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NOMMO: UNDERSTANDING THE POWER OF THE WORDS, A CRITIQUE OF *MATAL V. TAM*.

MALIK C. EDWARDS¹

I. INTRODUCTION

In *Matal v. Tam*² the Supreme Court held the disparagement clause of the Lanham Act³ unconstitutional. The disparagement clause reads:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it--

(a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after one year after the date on which the WTO Agreement (as defined in section 3501(9) of Title 19) enters into force with respect to the United States.⁴

This decision has raised a number of questions as to the current state of trademark within our larger understanding of the intersection of social justice and intellectual property.⁵ The case has been lauded as a victory by free

1. Associate Professor of Law, North Carolina Central University School of Law, J.D., New York University School of Law, (1994); Ph.D., University of Pennsylvania (2006); B.A. Oberlin College (1991). I am grateful for the thoughtful comments of Todd Clark, April Dawson, Don Corbett, Brenda Reddix-Small and Cheryl Amana-Burris.

2. *Matal v. Tam*, 137 S. Ct. 1744 (2017).

3. Lanham Act § 2, 15 U.S.C. § 1052(a) (2006). The Lanham Act is the primary federal trademark statute in the United States. The Act prohibits a number of activities, including trademark infringement, trademark dilution, and false advertising.

4. *Id.*

5. See Steven D. Jamar & Lateef Mtima, *The Centrality of Social Justice for an Academic Intellectual Property Institute*, 64 SMU L. REV. 1127,1135 (2011) (explaining that “[s]ocial justice encompasses at the very least inclusion of everyone in the benefits of society, culture, economic opportunity, and technological possibilities. People should be able to share fully the bounty that has been created and is being created. Sharing in the bounty includes being able to use what is to create what is to be; everyone should be able to use the past works to create new works.”); see also BILL IVEY, ARTS, INC.: HOW GREED AND NEGLECT HAVE DESTROYED OUR CULTURAL RIGHTS 2-3 (2008); Steven D. Jamar, *Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context*, 19 WIDENER L.J. 843, 851 (2010); Mtima & Steven D. Jamar, *Fulfilling the Copyright Social Justice Prom-*

speech advocates⁶, while others have viewed it as a defeat of the power of the state to protect minority groups from hate speech.⁷ A divide even exists within social justice scholarship, with some viewing it as victory for self-determination⁸ versus those who accept that some language is harmful no matter whom the speaker.⁹

I would argue that neither proposition is completely correct, and that the decision in *Tam*, provides an opportunity to examine the role of trademarks within the field of social justice and to use trademarks to call for a more nuanced reading of the free speech clause of the First Amendment. Miles' law tells us that "where you stand is based on where you sit."¹⁰ If we only look at the case from Simon Tam's perspective, we may reach a different conclusion than if we look from the perspective of the *Pro-Football, Inc. v. Blackhorse*¹¹ defendants.

In 2006, bass guitarist Simon Shiao Tam formed the Asian American dance rock band, The Slants. "Tam decided on the band name after asking a friend to identify common Asian stereotypes. The friend suggested slanted eyes, and The Slants were born."¹² Choosing the name was an intentional act by an Asian American band to "'reclaim' and 'take ownership' of stereotypes about people of Asian ethnicity."¹³ Mr. Tam applied to trademark the name, "The Slants," in 2010 at his attorney's suggestion. His attorney said, "This is a very simple process. It's just going to cost you a couple hundred bucks. The

ise: Digitizing Textual Information, 55 N.Y.L. SCH. L. REV. 77 (2010); John Tehranian, *Towards A Critical IP Theory: Copyright, Consecration, and Control*, 2012 B.Y.U.L. REV. 1237 (2012) (examining the myriad ways in which our intellectual-property regime reflects and even accentuates traditional race-, gender-, orientation-, and class-based divides).

6. See Clay Calvert, *Beyond Trademarks and Offense: Tam the Evolution Speech*, in CATO SUP. CT. REV. 25 (2016-2017) (Ilya Shapiro ed., 2017) (representing the Cato institute, a conservative Think Tank); Brief of the American Civil Liberties Union, the American Civil Liberties Union of Oregon, and the American Civil Liberties Union of the Nation's Capital as Amici Curiae in Support of Appellant at 7, *In re Tam*, 785 F.3d 567 (Fed. Cir. 2015) (No. 14-1203) ("[I]n the trademark context ... a literal marketplace allows members of the public to register protest through boycotts of a mark holder's products or services, or through other traditional First Amendment means.").

7. See Brief of Certain Members of Congress as Amici Curiae in Support of Neither Party, *Lee v. Tam*, 137 S. Ct. 30 (2016) (No. 15-1293), 2016 WL 6873057.

8. See Brief of Amicus Curiae San Francisco Dykes on Bikes Women's Motorcycle Contingent, Inc., *Lee v. Tam*, 137 S. Ct. 30 (2016) (No. 15-1293), 2016 WL 7422729 (arguing for the right of oppressed groups to reclaim and repurpose language).

9. See Brief for the Fred T. Korematsu Center for Law and Equality, Hispanic National Bar Association, National Asian Pacific American Bar Association, National Bar Association, National LGBT Bar Association, and National Native American Bar Association as Amici Curiae in Support of Petitioner, *Lee v. Tam*, 137 S. Ct. 30 (2016) (No. 15-1293), 2016 WL 6833411.

10. Rufus E. Miles Jr., *The Origin and Meaning of Miles' Law*, 38 PUB. ADMIN. REV. 399 (1978).

11. *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015).

12. Teta Alim, *Why This Band Is Fighting for Its Right to Have an 'Offensive' Name*, Bandwidth.fm (Sept. 18, 2015), <http://bandwidth.wamu.org/why-this-band-is-fighting-for-its-right-to-have-an-offensive-name>.

13. *Matal v. Tam*, 137 S. Ct. 1744, 1754 (2017).

whole thing will be over with very quickly.”¹⁴ It was not easy; Mr. Tam received a call from his attorney telling him, “Hey, we’ve got a problem with your trademark application. You were rejected because they said your name is disparaging to persons of Asian descent.”¹⁵ He responded, “Do they know that we’re of Asian descent?”¹⁶ The irony of all this is not lost on Mr. Tam. In commenting about the appeal to the Federal Circuit he said:

I’ll be there, and I’ll be watching, but I won’t be allowed to speak, which is the deeply ironic thing about it. . . You have some white attorneys arguing before some white judges about what’s offensive to Asian people, and the only Asian in the room will not be allowed to talk.¹⁷

He seemed more troubled by the fact that the United States Patent and Trademark Office (USPTO) provide no evidence that Asians were, in fact, offended by the name.

Mr. Tam questions, “who did they find that was offended by this?”¹⁸ His attorney said, “Technically, nobody, but they quoted UrbanDictionary.com and it included a photo of Miley Cyrus¹⁹ pulling her eyes back in a slanted eye gesture.”²⁰

Compare Tam’s story to that of petitioners in *Pro Football, Inc. v. Harjo*²¹ and *Blackhorse*.²² In these cases, groups of Native Americans petitioned to cancel the registrations of the Washington Redskins trademarks under Section 2(a) of the Lanham Act.²³ As a result of the arguments in *Blackhorse*, the Trademark Trial and Appeals Board (TTAB) “scheduled the cancellation of the registrations of the Redskins marks under Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a), finding that at the time of their registrations the marks consisted of matter that both ‘may disparage’ a substantial composite of Native Americans and bring them into contempt or disrepute.”²⁴ The finding of disparagement was supported by a historical understanding of the term “redskin.”

The term actually derives from the barbaric practice of scalping... the bloody mess that one saw when looking at the scalp ... thus the term “red” ...skin because it was the “skin” of an “animal” just like the others that they had...so, it became “redskins”. So, you see when we see or hear that term...

14. Alim, *supra* note 12.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Miley Cyrus is a White American pop artist known for cultural appropriation and outrageous antics. Her pulling of her eyes is a traditional means to mock Asian people.

20. Alim, *supra* note 12.

21. *Pro-Football, Inc. v. Harjo*, 565 F.3d 880 (D.C. Cir. 2009).

22. *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015).

23. *Id.* at 450.

