MORAL JUDGMENTS IN TRADEMARK LAW

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Under the federal Lanham Act, eligibility for trademark protection depends on whether a mark is sufficiently moral. The Federal Circuit has recently held this provision of the Act to be unconstitutional based on its interpretation of speech doctrine. The context of trademark law, however, refutes this interpretation. Indeed, speech doctrine appears to support this morality requirement. Nevertheless, there seems to be another reason that the Federal Circuit held the morality requirement unconstitutional: the judicial discomfort with morality serving as a basis for law. This Essay concludes that this judicial discomfort is unjustified in this instance. From both a constitutional and a policy perspective, morality may and should serve as a basis for denying trademark protection.

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INTRODUCTION

Trademark law exists to promote the commercial marketplace by regulating a certain type of speech. To that end, the Trademark Act of 1946 ("Lanham Act")[1] employs several content-based criteria that bar trademark eligibility.[2] Such criteria include inquiries into whether a mark is descriptive, generic, deceptive, or a government symbol; whether a mark resembles a living person or an existing mark; whether a mark is functional; and whether a mark is immoral, scandalous, or disparaging.[3] Recently, the criteria that bar trademark protection for immoral, scandalous, and disparaging marks—which I refer to as the "morality bars"—has come under constitutional attack. In *In re Tam*,[4] a majority of an en banc U.S. Court of Appeals for the Federal Circuit held that the morality bars violate the First Amendment.[5] Yet in the face of the other content-based bars in trademark law, coupled with the lengthy history of the morality bars, the majority's holding is puzzling.[6] The context of trademark law seems to justify the seeming offense to free speech.[7] For if the morality bars violate free speech, it would seem that the other

1. Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. §§ 1051–1141n (2012)).

2. *See* 15 U.S.C. § 1052 (imposing limitations on the issuance of trademarks); Ned Snow, *Free Speech & Disparaging Trademarks*, 57 B.C. L. REV. 1639, 1641 (2016) ("[T]rademark law recognizes other content-based criteria as conditions for trademark registration and has done so for more than a century."); Rebecca Tushnet, *The First Amendment Walks into a Bar: Trademark Registration and Free Speech*, 92 NOTRE DAME L. REV. 381, 383 (2016) ("[D]isparagement can't coherently be distinguished from a number of the other bars to registration once the harsh logic of the First Amendment applies.").

3. 15 U.S.C. § 1052.

4. 808 F.3d 1321 (Fed. Cir. 2015) (en banc), *cert. granted*, 137 S. Ct. 30 (2016).

5. *Id.* at 1327–28.

6. *See* Snow, *supra* note 2, at 1640–41 (noting that *Tam* did not address the holding's consistency within the broader context of trademark law). *Compare In re* Boulevard Entm't, Inc., 334 F.3d 1336, 1343 (Fed. Cir. 2003) (ruling the anti-immoral criterion of the Lanham Act does not violate the First Amendment), *abrogated by Tam*, 808 F.3d 1321, *In re* Mavety Media Grp. Ltd., 33 F.3d 1367, 1374 (Fed. Cir. 1994) (same), *abrogated by Tam*, 808 F.3d 1321, *and In re* McGinley, 660 F.2d 481, 484 (C.C.P.A. 1981) (same), *abrogated by Tam*, 808 F.3d 1321, *with Tam*, 808 F.3d at 1327–28 (holding that the First Amendment does not allow the government to refuse to register disparaging marks simply because the government disapproves of the expressive messages conveyed by the marks).

7. *See* Snow, *supra* note 2, at 1640–42.

content-based criteria do as well.[8] On the basis of speech, it is difficult to distinguish the morality bars from other content-based bars in trademark law.[9]

This is not to say that the morality bars are indistinguishable from the other content-based criteria that determine trademark eligibility. To the contrary, the morality bars reflect the only criteria that require the government to consider issues of morality in determining trademark protection. This distinction, I believe, lies at the heart of the *Tam* holding. Indeed, the *Tam* majority expressed uneasiness with the government making "moral judgments" to determine trademark eligibility.[10] Reading between the lines of *Tam*, as well as reading some particular lines of *Tam*, I infer that the majority disapproves of Congress legislating morality in a context that affects speech.[11] This leads me to believe that *Tam* is as much about legislating morality as it is about free speech. *Tam* may be viewed from either a speech paradigm or a morality paradigm. In the end, however, neither paradigm justifies the majority's holding. I argue that the morality bars reflect good policy and are constitutional.

This Essay addresses the speech and morality paradigms of *Tam* in two parts. Part I addresses the speech paradigm. In that Part, I briefly summarize the argument against finding a speech violation.[12] Part I provides the proper framework for discussing the morality paradigm in Part II. In Part II, I consider whether Congress can and should employ moral judgments to determine trademark eligibility. The Essay concludes that *Tam* was incorrectly decided: the morality bars are constitutional regulations of commercial speech and further the purpose of trademark law.

