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Immoral Trademarks After Brunetti

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ARTICLE

IMMORAL TRADEMARKS AFTER *BRUNETTI*

*Ned Snow**

ABSTRACT

Trademark law has recently experienced a fundamental shift. For more than a century, marks that were vulgar, profane, and obscene could not receive trademark protection. In 2019, however, the Supreme Court in *Iancu v. Brunetti* invalidated the statutory provision that had prevented such marks from receiving protection—the bars to “immoral” and “scandalous” marks. Those bars violated the First Amendment because they enabled the government to judge whether ideas in marks were inappropriate. Similarly, two years prior to *Brunetti*, the Court in *Matal v. Tam* struck down a bar to marks that could “disparage” others. The Court reasoned that to disparage is to offend, and the ability to offend is a core First Amendment value. So in the wake of *Brunetti* and *Tam*, the public must now be exposed to marks that employ highly offensive expression. Racial epithets, the F-word, and pornography are now more likely to appear as brands. And as time passes, businesses will gain confidence that such emotional attention-grabbing expressions will continue to be eligible for trademark protection. More businesses will begin to invest in them. The public, in turn, will be subject to a commercial experience that is more offensive and less inviting.

Congress must therefore act. Congress must bar trademark registration for the specific categories of vulgar, profane, and

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obscene language. Unlike the bars in *Brunetti* and *Tam*, these bars would not violate the First Amendment. They would target modes of expression—offensive methods of communication that invoke emotive force. The offensiveness of the communication derives not from any idea contained in a mark, but from the particular language employed. That distinction makes a constitutional difference. Modes of expression can be restricted in certain circumstances, such as the trademark context: the restriction furthers the trademark purpose of creating a commercial environment that is inviting to consumers. Congress may and should deny protection.

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I. INTRODUCTION

Two recent Supreme Court cases call into question whether Congress may condition trademark registration on moral criteria. In *Matal v. Tam* and *Iancu v. Brunetti*, the Court ruled that Congress could not bar registration for marks that “disparage” others or that are “immoral” or “scandalous.”¹ The disparagement, immoral, and scandalous bars all targeted offensive speech, and the right to speak offensive ideas represents a core First Amendment value.² Striking down a century of statutory precedent, the Court chose to protect businesses’ interests in speaking over the public’s interest in avoiding offensive marks.³

Tam and *Brunetti*, however, do not imply that trademark law must altogether divorce itself from morality. In particular, the cases do not imply that Congress must extend trademark protection to all vulgar, profane, and obscene expression. Those forms of expression represent modes of communicating an idea, and regulating a mode of expression is very different from regulating the idea within the expression.⁴ Indeed, the *Brunetti* Court explicitly left open the possibility for Congress to bar immoral modes of expressing marks.⁵ Some Justices even noted in their concurrences that bars to vulgar, profane, and obscene marks would be constitutional.⁶ Thus, the First Amendment may yet allow for Congress to deny trademark protection for certain types of immoral marks.

The question thus arises as to whether Congress should respond to *Tam* and *Brunetti* by denying trademark protection for expression that employs vulgar, profane, and obscene language.

1. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019); *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017).

2. *Brunetti*, 139 S. Ct. at 2300–01; *Tam*, 137 S. Ct. at 1751, 1763.

3. See Trademark Act of 1946 (Lanham Act), 15 U.S.C. § 1052(a) (barring protection for “immoral” and “scandalous” marks), *invalidated in part by Brunetti*, 139 S. Ct. at 2297; Trademark Act of 1905, Pub. L. No. 84, § 5(a), 33 Stat. 724, 725 (prohibiting trademark registration for scandalous or immoral matter), *repealed by* 15 U.S.C. § 1052(a).

4. See discussion *infra* Section III.B.1.

5. See *Brunetti*, 139 S. Ct. at 2302 n.*.

6. See *id.* at 2303 (Roberts, C.J., concurring in part and dissenting in part) (“[R]efusing registration to obscene, vulgar, or profane marks does not offend the First Amendment.”); *id.* at 2303 (Alito, J., concurring) (“Our decision does not prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas.”); *id.* at 2306 (Breyer, J., concurring in part and dissenting in part) (“[I]t is hard to see how a statute prohibiting the registration of only highly vulgar or obscene words discriminates based on viewpoint.”); *id.* at 2318 (Sotomayor, J., concurring in part and dissenting in part) (“With ‘scandalous’ narrowed to reach only obscene, profane, and vulgar content, the provision would not be overly broad.”).

This Article argues that Congress should deny protection and that doing so would not violate the First Amendment. The policy argument for denying protection is based on three premises.⁷ The first premise is that the public deems the use of vulgar, profane, and obscene language to be highly offensive and immoral.⁸ That language is crude, coarse, and base—usually employed solely to evoke emotional emphasis.⁹ Therefore, the law should not encourage its use.

The second premise posits that the forum of commercial advertising is particularly unsuited for vulgar, profane, and obscene language.¹⁰ The public expects commercial actors to present their goods through means that are inviting and non-offensive.¹¹ The law has traditionally upheld this expectation, punishing actors who use offensive methods of presentation such as robocalls and spam e-mail.¹² Furthermore, the use of highly offensive language in advertising impedes a robust commercial marketplace.¹³ Some segments of the public will either severely limit their exposure to advertising or change their consumption choices, and this will negatively affect commercial productivity.¹⁴ Hence, to uphold the expectations of the public and to prevent disruption of commercial activity, the law should discourage the use of highly offensive language in commercial advertising.

This leads to the third and final premise—that trademark law would be an effective means of deterring the use of such language in commercial advertising.¹⁵ By denying the language trademark protection, Congress would create a strong financial incentive for businesses to avoid using the language in their marks.¹⁶ Indeed, the Trademark Act (the Lanham Act) already denies protection for certain content in order to deter people from using that content: the Act bars registration for content that is deceptive, descriptive,

7. See discussion *infra* Part III.

8. See discussion *infra* Section III.A.

9. See discussion *infra* Section III.A.

10. See discussion *infra* Section III.B.

11. See discussion *infra* Section III.B.1.

12. See 15 U.S.C. § 7704(a)(4), (d) (barring unsolicited spam e-mail of a commercial or pornographic content); 47 U.S.C. § 227(b)(1)(B) (barring robocalls).

13. See discussion *infra* Section III.B.2.

14. See discussion *infra* Section III.B.2.

15. See discussion *infra* Section III.C.

16. See discussion *infra* Section III.C.

or confusingly similar to other marks.¹⁷ For that matter, the Lanham Act denies protection for content based on moral reasons: the Act bars registration for marks that portray deceased presidents (to respect the president's living spouse) or that portray government insignia (to prevent sully and debasing the insignia).¹⁸ Denying protection for highly offensive language would thus be consistent with existing trademark doctrine. Moreover, doing so would support the central purpose of trademark law—to serve the interests of consumers.¹⁹ Insofar as Congress acts soon—before businesses start investing in highly offensive marks—denying trademark protection would be an effective means to deter vulgar, profane, and obscene language in commercial advertising.²⁰

But what about the First Amendment? After all, the Supreme Court has protected vulgar expression as free speech.²¹ Yet some Justices in the *Brunetti* case suggested in their concurrences that trademark bars to highly offensive language would be constitutional.²² The question must therefore be posed: Would barring vulgar, profane, and obscene language from trademark registration abridge the freedom of speech?²³

This question calls for both a doctrinal and theoretical response. Doctrinally, the question raises a preliminary issue about whether denying trademark registration would constitute a speech-suppressive act.²⁴ Given that the denial would not preclude anyone from using offensive language, is the denial an act of abridgment? Although the Court's rulings in *Tam* and *Brunetti* imply that the denial would indeed constitute an abridgment, the issue is still worth considering.²⁵ In the end, the denial does appear

17. See 15 U.S.C. § 1052(a), (d)–(e). Note that the bar to descriptive marks applies only if the mark has not gained secondary meaning. See *id.* § 1052(f); *USPTO v. Booking.com B.V.*, No. 19-46, slip op. at 3 (U.S. June 30, 2020) (“[T]o be placed on the principal register, descriptive terms must achieve significance ‘in the minds of the public’ as identifying the applicant’s goods or services—a quality called ‘acquired distinctiveness’ or ‘secondary meaning.’” (quoting *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 211 (2000))).

18. See 15 U.S.C. § 1052(b), (c); discussion *infra* Section III.C.1.

19. See discussion *infra* Section III.C.1.

20. See discussion *infra* Section III.C.2.

21. See *Cohen v. California*, 403 U.S. 15, 25–26 (1971) (protecting F-word on jacket that communicated opinion about the federal draft).

22. See *supra* note 6.

23. See discussion *infra* Part IV.

24. See discussion *infra* Section IV.A.1.

25. See discussion *infra* Section IV.A.1.

to constitute an abridgment because trademark restrictions influence choices about which speech to use as a mark.²⁶

The next issue is whether bars to vulgar, profane, and obscene marks should be analyzed under a speech doctrine that allows for content-based restrictions in certain circumstances.²⁷ More specifically, the issue is whether the doctrine of limited public forums should apply to the trademark context.²⁸ That doctrine applies where the government extends a resource to facilitate private speech.²⁹ Content-based restrictions are permissible if they further a purpose of the government resource and if they are viewpoint neutral.³⁰ Here, the trademark system represents a resource that Congress extends to sellers of goods in order to facilitate trademark usage.³¹ Content restrictions on trademark registration are therefore justifiable if they further a purpose of trademark law and are viewpoint neutral. The restriction on highly offensive language furthers a purpose of trademark law—i.e., promoting commercial transactions.³²

With respect to the issue of viewpoint neutrality, the analysis is more nuanced.³³ In *Tam*, the Court held that Congress's attempt to bar disparaging marks was viewpoint discriminatory,³⁴ and in support of that holding, a plurality opined that “[g]iving offense is a viewpoint.”³⁵ In *Brunetti*, a unanimous Court held that Congress's attempt to bar “immoral” marks was similarly viewpoint discriminatory.³⁶ In view of these holdings, how can a bar to vulgar, profane, and obscene marks be viewpoint-neutral if the reason for the bar is that such marks are considered to be offensive and immoral? The answer is simple. *Tam* and *Brunetti* recognized that the bars to disparaging and immoral marks targeted the ideas within the marks.³⁷ They restricted offensive ideas. By contrast, the bars to vulgar, profane, and obscene marks would target the modes of expressing those ideas.³⁸ These bars

26. See discussion *infra* Section IV.A.1.

27. See discussion *infra* Section IV.A.2.

28. See discussion *infra* Section IV.A.2.

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

30. See *id.*

31. See discussion *infra* Section IV.A.2.

32. See discussion *infra* Section IV.A.2.

33. See discussion *infra* Section IV.B.

34. *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

35. *Id.* (plurality opinion).

36. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2297, 2303 (2019).

37. See discussion *infra* Sections IV.B.1–2.

38. See discussion *infra* Section IV.B.3.

restrict only offensive modes because they serve only to provide emphasis, akin to screaming one's message.³⁹ Although the mode of using vulgar language certainly adds emotive force to a mark, it does not communicate any specific viewpoint.⁴⁰ Hence, barring that mode of expression would be viewpoint-neutral.

From a theoretical standpoint, denying protection for vulgar, profane, and obscene language seems appropriate under the marketplace-of-ideas theory of free speech.⁴¹ That theory is most relevant here because it reflects the purpose of speaking a message through a trademark: just as ideas compete for public acceptance in the marketplace of ideas, marks compete for consumer recognition in the marketplace of commerce.⁴² Marketplace theory suggests the appropriateness of discouraging highly offensive marks because their offensiveness discourages full participation in the commercial marketplace, and thereby the marketplace of ideas.⁴³ Highly offensive marks lead to messages getting lost in their delivery. Therefore, the marketplace-of-ideas theory recognizes value in barring such language in the trademark context.

This Article concludes that Congress should bar trademark registration for vulgar, profane, and obscene language. Part II sets forth the specifics of this proposal, defining the meanings of these terms and providing instruction for their proper application. Part III argues that sound policy supports this proposal. Part IV examines the First Amendment issues.

II. PROPOSAL

This Article proposes that Congress bar registration for marks that employ vulgar, profane, or obscene language. This Part explains that proposal. It describes the sort of expression that these bars would target and how the United States Patent and Trademark Office (PTO) should apply these bars.

The meanings of vulgarity, profanity, and obscenity generally consist of crude and base descriptions of certain subject matter, and their definitions may overlap.⁴⁴ They are generally offensive to readers, and for this reason, this Article employs only referents

39. See discussion *infra* Section IV.B.3.

40. See discussion *infra* Section IV.B.3.

41. See discussion *infra* Section IV.D.

42. See discussion *infra* Section IV.D.

43. See discussion *infra* Section IV.D.

44. See ASHLEY MONTAGU, *THE ANATOMY OF SWEARING* 104–05 (1967) (defining categories of swear words).

to the particular words without full recitation of the words. First, vulgarity consists of expressions that are lewdly indecent.⁴⁵ This includes coarse or crude references to private body parts, to the sex act, and to certain bodily functions.⁴⁶ The F-word and swear words that refer to the excretory process (e.g., the S-word) may be the most common examples of vulgar expression.⁴⁷ Second, profanity consists of expressions that desecrate figures that are held sacred or holy by a segment of the public.⁴⁸ This includes vain references to holy religious figures, such as Jesus Christ, Jehovah, or Muhammad, and could also include derogatory references to particular races or cultures.⁴⁹ Third, obscenity consists of expressions “which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”⁵⁰ This includes explicit portrayals of the sex act.⁵¹

In denying registration for these categories of marks, the PTO should examine whether a particular mark employs vulgar, profane, or obscene language (where language includes both words

45. *Vulgar*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/vulgar> [<https://perma.cc/LTE5-UYZ6>] (last visited Sept. 18, 2020) (defining *vulgar* as “lewdly or profanely indecent”).

46. *See* *Iancu v. Brunetti*, 139 S. Ct. 2294, 2307 (2019) (Breyer, J., concurring in part and dissenting in part) (observing that vulgar expression has evolved over time “toward words that are sexually explicit or that crudely describe bodily functions”). *See generally* *United States v. Biocic*, 928 F.2d 112, 115–16 (4th Cir. 1991) (“The important government interest [in the public indecency statute] is the widely recognized one of protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens’ anatomies that traditionally in this society have been regarded as erogenous zones. These still include (whether justifiably or not in the eyes of all) the female, but not the male, breast.”).

