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*First Amendment — Freedom of Speech —  
Trademarks — Matal v. Tam*

The cornerstone of federal trademark law, the Lanham Act,<sup>1</sup> provides for the registration of trademarks.<sup>2</sup> However, the Act’s disparagement clause prohibits registration of trademarks that may “disparage” any “persons, living or dead, institutions, beliefs, or national symbols.”<sup>3</sup> The Patent and Trademark Office (PTO) famously cancelled the Washington Redskins’ trademarks on these grounds.<sup>4</sup> Last Term, in *Matal v. Tam*,<sup>5</sup> the Supreme Court held that the Lanham Act’s disparagement clause violated the Free Speech Clause.<sup>6</sup> In so doing, the Court further intensified scrutiny of commercial speech regulation and signaled a willingness to continue the deregulatory trend in commercial speech jurisprudence.

Simon Tam, a member of a band named “The Slants,” chose the name in order to reappropriate a slur that targets East Asians.<sup>7</sup> He applied for trademark registration, but a PTO examiner rejected the name under the disparagement clause, citing dictionaries that confirmed “slants” disparaged people of Asian descent.<sup>8</sup>

Tam unsuccessfully challenged the denial of registration before the examiner and then the PTO’s Trademark Trial and Appeal Board (TTAB).<sup>9</sup> On appeal, a panel of the Federal Circuit affirmed the TTAB’s determination.<sup>10</sup> Ultimately, however, the en banc Federal Circuit held that the First Amendment’s Free Speech Clause rendered the disparagement clause unconstitutional.<sup>11</sup> The majority rejected the clause as viewpoint-based discrimination.<sup>12</sup> Because the clause regulates the expressive component of trademarks, the majority held that it was subject to and failed strict scrutiny.<sup>13</sup> Judge O’Malley concurred, adding that he believed the disparagement clause also was unconstitutionally vague.<sup>14</sup> Judge Lourie dissented, reasoning that because a

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

<sup>2</sup> *Id.* § 1051.

<sup>3</sup> *Id.* § 1052(a).

<sup>4</sup> See *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d (BNA) 1080, 1111–12 (T.T.A.B. 2014).

<sup>5</sup> 137 S. Ct. 1744 (2017).

<sup>6</sup> *Id.* at 1751.

<sup>7</sup> *Id.* at 1754.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *In re Tam*, 785 F.3d 567, 568, 571 (Fed. Cir. 2015) (agreeing that “slant” is disparaging).

<sup>11</sup> *In re Tam*, 808 F.3d 1321, 1328, 1337 (Fed. Cir. 2015) (en banc).

<sup>12</sup> *Id.* at 1334.

<sup>13</sup> *Id.* at 1337–39. The majority found unpersuasive the argument that the clause was permissible as government speech or a government subsidy. *Id.* at 1345–55.

<sup>14</sup> *Id.* at 1358 (O’Malley, J., concurring). Writing separately, Judge Dyk rejected the facial challenge. *Id.* at 1363 (Dyk, J., concurring in part and dissenting in part).

trademark applicant may continue to express a phrase even if the PTO refuses to register that phrase, such a refusal does not infringe the applicant's right to speak; instead, the government merely declines to provide the benefit of federal enforcement.<sup>15</sup>

The Supreme Court affirmed. Writing for the Court, Justice Alito<sup>16</sup> held that the disparagement clause violated the Free Speech Clause.<sup>17</sup> The Court held that trademarks are not government speech.<sup>18</sup> The government-speech doctrine allows the government to communicate its own viewpoints without violating the First Amendment.<sup>19</sup> The Court raised concerns about an expansive view of this doctrine: "If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints."<sup>20</sup> The Court called "far-fetched" the idea that the content of trademarks is government speech.<sup>21</sup> If so, the government would simultaneously be expressing conflicting opinions, making crude statements, and supporting competing businesses.<sup>22</sup> In addition, the Court cited a TTAB decision disclaiming trademark registration as a "government imprimatur."<sup>23</sup> The Court then found its government speech precedents disanalogous because trademarks do not communicate a government message, and the public does not perceive trademarks to do so.<sup>24</sup> Finally, the Court expressed concern that upholding the disparagement clause would imply that copyrighted works could be subject to similar restrictions.<sup>25</sup>

Justice Alito, writing for himself, Chief Justice Roberts, Justice Thomas, and Justice Breyer, also rejected the government's argument that the Court's subsidized speech cases controlled the result.<sup>26</sup> While the government need not subsidize programs it prefers not to encourage,

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<sup>15</sup> *Id.* at 1374–76 (Lourie, J., dissenting). Judge Reyna also dissented, relying on intermediate scrutiny. *Id.* at 1376 (Reyna, J., dissenting).

