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# Denying Trademark for Scandalous Speech

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Recently in *Matal v. Tam*, the Supreme Court held that the disparagement clause of the Lanham Act was unconstitutional. The disparagement clause prevented registration of disparaging trademarks — i.e., marks that were offensively disparaging toward individuals — such that the clause could have induced mark owners to refrain from speaking offensive views. The potential for self-censorship led the Court to recognize a First Amendment violation. Importantly, the Justices unanimously agreed that the clause was viewpoint discriminatory. Viewpoint discrimination was damning. This central point of *Tam* calls into question another clause in the Lanham Act — the scandalous clause — which prevents registration of marks that are offensive to the public’s sense of decency and propriety. Simply put, does *Tam* suggest the unconstitutionality of the scandalous clause?

The Federal Circuit recently answered this question in *In re Brunetti*, holding that in view of *Tam*, the scandalous clause violated the First Amendment. This Essay concludes otherwise. The Essay argues that the scandalous clause does not violate the First Amendment if the clause is interpreted as restricting only sexually-explicit and vulgar content. In particular, this interpretation implies that the clause is viewpoint neutral because viewpoint discrimination entails the government targeting content that communicates an opposable view — i.e., an opinion or assertion. Content that is sexually explicit or vulgar does not communicate an opposable view: sexually-explicit content exists to stimulate a sexual response; vulgar content exists to evoke emotive force. Neither represents an opinion that may be disagreed with. Indeed, unlike in *Tam*, the

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\* Copyright © 2018 Ned Snow. Professor of Law, University of South Carolina. This Essay has greatly benefited from comments by participants at the Sixth Annual Trademark Works-in-Progress Colloquium, held at the American University School of Law. Special thanks to Mark Bartholomew, Josie Brown, Christine Farley, and Rebecca Tushnet for their helpful comments on earlier (and much different) drafts of this Essay.

*offensiveness of such content does not stem from any idea that the content proposes. Rather, the offensiveness derives from the public display and social effects of the content. And that matters in the viewpoint analysis. Furthermore, the proper framework for evaluating the scandalous clause's restriction of speech must be the limited public forum. Under that framework, various reasons justify the content-based restriction of the scandalous clause. Thus, as a viewpoint-neutral restriction that is justified under the limited-public-forum doctrine, the scandalous clause is constitutional.*

#### TABLE OF CONTENTS

INTRODUCTION .....	2333
I. THE MEANING OF SCANDALOUS .....	2337
A. <i>Content that Is Offensive to Moral Beliefs</i> .....	2337
B. <i>Content that Is Pornographic and Vulgar</i> .....	2338
II. VIEWPOINT NEUTRALITY .....	2340
A. <i>The Absence of Opinion</i> .....	2341
1. <i>Opposable Assertion</i> .....	2342
2. <i>Scandalous Content</i> .....	2345
3. <i>Protection for Entertainment</i> .....	2351
B. <i>Offensiveness</i> .....	2353
1. <i>Offense at Public Exposure</i> .....	2355
2. <i>Offense at Secondary Effects</i> .....	2357
III. JUSTIFICATION FOR CONTENT DISCRIMINATION .....	2361
A. <i>Strict Scrutiny and Commercial Speech</i> .....	2361
B. <i>Limited Public Forum</i> .....	2364
CONCLUSION .....	2368

## INTRODUCTION

In *Matal v. Tam*, the Supreme Court unanimously held that the disparagement clause of the Lanham Act violated the First Amendment.<sup>1</sup> The disparagement clause prohibited trademark registration of any expression that disparaged a person, belief, institution, or national symbol.<sup>2</sup> That prohibition could have caused mark owners to self-censor the content of their marks, threatening free speech.<sup>3</sup> Crucial to the Court's decision was the conclusion that the disparagement clause was viewpoint discriminatory.<sup>4</sup> All members of the Court agreed with this conclusion, despite the fact that the disparagement clause did not single out any particular disparaging view.<sup>5</sup> The Court's conclusion of viewpoint discrimination precluded any special consideration based on the context of the trademark system, namely, either as commercial speech or a limited public forum.<sup>6</sup> Context did not matter. Viewpoint discrimination was damning.<sup>7</sup>

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<sup>1</sup> *Matal v. Tam*, 137 S. Ct. 1744 (2017). The facts of *Matal v. Tam* concern a rock band that applied for federal trademark registration of the band's name, "The Slants." *Id.* at 1751. "Slants" is a disparaging term for Asian persons. *Id.* At the time the band sought registration for that name, the Lanham Act provided that marks which disparaged persons could not be registered. *See* 15 U.S.C. § 1052(a) (2018). The Patent and Trademark Office ("PTO") accordingly denied the band's application for registration. *Tam*, 137 S. Ct. at 1751. Reversing the PTO's decision, the Supreme Court ruled that this "disparagement clause" of the Lanham Act was unconstitutional. *Id.*

<sup>2</sup> 15 U.S.C. § 1052(a).

<sup>3</sup> *In re Tam*, 808 F.3d 1321, 1341 (Fed. Cir. 2016) (describing self-censorship that could result from the disparagement clause), *aff'g* 137 S. Ct. at 1751.

<sup>4</sup> *See Tam*, 137 S. Ct. at 1763 (Alito, J.) (plurality opinion); *id.* at 1765-67 (Kennedy, J., concurring in part).

<sup>5</sup> *Id.* at 1751 (majority opinion). Although all eight members of the Court held the clause to be unconstitutional, they did not join in one complete opinion. Justice Samuel Alito wrote a few sections for the combined Court and a few sections in which only three other justices joined. *Id.* Justice Anthony Kennedy wrote a concurrence, in which three other justices joined. *Id.* at 1765 (Kennedy, J., concurring in part). In the end, there was agreement on only two points relevant to the discussion of this Essay: (1) the disparagement clause violated the First Amendment; and (2) the disparagement clause constituted viewpoint-based content discrimination. *See id.* at 1751 (majority opinion) (a portion of the majority opinion joined by all justices, concluding that the disparagement clause violates the First Amendment); *id.* at 1763 (Alito, J.) (plurality opinion) (opining that the disparagement clause is viewpoint discriminatory); *id.* at 1765-67 (Kennedy, J., concurring in part) (elaborating on the majority's finding that the clause is viewpoint discriminatory).

<sup>6</sup> *Id.* at 1761-65 (Alito, J.) (plurality opinion.)

<sup>7</sup> Justice Alito opined that although the limited-public-forum doctrine might be the appropriate framework for evaluating content restrictions in the trademark

The reasoning of *Tam* suggests that other content-based restrictions in the Lanham Act may be unconstitutional, and in particular, the scandalous clause.<sup>8</sup> The scandalous clause denies trademark registration for marks that “give offense to the conscience or moral feelings,”<sup>9</sup> and under *Tam*, “[g]iving offense is a viewpoint.”<sup>10</sup> Hence, the language of *Tam* seems to straightforwardly imply that the scandalous clause violates the Free Speech Clause of the First Amendment. Indeed, the Federal Circuit held the scandalous clause to be unconstitutional in the recent case of *In re Brunetti*.<sup>11</sup> Given this straightforward reasoning and Federal Circuit precedent, is there even an argument to be made? The answer is an unequivocal yes. There is a constitutional interpretation of the scandalous clause that the Supreme Court must adopt.

This Essay argues that the scandalous clause is indeed viewpoint neutral and that its subject-matter content discrimination is justified under the limited-public-forum doctrine. The Essay first recognizes that the broad definition the Federal Circuit has applied to *scandalous* is problematic under the reasoning of *Tam*.<sup>12</sup> Accordingly, the Essay proposes a narrower definition, reflecting a description of the sort of content that courts have deemed to be scandalous. That narrower definition is simply sexually-explicit or vulgar content.

Under this narrower definition of *scandalous*, the Essay argues that the Lanham Act’s restriction of scandalous content is viewpoint neutral. In support of this argument, the Essay posits that viewpoint

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system, the disparagement clause could not pass muster because it is viewpoint discriminatory. *Id.* at 1763. Kennedy’s concurring opinion focused solely on the viewpoint discriminatory nature of the disparagement clause. *Id.* at 1765-69 (Kennedy, J., concurring in part). He argued that because the clause was viewpoint discriminatory, Alito’s additional analysis of the clause was unnecessary. *See id.* at 1765. Hence, the linchpin for both the Alito and Kennedy opinions was the conclusion that the disparagement clause was viewpoint discriminatory. Importantly, neither justice discussed implications of his opinion on the scandalous clause of the Lanham Act.

<sup>8</sup> See 15 U.S.C. § 1052(a) (2018).

<sup>9</sup> *In re McGinley*, 660 F.2d 481, 485 (C.C.P.A. 1981) (internal quotation marks omitted), *abrogated by In re Tam*, 808 F.3d 1321, 1341 (Fed. Cir. 2016).

<sup>10</sup> *Tam*, 137 S. Ct. at 1763 (Alito, J.) (plurality opinion).

<sup>11</sup> 877 F.3d 1330, 1335 (Fed. Cir. 2017) (“We conclude, however, that [the Lanham Act]’s bar on registering immoral or scandalous marks is an unconstitutional restriction of free speech.”).

<sup>12</sup> *See id.* at 1354-55 (“This court and its predecessor have consistently defined ‘scandalous’ as ‘shocking to the sense of truth, decency, or propriety; disgraceful; offensive; disreputable; giving offense to the conscience or moral feelings; or calling out for condemnation.’”).

discrimination occurs only if a restriction targets content that comprises viewpoints.<sup>13</sup> And to be a viewpoint, the content must reflect an asserted opinion of the speaker; some sort of debatable proposition must be present in the expression.<sup>14</sup> From a theoretical perspective, this makes sense. The theory that gives rise to the doctrine of viewpoint discrimination — the marketplace of ideas — protects the laissez-faire process of ideas competing against each other.<sup>15</sup> For that process to work, ideas must oppose each other, which means that the ideas must consist of content that is debatable or opposable. As a result, free-speech's heightened protection against viewpoint discrimination applies only to debatable content, or in other words, opposable assertions.

This simple principle suggests the viewpoint neutrality of the scandalous clause. Scandalous content exists to cause a sexually stimulating experience for its audience or to evoke emotional force or emphasis; the content does not propose or set forth a belief or opinion.<sup>16</sup> Simply put, scandalous content lacks a viewpoint, so its restriction cannot be viewpoint discriminatory.

With respect to the specific conclusion in *Tam* that “[g]iving offense is a viewpoint,”<sup>17</sup> this statement does not apply to the offensiveness caused by scandalous marks.<sup>18</sup> Giving offense is a viewpoint if, and only if, the offense arises as a result of the idea itself.<sup>19</sup> With respect to disparaging marks, the mark's idea directly causes the offense that makes it disparaging. For instance, the disparaging mark “down with librarians!” is disparaging because the idea communicated by the content — that librarians should be banished — is itself the offensive proposition. By contrast, an offense caused by a scandalous mark does not usually result from the idea itself that the content communicates. Rather, the offense results from the *public visibility* of the content. Consider, for instance, a picture of a nude couple engaged in sexual activity, which would likely be scandalous. The public does not take offense at, or even disagree with, the idea of a nude couple engaged in sexual activity; the idea of sex is well-accepted in society.<sup>20</sup> The public,

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<sup>13</sup> See discussion *infra* Section II.A.1.