47. *See generally* *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 509 (2009) (reciting and upholding FCC agency opinion stating that “the F-Word ‘is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language’” (quoting *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 FCC Rcd. 4975, 4979 (2004))).

48. *Profane*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/profane> [<https://perma.cc/A74G-QG28>] (last visited Sept. 18, 2020) (defining *profane* as “serving to debase or defile what is holy”); *Profane*, OXFORD ENG. DICTIONARY, <https://www-oed-com.ezproxy.lib.uh.edu/view/Entry/152024?rskey=dl598B&result=1&isAdvanced=false#eid> [<https://perma.cc/GC5R-YJT2>] (last visited Sept. 18, 2020) (defining *profane* as “characterized by, exhibiting, or expressive of a disregard or contempt for sacred things (esp., in later use, by the taking of God’s name in vain); not respectful of religious practice; irreverent, blasphemous, impious; (hence, more generally) ribald, coarse, indecent”).

49. *See* MONTAGU, *supra* note 44, at 100–01 (providing list of examples of profane utterances). The Judeo-Christian tradition holds that God commanded people to refrain from making vain references to the name of deity. *Exodus* 20:7.

50. *See* *Miller v. California*, 413 U.S. 15, 24–25 (1973) (defining legal obscenity).

51. *Id.* at 25.

and images⁵²) as a means to express an idea. The PTO should not deny protection if only the idea itself—rather than the language used to express the idea—is highly offensive. The inquiry by the PTO, then, should be into whether an average person would be highly offended because the mark contains vulgar, profane, or obscene language, but not because of a specific idea communicated by the mark.⁵³

A few examples illustrate this sort of analysis that the PTO should employ. The first is an example of a vulgar mark that expresses an idea that is not vulgar: F— THE DEVIL! Clearly the idea of this example is not offensive: the idea represents an imperative to harass and harm an evil being. The F-word, however, is a vulgar word (a crude reference to sexual intercourse) that is highly offensive to many people. Hence, the use of the highly offensive word to express the non-offensive idea would trigger the vulgarity bar.

Another example illustrates that a profane method of expression (or vulgarity or obscenity) must be highly offensive to be denied protection, and that marks that contain profane ideas may still receive protection. Consider a mark that communicates damnation to a religious figure. The word *damn* is a swear word that may be mildly offensive to some portion of the population, but not highly offensive.⁵⁴ Nevertheless, for a religious group, the idea contained within the phrase may be highly offensive, but not because of the choice of the word *damn*; rather, the offense would arise because of the idea of damning the religious figure, which is communicated by the mark.⁵⁵ Although this would constitute a profane idea because it is highly irreverent toward a religious figure, the words themselves used in the trademark do not constitute profanity. There is no profane language in the mark that serves to communicate the profane idea. Thus, it should *not* be denied trademark registration.

52. See COLIN CHERRY, ON HUMAN COMMUNICATION 275 (3d ed. 1978).

53. Cf. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2301 (2019) (explaining that the Government proposed interpreting the scandalous bar so that it would apply only to “marks that are offensive [or] shocking to a substantial segment of the public because of their *mode of expression*” such that the PTO would refuse only “marks that are ‘vulgar’—meaning ‘lewd,’ ‘sexually explicit or profane’” (emphasis added)).

54. Although *damn* may have been highly offensive at the time of *Gone with the Wind*, today the word invokes merely mild offense. See KRISTY BEERS FÄGERSTEN, WHO’S SWEARING NOW?: THE SOCIAL ASPECTS OF CONVERSATIONAL SWEARING 12 (2012) (noting research that, taken together, suggests “damn” to be a “weaker” swear word).

55. See *generally* *Muhammad v. City of N.Y. Dep’t of Corr.*, 904 F. Supp. 161, 168 (S.D.N.Y. 1995) (recognizing common belief among Muslims that Muhammad is the “seal of the prophets” and the last prophet).

By contrast, consider a phrase that uses the same name of the religious figure, but with a different purpose—merely to use the name in vane so as to express the speaker’s frustration. Such a phrase debases the name in order to communicate an idea that is not offensive (that someone is frustrated). The vain reference would be a profane use of language, so the phrase would fall within the scope of the profanity bar.

A final example illustrates the application of the obscenity bar. Consider a mark that states OPEN ORGY and a mark that displays a graphic depiction of an orgy. The OPEN ORGY mark contains an idea (unrestrained group sex) that is highly offensive to a significant portion of the public. It would not be denied registration, however, because the method of expressing that idea is not offensive. The words *open* and *orgy* represent non-offensive means of communicating an idea. By contrast, the mark that displays a graphic depiction of an orgy would be denied registration on the grounds that the display constitutes a highly offensive method (a graphic depiction) of expressing the same idea (unrestrained group sex). The graphic depiction is obscene. The fact that the method of expressing the idea also serves to express the idea itself does not change the fact that the method of expressing the idea is obscene. The depiction—even though a true representation of the idea—is still highly offensive. It would be denied protection under the obscenity bar.

III.POLICY

The reason to bar trademark registration for marks that contain vulgar, profane, and obscene language is simple.⁵⁶ The public generally finds the use of such language to be highly offensive and immoral, especially in the context of commercial advertising, and trademark law is an effective means for limiting such language in that context. This argument relies on three premises, addressed in the Sections below. The first premise is that the public generally deems the use of this language to be highly offensive and immoral.⁵⁷ The second is that the forum of commercial advertising should conform to the public’s preferences for proper methods of communicating commercial information.⁵⁸ The third is that the system of trademarks represents an effective

56. Professor Ilhyung Lee has made a similar proposal with regard to barring trademark protection for racial epithets. See Ilhyung Lee, Essay, Tam *Through the Lens of Brunetti: THE SLANTS, FUCT*, 69 EMORY L.J. ONLINE 2001 (2019).

57. See discussion *infra* Section III.A.

58. See discussion *infra* Section III.B.1.

means for limiting offensive language in commercial advertising.⁵⁹ Taken together, these premises establish that Congress should deny protection for vulgar, profane, and obscene marks.

A. *Offensive to the Public Generally*

As a general matter, the public finds the use of vulgar, profane, and obscene language to be highly offensive.⁶⁰ The Federal Communications Commission (FCC) defines these types of expression as being “grossly offensive” or “patently offensive.”⁶¹ As one linguistic researcher explained: “[S]ome words are consistently judged to be more offensive (abrasive, aggressive, impolite, profane, upsetting, etc.) than others. Sexual terms generally rated most offensive, followed by excretory terms which, in turn, are typically judged more offensive than sacred terms.”⁶² In short, “The greater the potential of a word to offend, the likelier the word is to be considered a swear word.”⁶³ By definition, vulgar, profane, and obscene language is offensive.⁶⁴

To be clear, the offensiveness of such language is not merely its use in an incorrect context (such as using *fart* in a formal business setting). Rather, the use is considered to be intrinsically inappropriate.⁶⁵ Indeed, many consider use of such language to be immoral, for morality represents a standard that defines the intrinsic rightness or wrongness of a proposition.⁶⁶ One study

59. See discussion *infra* Section III.C.

60. FÄGERSTEN, *supra* note 54, at 8 (ranking offensiveness of types of swear words).

61. See *Obscene, Indecent and Profane Broadcasts*, FED. COMM’NS COMM’N, <https://www.fcc.gov/consumers/guides/obscene-indecnt-and-profane-broadcasts> [<https://perma.cc/J882-AT4V>] (Dec. 30, 2019).

62. FÄGERSTEN, *supra* note 54, at 8 (citation omitted).

63. *Id.*

64. See Katy Steinmetz, *Swearing Is Scientifically Proven to Help You *%\$!ing Deal*, TIME (Dec. 15, 2016, 4:46 PM), <https://time.com/4602680/profanity-research-why-we-swear/> [<https://perma.cc/5XXP-P5V7>] (reciting cognitive scientist’s opinion that swear words dealing with sex, bodily functions, religion, and groups of people “are built to offend, to cause harm, to divide and to denigrate”).

65. See Kristin Wong, *The Case for Cursing*, N.Y. TIMES (July 27, 2017), <https://www.nytimes.com/2017/07/27/smarter-living/the-case-for-cursing.html> [<https://perma.cc/BT84-AKVK>] (explaining that swearing is viewed as inappropriate or taboo).

66. See *generally Moral*, OXFORD ENG. DICTIONARY, <https://www.oed.com/view/Entry/122086?rskey=W1HzE0&result=2&isAdvanced=false#eid> [<https://perma.cc/W4A6-CK6J>] (last visited Sept. 18, 2020) (defining *moral* as “relating to human character or behaviour considered as good or bad; of or relating to the distinction between right and wrong, or good and evil, in relation to the actions, desires, or character of responsible human beings; ethical”); *The Definition of Morality*, STAN. ENCYCLOPEDIA PHIL. (Feb. 8, 2016), <https://plato.stanford.edu/entries/morality-definition/> [<https://perma.cc/PHC2-B9P8>] (defining *morality* as “certain codes of conduct put forward by a society or a group (such as a religion), or accepted by an individual for her own behavior”).

indicates that use of such language is perceived as violating the moral foundation of purity.⁶⁷ This Article, however, does not take up the question of whether the use is immoral under any number of moral philosophies. Instead, the Article merely points out that use of the language is well recognized as inherently inappropriate, and in that sense, the use is seen to be as immoral.⁶⁸ This Article refers to vulgar, profane, and obscene language as “immoral language” only to reflect that many people consider the use of such language to be inherently inappropriate.

Use of immoral language is, of course, common in society. It is common in entertainment,⁶⁹ in informal conversations,⁷⁰ and more recently in political speeches.⁷¹ Paradoxically, then, there are some situations in which the use of inappropriate language is thought to be appropriate.⁷² There may be circumstances that would seem to justify the use.⁷³ Nevertheless, the use of immoral language remains highly offensive to many who hear or view it.⁷⁴ Indeed, the mere fact that it is used to invoke emotional emphasis (in whatever context) indicates that the language is still

67. See Karolina Sylwester & Matthew Purver, *Twitter Language Use Reflects Psychological Differences Between Democrats and Republicans*, PLOS ONE 2 (Sept. 16, 2015), <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0137422&type=printable> [<https://perma.cc/CZ5Z-VCKY>].

68. See, e.g., Gilad Feldman et al., *Frankly, We Do Give a Damn: The Relationship Between Profanity and Honesty*, 8 SOC. PSYCH. & PERSONALITY SCI. 816, 817 (2017), <https://journals.sagepub.com/doi/pdf/10.1177/1948550616681055> [<https://perma.cc/XG7F-B63G>] (recognizing that profanity “violates the moral foundations of purity and the common norm for speech” (citation omitted)).

69. See Barry S. Sapolsky & Barbara K. Kaye, *The Use of Offensive Language by Men and Women in Prime Time Television Entertainment*, 13 ATL. J. COMM’N 292, 293 (2005).

70. FÄGERSTEN, *supra* note 54, at 10 (“The influence of social context on swearing behavior became evident when word frequency studies revealed that swear words occurred highly frequently in the informal conversations of college students.” (citations omitted)).

71. See, e.g., Peter Baker, *The Profanity President: Trump’s Four-Letter Vocabulary*, N.Y. TIMES (May 19, 2019), <https://www.nytimes.com/2019/05/19/us/politics/trump-language.html> [<https://perma.cc/PL5Q-2LY6>]; Donica Phifer, *Congresswoman Rashida Tlaib Refers to Donald Trump in Speech, Tells Crowd ‘We’ Will ‘Impeach This Motherf---er,’* NEWSWEEK (Jan. 4, 2019, 1:28 AM), <https://www.newsweek.com/congresswoman-rashida-tlaib-refers-donald-trump-speech-tells-crowd-democrats-1279078> [<https://perma.cc/CP2P-MW88>]; John Dickerson, *WTF Did Biden Just Say?: A Brief History of Bad Language in Washington*, SLATE (Mar. 23, 2010, 7:43 PM), <https://slate.com/news-and-politics/2010/03/wtf-did-biden-just-say-a-brief-history-of-bad-language-in-washington.html> [<https://perma.cc/AYF6-5JUB>].

72. See Wong, *supra* note 65.

73. See, e.g., Feldman et al., *supra* note 68, at 824 (“[A] higher rate of profanity use was associated with more honesty.”).

74. See FÄGERSTEN, *supra* note 54, at 152 (“While the questionnaire participants and interview informants consider swearing to be an acceptable practice for themselves, they are less willing to sanction or approve of the use of swear words by others.”); *supra* notes 60–61.

offensive.⁷⁵ More to the point, the fact that the use may be common in some circumstances does not imply that the law should encourage the highly offensive language in the commercial context of trademarks.⁷⁶ Section III.B explains the reason that the commercial context, in particular, warrants against using immoral language. For now, it is sufficient to observe that usage of immoral language in some contexts does not imply that the public considers the usage appropriate in all contexts.

Why does the public find the use of immoral language to be highly offensive? To an extent, the answer appears to be that the language denotes meanings that are entirely inconsistent with established norms of human decency.⁷⁷ Collectively, society holds a moral view that in a public setting, private parts of the body should be covered and that the acts of excretion and sexual intercourse must not occur in the public setting.⁷⁸ In contrast to these established norms, vulgar and obscene expressions call attention to the crude portrayal of these body parts and bodily functions.⁷⁹ Vulgar and obscene expressions challenge fundamental moral tenets that deal with methods of referring to

75. See MONTAGU, *supra* note 44, at 93 (“Constant and overabundant usage of certain common swearwords, which sparingly employed do good service, may deprive them of all value for the purposes for which they were originally intended.”); Wong, *supra* note 65 (recognizing need for swear words not to be commonly used in order to preserve their effectiveness).

76. Cf. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 529–30 (2009) (“[T]he pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs . . .”).

77. See *Vulgar*, *supra* note 45 (defining *vulgar* to mean “lacking in cultivation” and “profanely indecent”); *Profane*, *supra* note 48 (defining *profane* to mean “serving to debase or defile what is holy”); *Obscene*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/obscene> [<https://perma.cc/CW4J-27XT>] (last visited Sept. 18, 2020) (defining *obscene* to mean “abhorrent to morality or virtue”); MONTAGU, *supra* note 44, at 100 (“In every case [of using swear words] there is an emotional association of some sort. This emotional association is generally an intrinsic part of the meaning of the word itself or else is extrinsically given to it either directly or by implication, as in negative swearing.”).