<sup>16</sup> Justice Alito was joined by Chief Justice Roberts and Justices Kennedy, Thomas, Ginsburg, Breyer, Sotomayor, and Kagan. Justice Gorsuch took no part in the consideration or decision of the case.

<sup>17</sup> *Tam*, 137 S. Ct. at 1751. The Court rejected *Tam*'s view that the statute only applied to natural and juristic persons, not racial groups. The Court noted that "persons" compose racial groups. *Id.* at 1755–57.

<sup>18</sup> *Id.* at 1758.

<sup>19</sup> *Id.* at 1757–58.

<sup>20</sup> *Id.* at 1758.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 1759 (quoting *In re Old Glory Condom Corp.*, 26 U.S.P.Q.2d 1216, 1220 n.3 (T.T.A.B. 1993)).

<sup>24</sup> *Id.* at 1759–60 (first citing *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005); then citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 472 (2009); and then citing *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2248–49 (2015)).

<sup>25</sup> *Id.* at 1760.

<sup>26</sup> *Id.* (Alito, J.).

it “may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.”<sup>27</sup> Justice Alito distinguished cases permitting subsidized speech as relying on cash subsidies or an equivalent.<sup>28</sup> Conversely, trademark registration requires paying a fee.<sup>29</sup>

Finally, Justice Alito concluded that because the disparagement clause could not satisfy even relaxed *Central Hudson*<sup>30</sup> review for commercial speech, whether strict scrutiny applies is irrelevant.<sup>31</sup> Under *Central Hudson*, restrictions on commercial speech must be narrowly drawn to serve a substantial interest.<sup>32</sup> First, the government claimed an interest in “preventing underrepresented groups from being bombarded with demeaning messages in commercial advertising.”<sup>33</sup> However, Justice Alito rejected this as an impermissible “interest in preventing speech expressing ideas that offend.”<sup>34</sup> This speech may be hateful, but it is still protected. Second, the disparagement clause purportedly served to protect the “orderly flow of commerce,” by combatting discrimination that impairs commerce.<sup>35</sup> Yet Justice Alito contended that the disparagement clause was not narrowly drawn to target only trademarks that harm this interest. The clause might even prohibit a trademark that said “Down with racists.”<sup>36</sup> Moreover, Justice Alito, noting the unclear bounds of commercial speech and that many products disparage important persons, feared a holding that “commercial speech may be cleansed of any expression likely to cause offense.”<sup>37</sup>

Justice Kennedy concurred in part and concurred in the judgment.<sup>38</sup> Justice Kennedy defined the test for viewpoint discrimination as “whether — within the relevant subject category — the government has singled out a subset of messages for disfavor based on the views

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<sup>27</sup> *Id.* at 1760–61 (quoting *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2328 (2013)). Justice Alito noted that limited public forum cases could be more analogous. However, he held that the disparagement clause engaged in viewpoint discrimination, which is prohibited in limited public forums. *Id.* at 1763.

<sup>28</sup> *Id.* at 1762.

<sup>29</sup> *Id.* at 1761. The Court has held that governments may enable public employers to collect union dues from employees without the First Amendment then compelling governments to allow employers to collect dues earmarked for political activities. Justice Alito deemed those cases irrelevant — the government may provide a noncash benefit to promote certain activities (for example, collective bargaining) without being required to provide a similar benefit to further a different activity (for example, unions’ political activities). *Id.* at 1761–62.

<sup>30</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980).

<sup>31</sup> *Tam*, 137 S. Ct. at 1764.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (internal quotation marks omitted).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1765.

<sup>37</sup> *Id.*

<sup>38</sup> Justice Kennedy was joined by Justices Ginsburg, Sotomayor, and Kagan.

expressed.”<sup>39</sup> Here, the disparagement clause identified the “relevant subject category” as persons, institutions, beliefs, and national symbols.<sup>40</sup> Within that category, one could not register a subset of trademarks: disparaging trademarks.<sup>41</sup> The government treated this subset of messages unfavorably based on the views such trademarks expressed.<sup>42</sup> Justice Kennedy posited that “[t]o prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so.”<sup>43</sup> Although the clause applied regardless of an applicant’s rationale, as with *The Slants*, the focus on effect instead of intent failed to insulate the clause from characterization as viewpoint discrimination.<sup>44</sup>

