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### Merging Offensive-Speech Cases with Viewpoint-Discrimination Principles: The Immediate Impact of *Matal v. Tam* on Two Strands of First Amendment Jurisprudence

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**MERGING OFFENSIVE-SPEECH CASES WITH  
VIEWPOINT-DISCRIMINATION PRINCIPLES: THE  
IMMEDIATE IMPACT OF *MATAL* v. *TAM* ON TWO STRANDS  
OF FIRST AMENDMENT JURISPRUDENCE**

Clay Calvert\*

ABSTRACT

This Article examines flaws with the U.S. Supreme Court’s 2017 decision in *Matal* v. *Tam* that equated giving offense with viewpoint discrimination. Already, the Court’s language in *Tam* that “giving offense is a viewpoint” is being cited by multiple lower courts. This Article argues, however, that giving offense is *not* synonymous with viewpoint discrimination. This Article contends that the Court in *Tam* conflated two distinct strands of First Amendment jurisprudence—namely, its offensive-speech cases with principles against viewpoint discrimination. The Article proposes two possible paths forward to help courts better clarify when a case such as *Tam* should be analyzed as an offensive-speech case and when it should be treated as a case involving viewpoint-based discrimination.

INTRODUCTION

In September 2018, the United States Court of Appeals for the Ninth Circuit held in *American Freedom Defense Initiative v. King County*<sup>1</sup> that banning disparaging advertisements on public buses violates the First Amendment’s freedom of speech.<sup>2</sup>

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<sup>1</sup> No. 17-35897, 2018 U.S. App. LEXIS 27581, at \*1 (9th Cir. Sept. 27, 2018).

<sup>2</sup> The First Amendment to the U.S. Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties that apply to state and local government entities and officials. *See* *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding that freedom of speech and of the press are “fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment”). *See Am. Freedom Def. Initiative*, 2018 U.S. App. LEXIS 27581, at \*15 (“In sum, Metro’s disparagement clause discriminates, on its face, on the basis of viewpoint. The disparagement clause therefore cannot serve as a constitutionally valid basis for rejecting Plaintiffs’ revised ad.”).

The court reasoned that, although ad space on buses was a nonpublic forum,<sup>3</sup> the prohibition against disparaging ads—enforced by King County, Washington’s Metro Transit agency—discriminated based on viewpoint.<sup>4</sup> That conclusion was the ordinance’s death knell.

First Amendment jurisprudence, as Justice Ruth Bader Ginsburg crisply explained in 2014, “disfavors viewpoint-based discrimination[,]”<sup>5</sup> including in nonpublic fora.<sup>6</sup> Indeed, “[t]he first rule of free speech theory and doctrine is that the government may not discriminate against a particular viewpoint based simply on its disagreement with that viewpoint.”<sup>7</sup> The Ninth Circuit applied this principle in *American Freedom Defense Initiative*. It specifically resolved—and critically so, for purposes of this Article—that “[g]iving offense is a viewpoint, so Metro’s disparagement clause discriminates, on its face, on the basis of viewpoint.”<sup>8</sup>

The lynchpin for the Ninth Circuit’s logic that giving offense is a viewpoint was the U.S. Supreme Court’s 2017 ruling in the trademark-registration case of *Matal v. Tam*.<sup>9</sup> The Court in *Tam* declared the disparagement clause of the Lanham Act,<sup>10</sup> which “governs federal trademark law unconstitutional.”<sup>11</sup> That clause gave the U.S. Patent and Trademark Office (USPTO) the power to deny registration for marks that “may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.”<sup>12</sup> The USPTO in *Tam* had invoked this clause to deny a band’s application to register its name, “The Slants,” because it disparaged Asians.<sup>13</sup>

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<sup>3</sup> *Am. Freedom Def. Initiative*, 2018 U.S. App. LEXIS 27581, at \*7.

<sup>4</sup> *Id.* at \*10.

<sup>5</sup> *Wood v. Moss*, 572 U.S. 744, 748 (2014).

<sup>6</sup> *See* *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (noting that the Court “employs a distinct standard of review to assess speech restrictions in nonpublic forums” and adding that under this standard, expression cannot be suppressed “merely because public officials *oppose the speaker’s view*” (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (emphasis added))); *see also* ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1204 (5th ed. 2015) (“The government may prohibit or restrict speech in nonpublic forums so long as the regulation is reasonable and *viewpoint neutral*.” (emphasis added)).

<sup>7</sup> Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 703 (2011).

<sup>8</sup> *Am. Freedom Def. Initiative*, 2018 U.S. App. LEXIS, at \*11.