78. See, e.g., *State v. Vars*, 237 P.3d 378, 381 (Wash. Ct. App. 2010) (“Washington common law has defined [open and obscene exposure] as ‘a lascivious exhibition of those private parts of the person which instinctive modesty, human decency, or common propriety require shall be customarily kept covered in the presence of others.’” (quoting *State v. Galbreath*, 419 P.2d 800, 803 (Wash. 1966))); *Arderly v. State*, 56 Ind. 328, 329–30 (1877) (“And it historically appears that the first most palpable piece of indecency in a human being was the public exposure of his or her, as now commonly called, privates . . .”).

79. See generally *Miller v. California*, 413 U.S. 15, 25 (1973) (describing material that states could prohibit as obscenity to include, as an example, “[p]atently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals”).

and portraying body parts and bodily functions.⁸⁰ Similarly, profanity represents a desecration of religious ideals that segments of the public hold sacred.⁸¹ Names of holy figures in particular are often the subject of profane expressions.⁸² To profane those names is to demonstrate a disrespect and irreverence for deeply held moral beliefs. Therefore, the use of immoral language challenges fundamental moral beliefs and norms of society.

To be clear, though, the reason that the public finds the use of this language to be inappropriate is not merely because the meaning suggests a viewpoint that contravenes established moral norms. Use of the language is inappropriate because of its crude and base portrayal of the meanings.⁸³ Consider the vulgar reference to the idea of sexual intercourse—i.e., the F-word. The vulgar word portrays the concept of sex in a crude and base manner. The concept of sex is not considered inappropriate, but its crude and base portrayal is. Now suppose that a person were to state the following argument: “rape should be permissible.” Although the argument forwards a viewpoint that most would consider to be immoral, the language used to convey that argument is not crude or base. Stated another way, the idea that the language conveys is offensive, but the language itself is not. Hence, the offensiveness of immoral language does not merely reflect disagreement with an immoral idea, but rather, it stems from the manner in which the idea’s expression occurs—i.e., in a manner that is crude, coarse, and base.

This premise for denying trademark protection—that the immoral language is highly offensive—is bolstered by the fact that those who use immoral language usually do so for the sole purpose of evoking emotion.⁸⁴ Precisely because many members of the public take offense at the crudeness of immoral language do

80. See *Fox Television Stations*, 556 U.S. at 517 (“As the Commission said with regard to expletive use of the F-Word, ‘the word’s power to insult and offend derives from its sexual meaning.’”); *id.* at 509 (defining F-word as a vulgar term meaning to copulate).

81. See MONTAGU, *supra* note 44, at 100–02.

82. See *id.*

83. Cf. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2309 (2019) (Sotomayor, J., concurring in part and dissenting in part) (arguing that offensiveness that results from scandalous marks “could result from the views expressed, but it could also result from the way in which those views are expressed: using a manner of expression that is ‘shocking to [one’s] sense of . . . decency,’ or ‘extremely offensive to the sense . . . of propriety’” (citation omitted)).

84. See MONTAGU, *supra* note 44, at 100.

speakers employ that language.⁸⁵ Indeed, those speakers usually do not intend to refer specifically to the concepts that immoral language represents.⁸⁶ Rather, they usually intend to invoke only the offensiveness that follows from the crude portrayal of those concepts.⁸⁷ The offensiveness evokes emotion, which serves to emphasize the idea expressed. Even where the speaker does not intend to convey a critical meaning, the immoral language usually involves an attempt to invoke an offensive connotation that emphasizes the idea. For instance, consider the phrase F—ING GOOD CHICKEN! as a mark for a restaurant that serves chicken. Presumably, the speaker intends neither to communicate anything about the actual meaning of the F-word (sexual intercourse) nor anything critical of chickens. Instead, the speaker intends to communicate that the chicken tastes very good. The F-word serves to grab the attention of readers owing to its inherent offensiveness. It adds offensive emotive force to the message.⁸⁸ This matters because it suggests that speakers employ vulgar, profane, and obscene expression for the specific purpose of invoking its offensive characteristic. Not only is the use of immoral language highly offensive to many in the public, its speakers intend it to be so.

Thus, Congress should deny trademark protection for immoral language because the public finds that language to be highly offensive. Users of immoral language purposefully employ it to evoke its offensive connotation. In their exposure to trademarks, members of the public should not be subject to purposefully offensive language.

B. Commercial Context

There are many contexts that the law has reserved for using vulgar, profane, and even obscene language. Political gatherings,⁸⁹

85. See *Brunetti*, 139 S. Ct. at 2311 (Sotomayor, J., concurring in part and dissenting in part) (“The most obvious ways—indeed, perhaps the only conceivable ways—in which a trademark can be expressed in a shocking or offensive manner are when the speaker employs obscenity, vulgarity, or profanity.”).

86. See MONTAGU, *supra* note 44, at 100; Teresa Elizabeth Stone et al., *Back to Swear One: A Review of English Language Literature on Swearing and Cursing in Western Health Settings*, 25 *AGGRESSION & VIOLENT BEHAV.* 65, 66 (2015) (“Swearwords are used primarily in a connotative way, referring to the emotional nuances commonly associated with swearing, whereas denotation refers to more literal meaning.” (citation omitted)).

87. See MONTAGU, *supra* note 44, at 93.

88. See *id.* at 100 (discussing “polite swearing”).

89. See sources cited *supra* note 71.

sporting events,⁹⁰ television,⁹¹ and even the public square are only a few of the many contexts that allow for their use.⁹² So, for those who believe that morally offensive terminology is necessary to communicate emotive force, the law permits such language in certain situations.

The forum of commercial advertising—and in particular trademarks—should *not* be one of those situations. Two reasons support this conclusion. First, the public prefers that businesses use non-offensive methods of expressing commercial information.⁹³ Second, use of such language as trademarks hinders commercial activity.⁹⁴ The Sections below discuss these two reasons.

1. *Offensive Methods of Communication.* As discussed in Section III.A, much of the public prefers not to encounter offensive language. That preference matters a lot in the commercial realm. Within the commercial realm, the government may determine permissible methods for businesses to present their commercial advertising.⁹⁵ Given that the purpose of commercial advertising is to attract consumers, the public expects the advertising to employ methods of advertising that are attractive, or at least non-offensive.⁹⁶ The public expects commercial advertisers to use means that do not offend the public sense of morality. Therefore,

90. See Lindsay H. Jones, *Profanities Still Flying in NFL Games Despite Flags*, USA TODAY: SPORTS (Oct. 11, 2014, 7:27 PM), <https://www.usatoday.com/story/sports/nfl/2014/10/11/profanity-language-penalties-officials/17120379/> [<https://perma.cc/8RH5-3TDC>]. *But see* MASS. GEN. LAWS ch. 272, § 36A (2020), <https://malegislature.gov/Laws/GeneralLaws/PartIV/TitleI/Chapter272/Section36A> [<https://perma.cc/BBV8-EVB2>] (“Whoever, having arrived at the age of sixteen years, directs any profane, obscene or impure language or slanderous statement at a participant or an official in a sporting event, shall be punished by a fine of not more than fifty dollars.”).

91. See Sapolsky & Kaye, *supra* note 69, at 292–301.

92. *E.g.*, *Ashcroft v. ACLU*, 535 U.S. 564, 569–70, 585–86 (2002) (enjoining enforcement of a statute prohibiting sexually oriented material on the internet and remanding); *ACLU v. Mukasey*, 534 F.3d 181, 206–07 (3d Cir. 2008) (striking down the statute as unconstitutional on remand).

93. See *infra* Section III.B.1.

94. See *infra* Section III.B.2.

95. *E.g.*, 15 U.S.C. § 1125(a)(1)(B) (regulating “commercial advertising” to avoid misrepresentations of goods).

96. This expectation is not the same as an expectation that ideas within advertisements be non-offensive or, in the words of Justice Alito, that trademarks consist only of “happy-talk” expression. See *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (plurality opinion). As discussed in Section III.B.1 below, a requirement that methods of communication be non-offensive is constitutionally distinct from a requirement that the ideas within the advertising be non-offensive. See discussion *infra* Section III.B.1. The latter requirement would be unconstitutionally viewpoint discriminatory; the former would not.

to meet that expectation, the law should not encourage highly offensive language in commercial advertising.

Other contexts support the argument that the law should support the public's preference for non-offensive methods of communicating commercial advertising. One example is computer-automated phone calls. Many members of the public prefer not to be bothered by a computer calling their cell phones and reciting commercial advertisements.⁹⁷ Congress has therefore passed a law that prevents placing automated phone calls which advertise unsolicited commercial messages (or in other words, that engage in robocalling).⁹⁸ That law carries a penalty of up to \$1 million for a single violation, and the FCC is actively enforcing it.⁹⁹ Another example is unsolicited commercial and pornographic e-mail, which most members of the public prefer not to receive. Congress enacted the CAN-SPAM Act, which imposes penalties of up to \$43,280 per e-mail for sending unsolicited commercial or pornography e-mail (under certain conditions).¹⁰⁰ In short, these modes of presenting commercial advertisements are offensive to members of the public, so Congress has acted to prevent them.

Just as the public prefers not to receive robocalls and spam e-mail, the public prefers not to receive advertisements through the method of highly offensive, immoral language. Like robocalls and spam e-mail, immoral language reflects a mode of communication that is independent of the specific message within the advertisement. When used merely to evoke emotional force—which is usually the case—immoral language is not employed to convey a specific viewpoint.¹⁰¹ In that situation, the immoral language is used to gain attention.¹⁰² The mode is crude and base, which effectuates offense, emotion, and attention. The public, understandably, prefers not to receive this mode of expression. As

97. See *Stop Unwanted Robocalls and Texts*, FED. COMMC'NS COMM'N, <https://www.ftc.gov/consumers/guides/stop-unwanted-robocalls-and-texts> [<https://perma.cc/YXD7-VGSX>] (July 9, 2020) (“Unwanted calls[—]including illegal and spoofed robocalls[—]are the FCC’s top consumer complaint and our top consumer protection priority.”).

98. 47 U.S.C. § 227(b)(1)(B)–(C).

99. *Id.* § 227(b)(1)(B)–(C), (5)(A); see also *The FCC’s Push to Combat Robocalls & Spoofing*, FED. COMMC'NS COMM'N, <https://www.fcc.gov/spoofed-robocalls> [<https://perma.cc/FEG6-CC98>] (last visited Aug. 19, 2020).

100. 15 U.S.C. § 7706; *CAN-SPAM Act: A Compliance Guide for Business*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/business-center/guidance/can-spam-act-compliance-guide-business> [<https://perma.cc/5MQN-KB4R>] (Jan. 1, 2020); see also Tracy McVeigh, *Porn Spammers Jailed for Five Years*, GUARDIAN (Oct. 14, 2007, 6:39 PM), <https://www.theguardian.com/technology/2007/oct/14/internet.crime> [<https://perma.cc/T8E3-7A8L>].

101. See MONTAGU, *supra* note 44, at 93, 100.

102. See *id.*

discussed below in Section III.C, denying a trademark is an effective means of limiting this mode in commercial advertising.

Of course, bars to robocalls and spam e-mail are distinguishable on the grounds that they do not target the content of speech. The Supreme Court has recently held that robocall regulations that target messages in speech violate the First Amendment.¹⁰³ However, this Section is not discussing the speech implications of a bar to immoral language. Part IV engages that discussion, and as discussed in Section IV.B, a bar to immoral language does not target any message or idea within speech. Here, I note merely that the offensiveness of being bothered by robocalls and spam e-mail illustrates limitations on acceptable modes of communication in advertising. Immoral language involves the same sort of offensiveness.

2. *Disruption to Commerce.* Marks that contain immoral language are likely to disrupt the commercial marketplace. Their intrinsic offensiveness creates an atmosphere that is uninviting. As time continues without any bar to immoral language, businesses are likely to become more confident that immoral language is worthy of investment as a brand that grabs the attention of consumers. And trademarks are everywhere, so encounters with offensive marks would not be avoidable.¹⁰⁴ Even if a person turns away from a mark, the trademark has already registered in the mind. The offense occurs. Consumers, in turn, feel less comfortable freely observing brands in the commercial marketplace.

In view of the risk of being offended, some consumers may severely limit their exposure to trademarks, perhaps reducing their participation in the commercial marketplace wherever possible. Some may continue to view offensive marks but alter consumption choices. Some may not let offensive marks affect their consumption choices at all, perhaps being only mildly annoyed. And some may even appreciate the offensive language as

103. The recent case of *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, No. 19-631, slip op. at 25 (U.S. July 6, 2020), is consistent with this conclusion. In *Barr*, the Supreme Court held that a provision of the federal robocall statute violated the First Amendment—specifically, the provision that exempted debt collection calls on behalf of the United States. *See id.* The Court explained that the law “favored debt-collection speech over [other] political speech,” so it was unconstitutional. *Id.* The proposal in this Article does not target the specific ideas or messages in speech, but instead, only the mode of expressing the message. *See* discussion *infra* Section IV.B.3 (explaining the distinction between targeting ideas and modes of expression).

104. *See* Ned Snow, *Denying Trademark for Scandalous Speech*, 51 U.C. DAVIS L. REV. 2331, 2362 (2018) [hereinafter *Denying Trademark*] (noting the ubiquity of trademarks).

a form of humor or entertainment. Of these various groups, those who act on their offense (by not participating or altering consumption choices) will negatively affect commercial activity.¹⁰⁵ Simply put, transactions that would have occurred will not. Of course, those who appreciate offensive marks might actually increase economic activity. Yet it seems unlikely that those consumers would cause a net gain for commercial activity in view of those consumers who decrease their activity because of their offense. In short, marks that contain offensive language would seem to diminish the robustness of commercial activity.¹⁰⁶ The offense has occurred, so commerce will not.

It is true that if consumers refuse to engage in commercial transactions because of offensive language, mark owners might change their marks, or alternatively, websites and stores might refuse to carry those goods with the offensive marks. Arguably the laissez-faire marketplace will resolve the problem of immoral language in marks.¹⁰⁷ But this argument fails to recognize the practical reality that a sufficient number of consumers might (and likely will) consume products with marks containing immoral language. Even if those consumers comprise a minority of the public, the minority is likely sufficient to keep the mark owner in business. That being the case, consumers who find the language offensive will continue to encounter such marks without means for preventing exposure. Although they might not purchase the good or frequent the store, they will still see, hear, and read the advertisements potentially anywhere. The specific commercial experience becomes an unpleasant one. And as more businesses invest in immoral-language marks, offensive experiences will become a regular occurrence. Uninviting and offensive, the commercial marketplace will suffer.

