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Beyond Headlines & Holdings: Exploring Some Less Obvious Ramifications of the Supreme Court's 2017 Free-Speech Rulings

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BEYOND HEADLINES & HOLDINGS: EXPLORING SOME LESS OBVIOUS RAMIFICATIONS OF THE SUPREME COURT'S 2017 FREE-SPEECH RULINGS

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ABSTRACT

Digging behind the holdings, this Article analyzes less conspicuous, yet highly consequential aspects of the United States Supreme Court's First Amendment rulings during the opening half of 2017. The four facets of the opinions addressed here—items both within individual cases and cutting across them—hold vast significance for future free-speech battles. Nuances of the justices' splintering in *Matal v. Tam*, *Packingham v. North Carolina*, and *Expressions Hair Design v. Schneiderman* are examined, as is the immediate impact of Justice Anthony Kennedy's *Packingham* dicta regarding online social networks. Furthermore, Justice Sonia Sotomayor's solo concurrence in the threats case of *Perez v. Florida* is explored.

INTRODUCTION

During the first six months of 2017, the U.S. Supreme Court issued three major decisions involving the First Amendment.[1] Each marked a victory for free speech and was rendered without participation by the Court's newest member, Justice Neil Gorsuch.[2]

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[1] *See, e.g.*, Matal v. Tam, 137 S. Ct. 1744 (2017); Packingham v. North Carolina, 137 S. Ct. 1730 (2017); Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017). The First Amendment to the U.S. Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." The Free Speech and Free Press Clauses were incorporated more than ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

[2] *See generally Tam*, 137 S. Ct. 1744; *Packingham*, 137 S. Ct. 1730; *Expressions Hair Design*, 137 S. Ct. 1144; *see also* Julie Hirschfeld Davis, *Neil Gorsuch Is Sworn In as Supreme Court Justice*, N.Y. TIMES (Apr. 10, 2017), https://nyti.ms/2oj1Xef.

In *Matal v. Tam*,[3] the Court—without dissent—struck down the disparagement clause[4] of the Lanham Act.[5] That provision vests the United States Patent and Trademark Office (PTO) with authority to deny registration for marks that disparage individuals and institutions.[6] The PTO invoked the clause to deny Simon Tam's application to register his band's name, The Slants, because it denigrates Asians.[7] The PTO's decision came despite the twin facts that Tam is Asian-American and that he sought to reappropriate the word "slant," eliminating its sting.[8]

Delivering the Court's judgment for Tam and The Slants, Justice Samuel Alito reasoned that the disparagement clause "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[9] Justice Anthony Kennedy, penning a concurrence joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, added that it "constitutes viewpoint discrimination—a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny. The Government's action and the statute on which it is based cannot survive this scrutiny."[10]

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[3] 137 S. Ct. 1744 (2017).

[4] *See* 15 U.S.C. § 1052(a) (2012) (giving the United States Patent and Trademark Office authority to deny registration for a mark 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").

[5] *Tam*, 137 S. Ct. at 1765. The Lanham Act is "the foundation of trademark law today." Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1687 (1999). It was passed by Congress in 1946 "in order to liberalize the law of unfair competition." Jeremy A. Rovinsky, *Troubleshooting Legal Malfunction:* Lexmark *and Consumer Standing Under the Lanham Act*, 48 J. MARSHALL L. REV. 453, 453 (2015). It "was written as a broad remedial statute intended to provide harmony to a patchwork of previous trademark laws." *Id.* at 454. The Act takes its name from U.S. Representative Fritz Lanham of Texas, who introduced "the bill that would become the federal Trademark Act of 1946." Sondra Levine, *The Origins of the Lanham Act*, 19 J. CONTEMP. LEGAL ISSUES 22, 25 (2010).

[6] 15 U.S.C. § 1052(a).

[7] *Tam*, 137 S. Ct. at 1754.

[8] As one article explains:

> Mr. Tam chose the name The Slants, he said, after he did an informal survey asking people what they thought all Asians had in common. The most frequent answer was slanted eyes. Because he grew up hearing that slur and being ridiculed, he thought he could take the term back, reappropriate the insult from decades ago.

Paula Reed Ward, *The Slants Challenge Trademark Rejection*, PITTSBURGH POST-GAZETTE, Apr. 28, 2017, at A1; *see also* Robert Barnes, *Next Gig for Band: Defending Its Name*, WASH. POST, Jan. 16, 2017, at A1 (reporting that The Slants are an "all Asian American, Chinatown dance-rock band" and that "[s]ome Asian American groups support Tam's attempt to reappropriate a slur and make it a point of pride, as other artists of color have done").

[9] *Tam*, 137 S. Ct. at 1751.

[10] *Id.* at 1765 (Kennedy, J., concurring in part and concurring in the judgment).

The same day it issued *Tam*, the Court in *Packingham v. North Carolina*[11] declared unconstitutional a state statute prohibiting registered sex offenders from accessing a wide swath of social-network Internet sites.[12] North Carolina used this law to prosecute and convict Lester Packingham, a registered sex offender who posted a Facebook message praising God and thanking Jesus for the dismissal of a traffic ticket.[13]

Authoring the Court's opinion in Packingham's favor, Justice Kennedy extolled the virtues of the Internet and online social networks as vital modes of modern communication.[14] He also lambasted the Tar Heel State statute for being "unprecedented in the scope of First Amendment speech it burdens."[15] As with *Tam*, *Packingham* was decided without dissent.[16]

Several months before the Court's June 2017 rulings in *Tam* and *Packingham*, it held in *Expressions Hair Design v. Schneiderman*[17] that New York's anti-surcharge, credit-card statute[18] regulated the speech of business merchants, not simply economic conduct.[19] The statute provides that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means."[20]

Although not deciding whether this law violates the First Amendment—the Court remanded the case to the U.S. Court of Appeals for the Second Circuit to resolve that question[21]—the decision was nonetheless a free-speech victory. Why? Because the Second Circuit previously had concluded the statute, at least as applied to single-sticker price frameworks, "regulates conduct, not speech."[22] In accord with

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[11] 137 S. Ct. 1730 (2017).

