
FIRST AMENDMENT — OFFENSE-BASED BAR ON TRADEMARK REGISTRATION — FEDERAL CIRCUIT HOLDS THE LANHAM ACT’S ANTIDISPARAGEMENT PROVISION UNCONSTITUTIONAL. — *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015) (en banc).

Passed in 1946, section 2(a) of the Lanham Act¹ (§ 2(a)) authorizes the Patent and Trademark Office to deny registration of marks that “disparage . . . persons, . . . institutions, beliefs, or national symbols.”² Though mark holders have challenged the provision on free speech grounds in the past, courts have categorically rejected such claims, deeming registration uncovered by the First Amendment.³ Recently, in *In re Tam*,⁴ the Federal Circuit reversed course.⁵ Because the provision was a content- and viewpoint-based regulation of trademark’s “expressive” aspect, the en banc court held that it was subject to and failed to satisfy strict scrutiny. As a normative matter, *Tam* effected a partial shift in regulatory control from the legislature to the judiciary in an area of law particularly unfit for judicial management. Doctrinally, it constitutes a problematic compromise with the recent Supreme Court case *Reed v. Town of Gilbert*,⁶ which significantly expanded the definition of content-based laws deemed presumptively unconstitutional.⁷ In an effort to insulate trademark law’s central provisions from *Reed*, *Tam* claimed the unprecedented power to distinguish between trademark’s expressive and commercial regulations and subject each to varying levels of scrutiny. But this move is too tenuous to cabin *Reed*’s deregulatory implications for key areas of trademark law.

In 2011, Simon Shiao Tam, “‘front man’ for the Asian-American dance-rock band The Slants,” sought federal registration for his band’s mark.⁸ The examining attorney refused under § 2(a), finding the band name likely disparaged people of Asian descent.⁹ Tam appealed, and the Trademark Trial and Appeal Board affirmed, holding that his mark satisfied both prongs of the governing test: (1) its “likely meaning . . . refer[red] to identifiable persons,” and (2) it disparaged “a sub-

¹ Ch. 540, 60 Stat. 427 (1946) (codified as amended in scattered sections of 15 U.S.C.).

² 15 U.S.C. § 1052(a) (2012). The Lanham Act is the federal law of trademarks, and § 2 specifies conditions under which marks cannot be registered. The list includes, but isn’t limited to, descriptive, functional, deceptively misdescriptive, deceptive, confusing, scandalous, immoral, and disparaging marks. *See id.* § 1052(a), (d), (e).

³ *See, e.g., In re Mavety Media Grp. Ltd.*, 33 F.3d 1367, 1374 (Fed. Cir. 1994); *see also Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 578 n.9 (5th Cir. 2005).

⁴ 808 F.3d 1321 (Fed. Cir. 2015) (en banc).

⁵ *See id.* at 1328.

⁶ 135 S. Ct. 2218 (2015).

⁷ *See id.* at 2226–27.

⁸ *Tam*, 808 F.3d at 1331.

⁹ *Id.*

stantial composite of the referenced group.”¹⁰ Almost as an afterthought, the Board cited to *In re McGinley*¹¹ for the proposition that because Tam could still call his band The Slants, registration refusal didn’t implicate his speech rights.¹² Again Tam appealed, this time raising a First Amendment challenge, and the Federal Circuit affirmed.¹³ Writing for the panel, Judge Moore confirmed the Board’s analysis, noting *McGinley* foreclosed Tam’s constitutional claim.¹⁴ Discontent with the result, Judge Moore penned “additional views,” urging the court to sit en banc and overturn its own precedent.¹⁵

Sitting en banc, the court held the disparagement provision unconstitutional.¹⁶ Writing again for the majority, Judge Moore¹⁷ argued the provision was content and viewpoint discriminatory, and, therefore, subject to strict scrutiny.¹⁸ A law is content based if “its reach is defined . . . by the topic (subject matter) of the covered speech,”¹⁹ and viewpoint based if it aims to exclude specific “viewpoints from the marketplace.”²⁰ The provision not only singled out disparaging speech as a subject matter for regulation,²¹ but also discriminated among viewpoints in attempting to eliminate disparaging, and not dignifying, marks from the market.²² Hence, it faced and failed strict scrutiny.²³

The majority then rejected the government’s characterization of the provision as a regulation of “commercial speech,” subject to a lower standard of scrutiny.²⁴ Trademarks, in the majority’s view, embody two “inextricably intertwined” aspects²⁵: they are both commercial “source identifier[s]” and expressive mediums of social discourse.²⁶ Because the disparagement provision specifically targeted “the mark[’s]

¹⁰ *In re Tam*, 108 U.S.P.Q.2d (BNA) 1305, 1309, 1311–13 (T.T.A.B. 2013).