<sup>14</sup> See discussion *infra* Section II.A.1.

<sup>15</sup> See discussion *infra* Section II.A.1.

<sup>16</sup> See discussion *infra* Section II.A.

<sup>17</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (Alito, J.) (plurality opinion).

<sup>18</sup> See discussion *infra* Section II.A.

<sup>19</sup> See discussion *infra* Section II.B.

<sup>20</sup> See discussion *infra* Section II.B.

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however, does take offense at the public visibility of that picture. The idea itself is not disagreeable; only its public visibility is.

Offensiveness caused by the public visibility of expression finds support in the law. The tort of invasion of privacy is instructive: one type of privacy invasion is based on the offensiveness that is caused by the public visibility of an expression of private facts.<sup>21</sup> Furthermore, the secondary-effects doctrine, which often applies to indecent content, further indicates that offense at public visibility of expression is not a viewpoint.<sup>22</sup>

Having concluded that the scandalous clause is not viewpoint discriminatory, this Essay examines the justifications for its subject-matter discrimination.<sup>23</sup> The Essay evaluates three reasons for the restriction: promoting the psychological well-being of minors; furthering efficient transactions in the commercial marketplace; and preventing inefficiencies based on imperfect information relating to harmful effects of pornography. In this evaluation, the Essay considers the appropriate framework of review: strict scrutiny; commercial speech; or limited public forum. It concludes that the limited public forum is the appropriate framework for evaluating the Lanham Act's content discrimination, and that under that framework, the cited reasons justify the scandalous clause.

Part I of this Essay examines the meaning of scandalous. It argues that courts should adopt a narrower meaning than the Federal Circuit applied prior to the *Tam* decision. Part II argues that under this narrower meaning, the scandalous clause is viewpoint neutral. It relies on the marketplace-of-ideas theory to argue that expression must include some sort of opposable assertion to be protected under the viewpoint-discrimination doctrine. Applying this principle, Part II concludes that the scandalous clause is viewpoint neutral because scandalous content exists to stimulate a sexual response or evoke emotion rather than to assert a proposition. Part II also argues that the offense caused by scandalous marks does not derive from the idea expressed in those marks, thereby distinguishing the scandalous clause from the disparaging clause in *Tam*. Part III examines the reasons for the scandalous clause's content restrictions, as well as the proper framework for evaluating those reasons. It concludes that the reasons should be evaluated within the limited-public-forum

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<sup>21</sup> See discussion *infra* Section II.B.1.

<sup>22</sup> See discussion *infra* Section II.B.2.

<sup>23</sup> See discussion *infra* Part III.

framework, and that within that framework, three reasons justify the restriction of scandalous marks.

### I. THE MEANING OF SCANDALOUS

The Lanham Act denies trademark registration for marks that consist of “scandalous matter,” yet the Act does not define *scandalous*.<sup>24</sup> In the absence of a precise definition, the Federal Circuit has relied on dictionaries to apply a meaning.<sup>25</sup> Those meanings include “shocking to the sense of truth, decency, or propriety; disgraceful; offensive; disreputable; giving offense to the conscience or moral feelings; or calling out for condemnation.”<sup>26</sup> As discussed in Part I.A, however, these definitions are constitutionally problematic. Courts must adopt a different definition, set forth below in Part I.B, which avoids these problems.

#### A. Content that Is Offensive to Moral Beliefs

The constitutionality of the definitions that the Federal Circuit has applied to the meaning of *scandalous* is suspect under the reasoning of *Matal v. Tam*. In *Tam*, the Court struck down the Lanham Act’s requirement that a mark must not disparage persons.<sup>27</sup> Justice Alito construed *disparaging* to mean expression that is offensive to its victim.<sup>28</sup> The characteristic of offensiveness was therefore integral to the meaning of *disparaging*. And restricting offensive speech, according to Alito, threatens “the heart” of the First Amendment.<sup>29</sup> Indeed, all members of the court recognized that the Lanham Act’s

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<sup>24</sup> 15 U.S.C. § 1052(a) (2018).

<sup>25</sup> See, e.g., *In re McGinley*, 660 F.2d 481, 485 (C.C.P.A. 1981), *abrogated by In re Tam*, 808 F.3d 1321, 1341 (Fed. Cir. 2016) (noting that past definitions of scandalous originate in dictionary); *In re Riverbank Canning Co.*, 95 F.2d 327, 328 (C.C.P.A. 1938) (citing dictionary definitions).

<sup>26</sup> *In re Brunetti*, 877 F.3d 1330, 1355-56 (Fed. Cir. 2017); *In re Fox*, 702 F.3d 633, 635 (Fed. Cir. 2012); see also *McGinley*, 660 F.2d at 486; *Riverbank Canning Co.*, 95 F.2d at 328.

<sup>27</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017).

<sup>28</sup> See *id.* at 1763-76 (Alito, J.) (plurality opinion) (explaining that the disparagement clause denies registration to marks that are “offensive to a substantial percentage of the members of any group”).

<sup>29</sup> *Id.* at 1764 (Alito, J.) (plurality opinion) (“The Government has an interest in preventing speech expressing ideas that offend. And, as we have explained, 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.’”).

restriction of disparaging speech, or in other words, speech that offends, is viewpoint discriminatory, and thereby violates the Free Speech Clause.<sup>30</sup> In a section of the opinion that the Justices unanimously joined, Justice Alito explained: “We now hold that [the disparagement clause] 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.”<sup>31</sup> And later, in his plurality opinion, he re-iterated: “Giving offense is a viewpoint.”<sup>32</sup>

The reasoning of *Tam* suggests that, under the Federal Circuit’s past definitions of *scandalous*, the scandalous clause is viewpoint discriminatory.<sup>33</sup> Specifically, by denying registration because a mark’s content shocks the public’s sense of propriety, because a mark offends the public’s sense of morality, or because the content calls out condemnation, the scandalous clause restricts content on the basis of disagreement with moral beliefs. For instance, a mark that promotes the killing of animals could be deemed scandalous, as could a mark that decries homosexuality or encourages abortions. Any of these propositions might be offensive to a substantial composite of the public’s sense of morality, call out condemnation, or shock the sense of propriety.<sup>34</sup> In short, the disagreeableness of these propositions — on the grounds of morality — would make them scandalous. The clause would amount to prohibition of morally offensive speech. Under this interpretation of *scandalous*, *Tam* would straightforwardly imply the clause’s unconstitutionality.

### B. Content that Is Pornographic and Vulgar

This conclusion that the Federal Circuit’s former definition of *scandalous* is unconstitutional under *Tam* does not imply that the scandalous clause is itself unconstitutional. That the Federal Circuit has cited dictionary definitions to arrive at a meaning does not suggest

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<sup>30</sup> See *id.* at 1763 (Alito, J.) (plurality opinion); *id.* at 1765 (Kennedy, J., concurring in part).

<sup>31</sup> *Id.* at 1751 (majority opinion).

<sup>32</sup> *Id.* at 1763 (Alito, J.) (plurality opinion).

<sup>33</sup> See *In re Brunetti*, 877 F.3d 1330, 1355-56 (Fed. Cir. 2017) (holding the scandalous clause unconstitutional under the broad definition that the Federal Circuit has previously applied).

<sup>34</sup> See *In re McGinley*, 660 F.2d 481, 485 (C.C.P.A. 1981), *abrogated by In re Tam*, 808 F.3d 1321, 1341 (Fed. Cir. 2016) (“Whether or not the mark, including innuendo, is scandalous is to be ascertained from the standpoint of not necessarily a majority, but a substantial composite of the general public.”).

that this is the only plausible interpretation of *scandalous*.<sup>35</sup> Indeed, where it is “fairly possible” to interpret a statute in a way that avoids a constitutional problem, the statute must be so interpreted.<sup>36</sup>

Although several categories of content may be deemed scandalous,<sup>37</sup> courts have most often applied the scandalous clause to content that is pornographic or vulgar.<sup>38</sup> As a sidenote, the PTO and courts often apply *scandalous* in conjunction with the term *immoral*, which appears adjacent to *scandalous* in the Act.<sup>39</sup> Yet regardless of its relation to the

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<sup>35</sup> A dictionary is not always the final authority on the legal meaning of a word. See Ned Snow, *The Meaning of Science in the Copyright Clause*, 2013 B.Y.U. L. REV. 259, 267-77 (2013) (explaining deficiencies in relying solely on dictionary meaning to determine meaning of a word in the law). In 1931, the Supreme Court defined *scandalous* in the context of a state statute that restrained newspapers from publishing “scandalous” matter. *Near v. Minnesota*, 283 U.S. 697, 709 (1931). The Court recognized the state court’s interpretation of scandalous to mean “‘detrimental to public morals and to the general welfare,’ tending ‘to disturb the peace of the community’ and ‘to provoke assaults and the commission of crime.’” *Id.*

<sup>36</sup> *Stern v. Marshall*, 564 U.S. 462, 477 (2011) (“[W]e will, where possible, construe federal statutes so as to avoid serious doubt of their constitutionality.” (internal quotations omitted)); *I.N.S. v. St. Cyr.*, 533 U.S. 289, 299-300 (2001) (“[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is *fairly possible*, we are obligated to construe the statute to avoid such problems.” (emphasis added) (internal quotations and citation omitted)); see, e.g., *Brunetti*, 877 F.3d at 1357-58 (Dyk, J., concurring) (interpreting the scandalous clause as applying only to legal obscenity).

<sup>37</sup> See, e.g., *In re Riverbank Canning Co.*, 95 F.2d 327, 329 (C.C.P.A. 1938) (finding that a religious icon, the Virgin Mary, was scandalous as a trademark for wine); see also *Brunetti*, 877 F.3d at 1356 n.7 (citing application of scandalous clause to content that portrays drugs, violence, and patriotic-symbol disparagement, among others). None of these other categories seem to arise with as much frequency as the category of sexual content. *Id.* at 1358-59 (Dyk, J., concurring). Regardless, the reasoning that suggests that religiously-irreverent content should not be construed as scandalous would seem to apply to these other categories as well. A full analysis of each category, however, might be necessary.

<sup>38</sup> See, e.g., *Brunetti*, 877 F.3d at 1360 (Dyk, J., concurring) (“[T]he central aim of the immoral-scandalous provision in this court’s cases has been sexual material reflected in trademarks.”); *In re Fox*, 702 F.3d 633, 634 (Fed. Cir. 2012) (affirming denial of registration for sexually-explicit term); *In re Boulevard Entm’t*, 334 F.3d 1336, 1340 (Fed. Cir. 2003) (“A showing that a mark is vulgar is sufficient to establish that it ‘consists of or comprises immoral . . . or scandalous matter’ within the meaning of section 1052(a).”); *In re Mavety Media Grp.*, 33 F.3d 1367, 1373 (Fed. Cir. 1994) (finding that evidence was unclear whether term referred to “African-American women as sexual objects”); *McGinley*, 660 F.2d at 482 (affirming refusal to register mark depicting genitalia).

