
*First Amendment — Freedom of Speech —
Trademarks — Iancu v. Brunetti*

In 1946, Congress passed the Lanham Act,¹ which regulates the registration of trademarks and contains provisions limiting certain marks from being federally registrable.² In 2017, the Supreme Court held in *Matal v. Tam*³ that one such provision barring “disparaging” trademarks comprised unconstitutional viewpoint discrimination in violation of the First Amendment.⁴ The Court was clear that this finding was fatal⁵: the Court often disposes of cases with little to no analysis after a finding of viewpoint discrimination, the most egregious subset of content discrimination.⁶ However, the Court did not answer whether trademarks are commercial speech or whether they may fall into a category such as a government program or limited public forum.⁷ Last Term, in *Iancu v. Brunetti*,⁸ the Supreme Court struck down a similar provision of the Lanham Act barring “immoral or scandalous” marks as facially invalid,⁹ narrowly holding that the provision also comprised viewpoint discrimination.¹⁰ *Iancu* sidestepped a speech-categories analysis by failing to engage with the reasoning of the lower court. As a result, the proper statutory approach to trademark restrictions remains unclear.

This case arose after Erik Brunetti founded his clothing brand, “FUCT,” in 1990, and attempted to register the trademark with the United States Patent and Trademark Office in 2011.¹¹ The examining attorney found that Brunetti’s mark constituted “immoral or scandalous

¹ 15 U.S.C. §§ 1051–1072, 1091–1096, 1111–1127, 1141–1141n (2012).

² *Id.*; see also *id.* § 1052.

³ 137 S. Ct. 1744 (2017).

⁴ *Id.* at 1751.

⁵ See *id.*; see also *id.* at 1765 (Kennedy, J., concurring in part and concurring in the judgment).

⁶ See Maura Douglas, Comment, *Finding Viewpoint Neutrality in Our Constitutional Constellation*, 20 U. PA. J. CONST. L. 727, 728 (2018) (explaining that the Court in such cases will state that strict scrutiny applies but oftentimes not delve into a strict scrutiny analysis).

⁷ See *Matal*, 137 S. Ct. at 1760–64 (plurality opinion); *id.* at 1767–68 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 1769 (Thomas, J., concurring in part and concurring in the judgment). The Court did clarify that trademarks are not government speech. *Id.* at 1760 (majority opinion).

⁸ 139 S. Ct. 2294 (2019).

⁹ While “immoral” and “scandalous” are two separate bars according to the text of the statute, 15 U.S.C. § 1052 (2012), the Court used the term “immoral or scandalous” as a singular bar because the terms were lumped together as one bar in this case and have been applied as one bar traditionally, see *In re Brunetti*, 877 F.3d 1330, 1336 (Fed. Cir. 2017).

¹⁰ 139 S. Ct. at 2299–302.

¹¹ See *Brunetti*, 877 F.3d at 1337; see also U.S. Trademark Application Serial No. 85/310,960 (filed May 3, 2011). Trademarks can be used in interstate commerce regardless of registration, but certain benefits accompany federal registration. Among other benefits, federal registration is prima facie evidence of the validity of the mark, 15 U.S.C. § 1115(a); it serves as “constructive notice of [the registrant’s] claim of ownership,” *id.* § 1072; and it allows trademark holders to bring actions for infringement, *id.* § 1114.

matter,”¹² which section 1052(a) of the Lanham Act (section 2(a)) specifically forbids.¹³ He thus “refused to register the mark.”¹⁴ Brunetti appealed the decision, and the Trademark Trial and Appeal Board affirmed.¹⁵ The Board highlighted that dictionary definitions characterized the word “fuck” as “offensive” and “vulgar.”¹⁶ As such, the Board found “FUCTION” to fall under the “immoral or scandalous” bar of the Lanham Act, rendering the mark unregistrable.¹⁷