¹¹ 660 F.2d 481 (C.C.P.A. 1981).

¹² *Tam*, 108 U.S.P.Q.2d (BNA) at 1313 (citing *McGinley*, 660 F.2d at 484).

¹³ *In re Tam*, 785 F.3d 567, 568–69, 571 (Fed. Cir. 2015).

¹⁴ *Id.* at 572. Judge Moore was joined by Judges Lourie and O’Malley.

¹⁵ *Id.* at 573 (Moore, J., additional views).

¹⁶ *Tam*, 808 F.3d at 1328.

¹⁷ Judge Moore was joined by Chief Judge Prost and Judges Newman, O’Malley, Wallach, Taranto, Chen, Hughes, and Stoll.

¹⁸ *Tam*, 808 F.3d at 1334–37.

¹⁹ *Id.* at 1334 (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015)).

²⁰ *Id.* at 1335 (quoting *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

²¹ *Id.* (“It is beyond dispute that § 2(a) discriminates on the basis of content . . .”).

²² *Id.* at 1337.

²³ *Id.* at 1339 (citing *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011)).

²⁴ *Id.* at 1337–38. Under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), commercial speech is subject to a brand of intermediate scrutiny. See *id.* at 566.

²⁵ *Tam*, 808 F.3d at 1339 (quoting *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988)).

²⁶ *Id.* at 1338.

expressive content,” it was subject to strict scrutiny.²⁷ In contrast, § 2’s most central provisions — § 2(d) (bar on marks causing consumer confusion) and § 2(e) (bar on misdescriptive marks) — target misleading commercial speech, thereby evading strict scrutiny.²⁸

Turning next to *McGinley*, the majority rejected the view that because Tam could still call his band The Slants, the disparagement provision left his speech rights undisturbed.²⁹ *Perry v. Sindermann*³⁰ repudiated this reasoning, barring the government from conditioning receipt of benefits on the relinquishment of a constitutional entitlement.³¹ Per *Perry*, the provision conditions the benefits of registration on the use of a nondisparaging mark and therefore “creates a serious disincentive to adopt [offensive] mark[s]” like The Slants.³² The court deemed this “chilling effect” sufficient to violate the First Amendment.³³

The majority then considered and rejected the government’s classification of registration as either a “subsidy” or “government speech,” both of which lie largely outside the bounds of the First Amendment.³⁴ As to the first, the majority argued that subsidies come in only two forms — monetary gifts or use of government property — and registration assumes neither.³⁵ As to the second, the court rejected the government’s position that it could “convert the underlying speech to government speech” simply by affixing a symbol (®) or listing the mark in a register.³⁶ If this were so, copyright — which uses these same “indicia of registration” — would also constitute government speech, a result clearly “[in]consistent with the First Amendment.”³⁷ Judge Moore concluded that even if strict scrutiny didn’t apply, the provision would still fail the commercial-speech test in *Central Hudson Gas & Electric Corp. v. Public Service Commission*³⁸ for lack of a legitimating state interest.³⁹

²⁷ *Id.*

²⁸ *See id.* at 1329 (noting that § 2(d) and § 2(e) “do not run afoul of the First Amendment”).

²⁹ *See id.* at 1333–34 (discussing *In re McGinley*, 660 F.2d 481, 484 (C.C.P.A. 1981)).

³⁰ 408 U.S. 593 (1972).

³¹ *See id.* at 597; *see also* *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011).

³² *Tam*, 808 F.3d at 1341. The majority referenced the numerous procedural and substantive benefits that attend to federal registration. *Id.* at 1340–41.

³³ *Id.* at 1342. The court defended the proposition with citations to amici briefs. *Id.* at 1341.

³⁴ *Id.* at 1345, 1348.

³⁵ *Id.* at 1351. Even conditions on subsidies cannot leverage conduct outside the contours of the program. Because the disparagement provision “bears no relation to the [commercial] . . . purpose of . . . registration,” it would be unconstitutional even as a subsidy. *Id.* at 1354.

