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United States Supreme Court Survey: 2018 Term

***Iancu v. Brunetti*: Free Speech Meets “Immoral and Scandalous” Trademarks in the Supreme Court**

Niki Kuckes*

In 1968, Paul Robert Cohen walked down the hallway of the Los Angeles Courthouse wearing a jacket that bore the words “Fuck the Draft.”¹ He wore the jacket to express his strong opposition to the Vietnam War. For the simple act of wearing a jacket bearing a profane message in a place where women and children were present, Mr. Cohen was criminally charged and convicted of disturbing the peace by engaging in “offensive” behavior.² The case ultimately landed in the Supreme Court of the United States (the Court). The Court agreed that the profanity chosen by Mr. Cohen to express his message was “crude,” “distasteful,” “scurrilous,” and “unseemly.”³ Mr. Cohen had chosen to use a four-letter word that was “more distasteful than most others of its genre.”⁴ But Mr. Cohen’s peaceful display of his “Fuck the Draft” jacket, the Court held, was speech protected by the First Amendment’s free speech

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1. *Cohen v. California*, 403 U.S. 15, 16 (1971).

2. *Id.*

3. *See id.* at 21–25.

4. *Id.* at 25.

guarantee, not simply in its anti-war message but also in the mode Cohen chose to express that message.⁵

There was no question that Mr. Cohen had the First Amendment right to express his political opposition to the Vietnam War. The question, rather, was whether the government could regulate his use of profanity as his *means* of expressing this message.⁶ On this point, the Supreme Court flatly rejected the notion that the States, “acting as guardians of public morality,” may properly remove offensive words from the public vocabulary in order to maintain “what they regard as a suitable level of discourse within the body politic”⁷ or to protect the sensibilities of members of the public.⁸ In what may be the most famous quote from *Cohen*, the Court observed, “it is . . . often true that one man’s vulgarity is another’s lyric.”⁹ It is because government officials cannot make “principled distinctions” in this area that the First Amendment leaves such matters of expression to individuals.¹⁰ Cohen’s conviction was invalidated.

The government’s power to burden speech because the speaker has chosen to use words that offend public sensibilities is once again the subject of a recent Court First Amendment decision.¹¹ Ironically, it was the very same four-letter word of profanity used in *Cohen* that led to the Court’s First Amendment decision in *Iancu v. Brunetti*, issued at the end of the Court’s October 2018 Term.¹² Almost fifty years after the Court issued its *Cohen* decision protecting Mr. Cohen’s “Fuck the Draft” jacket, the Court was called upon to rule on whether the government could bar a trademark owner from federally registering “FUCT” as the brand for his clothing line.¹³ While the context is different—and much First Amendment law has developed in the interim—the arguments in the two cases bear a strikingly similarity.

5. *Id.* at 26.

6. *Id.* at 19.

7. *Id.* at 22–23.

8. *Id.* at 21.

9. *Id.* at 25.

10. *Id.*

11. *See Iancu v. Brunetti*, 139 S. Ct. 2294 (2019).

12. *Id.* at 2297.

13. *Id.* at 2297.

In *Iancu v. Brunetti*, as noted, the First Amendment controversy arose from Mr. Brunetti's efforts to federally register the trademark "FUCT" for his clothing line.¹⁴ Using its statutory power to reject marks that it deems "immoral [or] scandalous," the United States Patent and Trademark Office (PTO) refused to register the mark.¹⁵ To defend the PTO's actions, the government insisted, in echoes of *Cohen*, that government officials may properly be given broad power to deny a legal status to trademarks it deems "disgraceful," "offensive," "disreputable," or "vulgar" without running afoul of the First Amendment.¹⁶

The case might seem to present a straightforward application of the *Cohen* principles. In 1971, the Supreme Court readily saw the "shortcomings" of a position that would allow government officials to punish peaceful speech expressed in expletives or other offensive words in order to "maintain what they regard as a suitable level of discourse within the body politic."¹⁷ But in the intervening years since the *Cohen* decision, the Court has spilled a great deal of ink issuing First Amendment free speech decisions. The dizzying array of First Amendment principles and caveats adopted in the interim made *Iancu* more difficult than the logical, intuitive, and eloquent application of the comparable principle in the *Cohen* case.

Indeed, its *Iancu* decision was not the first time the Court struggled with virtually the same First Amendment issue. Two terms earlier, the Court took up a First Amendment challenge to a closely related statutory bar under the Lanham Act—a bar on the registration of trademarks that "disparage" persons or groups—in *Matal v. Tam*.¹⁸ In that case, the Court struck that provision down unanimously without reaching an opinion representing a majority

14. *Id.* The Court had little difficulty in perceiving Mr. Brunetti's alternative spelling of "FUCT" as the "equivalent of [the] past participle form of a well-known word of profanity." *Id.*

15. 15 U.S.C. § 1052(a) (2012) (providing that the PTO may refuse registration to trademarks that include or consist of "immoral, deceptive, or scandalous matter"). There is no dispute with respect to the constitutionality of the PTO's power to refuse registration to "deceptive" trademarks. *Iancu* concerned the rest of this clause (the statutory bar on registering "immoral . . . or scandalous" marks). Rather than treating the two adjectives separately, the PTO has long applied this as a "unitary provision." *See Iancu*, 139 S. Ct. at 2298.

16. *See id.*

17. *Cohen v. California*, 403 U.S. 15, 23 (1971).

18. *See* 137 S. Ct. 1744, 1747 (2017).

of the Court.¹⁹ I previously wrote on the Court's inability in *Matal v. Tam* to agree on any single First Amendment lens through which to analyze the statutory bar in that case and the missed opportunity to make a clear and powerful statement of First Amendment law.²⁰

Given a second chance to revisit the same statutory provision, the Court has now rallied in *Iancu* to garner both a convincing majority and a single rationale to support its conclusion that a statutory bar on registering "immoral or scandalous" trademarks cannot withstand First Amendment scrutiny. Ultimately, the modern Supreme Court reached the same conclusion that the Court had so easily come to in 1971, that a "law disfavoring 'ideas that offend'" violates the First Amendment.²¹ This result is hardly surprising; it should be self-evident that government officials cannot, as a constitutional matter, be given power to decide that private speech is "immoral or scandalous" and should be banned, burdened or punished on that ground.

While the *Iancu* Court clearly reached the correct conclusion, the reasoning of its decision is far more labored than the eloquent *Cohen* opinion. One might be tempted to credit the historical context—after all, *Cohen*'s thoughtful affirmation of constitutional free speech values concerned a protest to the Vietnam War and was decided during the height of anti-war protests in 1971. But Justice Alito takes pains to point out in his concurrence that we too are in a historical moment when "free speech is under attack."²² In many countries with constitutions or legal traditions that "claim to protect freedom of speech," he states, "serious viewpoint discrimination is now tolerated."²³ In no uncertain terms, he includes the United States in his indictment, "such discrimination has become increasingly prevalent in this country."²⁴ If indeed reaffirming that the First Amendment "does not tolerate viewpoint discrimination" is no less important today than in 1971,²⁵ a

19. *See id.* at 1765.

20. *See generally* Niki Kuckes, *Matal v. Tam: Free Speech Meets "Disparaging" Trademarks in the Supreme Court*, 23 ROGER WILLIAMS U. L. REV. 122 (2018).

21. *Iancu*, 139 S. Ct. at 2301–02.

22. *Id.* at 2302–03 (Alito, J., concurring).

23. *Id.* at 2302.

24. *Id.*

25. *Id.* at 2303.

historical explanation for the modern Court's difficulty in writing a clear affirmation of this free speech principle does not ring true. A convincing explanation must be found elsewhere.

Iancu vividly illustrates the rigidity, complexity, and unworkability of modern First Amendment law as it has developed since 1971. First Amendment law has been compartmentalized into a series of conceptual boxes, differentiated by the "level of scrutiny" to be applied (strict, intermediate, rational basis, and so on). First Amendment analysis now proceeds on the flawed assumption that all free speech cases can fit into one of these boxes; in any given free speech case, a great deal of time is spent arguing over which box is correct. In the *Tam-Iancu* set of cases, the limits of that approach become apparent.

Below, this Survey begins in Section I by providing context for the Court's *Iancu v. Brunetti* decision by explaining the significance of the statutory bar for "immoral or scandalous" trademarks and the relationship between the *Iancu* dispute and the Court's earlier *Matal v. Tam* decision. In Section II, the Survey explores some key difficulties with modern First Amendment law illustrated by the *Tam-Iancu* sequence of decisions, and the narrow and compartmentalized constitutional analysis that modern free speech doctrine contemplates. Finally, in Section III, the Survey considers the weaknesses and strengths of the Court's *Iancu* decision, and asks whether, ultimately, the decision should be considered a disappointment or a triumph.

I. *IANCU V. BRUNETTI*: THE CASE AND ITS CONTEXT

The *Iancu v. Brunetti* case arose from the efforts of Erik Brunetti, an artist and entrepreneur who founded a clothing line, to federally register the trademark name he used for his clothing line: "FUCTION."²⁶ Mr. Brunetti not only used a variation of the same profanity as had Mr. Cohen in the 1971 decision, but he also prominently displayed it on clothing to be worn publicly. Beginning in 2011, Mr. Brunetti pursued an application to place "FUCTION" on the government's federal trademark registry as his brand for certain items of clothing.²⁷ Mr. Brunetti soon ran into difficulty (albeit not with a criminal prosecution), as described further below.