Brunetti appealed to the Federal Circuit, which reversed the Board’s decision.¹⁸ Writing for the court, Judge Moore¹⁹ conceded that the mark was “[v]ulgar and [t]herefore [s]candalous.”²⁰ Yet she found that the statutory bar on immoral or scandalous marks itself discriminated on the basis of content in violation of the First Amendment.²¹ Judge Moore set aside the question of viewpoint discrimination²² to address two of the government’s main arguments²³: (1) that trademark registration constitutes either a government subsidy program or a limited public forum and is thus subject to a “less exacting degree of scrutiny”;²⁴ and (2) that trademarks are purely commercial speech subject to only an intermediate level of scrutiny.²⁵ Judge Moore rejected the government’s characterization of trademark registration²⁶ and held that because section 2(a) targeted the expressive content of speech, strict scrutiny applied.²⁷ She further noted that section 2(a)’s “immoral or scandalous” bar would fail

¹² *Brunetti*, 877 F.3d at 1337.

¹³ 15 U.S.C. § 1052(a).

¹⁴ *Brunetti*, 877 F.3d at 1337.

¹⁵ *Brunetti*, No. 85310960, at 3 (T.T.A.B. 2014).

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 9–12. The Board reiterated that the analysis of whether a mark is scandalous needs to be from the viewpoint of “a substantial composite of the general public, and . . . in terms of contemporary attitudes,” *id.* at 4.

¹⁸ *Brunetti*, 877 F.3d at 1335.

¹⁹ Judge Moore was joined by Judge Stoll, and Judge Dyk concurred in the judgment.

²⁰ *Id.* at 1337; *see also id.* at 1337–40.

²¹ *Id.* at 1341–42.

²² *Id.* at 1341.

²³ *Id.* at 1341–49.

²⁴ *Id.* at 1342. In government-subsidy cases, content-based discrimination may be allowed so long as the regulation is reasonable and viewpoint neutral. *See Rust v. Sullivan*, 500 U.S. 173, 192–200 (1991). Content-based regulations may also be allowed in limited public forums. *See Douglas, supra* note 6, at 735. In declining to apply these categories, the court highlighted that “[t]rademark registration does not implicate Congress’ power to spend funds,” and that applicants actually have to expend funds to receive registration benefits — such benefits are “not analogous to [the] grant of federal funds.” *Brunetti*, 877 F.3d at 1344. It also noted that trademark registration does not map neatly onto public forum analysis because trademarks are not “tethered to government properties,” *id.* at 1347 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995)), and the registration list does not change that analysis, *id.* at 1348.

²⁵ *Brunetti*, 877 F.3d at 1342.

²⁶ *Id.* at 1342–48.

²⁷ *Id.* at 1348–49.

even under the intermediate scrutiny dictated by *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.²⁸

The Supreme Court affirmed the judgment.²⁹ Writing for the Court, Justice Kagan³⁰ ignored the appellate court's reasoning and found that the bar amounted to viewpoint discrimination.³¹ She began her analysis by invoking the Court's precedent, noting that "if a trademark registration bar is viewpoint-based, it is unconstitutional."³² In deciding whether the "immoral or scandalous" provision constituted such viewpoint discrimination, Justice Kagan first turned to the dictionary definition of the words.³³ She found that "the Lanham Act permit[ted] registration of marks that champion[ed] society's sense of rectitude and morality, but not marks that denigrate[d] those concepts."³⁴ Similarly, it "allow[ed] registration of marks when their messages accord[ed] with, but not when their messages def[ie]d society's sense of decency or propriety."³⁵ Justice Kagan concluded that these two "overlapping terms" made for a statute that "on its face, distinguish[ed] between two opposed sets of ideas," resulting in "facial viewpoint bias" and "viewpoint-discriminatory application."³⁶ Justice Kagan proceeded to illustrate how the statute had been applied in a viewpoint-discriminatory manner — for example, the Patent and Trademark Office had denied marks promoting drug use but had approved marks promoting sobriety.³⁷

