

**“Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”**  
**United States v. Schwimmer (1929) (Holmes, J., dissenting).—Justice ALITO**

**“By mandating positivity, the law here might silence dissent and distort the marketplace of ideas. . . .”—Justice KENNEDY**

**“I write separately because I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as ‘commercial.’”—Justice THOMAS**

### **Matal v. Tam**

582 U.S. \_\_\_, 137 S. Ct. 1744, 198 L.Ed.2d 366 (2017)

■ **JUSTICE ALITO** announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–A, and an opinion with respect to Parts III–B, III–C, and IV, in which **THE CHIEF JUSTICE [ROBERTS]**, **JUSTICE THOMAS**, and **JUSTICE BREYER** join.

This case concerns a dance-rock band’s application for federal trademark registration of the band’s name, “The Slants.” “Slants” is a derogatory term for persons of Asian descent, and members of the band are Asian–Americans. But the band members believe that by taking that slur as the name of their group, they will help to “reclaim” the term and drain its denigrating force.

The Patent and Trademark Office (PTO) denied the application based on a provision of federal law prohibiting the registration of trademarks that may “disparage . . . or bring . . . into contemp[t] or disrepute” any “persons, living or dead.” 15 U.S.C. § 1052(a). We now hold that this provision violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.

## **I**

### **A. . . .**

“[F]ederal law does not create trademarks.” *B & B Hardware, Inc. v. Hargis Industries, Inc.* (2015). Trademarks and their precursors have ancient origins, and trademarks were protected at common law and in equity at the time of the founding of our country. For most of the 19th century, trademark protection was the province of the States. Eventually, Congress stepped in to provide a degree of national uniformity, passing the first federal legislation protecting trademarks in 1870. The foundation of current federal trademark law is the Lanham Act, enacted in 1946. By that time, trademark had expanded far beyond phrases that do no more than identify a good or service. Then, as now, trademarks often consisted of catchy phrases that convey a message.

Under the Lanham Act, trademarks that are “used in commerce” . . . may be federally registered. 15 U.S.C. § 1051(a)(1). . . .

## B...

## C

The Lanham Act contains provisions that bar certain trademarks . . . [including] “the disparagement clause.” This provision prohibits the registration of a trademark “which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.” § 1052(a). This clause appeared in the original Lanham Act and has remained the same to this day.

When deciding whether a trademark is disparaging, an examiner at the PTO generally applies a “two-part test.” The examiner first considers “the likely meaning of the matter in question. . . .” Trademark Manual of Examining Procedure § 1203.03(b)(i) (Apr. 2017), p. 1200–150, <http://tmep.uspto.gov>. “If that meaning is found to refer to identifiable persons, institutions, beliefs or national symbols,” the examiner moves to the second step, asking “whether that meaning may be disparaging to a substantial composite of the referenced group.” *Ibid.* If the examiner finds that a “substantial composite, although not necessarily a majority, of the referenced group would find the proposed mark . . . to be disparaging in the context of contemporary attitudes,” a prima facie case of disparagement is made out, and the burden shifts to the applicant to prove that the trademark is not disparaging. *Ibid.* What is more, the PTO has specified that “[t]he fact that an applicant may be a member of that group or has good intentions underlying its use of a term does not obviate the fact that a substantial composite of the referenced group would find the term objectionable.” *Ibid.*

## D

Simon Tam is the lead singer of “The Slants.” He chose this moniker in order to “reclaim” and “take ownership” of stereotypes about people of Asian ethnicity.

Tam sought federal registration of “THE SLANTS,” but an examining attorney at the PTO rejected the request, applying the PTO’s two-part framework and finding that “there is . . . a substantial composite of persons who find the term in the applied-for mark offensive.” The examining attorney relied in part on the fact that “numerous dictionaries define ‘slants’ or ‘slant-eyes’ as a derogatory or offensive term.” The examining attorney also . . . cit[ed] a performance that was canceled because . . . “several bloggers and commenters to articles on the band have indicated that they find the term and the applied-for mark offensive.” . . .

## II. . . .

## III

Because the disparagement clause applies to marks that disparage the members of a racial or ethnic group, we must decide whether the clause violates the Free Speech Clause of the First Amendment. And at the outset, we must consider three arguments that would either eliminate any First Amendment protection or result in highly permissive rational-basis review. Specifically, the Government contends (1) that trademarks are government speech, not private speech, (2) that trademarks are a form of government subsidy, and (3) that the constitutionality of the disparagement clause should be tested under a new

“government-program” doctrine. . . .

## A

The First Amendment prohibits Congress and other government entities and actors from “abridging the freedom of speech”; [it] does not say that Congress and other government entities must abridge their own ability to speak freely. And our cases recognize that “[t]he Free Speech Clause . . . does not regulate government speech.” *Pleasant Grove City v. Summum* (2009).