26. *Id.* at 2297.

27. *In re Brunetti*, 877 F.3d 1330, 1337 (Fed. Cir. 2017).

A. *The Role of Federal Trademark Registration*

When Mr. Brunetti applied to register the trademark “FUCTION” for his clothing line, he was taking the only prudent course for a trademark owner. The federal government’s trademark registration scheme, in place in its current form since 1946, allows individuals, businesses, and groups to secure nationwide legal protection for their trademarks by registering them with the PTO.²⁸ The Court dryly describes federal trademark registration as offering “valuable benefits.”²⁹ Both the majority and dissenters emphasize that a seller can use a brand name as a trademark without federally registering it, and that unregistered marks still enjoy some legal protection outside of the federal scheme.³⁰ While this is technically true, no business with aspirations to distribute its products nationwide could possibly afford to rely on state law protection alone for its trademark. Such a business would be at a severe disadvantage against competitors with federally registered trademarks and at the mercy of opportunists who could seek to piggy-back on the success of an emerging brand.

The Supreme Court’s technical descriptions of the consequences of federal trademark registration might suggest to the reader that registration under the Lanham Act provides a series of procedural benefits that are desired by trademark holders, but that federal registration is not necessary. The Court begins its opinion by noting that registration is not “mandatory” and that the holder of an “unregistered trademark may still use it in commerce and enforce it against infringers.”³¹ The Court goes on to list certain (mainly procedural) “benefits” that flow from trademark registration (registration is treated as “prima facie” evidence in litigation that the trademark is valid, registered trademarks can

28. See 15 U.S.C. §1052(a) (2012).

29. *Iancu*, 139 S. Ct. at 2297; see also *Matal v. Tam*, 137 S. Ct. 1744, 1753 (2017) (noting that federal registration “confers important legal rights and benefits on trademark owners who register their marks”) (citation omitted). Justice Sotomayor, in partial dissent, downgrades the consequences of federal registration to merely providing “several ancillary benefits” to trademark-holders. See *Iancu*, 139 S. Ct. at 2316 (Sotomayor, J., concurring in part and dissenting in part).

30. See *Iancu*, 139 S. Ct. at 2297; see also *id.* at 2308, 2316, 2317 (Sotomayor, J., concurring in part and dissenting in part).

31. *Id.* at 2297 (majority opinion).

gain further defenses by the opportunity to achieve “incontestable” status, registered trademarks can get government assistance in halting the import of infringing goods, and so on).³²

What can get lost in that list of “benefits,” to a reader unfamiliar with trademark law, is that the most valuable aspect of federal registration is not procedural but *substantive*: It is only by achieving federal registration for a mark that the trademark owner gains nationwide legal protection for that mark. The very genesis of the federal trademark registration scheme was the congressional recognition that leaving trademark protection to State common law had become an impediment to creating a truly national economy.³³ Trademark rights, left to State law, had become “uncertain and subject to variation in different parts of the country.”³⁴ Given the important role played by trademarks in promoting fair competition and maintaining product quality, Congress determined that “a sound public policy requires that trademarks should receive nationally the greatest protection that can be given them.”³⁵

Using its powers under the Commerce Clause, Congress enacted the Lanham Act in 1946 specifically to “provide national protection for trademarks used in interstate and foreign commerce.”³⁶ Without federal registration, a trademark owner cannot get nationally effective legal protection for a mark. Instead, he is entitled to exclusive use of the trademark only in the limited local areas where he has actually used the mark, and is relegated largely to the patchwork of State law trademark protections decried by Congress in 1946 as inadequate.³⁷ As important, without the nationwide protection conferred by Lanham Act registration, once a particular brand begins to enjoy commercial success, a “competitor can swoop in and adopt the same mark for the same goods in a different location.”³⁸ In short, federal registration is essential for any serious business with aspirations to market goods nationally (in other words, for any business).

32. *Id.* at 2297–98.

33. *Park ‘N Fly v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 193 (1985).

34. *Id.*

35. *Id.* (quoting S. REP. NO. 79-1333, at 6 (1946)).

36. *See id.*

37. *See In re Tam*, 808 F.3d 1321, 1343 (Fed. Cir. 2015).

38. *Id.*

Describing federal registration as beneficial but not necessary because the trademark owner can still sell goods under the trademark is like describing car registration as beneficial but not necessary: Unregistered cars can still be driven on private property, and are simply barred from using public roads, but this scarcely makes car registration optional in any meaningful sense. As the Federal Circuit has emphasized, the legal consequences that flow from federal trademark registration are “now so significant as to make federal registration indispensable for any owner making an informed decision about its trademark rights.”³⁹ The Lanham Act is more properly understood—like car registration—as a regulatory scheme with important public purposes that operates through a registration process rather than a “benefit” scheme for trademark owners (a point that becomes important for First Amendment purposes, as discussed later).⁴⁰

B. *The Bar on Registering “Immoral or Scandalous Marks”*

Under the Lanham Act, trademarks that are “used in commerce” and are capable of identifying the source of a product are presumptively entitled to federal registration.⁴¹ These requirements relate directly to the Act’s dual purposes of protecting consumers’ interest in purchasing known goods and protecting the investment of trademark holders in the quality of their brand.⁴² The statute also specifies certain circumstances in which trademarks will not be registered.⁴³ Many of these statutory bars similarly relate directly to the Act’s goals; trademarks will not be registered, for example, if the proffered mark is so similar to a mark already registered that it would “cause confusion,” cause “mistake,” or “deceive.”⁴⁴

However, the Lanham Act also has a “hodgepodge of restrictions” that bar registration for other reasons.⁴⁵ It was one of those restrictions that proved problematic in Mr. Brunetti’s case:

39. *Id.* at 1341.

40. *See, e.g., id.* at 1346 (“Trademark registration is a regulatory activity.”).

41. *See* 15 U.S.C. § 1051(a)(1) (2012).

42. *See Tam*, 808 F.3d at 1328.

43. *See* § 1052.

44. § 1052(d).

45. *Tam*, 808 F.3d at 1329.

The statutory bar that directs the PTO to refuse registration to “immoral” or “scandalous” trademarks.⁴⁶ That wording has an antiquated air, and it may come as no surprise that the provision originated as part of trademark legislation adopted by Congress in 1905.⁴⁷ As it appears in the Lanham Act, the bar says that registration may be refused to a trademark that “[c]onsists of or comprises immoral, deceptive, or scandalous matter.”⁴⁸ Despite the statute weaving those restrictions together, the PTO has long treated “deceptive” marks as a separate type of bar, and treated “immoral or scandalous” marks as a single category (often simply termed the “scandalousness” bar).⁴⁹

To determine whether a trademark application should be rejected on the “scandalousness” basis, the PTO must determine whether a “substantial composite of the general public’ would find the mark scandalous, defined as ‘shocking to the sense of truth, decency or propriety; disgraceful; offensive; disreputable; . . . giving offense to the conscience or moral feelings . . . or calling out for condemnation.’”⁵⁰ Alternatively, the PTO may prove scandalousness by establishing that a mark is “vulgar.”⁵¹ Vulgar marks are also described as “lacking in taste, indelicate, [and] morally crude.”⁵²

“Disreputable”? “Lacking in taste”? Shocking to “the sense of truth”? If anything, the subjective terms supplied by case law are even broader than the statutory language. The cases can hardly be said to limit the breadth of the statutory terms or provide helpful guidance. This may well be an impossible task. The PTO’s administrative trial tribunal has itself noted that the guidelines are “somewhat vague” and the decision whether to reject a mark on “scandalous” grounds is “necessarily a highly subjective one.”⁵³ The

46. § 1052(a).

47. See *Tam*, 808 F.3d at 1330 (citing Act of Feb. 20, 1905, ch. 592, §5(a), 33 Stat. 724, 725).

48. § 1052(a).

49. See *In re Brunetti*, 877 F.3d 1330, 1336 (Fed. Cir. 2017) (noting that the PTO treats the bar as a “unitary provision” that it refers to as the “immoral or scandalous provision”).

50. *Id.* at 1336 (quoting *In re Fox*, 702 F.3d 633, 635 (Fed. Cir. 2012)).

51. *Id.* (citing *Fox*, 702 F.3d at 635).

52. *Id.* (quoting *In re McGinley*, 660 F.2d 481, 486 (C.C.P.A. 1981)).

53. *In re In Over Our Heads, Inc.*, 16 U.S.P.Q.2d 1653, 1990 WL 354546 at *1 (T.T.A.B. Aug. 28, 1990); see also *Brunetti*, 877 F.3d at 1354.