<sup>39</sup> 15 U.S.C. § 1052(a) (2018). Compare *Fox*, 702 F.3d at 634-35 (applying immoral and scandalous together to deny trademark protection), with *McGinley*, 660 F.2d at 484 n.6 (“Because of our holding, that appellant’s mark is ‘scandalous,’ it is

*immoral* term, the history of *scandalous* suggests an interpretation that is at least “fairly possible.” Indeed, the history extends well beyond a century, which appears a sufficient time period to conclude that its frequent application to pornographic or vulgar content suggests a corresponding meaning.<sup>40</sup> Interpreting *scandalous* to mean pornographic or vulgar seems reasonable, if not fairly possible.

To be clear, pornographic content means content that is sexually explicit in a way that indicates an intent of the speaker to stimulate a sexual response in his or her audience.<sup>41</sup> Vulgar content means content that is lewd or profanely indecent.<sup>42</sup> Given the obvious overlap between these definitions, the law often treats pornography and vulgarity, often under the label of “indecent speech.”<sup>43</sup> Notably, pornography and vulgarity do not necessarily constitute legal obscenity which lacks First Amendment protection.<sup>44</sup> The Parts below conclude that by narrowing the meaning of *scandalous* to this specific content — i.e., pornography and vulgarity — the Court would avoid the constitutional problems inherent in the more general definition that the Federal Circuit has applied in the past.

## II. VIEWPOINT NEUTRALITY

Perhaps the most pivotal issue in the constitutional analysis of the scandalous clause is whether that clause is viewpoint neutral. Crucial to the Supreme Court’s decision in *Matal v. Tam* was the conclusion that the disparagement clause was viewpoint discriminatory.<sup>45</sup> All

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unnecessary to consider whether appellant’s mark is ‘immoral.’ We note the dearth of reported trademark decisions in which the term ‘immoral’ has been directly applied.”).

<sup>40</sup> See Trademark Act of 1905, sec. 5(a), Pub. L. No. 84, 33 Stat. 724 (prohibiting trademark registration for scandalous or immoral matter in an earlier copyright act, later replaced by the Lanham Act).

<sup>41</sup> For this meaning of pornography, see Jennifer E. Rothman, *Sex Exceptionalism in Intellectual Property*, 23 STAN. L. & POL’Y REV. 119, 121 n.8 (2012).

<sup>42</sup> See *Vulgar*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/vulgar> (last visited Feb. 12, 2018).

<sup>43</sup> See, e.g., *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 729, 745 (1978) (examining content dealing with both sex and excretion, labeling it as “vulgar,” noting that the content is indecent but not obscene, and accordingly not outside of First Amendment protection).

<sup>44</sup> See *id.*

<sup>45</sup> See *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (“Speech may not be banned on the ground that it expresses ideas that offend.”); *id.* at 1763 (Alito, J.) (plurality opinion) (relying on viewpoint-discrimination doctrine to reject limited public forum argument); *id.* at 1765-67 (Kennedy, J., concurring in part) (citing viewpoint discrimination as basis for striking down scandalous clause).

members of the Court agreed with this conclusion, despite the fact that the disparagement clause did not single out any particular disparaging view.<sup>46</sup> The Court's conclusion of viewpoint discrimination precluded any special consideration based on the context of the trademark system, namely, either as commercial speech or a limited public forum.<sup>47</sup> Context did not matter.<sup>48</sup>

This Part argues that the scandalous clause is not viewpoint discriminatory. Section A interprets the doctrine of viewpoint discrimination as applying only where the government interferes with content that asserts an opposable opinion, and then argues that the scandalous clause does not target such content. Section B furthers this conclusion by contrasting the scandalous clause with the disparagement clause in *Tam*, explaining that the offensiveness of pornographic and vulgar content is distinct from the offensiveness of disparaging content.

#### A. *The Absence of Opinion*

The scandalous clause is viewpoint neutral simply because it does not target content that consists of viewpoints. Rather, the clause targets content that exists to sexually arouse its audience. As discussed in Subsection 1 below, in order for the government to restrict a viewpoint, the government must restrict content that communicates an opposable assertion. Subsection 2 argues that scandalous content — defined as pornography or vulgarity — does not communicate an opposable assertion. Subsection 3 addresses a counterargument — namely, that entertainment receives heightened protection because it often communicates subtle opinion, and pornography is entertainment.

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<sup>46</sup> See *id.* at 1751 (majority opinion); *id.* at 1763 (Alito, J.) (plurality opinion); *id.* at 1765-67 (Kennedy, J., concurring in part).

<sup>47</sup> See *id.* at 1763 (Alito, J.) (plurality opinion); *id.* at 1765-67 (Kennedy, J., concurring in part).

<sup>48</sup> In *In re Brunetti*, the Federal Circuit did not opine on whether the scandalous clause was viewpoint discriminatory. See *In re Brunetti*, 877 F.3d 1330, 1341-42 (Fed. Cir. 2017) (“While we question the viewpoint neutrality of the immoral or scandalous provision, we need not resolve that issue.”). Rather, the *Brunetti* court concluded that the clause would fail under strict or intermediate scrutiny, even if viewpoint neutral. *Id.* (“Independent of whether the immoral or scandalous provision is viewpoint discriminatory, we conclude the provision impermissibly discriminates based on content in violation of the First Amendment.”). Because this Essay concludes that the restriction is justifiable under the limited-public-forum doctrine, discussed below in Part III, this Essay must examine the issue of viewpoint neutrality, which the *Tam* opinion clearly raises.

### 1. Opposable Assertion

Viewpoint discrimination occurs where the government targets a speaker's viewpoint, or more precisely, where the government "give[s] one side of a debatable public question an advantage in expressing its views to the people."<sup>49</sup> From this simple principle, this Essay posits that viewpoint discrimination exists only if the government targets content that sets forth viewpoints. And to constitute a viewpoint, expression must include some sort of opposable assertion. Thus, this Essay proposes a simple corollary of the viewpoint-discrimination doctrine: viewpoint discrimination can occur only if a governmental restriction targets opinions or opposable assertions.

This corollary is apparent in the marketplace-of-ideas theory, which the Court often relies on in applying the viewpoint-discrimination doctrine.<sup>50</sup> The marketplace-of-ideas theory posits that the purpose of protecting speech from government interference is to provide a forum for ideas to compete.<sup>51</sup> Implicit in the notion that ideas compete against each other is the premise that to compete, ideas must be inconsistent with each other in some way. Stated differently, only an idea that can be disagreed with, opposed, or otherwise contested is capable of competing against other ideas. If that characteristic of an idea is not present, the competition process becomes unnecessary — not even possible; an idea that cannot be opposed cannot prevail over another. That is, an idea that fails to set forth an assertion cannot compete in the marketplace. Indeed, an idea without an assertion may not even be an idea at all. As contemplated in the marketplace theory,

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<sup>49</sup> *McCullen v. Coakley*, 134 S. Ct. 2518, 2533 (2014); *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) ("Government discrimination among viewpoints — or the regulation of speech based on the specific motivating ideology or the opinion or perspective of the speaker — is a more blatant and egregious form of content discrimination." (internal quotations omitted)); *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) ("While surprising at first glance, the notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles. Thus, an exemption from an otherwise permissible regulation of speech may represent a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people.").

<sup>50</sup> Supreme Court rhetoric often invokes the theory of the marketplace of ideas when the Court discusses viewpoint discrimination. *E.g.*, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995) (relying on "marketplace of ideas" in defining viewpoint discrimination); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (cautioning against regulation that allows "the government [to] effectively drive certain ideas or viewpoints from the marketplace").

<sup>51</sup> *See Simon & Schuster*, 502 U.S. at 116.

ideas seem to require some aspect that may be disagreed with. Only then may the idea compete.

This conclusion that the marketplace theory is most concerned with protecting opposable assertions finds support in the language of Justice Holmes, who introduced the marketplace theory into American jurisprudence.<sup>52</sup> He explained the theory in terms of “expressions of opinion,” and even explicitly qualified the theory as such when he stated: “I am speaking only of expressions of opinion and exhortations.”<sup>53</sup> Hence, Holmes indicates that the marketplace theory provides greatest protection for assertions that are opposable, which thereby compete for public acceptance.

In addition to the language of Holmes, modern Supreme Court rhetoric supports this understanding of the viewpoint-discrimination doctrine. The Court has explained viewpoint discrimination as occurring where the government interferes with a “*debatable* public question,”<sup>54</sup> where the government singles out a subset of content “based on the *views expressed*,”<sup>55</sup> or where the government regulates

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<sup>52</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>53</sup> Holmes explained the theory as follows:

Persecution for the *expression of opinions* seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. . . . While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the *expression of opinions* that we loathe and believe to be fraught with death. . . . Of course *I am speaking only of expressions of opinion and exhortations*, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.

*Id.* at 630-31 (emphases added).

<sup>54</sup> See *McCullen*, 134 S. Ct. at 2533; see also *Reed*, 135 S. Ct. at 2230; *Gilleo*, 512 U.S. at 51.

<sup>55</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part). Consider, for instance, a normative moral argument, a theory of reality, a political goal, and an assertion of artistic value. Each represents a proposition that competes against opposing opinions. Each requires subjective judgment about the correctness of the opinion. Each represents the primary object of protection in the marketplace of

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speech based on “the specific motivating *ideology* or the *opinion* or *perspective* of the speaker.”<sup>56</sup> These descriptions suggest that content must represent opposable opinion in order for its restriction to be viewpoint discriminatory.<sup>57</sup> In short, content lacking debatable

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ideas. Restrictions that specifically target these opinions would accordingly be viewpoint discriminatory.

What about statements of truth that are objectively verifiable? Although such truthful statements do not involve subjective judgment, they nevertheless represent an opposable assertion. Suppose, for instance, that the government were to punish speakers for reporting verifiable facts about the government’s past actions. The objectively verifiable truth would be opposed and highly debated. The idea itself — the past actions of the government — represents an opinion, even if verifiably true, and thereby worthy of protection. Hence, opinions lacking subjectivity are still opposable. Any assertion that can be opposed represents a viewpoint, eligible for heightened protection in the marketplace of ideas.