³⁶ *Id.* at 1346.

³⁷ *Id.*

³⁸ 447 U.S. 557 (1980).

³⁹ *Tam*, 808 F.3d at 1355–57. Judge O’Malley, joined by Judge Wallach, concurred, arguing that the disparagement provision is void for vagueness. *Id.* at 1358–63 (O’Malley, J., concurring).

Judge Dyk concurred in part and dissented in part.⁴⁰ Though he agreed the provision was unconstitutional as applied to Tam, he rejected the majority's facial invalidation. First, he noted that many marks, devoid of expressive content, warrant only intermediate scrutiny. When applied to these purely commercial marks, the provision survives intermediate scrutiny because it "protect[s] underrepresented groups . . . from being bombarded with demeaning messages."⁴¹ He then rejected the majority's narrow view of subsidies, deeming registration a nonmonetary subsidy subject to mere reasonableness review.⁴² Writing for himself, Judge Dyk concluded the provision was still unconstitutional as applied to Tam's "core political" speech.⁴³

Judge Reyna dissented as well.⁴⁴ He argued that registration, "considered as a whole, is indisputably commercial, not political."⁴⁵ Because the provision could have survived *Central Hudson* scrutiny, he would have upheld it both facially and as applied to Tam's mark.⁴⁶

Tam's novelty — that denial of registration burdens a *constitutional* speech interest — effected an undesirable shift in regulatory control from the legislature to the judiciary, one that could be amplified by *Reed*'s broadened definition of "content-based" laws. *Tam* attempted to insulate trademark's key provisions from *Reed*, but its doctrinal method proves wanting. According to the majority, courts can distinguish between trademark's "expressive" and "commercial" regulations and subject each to varying levels of scrutiny. But this apparently unprecedented move is tenuous at best, leaving open the possibility that trademark's most central provisions could face strict scrutiny.

As a normative matter, trademark presents a clash of speech-versus-speech, where vindicating one speech interest entails suppressing another.⁴⁷ Consider the case of two bands both calling themselves The Slants: Tam's group and a racist counterpart. As the majority observes, the disparagement provision burdens Tam's speech interest in reappropriating the slur. But if Tam were to receive registration, he could then enjoin the racist group from exercising its racist speech interest in the mark. In this zero-sum game, § 2 reflects legislative

⁴⁰ *Id.* at 1363–74 (Dyk, J., concurring in part and dissenting in part). Judges Lourie and Reyna joined all but the as-applied portions of Judge Dyk's opinion.

⁴¹ *Id.* at 1364.

⁴² *See id.* at 1372.

⁴³ *Id.* at 1374.

⁴⁴ *Id.* at 1376 (Reyna, J., dissenting). Judge Lourie also dissented, invoking stare decisis and separation of powers concerns and expressing skepticism as to the burdens of nonregistration. *Id.* at 1374–76 (Lourie, J., dissenting).

⁴⁵ *Id.* at 1378 (Reyna, J., dissenting).

⁴⁶ *Id.* at 1378–82. In his view, the disparagement provision served the substantial government interest of "promot[ing] the orderly flow of commerce." *Id.* at 1378.

⁴⁷ *See id.* at 1378 ("[I]f the expressive *content* of the mark precludes regulation, on what authority may the government grant Mr. Tam the exclusive right to use this mark . . . ?").

choices as to whose speech should prevail.⁴⁸ Before *Tam* was decided, when registration was uncovered by the First Amendment, courts generally let these legislative choices lie.⁴⁹ *Tam*'s novelty was to constitutionalize a speech interest in registration and thereby wrest power from the legislature to partially redraw trademark's boundaries.⁵⁰

Trademark's speech-versus-speech quality compounds the countermajoritarian difficulty here on two accounts.⁵¹ First, the moral quandary: between racist and reappropriative Slants, whose speech right *ought* to prevail? Should both groups be granted nonexclusive rights to the mark, or should the first to register win the power to exclude?⁵² In settling this rights contest, trademark regulators must decide on the moral status of intellectual property rights,⁵³ "essentially contested concepts"⁵⁴ best left to the legislature.⁵⁵ Second, the epistemic difficulty: to draw a defensible boundary, regulators require contextual, empirical data as to the incentive effects of registration refusal.⁵⁶ Consider *Tam*: did the provision really "chill" Tam's speech?⁵⁷ Even so, might it have had the justifying effect of maximizing aggre-

⁴⁸ Cf. *id.* at 1374 (Lourie, J., dissenting) ("[The majority] interfere[s] with the long-standing Congressional policy of . . . filter[ing] out . . . undesirable marks . . .").

