

Respect

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A DIVERSITY NEWSLETTER

Religious Beliefs vs. Discrimination *by Jodi L. Miller*

In today's culture there are many hot button issues, but perhaps none is more personal than religion.

The First Amendment to the U.S. Constitution says: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." Throughout history, maintaining a balance between religious freedom and discrimination has been challenging.

"In battles over slavery and racial segregation, religion and scripture were often cited as justification for maintaining inequality," Tisa Wenger, a professor of American religious history at Yale Divinity School, wrote in an op-ed for *The Washington Post*. "Until the civil rights era, refusals to serve African Americans

were often cloaked under the guise of religious freedom. As social norms changed, the religious justifications for this bigotry became legally untenable."

Sincerely held beliefs

So, are religious freedom laws used to discriminate against certain groups? Angela Carmella, a professor at Seton Hall University School of Law, who teaches courses on religion and the First Amendment, says there is no easy answer to that question, since "religious freedom sometimes allows discrimination."



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Defending Free Speech and Words That Offend *by Michael Barbella*

A famous quote usually attributed to Voltaire, a French writer, states: "I disapprove of what you say, but I will defend to the death your right to say it." Free speech is a pillar of American democracy, however, protecting it can come at the cost of tolerating offensive ideas.

The framers of the U.S. Constitution understood the importance of free expression and protected it under the First Amendment: "Congress shall make no law...abridging the freedom of speech..."



The U.S. Supreme Court has carved out a few exceptions that are not protected by the First Amendment.

These exceptions essentially fall into nine categories, including obscenity, fighting words (i.e., you can't yell fire in a crowded movie theater), defamation, child pornography, perjury, blackmail, incitement to imminent lawless action, true threats and solicitations to commit crimes.

Offensive but protected

The U.S. Supreme Court most recently reinforced the right to free speech with its June

2017 ruling in *Matal v. Tam* that overturned a law prohibiting the registration of disparaging or offensive trademarks. The justices unanimously agreed that the federal government's Lanham Act violates the First Amendment by banning trademarks deemed derogatory, even those brand names considered ethnically or religiously demeaning.

"This provision violates the Free Speech Clause of the First Amendment," Justice Samuel Alito wrote on

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Native Americans Protecting Seven Generations and Beyond

by Phyllis Raybin Emert

Native Americans believe in Seven Generations Stewardship, a concept, credited to the Iroquois, which honors the Earth and thinks seven generations ahead (approximately 140 years). The idea is that the decisions the current generation makes should benefit their children, as well as seven generations into the future.

Perhaps it is for that reason that the Standing Rock Sioux Tribe, as well as environmentalists, have fought so hard to prevent the controversial Dakota Access Pipeline (DAPL). In early 2016, the Standing Rock Sioux, along with 150 other tribal nations, began protesting the DAPL and filed a lawsuit against the government in September 2016. The tribe opposes the pipeline because they believe it infringes on their treaty rights with the U.S. government, threatens their drinking water source and crosses sacred burial sites.

The nearly 1,200 mile-long DAPL runs from North Dakota's Bakken oil fields through South Dakota, Iowa, and into Illinois. It is built over 90 feet below the riverbed under Lake Oahe, a large reservoir on the Missouri River. The main water intake valve for the Sioux reservation is 70 miles south of the pipeline, but the route of the oil runs just a half mile north of the reservation.

Water is life

The nearly \$4 billion pipeline is mostly owned by Energy Transfer Partners (ETP), which claims it is “among the safest, most technologically advanced pipelines in the world.” The company contends it is not on Native American property and that private property landowners near the Sioux Reservation have the freedom to willingly sell their land to DAPL, which increases energy for all Americans.

Pipeline representatives believe it is much safer to transport the oil underground rather than using hundreds of railroad cars and trucks each day. They call the pipeline protestors “extremists,” while the Sioux, whose mantra is “*mni wiconi*” or “water is life,” consider themselves “water protectors.” ETP

contends the Sioux water sources are safe as are the sacred burial and cultural sites, and that the Sioux were consulted numerous times during construction.