C. *Trademark Law as a Deterrent*

To the extent that the law can prevent immoral language in trademarks, the law will do much to prevent immoral language in

105. See *Iancu v. Brunetti*, 139 S. Ct. 2294, 2307 (2019) (Breyer, J., concurring in part and dissenting in part) (“These attention-grabbing words, though financially valuable to some businesses that seek to attract interest in their products, threaten to distract consumers and disrupt commerce.”).

106. See *id.* (“[Vulgar marks] may lead to the creation of public spaces that many will find repellent, perhaps on occasion creating the risk of verbal altercations or even physical confrontations.”).

107. See *Denying Trademark*, *supra* note 104, at 2367.

commercial advertising.¹⁰⁸ The question that follows is whether denying trademark registration for immoral language will actually prevent people from using them as trademarks. The answer appears to be yes. Businesses have an incentive to use only those marks that can be registered for federal trademark protection.¹⁰⁹ Registration ensures that other businesses will not pass themselves off as the mark owner.¹¹⁰ It facilitates effective brand marketing, leading to reputational value for the mark owner. Yet without trademark protection, a seller risks losing business to competitors who might copy the seller's brand name. Therefore, businesses have a strong financial incentive to choose a mark for their goods or services that is eligible for trademark registration. Accordingly, Congress should deny registration for marks containing immoral language to place economic pressure on businesses not to use those marks.

This premise that denying trademark would deter immoral language draws strength from both the purposes and doctrines of trademark law. That strength, however, is dependent on the timeliness of Congress's action. Both these points are discussed in the two Sections below.

1. *Purposes and Doctrines of Trademark Law.* The purposes that underlie trademark law support the purpose of denying protection for vulgar, profane, and obscene language. The general purpose of trademark law is to benefit consumers, and to further this general purpose, trademark law fulfills several specific purposes.¹¹¹ First, it protects consumers from confusion about the source of a product. By providing a mark owner an exclusive mark, trademark enables consumers to easily and accurately identify a product's brand.¹¹² Second, it protects consumers from deceptive

108. In order to qualify for federal trademark protection, a trademark must be placed on the good or displayed in the advertising or sale of a service. See 15 U.S.C. §§ 1051, 1127.

109. See generally USPTO, U.S. DEP'T OF COM., PROTECTING YOUR TRADEMARK: ENHANCING YOUR RIGHTS THROUGH FEDERAL REGISTRATION 11–12 (2020), <https://www.uspto.gov/sites/default/files/documents/BasicFacts.pdf> [<https://perma.cc/H6QU-EHH9>] (explaining benefits of registering a trademark).

110. See generally 15 U.S.C. § 1114 (imposing liability on parties who infringe a registered mark).

111. See generally Ned Snow, *Free Speech & Disparaging Trademarks*, 57 B.C. L. REV. 1639, 1668–70 (2016) [hereinafter *Free Speech*] (reciting various purposes of trademark law).

112. See *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 782 n.15 (1992) (Stevens, J., concurring) (quoting legislative history that articulates one purpose of trademark to be “protect[ing] the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get”).

advertising. Marks that deceive consumers about characteristics of the product are denied protection.¹¹³ Third, it facilitates an incentive for businesses to offer products that consumers value. The trademark provides a means for businesses to gain a reputation as sponsors of a product. That reputation incentivizes businesses to offer quality products.¹¹⁴

Consistent with these purposes of trademark law, denying protection for immoral language would also benefit consumers. Just as trademark law protects consumers from confusion over a product's source and from deception about characteristics of goods, trademark law can protect consumers from highly offensive modes of advertising. For many consumers, protection from offensive language is at least as beneficial as protection from confusion or deception.¹¹⁵ Furthermore, incentivizing businesses to use non-offensive modes of expression (by denying protection for immoral language) is analogous to incentivizing businesses to offer quality products to consumers: both incentives promote consumer satisfaction. Hence, denying protection for immoral language is consistent with the specific purposes of trademark law that ultimately benefit consumers.

Specific provisions of the Lanham Act (the Act) further support denying protection for immoral language. The Lanham Act already denies trademark registration for certain categories of content on moral grounds. The Act denies protection for portrayals of a deceased president while the spouse is alive (without his or her consent).¹¹⁶ The reason for this denial would seem to be that the public considers it inappropriate to commercialize a deceased president while his or her spouse is still living. The president's memory should not be commercialized, out of respect for the widow or widower.¹¹⁷ This is a moral reason. Similarly, the Act prevents

113. See Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1844 (2007) ("By preserving the integrity of these symbols, trademark law benefits consumers . . . by protecting them from being deceived into buying products they do not want . . .").

114. See *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163–64 (1995) ("[Trademark] law helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product.").

115. See *Denying Trademark*, *supra* note 104, at 2357, 2359, 2361.

116. 15 U.S.C. § 1052(c).

117. See Nicole Kinsley, *The Federal Trademark Statute Assumes Hillary Can't Win*, TRADEMARK & COPYRIGHT L. (July 21, 2016), <https://www.trademarkandcopyrightlawblog.com/2016/07/the-federal-trademark-statute-assumes-hillary-cant-win/> [<https://perma.cc/D66T-8NC4>]. Some might argue that the reason is to prevent consumers from being misled into believing that the deceased president had endorsed the good during his or her life. That reason, however, would not explain why the bar applies only during the life of the widow or widower.

registration of an insignia of the United States, any state, or any foreign nation.¹¹⁸ One court has noted the reason for this bar: government insignia “ought to be kept solely to signify the government and not to be sullied or debased by use as symbols of business and trade.”¹¹⁹ The use of government insignia as a trademark would sully or debase that insignia, which apparently should not be done.¹²⁰ Here, again, is another moral reason.¹²¹ Thus, the deceased-presidents bar and the government-insignia bar are both morally based bars to trademark protection. Bars to vulgar, profane, and obscene marks would not be the first, or the only, morally based bars.

2. *Timeliness of the Bars.* The effectiveness of the law at limiting immoral language in trademarks will decrease as Congress procrastinates the enactment of this proposal. As discussed in Part IV below, the Supreme Court in 2019 struck down a century-old statutory provision that barred registration of marks that were “scandalous” or “immoral.”¹²² Those terms allowed the government to deny protection not only to the immoral language but also to specific ideas that the government considered to be immoral.¹²³ The terms were thus held to be unconstitutional.¹²⁴ Importantly, though, several members of the Court wrote separately to observe that Congress could bar protection for marks that are vulgar, profane, or obscene.¹²⁵ The

118. 15 U.S.C. § 1052(b).

119. *Renna v. County of Union*, 88 F. Supp. 3d 310, 318 n.9 (D.N.J. 2014).

120. *See id.*

121. Some might argue that this reason for this bar is to protect people from being confused over whether the government endorses the good or service. That is possible, although not the view articulated by the *Renna* court quoted above. Furthermore, if that were the reason, the bar would have precluded protection only for parties who are not the government organization corresponding to the government insignia. But that is not so: the bar applies to government organizations as well. *E.g.*, *In re City of Houston*, 731 F.3d 1326, 1331 (Fed. Cir. 2013) (denying trademark protection for a city’s own government symbol); *see also* Rebecca Tushnet, *The First Amendment Walks into a Bar: Trademark Registration and Free Speech*, 92 NOTRE DAME L. REV. 381, 409 n.106 (2016) (questioning deceptiveness as a reason for the government insignia bar given that the bar prohibits governments from registering their own insignia).

122. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019); sources cited *supra* note 3.

123. *Brunetti*, 139 S. Ct. at 2299–2301.

124. *Id.* at 2302.

125. *See id.* at 2303 (Roberts, C.J., concurring in part and dissenting in part) (“[R]efusing registration to obscene, vulgar, or profane marks does not offend the First Amendment.”); *id.* (Alito, J., concurring) (“Our decision does not prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas.”); *id.* at 2306 (Breyer, J., concurring in part and dissenting in part) (“[I]t is hard to see how a statute

majority opinion explicitly noted that its holding did not reach such modes of expression.¹²⁶ Hence, the Court sent a clear signal to Congress that it could—and perhaps should—bar protection for vulgar, profane, and obscene marks.

Given the Court's signal, one would expect Congress to quickly enact trademark bars for vulgar, profane, and obscene language. Indeed, for a century, Congress blocked such immoral language under the old “immoral” and “scandalous” bars, never hinting that it would remove those bars.¹²⁷ So when the Court struck down those bars, one would have expected Congress to immediately fix the seeming technicality. One would have expected Congress to replace the old unconstitutional terms with the freshly endorsed constitutional terms: *vulgar*, *profane*, and *obscene*. But two years have passed since *Brunetti* and Congress has done nothing. Has Congress changed its mind about immoral language in trademarks? As time continues to pass, the question becomes more pressing. Congress's continued silence after the Court's explicit invitation to replace the old bars suggests that Congress no longer values non-offensive modes of expressing commercial information. Or perhaps it suggests that Congress no longer has a problem with immoral language.

Whatever the reason that Congress delays, the passing of time creates an expectation on the part of businesses that use of immoral language is permissible for trademark registration. Expectations become settled, so businesses gain confidence to invest in marks containing immoral language. With the passage of time, businesses become confident that such marks are here to stay. And those marks will only continue to grab the attention of consumers. They are, therefore, likely to become more common as Congress postpones any action. Crude portrayals of concepts that contravene fundamental moral norms will become a part of the commercial marketplace. Unless Congress acts soon, civilized discourse will quickly erode.

prohibiting the registration of only highly vulgar or obscene words discriminates based on ‘viewpoint.’”); *id.* at 2318 (Sotomayor, J., concurring in part and dissenting in part) (“With ‘scandalous’ narrowed to reach only obscene, profane, and vulgar content, the provision would not be overly broad.”).

126. See *id.* at 2301–02, 2302 n.* (majority opinion).

127. See Trademark Act of 1905, Pub. L. No. 84, § 5(a), 33 Stat. 724, 725 (prohibiting trademark registration for scandalous or immoral matter), *repealed by* 15 U.S.C. § 1052(a).

IV. CONSTITUTION

The proposal that Congress enact bars to vulgar, profane, and obscene marks (VPO bars) raises an obvious question: Would the VPO bars violate the First Amendment?¹²⁸ This question calls for both a doctrinal and theoretical discussion. The doctrinal discussion first considers whether denying trademark registration constitutes an act of speech suppression.¹²⁹ Concluding that the denial is indeed an act of suppression, the discussion considers whether an exceptional speech doctrine could justify the VPO bars. Specifically, does the context of trademark registration suggest the application of the limited public forum doctrine?¹³⁰ Section IV.A takes up these two issues. Section IV.B focuses on the single issue of whether the VPO bars would be viewpoint-neutral—a critical requirement in most First Amendment contexts. Viewpoint neutrality merits close attention in light of the two recent Supreme Court cases mentioned above—*Matal v. Tam*¹³¹ and *Iancu v. Brunetti*.¹³² Section IV.B analyzes those cases. Section IV.C then observes recent remarks made by Justices relating to the constitutionality of the VPO bars, specifically. Finally, this Part engages a theoretical discussion in Section IV.D, considering whether the VPO bars would be consistent with the theory that underlies free speech.

A. Doctrinal Framework

Any government restriction that discriminates on the content of speech presumptively represents Congress “abridging the freedom of speech,” in direct violation of the First Amendment.¹³³ The doctrine is simple: the government “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”¹³⁴ Thus, the question here is whether Congress is

128. Professor Gary Myers has examined this question as well. See Gary Myers, *It's Scandalous! – Limiting Profane Trademark Registrations after Tam and Brunetti*, 27 J. INTELL. PROP. L. 1, 10–19 (2019). He has concluded that a statutory bar to vulgar, profane, and obscene marks would not violate the First Amendment. *Id.* at 19–20.

129. See discussion *infra* Section IV.A.1.

130. See discussion *infra* Section IV.A.2.

131. 137 S. Ct. 1744, 1757–58 (2017).

132. 139 S. Ct. at 2299–2302 (2019).

133. U.S. CONST. amend. I; see also cases cited *infra* note 134.

134. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (quoting Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972)); see also *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790–91 (2011); *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002); *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (“If there is a bedrock principle underlying the

restricting expression because of its message, ideas, subject, or content when Congress denies trademark registration for vulgar, profane, or obscene marks.

1. *Act of Abridgment.* This question raises a preliminary issue that the recent Court cases appear to have settled—i.e., whether denying trademark registration constitutes an act of abridgment. By denying registration, the government does not preclude anyone from using any sort of expression as a mark.¹³⁵ That is, in the absence of registration, a seller who uses a mark to represent her products can continue to do so; she merely cannot prevent someone else from duplicating the same mark. The seller is in no way prohibited from using the mark. Although the effect of denying registration may be to deprive the seller of the economic benefit that follows from trademark protection, trademark law does not directly preclude the seller from using any sort of expression as a mark. On this basis, it is arguable that denying registration does not abridge any speech. The speech can still occur.

For several decades, appellate courts employed this reasoning to hold that content-based restrictions on trademark registration did not raise any speech issue.¹³⁶ Without an abridgment, any sort of discrimination would not matter. But in the two recent cases of *Iancu v. Brunetti*¹³⁷ and *Matal v. Tam*,¹³⁸ the Court's holdings imply otherwise. In both cases, the Court struck down content-based bars to trademark registration on First Amendment grounds (which will be discussed in greater detail below in Section

First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” (quoting *United States v. Eichman*, 496 U.S. 310, 319 (1990))).

135. See 15 U.S.C. § 1051 (setting forth requirements for trademark registration); *Brunetti*, 139 S. Ct. at 2303 (Roberts, C.J., concurring in part and dissenting in part) (“Whether such marks can be registered does not affect the extent to which their owners may use them in commerce to identify goods. No speech is being restricted; no one is being punished.”).

136. See *In re Boulevard Ent., Inc.*, 334 F.3d 1336, 1343 (Fed. Cir. 2003) (following precedent that “rejected First Amendment challenges to refusals to register marks under [S]ection 1052(a), holding that the refusal to register a mark does not proscribe any conduct or suppress any form of expression because it does not affect the applicant’s right to use the mark in question”), *abrogated by Brunetti*, 139 S. Ct. at 2302; *In re Mavety Media Grp. Ltd.*, 33 F.3d 1367, 1374 (Fed. Cir. 1994) (holding that the scandalous and immoral bars do not abridge a trademark applicant’s speech rights on the grounds that “[n]o conduct is proscribed, and no tangible form of expression is suppressed”), *abrogated by Brunetti*, 139 S. Ct. at 2302; *In re McGinley*, 660 F.2d 481, 484 (C.C.P.A. 1981) (employing the same reasoning as the court in *Mavety Media Grp.*), *abrogated by Brunetti*, 139 S. Ct. at 2302.

