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## Supreme Court Speech Rulings Protect Sex Offenders, Offensive Trademarks

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### Introduction

June 19, 2017, was a big day for the First Amendment. In two different but equally interesting cases, the Supreme Court struck down (i) a state statute restricting the use of social media by a registered sex offender and (ii) the portion of the federal Lanham Act barring the registration of disparaging trademarks. Both rulings, while arising in different settings and implicating different aspects of First Amendment doctrine, reflect the generally strong protection of the “public square” against government interference by the Roberts Court.

In *Packingham v. North Carolina*,<sup>1</sup> “one of the first” cases of its kind, the Court considered “the relationship between the First Amendment and the modern Internet,” holding that a North Carolina statute barring registered sex offenders from accessing popular social media sites was unconstitutional. Writing for the Court, Justice Kennedy explained that North Carolina’s statute placed an “unprecedented” burden on lawful speech by making it a crime for registered sex offenders to access “what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.”<sup>2</sup> The Court invalidated the statute on the ground that it burdened substantially more speech than was necessary to further the government’s legitimate interests in protecting minors from sexual abuse.

In *Matal v. Tam*,<sup>3</sup> the Court considered a challenge to the Lanham Act’s “disparagement clause,” 15 U.S.C. § 1052(a), an over seventy-year-old statute prohibiting the registration of any trademark that “may disparage. . . persons, living or dead, institutions, beliefs, or natural symbols, or bring them into contempt, or disrepute.”<sup>4</sup> The Court held that disparagement clause constituted viewpoint discrimination and was an overly broad—and unconstitutional—restriction on private speech.

Below, we discuss each of these decisions in greater detail and then offer some observations as to what they reveal about the Court’s approach to the First Amendment.<sup>5</sup>

### *Packingham* Background

In 2008, North Carolina passed N.C. Gen. Stat. Ann. §§ 14–202.5, which made it a felony for any registered sex offender to access “a commercial

social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages.”<sup>6</sup> The statute defined a “commercial social networking Web site” as one that (1) “is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site”; (2) “facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges”; (3) “allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site”; and (4) “provides users or visitors . . . mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.”<sup>7</sup>

In 2012, Lester Gerard Packingham, a registered sex offender, celebrated the dismissal of a traffic ticket by posting a message on Facebook under the name “J.R. Gerrard.” A member of the Durham Police Department investigating violations of section 14–202.5 saw the post and eventually discovered that “J.R. Gerrard” was, in fact, Packingham. A grand jury indicted Packingham for violating section 14–202.5. Packingham moved to dismiss the indictment, arguing that the statute violated the First Amendment, but the trial court denied the motion. Packingham was eventually convicted and given a suspended prison sentence.

Packingham successfully appealed his conviction to the Court of Appeals of North Carolina, which held that section 14–202.5 was not sufficiently tailored to serve the State’s legitimate interest in protecting minors from sexual abuse and “arbitrarily burden[ed] all registered sex offenders by preventing a wide range of communication and expressive activity unrelated to achieving its purported goals.”<sup>8</sup> That ruling was reversed in a split decision by the North Carolina Supreme Court, which held that section 14–202.5

was “carefully tailored . . . to prohibit registered sex offenders from accessing only those Web sites that allow them the opportunity to gather information about minors” and left registered sex offenders with “adequate alternative means of communication.”<sup>9</sup>

## The *Packingham* Supreme Court Decision

In its June 19 ruling, the Supreme Court reversed and held that section 14–202.5 violated the First Amendment. The majority opinion by Justice Kennedy was joined by the members of the Court’s liberal wing (Justices Ginsburg, Breyer, Sotomayor, and Kagan), while Justice Alito filed an opinion concurring in the judgment that was joined by Chief Justice Roberts and Justice Thomas.

In finding section 14–202.5 unconstitutional, the Court focused heavily on the important role that the Internet, and particularly social media, plays in modern public discourse, noting that cyberspace has become one of the “most important places . . . for the exchange of views” and that “social media users employ these websites to engage in a wide array of protected First Amendment activity on topics ‘as diverse as human thought.’”<sup>10</sup>