The Standing Rock Sioux contend that even the most modern pipeline can have hazardous leaks. According to the U.S. Department of Transportation's Pipeline and Hazardous Material

"The Sioux, whose mantra is "mni wiconi" or "water is life," consider themselves "water protectors."

Safety Administration, there is “more than one leak, failure or rupture involving an oil or gas pipeline every day in the U.S.”

In a statement, Standing Rock Chairman Mike Faith said, “ETP estimates that 12,500 barrels of oil [being spilled] would be the worst case scenario,

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be directed to Jodi Miller
at jmiller@njsbf.org



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but that is based on a nine-minute shutdown time. By looking at prior spills, we know that the true shutdown time is hours, and can even take days. We are minutes, if not seconds, south of where the pipeline is.”

All about the land

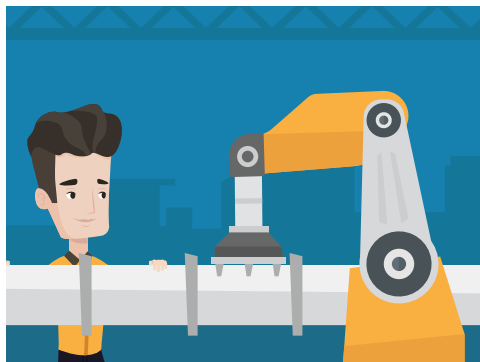
Jan Hasselman, an attorney with EarthJustice, a non-profit environmental law firm in Seattle and the lead counsel for the Standing Rock Sioux Tribe, says, “The issue of who ‘owns’ the land is a sensitive one. All of that land was promised ‘in perpetuity’ [forever] to the people of the Great Sioux Nation under treaties,” Hasselman explains. “But the U.S. violated those treaties, and Congress **repudiated** them.”

The treaties in question are the Fort Laramie treaties of 1851 and 1868. In the first Fort Laramie Treaty, the government acknowledged certain land as Indian Territory and the Native Americans guaranteed safe passage for settlers, allowing roads and forts to be built in their territory. The government did little to prevent settlers from taking over Indian land. The settlers competed with the Indians for water and game, and the situation turned hostile.

The 1868 Treaty of Fort Laramie reduced the original Indian Territory and established the Great Sioux Reservation, which included the Black Hills and the Missouri River. According to the Standing Rock Sioux, they retained hunting rights to a much larger area, and the treaty stated that the giving up of additional Indian land would only be valid if there was approval by three-fourths of the tribe’s adult males. Congress then passed the Act of February 28, 1877, which removed the sacred Black Hills from the Great Sioux Reservation, but never obtained the consent of three-fourths of the Sioux, as required in the 1868 treaty. The Great Sioux Reservation was further decreased in the late 1880s so that it now occupies only fragments of the original territory.

The Sioux Nation brought a lawsuit against the government in 1980 and the U.S. Supreme Court concluded that the Sioux had never been sufficiently

compensated and ordered “just compensation to the Sioux Nation, and that obligation, including an award of interest, must now, at last, be paid.” The Sioux Nation refused to accept the payment because they wanted the Black Hills returned to them. The original award of \$102 million has been acquiring interest in a Bureau of Indian Affairs account and is now worth over \$1 billion.



Legal timeline

In 2016, U.S. District Court Judge James E. Boasberg denied the Tribe’s request for a temporary injunction (to stop action on the pipeline). In November 2016, and with President Barack Obama’s support, the U.S. Army Corp of Engineers announced they were delaying the final section until an additional environmental review could be produced, working together with the Standing Rock people. On December 4, 2016, DAPL was denied the right to cross under Lake Oahe and the Corps decided to prepare alternative routes.

Within days of taking office, President Donald Trump approved the final easement for the pipeline, and in February 2017 the Corps issued the official order. On June 1, 2017, the Dakota Access Pipeline started the flow of commercial oil and since then approximately 570,000 gallons of crude oil travel each day through the pipeline.