137. 139 S. Ct. at 2302.

138. 137 S. Ct. 1744, 1765 (2017).

IV.B). Although in neither case did the Court ever explicitly state that the bars served to suppress or abridge the speech of mark owners, the Court's holdings in both cases—that the bars violated the First Amendment—require that conclusion. How else could the bars have violated the First Amendment other than through an act of speech suppression? Hence, the issue is settled: content bars to trademark registration have an effect on speech sufficient to trigger First Amendment interests.

From a practical standpoint, this implied holding of *Brunetti* and *Tam* makes sense. Simply put, denying the economic benefit of trademark rights chills the exercise of speech. Potential mark owners avoid speaking marks that would not be eligible for those rights. Indeed, the very purpose of denying registration for immoral language—to prevent mark owners from using those sorts of marks—necessarily implies that the government is attempting to restrict speech based on content. A speech abridgment is definitely occurring.

2. *Justifications for Content Restrictions.* The blanket statement that Congress “has no power to restrict expression because of its message, its ideas, its subject matter, or its content” is not without exception.¹³⁹ Viewed under a standard of “strict scrutiny,” government restrictions of speech content are permissible if narrowly tailored to serve a compelling government interest,¹⁴⁰ such as “protecting the physical and psychological well-being of minors”¹⁴¹ or protecting national security.¹⁴² Under this standard, however, the VPO bars would not likely pass constitutional muster. The government's interest in ensuring that consumers are not offended by immoral language does not seem compelling. There is no demonstrable harm to consumers—just the inconvenience of avoiding certain marks.¹⁴³

Perhaps, though, the bars serve a compelling government interest because they protect the psychological well-being of

139. See *Reed*, 135 S. Ct. at 2226.

140. *Id.* at 2226–27.

141. See *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.”).

142. See *Haig v. Agee*, 453 U.S. 280, 307–08 (1981).

143. Cf. *Virgin Enters. Ltd. v. Nawab*, 335 F.3d 141, 147 (2d Cir. 2003) (“The purpose for which the trademark law accords merchants the exclusive right to the use of a name or symbol in their area or commerce is *identification*, so that the merchants can establish goodwill for their goods based on past satisfactory performance, and the consuming public can rely on a mark as a guarantee that the goods or services so marked come from the merchant who has been found to be satisfactory in the past.”).

children. Trademarks are basically everywhere,¹⁴⁴ and at least with respect to obscene marks that are pornographic in nature, courts,¹⁴⁵ legal scholars,¹⁴⁶ and social scientists¹⁴⁷ agree that pornographic material causes serious harms to the psychological wellness of children. Yet even assuming a compelling interest, the VPO bars would not appear narrowly tailored to serve that interest.¹⁴⁸ The law could still provide protection for marks containing immoral language by limiting the protection to certain contexts that children do not usually frequent (e.g., adult-media stores and websites). Or alternatively, the law could deny protection only for the specific contexts where children are likely to view marks (e.g., children's toys). Under strict scrutiny, the broad reach of the VPO bars does not seem justifiable.

That the VPO bars cannot satisfy the strict-scrutiny standard does not imply their unconstitutionality. There are many content-based restrictions in trademark law that are likely not justified under the strict-scrutiny standard.¹⁴⁹ Yet those other content-based restrictions must be constitutional if the trademark system

144. See *Denying Trademark*, *supra* note 104, at 2362.

145. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 748–51 (1978) (upholding regulation of constitutionally protected indecent speech over broadcast airwaves on grounds that “a uniquely pervasive presence in the lives of all Americans” and, moreover, “broadcasting is uniquely accessible to children”).

146. See, e.g., Cass Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 601–02 (“All of these factors support the conclusion that pornography is a significant social problem—producing serious harm, mostly to women—and that substantial benefits would result if the pornography industry were regulated.”).

147. See, e.g., Michael Flood, *The Harms of Pornography Exposure Among Children and Young People*, 18 CHILD ABUSE REV. 384, 391–93 (2009); Kirk Doran & Joseph Price, *Pornography and Marriage*, 35 J. FAM. & ECON. ISSUES 489, 495–96 (2014) (finding that the use of pornographic material is associated with less marital satisfaction and summarizing other research on pornography's effect on marriages and families); Destin N. Stewart & Dawn M. Szymanski, *Young Adult Women's Reports of Their Male Romantic Partner's Pornography Use as a Correlate of Their Self-Esteem, Relationship Quality, and Sexual Satisfaction*, 67 SEX ROLES 257, 257 (2012) (“Results [of the survey] revealed women's reports of their male partner's frequency of pornography use were negatively associated with their relationship quality. More perceptions of problematic use of pornography was negatively correlated with self-esteem, relationship quality, and sexual satisfaction.”); Valerie Voon et al., *Neural Correlates of Sexual Cue Reactivity in Individuals with and Without Compulsive Sexual Behaviours*, PLOS ONE (July 11, 2014), <https://journal.s.plos.org/plosone/article/file?id=10.1371/journal.pone.0102419&type=printable> [https://perma.cc/5KTQ-KTAX] (conducting empirical study demonstrating that brain activity of pornography users is akin to drug addicts).

148. Perhaps, though, such a bar would be narrowly tailored. Professor Gary Myers has compared the VPO bars to indecent-speech regulation by the FCC, which the Court has held to be constitutional in *FCC v. Pacifica*, 438 U.S. 726 (1978). See Myers, *supra* note 128, at 18.

149. E.g., 15 U.S.C. § 1052 (listing criteria for trademark registration that are based on the content of a mark).

is to work.¹⁵⁰ Consider the bars to registering marks that are deceptive,¹⁵¹ that are descriptive of goods,¹⁵² that are so similar to an existing mark that they are likely to cause confusion or mistakes among consumers,¹⁵³ or that falsely suggest a connection with persons.¹⁵⁴ These content-based bars facilitate truthful advertising and efficiency in the commercial marketplace.¹⁵⁵ Trademark could not fulfill its purposes without them. Unsurprisingly, then, some members of the Court have explicitly recognized that some content-based criteria in trademark law must be constitutional.¹⁵⁶ Nevertheless, the Court has not yet delineated the proper test for evaluating whether content-based restrictions in the trademark context are permissible under the First Amendment.¹⁵⁷ In short, content-based restrictions must be permissible in trademark law; the Court simply has not explained the correct analytical framework that would justify the restrictions.

Although the Court has not definitively set forth the proper framework, Justices Alito, Sotomayor, and Breyer have suggested that the appropriate framework might be the limited-public-forum

150. See *Free Speech*, *supra* note 111, at 1647–61 (arguing that restrictions in trademark law must fall within an exception that allows for content discrimination).

151. See 15 U.S.C. § 1052(a), *invalidated in part* by *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *Matal v. Tam*, 137 S. Ct. 1744 (2017).

152. 15 U.S.C. § 1052(e). The descriptive bar applies only if the mark has not become distinctive. See *id.* § 1052(f).

153. *Id.* § 1052(d).

154. *Id.* § 1052(a), *invalidated in part* by *Brunetti*, 139 S. Ct. at 2294; *Tam*, 137 S. Ct. at 1744.

155. See generally William M. Landes & Richard A. Posner, *The Economics of Trademark Law*, 78 TRADEMARK REP. 267, 267, 276–77 (1988) (“The overall conclusion is that trademark law . . . can best be explained on the hypothesis that the law is trying to promote economic efficiency.”).

156. See *Brunetti*, 139 S. Ct. at 2306 (Breyer, J., concurring in part and dissenting in part) (“[R]egulations governing trademark registration inevitably involve content discrimination.” (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2234–35 (2015) (Breyer, J., concurring))); *Tam*, 137 S. Ct. at 1768 (Kennedy, J., concurring in part and concurring in judgment) (recognizing that it is well settled that certain content-based criteria for trademark registration is constitutional).

157. See *Brunetti*, 139 S. Ct. at 2298–99 (recognizing that the *Tam* Court could not agree on whether a bar in the Lanham Act constitutes “a condition on a government benefit or a simple restriction on speech,” such that the Court could not reach consensus on “the overall framework for deciding the case,” and deciding *Brunetti* on the same grounds as *Tam*).

doctrine.¹⁵⁸ They appear correct.¹⁵⁹ The limited-public-forum doctrine applies when evaluating government restrictions on speech that occurs within a forum that the government has created to facilitate private speech for certain purposes.¹⁶⁰ In that context, content discrimination is permissible if the restrictions are viewpoint-neutral and “reasonable in light of the purpose served by the forum.”¹⁶¹ For example, a public library might designate a room for discussing the works of Mark Twain at a particular time. The room is a government forum intended to facilitate private speech. The content restriction—only speech about Mark Twain—serves a purpose of the library—to provide educational opportunities about authors—and it is viewpoint-neutral—any opinion about Mark Twain is welcome. Importantly, the limited-public-forum doctrine is not limited only to physical fora. The doctrine may apply to metaphysical fora, or in other words, it may apply where the government has expended benefits or resources that further private speech.¹⁶² For example, the Court has applied this doctrine when it has evaluated school funding for a student publication that is conditioned on content-based restrictions,¹⁶³ and a school’s provision of resources for a student organization that is conditioned on content-based restrictions.¹⁶⁴ Thus, the limited-public-forum doctrine allows for content-based restrictions on private speech where the government has expended resources to facilitate the speech, insofar as the restrictions are viewpoint-neutral and serve a purpose for expending the resources.

158. See *id.* at 2305 (Breyer, J., concurring in part and dissenting in part) (“But one can find some vague resemblance between trademark registration and what this Court refers to as a ‘limited public forum’ created by the government for private speech.”); *id.* at 2316 (Sotomayor, J., concurring in part and dissenting in part) (“[T]he Court has treated such initiatives as a limited public (or nonpublic) forum.”); *Tam*, 137 S. Ct. at 1763 (plurality opinion) (“Potentially more analogous [to speech restrictions in the Lanham Act] are cases in which a unit of government creates a limited public forum for private speech.”).

159. See *Denying Trademark*, *supra* note 104, at 2364–65 (arguing that trademark restrictions fall within the doctrine of limited public forum).

160. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (“The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.”).

161. See *id.* (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

162. See *id.* at 830.

163. See *id.* at 829–31.

164. See *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 672–73 (2010).

This doctrine appears applicable to the context of trademark registration.¹⁶⁵ Through the registration process, the government extends enforceable property rights to persons who register their marks.¹⁶⁶ The provision of enforceable rights is intended to facilitate private speech in the form of trademarks.¹⁶⁷ Furthermore, the Court has noted that where the government “is dangling the carrot of subsidy, not wielding the stick of prohibition,” the restriction is more likely to be viewed within the framework of a limited public forum.¹⁶⁸ This point is, of course, relevant because trademark registration represents a government reward that only indirectly influences speech—not a criminal or financial punishment. Thus, the limited-public-forum doctrine appears the correct framework for analyzing content-based restrictions in trademark registration.

This conclusion that the limited-public-forum doctrine applies to trademark is especially important in evaluating the VPO bars in light of a particular Supreme Court case, *Cohen v. California*. There, a man was criminally prosecuted for wearing a jacket containing the phrase “F—the Draft” in a state courthouse.¹⁶⁹ In holding that the state had violated his First Amendment right, the Court noted that “words are often chosen as much for their emotive as their cognitive force.”¹⁷⁰ *Cohen* thus recognizes protection for the F-word. But as Justice Sotomayor pointed out in her *Brunetti* opinion, the context of *Cohen* is very different from the context of trademark registration.¹⁷¹ A criminal prosecution for speaking a profanity in a courthouse about a government policy is very different from a denial of trademark registration for speaking the

165. See *Denying Trademark*, *supra* note 104, at 2364–68 (arguing that trademark system constitutes a limited public forum for purposes of evaluating speech restrictions). But see Lisa P. Ramsey, *A Free Speech Right to Trademark Protection?*, 106 TRADEMARK REP. 797, 877–78 (2016) (concluding that bars to trademark registration should not be analyzed under a public-forum framework).

166. See *Matal v. Tam*, 137 S. Ct. 1744, 1753 (2017) (listing benefits of trademark registration).

167. The private speech consists of names of marks that will enable consumers to identify the brand of good or service. See discussion *supra* Section III.C.1 (explaining the purpose of trademark law).

168. *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 682–83 (2010) (noting that the subsidy nature of a school’s provision of resources for a student organization supported the analytical framework of a limited public forum).

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

170. *Id.* at 26.

171. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2314–15 (2019) (Sotomayor, J., concurring in part and dissenting in part).

same profanity in commercial advertising.¹⁷² Speech restrictions in *Cohen* would, under today's doctrine, be subject to strict scrutiny, whereas speech restrictions in the trademark context should be subject to the standards of a limited public forum.¹⁷³

As mentioned above, the limited-public-forum doctrine requires, first, that content restrictions be reasonable in light of the trademark system's purpose, and second, that the restrictions be viewpoint-neutral.¹⁷⁴ With regard to the requirement of reasonableness, as discussed in Part III above, the VPO bars would reduce instances of public offense at modes of expression.¹⁷⁵ Such offenses can impede commercial transactions in the marketplace, which can undermine stability and orderliness in the commercial marketplace.¹⁷⁶ Simply put, highly offensive language can make the commercial marketplace less inviting to the public.¹⁷⁷ Marks containing offensive language disrupt commercial activity.¹⁷⁸ Barring them is therefore a reasonable act by Congress in light of the trademark system's broad purpose of facilitating commercial activity. The VPO bars thus satisfy the limited-public-forum doctrine's requirement of reasonableness.

With regard to the doctrine's requirement of viewpoint neutrality, Section IV.B below discusses that issue.

B. Viewpoint Neutrality

Content discrimination targets either the content's general subject matter or its specific viewpoint.¹⁷⁹ Discrimination based on the subject matter occurs when the restriction targets a broad, general category of expression, whereas viewpoint discrimination occurs "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction,"¹⁸⁰ or

172. *Id.* at 2314–17 (contrasting the *Cohen* Court's condemnation of the F-word as viewpoint-neutral content discrimination with regulation against its use in the trademark context under the limited-public-forum doctrine).