<sup>9</sup> 137 S. Ct. 1744 (2017).

<sup>10</sup> 15 U.S.C. § 1051, 1052(a) (2012). The Lanham Act is “the foundation of trademark law today.” Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1687 (1999).

<sup>11</sup> Mark Conrad, *Matal v. Tam—A Victory for The Slants, a Touchdown for the Redskins, But an Ambiguous Journey for the First Amendment and Trademark Law*, 36 CARDOZO ARTS & ENT. L.J. 83, 90 (2018).

<sup>12</sup> 15 U.S.C. § 1052(a) (2012).

<sup>13</sup> *Tam*, 137 S. Ct. at 1751.

In striking down the disparagement clause in *Tam*, Justice Alito reasoned for a bloc of four justices that the clause “discriminates on the bases of ‘viewpoint’” because “[g]iving offense is a viewpoint.”<sup>14</sup> For Justice Alito, this comported with the notion that the Court uses “the term ‘viewpoint’ discrimination in a broad sense.”<sup>15</sup>

Penning a concurrence joined by three other justices, Justice Kennedy also found that the disparagement clause was viewpoint based, but he more precisely attempted to define when viewpoint discrimination exists.<sup>16</sup> He wrote that the “test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed.”<sup>17</sup> Applying this rule to the facts of *Tam*, Justice Kennedy elaborated that:

[T]he disparagement clause the Government now seeks to implement and enforce identifies the relevant subject as “persons, living or dead, institutions, beliefs, or national symbols.” 15 U.S.C. § 1052(a). Within that category, an applicant may register a positive or benign mark but not a derogatory one. The law thus reflects the Government’s disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination.<sup>18</sup>

Significantly, *American Freedom Defense Initiative* is not the only federal-appellate-court ruling since *Tam* was handed down in June 2017 to equate giving offense with viewpoint discrimination. In January 2018, the U.S. Court of Appeals for the Second Circuit in *Wandering Dago, Inc. v. Destito*<sup>19</sup> held that the New York State Office of General Services engaged in unconstitutional viewpoint discrimination when it prevented the “Wandering Dago” food truck from participating in a lunch program,<sup>20</sup> because that name, along with the names of items sold from the truck, constituted ethnic slurs.<sup>21</sup> Citing *Tam*, the Second Circuit concluded that “the mere use of these potentially offensive words in the factual setting presented here reflects a viewpoint.”<sup>22</sup>

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<sup>14</sup> *Id.* at 1763.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1766 (Kennedy, J., concurring). Justice Kennedy was joined by Justices Ginsburg, Sotomayor, and Kagan. *Id.* at 1765.

<sup>17</sup> *Id.* at 1766.

<sup>18</sup> *Id.*

<sup>19</sup> 879 F.3d 20 (2d Cir. 2018).

<sup>20</sup> *Id.* at 33.

<sup>21</sup> *See id.* at 28 (stating that proposed menu items to be sold by the Wandering Dago truck included ones named “‘Dago,’ ‘Castro,’ ‘American Idiot,’ ‘Goombah,’ ‘Guido,’ ‘Polack,’ ‘El Guapo,’ and ‘KaSchloppas’”); *id.* at 30–33; *see also* Jessica Barbata Jackson, *Before the Lynching: Reconsidering the Experience of Italians and Sicilians in Louisiana, 1870s–1890s*, 58 LA. HIST. 300, 305 n.15 (2017) (“The pejorative epithet ‘dago’ was commonly used in the late nineteenth and early twentieth centuries to refer to Italians.”).

<sup>22</sup> *Wandering Dago*, 879 F.3d at 33.

Writing for a unanimous three-judge panel, Judge Susan Carney added that *Tam* “is clear that ‘[g]iving offense is a viewpoint’ when it comes to ethnic slurs.”<sup>23</sup>

Furthermore, a federal district court in Pennsylvania in April 2018 cited *Tam*’s language that “[g]iving offense is a viewpoint” in concluding that a ban on profanity and vulgarity near an arena “likely constitutes viewpoint discrimination.”<sup>24</sup> Additionally, a federal district court in Texas in October 2017 held that removing an exhibit from the Texas Capitol building because the exhibit’s “satirical tone rendered it offensive to some portion of the population” represented viewpoint discrimination under *Tam*’s logic.<sup>25</sup> In other words, as Judge Sam Sparks put it, censoring speech because of its “ostensibly mocking tone” equates to “viewpoint discrimination as a matter of law.”<sup>26</sup>

*Tam* and its early lower-court offspring raise an important question for First Amendment jurisprudence: is censoring speech because it offends truly synonymous with discriminating against a viewpoint, and therefore unconstitutional? Is it possible, in other words, for speech to offend without it taking sides—to use Justice Kennedy’s words in *Tam*—on a particular “subject category”?<sup>27</sup> That is the issue this Article explores.