As we have said, “it is not easy to imagine how government could function” if it were subject to the restrictions that the First Amendment imposes on private speech. *Summum*. [I]mposing a requirement of viewpoint-neutrality on government speech would be paralyzing. When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture.

Here is a simple example. During the Second World War, the Federal Government produced and distributed millions of posters to promote the war effort. There were posters urging enlistment, the purchase of war bonds, and the conservation of scarce resources. These posters expressed a viewpoint, but the First Amendment did not demand that the Government balance the message of these posters by producing and distributing posters encouraging Americans to refrain from engaging in these activities.

But while the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents.

At issue here is the content of trademarks that are registered by the PTO, an arm of the Federal Government. The Federal Government does not dream up these marks, and it does not edit marks submitted for registration. Except as required by the statute involved here, an examiner may not reject a mark based on the viewpoint that it appears to express. Thus, unless that section is thought to apply . . . registration is mandatory. . . .

In light of all this, it is far-fetched to suggest that the content of a registered mark is government speech. If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently. It is saying many unseemly things. It is expressing contradictory views. It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public. . . .

None of our government speech cases even remotely supports the idea that registered trademarks are government speech. . . .

Our decision in *Summum* is . . . far afield. A small city park contained 15 monuments. Eleven had been donated by private groups, and one of these displayed the Ten Commandments. A religious group claimed that the city, by accepting donated monuments, had created a limited public forum for private

speech and was therefore obligated to place in the park a monument expressing the group's religious beliefs.

Holding that the monuments in the park represented government speech, we cited many factors. Governments have used monuments to speak to the public since ancient times; parks have traditionally been selective in accepting and displaying donated monuments; parks would be overrun if they were obligated to accept all monuments offered by private groups; “[p]ublic parks are often closely identified in the public mind with the government unit that owns the land”; and “[t]he monuments that are accepted . . . are meant to convey and have the effect of conveying a government message.”

Trademarks share none of these characteristics. Trademarks have not traditionally been used to convey a Government message. With the exception of the enforcement of 15 U.S.C. § 1052(a), the viewpoint expressed by a mark has not played a role in the decision whether to place it on the principal register. And there is no evidence that the public associates the contents of trademarks with the Federal Government.

This brings us to the case on which the Government relies most heavily, *Walker v. Texas Div., Sons of Confederate Veterans, Inc.* (2015), which likely marks the outer bounds of the government-speech doctrine. Holding that the messages on Texas specialty license plates are government speech, the *Walker* Court cited three factors distilled from *Summum*. First, license plates have long been used by the States to convey state messages. Second, license plates “are often closely identified in the public mind” with the State, since they are manufactured and owned by the State, generally designed by the State, and serve as a form of “government ID.” Third, Texas “maintain[ed] direct control over the messages conveyed on its specialty plates.” [N]one of these factors are present in this case.

In sum, [h]olding that the registration of a trademark converts the mark into government speech would constitute a huge and dangerous extension of the government-speech doctrine. . . .

Trademarks are private, not government, speech.

## B

We next address the Government's argument that this case is governed by cases in which this Court has upheld the constitutionality of government programs that subsidized speech expressing a particular viewpoint. These cases implicate a notoriously tricky question of constitutional law. “[W]e have held that the Government ‘may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.’ ” *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.* (2013). But at the same time, government is not required to subsidize activities that it does not wish to promote. Determining which of these principles applies in a particular case “is not always self-evident,” but no difficult question is presented here.

Unlike the present case, the decisions on which the Government relies all involved cash subsidies or their equivalent. In *Rust v. Sullivan* (1991), a federal law provided funds to private parties for family planning services. In *National Endowment for Arts v. Finley* (1998), cash grants were awarded to artists. And federal funding for public libraries was at issue in *United States v. American Library Assn., Inc.* (2003). . . .

The federal registration of a trademark is nothing like the programs at issue in these cases. The PTO does not pay money to parties seeking registration of a mark. . . .

The Government responds that registration provides valuable non-monetary benefits that “are directly traceable to the resources devoted by the federal government to examining, publishing, and issuing certificates of registration for those marks.” But just about every government service requires the expenditure of government funds. This is true of services that benefit everyone, like police and fire protection, as well as services that are utilized by only some, *e.g.*, the adjudication of private lawsuits and the use of public parks and highways. . . .

Cases like *Rust* and *Finley* are not instructive in analyzing the constitutionality of restrictions on speech imposed in connection with such services.

## C

. . . Potentially more analogous are cases in which a unit of government creates a limited public forum for private speech. See, *e.g.*, *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995); *Lamb’s Chapel v. Center Moriches Union Free School Dist.* (1993). When government creates such a forum, in either a literal or “metaphysical” sense, see *Rosenberger*, some content- and speaker-based restrictions may be allowed. However, even in such cases, what we have termed “viewpoint discrimination” is forbidden.