24. *Id.* at 451.

we see the bloody pieces of scalps that were hacked off of our men, women and even our children... we hear the screams as our people were killed... and “skinned” just like animals.... you can safely say that the term is considered extremely offensive. European settlers encouraged the scalping of Native Americans by offering payments of bounties. A 1755 Proclamation encouraged scalping as a means of providing valid “evidence” of having killed a Native American.²⁵

The response of Daniel Snyder, the billionaire owner of the Washington football team, is that the use of the term “redskin” is a sign of respect and that the feelings of these Native Americans and the history should not matter.²⁶

Although the *Harjo* and *Blackhorse* cases might appear to be distinguishable from the issues in *Tam*, even an attempt to distinguish them may run afoul of traditional First Amendment jurisprudence because such arguments support challenges based on the “void for vagueness” doctrine. One of the failures of American free speech jurisprudence is a refusal of courts to address power inequities generally, and more specifically, a refusal to address the power of language to facilitate the continuation of a system of white supremacy.²⁷

As we look to develop trademark protections, now that Section 2(a) has been found to be unconstitutional, we must look to move beyond limited and individualized notions of speech protection. The development of trademark provisions to replace Section 2(a) must be grounded in social justice²⁸ and should acknowledge the power of words, specifically as they affect oppressed communities. It must be aware of, but not limited by, the Supreme Court’s limited reading of the First Amendment under which individual speech rights are given primacy over harm to traditionally marginalized communities.²⁹

25. Brief and Addendum of Amici Curiae National Congress of American Indians, National Indian Education Association, National Indian Youth Council, and Tulsa Indian Coalition Against Racism in Support of Appellants at 5-6, *Pro Football v. Harjo*, 565 F.3d 880, 881 (2009) (No. 03-7162), 2004 WL 1926878 (C.A.D.C.).

26. *Daniel Snyder Defends Redskins* (Aug. 6, 2014), http://www.espn.com/nfl/story/_id/11313245/daniel-snyder-redskins-term-honor-respect.

27. Brief of Amici Curiae Native American Organizations in Support of Petitioner at 28, *Lee v. Tam*, 137 S. Ct. 30 (2016) (No. 15-1293) (pointing out that the harms imposed by racially disparaging trademarks are not theoretical or academic; such trademarks cause real and concrete injury).

28. See *Jamar & Mtima*, *supra* note 5, at 1135, (explaining that “[s]ocial justice encompasses at the very least inclusion of everyone in the benefits of society, culture, economic opportunity, and technological possibilities. People should be able to share fully the bounty that has been created and is being created. Sharing in the bounty includes being able to use what is to create what is to be; everyone should be able to use the past works to create new works.”); see also *IVEY*, *supra* note 5, at 2-3; *Jamar*, *supra* note 5, at 851; *Mtima & Jamar*, *supra* note 5, at 77.

29. See *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992); *Virginia v. Black*, 538 U.S. 343 (2003). In each of these cases, free speech arguments resulted in finding states’ efforts to limit terroristic actions unconstitutional.

To this end, this Work will examine the Court's holding in *Tam*,³⁰ guided by an understanding of the rhetorical concept of Nommo,³¹ an understanding of the power of words to produce, "life, death, disease, health, and ... liberation."³² I have chosen an Afrocentric concept because of the failure of classical European philosophers to consider group rights.³³ This has resulted in an intellectual property scholarship with a single-minded focus on efficiency, which "neglects the distribution of resources in society."³⁴

Although developed as a rhetorical concept, Nommo has shown usefulness "in providing conceptual space not only for African-centered grounding in the field of rhetoric but for exploring alternative ways of understanding and approaching communicative practice."³⁵ In this context it is important because Nommo identifies the power of words to generate and create reality. Molefi Asante³⁶ characterizes Nommo as the process undertaken in community to foster transformation in that community by naming the current reality and reimagining the future.³⁷

30. *Matal v. Tam*, 137 S. Ct. 1744 (2017).

31. See THE VOICE OF BLACK RHETORIC: SELECTIONS (Arthur L. Smith & Stephen Robb eds., 1971); Maulana Karenga, *Nommo, Kawaida, and Communicative Practice: Bringing Good into the World*, in THE GLOBAL INTERCULTURAL COMMUNICATIONS READER (Molefi Kete Asante et al. eds., 2014).

32. Arthur L. Smith, *Socio-Historical Perspectives of Black Oratory*, 56 Q.J. SPEECH 264 (1970).

33. See William W. Fisher & Talha Syed, *Global Justice in Healthcare: Developing Drugs for the Developing World*, 40 U.C. DAVIS L. REV. 581, 603 (2007) (examining Rawlsian distributive justice versus Utilitarianism); Paul N. Cox, *The Supreme Court, Title VII and "Voluntary" Affirmative Action—A Critique*, 21 IND. L. REV. 767 (1988) (examining the difficulties of group based remedies in light American Constitutional laws grounding in individual rights).

34. Anupam Chander & Madhavi Sunder, *Copyright's Cultural Turn*, 91 TEX. L. REV. 1397, 1400 (2013).

35. Karenga, *supra* note 31, at 212; See also Janice D. Hamlet, *Understanding African American Oratory: Manifestations of Nommo*, in AFROCENTRIC VISIONS: STUDIES IN CULTURE AND COMMUNICATION (Janice D. Hamlet ed., 1998); THE RHETORIC OF STRUGGLE: PUBLIC ADDRESS BY AFRICAN AMERICAN WOMEN (Robbie Jean Walker ed. 1992).

36. Dr. Molefi Kete Asante is Professor and Chair, Department of African American Studies at Temple University. Asante is known for his writings on Afrocentricity, a school of thought that has influenced the fields of sociology, intercultural communication, critical theory, political science, the history of Africa, and social work.

37. *The Power of Nommo in Learning Exchanges*, Leadership Learning Exchange <http://www.ecu.edu/cs-acad/dcs/upload/NOMMO.pdf>. ("Nommo substantiates the power of language and story to define and change reality. Nommo is a process of speaking truth. While some would say that you have truth and you drape it in words, Nommo comes from the perspective that words cannot be separated from form (or in the case of leadership, the leadership practice) and that the form (and the actions) hold some truth about the work that is greater than is often seen. Nommo points to the importance of speaking to a community rather than to individuals. The point of Nommo, as described above, is to build community. Accomplished through a communal experience with the spoken word—the process of listening and speaking and co-creating through conversation a joint and shared re-imagining of reality. Nommo points to a "participation" of the community in the word rather than being passive listeners. The goal of Nommo is to bring about a unified community who are at one with the word that comes through repetition and in a form that is easily entered. Nommo is holistic(both---and) and not dualistic (either---or).

The holding in *Tam* leads us to examine rhetoric because it concedes that trademarks are speech.³⁸ The Amicus for Certain Members of Congress³⁹ filed in *Tam* acknowledges the power of language, stating “[l]anguage is powerful. It shapes our attitudes and informs our actions. Racist, sexist, misogynist, and homophobic slurs in everyday commerce send the message that discriminatory behavior is acceptable.”⁴⁰ A critique of the Court’s holding in *Tam* that only explores the harmful use of slurs is limited because it precludes our ability to examine how “The Slants” and “Redskins” might require different consideration for trademark purposes. Nommo can help develop a trademark policy that addresses what Mari Matsuda⁴¹ has identified as the

It seeks to use the power of language to overstep dualities.”). See also MOLEFI KETE ASANTE, *THE AFROCENTRIC IDEA* (1987).

38. *Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017).

39. Amici are certain Members of the U.S. House of Representatives and one Member of the U.S. Senate

U.S. House of Representatives:

Rep. Hakeem Jeffries (NY-08)
 Rep. Karen Bass (CA-37)
 Rep. Joyce Beatty (OH-03)
 Rep. G.K. Butterfield (NC-01)
 Rep. Judy Chu (CA-27)
 Rep. David Cicilline (RI-01)
 Rep. Yvette Clarke (NY-09)
 Rep. Theodore Deutch (FL-21)
 Rep. Tulsi Gabbard (HI-02)
 Rep. Colleen Hanabusa (HI-01)
 Rep. Michael Honda (CA-17)
 Rep. Sheila Jackson Lee (TX-18)
 Rep. Henry C. “Hank” Johnson Jr. (GA-04)
 Rep. Barbara Lee (CA-13)
 Rep. John Lewis (GA-05)
 Rep. Ted Lieu (CA-33)
 Rep. Grace Meng (NY-06)
 Rep. Gwen Moore (WI-04)
 Del. Eleanor Holmes Norton (DC-at large)
 Rep. Scott Peters (CA-52)
 Rep. Cedric Richmond (LA-02)
 Rep. Terri Sewell (AL-07)
 Rep. Mark Takano (CA-41)
 Rep. Frederica S. Wilson (FL-24)
 Rep. Doris Matsui (CA-06)

U.S. Senate:

Sen. Mazie Hirono (HI).

40. Brief of Certain Members of Congress as Amici Curiae in Support of Neither Party at 4, *Lee v. Tam*, 137 S. Ct. 30 (2016) (No. 15-1293).