I. SPEECH

The *Tam* majority recited First Amendment jurisprudence that, outside the context of trademark law, might seem to condemn the morality bars.[13] Context, however, is everything in speech law.[14]

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8. *See id.* at 1640–42, 1678–82 (explaining that the *Tam* majority's holding suggests that the Lanham Act's anti-deception provision also violates the First Amendment as unconstitutional viewpoint discrimination).

9. *See id.*

10. *See Tam*, 808 F.3d at 1338.

11. *See id.*

12. For a more in-depth discussion of the speech violation argument, see generally Snow, *supra* note 2.

13. *See Tam*, 808 F.3d at 1334–57 (finding that the disparagement provision "chills private speech," is "not content or viewpoint neutral," regulates expression,

Ignoring the context of the morality bars (i.e., marks designating commercial source) is akin to ignoring the context of a man shouting fire (i.e., in a building that is ablaze as opposed to a crowded theatre that is not).[15] The context in which trademark arises demonstrates that the morality bars must be constitutional as a matter of free speech law. The intricacies of that context, and its implication on speech law, I address in a separate work.[16] Here, I only summarize the general points of the context to aid my discussion in Part II about the *Tam* morality paradigm.

When a person uses a trademark to represent herself as the source of a good or service, she is speaking. She is expressing the idea of her identity as the source.[17] A bus company chooses GREYHOUND. A car company chooses MERCEDEZ. A restaurant company chooses CHICK-FIL-A. Each company communicates meaning through the mark. Specifically, the mark communicates how consumers should conceptualize the company that is the source of certain goods or services. The mark communicates the reputation of the company. And in many cases, it communicates a characteristic of the good that the company is offering for sale (e.g., CHICK-FIL-A suggests that the restaurant sells chicken). Marks serve as an expression of meaning.[18] They represent speech.

The conclusion that marks represent speech suggests that any content-based restrictions on trademark eligibility lie in tension with the right of free speech. If I start a restaurant that serves chicken filets, free speech principles suggest that I should be able to call my restaurant whatever I choose, including CHICK-FIL-A (even though another restaurant company already uses that same mark). Yet

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fails strict scrutiny, and fails the test for commercial speech regulation, and that trademarks are "not government speech" or "government subsid[ies]").

14. *See generally* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226–27 (2015) (explaining that First Amendment jurisprudence distinguishes speech restrictions based upon the type of speech the prohibition targets and how it applies to that speech as well as the government interests supporting the restriction); Schenck v. United States, 249 U.S. 47, 52 (1919) ("But the character of every act depends upon the circumstances in which it is done." (citing Aikens v. Wisconsin, 195 U.S. 194, 205–06 (1904)).

15. *See Schenck*, 249 U.S. at 52.

16. *See generally* Snow, *supra* note 2.

17. *See id.* at 1648–51.

18. *See* Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 209–10 (2000) (interpreting the Lanham Act's designation that any "symbol" or "device" may serve as a trademark to mean that the scope of trademark protection encompasses "almost anything at all that is *capable of carrying meaning*" (emphasis added) (quoting Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 162 (1995))).

trademark law denies me such an opportunity to speak. Furthermore, trademark law withholds the benefits of registration to speakers who use specific categories of content to identify themselves. For instance, trademark law denies me the benefits of registration if I seek to identify myself with a mark that someone else has already registered; with a mark that is generic or descriptive relevant to the product I am selling; with a mark that is disparaging, scandalous, or immoral; or even with a mark that constitutes my own surname.[19] Such restrictions on self-identification would seem to violate the fundamental free-speech principle that prohibits content-based restrictions.[20]

Of course the First Amendment does not provide an absolute right of free speech.[21] Exceptions may arise based on the context of the speech: Supreme Court jurisprudence well recognizes that exceptional contexts permit the government to impose content-based restrictions on speech.[22] Such an exception must exist for trademark law, for if trademark law were not an exception to free speech's prohibition of content-based restrictions, none of the content-based criteria for eligibility would be constitutional.[23] Simply put, if trademark registration is to exist, speech law must yield. And speech law does yield. Three speech doctrines allow for the content-based restrictions of trademark law to be consistent with the right of free speech. The doctrines of government subsidies, commercial speech, and the limited-public forum appear to allow for the sort of content-

19. *See* 15 U.S.C. § 1052 (2012).

20. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional . . . .").

21. *See* Elrod v. Burns, 427 U.S. 347, 360 (1976) (noting that "[r]estraints are permitted for appropriate reasons").