[12] *See generally id.*; N.C. GEN. STAT. § 14-202.5 (2017) (making it unlawful for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site"), *declared unconstitutional by Packingham*, 137 S. Ct. 1730.

[13] *Packingham*, 137 S. Ct. at 1734–35.

[14] *See id.* at 1735 ("While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular." (internal citation omitted) (quoting Reno v. ACLU, 521 U.S. 844, 868 (1997))).

[15] *Id.* at 1737.

[16] *See generally id.*

[17] 137 S. Ct. 1144 (2017).

[18] N.Y. GEN. BUS. LAW § 518 (McKinney 2017).

[19] *See Expressions Hair Design*, 137 S. Ct. at 1151 ("In regulating the communication of prices rather than prices themselves, § 518 regulates speech.").

[20] N.Y. GEN. BUS. LAW § 518.

[21] *Expressions Hair Design*, 137 S. Ct. at 1151.

[22] Expressions Hair Design v. Schneiderman, 808 F.3d 118, 135 (2d Cir. 2015), *vacated*, 137 S. Ct. 1144 (2017). In December 2017, the Second Circuit certified the following question to the New York Court of Appeals: "Does a merchant comply with New York's General

the results in both *Tam* and *Packingham*, the Supreme Court's March 2017 ruling in *Expressions Hair Design* came without dissent.[23]

The positive impact of *Expressions Hair Design*'s holding that New York's statute raised First Amendment–based speech concerns came swiftly. Specifically, the U.S. Court of Appeals for the Fifth Circuit held in 2016 that a similar Texas law "regulates conduct, not speech, and, therefore, does not implicate the First Amendment."[24] In April 2017, however, the Supreme Court vacated the Fifth Circuit's decision in light of *Expressions Hair Design* and remanded the case to that court.[25] In May 2017, the Fifth Circuit then remanded it to a "district court for further proceedings consistent with *Expressions Hair Design*."[26]

If one were writing headlines for these cases for a law-centric newspaper, they might read—from *Tam* to *Packingham* to *Expressions Hair Design*, respectively—something akin to:

- "Court Reaffirms Right to Offend, Blasts Viewpoint Censorship."[27]
- "Court Reinforces Requirement of Narrowly Tailoring Statutes."[28]
- "First Amendment Triggered by Economic Statutes Affecting Speech."[29]

Business Law § 518 so long as the merchant posts the total-dollars-and-cents price charged to credit card users?" Expressions Hair Design v. Schneiderman, 877 F.3d 99, 107 (2d Cir. 2017). In January 2018, the New York Court of Appeals accepted the Second Circuit's certification of this question in an unpublished opinion, noting that "the issues presented are to be considered after briefing and argument." Expressions Hair Design v. Schneiderman, 30 N.Y.3d 1051, 1052 (Jan. 11, 2018).

[23] *See generally Expressions Hair Design*, 137 S. Ct. 1144.

[24] Rowell v. Pettijohn, 816 F.3d 73, 80 (5th Cir. 2016), *vacated*, 137 S. Ct. 1431 (2017).

[25] Rowell v. Pettijohn, 137 S. Ct. 1431 (2017).

[26] Rowell v. Pettijohn, 865 F.3d 237, 238 (5th Cir. 2017).

[27] Actual newspaper headlines for *Tam* tended to focus on either the trademark aspect of the case or the decision's effect on the dispute over trademark registration for the name of the Washington Redskins football team. *See, e.g.*, Robert Barnes, *Trademark Ruling Boosts Redskins' Defense of Name*, WASH. POST, June 20, 2017, at A1; Brent Kendall, *Supreme Court Rejects Curbs on Trademarks*, WALL ST. J., June 20, 2017, at A2; Adam Liptak, *Law Barring Disparaging Trademarks Is Rejected in a Unanimous Decision*, N.Y. TIMES, June 20, 2017, at A14; Richard Wolf, *First Amendment Protects Offensive Trademarks*, USA TODAY, June 20, 2017, at 8A.

[28] Actual newspaper headlines for *Packingham* generally focused on the First Amendment speech rights of sex offenders. *See, e.g.*, Opinion, *Free Speech for Sex Offenders*, WALL ST. J., June 21, 2017, at A16; Richard Wolf, *Ruling: Sex Offenders Can Access Social Sites*, USA TODAY, June 20, 2017, at 8A.

[29] Actual newspaper headlines for *Expressions Hair Design* typically centered on surcharges and/or credit cards. *See, e.g.*, Lawrence Hurley, *Supreme Court Tosses Ruling that Upheld N.Y. Credit Card Purchases Law*, WASH. POST, Mar. 30, 2017, at A2; Brent Kendall, *Top Court Remands Surcharge Case*, WALL ST. J., Mar. 30, 2017, at B10; Adam Liptak, *Justices Say Free Speech Applies in Card Fee Case*, N.Y. TIMES, Mar. 30, 2017, at B2; David G. Savage, *Court Weighs In on Credit Card Fees*, L.A. TIMES, Mar. 30, 2017, at C2.

This Article digs behind the headlines and holdings to examine other features of the high court's rulings affecting free expression during the first half of 2017. Some of the items analyzed here cut across the Court's decisions while others reside more narrowly within individual cases. In brief, this Article does not purport to provide a comprehensive analysis of each decision, but rather focuses on perhaps subtler and sometimes deeper outcomes.

Part I examines Justice Sotomayor's concurrence in the threats-of-violence case of *Perez v. Florida*.[30] Part II then analyzes the fracturing among the Justices in *Tam*, *Packingham*, and *Expressions Hair Design*.[31] Next, Part III delves into Justice Kennedy's dicta in *Packingham* regarding online social networks and illustrates how his words already are influencing a raft of cases asserting a First Amendment right of access to the social media accounts of government officials, including President Donald J. Trump.[32] Part IV explores the different conceptions of viewpoint discrimination articulated by Justices Alito and Kennedy in *Tam*, as well as the impact of labeling a statute viewpoint based.[33] Finally, the Article concludes by highlighting other important facets of the cases, as well as contending that the lack of unanimity across all of the cases from the first half of 2017 suggests trouble ahead in free-speech cases.[34] The order in which the topics are addressed does not necessarily reflect their importance.

