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That's Fuct: Why the Political Question Doctrine Should Have Barred the Supreme Court from Deciding Iancu v. Brunetti

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THAT'S FUCT: WHY THE POLITICAL QUESTION DOCTRINE SHOULD HAVE BARRED THE SUPREME COURT FROM DECIDING *IANCU V. BRUNETTI*

BY JENNIFER L. MADARAS[1]

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I. INTRODUCTION

On June 24, 2019, the United States (U.S.) Supreme Court decided the most anticipated intellectual property case of 2019: *Iancu v. Brunetti*.[2] In 2011, Erik Brunetti applied for federal registration over his trademark FUCT that was used in connection with various apparel items.[3] Erik Brunetti pronounces FUCT as four letters, one after the other: F-U-C-T.[4] The examining attorney at the U.S. Patent and Trademark Office (PTO), however, thought that FUCT was the past tense of the work "fuck" and a scandalous trademark.[5] Therefore, the examining attorney denied Erik Brunetti's application, citing the Lanham Act's prohibition against federally registering "immoral" or "scandalous" trademarks (herein "the immoral or scandalous bar").[6]

After unsuccessfully appealing his case to the Trademark Trial and Appeal Board (TTAB), Erik Brunetti brought a First Amendment challenge to the immoral or scandalous bar. This challenge would plunge both the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) and the Supreme Court into a sea of uncertainty, showcasing just how underequipped the judicial system was to decide this case. This article will argue that the Supreme Court was not equipped to decide this First Amendment challenge because the case contained an inextricable political question. Specifically, two *Baker v. Carr*[7] factors are inextricable from *Brunetti*: (1) lack of

[2] Iancu v. Brunetti, 139 S.Ct. 2294 (2019).

[3] *Id.* at 2297.

[4] *Id.*

[5] In Re Brunetti, 877 F.3d 1330, 1337 (Fed. Cir. 2017).

[6] 15 U.S.C. § 1052(a) states that "[n]o trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it [] consists of or comprises immoral, deceptive, or scandalous matter."

[7] 369 U.S. 186 (1962).

judicially discoverable and manageable standards and (2) impossibility of deciding the issue without an initial policy determination of a kind clearly for nonjudicial discretion.

To begin, this article will briefly explore the history of trademark law from the common law beginnings until the passage of the Lanham Act[8] in 1905. This historical review is necessary because it showcases the policy decisions that Congress has made regarding trademark law; it is these Congressional policy decisions that set the stage for *Brunetti* over one hundred years before the Supreme Court decided the case.[9] Next the article will examine *Matal v. Tam,*[10] the predecessor case to *Brunetti*. *Tam* plays a critical role in an analysis of *Brunetti* because *Tam* was the first case that the Supreme Court decided that involved a First Amendment challenge to a Lanham provision.[11] *Tam* centered around the "disparagement" bar of the Lanham Act.[12]

The article will then examine the decisions of both the Federal Circuit and the Supreme Court Justices in *Brunetti*. The Federal Circuit sided with Erik Brunetti and held that the bar was unconstitutional because it violated the First Amendment, as the bar impermissibly discriminated based on content.[13] The U.S. Supreme Court granted certiorari,[14] and the majority opinion, authored by Justice Kagan, also held the bar violated the First Amendment.[15] However Justice

[8] 15 U.S.C. § 85(a) (1905).

[9] As discussed in Part II, Congress made the policy decision to ban the federal registration of immoral or scandalous trademark in 1905.

[10] Matal v. Tam, 137 S.Ct. 1744 (2017).

[11] Tam is discussed in Part III, and this paper analyzes the two main opinions: Justice Alito's opinion and Justice Kennedy's opinion.

[12] Tam, 137 S.Ct. at 1751.

[13] In Re Brunetti, 877 F.3d at 1341 (holding "we conclude the provision impermissibly discriminates based on content in violation of the First Amendment.").

[14] Brunetti, 139 S.Ct. at 2298.

[15] *Id.* at 2302.

Kagan believed the bar violated the First Amendment because it acted as a viewpoint-based restriction on expression.[16]

Chief Justice Roberts, Justice Breyer, and Justice Sotomayor disagreed with the Federal Circuit and Justice Kagan; these Justices believed that the term "scandalous" could be read to only bar federal registration for trademarks that are obscene, vulgar, or profane.[17] Additionally, Justices Breyer and Sotomayor disagreed with both the Federal Circuit and Justice Kagan on what type of discrimination to label the bar. Justice Breyer believes the category label is unimportant[18] while Justice Sotomayor believes the scandalous bar is a form of permissible viewpoint-neutral content discrimination.[19] These blatant and fundamental disagreements between the Justices highlight the issue of the judiciary deciding political questions – the judiciary is simply not prepared to decide them.

After examining the decision of the Federal Circuit and the Justices, this article explains the history of the political question, highlighting how the Supreme Court has depowered the doctrine over the last century. Then the article examines the *Brunetti* decisions under two *Baker* factors to argue that *Brunetti* should have been dismissed by the Supreme Court. By dismissing *Brunetti* as a political question, the Supreme Court could right the dangerous notion that the Supreme Court has the right to decide every case. Instead, the Supreme Court chose to continue relying on the notion of judicial supremacy.[20]

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[16] *Id.* at 2299 ("the key question becomes: Is the 'immoral or scandalous' criterion in the Lanham Act viewpoint-neutral or viewpoint-based? It is viewpoint-based.").

[17] *Id*. at 2303 (Kennedy, J); *Id.* (Breyer, J.); *Id*. 2311 (Sotomayor, J.).

[18] *Id*. at 2304 (Breyer, J).

[19] *Id*. at 2311 (Sotomayor, J.).

[20] In this article, judicial supremacy refers to the idea that the judicial branch has the power, right, and duty to decide every case that is before it, regardless of whether the legislative or executive branch are involved.

The article will conclude by examining the possible implications that the *Brunetti* decision has on trademark law. Throughout the opinions of *Brunetti*, the Justices continuously threaten trademark owners by severely downplaying the importance of federal trademark registration. This downplaying could dramatically decrease the value of trademarks and cause trademark owners to lose their investment in the trademark; or the Justices could cause trademark owners to forgo the federal trademark registration process entirely. In either of these cases, the public would also suffer. Federal trademark registration creates the opportunity for the public to choose to purchase high quality products. Should trademark holders lose incentive to federally register their trademarks, trademark holders would have less incentive to create high quality products or services because they would gain little from federally registering. Thus, the public would be unable to recognize a product or service as coming from a brand with high or low quality.

Finally, this article discusses how vulnerable trademark law is because the Constitution contains no provision granting Congress the right to grant trademarks. Therefore, if the Supreme Court were to continue on the path of using judicial supremacy to decide trademark cases such as *Brunetti*, it could eventually be the Supreme Court, and not Congress, that regulates trademarks.

II. GENERAL TRADEMARK LAW

Trademarks have received important benefits, at common law, since the beginning of the United States.[21] The oldest reported trademark case in Anglo-American law is known as *Sandforth's Case*,[22] and it was decided more than one hundred years before the United States issued the Declaration of Independence in 1776.[23] While the exact date *Sandforth's Case* was decided is unknown, it was briefly referenced in *Southern v. How*,[24] which was decided in 1618.[25] In *Sandforth's Case*, a senior cloth maker was found to have a cause of action against a junior competitor who counterfeited the senior cloth maker's mark on inferior cloths.[26] Scholars believe that this case conclusively shows that the English courts, as early as 1584, recognized a common law right to certain trademark benefits, such as the right to be free from trademark infringement.[27] Despite the early common law start to trademark law, it would take at least 252 years for the United States to have a federal trademark statute granting similar benefits.

[21] *See* Scandinavia Belting Co. v. Asbestos Rubber Works of America, Inc., 257 F. 937, 941 (2nd Cir. 1919) ("property in trademarks, exclusive and absolute, has existed and been recognized as a legal possession, which may be bought and sold and transmitted, from the earliest days of our recorded jurisprudence.").

[22] Keith M. Stolte, *How Early Did Anglo-American Trademark Law Begin? An Answer to Schechter's Conundrum*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 505, 506 (1998).

[23] *Id.*

[24] Popham 143, 79 Eng. Rep. 1243 (1618).

[25] Stolte, *supra* note 22, at 506.

[26] *Id*.

[27] *Id*.

A. ACT OF JULY 8, 1870

The first federal trademark legislation was enacted by Congress in 1870.[28] This legislation attempted to confer exclusive national trademark rights to those who registered their marks with the United States Patent Office[29].[30] "[A]ny . . . who are entitled to the exclusive use of any lawful trade-mark or who intend to adopt and use any trade-mark for exclusive use within the United States, may obtain protection for such lawful trade-mark by complying with the following requirements . . ."[31] This statute was declared unconstitutional by the U.S. Supreme Court nine years later.[32]

The Supreme Court thought that Congress relied on Article 1, Section 8, Clause 8 of the U.S. Constitution to pass the legislation.[33] Article 1, Section 8, Clause 8 authorizes Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[34] In declaring the statute unconstitutional, the Supreme Court noted that the legislation gave exclusive rights upon registration, and the rights did not, "depend upon novelty, invention, discovery, or any work of the brain. It require[d] no fancy or imagination, no genius, no laborious thought . . . we are unable to

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[28] Act of July 8, 1870, ch. 230, §§ 77-84, 16 Stat. 198, 210-12 (can be viewed at: https://www.loc.gov/law/help/statutes-at-large/41st-congress/session-2/c41s2ch230.pdf).

[29] The Act itself is called, "[a]n Act to revise, consolidate, and amend the Statutes relating to Patents and Copyrights." *Id.* Therefore, this legislation is commonly referred to as either the "Patent Act of 1870" or "Copyright Act of 1870."

[30] *Id.*

[31] *Id.* at § 77.

[32] In re Trade-Mark Cases, 100 U.S. 82, 93 (1879).

[33] *Id.* ("it is a reasonable inference that this part of the statute [referring to the trademark provisions] also was, in the opinion of Congress, an exercise of the power found in that clause of the Constitution.").