Federal Circuit, looking to the history of trademark applications considered under the statutory bar, made the frank observation that it could not “discern any pattern indicating when the incorporation of an offensive term into a mark will serve as a bar to registration and when it will not.”⁵⁴

C. *The Inevitable Fate of Mr. Brunetti’s Trademark “FUCT” in the PTO*

Given this panoply of subjective terms, Mr. Brunetti’s case did not prove difficult. The examining attorney found the trademark “FUCT” to be the “past tense of the verb ‘fuck,’” and denied the trademark registration as a “vulgar” word.⁵⁵ That decision was affirmed on appeal with the PTO by its administrative tribunal, which found “FUCT” to be both “highly offensive” and “vulgar,” with “decidedly negative sexual connotations.”⁵⁶

Mr. Brunetti thus joined a long line of trademark owners whose applications for registration had similarly been rejected over the years as “immoral or scandalous.”⁵⁷ In the 1930s, the PTO found “scandalous” and refused registration to such marks as “MADONNA” for wine and “QUEEN MARY” for women’s underwear.⁵⁸ Eighty years later, by contrast, the “BLUE NUN” was considered acceptable for wine.⁵⁹ Instead, the PTO’s “immoral or scandalous” rejections included marks such as “BULLSHIT” for beverages, “1-800-JACK-OFF” for adult-oriented telephone conversation services, and “THE BEARDED CLAM” for restaurant services.⁶⁰

Given the breadth of the statutory language, such rejections were by no means limited to profane or sexually suggestive marks.

54. *Brunetti*, 877 F.3d at 1354.

55. *Id.* at 1337.

56. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2298 (2019). The Board also relied on the “anti-social” and “nihilistic” content of Mr. Brunetti’s website as support for its rejection. *Id.*

57. In an excellent and very thorough article, authors Anne Gilson LaLonde and Jerome Gilson documented the PTO’s history of granting and denying marks challenged as “immoral or scandalous.” *See Anne Gilson LaLonde & Jerome Gilson, Trademarks Laid Bare: Marks That May Be Scandalous or Immoral*, 101 TRADEMARK REP. 1476, 1488–1533 (2011).

58. *Brunetti*, 877 F.3d at 1336 (citations omitted).

59. *See BLUE NUN*, Registration No. 3754794.

60. LaLonde & Gilson, *supra* note 57, at 1541–42.

An in-depth study of the history of the statutory bar found a “wide variety of trademarks . . . implicated by the ban on registering scandalous and immoral marks, from religion and political imagery to sexual matter, profanity and illegality.”⁶¹ Thus, the PTO rejected as “immoral or scandalous” trademarks with political messages that it read to suggest support for the terrorist group al-Qaeda (“BABY AL QAEDA” and “AL QAEDA” for t-shirts).⁶² The PTO also deemed “immoral or scandalous” trademarks it deemed to convey approval for or “glamorize” drug use (“YOU CAN’T SPELL HEALTHCARE WITHOUT THC” for pain-relief medication).⁶³

Even to the untutored eye, a statutory standard that invites government officials to decide whether particular words or terms are “immoral or scandalous” and should thus be denied a legal status poses evident free speech concerns. But the Federal Circuit—which hears all appeals from registration denials by the PTO—had until recently taken the position that the First Amendment was not implicated by the Lanham Act’s statutory bars.⁶⁴ As recently as 2011, trademark law experts predicted that, while legally problematic, the statutory bar to registering “immoral or scandalous” trademarks was unlikely to lose a First Amendment challenge any time soon.⁶⁵ By the time Mr. Brunetti’s First Amendment challenge reached the courts, however, the timing proved opportune.

D. *The Back Story: The Slants Test the First Amendment Waters*

The groundwork for *Iancu v. Brunetti*, as noted, had already been laid two terms earlier in the Supreme Court’s First Amendment decision in *Matal v. Tam*.⁶⁶ *Tam* involved a free speech challenge to another statutory bar to federal trademark registration—the bar on registering “disparaging” trademarks

61. *Id.* at 1510.

62. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2300–01 (2019).

63. *Id.* at 2300.

64. See *In re Mavety Media Grp. Ltd.*, 33 F.3d 1367, 1374 (Fed. Cir. 1994); *In re McGinley*, 660 F.2d 481, 484 (C.C.P.A. 1981).

65. LaLonde & Gilson, *supra* note 57, at 1531 (“All challenges to the validity of Section 2(a)’s ban on scandalous marks on the basis that it violates the First Amendment have met a brick wall that is unlikely to crumble any time soon.”).

66. *Matal v. Tam*, 137 S. Ct. 1744 (2017).

(those that disparage persons or groups).⁶⁷ Simon Tam named his band, made up entirely of Asian-Americans, “The Slants” as a way of reclaiming an ethnic slur.⁶⁸ He then applied to register “THE SLANTS” as the trademark for his band’s musical services.⁶⁹ After determining that this term was considered disparaging by many of Asian descent, the PTO refused to register “The Slants” as a trademark for the band.⁷⁰ Mr. Tam challenged the statutory bar on First Amendment grounds.⁷¹

The *Tam* case may have involved an obscure band name, but notably, the very same issue was also confronting a far better-known and highly valuable trademark—the team name for the Washington Redskins. The “REDSKINS” trademark had just been cancelled by the PTO after many years of federal registration, on the ground that the term was “disparaging to Native Americans.”⁷² That case was making its way through the courts in the Fourth Circuit at the very same time as Mr. Tam’s free speech challenge was being decided by the Federal Circuit.⁷³ It was, in a sense, a perfect storm for First Amendment concerns over trademark registration.

The Federal Circuit used this opportunity to reconsider and reverse its longstanding position that the bar on registering “disparaging” trademarks presented no First Amendment issues. Sitting en banc, the Federal Circuit struck down the statutory bar as an unconstitutional burden on private speech in a decision that generated no less than five opinions arguing over the correct constitutional approach.⁷⁴ The Supreme Court granted certiorari

67. See 15 U.S.C. § 1052(a) (2012) (prohibiting the registration of trademarks that “disparage . . . or bring . . . into contempt, or disrepute” any “persons, living or dead”).

68. *Tam*, 137 S. Ct. at 1754.

69. *Id.*

70. *Id.*

71. *Id.*

72. See *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d (BNA) 1080 (T.T.A.B. 2014) (cancelling the “REDSKINS” trademark for being “disparaging” to Native Americans).

73. See *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015) (affirming PTO’s cancellation of “REDSKINS” trademark), *vacated*, 709 F. App’x 182 (per curiam) (4th Cir. 2018).

74. *In re Tam*, 808 F.3d 1321, 1358 (Fed. Cir. 2015); see also *Tam*, 137 S. Ct. at 1754–55 (summarizing the “assortment of theories” expressed in the opinions generated in the en banc Federal Circuit decision).

as is its practice when a federal circuit court invalidates a federal statute on constitutional grounds.⁷⁵

The most remarkable thing about the Supreme Court's ensuing decision in *Tam* was that even though all participating Justices agreed that the bar on registering "disparaging" trademarks was unconstitutional—and even though all agreed further that the constitutional flaw was that the Lanham Act provision unlawfully authorized "viewpoint discrimination" against private speech by government officials—the eight Justices participating could not reach agreement on any single articulation of a rationale for the Court's decision.⁷⁶ In writing for the majority in the later *Iancu* decision, Justice Kagan highlights that oddity, noting that the Court "could not agree on the overall framework for deciding the case" even though there was "common ground" for a "core postulate of free speech law: The government may not discriminate against speech based on the ideas or opinions it conveys."⁷⁷ As noted, I have also written at length on the puzzling breakdown in the *Matal v. Tam* decision.⁷⁸ It was against this background that *Iancu* came up for review before the Supreme Court.

E. *The Iancu v. Brunetti Court Finds a Majority Where the Matal v. Tam Court Failed*

Given a second chance in Mr. Brunetti's case, with artful drafting by Justice Kagan, the Supreme Court was able to not only agree that the statutory bar on registering "immoral or scandalous" trademarks fails under the First Amendment but also reach common ground on *why* it does so. To garner the support of six

75. See *Iancu v. Brunetti*, 139 S. Ct. 2294, 2298 (2019) ("As usual when a lower court has invalidated a federal statute, we granted certiorari"). In *Matal v. Tam*, the lawyers for Pro-Football took the unusual step of asking the Supreme Court to bypass the federal appellate process and take certiorari in the REDSKINS case before the Fourth Circuit had ruled, along with the Supreme Court's consideration of THE SLANTS trademark application. The Supreme Court denied that request. See *Pro-Football, Inc. v. Blackhorse*, 137 S. Ct. 44 (2016). However, Pro-Football did participate as amicus curiae in *Matal v. Tam*. See *Tam*, 137 S. Ct. at 1758 (citing to Pro-Football *amicus* brief).

76. See generally, Kuckes, *supra* note 20, at 134–56 (noting the areas of agreement and disagreement among the three plurality decisions in *Matal v. Tam*).

77. *Iancu*, 139 S. Ct. at 2298–99.