Adopting the assumption that the statute was content-neutral and therefore subject to intermediate scrutiny, the Court nevertheless found that the law failed to meet this standard because it burdened “substantially more speech than is necessary to further the government’s legitimate interests.”<sup>11</sup> Specifically, the Court was troubled by the fact that the broad wording of the statute would likely bar registered sex offenders from accessing “not only . . . commonplace social media websites but also . . . websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com.”<sup>12</sup> The Court rejected the State’s argument that the law “must be this broad to serve its preventative purpose of keeping convicted sex offenders away from vulnerable victims,” concluding that the State failed to show that “this sweeping law is necessary or legitimate to serve that purpose.”<sup>13</sup> The government, the Court stated, “may not suppress lawful speech as the means to suppress unlawful speech.”<sup>14</sup>

Although it concluded that the statute was overly broad, the Court recognized that, like all modern advances, the internet has been—and will continue to be—“exploited by the criminal mind.”<sup>15</sup> Accordingly, the Court was careful to note that its opinion “should not be interpreted as barring a State from enacting *more specific laws* than the one at issue,” thereby leaving open the possibility that a more tailored statute could pass constitutional muster.<sup>16</sup>

In his concurring opinion, Justice Alito agreed with the majority that the law was too broad because it applied to “a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child,”<sup>17</sup> but he criticized the majority opinion as containing “undisciplined dicta” which, in his view, unnecessarily—and dangerously—likened the Internet and social media to “public streets and parks.”<sup>18</sup> He expressed concern that the Court’s “loose rhetoric” would largely strip the states of power to regulate the Internet, including by “restrict[ing] even the most dangerous sexual predators” from visiting websites visited predominantly by minors.

### **Matal Background**

Simon Tam, lead singer of a band called “The Slants,” attempted to register the name of the band as a trademark with the Patent and Trademark Office (“PTO”). “The Slants” are a dance-rock band comprised of Asian-Americans. By calling themselves “The Slants,” a derogatory term for persons of Asian descent, the band hoped to “reclaim” and “take ownership” of the term in an effort to diminish the stereotypes associated with people of Asian ethnicity.<sup>19</sup>

The PTO rejected Tam’s trademark application, citing section 1052(a) of the Lanham Act, which prohibits, among other things, the registration of any trademark that “may disparage . . . persons, living or dead, institutions, beliefs, or natural symbols.” Tam appealed the PTO’s decision to the PTO’s Trademark Trial and Appeal Board to no avail. Tam appealed that decision, in turn, to the Federal Circuit, which ultimately held en banc that the disparagement clause was facially unconstitutional under the First Amendment as a viewpoint-discriminatory restriction of noncommercial speech.

To no one’s surprise, the Supreme Court granted the government’s petition for certiorari.

### **The *Matal* Supreme Court Decision**

In an opinion by Justice Alito, joined in full by Chief Justice Roberts and Justices Thomas and Breyer and in part by Justices Kennedy, Ginsburg, Sotomayor, and Kagan, the Supreme Court affirmed, agreeing with the Federal Circuit that the disparagement clause violated the First Amendment.

After dispensing with Tam’s statutory argument that the disparagement clause does not apply to trademarks that disparage racial or ethnic groups (as opposed to individuals and entities), the Court considered the government’s arguments that the First Amendment does not apply. First, the government claimed that registered trademarks are not subject to First Amendment protection at all because they constitute “government speech” by virtue of being registered by the PTO. The Court unanimously found this argument both “far-fetched”<sup>20</sup> and “a huge and dangerous extension of the government-speech doctrine.”<sup>21</sup> The Court distinguished the registration of trademarks from the various forms of speech it has classified as “government speech,” including, most recently, in *Walker v. Texas Division*, 135 S. Ct. 2239 (2015), where the Court held that messages on Texas specialty license plates were government speech. Observing that *Walker* likely demarcated “the outer bounds of the government-speech doctrine,”<sup>22</sup> the Court concluded that trademarks were “vastly different” from specialty license plates because, unlike the license plates, trademarks are not owned by the state, designed by the state, or a form of government identification, and they are not generally associated with the state. The Court stated that if all registered trademarks were deemed to be government speech, it would mean the government has been “babbling prodigiously and incoherently,”<sup>23</sup> and it pointed out that registration does not connote government approval of a mark. The Court also underscored the “worrisome implication” of the government’s contention that registration converted trademarks into government speech by questioning (rhetorically) whether the same transformation in the legal status

of books into government speech occurred by means of copyright registration.<sup>24</sup> For all these reasons, the Court concluded that trademarks “are private, not government, speech.”<sup>25</sup>

Joined only by Chief Justice Roberts and Justices Thomas and Breyer, Justice Alito next rejected the government’s argument that trademarks are a form of government subsidy because the government does not fund the creation of private trademarks. These Justices also rejected the government’s alternative theory that trademark registration is a “government program” pursuant to which the government may adopt certain content- and speaker-restrictions. Justice Alito wrote that the disparagement clause would not pass muster even if this theory were accepted because it “denies registration to any mark that is offensive to a substantial percentage of the members of any group,” and, therefore, “discriminates on the bases of ‘viewpoint’”<sup>26</sup> – the most invidious form of content discrimination.