On June 14, 2017, Judge Boasberg ruled that the U.S. Army Corps of Engineers “did not adequately consider the impacts of an oil spill on fishing rights, hunting rights or environmental justice, or the degree to which the pipeline’s effects are likely to be highly controversial.” In December 2017, the judge

ordered ETP to develop a final spill response plan. Citing the Keystone Pipeline spill, which released as much as 210,000 gallons of oil in South Dakota, Judge Boasberg wrote, “Although the court is not suggesting that a similar leak is imminent at Lake Oahe, the fact remains that there is an inherent risk with any pipeline.” The judge ruled in October 2017 that the pipeline could continue operation pending the submission of an environmental review by the Corps working together with the Standing Rock Sioux Tribe. Completion of the review is expected in April 2018.

Impact on Standing Rock

The Sioux believe the Army Corps of Engineers violated the law when it issued permits without considering the impact on the people of Standing Rock and they specifically asked for better oil spill response planning, according to Hasselman.

“We asked that oil be shut down while the new environmental studies are underway,” he says. “It makes no sense at all to find that an agency violated the law by failing to study something adequately, and then allow that activity to continue while the risks are being studied.”

The pipeline crosses the Missouri River just half a mile upstream of the Standing Rock reservation.

“If there is a spill it will flow downstream directly into the reservation, which is an existential [real] threat to the economic and cultural life of the Standing Rock people,” says Hasselman and explains that the Sioux are closely tied to the water. “It is central to their world view and cultural practices. Tribal members rely on that water for fishing, hunting, and religious practices which sustain them as a people.”

The Standing Rock Sioux Tribe will not give up the fight, Hasselman says. “The fact that oil flows every day past the reservation’s doorstep is a traumatic insult to the Tribe...and they will keep fighting until the project is rerouted away from them, or abandoned. They know that it is not a matter of ‘if’ but a matter of ‘when’ there is a spill or a leak.” •

Fighting Environmental Racism with Environmental Justice

by Cheryl Baisden

When it comes to building sewage and water treatment plants, power plants, landfills and trash incinerators, there is usually little argument that such facilities are necessary evils of modern civilization. At the same time, pretty much no one wants them built in their own backyard. As a result, these polluting—and in many cases hazardous—facilities are usually built in neighborhoods where the residents can offer the least resistance.

The end result is that “communities of color and low-income communities are exposed to a disproportionate amount of industrial pollution and other environmental hazards,” says Thomas Prol, a Sparta attorney who practices environmental law. Known as environmental racism, this means that “people who are politically and economically disadvantaged are made to bear a greater environmental and health burden than others.”

By establishing government and corporate regulations and policies that deliberately target these communities over others, these populations can end up being exposed to toxic waste and soil, water and air pollution; denied a voice in land management and natural resource decisions; and relegated to live in flood-prone or utility-deficient areas.

While “environmental racism is the injustice that results from discriminatory implementation of policies and processes that negatively impacts people of color and of lower socio-economic means, resulting in them bearing a disproportionate share of the burden of environmental contamination and human health consequences,” explains Prol, “environmental justice should be the true objective, focusing on the fair treatment and meaningful involvement of all people, regardless of race, color, national origin, ethnicity, or income, in the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.”

Although environmental justice should be the objective, studies as far back as 1971 show that polluting industries are predominately located in minority and impoverished areas around the country.

Not a new concept

Although the term environmental racism has gained more notice in recent years, the concept first drew national attention in the 1980s, in connection with complaints surrounding a toxic landfill located in Afton, North Carolina, a community with one of the largest black populations in the state.

In 1979, the North Carolina Department of Environmental and Natural Resources and the Environmental Protection Agency (EPA) selected Afton as the site to dump thousands of gallons of a class of chemicals so toxic that the following

year Congress banned their production. Although findings showed the drinking water level at the site was only five-10 feet below the surface, the courts supported the government’s decision, and more than 500 people were arrested when they attempted to block 10,000 truckloads of contaminated soil from entering the site.

After nearly two decades of soil and water contamination surrounding the landfill, continued public pressure led to the state and federal government paying \$17 million to clean up the site.