Our cases use the term “viewpoint” discrimination in a broad sense, and in that sense, the disparagement clause discriminates on the bases of “viewpoint.” To be sure, the 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. It denies registration to any mark that is offensive to a substantial percentage of the members of any group. But in the sense relevant here, that is viewpoint discrimination: 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* (1969). See also *Texas v. Johnson* (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”). . . .

## IV

[Finally,] we must confront a dispute between the parties on the question whether trademarks are commercial speech and are thus subject to the relaxed scrutiny outlined in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N. Y.* (1980). The Government argue[s] that all trademarks are commercial speech. Tam, on the other hand, contend[s] that many, if not all, trademarks have an expressive component. The trademark in this case illustrates this point. The name “The Slants” not only identifies the band but expresses a view about social issues. . . .

We need not resolve this debate between the parties because the disparagement clause cannot

withstand even *Central Hudson* review. Under *Central Hudson*, a restriction of speech must serve “a substantial interest,” and it must be “narrowly drawn.” This means, among other things, that “[t]he regulatory technique may extend only as far as the interest it serves.” The disparagement clause fails this requirement.

It is claimed that the disparagement clause serves two interests. [First,] the Government asserts an interest in preventing “ ‘underrepresented groups’ ” from being “ ‘bombarded with demeaning messages in commercial advertising.’ ” An *amicus* supporting the Government refers to “encouraging racial tolerance and protecting the privacy and welfare of individuals.” But no matter how the point is phrased, its unmistakable thrust is this: The Government has an interest in preventing speech expressing ideas that offend. And . . . that idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express “the thought that we hate.” *United States v. Schwimmer* (1929) (Holmes, J., dissenting).

The second interest asserted is protecting the orderly flow of commerce. Commerce, we are told, is disrupted by trademarks that “involv[e] disparagement of race, gender, ethnicity, national origin, religion, sexual orientation, and similar demographic classification.” Such trademarks are analogized to discriminatory conduct, which has been recognized to have an adverse effect on commerce.

A simple answer to this argument is that the disparagement clause is not “narrowly drawn” to drive out trademarks that support invidious discrimination. The clause reaches any trademark that disparages *any person, group, or institution*. It applies to trademarks like the following: “Down with racists,” “Down with sexists,” “Down with homophobes.” It is not an anti-discrimination clause; it is a happy-talk clause. In this way, it goes much further than is necessary to serve the interest asserted. . . .

There is also a deeper problem with the argument that commercial speech may be cleansed of any expression likely to cause offense. The commercial market is well stocked with merchandise that disparages prominent figures and groups, and the line between commercial and non-commercial speech is not always clear, as this case illustrates. If affixing the commercial label permits the suppression of any speech that may lead to political or social “volatility,” free speech would be endangered.

\* \* \*

For these reasons, we hold that the disparagement clause violates the Free Speech Clause of the First Amendment. . . .

■ **JUSTICE GORSUCH** took no part in the consideration or decision of this case.

■ **JUSTICE KENNEDY**, with whom **JUSTICE GINSBURG**, **JUSTICE SOTOMAYOR**, and **JUSTICE KAGAN** join, concurring in part and concurring in the judgment. . . .

## I

Those few categories of speech that the government can regulate or punish—for instance, fraud, defamation, or incitement—are well established within our constitutional tradition. See *United States v.*

Stevens (2010). Aside from these and a few other narrow exceptions, it is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys. See *Rosenberger*.

The First Amendment guards against laws “targeted at specific subject matter,” a form of speech suppression known as content based discrimination. *Reed v. Town of Gilbert* (2015). . . . A law found to discriminate based on viewpoint is an “egregious form of content discrimination,” which is “presumptively unconstitutional.”

At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed. In the instant case, the disparagement clause the Government now seeks to implement and enforce identifies the relevant subject as “persons, living or dead, institutions, beliefs, or national symbols.” Within that category, an applicant may register a positive or benign mark but not a derogatory one. The law thus reflects the Government’s disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination.

The Government disputes this conclusion. It argues, to begin with, that the law is viewpoint neutral because it applies in equal measure to any trademark that demeans or offends. This misses the point. A subject that is first defined by content and then regulated or censored by mandating only one sort of comment is not viewpoint neutral. To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so. The logic of the Government’s rule is that a law would be viewpoint neutral even if it provided that public officials could be praised but not condemned. . . . By mandating positivity, the law here might silence dissent and distort the marketplace of ideas. . . .

. . . The Government does not dispute that respondent seeks to use his mark in a positive way. . . . Respondent’s application was denied not because the Government thought his object was to demean or offend but because the Government thought his trademark would have that effect on at least some Asian-Americans.

. . . The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. That danger is all the greater if the ideas or perspectives are ones a particular audience might think offensive, at least at first hearing. An initial reaction may prompt further reflection, leading to a more reasoned, more tolerant position. . . .