22. *See, e.g.*, Christian Legal Soc'y v. Martinez, 561 U.S. 661, 679 (2010) (recognizing a limited-public forum exception in which the government may more readily restrict speech occurring through a state-funded student-organization program); Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 188–89 (2007) ("[I]t is well established that the government can make content-based distinctions when it subsidizes speech."); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562–63 (1980) (upholding government regulation of commercial speech); Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (per curiam) (upholding the prohibition of speech that would incite "imminent lawless action"); Roth v. United States, 354 U.S. 476, 485 (1957) (allowing the regulation of obscene speech); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (permitting local governments to curtail "fighting words").

23. *See* Snow, *supra* note 2, at 1641; Tushnet, *supra* note 2, at 383–84.

based restrictions that arise in trademark law.[24] The relevant question here is whether the morality bars in particular fall within these doctrinal exceptions to free-speech law.

A. Government Subsidy

Government may draw content-based distinctions when it subsidizes private speech through a government program.[25] As the Supreme Court has noted, "Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."[26] Restrictions in a government program that affect speech content are permissible insofar as those restrictions support the purpose of the program.[27]

Trademark registration represents a government program that subsidizes private speech. The trademark system provides mark owners a subsidy, in the form of a property right, that affects speech content.[28] As a general matter, content-based restrictions within the subsidy program of trademark registration are permissible because the restrictions support the purpose of trademark law—i.e., they promote efficiency and growth in the commercial marketplace.[29]

With respect to the morality bars specifically, the restrictions support growth in the commercial marketplace by facilitating an

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24. *See* Snow, *supra* note 2, at 1644–46. None of these three exceptions allow the government to engage in viewpoint discrimination. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995). Hence, the question arises as to whether the morality bars constitute viewpoint discrimination. I address that question in another work, concluding that *Tam*'s finding of viewpoint discrimination is not compatible with the broader principles of trademark law. *See* Snow, *supra* note 2, at 1677–83.

25. *See Davenport*, 551 U.S. at 188–89 ("[I]t is well established that the government can make content-based distinctions when it subsidizes speech."); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 588 (1998) ("Congress may 'selectively fund a program to encourage certain activities it believes to be in the public interest . . . .'" (quoting Rust v. Sullivan, 500 U.S. 173, 193 (1991)).

26. *Finley*, 524 U.S. at 587–88.

27. *See* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2329–30 (2013) (citing *Rust*, 500 U.S. at 196).

28. *See In re* Tam, 808 F.3d 1321, 1368 (Fed. Cir. 2015) (en banc) (Dyk, J., concurring and dissenting), *cert. granted*, 137 S. Ct. 30 (2016); Snow, *supra* note 2, at 1645. *But see Tam*, 808 F.3d at 1353 (rejecting the notion that trademark registration is a subsidy).

29. *See* Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163–64 (1995) (discussing the economic benefits of trademark law); 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:3 (4th ed. 2016) (same); Snow, *supra* note 2, at 1667–70, 1674 (same).

environment that is more conducive to commercial transactions. Presumably, most commercial actors would rather not engage in a commercial forum that promotes name-calling and displays of immoral conduct. Personal offense to such marks might disrupt an otherwise efficient transaction—a potential buyer refusing to purchase a good based on its mark. This situation could lead to uncertainty regarding market demand for the good represented by the mark.[30] In short, disparaging, immoral, and scandalous marks may produce uncertainty in market transactions. Congress's refusal to subsidize such marks therefore appears justifiable on the grounds that its refusal promotes efficiency in the commercial marketplace.

B. Commercial Speech

Commercial speech occurs where a speaker uses expression to propose a commercial transaction.[31] The government may impose a content-based restriction on commercial speech so long as the government is reasonably advancing a substantial interest through that restriction.[32]

Trademarks are commercial speech.[33] By indicating the source of a product, trademarks facilitate commercial transactions.[34] Restrictions on trademarks, then, are permissible if Congress is reasonably advancing a substantial interest through the restrictions. As a general matter, the restrictions on trademarks appear to reasonably advance the substantial interests of promoting efficiency and growth in the commercial marketplace. For instance, the restriction that requires marks to be distinct[35] promotes efficiency by reducing search costs for consumers, and it promotes growth by fostering reputational incentives for producers.[36]

Under this commercial-speech test, the morality bars seem justified. Marks that are immoral, scandalous, or disparaging are offensive to

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30. *See Tam*, 808 F.3d at 1379 (Reyna, J., dissenting); *infra* text accompanying notes 37–39.

31. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562–63 (1980).

32. *Id.* at 564.

33. *See* S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 539–40 (1987).

34. *See id.*

35. 15 U.S.C. § 1052(e)–(f) (2012).

36. *See* Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163–64 (1995) ("In principle, trademark law, by preventing others from copying a source-identifying mark, reduces the customer's costs of shopping and making purchasing decisions, for it quickly and easily assures a potential customer that *this* item—the item with this mark—is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past." (internal quotation marks and citation omitted)).

segments of society. This offense may cause some consumers to refrain from purchasing goods or services that they would otherwise purchase. In that situation, the mark would interfere with a realization of the optimum level of consumer demand, thereby affecting pricing and supply.[37] The offensive mark would create an inefficient outcome, which would harm the government's substantial interest in growth of the commercial marketplace.

