Disparaging Trademarks: Defined and as Speech

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One of the two trademark registration prohibitions based more in morality rather than competition concerns, the disparaging trademark prohibition has recently rocketed to prominence because of the petition to cancel brought by Suzan Harjo and several other Native Americans against the Washington football team's trademarks. In truth, the cancellation action began in 1992. Now, it is spearheaded by Amanda Blackhorse and several others but did not reach national recognition until the past year or two, with numerous sports outlets debating whether to continue to use the full, and claimed racist, name.

Similarly, Congress added the disparaging prohibition in 1946, but it was the Harjo matter that solidified a new test for what it means to have a racially disparaging mark. And it did so in reference to the other registration prohibition based in morality, scandalousness. As I argue elsewhere, this conflation led to a fundamentally flawed appreciation of disparaging. Without exploring why this particular prohibition was enacted as well as what it can do to protect non-majority voices, courts are acting in a vacuum, and the Supreme Court denied certiorari in a recent attempt to gain clarity.

I propose that the test for disparaging not only should be broader, but it needs to be framed in a way to address concerns of reinforcing stereotypes and the associated harms to various communities. Further, this test should be distinct from the test for harm to institutions, like Greyhound, and should apply to other identity groups that lack the market power to force a change, such as smaller religions and LGBTIQA folks. Finally, I want to use this discussion to further the conversation on the nature of trademark as commercial speech and why such regulations do not harm fundamental free speech, contrary to the position of groups like the Stop Islamisation of America group, a recognized hate group, who has petitioned for cert because their trademark was denied as disparaging.