78. See generally, Kuckes, *supra* note 20.

Justices, Justice Kagan wrote a narrow opinion concluding that the statutory bar suffers from exactly the same free speech flaw as the bar on registering “disparaging” trademarks: “[i]t is viewpoint-based.”⁷⁹ To reach that conclusion, Justice Kagan does a masterful job of emphasizing those aspects of the case that make the issue seem, indeed, indistinguishable from *Tam*. The statutory provision at issue in *Iancu* empowered government officials to reject a legal status to trademarks which are found “immoral or scandalous.”⁸⁰ When is expressive material “immoral,” Justice Kagan asks? When it is “inconsistent with rectitude, purity, or good morals” or “opposed to or violating morality.”⁸¹ That Lanham Act provision, she concludes, thus permits registration of marks that “champion society’s sense of rectitude and morality, but not marks that denigrate those concepts,” which can only be described as viewpoint discrimination.⁸²

The statutory term “scandalous,” Justice Kagan goes on, is likewise defined as material that “giv[es] offense to the conscience or moral feelings” and “call[s] out condemnation.”⁸³ That means, once again, that the Lanham Act provision allows registration of marks “when their messages accord with, but not when their messages defy, society’s sense of decency or propriety.”⁸⁴ That is viewpoint discrimination once again. “Put the pair of overlapping terms together,” and what you find, she concludes, is that the statute on its face distinguishes between two opposing ideas: “those aligned with conventional moral standards and those hostile to them.”⁸⁵ Trademarks that induce “societal nods of approval” are favored, but those that provoke “offense and condemnation” are disfavored.⁸⁶ The statute burdens messages that express offending viewpoints and favors those with positive or innocuous points of view (thus, she predicts, “HATE RULES” will not be registered as a trademark, but “LOVE RULES” will).⁸⁷ Justice Kagan finds the

79. *Iancu*, 139 S. Ct. at 2299.

80. *Id.* at 2298.

81. *Id.* at 2299 (citing dictionary definitions).

82. *Id.* at 2299–300.

83. *Id.* (alterations in original) (citing dictionary definitions).

84. *Id.* at 2300.

85. *Id.*

86. *Id.*

87. *Id.*

same flaw in the PTO's record of applying the statute. Looking to the record of granting and rejecting trademark applications under the statutory bar, she concluded that the facial viewpoint bias in the statute has also led to viewpoint-discriminatory application.⁸⁸ To support that conclusion, she selects an interesting set of examples from the (voluminous) administrative record.⁸⁹

Recall that the statutory bar on registering "disparaging" trademarks, struck down in *Tam*, had on its face allowed marks that commented positively on a group but barred marks that commented negatively on (that is, "disparaged") the same group. Thus, the PTO allowed the registration of trademarks that made positive comments about an ethnic or religious group but refused registration to marks that were hostile to the same group. The trademark "ASIAN EFFICIENCY" was registered but "THE SLANTS" was not. The trademark "THINK ISLAM" was approved for registration but "STOP THE ISLAMISATION OF AMERICA" was rejected.⁹⁰ In *Tam*, those results followed naturally from the statutory language. Because "disparaging" is by definition the opposite of "praising," the statutory bar in *Tam* was inevitably applied in a way that discriminated between marks that expressed positive and negative views on the same topic.⁹¹ In a pithy example, Justice Kennedy observed in his plurality opinion in *Tam* that if the government's defense of the PTO's ability to reject "disparaging" trademarks were constitutional, "a law would be viewpoint neutral even if it provided that public officials could be praised but not condemned."⁹² Using an example of a law that would obviously be constitutionally indefensible, he showed starkly the problematic nature of the "disparaging" trademarks bar.

In crafting the majority opinion in *Iancu*, Justice Kagan picked examples to illustrate that the bar on "immoral and scandalous" trademarks worked in just the same manner as Justice Kennedy's example above. She emphasized that the PTO, applying its

88. *Id.*

89. *See id.*; *see also* LaLonde & Gilson, *supra* note 57 (detailing an extensive history of the PTO's application of the "immoral or scandalous" statutory bar).

90. *In re Tam*, 808 F.3d 1321, 1336–37 (Fed. Cir. 2015).

91. *See id.*

92. *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment).

“scandalousness” inquiry, had allowed the registration of marks that conveyed an anti-drug message (such as “SAY NOT TO DRUGS – REALITY IS THE BEST TRIP IN LIFE”) but refused registration to marks that glamorized drug use (such as “YOU CAN’T SPELL HEALTHCARE WITHOUT THC”).⁹³ Trademarks that supported religious faith were registered (such as “PRAISE THE LORD”) but those with an anti-religious or blasphemous message were rejected (such as “BONG HITS 4 JESUS”).⁹⁴ Differential treatment by the government of private speech on the same topic, depending on whether it is critical or laudatory, does of course constitute obvious and unconstitutional “viewpoint discrimination.” As Justice Kennedy observed in *Tam*, the key flaw in the bar on “disparaging” marks is that within a single category, “an applicant may register a positive or benign mark but not a derogatory one,” a consequence that is “the essence of viewpoint discrimination.”⁹⁵ Justice Kagan’s close adherence to the common ground among the *Tam* pluralities charted a wise course and clearly succeeded in garnering a strong majority for a clear statement of First Amendment law (a result that an eight-member Court could not achieve two years earlier).

At the same time, the *Iancu v. Brunetti* majority opinion glosses over some broader issues. The truth is that many of the trademarks rejected by the PTO under the “scandalousness” bar express no viewpoint at all. Can a trademark like “FUCTION” really be said to express a “view” on any particular issue? The mark was rejected not because it expressed a viewpoint, but because it was found “vulgar.” Mr. Brunetti was trying to create shock value for his brand not by expressing a viewpoint criticizing anything in particular but by using shocking language. Even still, the government regulating private speech because it has found it “offensive” or “distasteful” should be as abhorrent to First Amendment values as classic viewpoint discrimination. That insight, expressed so well and so naturally in the *Cohen* decision in 1971, was lost in the cautious structure of the *Iancu* majority, as discussed further below.

93. *Iancu*, 139 S. Ct. at 2300.

94. *Id.*

95. *Tam*, 137 S. Ct. at 1766 (Kennedy, J., concurring in part and concurring in the judgment).

II. WHAT THE *IANCU-TAM* CASES REVEAL ABOUT MODERN FIRST AMENDMENT DOCTRINE

Together, the splintered decisions in *Tam* and the more successful resolution of virtually the same issue in *Iancu* shed a spotlight on the problematic nature of current First Amendment free speech doctrine. That problem can be highlighted by a simple question: How could it be that in *Tam*, eight members of the Court unanimously agreed that the Lanham Act provision at issue violated the First Amendment, but could not agree why? Justice Kagan explained the answer well: In *Tam*, the Court could not agree on an overall framework for deciding the case because “no majority emerged to resolve whether a Lanham Act bar is a condition on a government benefit or a simple restriction on speech.”⁹⁶ This brief note about whether trademark registration is a “government benefit” hints at a much larger First Amendment debate. Justice Kagan succeeded in *Iancu* by crafting a narrow decision that largely managed to sidestep that debate.

The challenge faced by Justice Kagan in *Iancu* was to write an opinion that avoided the need to characterize the nature of trademark registration. Otherwise, the decision would have become mired in a set of very difficult questions: Should trademark registration be viewed as a type of “limited public forum”?⁹⁷ Or is it more accurate to say that the government’s decision to publish a trademark in the federal registration database transforms the trademark into “government speech”?⁹⁸ If not, should trademark registration instead be seen as a “benefit” akin to those addressed

96. *Iancu*, 139 S. Ct. at 2298–99.

97. *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001) (describing the free speech principles applicable to private speech in a “limited public forum”); *see also* *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (explaining the Court’s “forum-based” free speech framework).

98. *See, e.g.*, *Pleasant Grove v. Summum*, 555 U.S. 460, 467 (2009) (recognizing the principle that “the Free Speech Clause . . . does not regulate government speech”). In *Matal v. Tam*, there was consensus among the Justices on this point at least—that trademark registration does not turn a private trademark into “government speech.” *See Tam*, 137 S. Ct. at 1760 (stating for the Court that “[t]rademarks are private, not government, speech”).

in the government spending cases?⁹⁹ Or is a trademark more properly characterized as “commercial” speech that the government may more readily regulate?¹⁰⁰ The *Tam* decision floundered on these very issues. It was disagreement among the Justices about how to characterize trademark registration, and which line of First Amendment free speech cases to invoke, that resulted in the lack of a majority opinion in *Tam*. The unsatisfactory state of First Amendment free speech law is highlighted, once again, in the *Iancu* decision. First Amendment law presented a series of shoals that Justice Kagan would need to navigate if she was to hold together a majority, as explained further below.

A. *The Rigid “Taxonomy” of Modern First Amendment Free Speech Law*

Both *Iancu* and *Tam* illustrate that a great deal of time and energy is spent in modern First Amendment free speech cases arguing over which of the legal “boxes” created by the Supreme Court is the proper category. Justice Breyer lamented this in his separate opinion in *Iancu*, urging the Court to “place less emphasis on trying to decide [how] the statute at issue should be characterized” and more time focusing on the “values the First Amendment seeks to protect.”¹⁰¹ As he pithily observed, “[t]he First Amendment is not the Tax Code.”¹⁰² That was an apt observation. The free speech guarantee in the First Amendment is, of course, addressed to governmental restrictions on private speech. Such restrictions can take many forms. A city rule that requires a permit to hold a rally in a city park is a government rule restricting private speech (though perhaps permissibly), as is a federal agency regulation that bars or requires certain terms in advertising for drug products. A statute criminalizing fraudulent

99. *See, e.g.*, *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214–15 (2013) (explaining the principle that Congress, in enacting spending programs, can impose speech-related restrictions to ensure funds are used for the activities it wishes to subsidize).