It is a vital question because offensiveness is instantiated today in several doctrines affecting First Amendment speech rights.<sup>28</sup> For example, the Court’s three-part test for obscenity adopted in *Miller v. California*<sup>29</sup> measures obscenity partly by whether content is “patently offensive.”<sup>30</sup>

Yet, this type of taking offense at viewing displays of sexual conduct does not embody the dangers traditionally associated with viewpoint discrimination as the Court has conceptualized it.<sup>31</sup> Justice Antonin Scalia made this clear more than

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<sup>23</sup> *Id.* at 32 (quoting *Tam*, 137 S. Ct. at 1763) (alteration in original).

<sup>24</sup> *Pomicter v. Luzerne Cty. Convention Ctr. Auth.*, 322 F. Supp. 3d 558, 576 (M.D. Pa. 2018).

<sup>25</sup> *Freedom from Religion Found. v. Abbott*, No. A-16-CA-00233-SS, 2017 U.S. Dist. LEXIS 170183, at \*16 (W.D. Tex. Oct. 13, 2017).

<sup>26</sup> *Id.* at \*18.

<sup>27</sup> *Tam*, 137 S. Ct. at 1766.

<sup>28</sup> In addition to the obscenity doctrine discussed immediately below, the Federal Communications Commission’s test for indecency on the broadcast airwaves entails considering whether the speech in question “depicts or describes sexual or excretory organs or activities in terms *patently offensive* as measured by contemporary community standards for the broadcast medium.” *In re WDBJ Television, Inc.*, Notice of Apparent Liability for Forfeiture, 30 F.C.C.R. 3024, 3027 (Mar. 23, 2015), [https://docs.fcc.gov/public/attachments/FCC-15-32A1\\_Rcd.pdf](https://docs.fcc.gov/public/attachments/FCC-15-32A1_Rcd.pdf) [<https://perma.cc/TW3C-3D5W>].

<sup>29</sup> 413 U.S. 15, 24 (1973) (stating that the trier of fact must examine whether: (a) the “‘average person, applying community standards’ would find the work . . . appeals to the ‘prurient interest’”; (b) the work offensively depicts or describes sexual conduct; and (c) the work “lacks serious literary, artistic, political, or scientific value”).

<sup>30</sup> *Id.*

<sup>31</sup> *See infra* note 39 and accompanying text (describing viewpoint discrimination as conceptualized by the Supreme Court in *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995)).

twenty-five years ago in *R.A.V. v. City of St. Paul*.<sup>32</sup> He wrote that “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.”<sup>33</sup> Scalia used obscenity—one of the few classes that is, in his words, proscribable—to illustrate this point.<sup>34</sup> He explained that “[a] State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience*—*i.e.*, that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages.”<sup>35</sup>

With this in mind, Part I of this Article uses two Supreme Court rulings to illustrate how offensiveness can exist independent of viewpoint discrimination. Next, Part II analyzes a third Supreme Court ruling to demonstrate how some cases, in fact, are hybrids in which offensiveness and viewpoint discrimination are inextricably linked. Part III then returns to *Tam* to suggest how the justices might have avoided conflating offensiveness with viewpoint discrimination. Finally, the Article concludes in Part IV by calling on the Court to exercise what might be considered better doctrinal hygiene in cases such as *Tam*. That is especially imperative because the First Amendment already “float[s] atop a tumultuous doctrinal sea.”<sup>36</sup> The Conclusion proposes two possible ways in which this might be done.

#### I. UNTANGLING DISTINCT DOCTRINES: THE *COHEN* AND *PACIFICA FOUNDATION* EXAMPLES OF SEPARATING OFFENSIVE-SPEECH CASES FROM ONES FOCUSING ON VIEWPOINT DISCRIMINATION

Equating offensiveness with viewpoint discrimination in *Tam*—holding that offensiveness and viewpoint discrimination are one in the same—and in subsequent lower-court rulings unnecessarily blurs doctrinal lines. Specifically, the boundary is now muddled between what traditionally might have been considered offensive-speech cases—*Cohen v. California*<sup>37</sup> and *FCC v. Pacifica Foundation*,<sup>38</sup> most notably—and viewpoint-discrimination cases in which the government targets “views taken by speakers on a subject” because of “the specific motivating ideology or the opinion or perspective of the speaker.”<sup>39</sup>

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<sup>32</sup> 505 U.S. 377 (1992).