41. Professor Matsuda is a leading critical race theorist.

twin goals of anti-subordination⁴² and radical pluralism.⁴³ Professor Matsuda said “in promoting cultural difference, we must maintain both a collective and separate ability to critique domination. Cultural practices that degrade women, children, and others, for example, should remain subject to carefully deployed collective sanction as well as vigorous intragroup challenge.”⁴⁴

In this article I will attempt to I: place *Tam* in a developing scholarship of intellectual property and social justice; II: understand *Tam* as part of a larger first amendment jurisprudence; III: provide a critique of its failure to acknowledge the power of words in the trademark context; and finally, IV: examine how the concept of Nommo should be used to guide a more inclusive trademark regime.

II. TRADEMARKS AND SOCIAL JUSTICE

As we look to build a better trademark regime, trademarks must be placed in a larger general construct of intellectual property protections. A traditional intellectual property definition:

begin[s] by identifying it as nonphysical property which stems from, is identified as, and whose value is based upon some idea or ideas. Furthermore, there must be some additional element of novelty. Indeed, the object, or res, of intellectual property may be so new that it is unknown to anyone else. The novelty, however, does not have to be absolute. What is important is that at the time of propertization the idea is thought to be generally unknown. The res cannot be common currency in the intellectual life of the society at the time of propertization.⁴⁵

42. See Ruth Colker, *Anti-subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1003 (1986) (“Anti-subordination [theory] argues that it is inappropriate for groups to be subordinated in society. The latter perspective rejects policies, even if facially neutral, that perpetuate the historical subordination of groups, while embracing even facially differentiating policies that ameliorate subordination.”).

43. See Mari Matsuda, *Voices of America: Accent, Anti-Discrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1401 (1991) (“By radical pluralism, I mean that groups and individuals as members of groups are free to live in and express their culture—including their language, their religion, and their style of living. There is no norm in any of these things that a democratic nation can legitimately impose, and the right to cultural difference must spread to the full range of culture chosen and defined by the group, not by any dominant culture. That is, we cannot say “Thai food, yes, Thai accents no” or “Black music, yes, Black English no.” The selective filter that appropriates certain aspects of subordinate culture and discards others is not pluralism; it is domination. Radical pluralism includes self-determination—the rights to make and promote one’s culture and to share it in whole cloth with other politically equal cultures.”).

44. *Id.* at 1402.

45. Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 293 (1988).

Such a definition builds upon John Locke's labor theory⁴⁶ that one gains property rights by exerting labor.⁴⁷ We start with Locke because "Locke's labor theory of property sits at the root of modernity and of the Anglo-American legal tradition. A Lockean conception of property animated the American Revolution and the U.S. Constitution."⁴⁸

An initial critique of Locke's labor theory is that it assumes that we own ourselves.⁴⁹ From a Marxist perspective, we would be forced to ask how we deal with those who are alienated from the labor.⁵⁰ Locke's labor theory is still used to support arguments "that it is only fair that a person who expends labor in a socially valued endeavor should receive a return commensurate with his or her effort."⁵¹ There have been critiques of such definitions from a social justice perspective, inasmuch as they have been used to support imperialistic conceptions of property.⁵² Locke's labor theory is usually challenged

46. John Locke argued that property rights are derived from an individual's labor; see Jeremy N. Sheff, *Marks, Morals, and Markets*, 65 STAN. L. REV. 761, 766 (2013); W. JULIAN KORAB-KARPOWICZ, ON THE HISTORY OF POLITICAL PHILOSOPHY: GREAT POLITICAL THINKERS FROM THUCYDIDES TO LOCKE 291 (2012) (John Locke was an English philosopher and physician, widely regarded as one of the most influential of Enlightenment thinkers and commonly known as the "Father of Liberalism").

47. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 145-146 § 27 (1690).

48. Steven Menashi, *Cain as His Brother's Keeper: Property Rights and Christian Doctrine in Locke's Two Treatises of Government*, 42 SETON HALL L. REV. 185, 186 (2012).

49. LOCKE, *supra* note 47.

50. Marxist theory explores the exploitation of labor of the working class positing that they are alienated from the labor. See KARL MARX, THEORIES OF SURPLUS VALUE 29 (G.A. Bonner & Emile Burns trans., 1952) (1863) (critiquing Locke as "the classical exponent of bourgeois society's ideas of right in opposition to the feudal, and his philosophy moreover served all subsequent English economists as the foundation for all their ideas.").

51. Fisher & Syed, *supra* note 33, at 671 (2007). See also JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 5-24 (William J. Ashley ed., 7th ed. 1909), available at <http://www.econlib.org/library/Mill/mIP14.html>.

52. See generally Lateef Mtima, *What's Mine is Mine but What's Yours is Ours: IP Imperialism, the Right of Publicity, and Intellectual Property Social Justice in the Digital Information Age*, 15 SMU SCI. & TECH. L. REV. 323, 360-70 (2012); Lateef Mtima, *Copyright and Social Justice in the Digital Information Society: "Three Steps" Toward Intellectual Property Social Justice*, 53 HOUS. L. REV. 459 (2015) (proposing "social justice assessment" for copyright claims).

by deontological political philosophies.⁵³ The two most influential deontological theorists are John Rawls⁵⁴ and Ronald Dworkin⁵⁵, who both advance egalitarian conceptions of distributive justice.⁵⁶

These theories are rooted in a liberal commitment to two values: individual liberty to pursue different ways of life, which is best respected by government's neutrality (or maximal pluralism) toward conceptions of the good; and the essential dignity, or at least political inviolability, of individuals, whose fundamental interests are not to be sacrificed for the sake of groups or the greater good.⁵⁷

The granting of intellectual property rights protection is generally a statutory process that provides protections for a period of time for the right holder to benefit from the fruits of his labor.⁵⁸ This period of protection varies. For instance, the period of protection for copyrights, is the life of the author plus seventy years.⁵⁹ While in patents, the protection generally lasts for twenty years.⁶⁰ In trademarks, however, protection is normally indefinite.⁶¹

If we follow Locke's labor theory, it is interesting that trademarks receive the greatest protection, being potentially infinite, while departing most from a requirement for an exertion of labor. In both patent and copyright, the works are directly linked to the exertion of labor. The work copyrighted or the product or ideas patented are the direct output of the effort invested. Trademark, however, requires no "invention, discovery, or any work of the brain."⁶² This

53. See Sheff, *supra* note 46, at 775 (defining deontological philosophy as "the rational foundations of the proper relationship between the individual and the institutions of the state."); Fisher & Syed, *supra* note 33, at 624 ("Deontological political philosophies assert that 'the right,' or considerations of 'justice,' is prior to 'the good,' or considerations of human welfare or 'excellence.'").

54. John Rawls, Stanford Encyclopedia of Philosophy, <https://plato.stanford.edu/entries/rawls/> (Jan. 9, 2017). ("John Rawls (b. 1921, d. 2002) was an American political philosopher in the liberal tradition. His theory of justice as fairness describes a society of free citizens holding equal basic rights and cooperating within an egalitarian economic system. His theory of political liberalism delineates the legitimate use of political power in a democracy, and envisions how civic unity might endure despite the diversity of worldviews that free institutions allow.").

55. Ronald Dworkin, The New York Review, <http://www.nybooks.com/contributors/ronald-dworkin/> (Nov. 7, 2013). ("Ronald Dworkin (1931-2013) was Professor of Philosophy and Frank Henry Sommer Professor of Law at NYU. His books include *Is Democracy Possible Here?*, *Justice in Robes*, *Freedom's Law*, and *Justice for Hedgehogs*. He was the 2007 winner of the Ludvig Holberg International Memorial Prize for 'his pioneering scholarly work' of 'worldwide impact' and he was recently awarded the Balzan Prize for his 'fundamental contributions to Jurisprudence.'").

56. See Fisher & Syed, *supra* note 33, at 626 (2007); Justin Hughes & Robert P. Merges, *Copyright and Distributive Justice*, 92 NOTRE DAME L. REV. 513 (2016).

57. Fisher & Syed, *supra* note 33, at 625 (2007). See also ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 76-88 (1975).

58. See P. Sean Morris, *The Economics of Distinctiveness: The Road to Monopolization in Trade-mark Law*, 33 LOY. L.A. INT'L & COMP. L. REV. 321, 330 (2011).

59. 17 U.S.C. § 302(a) (1998).

60. 35 U.S.C. § 154(a)(2) (2013).

61. 15 U.S.C. § 1058(a) (2010).

62. *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

distinction becomes meaningful when we try to fit trademarks into the growing scholarship on the intersection of intellectual property and social justice.