100. *See, e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564–65 (1980) (articulating the free speech doctrines applicable to government regulation of “commercial speech”).

101. *Iancu*, 139 S. Ct. at 2304–05 (Breyer, J., concurring in part and dissenting in part).

102. *Id.* at 2304.

misrepresentations is another restriction on private speech (though certainly permissible). Many, many more examples exist, reflecting the wide gamut of legal contexts in which government rules may result in restrictions on private speech.

Rather than create a general constitutional principle to cover the full range of free speech cases, the Supreme Court has created separate free speech rules for particular categories of cases. Courts tend to apply these doctrines quite rigidly and formalistically.¹⁰³ As Justice Breyer observes, the Court tends to “deduc[e] the answers to First Amendment questions strictly from categories,” an approach he believes to be misguided.¹⁰⁴ Even more important than the categories themselves is the consequences that flow from choosing the category. Depending on which First Amendment “box” is deemed to be most apt, the Court’s weighing of the government and private interests—the degree of scrutiny—will differ significantly.

B. *The Real Issue: What Balancing Test is Dictated Here?*

In certain relatively rare circumstances, the Supreme Court does not engage in any interest balancing. At one end of the spectrum, the Court has held that certain speech does not enjoy any First Amendment protection. In areas where the need for government control is most evident, the Court has simply declared that certain private speech is not protected by the First Amendment at all; speech in that category includes fraudulent statements, obscenity, and “fighting words.”¹⁰⁵ Excluding such speech from constitutional protection eliminates any First Amendment challenge to statutes that criminalize fraud and validates other governmental schemes where the Court concludes that the private speaker has no legitimate interest while the government’s interest is great (such as obscenity).

More often, however, the Court has created separate lines of authority dictating the particular balancing test to use in a given setting to weigh the private speaker’s right to speak with the

103. *See id.* at 2304 (arguing that the Court has sometimes applied free speech rules “too rigidly,” especially those related to “content discrimination”).

104. *Id.* at 2305.

105. *See Cohen v. California*, 403 U.S. 15, 20 (1971) (noting that the government may properly ban obscenity and “fighting words”).

government's interest in restricting, burdening, or barring that speech. How to strike the appropriate balance for a particular setting has been a continuing challenge, particularly given the Supreme Court's relatively recent expansion of free speech protections to commercial speech (previously put in the category of speech that had no First Amendment protection).¹⁰⁶ The most significant factor in these decisions—significant, that is, in terms of being outcome-determinative—is the “level of scrutiny” dictated by a particular line of free speech cases.

Will the government simply be expected to articulate some reasonable interest (to which the courts will generally defer)? Or will the courts closely scrutinize the government's reasons for restricting speech (putting a thumb on the side of the scales for the private speaker)? It is said, with some accuracy, that a “strict scrutiny” test is “strict in theory, fatal in fact.”¹⁰⁷ On the other hand, so-called “intermediate scrutiny” tests can have the opposite problem, that of excessive deference to governmental interests. The development of varying levels of scrutiny in First Amendment free speech cases has, not surprisingly, led to fierce battles about in what “box” any given free speech restriction should be placed, since the Court's preliminary decision about how to categorize the case will determine the level of scrutiny (and ultimately, predict the case outcome). Justice Breyer explicitly describes the Court's lines of First Amendment authority as “outcome-determinative categories.”¹⁰⁸

C. Avoiding Landmines in Drafting the Iancu v. Brunetti Decision

Justice Kagan could not simply draft an opinion treating the case as a straightforward application of the principles recognized in *Cohen*. She had to find a route that would avoid the disagreements that would inevitably arise from any attempt to characterize the

106. See generally 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496–500 (1996) (describing the evolution of commercial speech doctrine).

107. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (referring to the notion that “strict scrutiny is ‘strict in theory, but fatal in fact’” while seeking to dispel it).

108. See *Iancu*, 139 S. Ct. at 2304, 2306 (Breyer, J., concurring in part and dissenting in part) (noting the Court's tendency to treat its “speech-related categories . . . as outcome-determinative rules”).

Lanham Act's statutory bars by explaining where the case fit within the existing First Amendment "taxonomy" (and what level of scrutiny followed). One particular First Amendment "box" was already off the table: The Court in *Tam* had sensibly rejected the argument that private trademarks accepted for federal registration become a type of "government speech" (giving the government full leeway to decide which trademarks to endorse or reject).¹⁰⁹ The government is obviously not endorsing a trademark's message when it grants a trademark registration, simply making the determination that a particular mark meets the requirements of federal law and putting the public on notice of the registration decision. As Justice Alito aptly put it, "if trademarks represent government speech, what does the Government have in mind when it advises Americans to 'make.believe' (Sony), to 'Think different' (Apple), to 'Just do it' (Nike), to 'Have it Your Way' (Burger King)?"¹¹⁰ By the time *Iancu* arrived at the Court, it was clear at least that "[t]rademarks are private, not government, speech."¹¹¹

Instead, there was heated debate over a closely related argument: whether trademark registration should be seen as a type of "government benefit" program, thereby bringing the case within the line of First Amendment law establishing that the government can decide which speech activities it wishes to "subsidize" in funding such programs.¹¹² Federal trademark registration is often said to confer important "benefits" on trademark owners.¹¹³ It may seem tempting to invoke the government benefits line of free speech cases as the right "box" for the case. In *Iancu*, for example, both Justice Breyer and Justice Sotomayor, writing in partial dissent, relied heavily on the notion that the government can legitimately decide to not provide the "benefits" of trademark registration to scandalous, offensive, and vulgar trademarks without violating free

109. See *Matal v. Tam*, 137 S. Ct. 1744, 1757–60 (2017).

110. *Id.* at 1759.

111. *Id.* at 1760.

112. See, e.g., *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214–15 (2013); see also *Tam*, 137 S. Ct. at 1761 (noting that the "government is not required to subsidize activities that it does not wish to promote").

113. *Tam*, 137 S. Ct. at 1753.

speech rights.¹¹⁴ However, the type of “benefits” addressed in those cases involve “cash subsidies or their equivalent.”¹¹⁵ Insofar as beneficial legal results follow federal trademark registration, these are more aptly described as the “legal consequences” of registration than as “benefits” in the sense used in those cases. Trademark registration is a routine government regulatory scheme, not a spending program involving the type of “cash” benefits or grant funds at issue in the “government benefits” cases. Whatever her own views on the propriety of treating trademark registration as a government “benefit,” however, Justice Kagan could not wade into this controversy without risking losing her coalition. As Justice Alito emphasized in his plurality in *Tam*, the First Amendment’s “government benefits” doctrine presents a “notoriously tricky question of constitutional law.”¹¹⁶

Some Justices urged the Court instead to treat trademark registration as a type of “limited public forum,” a designated government channel for private speech in which the government has power to ensure that the forum is used for its intended purposes, such as a school’s internal mailbox system.¹¹⁷ But the only arguable “forum” in the trademark registration program is a public online database listing those trademarks approved for federal registration (along with a docket disclosing the history of

114. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2307 (2019) (Breyer, J., concurring in part and dissenting in part) (emphasizing that the government should be able to “disincentivize” the use of offensively worded trademarks by “denying the benefit of trademark registration”); *see also id.* at 2308 (Sotomayor, J., concurring in part and dissenting in part) (emphasizing that the trademark registration system “confers a small number of non-cash benefits on trademark-holders who register their marks” and that the government “need not provide this largely commercial benefit at all”).

115. *Tam*, 137 S. Ct. at 1761.

116. *Id.* at 1760.

117. *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46, 49 (1983) (noting that “[i]mplicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity These distinctions . . . are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property”); *see also Iancu*, 139 S. Ct. at 2305 (Sotomayor, J., concurring in part and dissenting in part) (arguing that the case should be treated as “a limited public forum”).

each trademark prosecution).¹¹⁸ The database of federal trademarks is more akin to a court's online docketing system than a forum for private communication. If such databases create a "limited public forum" for private speech, then there are innumerable other such forums, including not only court and agency case docketing systems but also government databases listing car registrations, professional licensing, registered corporations, and the like. Are registrants really "speaking" (presumably to each other) in such a database? This argument is untenable.¹¹⁹

Yet another First Amendment "box" urged upon the Court as the correct analogy for trademark registration was the line of First Amendment authority related to "commercial speech."¹²⁰ Where the commercial speech analysis applies, the government is subject to less exacting scrutiny of its conduct and governmental restrictions affecting speech are more likely to be upheld. However, major controversy swirls over the proper application and reach of the commercial speech doctrine. What should be considered "commercial speech," and in what settings the doctrine should apply is a matter of debate. Initially, the Supreme Court defined "commercial speech" as speech that "propose[s] a commercial transaction."¹²¹ Thereafter, the Court spoke somewhat more broadly of commercial speech as "expression related solely to the economic interests of the speaker and its audience."¹²² But, "the line between commercial and non-commercial speech is not always clear."¹²³ Speech can be both political and economically motivated (for example, an editorial in a newspaper) or both economically

118. See Trademark Electronic Search System (TESS), <https://www.uspto.gov/trademarks-application-process/search-trademark-database> [<https://perma.cc/Y293-JD6K>] (last visited Dec. 1, 2019).

