Boyle, *supra* note 24, at 502 (emphasizing that minorities “can cope with hate if they are confident it is the view of the marginal. It is when they experience the inaction of the majority . . . or the majority’s disinterest in their struggle for equality that hate speech hurts”).

¹²³ Monica C. Bell, *Legal Estrangement: A Concept for These Times*, 48 FOOTNOTES (SPECIAL ISSUE) 7, 8 (2020), https://www.asanet.org/sites/default/files/attach/footnotes/footnotes_july-august_2020.pdf. Professor Bell introduced this concept as a consequence of policing but has noted it is not limited to that context. *Id.*

¹²⁴ Matsuda, *supra* note 83, at 24; Amicus Brief, *supra* note 119, at 22–23.

¹²⁵ Matsuda, *supra* note 83, at 24.

¹²⁶ Amicus Brief, *supra* note 119, at 23.

¹²⁷ *Id.* at 25.

¹²⁸ Matsuda, *supra* note 83, at 25.

On a societal level, hate speech negatively impacts the way groups function together, as well as stability and trust within society.¹²⁹ Dominant-group members who associate with members of a target group may be harassed and threatened for such association.¹³⁰ Further, members of the dominant group often experience guilt due to the relief they feel because they are not, and will likely never be, the victims of such speech.¹³¹ This divide between target and non-target, or dominant, groups causes distrust between the two groups.¹³² This division “forces victim-group members to view all dominant-group members with suspicion” and “well-meaning dominant-group members to use kid-glove care in dealing with outsiders.”¹³³ Finally, at some level, hate speech is so pervasive that the idea of racial inferiority is likely to take root in the minds of both victims and well-meaning dominant-group members who may unconsciously internalize those perspectives.¹³⁴

In addition to these definitions and harms, another key element of understanding the hate speech issue is that hate speech is relatively new as a category of expression.¹³⁵ Until recently, what is now recognized as “hate speech was . . . mainstream speech. . . . There were no ‘hate groups’ espousing racism and white superiority when it was in fact the official ideology or mainstream idea.”¹³⁶

B. Reappropriation

In choosing “The Slants” for his band’s name, Simon Tam intended to reclaim the derogatory term “slant” to empower the Asian American community against negative stereotypes; share the band members’ perspective or “slant” on “what it’s like to be people of color in the U.S.”; and “pay[] homage to Asian-

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* (“Thus [the dominant-group members] are drawn into unwilling complicity with[, for example,] the Klan, spared from being the feared and degraded thing.”).

¹³² *See id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *See* Boyle, *supra* note 24, at 493–96 (discussing the United Nations’s adoption of international agreements addressing hate speech in the mid to late 1960s). *See generally* MATSUDA ET AL., *supra* note 30, at 1–6 (discussing the development of critical race theory since the late 1970s, which catalyzed interrogation of and scholarship on topics such as hate speech).

¹³⁶ Boyle, *supra* note 24, at 493. Hate speech was—and, in many ways, still is—the status quo, and “defenders of the status quo have discovered, in the [F]irst [A]mendment, a new weapon. The debate about affirmative action and inclusion of historically excluded groups is being recast as a debate about free speech. . . . without reference to historical context or uneven power relations” between the excluded groups and those who establish and preserve the status quo. MATSUDA ET AL., *supra* note 30, at 14.

American activists who had been using the term in this kind of self-appropriated way for decades.”¹³⁷ In other words, Tam was engaging in reappropriation, a “cultural process by which a group reclaims terms or artifacts that were previously used in a disparaging way towards that group . . . and shifts power from dominant groups into the marginalized.”¹³⁸ For generations, reappropriation has been used by minority groups to remove the sting and stigma from historically racist, hateful, and discriminatory devices, such as terms, symbols, and images, by using those terms in a new context to empower and define themselves.¹³⁹ As a result of empowering the targeted group, reappropriation revokes power from bigots, depriving them “of a linguistic weapon” and placing that power to identify and define the minority in the hands of the minority group members themselves.¹⁴⁰ As Tam himself has expressed, “[T]here’s so much power in being able to claim an identity; . . . when you say, ‘This belongs to me and my community,’ . . . instead of letting you use it as something to push me down, it can be truly empowering and transformative.”¹⁴¹

The power of reappropriation has also been recognized by the scientific community. In particular, reappropriation of slurs has long been considered by linguists and sociologists as an effective way to foster “individual and group identity, recapturing the ‘right of self-definition and naming one’s own existence.’”¹⁴² However, despite the mainstream recognition of the power and import of reappropriation, the concept has confounded the USPTO, which has responded with inconsistent results when applicants have sought registration of marks that might be considered disparaging to access the benefits that accompany federal registration.¹⁴³

¹³⁷ Make No Law: The First Amendment Podcast, *Disparagement, Contempt, and Disrepute*, LEGAL TALK NETWORK, at 00:25 (Mar. 15, 2018), <https://legaltalknetwork.com/podcasts/make-no-law/2018/03/disparagement-contempt-and-disrepute/> (interviewing Simon Tam).

¹³⁸ Tam, *supra* note 16, at 5.

¹³⁹ See Sohn, *supra* note 19, at 1741–42; Conrad, *supra* note 19, at 85–86 (citations omitted) (“The historically negative connotations of the label are challenged by the proud, positive connotations implied by a group’s use of the term as a self-label.”).

¹⁴⁰ Adam D. Galinsky, Kurt Hugenberg, Carla Groom & Galen V. Bodenhausen, *The Reappropriation of Stigmatizing Labels: Implications for Social Identity*, in 5 IDENTITY ISSUES IN GROUPS 221, 232 (Jeffrey T. Polzer ed., 2003).

¹⁴¹ Make No Law, *supra* note 137, at 01:45–02:04 (interviewing Simon Tam).

¹⁴² Sohn, *supra* note 19, at 1742 (quoting Todd Anten, Note, *Self-Disparaging Trademarks and Social Change: Factoring the Reappropriation of Slurs into Section 2(a) of the Lanham Act*, 106 COLUM. L. REV. 388, 422 (2006)).

¹⁴³ See, e.g., Anten, *supra* note 142, at 388–93 (discussing the USPTO’s inconsistent treatment of applications to register marks engaging in reappropriation).

III. TRADEMARKS AND THE LANHAM ACT

This Part provides a brief overview of trademark law in the United States. Specifically, it concentrates on the requirements to obtain a federal registration—as that was at issue in the *Tam* decision—with a particular focus on the significant benefits of having a federal registration.

A. The Lanham Act: Codifying Common Law Trademark Rights

Symbols have been used to “identify ownership or origin of [tangible and intangible] articles for thousands of years.”¹⁴⁴ In the seventeenth century, English common law courts began to recognize rights for the use of marks intended to identify an item’s source or origin.¹⁴⁵ The English based these newly acknowledged rights in existing property law.¹⁴⁶ Later, in the development of American trademark law, U.S. courts drew from English common law by basing trademark rights on property law. Moreover, both English and American courts recognized that “[t]he object or purpose of the law in protecting trademarks is two-fold”: first, to protect the manufacturer, and second, to prevent consumer confusion.¹⁴⁷ For manufacturers, trademark protection allows a way to profit from hard-earned consumer goodwill and shields against others’ attempts to profit unfairly off that goodwill.¹⁴⁸ For consumers, trademark protection provides a means to navigate the marketplace with ease and assures that a product sold under a distinctive mark is the genuine product of that manufacturer.¹⁴⁹

Additionally, though trademark rights do not rely on legislation for their enforcement given their common law foundation,¹⁵⁰ the United States has statutory trademark protection in all fifty states and at the federal level.¹⁵¹ At the federal level, after several unsuccessful attempts,¹⁵² Congress successfully

¹⁴⁴ J. THOMAS MCCARTHY, 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 5:1 (5th ed. 2020); see also Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1849–50 (2007) (noting the use of marks to “identify and distinguish one’s property dates to antiquity, and regulations regarding that use almost as long”).

¹⁴⁵ McKenna, *supra* note 144, at 1850–54.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1858–60, 1863–65 (quoting *Boardman v. Meriden Britannia Co.*, 35 Conn. 402, 404 (1868)).

¹⁴⁸ *Id.* at 1858–60.

¹⁴⁹ *Id.* at 1863–64.

¹⁵⁰ *In re Trade-Mark Cases*, 100 U.S. 82, 93 (1879).

¹⁵¹ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9 (1995).