Hard to grasp

While the concept of environmental racism has been around for nearly four decades, it is still hard for some to grasp. Vann Newkirk, a staff writer for *The Atlantic*, has written extensively on this topic. In a recent article, he wrote: “The idea of environmental racism is, like all mentions of racism in America, controversial. Even in the age of climate change, many people still view the environment mostly as a set of forces of nature, one that cannot favor or disfavor one group or another.”

A study by researchers from the EPA’s National Center for Environmental Assessment, released in February 2018, revealed that people of color and those in poverty are more likely to breathe polluted air because they likely live near polluters. According to the study, “results at the national, state and county scales all indicate that non-Whites tend to be burdened disproportionately to Whites.” In addition, the study stated: “A focus on poverty to the exclusion of race may be insufficient to meet the needs of all burdened populations.”

A prime example in Flint

An often-cited and relatively recent example of environmental racism is the plight of residents in the predominantly black community of Flint, Michigan, where 40 percent of the population lives below the poverty line.

In 2014, the drinking water source for the community was changed to the Flint River in a cost-saving measure, without proper treatment to protect pipes from leeching lead into the water. Although residents continually complained about the odor and color of the water, and many developed rashes and other health conditions, state and county officials failed to notify residents of (and even publicly denied) the potential danger surrounding the water for nearly two years, until just weeks before the federal government, under President Barack Obama, declared the situation a state of emergency. As a result, it is believed that over 100,000 people, including as many as 12,000 children, were exposed to lead

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contamination. These citizens may experience a range of serious health problems as a result. Additionally, a dozen deaths have been reported from a respiratory illness known as Legionnaire's disease, which may be linked to the water situation, resulting in several officials being charged with involuntary manslaughter by the Michigan Attorney General's Office.

"There is no doubt that if the people of Flint, Michigan, were not politically oppressed as they are due to race and poverty, they would have been treated better and more fairly than they were during the crisis," says Prol.

Today, many Flint residents continue to rely on bottled water until the court-ordered process of replacing the city's water lines is completed, which is estimated to be some time in 2020.

Luckier than most

As bad as Flint's environmental crisis has been, the city's residents still stand among a small number of successes when it comes to winning a case against environmental racism.

From a federal government perspective, complaints regarding environmental racism must be filed with the EPA, through its Office of Civil Rights, and are reviewed based on Title VI of the Civil Rights Act of 1964. Title VI, which deals with ensuring recipients of federal aid don't discriminate, can be violated if state environmental agencies, for example, choose to disproportionately locate environmentally unfriendly industries in minority communities.

The **burden of proof**, however, is extremely high, says Prol, which makes a finding in favor of a minority community unlikely. For example,

in 1997 Flint residents filed an EPA Title IV complaint in connection with a state-approved industrial operation that would pump 100 tons of lead and other pollutants into the region's air annually. The EPA ruled that environmental regulations that permitted placing the operation there trumped civil rights protections of the residents.

Although the "mini-mill" was never constructed, the EPA's decision set a precedent that still stands today. In fact, a 2015 study by the Center for Public Integrity found that in nearly 300 complaints filed by minority communities the EPA never once ruled in favor of community members. Additionally, on average it takes close to a year for the EPA to decide if it will even investigate a complaint.

Prol also notes a February 23, 2018 policy statement is going to make it even more challenging for future plaintiffs in these matters. In the statement, EPA Administrator Scott Pruitt's senior staff announced that the EPA was eliminating the freestanding Office of Environmental Justice and will merge it into the EPA Office of Policy.

"This was largely seen to line up with a reduced priority of President Donald Trump in addressing environmental justice matters and a change in enforcement priorities regarding environmental and public health issues and concerns," says Prol. "Thus, if you want to be active on environmental justice issues, you likely will have to do it through a private entity or on your own." •



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behalf of the court. "It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."

The case centered on a provision of the 72-year-old Lanham Act referred to as the "disparagement clause" that allows the U.S. Patent

and Trademark Office (USPTO) to deny a trademark request if it "may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute..." The

Court found that the disparagement clause constituted viewpoint discrimination, which is unconstitutional. In other words, the government (in this case the USPTO) cannot bar the expression of an idea simply because it finds it offensive.