I. NUDGING FORWARD THE TRUE THREATS DOCTRINE: A CALL FOR RESOLVING THE QUESTION OF INTENT & ACKNOWLEDGING THE DANGERS OF AVOIDANCE

The true-threats aspect of the Court's rulings from the first half of 2017 stems not from *Tam*, *Packingham*, or *Expressions Hair Design*. Instead, it arises from an easy-to-overlook March 2017 case called *Perez v. Florida*.[35] The Court in *Perez* denied a petition for a writ of certiorari to consider a Florida appellate court ruling[36] upholding Robert Perez's conviction for violating a state statute prohibiting threats of violence.[37]

True threats are one of the few categories of speech not protected by the First Amendment.[38] In 2003, the Supreme Court defined true threats as "statements where

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[30] 137 S. Ct. 853 (2017); *see* discussion *infra* Part I.

[31] *See* discussion *infra* Part II.

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

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

[34] *See* discussion *infra* Conclusion.

[35] *Perez*, 137 S. Ct. 853.

[36] Perez v. State, 189 So. 3d 797 (Fla. Dist. Ct. App. 2016) (per curiam), *cert. denied*, 137 S. Ct. 853 (2017).

[37] 137 S. Ct. at 853; *see also* FLA. STAT. § 790.162 (2017) (making it a second-degree felony "to threaten to throw, project, place, or discharge any destructive device with intent to do bodily harm to any person or with intent to do damage to any property of any person").

[38] *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 717 (2012) (plurality opinion) (identifying "true threats" as one of several categories of unprotected speech); Watts v. United States, 394

the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[39] The problem, however, was that "the Court declined to lay out what standard of intent was required to sustain a true threat conviction."[40]

What makes fascinating the Court's decision not to hear *Perez* is Justice Sotomayor's solo concurrence.[41] Specifically, she asserted "that to sustain a threat conviction without encroaching upon the First Amendment, States must prove more than the mere utterance of threatening words—*some* level of intent is required."[42] Furthermore, Sotomayor called on her fellow justices to "decide precisely what level of intent suffices under the First Amendment."[43]

This is significant because the Court had a prime opportunity in 2015 in *Elonis v. United States*[44] to resolve whether a speaker must subjectively intend to communicate a threat in order for the speech to fall outside the bounds of First Amendment protection.[45] The Court, however, squandered that chance in *Elonis*. It resolved the case on federal statutory grounds,[46] thereby rendering it "not necessary to consider any First Amendment issues."[47] The outcome in *Elonis* thus fits snuggly within the traditions of constitutional avoidance and minimalism often embraced by the Court under Chief Justice John Roberts's leadership.[48]

U.S. 705, 707 (1969) (per curiam) ("What is a threat must be distinguished from what is constitutionally protected speech.").

[39] Virginia v. Black, 538 U.S. 343, 359 (2003).

[40] Jing Xun Quek, Elonis v. United States*: The Next Twelve Years*, 31 BERKELEY TECH. L.J. 1109, 1114 (2016).

[41] *Perez*, 137 S. Ct. at 853 (Sotomayor, J., concurring in the denial of certiorari).

[42] *Id.* at 855.

[43] *Id.*

[44] 135 S. Ct. 2001 (2015).

[45] The question presented to the Court in the *Elonis* petition was:

> Whether, consistent with the First Amendment and *Virginia v. Black*, 538 U.S. 343 (2003), conviction of threatening another person requires proof of the defendant's subjective intent to threaten, as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island, and Vermont; or whether it is enough to show that a "reasonable person" would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort.

Petition for a Writ of Certiorari at I, *Elonis*, 135 S. Ct. 2001 (No. 13-983).

[46] The statute at issue was 18 U.S.C. § 875(c). It provides that "[w]hoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both." *Id.*

[47] *Elonis*, 135 S. Ct. at 2012.

[48] *See* Clay Calvert & Matthew D. Bunker, *Fissures, Fractures & Doctrinal Drifts: Paying the Price in First Amendment Jurisprudence for a Half Decade of Avoidance, Minimalism & Partisanship*, 24 WM. & MARY BILL RTS. J. 943, 943–46 (2016) (addressing the Court's avoidance of the First Amendment issue in *Elonis*).

Specifically, it comports with Justice Louis Brandeis's observation more than eighty years ago that "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."[49] Brandeis added that "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."[50] This sometimes is called the last resort rule,[51] one component of a larger avoidance canon[52] that "encompasses a range of different practices."[53]

Yet avoidance in *Elonis* proved problematic. Professor Joseph Russomanno points out that the true threats doctrine is "marked by murky definitions and haphazard application."[54] Indeed, as UCLA Professor Eugene Volokh wrote subsequent to *Elonis*, "the Court hasn't even resolved whether statements are punishable only (a) if the speaker intends to put a person in fear, or whether it is enough that (b) a reasonable speaker would realize that the statement would put a person in fear."[55] Due to the Court's sidestepping of the First Amendment issue in *Elonis*, Volokh adds that "[t]he circuit split on the constitutional *mens rea* question—what is the minimum mens rea that the First Amendment requires for a threat conviction?—thus remains unresolved."[56] "Mens rea" is "the Latin phrase for a guilty mind."[57]

Perez thus gave the Court another opportunity in 2017 to clarify this matter. With the Court denying certiorari, however, Justice Sotomayor seemed intent to illustrate why the Court's continuing failure to explicate the precise contours of the

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[49] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

[50] *Id.*

[51] Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1004 (1994).

[52] Broadly put, the avoidance canon, as a rule of statutory interpretation, "encourages a court to adopt one of several plausible interpretations of a statute in order to avoid deciding a tough constitutional question." Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 181–82 (2010). The avoidance canon represents "a form of judicial restraint that avoids unnecessary constitutional decisions and, as a result, confrontations between the courts and the political branches." Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1573 (2000). A complete discussion of all facets of the avoidance canon is beyond the scope of this Article.