For purposes of social justice arguments grounded in Constitutional law, trademarks meaningfully differ from copyright and patent law, because copyright and patent laws in the United States owe their origin to the so-called “Intellectual Property Clause” of the United States Constitution.⁶³ Trademark social justice arguments “arise from common law unfair competition doctrines and not the Intellectual Property Clause of the Constitution.”⁶⁴ This is meaningful because for those of us who read the Constitution as an anti-subordination document,⁶⁵ the “Intellectual Property Clause” should be read not only to insure social utility but social justice as well.⁶⁶ Lateef Mtima, Director of The Institute for Intellectual Property and Social Justice at Howard University School of Law and one of the leaders in the developing field of IP social justice, identifies how the Intellectual Property Clause fits with a social justice reading of the Constitution, stating “regardless of the independent social justice breadth of the Intellectual Property Clause, the Constitution as a whole, adopted and ordained to form a more perfect union and to ‘secure Justice’ and ‘promote the General Welfare,’ arguably requires affirmative action in the cause of copyright social justice.”⁶⁷

Keith Aoki, a leading intellectual property scholar, has documented the failure of patent law to protect the inventions of enslaved African-Americans.⁶⁸ This resulted from a reading of the Intellectual Property Clause consistent with the Supreme Court’s holding in *Dred Scott v. Sandford*,⁶⁹ where Chief Justice Taney held that black people were “a subordinate and inferior

63. U.S. CONST. art. I, § 8, cl. 8 (“Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

64. Rita Heimes, *Trademarks, Identity, and Justice*, 11 J. MARSHALL REV. INTELL. PROP. L. 133, 149 (2011).

65. See Natsu Taylor Saito, “Lift Every Voice”: *Mari Matsuda’s Jurisprudence of Antisubordination*, 18 UCLA ASIAN PAC. AM. L.J. 51 (2013); Matsuda, *supra* note 43, at 1402-05.

66. See Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 W. VA. L. REV. 97 (2009) [hereinafter *Copyright Social Utility*]; Lateef Mtima, *Symposium: Intellectual Property and Social Justice*, 48 HOW. L.J. 571 (2005) [hereinafter *Intellectual Property and Social Justice*]; Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107 (2001); Hannibal Travis, *Building Universal Digital Libraries: An Agenda for Copyright Reform*, 33 PEPP. L. REV. 761 (2006).

67. *Copyright Social Utility*, *supra* note 66, at 121.

68. Because enslaved Africans’ humanity was not recognized they did not have standing to file a patent. See *In re Trade-Mark Cases*, 100 U.S. at 82; see generally Keith Aoki, *Distributive Justice and Intellectual Property: Distributive and Syncretic Motives in Intellectual Property Law*, 40 U.C. DAVIS L. REV. 717 (2007).

69. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

class of beings, who . . . whether emancipated or not . . . had no rights which the white man was bound to respect. . . .”⁷⁰

If the 14th Amendment to the United States Constitution overturned *Dred Scott*, and gave full citizenship to African-Americans, then it requires an expansive reading of the Intellectual Property Clause. The Intellectual Property Clause in concert with Equal Protection Clause of the 14th Amendment requires a social justice reading.

Although trademarks do not grow from the Intellectual Property Clause and, in fact, have more ancient origins, this does not preclude an understanding of a social justice promise.⁷¹ In fact, I would argue that the same social justice protections should exist in the common law and equity understandings of trademark law.⁷² As Justice Clifford noted in 1879, “[e]quity courts in all civilized countries have for centuries afforded protection to trade-marks, the object of such protection being not only to secure to the individual the fruits of his skill, industry, and enterprise, but also to protect the public against fraud.”⁷³

The protection of the tradesperson would be consistent with other intellectual property regimes; it is the aspect of community protection that is unique.⁷⁴ This need not be read as a limited consumer protection. Chad J. Doellinger, in his call for a “New Theory of Trademarks,” argues that “[a]t its core, trademark law provides a normative code of proper business conduct. This concept--which I call “integrity”--is at the heart of trademark jurisprudence. Indeed, trademark law has always been a rich and normatively driven body of law, with deep common law roots and traditions.”⁷⁵

Such an understanding should allow for community discourse around the meaning of an acceptable use of trademarks. The move away from social justice understanding has been linked to the publication of Professor

70. *Id.* at 404-07.

71. Trademarks are creatures of the common law, and, so, not linked to the Constitution; their purpose, however, has always been to protect society, and, as such, they can still be examined using a social justice lens. See Heimes, *supra* note 64, at 138; 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 (2006).

72. See Chad J. Doellinger, *A New Theory of Trademarks*, 111 PENN ST. L. REV. 823 (2007).

73. *Amoskeag Mfg. Co. v. D. Trainer & Sons*, 101 U.S. 51, 57 (1879) (Clifford, J., dissenting); see also *Manhattan Med. Co. v. Wood*, 108 U.S. 218, 223 (1883); *Delaware & Hudson Canal Co. v. Clark*, 80 U.S. 311, 323 (1871) (noting the two distinct purposes of trademark law, namely preventing injury to goodwill and injury to consumers).

74. See Doellinger, *supra* note 72, at 856-59 (examining the duality of trademark law).

75. *Id.* at 823.

Landes⁷⁶ and Judge Posner's⁷⁷ seminal article *Trademark Law: An Economic Perspective*.⁷⁸ This article marked a revolution and most examination of trademark law today are grounded in the law and economics conceptions of the Chicago School.⁷⁹ Although Posner and Landes' "search cost theory"⁸⁰ ostensibly acts to provide consumer protections, it does not provide consumers with a voice but merely a guide in what should be considered in examining claims. In order for trademarks to address community based social justice issues, scholarship must turn away from "the empirical contingencies of consequentialism and toward a fundamentally different normative framework."⁸¹

So, we may look for social justice understanding of proper business conduct, and that may be found in common law understandings of the role of trademark;⁸² or we can develop arguments to place trademark protections within the equal protection promise of the 14th Amendment. For "most of the 19th century, trademark protection was the province of the States."⁸³ Why do we see a shift to these powers in the Federal realm? It is important to note Congress passed the first federal legislation protecting trademarks in 1870 during the period of Reconstruction.⁸⁴ The Reconstruction Amendments mark a shift in understandings of constitutional protections to provide full

76. William Landes was the Clifton R. Musser Professor of Law and Economics at the University of Chicago Law School from 1992 to 2009. Landes has written widely on the application of economics and quantitative methods to law and legal institutions, including torts, intellectual property, judicial behavior, legal decision-making, and art law. His most recent book, *The Economic Structure of Intellectual Property Law* (2003) with Judge Richard Posner, applies economic analysis to the many legal doctrines in trademark, copyright, trade secret, and patent law.

77. *Richard Posner*, Wikipedia, https://en.wikipedia.org/wiki/Richard_Posner (last visited Apr. 22, 2018) ("Richard Allen Posner is an American jurist and economist who was a United States Circuit Judge of the United States Court of Appeals for the Seventh Circuit in Chicago from 1981 until 2017, and is a Senior Lecturer at the University of Chicago Law School. He is a leading figure in the field of law and economics, and was identified by *The Journal of Legal Studies* as the most cited legal scholar of the 20th century.")

78. William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265 (1987). According to Landes and Posner, the total cost of a good is an aggregate of the nominal price and the cost of searching with respect to that good. When search costs are reduced, social welfare is increased because the premium a brand owner charges for trademarked goods is less than the cost of a search without the trademarks. See also Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 75-76 (2012); Doellinger, *supra* note 72, at 833.

79. The Chicago school of economics is a neoclassical school of economic thought associated with the work of the faculty at the University of Chicago, some of whom have constructed and popularized its principles. See Sheff, *supra* note 46, at 765.

80. Landes & Posner, *supra* note 78, at 269-70. They reduced the "the benefits of trademarks in lowering consumer search costs presuppose legal protection of trademarks."

81. Market based models limit understandings of justice which are the basis for deontological approaches. See Sheff, *supra* at 46, at 768.

82. See Doellinger, *supra* note 72, at 823.

83. *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017).

84. Reconstruction was the period between the end of the Civil War and the Compromise of 1877. With the protections of federal troops in the former Confederate states, Blacks could exercise political power in a manner not seen again until the 1960s. See Act of July 8, 1870, §§ 77-84, 16 Stat. 210-212; See also *Tam*, 137 S. Ct. at 1751-52.

citizenship.⁸⁵ But we also see Federal intervention to protect the rights of newly emancipated Blacks.⁸⁶ While Congress clearly had the authority to regulate trademarks through Commerce Clause authority,⁸⁷ we should examine if this is part of a larger federal effort to address the plight of previously disenfranchised persons.