Justice Kagan rejected the government's argument that the Court should have applied a limiting construction to render the provision constitutional.³⁸ She noted the avoidance canon "applies only when ambiguity exists."³⁹ It forbids effectively rewriting a statute, which is what the Court would have had to do.⁴⁰ Justice Kagan likewise rejected the

²⁸ 447 U.S. 557 (1980); see *Brunetti*, 877 F.3d at 1350–55. Under *Central Hudson*, courts ask "whether (1) the speech concerns lawful activity and is not misleading; (2) the asserted government interest is substantial; (3) the regulation directly advances the government interest; and (4) whether the regulation is 'not more extensive than necessary to serve that interest.'" *Id.* at 1350 (quoting *Central Hudson*, 447 U.S. at 566). The court neglected to decide whether trademarks are commercial speech. Nonetheless, the court held that the immoral or scandalous bar failed prongs two, three, and four of *Central Hudson*. *Id.* at 1350–54.

²⁹ *Brunetti*, 139 S. Ct. at 2302.

³⁰ She was joined by Justices Thomas, Ginsburg, Alito, Gorsuch, and Kavanaugh.

³¹ See *Brunetti*, 139 S. Ct. at 2297.

³² *Id.* at 2299 (first citing *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (majority opinion); then citing *id.* at 1762–63 (plurality opinion); and then citing *id.* at 1751, 1753 (majority opinion)).

³³ See *id.* at 2299–300.

³⁴ *Id.* at 2299. This is the synthesis of the definitions Justice Kagan articulated for "immoral."

³⁵ *Id.* at 2300. This is the synthesis of the definitions Justice Kagan articulated for "scandalous."

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 2301–02. The government argued that the Court could also read the provision as a bar on marks "offensive [or] shocking . . . because of their *mode* of expression" such as profanity. *Id.* at 2301.

³⁹ *Id.*

⁴⁰ *Id.* (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009)).

government’s “overbreadth doctrine” argument that the bar’s “unconstitutional applications [were] not substantial relative to the statute’s plainly legitimate sweep.”⁴¹ She highlighted the doctrine’s inapplicability to viewpoint-discrimination cases and noted that the provision was “substantially overbroad”: “There are a great many immoral and scandalous ideas in the world,” and the provision “cover[ed] them all.”⁴²

Justice Alito concurred.⁴³ He agreed that the “immoral or scandalous” bar was viewpoint discrimination, which he characterized as “poison to a free society.”⁴⁴ But he noted the possibility for Congress to “adopt[] a more carefully focused statute that [would preclude] the registration of marks containing vulgar terms that play no real part in the expression of ideas.”⁴⁵ He further opined that “FUCT” could “be denied registration under such a statute.”⁴⁶

Chief Justice Roberts concurred in part and dissented in part.⁴⁷ First, he agreed with the majority that the use of the word “immoral” in the provision was not susceptible to a narrowing construction and was thus viewpoint discriminatory.⁴⁸ However, he stated that the “scandalous” portion of the provision could “be read more narrowly to bar only marks that offend because of their *mode* of expression.”⁴⁹ The Court could have read the provision as barring “marks that are obscene, vulgar, or profane” on their own, not because of ideas they express.⁵⁰ He explained that construing “scandalous” in this way could not “offend the First Amendment” because registrants could still use their marks in commerce; the government would simply not extend them the benefits accompanying registration.⁵¹ He further clarified that the government has an interest in “not associating itself” with scandalous trademarks.⁵²

Justice Breyer concurred in part and dissented in part.⁵³ He cautioned that the Court’s “precedents warn . . . against interpreting statutes in ways that would likely render them unconstitutional.”⁵⁴ The

⁴¹ *Id.* at 2302 (internal quotation marks omitted) (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)). The overbreadth doctrine upholds statutes that could have unconstitutional applications on the basis that such applications are insubstantial. *See id.*

⁴² *Id.*

⁴³ *Id.* (Alito, J., concurring).