119. See *Iancu*, 139 S. Ct. at 2305 (Breyer, J., concurring in part and dissenting in part) (seeing only a "vague resemblance" between trademark registration and a "limited public forum").

120. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564–66 (1980) (articulating the free speech doctrines applicable to government regulation of "commercial speech").

121. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)).

122. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561.

123. *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017).

motivated and political (for example, a public service announcement made by a drug company). The difficulty of applying the “commercial speech” doctrine is evident. Trademarks, for example, are not necessarily related “solely” to the speaker’s economic interests, but instead can be *both* highly expressive *and* related to commercial activity. The trademark at issue in *Matal v. Tam* was a prime example: Simon Tam chose “The Slants” as his band’s trademark to send a message about discrimination against Asian-Americans.¹²⁴ As Justice Alito emphasized in *Tam*, “trademarks often have an expressive content.”¹²⁵ Moreover, Justice Alito highlights a deeper problem with invoking the “commercial speech” cases in a way that would allow the government to cleanse such speech of “offensive” content. As he observed in *Tam*, if “affixing the commercial label permits the suppression of any speech that may lead to political or social ‘volatility,’ free speech would be endangered.”¹²⁶

After reading the numerous opinions in both the Federal Circuit and the Supreme Court in the two cases taking a wide variety of positions on how trademark registration should be characterized, the bottom line is best stated by Justice Breyer in his partial dissent in *Iancu*: “This case illustrates the limits of relying on rigid First Amendment categories” since trademark registration “does not fit easily into any of these categories.”¹²⁷ Given the stark disagreements among the members of the Court on how to characterize the trademark registration program for First Amendment purposes, Justice Kagan had to find a way to draft an opinion that did not require going through that step. She did so by narrowly analyzing the case as one of “viewpoint discrimination” and making clear that no balancing of the government’s interests is required in any setting once this conclusion is reached. Her approach succeeded in holding together an unusual assortment of

124. *Id.* at 1751 (noting that while “The Slants” is a “derogatory term for persons of Asian descent,” the “band members believe by taking that slur as the name of their group, they will help to ‘reclaim’ the term and drain its denigrating force”).

125. *Id.* at 1760.

126. *Id.* at 1765 (plurality opinion).

127. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2305 (2019) (Breyer, J., concurring in part and dissenting in part).

conservative and liberal Justices to make a majority,¹²⁸ though one still senses that the decision is held together with string and tape. The limitations and benefits of her approach are explored further below.

III. *IANCU V. BRUNETTI'S SOLUTION: FLAWS AND BENEFITS IN A VIEWPOINT-DISCRIMINATION APPROACH*

When the Supreme Court decided *Tam*, as noted, deep divisions over the proper direction of free speech doctrine divided the Court and made unity impossible, even though the eight Justices all agreed both on the core principle and on the case outcome. By the time the *Iancu* decision was issued, Justice Kagan had of course taken over the drafting pen. With participation by two new Justices (Justices Gorsuch and Kavanaugh), she convinced six members of the Court to join a single opinion holding that the Lanham Act bar on registering “immoral or scandalous” trademarks should be struck down as unconstitutional viewpoint discrimination. To reach that outcome, however, Justice Kagan finessed several significant issues that, had they been engaged, might well have unraveled the majority.

A. *Hints That a Viewpoint Discrimination Lens is Not Entirely Satisfactory*

In particular, the Court avoided answering two central questions: First, is Mr. Brunetti’s “vulgar” trademark constitutionally entitled to free speech protection? And second, can this case really be analyzed based only on viewpoint discrimination? Asking these questions yields interesting results.

1. *Are “Vulgar” Trademarks Constitutionally Protected?*

The dissenting Justices express a shared sense of offense at the vulgarity of Mr. Brunetti’s “FUCT” trademark (and similar or worse marks) and the idea that the PTO would have to register trademarks of this ilk. Justice Sotomayor, in dissent, predicts a “coming rush” of trademark owners seeking to register “the most

128. *Id.* at 2294. The majority consisted of Justice Thomas, Justice Ginsburg, Justice Alito, Justice Gorsuch, Justice Kavanaugh, and Justice Kagan.

vulgar, profane or obscene words and images imaginable.”¹²⁹ Justice Roberts cannot imagine reading the First Amendment’s free speech right to “require the Government to give aid and comfort to those using obscene, vulgar, or profane modes of expression.”¹³⁰ The majority does not engage on this issue, other than to emphasize that the Lanham Act’s “scandalousness” bar “covers the universe of immoral or scandalous” material, and is not limited to vulgar or profane speech.¹³¹ Ironically, given that Mr. Brunetti’s “FUCT” trademark was rejected on the ground that it was “vulgar,” the majority opinion expresses no view as to whether “vulgar” trademarks are protected by the free speech guarantee. It steers entirely clear of the hot-button issue of “vulgar” material.

Instead, the Court emphasizes the statute as a whole, finding that the “statute, as written, does not draw the line at lewd, sexually explicit, or profane marks.”¹³² The examples of trademarks that the majority opinion uses as illustrations, notably, do not include a single one that would be considered vulgar.¹³³ While this case involves a facial challenge, the omission is still striking. Rather than talk about “vulgar” trademarks, Justice Kagan uses stirring analogies, comparing the case to a statute by which the government purported to ban “subversive” speech (clearly unconstitutional).¹³⁴

The majority’s avoidance of any direct engagement on the issue of “vulgarity” reflects the very cautious steps needed to avoid plunging the Court back into the disputes that precluded agreement in *Tam*. Notably, the government had invited the Court

129. *Id.* at 2308 (Sotomayor, J., concurring in part and dissenting in part).

130. *Id.* at 2303–04 (Roberts, C.J., concurring in part and dissenting in part) (finding the government to have “at least a reasonable interest in ensuring that it is not involved in promoting highly vulgar or obscene speech”).

131. *Id.* at 2301 (majority opinion).

132. *Id.*

133. *See id.* at 2300–01. The Federal Circuit was more direct in openly analyzing the many examples of (and flaws in) the statute as applied to vulgar marks such as “FUCT.” *See In re Brunetti*, 877 F.3d 1330, 1352–55 (Fed. Cir. 2017) (emphasizing that the “government does not have a substantial interest in protecting the public from scandalousness and profanities”). The Federal Circuit’s decision devotes an entire page to analyzing the PTO’s inconsistent treatment of trademarks like “FCUK,” “FUGLY,” “ROLL TURD,” and “MILF” (an acronym for “moms I’d like to fuck”). *Id.* at 1354.

134. *Iancu*, 139 S. Ct. at 2302.

in *Iancu* to adopt a “limiting construction” by reading the “immoral or scandalous” statutory ban as limited to marks offensive “because of their *mode* of expression, independent of any views that they may express.”¹³⁵ In essence, the government would have read the ban to bar only trademarks that express their message in a vulgar, lewd, profane, or sexually explicit manner (such as Mr. Brunetti’s brand-name).¹³⁶ There was already precedent for rejecting that position. The *Cohen* Court had explicitly and definitively rejected the same argument: It held that the “mode” of expression—in *Cohen*, using profanity as part of a political message—is protected as much as the content of speech.¹³⁷ But Justice Kagan chose not to engage on this issue either with the dissenters, who believed that this narrower reading would be both reasonable and constitutional,¹³⁸ or with concurring Justice Alito, who urged Congress to amend the statute to limit it to “vulgar” trademarks.¹³⁹ To take on that issue would have led the Court into the very interest balancing it was trying to avoid. Consider, for example, the reading proposed by Justice Sotomayor, who urged that at least as to the bar on “scandalous” trademarks, the Lanham Act could reasonably be read “to address only obscenity, vulgarity, and profanity.”¹⁴⁰ Notably, however, only one of these three types of speech—obscenity—has been held to lie outside of free speech protection altogether.¹⁴¹ As *Cohen* makes clear, in contrast to obscenity, vulgar and profane words like “Fuck the Draft” may indeed enjoy

135. *Id.* at 2301.

136. *Id.*

137. *Cohen v. California*, 403 U.S. 15, 21 (1971).

138. *See Iancu*, 139 S. Ct. at 2317 (Sotomayor, J., concurring in part and dissenting in part) (arguing that “[p]rohibiting the registration of obscene, profane, or vulgar marks qualifies as reasonable, viewpoint-neutral, content-based regulation”).

139. *Id.* at 2303 (Alito, J., concurring). Justice Alito, who joined the majority, also wrote separately to emphasize similarly his belief that Congress could amend the statute to “preclude[] the registration of marks containing vulgar terms that play no real part in the expression of ideas.” *Id.*

140. *Id.* at 2308 (Sotomayor, J., concurring in part and dissenting in part) (arguing that a narrowed reading of the statute “would save it from unconstitutionality”); *see also id.* at 2303 (Roberts, C.J., concurring in part and dissenting in part) (concluding likewise that “refusing registration to obscene, vulgar or profane marks does not offend the First Amendment”).