¹⁵² See generally MCCARTHY, *supra* note 144, § 5:3 (discussing Congress’s attempts at trademark legislation in the Act of 1870; the Act of March 3, 1881; and the Act of 1905).

codified trademark rights in the Lanham Act of 1946,¹⁵³ providing “a degree of national uniformity” for trademark protection and a scheme that fosters competition and encourages producers to maintain a high quality of goods and services.¹⁵⁴

The Lanham Act “provide[s] a mechanism for the registration of trademarks, describe[s] the types of marks that may [and may not] be registered, and specif[ies] the procedural and substantive advantages afforded to the owner of a trademark registration.”¹⁵⁵ The Act also provides legal frameworks for claims of infringement of registered and unregistered trademarks,¹⁵⁶ as well as a broad definition of what may constitute a trademark.¹⁵⁷

As outlined in the Lanham Act, a trademark is a designation—including “any word, name, symbol, or device, or any combination thereof”—that serves to “identify and distinguish” a person’s goods or services from another’s goods or services.¹⁵⁸ If the designation “identif[ies] the source of one seller’s goods [or services] and distinguish[es] that source from other sources,” then the designation is “distinctive” and therefore entitled to legal protection.¹⁵⁹ Within the realm of federal trademark law, legal protection is available for both registered and unregistered marks, but federal registration of a trademark provides mark owners with numerous “procedural and substantive legal advantages over-reliance on common law rights.”¹⁶⁰

*B. Why Register? Benefits of Federal Registration on the Principal Register*¹⁶¹

Put simply, “[f]ederal registration is the T.S.A. PreCheck of intellectual-property law: Not everyone has to get it, but if you do a lot of business, you probably should.”¹⁶² Broadly speaking, the advantages of federal registration of

¹⁵³ *Id.* § 5:4.

¹⁵⁴ *Matal v. Tam*, 137 S. Ct. 1744, 1752 (2017) (plurality opinion) (explaining why federal trademark legislation is desirable).

¹⁵⁵ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9 (1995).

¹⁵⁶ MCCARTHY, *supra* note 144, § 5:4 (discussing the use of Lanham Act § 43(a), 15 U.S.C. § 1125(a), to assert claims—which were previously only available under state law—of infringement of an unregistered mark).

¹⁵⁷ Lanham Act § 45, 15 U.S.C. § 1127.

¹⁵⁸ *Id.*

¹⁵⁹ MCCARTHY, *supra* note 144, § 3:1; *see also* BARTON BEEBE, TRADEMARK LAW: AN OPEN-SOURCE CASEBOOK 34–35 (7th ed. 2020) (defining “distinctiveness”).

¹⁶⁰ MCCARTHY, *supra* note 144, § 19:9.

¹⁶¹ The Lanham Act also created the Supplemental Register for marks that “are not registrable on the Principal Register, but . . . are ‘capable of distinguishing’ goods and services” and marks that may later become registrable on the Principal Register. *Id.* § 19:32 (citations omitted); Lanham Act §§ 23, 27, 15 U.S.C. §§ 1091, 1095. This Comment focuses on the Principal Register and its benefits.

¹⁶² Jeong, *supra* note 13.

a mark on the Principal Register include nationwide notice of constructive use from the filing date of the application for registration;¹⁶³ the potential for the registration to become “incontestable,” which substantially reduces the number of ways a registration can be challenged;¹⁶⁴ prima facie evidence of the mark’s validity, registration, and the registrant’s ownership and right to exclusive use of the mark; federal jurisdiction to sue for infringement; and the possibility of recovering treble damages.¹⁶⁵

In addition to the considerable legal benefits, there are also practical advantages to having a federally registered trademark. The Slants, for example, sought federal registration in part because, according to Simon Tam, “[i]f you want a record label deal, they won’t sign you unless you have a registered trademark.”¹⁶⁶ So began a long journey toward registration that brought Simon Tam and The Slants before the Supreme Court and into a national dialogue about trademarks and hate speech.

IV. FREE SPEECH ABSOLUTISM COMES TO TRADEMARK LAW

This Part first discusses the landmark trademark case of *Matal v. Tam* and the double-edged sword its holding created within the realm of trademark law. It then discusses *Tam*’s companion case, *Iancu v. Brunetti*, and concerns over the combined effect and implications of the two holdings.

A. *Matal v. Tam*

Beginning with a discussion of the federal trademark registration battle that led Simon Tam to challenge the constitutionality of the disparagement clause, this section breaks down the Supreme Court’s opinions in *Tam* and discusses the reactions to and ramifications of that decision.

1. *The Road to the Supreme Court*

When Simon Tam started his all-Asian American dance-rock band, he chose the name “The Slants” to represent the band members’ “perspective, or slant, on life as people of color, geeks, and musicians. It was also reappropriating a

¹⁶³ Lanham Act § 7(c), 15 U.S.C. § 1057.

¹⁶⁴ Lanham Act §§ 15, 33, 15 U.S.C. §§ 1065, 1115.

¹⁶⁵ MCCARTHY, *supra* note 144, § 19:9.

¹⁶⁶ Nina Totenberg, *In Battle over Band Name, Supreme Court Considers Free Speech and Trademarks*, NPR (Jan. 18, 2017, 4:50 AM), <https://www.npr.org/2017/01/18/510310945/in-battle-over-band-name-supreme-court-considers-free-speech-and-trademarks>.

stereotype that people often hold about Asians, that we all have slanted eyes.”¹⁶⁷ Though the band was not started to be a “socio-political project,”¹⁶⁸ it increasingly became one, as The Slants became “deeply involved with Asian American advocacy organizations . . . and helped lead discussions on race and identity across North America.”¹⁶⁹

As The Slants gained success, the band decided to pursue a federal trademark registration for their name.¹⁷⁰ Tam applied to register “The Slants” as a mark twice but was denied both times under the disparagement clause of Section 2(a) of the Lanham Act.¹⁷¹

The disparagement clause bars registration of marks that “[c]onsist[] of or comprise[] . . . matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols.”¹⁷² Whether a mark is disparaging is determined by a two-part test applied by the Examining Attorney assigned to a particular application.¹⁷³ First, the Examining Attorney “considers the likely meaning of the matter in question” based on dictionary definitions, the nature of the goods or services, and how the mark is used in connection with the goods or services.¹⁷⁴ Then, “[i]f that meaning is found to refer to identifiable persons, institutions, beliefs, or national symbols,” the Examining Attorney asks “whether that meaning may be disparaging to a substantial composite of the referenced group.”¹⁷⁵ Such a finding constitutes a *prima facie* case of disparagement and shifts the burden to the applicant to demonstrate otherwise.¹⁷⁶ Perhaps most notably in this analysis, however, the applicant’s intent in using the mark—e.g., reappropriation—is irrelevant.¹⁷⁷

¹⁶⁷ Tam, *supra* note 16, at 4.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 4–5.

¹⁷⁰ Jeong, *supra* note 13.

¹⁷¹ Tam, *supra* note 16, at 7–10.

¹⁷² Lanham Act § 2(a), 15 U.S.C. § 1052(a).

¹⁷³ *Matal v. Tam*, 137 S. Ct. 1744, 1753 (2017) (plurality opinion); Tam, *supra* note 16, at 7 (“Determination of what [is disparaging] is based on the subjective sensibilities of each individual Examining Attorney, which is why DYKES ON BIKES and other cases may receive two different responses with the exact same phrase.”). The USPTO itself acknowledged the vagueness and subjectiveness of the test. Tam, 137 S. Ct. at 1756–57 n.5 (plurality opinion).

¹⁷⁴ Tam, 137 S. Ct. at 1753 (plurality opinion) (citing TMEP § 1203.03(b)(i) (Apr. 2017), <http://tmep.uspto.gov>).

¹⁷⁵ *Id.* at 1753 (quoting TMEP § 1203.03(b)(i) (Apr. 2017), <http://tmep.uspto.gov>).

¹⁷⁶ *Id.* (citing TMEP § 1203.03(b)(i) (Apr. 2017), <http://tmep.uspto.gov>).

¹⁷⁷ *Id.* (quoting TMEP § 1203.03(b)(i) (Apr. 2017), <http://tmep.uspto.gov>) (“[T]he [US]PTO has specified that “[t]he fact that an applicant may be a member of that group or has good intentions underlying its use of a term does not obviate the fact that a substantial composite of the referenced group would find the term objectionable.””).