<sup>56</sup> *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

<sup>57</sup> In addition to its rhetoric, the reasoning of the Court suggests this principle. In *Rosenberger v. Rector and Visitors of the University of Virginia*, a University policy excluded funding for any “religious activity,” which consisted of an activity that “primarily promotes or manifests a particular belief in or about a deity or an ultimate reality.” *Rosenberger*, 515 U.S. at 823. On the one hand, this religious-activity restriction seems viewpoint neutral because it applies to all religious beliefs; it does not single out any particular religious belief. In dissent, Justice Souter argued this very point. *Id.* at 895-96 (Souter, J., dissenting). Justice Kennedy, however, held the criterion to be viewpoint discriminatory in his opinion for the Court majority. Kennedy’s analysis is instructive:

It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. . . . We conclude, nonetheless, that here, as in *Lamb’s Chapel*, viewpoint discrimination is the proper way to interpret the University’s objections to [the religious publication]. By the very terms of the [religious-activity] prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial *viewpoints*.

*Id.* at 831 (emphasis added). Here, Kennedy recognized that a restriction on religious content could be viewpoint neutral. A viewpoint-neutral restriction would have targeted all religion as “a comprehensive body of thought,” which would include the history of religions, descriptions of religious practices and beliefs, along with subjective assertions of religious beliefs. *See id.* Such a viewpoint-neutral restriction would have “excluded religion as a subject matter.” *See id.* It would not have targeted assertive opinion. By contrast, the University’s religious-activity restriction targeted speech that promotes “a particular belief” about a deity or ultimate reality. *See id.* at 895. As Kennedy pointed out, the restriction singles out religious editorial “viewpoints.” *See id.* Importantly, then, the Court found viewpoint discrimination because the restriction specifically targeted subjective beliefs. *See also* *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) (finding viewpoint discrimination on the grounds that “speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from

expression cannot express a viewpoint, so such content cannot be the subject of viewpoint discrimination.

## 2. Scandalous Content

Given this principle that viewpoint discrimination can occur only where government interferes with debatable expression, the scandalous clause cannot be viewpoint discriminatory.<sup>58</sup> Scandalous

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a religious viewpoint”). The fact that the restriction targeted an entire class of religious beliefs did not matter, which conclusion Kennedy stated later in the opinion. See *Rosenberger*, 515 U.S. at 831-32. What did matter was the subjectivity of the content that the restriction targeted.

In *Reed v. Town of Gilbert*, the government restricted “Temporary Directional Signs Relating to a Qualifying Event.” *Reed*, 135 S. Ct. at 2218, 2224. The Court described this as “a paradigmatic example of content-based discrimination” even though the restriction “does not target viewpoints within that subject matter.” *Id.* at 2230. Yet one could argue that the restriction targets a specific view, namely, the view of directing others to qualifying events. Nevertheless, directions to a certain event do not usually involve an opinion, or at least not one that is debated. Although persons might hold differing opinions as to the best route to an event, directions to a geographic destination do not usually cause disagreement to the same extent as other more controversial topics. Geographical directions appear much more settled than religious beliefs, see *Rosenberger*, 515 U.S. at 829-30, fighting words about race, see *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992), or editorials about government policy, see *FCC v. League of Women Voters*, 468 U.S. 364, 366 (1984). Thus, the conclusion in *Reed* that the restriction was viewpoint neutral appears to have been due to the fact that the restriction targeted content that lacked either subjective judgment or debatable belief.

<sup>58</sup> The conclusion that scandalous content does not assert a viewpoint is straightforward because this Essay simply re-defines scandalous content to mean content that is sexually explicit and is intended to stimulate a sexual response. See discussion *supra* Section I.B. Other clauses in the Lanham Act, however, are not as easy to identify as targeting expression that asserts an opinion. Consider the Lanham Act’s restriction against displaying the flag. See 15 U.S.C. § 1052(b) (2018). The restriction does not seem directed toward a view about the flag, but on the other hand, flags represent means to express allegiance to a state. What if the restriction were with respect to Nazi flags? Such specificity would seem to indicate that the restriction targets the subjective view in support of Nazism. What about the Lanham Act’s denial of trademark registration for “the flag or coat of arms or other insignia of the United States”? See 15 U.S.C. § 1052(b). Does this restriction target subject views about the United States? Although the view that it targets may not be a derogatory one of the United States (as contrasted with denial of trademark registration for the Nazi flag), it nevertheless apparently targets a viewpoint. One court explained the rationale for the government-insignia bar, which includes the U.S. flag, as follows:

[S]tate insignia are not appropriate subjects of trademark law at all. Trademark law concerns itself with goods and services in commerce. As a leading authority explains it, Section 2(b)’s absolute bar is founded upon “the thinking that these kinds of governmental insignia . . . should not be

content does not communicate an opinion, an assertion, or a belief.<sup>59</sup> There is nothing to disagree with; there is no debate. As Professor John Fee has recognized, “[P]ornography does not typically express any concrete viewpoint (although it may be used to do so), but rather, is characterized by its sexual explicitness.”<sup>60</sup> Pornographic expression exists to entertain. Its purpose is to cause an exciting or stimulating experience for its audience — not to propose any belief or to persuade anyone of a debatable opinion.<sup>61</sup> Consider, for instance, a

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registered as symbols of origin for commercial goods and services” because such 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.”

*Renna v. County of Union*, 88 F. Supp. 3d 310, 318 n.9 (D.N.J. 2014) (citation omitted). This reasoning suggests that the bar precluding registration of U.S. flags exists to exclude the subjective opinion that the government may be “sullied or debased” by business and trade. It seems viewpoint discriminatory.

<sup>59</sup> See John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 314 (2009) (“[P]ornography does not typically express any concrete viewpoint (although it may be used to do so), but rather, is characterized by its sexual explicitness.”). That pornographic content does not communicate a viewpoint does not imply that all statutes restricting pornographic content are viewpoint neutral. As a professor, now-Justice Elena Kagan wrote that anti-pornography statutes were viewpoint discriminatory:

[T]he principle of viewpoint neutrality, which now stands as the primary barrier to certain modes of regulating pornography and hate speech, has at its core much good sense and reason. Although here I can do no more than touch on the issue, my view is that efforts to regulate pornography and hate speech not only will fail, but also should fail to the extent that they trivialize or subvert this principle.

Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873, 878 (1993). Professor Kagan’s comments here addressed legislation considered in *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 324 (7th Cir. 1985), which expressly targeted expression directed toward sexually-explicit content that portrayed women as sexually subservient. As discussed above, however, the scandalous clause of the Lanham Act is not directed toward a view of how women are treated.

<sup>60</sup> See Fee, *supra* note 59, at 314; see also Cass Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 609-17 (arguing that legislation targeting pornography does not raise the sort of concerns of typical viewpoint discriminatory legislation) (“[A]ntipornography legislation should be regarded not as an effort to exclude a point of view, but instead as an effort to prevent harm.”).

<sup>61</sup> See *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 832 (Scalia, J., dissenting) (“[I]t is clear from the context in which exchanges between such businesses and their customers occur that neither the merchant nor the buyer [of indecent material] is interested in the work’s literary, artistic, political, or scientific value. . . . [The reader of this material] looks for titillation, not for saving intellectual content.”); Sunstein, *supra* note 60, at 606 (“The effect and intent of pornography, as

pornographic image of a woman who extends an invitation for a sexual encounter. Is the purpose of that image to impart an actual proposition from the woman to her audience that she does in fact seek a sexual encounter with them? Highly unlikely. The purpose of such expression is not to communicate any debatable opinion or proposition, but instead to entertain its audience — to stimulate a sexual response.

The same can be said for vulgar expression: standing alone, lewdness and profane indecency fail to propose an opinion. Instead, they convey emotional emphasis. Consider, for instance, a vulgar portrayal of excretion. Is the purpose of portraying the excretion in this manner to propose the existence of, or support for, the process of defecation? Of course not. The vulgar portrayal is intended to shock — or even entertain — the audience. It is intended to evoke an emotional reaction. But it does not assert an opinion.

Understood as targeting pornographic and vulgar content, the scandalous clause is unlike the restriction against disparaging marks. A mark that is disparaging necessarily expresses an opinion — namely, the opinion that a person or thing is of little worth. By definition, disparaging content involves subjective belief, the purpose of which is to express a negative opinion about someone.<sup>62</sup> Scandalous and vulgar content, by contrast, exists to entertain or evoke emotional reaction, without an assertion of opinion. Although some members of the public may be offended at the public display of the scandalous expression, the expression itself does not communicate an opinion. Simply put, scandalous content lacks a viewpoint, so there can be no viewpoint discrimination.<sup>63</sup>

Of course, it is possible that scandalous content might be expressed for the purpose of communicating an opinion in conjunction with the vulgar or sexually-explicit content. Vulgarity might be coupled with a specific opinion.<sup>64</sup> To be sure, President Trump's vulgar tweets express viewpoints.<sup>65</sup> But the vulgarity in his tweets does not itself express the

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it is defined here, are to produce sexual arousal, not in any sense to affect the course of self-government. Though comprised of words and pictures, pornography does not have the special properties the single out speech for special protection; it is more akin to a sexual aid than a communicative expression.”)

<sup>62</sup> See generally 15 U.S.C. § 1052(a); *Matal v. Tam*, 137 S. Ct. 1744, 1753-54 (2017) (explaining application of scandalous clause).

<sup>63</sup> See *Fee*, *supra* note 59, at 314.

<sup>64</sup> See, e.g., *Cohen v. California*, 403 U.S. 15, 26 (1971).

<sup>65</sup> See, e.g., Phil Hesel & James Rainey, *Trump's Vulgar Remark on Haiti, Africa Leaves Immigrants Baffled*, NBC NEWS (Jan. 12, 2018), <https://www.nbcnews.com/news/us-news/trump-s-vulgar-remark-haiti-africa-leaves-immigrants-baffled-n837031>

opinion; the vulgarity merely emphasizes the opinion, attempting to communicate emotive force with that opinion. This distinction between the vulgarity and the opinion to which it is attached is important because the scandalous clause does not target any opinion that might be coupled with vulgar content. Coupling vulgarity with an opinion does not change the fact that the vulgarity itself lacks an opposable view.

The same conclusion holds true for pornography. Pornography often depicts women as objects of sexual abuse, which suggests the opinion that women should be treated in a certain way.<sup>66</sup> For this reason Professor Geoffrey Stone has characterized anti-pornography laws generally as viewpoint discriminatory: such laws target the view that women may desire cruel treatment in sexual encounters.<sup>67</sup> But Professor's Stone's characterization would not be an accurate description of the government's motive for restricting scandalous marks. The scandalous clause is not directed to the specific portrayal of how men should treat women in sexual activities — even though that view does arise with frequency in pornographic content.<sup>68</sup> So although vulgar and sexually-explicit expression may be employed to further viewpoints, the scandalous clause does not direct its restriction to those viewpoints.<sup>69</sup>

On the other hand, if the Lanham Act were to restrict marks that specifically depict women as sexually subordinate to men, the restriction would be viewpoint discriminatory, targeting the subjective

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(reporting on tweet by President Trump espousing the view that immigrants from certain countries are not welcome in America, but using vulgarity to express this view).