This view of the morality bars—as criteria that prevent disruption to commercial activity—finds support in Judge Reyna's dissenting opinion in *Tam*. He stated, "Commercial speech that insults groups of people, particularly based on their race, gender, religion, or other demographic identity, tends to disrupt commercial activity and to undermine the stability of the marketplace in much the same manner as discriminatory conduct."[38] Simply put, to further participation in commercial transactions, Congress has barred offensive marks from registration eligibility.[39] The morality bars, then, facilitate an environment of trade that is non-offensive to members of society, which fosters an environment that is more conducive to participation in commercial transactions. Such restrictions would appear constitutional under the commercial-speech doctrine.

C. Limited-Public Forum

Another exception to the free-speech prohibition on content-based restrictions is the limited-public forum doctrine.[40] A limited-public forum arises where the government has created a forum (or provided resources) that furthers private speech on a particular topic.[41] The government may impose content-based speech restrictions on the public's use of the forum—or on the public's use of the government-provided resources—insofar as the restriction confines the forum to its limited and legitimate purposes.[42]

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37. *See* Snow, *supra* note 2, at 1670–73.

38. *In re* Tam, 808 F.3d 1321, 1379 (Fed. Cir. 2015) (en banc) (Reyna, J., dissenting), *cert. granted*, 137 S. Ct. 30 (2016).

39. *See id.*

40. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

41. *See id.*; *see also* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 655 (1981) (declaring the Minnesota State Fair a limited-public forum for the purpose of "exhibitors temporarily to present their products or views, be they commercial, religious, or political, to a large number of people in an efficient fashion").

42. *See Rosenberger*, 515 U.S. at 829 ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.").

This doctrine arguably applies in the trademark context.[43] The system of trademark law may represent a limited-public forum, albeit a sort of metaphysical government-created forum—or more precisely, government-provided resources.[44] Trademark rights represent a government resource that facilitates the speech of private actors, and Congress has provided that resource to promote commercial transactions.

Assuming that trademark rights represent such a forum, restrictions on trademark speech would be permissible to the extent that the restrictions serve to confine trademark rights to the purpose of promoting commercial transactions. An example of such a justifiable restriction (although not necessarily justifiable under the commercial-speech doctrine) is the bar preventing registration of government symbols: Congress has decided that government symbols may not receive trademark protection.[45] According to commentators, the reason that Congress imposed this bar is that government symbols should "not be sullied or debased by use as symbols in business and trade."[46] Government symbols are apparently too sacrosanct to be the subject of a commercial transaction—even where a government entity seeks trademark protection for its own symbol.[47] Thus, Congress has judged that government symbols fall outside the purpose of the forum of trademark rights that it created. Tellingly, trademarking government symbols would not diminish the efficiency of the marketplace; indeed, consumers of government services could more easily identify a government actor in the absence of third parties imitating a government-symbol mark.[48] Nevertheless, by barring trademark rights for government symbols, Congress has confined trademark rights to content that Congress deems within the purpose of the commercial forum. The government-symbols bar is justified under the limited-public forum doctrine.

Like the government-symbols bar, the morality bars appear to constitute a permissible speech restriction within the limited-public

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43. *See* Snow, *supra* note 2, at 1646–47.

44. *See id.* at 1646–47 & n.57 (analogizing trademark rights to the government-provided benefits for student groups held to be a limited-public forum in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010)).

45. *See* 15 U.S.C. § 1052(b) (2012).

46. 3 MCCARTHY, *supra* note 29, § 19:78.

47. *See id.*

48. *See In re* City of Hous., 731 F.3d 1326, 1331 (Fed. Cir. 2013) (denying trademark protection for Houston's city seal despite the City's argument that the trademark would *promote* efficiency by preventing the seal's use by "pirates and cheats").

forum of trademark.[49] The morality bars serve the purpose of the trademark forum—promoting the commercial marketplace—by reducing instances of offense that would impede marketplace transactions.[50] They also limit the promotion of goodwill through trademark rights to those markholders who do not hinder marketplace transactions. The morality bars thereby confine trademark rights to the purpose of promoting commerce.[51] Thus, the doctrine of the limited-public forum suggests the constitutionality of the morality bars as a speech restriction.

II. MORALITY

Despite the fact that speech doctrines do not appear to provide a basis for distinguishing the morality bars from other content-based criteria in trademark law, the morality bars are distinguishable from these criteria in one obvious way: they require the government to make moral judgments. To determine whether a mark is immoral, scandalous, or disparaging, a Patent and Trademark Office ("PTO") examiner must draw upon moral norms of society. No other criterion for trademark protection introduces value judgments that are based on standards of decency, goodness, and virtue. This distinction, I believe, was particularly troublesome for the *Tam* majority.