⁴⁹ See, e.g., *In re McGinley*, 660 F.2d 481, 484 (C.C.P.A. 1981).

⁵⁰ To be clear, courts have long recognized that registration can threaten the constitutional speech interests of enjoined parties. See, e.g., *Lamparello v. Falwell*, 420 F.3d 309, 313 (4th Cir. 2005); *Rogers v. Grimaldi*, 875 F.2d 994, 998 (2d Cir. 1989). The inverse claim — that registration refusal threatens the mark holder's speech interests — is *Tam*'s novelty.

⁵¹ See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–23 (Yale Univ. Press 2d ed. 1986) (1962) (identifying legitimacy concerns that arise when unelected judges strike down laws enacted by democratically accountable bodies).

⁵² Intuitions diverge on this point. See, e.g., Sonia K. Katyal, *Trademark Intersectionality*, 57 UCLA L. REV. 1601, 1686 (2010) ("[C]ensorship does not stem from section 2(a), but from the trademark owner's power to control alternate commentaries on a specific mark . . ."); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 644 (1990) ("[O]ur usual method of correcting for bias in public debate is not to suppress speech but to encourage counterspeech.").

⁵³ Cf. *Intellectual Property and First Principles*, CATO INST. (Feb. 10, 2016), <http://www.cato.org/events/intellectual-property-first-principles> [<http://perma.cc/9AT2-LYZQ>] (discussing intralibertarian dispute as to the moral status of intellectual property rights).

⁵⁴ See generally W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167 (1956) (describing concepts whose contents invoke disputed normative judgments).

⁵⁵ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2622 (2015) (Roberts, C.J., dissenting) ("[A] Justice's commission does not confer any special . . . insight sufficient to justify imposing [his or her own moral] perceptions on fellow citizens . . ."); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1001 (1992) (Scalia, J., dissenting) ("Value judgments . . . should be voted on, not dictated . . .").

⁵⁶ See generally *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 329 n.2 (7th Cir. 1985) ("[A]s judges we must accept the legislative resolution of . . . disputed empirical questions."); William McGeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 65 (2008) (considering the complex incentive effects of trademark's doctrinal details).

⁵⁷ Compare *Tam*, 808 F.3d at 1341 (describing a chilling effect), with *id.* at 1374–75 (Lourie, J., dissenting) (disputing the existence of a chilling effect in Tam's case).

gate speech?⁵⁸ In short, *Tam*'s novelty invites courts to implicitly adjudicate trademark's murkiest moral and empirical questions.

A recent shift in the Supreme Court's First Amendment jurisprudence risks exacerbating this normative problem. Last Term in *Reed*, the Court vastly expanded the category of content-based regulations deemed presumptively unconstitutional.⁵⁹ Before *Reed*, laws were content based when animated by disagreement with the regulated speech.⁶⁰ *Reed*'s definition swept more broadly, including any law "that depend[s for its application] on an evaluation of the content of the speech."⁶¹ Decided in our post-*Reed* world, *Tam* rightly branded the disparagement provision content based.⁶² But as Professor Rebecca Tushnet has argued, the same could be said of § 2(d) and § 2(e): whether a mark is confusing or misdescriptive will similarly depend upon its content.⁶³ Taken together, *Tam*'s novelty and *Reed*'s broad definition of "content based" might be used to justify an expansion of strict scrutiny to § 2's key content-based provisions.

The *Tam* majority seemed to have understood that its holding could be extended beyond the disparagement provision.⁶⁴ And so to insulate § 2's key provisions from strict scrutiny, the majority offered a three-step doctrinal argument: (1) *Reed* covers only expressive speech;⁶⁵ (2) commercial and expressive aspects are "inextricably intertwined" in registra-

⁵⁸ Compare Katyal, *supra* note 52, at 1686 ("[S]ection 2(a) might indirectly . . . add[] more speech, rather than less, to the marketplace . . ."), with Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act Is Unconstitutional*, 36 LOY. L.A. L. REV. 83, 83 (2002) ("Without copyright protections, less speech would occur.")

⁵⁹ See *Norton v. City of Springfield*, 806 F.3d 411, 413 (7th Cir. 2015) (Manion, J., concurring).