[53] Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2115 (2015).

[54] Joseph Russomanno, *Facebook Threats: The Missed Opportunities of* Elonis v. United States, 21 COMM. L. & POL'Y 1, 3 (2016).

[55] Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981, 1005 (2016).

[56] *Id.* at 1005 n.141.

[57] John Villasenor, *Technology and the Role of Intent in Constitutionally Protected Expression*, 39 HARV. J.L. & PUB. POL'Y 631, 642 (2016).

mens rea requirement within the true threats doctrine is troublesome.[58] Specifically, she highlighted the real-world consequences and human toll wrought by constitutional avoidance and minimalism.[59]

Delving into the facts of the case, Sotomayor began by bluntly asserting that "Robert Perez is serving more than 15 years in a Florida prison for what may have been nothing more than a drunken joke."[60] Perez was inebriated when he made what Sotomayor called an "apparent joke"[61] to a liquor store employee who misinterpreted Perez's use of the phrase "Molly cocktail"—a drink combining vodka with grapefruit juice that Perez had just been drinking at a nearby beach—with a Molotov cocktail.[62] A Molotov cocktail, sometimes referred to as a petrol bomb, is an inexpensive, homemade weapon that today is classified as an improvised explosive device.[63] Perez thereafter proclaimed, "I'm going to blow up this whole [expletive] world."[64]

He was prosecuted under a Florida statute[65] for threatening to blow up the liquor store.[66] The jury, as Sotomayor explained, was given an instruction that permitted it "to convict Perez based on what he 'stated' alone—irrespective of whether his words represented a joke, the ramblings of an intoxicated individual, or a credible threat."[67] He was convicted and sentenced to fifteen years plus one day in prison.[68]

Sotomayor was disturbed by this seemingly unjust outcome. She opined that "the jury instruction—and Perez's conviction—raise serious First Amendment concerns worthy of this Court's review."[69] Citing the sentencing transcript, Sotomayor pointed out that even "the prosecutor acknowledged that Perez may have been 'just a harmless drunk guy at the beach.'"[70] Beyond the instructions failing to consider Perez's intent, she was also troubled because they did not require jurors to

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[58] *See generally* Perez v. Florida, 137 S. Ct. 853, 853 (2017) (Sotomayor, J., concurring in the denial of certiorari).

[59] *See id.* at 853–55 (stating how the harmless ramblings of a drunk guy at a beach could lead to a fifteen-year prison sentence without the state having proved mens rea).

[60] *Id.* at 853.

[61] *Id.*

[62] *Id.*

[63] Carlos Martín-Alberca et al., *Anionic Markers for the Forensic Identification of Chemical Ignition Molotov Cocktail Composition*, 53 SCI. & JUST. 49, 49 (2013). The Molotov cocktail takes its name from Soviet Union politician Vyacheslav Molotov and was coined by the Finns when fighting against the Soviets during the Winter War of 1939–1940. Jon Guttman, *Hand Tool: Molotov Cocktail—One Drink Soldiers Would Always Rather Send Back*, MIL. HIST., July/Aug. 2007, at 21.

[64] *Perez*, 137 S. Ct. at 853 (Sotomayor, J., concurring in the denial of certiorari) (alteration in original).

[65] FLA. STAT. § 790.162 (2017).

[66] *Perez*, 137 S. Ct. at 853 (Sotomayor, J., concurring in the denial of certiorari).

[67] *Id.* at 854.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 855 (citation omitted).

consider the context surrounding Perez's statements.[71] Sotomayor asserted that "[c]ontext in this case might have made a difference."[72]

Sotomayor made it evident she believes the Supreme Court's true threats decisions in *Watts v. United States*[73] and *Virginia v. Black*[74] collectively stand for the proposition

> that to sustain a threat conviction without encroaching upon the First Amendment, States must prove more than the mere utterance of threatening words—*some* level of intent is required. And these two cases strongly suggest that it is not enough that a reasonable person might have understood the words as a threat—a jury must find that the speaker *actually intended* to convey a threat.[75]

She concluded that "[t]he Court should also decide precisely what level of intent suffices under the First Amendment—a question we avoided two Terms ago in *Elonis*."[76] Ultimately, Sotomayor only agreed with the Court's refusal to hear the case because the lower courts never addressed the First Amendment issue.[77]

All of this is significant for two reasons. First and foremost, Sotomayor's concurrence demonstrates the dire consequences that the Court's penchant for avoidance and minimalism can have on individuals like Robert Perez.[78] Had the Court in *Elonis* addressed the First Amendment question and had it, in turn, embraced a subjective intent requirement, then Perez's conviction would not stand on appeal because the jury instructions rendered intent irrelevant.[79] Incarceration of fifteen years is a steep price to pay for what may have been a drunken joke lost in translation. While the last resort rule may be a well-established facet of constitutional avoidance, it also can leave in its wake the wrecked lives of individuals like Robert Perez.

Additionally, Sotomayor's concurrence is important because she makes it clear she believes not only that "*some* level of intent is required"[80] under the true threats doctrine, but more specifically that *Watts* and *Black* "strongly suggest"[81] a speaker must have "*actually intended* to convey a threat" for the speech to fall outside the

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[71] *Id.*

[72] *Id.*

[73] 394 U.S. 705 (1969) (per curiam).

[74] 538 U.S. 343 (2003).

[75] *Perez*, 137 S. Ct. at 855 (Sotomayor, J., concurring in the denial of certiorari) (emphasis added to "actually intended," emphasis in original for "some").

[76] *Id.*

[77] *Id.* at 854.

[78] *Id.* at 855 (indicating that context made all the difference for Perez's conviction).

[79] *Id.* ("[T]he jury was directed to convict solely on the basis of what Perez 'stated.'").