The foundation of current federal trademark law is the Lanham Act, enacted in 1946.⁸⁸ The Lanham Act was intended to codify the common law.⁸⁹ The Act's legislative history provides an understanding of the purpose of trademarks:

The purpose underlying any trade-mark statute is twofold. One is to protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get. Secondly, where the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats. This is the well-established rule of law protecting both the public and the trade-mark owner.⁹⁰

Based on this guidance, the Lanham Act must be read to provide community protections. Section 2(a) was a part of such protections. It is with such an understanding that *Taml* must be examined. Clearly the Slants have an argument that the intellectual property should be protected, but against what is that balanced? In a search for guidance we look to Justice Frankfurter's explanation of trademark:

The protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the

85. The Reconstruction Amendments extended citizenship and the right to vote to former slaves. U.S. CONST. amend. XIV; U.S. CONST. amend. XV; see Patty Ferguson-Bohnee, *The Struggle for Equal Voting Rights*, 47 ARIZ. ATT'Y 26 (2010).

86. See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 (Henry Steele Commager & Richard B. Morris eds., 2002); JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR (2d ed. 1994); Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done*, 175 MIL. L. REV. 86, 100-01 (2003).

87. Peter J. Karol, *The Constitutional Limitation on Trademark Propertization*, 17 U. PA. J. CONST. L. 1065, 1076 (2015).

88. See Act of July 5, 1946, ch. 540, 60 Stat. 427.

89. Doellinger, *supra* note 72, at 826.

90. *Id.* (citing S. Rep. No. 79-1333, at 3 (1946), reprinted in 1946 U.S.C.C.A.N. 1274, 1277); *id.* at n.9 ("Congressman Lanham explained the dual nature of trademark protection: 'The purpose of [this Act] is to protect legitimate business and the consumer of the country.'") (citing 92 Cong. Rec. 7524 (daily ed. June 25, 1946) (statement of Rep. Lanham)).

aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears.⁹¹

As we look to develop a replacement to Section 2(a), we need not limit ourselves to domestic understandings. Although this article is grounded in American statutory understandings of trademarks, as we look to place trademark in the understanding of intellectual property and social justice, one need not be limited to the United States Code. The protection of trademarks under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in the World Trade Organization (WTO)⁹² is found in Articles 15–21.3 under Article 15(1) of TRIPS.⁹³ The definition of trademarks under TRIPS is similarly echoed in the European Union (EU)⁹⁴, where applications can be made for a Community trademark, under Article 4 of Regulation No. 40/94, the Community Trade Mark Regulation (CTMR).⁹⁵

[a] Community trade mark may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.⁹⁶

In many ways the international definitions are consistent with those found in the Lanham Act, § 1127. “The term “mark” includes any trademark, service mark, collective mark, or certification mark.”⁹⁷ While “the term “trademark” includes any word, name, symbol, or device, or any combination thereof (1) used by a person, or (2) which a person has a bona fide intention to use in commerce.”⁹⁸ One of the distinctions is the Lanham Act’s limitations on persons. A trademark, according to the Lanham Act, is used by a

91. *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942).

92. World Trade Organization, <https://www.wto.org> (last visited Apr. 22, 2018) (“The World Trade Organization (WTO) deals with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible.”).

93. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 15, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS Agreement]. (Article 15(1) of TRIPS describes trademarks as “[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use.”).

94. The European Union (EU) is a political and economic union of 28 member-states that are located primarily in Europe. The EU has developed an internal single market through a standardized system of laws that apply in all member-states. EU policies aim to ensure the free movement of people, goods, services, and capital within the internal market, enact legislation in justice and home affairs, and maintain common policies on trade and regional development.

95. Council Regulation 40/94, 1993 O.J. (L 11) 1 (EC) (amended and replaced by Council Regulation 207/2009, O.J. (L 78) 1(EC)).

96. *Id.* art. 4.

97. Lanham Act § 45, 15 U.S.C. § 1127 (2004).

98. 15 U.S.C. § 1127.

person in commerce to “identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”⁹⁹ Internationally we have the concept of a community-based mark. This allows countries or regions to protect their products.¹⁰⁰ How could this be extended to the rights of traditionally disenfranchised groups to control the use of terms both positive and negative that reference their group? This builds on concepts of protecting Traditional Knowledge. The World Intellectual Property Organization (hereinafter “WIPO”)¹⁰¹ defines Traditional Knowledge (hereinafter “TK”) as including:

[K]now-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities or contained in codified knowledge systems passed between generations and continuously developed following any changes in the environment, geographical conditions and other factors. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and any traditional knowledge associated with cultural expressions and genetic resources.¹⁰²

It fits with the Nommo which “reaffirms not only the creative power of the word but also rootedness in a world historical community and culture, which provides the foundation and framework for self-understanding and self-assertion in the world.”¹⁰³

The struggle of the Maori, the indigenous people of New Zealand, to protect their culture from commercial exploitation by the Lego corporation reflect the benefits of international law perspectives that acknowledge group rights.¹⁰⁴ Such a claim would most likely fail under United States law which

99. *Id.*

100. Geographical indications are “place names (in some countries also words associated with a place) used to identify the origin and quality, reputation, or other characteristics of products (for example, ‘Champagne’, ‘Tequila’ or ‘Roquefort’); Dinisha L. Fernando, *Intellectual Property and the Protection of Indigenous Culture in the United States and New Zealand: An Effective Solution for Indigenous Communities?*, 12 CARDOZO PUB. L. POL’Y & ETHICS J. 149, 175 (2013).

101. World Intellectual Property Organization, <http://www.wipo.int/about-wipo/en/> (last visited Apr. 22, 2018) (“WIPO is the global forum for intellectual property services, policy, information and cooperation. It is a self-funding agency of the United Nations, with 191 member states. [Its] mission is to lead the development of a balanced and effective international intellectual property (IP) system that enables innovation and creativity for the benefit of all. [Its] mandate, governing bodies and procedures are set out in the WIPO Convention, which established WIPO in 1967.”).

102. World Intell. Prop. Org., *The Protection of Traditional Knowledge: Revised Objectives and Principles*, WIPO Doc. WIPO/GRTKF/IC/18/5, Annex. 18 (Jan. 10, 2011).

103. Karenga, *supra* note 31, at 213.

104. The Maori object to LEGO’s use of Maori words and historical references in Bionicle, a hi-tech, interactive LEGO game. See Sarah La Voi, *Cultural Heritage Tug of War: Balancing Preservation Interests and Commercial Rights*, 53 DEPAUL L. REV. 875, 880 (2003).

generally does not protect facts, history, or language.¹⁰⁵ It might even fail under TRIPs, which is all the more reason to develop a trademark regime that empowers communities and gives voice to traditionally exploited communities.¹⁰⁶

III. FIRST AMENDMENT

As we look to develop social justice protections in the trademark context, we must do so aware of the limitations that might arise from limited understandings of the First Amendment. The Supreme Court's holding in *Tam* is grounded in an understanding of the First Amendment which holds, "(w)ith few narrow exceptions, a fundamental principle of the First Amendment is that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys."¹⁰⁷ "Content-based regulations are presumptively invalid."¹⁰⁸ To determine if a regulation is content based, the Court must determine, "[W]hether - within the relevant subject category—the government has signaled out a subset of messages for disfavor based on the views expressed."¹⁰⁹ The Court applies "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. . . . In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny."¹¹⁰

Although there were arguments made that trademarks are not speech, and as such should not be covered by the First Amendment, these suggestions were rejected by the court in *Tam*, and I would argue rightly so. It is clear that "[t]rademarks play a significant role in our public discourse."¹¹¹ It is for this reason that development of new trademark protections should develop with an awareness of "communicative practice."¹¹² In balancing speech rights we might look to balance "antibureaucratic and the radical pluralism," as opposed to the speaker being left alone¹¹³

105. *See id.* at 927.

106. *See generally* Fernando; *see also* Fernando, *supra* note 100.

107. *Matal v. Tam*, 137 S. Ct. 1744, 1750 (2017).

108. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992).

109. *Tam*, 137 S. Ct. at 1750.

110. *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 642 (1994).

111. Margreth Barrett, *Internet Trademark Suits and the Demise of "Trademark Use"*, 39 U.C. DAVIS L. REV. 371, 451 (2006).

112. *See* Karenga, *supra* note 31, at 212 (for an explanation of using Nommo to address social justice).

113. Matsuda, *supra* note 43, at 1402.

Although constitutional amendments should be held equal to one another, the placement and subject matter of the First Amendment is often read as giving it primacy.¹¹⁴ This idea of free speech being essential to the pursuit of democracy is linked to natural law arguments,¹¹⁵ However, it is most often linked to the philosophy of John Stuart Mill.¹¹⁶ Mill's *On Liberty* would later be christened as the "marketplace of ideas."¹¹⁷ The argument for the marketplace of ideas was most eloquently captured by Justice Holmes in his dissent in *Abrams v. United States*.

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.¹¹⁸

114. See James G. McLaren, *The "Primacy" of the First Amendment: Does It Have a Justification in Natural Law, History, and Democracy?*, 5 USAFA J. LEG. STUD. 45 (1989).