⁴⁴ *Id.*

⁴⁵ *Id.* at 2303.

⁴⁶ *Id.*

⁴⁷ *Id.* (Roberts, C.J., concurring in part and dissenting in part).

⁴⁸ *Id.*

⁴⁹ *Id.* (emphasis added).

⁵⁰ *Id.*

⁵¹ *Id.* at 2303–04. While not explicitly doing so, Chief Justice Roberts seemed to be making a *Rust v. Sullivan*, 500 U.S. 173 (1991), government subsidy type of argument. *See supra* note 24.

⁵² *Brunetti*, 139 S. Ct. at 2303 (Roberts, C.J., concurring in part and dissenting in part).

⁵³ *Id.* at 2304 (Breyer, J., concurring in part and dissenting in part).

⁵⁴ *Id.* (first citing *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 397 (1988); and then citing *United States v. 12 200-ft. Reels of Super 8MM. Film*, 413 U.S. 123, 130 n.7 (1973)).

Court *could* have read the “scandalous” portion of the provision in a way that would render it constitutional.⁵⁵ In reaching this conclusion, Justice Breyer explained that the Court should treat the categories of speech in its First Amendment jurisprudence not as “outcome-determinative rules, but instead as rules of thumb.”⁵⁶ Rather than “rigidly” adhering to these speech categories, he would have applied a “proportionality analysis.”⁵⁷ Such an analysis appeals to the underlying values of the First Amendment by weighing the harm a provision poses to free speech values against the government interests and objectives underlying the provision.⁵⁸ Applying his balancing test, Justice Breyer would have found in favor of upholding the “scandalous” portion of the bar.⁵⁹ Unlike Chief Justice Roberts, Justice Breyer would have avoided a categories analysis *entirely* and upheld this portion of the provision under his balancing approach,⁶⁰ especially considering the government’s interest in protecting society and the “sensibilities of children.”⁶¹

Justice Sotomayor concurred in part and dissented in part.⁶² She warned that the decision would “beget unfortunate results,” because the government would no longer have a “statutory basis to refuse . . . registering the most vulgar, profane, or obscene words and images imaginable.”⁶³ Rather than reach such a result, she would have applied a “narrowing construction to the term ‘scandalous’ and accordingly reject[ed] . . . Brunetti’s facial challenge” to that portion of the provision.⁶⁴ Justice Sotomayor agreed with the majority that the Court could not read “immoral” in a way that would render that portion of the provision constitutional.⁶⁵ But she argued that “scandalous” offered more

⁵⁵ *Id.* He would have read it as barring only “highly vulgar or obscene modes of expression.” *Id.* (internal quotation marks omitted) (quoting *id.* at 2310 (Sotomayor, J., concurring in part and dissenting in part)).

⁵⁶ *Id.* (Breyer, J., concurring in part and dissenting in part) (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2224 (2015)). Justice Breyer explained that the categories of speech were unhelpful here, because trademark registration did not neatly fall into categories like forum analysis or regulation of government speech. *Id.* at 2305–06.

⁵⁷ *Id.* at 2306.

⁵⁸ *See id.* (citing *Reed*, 135 S. Ct. at 2235–36 (Breyer, J., concurring in the judgment)).

⁵⁹ *See id.* at 2306–08. Justice Breyer argued that such a bar would still leave rejected applicants free to use their marks in interstate commerce, and added that the “mission” of trademark law necessarily imposes limitations. *Id.* at 2306. He also noted that the government has an interest in not associating itself with “vulgar[ity]” and that “scientific evidence suggests that certain highly vulgar words have a physiological and emotional impact” on people such that the government has an interest in protecting society from their widespread use. *Id.* at 2307.

⁶⁰ *Id.* at 2308.

⁶¹ *Id.* at 2307 (citing *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 743 (1996) (plurality opinion)).