<sup>66</sup> See Fee, *supra* note 59, at 314 n.103 (“[P]ornography tends to portray women as objects of abuse, and that it affects readers’ attitudes towards women.”); Morrison Torrey, *The Resurrection of the Anti-Pornography Ordinance*, 2 TEX. J. WOMEN & L. 113, 120-21 (1993) (“[V]ictims of sexual violence testified in explicit detail about their abuse. The reports described acts of sodomy, torture, and sexual abuse of children. All of the victims cited pornographic materials as the motivating factor for their abusers.”).

<sup>67</sup> Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POL’Y 461, 463 (1986).

<sup>68</sup> See discussion *supra* Section I.B (defining scandalous).

<sup>69</sup> See *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (“[T]he regulation of the places where sexually-explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate; whether a motion picture ridicules or characterizes one point of view or another, the effect of the ordinances [that restricts ‘Specified Sexual Activities’] is exactly the same.”).

view that women are subordinate to men.<sup>70</sup> Such language would reflect a government motive to interfere with this particular view of women, which the Seventh Circuit has held to be viewpoint discriminatory in the famous case of *American Booksellers Association v. Hudnut*.<sup>71</sup> But of course the scandalous clause does not target such depictions of women. Targeting pornography generally, the scandalous clause incidentally restricts the view that men should abuse women. That the clause incidentally restricts that view does not make it anymore viewpoint discriminatory than its restriction of pornography that might include a political slogan. Hence, the scandalous clause's incidental inclusion of material that may communicate an opinion does not make the clause viewpoint discriminatory.

It is of course possible to construe the scandalous clause as targeting a viewpoint that is not incidental to the restriction — namely, the view that the human body should be portrayed in a sexual manner. This would be similar to an assertion that an artist makes in expressing her artistic work — i.e., that the subject matter should be portrayed in a certain way. This purported opinion, however, would imply that all expression communicates a viewpoint. All content could be construed as asserting a view about how the content should be expressed. And if that were the case, all restrictions of content would be viewpoint based, such that viewpoint neutrality would be impossible. Any distinction between subject-matter and viewpoint discrimination would be illusory.<sup>72</sup> Assuming that this is not the case, it means that

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<sup>70</sup> Cf. *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 324 (7th Cir. 1985) (Easterbrook, J.) (holding viewpoint discriminatory a city ordinance that banned expression depicting “sexually explicit subordination of women”).

<sup>71</sup> See *id.*; Stone, *supra* note 67, at 467.

<sup>72</sup> Consider the subject-matter restriction in *Reed v. Town of Gilbert*: a city restricted temporary signs that provided directions to qualifying events. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2224 (2015). Under the argument that a content's opinion is that the content should be publicly visible, the sign restriction in *Reed* would be viewpoint discriminatory because it targets the opinion that such signs should be posted publicly. Certainly there are contrary opinions on whether the signs should be publicly visible given that the ordinance restricted people from posting the signs. The debatable position of whether the signs should be publicly visible would represent a viewpoint, such that the restriction would be viewpoint discriminatory, in derogation of the Court's holding. Or consider the Lanham Act's denial of trademark registration for marks of deceased Presidents. See 15 U.S.C. § 1052(c) (2018). The deceased-Presidents content does not appear to represent an opinion. Yet the issue of whether such marks should be denied registration, affecting their public visibility, is entirely subjective. So, under the proffered argument, the deceased-President restriction would be viewpoint discriminatory. Thus, the argument that scandalous content asserts a

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although a creator of pornography may hold that belief that the human body should be portrayed in a way that is sexually stimulating, the pornographic image itself cannot be construed as communicating this opinion. And this makes sense, for the purported opinion is an abstraction of the actual message. The opinion that the creator holds about how the body should be portrayed is a viewpoint *about* the content, not a viewpoint *of* the content. The opinion is an abstraction of content — not an idea that the content itself communicates.

What is the purpose, then, of scandalous content? Scandalous content exists to evoke an emotional, non-cognitive experience in its audience, an emotional experience that lacks rational opinion. Although some First Amendment theories may ascribe value to such emotive communication, the value of that communication is minimal in marketplace theory.<sup>73</sup> Its value in marketplace theory would lie only in its ability to emphasize opinion that is coupled with, yet distinct from, the scandalous content.<sup>74</sup>

For instance, consider an expression that employs a scandalous term — e.g., a four-letter expletive — to criticize a government policy — e.g., the draft.<sup>75</sup> The expression utilizes the emotional force of the expletive to communicate disdain for the draft; the expletive serves to emphasize the disdain in a way that other prose simply would not achieve. By itself, however, the expletive fails to communicate that opinion, or any other opinion for that matter. That is to say, the emotional experience of the scandalous expression is not communicating reasoned thought. Emotional emphasis is all that the scandalous content communicates. Standing alone, then, scandalous content lacks any opposable reasoned opinion. It lacks a viewpoint. And absent a viewpoint, scandalous content cannot compete in the marketplace of ideas.

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viewpoint that it should be publicly visible implies that all content-based restrictions are viewpoint based. That cannot be.

<sup>73</sup> See Sunstein, *supra* note 60, at 617 (“What is distinctive about pornography is its noncognitive character; though it amounts to words and pictures, its purposes and effects are far from the purposes and effects that justify the special protection accorded to freedom of speech.”); cf. Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WIS. L. REV. 221, 240-42 (explaining deficiencies of marketplace theory as rationale for protecting artistic expression).

<sup>74</sup> See *Cohen v. California*, 403 U.S. 15, 26 (1971) (“We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.”).

<sup>75</sup> See *id.*

### 3. Protection for Entertainment

One might argue that the scandalous clause should be construed as viewpoint discriminatory for the simple reason that at least with respect to pornography, the scandalous clause targets content that is entertaining. Entertainment often communicates an opinion through its motif of amusement. In the case of *Brown v. Entertainment Merchants Association*, the Court recognized full First Amendment protection for violent video games, whose ostensible purpose was to entertain a younger audience.<sup>76</sup> The *Brown* Court made clear that entertaining video games communicate ideas. In the Court's words:

The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try. "Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."<sup>77</sup>

Entertainment can communicate ideas effectively because of the very fact that entertainment presents ideas in a way that is attractive and alluring to audiences. As a result, the very attempt to distinguish pure amusement from opinion is, in the Court's judgment, "dangerous." This principle could suggest that the amusement, titillation, and attractiveness of indecent speech is merely a means to call people's attention to underlying opinions that the speech communicates. It might be argued, then, that restricting pornographic content risks the danger of restricting opinion.

Although the *Brown* Court did recognize that "whatever a legislature finds shocking" does not constitute unprotected speech,<sup>78</sup> depictions of sexual content are another matter. Purveyors and consumers of pornographic expression are unlikely to be interested in the communication of serious opinion — a point that the author of *Brown*, Justice Scalia, explicitly recognized in a dissenting opinion of another case.<sup>79</sup> Indeed, Scalia opined that in the context of a business emphasizing sexually provocative expression in order to obtain the business of those persons disposed to that content, the behavior is not

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<sup>76</sup> See *Brown v. Entm't Merch. Assoc.*, 564 U.S. 786, 805 (2011).

<sup>77</sup> *Id.* at 790 (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948)).

<sup>78</sup> *Id.* at 792-93 ("Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of "sexual conduct.").

<sup>79</sup> *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 832-33 (2000) (Scalia, J., dissenting).

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constitutionally protected.<sup>80</sup> That scenario appears to capture the purpose of using scandalous content as a trademark: a business employing a scandalous image as its mark likely does so to attract consumers who are disposed to those marks, drawing attention through sexual arousal and excitement. In that situation, communication of source likely becomes a mere secondary purpose for using the mark, a purpose that is subordinate to the primary purpose of delivering a certain sort of experience to potential consumers who view the mark. Scalia, the author of *Brown*, would have likely labeled this scenario as unprotected behavior.

Nevertheless, assuming that pornographic marks do constitute protected speech, that fact does not matter in the viewpoint analysis. What matters is why the mark owner employs the scandalous content as a mark. That reason is to cause sexual arousal. The expression and consumption of the pornographic content focus on the experience of the audience, which derives solely from the entertaining aspect of the content. Even if an opinion is included in scandalous content, that opinion is secondary to the primary purpose of amusing, exciting, or arousing the audience; scandalous content exists to provide a certain experience for viewers — not to communicate opinion. It is thus unsurprising that courts have tended to treat restrictions of pornographic speech as viewpoint neutral.<sup>81</sup> The danger of restricting

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<sup>80</sup> Scalia explained:

We have recognized that commercial entities which engage in the sordid business of pandering by deliberately emphasizing the sexually provocative aspects of their nonobscene products, in order to catch the salaciously disposed, engage in constitutionally unprotected behavior. This is so whether or not the products in which the business traffics independently meet the high hurdle we have established for delineating the obscene, viz., that they contain no serious literary, artistic, political, or scientific value. We are more permissive of government regulation in these circumstances because it is clear from the context in which exchanges between such businesses and their customers occur that neither the merchant nor the buyer is interested in the work's literary, artistic, political, or scientific value. The deliberate representation of petitioner's publications as erotically arousing stimulates the reader to accept them as prurient; he looks for titillation, not for saving intellectual content.

*Id.* at 831-32 (Scalia, J., dissenting) (internal quotations and citations omitted).

<sup>81</sup> The case of *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) implicitly supports the conclusion that restricting pornographic content is viewpoint neutral. In that case, Congress had passed a law requiring cable television operators to either fully scramble or fully block channels "primarily dedicated to sexually-oriented programming," insofar as those channels transmitted their programming when children were likely to be viewing. *Id.* at 806 (quoting the

entertainment, as highlighted in *Brown*, is not present in restricting scandalous marks.

### B. Offensiveness

It is indisputable that the government is restricting pornographic and vulgar content through the scandalous clause because the government finds that content offensive. Even if the Court construes the clause narrower than in the past, the scandalous clause would restrict content because it offends the public. Offensiveness as a reason to restrict content seems problematic given statements by Justice Alito in *Tam*. Specifically, in the unanimous portion of the opinion, Alito stated: “Speech may not be banned on the ground that it expresses ideas that offend”;<sup>82</sup> and in his plurality opinion, he stated: “Giving offense is a viewpoint.”<sup>83</sup> If these statements are true, and given that the offensiveness of scandalous content is the reason for its restriction, then how could that restriction be viewpoint neutral? On this basis, it might seem that the restriction of scandalous content amounts to viewpoint discrimination.