In the case of The Slants, the Examining Attorney who reviewed the band's application for registration rejected it because "it is uncontested that applicant [Simon Tam] is a founding member of a band . . . composed of members of Asian descent."¹⁷⁸ According to the Examining Attorney, "if [the band] had been comprised of any other ethnicity, [then the] mark would not be considered disparaging" because there would be no connection to individuals of Asian descent to call to mind the term's disparaging meaning.¹⁷⁹ To demonstrate the term's allegedly disparaging meaning, the Examining Attorney cited definitions from UrbanDictionary.com and an image of Miley Cyrus pulling at her eyes to make them appear slanted but no evidence of any Asian Americans who considered the term disparaging.¹⁸⁰ The burden then shifted to The Slants to demonstrate, on appeal, that the mark was not disparaging.¹⁸¹

Tam attempted to meet that burden twice to no avail, despite evidence supporting The Slants's use of the term, evidence supporting the use of the term for reappropriation generally, linguistics expert opinions, survey evidence, legal declarations detailing the band's work with Asian American organizations,¹⁸² and the filing of a second "ethnic neutral" application to avoid the association that the USPTO claimed made the mark disparaging.¹⁸³ After being rejected twice by the USPTO, Tam appealed to the Federal Circuit.¹⁸⁴ He saw the USPTO's application of the disparagement clause as an "inherent flaw in the legal system" that disproportionately affected minorities "based on their race, religion, sexuality, and gender" because those characteristics are generally both the one element that creates the context which makes a mark disparaging and the one thing the applicant cannot change.¹⁸⁵

Before the Federal Circuit, Tam challenged the constitutionality of the disparagement clause. After initially affirming the rejection of The Slants's application and rejecting Tam's constitutional challenges,¹⁸⁶ the court *sua*

¹⁷⁸ Tam, *supra* note 16, at 2 (quoting U.S. Trademark Application Serial No. 85,472,044 (filed Nov. 14, 2011) (citing Office Action dated June 20, 2012)).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 7.

¹⁸¹ See Tam, 137 S. Ct. at 1753 (plurality opinion) (citing TMEP § 1203.03(b)(i) (Apr. 2017), <http://tmep.uspto.gov>); Tam, *supra* note 16, at 7–8.

¹⁸² Tam, *supra* note 16, at 7–9. These legal and other expert services were donated. *Id.* Had those services not been donated, Tam noted, "the costs would have been unbearable," and the band would likely not have proceeded. *Id.* at 8–11 (discussing the financial aspect of the inequitable trademark application process pre-Tam that disproportionately affected minorities).

¹⁸³ *Id.* at 9.

¹⁸⁴ *Id.* at 10.

¹⁸⁵ *Id.*

¹⁸⁶ *In re Tam*, 785 F.3d 567, 572–73 (Fed. Cir. 2015), *reh'g en banc granted, opinion vacated*, 808 F.3d

sponte ordered a rehearing en banc and held that the disparagement clause was unconstitutional as a “governmental regulation that burdens private speech based on disapproval of the message conveyed,” which is subject to and unable to survive strict scrutiny.¹⁸⁷

2. *The Slants’s Success at the Supreme Court*

In 2017, the Supreme Court affirmed the en banc judgment of the Federal Circuit in an opinion that has been a double-edged sword within trademark law since it was issued. The *Tam* opinion can be divided into three main sections: (1) the opinion of the Court,¹⁸⁸ (2) Justice Alito’s four-justice plurality, and (3) Justice Kennedy’s concurrence. First, and most significantly, the Court held that the disparagement clause of Section 2(a) of the Lanham Act was unconstitutional because it violated a “bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.”¹⁸⁹ Particularly, the clause is unconstitutional because it allows the government to engage in viewpoint discrimination by barring the registration of marks that it finds disparaging.¹⁹⁰

Specifically, the First Amendment protects against content discrimination, which is the punishment or restriction of speech through “laws ‘targeted at specific subject matter’” and of which viewpoint discrimination is a subcategory.¹⁹¹ Viewpoint discrimination, in turn, describes laws that punish or restrict speech based on the perspective that the speech expresses on a particular subject.¹⁹² In general, a regulation on private speech constitutes viewpoint discrimination when “the government has singled out a subset of messages for disfavor based on the views expressed.”¹⁹³ This violates the First Amendment principle that “the government may not punish or suppress speech based on

1321 (Fed. Cir. 2015), *as corrected* (Feb. 11, 2016), *aff’d sub nom.* *Matal v. Tam*, 137 S. Ct. 1744 (2017) (plurality opinion).

¹⁸⁷ *In re Tam*, 808 F.3d at 1334–35. For an explanation of viewpoint discrimination and strict scrutiny, see *infra* Part IV.A.2.

¹⁸⁸ *Matal v. Tam* was decided by only eight justices; Justice Gorsuch did not participate. *Tam*, 137 S. Ct. at 1765 (plurality opinion).

¹⁸⁹ *Id.* at 1751.

¹⁹⁰ *Id.* at 1757.

¹⁹¹ *Id.* at 1765–66 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015)).

¹⁹² *Id.* at 1766 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995)).

¹⁹³ *Id.* (citing *Cornelius v. NAACP Legal Def. Fund & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

disapproval of the ideas or perspectives the speech conveys.”¹⁹⁴ Both content and viewpoint discrimination are “presumptively unconstitutional.”¹⁹⁵

Laws that permit content and viewpoint discrimination are subject to strict scrutiny, the level of constitutional scrutiny “used to review any governmental regulation that burdens private speech based on disapproval of the message conveyed.”¹⁹⁶ Under strict scrutiny, such regulations “may be justified only if the government proves that [the laws] are narrowly tailored to serve compelling state interests.”¹⁹⁷ The only viewpoint discrimination exempt from strict scrutiny is government speech, an exception the USPTO claimed applied to federally-registered trademarks.¹⁹⁸

Government speech is not subject to strict scrutiny because some amount of viewpoint discrimination is required for the government to function: “When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others.”¹⁹⁹ However, while this doctrine is necessary, the *Tam* Court emphasized that it is—and must continue to be—narrow in order to prevent “dangerous misuse”: “If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.”²⁰⁰ Such was the Court’s response to the USPTO’s argument that registered trademarks should be treated as government speech and thus not subject to First Amendment scrutiny.²⁰¹ The Court unequivocally stated that “[t]rademarks are private, not government, speech” and affirmed the Federal Circuit’s en banc judgment that the disparagement clause was subject to and unable to withstand strict scrutiny.²⁰²

¹⁹⁴ *Id.* at 1765 (citation omitted).

¹⁹⁵ *Id.* at 1766 (quoting *Rosenberger*, 515 U.S. at 828–29); *In re Tam*, 808 F.3d 1321, 1334 (Fed. Cir. 2015), *as corrected* (Feb. 11, 2016), *aff’d sub nom.* *Matal v. Tam*, 137 S. Ct. 1744 (2017) (plurality opinion).

¹⁹⁶ *In re Tam*, 808 F.3d at 1334; *see Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011).

¹⁹⁷ *In re Tam*, 808 F.3d at 1334.

¹⁹⁸ *Tam*, 137 S. Ct. at 1757–60 (plurality opinion) (“[O]ur cases recognize that “[t]he Free Speech Clause . . . does not regulate government speech.”” (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009))).

¹⁹⁹ *Id.* at 1757. For example, during World War II, the government distributed posters supporting the war effort—thus preferencing a particular viewpoint—but, due to the government speech doctrine, was neither prevented from doing so nor required to distribute posters discouraging support of the war effort. *Id.* at 1758.

²⁰⁰ *Id.* at 1758.

²⁰¹ *Id.* at 1758–60.

²⁰² *Id.* at 1760, 1765; *In re Tam*, 808 F.3d at 1337 (“[N]o argument has been made that the [disparagement clause] survives such scrutiny.”).