[34] U.S. CONST. art. I, § 8, cl. 8.

see any such power in the constitutional provision concerning authors and inventors, and their writings and discoveries."[35] The Supreme Court was also concerned that Congress was attempting to regulate all trade, a power Congress lacked.[36] Therefore, the Supreme Court cautioned Congress to only create trademark legislation that fell within the Commerce Clause.[37]

B. ACT OF 1881

The next federal trademark statute was passed in 1881.[38] Congress confined this state to trademarks only used in commerce "with Foreign nations or the Indian Tribes."[39] Thus, the statute did not apply to interstate commerce.[40] Trademark scholars speculate that the narrow scope of this statute was a direct reaction to the Supreme Court's decision in *Trade-Mark Cases*.[41] This narrow trademark statute would remain in effect for the next twenty five years.[42]

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[35] Trade-Mark Cases, 100 U.S. at 94.

[36] *See id.* at 96-97 (under the commerce clause, "the power of regulation there conferred on Congress is limited to commerce with foreign nations, commerce among the States, and commerce with the Indian tribes . . . there still remains a very large amount of commerce . . . which . . . is beyond the control of Congress. If [an act's] main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress.").

[37] *Id.*

[38] Beverly W. Pattishall, *The Constitutional Foundations of American Trademark Law*, 78 TRADEMARK REPORTER 456, 461-62 (1988).

[39] *Id.*

[40] Shontavia Johnson, *Trademark Territoriality in Cyberspace: An Internet Framework for Common-Law Trademarks*, 29 BERKELEY TECH. L.J. 1253, 1264 n.53 (2014).

[41] Kenneth Pierce, *The Trademark Law Revision Act*, 64-MAY FLA. B.J. 35, 37 (1990).

[42] *Id.*

C. ACT OF FEBRUARY 20, 1905

In 1905, Congress passed the second federal trademark statute.[43] This legislation was the first time Congress directly and explicitly forbid the registration of "scandalous" and "immoral" trademarks.[44] Congress made a clear and conscious choice to use this express language. This is proven by comparing the 1905 statute to the Act of 1881. The Trademark Act of 1881 did not center around morality; instead, the Act of 1881 simply stated that "no alleged trade-mark shall be registered unless the same appears to be lawfully used ...."[45] Therefore, Congress made the policy decision to bar the federal registration of immoral or scandalous trademarks. This policy decision would remain unchallenged for more than one hundred years. Then *Brunetti* reached the U.S. Supreme Court in 2019,[46] and the immoral or scandalous bar would serve as a major disagreement between the Justices.[47]

D. THE LANHAM ACT

The next version of federal trademark statute was the Lanham Act,[48] and the Lanham Act was signed into law in 1946.[49] This legislation was the first time Congress bared the registration

[43] 15 U.S.C. § 85(a) (1905).

[44] *Id*. at § 5(a) ("no mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark unless such mark [] (a) Consists of or comprises immoral or scandalous matter.").

[45] *See* Stephen R. Baird, *Moral Intervention in the Trademark Arena: Barring the Registration of Scandalous and Immoral Trademarks* 83 TMR 661, 666 n.15 (1993).

[46] *See* Brunetti, 139 S.Ct. 2294.

[47] *See* discussion *infra* Part IV.

[48] The act was named after its original sponsor, Texas Congressman Fritz Lanham. Pierce, *supra* note 33, at n.1.

[49] *Id*. at 37.

of "disparaging" trademarks.[50] The "disparagement" bar would remain unchallenged until the U.S. Supreme Court decided the constitutionality of the bar in the 2017 case *Matal v. Tam*.[51] The original Lanham Act would be subsequently revised by the Trademark Law Revision Act of 1988,[52] but a discussion of the changes is unnecessary for the purposes of this study.[53]

III. *MATAL V. TAM*

To understand the Justices' opinions in *Brunetti*, a thorough discussion of *Matal v. Tam*[54] is necessary because every opinion in *Brunetti* refers to *Tam*. Thus, a basic understanding of *Tam* is necessary to understand the differing Justices' opinions in *Brunetti*. *Tam* was the first case that the U.S. Supreme Court heard that involved a First Amendment challenge to the Lanham Act, and this case was decided just two terms prior to *Brunetti*.[55] In *Tam*, Simon Tam sought federal trademark registration of the mark "THE SLANTS" for his musical rock group.[56] The PTO denied Tam's application under the "disparaging bar" of the Lanham Act.[57] This bar prohibits the federal

[50] 15 U.S.C. § 1052 (1946) (prohibiting the registration of marks that "may disparage persons, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute").

[51] *See* discussion *infra* Part III.

[52] *See* Todd B. Carver, *What is the Impact of the Trademark Law Revision Act of 1988?*, 16 U. DAYTON L. REV. 129, 136 n.32 (1990).

[53] For a thorough analysis of the Trademark Law Revision Act of 1988, refer to Todd Carver's law review article, *What is the Impact of the Trademark Law Revision Act of 1988?* Carver, *supra* note 43.

[54] Tam, 137 S.Ct. 1744.

[55] *Id*.

[56] *Id.* at 1747.

[57] *Id*.

registration of trademarks 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."[58] Tam's application was denied because "Slants" has historically been a derogatory term for people of the Asian descent.[59]

Tam appealed the denial before the examining attorney and then before the TTAB.[60] Tam wanted the trademark in hopes to re-appropriate the derogatory term.[61] The denial of his application was affirmed by both the examining attorney and the TTAB.[62] Tam then appealed the denial to the Federal Circuit.[63] The en banc Federal Circuit found the disparagement clause was facially unconstitutional under the Free Speech Clause of the First Amendment because the bar engaged in viewpoint-based discrimination.[64] Viewpoint discrimination is discrimination based on the ideas or opinions the speech conveys.[65] The Government believed the disparagement bar was constitutional, and thus the Government filed a petition for certiorari which the U.S. Supreme

[58] 15 U.S.C. §1052(a) (2006).

[59] Tam, 137 S.Ct. at 1754 (the examining attorney at the PTO relied, in part, on the fact that many dictionaries define "slants" or "slant-eyes" as an offensive or derogatory term for people of the Asian decent to reach this conclusion).

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id*.

[64] *Id.*

[65] Brunetti, 139 S.Ct. at 2299 (citing Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829–830 (1995)).

Court granted.[66] For the first time in history, the Supreme Court had to decide the constitutionality of a Lanham Act provision under the First Amendment's Free Speech Clause.[67]

The Supreme Court affirmed the Federal Circuit. Justice Alito,[68] writing for the Court, came to two main conclusions: (1) the disparagement clause violated the First Amendment because the bar was viewpoint based;[69] and (2) trademarks are not government speech[70] because "trademarks have not traditionally been used to convey a Government message . . . [a]nd there is no evidence that the public associates the contents of trademarks with the Federal Government."[71] This is where the Justices' agreement ended; the eight Justices[72] divided evenly between two subsequent opinions written by Justice Alito and Justice Kennedy.

Justice Alito[73] focused primarily on two points: (1) the government's argument that the Court's subsidized speech cases controlled the outcome was unpersuasive;[74] and (2) it was unnecessary to decide whether trademarks are commercial speech and thus subject to the relaxed

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[66] Tam, 137 S.Ct. at 1754.

[67] *Id.*

[68] Joined by Chief Justice Roberts and Justices Kennedy, Thomas, Ginsburg, Breyer, Sotomayor, and Kagan.

[69] *Id.* at 1751 (holding "this provision violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.").

[70] This is an important distinction because the "Free Speech Clause ... does not regulate government speech." *Id.* at 1757 (citing Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009)). Thus, if trademarks were considered a government speech, a First Amendment challenge to the Lanham Act would be unsuccessful because the First Amendment "does not say that Congress and other government entities must abridge their own ability to speak freely." *Id.*

[71] *Id.* at 1760.

[72] Justice Gorsuch took no part in the consideration or decision of the case.

[73] Joined by Chief Justice Roberts and Justices Thomas and Breyer.

[74] The Court's previous subsidized speech cases involved the Government providing cash subsidies or their equivalent, while trademark registration requires an applicant to pay a filing fee and continue paying a fee every ten years to maintain the registration. *Id.* at 1761 (Alito, J.).

scrutiny of *Central Hudson*[75] because the disparagement bar could not withstand even *Central Hudson* review.[76] *Central Hudson* requires that the speech restriction serve a substantial interest, be narrowly drawn, and not extend further than the interest that it serves.[77] The government argued that the disparagement clause served two interests.[78] Firstly, the government was interested in "preventing underrepresented groups from being bombarded with demeaning messages in commercial advertising."[79] Secondly, the government was interested in "protecting the orderly flow of commerce," which is disrupted by trademarks disparaging race, gender, ethnicity, national origin, religion, sexual orientation, and similar demographic classification.[80] Justice Alito struck down both these interests, thus the disparagement bar flunked the *Central Hudson* test.[81]

Justice Kennedy, on the other hand, never mentioned *Central Hudson*. Instead, Justice Kennedy[82] focused almost exclusively on viewpoint discrimination.[83] For Justice Kennedy, "[a]t its most basic, the test for viewpoint discrimination is whether —within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views

[75] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

[76] Tam, 137 S.Ct. at 1764 (Alito, J.) (citing Central Hudson, 447 U.S. at 564-565).

[77] *Id.*

[78] *Id*.

[79] *Id.* (internal quotation marks omitted).

[80] *Id.*

[81] Justice Alito rejected the first interest because "[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." *Id.* (citing United States v. Schwimmer, 279 U.S. 644, 655 (1929). Justice Alito rejected the second interest because "the disparagement clause is not narrowly drawn to drive out trademarks that support invidious discrimination. The clause reaches any trademark that disparages any person, group, or institution." *Id.* at 1764-65 (Alito, J.).

[82] Joined by Justices Ginsburg, Sotomayor, and Kagan.