115. *Id.*

116. *John Stuart Mill*, Stanford Encyclopedia of Philosophy, <https://plato.stanford.edu/entries/mill/> (last visited Apr. 22, 2018) ("John Stuart Mill (1806-73) was the most influential English language philosopher of the nineteenth century. He was a naturalist, a utilitarian, and a liberal, whose work explores the consequences of a thoroughgoing empiricist outlook. In doing so, he sought to combine the best of eighteenth-century Enlightenment thinking with newly emerging currents of nineteenth-century Romantic and historical philosophy. His most important works include *System of Logic* (1843), *On Liberty* (1859), *Utilitarianism* (1861) and *An Examination of Sir William Hamilton's Philosophy* (1865).").

117. JOHN STUART MILL, *ON LIBERTY AND OTHER ESSAYS* 24-26, 40-45, 59 (John Gray ed., 1998) (1859); see also Alissa Ardito, *Social Media, Administrative Agencies, and the First Amendment*, 65 ADMIN. L. REV. 301, 323 (2013); Robert C. Post, *A Progressive Perspective on Freedom of Speech, in THE CONSTITUTION IN 2020* 179-86 (Jack M. Balkin & Reva B. Siegel eds., 2009); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2366-69 (2000); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 279-82 (1991) [hereinafter Post, *Racist Speech*].

118. *Abrams v. United States*, 250 U.S. 616, 630 (1919).

We also see free speech arguments ground in “enabling self-governance and political participation; or serving as a check on the processes of government.”¹¹⁹ The primacy of speech, especially when balancing group rights, is in some way uniquely American.

Again, as we develop workable interventions, we should look beyond parochial understandings of rights. Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination mandates out-lawing expression of racist ideas.¹²⁰ But even in the development of the Convention, many states formulated declarations or reservations to article 4,¹²¹ perhaps captured best by the Colombian delegate to the Conference:

Punishing ideas, whatever they may be, is to aid and abet tyranny, and leads to the abuse of power . . . As far as we are concerned and as far as democracy is concerned, ideas should be fought with ideas and reasons; theories must be refuted by arguments and not by the scaffold, prison, exile, confiscation or fines.¹²²

Whether grounded in natural law or “marketplace of idea,” the arguments in support of freedom of expression although eloquently made, assume an equality that does not yet exist.

An understanding of speech as a tool that can be used in support of white supremacy is not new; nonetheless, that is not enough to limit speech under American free speech jurisprudence. In trademark, as in other speech analysis, you generally need to identify harm. Robert Post, a first amendment scholar, has presented five harms of racist speech.¹²³ First, it causes a “deontic” harm.¹²⁴ Racist speech is antithetical to the larger goal of equality, and therefore should be regulated.

119. Note, *Deference to Legislative Fact Determinations in First Amendment Cases After Turner Broadcasting*, 111 HARV. L. REV. 2312, 2318 (1998).

120. The convention was ratified by 120 states, including all the Western democracies, with the exception of the United States. See NATAN LERNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (2d ed. 1980); Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT'L L. 283 (1985).

121. For example, Belgium stated that the article 4 obligations “must be reconciled with the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association”; France interpreted article 4 as “releasing the States Parties from the obligation to enact anti-discrimination legislation which is incompatible with freedom of opinion and expression and of peaceful assembly and association”; Italy declared that the measures adopted under article 4 must not “jeopardize the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association.” See LERNER, *supra* note 120, at 156-62; Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZA L. REV. 445, 449 (1987).

122. LERNER, *supra* note 120, at 47.

123. Post, *Racist Speech*, *supra* note 117, at 271-77.

124. See R. George Wright, *Racist Speech and the First Amendment*, 9 MISS. C. L. REV. 1, 14-22 (1988).

The thrust of this argument is that a society committed to ideals of social and political equality cannot remain passive: it must issue unequivocal expressions of solidarity with vulnerable minority groups and make positive statements affirming its commitment to those ideals. Laws prohibiting racist speech must be regarded as important components of such expressions and statements.¹²⁵

Second is an understanding that racist expression ought to be regulated because it harms those groups that are the target.¹²⁶ This conception is important because it acknowledges the notion of group harm and by extension, the rights of a group to challenge trademarks. The approach also addresses the balance of traditional First Amendment arguments by understanding racism as “the structural subordination of a group based on an idea of racial inferiority.”¹²⁷ Group harm arguments can also be grounded in group libel,¹²⁸ as seen in *Beauharnais v. Illinois*.¹²⁹ In *Beauharnais*, the Supreme Court recognized the right of the state to limit speech in support of anti-subordination.¹³⁰

Third, is an understanding that racist expression causes harm to individuals.¹³¹ This realization is grounded in common law dignitary torts such as defamation, invasion of privacy, and intentional infliction of emotional distress.¹³² This argument is explained by Richard Delgado¹³³ in his seminal

125. Kretzmer, *supra* note 121, at 456.

126. Post, *Racist Speech*, *supra* note 117, at 273.

127. See Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2358 (1989) (“In order to respect first amendment values, a narrow definition of actionable racist speech is required. Racist speech is best treated as a sui generis category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse.”).

128. *Group Libel Laws*, Encyclopedia.com, <http://www.encyclopedia.com/history/dictionaries-the-sauruses-pictures-and-press-releases/group-libel-laws> (“[G]roup libel laws penalize speech or other communication that attacks or defames a particular group on the basis of its race, ethnicity, gender, sexual orientation, religion, or other such characteristic. These laws are typically based on the belief that group libel, particularly against groups that suffer from social prejudice and discrimination, cements the groups’ subordinated status, helps create a social climate that encourages violence against the group, and causes the targeted group to curtail its own speech.”).

129. *Beauharnais v. Illinois*, 343 U.S. 250 (1952); see also Post, *Racist Speech*, *supra* note 117, at 273; Kenneth Lasson, *Group Libel Versus Free Speech: When Big Brother Should Butt In*, 23 DUQ. L. REV. 77 (1984); Note, *Group Vilification Reconsidered*, 89 YALE L.J. 308 (1979).

130. *Beauharnais*, 343 U.S. at 250 (The Supreme Court narrowly upheld the constitutionality of a state statute criminalizing the libel of a group of citizens. The Court said that, like “fighting words” (words that would cause the average addressee to fight), libel against individuals or groups was not within a constitutionally protected category of speech. While *Beauharnais* has never been expressly overruled, it is unclear if it would be upheld today).

131. Post, *Racist Speech*, *supra* note 117, at 273-74.

132. *Id.* at 273; see also Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 150 (1982).

133. Richard Delgado teaches civil rights and critical race theory at University of Alabama School of Law; he is a founder of the critical race theory school of legal scholarship and is notable for his scholarship on hate speech and introducing storytelling into legal scholarship.

work *Words That Wound*¹³⁴ when he argues that courts should create a tort for racial insult when “[l]anguage was addressed to him or her by the defendant that was intended to demean through reference to race; that the plaintiff understood as intended to demean through reference to race; and that a reasonable person would recognize as a racial insult.”¹³⁵

Building on Delgado’s theory, Post argues for a system of regulation that acknowledges that racial expression cause: “‘feelings of humiliation, isolation, and self-hatred,’ as well as ‘dignitary affront.’ The injuries are particularly powerful because ‘racial insults . . . conjure up the entire history of racial discrimination in this country.’”¹³⁶

The fourth argument in support of restrictions on racist speech looks directly to arguments in support of free speech: which is that racist expression harms the marketplace of ideas.¹³⁷ Post argues that racist expression is inconsistent with rational deliberation because said racist expression:

“infests, skews, and disables the operation of the market Racism is irrational and often unconscious.” Finally, it is argued that racism “systematically” silences “whole segments of the population,” either through the “visceral” shock and “preemptive effect on further speech” of racist words, or through the distortion of “the marketplace of ideas by muting or devaluing the speech of blacks and other non-whites.”¹³⁸

I would also argue that racist speech exacerbates market inequities in both access and response to traditionally underrepresented groups. This is important because the right of Congress to regulate trademarks is linked to their Commerce Clause powers and the ability to regulate markets.¹³⁹ Although our Constitution is generally viewed from an individualist perspective, the First Amendment should work to protect expression of subjugated groups and prevent tyranny of the majority.¹⁴⁰

Post’s final harm to be addressed is less important in discussions of trademark and intellectual property generally, but still has importance when examining the call of Jamar and Mtima for Academic Intellectual Property Institutes grounded in social justice.¹⁴¹ The fifth harm is “the harm that racist expression is understood to cause to the educational mission of universities

134. Delgado, *supra* note 132, at 133.

135. *Id.* at 179.

136. Post, *Racist Speech*, *supra* note 117, at 274 (citing Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C. L. L. REV. 133, 137 (1982)).