Justice Alito’s plurality opinion—joined by Chief Justice Roberts and Justices Thomas and Breyer—addressed the USPTO’s three alternative arguments in defense of the disparagement clause, including that the discrimination permitted by the clause was constitutional because (1) trademark registration is a government subsidy, (2) trademark registration is a government program (suggesting the creation of a new doctrine), or (3) trademarks are commercial speech.²⁰³

Justice Alito’s opinion rejected the USPTO’s first argument—that trademark registration is a government subsidy program—because trademark registration does not resemble the subsidy programs in the cases upon which the USPTO relied, which generally involved the government providing funds or tax benefits to private parties.²⁰⁴ While trademark registration “provides valuable non-monetary benefits” that result from the government’s role in processing the registration and, by extension, an expenditure of government funds, Justice Alito noted the same can be said of “just about every government service.”²⁰⁵ Justice Alito rejected the USPTO’s second argument—advocating for a new “‘government program’ doctrine”—under similar reasoning.²⁰⁶

With regard to the USPTO’s third argument, Justice Alito rejected the contention that registered trademarks should be considered commercial speech, meaning the disparagement clause would be subject to intermediate scrutiny rather than strict scrutiny.²⁰⁷ Justice Alito reasoned that the Court did not need to determine whether trademarks are commercial speech because, even if they are, the disparagement clause cannot survive intermediate scrutiny under the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.²⁰⁸ For a restriction on speech to be constitutional under the *Central Hudson* test, the restriction must (1) serve a substantial government interest and (2) be “narrowly drawn,” meaning the restriction must regulate speech only as far as necessary to serve the substantial interest.²⁰⁹

The USPTO claimed that two government interests justified the disparagement restriction. First, the USPTO claimed an interest in preventing marginalized groups from being confronted with disparaging messaging in

²⁰³ *Tam*, 137 S. Ct. at 1757 (plurality opinion).

²⁰⁴ *Id.* at 1761.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 1761–63.

²⁰⁷ *Id.* at 1763–64.

²⁰⁸ *Id.*; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564–65 (1980).

²⁰⁹ *Tam*, 137 S. Ct. at 1764 (plurality opinion) (citing *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 564–65).

advertising.²¹⁰ In perhaps the most memorable part of his plurality, Justice Alito rejected that interest: “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.’”²¹¹

The USPTO also claimed an interest in “protecting the orderly flow of commerce” from disruption by disparaging trademarks, which have been likened to “discriminatory conduct, which has been recognized to have an adverse effect on commerce.”²¹² Regardless of the substantialness of the interests, the plurality stated that “[a] simple answer to [the commercial speech] argument is that the disparagement clause is not ‘narrowly drawn.’”²¹³ In other words, the disparagement clause applied to bar registration of marks that disparage “*any person, group, or institution*” and is not limited to protect only the individuals and groups that the government expressed an interest in protecting.²¹⁴ The restriction “is not an anti-discrimination clause; it is a happy-talk clause.”²¹⁵ It is therefore broader “than is necessary to serve the interest asserted” and cannot pass the intermediate scrutiny test.²¹⁶

Writing separately, Justice Kennedy concurred in part—as to the findings of viewpoint discrimination and that registered trademarks are not government speech—and in the judgment; he was joined by Justices Ginsburg, Sotomayor, and Kagan.²¹⁷ The Kennedy concurrence posited that the viewpoint discrimination issue alone invoked strict scrutiny, and thus consideration of other questions, like whether trademarks are commercial speech, was unnecessary.²¹⁸

²¹⁰ *Id.*

²¹¹ *Id.* (emphasis added) (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

²¹² *Id.* (citations omitted).

²¹³ *Id.* at 1764–65.

²¹⁴ *Id.* at 1765.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* (Kennedy, J., concurring in part and concurring in the judgment).

²¹⁸ *Id.* at 1767 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011)) (“‘Commercial speech is no exception’ . . . to the principle that the First Amendment ‘requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys.’”). Justice Thomas also concurred, opining that speech restrictions should always receive strict scrutiny regardless of whether the speech is commercial. *Id.* at 1769 (Thomas, J., concurring in part and concurring in the judgment).

3. *Reactions and Ramifications to Tam: A Double-Edged Sword*

Almost immediately after the *Tam* decision was announced, critics and commentators voiced concerns over the consequences of the Court's "pronouncement of a fundamental right to register a racial epithet" as a federal trademark and questioned whether the Court would have reached the same result in a case with less "favorable facts" or less sympathetic and well-intentioned plaintiffs than those involved *Tam*.²¹⁹ In particular, many commentators, including *Tam* himself, have pointed out the double-edged sword effect of the decision—that *Tam* may "inadvertently help[] groups whose intentions are not as pure" as The Slants's.²²⁰ This effect is acutely apparent with regard to a similar but less sympathetic case contemporaneous with *Tam*—the case to cancel the then-Washington Redskins's federal trademark registration for disparaging Native Americans.²²¹ The Supreme Court declined to hear the football team's case but granted certiorari to The Slants, though both cases challenged the constitutionality of the disparagement clause on First Amendment grounds.²²² Because the Supreme Court granted certiorari to The Slants and found the disparagement clause unconstitutional, the Redskins's case was moot and the team's marks were not cancelled.²²³ Under *Tam*, both The Slants's *reappropriation* use of a slur and the Washington Redskins's *non-reappropriation* use of a slur are treated equally—both are eligible for federal registration though the intent behind the use of the two marks is very different.²²⁴

²¹⁹ Lee, *supra* note 19, at 2004, 2006.

²²⁰ *Tam*, *supra* note 16, at 11; see Conrad, *supra* note 19, at 123; Jeong, *supra* note 13 ("[T]he Slants aren't the only people caught in the cross hairs of Section 2(a)—they're just the more sympathetic ones.").

²²¹ Pro Football, Inc. v. Harjo, 565 F.3d 880, 881 (D.C. Cir. 2009) (affirming the district court's grant of summary judgment to the team on the issue of whether its trademarks should be cancelled for disparagement). The Native American community had been fighting for the cancellation of the Washington Redskins's federal trademark registrations since at least 1992 in "an endless slog of litigation" that led to the marks' cancellation in 1999 and 2014, the latter of which was the subject of the appeal. Jeong, *supra* note 13. Amidst the surge of support for the Black Lives Matter movement in the summer of 2020, the Washington Redskins decided to change the team's name and logo. Rosa Sanchez, *NFL's Washington Redskins to Change Name Following Years of Backlash*, ABC NEWS (July 13, 2020, 11:34 AM), <https://abcnews.go.com/US/washington-redskins-change-years-backlash/story?id=71744369>. For the 2020 football season, the organization announced it would use the temporary name the "Washington Football Team." Emily Iannaconi, *Franchise Formerly Known as Redskins Announces New Name in Time for 2020 Season: Washington Football Team*, FORBES (July 23, 2020, 2:28 PM), <https://www.forbes.com/sites/emilyiannaconi/2020/07/23/washington-announces-franchise-will-be-called-washington-football-team-for-upcoming-season/?sh=151abaa1c9f9>.

²²² Harjo v. Pro-Football, Inc., 558 U.S. 1025, 1025 (2009) (denying certiorari). Some commentators have suggested that this separation indicates that the Court perceived what *Tam* called the "fundamental difference" between the two situations and "would rather have the two cases detached from each other." Jeong, *supra* note 13.

²²³ Pro-Football, Inc. v. Blackhorse, 709 F. App'x 182, 183 (4th Cir. 2018).

²²⁴ See *Tam*, *supra* note 16, at 11 (discussing the then-Redskins and "the notion of [*Tam*] inadvertently helping groups whose intentions are not as pure").

Thus, while *Tam* was a victory for The Slants and the project of reappropriation, “it also opened the door for organizations . . . to continue profiting from racially or culturally disparaging terms.”²²⁵

Since *Tam*, applications for federal registration of marks containing racial epithets have been filed with and approved by the USPTO.²²⁶ Some of these applications were filed on June 19, 2017—the very day the *Tam* decision was announced.²²⁷ Some such applications were even filed by minority group members and well-meaning dominant-group members, “like a team playing defense,” to secure the mark and prevent it from being used by someone with a truly hateful or ignorant intent.²²⁸ Ironically, under this course of action, applicants have to actually use the marks in commerce to some degree to obtain and maintain their registration.²²⁹

On the other hand, after *Tam*, there remained a small possibility that applications to register marks consisting of some of the most egregious racial epithets could be denied under a surviving Section 2(a) provision against the registration of “immoral . . . or scandalous” marks.²³⁰ That possibility was eliminated two years after *Tam*, however, with the Court’s decision in *Iancu v. Brunetti*, which, following the precedent set in *Tam*, struck down the “immoral or scandalous” clause.²³¹

B. *The Companion Case: Iancu v. Brunetti*

In *Iancu v. Brunetti*, the Supreme Court revisited the Lanham Act with a focus on the “immoral or scandalous” clause of Section 2(a).²³² The “immoral or scandalous” clause barred registration of marks that “[c]onsist[] of or comprise[] immoral . . . or scandalous matter.”²³³ When *Brunetti* reached the Supreme Court, the Court followed the precedent set in *Tam*.²³⁴ The Court held

²²⁵ Sohn, *supra* note 19, at 1730–31.