[83] *Id.* at 1765-69 (Kennedy, J.).

expressed."[84] And under this test, Justice Kennedy thought the disparagement bar was "the essence of viewpoint discrimination" because "an applicant may register a positive or benign mark but not a derogatory one, [and] the law thus reflects the Government's disapproval of a subset of messages it finds offensive."[85] As the disparagement bar engaged in viewpoint discrimination, it was irrelevant for Justice Kennedy to determine whether the disparagement clause regulated commercial speech;[86] regardless of whether or not a government regulation of speech targets commercial speech, a regulation of speech engaging in viewpoint discrimination must receive heightened scrutiny.[87]

Justice Thomas concurred and chose to write separately because he "continue[s] to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as commercial."[88]

The opinions of both Justice Alito and Justice Kennedy's left two important question unanswered: (1) whether *Central Hudson* is the appropriate test for deciding free speech challenges to provisions of the Lanham Act[89] and (2) whether trademarks are pure commercial speech.[90] As

[84] *Id.* at 1766 (Kennedy, J.).

[85] *Id.*

[86] *Id.*

[87] *Id.* at 1767 (Kennedy, J.).

[88] *Id.* at 1769 (citing Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 572 (2001) (Thomas, J., concurring in part and concurring in judgment)).

[89] *Id.* at 1764 n.17 (Alito, J.) (leaves open whether Central Hudson is the appropriate test for deciding free speech challenges to provisions of the Lanham Act); see also *id.* at 1767 (Kennedy, J.) (same).

[90] *Id.* at 1764 (Alito, J.) (leaves open whether trademarks are commercial speech); see also *id.* at 1767 (Kennedy, J.) (same).

these are important questions for a First Amendment challenge to the Lanham Act, one might logically assume the Supreme Court would answer them in *Brunetti*. Or at least discuss them. But these questions were only considered by the Federal Circuit. The Supreme Court Justices simply ignored them.

IV. IANCU V. BRUNETTI

Artist and entrepreneur Erik Brunetti owns a street clothing line with the brand name FUCT[91].[92] Brunetti sought federal registration over FUCT from the PTO for various items of apparel.[93] The examining attorney at the PTO denied his application, finding FUCT was "the equivalent of [the] past participle form of a well-known word of profanity [fuck]."[94] The examining attorney reasoned that because FUCT is the past tense of the vulgar word "fuck," the FUCT trademark was scandalous and therefore, Brunetti's application was denied under the immoral or scandalous bar of the Lanham Act.[95]

This bar prohibits registration of trademarks that "[c]onsists of or comprises immoral, deceptive, or scandalous matter." [96] The PTO determines a trademark is barred if a "substantial composite of the general public" would find the mark "shocking to the sense of truth, decency, or propriety"; "giving offense to the conscience or moral feelings"; "calling out for condemnation";

[91] According to Brunetti, "FUCT" is pronounced as four letters, one after the other: F-U-C-T. Brunetti, 139 S.Ct. at 2297.

[92] *Id.*

[93] *Id*.

[94] *Id.*

[95] In Re Brunetti, 877 F.3d at 1337.

[96] 15 U.S.C. § 1052(a) (2006).

"disgraceful"; "offensive"; "disreputable"; or "vulgar."[97] Brunetti appealed the application rejection before the examining attorney and the PTO's TTAB to no avail[98].[99]

Brunetti then brought a First Amendment challenge to the provision in the Federal Circuit[100].[101] While *Brunetti* was on the Federal Circuit's docket, the Supreme Court decided *Tam*.[102] Once *Tam* was decided, the Federal Circuit requested briefs from each party regarding the impact *Tam* had on Brunetti's case, and oral arguments were heard in August of 2017.[103] The Government argued that *Tam* did not resolve the issue of whether the immoral or scandalous bar was constitutional because the bar was viewpoint neutral while the disparagement bar in *Tam* implicated viewpoint discrimination.[104] The Federal Circuit held it was actually unnecessary to resolve whether the immoral or scandalous bar was viewpoint neutral, however, because the provision discriminated based on content[105].[106] Speech is restricted by the government based on

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[97] Brunetti, 139 S.Ct. at 2297.

[98] *Id.*

[99] The TTAB found that Brunetti's mark was "highly offensive" and "vulgar," in part because Urban Dictionary defines "fuct" as the past tense of the verb "fuck" and states that "fuct" is pronounced the same as "fucked." *In Re Brunetti*, 877 F.3d at 1337. Additionally, because of how Brunetti used the mark, Brunetti's mark communicated extreme examples of misogyny, nihilism or violence including dismemberment. *Id*. Therefore, the TTAB concluded Brunetti's mark was vulgar and thus unregistrable under the immoral or scandalous bar. *Id.*

[100] In the alternative, Brunetti argued that (1) the evidence does not support the finding that FUCT is vulgar; (2) even if FUCT is vulgar, the Lanham Act does not expressly prohibit registering vulgar marks – only immoral or scandalous marks; and (3) marks should be approved for registration when doubt exists as to the mark's meaning. *Id.* As these arguments are unimportant to this article, they are not discussed further.

[101] Brunetti, 139 S.Ct. at 2298.

[102] Tam, 137 S.Ct. 1774.

[103] In Re Brunetti, 877 F.3d at 1341.

[104] *Id*.

[105] "Independent of whether the immoral or scandalous provision is viewpoint discriminatory, we conclude the provision impermissibly discriminates based on content." *Id.*

[106] *Id*.

content when "a law applies to particular speech because of the topic discussed or the idea or message expressed."[107] A statute that restricts based on content must withstand strict scrutiny.[108] Strict scrutiny review requires the government to "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest."[109]

The Government conceded that the immoral or scandalous bar is content based speech restriction, but argued that trademark registration is either a government subsidy program[110] or limited public forum[111] and therefore, the First Amendment is not implicated.[112] Alternatively, the government argued that trademarks are commercial speech and should receive "the intermediate level of scrutiny set forth in *Central Hudson*."[113]

The Federal Circuit rejected all of the Government's arguments. The Federal Circuit held that the grant of trademark registration is not a government subsidy program[114] nor is the grant an

[107] *Id.* (citing Reed v. Town of Gilbery, 135 S.Ct. 2218, 2227 (2015)).

[108] *Id*. at 1342.

[109] *Id.* (citing Reed, 135 S.Ct. at 2231).

[110] Under the Spending Clause of the Constitution, Congress has the authority to attach certain condition to the use of Congressional funds to make sure the funds are used in the manner Congress intended. *Id*. (citing Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 212 (2013)). The Government pointed to Agency and argued that the immoral or scandalous bar is a reasonable exercise of the government's spending power because the bar on registration is simply a constitutional condition that defines the limits of trademark registration. *Id.* at 1343.

[111] "Limited public forums are places [that] the government has 'limited to use by certain groups or dedicated solely to the discussion of certain subjects.'" *Id.* at 1346 (citing Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 469 (2015)). When the government opens its property for a limited purpose, the government can constitutionally restrict speech consistent with that limited purpose as long as the restriction on speech is reasonable, and the restriction is not an effort to suppress expression simply because officials dislike the speaker's view. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). Therefore, the Government argued that federal trademark registration is a public forum entitling the immoral or scandalous bar to a less demanding degree of scrutiny. *In Re Brunetti*, 877 F.3d at 1346.

[112] *Id.* at 1341.

[113] *Id.*

[114] The Federal Circuit rejected the Government's argument because Justice Alito's opinion in *Tam* reached the issue and held the government subsidy framework of Agency for International Development does not apply to

equivalent of a government subsidy[115];[116] the Federal Circuit held trademark registration is not a limited public forum[117];[118] and the Federal Circuit held that "[s]ection 2(a) regulates the expressive components of speech, not the commercial components of speech, and as such it should be subject to strict scrutiny[119]."[120]

The Federal Circuit then went on to explain that, even if the immoral or scandalous bar was treated as a regulation of purely commercial speech, it would not survive the intermediate scrutiny of *Central Hudson*.[121] This is because three of the four *Central Hudson* prongs[122] are not met.[123]

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trademark registration. *Id.* (citing *Tam*, 137 S.Ct. at 176. (Alito, J.)). "Trademark registration does not implicate Congress' power to spend funds. An applicant does not receive federal funds upon the PTO's consideration of, or grant of, a trademark." *Id.* at 1344.

[115] While [the benefits to trademark owners who register their marks] are valuable, they are not analogous to Congress' grant of federal funds. The benefits of trademark registration arise from the statutory framework of the Lanham Act, and the Lanham Act in turn derives from the Commerce Clause." *Id.* at 1344-345.

[116] *Id.* at 1342-344.

[117] "The registration and use of registered trademarks simply does not fit within the rubric of public or limited public forum cases." *Id.* at 1348. "Because trademarks are by definition used in commerce, the trademark registration program bears no resemblance to these limited public forums. The speech that flows from trademark registration is not tethered to a public school, federal workplace, or any other government property." *Id.* at 1347.

[118] *Id.* at 1348.

[119] The Federal Circuit relied on Justice Kennedy's concurrence in Tam to reach this conclusion. *Id.* at 1349. In Tam, Justice Kennedy reasoned that the purpose of trademark registration is source identification, and whether a mark is disparaging has no plausible relation to the goal. Tam, 137 S.Ct at 1768 (Kennedy, J.). The Federal Circuit found this logic applies to the immoral or scandalous bar as well; "[a]s in the case of disparaging marks, the PTO's rejections under § 2(a)'s bar on immoral or scandalous marks are necessarily based in the government's belief that the rejected mark conveys an expressive message—namely, a message that is scandalous or offensive to a substantial composite of the general population." In Re Brunetti, 877 F.3d at 1349.

[120] *Id.* at 1349.

[121] *Id.* at 1350.

[122] Central Hudson consists of a four part test that asks whether: "(1) the speech concerns lawful activity and is not misleading; (2) the asserted government interest is substantial; (3) the regulation directly advances that government interest; and (4) whether the regulation is "not more extensive than necessary to serve that interest." *Id.* (citing Central Hudson, 447 U.S. at 566).

[123] *Id.* at 1351; *see also id.* at 1353.