137. *Id.* at 275.

138. *Id.* (citing Charles Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431).

139. Brief of Certain Members of Congress as Amici Curiae in Support of Neither Party at 2, *Lee v. Tam*, 137 S. Ct. 30 (2016) (No. 15-1293).

140. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (explaining that the First Amendment’s purpose was to protect the speaker of unpopular views from the “tyranny of the majority.”).

141. Jamar & Mtima, *supra* note 5, at 1130; see *id.* at n.25.

or colleges.”¹⁴² While the above-mentioned harms are present in the educational context, Post argues:

racist expression interferes with education not merely because of general harms that it may inflict on groups or individuals or the marketplace of ideas, but also, and more intrinsically, because racist expression exemplifies conduct that is contrary to the particular educational values that specific colleges or universities seek to instill.¹⁴³

Trademarks should clearly fall into Post’s arguments for speech control. As K.J. Green documents:

(F)ar from being at the fringes of the process of racial subordination, trademarked imagery has been central to the promotion of derogatory racial stereotypes. Negative racial stereotypes have generally declined as norms of racial equality have taken hold in our society. However, despite progress in race relations, the resonance of stereotypes is still profoundly strong in American culture and is reflected in stereotypical trademark uses.¹⁴⁴

Before Section 2(a) was deemed unconstitutional the United States Patent and Trademark Office used Section 2(a) to refuse registration to the following marks:

- SOUTHERN WHITE KNIGHTS TO THE KU KLUX KLAN¹⁴⁵
- PUSSY NIGGA BE COOL (P. N. B. C.)¹⁴⁶
- S.N.I.T.C.H= SUCKA NIGGA INFORMING THE COPS HATING¹⁴⁷
- BABY JAP¹⁴⁸
- BFF BIG FUCKING FAGGOT¹⁴⁹
- CUNT¹⁵⁰
- FUDGEPACKERS¹⁵¹

The USPTO has also used Section 2(a) to refuse registration of the design mark “HADJI, PLEASE!” for firearm targets.¹⁵²

In looking to develop new protections, we need to examine areas where restrictions have been held permissible. As we look for examples of the state’s authority to limit racist expression, we need look no further than Title

142. Post, *Racist Speech*, *supra* note 117, at 275-77.

143. *Id.* at 277.

144. K.J. Greene, *Trademark Law and Racial Subordination: From Marketing of Stereotypes to Norms of Authorship*, SYRACUSE L. REV. 431, 433 (2008).

145. U.S. Trademark App. No. 78/478,272 (filed Sept. 2, 2004).

146. U.S. Trademark App. No. 85/952,753 (filed June 6, 2013).

147. U.S. Trademark App. No. 85/379,668 (filed July 25, 2011).

148. U.S. Trademark App. No. 78/665,332 (filed July 7, 2005).

149. U.S. Trademark App. No. 77/722,463 (filed Apr. 25, 2009).

150. U.S. Trademark App. No. 77/048,672 (filed Nov. 21, 2006).

151. U.S. Trademark App. No. 78/681,877 (filed July 29, 2005).

152. U.S. Trademark App. No. 77/424,420 (filed Mar. 18, 2008).

II of the Civil Rights Act of 1964.¹⁵³ The Civil Rights Act has been used to address the deleterious effects of racism on commerce and individual dignity for the past half-century. Challenges to the Civil Rights Act were also grounded in First Amendment jurisprudence.¹⁵⁴ Is the fact that these laws examined public accommodations as opposed to trademark registration significant? The Supreme Court in *Heart of Atlanta Motel, Inc. v. United States*¹⁵⁵ tells us that the Civil Rights Act was enacted “to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’”¹⁵⁶ There is an argument that Title II of the Civil Rights Act of 1964 addresses conduct and not speech, and the majority opinion at the circuit court level of *Tam* made a distinction between conduct and speech, which the Supreme Court seemed to agree. I would argue, however, that Judge Reyna had the better argument in his dissent in examining conduct versus speech distinction. “[T]he distinction is without a difference in this context. Whether a restaurant named “SPICS NOT WELCOME” would actually serve a Hispanic patron is hardly the point. The mere use of the demeaning mark in commerce communicates a discriminatory intent as harmful as the fruit produced by the discriminatory conduct.”¹⁵⁷

The speech versus conduct distinction is also weakened because Congress recognized the harms of racial discrimination in areas more analogous to the speech restriction in Section 2(a). Title VIII¹⁵⁸ of the Civil Rights Act explicitly prohibits advertisements that communicate a discriminatory preference, making it “unlawful to make, print, or publish ... any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, [or] sex.”¹⁵⁹

Title VII makes it unlawful “to print or publish ... any notice or advertisement relating to employment ... indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin.”¹⁶⁰

153. 42 U.S.C. 2000(a) (1964). The Civil Rights Act of 1964 grew out of the protest movements of the 1950's and 1960's and looked to address discrimination by individual actors. Congress used its Commerce Clause powers to justify the limitation of discrimination of businesses engaged in interstate commerce; *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 259-60, 259 n.8 (1964).

154. Challenges to Article II where grounded in freedom of association, freedom of religion as well as freedom of expression.

155. *Heart of Atlanta Motel, Inc.*, 379 U.S. 241.

156. *Id.* at 250. (quoting S. Rep. No. 88-872, at 16-17 (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2370).

157. *In re Tam*, 808 F.3d 1321, 1380 (Fed. Cir. 2015) (Reyna, J., dissenting).

158. 42 U.S.C. § 3604(c) (1988).

159. *Id.*

160. *See* 42 U.S.C. § 2000e-3(b).

Ultimately, while I disagree with the Court's reasoning, I think the result is required because the statute is impermissibly vague.¹⁶¹

Historically, the Court has been particularly quick to apply the Void for Vagueness Doctrine to legislation which negatively impacts an individual's First Amendment rights out of fear that such laws might chill otherwise constitutionally protected speech. This is because "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."¹⁶²

The subjective nature of the trademark processes and its effect on vagueness analysis has been well documented.¹⁶³ An application for trademark must be approved by a Patent and Trademark Office (PTO) examiner, who, prior to *Tam*, could reject or approve it pursuant to Section 2(a).¹⁶⁴ Upon approval by the examiner, the trademark is published in the Official Gazette,¹⁶⁵ and the public has thirty days to register any opposition.¹⁶⁶ If there is no opposition, the PTO issues a certificate of registration.

If the mark is rejected, the applicant may reapply or appeal the denial of registration in an ex parte proceeding to the Trademark Trial and Appeal Board (TTAB).¹⁶⁷ If the denial is upheld, the applicant can appeal to the U.S. Court of Appeals for the Federal Circuit or to the U.S. District Court.¹⁶⁸ Registration does constitute prima facie evidence that the trademark is valid;¹⁶⁹ the mark's validity can still be attacked by any person who believes that she is damaged by the registration.¹⁷⁰ If the action is taken within five years of the mark's registration, a person who believes that she is damaged by the registration can file a Petition for Cancellation of the trademark for any of the reasons the examiner could have refused registration.¹⁷¹ After five years, a Petition for Cancellation can only be filed if the registered mark becomes generic, has been abandoned, was fraudulently obtained, or should not have been granted because the mark was inconsistent with one of the content-

161. See Robert H. Wright, *Today's Scandal Can Be Tomorrow's Vogue: Why Section 2(a) of the Lanham Act is Unconstitutionally Void for Vagueness*, 48 HOW. L. J. 659, 683 (2005).

162. *Id.* at 665 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)).

163. See *id.* at 666-67; Regan Smith, *Trademark Law and Free Speech: Protection for Scandalous and Disparaging Marks*, 42 HARV. C.R.-C.L. L. REV. 451, 456 (2007).

164. 15 U.S.C. § 1070 (2000).

165. *Official Gazette*, United States Patent and Trademark Office, <https://www.uspto.gov/learning-and-resources/official-gazette> (last visited Apr. 22, 2018) ("The Official Gazette (OG) is the official journal of the USPTO, published weekly on Tuesday, that includes bibliographic information and a representative drawing for each patent granted or trademark published on that issue date. There is a separate Official Gazette for Patents and Official Gazette for Trademarks, and the most recent 52 issues for each are available online.").

166. 37 C.F.R. § 2.80 (2006).

167. 15 U.S.C. § 1070.

168. 15 U.S.C. § 1071(a)-(b) (2011).

169. 15 U.S.C. § 1057(b) (2010).

170. 15 U.S.C. § 1064 (2006).

