Rock band The Slants' victory in court secures your rights

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Marc Randazza June 19, 2017

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CNN —

In the 1971 free speech case, Cohen v. California, the Supreme Court said, "One man's vulgarity is another's lyric." That rings very true today.

In 2015, I wrote an article with the headline "Decision on Asian-American band's name is wrong." That was after an early decision by the US Court of Appeals for the Federal Circuit that denied the rock band, The Slants, a trademark registration because a bureaucrat said that it was "disparaging." Section 2(a) of the trademark act lets the government deny trademark protection to a mark that is "immoral," "scandalous" or "disparaging." I wrote a similar article about a case involving the Washington Redskins.

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courtesy of the author

Now, I get to say: "I told you so."

On Monday, the Supreme Court agreed that this use of Section 2(a) is unconstitutional. Justice Samuel Alito, who wrote the opinion, could not have made it clearer:

"We now hold that this provision violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."

This decision could also wipe out the Redskins' decision – effectively ending that team's need to continue its appeal. The Redskins are involved in a similar case, where they lost a long-registered trademark because the US. District Court for the Eastern District of Virginia

held that the “Redskins” name disparages Native Americans.

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The Supreme Court has made an inspiring decision in The Slants case in that it protects all of our rights – not just the rights of an eminently likable rock band and a somewhat less-than beloved football team.

Had this gone the other way, we would have had a government mandate that if one bureaucrat – in this case, from the United States Patent and Trademark Office – finds your speech to be offensive, the force of the entire federal government may use its weight to suppress your speech.

The trademark office had argued that granting trademark registration was tantamount to the government actually speaking – and thus it should not have to be forced to speak in a way that it disapproves of. But, trademark registration is an important benefit.

Under the unconstitutional conditions doctrine, the government may not condition the availability of a government benefit on an individual’s agreement to surrender a constitutional right. The government cannot transform private speech into government speech by merely having some government involvement in the speech.

The Supreme Court ruled that, “If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently.” After all, the trademark register has millions of trademarks on it – the federal government can’t be saying all those things at once.

Had this case gone the other way, the implications would have been grim: The “government speech” doctrine would have made almost any speech that so much as touched government lips subject to the government censor. Protest on government land? Government speech. Speak at a state university? Government speech!

What’s more, if the court had ruled differently, it would have given the government the ability to deny copyright protection to speech it found offensive. Some academics have called for just that. Had this gone the wrong way, everything from James Joyce to Stanley Kubrick to “Fifty Shades of Grey” would have been subject to the government censor.

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This would also have had international implications, as trademark rights and copyrights receive international benefits as well. Further, this decision is consistent with a

trend in Europe, where the European Union seems to be requiring greater levels of justification to deny government benefits in order to comply with Article 1 and 10 of the European Convention on Human Rights.

Bottom line: The government should not be in the business of deciding what is moral, immoral or offensive. The section of the trademark act in question in this case is a leftover from Victorian times, and is used now primarily, I would argue, (and *have* argued) to promote social agendas with coercive censorship. I do not trust any government to tell me what I can and cannot handle. The marketplace of ideas will do that for us.

The First Amendment demands viewpoint neutrality under the law. As Justice Anthony Kennedy said in his concurrence: "In the realm of trademarks, the metaphorical marketplace of ideas becomes a tangible, powerful reality. To permit viewpoint discrimination in this context is to permit Government censorship."

In other words a different outcome in this case could have left the government free to support "positive" speech, but not "negative." "Disparaging" trademarks could be suppressed, but "uplifting" ones allowed. And, a government bureaucrat could then decide what was "disparaging" and what was not.

Justice Kennedy summed it up perfectly:

"By mandating positivity, the law here might silence dissent and distort the marketplace of ideas."

Today, because of a little-known band and a naughty word, you are all more free. And, that word – "Slant"–may have once been a vulgarity. But, Simon Tam took it back today and made it all of our lyric.