<sup>33</sup> *Id.* at 388.

<sup>34</sup> *Id.* The Supreme Court held more than sixty years ago that obscenity is not protected by the First Amendment’s guarantee of free speech. *See* *Roth v. United States*, 354 U.S. 476, 485 (1957) (writing that “obscenity is not within the area of constitutionally protected speech or press”).

<sup>35</sup> *R.A.V.*, 505 U.S. at 388.

<sup>36</sup> Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2355 (2000).

<sup>37</sup> 403 U.S. 15 (1971).

<sup>38</sup> 438 U.S. 726 (1978).

<sup>39</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

In the former cases, this Article contends that offense is taken at *how* a message is being expressed—the *manner* or *mode* in which it is conveyed. Censorship, in turn, is impermissibly justified by the government in the interest of policing norms of public morality and civility in how people communicate and interact with each other.<sup>40</sup> A word such as “fuck” is censored in this scenario because its usage “is a cultural taboo”<sup>41</sup> in terms of how one should speak or talk, and thus it causes offense.<sup>42</sup>

Conversely, in the latter situation, discrimination is premised on the underlying substantive position, opinion, or perspective that a message conveys.<sup>43</sup> Censorship in these scenarios is wrongly justified by the government deeming one substantive position, opinion, or perspective more legitimate than another in the metaphorical marketplace of ideas.<sup>44</sup>

*Cohen v. California* neatly illustrates the fundamental difference between these perspectives.<sup>45</sup> In *Cohen*, the Supreme Court threw out Paul Robert Cohen’s conviction under a statute banning offensive conduct after he wore a jacket emblazoned with the words “Fuck the Draft” in a Los Angeles courthouse.<sup>46</sup>

If *Cohen* had been analyzed by the Court as a case about viewpoint discrimination, then, per Justice Kennedy’s logic in *Tam*, the relevant subject matter would have been the draft.<sup>47</sup> California, in turn, would have engaged in viewpoint discrimination if it punished *only* anti-draft messages like Cohen’s and permitted pro-draft ones. That would be a classic instance of viewpoint discrimination; one in which the government favors one substantive opinion or perspective on a single topic while restraining another.

It also would have been irrelevant under such a viewpoint-discrimination framework that Cohen used the word “fuck.”<sup>48</sup> Punishing him for “I object to the draft” would have amounted to viewpoint discrimination just as much as punishing

<sup>40</sup> This reflects former Yale Law School Dean Robert Post’s observation that First Amendment cases since the 1940s, including *Cohen v. California*, have “generally served the purposes of democracy by suspending the enforcement of civility rules.” ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 301 (1995).

<sup>41</sup> Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711, 1722 (2007).

<sup>42</sup> *Id.* at 1722 n.72 (“Tabooed words are today known as *obscene language*, *dirty words*, *four-letter words* . . . .” (quoting EDWARD SAGARIN, THE ANATOMY OF DIRTY WORDS 31 (1962))).

<sup>43</sup> See *Am. Freedom Def. Initiative v. King Cty.*, No. 17-35897, 2018 U.S. App. LEXIS 27581, at \*10 (9th Cir. Sept. 27, 2018) (“[W]e conclude that Metro’s disparagement standard discriminates, on its face, on the basis of viewpoint.”).

<sup>44</sup> See RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 6 (1992) (“The ‘marketplace of ideas’ is perhaps the most powerful metaphor in the free speech tradition.”); Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 998 (2003) (“The marketplace of ideas locates the value of free speech in finding the truth, and it makes the market the arbiter of truth or falsity.”).

<sup>45</sup> See 403 U.S. 15, 16, 20, 22–23 (1971).

<sup>46</sup> *Id.* at 16–17.

<sup>47</sup> *Id.* at 16.

<sup>48</sup> *Id.*

him for “Fuck the Draft” provided that, in both scenarios, California would have allowed Cohen to wear a jacket sporting “I support the draft.”<sup>49</sup> In brief, it is taking sides—not taking offense—about the merits of the draft that would have mattered under a viewpoint-discrimination analysis in *Cohen*.

The Court, however, did not analyze *Cohen* as a viewpoint-discrimination case.<sup>50</sup> Instead, it treated *Cohen* as an offensive-speech case. To wit, the central issue, after determining that the speech was neither obscene<sup>51</sup> nor likely to incite violence,<sup>52</sup> was whether “the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.”<sup>53</sup> In analyzing this issue, the Court focused not on whether California was discriminating against Cohen’s substantive anti-draft viewpoint. Rather, it focused on his manner of expression<sup>54</sup> and concomitant vagueness and line-drawing issues plaguing the concept of offensive expression for which Cohen was convicted.<sup>55</sup> As the Court wrote:

How is one to distinguish this from any other offensive word? . . .  
For, while the particular four-letter word being litigated here is

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<sup>49</sup> *Id.* at 16, 18.