Because Justice Kennedy found the clause to engage in viewpoint discrimination, he deemed irrelevant the question of whether the clause regulated commercial speech.<sup>45</sup> Regulations engaging in viewpoint discrimination receive heightened scrutiny whether or not they target commercial speech, he argued.<sup>46</sup> Noting important uses of trademarks in the “tangible” “marketplace of ideas,” such as nonprofit advocacy or fundraising, he feared “viewpoint discrimination in this context is . . . Government censorship.”<sup>47</sup>

Justice Thomas concurred in part and concurred in the judgment, arguing that commercial speech deserves strict scrutiny protection when the government restricts truthful speech to suppress an idea.<sup>48</sup>

Justice Thomas’s focus on protecting commercial speech highlights an important trend. Over time, judicial scrutiny of commercial speech regulation has intensified.<sup>49</sup> This intensification led one scholar to denounce the deregulatory trend in First Amendment doctrine as the “New

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<sup>39</sup> *Id.* at 1766 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1767.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1768.

<sup>48</sup> *Id.* at 1769 (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas joined all of Justice Alito’s opinion, except for the statutory argument, which he believed the Court should have ignored because the Court rejected certiorari on the question. *Id.*

<sup>49</sup> See Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 332 (2016); Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 68 (2007); Martin H. Redish & Kyle Voils, *False Commercial Speech and the First Amendment: Understanding the Implications of the Equivalency Principle*, 25 WM. & MARY BILL RTS. J. 765, 765 (2017) (“Although it took almost seventy years, commercial speech went from being outside the First Amendment looking in to a status almost equivalent to that of the most protected forms of expression.”); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1430–39 (2017).

*Lochner*.<sup>50</sup> The opinions in *Tam* are yet another indicator of the First Amendment’s deregulatory power: descriptively, they further tighten scrutiny of commercial speech regulations and, predictively, they suggest the Justices’ continued willingness to do so. The tea leaves abound. First, the Justices appear eager to define commercial speech narrowly, thus exposing more regulations to strict scrutiny.<sup>51</sup> They employ rhetoric lauding commercial speech, implying they are poised to protect it. Second, the Justices construe viewpoint discrimination broadly, which has a deregulatory effect in commercial speech cases. Third, the Justices apply *Central Hudson* review stringently across its multiple prongs. Finally, the alignment of the Justices in *Tam* suggests these trends will continue.

The deregulatory trend in commercial speech doctrine began in the last fifty years.<sup>52</sup> Originally, in the wake of the end of the *Lochner* era, the Court held that the Constitution provided no protection to commercial speech.<sup>53</sup> However, within decades, the Court changed course. It held commercial speech worthy of constitutional protection, reasoning that listeners (consumers) depend on the “free flow of commercial information” to make intelligent economic decisions.<sup>54</sup> In *Central Hudson*, the Court articulated a test for commercial speech, which receives “a lesser protection than . . . other constitutionally guaranteed expression.”<sup>55</sup> The government may ban commercial speech that is misleading or related to illegal activity, but otherwise the government “must assert a substantial interest to be achieved.”<sup>56</sup> In addition, “the regulatory technique must be in proportion to that interest.”<sup>57</sup>

Over time, the Court has intensified this form of intermediate heightened scrutiny. The Court has strengthened the deregulatory effect of its

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<sup>50</sup> Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133. This designation refers to the case that ushered in an era of laissez-faire Supreme Court jurisprudence. See *Lochner v. New York*, 198 U.S. 45 (1905); see also *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 602–03 (2011) (Breyer, J., dissenting) (warning of the “reawaken[ing] of *Lochner*’s pre–New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue,” *id.* at 603).

<sup>51</sup> “Narrowly” is used here to mean that more speech will be held noncommercial. Of course, the deregulatory trend in commercial speech doctrine, in certain applications, could lead to a broader definition of commercial speech. For example, the Court could hold that speech that once was outside the First Amendment is now properly viewed as commercial speech. That possibility is not to be ignored.

<sup>52</sup> See Redish, *supra* note 49, at 67.

<sup>53</sup> *Valentine v. Chrestensen*, 316 U.S. 52, 54–55 (1942).

<sup>54</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976).

<sup>55</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980). Such other expression is protected by strict scrutiny, which requires that a law be “narrowly drawn” to further “a compelling government interest.” *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799 (2011).

<sup>56</sup> *Cent. Hudson*, 447 U.S. at 563–64.

