

*Matal v. Tam*

The Lanham Act prohibits the registration of trademarks that “disparage ... or bring ... into contemp[t] or disrepute” any “persons, living or dead.” The Federal Circuit held this provision facially unconstitutional pursuant to the First Amendment’s Free Speech Clause. Today, in a splintered set of opinions that all agreed with the ultimate outcome, the Supreme Court affirmed.

Justice Alito announced the judgment of the Court and issued an opinion that was, in part, the opinion of the Court. In a portion of the opinion joined by seven of the eight participating Justices, he rejected the statutory argument that the disparagement clause prohibits only trademarks that disparage particular natural persons, as opposed to members of a racial or ethnic group more broadly. And in a portion of the opinion joined by all participating Justices, he rejected the suggestion that trademarks constitute government speech.

The remainder of Justice Alito’s opinion was joined by the Chief Justice and Justices Thomas and Breyer. That four-Justice bloc concluded that precedents appearing to apply a different standard to government decisions to subsidize certain speech could be distinguished because those cases involved cash subsidies. The plurality likewise refused to approve the disparagement clause under a new “government-program” doctrine that would merge the Court’s government-speech and subsidy cases. The plurality concluded that the disparagement clause is unconstitutional because, even if trademarks are considered to be commercial speech subject to the relaxed scrutiny of *Central Hudson*, the disparagement clause cannot satisfy that standard, as the prohibition is not narrowly drawn to the interests it purports to advance.

Justice Kennedy issued a separate opinion for another four-Justice bloc, joined by Justices Ginsburg, Sotomayor, and Kagan. In his view, the disparagement clause amounts to viewpoint discrimination, which renders it unconstitutional, irrespective of whether commercial speech is involved.

Justice Thomas also issued a separate concurrence that appeared to stake a middle ground between Justice Alito’s opinion (which he joined) and Justice Kennedy’s. Although Justice Thomas agreed with Justice Alito that the disparagement clause would not satisfy *Central Hudson*’s intermediate scrutiny, he believed that strict scrutiny would ultimately apply because the government was seeking to restrict truthful speech in order to suppress the ideas it conveys.

Justice Gorsuch did not participate.