This argument fails for the simple reason that scandalous content offends because of its effects, not because of any idea that it asserts. This distinction is critical. When Justice Alito declared that “[g]iving offense is a viewpoint,” he provided important context for this statement. Specifically, Alito quoted two prior statements by the Court: first, “the public expression of ideas may not be prohibited

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Telecommunications Act of 1996, Pub. L. No. 104-104, § 505, 110 Stat. 56 (1996)). The majority opinion struck down the law under a strict scrutiny standard of review. *See id.* at 826-27. Relevant in the majority opinion to the issue of viewpoint discrimination was the statement that the law represented “the essence of *content*-based regulation.” *Id.* at 812 (emphasis added). Noticeably absent was any reference to viewpoint discrimination, which doctrine was in full force in 2000 at the time of the opinion. Telling about the absence of any reference to viewpoint discrimination is the fact that the *Playboy* opinion was written by Justice Kennedy, who had five years earlier written *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 829-30 (1995), wherein he articulated his intricate analysis of viewpoint discrimination. *Cf. Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 583 (1998) (rejecting argument that a law requiring a federal agency to consider “general standards of decency” in awarding grants for artistic works is “sufficiently subjective that the agency could utilize them to engage in viewpoint discrimination”); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (recognizing that the government can prohibit indecent films — and in particular, films showing “Specified Sexual Activities” — “without violating the government’s paramount obligation of neutrality in its regulation of protected communication”).

<sup>82</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017).

<sup>83</sup> *Id.* at 1763 (plurality opinion).

merely because the *ideas are themselves* offensive to some of their hearers”;<sup>84</sup> and second, “the government may not prohibit the expression of an idea simply because society finds *the idea itself* offensive or disagreeable.”<sup>85</sup> In both statements, the Court made clear that the cause of the offense must be the idea itself that the content communicates. Stated differently, the offense that Alito characterized as a viewpoint is the offense that arises in response to the idea directly communicated by the expression. A clear example of this is the offense caused by disparaging marks: people take offense because of the disparaging idea that the mark communicates. For example, the idea in the disparaging mark “Zookeepers suck!” is the inferiority of zookeepers, and that idea itself would be offensive to zookeepers. Giving that type of offense, Alito declared, represents a protected viewpoint.

This simple insight — that the idea itself must be the cause of the offense — is consistent with the theory underlying the viewpoint-discrimination doctrine. The marketplace of ideas protects ideas from being silenced by the government because of popular sentiment against an idea, or in other words, because the public finds an idea to be offensive. Offensiveness as a viewpoint therefore makes sense only to the extent that the offensiveness stems from opposition to ideas. This is all to say that Alito’s declaration that “giving offense is a viewpoint” can impliedly be read to mean that giving offense is a viewpoint where the offense is caused by disagreement with the idea itself.

Scandalous marks do not cause offense on the basis of the scandalous idea itself. The offense arises because the pornographic or vulgar content appears as a mark, or in other words, the content appears as a brand that is subject to public viewing in the commercial marketplace. Consider, for instance, the scandalous mark in the case of *In re McGinley*: the mark consisted of a photograph of a nude couple embracing, which designated the source of a newsletter.<sup>86</sup> Concluding that the mark was scandalous, the Trademark Board found that an overwhelming majority of potential consumers of the newsletter “would be affronted by *the use as a mark* of a photograph of a nude couple embracing, whether or not the models who posed for the photograph happened to be married to each other.”<sup>87</sup> Notably, the

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<sup>84</sup> *Id.* (quoting *Street v. New York*, 394 U.S. 576, 592 (1969) (emphasis added)).

<sup>85</sup> *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (emphasis added)).

<sup>86</sup> *In re McGinley*, 660 F.2d 481, 482 (C.C.P.A. 1981).

<sup>87</sup> *Id.* at 483 (emphasis added).

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Board did not find that consumers would be affronted by the idea of a nude couple embracing; rather, the affront would have stemmed from the nude-couple photograph *being used as a mark*. In affirming the Board's holding, the appellate court further observed that the mark could "be used in a prominent location for public viewing by persons of all ages and convictions."<sup>88</sup>

The reasoning of both the Board and appellate court in *McGinley* appears correct. It seems inconceivable that the public would in any way disagree with, or take offense at, the idea of a nude couple embracing. Sexual relations are an integral part of the human experience. The offensiveness of the mark, then, does not arise from the idea itself (i.e., the nude couple embracing), but rather from its public presentation. The sexual image *used as a mark* is offensive to the public, ostensibly because when used as a mark, the image is displayed "for public viewing," including "persons of all ages and convictions."<sup>89</sup> Hence, sex is not the affront; its public visibility is. Therefore, the offense that defines indecently scandalous marks does not represent opposition to an idea. It instead represents opposition to the circumstances under which the idea is presented. This is all to say that the viewpoint which consists of giving offense by expressing an idea (which Alito declared in *Tam*) does not apply to the offense that a scandalous-mark speaker gives.

#### 1. Offense at Public Exposure

Given that the offensiveness of scandalous content relates to its public visibility, the question arises as to whether the offensiveness of an idea's public visibility could ever be considered a viewpoint. It would seem so. Suppose, for instance, that *The New York Times* intended to publish a story about President Nixon's involvement in the Watergate scandal. Suppose further that President Nixon was offended that *The Times* was planning to publicize the story, and based on that offense, used government resources to restrain *The Times* from publishing it. The offensiveness (to Nixon) of publishing the story publicly would seem just as much a viewpoint as the offensiveness of the story itself. To deny *The Times* the right to publish the story on the grounds that President Nixon objected to the public exposure of the idea seems as viewpoint discriminatory as denying *The Times* that right on the grounds that the story itself was untrue. Either way, the

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<sup>88</sup> *Id.* at 486.

<sup>89</sup> *Id.*

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government would be denying the public the opportunity to judge the truthfulness of the idea.

This example illustrates that in order for the offensiveness of an idea's public visibility not to constitute a viewpoint, the idea cannot be a matter of public concern. This principle is evident in the theory of the marketplace of ideas. The marketplace provides a truth-testing forum for the benefit of the public as ideas compete for public acceptance. This public acceptance of an idea suggests that the ideas are matters that would necessitate public consideration — i.e., matters of public concern. Offensiveness of publicizing an idea represents a viewpoint, then, where the idea concerns a matter of public concern.

Additional support for this principle is found in tort law. It is well established in tort law that the government may restrict an idea because the *public exposure* of an idea gives offense to a private individual. Specifically, a speaker who publicly expresses private facts about a person is liable for violating that person's right of privacy if exposure of those facts is highly offensive to a reasonable person.<sup>90</sup> Importantly, though, there is no violation if the facts at issue represent a matter of public concern.<sup>91</sup> Thus, the characteristic of public concern controls whether government should be able to regulate content based on the offensiveness of the content's public visibility.

Supreme Court rhetoric further supports this principle. On multiple occasions the Court has explained viewpoint discrimination as occurring when the government favors one side of a "debatable *public* question."<sup>92</sup> The Court's qualification of *public* in its definition of

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<sup>90</sup> RESTATEMENT (SECOND) OF TORTS § 652(D) (AM. LAW INST. 1977).

<sup>91</sup> *See id.* Courts have recognized that the First Amendment circumscribes the tort of giving publicity to private life. *See, e.g.,* *Bonome v. Kaysen*, No. 032767, 2004 WL 1194731, at \*3 (Mass. Mar. 3, 2004); *cf. Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 493-94 (1975) (noting that under "the prevailing law" there is no liability for the tort of giving unwanted publicity to private life if the information is already public).

<sup>92</sup> *United States v. Kokinda*, 497 U.S. 720, 736 (1990) ("By excluding all groups from engaging in solicitation, the Postal Service is not granting to one side of a debatable *public* question a monopoly in expressing its views." (emphasis added) (quoting *Monterey Cty. Democratic Cent. Comm. v. U.S. Postal Serv.*, 812 F.2d 1194, 1198-99 (9th Cir. 1987))); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 59 n.2 (1983) ("Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable *public* question an advantage in expressing its views to the people, the First Amendment is plainly offended." (emphasis added) (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978))); *Madison v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175-76 (1976) ("To permit one side of a debatable *public* question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." (emphasis added)); *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2238 (2015) (Kagan, J.,

viewpoint discrimination implies that if a question did *not* concern a matter of public concern, government favoring one side would not represent viewpoint discrimination.

To be sure, scandalous marks do not represent matters of public concern. Absent from their pornographic or vulgar content is any proposition about public life or any assertion that would affect the well-being of a significant segment of the population. The Court on several occasions has articulated this sentiment. In a plurality opinion, Justice Stevens opined that “few of us would march our sons and daughters off to war to preserve the citizen’s right to see ‘Specified Sexual Activities’ exhibited in the theaters of our choice.”<sup>93</sup> Why not? Because pornographic and vulgar content does not reflect a matter of public concern. Or in *FCC v. Pacific Foundation*, the Court explained that although “references to excretory and sexual organs and activities . . . may be protected, they surely lie at the periphery of First Amendment concern.”<sup>94</sup> Regulation of such content, the *Pacifica* Court explained, does not raise the same sort of concern as regulation of content concerning “important social and political controversies.”<sup>95</sup> In short, pornographic and vulgar content does not raise matters of public concern, suggesting that the offensiveness of its public visibility does not merit heightened protection in the marketplace of ideas. The offensiveness does not constitute a protected viewpoint.

## 2. Offense at Secondary Effects

Why is the public visibility of pornographic content so offensive to the public? If not because of any idea that the content asserts, what is there to cause the offense? The answer to these questions is that the offensiveness derives from the harmful effects that the publicity causes. Offense based on effects of speech finds supports in First

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concurring) (“[W]e have recognized that such subject-matter restrictions, even though viewpoint-neutral on their face, may suggest an attempt to give one side of a debatable *public* question an advantage in expressing its views to the people.” (emphasis added)); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 894 (1995) (Souter, J., dissenting) (explaining viewpoint discrimination in terms of “debatable *public* question” (emphasis added)); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 430-31 (1992) (Stevens, J., concurring in judgment) (asserting viewpoint discrimination arises when there is a debatable public question).

<sup>93</sup> *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion).

<sup>94</sup> *FCC v. Pacific Found.*, 438 U.S. 726, 743 (1978).

<sup>95</sup> *Id.*; see Sunstein, *supra* note 60, at 608 (“Under any standard, pornography is far afield from the kind of speech conventionally protected by the first amendment.”).

Amendment law.<sup>96</sup> *Young v. American Mini Theatres, Inc.* is illustrative.<sup>97</sup> There the Court upheld a city ordinance that restricted the placement of adult-entertainment theaters to no more than one establishment within 500 feet of a residential area.<sup>98</sup> The reason for the restriction was the secondary effects of those establishments on the community.<sup>99</sup> Given that the content's secondary effects were the basis for the restriction, rather than the idea itself, Justice Stevens in a plurality opinion recognized that the restriction maintained viewpoint neutrality.<sup>100</sup> A decade later the Court re-iterated this reasoning in *City*

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<sup>96</sup> See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

<sup>97</sup> 427 U.S. 50 (1976).

<sup>98</sup> *Id.* at 52.

<sup>99</sup> *Id.* at 71 (Stevens, J.) (plurality opinion). Writing for a plurality of the Court, Justice Stevens explained:

The remaining question is whether the line drawn by these ordinances is justified by the city's interest in preserving the character of its neighborhoods. . . . The record disclosed a factual basis for the Common Council's conclusion that this kind of restriction will have the desired effect. . . . [T]he city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect.