The Court found prong two, the requirement of a substantial government interest, was not met because the only governmental interest the Federal Circuit could find was "protecting public order and morality[124]."[125] The third prong, requiring the speech regulation directly advance the government's asserted interests, was not met because the immoral or scandalous bar does not directly stop applicants from using their marks.[126] And the fourth prong, requiring the statute be carefully narrowed to only serve the governmental interest, is not met because of the PTO's inconsistent application of the provision[127].[128]

The opinion ends with a discussion of why there are no definitions of "scandalous" and "immoral" that would preserve the constitutionality of the statute.[129] The concurring opinion proposes a narrowing of the statute to "obscene marks," and stated, "[the Federal Circuit is] obligated to do so."[130] But, the majority holds, "[i]t is not reasonable to construe the words

[124] Ultimately, the Government argued "Congress' primary interest is the promotion of the use of non-scandalous marks in commerce." *See* Oral Arg. At 22:33-42. The idea that the government has in interest in promoting certain trademarks over others was unpersuasive, however; "the government has failed to identify a substantial interest justifying its suppression of immoral or scandalous trademarks." In Re Brunetti, 877 F.3d at 1351. Additionally, the Federal Circuit found the decision in Tam supports the conclusion that "the government's interest in protecting the public from off-putting marks is an inadequate government interest for First Amendment purposes." *Id.* at 1351.

[125] *Id.* at 1350.

[126] *Id.* at 1353.

[127] The Federal Circuit supports this conclusion by listing "nearly identical" trademarks that were approved and rejected, for example, "FUGLY" was registered for use on clothing but refused for registration on alcohol. *Id.* at 1354.

[128] *Id.*

[129] *Id.* at 1355.

[130] *Id.* at 1359 (Dyk, CJ.).

immoral and scandalous as confided to obscene materials[131]."[132] The Federal Circuit explained that "[t]he Supreme Court has made clear that the definition of obscenity for the purposes of the First Amendment is 'material which deals with sex in a manner appealing to prurient interests' i.e., 'material having a tendency to excite lustful thoughts.'"[133] Further, no dictionary defines "immoral" or "scandalous" in sexual terms.[134] Therefore, the immoral or scandalous bar could not be saved.[135] The Supreme Court then granted certiorari.[136]

All nine of the United States Supreme Court Justices agreed that the "immoral" bar on trademark registrations violated the First Amendment.[137] However only six Justices[138] agreed that the bar on registering "scandalous" violated the First Amendment. Writing for the Court, Justice Kagan[139] held the immoral and scandalous provision of the Lanham Act discriminates based on

[131] The Federal Circuit thought that "an obscene mark would be scandalous or immoral; however, not all scandalous or immoral marks are obscene." *Id.* at 1355. The Federal Circuit likened it to the common phrase, "[a]ll apples are fruit, but not all fruits are apples." *Id.* at 1355-356. Additionally, the PTO previously rejected marks that were scandalous or immoral that were "clearly not obscene." *Id.* at 1356.

[132] *Id.* at 1355-356.

[133] *Id.* at 1356 (citing Roth v. United States, 354 U.S. 476, 487 (1957)).

[134] *Id.*

[135] *Id.*

[136] Brunetti, 139 S.Ct. at 2298.

[137] *Id.* at 2295.

[138] Justice Sotomayor, Chief Justice Roberts, and Justice Breyer each wrote dissenting opinions holding they would allow the "scandalous" bar on trademark registration to stand, but each agreed that the bar on registration for "immoral" marks was unconstitutional. *Id.* at 2303 (Kennedy, J); *Id.* (Breyer, J.); *Id.* 2311 (Sotomayor, J.).

[139] Joined by Justices Thomas, Ginsburg, Alito, Gorsuch, and Kavanaugh.

viewpoint[140] independent of the PTO's interpretation of the statute[141].[142] In deciding the immoral or scandalous bar was viewpoint based, Justice Kagan relied on one main source – the dictionary.[143]

From the dictionary definitions of "immoral" and "scandalous," Justice Kagan concluded the Lanham Act "permits registration of marks that champion society's sense of rectitude and morality, but not marks that denigrate those concepts . . . the Lanham Act [also] allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety."[144] Therefore, the immoral or scandalous bar results in viewpoint-discriminatory application[145].[146] Justice Kagan then went on to reject the Government's argument that the immoral or scandalous bar could be viewpoint neutral by a limiting construction of the statute.[147] Justice Kagan was unconvinced that the Supreme Court should try to construe the

[140] "The facial viewpoint bias in the law results in viewpoint discriminatory application." *Id.* At 2230.

[141] The PTO viewed the "immoral" or "scandalous" bar as a unitary provision, which means the PTO did not treat the two adjectives separately. *Id*. at 2298.

[142] *Id.* At 2299.

[143] Justice Kagan wrote the definition for "immoral" and "scandalous" according to the Webster's New International Dictionary (2d ed 1949). *Id.* "Expressive material [is] immoral . . . when it is inconsistent with rectitude, purity, or good morals; wicked; or vicious . . . . [Expressive] material is scandalous . . . when it "giv[es] offense to the conscience or moral feelings; excite[es] reprobation; or call[s] out condemnation.") (internal quotations omitted). *Id.*

[144] *Id.*

[145] *Id.*

[146] To bolster her conclusion, Justice Kagan listed examples of similar trademarks that the PTO has refused to register and those the PTO has allowed registration for. *Id.* Justice Kagan explains that the refused trademarks communicate "immoral" or "scandalous" views on drug use, religion, and terrorism, while the registered trademarks express "more accepted views on the same topic[s]." *Id.* Justice Kagan agreed these rejected marks are understandable because they express opinions that are offensive to many Americans. *Id.* But she then cited to *Tam* to express the notion that "a law disfavoring 'ideas that offend' discriminates based on viewpoint, in violation of the First Amendment." *Id.* (citing *Tam*, 137 S.Ct. at 1751 (Alito, J) and *Tam*, 137 S.Ct. at 1762-63 (Kennedy, J).

[147] The Government wanted to narrow the statutory bar, and the result would be the PTO could only refuse marks that are "vulgar," which would be defined as "lewd," "sexually explicit" or "profane." *Id.* at 2301. This

provision in a way that would render it constitutional because "[t]o cut the statute off where the Government urges is not to interpret the statute Congress enacted, but to fashion a new one."[148]

Justice Kagan was unconvinced the statute could be saved despite, as Justices Breyer and Sotomayor point out, Supreme Court precedent warns against interpreting statutes in ways that would likely made them unconstitutional.[149] Justice Kagan ended her opinion with the sweeping statement, "the immoral or scandalous bar is substantially overbroad. There are a great many immoral and scandalous ideas in the world (even more than there are swearwords), and the Lanham Act covers them all. It therefore violates the First Amendment."[150]

Justice Alito's concurring opinion does not add much substantive analysis. Justice Alito believes the immoral or scandalous bar of the Lanham Act discriminates on the basis of viewpoint and the viewpoint discrimination cannot be removed without rewriting the statute.[151] Interestingly, Justice Alito also specifies that this decision "does not prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas."[152]

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narrowing removes the viewpoint discrimination, and thus the Government believed the Supreme Court could uphold the statute. *Id.*

[148] *Id.*

[149] *See id.* at 2304 (Breyers, J.) (citing Virginia v. American Booksellers Assn., Inc., 484 U.S. 383, 394 (1988) (holding a law "will be upheld" if it is "'readily susceptible' to a narrowing construction that would make it constitutional." *See also id.* at 2313 (Sotomayor, J.) (citing Stern v. Marshall, 654 U.S. 462, 477-478 (2011) and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) ("the cardinal principle of statutory construction is to save and not destroy.").

[150] *Id.*

[151] *Id.* at 2302-03 (Alito, J.).

[152] *Id*.

Chief Justice Roberts concurred in part because he agreed that the "immoral portion of the provision is not susceptible of a narrowing construction that would eliminate its viewpoint bias."[153] Chief Justice Roberts dissented in part, however, because he agrees with Justice Sotomayor that the "scandalous portion of the provision is susceptible of such a narrowing construction."[154] The Chief Justice believes the term "scandalous" can be read more narrowly to bar marks that are obscene, vulgar, or profane,[155] and a bar on federally registering these marks does not restrict speech; "no one is being punished" because "owners may [still] use [these marks] in commerce to identify goods."[156]

Justice Breyer, like Chief Justice Roberts and Justice Sotomayor, believes the "scandalous" portion of the provision can be interpreted to refer only to "certain highly 'vulgar' or 'obscene' modes of expression."[157] To Justice Breyer, the issue is then whether The First Amendment allows the Government to "rely on this statute, as narrowly construed, to deny the benefits of federal trademark registration to marks like the one at issue here, which involves the use of the term 'FUCT' in connection with a clothing line that includes apparel for children and infants."[158] He believes the answer is yes.[159]

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[153] *Id.* at 2303 (Kennedy, J.).

[154] *Id.*

[155] These marks offend only because of their mode of expression. *Id.*

[156] *Id*.

[157] *Id.* (Breyer, J.).

[158] *Id.*

[159] While Justice Sotomayor also comes to this same conclusion, the Justices differ on why the First Amendment permits the PTO to deny registration to marks such as "FUCT."

Justice Breyer disfavors the "category-based approach" taken by Justice Kagan.[160] He believes the Court should not dwell on categorizing the statute as viewpoint discriminatory, content discriminatory, commercial speech, or government speech.[161] Instead, he believes the Court should rely on his opinion in *Reed*[162] and use following test for the Lanham Act: "[d]oes 'the regulation at issue wor[k] harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives'"?[163] Justice Breyer believes the bar on registering "highly vulgar or obscene trademarks" creates very little First Amendment harm[164] while the Government has "at least a reasonable interest" in barring the registration of these marks.[165] Justice Breyer attempts to bolster the reasonableness of the Government's interest by citing to scientific studies that explain "certain highly vulgar words have a physiological and emotional impact that makes them different in kind from most other words."[166] He reasons these highly vulgar words threaten to disrupt commerce, and therefore, the Government has an interest to prevent the use of such

[160] Although Justice Breyer never directly states this, he necessarily disagrees with Justice Kennedy's approach in Tam as well; Justice Kennedy, joined by Justices Ginsburg, Sotomayor, and Kagan, concluded that because the disparagement bar was viewpoint discriminatory, the disparagement bar violated the First Amendment. Tam, 137 S.Ct. at 1765-69 (Kennedy, J.).