²²⁶ Lee, *supra* note 19, at 2003–04 nn.8–9; *see also* Katyal, *supra* note 15, at 825 (noting the filing of two applications to register marks containing the “n-word” on the day the *Tam* opinion was announced and at least ten other applications for racially or otherwise disparaging marks within the next five weeks).

²²⁷ Lee, *supra* note 19, at 2003–04.

²²⁸ Katyal, *supra* note 15, at 827 (citing applications for registration of the “n-word” and a swastika).

²²⁹ *Id.*

²³⁰ Lee, *supra* note 19, at 2004.

²³¹ *Iancu v. Brunetti*, 139 S. Ct. 2294, 2297 (2019).

²³² *Id.* (concerning a rejected application to register “FUCT” as a trademark for a clothing line).

²³³ Lanham Act § 2(a), 15 U.S.C. § 1052(a). A mark is “immoral or scandalous” if the USPTO Examining Attorney finds that a majority of the public would consider the mark “shocking to the sense of truth, decency, or propriety; . . . disgraceful; offensive; disreputable; or vulgar.” *Brunetti*, 139 S. Ct. at 2298 (citation omitted).

²³⁴ *Brunetti*, 139 S. Ct. at 2297.

that the “immoral or scandalous” clause violated the First Amendment in the same manner as the disparagement clause: “It too disfavor[ed] certain ideas,” and thus constituted viewpoint discrimination.²³⁵

For some scholars and commentators, the implications of the combined effect of *Tam* and *Brunetti* are concerningly comprehensive. Taken together, in the name of free speech, *Tam* and *Brunetti* have cleared the way for the potential for “our branded world . . . [to] look more like . . . a virtual Insult-o-Mart of the most flagrant terms for derision.”²³⁶ Interestingly, a close reading of *Brunetti* indicates that some of the Justices may have shared similar concerns.²³⁷

While the *Brunetti* Court was in agreement that the “immoral or scandalous” clause violated the First Amendment, the Court was much more fractured than it had been in *Tam*.²³⁸ The majority was written by Justice Kagan and joined by the unexpected quintet of Justices Thomas, Ginsburg, Alito, Gorsuch, and Kavanaugh.²³⁹ Additionally, Chief Justice Roberts²⁴⁰ and Justice Breyer²⁴¹ each wrote opinions concurring in part and dissenting in part; Justice Sotomayor was joined by Justice Breyer in an opinion concurring in part and dissenting in part²⁴²; and Justice Alito, who wrote the opinion of the Court and the plurality in *Tam*, wrote a concurrence.²⁴³

In *Brunetti*’s fractured opinions, commentator Ilhyung Lee perceived “signs of second thoughts for some Justices regarding the reach of *Tam* and its consequences.”²⁴⁴ For example, Justice Breyer suggested that “[t]he Government has at least a reasonable interest in ensuring that it is not involved in promoting [through federal trademark registration] highly vulgar or obscene speech, and that it will not be associated with that speech”—an argument he had rejected as to racist speech as part of the plurality in *Tam*.²⁴⁵ In their respective

²³⁵ *Id.*

²³⁶ Katyal, *supra* note 15, at 824. However, others have argued that the marketplace will operate to exclude racist and hateful marks. See Jake MacKay, *Racist Trademarks and Consumer Activism: How the Market Takes Care of Business*, 42 L. & PSYCH. REV. 131, 147 (2018) (arguing for companies to be able to register racist or derogatory marks); Tam, *supra* note 16, at 16 (referring to *Tam* as a “Pandora’s Box or floodgate for hate speech [that] has been opened”). For a response to this market-based argument, see *infra* Part V.D.2.

²³⁷ Lee, *supra* note 19, at 2012.

²³⁸ *Id.*

²³⁹ *Brunetti*, 139 S. Ct. at 2296.

²⁴⁰ *Id.* at 2303–04 (Roberts, C.J., concurring in part and dissenting in part).

²⁴¹ *Id.* at 2304–08 (Breyer, J., concurring in part and dissenting in part).

²⁴² *Id.* at 2308–18 (Sotomayor, J., concurring in part and dissenting in part).

²⁴³ *Id.* at 2302–03 (Alito, J., concurring).

²⁴⁴ Lee, *supra* note 19, at 2012.

²⁴⁵ *Brunetti*, 139 S. Ct. at 2307 (Breyer, J., concurring in part and dissenting in part).

opinions, Chief Justice Roberts (a member of the *Tam* plurality) and Justice Sotomayor also suggested that the government has such an interest.²⁴⁶ Accordingly, Lee questioned “whether the Government may have a similar interest regarding the trademark registration of hateful racial epithets.”²⁴⁷

Justice Breyer also revisited the issue of allowing the registration of racial slurs, citing “scientific evidence . . . that certain highly vulgar words have a physiological and emotional impact that makes them different in kind from most other words.”²⁴⁸ He included in this category race-based epithets, expressing concern about “the list of offensive swear words”²⁴⁹ evolving to include such slurs and the consequences of permitting their registration:

These attention-grabbing words . . . may lead to the creation of public spaces that many will find repellant, perhaps on occasion *creating the risk of verbal altercations or even physical confrontations*. . . . The Government thus has an interest in . . . disincentiviz[ing] the use of such words in commerce by denying the benefit of trademark registration.²⁵⁰

That Justice Breyer voiced these concerns is particularly surprising given that he had joined the *Tam* plurality opinion two years earlier, which stated in no uncertain terms that the protection of hateful speech is the “proudest boast” of American free speech jurisprudence.²⁵¹

Even more surprising, Justice Alito, who authored the *Tam* plurality, joined the majority in *Brunetti* but filed a concurring opinion as to the possibility—and, perhaps, desirability—of Congress “adopting a more carefully focused statute that precludes the registration of marks containing vulgar *terms that play no real part in the expression of ideas* . . . [and] generally signif[y] nothing except emotion and a severely limited vocabulary.”²⁵² While Justice Alito, Justice

²⁴⁶ *Id.* at 2303–04 (Roberts, C.J., concurring in part and dissenting in part) (noting the Government’s interest in “not associating itself with trademarks whose content is obscene, vulgar, or profane. The First Amendment protects the freedom of speech; it does not require the Government to give aid and comfort to those using obscene, vulgar, and profane modes of expression”); *id.* at 2317 (Sotomayor, J., concurring in part and dissenting in part).

²⁴⁷ Lee, *supra* note 19, at 2013.

²⁴⁸ *Brunetti*, 139 S. Ct. at 2307 (Breyer, J., concurring in part and dissenting in part).

²⁴⁹ *Id.*

²⁵⁰ *Id.* (emphasis added) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam)). This citation to *Brandenburg*, the case that established the incitement exception, could suggest the potential for hateful race-based epithets to constitute speech that would fall within the incitement exception to First Amendment protection.

²⁵¹ Lee, *supra* note 19, at 2013; *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (plurality opinion).

²⁵² *Brunetti*, 139 S. Ct. at 2303 (Alito, J., concurring) (emphasis added). Interestingly, like Justice Breyer’s *Brandenburg* citation, the language used by Justice Alito here is nearly identical to the language that established

Breyer, and Chief Justice Roberts were referring to vulgar words as opposed to hate speech, these concurrences invite compelling questions: “What part does a [slur] play . . . in the ‘expression of ideas’? . . . Is the racial slur or image ‘needed to express any idea,’ or instead, does its use signify little ‘except emotion and a severely limited vocabulary?’”²⁵³

V. A SOLUTION TO *TAM*’S DOUBLE-EDGED SWORD

This Part outlines some of the arguments made by critical race theorists, legal scholars, and others against protecting hate speech under the First Amendment. Joining that argument, this Comment then proposes an amendment to the Lanham Act to resolve the double-edged sword issue presented by the *Tam* decision and its consequences. This Part also distinguishes the amendment proposed here from other suggested solutions.