[80] *Id.*

[81] *Id.*

ambit of First Amendment protection.[82] This position seemingly puts Sotomayor at odds with the views expressed by both Justices Alito and Thomas in *Elonis*.[83]

In *Elonis*, Alito penned an opinion concurring and dissenting in part with the Court's opinion delivered by Chief Justice Roberts.[84] In the process, Alito rejected defendant Anthony Elonis's contention that the First Amendment requires something more than just recklessness on the part of the speaker.[85] Alito explained that "whether or not the person making a threat intends to cause harm, the damage is the same."[86] In other words, the harm that justifies suppressing true threats arises regardless of a speaker's intent. Thus, for Alito, all that the First Amendment requires for a true threat to fall outside its scope of protection is for a speaker to act—akin to the second prong of the actual malice standard in libel law[87]—with reckless disregard of putting a victim in fear of violence.[88] Recklessness lies just "[o]ne step above negligence on the hierarchy of criminal culpability."[89]

Justice Thomas dissented in *Elonis*.[90] In contrast to Justice Sotomayor's interpretation of *Watts* and *Black*, Thomas wrote that "[n]either of those decisions . . . addresses whether the First Amendment requires a particular mental state for threat prosecutions."[91] Furthermore, Thomas emphasized that other categories of unprotected speech do not include a specific intent component.[92] For example, he pointed out that fighting words may exist "without proof of an intent to provoke a violent reaction."[93] Thomas thus saw no reason "why we should give threats pride of place among unprotected speech."[94]

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[82] *Id.* (emphasis added).

[83] *Compare* Elonis v. United States, 135 S. Ct. 2001, 2014–16 (2015) (Alito, J., concurring in part and dissenting in part) ("In my view, the term 'threat' in § 875(c) can fairly be defined as a statement that . . . was at least reckless . . . ."), *and id.* at 2018 (Thomas, J., dissenting) ("[T]he Court of Appeals properly applied the general-intent standard . . . ."), *with Perez*, 137 S. Ct. at 855 (Sotomayor, J., concurring in the denial of certiorari) ("[A] jury must find that the speaker *actually* intended to convey a threat." (emphasis added)).

[84] *Elonis*, 135 S. Ct. at 2013–18 (Alito, J., concurring in part and dissenting in part).

[85] *Id.* at 2016.

[86] *Id.*

[87] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964) (defining actual malice as a statement published "with knowledge that it was false or with reckless disregard of whether it was false or not").

[88] *Elonis*, 135 S. Ct. at 2017 (Alito, J., concurring in part and dissenting in part).

[89] Enrique A. Monagas & Carlos E. Monagas, *Prosecuting Threats in the Age of Social Media*, 36 N. ILL. U. L. REV. 57, 75 (2016).

[90] *Elonis*, 135 S. Ct. at 2018–28 (Thomas, J., dissenting).

[91] *Id.* at 2026.

[92] *See id.* at 2027 ("We generally have not required a heightened mental state under the First Amendment for historically unprotected categories of speech.").

[93] *Id.*

[94] *Id.* at 2028.

If the Court heeds Justice Sotomayor's call in *Perez* to resolve the intent quagmire plaguing the true threats doctrine, then it appears the justices may fracture on what constitutes the correct standard. Sotomayor's sentiment in *Perez* seemingly diverges from those of both Alito and Thomas in *Elonis*.[95]

Ultimately, Sotomayor's lone concurrence in *Perez* exposing the underlying facts of the case and venting her worry over whether the outcome was unjust is unsurprising. That's because the case lies at the intersection of the First Amendment freedom of speech and the criminal justice system.[96] As Rachel Barkow astutely wrote in 2014, Sotomayor is "a powerful voice in criminal law cases"[97] whose view "is firmly grounded in how things actually work in practice, and she pays close attention to the specific facts of cases before her. Her experience as an assistant district attorney and trial judge also seems to have made her attuned to the need for checks on government power."[98]

Writing in 2016, *New York Times* Supreme Court reporter Adam Liptak observed that "[m]ost of the justices, including some of its more liberal members, are inclined to give the police the benefit of the doubt. Justice Sotomayor is more apt to see encounters with the police through the eyes of the powerless, as tinged with humiliation, danger and worse."[99] That was the situation with her "fierce and personal dissent"[100] in 2016 in the Fourth Amendment stop-and-frisk case of *Utah v. Strieff*,[101] and it certainly was reflected again in Sotomayor's 2017 analysis of the facts in *Perez*.[102] Her dissent in *Strieff* made evident, as Professor Josephine Ross notes, that "Sotomayor wants her fellow Justices to understand the real-life consequences of relaxing Fourth Amendment protections."[103] Her concurrence in *Perez*,

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[95] *See supra* notes 60–94 and accompanying text.

[96] *See supra* notes 60–83 and accompanying text.

[97] Rachel E. Barkow, *Justice Sotomayor and Criminal Justice in the Real World*, 123 YALE L.J. F. 409, 411 (2014), https://www.yalelawjournal.org/forum/justice-sotomayor-and-criminal-justice-in-the-real-world [https://perma.cc/Z8UZ-WTZX].

[98] *Id.* at 410.

[99] Adam Liptak, *Sotomayor, in Dissents, Tackles Criminal Justice*, N.Y. TIMES, July 5, 2016, at A11.

[100] Robert Barnes, *Fierce Dissent Over Illegal Police Stop*, WASH. POST, June 21, 2016, at A3.

[101] *See* 136 S. Ct. 2056, 2064–71 (2016) (Sotomayor, J., dissenting). In *Strieff*, Sotomayor observed, among other things, that "it is no secret that people of color are disproportionate victims" of police stops and interrogations. *Id.* at 2070. She added that:

> For generations, black and brown parents have given their children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.

Id.

[102] *See* Perez v. Florida, 137 S. Ct. 853, 853–55 (2017) (Sotomayor, J., concurring in the denial of certiorari).

[103] Josephine Ross, *Warning: Stop-and-Frisk May Be Hazardous to Your Health*, 25 WM. & MARY BILL RTS. J. 689, 710 (2016).

in turn, suggests she also wants her colleagues to recognize the real-life implications of repeatedly avoiding the intent question in true threats cases.[104] The fifteen-year incarceration of a drunken man who may only have been joking is, indeed, no laughing matter.