141. *See, e.g., Roth v. United States*, 354 U.S. 485 (1957) (holding that “obscenity is not within the area of constitutionally protected speech or press”).

free speech protection.¹⁴² Limiting the statute as Justice Sotomayor proposes would not, in fact, have made the constitutionality inquiry easier. Instead, it would have led the Court down the same rabbit hole it fell into in *Tam*.

What government interest could possibly sustain the constitutionality of a statute burdening “vulgar” speech? Chief Justice Roberts proposes one: barring the registration of obscene, vulgar or profane trademarks would be adequately supported by the government’s interests in “not associating itself with trademarks whose content is obscene, vulgar or profane.”¹⁴³ In other words, the government should be able to treat vulgar speech differently because it does not approve of vulgar speech. Such a circular rationale is not usually an adequate justification for First Amendment purposes.¹⁴⁴ Rather than take on the issue, Justice Kagan (wisely perhaps given the context) simply states that “even assuming” the government’s reading would eliminate First Amendment problems, it is simply not a reasonable reading of the statutory language.¹⁴⁵ Thus, the question that is *not* aired in the majority opinion is how such a “narrowing reading” could possibly be constitutional. Can it really be that Congress can freely regulate, prohibit or burden private speech on the ground that it includes swear words (particularly in a setting outside of schools or captive audiences)? “Vulgarity” may be distasteful, but it does not fall into any category of speech that does not enjoy First Amendment protection, such as obscenity, fighting words, and fraudulent or deceptive speech. The Supreme Court in *Cohen* had no difficulty in discerning that penalizing a speaker for using vulgarity to express a message (such as “Fuck the Draft”) is not a constitutional means of regulating speech.¹⁴⁶ That frank and direct acknowledgement of the sometimes difficult truths that flow from the First Amendment’s free speech guarantee is missing from

142. See *Cohen*, 403 U.S. at 20 (emphasizing that “[t]his is not . . . an obscenity case”).

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

144. See, e.g., *Cohen*, 403 U.S. at 22 (finding “plainly untenable” the “general assertion that the States, acting as guardians of public morality, may properly remove [an] offensive word from the public vocabulary”).

145. *Iancu*, 139 S. Ct. at 2301.

146. See *Cohen*, 403 U.S. at 26.

Iancu. The *Cohen* case also involved a facial challenge to the California statute penalizing “offensive” speech, and the Court directly confronted the import of its holding: messages expressed in profane language are protected by the First Amendment no less than messages using conventional political terms.¹⁴⁷ Indeed, the *Cohen* Court emphasized that using profane language can be part of creating a powerful impact for the message, noting that “words are often chosen as much for their emotive as their cognitive force.”¹⁴⁸ In *Iancu*, by contrast, the Court emphasizes the facial aspect of the constitutional challenge, and steers clear from the “FUCT” trademark that sparked the challenge.

While pragmatic, the majority’s strict focus on the facial challenge to the statute has an odd, though unstated, result: Mr. Brunetti wins without ever receiving any affirmation that his own profane trademark is actually constitutionally protected speech. By contrast, the Court did not shy away from the analogous issue in deciding *Cohen* in 1971. While acknowledging that the answer may not seem “obvious” from the case before it, given the broader implications of its ruling, the Court flatly held that vulgar but peaceful speech, such as Mr. Cohen’s “Fuck the Draft” jacket, cannot constitutionally be restricted on the ground that the government, or some part of the public, finds that the message uses an “offensive word.”¹⁴⁹ No such clear or direct engagement with the underlying issue of the individual challenger can be found in the *Iancu* decision. That judicial reticence has an odd result: If Congress were to take up Justice Alito’s invitation, and rewrite the statute to bar only the registration of trademarks that include “vulgar” terms, the *Iancu* majority decision would not explicitly address the constitutionality of such a revised statute. It is entirely possible that the Court will be presented with yet another constitutional challenge in its *Tam-Iancu* sequence if Congress takes up the invitation to rewrite the Lanham Act.

If “Round Three” of the dispute follows, a revised Lanham Act will directly call upon the Court to say whether a statutory bar written to preclude only the registration of “vulgar” marks is

147. *Id.* at 25.

148. *Id.* at 26.

149. *Id.* at 25; *see also id.* at 15 (noting that while this “case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance”).

unconstitutionally “viewpoint discriminatory,” since it is hard to see what “viewpoint,” if any, vulgar terms are expressing. As Justice Breyer observed in his separate concurrence, it is “hard to see how a statute prohibiting the registration of only highly vulgar or obscene words discriminates based on ‘viewpoint.’”¹⁵⁰ The issue of the Supreme Court’s insistence that “viewpoint discrimination” is the real flaw in the Lanham Act’s “scandalousness” provision is taken up in turn below.

2. *Is “Viewpoint Discrimination” the Real Problem Here?*

Justice Kagan does a masterful job of fitting this case into the “viewpoint discrimination” box in the modern free speech taxonomy. The concept of “discrimination” inherently suggests that the government is treating two similar groups differently,¹⁵¹ and her opinion highlights the ways in which the PTO discriminates in registration between those trademarks whose message offends public sensibilities (“BABY AL-QAEDA” for t-shirts) and those whose message accords with public values (“PRAISE THE LORD” for a game).¹⁵² The analysis worked well (or would have worked well) in *Tam*, because the concept of a “disparaging” trademark is inherently viewpoint-discriminatory. The statutory term “disparaging” itself dictates that the PTO look to the message of the trademark and discriminate based on viewpoint; those trademarks that “disparage” a group will be refused registration, while those that praise the same group will be registered.

Can the same really be said for the bar on “scandalous” marks? Is discrimination based on viewpoint inherently required by this statutory term?¹⁵³ Or is there a deeper issue here? While the *Iancu* majority selects examples that reveal discrimination based on

150. *Iancu*, 139 S. Ct. at 2306 (Breyer, J., concurring in part and dissenting in part).

151. Most aptly, Black’s Law Dictionary defines discrimination as follows: “Differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.” *Discrimination*, BLACK’S LAW DICTIONARY (10th ed. 2014).

152. *Iancu*, 139 S. Ct. at 2300.

153. The dissenters agreed that a bar on “immoral” trademarks constitutes viewpoint discrimination, but would have found a bar on “scandalous” trademarks constitutional. *See id.* at 2309 (Sotomayor, J., concurring in part and dissenting in part) (noting that it is “with regard to the word ‘scandalous’ that I part ways with the majority”).

viewpoint, an even greater problem has been the PTO's inconsistency and subjectivity in applying the statutory test.¹⁵⁴ There are two issues with respect to subjectivity in the agency's pattern of applying the relevant part of the Lanham Act. First, what was "considered scandalous as a trademark or service mark twenty, thirty or fifty years ago may no longer be considered so, given the changes in societal attitudes."¹⁵⁵ Thus, the statutory bar to federal trademark registration presents an uncertain and moving target for trademark owners. Second, even within the same era, different trademark examiners may come to different conclusions about what is "immoral or scandalous." Studies comparing data concerning the treatment of similar trademark application requests have found the PTO's decision making erratic and unpredictable.¹⁵⁶ Consider the acronym "MILF" (which is apparently a well-known shorthand for the phrase "Mom(s) I'd Like to Fuck").¹⁵⁷ A 2011 study looked at trademark registration applications that included "MILF." As of that date, a remarkable total of forty-one applications had been filed seeking to register trademarks that included the term; of those applications, twenty were rejected as "immoral or scandalous" for using the term MILF while the other twenty were not.¹⁵⁸

Even considering that different products may have been involved, this data clearly suggests inconsistent application of the same legal standard by different government officials (which would scarcely be surprising). It is hard to reconcile, for example, why "MILF MAGNET" would be granted registration as a trademark for athletic clothing but "MILF GOLF" would be rejected as a

154. See LaLonde and Gilson, *supra* note 57, at 1477 (noting that the PTO has "no independent standards that apply to such determinations, which are made by dozens of different individuals of varying political, religious, geographic and family backgrounds").

155. *Id.* at 1495 (quoting *In re Old Glory Condom*, 26 U.S.P.Q.2d 1216 (T.T.A.B. 1993)).

156. Consistency is also retarded by PTO guidelines, which specify that a registration decision rejecting a particular trademark as "immoral or scandalous" has no precedential value for later registrations even when the very same terms may be at issue. See *id.* at 1477-78.

157. *Id.* at 1478.

158. *Id.* These included such marks as "WANT MILF?," "GOT MILF," "MILF MAGNET," "DIARY OF A MILF," "MILF HUNTER," "MILF CLOTHING," "MILF MATERNITY WEAR," and so on. *Id.*

trademark for women's golf apparel.¹⁵⁹ The risk of varying, standard-less, and subjective applications of the statutory standard seems clear.