Before going further, I should define morality here. By morality, I mean that which leads a person or a society to realize a more virtuous life.[52] Morality suggests standards of goodness, decency, and virtue. I employ this meaning to consider whether the government can and should make moral judgments in deciding trademark eligibility.

A. The Majority's Problem with Moral Judgments

That the government must make moral judgments in deciding trademark registration appears to have mattered to the majority in *Tam*.[53] While arguing that the disparagement bar targets expressive content, the majority took issue with the moral judgments that that criterion invokes.[54] Interestingly, the majority's conclusion that the

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49. *See* Snow, *supra* note 2, at 1675–77.

50. *Id.*

51. *Id.*

52. The morality to which I refer is that which Professor Lon Fuller describes as the "morality of aspiration." *See* LON L. FULLER, THE MORALITY OF LAW 5, 8–9 (rev. ed. 1969).

53. *See In re* Tam, 808 F.3d 1321, 1338 (Fed. Cir. 2015) (en banc), *cert. granted*, 137 S. Ct. 30 (2016).

54. *See id.*

disparagement bar targets expressive content is not remarkable, for whenever the PTO denies registration on the grounds that a mark does not satisfy any criterion for protection under the Lanham Act—not just the morality bars—the PTO is targeting expressive content—namely, the expression of the source's identity.[55] What is remarkable, though, is a statement by the majority concerning "moral judgments."[56] In particular, the majority analyzed two marks for which the PTO denied registration, HEEB and SQUAW VALLEY, and in doing so, the majority referred to the moral judgments that the government made in denying registration:

> It was these expressive messages [in the HEEB and SQUAW VALLEY marks] that the government found objectionable, and that led the government to refuse to register or to cancel the marks. In doing so, the government made *moral judgments* based solely and indisputably on the marks' expressive content. Every single time registration is refused or cancelled pursuant to the disparagement provision, it is based upon a determination by the government that the expressive content of the message is *unsuitable* because it would be viewed by the referenced group as disparaging them.[57]

Importantly, to conclude that the PTO targeted expressive content in HEEB and SQUAW VALLEY, the majority did not need to cite that the government made "moral judgments" or found the message "unsuitable." The majority could have explained that in choosing these marks, the markholders were communicating both the identity of the good's source and a message about the referenced group such that the bar against disparaging marks was targeting expressive content. Indeed, the topic sentence of the paragraph containing the above quotation indicates the majority's disapproval of only expressive content serving as a basis for denial—not of the government's employment of moral judgments.[58] The presence of moral judgments thus seems unnecessary to arrive at the conclusion that the disparaging bar targets expressive content. That the government makes moral judgments or determinations of unsuitability adds nothing to further the conclusion that the disparaging bar targets expression.

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55. *See* Snow, *supra* note 2, at 1648–55. *See generally* 17 U.S.C. 1052 (2012).

56. *See Tam*, 808 F.3d at 1338.

57. *Id.* (emphases added).

58. The topic sentence of the paragraph states: "Importantly, *every time* the PTO refuses to register a mark under § 2(a) [which sets forth the morality bars], it does so because it believes the mark conveys an expressive message—a message that is disparaging to certain groups." *Id.*

Why, then, does the majority refer to the government making "moral judgments" as well as the government's determination that content is "unsuitable"? Given that these facts are not necessary for the majority's conclusion about expressive content, these facts suggest an additional reason for condemning the disparagement bar. That is, the majority's calling attention to moral judgments suggests that the majority finds further reprehensibility in the disparagement bar. So apparently for the majority, the PTO's actions are worse than merely targeting expressive content because the PTO is making "moral judgments" to decide what is "unsuitable." Hence, trademark registration represents the government imposing its own morality, and that possibility the majority simply cannot accept.

Assuming that this interpretation of the majority's position is correct, I do not believe that the majority's position is altogether groundless. Moral values can be diverse across a culturally diverse society. This diversity of moral values is evident even among the PTO examiners who apply the disparagement bar as they have manifested inconsistent understandings of what is suitable and what is not.[59] Moral judgments can be subjective and personal. Consequently, the government should not impose its view of morality on the masses; more specifically, the government should not be defining whether speech content is moral enough to receive a property benefit, especially where the content demonstrates sufficient value to receive constitutional protection as speech. The majority's objection to moral judgments thus makes sense. Moral views vary, so each individual should be able to make moral judgments for himself. The government should not be a gatekeeper for trademark morality.