According to IPWatchdog, a legal blog on intellectual property law, "The core tenet behind viewpoint discrimination legislation is the notion that certain ideas or perspectives cannot be censored

from the market of ideas without risking creating an ideological **tyranny** of sorts that favors only one position."

The government argued in the case that registered trademarks amount to government speech and therefore are not affected by the First Amendment.

Justice Alito wrote, "If the federal registration of a trademark makes the mark government speech, the federal government is babbling prodigiously and incoherently."

In a **concurrent opinion**, Justice Anthony Kennedy wrote, "To permit viewpoint discrimination in this context is to permit government censorship."

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Professor Carmella explains the concept of “church autonomy protects churches [or any religious institution, including synagogues, mosques, etc.] from state interference on religious matters.” For instance, anti-discrimination laws do not bind religious institutions when they make employment decisions regarding religious functions. “In addition to protections for such core religious activities, thousands of religious exemptions exist to protect many aspects of free exercise for churches, religious nonprofits, some for-profits, and individuals,” she says.

What makes this issue difficult is that it is “entirely possible to have sincerely held religious beliefs that are also discriminatory,” says Katie Eyer, a professor at Rutgers Law School—Camden, whose focus is anti-discrimination law and theory. “For example, there were, until fairly recently, people and institutions who sincerely believed, as a matter of their religious beliefs, that white and black people should not mix—there are many religions where people sincerely believe that women shouldn’t hold certain types of public facing roles—there are religions in which people with disabilities are sincerely believed to be less godly. And, as most of the current discussion is focused, there are people who have sincerely held religious beliefs about the LGBT community that are discriminatory.”

Professor Eyer says, “The question is not about where the line is between sincerely held religious beliefs and discrimination—in these cases there is no such line—but rather about whether and where we are going to allow exemptions from anti-discrimination law and other legal and private requirements for religious beliefs that are discriminatory.”

Allowing discrimination in Mississippi

Much of religious freedom legislation in the U.S. is based on the 1993 Religious Freedom Restoration Act (RFRA), a federal law which states the “government shall not substantially burden a person’s exercise of religion.” The law was originally intended to protect Native American sacred religious

ceremonies. In 1997, the U.S. Supreme Court ruled that the RFRA only applied federally, not to the states. The ruling prompted 21 states to pass their own versions of RFRA.

In April 2016, Mississippi passed one of the broadest religious freedom laws in the country. Among other things, the Protecting Freedom of Conscience from Government Discrimination Law allows government clerks to cite religious objections and *refuse* themselves from issuing same-sex marriage licenses, and it protects merchants that refuse services to members of the LGBT community.

Professor Eyer contends that when a religious freedom law, like a state RFRA, is used as a defense to anti-discrimination law, the argument the defendant is making is he or she should be allowed to discriminate due to religious beliefs.

“Although most of this conversation is focused on the LGBT community at this point, these types of religion-based arguments have been made about rights to discriminate against other groups,” Professor Eyer says.

So far, there hasn’t been much success in making an argument for a right to discriminate under most federal and state religious freedom laws, she says, but the issue is still “very much in flux.”

Professor Carmella points out that state courts have decided that public accommodations law applies to all vendors without exception, meaning that same-sex couples cannot be turned away.

“The vendors have argued that the public accommodations laws actually discriminate against them, in not protecting their religious exercise when there is no harm to the public (since the goods and services could be provided by other vendors),” Professor Carmella says. “The state commissions point to the dignitary harms involved in being denied service.”

It is unlikely that most RFRA laws would be found unconstitutional, Professor Eyer says, but ultimately she thinks “extreme laws, like Mississippi’s religious freedom law, are likely to be deemed unconstitutional.”

In January 2018, the U.S. Supreme Court declined to hear a case concerning the

constitutionality of Mississippi’s law, which allows the lower court ruling to stand. Essentially, the lower court ruled that the plaintiffs in the case lacked “standing” because they had yet to be discriminated against, which does not rule out a future challenge to the law.

Doing no harm

Two congressmen—Joseph Kennedy III of Massachusetts and Bobby Scott of Virginia—would like to amend the RFRA of 1993 and introduced legislation called the Do No Harm Act, which would clarify that “no one can seek religious exemption from laws guaranteeing fundamental civil and legal rights.”