<sup>57</sup> *Id.* at 564.

commercial speech doctrine.<sup>58</sup> For example, in *Lorillard Tobacco Co. v. Reilly*,<sup>59</sup> the Court made clear that commercial speech doctrine is now grounded in more than the interests of listeners: “retailers and manufacturers have an interest in conveying truthful information about their products to adults.”<sup>60</sup> Concurring in that case, Justice Thomas argued that “there is no philosophical or historical basis for asserting that commercial speech is of lower value than noncommercial speech.”<sup>61</sup>

Similarly, Justice Thomas concurred in *Tam* to reiterate that “when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as commercial.”<sup>62</sup> But Justice Thomas was not the only Justice in *Tam* to indicate a desire to strengthen scrutiny of commercial speech regulations.

Both Justice Alito’s and Justice Kennedy’s opinions embrace a deregulatory view of commercial speech doctrine, beginning with the definition of commercial speech. While they declined to decide whether trademarks are commercial speech, both opinions contain language hinting at a narrow (and therefore more deregulatory) definition of commercial speech. Justice Alito observed that *Tam* demonstrated that the Justices struggle to delineate commercial speech.<sup>63</sup> He then expressed the fear that “[i]f affixing the commercial label permits the suppression of any speech that may lead to political or social volatility, free speech would be endangered.”<sup>64</sup> These concerns over line drawing and suppression favor erring on the side of striking down speech regulations. Justice Alito also noted that “[t]he commercial market is well stocked with merchandise that disparages prominent figures and groups,” implying that either the speech is noncommercial, or if it is commercial, it deserves strong protection.<sup>65</sup> Justice Kennedy was more pointed in hinting at the noncommercial nature of trademarks, explaining that “[i]n the realm of trademarks, the metaphorical marketplace of ideas becomes a tangible, powerful reality.”<sup>66</sup> This reasoning stands in contrast to a commercial speech case Justice Kennedy cited, *Bolger v. Youngs Drug Products Corp.*,<sup>67</sup> which held that certain advertisements were commercial

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<sup>58</sup> See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565–66 (2011); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (Stevens, J.).

<sup>59</sup> 533 U.S. 525 (2001).

<sup>60</sup> *Id.* at 564.

<sup>61</sup> *Id.* at 575 (Thomas, J., concurring in part and concurring in the judgment).

<sup>62</sup> *Tam*, 137 S. Ct. at 1769 (Thomas, J., concurring in part and concurring in the judgment).

<sup>63</sup> *Id.* at 1765 (Alito, J.).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1768 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>67</sup> 463 U.S. 60 (1983).

speech regardless of their “discussions of important public issues.”<sup>68</sup> Coupling the Justices’ reasoning with Justice Kennedy’s highlighting of nonprofits that use trademarks for fundraising and advocacy either undermines the notion that “commercial speech may be more durable than other kinds”<sup>69</sup> by showing that vulnerable actors can issue commercial speech, or suggests trademarks should be considered noncommercial.

Even if these elements of both opinions represent only rhetorical flourishes, they evince the Justices’ willingness to narrow the definition of commercial speech — thus exposing more speech regulation to strict scrutiny — and to carefully protect what remains of commercial speech. Moreover, merely declaring unresolved the question of whether trademarks constitute commercial speech is noteworthy, given the Court’s suggestion in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*<sup>70</sup> that trademarks are commercial speech despite their capacity for making political statements.<sup>71</sup>

The opinions also suggest that the Court will employ a newly broad definition of viewpoint discrimination to further constrain the application of *Central Hudson* review. Justice Kennedy suggested that viewpoint discrimination “renders unnecessary” *Central Hudson* review.<sup>72</sup> In *Central Hudson*, however, the regulation at issue was not viewpoint neutral — it required electric utilities to stop advertising that “*promot[es]* the use of electricity.”<sup>73</sup> The regulation did not prevent advertising that criticized the use of electricity or promoted conservation.<sup>74</sup> If viewpoint discrimination was a trump card, it is surprising that *Central Hudson* overlooked it.<sup>75</sup> And if viewpoint discrimination is now a trump card, the newly expansive definition set forth by both Justices Kennedy and Alito will have a deregulatory effect in commercial speech cases. Justice Alito found the disparagement clause to engage in viewpoint discrimination even while admitting that “the clause evenhandedly prohibits disparagement of all groups.”<sup>76</sup>

<sup>68</sup> *Id.* at 66–68.