Under this anti-moral-judgment argument, a laissez-faire approach to trademark registration seems appropriate. Rather than the government imposing its morals, consumers should decide for themselves whether they find a given mark offensive. If a mark were so disparaging that consumers disagreed with its content, consumers would not purchase the product that corresponds to the mark; the mark owner, in turn, would fail to realize a commercial benefit because of the disparaging content, and thereby he would lack incentive to continue using the disparaging mark. On the other hand, if a sufficient number of consumers were to purchase a product

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59. *See id.* at 1342 n.7 (exemplifying the inconsistencies in mark registrations and denials, such as denying protection for HAVE YOU HEARD SATAN IS A REPUBLICAN as a disparaging mark but registering the mark THE DEVIL IS A DEMOCRAT).

containing an otherwise "unsuitable" mark, the mark's success in the marketplace would demonstrate that the government's moral assessment was incorrect—that a sufficient amount of the public does approve of the message.[60] Popular opinion would demonstrate the suitability of a mark. Therefore, if the mark offends the public, the mark will cause failure in the marketplace, whereas if the mark does not offend enough of the public, the mark will not impede commercial success. This laissez-faire approach prevents one government official's view from standing in the way of the public's choice.

B. Participation in Commerce

Although this laissez-faire approach promotes individual choice, it does so at the cost of a collective benefit in the forum of commerce. As discussed below, that cost is great, and indeed, too great to justify.

Commerce, of course, is about engaging in transactions that may provide economic benefit. But more than that, commerce represents a system that causes social interaction between people who hold disparate views on important issues, coming from different backgrounds and cultures.[61] Commerce creates bridges across deeply held and opposing beliefs. It tempers extreme passions in exchange for a practical outcome. Indeed, people provide and receive benefits to and from those with whom they disagree on every other issue. Religion, ideology, and political party all yield to commerce. Commerce, then, does more than simply provide economic benefit. It represents a means for promoting civil dialogue and social agreement across disparate belief systems. It is integral to the fabric of a peaceful society.[62]

Immoral and disparaging marks tend to disrupt this social benefit of a well-functioning commercial system. Those marks tend to create an atmosphere and an environment that thwarts universal participation in commercial transactions. Specifically, a mark that

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60. This statement perhaps oversimplifies the analysis. A sizeable minority may be sufficient to sustain a disparaging mark such that the government's moral assessment of the public's view may correctly reflect the majority view even though a minority of the public continues to make the mark profitable. In that situation, there may be lost opportunities for commercial transactions by the majority who find a mark offensive. For a fuller discussion, see Snow, *supra* note 2, at 1671–72.

61. *See Commerce*, BLACK'S LAW DICTIONARY (10th ed. 2014).

62. *Cf.* Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, 666–67 (1996) (observing that "[t]he relationship between free trade and peace has been noted for centuries by observers such as Immanuel Kant, Charles Montesquieu, and John Stuart Mill" (footnotes omitted)).

disparages a group sends a message that the group is not respected. Likewise, a mark that is pornographically immoral or scandalous sends a message that women are to be viewed as objects, devoid of dignity or respect as persons. Hence, disparaging and immoral content suggests that certain groups of persons are not respected and lack human dignity. Within the context of a trademark, this message of disrespect and indignity reduces the effectiveness of the commercial forum. The commercial transaction, which is supposed to facilitate universal cooperation, becomes a means to promote disrespect and indignity towards certain groups. Immoral and disparaging marks are thus contrary to the socially beneficial purpose of a commercial system.

Given that these marks undermine this social benefit of commerce, how should the law treat these marks? A law that facilitates registration of immoral and disparaging marks implies that the government accepts—even assists—the sort of speech that disrupts the fundamental societal benefit of a well-functioning commercial system. In the absence of the morality bars, commerce would no longer represent a forum that invites universal participation. Even assuming that some individual consumers would realize utility from immoral and disparaging marks, that increase in individual utility would be at the expense of the collective benefit that comes from a wholesome, non-offensive forum of trade. The law, then, should bar immoral and disparaging marks because they undermine the social benefit of commerce: a means for facilitating cooperation by persons holding divergent beliefs and backgrounds.

C. The Market

Not only do the morality bars draw support from the social-benefit perspective, they also draw support from a market perspective. The morality bars prevent market failures in the general commercial marketplace. Every market is subject to failures. To prevent failures, the government intervenes in a variety of markets: environmental, financial, transportation, education, and health to name only a few.[63] Even the marketplace of ideas is subject to government intervention.[64] The marketplace for commercial trade is no different.

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63. *See, e.g.*, Len M. Nichols, *Government Intervention in Health Care Markets Is Practical, Necessary, and Morally Sound*, 40 J.L., MED. & ETHICS 547, 550–51 (2012) (providing the economic justifications for state intervention within the health care market).

64. *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 965 (1978) ("Just as real world conditions prevent the laissez-faire

It, too, is subject to market failures. The government must regulate commerce—and specifically marks indicating source—to prevent an inefficient allocation of resources.

The benefit of government intervention in trademark law is clear. Suppose that two companies choose the same mark to represent the same good. Consumers would not easily be able to distinguish the two companies resulting in some consumers holding imperfect information about companies and their goods. The possibility of such imperfect information would increase the transaction cost of correctly identifying a source of goods. Market inefficiencies would thus result. Hence, to alleviate this failure, the government restricts the use of trademarks.