⁶⁰ See *id.* at 412 (majority opinion) ("[Before *Reed*,] the absence of an effort to burden unpopular ideas implie[d] the absence of content discrimination.")

⁶¹ Rebecca Tushnet, Essay, *The First Amendment Walks into a Bar: Trademark Registration and Free Speech*, 91 NOTRE DAME L. REV. (forthcoming 2016) (manuscript at 2), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2745016 [<http://perma.cc/PBG2-CRES>]; see also *id.* (manuscript at 22–23) (discussing *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015)).

⁶² See *Tam*, 808 F.3d at 1334 (citing *Reed*, 135 S. Ct. at 2226).

⁶³ See Tushnet, *supra* note 61 (manuscript at 2) ("Section 2 is almost nothing but content-based."); see also *Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring in the judgment) ("Regulatory programs almost always require content discrimination.")

⁶⁴ See *Tam*, 808 F.3d at 1330 n.1 ("We limit our holding in this case to the constitutionality of the § 2(a) disparagement provision. . . . [O]ther portions of § 2 may likewise constitute government regulation of expression based on message . . .").

⁶⁵ *Tam* made this move implicitly when it identified *Central Hudson*'s intermediate scrutiny as the governing standard for commercial speech. See *Tam*, 808 F.3d at 1355; see also *id.* at 1329 (citing to *Central Hudson* for the claim that § 2(d) and § 2(e) don't "run afoul of the First Amendment"). Query whether this is the best reading of *Reed*. Compare *Mass. Ass'n of Private Career Sch. v. Healy*, No. 14-13706-FDS, 2016 WL 308776, at *10–11 (D. Mass. Jan. 25, 2016) (limiting *Reed* to noncommercial speech), and Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1990–92 (2016), with *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (applying "heightened scrutiny" to some commercial speech restrictions).

tion;⁶⁶ and (3) the standard of scrutiny for a particular trademark provision should depend upon which aspect it regulates. In defense of this last move, *Tam* cited to *R.A.V. v. City of St. Paul*⁶⁷ for the proposition that “speech can be proscribable on the basis of one feature [e.g., its commercial function] . . . but not [necessarily] on the basis of another [e.g., its expressive content].”⁶⁸ On this view, *Tam* could limit *Reed* to the disparagement provision (a regulation of expressive content), while leaving § 2(d) and § 2(e) (regulations of trademark’s commercial function) completely undisturbed.⁶⁹ What’s more, because these latter provisions bar distinctly *deceptive* commercial speech, they need only satisfy reasonableness review.⁷⁰

But this argument rests § 2’s constitutionality on tenuous doctrinal grounds. When the Court first introduced “inextricably intertwined” speech in *Riley v. National Federation of the Blind of North Carolina, Inc.*,⁷¹ it expressly rejected *Tam*’s limiting principle, holding that speech does not “retain[] its commercial character when it is inextricably intertwined with . . . fully protected speech.”⁷² As recognized by other circuits, *Riley* requires a ratcheting up of protection whenever speech’s commercial and expressive aspects are sufficiently intertwined.⁷³ Assuming, as *Tam* did, that the commercial and expressive really are intertwined in registration,⁷⁴ any effort to regulate the former should trigger the full protections accorded to the latter.⁷⁵ And though it’s true that § 2(d) and § 2(e) regulate purportedly deceptive speech, the Supreme Court has held in *United States v. Alvarez*⁷⁶ that *expressive* deception warrants full constitutional protection, absent a clear showing of harm.⁷⁷ *Riley*, in requiring that intertwined speech

⁶⁶ *Tam*, 808 F.3d at 1339 (citing *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988)).

⁶⁷ 505 U.S. 377 (1992).

⁶⁸ *Tam*, 808 F.3d at 1339 (quoting *R.A.V.*, 505 U.S. at 385).

⁶⁹ *See id.* at 1338.

⁷⁰ *See id.* at 1329 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980)).

⁷¹ 487 U.S. 781.

⁷² *Id.* at 796. In *Riley*, the Court struck down a state law requiring fundraisers to disclose the percentage of charity they retained as commission in the prior year. *See id.* at 798.

⁷³ *See, e.g.*, *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 520–21 (7th Cir. 2014); *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 962 (9th Cir. 2012) (“We treat the entirety of the intertwined speech as fully protected expression.” (citing *Riley*, 487 U.S. at 796)).