A. *The Problems with Protecting Hate Speech*

Critical race theorists, legal scholars, and commentators interrogating and opposing American tolerance of hate speech argue that the current absolutist interpretation of the First Amendment is not compatible with American society today nor the constitutional rights and norms it claims to provide and protect for each citizen—namely, the right to equal protection under law. These authors find that the common justifications for tolerating hate speech within a broader right to freedom of speech—for example, that free speech “respects individual autonomy and opinion, increases our access to ideas, protects dissent, and respects citizens’ rights to self-governance”—are “at best, incomplete, and, at worst, harmful.”²⁵⁴ By upholding an ideal of tolerance and ascribing “equivalent truth value” to every perspective, First Amendment absolutism “entrenches and legitimizes ideas that deny [minorities and minority groups] their humanity,” thus preventing social change and “preserv[ing] legal, social, and political structures.”²⁵⁵ In the specific context of race-based hate speech, scholars argue that the First Amendment is weaponized to perpetuate and legitimize racism in the name of free speech and in violation of the Equal Protection clause:

The first amendment arms conscious and unconscious racists—Nazis and liberals alike—with a constitutional right to be racist. Racism is

the fighting words doctrine in *Chaplinsky v. New Hampshire* and could suggest the potential for hateful race-based epithets to constitute speech that would fall within the fighting words exception. See *supra* Part I.B.1.

²⁵³ Lee, *supra* note 19, at 2014 (quoting *Brunetti*, 139 S. Ct. at 2303 (Alito, J., concurring)).

²⁵⁴ Bradley, *supra* note 25, at 520 (citing MATTHEW D. BUNKER, *CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY* 1–17 (2001)).

²⁵⁵ *Id.*

just another idea deserving of constitutional protection like all ideas. The first amendment is employed to trump or nullify *the only substantive meaning of the equal protection clause*, that the Constitution mandates the disestablishment of the ideology of racism.²⁵⁶

Tolerance of hate speech has the same discriminatory effect when the speech targets individuals based on their “race, colour, ethnicity, religious beliefs, sexual orientation, or other status,” like sex.²⁵⁷

The denial of the right to equal protection to minorities in order to uphold absolute freedom of expression for all exemplifies philosopher Karl Popper’s “paradox of tolerance.”²⁵⁸ The paradox of tolerance highlights the danger of unlimited or absolute tolerance—that “[i]f we extend unlimited tolerance even to those who are intolerant, . . . then the tolerant will be destroyed, and tolerance with them.”²⁵⁹ Popper therefore proposes that “[w]e should . . . claim, in the name of tolerance, the right not to tolerate the intolerant.”²⁶⁰ Further, because of the potential for unchecked intolerance to destroy tolerance, Popper argues that any movement promoting intolerance or incitement to intolerance should be considered criminal.²⁶¹

In *Tam*, the Court expanded its free speech absolutism into trademark law, stating that “the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate,’” such as intolerant speech.²⁶² However, this proposition, which undergirds free speech absolutism generally, fails to recognize the dire consequences of not differentiating between “dissent—or the right to criticize the powerful institutions that govern our lives—and *hate speech*, which is directed against the least powerful segments of our community.”²⁶³ The former is more representative of the culture of dissent through which a democratic society evolves, as imagined by John Stuart Mill and the framers of the U.S. Constitution.²⁶⁴ It is also more representative of the

²⁵⁶ MATSUDA ET AL., *supra* note 30, at 15 (emphasis added).

²⁵⁷ Boyle, *supra* note 24, at 489 (noting these categories as examples of the bases on which hate speech victims are targeted).

²⁵⁸ KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 581 n.4 (Princeton Univ. Press ed. 2020) (emphasis omitted).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (plurality opinion) (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

²⁶³ MATSUDA ET AL., *supra* note 30, at 10 (emphasis added).

²⁶⁴ See Bradley, *supra* note 25, at 533–34.

political speech-oriented case law that laid the foundation for the Supreme Court's free speech absolutism.²⁶⁵ The latter—hate speech—violates the Equal Protection Clause and appears to fall into the category of speech that the Supreme Court defined when it first articulated the “fighting words” exception to the First Amendment: words which “by their very utterance inflict injury or tend to incite an immediate breach of the peace.”²⁶⁶ The *Chaplinsky* Court stated the following:

[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. “Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.”²⁶⁷

In this articulation of the fighting words exception, the Supreme Court demonstrated an understanding of this distinction between, on the one hand, speech that is actual “communication” and contributes to the development and progress of society and, on the other hand, speech that does not possess such value, like hate speech.²⁶⁸ However, in this area, the Court has chosen only to restrict speech in accordance with the speech-conduct distinction, under which “mere” hate speech that does not immediately provoke violent action is protected. This is contrary to the way speech is treated by many philosophers of language and some legal scholars.²⁶⁹ The speech-conduct distinction conceives of most speech as passive, whereas philosophers of language view speech itself, colloquially, as “doing things with words to people.”²⁷⁰ Likewise, legal scholar Stanley Fish has noted that “because everything we say impinges on the world in ways *indistinguishable from the effects of physical action*, we must take responsibility for our verbal performances . . . and not assume that they are being taken care of by a clause in the Constitution.”²⁷¹

In addition to the conception of speech itself as action, there is also an inescapable correlation between the proliferation of hate speech and acts of physical violence against hate speech victims that makes it difficult to determine

²⁶⁵ See *supra* Part I.A.

²⁶⁶ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

²⁶⁷ *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309–10 (1940)).

²⁶⁸ *Id.*

²⁶⁹ See, e.g., *The Philosopher's Arms*, *supra* note 30, at 07:03; FISH, *supra* note 30, at 114.

²⁷⁰ *The Philosopher's Arms*, *supra* note 30, at 06:47.

²⁷¹ FISH, *supra* note 30, at 114 (emphasis added).

where speech ends and action begins.²⁷² For example, as legal scholar and critical race theorist Mari Matsuda has pointed out, the “deadly violence that accompanies the persistent verbal degradation of those subordinated because of gender or sexuality explodes the notion that there are clear lines between words and deeds.”²⁷³ Even more specifically, the United States witnessed the correlation between hate speech and violence in the increase in hate crimes against Asian Americans in the beginning of 2020, which many attributed to the Trump administration’s practice of calling the coronavirus the “Chinese virus,” the “Wuhan virus,” or the “Kung Flu.”²⁷⁴

Hate speech, whether expressed in a trademark or at an alt-right rally, is an act that causes harm in itself, leads to greater and more frequent violence against minorities, and does not contribute to the marketplace of ideas in any meaningful way. To pretend otherwise in the name of democracy is to legitimize and perpetuate the systems and power dynamics that deny the guarantee of equal protection to minorities in the United States.

B. A Solution Within Trademark Law

This section explains this Comment’s proposed amendment to the Lanham Act. The two-pronged amendment would include (1) a clause barring federal registration of marks that would constitute hate speech and (2) an exception to permit registration of such marks when they are used to engage in reappropriation.

The proposed amendment to the Lanham Act would—as part of a widespread decision on the part of the federal government to exclude hate speech from First Amendment protection—bar federal registration of marks that would constitute hate speech. However, the amendment would also include a reappropriation exception to the bar against hateful marks to allow for minority groups to engage in reappropriation of hate speech through a burden-shifting framework. Marks that constitute hate speech would be presumptively barred

²⁷² See *id.*; Matsuda, *supra* note 83, at 23.

²⁷³ Matsuda, *supra* note 83, at 23.