⁶² *Id.* at 2308 (Sotomayor, J., concurring in part and dissenting in part). Justice Breyer joined her opinion.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 2309.

ambiguity and latitude for applying the avoidance canon than the majority recognized.⁶⁶ A narrow interpretation of “scandalous,” was reasonable if one looked at this word in context, reading the other words in the statute as “constrain[ing] its scope.”⁶⁷ Reading “scandalous” and “immoral” together “collapse[d]” the two,⁶⁸ making one essentially superfluous, which was not Congress’s intent.⁶⁹ Instead, the Court should have treated them “as each holding a distinct, nonredundant meaning, with ‘immoral’ covering marks that are offensive because they transgress social norms, and ‘scandalous’ covering marks that are offensive because of the mode in which they are expressed.”⁷⁰ Justice Sotomayor went on to defend her limiting construction as “both appropriate . . . and consistent with past precedent.”⁷¹ Finally, she argued that interpreting the “scandalous” portion of the provision as a bar on shocking or offensive *modes* of expression would be constitutionally permissible as a “reasonable, viewpoint-neutral, content-based regulation.”⁷² Trademark registration, she argued, is tantamount to either a limited public forum or government subsidy, both of which allow such reasonable content-based regulation.⁷³ Justice Sotomayor’s opinion therefore differed from Justice Breyer’s in that she would still have tried to situate trademark within the larger jurisprudence of speech categories.⁷⁴ Even further, Justice Sotomayor was willing to opine on where trademark may fall among these categories, unlike Chief Justice Roberts.⁷⁵

The majority, however, failed to clarify where trademark registration falls within traditional First Amendment speech categories, leaving the Lanham Act’s future unclear. The Lanham Act narrowly defines trademarks as speech serving a source-identification function in the marketplace. Given this definition the Lanham Act inevitably contains content-based distinctions. As the lower court invalidated the “immoral

⁶⁶ *See id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 2311.

⁶⁹ *Id.* at 2310. Justice Sotomayor pointed out that “scandalous” and “immoral” were separated by the unrelated word “deceptive” in the statute, *id.* at 2310, which demonstrated that the terms were not necessarily “mutually reinforcing,” *id.* at 2311.

⁷⁰ *Id.*

⁷¹ *Id.* at 2312; *see also id.* at 2312–13.

⁷² *Id.* at 2317.

⁷³ *Id.* Justice Sotomayor distinguished the trademark-registration context from the context of *Cohen v. California*, 403 U.S. 15 (1971), which was criminal. *Brunetti*, 139 S. Ct. at 2314–15 (Sotomayor, J., concurring in part and dissenting in part).

⁷⁴ *Compare Brunetti*, 139 S. Ct. at 2317 (Sotomayor, J., concurring in part and dissenting in part), *with id.* at 2304–08 (Breyer, J., concurring in part and dissenting in part).

⁷⁵ *Compare id.* at 2316–17 (Sotomayor, J., concurring in part and dissenting in part), *with id.* at 2303 (Roberts, C.J., concurring in part and dissenting in part) (noting that where trademark falls within First Amendment precedent was still unsettled, but that the “scandalous” portion of the provision would be constitutional “regardless” of where within First Amendment categories trademark is “best conceived”).

or scandalous” bar for being content based, it was crucial that the Court engage with this reasoning and categorize trademark within First Amendment jurisprudence. Doing so may have settled that trademark can qualify as a limited public forum or a government program, which would allow reasonable content-based distinctions. Yet, by ignoring this important issue, the Court left the future of trademark regulation unclear and the Lanham Act potentially inoperative.