[161] Brunetti, 139 S.Ct. at 2304 (Breyer, J.).

[162] United States v. 12 200-ft. Reels of Super 8MM. Film, 413 U.S. 123 (1973).

[163] Brunetti, 139 S.Ct. at 2308 (citing Reed, 576 U.S. at 2235-36) (Breyer, J.). Justice Breyer believes this is the correct test because a statute that is purportedly viewpoint discriminatory, or subject to strict scrutiny, sometimes is held to be constitutional after weighing the competing interests involved. *Id.* For example, a statute stating that schools can restrict speech that can reasonably be regarded as encouraging illegal drug use is constitutional. *See* Morse v. Frederick, 551 U.S. 393, 397 (2007). Justice Breyer further explains that Brunetti's case highlights the difficulties of categorizing a statute; the Supreme Court has never decided whether the Lanham Act is a method of regulating pure "commercial speech" or regulating "government speech. Brunetti, 139 S.Ct at 2305 (Breyer, J.).

[164] *Id.* at 2306 (Breyer, J.).

[165] The Government's interest is reasonable, Justice Breyer reasons, because when the PTO registers a mark, "[the PTO] is necessarily involved in promoting that mark." *Id.* (internal quotations omitted).

[166] *Id.*

words in commerce by denying the benefit of trademark registration.[167] Justice Breyer also explains the Government "may have an interest in protecting the sensibilities of children by barring the registration of [highly vulgar] words" because children are more likely to be exposed to the words.[168] Therefore, "the prohibition on registering scandalous marks does not work harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives," and this part of the statute should be upheld.[169]

The "immoral bar," however, Justice Breyer believes violates the First Amendment, and he joins Justice Sotomayor's opinion because the two "reach the same conclusions, using roughly similar reasoning."[170] Justice Sotomayor stands in stark opposition to the majority's decision.[171] The first divergence is that Justice Sotomayor believes the majority has "ill-advisedly collaps[ed] the words 'scandalous' and 'immoral."[172] Instead, Justice Sotomayor believes "[the Court] should treat them as each holding a distinct, nonredundant meaning, with 'immoral' covering marks that are offensive because they transgress social norms, and 'scandalous' covering marks that are

[167] *Id.*

[168] *Id.*

[169] *Id.* at 2308 (internal quotations omitted).

[170] *Id.*

[171] According to Justice Sotomayor, "[t]he Court's decision today will beget unfortunate results;" "the Government will have no statutory basis to refuse . . . registering marks containing the most vulgar, profane, or obscene words imaginable." *Id.* (Sotomayor, J.). This statement is an interesting juxtaposition to Justice Alito's opinion. Justice Alito stated, "[o]ur decision does not prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas. the particular mark in question in this case could be denied registration under such a statute." *Id.* at 2303 (Alito, J.). The stark disagreement between the Justices showcases how little standards the Supreme Court has for deciding this issue. It is true that clear and defined legal standards do not always yield agreement from the Supreme Court Justices. Usually however, the Justices disagree on whether a clear legal standard applies, not what the standard actually is.

[172] *Id.* at 2311 (Sotomayor, J.).

offensive because of the mode in which they are expressed."[173] Justice Sotomayor reaches this conclusion by analyzing six different dictionary definitions for the word "scandalous."[174] As each dictionary provides a different definition, "[t]he word 'scandalous' on its own, then is ambiguous: it can be read broadly (to cover both offensive ideas and offensive manners of expressing ideas), or it can be read narrowly (to cover only offensive modes of expression."[175] Therefore, she believes the limited construction of the "scandalous" provision on the Lanham Act is appropriate[176].[177]

"Scandalous" would then only cover trademarks "when the speaker employs obscenity, vulgarity, or profanity . . . [and would allow] the PTO to restrict . . . the small group of lewd words or 'swear' words that cause a visceral reaction, that are not commonly used around children, and that are prohibited in comparable settings."[178] Following this proper narrowing, the "scandalous bar" would then be a viewpoint-neutral form of content discrimination that would be permissible.[179]

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[173] *Id.* at 2311 (Sotomayor, J.).

[174] *Id.* at 2309 (Sotomayor, J.).

[175] *Id*.

[176] Justice Sotomayor further supports her conclusion by analyzing the Supreme Court's previous actions to shed light on "what work [] Congress intend[ed] [] 'scandalous' to do." *Id.* at 2310 (Sotomayor, J.). Justice Sotomayor explains that Tam decided that the goal of the "disparagement bar" was to prohibit registration of marks that were offensive because they "derided a particular person or group." *Id.* (citing Tam, 137 S.Ct. at 1749). Additionally, the majority in this case held the goal of the "immoral bar" was to prohibit registration of marks that are offensive because they transgress widely held moral beliefs. Thus, "Congress meant for 'scandalous' to target a third and distinct type of offensiveness: offensiveness in the mode of communication rather than the idea." *Id.*

[177] *Id*.

[178] *Id.*

[179] *Id.*

Justice Sotomayor also disagrees with the majority's conclusion that the immoral or scandalous bar is viewpoint discrimination – "[t]o treat a restriction on vulgarity, profanity, or obscenity as viewpoint discrimination would upend decades of precedent."[180] Justice Sotomayor then launches into a discussion of why *Cohen v. California*[181] does not, as Brunetti argues, showcase that restriction at issue is viewpoint discriminatory[182].[183] Instead, the issue is whether "prohibiting the registration of obscene, profane, or vulgar marks qualifies as reasonable, viewpoint-neutral, content-based regulation."[184] The prohibition is reasonable, Justice Sotomayor believes, because a trademark registration, "entails Government involvement in promoting a particular mark. Registration requires the Government to publish the mark, as well as to take steps to combat infringement . . . the Government has a reasonable interest in refraining from lending its ancillary support to marks that are obscene, vulgar, or profane."[185]

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[180] *Id.*

[181] 403 U.S. 15, 91 (1971). This criminal case arose from the following facts: Cohen was arrested and placed in prison under a California disturbing the peace statute because Cohen was wearing a jacket that said, "Fuck the Draft." *Id.* at 16. The Supreme Court held that applying the statute to Cohen because of his jacket violated Cohen's First Amendment rights. *Id.* at 21. The Supreme Court also held that California had engaged in "viewpoint-neutral content discrimination—it had regulated 'the form or content of individual expression." Brunetti, 139 S.Ct. at 2315 (Sotomayor, J.) (citing Cohen, 403 U.S. at 24-26).

[182] Cohen, Justice Sotomayor explains, like Brunetti was subject to content discrimination, and Cohen faced content discrimination that was viewpoint neutral. *Id.* However, *Cohen* takes place in the context of a criminal prosecution while Brunetti "[was] subject to such regulation only in the context of the federal trademark-registration system." *Id.* Viewpoint-neutral content discrimination is impermissible in criminal prosecution but is permissible under the framework of either "a limited public (or nonpublic forum" or "a government program or subsidy." *Id.* at 2316-317 (Sotomayor, J.). Justice Sotomayor goes on to argue that whether one chooses the "limited public forum" or "a government program or subsidy," "the federal system of trademark registration fits." *Id.* at 2317 (Sotomayor, J.).

[183] Brunetti, 139 S.Ct. at 2314-315 (Sotomayor, J.).

[184] *Id.*

[185] *Id.* at 2317 (Sotomayor, J.).

Justice Sotomayor concludes her opinion by stating, "[f]reedom of speech is a cornerstone of our society, and the First Amendment protects Brunetti's right to use words like the one at issue here."[186] But, the Government does not need to be "forced to confer on Brunetti's trademark (and some more extreme) the ancillary benefit of trademark registration, where "scandalous" in § 1052 (a) can reasonably be read to bar the registration of only those marks that are obscene, vulgar, or profane."[187]

V. THE POLITICAL QUESTION DOCTRINE

The Political Question Doctrine refers to subject matter that the Court deems to be inappropriate for judicial review even though all of the jurisdictional and other justiciability requirements are met.[188] Although there is an allegation that that Constitution has been violated, federal courts refuse to rule and instead dismiss the case, leaving the constitutional question to be resolved in the political process.[189] As explained below, the U.S. Supreme Court should have found that Brunetti's case posed a political question and left the issue to be resolved in the political process.

[186] *Id.* at 2318 (Sotomayor, J.).

[187] *Id.*

[188] William Funk, INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS (AMERICAN CASEBOOK SERIES), (1st ed. 2014).

[189] *Id.*

A. EARLY BEGINNINGS

In the notorious opinion of *Marbury v. Madison,*[190] Chief Justice Marshall declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[191] This one phrase has since been used to elevate judicial power, almost to a seemingly limitless power to answer all constitutional questions regarding any branch of the government.[192] The issue is this phrase is sometimes read independently from the entire opinion. The judiciary branch does not actually have a limitless authority on interpretation of the Constitution; in fact, in *Marbury*, Chief Justice Marshall specifically acknowledged that "questions, in their nature political"[193] are wholly outside the judiciary's review.[194] When political questions are presented, it is not the judiciary's duty to say what the law is, it is the duty of Congress or the Executive.[195]

At the heart of the political question doctrine is the Framers' recognition that "the political branches possess institutional characteristics that make them superior to the judiciary in deciding certain constitutional questions."[196] For instance, the Supreme Court Justices are not elected, and therefore the Supreme Court is ideal for preserving individual rights without fear of Justices ruling

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[190] 5 U.S. (1 Cranch) 137 (1803).

[191] *Id.* at 176.

[192] *See e.g.* Powell v. McCormack, 395 U.S. 486 (1969) (The Supreme Court was able to decide whether the House of Representative's refusal to seat Powell was unconstitutional, despite Article 1 § 5 of the US Constitution stating the Senate is to "be the Judge of the Qualifications of its own Members."); *see also* National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012) (Both the President and Congress had signed off on the individual mandate in the new health care reform law, but the Supreme Court still decided the individual mandate was unconstitutional).