<sup>50</sup> The Court in *Cohen* did observe, however, that censoring speech because words themselves cause offense could be used as a ruse to discriminate against viewpoints. *Id.* at 26. Specifically, it wrote that “we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.” *Id.*

<sup>51</sup> The Court explained that *Cohen* was:

[N]ot . . . an obscenity case. Whatever else may be necessary to give rise to the States’ broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen’s crudely defaced jacket.

*Id.* at 20 (citing *Roth v. United States*, 354 U.S. 476 (1957)).

<sup>52</sup> In rejecting this argument, the Court reasoned:

We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression.

*Id.* at 23.

<sup>53</sup> *Id.* at 22–23.

<sup>54</sup> *See id.* at 19 (noting that Cohen’s “conviction . . . rests squarely upon his exercise of the ‘freedom of speech’ . . . and can be justified, if at all, only as a valid regulation of the *manner* in which he exercised that freedom, not as a permissible prohibition on the *substantive message* it conveys” (emphases added)).

<sup>55</sup> *Id.* at 25.



perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.<sup>56</sup>

The Court also rebuffed the notion that California could censor the word "fuck" simply to police norms of civil communication and maintain "a suitable level of discourse within the body politic."<sup>57</sup> Justice John Marshall Harlan II explained that "[s]urely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us."<sup>58</sup> Only if "substantial privacy interests are being invaded in an essentially intolerable manner"<sup>59</sup> can speech be squelched "solely to protect others from hearing it."<sup>60</sup> Otherwise, the "emotive function" of speech served by offensive words like Paul Robert Cohen's must prevail.<sup>61</sup> The remedy for those who take offense in public places at messages such as Cohen's is simply to avert the eyes.<sup>62</sup>

*Cohen's* dialectic between the cognitive and emotive functions of speech taps into the difference between censoring speech because of its substantive viewpoint (cognitive) and censoring speech because it causes emotional upheaval (emotive).<sup>63</sup> In other words, while viewpoint-discrimination cases are about what *substantive idea* is being said and censored, offensive-speech cases are about the *emotional impact* (rather than the cognitive meaning) of speech.<sup>64</sup> The latter is an insufficient reason, standing alone, for squelching expression.<sup>65</sup>

In a nutshell, "fuck" is what offended in *Cohen*, not Cohen's viewpoint about conscription.<sup>66</sup> "Fuck" is not a viewpoint. It is not even a viewpoint about sex. It is, instead, a word that violates certain norms of civil discourse in polite society and thus gives offense to some people by its very utterance. Justice Alito thus was wrong

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 23.

<sup>58</sup> *Id.* at 25.

<sup>59</sup> *Id.* at 21.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 26.

<sup>62</sup> *Id.* at 21.

<sup>63</sup> The Court wrote that "much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force." *Id.* at 26.

<sup>64</sup> *See id.* at 18, 22.

<sup>65</sup> *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (observing the Court's "longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience").

<sup>66</sup> *See Cohen*, 403 U.S. at 18.

in *Tam* when he flatly proclaimed, in oversimplistic fashion, that “[g]iving offense is a viewpoint.”<sup>67</sup> Perhaps better put, giving offense *sometimes* may be a viewpoint,<sup>68</sup> but giving offense is not *always* a viewpoint.

The Supreme Court’s decision in *Federal Communications Commission v. Pacifica Foundation*,<sup>69</sup> which upheld the FCC’s power to censor indecent speech in broadcasting, also illustrates the difference between offensive-speech cases and viewpoint-discrimination cases.<sup>70</sup> *Pacifica Foundation*, in brief, was an offensive-speech case.<sup>71</sup> The Court framed the issue before it as “whether a broadcast of *patently offensive* words dealing with sex and excretion may be regulated because of its content.”<sup>72</sup> The FCC’s concern about George Carlin’s monologue regarding seven filthy words<sup>73</sup> that gave rise to the case was *not* about Carlin’s substantive viewpoint that society’s attitudes to certain words were silly, but rather about “the way in which it [was] expressed.”<sup>74</sup> Indeed, the Court observed that “[o]ur society has a tradition of performing certain bodily functions in private, and of severely limiting the public exposure or discussion of such matters. Verbal or physical acts exposing those intimacies are offensive *irrespective of any message that may accompany the exposure.*”<sup>75</sup> The Court added that:

If there were any reason to believe that the Commission’s characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four-letter words—First Amendment protection might be required. But that is simply not this case.<sup>76</sup>

Ultimately, the Court found that Carlin’s words were simply nuisances, unfit for children to hear at times of day when they were likely to be in the broadcast audience.<sup>77</sup> It was the danger of minors learning those offensive words—not any viewpoint attached to them—that most concerned the Court.<sup>78</sup> As the next Part briefly

<sup>67</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

<sup>68</sup> See Ned Snow, *Denying Trademark for Scandalous Speech*, 51 U.C. DAVIS L. REV. 2331, 2335 (2018) (“Giving offense is a viewpoint if, and only if, the offense arises as a result of the idea itself.”).

<sup>69</sup> 438 U.S. 726 (1978).

<sup>70</sup> See *id.* at 745–46 (explaining that the FCC punished Carlin’s monologue simply because it was patently offensive, not because of any viewpoint expressed by the monologue).

<sup>71</sup> *Id.* at 746.

<sup>72</sup> *Id.* at 745 (emphasis added).

<sup>73</sup> Carlin’s filthy words were “shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.” *Id.* at 751.

<sup>74</sup> *Id.* at 746 n.22.

<sup>75</sup> *Id.* at 746 n.23 (emphasis added).

<sup>76</sup> *Id.* at 746.

<sup>77</sup> *Id.* at 749–51.

<sup>78</sup> See *id.* at 749 (“[B]roadcasting is uniquely accessible to children, even those too young

illustrates, however, there are some cases in which an offensive mode of expression is inextricably intertwined with the substantive viewpoint expressed.

## II. A HYBRID CASE ILLUSTRATING WHAT HAPPENS WHEN LINES BLUR:

### *TEXAS V. JOHNSON*

The Court's decision in *Texas v. Johnson*,<sup>79</sup> which upheld the right to burn the American flag "as a means of political protest,"<sup>80</sup> represents an instance of blurring the lines between taking offense at the manner and mode of communication and taking offense at the underlying substantive viewpoint. The Texas statute at issue was designed to protect the American flag "against impairments that would cause *serious offense* to others"<sup>81</sup> and thus targeted "only those severe acts of physical abuse of the flag carried out in a way likely to be *offensive*."<sup>82</sup> The statute was justified, Texas contended, to preserve "the flag as a symbol of nationhood and national unity."<sup>83</sup> Gregory Lee Johnson burned the flag as a means of protesting against President Ronald Reagan and his policies, which Johnson viewed as unpatriotic.<sup>84</sup>

*Johnson* can be analyzed as either a viewpoint-discrimination case or as an offensive-speech case. *Johnson* constitutes a viewpoint-discrimination case to the extent that the defendant was punished for his negative views about the American flag—views that conflicted with Texas's positive position of the flag as a symbol of national unity.<sup>85</sup> As Justice Brennan wrote for the majority, Johnson argued:

[T]hat the State's desire to maintain the flag as a symbol of nationhood and national unity assumes that there is only one proper view of the flag. Thus, if Texas means to argue that its interest does not prefer *any* viewpoint over another, it is mistaken; surely one's attitude toward the flag and its referents is a viewpoint.<sup>86</sup>

More simply put, if Johnson was punished because of his negative perspective toward either the American flag or the policies of President Reagan that the flag supposedly represented, then *Johnson* was an open-and-shut case of viewpoint discrimination.<sup>87</sup> The topic or subject matter was either the American flag or Reagan's policies, and

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to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant.").

<sup>79</sup> 491 U.S. 397 (1989).

<sup>80</sup> *Id.* at 399.

<sup>81</sup> *Id.* at 411 (emphasis added).

<sup>82</sup> *Id.* (emphasis added).

<sup>83</sup> *Id.* at 413.

<sup>84</sup> *Id.* at 406.

<sup>85</sup> *Id.* at 412–13.

<sup>86</sup> *Id.* at 413 n.9.

<sup>87</sup> *See id.* at 416–17.

the government of Texas, in turn, targeted only a subset of views—namely negative ones—about those topics for punishment.<sup>88</sup>

*Johnson* can also be viewed as an offensive-speech case. That is because it also was the manner or mode of Johnson’s expression of his negative views about the American flag and Reagan’s policies that allegedly caused offense.<sup>89</sup> In brief, Johnson would not have been punished had he simply handed out flyers stating, “I hate the American flag and everything it stands for, including President Reagan’s policies.”<sup>90</sup> He would not, in other words, have been prosecuted for those negative opinions, perspectives, and viewpoints about either the American flag or Reagan’s policies using a printed-word-only mode of expression. Instead, Johnson was prosecuted because the manner and mode in which he conveyed his ideas—the act of burning the American flag—allegedly causes offense.<sup>91</sup> Viewed in this light, he was punished because his method of communicating a negative message violated norms of civil and proper discourse.