²⁷⁴ See Madeleine Aggeler, *The U.S. Is Seeing a Massive Spike in Anti-Asian Hate Crimes*, THE CUT (Feb. 10, 2021), https://www.thecut.com/2021/02/the-us-is-seeing-a-massive-spike-in-anti-asian-hate-crimes.html?utm_source=instagram&utm_medium=social_acct&utm_campaign=nym&utm_content=nym&utm_term=curalate_like2buy_K7xsY9mK__1de06716-5541-42be-8284-ea310e5ff968 (noting use of “China virus” and “Wuhan virus” and citing, *inter alia*, U.N. data showing more than 1,800 anti-Asian incidents in the United States between March and May 2020, coinciding with the beginning of the coronavirus pandemic); Weijia Jang, Bo Erickson, Arden Farhi & Gaby Ake, *Biden to Address Racism Toward Asian Americans During Pandemic with Executive Action*, CBS NEWS (Jan. 26, 2021, 2:31PM), <https://www.cbsnews.com/news/biden-racism-asian-americans-executive-action/> (noting the Trump administration’s use of “Kung Flu”).

from registration, and the burden would be on the applicant to introduce evidence that they are making a reappropriation use of the mark. An applicant could establish a prima facie claim of reappropriation by (1) demonstrating that they are a member of a protected class or a class that has been historically discriminated against and (2) providing evidence that they are using the mark to engage in reappropriation. In other words, as to the second requirement, the applicant's intent in using the mark would be considered in the USPTO's evaluation of whether to grant registration. The applicant could submit evidence from their own experience using the mark, as well as other extrinsic evidence such as opinions from linguistic experts and examples of other civil rights or advocacy groups using the mark for reappropriation. If the applicant was able to make out a prima facie claim of reappropriation, the burden would then shift to the USPTO to consider the claim and, if necessary, demonstrate that the reappropriation value does not outweigh the harm of granting a registration to the mark and allowing the term in society. In this consideration, the USPTO could consider a number of non-exclusive factors, such as those suggested by the amicus brief of Asian Americans Advancing Justice in *Tam*, including (1) "whether the mark is part of a reclamation effort;" (2) the history and "potential harmful effects of the term," and (3) "how expressive the mark is."²⁷⁵ As the amicus brief suggested, "simply claiming reappropriation is [not] enough to obtain trademark protection for an otherwise harmful and disparaging mark"; the test should "look[] holistically" at the mark and circumstances surrounding it.²⁷⁶

C. *Distinguishing from Other Solutions*

This section discusses the ways in which this Comment's proposal is distinct from and more appropriate than other proposed solutions, namely (1) the judicial test for reappropriation suggested by the amicus brief of Asian Americans Advancing Justice and (2) a reappropriation defense to trademark infringement.

In an amicus brief to the Supreme Court in advance of *Tam*, Asian Americans Advancing Justice and a number of other civil rights and advocacy groups urged the Court to "adopt a narrower holding" rather than "[c]ompletely removing" the disparagement clause.²⁷⁷ Specifically, the brief suggested a "sharper judicial scalpel to balance the interest of free speech and the strong public policy against prejudice, discrimination, and aiding in the commercial

²⁷⁵ Amicus Brief, *supra* note 119, at 17.

²⁷⁶ *Id.* at 19–20.

²⁷⁷ *Id.* at 4.

appropriation of slurs and disparaging terms.”²⁷⁸ The brief imagined this scalpel as a judicial test and suggested several non-exclusive factors for the Court to consider in such a test, including (1) “whether the mark is part of a reclamation effort;” (2) the history and “potential harmful effects of the term,” and (3) “how expressive the mark is.”²⁷⁹ Like the amendment proposed here, the brief suggested that, under a proper judicial test, “simply claiming reappropriation is [not] enough to obtain trademark protection for an otherwise harmful and disparaging mark,” and that the test should “look holistically” at the mark and circumstances surrounding it.²⁸⁰ While the factors that the brief suggested are similar to those that would be involved in applying for registration under the reappropriation exception proposed here, the brief’s solution is a judicial test, which can be unpredictable and implies litigation, a notoriously expensive process that financially burdens most litigants, especially minority group members who may be less able to finance it.²⁸¹

As an alternative solution, one commentator has proposed a “reappropriation use” defense as a new defense to trademark infringement.²⁸² The reappropriation defense would apply when a disparaging mark is registered and used in a disparaging way, and a target group wanting to reclaim the mark could use the mark for their own goods and defend against a claim of trademark infringement by claiming reappropriation.²⁸³

This solution is distinct from this Comment’s proposed amendment in a number of ways. As a preliminary matter, the defense operates within the confines of current First Amendment jurisprudence, whereas the amendment proposed here presumes a change in that jurisprudence, such as a hate speech exception to First Amendment protection or the inclusion of hate speech in an existing exception, like the fighting words or incitement exceptions.²⁸⁴ Additionally, the brief’s proposal concerns a post-registration defense to be employed during litigation, as opposed to the amendment to the actual registration process proposed here. Next, and most significantly, a reappropriation defense, which is reactive in nature, would not prevent the harmful effects of hate speech and would allow the registration of such speech

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 17.

²⁸⁰ *Id.* at 19–20.

²⁸¹ *See, e.g., Tam, supra* note 16, at 10 (explaining that had legal and other expert services not been donated, Tam would not have continued the legal battle for The Slants’s registration).

²⁸² Sohn, *supra* note 19, at 1758–59.

²⁸³ *Id.* at 1760.

²⁸⁴ *See supra* notes 248–52 and accompanying text.

as trademarks to continue. Further, a reappropriation defense puts the onus on individuals from marginalized groups to do the work of combatting hate speech through reappropriation. In the trademark context, this means that, to confront hateful trademarks, a minority-group member would have to create a reappropriation mark, use it in commerce, and potentially meet other requirements, depending on whether they pursued a registered or unregistered mark. In doing so, those who are already burdened as the “traditional victims of discrimination”²⁸⁵ must also assume the burden of acquiring and maintaining a trademark in which they may have no interest. Thus, once again, those most burdened by the tolerance of hate speech would be “the only ones taxed.”²⁸⁶

Under the solution proposed in this Comment, marks that constitute hate speech would be barred from registration *unless* the applicant successfully demonstrates that the mark is being used for reappropriation. This would stop the spread of hate speech in the trademark context and also provide target group members with the opportunity—if they so desired—to register marks that would otherwise be considered hate speech in order to reclaim the term for their own community and challenge the stereotype the hate speech had perpetuated.

D. A Response to Arguments Against a Hate Speech Exception to First Amendment Protection

This section addresses several arguments against a hate speech exception to the First Amendment, with a focus on how those arguments operate within the context of trademark law, including (1) the “slippery slope” argument and (2) the argument that the marketplace of ideas and the actual marketplace will independently exclude hate speech.

1. The “Slippery Slope” Argument

The “slippery slope” argument that a prohibition on hate speech would lead to government censorship is precisely the kind of selectively limited doctrinal imagination that Matsuda critiques in her analysis of the lack of anti-hate speech legislation in the United States.²⁸⁷ Matsuda highlights that “[t]his limited imagination has not affected lawmakers faced with other forms of offensive speech” or discrimination in other contexts in which the federal government has recognized that “certain forms of expression are qualitatively different from the

²⁸⁵ Matsuda, *supra* note 83, at 47.

²⁸⁶ *Id.* at 48.

²⁸⁷ *Id.* at 47.

kind of speech deserving absolute protection.”²⁸⁸ For example, the remedies available to victims of defamation acknowledge the potentially life-changing consequences of defamation for its victims: “Their standing in the community, their opportunities, their self-worth, their free enjoyment of life are limited. Their political capital—their ability to speak and be heard—is diminished.”²⁸⁹ As Matsuda correctly concludes, for lawmakers to perceive these effects of defamation, “and yet to fail to see that the very same things happen to the victims of racist speech, is selective vision[,] . . . result[ing] in unequal application of the law.”²⁹⁰

In the employment context, the federal government has demonstrated an awareness of the negative effects of discrimination and harassment in the workplace through Title VII of the Civil Rights Act of 1964 and the policies of the U.S. Equal Employment Opportunity Commission (EEOC).²⁹¹ Title VII prohibits discrimination in hiring, firing, or other employment matters on the basis of “race, color, religion, sex, or national origin.”²⁹² Likewise, the EEOC’s policy against discrimination and harassment provides that “[e]thnic slurs and other verbal or physical conduct because of nationality are illegal if they are severe or pervasive and create an intimidating, hostile or offensive working environment, interfere with work performance, or negatively affect job opportunities.”²⁹³ Such prohibitions indicate that there are certain modes of expression—generally the use of language or displays of other behavior that discriminate and promote hatred—which are intolerable in the workplace.²⁹⁴ Why then are such language and behavior permitted in other public spaces that individuals must inhabit to participate in society and on the Principal Register of federal trademarks?²⁹⁵ If such expression has the potential to create a hostile work environment, which would negatively impact workers’ productivity and prevent harmony in the workplace, why are measures not taken to restrict such expression elsewhere and therefore promote social productivity and cohesion?

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ See 42 U.S.C. §§ 2000e-2(a)–(m); IMMIGRANTS’ EMPLOYMENT RIGHTS UNDER FEDERAL ANTI-DISCRIMINATION LAWS, U.S. EQUAL EMP. OPPORTUNITY COMM’N (2010), <https://www.eeoc.gov/eeoc/publications/immigrants-facts.cfm> (referring to “Harassment Based on National Origin”).