173. Compare *id.*, with *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) ("Laws that burden political speech are 'subject to strict scrutiny' . . .").

174. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

175. See discussion *supra* Section III.B.2.

176. See *Denying Trademark*, *supra* note 104, at 2364–68 (arguing that offense at marks impedes the purposes of trademark law).

177. *Id.* at 2353–61.

178. See *id.*

179. See *Rosenberger*, 515 U.S. at 829 (defining viewpoint discrimination as blatantly occurring "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject").

180. *Id.*

in other words, when the government “give[s] one side of a debatable public question an advantage in expressing its views to the people.”¹⁸¹

Under this understanding, the VPO bars would not be viewpoint-discriminatory. They do not target any particular opinion or ideology of a speaker, but rather, they target the general category of words that are highly offensive to the public’s sense of morality.¹⁸² The bars discriminate against vulgar, profane, or obscene language without regard for any viewpoint that a speaker may be asserting through such language.¹⁸³ Hence, on their face, the VPO bars would seem to be viewpoint-neutral.

Although this analysis may seem straightforward, the issue of viewpoint neutrality is especially nuanced in the trademark context. In the recent cases of *Tam* and *Brunetti*, the Court struck down content-based bars to trademark registration that were based on moral considerations.¹⁸⁴ Both cases provide guidance on viewpoint discrimination in the context of content-based trademark bars.¹⁸⁵ Hence, *Tam* and *Brunetti* must be studied closely to understand whether bars to vulgar, profane, and obscene marks would be subject to the same viewpoint-discriminatory failing.

1. *Matal v. Tam*. In *Tam*, Mr. Simon Tam chose “The Slants” as his band name in order to “reclaim” or “take ownership” of stereotypes associated with persons of Asian descent.¹⁸⁶ Mr. Tam accordingly applied to register THE SLANTS as a federally protected trademark.¹⁸⁷ In response, the PTO found that the term was offensive to Asians and thereby denied Mr. Tam’s application for registration under the disparagement bar.¹⁸⁸ The Supreme Court, however, unanimously concluded that the disparagement bar was viewpoint-discriminatory in violation of the First Amendment.¹⁸⁹

181. *McCullen v. Coakley*, 573 U.S. 464, 482–83 (2014).

182. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2313–15 (2019) (Sotomayor, J., concurring in part and dissenting in part) (“A restriction on trademarks featuring obscenity, vulgarity, or profanity is similarly viewpoint neutral, though it is naturally content-based.”).

183. *See, e.g., id.* at 2308.

184. *See id.* at 2298, 2302; *Matal v. Tam*, 137 S. Ct. 1744, 1763–65 (2017) (plurality opinion).

185. *See Brunetti*, 139 S. Ct. at 2298–2300; *Tam*, 137 S. Ct. at 1753, 1763 (plurality opinion).

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

187. *Id.*

188. *Id.*

189. *Id.* at 1751, 1753, 1765, 1769.

Although the Court overwhelmingly reached the conclusion that the disparagement bar was viewpoint-discriminatory, that conclusion is, in one sense, puzzling. The disparagement bar did not appear to target any specific ideology, opinion, or perspective of the speaker.¹⁹⁰ It did not give a particular side an advantage in a public debate, applying equally to all debates—neither side was allowed to disparage.¹⁹¹ Justice Alito wrote a plurality opinion that recognized this fact, specifically noting: “[T]he [disparagement] clause evenhandedly prohibits disparagement of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue.”¹⁹² So, if the disparagement bar did not target any specific viewpoint, how could it be viewpoint-discriminatory?

Justice Alito answered the question by explaining:

Giving offense is a viewpoint.

We have said time and again that “the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.” *Street v. New York*, 394 U.S. 576, 592 (1969). See also *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”).¹⁹³

According to Justice Alito, then, “[g]iving offense is a viewpoint.”¹⁹⁴ But this statement should not be read in a vacuum. It does not mean that any and all means of being offensive constitutes a viewpoint. Rather, it means that speaking an offensive idea is a viewpoint.

The necessity of offending through an idea is apparent in the sentences that Justice Alito quotes after making this giving-offense statement. Specifically, Justice Alito quoted two prior statements by the Court: first, “the public expression of ideas may not be prohibited merely because *the ideas are themselves* offensive to some of their hearers”;¹⁹⁵ and second, “the government may not prohibit the expression of an idea simply because society finds *the idea itself* offensive or disagreeable.”¹⁹⁶ In both statements, the

190. *Free Speech*, *supra* note 111, at 1677–83.

191. *Tam*, 137 S. Ct. at 1763 (plurality opinion).

192. *Id.*

193. *Id.* (citations omitted).

194. *Id.*

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

196. *Id.* (emphasis added) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

Court made clear that the cause of the offense must be the idea itself that the content communicates. Hence, the offense that Alito characterized as a viewpoint must be the offense that arises in response to the idea directly communicated by the expression.

Marks that disparage cause such offense. Disparaging marks are those that offend through their ideas.¹⁹⁷ That is, people take offense because of the disparaging idea that the mark communicates.¹⁹⁸ Indeed, the disparaging examples that Justice Alito cited as viewpoint-discriminatory exemplify targeting an idea within the disparaging mark: “Down with racists,” “Down with sexists,” and “Down with homophobes.”¹⁹⁹ The ideas in these examples consist of putting down racists, sexists, and homophobes. Those ideas are offensive to those groups.

A concurring opinion by Justice Kennedy supports this understanding. According to Justice Kennedy, the test for viewpoint discrimination turns on whether “the government has singled out a subset of messages for disfavor based on the views expressed.”²⁰⁰ Viewpoint discrimination must be “based on the views expressed,” or in other words, based on the ideas within the expression. To speak disparaging ideas is to speak a viewpoint, so the disparagement bar singles out speech based on an expressed view. Like Justice Alito, Justice Kennedy explained viewpoint discrimination in terms of targeting ideas within expression.

Another fact that explains the *Tam* holding of viewpoint discrimination is the broad scope of the disparagement bar. Because it applied to all disparaging content, it was impossible to fully enforce.²⁰¹ As a result, its application became “highly subjective,” entirely based on PTO officers’ opinions about what is inappropriately critical and what is not.²⁰² The bar enabled the PTO to pick and choose among competing ideas.²⁰³ Hence, the general term *disparage*—without any stated viewpoint bias—enabled the government to target particular opinions and viewpoints.

The takeaway from *Tam*, then, is twofold. First, a bar to registration cannot be based on the offensiveness of an idea in a

197. *See id.*

198. *See id.*

199. *Id.* at 1765.

200. *Id.* at 1766 (Kennedy, J., concurring).

201. *See, e.g.,* *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018) (illustrating that broad, “indeterminate” restrictions are more difficult to uphold than narrower restrictions).

202. *Id.* at 1756 n.5.

203. *See Tam*, 137 S. Ct. at 1753–54.

mark. Second, a restriction cannot be so broad as to permit subjective enforcement against particular ideas. Accordingly, these principles must be applied to the VPO bars to determine their viewpoint neutrality. That application is set forth below in Section IV.B.3.

2. *Iancu v. Brunetti*. In *Iancu v. Brunetti*, a business owner applied to register a mark that closely resembled the F-word as a brand name for his clothing line.²⁰⁴ The PTO denied his application under the Lanham Act's bar that precluded registration of terms that were "immoral" or "scandalous."²⁰⁵ Reversing the PTO, the Court struck down these bars as viewpoint-discriminatory.²⁰⁶

a. Immoral Bar. All nine members of the Court agreed that the "immoral" bar was viewpoint-discriminatory in violation of the First Amendment.²⁰⁷ Writing the Court's opinion, Justice Kagan explained:

[T]he Lanham Act permits registration of marks that champion society's sense of rectitude and morality, but not marks that denigrate those concepts. . . . [T]he statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter.²⁰⁸

As the Court made clear here, the immoral bar enabled, and indeed required, the government to pass judgment on whether particular ideas were morally acceptable. Stated differently, the immoral bar required the government to suppress ideas (by denying trademark registration) that it deemed inappropriate. This, according to the Court, was viewpoint-discriminatory.²⁰⁹

Like the disparagement bar, the immoral bar did not specify which particular beliefs were immoral.²¹⁰ The immoral bar did not target any specific ideology, specific opinion, or specific

204. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2297 (2019).

205. *Id.* at 2298.

206. *Id.* at 2297.

207. *Id.*

208. *Id.* at 2299–2300.

209. *See id.* at 2300.

210. *See* 15 U.S.C. § 1052(a) (2018), *invalidated in part by Brunetti*, 139 S. Ct. at 2294 ("No trademark . . . shall be refused registration on the principal register on account of its nature unless it—(a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols . . .").

perspective.²¹¹ Nevertheless, the immoral bar enabled the government to target only the specific views that it found unacceptable.²¹² It mandated enforcement against specific viewpoints, akin to a restriction against any idea with which the government disagreed.²¹³ In the wake of *Tam*, the immoral bar was inevitably viewpoint-discriminatory.²¹⁴

Underlying the Court's condemnation of the immoral bar was another problematic aspect—vagueness. Although the Court did not invoke the vagueness doctrine, the fact that the bar enabled government officials to pick and choose which beliefs were acceptable suggested vagueness problems.²¹⁵ The bar failed to provide notice about which types of marks were immoral, and it impermissibly delegated policy matters for subject determination by the PTO.²¹⁶ In effect, then, its vagueness enabled viewpoint discrimination.²¹⁷

b. *Scandalous Bar.* The *Brunetti* Court split over whether the scandalous bar was viewpoint-discriminatory.²¹⁸ Writing for five other Justices (i.e., Justices Alito, Thomas, Gorsuch, Kavanaugh, and Ginsburg), Justice Kagan interpreted *scandalous* as having an overlapping meaning with *immoral*, such that it also required the PTO to judge whether a mark's idea or viewpoint was acceptable.²¹⁹ The majority interpreted scandalous and immoral as “overlapping terms” that should be read together to arrive at a

211. See *Brunetti*, 139 S. Ct. at 2300–01.

212. See *id.* (noting examples of ideas that the PTO approved for trademark registration and contrasting ideas that the PTO refused).

204. See *id.* (“The facial viewpoint bias in the law results in viewpoint-discriminatory application.”).

214. *Id.* at 2301.

215. See generally *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (explaining the dangers of a vague statute). Why did the *Brunetti* Court not invoke the vagueness doctrine? The answer could be that the Court is generally reluctant where the government act constitutes an economic subsidy for speech. See *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 589 (1998) (“In the context of selective subsidies, it is not always feasible for Congress to legislate with clarity. Indeed, if this statute is unconstitutionally vague, then so too are all Government programs awarding scholarships and grants on the basis of subjective criteria such as ‘excellence.’”).

216. See *Brunetti*, 139 S. Ct. at 2298; cf. *Grayned*, 408 U.S. at 108–09.

217. Cf. *In re Tam*, 808 F.3d 1321, 1341–43 (Fed. Cir. 2015), *aff'd*, 137 S. Ct. 1744 (2017) (recognizing that the vagueness of the disparagement bar “contributes significantly to the chilling effect on speech”).

218. See *Brunetti*, 139 S. Ct. at 2294 (“Justice Alito filed a concurring opinion. Chief Justice Roberts filed an opinion concurring in part and dissenting in part. Justice Breyer filed an opinion concurring in part and dissenting in part. Justice Sotomayor, joined by Justice Breyer, filed an opinion concurring in part and dissenting in part.”).

219. See *id.* at 2299–2300.

single meaning—ideas that are hostile to moral standards.²²⁰ For the majority, the scandalous and immoral terms thus constituted a single bar to registration.²²¹ The majority regarded *scandalous*—like *immoral*—as a term that called for a judgment about actual ideas within a mark.²²² It was, therefore, viewpoint-discriminatory.²²³

Justices Sotomayor, Breyer, and Roberts interpreted *scandalous* very differently. Although each wrote separately, all three Justices together reached the same basic interpretation of *scandalous*. They interpreted *scandalous* as not requiring an assessment of an idea contained within a mark, but rather, as requiring an assessment of only the *mode* of expression.²²⁴ A mode of expression is the way or manner of expressing an idea.²²⁵ The Court had previously recognized that “[n]othing in the Constitution prohibits the [government] from insisting that certain modes of expression are inappropriate and subject to sanctions.”²²⁶ According to the dissenting Justices, *scandalous* may be interpreted to refer to modes of expressing an idea; specifically, the modes of “obscenity, vulgarity, and profanity.”²²⁷

220. *Id.* at 2300 (“Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation.”).

221. *See id.* at 2299–2300.

222. *See id.* at 2300. Justice Kagan provided a simple example to illustrate the point: the marks LOVE RULES and ALWAYS BE GOOD as contrasted with the marks HATE RULES and ALWAYS BE CRUEL. *Id.* The PTO would judge the ideas expressed in the first two marks to be moral and the ideas expressed in the second two marks to be immoral. *See id.*

223. *Id.*

224. *See id.* at 2303 (Roberts, C.J., concurring in part and dissenting in part) (“Standing alone, the term ‘scandalous’ need not be understood to reach marks that offend because of the ideas they convey; it can be read more narrowly to bar only marks that offend because of their mode of expression . . .”); *id.* at 2304 (Breyer, J., concurring in part and dissenting in part) (“[W]e should interpret the word ‘scandalous’ in the present statute to refer only to certain highly ‘vulgar’ or ‘obscene’ modes of expression.”); *id.* at 2308–11 (Sotomayor, J., concurring in part and dissenting in part) (recognizing that *scandalous* “can be read narrowly (to cover only offensive modes of expression)”).

225. *Mode*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining *mode* as “a manner of . . . doing something”).

226. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

227. *See Brunetti*, 139 S. Ct. at 2308 (Sotomayor, J., concurring in part and dissenting in part) (interpreting *scandalous* “to address only obscenity, vulgarity, and profanity”); *id.* at 2303 (Roberts, C.J., concurring in part and dissenting in part) (explaining that *scandalous* can be interpreted to apply to only marks “that are obscene, vulgar, or profane”); *id.* at 2304 (Breyer, J., concurring in part and dissenting in part) (interpreting *scandalous* as referring to certain marks that are “highly ‘vulgar’ or ‘obscene’”).