Finally, assuming without deciding that disparaging trademarks are commercial speech, the Court applied the commercial speech test established in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980), and held that the disparagement clause violated the First Amendment because it did not clearly serve a substantial interest and was not narrowly drawn to “extend only as far as the interest it serves.”<sup>27</sup>

The government articulated two interests served by the disparagement clause, neither of which the Court found sufficient. First, it claimed an interest in “preventing ‘underrepresented groups’ from being ‘bombarded with demeaning messages in commercial advertising.’”<sup>28</sup> The Court rejected this interest out of hand, noting that it reduced to an argument that the government “has an interest in preventing speech expressing ideas that offend”—an “idea that strikes at the heart of the First Amendment.”<sup>29</sup>

Second, the Government argued that the disparagement clause protects the “orderly flow of commerce” by barring “trademarks that support invidious discrimination.” The Court was not persuaded, pointing out the disparagement clause was not narrowly tailored so as to drive out only

invidious discriminatory trademarks but, rather, was a wholesale ban against “any trademark that disparages *any person, group, or institution.*”<sup>30</sup> The Court found that the disparagement clause went “much further than is necessary to serve the interest asserted” and therefore did not satisfy *Central Hudson*.

Justice Kennedy, joined by Justices Ginsburg, Sotomayor, and Kagan, filed a concurring opinion in which he stated that the viewpoint discrimination rationale applies even if trademarks are commercial speech and that this rendered unnecessary the Court’s consideration of all but the government’s flawed government speech theory (which, if accepted, would avoid First Amendment scrutiny altogether). Citing his majority opinion in *Sorrell v. IMS Health Inc.*, he stated that the First Amendment “requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys”<sup>31</sup> and that the disparagement clause “reflects the Government’s disapproval of a subset of messages that it finds offensive,” which is “the essence of viewpoint discrimination.”<sup>32</sup> Justice Kennedy further observed that, to the extent they are commercial in nature, trademarks are a “tangible, powerful” manifestation of the (viewpoint-neutral) marketplace of ideas metaphor and “make up part of the expression of everyday life.”<sup>33</sup>

Justice Thomas filed a short concurring opinion in which he noted his longstanding position that strict scrutiny should be applied even to commercial speech.

## Discussion

*Packingham* and *Matal* represent important additions to the Roberts Court’s First Amendment jurisprudence. In broad terms, the Court reaffirmed its determination to protect the marketplace of ideas (although only Justice Kennedy, concurring in *Matal*, explicitly used that term), no matter how offensive the content or the speaker and without regard to medium. In *Packingham*, the Court hearkened back to its first major Internet decision, *Reno v. American Civil Liberties Union*, where it described cyberspace as “a unique medium” that is “available to anyone, anywhere in the world, with access to the Internet.”<sup>34</sup> Echoing Justice Stevens’ opinion for the

Court in *Reno*, Justice Kennedy's majority opinion in *Packingham* touted the power and reach of social networking sites in particular, and of the Internet in general, as a crucial means of contemporary communication, access to which can be restricted by the government only in a narrowly tailored manner. The decision also implicitly echoed a point Justice Kennedy emphasized in his majority opinion in *Citizens United* (as well as in *Sorrell*), namely, that the First Amendment stands against "restrictions distinguishing among different speakers, allowing speech by some but not others."<sup>35</sup>

The consequences remain to be seen of the Court's characterization in *Packingham* of privately owned social media networks, with their terms of use that do not necessarily track the First Amendment,<sup>36</sup> as successors to streets and parks as venues for protected expression. As noted, Justice Alito, in his concurrence, specifically took issue with the wisdom of this aspect of the Court's ruling.

In *Matal*, the Court made clear that even in the realm of commercial speech (which the Court stopped short of holding is the proper classification of trademarks), the government is not permitted to regulate in a viewpoint-discriminatory manner on the basis of perceived offensiveness. In this regard, the decision extends a line of Supreme Court rulings rejecting offensiveness as a valid ground for government restriction of, or the imposition of liability for, speech. In *Snyder v. Phelps*, for instance, which involved a virulent anti-gay funeral protest by the Westboro Baptist Church, Chief Justice Roberts stated in his majority opinion that speech "cannot be restricted simply because it is upsetting or arouses contempt,"<sup>37</sup> while in *Texas v. Johnson* Justice Brennan, writing for the Court, stated (famously) that "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."<sup>38</sup> This powerful principle carried the day in *Matal*.