<sup>100</sup> *Id.* at 67, 70 ("[R]egulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator."). Stevens explained:

Such a line may be drawn on the basis of content without violating the government's paramount obligation of neutrality in its regulation of protected communication. For the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate; whether a motion picture ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same.

Notably, Stevens appears to have limited his reasoning here to pornographic content. He explained:

[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.

of *Renton v. Playtime Theatres, Inc.*<sup>101</sup> Once again, a city had passed an ordinance limiting the concentration of adult-entertainment theaters.<sup>102</sup> And once again, because the ordinance targeted secondary effects of the content, rather than the content itself, the Court held that the restriction should be treated as though it were content neutral (and thereby viewpoint neutral).<sup>103</sup>

The reasoning that underlies the secondary-effects doctrine arguably applies to the scandalous clause.<sup>104</sup> Offense caused by the public visibility of scandalous marks is based on purported effects of that visibility. There are apparently harmful consequences to society if pornographic and vulgar images are publicly displayed. Indeed, those apparent consequences have given rise to public-decency laws.<sup>105</sup> A substantial segment of the public believes that public viewing of sexual or naked images — whether in real life or as expression — leads to socially-harmful effects.<sup>106</sup> It is argued that those effects include addictive tendencies, disruptions to marital relationships,

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*Id.* at 70. In his concurrence, Justice Powell endorsed the secondary-effects rationale, but he did not limit it to pornographic content. *Id.* at 80 (Powell, J., concurring).

<sup>101</sup> 475 U.S. 41, 47-48 (1986).

<sup>102</sup> *Id.* at 43.

<sup>103</sup> *Id.* at 47-48. Writing for the majority, Justice Rehnquist explained:

[T]he ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the District Court concluded, the Renton ordinance is aimed not at the *content* of the films shown at “adult motion picture theatres,” but rather at the *secondary effects* of such theaters on the surrounding community. . . . [T]he Renton ordinance is completely consistent with our definition of “content-neutral” speech regulations as those that are *justified* without reference to the content of the regulated speech.

<sup>104</sup> See Fee, *supra* note 59, at 338 (observing that those who would regulate sexually-explicit speech object to its negative effects).

<sup>105</sup> See, e.g., *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.”).

<sup>106</sup> See Sunstein, *supra* note 60, at 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.”); cf. Fee, *supra* note 59, at 338 (“The real secondary effects doctrine has little to do with the term secondary and has everything to do with the content of sexually explicit speech.”).

abuse toward women, and developmental harms to youth, to name only a few.<sup>107</sup>

Of course, these secondary effects reflect highly subjective opinion, just like the secondary effects in *Young* and *City of Renton*. The causal relationship between scandalous content and its purported effects may never be demonstrable. Nevertheless, free-speech jurisprudence well recognizes that subjective judgment about indemonstrable effects of pornographic speech may serve as a reason to restrict it.<sup>108</sup> Indeed, the

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<sup>107</sup> See, e.g., Pat Fagan, *The Effects of Pornography on Individuals, Marriage, Family and Community*, FAM. RES. COUNCIL, <http://www.frc.org/issuebrief/the-effects-of-pornography-on-individuals-marriage-family-and-community> (last visited Jan. 28, 2018); see also 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), <https://link.springer.com/article/10.1007/s11199-012-0164-0> ("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*, 9 PLoS ONE, July 11, 2014, at 1, <https://doi.org/10.1371/journal.pone.0102419> (2014) (conducting empirical study demonstrating that brain activity of pornography users is akin to drug addicts).

<sup>108</sup> Justice Burger articulated the argument that subjective, unprovable beliefs may reasonably serve as a basis to limit pornographic speech in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 62-63 (1973). There he stated:

The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional. If we accept the unprovable assumption that a complete education requires the reading of certain books, and the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior? Many of these effects may be intangible and indistinct, but they are nonetheless real. Mr. Justice Cardozo said that all laws in Western civilization are "guided by a robust common sense." The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

belief that obscenity is harmful to society reflects subjective belief with unprovable assumptions, but that belief is apparently sufficient to support the unprotected status of obscenity.<sup>109</sup> In sum, the secondary-effects doctrine suggests that the judgment that scandalous marks cause harmful effects is sufficient to exclude the content from trademark registration. At a minimum, the reasoning of that doctrine strengthens the conclusion that the scandalous clause is viewpoint neutral.

### III. JUSTIFICATION FOR CONTENT DISCRIMINATION

Although the scandalous clause appears to be viewpoint neutral, the clause still represents a content-based restriction. The Supreme Court has made clear that, as a general matter, the government cannot discriminate against the message, idea, subject matter, or content of expression.<sup>110</sup> Laws that target the content of speech are presumptively subject to strict-scrutiny review.<sup>111</sup> The context of speech, however, may subject the content discrimination to a less-stringent framework of review. As discussed below, the context of the trademark system suggests such a framework, the limited public forum, and under that framework, the restriction appears justifiable.

#### A. *Strict Scrutiny and Commercial Speech*

If the scandalous clause is subject to strict scrutiny review, this would require that its content-based restriction be the least restrictive means for achieving a compelling government interest.<sup>112</sup> A compelling government interest represents an interest “of the highest order,”<sup>113</sup> such as “protecting the physical and psychological well-being of minors”<sup>114</sup> or protecting national security.<sup>115</sup> Under this standard, the scandalous clause arguably survives strict scrutiny. The apparent government interest is to protect the psychological well-

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<sup>109</sup> *Id.*

<sup>110</sup> *Nev. Comm’n on Ethics v. Carrigan*, 564 U.S. 117, 121 (2011).

<sup>111</sup> *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

<sup>112</sup> *See McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014).

<sup>113</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

<sup>114</sup> *E.g., 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.”).

<sup>115</sup> *E.g., Haig v. Agee*, 453 U.S. 280, 306 (1981) (“It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation.” (internal quotations omitted)).

being of minors, given that harmful effects follow from viewing pornography.<sup>116</sup> And trademarks appear everywhere: they are openly displayed in stores, presented on billboards and road signs, delivered to the mailbox, embedded in movies and television, advertised throughout the internet (e.g., in the app store, in an unsuspecting email, on the Amazon website).<sup>117</sup> Trademarks have become as pervasive as commerciality itself in the modern age.<sup>118</sup> Consequently, scandalous marks can easily reach children. Withholding registration for them furthers the protection of children from psychological harm.

It is debatable, however, whether the scandalous-clause restriction is the least restrictive means available for achieving the government's interest. Could the Lanham Act restrict scandalous marks only with respect to commercial channels that are especially accessible to children? Could the Act at least allow registration for marks used in connection with adult stores or adult websites?<sup>119</sup> Perhaps. Arguably,

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<sup>116</sup> See, e.g., Patricia M. Greenfield, *Inadvertent Exposure to Pornography on the Internet: Implications of Peer-to-Peer File-Sharing Networks for Child Development and Families*, 25 APPLIED DEVELOPMENTAL PSYCHOL. 741, 743 (2004), <http://www.sjsu.edu/people/carol.mukhopadhyay/courses/AnthBioHS140/s6/Greenfield-article-on-Porno-impacts.pdf> (“In sum, the evidence indicates that pornography and related sexual media can influence sexual violence, sexual attitudes, moral values, and sexual activity of children and youth.”).

<sup>117</sup> The Federal Circuit majority in *In re Brunetti* disagreed with this conclusion. See *In re Brunetti*, 877 F.3d 1330, 1353 (Fed. Cir. 2017). The majority rejected the government's interest in protecting children from potentially harmful content on two grounds: first, “[a] trademark is not foisted upon listeners by virtue of its being registered”; and second, registration does not “make a scandalous mark more accessible to children.” *Id.* These two reasons, however, fail to acknowledge the strength of the government's interest. The commercial context does indeed foist its marks upon its viewers. Marks are supposed to be identifiable so that consumers can see them. They are supposed to appear in a way that is noticeable. They are — by definition — foisted upon their listeners. Anywhere a child might perceive a commercial product, a child can perceive a scandalous mark. Because trademark's reach knows no bounds, the government unquestionably holds an interest in protecting the psychological well-being of children in the trademark context. Hence, the *Brunetti* court's suggestion that registration does not foist a mark upon listeners simply misses the mark. Registration gives legal recognition to a mark, and with that recognition, mark owners employ the mark everywhere that they can possibly get the attention of viewers — including children.

<sup>118</sup> Cf. *FCC v. Pacifica Found.*, 438 U.S. 726, 748-50 (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”) (“To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.”).

<sup>119</sup> Cf. *Ashcroft v. ACLU*, 542 U.S. 656, 666-70 (2004) (striking down federal statute that punished persons who communicate obscenity or patently offensive

then, some other less-restrictive means could achieve the government's interest.

The scandalous clause, however, is not likely subject to strict scrutiny. As an initial matter, strict scrutiny would call into question several more content-based provisions in the Lanham Act, such as the clause barring registration for marks that describe the product,<sup>120</sup> that are too similar to another mark,<sup>121</sup> that represent a surname,<sup>122</sup> that comprise government insignia,<sup>123</sup> that portray a living individual (using his name, portrait, or signature) without his consent, or that resemble a deceased president during the life of the surviving widow (or widower) in the absence of that widow's consent.<sup>124</sup> It is doubtful that the least restrictive means justifies a compelling government interest for each of these content-based restrictions. Strict scrutiny would likely subject the Lanham Act to a substantial overhaul, to be sure.

Rather than strict scrutiny, the less-stringent test that governs commercial speech would seem more applicable. Trademarks represent the source of goods that are offered for sale, so they are integral to a commercial offer.<sup>125</sup> Under that test, the government need show only a "substantial interest" supporting its restriction, and the restriction need merely be narrowly drawn to achieve that interest.<sup>126</sup>

Even under the less stringent standard for commercial speech, uncertainty still surrounds whether the Lanham Act's restriction of scandalous mark is "narrowly drawn" to achieve the government's interest in protecting the well-being of minors.<sup>127</sup> There are significant channels of commerce that do not readily reach innocent eyes and ears of children. The scandalous clause does not narrowly tailor its restriction to pornographic content that children might perceive;

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material on the internet, on the grounds that less restrictive alternatives exist to protect the government's interest in blocking access to children).

<sup>120</sup> See 15 U.S.C. §§ 1052(e)(1)-(2) (2018).

<sup>121</sup> See *id.* § 1052(d). Also, trademark registration is denied if a mark is likely to dilute another mark. See *id.* § 1052(f).

<sup>122</sup> See *id.* § 1052(e)(4).

<sup>123</sup> See *id.* § 1052(b).

<sup>124</sup> See *id.* § 1052(c).

<sup>125</sup> The *Tam* Court left open the question of whether *Central Hudson's* commercial speech test applies to speech restrictions in the Lanham Act. See *Matal v. Tam*, 137 S. Ct. 1744, 1764 n.17 (2017). It seems likely that the test would apply given that trademark rights do not exist unless there is a bona fide use in commerce of the mark. See 15 U.S.C. §§ 1114, 1127 (2018).