Ultimately, the Court in *Johnson* famously remarked that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>92</sup> This captures well the hybrid nature of *Johnson*. It was Johnson’s chosen mode of expressing (burning the American flag) an idea (disagreement with the policies of the Reagan presidency and contempt for the flag as a symbol of national unity) that was so offensive and disagreeable.<sup>93</sup> Johnson, in other words, cannot be punished under the First Amendment for either of two reasons—because his manner or mode of expressing a viewpoint offends some people or because the government dislikes and disfavors his underlying substantive viewpoint.<sup>94</sup> The First Amendment, in a nutshell, protects *both* offensive modes of expression and disagreeable viewpoints from government censorship.

### III. DIGGING DEEPER INTO *MATAL V. TAM*

The problem in *Matal v. Tam* of equating *giving offense* with *viewpoint discrimination* could have been avoided in two possible ways. First, the Court could have treated the case as one of pure viewpoint discrimination. It could have done this by focusing on the fact that the USPTO possessed power under federal law to deny registration only to negative marks—but not positive ones—about individuals.<sup>95</sup> To

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<sup>88</sup> *Id.* at 411.

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

<sup>90</sup> *See id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 414.

<sup>93</sup> *Id.* at 411.

<sup>94</sup> *See id.* at 414, 416.

<sup>95</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1755 (2017).

take this tack, the Court simply would have interpreted the meaning of the key statutory word “disparage”<sup>96</sup> more consistently with its dictionary definition. *Disparage* means “[to] speak slightingly about,” and synonyms include “[to] belittle” and “[to] denigrate.”<sup>97</sup> This definition is not identical to that of the word *offensive*.<sup>98</sup> Antonyms for *disparage*, in turn, are “[to] applaud” and “[to] laud.”<sup>99</sup>

The statutory clause at issue in *Tam* that allowed the USPTO to deny registration to marks that “may disparage . . . persons”<sup>100</sup> thus simply could have been interpreted to mean that the USPTO could deny registration to marks that are *negative* about individuals, while allowing them to register marks that are *positive* about those same people. In fact, Justice Alito hinted at such an approach when he called the disparagement provision “a happy-talk clause.”<sup>101</sup> He noted that it “applies to trademarks like the following: ‘Down with racists,’ ‘Down with sexists,’ ‘Down with homophobes.’”<sup>102</sup> Not one of those examples is offensive in terms of the manner or mode in which it is phrased. Instead, each is simply a negative statement about a group of individuals, rather than an opposing positive one, such as “Up with racists.”<sup>103</sup> Put differently and in the factual context of *Tam*, the Court could have focused on the fact that the disparagement clause applied to “Down with Asians” but not to “Up with Asians,” thereby providing a tidy way of analyzing *Tam* as an unadulterated case of viewpoint discrimination. It would have allowed the Court not to conflate its offensive-speech jurisprudence with its principles against viewpoint discrimination.

An alternative approach for analyzing *Tam* would simply have been to address it as an offensive-speech case. The Court could have focused on the word “slants” and, in turn, reasoned that the USPTO cannot deny registration to that word simply because it violates norms of civil conversation in identifying or describing Asians.<sup>104</sup> In this sense, the use of “slants” offends, much like the word “fuck,” as a type of cultural taboo.<sup>105</sup> Under this path, the Court could have viewed the USPTO’s use of the disparagement clause as an impermissible tool or weapon to cleanse discourse by removing from what the Court in *Cohen* called “distasteful” speech.<sup>106</sup>

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<sup>96</sup> 15 U.S.C. § 1052(a) (2012).

<sup>97</sup> *Disparage*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/disparage> [<https://perma.cc/A89T-3ABS>].

<sup>98</sup> Offensive remarks are ones that “caus[e] displeasure or resentment” or “caus[e] someone to feel hurt, angry, or upset.” *Offensive*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/offensive> [<https://perma.cc/98VF-VDCD>].

<sup>99</sup> MERRIAM-WEBSTER, *supra* note 97.

<sup>100</sup> 15 U.S.C. § 1052(a) (2012).

<sup>101</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017).

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

<sup>103</sup> *See id.* at 1754.

<sup>104</sup> *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

<sup>105</sup> Fairman, *supra* note 41, at 1722.