[193] Marbury, 5 U.S. (1 Cranch) at 170.

[194] *Id.*

[195] Rachel E. Barkow, *More Supreme than Court?* The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 COLUM. L. REV. 237, 239 (2002) [hereinafter Barkow, *More Supreme than Court?*].

[196] *Id.* at 240.

to keep voters happy.[197] But, this independence from the electorate "renders the Court a poor factfinder and policymaker as compared to Congress and the Executive."[198] Thus, when a constitutional question centers around questions of policy, there is sound reason for the Supreme Court to "defer to the judgment of Congress."[199]

The Supreme Court does not, however, typically defer to the judgment of Congress. Ever since *Marbury*, the Supreme Court has gradually given itself more and more power, while decreasing the power of the political question doctrine.[200] The political question doctrine is at odds with the Supreme Court's view of the Court's interpretive power to decide all constitutional questions, and it is unsurprising that the Supreme Court has basically abandoned the political question doctrine.[201] One would be hard-pressed to find a recent Supreme Court case where the Supreme Court even mentions the political question doctrine, let alone apply the doctrine. The famous case of *Baker v. Carr*[202] is a key case that showcases the Supreme Court's decision to begin to abandon the political question doctrine.

B. BAKER V. CARR

The Supreme Court decided *Baker v. Carr* in 1962.[203] At issue in *Baker* was whether a justiciable cause of action was presented from a complaint alleging that a state apportionment

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[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] Barkow, *More Supreme than Court?*, at 242.

[202] 369 U.S. 186 (1962).

[203] *Id.*

statute violated the Equal Protection Clause.[204] The Supreme Court held there was a justiciable cause of action.[205] In reaching the decision, Justice Brennan discussed the political question doctrine in great detail and reviewed many political question doctrine cases.[206] Justice Brennan then used the previous political question doctrine cases to create a list of six factors that courts should use to evaluate whether a political question is present:

> [1] Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6]the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[207]

The Court held none of these factors were present in *Baker*, and therefore the case could proceed.[208] Importantly, Justice Brennan stressed that even if one of those factors was present in the case, the Supreme Court could still theoretically decide the case; "[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence."[209]

Because of this extreme narrowing of the political question doctrine, it is extremely rare for a Supreme Court majority to hold that issues present political questions. A Supreme Court

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[204] *Id.* at 237.

[205] *Id.*

[206] *Id.* at 211-17.

[207] *Id.* at 217.

[208] *Id.* at 237.

[209] *Id.* at 217.

majority has however, found political questions in *Gilligan v. Morgan*[210] and *Nixon v. United States*.[211] Additionally, the gerrymandering issue in *Vieth v. Jubelirer*[212] was declared a political question by a Supreme Court plurality. Because of the Supreme Court's own reasoning in these three cases, *Brunetti* should have also been declared nonjudicial because Baker factors two and three are clearly inextricable from Brunetti's case.

1. Baker factor three: impossibility of deciding the issue without an initial policy determination of a kind clearly for nonjudicial discretion

The Supreme Court has recognized that "courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature."[213] But the Federal Circuit and the Supreme Court did just that in *Brunetti*; both courts formulated national policy.

The Federal Circuit, Justice Kagan, and Justice Sotomayor filled their opinions with a variety of dictionary definitions for the words "scandalous" and "immoral." The Federal Circuit held the immoral or scandalous bar was not able to be preserved because no dictionary defines "immoral" or "scandalous" in sexual terms.[214] Additionally, both Justice Kagan's majority

[210] 413 U.S. 1 (1973). In Gilligan, the Supreme Court dismissed a lawsuit initiated by Kent State students that claimed student protesters were killed because of the government's negligent training of the National Guard. *Id.* at 4. Chief Justice Burger explained that "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." *Id.* at 10.

[211] 506 U.S. 224 (1993). In Nixon, the Supreme Court held that whether the Senate could impeach a federal judge under Article 1, Section 3, Clause 6 was a nonjusticiable political question. *Id.* at 226. Chief Justice Rehnquist cited the first two Baker factors – a textually demonstrable commitment to a coordinate political branch and the lack of judicially manageable standards. *Id.* at 228.

[212] 541 U.S. 267 (2004). In Vieth, the issue was whether the congressional redistricting plan the Pennsylvania's General Assembly adopted constituted a political gerrymander in violation of Article I and the Fourteenth Amendment's Equal Protection Clause. *Id.* at 267. Justice Scalia held that political gerrymandering claims are nonjusticiable because no judicially discernible and manageable standards for adjudicating the claims exist. *Id.*

[213] Japan Whaling Ass'n v. American Cetacean Soc., 478 U.S. 221, 230 (1986) (quoting Joseph v. Cannon, 642 F.2d 1373, 1379 (D.C.Cir.1981)).

[214] In Re Brunetti, 877 F.3d at 1356.

opinion and Justice Sotomayor's dissent opinion reached their conclusions based on the dictionary definitions for "immoral" and "scandalous."[215]

The issue is that these definitions can change over time; what was "immoral" in the public's opinion in the 1900s is not necessarily immoral to the present-day public. For example, in early patent law, the PTO refused to register gambling machines because gambling was considered "immoral."[216] Now, however, Minnesota alone has eighteen casinos.[217] This evidences the idea that what constitutes "immoral" or "scandalous" is an inherently subjective policy decision that changes over time with shifts in public taste and morality. These decisions are exactly what the state and local political process are intended to address. Should the public want action to be taken regarding "scandalous" or "immoral" material, the public would act during the political process. But the Supreme Court is insulated from the public, and that is exactly why the Supreme Court should not have decided this issue. Questions that are "delicate, complex, and involve large elements of prophecy . . . should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility."[218]

By deciding what constituted the correct definition of "scandalous" or "immoral," the Supreme Court "interpose[d] its own will above the will of . . . Congress."[219] The Court could not

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[215] Brunetti, 139 S.Ct. at 2299 (Kagan, J.); *id*. at 2309 (Sotomayor, J.).

[216] Carl Moy, *Moy's Walker on Patents*, § 6.15 (2017).

[217] USA TODAY, List of Casinos in Minnesota, https://traveltips.usatoday.com/list-casinos-minnesota-21749.html (last visited Nov. 5, 2019).

[218] Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948). While Southern Air Lines relates to Executive decisions, this same analysis still applies to Congressional decisions that affect a large population. The Supreme Court's decision in Brunetti not only affects trademark owners, but it also affects the public at large. *See* discussion *infra* Part VI.

[219] Chaser Shipping Corp. v. United States, 649 F. Supp. 736, 738 (S.D.N.Y. 1986) aff'd, 819 F.2d 1129 (2nd Cir. 1987)

make this determination without deciding making a policy decision that disregards the trademark policy choices that Congress has already made.[220] And when the Justices made these policy decisions, the Justices relied on standards not legal in nature. Thus, *Brunetti* is further brought under the scope of the political question doctrine from the second *Baker* factor.

2. Baker factor two: lack of judicially discoverable and manageable standards

As the Supreme Court explained in *Vieth*, a case is not justiciable unless the court affirmatively identifies judicially manageable standards for resolving the claims.[221] "One of the most obvious limitations imposed by [Article III, § 1, of the Constitution] is that judicial action must be governed by *standard, by rule*. Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions."[222]

The standards must be available to the Supreme Court at the time of decision,[223] meaning a case cannot be decided on the assumption that the judicially manageable standards will eventually become known. Additionally, "[a]ny standard for resolving such claims must be grounded in a 'limited and precise rationale' and must be 'clear, manageable, and politically neutral.'"[224] The "standards" used in *Tam* and *Brunetti* are anything but a precise rationale or clear

[220] This was the line of reasoning the Supreme Court of Nebraska used when determining that what level of public education the Legislature must provide is a political question. *See* Nebraska Coalition for Educational Equity and Adequacy (Coalition) v. Heineman, 731 N.W.2d 164, 183 (2007).

[221] Vieth, 541 U.S. at 281.

[222] *Id.* at 278.

[223] The Justices agreed that, absent identified standards, the case cannot proceed. *See id.*

[224] Rucho v. Common Cause, 139 S.Ct. 2484, 2498 (2019) (citing Vieth, 541 U.S. at 306-308 (Kennedy, J.)).

and manageable. Both *Tam* and *Brunetti* thrusted the Federal Circuit and the Supreme Court into "a sea of imponderables,"[225] evidenced by the confusion and disagreement between the opinions.

3. The confusion of the *Tam* and *Brunetti* decisions

In *Tam*, Justice Alito believed that the disparagement bar was unconstitutional, and he thought it was necessary to explore how the bar could not withstand even *Central Hudson* review because the bar extended farther than the Government's purported interests.[226] Therefore, it was unnecessary to decide whether trademarks are commercial speech that were subject to relaxed scrutiny.[227] Justice Kennedy, on the other hand, focused on how the test for viewpoint discrimination is whether the government disfavors a subset of messages based on the views they express, and thus a *Central Hudson* analysis was not necessary.[228] Additionally, Justice Kennedy believed that, because the bar was viewpoint discriminatory, whether trademarks are commercial speech was irrelevant.[229] Considering that both *Tam* and *Brunetti* faced a First Amendment challenge to the same section of the Lanham Act, the opinions in *Brunetti* should bear some semblance to *Tam*. But they don't, and this is because the challenge to the immoral or scandalous bar lacked judicially manageable standards.

The Federal Circuit held the immoral or scandalous bar impermissibly discriminated based on content, and the bar was not able to be preserved because no dictionary defines "immoral" or

[225] Vieth, 541 U.S. at 290.

[226] Tam, 137 S.Ct. at 1764 (Alito, J.).

[227] *Id*.

[228] *Id*. at 1766 (Kennedy, J.).

[229] *Id*. at 1767 (Kennedy, J.).