II. UNITED BUT DIVIDED: A LACK OF UNANIMITY CLOUDS THE FIRST AMENDMENT

This facet of division among the justices cuts across the Court's rulings in *Tam*, *Packingham*, and *Expressions Hair Design*. All three decisions were free-speech victories and none had a dissent, but not one was unanimous.[105] As discussed later,[106] the rifts among the justices could cloud future First Amendment cases.

A. Matal v. Tam

Tam involved three opinions. They were authored by Justices Alito,[107] Kennedy,[108] and Thomas.[109] Most significantly, there was no five-Justice majority when it came to applying two important doctrines—viewpoint discrimination and commercial speech.[110]

Regarding viewpoint discrimination, Justice Alito authored a section of the opinion joined by Chief Justice Roberts, and Justices Thomas and Breyer.[111] Alito, however, only cursorily addressed viewpoint discrimination, devoting a mere two paragraphs to it.[112] In contrast, Justice Kennedy offered a much lengthier and more robust analysis in a concurrence joined by Justices Ginsburg, Sotomayor, and Kagan.[113] As described in Part IV, the Kennedy bloc also embraced a cleaner, textbook-like understanding of viewpoint discrimination and, in turn, treated it as fatal for statutes embodying it.[114] Thus, while all eight justices concluded the disparagement clause was viewpoint based, they divided four-to-four on their analysis of that key issue.[115]

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[104] *Perez*, 137 S. Ct. at 853–54 (Sotomayor, J., concurring in the denial of certiorari).

[105] *See supra* Introduction (describing the outcomes in *Tam*, *Packingham*, and *Expressions Hair Design*).

[106] *See infra* Part IV (exploring in greater detail the cleft on viewpoint discrimination in *Tam*).

[107] Matal v. Tam, 137 S. Ct. 1744, 1751–65 (2017).

[108] *Id.* at 1765–69 (Kennedy, J., concurring in part and concurring in the judgment).

[109] *Id.* at 1769 (Thomas, J., concurring in part and concurring in the judgment).

[110] *See generally id.* at 1760–63 (plurality opinion) (discussing viewpoint discrimination; joined by the Chief Justice, Justice Thomas, and Justice Breyer).

[111] *See id.* at 1763 (addressing viewpoint discrimination).

[112] *Id.*

[113] *Id.* at 1765–69 (Kennedy, J., concurring in part and concurring in the judgment) (addressing viewpoint discrimination).

[114] *See infra* notes 313–21, 323–24 and accompanying text.

[115] Justice Alito, joined by Roberts, Breyer, and Thomas, wrote that the disparagement clause "denies registration to any mark that is offensive to a substantial percentage of the members of any group. . . . [T]hat is viewpoint discrimination: Giving offense is a viewpoint."

On the commercial speech front, the *Tam* justices splintered three ways. Thomas penned a lone concurrence.[116] He reiterated his belief[117] that statutes targeting commercial speech should be measured against strict scrutiny.[118] Regulations of commercial speech today are generally evaluated under an intermediate scrutiny standard[119] established more than thirty-five years ago in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[120] Thomas was the only Justice in *Tam* to argue that commercial speech regulations should always be subject to strict scrutiny.[121]

Justice Alito, again joined by Roberts, Thomas,[122] and Breyer, wrote a portion of *Tam* analyzing the disparagement clause under the intermediate scrutiny standard used in commercial speech cases and holding it could not survive that analysis.[123] Conversely, Justice Kennedy, along with Ginsburg, Sotomayor, and Kagan, reasoned that the "viewpoint based discrimination at issue here necessarily invokes

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Tam, 137 S. Ct. at 1763 (plurality opinion). Justice Kennedy, along with Ginsburg, Sotomayor, and Kagan, reasoned that the clause "constitutes viewpoint discrimination—a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny. The Government's action and the statute on which it is based cannot survive this scrutiny." *Id.* at 1765 (Kennedy, J., concurring in part and concurring in the judgment).

[116] *Tam*, 137 S. Ct. at 1769 (Thomas, J., concurring in part and concurring in the judgment).

[117] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 572 (2001) (Thomas, J., concurring in part and concurring in the judgment) (opining that "I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial'" (citation omitted)); *see also* Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 149 ("Justice Thomas has authored a number of separate opinions in recent years calling for commercial speech to be treated on par with political speech.").

[118] *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231 (2015) (observing that "content-based restrictions on speech" are permissible "only if they survive strict scrutiny," and noting that strict scrutiny requires a compelling government interest and a statute that is narrowly tailored to serve that interest); United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest.").

[119] *See* Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1283 (2014) (noting that "the Supreme Court differentiates between commercial speech (such as advertising) and noncommercial speech, and subjects the former to intermediate scrutiny").

[120] 447 U.S. 557 (1980); *see* Lili Levi, *A "Faustian Pact"? Native Advertising and the Future of the Press*, 57 ARIZ. L. REV. 647, 681 n.172 (2015) (noting that in *Central Hudson* the Court articulated "a four-pronged standard of intermediate scrutiny for commercial speech").

[121] *See generally* Matal v. Tam, 137 S. Ct. 1744, 1769 (2017) (Thomas, J., concurring in part and concurring in the judgment).

[122] Although Thomas argued in his concurrence that strict scrutiny should apply in commercial speech cases, he nonetheless joined Justice Alito's opinion determining that the disparagement clause could not pass muster "even under the less stringent test announced in *Central Hudson*." *Id.*

[123] *Id.* at 1763–65 (plurality opinion).

heightened scrutiny"[124] even if the speech is commercial.[125] In other words, while the Alito bloc was content applying intermediate scrutiny, Kennedy's cohort felt that standard was insufficient due to the viewpoint nature of the disparagement clause.

When Thomas's call for commercial speech cases to be considered under strict scrutiny is coupled with Kennedy's four-justice concurrence arguing for deployment of "heightened scrutiny,"[126] it means a majority of the *Tam* justices believed intermediate scrutiny was the wrong test to apply to the disparagement clause. This doctrinal schism could haunt the Court in future commercial speech cases.