<sup>126</sup> See *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

<sup>127</sup> See *Tam*, 137 S. Ct. at 1764 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564-65 (1980)).

rather, the clause applies to all commercial speech. Hence, the constitutionality of the scandalous clause as a commercial-speech restriction is questionable.

### B. Limited Public Forum

The appropriate framework for evaluating restrictions on trademark registration is likely the limited public forum, more so than the commercial-speech test. Justice Alito contemplated applying this framework to trademark restrictions in his *Tam* plurality opinion — although the Federal Circuit’s majority opinion in *Brunetti* rejected that conclusion.<sup>128</sup> The limited public forum applies when evaluating restrictions on speech that occur within a forum that the government has created to facilitate private speech for certain purposes.<sup>129</sup> The framework may apply in a metaphysical sense, where the government has expended benefits or resources that further private speech.<sup>130</sup> The

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<sup>128</sup> Compare *Tam*, 137 S. Ct. at 1763 (Alito, J.) (plurality opinion) (observing that trademark registration is “analogous” to “cases in which a unit of government creates a limited public forum for private speech,” and noting that in situations where government creates such a forum in a metaphysical sense, some content-based restrictions may be allowed), with *In re Brunetti*, 877 F.3d 1330, 1347 (Fed. Cir. 2017) (“[T]he trademark registration program bears no resemblance to these limited public forums.”).

<sup>129</sup> 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.”).

<sup>130</sup> In *Christian Legal Society v. Martinez*, a student organization, the Christian Legal Society (“CLS”) sought to exclude students from its organization based on homosexual conduct or religious beliefs. *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 672 (2010). Because of these exclusions, Hastings Law School refused to give CLS official recognition as a student organization, which made CLS ineligible for a variety of privileges (e.g., funding and facility use). *Id.* at 672-73. At issue, then, was whether the First Amendment precluded Hastings from denying the benefit of official recognition as a student organization. *Id.* at 678-80. In deciding this question, the Court applied a limited-public-forum analysis. *Id.* One reason for the Court’s application of limited-public forum was that the benefit was a subsidy rather than a prohibition. *Id.* at 682. In the Court’s words:

[T]his case fits comfortably within the limited-public-forum category, for CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition. . . . In diverse contexts, our decisions have distinguished between policies that require action and those that withhold benefits. Application of the less restrictive limited-public-forum analysis better accounts for the fact that Hastings,

Supreme Court, for instance, has applied the limited-public-forum analysis where the government has funded a student organization or a publication.<sup>131</sup>

The trademark registration system appears to represent a limited public forum.<sup>132</sup> Through that system, Congress has enabled individuals to realize limited rights of exclusion over marks in commerce.<sup>133</sup> The registration system exists to foster private speech: specifically, the system encourages commercial speakers to employ marks that will efficiently indicate the source of their goods.<sup>134</sup> The government's purpose in providing this system is to foster efficiency in the market for goods and to promote the collective welfare of the public.<sup>135</sup>

The *Brunetti* court disagreed with this conclusion. The majority panel distinguished the trademark system from a limited public forum on the basis that the trademark system was not "tethered to government properties."<sup>136</sup> Although the *Brunetti* court recognized that limited public forums could exist "more in a metaphysical than in a spatial or geographic sense," the majority required the forums to affect physical property.<sup>137</sup> On this basis, the *Brunetti* court observed that the trademark system is unlike a University-sponsored publication that affects University property,<sup>138</sup> a charity drive held at a

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through its [student organization] program, is dangling the carrot of subsidy, not wielding the stick of prohibition.

*Id.* at 682-83 (citations and internal quotations omitted). Because CLS could still exist as an organization, even if it did not comply with the law school's condition, the pressure to comply with the condition was indirect. *See id.* Denying the benefit was less severe than compelling compliance, and for that reason, the less restrictive analysis of limited-public forum was appropriate. *See id.* Analogously, even if a markholder is denied registration, the markholder can still use a scandalous mark as a trademark; the markholder simply cannot receive the rights that derive from registration.

<sup>131</sup> *Id.* at 679-80 (student organization); *Rosenberger*, 515 U.S. at 829-31 (recognizing university funding for student publications as a limited public forum).

<sup>132</sup> *See Tam*, 137 S. Ct. at 1763.

<sup>133</sup> *See Ned Snow, Free Speech & Disparaging Trademarks*, 57 B.C. L. REV. 1639, 1646-47 (2016).

<sup>134</sup> *Id.*

<sup>135</sup> *See id.* at 1646-47, 1668-70.

<sup>136</sup> *In re Brunetti*, 877 F.3d 1330, 1347 (Fed. Cir. 2017).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995)).

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workplace that affects the physical workplace,<sup>139</sup> or a state-owned broadcast that affects the broadcaster's physical facilities.<sup>140</sup>

This apparent basis for distinguishing the limited public forum from the trademark system does not make good sense. As an initial matter, the Supreme Court has never articulated any sort of suggestion that a limited public forum must somehow affect physical property. And that is not surprising. The rationale underlying the limited-public-forum framework is that the government should be able to restrict a benefit that facilitates private speech, insofar as that restriction furthers the purpose for which the government created the benefit in the first place.<sup>141</sup> That is, if the government creates benefit *X* to facilitate private speech that furthers purpose *Y*, the government should be able to craft content-based conditions for receiving benefit *X* that will reasonably support purpose *Y*. All that is relevant is whether the government has created a benefit that facilitates private speech for a permissible purpose.<sup>142</sup> That benefit could just as easily be provision of intellectual property (e.g., trademark registration) as it could be provision or use of physical property. In either scenario — provision of intellectual property or provision of physical property — the benefit that the government bestows affects private speech to further a government purpose. Accordingly, the Supreme Court has never inquired whether a benefit affects physical property in determining whether to apply the limited public forum. Rather, the Court has inquired whether the influence on speech reflects a beneficial subsidy or a penalizing prohibition.<sup>143</sup> The Court looks for a benefit — not an effect on physical property. Thus, the *Brunetti* court's attempt to distinguish the trademark system — which provides intellectual-property rights for certain types of private speech (a clear beneficial subsidy) — finds no support in any of the Court's cases articulating the limited-public-forum doctrine or in the rationale underlying that doctrine. The *Brunetti* court's attempt fails.

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<sup>139</sup> *Id.* (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 790 (1985)).

<sup>140</sup> *Id.* (citing *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 669, 672 (1998)).

<sup>141</sup> See *Rosenberger*, 515 U.S. at 829.

<sup>142</sup> Notably, the unconstitutional-conditions doctrine would not apply to analyze a benefit that is not a cash subsidy or its equivalent. See *Matal v. Tam*, 137 S. Ct. 1744, 1761 (2017) (refusing to apply government subsidy doctrine that governs government programs because those cases involved cash subsidies or their equivalent).

<sup>143</sup> See, e.g., *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 682-83 (2010).

Restrictions of speech in a limited public forum must be reasonable in light of the forum's purpose.<sup>144</sup> So with respect to the limited public forum of the trademark system, the restriction of scandalous marks seems reasonable in light of trademark's purposes. Three reasons support, or are consistent with, those purposes. The first reason, as mentioned above, is to prevent psychological harm to children. Given that children are consumers in the commercial marketplace, protecting their interests is entirely reasonable in the commercial forum of trademark. Moreover, restricting scandalous marks does not prevent mark owners from communicating source through other expression. Protecting children seems a reasonable basis for the scandalous clause in view of trademark's purpose.

The second reason for restricting scandalous marks is to facilitate commercial transactions. As discussed above, some consumers object to pornographic and vulgar expression being publicly displayed in the commercial marketplace.<sup>145</sup> And in some instances, the consumer might refrain from purchasing the good with a scandalous mark solely because of the scandalous mark. In that situation, the scandalous mark would deter an efficient market transaction.

One might argue, however, that some scandalous marks actually promote commerce. Some scandalous marks describe their goods (say, for instance, a pornographic image describing sex toys or adult magazines), and furthermore, other scandalous marks simply appeal to consumers independent of their goods (say, for instance, a naked woman as a mark for beer). In either situation, the scandalous mark would not interfere with, and perhaps even promote, commercial transactions.

Those possibilities may well exist. And indeed, the question of whether the net effect of scandalous marks would be to deter or to promote market transactions may never be known. But that is beside the point, for in a limited public forum, the grounds for restriction need merely be reasonable.<sup>146</sup> All that matters is that scandalous marks are likely to disrupt some transactions. That fact is sufficiently reasonable to enable Congress to restrict their registration, given the viewpoint neutrality of the restriction.<sup>147</sup>

The third reason for restricting scandalous marks is that their effects cause harm to the overall welfare of society. Social science is

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<sup>144</sup> See *Rosenberger*, 515 U.S. at 829-30.

<sup>145</sup> See discussion *supra* Section II.B.

<sup>146</sup> See *Rosenberger*, 515 U.S. at 829-30.

<sup>147</sup> See discussion *supra* Part II.

establishing that pornography leads some consumers to addictive behaviors that harm marriages and family relationships.<sup>148</sup> Moreover, consumers of pornography may not realize these likely consequences, thereby basing the decision to consume on imperfect information. Simply put, a person choosing to consume sexually-explicit material may not account for the cost to family relationships. Consequently, consumers of goods with scandalous marks may overvalue the mark, and in turn, the market would fail to provide consumers an accurate value of the good or service associated with the mark. A market failure is reasonably conceivable, possible, and plausible. Hence, restricting scandalous marks appears reasonable as a means to prevent this market failure.

#### CONCLUSION

Courts should interpret scandalous marks as marks that communicate sexually-explicit or vulgar content. Under that interpretation, the Lanham Act's denial of trademark registration for scandalous marks would avoid the constitutional problems that doomed the disparagement clause. Unlike the disparagement clause, the scandalous clause would be viewpoint neutral because it would target content that lacks an opposable assertion. Specifically, scandalous content stimulates a sexual response or emphasizes through emotive force, but it does not assert anything. Moreover, scandalous content is offensive not because of any opinion that it offers, but because of its public visibility and the effects that the visibility poses to society. Scandalous content therefore lacks a viewpoint to protect. Its restriction cannot be viewpoint discriminatory.

As a viewpoint-neutral restriction, the scandalous clause restricts a general subject matter of content. Although its subject-matter restriction may not be justifiable under strict scrutiny, strict scrutiny is not the appropriate framework for evaluating content-based restrictions in the Lanham Act. The appropriate framework must be a limited public forum. Under that framework, the restriction seems reasonable as a means for protecting the psychological well-being of

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<sup>148</sup> See, e.g., Doran & Price, *supra* note 107 (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); Stewart & Szymanski, *supra* note 107 ("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., *supra* note 107.

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2018]

*Denying Trademark for Scandalous Speech*

2369

minors, promoting efficient market transactions, and preventing consumers from making decisions based on imperfect information. The scandalous clause is constitutional.