The morality bars in trademark law alleviate other potential market failures. Consider a disparaging mark: Neither the producer nor the consumer of the mark (and the corresponding good) likely account for the decrease in utility to members of the group that the mark disparages. In that situation, a negative externality may result from the disparagement.[65] The producer and consumer would fail to account for the cost of the disparaging mark to the group. This failure would result in the producer and consumer overvaluing the mark. The market would thereby fail to capture the decrease in social utility that results from the disparagement.

Consider a scandalously pornographic mark: It is possible that pornographic marks may lead some consumers to addictive behaviors that harm their marriages and families.[66] Where that possibility is

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economic market—praised as a social means to facilitate optimal allocation and production of goods—from achieving the socially desired results, critics of the classic marketplace of ideas theory point to factors that prevent it from successfully facilitating the discovery of truth or generating proper social perspectives and decisions."); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5, 15–17 (describing the laissez-faire economic model that free-speech theory follows and criticizing that model for employing faulty assumptions); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 44 (2000) (observing that speech regulation can improve the functioning of the speech market to increase the aggregate amount of choice among competing ideas).

65. A negative externality represents a cost incurred by a third party to a transaction. *See Externality*, BLACK'S LAW DICTIONARY, *supra* note 61. The first and second parties directly involved in the transaction fail to account for, or internalize, the cost that the third party indirectly incurs from the transaction.

66. *See* Kirk Doran & Joseph Price, *Pornography and Marriage*, 35 J. FAM. & ECON. ISSUES 489, 495–96 (2014) (finding that the use of pornographic material is

likely, it is further possible that a consumer of the pornographic mark may not realize the likelihood of those consequences. In that situation, the consumer would base his decision to consume pornography on imperfect information: he would fail to account for the likelihood of negative consequences. This failure could also lead the consumer to overvalue the mark. The consumer would value only the immediate consequence of consumption, failing to account for the long-term effects on his marriage and family relationships. Hence, imperfect information about pornographic marks could lead to consumers overvaluing such marks, producing an inefficient outcome.

Disparaging and immoral marks may therefore be overvalued due to market failure. In an attempt to correct this problem, the government refuses to extend exclusive rights to disparaging marks, which reduces their value for producers. The morality bars thus represent a means for the government (even if paternalistic) to correct failures in the commercial marketplace. Nevertheless, even without exclusive rights in those marks, producers may still value them if consumer demand for the marks is sufficiently high. So even in the absence of the exclusive rights, producers may continue to use disparaging or immoral marks. For example, if the PTO denies protection for REDSKINS as a disparaging mark, the Washington football organization may nevertheless continue to use the mark because of the high value its fans place on it. For the football organization, the market demand for the REDSKINS mark might outweigh the absence of exclusive rights in that mark. Thus, even in the absence of enforceable trademark rights, market participants might still realize utility from an offensive mark but only if those participants place a sufficiently high value on it. In that scenario, the market would overcome Congress's attempt to curb offensive marks.

D. The Constitutionality of Morality

That the morality bars are justified as a matter of policy does not imply that they are constitutional. Does Congress have constitutional authority to legislate the morality bars? The simple answer is yes insofar as Congress is acting under an enumerated power (i.e., the Commerce Clause)[67] and does not violate a fundamental right.[68] In

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associated with less marital satisfaction and summarizing other research on pornography's effect on marriages and families).

67. Congress's trademark authority is supported by the Constitution's Commerce Clause. U.S. CONST. art. 1, § 8, cl. 3; *see In re* Trade-Mark Cases, 100 U.S. 82, 94–96 (1879).

Sections B and C of this Part, I explain how the morality bars promote the commercial marketplace, indicating that Congress is acting within the scope of the Commerce Clause.[69] And as I explain in Part I, free-speech doctrines suggest that the morality bars do not violate the fundamental right of free speech.[70] Indeed, the morality bars do not resemble the sort of legislation that, under a morality justification, has been held to violate a fundamental right. The morality bars, for instance, do not withhold a benefit from a group in a way that creates a social stigma.[71] They do not criminalize private behavior,[72] nor do they compel individuals to adopt a moral view.[73] Rather, the morality bars represent Congress exercising its right "to maintain a decent society" within the forum of commercial trade—a right that the Supreme Court has recognized in other contexts.[74]

On further reflection, we might ask whether legislation that calls for the government to make moral judgments necessarily implies a violation of a fundamental right. This seems to be the position of the *Tam* majority. Indeed, the majority's condemnation of moral judgments suggests that it believed there could be no justification for the disparagement bar. Apparently for the majority, if morality legislation affects speech content, there must be a speech violation.