⁷⁴ *See Tam*, 808 F.3d at 1339.

⁷⁵ Whereas *Riley* refused to “parcel out the [intertwined] speech, applying one test to one phrase and another test to another phrase,” *Riley*, 487 U.S. at 796, *Tam* — though it recognized trademark as an instance of inextricably intertwined speech — sought to untangle the expressive and commercial dimensions of a single word, a move ruled out by *Riley* a fortiori.

⁷⁶ 132 S. Ct. 2537 (2012).

⁷⁷ *See id.* at 2549; Tushnet, *supra* note 61 (manuscript at 23 n.75). Section 2(e) would likely fail this test because it “doesn’t require . . . that consumers would change their behavior because of the confusion or that the senior trademark owner would suffer . . . harm.” *Id.* (manuscript at 32).

be treated like expressive speech, would seem to trigger *Alvarez*, subjecting even § 2(d) and § 2(e) to strict scrutiny.⁷⁸ Under the tetrarchy of *Riley*, *Reed*, *Alvarez*, and now *Tam*, just about every provision in § 2 could face the fatal test of narrow tailoring.⁷⁹

In reply, *Tam* would likely reemphasize *R.A.V.*, where the Court struck down a statute — similar to the one in *Tam* — that singled out and criminalized disparaging “fighting words.”⁸⁰ Though fighting words are generally excepted from First Amendment protection, *R.A.V.* held they still cannot be regulated on the basis of “nonproscribable,” racist content.⁸¹ Analogously, *Tam* held registration regulable on the basis of a mark’s commercial misleadingness, just not on the basis of its expressive, offensive message.⁸² But this analogy engenders doctrinal tension: for *R.A.V.* has never been applied to intertwined speech,⁸³ and by extending its logic to the commercial/expressive distinction, *Tam* placed it on a direct collision course with *Riley*’s ratcheting-up requirement. Perhaps this tension reflects the unsettled nature of intertwined speech law.⁸⁴ But with *Reed* lying in wait, courts should seek more than a contestable argument from an unresolved area of doctrine to shield § 2 from heightened scrutiny.

Within a few weeks of *Tam*, the government conceded that § 2(a)’s bar on immoral and scandalous marks was also unconstitutional.⁸⁵ This may have been *Tam*’s easiest extension; but given *Reed*, *Riley*, and *Alvarez*, it needn’t be the last. For the sake of both a functioning trademark system and a coherent free speech jurisprudence, courts should “hesitate, and then hesitate some more”⁸⁶ before constitutionalizing the mark holder’s right to silence dissent.⁸⁷ Even free speech absolutists can agree that a subject so fraught with rights conflicts and epistemic complexity should rest primarily with the legislature.

⁷⁸ See Tushnet, *supra* note 61 (manuscript at 23 n.75).

⁷⁹ Both *Tam*’s argument and the above criticism assume without argument that trademark constitutes inextricably intertwined speech. For a defense of this assumption, see Kristian D. Stout, *Terrifying Trademarks and a Scandalous Disregard for the First Amendment: Section 2(A)’s Unconstitutional Prohibition on Scandalous, Immoral, and Disparaging Trademarks*, 25 ALB. L.J. SCI. & TECH. 213, 242–49 (2015).

⁸⁰ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992).

⁸¹ *Id.* at 385–86.

⁸² See *Tam*, 808 F.3d at 1355.

⁸³ *Tam* appears to be the first and only case to use *R.A.V.* to untangle inextricably intertwined speech. Cf. *Gaudiya Vaishnava Soc’y v. City and County of San Francisco*, 952 F.2d 1059, 1065 (9th Cir. 1990) (explicitly rejecting an *R.A.V.*-style argument for regulating intertwined speech).

⁸⁴ See, e.g., Katyal, *supra* note 52, at 1647; Stout, *supra* note 79, at 242.

⁸⁵ *In re Brunetti*, No. 2015-1109 at 1–2, *In re Brunetti*, No. 15-1109 (Fed. Cir. Jan. 21, 2016).

⁸⁶ *Kansas v. Nebraska*, 135 S. Ct. 1042, 1061 (2015).

⁸⁷ Cf. Katyal, *supra* note 52, at 1686 (“[C]ensorship . . . stem[s] from . . . the trademark owner’s power to control alternate commentaries on a specific mark . . .”).