B. Packingham v. North Carolina

In addition to fracturing in *Tam*, the Justices divided in *Packingham* in strikingly similar blocs. Specifically, Justice Kennedy wrote the Court's opinion and was joined, exactly as he was in *Tam*, by Justices Ginsburg, Sotomayor, and Kagan.[127] In addition, Justice Breyer partnered with Kennedy's opinion.[128] Justice Alito authored a concurrence and was joined, as he was in *Tam*, by Roberts and Thomas.[129] In other words, only Breyer changed his alignment in *Packingham* when compared with *Tam*. Thus, while all of the justices agreed North Carolina's statute restricting registered sex offenders' access to social media websites was unconstitutional for being too broadly drafted,[130] they failed to unite around a single opinion.

In contrast to *Tam*, however, the fissure between the Kennedy and Alito blocs in *Packingham* was not doctrinal. Instead, it pivoted on dicta.[131] Specifically, Alito criticized Kennedy for "undisciplined dicta" and "musings"[132] extolling the virtues of the Internet and online social networks as high-tech avenues for dialogue and discourse akin to traditional public fora such as parks and streets.[133]

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[124] *Id.* at 1767 (Kennedy, J., concurring in part and concurring in the judgment).

[125] *See id.* ("Unlike content based discrimination, discrimination based on viewpoint, including a regulation that targets speech for its offensiveness, remains of serious concern in the commercial context.").

[126] *See id.*

[127] Packingham v. North Carolina, 137 S. Ct. 1730, 1733–38 (2017).

[128] *Id.*

[129] *Id.* at 1738–44 (Alito, J., concurring in the judgment).

[130] *See id.* at 1730–44 (majority opinion and Alito, J., concurring in the judgment). Justice Kennedy deemed the statute "unprecedented in the scope of First Amendment speech it burdens." *Id.* at 1737 (majority opinion). Similarly, Justice Alito lamented its "extraordinary breadth." *Id.* at 1738 (Alito, J., concurring in the judgment). Alito added that the statute "sweeps far too broadly to satisfy the demands of the Free Speech Clause." *Id.* at 1743.

[131] Dicta, the plural of dictum, generally refers to "expressions in an opinion of the court which are not necessary to support the decision." *Dicta*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969).

[132] *Packingham*, 137 S. Ct. at 1738 (Alito, J., concurring in the judgment).

[133] Kennedy noted that streets and parks are "quintessential" public fora for exercising

Kennedy, for instance, wrote in *Packingham* that it "is clear"[134] today that "cyberspace [generally] and social media in particular"[135] are "the most important places . . . for the exchange of views."[136] He pointed out the inexpensive, cost-efficient nature of communicating on social networks and emphasized that many government officials now have social media accounts that allow citizens to "petition their elected representatives and otherwise engage with them in a direct manner."[137]

In other words, two First Amendment rights are at stake when it comes to social media—not simply free speech, but also the right "to petition the government for a redress of grievances."[138] It was as if Kennedy was channeling his inner Alexander Meiklejohn, substituting online social networks in place of the famed First Amendment theorist's "town meeting [where] the people of a community assemble to discuss and to act upon matters of public interest."[139]

Kennedy zeroed in on the importance of citizens possessing access to Internet-based venues for expression.[140] He remarked that "[a] fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more."[141] The Court therefore "must exercise extreme caution" when limiting First Amendment protection "for access to vast networks" on the Internet.[142]

Alito felt these pronouncements were simply over the top and unnecessary to reach the conclusion that the North Carolina statute was overbroad.[143] Alito explained he was

> troubled by the Court's loose rhetoric. After noting that "a street or a park is a quintessential forum for the exercise of First Amendment rights," the Court states that "cyberspace" and "social media in particular" are now "the most important places (in a spatial sense) for the exchange of views." The Court declines to explain what this means with respect to free speech law . . . .[144]

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speech rights and that they remain "essential venues" today. *Id.* at 1735 (majority opinion). He stressed, however, that "the most important places . . . today" for expression are the Internet and, in particular, "social media." *Id.*

[134] *Id.*

[135] *Id.* (internal citation omitted).

[136] *Id.*

[137] *Id.*

[138] U.S. CONST. amend. I.

[139] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 22 (1948).

[140] *See Packingham*, 137 S. Ct. at 1735–36.

[141] *Id.* at 1735.

[142] *Id.* at 1736.

[143] *See id.* at 1743 (Alito, J., concurring in the judgment).

[144] *Id.* (internal citation omitted).

Alito fretted about how lower courts will use Kennedy's dicta glorifying online social networks.[145] Alito contended that Kennedy's "unnecessary rhetoric"[146] might "be interpreted by some to mean that the States are largely powerless to restrict even the most dangerous sexual predators from visiting any internet sites, including, for example, teenage dating sites and sites designed to permit minors to discuss personal problems with their peers."[147] In brief, Alito worried Kennedy's dicta will blur the traditional distinction separating a holding from dicta[148] by taking on the precedential force of a holding.[149]

Alito's concern, however, may be unwarranted. That is because Kennedy wrote that "this opinion should *not* be interpreted as barring a State from enacting more specific laws than the one at issue. Specific criminal acts are not protected speech even if speech is the means for their commission."[150] Kennedy added that "it can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor."[151]

Thus, although Alito is correct that Kennedy celebrated the Internet and online social networks,[152] Kennedy also carefully highlighted that states retain power to restrict sex offenders' access to websites via more narrowly drafted statutes.[153] One thus speculates whether Alito's attack on Kennedy's "loose rhetoric"[154] was launched for other reasons. Perhaps the condemnation simply reflects overarching differences between the two jurists. To wit, Kennedy typically is the pivotal swing

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[145] *Id.* at 1738.

[146] *Id.*

[147] *Id.*

[148] *See* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1094 (2005) (addressing in detail "the important distinction between holding and dicta").