<sup>106</sup> *Cohen v. California*, 403 U.S. 15, 25 (1971).

## CONCLUSION

Before the Supreme Court's observation in *Matal v. Tam* that "[g]iving offense is a viewpoint" becomes deeply entrenched in First Amendment jurisprudence and widely embraced by lower courts, it is important to understand that giving offense is not synonymous with viewpoint discrimination. As this Article illustrated, both *Cohen v. California* and *FCC v. Pacifica Foundation* demonstrate that offense may exist independently from viewpoint discrimination.<sup>107</sup>

*Tam*, in essence, equated offensive name-calling with viewpoint discrimination.<sup>108</sup> For full-throated free speech advocates, that certainly was wonderful news, reinforcing the notion that what some might consider to be hate speech is protected by the First Amendment.<sup>109</sup> *Tam*, however, conflated the general rule from cases such as *Cohen*—that speech cannot be censored merely because it offends—with the principle that the government cannot favor one viewpoint over another in debate on any substantive topic or subject matter.<sup>110</sup> Although the Court in *Tam* reached the correct conclusion that the disparagement clause violated the First Amendment's guarantee of free speech,<sup>111</sup> it easily could have arrived at that same result, as described in Part III, by taking either one of two separate paths. Specifically, it could have held that the government cannot ban phrases like "The Slants" because they offend—as a taboo manner of speaking about a group of people—norms of civility. Alternatively, it could have resolved—as an instance of viewpoint discrimination—that the government cannot permit only laudatory, celebratory, or positive viewpoints about a group of people, e.g., "Asians rock!," while banning derogatory, critical or negative viewpoints about that same group, e.g., "Asians suck!"

Perhaps one way to untangle the difference in the future is for the Court initially to ask whether it is *how* a message is being expressed—the manner or mode of expression, such as whether it involves "taboo language"—to which offense is taken as "a reaction to the word"—in question—or whether it is a *substantive perspective* about an idea, person, or group of persons that is the primary reason for it being caught in the cross-hairs of censorship. If this were the threshold question of analysis in a

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<sup>107</sup> See *supra* Part I (analyzing both *Cohen* and *Pacifica Foundation*).

<sup>108</sup> See *supra* Introduction, Part I.

<sup>109</sup> As Justice Alito explained in *Tam*, "[s]peech 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.'" *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)). See Leslie Kendrick, *The Answers and the Questions in First Amendment Law*, in CHARLOTTESVILLE 2017: THE LEGACY OF RACE AND INEQUITY 70 (Louis P. Nelson & Claudrena N. Harold eds., 2018) (observing that "[i]n America, hate speech is not a legal category").

<sup>110</sup> See *supra* Introduction, Part I.

<sup>111</sup> *Tam*, 137 S. Ct. at 1765.

case like *Tam*, then the Court could take a cleaner approach in its examination that does not unnecessarily blend different doctrines.

In other words, in a case such as *Cohen v. California*,<sup>112</sup> the Court would start by asking whether it is the mere use of the word “fuck” in an anti-draft message that is the primary reason for censorship, or whether it is the underlying perspective about the draft that triggers censorship.<sup>113</sup> Only in cases where the primary reason for censorship is not clear as between these two paths should the Court then proceed to analyze them under both approaches. In analyzing such cases under both tacks, however, the Court should nonetheless keep separate its two analyses rather than entangling them.

A second possible way to keep offensive-speech cases largely separate from viewpoint-discrimination principles is to deploy the Court’s dichotomy in *Cohen* between the emotive and cognitive functions of speech.<sup>114</sup> Under this methodology, if the primary reason for censorship is to protect individuals from the emotional pain and anguish caused by hearing a particular word or phrase, then the case is better analyzed as an offensive-speech case. Conversely, if the primary reason for censorship is to protect individuals from hearing a substantive viewpoint or perspective—something other than just name-calling—because it may cause them to think differently about a particular issue or to take a different course of action than they would without hearing it, then the case is better addressed as one of viewpoint discrimination.

Neither proposal may work in all situations and, as Part II suggested, there may be some cases, such as *Texas v. Johnson*, where offensive speech and viewpoint discrimination are seemingly inextricably knotted.<sup>115</sup> Both suggestions, however, may help the Court to distinguish better between two doctrinal strands of First Amendment jurisprudence that were muddled in *Matal v. Tam*.

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<sup>112</sup> See *supra* Part I (addressing *Cohen*).

<sup>113</sup> See *supra* Part I.

<sup>114</sup> See *supra* notes 63–65 and accompanying text.

<sup>115</sup> See *supra* Part II.