“Inherent in our nation’s right to religious freedom is a promise that my belief cannot be used to infringe on yours or do harm,” said Congressman Joseph Kennedy in a statement. “The Religious Freedom Restoration Act was intended to protect against such distortions of faith, not to justify them. Unfortunately in recent years, that legislation has been used as cover to erode civil rights protections, equal access to health care and child labor laws. In the face of mounting threats from an Administration that continues to back away from civil rights protections, the Do No Harm Act will restore the sacred balance between our right to religious freedom and our promise of equal protection under law.”

In August 2017, the legislation was referred to the Subcommittee on the Constitution and Civil Justice.

Conscience and religion

In January 2018, the Trump Administration created a new entity, the Conscience and Religious Freedom Division, under the umbrella of the Department of Health and Human Services. The new division is tasked with enforcing laws to protect the rights of health care workers who want to opt out of certain procedures. Critics expressed concern about the new division and what it will mean for quality of care, raising the possibility that health care professionals would deny access to abortion, gender

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reassignment surgery or fertility treatments, as well as basic care to members of the LGBT community.

"This is the essence of the long-standing debate about these types of 'conscience' exemptions in the healthcare context," Professor Eyer says. "People who oppose them view them as discriminatory and contrary to professional obligations for healthcare providers to provide the best care to their patients. People who support them view them as ways to ensure that people aren't forced to affirmatively participate in medical procedures that are contrary to their deeply held religious beliefs."

Waiting on a cake shop

In June 2015, Senator Mike Lee of Utah introduced the First Amendment Defense Act (FADA) in Congress. The bill would prohibit the federal government from taking action against a person "on the basis that such person believes or acts in accordance with a religious belief or moral conviction that: (1) marriage is or should be recognized as the union of one man and one woman, or (2) sexual

relations are properly reserved to such a marriage."

"Here the notion of discrimination has been placed squarely on the side of religious freedom, rather than in opposition to it," Professor Carmella says.



The original FADA never got out of committee, however Senator Lee introduced a new version of the legislation in March 2018. The change to the legislation is that it would essentially also protect those that support same-sex marriage.

Sarah Warbelow, legal director for the Human Rights Campaign, told CNN, "It appears to be a false

attempt or a failed attempt to make this legislation constitutional by making it seem they're not just targeting LGBTQ people."

According to Professor Carmella, the fate of the bill will likely depend on the U.S. Supreme Court's decision in *Masterpiece Cakeshop v. Colorado*. In that case, a baker refused to provide a cake for a same-sex couple's wedding on the grounds that it would be endorsing a message in favor of same-sex marriage, which he does not believe in. The Court heard oral arguments in the case in January 2018 and a ruling is expected in June.

In her *Washington Post* op-ed, Professor Wenger writes that freedom of religion is a treasured American ideal. "Religious freedom remains as an important tool for minority groups—Jews, Muslims, Sikhs, Hindus, Native Americans and more—who need culturally sanctioned ways to defend their communal practices and identities. Rather than upending this freedom, those who seek a more just society should instead reclaim and redefine it in more inclusive and more balanced ways." •

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Another slant

The Court's ruling ended a lengthy trademark battle by an Asian American dance-rock band called The Slants. The USPTO rejected the group's trademark application in 2010 because it believed the name was disparaging to Asian Americans. Band founder Simon Tam, however, contended the name was chosen not to offend but rather to reclaim a slur and use it as a "badge of pride."

"[The name] came from me asking friends when I was trying to think of a band name. I said, 'What's something you think all Asians have in

common?' and they told me slanted eyes," Tam told *The New York Times*. "That's interesting because it's not true. But it worked [as a name] because we could talk about our perspective—our slant on life, as people of color navigating the entertainment industry—and at the same time, pay homage to the Asian American activists who had been using the term in a re-appropriated, self-empowering way for about 30 years."

A federal appeals court initially agreed with the USPTO, but later voided its own ruling and determined that the Lanham Act's disparagement

"This journey has always been much bigger than our band; it's been about the rights of all marginalized communities to determine what's best for ourselves."