Trademarks as speech are limited to their source-identification function. While trademarks may communicate different things, “the only thing the government protects *as a trademark* is the communication ‘this symbol stands for a particular producer.’”⁷⁶ The Lanham Act encapsulates this purpose by narrowly defining “trademark” as a mark used “*to identify and distinguish [one’s] goods . . . from those manufactured or sold by others and to indicate the [goods’] source.*”⁷⁷ Tied to this definition, trademark law performs the important function of reducing transaction costs associated with “shopping and making purchasing decisions.”⁷⁸ The government therefore “has a role to play in creating a scheme whereby consumers can benefit from trademarks in the marketplace.”⁷⁹ Trademark bars thus ensure that trademarks perform this limited source-identifying function.⁸⁰

In light of a trademark’s function, content-based distinctions are necessary to preserve the trademark system’s efficiency.⁸¹ Registration “is inherently about the content of the registrant’s mark”⁸² because such content “is important to figuring out if a symbol is capable of being a trademark.”⁸³ For example, “APPLE lacks trademark significance when applied to the fruit instead of computers,” and therefore would

⁷⁶ Rebecca Tushnet, *The First Amendment Walks into a Bar: Trademark Registration and Free Speech*, 92 NOTRE DAME L. REV. 381, 395 (2016). Courts have recognized this limited function of trademarks. See, e.g., *Gorenstein Enters., Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 435 (7th Cir. 1989) (explaining that a trademark’s purpose is “to identify a good or service to the consumer”); cf. *El Greco Leather Prods. Co. v. Shoe World, Inc.*, 806 F.2d 392, 395 (2d Cir. 1986) (recognizing a prominent value of trademark protection as the right to control quality).

⁷⁷ 15 U.S.C. § 1127 (2012) (emphases added).

⁷⁸ Carl J. Minniti III, *The Lanham Act’s Unconstitutional Hodgepodge*, 17 RUTGERS J.L. & RELIGION 315, 319 (2016).

⁷⁹ *Id.*

⁸⁰ See Michael Grynberg, *A Trademark Defense of the Disparagement Bar*, 126 YALE L.J.F. 178, 187, 191 (2016).

⁸¹ Cf. Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 207 (1994) (explaining how government regulation of speech-related institutions necessarily involves content-based distinctions). Chief Justice Roberts himself recognized the necessity of making content-based decisions in the trademark-regulation context, stating “it’s completely content-based, but it’s the nature of the program.” Transcript of Oral Argument at 48, *Brunetti*, 139 S. Ct. 2294 (2019) (No. 18-302).

⁸² Tushnet, *supra* note 76, at 403.

⁸³ *Id.* at 397.

not serve as the “empty vessel[] that trademark law idealizes” in ensuring trademarks evoke only a source-identification message.⁸⁴ Such a distinction is impossible without reference to content. The Supreme Court has defined content-based regulations as those targeting speech based on “the topic discussed or the idea or message expressed.”⁸⁵ Viewed through this lens, section 2 of the Lanham Act is “almost nothing but content-based.”⁸⁶

Given the focus on trademark registration as a content-based regulation in the lower court opinion, and the ambiguity surrounding trademark’s place among the First Amendment speech categories after *Tam*, the *Brunetti* Court should have provided guidance on the best approach. The lower court invalidated the “immoral or scandalous” bar because it was content based while declining to situate trademark in a speech category that would have forgiven such content discrimination.⁸⁷ If trademark registration were a government program or limited public forum, then the reality that registration is content based would not be dispositive.⁸⁸ If it did not fit in either of those categories, then strict scrutiny or *Central Hudson* scrutiny would apply.⁸⁹ Either level of scrutiny would likely lead to the invalidation of much of the Lanham Act.⁹⁰

There are compelling arguments for trademark registration to fall under a limited public forum or a government program framework, or to qualify as commercial speech. While some Justices were open to the idea of placing trademark registration under either framework in *Brunetti*, none could quite decide where trademark registration belongs.⁹¹ The Court could analyze trademark registration under the gov-

⁸⁴ Grynberg, *supra* note 80, at 187.

⁸⁵ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (first citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563–67 (2011); then citing *Carey v. Brown*, 447 U.S. 455, 462 (1980); and then citing *Police Dep’t. v. Mosley*, 408 U.S. 92, 95 (1972)).