Responding to this argument, the *Brunetti* majority rejected this argument that *scandalous* targets only modes of expressing ideas.²²⁸ In the majority's view, the Lanham Act did not clearly limit *scandalous* only to modes that are offensive, independent of any viewpoint contained in a mark.²²⁹ For the majority, *scandalous* included both the modes of expression and the ideas that are offensive.²³⁰

The upshot of *Brunetti*, then, is that where a bar to registration requires the PTO to pass judgment on an idea contained within a mark, that bar is viewpoint-discriminatory.²³¹ As a corollary to this principle, the Court implicitly recognized that restrictions on *modes* of expression do not require the PTO to pass judgment on an idea within a mark.²³² The next Section applies these principles to the VPO bars.

3. *VPO Bars.* A surface understanding of *Tam* and *Brunetti* might suggest that the VPO bars are viewpoint-discriminatory. The *Tam* Court condemned a bar that restricted offensive marks,²³³ and the VPO bars target vulgar, profane, and obscene marks specifically because they are so offensive.²³⁴ As Alito noted, “[g]iving offense is a viewpoint.”²³⁵ At first glance, then, the highly offensive nature of vulgar, profane, and obscene marks would seem to represent a protected viewpoint. Likewise, *Brunetti* condemned bars that denied protection based on a view that certain marks were immoral,²³⁶ and the VPO bars deny protection based on the view that vulgar, profane, and obscene marks are immoral.²³⁷ Thus, if construed in this way, *Tam* and *Brunetti* would imply the unconstitutionality of the VPO bars.

But of course, construing *Tam* and *Brunetti* in this way would not be correct. As discussed in the Section above, *Tam* teaches that viewpoint discrimination exists where a bar restricts a mark

228. *Id.* at 2302 n.*.

229. *Id.* at 2301–02, 2302 n.*.

230. *Id.*

231. *See id.* at 2300–02.

232. *See id.* at 2301–02, 2302 n.*.

233. *See Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (“Speech may not be banned on the ground that it expresses ideas that offend.”).

234. *See* discussion *supra* Part III (arguing that trademark registration should be denied for vulgar, profane, and obscene marks specifically because they are highly offensive to the general public).

235. *Tam*, 137 S. Ct. at 1763 (plurality opinion).

236. *See Brunetti*, 139 S. Ct. at 2300–01.

237. *See* discussion *supra* Section III.A (observing the general opinion that use of vulgar, profane, and obscene language is immoral).

owner's ability to speak critically of an idea (because the bar targets offensive *ideas*).²³⁸ It further teaches that viewpoint discrimination exists where the subject matter of the bar is so broad that it invites subjective application, such that the PTO picks which ideas should win in the marketplace.²³⁹ *Brunetti* teaches that viewpoint discrimination exists where a bar requires the PTO to pass judgment on an idea.²⁴⁰ Thus, under these principles that underlie the holdings of *Tam* and *Brunetti*, the constitutional questions relevant to the VPO bars are the following: (1) whether the VPO bars target ideas that are offensive; and (2) whether the VPO bars invite the PTO to apply its own judgment about whether an idea is unacceptable. As discussed below, the answers to these questions indicate that the VPO bars are not viewpoint-discriminatory.

Question 1

Do the VPO bars target ideas that are offensive? The VPO bars restrict a mark owner's ability to engage in crude, coarse, and base manners of speaking.²⁴¹ They do not restrict the ability to speak ideas that are offensive or critical.²⁴² Any criticism asserted, or offense caused, by an idea within a mark is not the reason for denying a mark that contains immoral language.²⁴³ The mark's language is offensive, independent of any offensiveness of the idea itself.²⁴⁴ The F-word, for instance, is highly offensive, regardless of whether the idea that it emphasizes is itself offensive. F—ING GOOD CHICKEN is offensive, whereas that mark's idea—that the chicken tastes very good—is not.²⁴⁵ The purpose, then, of barring immoral language is to prevent offense at the mode of

238. See discussion *supra* Section IV.B.1.

239. See *id.*

240. See discussion *supra* Section IV.B.2.

241. See discussion *supra* Section III.A (explaining that the reason for offense is the crude portrayal of ideas).

242. See discussion *supra* Part II (illustrating that inappropriate ideas that do not use vulgar, profane, or obscene language would not be denied trademark protection).

243. See discussion *supra* Part III.

244. See generally *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992) (“The proposition that a particular instance of speech can be proscribable on the basis of one feature (*e.g.*, obscenity) but not on the basis of another (*e.g.*, opposition to the city government) is commonplace.”); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (“Nothing in the Constitution prohibits the [government] from insisting that certain modes of expression are inappropriate and subject to sanctions.”).

245. See discussion *supra* Section III.A (analyzing F—ING GOOD CHICKEN example).

communicating the idea.²⁴⁶ It is not to prevent criticism by, or offense taken from, the idea itself.

This distinction between offense at an idea and offense at a mode is therefore key to the constitutionality of the VPO bars.²⁴⁷ The distinction is apparent in Alito's plurality opinion in *Tam*, where he declared that "[g]iving offense is a viewpoint."²⁴⁸ As discussed above, the context of Alito's opinion implies that giving offense *based on an idea* is a viewpoint.²⁴⁹ Alito was not speaking about giving offense through a mode of expression. Indeed, at the beginning of the *Tam* decision, where he briefly wrote for the unanimous Court, Alito explained the offense in terms of an expression's idea: "Speech may not be banned on the ground that it expresses *ideas* that offend."²⁵⁰ It appears clear, then, that Alito was not opining about offenses that derive from the mode of expression.

This same distinction between an offense caused by a mode and an offense caused by an idea is further apparent in the *Brunetti* majority opinion. In arguing that the scandalous bar also requires a judgment about the acceptability of an idea (like the immoral bar), Justice Kagan explained: "[T]he category of scandalous marks thus includes *both* marks that *offend by the ideas they convey and* marks that *offend by their mode of expression*. And its coverage of the former means that it discriminates based on viewpoint."²⁵¹ Kagan's reasoning is clear: the offense from an idea is different from the offense from a mode, and it is the idea offense—not the mode offense—that results in viewpoint discrimination.²⁵² Implicitly, her reasoning indicates that offenses caused by modes are not viewpoint-discriminatory.²⁵³

246. Cf. *R.A.V.*, 505 U.S. at 393 ("[T]he reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey.").

247. See *Iancu v. Brunetti*, 139 S. Ct. 2294, 2313–14 (2019) (Sotomayor, J., concurring in part and dissenting in part) (recognizing the distinction between ideas within a mark and the modes of expressing those ideas).

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

249. See discussion *supra* Section IV.B.1 (explaining that offense as a protected viewpoint is only with respect to ideas that are offensive).

250. *Tam*, 137 S. Ct. at 1751 (emphasis added).

251. *Brunetti*, 139 S. Ct. at 2302 n.* (second and fourth emphases added).

252. See *id.*

253. See *id.* ("We say nothing at all about a statute that covers only the latter—or, in the Government's more concrete description, a statute limited to lewd, sexually explicit, and profane marks.").

Question 2

Do the VPO bars invite the PTO to apply its own judgment about whether an idea should be denied (which would be condemned by *Brunetti* and *Tam*)? The answer to this question is no. Because the bars do not target ideas, they do not call for any judgment about an idea. The VPO bars require a judgment about whether specific language is vulgar, profane, or obscene, but not a judgment about the ideas that the language communicates.²⁵⁴

Importantly, the judgment about whether language is vulgar, profane, or obscene does not depend on individual moral values of PTO officers. The VPO bars are not hopelessly vague like the immoral bar. There is an established public understanding of words and images that comprise vulgar, profane, and obscene language.²⁵⁵ The FCC, for instance, already employs objective standards to define these categories.²⁵⁶ Particular words, specific bodily functions, specific body parts, and specific religious references are identified as comprising the content of vulgar, profane, and obscene language.²⁵⁷ Therefore, the PTO would neither apply its own judgment about any idea nor apply its own judgment about the meaning of the immoral language. Consistent with *Tam* and *Brunetti*, the VPO bars would not invite subjective application of moral judgments.

One might argue that changing moral standards would make the VPO bars vague. What is vulgar today may become acceptable tomorrow. Yet a standard that depends on the public's changing understanding of a word does not imply that a trademark standard is vague.²⁵⁸ Trademark law already recognizes standards for protection that depend on meanings that change.²⁵⁹ The bar to generic marks calls for an evaluation of whether the meaning of a

254. See discussion *supra* Section III.A (explaining basis for public offense of immoral language).

255. See discussion *supra* Part III (explaining meanings of vulgarity, profanity, and obscenity).

256. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 506–10 (2009) (explaining FCC's interpretation and enforcement of indecency statute); *Obscene, Indecent and Profane Broadcasts*, *supra* note 61.

257. See discussion *supra* Part III.

258. See, e.g., 15 U.S.C. § 1052(f) (providing trademark protection for marks that “become distinctive”).

259. See *id.*; cf. *Graham v. Florida*, 560 U.S. 48, 58 (2010) (“[T]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.”).

word has become generic over time.²⁶⁰ The bar to descriptive marks may be overcome if a proponent can show that the mark has gained public recognition of the mark (i.e., secondary meaning).²⁶¹ Application of these bars depends on the public's understanding of meaning, which can change over time.²⁶² Changing public understanding of a word does not make a trademark bar vague.

C. *Judicial Support for VPO Bars*

This conclusion that the VPO bars are viewpoint-neutral draws support from statements by several Justices in the *Brunetti* case.²⁶³ Several Justices indicated that denying trademark registration for marks that are vulgar, profane, or obscene would be constitutional. Quoted below are their statements.

Chief Justice Roberts stated:

I also agree that . . . refusing registration to obscene, vulgar, or profane marks does not offend the First Amendment. . . . The Government . . . has an interest in not associating itself with trademarks whose content is obscene, vulgar, or profane. The First Amendment protects the freedom of speech; it does not require the Government to give aid and comfort to those using obscene, vulgar, and profane modes of expression.²⁶⁴

Justice Alito stated:

Our decision does not prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas. The particular mark in

260. See, e.g., *Bayer Co. v. United Drug Co.*, 272 F. 505, 511 (S.D.N.Y. 1921) (holding that fanciful mark ASPIRIN had become generic over time and thereby lost trademark protection). The word *cellophane* once communicated brand, but it quickly became generic through public usage. See *DuPont Cellophane Co. v. Waxed Prods. Co.*, 85 F.2d 75, 80 (2d Cir. 1936).

261. See, e.g., 15 U.S.C. § 1052(f). The changing meaning of words leads to difficulty in applying trademark standards that determine protection. See, e.g., *Thompson Med. Co. v. Pfizer Inc.*, 753 F.2d 208, 213 n.8 (“[B]ecause generic marks cannot be protected even upon a showing of secondary meaning, courts increasingly have been called upon to delineate the chimerical line between the descriptive and the generic.”).

262. See *USPTO v. Booking.com B.V.*, No. 19-46, slip op. at 3 (U.S. June 30, 2020) (“[T]o be placed on the principal register, descriptive terms must achieve significance ‘in the minds of the public’ as identifying the applicant’s goods or services—a quality called ‘acquired distinctiveness’ or ‘secondary meaning.’” (quoting *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 211 (2000))).

263. See *supra* note 6.

264. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2303–04 (2019) (Roberts, C.J., concurring in part and dissenting in part).

question in this case could be denied registration under such a statute. The term suggested by that mark is not needed to express any idea and, in fact, as commonly used today, generally signifies nothing except emotion and a severely limited vocabulary. The registration of such marks serves only to further coarsen our popular culture.²⁶⁵

Justice Breyer stated:

[I]t is hard to see how a statute prohibiting the registration of only highly vulgar or obscene words discriminates based on “viewpoint.” Of course, such words often evoke powerful emotions. Standing by themselves, however, these words do not typically convey any particular viewpoint.²⁶⁶

Justice Sotomayor stated:

Adopting a narrow construction for the word “scandalous”—interpreting it to regulate only obscenity, vulgarity, and profanity—would save it from unconstitutionality. . . .

. . . .

. . . To treat a restriction on vulgarity, profanity, or obscenity as viewpoint discrimination would upend decades of precedent.

. . . .

Prohibiting the registration of obscene, profane, or vulgar marks qualifies as reasonable, viewpoint-neutral, content-based regulation. . . . The Government has a reasonable interest in refraining from lending its ancillary support to marks that are obscene, vulgar, or profane.²⁶⁷

Writing for the Court majority, Justice Kagan suggested (without explicitly stating) that the VPO bars would be constitutional.²⁶⁸ Specifically, while drawing the distinction between offenses based on ideas that marks convey and offenses based on modes of expression, Justice Kagan contrasted the immoral and scandalous bars with bars that target marks that are “lewd” (which is akin to vulgar), “sexually explicit” (which is akin to obscene), and “profane.”²⁶⁹ She stated:

The statute as written does not draw the line at lewd, sexually explicit, or profane marks. Nor does it refer only to marks whose “mode of expression,” independent of

265. *Id.* at 2303 (plurality opinion).

266. *Id.* at 2306 (Breyer, J., concurring in part and dissenting in part).

267. *Id.* at 2313–14, 2317 (Sotomayor, J., concurring in part and dissenting in part).

268. *See id.* at 2301–02.

269. *Id.*

viewpoint, is particularly offensive. It covers the universe of immoral or scandalous—or (to use some PTO synonyms) offensive or disreputable—material. Whether or not lewd or profane. Whether the scandal and immorality comes from mode or instead from viewpoint.²⁷⁰

This contrast between the immoral and scandalous bars and “lewd, sexually explicit, [and] profane” bars suggests that Kagan views the latter group as constitutional.

Thus, four Justices explicitly indicated that barring either vulgar, profane, or obscene modes of expression would be constitutional. Specifically, Justices Roberts and Sotomayor expressly condoned bars to “vulgar,” “profane,” and “obscene” modes of expression;²⁷¹ Justice Breyer condoned bars to “vulgar” and “obscene” modes (and referred to “profane” in a supporting parenthetical);²⁷² and Justice Alito condoned a bar to the “vulgar” mode.²⁷³ The remaining five Justices, through the majority opinion written by Justice Kagan, recognized a distinction between the bars that target immoral and scandalous content and the bars that target modes of expression that are lewd, sexually explicit, and profane.²⁷⁴

D. *Speech Theory*

Although free-speech doctrine may be interpreted as being consistent with the VPO bars, exceptions to core free-speech principles should be applied with caution. Doctrines are inherently flexible, always able to change for exceptional circumstances. The danger of flexible application is that exceptions may arise where the reason for the exception, in view of the reason for the doctrine, does not seem justifiable. To guard against this possibility, the law should respect the theory underlying the doctrine. Only if the exception is consistent with the theory should it apply. Accordingly, this Section analyzes whether the VPO bars are justified in view of the theory that underlies free-speech doctrine.