"scandalous" in sexual terms.[230] Additionally, to answer the Government's counterarguments, the Federal Circuit held the granting of trademark registration is not a government subsidy program or a limited forum, and that the bar was subject to strict scrutiny.[231]

Like the Federal Circuit, both Justice Kagan's majority opinion and Justice Sotomayor's dissent opinion reached their conclusions based on the dictionary definitions for "immoral" and "scandalous." Justice Kagan believed the immoral or scandalous bar impermissibly discriminated based on viewpoint while Justice Sotomayor believed the "scandalous" bar was a permissible viewpoint-neutral content discrimination. Because of the Justices' heavy reliance on the definitions of these words, *Brunetti* is comparable to *U.S. v. Nixon*.[232]

In *Nixon*, Nixon argued that the word "try" in the Impeachment Trial Clause imposed a constitutional requirement that the entire senate take place in an impeachment evidentiary hearing, not just a senate committee.[233] The Supreme Court held that because "a variety of definitions" could be assigned to the word "try," the word "lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions."[234] The Court also concluded that there were no judicially manageable standards for reviewing how the House counted votes.[235]

Similarly, there is no way for either Justice to truly discover and manage the standards for what is "immoral" and "scandalous" because these are not legal terms. These words are common words

[230] In Re Brunetti, at 1356.

[231] *Id*. at 1344-347.

[232] Nixon, 506 U.S. 224.

[233] Nixon, 506 U.S. at 228.

[234] *Id.*

[235] *Id.* at 219.

that are used by the public to describe how they feel about certain topics, and there are no judicially manageable standards for reviewing what definition the public attaches to the words.

Additionally, the Supreme Court is not well-suited to determine whether a trademark is appropriate or inappropriate. Any judge[236] reviewing an appeal from the decision of the TTAB simply applies the Lanham Act to the trademark to see if the trademark is registerable or not.[237] The Court will also typically afford deference to the TTAB's expert knowledge in trademark matters.[238] As Justice Blackmun's concurring opinion in *Gilligan* explains, "[t]he relief sought by respondents … is beyond the province of the judiciary [because] judicially manageable standards are lacking" because judges do not regulate the military.[239] The same is true here; judges do not determine the meaning the public attaches to non-legal words, and judges do not determine whether a trademark is appropriate or not. There are simply no judicial standards for which Justice Kagan could have relied on.

Justice Breyer's opinion mainly focused on how the Government's interests in preventing "scandalous" trademark registration outweigh any potential harm from the restriction. Justice Breyer used two supporting points: (1) scientific studies explain that highly vulgar words have physiological and emotional impacts that, in his opinion, threaten to disrupt commerce,[240] and (2) children are more likely to be exposed to vulgar words if the word is a registered trademark.[241]

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[236] When appealing the decision of the TTAB, a trademark applicant may either bring the case before the Federal Circuit or to federal district courts. *See* Todd Schneider, *Appealing Decisions of Stubborn Examining Attorneys: The Path of Ex Parte Appeal to the TTAB and Federal Circuit*, 19 J. CONTEMP. LEGAL ISSUES 141, 142 (2010).

[237] *Id.*

[238] *Id.* at 146 (citing Hope Hamilton, *Parsing the Standard of Review Puzzle: How much Deference Should Federal District Courts Afford Trial and Appeal Board Decision?*, 12 FEDERAL CIRCUIT B.J. 489, 497 (2003)).

[239] Gilligan, 412 U.S. at 14 (Blackmun, J.).

[240] Brunetti, 139 S.Ct. at 2306 (Breyer, J.).

[241] *Id.*

Regarding Justice Breyer's first point, there is no way of actually measuring this. Justice Breyer is not a psychologist or an economist that run surveys or impact reports. Additionally, this type of data is not a standard or a rule. The job of the Justices is to apply the Constitution to the actions of the Legislative or Executive branch, not determine the effect on commerce that certain words have on the public. Justice Breyer's second point is similarly faulted. Firstly, developing solutions to combat these "scandalous" trademarks in public where the children can see them should not be the task of the judicial branch. Secondly, whether children actually are more exposed to these words is not measurable. This is an opinion. Additionally, the Federal Circuit said that children were not more likely to see these words because the word is a registered trademark.[242]

From the sheer amount of confusion between the Federal Circuit and the Justices, it is clear there were no qualitative, constitutional standards for trademarks that the Supreme Court, or lower courts, could enforce. And nowhere in any opinion, from either the Federal Circuit or any Justice, is there an explanation of how these purported standards could be applied in a judicially manageable way to resolve the issue without making impermissible political judgments. Therefore, this matter should have been reserved for Congress.

VI. THE IMPLICATIONS *BRUNETTI* HAS ON TRADEMARK LAW

It is clear that the Supreme Court has decided that "it alone among the three branches has been allocated the power to provide the full substantive meaning of all constitutional provisions."[243] In the Court's view, "[e]ver since Marbury, [the Supreme] Court has remained

[242] In Re Brunetti, 877 F.3d at 1353.

[243] Barkow, *More Supreme than Court?*, at 241.

the ultimate expositor of the constitutional text."[244] Thus, the Supreme Court has begun to recognize "only one half of *Marbury* and ignores the existence of political questions."[245] But, *Brunetti* is the case that should have changed this; the Supreme Court should have recognized that it would be making a policy determination of a kind clearly not for judicial discretion and that there were a lack of judicially discoverable and manageable standards for resolving the issue. Because the Supreme Court failed to find *Brunetti* was a political question, trademark holders could potentially face devastating consequences.

A. THE IMPORTANCE OF FEDERAL TRADEMARK REGISTRATION TO TRADEMARK OWNERS

From the opinions in *Brunetti*, it seems apparent that the Justices severely downplay the importance of federal trademark registration. The worst offender being Justice Sotomayor's dissenting opinion because Justice Sotomayor believes that "[federal trademark registration] confers *a small number of noncash benefits* on trademark-holders who register their marks."[246] Justice Sotomayor thereafter refers to the benefits as only "ancillary benefits."[247] Chief Justice Roberts's concurring opinion is not far behind Justice Sotomayor. Chief Justice Roberts explained that a refusal to register obscene, vulgar, or profane marks does not violate the First Amendment because "no one is being punished. The owners of such marks are merely denied *certain additional benefits* associated with federal trademark registration."[248]

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[244] United States v. Morrison, 529 U.S. 598, 617 n.7. (2000). In Morrison, the Supreme Court declared the Violence Against Women Act as unconstitutional because Congress had exceeded its power under the Commerce Clause. *Id.*

[245] *Id.*

[246] Brunetti, 139 S.Ct. at 2308 (Sotomayor, J) (emphasis added).

[247] *Id.* at 2312-318 (Sotomayor, J.).

[248] *Id.* at 2303 (Kennedy, J.) (emphasis added).

While Justice Kagan and Justice Breyer's opinions do not severely underplay the important of federal registration, their opinions do not adequately capture how important registration is. Justice Kagan's opinion only mentions two benefits of registration: prima facie evidence of the mark's validity and "constructive notice of the registrant's claim of ownership," which forecloses some defenses in infringement actions."[249] Justice Breyer believes trademark registration only "confers certain benefits upon the owner,"[250] and discusses how business owners are free to use highly vulgar or obscene words on their products if they are willing to forgo the benefits of registration.[251]

The Justices do not seem to understand that the benefits of federal trademark registration can be life changing for businesses. It is true, as Justice Breyer pointed out, that business owners are still able to use a trademark whether or not it is federally registered. But, "while a trademark owner has an ostensible legal right to use a mark even without registration, the value of this "right" should not be overstated." [252] As the Federal Circuit has explained, "it is 'widely recognized that federal trademark registration bestows truly significant and financially valuable benefits upon mark [] holders'—benefits unavailable if federal registration is denied."[253] In fact, "the incentives to pursue federal registration . . . are now so significant as to make federal registration

[249] *Id.* at 2297-298.

[250] *Id.* at 2305 (Breyer, J.).

[251] *Id.*

[252] Niki Kuckes, *Matal v. Tam: Free Speech Meets "Disparaging" Trademarks in the Supreme Court*, 23 ROGER WILLIAMS U. L. REV. 122, 128 (2018).

[253] *Id.* (citing Tam, 808 F.3d at 1340).

indispensable for any owner making an informed decision about its trademark rights. A federal registration is the only rational choice . . . ."[254]

"Trademark [r]egistration is significant. The Lanham Act confers important legal rights and benefits on trademark owners who register their marks."[255] The benefits a federal trademark registration confers are numerous:

> The holder of a federal trademark has a right to excusive nationwide use of that mark where there was no prior use by others. Because the common law grants a markholder the right to exclusive use only in the geographic areas where he has actually used his mark, holders of a federally registered trademark have an important substantive right they could not otherwise obtain. Also, a registered mark is presumed to be valid . . . A markholder may sue in federal court to enforce his trademark, and he may recover treble damages if he can show infringement was willful. He may also obtain the assistance of U.S. Customs and Border Protection in restricting importation of infringing or counterfeit goods, and qualify for a simplified process for obtaining recognition and protection of his mark in countries that have signed the Paris Convention. Lastly, registration operates as a complete defense to state or common law claims of trademark dilution.[256]

Additionally, a trademark registration serves as "constructive notice of the registrant's claim of ownership," which prevents some defenses in an infringement action.[257] The benefits are only available to trademark owners who federally register their marks.[258]

By downplaying the importance of federal trademark registration, the Justices are threatening trademark holders everywhere. One of the major purposes of trademark law has always been to protect a trademark owner's investment in his mark,[259] and in an ever business-

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[254] Lee Ann W. Lockridge, *Abolishing State Trademark Registrations*, 29 CARDOZO ARTS & ENT. L.J. 597, 605 (2011).

[255] B&B Hardware, Inc. v. Hargis Indus., Inc., 135 S.Ct. 1293, 1300 (2015).

[256] In re Tam, 808 F.3d at 1328 (citations omitted).