⁸⁶ Tushnet, *supra* note 76, at 382. The bar on “deceptive” marks, 15 U.S.C. § 1052(a) (2012), the bar on marks “[c]onsist[ing] of or compris[ing] . . . flag[s] or coat[s] of arms or other [official] insignia,” *id.* § 1052(b), and even bars on “merely descriptive” marks, *id.* § 1052(e), among others, are all references to content.

⁸⁷ See generally *In re Brunetti*, 877 F.3d 1330, 1341–48 (Fed. Cir. 2017).

⁸⁸ See *supra* note 24.

⁸⁹ See *Brunetti*, 877 F.3d at 1342.

⁹⁰ See *supra* note 28 and accompanying text; see also Tushnet, *supra* note 76, at 403.

⁹¹ Justice Breyer noted in his opinion the “vague resemblance between trademark registration and . . . a ‘limited public forum,’” *Brunetti*, 139 S. Ct. at 2305 (Breyer, J., concurring in part and dissenting in part) (citing *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 669 n.11 (2010)); and the resemblance “to cases involving government subsidies,” *id.* (citing *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543–44 (2011)). Justice Sotomayor explained that the Court has treated similar government initiatives “as a limited public (or nonpublic) forum,” *id.* at 2316 (Sotomayor, J., concurring in part and dissenting in part) (first citing *Martinez*, 561 U.S. at 669–70, 682; then citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 823–24, 829–30 (1995); and then citing *Cornelius v. NAACP Legal Def. & Educ.*

ernment program framework as a reasonable limitation on such a program.⁹² As Chief Justice Roberts, Justice Breyer, and Justice Sotomayor explained, trademark bars simply deny registrants the benefits accompanying federal trademark registration without restricting registrants from otherwise using the marks.⁹³ The Court could also treat trademark registration as a limited or nonpublic forum.⁹⁴ Justice Sotomayor briefly laid out how this analysis might look in analogizing to *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*⁹⁵ at oral argument.⁹⁶ There, the Court held that a federal fund drive, to which a limited set of organizations were invited to participate, was “a nonpublic forum.”⁹⁷ If classified under either category, trademark regulation would probably be safe from First Amendment challenges so long as it was reasonable and viewpoint neutral.⁹⁸ Finally, the Court could view trademark regulation as regulating commercial speech.⁹⁹ Classifying trademark as such would possibly protect provisions of the Lanham Act dealing with deception.¹⁰⁰ Yet it probably would not help protect other provisions as *Central Hudson* scrutiny is beginning to look more like strict scrutiny.¹⁰¹

Fund, Inc., 473 U.S. 788, 790–91, 799–801, 806 (1985)); or “as government programs or subsidies,” *id.* (first citing *Velazquez*, 531 U.S. at 536, 543–44; then citing Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 573, 585–87 (1998)). Justice Gorsuch asked at oral argument, “Why isn’t [trademark registration] a government benefit and why can’t the people choose to withhold the benefit . . . ?” Transcript of Oral Argument at 40, *Brunetti*, 139 S. Ct. 2294 (2019) (No. 18-302).

⁹² See Tushnet, *supra* note 76, at 397–99 (applying the reasoning of *Rust v. Sullivan* and other unconstitutional conditions cases to trademark-bar cases, noting that the conditions imposed by trademark bars do not affect recipients’ speech outside the federal trademark program (unconstitutional), but rather specify what speech the government wants to subsidize (constitutional)).

⁹³ See *Brunetti*, 139 S. Ct. at 2303 (Roberts, C.J., concurring in part and dissenting in part); *id.* at 2305 (Breyer, J., concurring in part and dissenting in part) (citing *Velazquez*, 531 U.S. at 543–44); *id.* at 2316 (Sotomayor, J., concurring in part and dissenting in part).

⁹⁴ See Tushnet, *supra* note 76, at 393 (arguing that courts could view trademark as a nonpublic forum, because it involves a “detailed, individualized inquiry,” which is “[o]ne key feature of a nonpublic forum”).

⁹⁵ 473 U.S. 788 (1985).