²⁹² See, e.g., 42 U.S.C. § 2000e-2(a).

²⁹³ U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 291 (referring to “Harassment Based on National Origin”). Moreover, “[e]xamples of potentially unlawful conduct include insults, taunting, or ethnic epithets, such as making fun of a person’s foreign accent or comments like, ‘Go back to where you came from,’ whether made by supervisors or by co-workers.” *Id.*

²⁹⁴ Lee, *supra* note 19, at 2011.

²⁹⁵ *Id.* (“[U]nder *Tam*, [hateful and discriminatory expression] packaged as a trademark may have a place in the rolls of the Principal Register, as a matter of Free Speech.”).

One possible, though ultimately unsatisfactory, answer lies in another argument against a hate speech exception to First Amendment protection and, by extension, the Lanham Act amendment proposed here: the marketplace argument.

2. *The Marketplace Argument*

The marketplace argument draws on the ideas of John Stuart Mill, whose nineteenth-century philosophy on free speech is still used by contemporary commentators to support arguments in favor of an absolutist approach to the First Amendment.²⁹⁶ In particular, the marketplace argument draws upon the concept of the “marketplace of ideas,” in which false information is socially parsed out through discourse and “truth” is revealed, with that truth becoming the dominant and accepted doctrine in society.²⁹⁷ In other words, “the market will decide whether an offensive idea or trademark can remain, survive, and prevail.”²⁹⁸ In the trademark context, this marketplace argument becomes much more concrete because of the visible evidence of what goods and services consumers actually choose to purchase.²⁹⁹ Commentators in favor of the absolutist interpretation, including Simon Tam himself, have used this reasoning to respond to concerns about the registration of hateful marks, arguing that (1) “consumers will refuse to buy goods or services with truly offensive marks and . . . the offensive sellers will go out of business,”³⁰⁰ (2) the market is “the best way to prevent any proliferation of distasteful trademark registrations,”³⁰¹ and (3) consumer activism will solve “[a]ny issues of indecency or harm that arise from negative, derogatory trademarks or other hate speech.”³⁰² However, despite their prevalence, these arguments seem, at best, naïve and, at worst, ignorant of the harms hate speech inflicts and the systemic racism it perpetuates.

For one thing, “[i]n today’s climate, businesses are happy to engage in ‘shock marketing’ tactics and cater to the lowest common denominator.”³⁰³ Additionally, as Professor Rebecca Tushnet notes, the marketplace argument “does not deal with disparaging marks that target only subsets of the population;

²⁹⁶ Bradley, *supra* note 25, at 533 (citing JOHN STUART MILL, ON LIBERTY 36 (Andrew UK Ltd. 2011) (1859) (ebook)).

²⁹⁷ *Id.* at 533–34; see Lee, *supra* note 19, at 2015.

²⁹⁸ Lee, *supra* note 19, at 2015.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 2016 (citing Rebecca Tushnet, *The First Amendment Walks into a Bar: Trademark Registration and Free Speech*, 92 NOTRE DAME L. REV. 381, 388 n.25 (2016)).

³⁰¹ Tam, *supra* note 16, at 17.

³⁰² MacKay, *supra* note 236, at 147.

³⁰³ Amicus Brief, *supra* note 119, at 20.

a market can segment so that racists, or even people who just do not care about harm to the target group, can support the trademark owner.”³⁰⁴

For another, though proponents of the marketplace argument may cite the changing of many brand names in response to the Black Lives Matter movement of the summer of 2020 as evidence of the marketplace snuffing out offensive marks, it would be more accurate to view these changes as evidence of the unpredictability and unreliability of the market as a controlling or protective element. Many of the brands and companies that changed or announced the intention to change their trademark names had existed, and in many cases, been criticized for their insensitive marks long before 2020.³⁰⁵ The team formerly known as the Washington Redskins, for example, had been the subject of criticism and litigation since at least 1992 but did not change its name until nearly thirty years later.³⁰⁶ Until the overwhelming show of support for the Black Lives Matter movement in the midst of a global pandemic, brands had little incentive to abandon racist trademarks that provided invaluable “familiarity and recognition” in the marketplace and served their bottom lines.³⁰⁷ While this *is* a reaction to the marketplace, this particular reaction is the result of a confluence of unprecedented and traumatic events caused or highlighted by the coronavirus pandemic: “We’re drawn to the media more than ever before, without work or the daily distractions of life. This has been going on for decades, centuries even, but we are literally and globally being forced to stop and watch injustice.”³⁰⁸ Should the United States have to wait for the next global pandemic to reevaluate its racism?

CONCLUSION

When Justice Holmes articulated the “marketplace of ideas” concept in his *Abrams v. United States* dissent, he laid the foundation for an absolutist interpretation of freedom of speech that has characterized the Court’s First Amendment jurisprudence over the past century.³⁰⁹ That the truth will win out through the market of ideas, he wrote, “is the theory of our Constitution. It is an

³⁰⁴ Tushnet, *supra* note 300, at 388 n.25.

³⁰⁵ Williams, *supra* note 8 (noting that, prior to 2020, “[i]n response to previous and frequent outcries over racially charged [brand] mascots, brands have done little”).

³⁰⁶ Jeong, *supra* note 13.

³⁰⁷ Terry Nguyen, *Aunt Jemima and the Long-Overdue Rebrand of Racist Stereotypes*, Vox (June 17, 2020, 2:01 PM), <https://www.vox.com/the-goods/2020/6/17/21294483/aunt-jemima-rebrand-stereotype> (quoting a Quaker Oats spokesperson’s remarks in 1989 on criticism of the ‘Aunt Jemima’ name and image).

³⁰⁸ Williams, *supra* note 8 (quoting Dr. Psyche Williams-Forsen, Department Chair of American Studies at the University of Maryland College).

³⁰⁹ *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

experiment.”³¹⁰ If that experiment ever successfully balanced freedom of expression with freedom from discrimination, the arguments that it no longer does so are persuasive. In its permissive approach to hate speech, the current absolutist jurisprudence allows intolerance in the name of tolerance and democracy and at the expense of both.³¹¹

As one article noted, “Charlottesville is not an anomaly. . . . It is a symptom of a greater moral malady afflicting our nation”³¹²—racism. The events of recent years have demonstrated more strongly than ever that racism and hate speech are “as American as apple pie,”³¹³ and their roots in American history run even deeper than the roots of an absolutist interpretation of the First Amendment. For the United States to meaningfully denounce racism, it must also “denounce and restructure the systems”—like free speech absolutism—“that create [and protect] the animus and ignorance that that ignite events like [Charlottesville].”³¹⁴ A federal prohibition on hate speech may be the first step in that project, but—as this Comment has endeavored to show—it will be important to reserve the right for marginalized groups to reclaim the words that oppressed them and use those words to empower their communities if they wish to do so. As *The Slants* demonstrated, trademark law is certainly one place where minority groups can engage in the work of reappropriation and that should remain the case.

As the law stands today, trademarks representing “the thought that we hate” may be federally registered, but they are also “perpetuat[ing] stereotypes [and] alienat[ing] members of American society along racial lines at a time of heightened divisiveness.”³¹⁵ In the trademark context, the marketplace cannot be relied upon to exclude hateful speech, but areas of U.S., international, and foreign law have been constructed to prevent and punish discriminatory behavior without sliding down a slippery slope into unchecked government censorship. The Lanham Act provides a framework to construct such law for federal trademark registration to serve the government’s interest in securing constitutional rights to all its citizens. While some argue that the solution to the problem of hate speech is simply to allow more speech, “action speaks louder than words. Action that identifies the democracy unequivocally with the exact opposite goals of the racist, with the struggle of minorities for equality, is the

³¹⁰ *Id.*

³¹¹ See Bradley, *supra* note 25, at 520; POPPER, *supra* note 258, at 581 n.4.

³¹² Politico Mag., *supra* note 2 (quoting Reverend William J. Barber II).

³¹³ MATSUDA ET AL., *supra* note 30, at 1.

³¹⁴ Politico Mag., *supra* note 2 (quoting Reverend William J. Barber II).

³¹⁵ Lee, *supra* note 19, at 2004, 2008, 2016.

real answer to hate speech.”³¹⁶ If there is anything to be learned from the evolution of First Amendment jurisprudence amidst the historical and social upheavals of the twentieth century, it is that there is perhaps no better time than now, in the midst of new upheavals, to take such action.

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³¹⁶ Boyle, *supra* note 24, at 502.

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