<sup>69</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976) (“Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.”).

<sup>70</sup> 483 U.S. 522 (1987).

<sup>71</sup> *Id.* at 535–36.

<sup>72</sup> *Tam*, 137 S. Ct. at 1765–68 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>73</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 558 (1980) (alteration in original) (emphasis added).

<sup>74</sup> An electric company might want to discourage use during peak times. See Geoff Williams, *Why Your Energy Company Wants You to Use Less Energy*, U.S. NEWS & WORLD REP. (Apr. 2, 2013, 10:20 AM), <https://money.usnews.com/money/personal-finance/articles/2013/04/02/why-your-energy-company-wants-you-to-use-less-energy> [https://perma.cc/93TF-7QKR].

<sup>75</sup> Indeed, *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), held a commercial speech regulation to be viewpoint discrimination but still engaged in *Central Hudson* analysis, *id.* at 565.

<sup>76</sup> *Tam*, 137 S. Ct. at 1763 (Alito, J.).

Justice Kennedy reasoned that “[t]o prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so.”<sup>77</sup> Ultimately, the broader the definition of viewpoint discrimination, the more likely a commercial speech regulation will be ensnared in its reach and consequently struck down.

The Justices also appear intent on strengthening the prongs of *Central Hudson* review. For instance, Justice Alito’s opinion announced, for the first time, that reducing messages that demean underrepresented groups or undermine racial tolerance is not a permissible interest for regulating commercial speech.<sup>78</sup> Justice Alito rejected this interest as one “in preventing speech expressing ideas that offend,”<sup>79</sup> even though the disparagement clause removes an incentive for speech rather than prevents speech. Justice Alito left unaddressed the Court’s prior holding in *Roberts v. United States Jaycees*<sup>80</sup> that eradicating discrimination, there against women, is a compelling state interest unrelated to the suppression of ideas.<sup>81</sup>

Justice Alito staked out a version of *Central Hudson*’s requirement that restrictions be narrowly drawn that is largely indistinguishable from its strict scrutiny equivalent. The disparagement clause allegedly pursued an interest in “the orderly flow of commerce” by reducing disruption from disparaging trademarks.<sup>82</sup> In finding the disparagement clause not narrowly drawn, Justice Alito cited no existing trademarks caught in the clause’s allegedly overinclusive reach. Instead, he merely referred to hypothetical trademarks, such as “Down with racists,”<sup>83</sup> without presenting the actual effect of the clause, explaining why these hypothetical marks would necessarily be included, or analyzing how the clause could have been narrowly drawn. Moreover, Justice Alito reframed the interest as confined to driving out “invidious discrimination”<sup>84</sup> even though no party argued that only invidious discrimination would disrupt the orderly flow of commerce. Narrowing the interest increased the odds that the law would be overinclusive. Justice Alito also declined to adopt a narrowing construction of the seemingly vague term “disparaging” in order to preserve the statute through constitutional avoidance.<sup>85</sup> One strains to imagine a law that would survive the Court’s modern view of *Central Hudson* narrow tailoring but fail strict

<sup>77</sup> *Id.* at 1766 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>78</sup> *Id.* at 1764 (Alito, J.).

<sup>79</sup> *Id.*

<sup>80</sup> 468 U.S. 609 (1984).

<sup>81</sup> *Id.* at 623.

<sup>82</sup> *Tam*, 137 S. Ct. at 1764 (Alito, J.).

<sup>83</sup> *Id.* at 1765.

<sup>84</sup> *Id.*

<sup>85</sup> *See, e.g., Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 645–46 (1980) (plurality opinion).

scrutiny on those grounds. This intensification of *Central Hudson* represents an evolution from earlier case law, which justified reviewing *bans* on commercial speech “carefully . . . because they all but foreclose alternative means of disseminating certain information.”<sup>86</sup> This rationale fails to justify the penetrating review in *Tam* because the disparagement clause discouraged, rather than banned, certain speech.