As the foregoing reveals, there is an issue here that goes beyond “viewpoint” discrimination: Government officials should not be empowered to award or withhold an important governmental status to a person based on an officials’ subjective judgment about whether or not a person’s speech is “scandalous” or offensive (even if the speech expresses no particular viewpoint, or the plaintiff cannot show disparate treatment). By limiting the issue to one of viewpoint discrimination, the majority in *Iancu* accomplishes a critical step in the First Amendment logic. If the regulation at issue discriminates based on speakers’ viewpoints, it is unconstitutional, period. There is no need to look at the reasons the government offers to support the regulations. That is so because it is impossible to come up with a neutral reason for adopting a viewpoint-discriminatory regulation. To defend a government rule that bans or burdens a viewpoint, the government must argue one of two things: either the viewpoint at issue is one that the government opposes, finds offensive, or does not support; or the viewpoint is one that members of the public oppose, find offensive, or do not support. Neither reason is a “viewpoint-neutral” rationale—that is, a reason for the rule that has nothing to do with the viewpoint being suppressed. If the *Iancu* decision finesses certain key questions, at the same time, it does advance First Amendment law by making a clear statement on the doctrine of “viewpoint discrimination.”¹⁶⁰ Below, the strengths of *Iancu* are considered.

159. *Id.* at 1479–80.

160. The Court has, without expressly saying so, adopted a view closely akin to that of Justice Thomas in *Tam*. There, he said that viewpoint discrimination is unconstitutional, period, in whatever setting it occurs. See *Matal v. Tam*, 137 S. Ct. 1744, 1769 (2017) (Thomas, J., concurring in part and concurring in the judgment) (noting 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’” (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001) (Thomas, J., concurring in part and concurring in the judgment))).

B. *Strengths and Enduring Themes in the Iancu v. Brunetti Decision*

While narrow, and subject to the critiques outlined above, the *Iancu* decision accomplishes several important things. Not insignificantly, Justice Kagan takes a constitutional issue that was, if anything, more difficult than the issue in *Tam* and brings together a solid majority in favor of a clear First Amendment holding. This was the point on which the *Tam* Court failed.¹⁶¹ In *Iancu*, the Court endorses in clear terms the constitutional principle that “if a trademark registration bar is viewpoint-based, it is unconstitutional.”¹⁶² The Court describes as a “core postulate of free speech law” that “[t]he government may not discriminate against speech based on the ideas or opinions it conveys.”¹⁶³ Because it finds the Lanham Act’s bar on registering “immoral or scandalous” trademarks to be viewpoint-based, the Court concludes that the statute cannot withstand a First Amendment challenge; to paraphrase the Court, the “finding of viewpoint bias end[s] the matter.”¹⁶⁴ By so stating, the Court has clearly situated viewpoint discrimination as a circumstance that requires no balancing (and no need to characterize the law at issue on the free speech spectrum). Whatever the setting, a finding that a government restriction on private speech is viewpoint-discriminatory ends the analysis. There is no need to consider the government’s “interest” in the provision because there can be no legitimate government interest in suppressing a particular viewpoint. In that sense, the case bookends the Court’s approach to categories of speech like obscenity, which likewise requires no balancing, though for a converse reason.

The decision is also well-drafted in that it leaves room for a broader understanding of viewpoint discrimination. The classic terms used in First Amendment law, “viewpoint discrimination” (and the related term, “content discrimination”), are misnomers in many ways. The concept of viewpoint “discrimination” suggests

161. See Kuckes, *supra* note 20, at 167 (arguing that *Tam* presented a “rare circumstance[e] in which a law on its face violates the Free Speech Clause” and that the Court “missed an opportunity to make a clear statement of this narrow but fundamental point of law”).

162. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019).

163. *Id.*

164. *Id.* at 2302.

that there should be disparate treatment of different speakers based on the viewpoints they express (this idea is the focus of the majority's decision in *Iancu*). More broadly, the concept would be better described not simply as addressing discrimination by the government *among* private speakers, but also encompassing discrimination *against* any particular private speaker based on the government's opposition to the speaker's message. "Discrimination" is a poor term to capture the constitutional concept at stake.

A statute that allows government officials to withhold a legal status to which speakers are otherwise entitled on the ground that the government finds their speech to be "immoral or scandalous" is a clear violation of the First Amendment. This is exactly what the Lanham Act does. But the problem is not simply that the government cannot treat different speakers differently, depending on the view they want to express (though this is certainly true). The problem, more fundamentally, is that the government cannot suppress the private speech of even one person simply because it finds that person's speech offensive, undesirable, socially unacceptable, distasteful or vulgar. It was Justice Frankfurter who wrote that American citizenship carries with it the "right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation."¹⁶⁵ Fortunately, *Iancu* is drafted to lay the groundwork for a broader understanding of the flaws in what is currently denominated "viewpoint discrimination." While the principal focus is on "viewpoint discrimination" in the narrow sense, the decision also contains the groundwork for a holding, in a future case, that the doctrine is broader. That is an issue that will certainly arise if Congress takes up the invitation to amend the Lanham Act to bar the registration of "vulgar" trademarks.

Another challenge that faced Justice Kagan was drafting an opinion that reconciled the differing views between Justice Alito and Justice Kennedy as to exactly what the "viewpoint discrimination" problem was in the Lanham Act statutory bar

165. *Cohen v. California*, 403 U.S. 15, 26 (1971) (quoting *Baumgartner v. United States*, 322 U.S. 665, 673–674 (1944)).

cases.¹⁶⁶ In *Tam*, Justice Alito's vision of "viewpoint discrimination" was a broad one. He argued that the First Amendment cases "use the term 'viewpoint' in a broad sense" and that "giving offense is a viewpoint."¹⁶⁷ In the plurality portion of his opinion, he invokes case law from the *Cohen* era holding flatly that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."¹⁶⁸ Justice Kennedy, more narrowly, argued in *Tam* that the "essence of viewpoint discrimination" occurs when the government has "singled out a subset of messages for disfavor based on the views expressed."¹⁶⁹ His focus was on the fact that the government allowed the registration of a "positive or benign mark but not a derogatory one."¹⁷⁰

Justice Kagan incorporates both concepts into the *Iancu* majority opinion. The examples she gives are in line with Justice Kennedy's focus (allowing the registration, for example, of trademarks that celebrate religion but not those that criticize religion). But the decision also contains broader language. The *Iancu* decision states, for example, that "as the Court made clear in *Tam*, a law disfavoring 'ideas that offend' discriminates based on viewpoint, in violation of the First Amendment."¹⁷¹ It speaks as well of the unconstitutionality of a statute that "aim[s] at the suppression of views."¹⁷² Those statements may prove key if there is, indeed, a "round three" in the litigation over the Lanham Act statutory bars.

CONCLUSION

In the end, one must admire Justice Kagan's feat of discipline, careful drafting, and leadership in *Iancu v. Brunetti* in summoning a decisive Court majority for a clear (if narrow) statement of First

166. See *Iancu*, 139 S. Ct. at 2299 (comparing the different approaches taken by Justices Alito and Kennedy with respect to the application of "viewpoint discrimination" in *Tam*).

167. *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality opinion).

168. *Id.* (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)).

169. *Id.* at 1766 (Kennedy, J., concurring in part and concurring in the judgment).

170. *Id.*

171. *Iancu*, 139 S. Ct. at 2301.

172. *Id.* at 2302.

Amendment law. As this Survey shows, her task was considerably harder than in *Cohen* in 1971, where the Court could readily and broadly declare the unconstitutionality of a statute that allowed a speaker to be punished simply for publicly wearing a jacket stating “Fuck the Draft.” By 2018, despite the similarity of the issues—a private speaker’s rights with respect to government restrictions on “vulgar” speech (here, the trademark “FUCT”)—the resulting decision is considerably narrower. In the five decades since *Cohen* was decided, the development of First Amendment law into a highly compartmentalized “taxonomy” of numerous, distinct strands of legal doctrine has increased disagreements within the Court in free speech cases.¹⁷³ In this era, it is quite frankly puzzling as to how to analyze a Free Speech case that does not fall neatly into one of the pre-existing categories. The problem with that approach becomes acutely evident in cases like *Iancu* and *Tam*.

The existing First Amendment categories simply do not work for every case. At the same time, there is no overarching First Amendment free speech doctrine that ties the “taxonomy” together and supplies rules for cases not readily characterizable. The Court’s struggle to fit the Lanham Act statutory bars into the existing First Amendment case law is a clear illustration of the problem. Justice Kagan wisely recognized that the case could and must be decided without delving into the difficulties of First Amendment free speech doctrine. Indeed, to include a foray in that direction might have made mustering a clear majority impossible. To that end, the *Iancu* decision is disciplined, tight, clear, and narrow. It does the needed job even if in certain respects it may be criticized as incomplete. Is the decision a disappointment or a triumph? Skillfully drafted or overly cautious? Forward-looking or limited in scope? While only the future will determine the answers to those questions, Justice Kagan is to be commended for successfully rallying a majority for a decisive and sound First Amendment decision.

173. See *id.* at 2314–15 (Sotomayor, J., concurring in part and dissenting in part) (contrasting the “taxonomy” of free speech terminology that is commonly used today with the approach 1971, when *Cohen* was decided).