⁹⁶ Transcript of Oral Argument at 27, *Brunetti*, 139 S. Ct. 2294 (2019) (No. 18-302).

⁹⁷ See *Cornelius*, 473 U.S. at 794–806. The Court struck down a group of organizations’ argument that their exclusion was a First Amendment violation, holding the fund drive was a nonpublic forum and therefore the government merely had to be reasonable and viewpoint neutral. *Id.* at 806, 811.

⁹⁸ *Brunetti*, 139 S. Ct. at 2316–17 (Sotomayor, J., concurring in part and dissenting in part) (first citing *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 679 (2010); then citing *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543–44, 548–49 (2011); and then citing *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 355 (2009)). *Brunetti* would have probably had a different outcome under such an analysis.

⁹⁹ See Tushnet, *supra* note 76, at 403 (“The adoption of a symbol as an indication of the source of goods or services . . . is generally commercial speech.”).

¹⁰⁰ The first prong of the *Central Hudson* test concerns “misleading” speech. See *supra* note 28.

¹⁰¹ See *The Supreme Court, 2016 Term — Leading Cases*, 131 HARV. L. REV. 223, 250 (2017) (noting how in *Tam*, “Justice Alito staked out a version of *Central Hudson*’s requirement that restrictions be narrowly drawn that is indistinguishable from its strict scrutiny equivalent”).

By avoiding such analyses entirely, the Court left the future of the Lanham Act in peril. Such a conclusion was acknowledged at oral argument.¹⁰² Almost all of the trademark registration bars are content based. Many if not most of the provisions seem to fail strict scrutiny. It is hard to determine what the substantial government interest would be.¹⁰³ Further, a less restrictive alternative exists in the government’s ability to “make an individualized determination rather than to deter all uses of marks within a class.”¹⁰⁴ Even if not subject to strict scrutiny, many provisions would still probably fail under *Central Hudson* scrutiny where provisions “more extensive than . . . necessary to serve [a government] interest” would be suspect.¹⁰⁵ “More extensive than necessary” does not seem to leave much more room than its “least restrictive alternative” strict scrutiny cousin.¹⁰⁶ Thus, only purely deceptive speech would probably be safe to regulate under *Central Hudson*.¹⁰⁷

Given this outcome-determinative nature of strict or *Central Hudson* scrutiny, coupled with the fact that trademark registration *is* inherently content based, a speech-categories analysis was crucial in *Brunetti*. As the government explained at oral argument, striking down the “immoral or scandalous” bar of the Lanham Act leaves the government without the opportunity to “restrict trademarks on the ground that they’re obscene.”¹⁰⁸ If other provisions are invalidated due to their content-based nature, there will be little left for the government to use as a basis for restricting trademarks. This would essentially render the Lanham Act substantially inoperative and trademark regulation ineffective. *Brunetti* thus leaves Congress and future litigants with no clear path forward.

¹⁰² Counsel for Brunetti noted the provisions “deal[ing] with . . . flags and symbols, and . . . with using people’s names, could under certain circumstances raise constitutional issues.” Transcript of Oral Argument at 1, 49, *Brunetti*, 139 S. Ct. 2294 (2019) (No. 18-302).

¹⁰³ The lower court made this point, noting “the government does not have a substantial interest in promoting certain trademarks over others” nor in protecting society from certain types of marks. *Brunetti*, 877 F.3d at 1351. If anything, the government *may* have an interest in protecting consumers from deceptive marks, but such interest could be met through less restrictive alternatives than the broad provisions delineated in the Lanham Act. See Tushnet, *supra* note 76, at 407.

¹⁰⁴ See Tushnet, *supra* note 76, at 407.

¹⁰⁵ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

¹⁰⁶ See *Leading Cases*, *supra* note 101, at 250.

¹⁰⁷ See *supra* note 103.

¹⁰⁸ Transcript of Oral Argument at 1, 11, *Brunetti*, 139 S. Ct. 2294 (2019) (No. 18-302).