Going forward, plaintiffs will likely be able to construct a majority of Justices willing to further embrace the deregulatory power of the First Amendment. The Justices regarded as conservatives, particularly Justice Thomas, have indicated a desire to intensify *Central Hudson*. Justice Gorsuch took no part in the case, but he will also likely have a deregulatory view of commercial speech doctrine.<sup>87</sup> Notably, the Justices regarded as members of the liberal wing split between the opinions, both of which represent the same deregulatory trend. As a further indication of their willingness, the Justices lined up 8–0 in favor of strengthening the commercial speech doctrine even though a potentially easier route, finding the statute unconstitutionally vague,<sup>88</sup> was validated in the record.<sup>89</sup>

One may doubt that *Tam* truly represents a deregulatory step. After all, the Court avoided deciding that trademarks are commercial speech. However, the Court has been gradual in evolving First Amendment doctrine<sup>90</sup> and traditionally does not resolve unnecessary issues.<sup>91</sup> The Court appears unwilling to overrule *Central Hudson* overtly, and the intensification of that test has diminished the practical necessity of such a holding or determining whether specific speech is commercial or non-commercial. Additionally, one might argue that a holding that someone will receive a government benefit is not deregulatory. However, at minimum, the doctrinal effect is deregulatory. If markholders have a putative property interest in their trademarks, removing a barrier to registration deregulates the process of owning intellectual property. As circumstantial evidence, the libertarian Cato Institute filed an amicus brief on behalf of *Tam*.<sup>92</sup>

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<sup>86</sup> 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality opinion).

<sup>87</sup> See Tejinder Singh, *Judge Gorsuch's First Amendment Jurisprudence*, SCOTUSBLOG (Mar. 7, 2017, 11:16 AM), <http://www.scotusblog.com/2017/03/judge-gorsuchs-first-amendment-jurisprudence/> [<https://perma.cc/JW7B-DWGL>].

<sup>88</sup> *In re Tam*, 808 F.3d 1321, 1358 (Fed. Cir. 2015) (en banc) (O'Malley, J., concurring).

<sup>89</sup> See Brief of Amicus Curiae Pro-Football, Inc. in Support of Respondent at 21–24, *Tam*, 137 S. Ct. 1744 (No. 15-1293) (collecting examples).

<sup>90</sup> Shanor, *supra* note 50, at 150.

<sup>91</sup> See, e.g., *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 645–46 (1980) (plurality opinion).

<sup>92</sup> Brief of the Cato Institute et al. as Amici Curiae Supporting Respondent, *Tam*, 137 S. Ct. 1744 (No. 15-1293).

Reading *Tam*'s doctrinal tea leaves and counting votes reveals that the Supreme Court has once again indicated its wariness of commercial speech regulations. Indeed, the Court has not upheld a restriction of nonmisleading commercial speech in over two decades, and the Court did not reverse course in *Tam*.<sup>93</sup> The Justices demonstrated that they appear willing to narrow the commercial speech doctrine. Therefore, *Tam* casts doubt on other areas of commercial speech regulation such as the Lanham Act's tarnishment provision,<sup>94</sup> which prohibits the unflattering portrayal of trademarks.<sup>95</sup> Further, *Tam* calls into question lower court decisions like *American Freedom Defense Initiative v. Massachusetts Bay Transportation Authority*,<sup>96</sup> which upheld a transportation authority's policy of restricting "disparaging" advertisements and declared that policy viewpoint neutral.<sup>97</sup> Litigants are already citing *Tam* in their efforts to undo federal financial regulation.<sup>98</sup> From the opinions' discussion of line-drawing problems, to their lauding of the value of commercial speech for speaker and listener alike, they suggest the Court's deregulatory view of commercial speech regulation. It remains to be seen, however, if the Court will place commercial speech on equal constitutional footing with noncommercial speech or whether that potential decision will recede in importance as *Central Hudson* intensifies.<sup>99</sup> Given the wide swath of commercial behavior cognizable as "speech,"<sup>100</sup> such a decision could jeopardize a broad range of government actions and the vast regulatory state.

<sup>93</sup> Redish & Voils, *supra* note 49, at 774.

<sup>94</sup> 15 U.S.C. § 1125(c) (2012).

<sup>95</sup> Rebecca Tushnet (@rtushnet), TWITTER (June 19, 2017, 8:00 AM), <https://twitter.com/rtushnet/status/876816965813379073> [<https://perma.cc/KV4X-RS38>] ("[H]ot take on *Tam*: bye bye, dilution.").

<sup>96</sup> 781 F.3d 571 (1st Cir. 2015).

<sup>97</sup> *Id.* at 574, 581–82.

<sup>98</sup> ACLI & NAIFA Appellants' Reply at 8, *Chamber of Commerce v. Dep't of Labor*, No. 17-10238 (5th Cir. July 20, 2017), 2017 WL 3216754 at \*8.

<sup>99</sup> Redish & Voils, *supra* note 49, at 766–67.

<sup>100</sup> Shanor, *supra* note 50, at 150.