171. 15 U.S.C. § 1064.

based prohibitions in subsections 2(a), (b), or (c) of the Lanham Act.¹⁷² A Petition for Cancellation, like an opposition, is heard by the TTAB. Decisions of the TTAB can be appealed to either the United States Court of Appeals for the Federal Circuit or to a United States District Court.¹⁷³

An argument that Section 2 is impermissibly vague is not new.¹⁷⁴

Before a law will be found unconstitutional under the Void for Vagueness Doctrine, two substantive requirements must be met. First, a showing must be made that the challenged statute fails to provide adequate notice of the conduct which it prohibits. Second, evidence must be presented to show that the law in question has the potential to be enforced arbitrarily and discriminatorily.¹⁷⁵

The fact that the Lanham Act itself is silent as to the meaning of the term “disparag[ing],” has not led to courts to issue much clarity.¹⁷⁶ It was not until 1998 that the TTAB defined the term.

[D]isparagement is essentially a violation of one’s right of privacy - the right to be “let alone” from contempt or ridicule . . . [t]he two elements of such a claim are (1) that the communication reasonably would be understood as referring to the plaintiff; and (2) that the communication is disparaging, that is, would be considered offensive or objectionable by a reasonable person of ordinary sensibilities.¹⁷⁷

The definition seems to be an attempt to fit into the Court’s fighting words exception to First Amendment restrictions. In *Chaplinsky v. New Hampshire*,¹⁷⁸ the Supreme Court expressly held that fighting words are a category of speech unprotected by the First Amendment.

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such 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.¹⁷⁹

172. 15 U.S.C. § 1064(3).

173. 15 U.S.C. § 1071 (2011).

174. Wright, *supra* note 161, at 665 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)); see also Russ VerSteeg, *Blackhawk Down or Blackhorse Down? The Lanham Act’s Prohibition of Trademarks That “May Disparage” & the First Amendment*, 68 OKLA. L. REV. 677 (2016).

175. Wright, *supra* note 161, at 662; see also David W. Gartenstein & Joseph F. Warganz, Note, *RICO’S “Pattern” Requirement: Void for Vagueness?*, 90 COLUM. L. REV. 489, 512-14 (1990).

176. Wright, *supra* note 161, at 669.

177. *Greyhound Corp. v. Both Worlds, Inc.*, 6 U.S.P.Q.2d 1635, 1639 (T.T.A.B. 1988).

178. *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942).

179. *Id.* at 571-72.

Though oft cited,¹⁸⁰ there is support for an argument that *Chaplinsky* is dead.¹⁸¹ In *R.A.V. v. City of St Paul*, the Supreme Court acknowledged that communities may seek to prohibit fighting words only where they incite immediate violence.¹⁸² This immediacy would seem to be lacking in the trademark context.¹⁸³

Vagueness doctrine is often read in concert with the Court's overbreadth jurisprudence,¹⁸⁴ and although while linked, the concepts are different. Overbreadth is guided by an understanding that regulation is unconstitutional if it regulates substantially more speech than necessary to meet the governmental interest.¹⁸⁵ It has been argued that the use of "may" in Section 2(a) by itself renders the provision void, arguing that "(b)y definition the word "may" ordinarily implies mere possibility not probability."¹⁸⁶ This is consistent with how the TTAB has read the statute, finding "may" in Section 2(a) requires a finding that intent to disparage is not required.¹⁸⁷ This in and of itself would seem to run afoul of the Supreme Court's holding in *Virginia v. Black*.¹⁸⁸ It may be instructive that the Court in *Tam* discussed vagueness briefly¹⁸⁹ and not overbreadth, although using neither doctrine to reach its ultimate decision.

IV. POWER

This examination brings us back to the argument with which I began. In trademark, like other areas of First Amendment jurisprudence, the courts have failed to acknowledge the power of words. I began with the concept of Nommo because I think that the courts need to go beyond merely a concept of the power of words to harm, which may work in a limited trademark concept, but also at the power of words to create and to heal. Social justice has

180. In the Supreme Court alone, *Chaplinsky* has been cited in at least 109 opinions; see Rodney A. Smolla, *Words "Which by Their Very Utterance Inflict Injury": The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 319 (2009).

181. See Gregory Preves, *The Death Knell for Hate-Crime Laws? The Supreme Court Protects Unpopular Speech in R.A.V. v. City of St. Paul*, 24 LOY. U. CHI. L. J. 309, 336-40 (1993) (Arguing that post *R.A.V. v. City of St. Paul*, the personal injury prong of *Chaplinsky* is dead.).

182. *R.A.V. v. City of St. Paul*, Minn., 505 U.S. 377, 424 (1992).

183. A party has an opportunity to respond to trademark although somewhat more limited without article 2. It lacks the immediacy of a phrase uttered in the moment.

184. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 16.8-16.9, at 1274-81 (8th ed. 2010).

185. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

186. VerSteege, *supra* note 174, at 739.

187. *Id.*; *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d 1705, 1821-22 (T.T.A.B. 1999); see also Regan Smith, *supra* note 163, at 473.

188. *Virginia v. Black*, 538 U.S. 343 (2003). The Court held that cross burning was not prima facie evidence of intent to intimidate.

189. *Matal v. Tam*, 137 S. Ct. 1744, 1754, 1756 (2017).

to move beyond deficit-based theories where the courts look to protect disenfranchised groups from harm to providing tools and space for groups to empower themselves.

The irony of the *Tam* decision is that the real winner is the Washington Redskins.¹⁹⁰ The Slant's should have been given their trademark.

V. CONCLUSION

How do we move forward in the post-*Tam* context? The Court's decision in *Matal* provides an opportunity to create a new means to regulate trademarks. Such a process should challenge limited First Amendment readings and place trademark into the larger discussion of intellectual property and social justice. Arguments for the use of a semiotic approach to address the issue context have been developed by Professor Llewellyn Gibbons:¹⁹¹

A semiotic theory¹⁹² of trademark law recognizes that language, words, phonemes, symbols all exist prior the creation of a mark. The mark is created with secondary meaning is attached; the point when the symbols now adds one additional meaning so that in functions as a source, origin, or sponsorship indicator. Regardless of the expenditure by the person desiring to claim a symbol from the commons to create a mark, ultimately communities and not individuals create a language of marks (langue) that has its own rules and conventions.¹⁹³

Gibbons' use of semiotic theory is useful because it acknowledges the role of communities in making meaning of symbols. This theory goes beyond just examining the intent of the speaker, how it is received by an individual or even by society as a whole. How does the symbol affect disenfranchised communities? To this end, I think we have to explore outsider¹⁹⁴ scholarship as we look to give a voice to disenfranchised communities. Part of the debate of Section 2(a) revolved around self-definition. This is a seminal concept in queer theory.

190. See Gabriela M. Kirkland, *An Offensive Mark on Offensive Lines: The Question of Violating the First Amendment Through the Cancellation of the Washington Redskins' Trademark*, 44 HASTINGS CONST. L.Q. 479, 481 (2017).

191. Associate Professor, University of Toledo College of Law.

192. See Regan Smith, *supra* note 163, at 477 (explaining that semiotic theory is the study of signs and their functioning. "A sign is anything that contains meaning to someone, including words and graphics. A sign is composed of a signifier, that which points to the concept evoked by a word (known as the signified). Semiotics is structural. Meaning is created through the relationships or oppositions among elements.") (internal citations omitted).

193. Llewellyn Joseph Gibbons, *Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(a) Trademark Law After Lawrence v. Texas*, 9 MARQ. INTELL. PROP. L. REV. 187, 198 (2005).

194. See Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229, 1229 n.2 (1995) (defining "outsider" as "the term that feminist, critical race, and gay scholars use to identify themselves.").

Queer scholarship is critical in exploring these questions because it examines how the language surrounding our identities has always been in contention. By definition, queer theory strives to reclaim “queerness” from its pejorative origins, repositioning it as an empowering analytic. For white supremacy and heterosexism alike, defining and quarantining “the other” has been a key exercise of power and epistemological violence. In response, queer theorists see self-definition (and redefinition) as critical acts of resistance, strategies that allow us to transform not mere terminology but social terrain.¹⁹⁵

As I think of a replacement for Section 2(a), I am drawn to Audre Lorde’s words, “If I didn’t define myself for myself, I would be crunched into other people’s fantasies for me and eaten alive.”¹⁹⁶ Ultimately this process is discursive, because we must engage and challenge understandings. This reconceptualization of the marketplace of ideas as a market where ideas are exchanged is for me grounded in Nommo, because we will need “alternative ways of understanding and approaching communicative practice.”¹⁹⁷

195. Amit Sen, *Policing the Border: Regulating Race, Gender, and Sexuality*, 8 *GEO. J. GENDER & L.* 67, 70 n.9 (2007).

196. AUDRE LORDE, *SISTER OUTSIDER: ESSAYS AND SPEECHES* 137 (1984).

197. Karenga, *supra* note 31, at 212.