The Government’s argument in defense of the statute assumes that respondent’s mark is a negative comment. . . . From respondent’s submissions, it is evident he would disagree that his mark means what the Government says it does. The trademark will have the effect, respondent urges, of reclaiming an offensive term for the positive purpose of celebrating all that Asian-Americans can and do contribute to our diverse Nation. While thoughtful persons can agree or disagree with this approach, the dissonance between the trademark’s potential to teach and the Government’s insistence on its own, opposite, and negative interpretation confirms the constitutional vice of the statute.

## II. . . .

To the extent trademarks qualify as commercial speech, they are an example of why that term or category does not serve as a blanket exemption from the First Amendment’s requirement of viewpoint neutrality. Justice Holmes’ reference to the “free trade in ideas” and the “power of . . . thought to get itself accepted in the competition of the market,” *Abrams v. United States* (1919) (dissenting opinion), was a metaphor. In the realm of trademarks, the metaphorical marketplace of ideas becomes a tangible, powerful reality. Here that real marketplace exists as a matter of state law and our common-law tradition, quite without regard to the Federal Government. These marks make up part of the expression of everyday life, as with the names of entertainment groups, broadcast networks, designer clothing, newspapers, automobiles, candy bars, toys, and so on. Nonprofit organizations—ranging from medical-research charities and other humanitarian causes to political advocacy groups—also have trademarks, which they use to compete in a real economic sense for funding and other resources as they seek to persuade others to join their cause. To permit viewpoint discrimination in this context is to permit Government censorship.

. . .

\* \* \*

A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government’s benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.

For these reasons, I join the Court’s opinion in part and concur in the judgment.

■ **JUSTICE THOMAS**, concurring in part and concurring in the judgment. . . .

I write separately because “I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as ‘commercial.’ ” *Lorillard Tobacco Co. v. Reilly* (2001) (Thomas, J., concurring in part and concurring in judgment); see also, *e.g.*, *44 Liquormart, Inc. v. Rhode Island* (1996) (same). I nonetheless join Part IV of Justice Alito’s opinion because it correctly concludes that the disparagement clause is unconstitutional even under the less stringent test announced in *Central Hudson*.

### ***EDITORS’ NOTES***

(1) As Justice Alito observes, Justice Holmes famously wrote, in dissent, that “the principle of free thought” is “not free thought for those who agree with us but freedom for the thought that we hate.” *United States v. Schwimmer* (1929). Alito writes: “the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’” Is Alito construing the First Amendment in isolation from the constitutional scheme as a whole? May we also proudly boast of having an equal protection jurisprudence that protects against discrimination that, to quote Alito, “demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground”? If so, we would face difficult judgments about how to reconcile conflicts between these two proud boasts or aspirations. Is this conflict easy for Alito because he privileges the First Amendment to the exclusion of Equal Protection? To what

extent does Alito's opinion in *Matal* echo the views expressed by Justice Scalia in *R.A.V. v. St. Paul* (1992, reprinted above, \_\_\_\_\_)?

(2) Consider again Alito's statement that "the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" Does this formulation imply that we should have no regrets about protecting speech that "demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground," which by Alito's admission is "hateful"? One can imagine a quite different formulation of our free speech jurisprudence: defending freedom of speech while expressing regret that such freedom entails freedom to express hateful speech. This formulation might recognize the loss, sacrifice, or cost for the constitutional scheme as a whole due to freedom of speech jurisprudence. It also might recognize that the Constitution aspires to secure the status of equal citizenship for all, not merely to protect freedom of speech. Which is the more defensible view of freedom of speech in relation to the constitutional scheme as a whole?

(3) What does Alito mean by saying that the statute's "disparagement clause" is a "happy-talk clause"? What is the significance of the distinction he draws between an antidiscrimination clause and a "happy-talk clause"? Would the statute have been constitutional had it been an anti-discrimination clause or would that, on Alito's view, have made the statute even worse? As it stands, if the "happy-talk clause" prohibits both "down with racists" and "up with racists," is it viewpoint-neutral?

(4) Alito lumps together ideas that offend and ideas that discriminate. Is there a constitutionally relevant distinction between ideas that offend and ideas that discriminate on the basis of, to recall Alito's list, "race, ethnicity, gender, religion, age, disability, or any other similar ground"? We might concede that there is no constitutional basis for government protecting us against ideas that offend. But, if we are committed to securing the status of equal citizenship for all, and if we accept that government has a compelling interest in protecting against discrimination on the listed bases, might there be a constitutional basis for government protecting against ideas that demean on the listed bases? Or is government limited to protecting against conduct that demeans on those bases?

(5) Does Alito convincingly distinguish this case from cases like *Rust v. Sullivan* (1991; reprinted below, \_\_\_\_\_)?