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clause was unconstitutional. The USPTO appealed to the U.S. Supreme Court, arguing the clause should be treated as an exception to the First Amendment's free speech provision.

"For too long, people of color and the LGBTQ community have been prime targets under Section 2(a) of the Lanham Act, simply because we believe in the deliberate disarmament of toxic language and symbols," Tam wrote in a Facebook post after the ruling came out. "Now, Americans can decide who should prevail in the marketplace of ideas rather than a lone examining attorney. This journey has always been much bigger than our band; it's been about the rights of all marginalized communities to determine what's best for ourselves."

Forty-year fight ends

The Court's decision also affected another trademark case that has been in the courts since 1992, although the fight began 20 years prior, when in 1972 a delegation of Native Americans asked Edward Bennett Williams, then-president of the Washington Redskins, to change the team's name.

Five Native Americans attempting to ban the Washington Redskins name and logo from the NFL ended their fight within days of the Supreme Court's decision in *Tam*. The team lost its trademark registration protection in 2014 after decades of use and was appealing to the U.S. Court of Appeals for the 4th Circuit. The **appeal** was on hold, however, pending the Supreme Court's decision in *Matal v. Tam*.

"There's no more challenge to make," Jesse A. Witten, an attorney representing the Native Americans, told *The Washington Post* but indicated

the effort wasn't wasted. "There's the legal case and then there's the cause. It was a galvanizing force that caused people to pay attention to the cause."

The high court decision also ended the federal government's legal efforts to rename the Redskins.

"Consistent with *Tam*, the Court should reverse the judgment of the district court and **remand** the case with instructions to enter judgment in favor of Pro-Football," Mark Freeman, an attorney for the Justice Department's civil division, wrote to the 4th Circuit Court.

The USPTO refrained from commenting on *Matal v. Tam*, but nevertheless acted quickly to update its guidance on trademark applications. Within a week of the decision, the Office specified it would no longer use the disparagement clause to evaluate trademark requests.

Rush to offend?

Although the Supreme Court decision is considered a victory for free speech, some minority and ethnic groups feared the ruling would trigger a glut of potentially offensive trademark applications.

"It seems this decision will indeed open the floodgates to applications for all sorts of potentially offensive and hateful marks," Lisa Simpson, a New York attorney, told *The National Law Journal*. "While this may be the right result under the First Amendment... it seems the responsibility will now pass to the public. Trademark is a consumer-based law. And so it will be up to consumers to reject the most hateful of these marks and slogans."

Indeed, *Matal v. Tam* did generate a few applications for trademarks on variations of the n-word, although the applicants told



The Washington Post their motive was to keep it out of the hands of racist hate groups.

Despite this initial blitz of n-word trademark applications, one legal expert doubts the Supreme Court decision will significantly increase the number of potentially offensive petitions.

"I don't believe the Supreme Court's decision will result in there being a rush to file trademark applications for marks that previously would have been subject to a possible disparagement rejection," said John R. Kettle, a law professor and director of the Intellectual Property Law Clinic at Rutgers Law School—Newark. "Since a trademark functions as a signal to the public as to both source or origin of the product or service, it also serves to indicate something about the quality, consistency, pricing, and other goodwill aspects about the product or service. As such, adopting a mark that may disparage, or be immoral or scandalous is a questionable business decision. Will such a mark enhance the image of the user, or result in a negative public reaction to the product or service?"

Ultimately, like Voltaire, Justice Alito concluded, "Speech that demeans based on 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.'" •

Glossary

appeal — a complaint to a higher court regarding the decision of a lower court. **burden of proof** — the obligation to prove a case. **concurrent opinion** — a separate opinion delivered by one or more justices or judges that agrees with the decision of the court but not for the same reasons. **jurisprudence** — the theory of philosophy of law. **recuse** — to excuse oneself from carrying out a duty because of a conflict of interest (or in this case a religious belief). **remand** — to send a case back to a lower court. **repudiate** — refuse to accept or be associate with. **tyranny** — power used in a cruel or unfair manner.