[257] *Id.*

[258] *Id.*

[259] Publications Intern., Ltd. v. Landoll, Inc., 164 F.3d 337, 339 (7th Cir. 1998) (Posner, J.: "[T]he seller will be able to appropriate the benefits of making a product that consumers like and so he will have an incentive to make a

centered world, trademarks are one of the most valuable assets a brand can have. In a purely financial sense, famous registered trademarks like Coca Cola or Microsoft are worth an incredible amount; the value of Coca Cola is estimated at $72.5 billion dollars[260] while Microsoft is estimated at a $70.5 billion dollars.[261]

The benefits from federal registration, such as the right to exclusive nationwide use, play a large part in why these trademarks have amassed so much value. When the Justices fail to recognize how valuable the federal registration benefits are, the Justices could set a precedent that federal registration is not important. This could, in turn, lead to the devaluation of trademarks and cause businesses to lose their investment in the trademarks. Or perhaps trademark owners will forgo the federal registration process entirely. After all, Erik Brunetti fought to get his trademark federally registered for eight years. That is a big time and financial commitment for trademark owners to make if the benefits, as the Justices suggest, are only minimal or ancillary. Should trademark owners forgo federal registration, it would not only be trademark owners that would suffer. The public would suffer too.

B. THE IMPORTANCE OF FEDERAL TRADEMARK REGISTRATION TO THE PUBLIC

Trademarks are a valuable tool to the public in a competitive, free market[262] because a trademark guarantees, identifies, and sells the service or product to which it refers.[263] In the

good product."). A trademark owner invests a substantial amount of time and money into making sure his mark is of high quality and that the mark identifies high quality goods or services. *Id.*

[260] Kenneth L. Port, *Trademark Extortion: The End of Trademark Law*, 65 WLLR 585, 586 n.4. (citing Suhejla Hoti, Michael McAleer & Daniel Slottje, *Intellectual Property Litigation Activity in the United States*, 20 J. ECON. SURV. 715, 715 (2006)).

[261] *Id.*

[262] Malla Pollack, Callmann on Unfair Competition, Trademarks & Monopolies § 17:01 (4th ed. 2019).

[263] *Id.*

microeconomic theory of trademark law, the two main market functions of trademarks are: "(1) they encourage the production of quality products; and (2) they reduce the customer's costs of shopping and making purchasing decisions."[264]

Trademarks play a vital pro-competitive role in a modern economy:

> Trademarks play a crucial role in our free market economic system. By identifying the source of goods or services, marks help consumers to identify their expected quality and, hence, assist in identifying goods and services that meet the individual consumer's expectations. … [T]rademark counterfeiting … if freely permitted, … would eventually destroy the incentive of trademark owners to make the investments in quality control, promotion and other activities necessary to establishing strong marks and brand names. It is this result that would have severe anticompetitive consequences.[265]

Trademarks create responsibility and accountability because trademarks allow consumers to trace low quality products to their source.[266] As federally registering a trademark allows for a company to have exclusive nation-wide use, a federal registration can increase the pressure for companies to have high quality products; if a company's products are low quality and sold nationwide, the company would likely have much more negative attention towards their products.[267] Thus, federal registration of trademarks create an incentive for companies to keep up a good reputation for quality products.[268] Conversely, without trademarks, consumers would be unable to trace low quality products to their source.[269]

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[264] McCARTHY, TRADEMARKS AND UNFAIR COMPETITION, §§ 2:3-2:9 (5th ed. 2019).

[265] *Id.* (citing William F. Baxter, Statement before the Senate Committee on the Judiciary concerning S. 2428 (a bill to strengthen the laws against counterfeiting of federally registered trademarks), Sept. 15, 1982).

[266] *Id.*

[267] W.M. Landes & R.A. Posner, *The Economic Structure of Intellectual Property Law* 168, 179 (2003) ("[A] firm with a valuable trademark will be reluctant to lower the quality of its brand because it would suffer a capital loss on its investment in the trademark …. [L]egal protection of trademarks encourages the production of higher-quality products.").

[268] McCARTHY, TRADEMARKS AND UNFAIR COMPETITION, *supra* note 223 §§ 2:3-2:9

[269] *Id.*

When the Supreme Court underestimates the value of federal registration, as the Justices did in *Brunetti*, the Supreme Court could inadvertently hurt the public. Without the ability to federally register a trademark, companies would have less incentive to create high quality products or services because, at a nationwide level, companies would gain little from improving the quality of the products of services.[270] Consumers would not be able to recognize a product as coming from a brand with high or low quality, so sales would naturally go to companies that have the cheapest products, usually resulting in lower quality.[271] Therefore, the Supreme Court could indirectly take away the public's ability to choose high quality products.

C. TRADEMARK LAW VULNERABILITY

Trademark law is more vulnerable to the Supreme Court than both patents and copyrights. Both patents and copyrights exist because the U.S. Constitution expressly grants Congress the authority to patent and copyright.[272] As noted earlier in part II, the Supreme Court expressly stated that the Patent and Copyright Clause did give Congress the authority for trademark law.[273] Instead, Congress regulates trademarks under the Commerce Clause[274] because trademarks are accepted as being a function of commerce.[275] Therefore, there is no strict constitutional grant for Congress to regulate trademarks.[276]

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[270] W.M. Landes & R.A. Posner, The Economic Structure of Intellectual Property Law, at 179.

[271] McCARTHY, TRADEMARKS AND UNFAIR COMPETITION, supra note 223, at §2:4.

[272] U.S. CONST. art. I, § 8, cl. 8.

[273] Trade-Mark Cases, 100 U.S. at 94.

[274] U.S. CONST. art. I, § 8, cl. 3 (gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.").

[275] See Trade-Mark Cases, 100 U.S. at 96-97; see also *In Re Brunetti*, 877 F.3d at 1344-345 ("[t]he benefits of trademark registration arise from the statutory framework of the Lanham Act, and the Lanham Act in turn derives from the Commerce Clause.").

[276] See In Re Brunetti, 877 F.3d at 1344-345.

Should the Supreme Court continue down the current path of deciding trademark cases such as *Brunetti*, it could be the Supreme Court, not Congress that regulates trademarks. In the most extreme sense, the Supreme Court could eventually decide what trademarks are and are not allowed, thereby depriving trademark owners of essential benefits of federal registration simply based on the Justices' personal opinions. The Justices already proved in *Brunetti* they have no qualms about making policy determinations, so perhaps the next trademark case that the Justices decide will create a policy where a trademark owner is not entitled to federal registration if the trademark is used in connection with items the Justices disapprove of. As no clear legal standard exists for deciding First Amendment challenges to trademark statutes, the right case could create this scenario.

In a less extreme scenario, trademark law could be looking at a situation similar to *Garcia v. San Antonio Metro. Transit Authority*[277] and *National League of Cities*.[278] In *National League of Cities*, the Supreme Court decided, in a sharply divided vote, that the Commerce Clause does not empower Congress to enforce the provision of the Fair Labor Standards Act relating to minimum-wage and overtime against the States "in areas of traditional governmental functions."[279] Then, nine years later, the Supreme Court decided that Congress could afford San Antonio Metropolitan Transit Authority employees the protections of minimum wage and overtime under the Fair Labor Standards Act.[280]

[277] 469 U.S. 528, 531 (1985)

[278] National League of Cities v. Usery, 426 U.S. 833 (1976).

[279] *Id*. at 852.

[280] Garcia, 469 U.S. at 556.

In *Brunetti*, six of the Justices did not like Congress' ban on immoral or scandalous trademarks.[281] Three of the Justices thought Congress' ban on scandalous trademarks was fine.[282] Perhaps the next seminal trademark case decided by the Supreme Court will reaffirm the constitutionality of a ban on immoral or scandalous trademarks. As *Brunetti* was decided without judicially manageable standards, this situation is entirely plausible because a future Supreme Court could also rely on non-judicially manageable standards to come up with a different result. In any case, these hypothetical scenarios highlight the uncertainty that trademark owners face. Only time will tell trademark owners the future of their trademarks.

VII. CONCLUSION

Starting with *Baker v. Carr*, the Supreme Court has set a dangerous precedent – that they alone have the power to determine what the law is, no matter what circumstances the case arises under. But this is not the future Chief Justice Marbury imagined for the Supreme Court when he created the political question doctrine in 1803. Instead, Chief Justice Marbury wanted Congress to the body that created policy decision. Congress created a policy decision in 1905 to prohibit the federal registration of "immoral" or "scandalous" trademarks. But the Supreme Court Justices took the matter into their own hands and made their own policy decision. They made this policy decision while insulated from the election that Congress members. These elections are held to ensure that Congress is making policy decisions that the public wants. In addition, when the Justices made their policy decision, the Justices relied on standards not legal in nature. Thus, *Brunetti* is further brought under the scope of the political question doctrine.

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[281] *See* Brunetti, 139 S.Ct. at 2297 (joined by Justices Thomas, Ginsburg, Alito, Gorsuch, and Kavanaugh).

[282] See *id.* at 2303 (Kennedy, J.); see also *id.* at 2308 (Breyer, J); *id.* at 2318 (Sotomayor, J.).

Instead of applying the political question doctrine to *Brunetti*, however, the Justices simply "took for granted that they had the 'responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront."[283] But the Supreme Court should not have decided *Brunetti*. To make matters worse, in deciding *Brunetti*, the Justices threatened the security of trademark owners by downplaying the importance of federal registration. Without a federal registration, a trademark holder cannot access extremely valuable benefits, such as exclusive nationwide use and the help of U.S. Customs and Border Patrol in restricting the importation of infringing or counterfeit goods. By downplaying these benefits, the Supreme Court could inadvertently take away the public's ability to choose to purchase high quality products. And finally, if the Supreme Court were to continue on the path of deciding trademark cases such as *Brunetti*, it could eventually be the Supreme Court, and not Congress, that regulates trademarks.

The Supreme Court had a chance to fix the dangerous notion of judiciary supremacy. But instead, the Court forged ahead, giving little regard to the decisions that Congress had already made. As a consequence, trademark owners everywhere, and the public, could suffer.

[283] Barkow, *More Supreme than Court?*, at 243 (citing Bush v. Gore, 531 U.S. 98, 111 (2000)).

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