The examination of theory proceeds in two parts. The first part considers whether a particular speech theory should govern the theoretical analysis of the VPO bars. It concludes that only the

270. *Id.* (citation omitted).

271. *Id.* at 2303–04 (Roberts, C.J., concurring in part and dissenting in part); *id.* at 2313–14, 2317 (Sotomayor, J., concurring in part and dissenting in part).

272. *Id.* at 2307 (Breyer, J., concurring and dissenting in part).

273. *Id.* at 2303 (plurality opinion).

274. *Id.* at 2301–02.

marketplace-of-ideas theory should govern the analysis.²⁷⁵ The second part performs that analysis. Arguing that vulgar, profane, and obscene marks are harmful to the marketplace of ideas, it concludes that the theory supports the VPO bars.²⁷⁶

1. *Speech Theories and Trademarks.* Various theories underlie the right of free speech.²⁷⁷ Marketplace of ideas, individual liberty, and democratic self-governance are perhaps the most commonly cited.²⁷⁸ Marketplace theory posits that the purpose of speech protection is to provide a forum for testing the truth of ideas.²⁷⁹ As ideas compete for public acceptance without government interference, truthful ideas have the best opportunity to prevail—according to the theory.²⁸⁰ By contrast, individual-liberty theory recognizes speech as an end in and of itself.²⁸¹ The speech right exists for individuals to realize self-identity and fulfillment.²⁸² Finally, democratic self-governance theory recognizes that the right of free speech is absolute with respect to speech related to self-governance in a democracy.²⁸³ Other types of speech may be regulated.²⁸⁴

Of these theories, the marketplace of ideas seems most appropriate to evaluate content-based restrictions on trademark registration. When speaking a message through a trademark, a speaker is seeking for the mark to be accepted in the commercial marketplace.²⁸⁵ In other words, the trademark exists to gain public recognition, and more specifically, it exists to distinguish itself as

275. See discussion *infra* Section IV.D.1.

276. See discussion *infra* Section IV.D.2.

277. See 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 2:3 (2018) (recognizing three classic theories of free speech: “marketplace of ideas”; “human dignity and self-fulfillment”; and “democratic self-governance”).

278. See *id.*

279. See generally *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (articulating the theory of marketplace of ideas as “the best test of truth”).

280. See SMOLLA, *supra* note 277, § 2:19 (“The marketplace theory is thus best understood *not* as a guarantor of the final conquest of truth, but rather as a defense of the *process* of an open marketplace.”).

281. See *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503 (1984) (“The First Amendment presupposes that the freedom to speak one’s mind is . . . an aspect of individual liberty—and thus a good unto itself.”).

282. See SMOLLA, *supra* note 277.

283. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948).

284. See *id.*

285. See *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164 (1995) (articulating the purpose of trademark law).

superior to other competing goods.²⁸⁶ As consumers form opinions about the good associated with the mark, the mark captures the reputation of the mark's owner in comparison to other competitors.²⁸⁷ Hence, the purpose of a person's speech through a trademark is to establish reputational distinction among competing goods in the eyes of consumers.²⁸⁸

This purpose aligns well with marketplace theory. As already stated, the purpose of speech under marketplace theory is for ideas to compete against other ideas, with the public determining which ideas prevail.²⁸⁹ Just as ideas compete for public acceptance in the marketplace of ideas, marks compete for consumer recognition in the marketplace of commerce.²⁹⁰ Marks represent a specific subset of ideas, and consumers represent a specific subset of the public. Accordingly, the purpose of marks in the marketplace of commerce reflects a specific application of the purpose of ideas in the marketplace of ideas—competition with other ideas for public acceptance.

Of course, speakers might employ trademarks for the purpose of exercising individual liberty or exercising democratic self-governance. A seller, for instance, might use her own name as a mark for the purpose of gaining a sense of personal satisfaction: her name as a mark might provide self-fulfillment and self-identity.²⁹¹ Likewise, a person might use a political slogan as a mark to further the democratic process.²⁹² In those instances, these other theories of speech law seem relevant to speech made through trademarks.

These situations, however, do not imply that the restrictions on registration of a trademark should be evaluated according to these other theories. Recall that registration provides mark owners a right to exclude others from using the mark.²⁹³ That benefit of exclusion would not seem valuable to a mark owner who

286. *See id.* (“[Trademark] law helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product.”).

287. *Id.*

288. *See id.*

289. *See* discussion *supra* Section IV.D.1.

290. *See Qualitex*, 514 U.S. at 164–65; *cf. Standard Oil Co. v. Standard Oil Co.*, 252 F.2d 65, 75 (10th Cir. 1958) (noting that public recognition may establish whether a trademark has achieved secondary meaning).

291. *E.g., Matal v. Tam*, 137 S. Ct. 1744, 1754 (2017) (“[Mr. Tam] chose this moniker [THE SLANTS] in order to ‘reclaim’ and ‘take ownership’ of stereotypes about people of Asian ethnicity.”).

292. *E.g., BEN CARSON FOR PRESIDENT 2016*, Registration No. 4,890,768.

293. *See* USPTO, *supra* note 109, at 11–12 (describing the benefits of a trademark).

uses the mark to exercise individual liberty or democratic self-governance. The mark owner who is exercising individual liberty through the mark is not concerned whether others replicate her mark, for she is only concerned about realizing her own self-fulfillment through her speech. Similarly, the mark owner who is using the mark to exercise self-governance would not oppose another who replicated the mark, and in fact, would likely be in favor of that replication; the repetition would only serve to strengthen support for the democratic idea expressed through the mark. Hence, the restrictive nature of the VPO bars would seem to have minimal effect on speech expressed to realize individual-liberty or self-governance interests.

One might argue that the trademark rights are important to these other speech interests because they facilitate economic gain for speakers. That gain supports continued speech, which would again be made for realizing individual liberty and democratic self-governance. For instance, the ADIDAS® mark is named after its founder, Adi Dassler.²⁹⁴ Suppose that Adi realizes self-fulfillment by using his name as the mark. Adi's trademark rights over ADIDAS® enables him (or his company) to realize profits, from which Adi can make and sell more shoes with the ADIDAS® mark, ultimately yielding further self-fulfillment. In this way, trademark rights may be valued by those who use marks to realize individual liberty or democratic self-governance.

Although the trademark rights may be valued by speakers with these individual liberty and self-governance interests, this fact does not imply that content restrictions on marks should be evaluated through these other theories. Even though mark owners may speak for purposes other than to gain market recognition, the value that those mark owners realize from being able to enforce their rights in a mark does depend on market recognition. In the example above, Adi cannot make more shoes with his name on them unless his brand has gained sufficient market recognition to perpetuate demand. Adi must rely on the market recognizing his marks. Reliance on the market implies that the speaker (Adi) must speak for the purpose of gaining market recognition, even if the ultimate purpose may be self-fulfillment. And if market recognition is one purpose, the speaker is necessarily seeking for her idea to prevail over another. Hence, to the extent that trademark rights matter to a speaker (such that they should not be restricted), they matter for the purpose of gaining consumer

294. *History*, ADIDAS GRP., <https://www.adidas-group.com/en/group/history/> [<https://perma.cc/J69K-UTZC>] (last visited Sept. 26, 2020).

recognition of the mark, which aligns only with marketplace theory. Marketplace theory is thus the appropriate lens through which to evaluate content-based restrictions on trademark eligibility.

2. *VPO Bars Under Marketplace Theory.* How would trademark bars to vulgar, profane, and obscene language affect the marketplace of ideas? As a preliminary point, it is important to note that such bars would not impede any ideas from reaching that marketplace. The bars would target only modes of expressing ideas—not actual ideas contained within a mark.²⁹⁵ Although speakers would not be able to use the immoral language as a means for proclaiming ideas in the marketplace, the ideas themselves could still enter the marketplace and compete against others. So, without employing vulgar, profane, or obscene language, speakers could still freely communicate their ideas contained in trademarks.

Nevertheless, restricting these offensive modes may affect the performance of an idea in the marketplace. The offensiveness of immoral language could serve to attract attention to the idea. F—THE DRAFT enters the marketplace of ideas with much greater force than I HATE THE DRAFT. Without immoral language, the emotive force of a mark may not be as strong, which could affect the attention that the mark receives in the marketplace of ideas.²⁹⁶ This decreased attention, to a certain extent and in some circumstances, could affect the speaker's ability to get his or her point across. Hence, there is a cost to restricting offensive modes.

In the context of commercial trademarks, this cost appears worthwhile. Much of the public prefers not to experience commercial speech that is highly offensive—so much so that the offensiveness of the immoral language may interfere with the public even contemplating an idea.²⁹⁷ The message gets lost in the delivery. For instance, if a speaker chooses F—ING GOOD CHICKEN as his mark, some consumers are likely to refuse to test whether the speaker's claim is true (about the tastiness of the chicken) simply because the F-word is used as a mode of

295. See discussion *supra* Section III.B.1 (explaining that the immoral language is a method of communication); discussion *supra* Section IV.B.3 (observing that the immoral language is a mode of expression).

296. See *Cohen v. California*, 403 U.S. 15, 25–26 (1971) (recognizing First Amendment protection for emotive force of F-word given that “words are often chosen as much for their emotive as their cognitive force”).

297. See discussion *supra* Section III.B.2 (discussing negative effects of introducing immoral language into trademarks).

expressing the idea. Others, though, will not care about the use of the F-word because it is not offensive to them, suggesting that the F-word does not accomplish its purpose of providing emotive force through offensive language. Others may be offended but still try the chicken; yet as they continue to encounter such language, they will likely become less offended, again decreasing the emotive force of the F-word.²⁹⁸ As immoral language becomes more common in trademarks, some consumers are likely to avoid trademarks wherever possible.²⁹⁹ Hence, use of the immoral language in marks will either decrease public participation in the commercial marketplace (thereby decreasing participation in the marketplace of ideas) or the use will weaken the offensiveness of the language in contravention to the very purpose for using that language. Put more simply, use of immoral language will either thwart participation in the marketplace or undermine the purpose of bringing attention to an idea. Therefore, barring vulgar, profane, and obscene marks supports a well-functioning marketplace of ideas.

V. CONCLUSION

Vulgar, profane, and obscene marks threaten a core purpose of commerce. That purpose is not merely to facilitate economic gain for certain members of the public. Commerce serves a more fundamental purpose—a purpose that “is integral to the fabric of a peaceful society.”³⁰⁰ The commercial marketplace facilitates peaceful interactions between citizens who have disparate backgrounds, beliefs, and behaviors. Its role is crucial in a democracy that consists of a diverse and pluralistic society. Opposing beliefs about religion, ideology, and politics all yield to commercial opportunities. Commerce, then, promotes civil dialogue and trust between people who often hold disparate beliefs and value systems.

Vulgarity, profanity, and obscenity disrupt this purpose of commerce. They create an atmosphere that is offensive, that is emotionally provocative, and that thwarts universal participation.³⁰¹ As the norm for commercial dialogue begins to reflect such base and coarse modes of communication, members of the public are less likely to feel welcome in the marketplace of

298. See *supra* note 75 and accompanying text.

299. See discussion *supra* Section III.B.2.

300. Ned Snow, *Moral Judgments in Trademark Law*, 66 AM. U. L. REV. 1093, 1105–06 (2017).

301. See discussion *supra* Sections III.B.1–2.

commerce.³⁰² Crudeness replaces civility. Confrontational offense quickly overtakes peaceful cooperation.³⁰³ Vulgar, profane, and obscene communication subtly but effectively erode a fundamental purpose of commerce—establishing a civil society.

Thus, the law should encourage civility in commercial transactions. To that end, trademark law plays a critical role.³⁰⁴ Trademark represents the means for communicating commercial propositions. Civil dialogue in trademarks implies civility in commercial transactions. As trademark law discourages vulgar, profane, and obscene language, it promotes peaceful interactions between market participants. Trademark law represents an indirect means for the government to promote civility in the commercial marketplace.

To be sure, the law must protect the freedom of mark owners to freely speak through their marks. The commercial marketplace is a forum for speaking about any idea—commercial or otherwise. But that right to speak has limits. The speech must not threaten the very forum in which persons seek to exercise their right of speech. Vulgar, profane, and obscene marks threaten that forum.³⁰⁵ Those sorts of marks must therefore be discouraged by denying them trademark protection.

Doctrinally, such a denial is consistent with free-speech jurisprudence.³⁰⁶ The recent cases of *Matal v. Tam* and *Iancu v. Brunetti* are consistent with Congress enacting the VPO bars.³⁰⁷ *Tam*'s teaching that giving offense is a viewpoint is only with respect to offense caused by ideas within the marks—not offense that results from certain modes of expression.³⁰⁸ *Brunetti*'s teaching that the government should not pass judgment on ideas within a mark does not apply to offensive modes of expression that a mark may employ.³⁰⁹ Accordingly, the VPO bars survive the holdings of *Tam* and *Brunetti*.³¹⁰

302. See discussion *supra* Section III.B.2.

303. See *Iancu v. Brunetti*, 139 S. Ct. 2294, 2307 (2019) (Breyer, J., concurring in part and dissenting in part) (“[Vulgar marks] may lead to the creation of public spaces that many will find repellant, perhaps on occasion creating the risk of verbal altercations or even physical confrontations. (Just think about how you might react if you saw someone wearing a t-shirt or using a product emblazoned with an odious racial epithet.)”).

304. See discussion *supra* Section III.C.

305. See discussion *supra* Section IV.D.

306. See discussion *supra* Section IV.C.

307. See discussion *supra* Section IV.B.

308. See discussion *supra* Section IV.B.1.

309. See discussion *supra* Section IV.B.2.

310. See discussion *supra* Section IV.B.3.

Congress must act soon, though. Before the commercial marketplace begins to more fully adopt immoral language as trademarks, Congress must deny protection.³¹¹ As time passes, businesses begin to expect that such bars will never be in place. Expectations become settled, so that businesses begin investing in vulgar, profane, and obscene marks, all of which promise to emotionally grab the attention of potential consumers. As that investment occurs, Congress will find it politically difficult to bar the language. So, although today the bars will easily pass as a simple amendment to the Lanham Act, tomorrow is not as certain. Congress must immediately enact the VPO bars.

311. See discussion *supra* Section III.C.2.