As important doctrinally as its unanimous rejection of viewpoint discrimination in *Matal* was the Court's unanimous rejection of the government's argument that registered trademarks are government speech.

The Court noted correctly that the government-speech doctrine "is susceptible to dangerous misuse" because "[i]f private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints."<sup>39</sup> By describing *Walker*—the Texas license plate involving an interplay of private expression and government administration—as likely marking "the outer bounds" of the government-speech doctrine,<sup>40</sup> the Court consciously sought to discourage further expansion of a potentially powerful tool of censorship.

*Matal* also can be seen as reflecting the strongly libertarian understanding of the First Amendment running through the Court's recent free speech jurisprudence, most notably, but not exclusively, in opinions by Justice Kennedy. In his *Matal* concurrence, for example, Justice Kennedy referred to trademarks as literal embodiments of the marketplace of ideas metaphor. In doing so, he called to mind his plurality opinion in *United States v. Alvarez*, where he expressly embraced Justice Holmes' theory that "the best test of truth is the power of the thought to get itself accepted in the competition of the market"<sup>41</sup> as preferable to government regulation as a means of exposing lies (in that case, about having received the Medal of Honor). Justice Kennedy wrote in *Alvarez* that the right to "engage in open, dynamic, rational discourse" is "not well served when the government seeks to orchestrate public discussion through content-based mandates."<sup>42</sup> Along these lines, the Court in *Matal* held, in effect, that it is for consumers, not for the government, to punish offensive trademarks. As John C. Conner of Archer PC, who argued the case for The Slants at the Supreme Court, put it: "The debate over socially appropriate language will continue . . . in the proper forum, which is the arena of public discourse, not in a setting refereed by the government."<sup>43</sup>

## Conclusion

The Supreme Court's rulings in *Packingham* and *Matal* draw upon, and extend, several existing strands of the Court's First Amendment jurisprudence, the collective thrust of which is to narrowly circumscribe



the extent to which the government can restrict speech based on the medium, the identity of the speaker, or the offensiveness of the speech. The Court also, in *Matal*, squarely (and properly) rejected the government's troubling effort to insulate its regulation of disparaging trademarks under the government-speech doctrine.

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1. *Packingham v. North Carolina*, No. 15–1194, 2017 WL 2621313 (S. Ct. June 19, 2017).
  2. *Id.* at \*7.
  3. *Matal v. Tam*, No. 15–1293, 2017 WL 2621315 (S. Ct. June 19, 2017).
  4. 15 U.S.C. § 1052(a).
  5. Justice Gorsuch did not participate in either case.
  6. *Packingham v. North Carolina*, 2017 WL 2621313, at \*3.
  7. *Id.* at \*10 (internal quotation marks and alterations omitted).
  8. *Id.* at \*4.
  9. *Id.*
  10. *Id.* at \*5.
  11. *Id.* at \*6.
  12. *Id.*
  13. *Id.* at \*7.
  14. *Id.* at \*8 (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002)).
  15. *Id.* at \*6.
  16. *Id.*
  17. *Id.* at \*11
  18. *Id.* at \*8.
  19. *Matal*, 2017 WL 2621315, at \*8.

20. *Id.* at \*12.
21. *Id.* at \*14.
22. *Id.*
23. *Id.* at \*12.
24. *Id.* at \*14.
25. *Id.* at \*15.
26. *Id.* at \*18.
27. *Id.* at \*19 (internal quotation marks omitted).
28. *Id.*
29. *Id.*
30. *Id.* at \*20.
31. *Id.* at \*23 (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011)).
32. *Id.* at \*21.
33. *Id.* at \*23.
34. 521 U.S. 844, 851 (1997).
35. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010).
36. See Margot E. Kaminski and Kate Klonick, "Speech in the Social Public Square," N.Y. Times, June 27, 2017, at A23.
37. 562 U.S. 443, 458 (2011).
38. 491 U.S. 397, 414 (1989).
39. *Matal*, 2017 WL 2621315, at \*12.
40. *Id.* at \*14.
41. 567 U.S. 709, 728 (2012) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).
42. *Id.*
43. Bill Donahue, "Postgame: Slants Attys Talk High Court Victory," Law360, June 26, 2017.

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