The apparent position of the majority might be interpreted as raising two very different questions. The majority's position may raise the question of whether Congress may legislate a moral view without any other justification for the law other than the moral stance of the popular majority. On the other hand, the majority's position may

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68. *See* Meyer v. Nebraska, 262 U.S. 390, 401 (1923) ("That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected.").

69. *See* Snow, *supra* note 2, at 1668–70.

70. *See generally id.*

71. *Cf.* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) ("The avowed purpose and practical effect of the [Defense of Marriage Act] are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.").

72. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.").

73. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) ("The First Amendment does not permit [the government] to impose special prohibitions on those speakers who express views on disfavored subjects.").

74. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59–60 (1973) ("[T]here is a 'right of the Nation and of the States to maintain a decent society . . . .'" (quoting Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting))).

raise a very different question: whether Congress may rely on considerations of morality in furtherance of a commercial purpose. The answer to the first question may be that the legislated moral view implies a violation of a fundamental right or, at least, lies outside the authority of Congress. That first question, however, is not relevant to the morality bars. The morality bars do not represent legislation that exists solely to implement a moral view. They represent legislation that is justified by a reason central to the proliferation and efficiency of the commercial marketplace, and that reason relies on considerations of morality.[75]

The answer to the second question—whether Congress may rely on considerations of morality in furtherance of a commercial purpose—seems clear under precedent and practice. The presence of morality does not imply the absence of a context that would constitutionally justify a law. Moral judgments often shape law. For example, the law permits school districts to choose curriculum that teaches decency and civility to students, and moral judgments define those standards.[76] Another example is the Federal Communications Commission regulating speech over publicly available radio and television stations. Speech within this context is subject to prohibitions of indecent and profane content, and moral judgments are necessary to define indecency and profanity.[77] Or consider state laws that restrict persons from engaging in indecent exposure. Moral judgments are necessary to give meaning to public decency law.[78] And as a general matter, the Supreme Court has recognized that a

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75. As stated in Part I, where marks offend moral views, the offense threatens the collective benefit of the commercial marketplace. *See supra* Sections I.A–B.

76. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 864, 871 (1982) (plurality opinion) (recognizing "that local school boards must be permitted to establish and apply their curriculum in such a way as to transmit community values, and that there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political" and to that end, noting the "discretion of a local school board to choose books to *add* to the libraries of their schools" (internal quotation marks omitted)).

77. *See* FCC v. Pacifica Found., 438 U.S. 726, 740, 748–51 (1978) (finding that "the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality").

78. *See* United States v. Biocic, 928 F.2d 112, 115–16 (4th Cir. 1991) ("The important government interest [in the public indecency statute] is the widely recognized one of protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies that traditionally in this society have been regarded as erogenous zones. These still include (whether justifiably or not in the eyes of all) the female, but not the male, breast.").

legislature may enact laws to promote its social interest in "*order and morality*."[79] Morality, then, does not diminish the strength of a context that would justify a speech restriction. More generally, morality does not imply a violation of a fundamental right.

So, may Congress refrain from extending a commercial benefit to businesses that use expletives, hate speech, and pornography in their offers of sale? The answer is simple: Because the marketplace is more conducive to commercial transactions in the absence of these sorts of expressions, the government may permissibly discourage their use—regardless of the fact that moral judgments must be made to define the expressions. Merely because expletives, hate speech, and pornography are defined by moral judgments does not make them immune from commercial regulation.

CONCLUSION

The morality bars neither offend the First Amendment nor reflect an unconstitutional basis for law. As to speech concerns, they are no more restrictive of trademark speech than any of the other content-based restrictions on trademark registration. The morality bars are permissible under the speech doctrines of government subsidy, commercial speech, or limited-public forum. As a matter of general constitutional interpretation, the Constitution does not preclude Congress from relying on morality considerations if those considerations do not violate a fundamental right. Indeed, moral considerations are integral to many laws, even laws that affect speech. Trademark registration is no different.

Moreover, the morality bars reflect good policy. Although they do represent the government interfering with individuals making their own choices regarding the value of immoral, scandalous, or disparaging marks, that interference is well justified. First, the morality bars ensure a collective societal benefit of commerce—i.e., they promote broad participation by members of society who hold diverse beliefs and backgrounds. Second, the morality bars cure market failures that prevent individual consumers from realizing the

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79. Roth v. United States, 354 U.S. 476, 485 (1957) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (emphasis added in *Roth*)); *e.g.*, McGowan v. Maryland, 366 U.S. 420, 436 (1961) ("Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and *moral* debasement which comes from uninterrupted labor." (emphasis added) (quoting Soon Hing v. Crowley, 113 U.S. 703, 710 (1885))).

most efficient valuation of marks. Like any other instance of government intervention in the marketplace, the cost to individual autonomy must be weighed against collective and individual benefits that the intervention may achieve. The benefits here outweigh the costs. The morality bars are justified.