[149] This blending or merger between dicta and holding is a common concern. As Professor Stacy Scaldo explains:

> Whether highly detailed or overly simplified, finding a consistently workable definition of dictum is akin to shooting at a moving target. But the more pertinent question to be addressed is the potential effect dicta have on future cases. If dictum is not part of the holding of a case, it should not be binding precedent.

Stacy A. Scaldo, *Deadly Dicta:* Roe*'s "Unwanted Motherhood,"* Carhart II*'s "Women's Regret," and the Shifting Narrative of Abortion Jurisprudence*, 6 DREXEL L. REV. 87, 91 (2013) (footnote omitted).

[150] *Packingham*, 137 S. Ct. at 1737 (emphasis added).

[151] *Id.*

[152] For instance, Kennedy wrote that "[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular." *Id.* at 1735 (quoting Reno v. ACLU, 521 U.S. 844, 868 (1997)).

[153] *Id.* at 1737.

[154] *Id.* at 1743 (Alito, J., concurring in the judgment).

vote[155] and "one of the Court's strongest First Amendment advocates."[156] In contrast, "Alito's record is the most consistently conservative of any justice on the current Court"[157] and he stands as "the Roberts Court's most consistent critic of expanding First Amendment free speech rights."[158]

A cynic also might wonder if Alito is taking up the late Justice Antonin Scalia's mantle as chief criticizer of Kennedy's opinions.[159] Or possibly that Alito's brickbats in *Packingham* were payback for Kennedy joining the Court's liberal wing in the 2016 abortion-restriction case of *Whole Woman's Health v. Hellerstedt*.[160] Kennedy's vote there fashioned a five-to-three decision striking down a Texas law limiting access to abortions.[161] If, as Dean Erwin Chemerinsky writes, "Kennedy had voted with Roberts, Thomas, and Alito in *Whole Wom[a]n's Health* to uphold the Texas law, it would have been a 4–4 split and the Texas law would have gone into effect."[162]

Ultimately, and regardless of the reason why, it is clear—based on both *Tam* and *Packingham*—that Kennedy and Alito didn't see eye to eye in First Amendment

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[155] *See* Elizabeth Price Foley, Whole Woman's Health *and the Supreme Court's Kaleidoscopic Review of Constitutional Rights*, 2015–2016 CATO SUP. CT. REV. 153, 169–70 (2016) (describing Kennedy as "the Court's current 'swing' vote"); Eric J. Segall, *Invisible Justices: How Our Highest Court Hides from the American People*, 32 GA. ST. U. L. REV. 787, 829 (2016) (asserting that "it is well accepted that, prior to Justice Scalia's death, Justice Kennedy was the all-important swing vote on the Court in most important areas of constitutional law including abortion and affirmative action").

[156] Samuel P. Siegel, Comment, *Reconciling* Caperton *and* Citizens United*: When Campaign Spending Should Compel Recusal of Elected Officials*, 59 UCLA L. REV. 1076, 1088 (2012).

[157] Tom Donnelly & Brianne Gorod, *Conservatism and Samuel Alito's Tenure on the Supreme Court*, ATLANTIC (Jan. 30, 2016), https://www.theatlantic.com/politics/archive/2016/01/none-to-the-right-of-samuel-alito/431946/ [https://perma.cc/2NSE-VPZQ].

[158] Ronald K.L. Collins, Foreword, *Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 440 (2013).

[159] For example, Justice Scalia savaged Kennedy's opinion for the Court in the same-sex marriage case of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), as "an opinion lacking even a thin veneer of law" and replete with "mummeries and straining-to-be-memorable passages." *Id.* at 2628 (Scalia, J., dissenting). Scalia added that Kennedy's "opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so." *Id.* at 2630.

[160] *See* 136 S. Ct. 2292, 2299 (2016). The Court in *Hellerstedt* declared that two provisions of a Texas law affecting the ability of a woman to obtain an abortion were unconstitutional. *Id.* at 2300. Justice Kennedy joined the Court's opinion authored by Justice Breyer and also joined by Justices Ginsburg, Sotomayor, and Kagan. *See id.* at 2299 (identifying the justices that joined with Breyer's opinion for the Court). Justice Alito, in contrast, wrote a lengthy dissent joined by Chief Justice Roberts and Justice Thomas. *Id.* at 2330–53 (Alito, J., dissenting).

[161] *Id.* at 2300 (majority opinion). The seat on the Court held by the late Justice Antonin Scalia was still vacant when the Court ruled in *Hellerstedt* and thus only eight justices participated in the case. *See id.* at 2299.

[162] Erwin Chemerinsky, *Everything Changed: October Term 2015*, 19 GREEN BAG 2D 343, 356 (2016).

cases in 2017.[163] Although the pair agreed on the bottom-line results in *Tam* and *Packingham*, their logic and reasoning diverged. Such fissures, be they doctrinal as in *Tam* or dicta-centric as in *Packingham*, could impact future free-speech cases.

C. Expressions Hair Design v. Schneiderman

Finally, the Court's March 2017 ruling in *Expressions Hair Design v. Schneiderman* featured three separate opinions: (1) the opinion of the Court by Chief Justice Roberts and joined by Justices Kennedy, Thomas, Ginsburg, and Kagan;[164] (2) a lone concurrence in the judgment by Justice Breyer;[165] and (3) a concurrence in the judgment authored by Justice Sotomayor and joined by Justice Alito.[166] Two opinions—those of Roberts and Breyer—agreed that New York's anti-surcharge, credit-card statute raised First Amendment–based free-speech concerns.[167]

Breyer's solo concurrence, however, continued what Professor Mark Tushnet calls the Justice's "project of partial de-doctrinalization."[168] Indeed, Benjamin Pomerance points out that Breyer "appears to distrust the Court's typical strict scrutiny framework for evaluating freedom of speech cases, including certain disputes where viewpoint discrimination is at issue. Frequently, he prefers employing a 'proportionality' balancing test for the vast majority of cases . . . ."[169] Proportionality is embraced by courts in other nations, but not by the U.S. Supreme Court.[170]

This absence in United States jurisprudence comes despite Justice Breyer's opinions that, in the words of First Amendment attorney Floyd Abrams, "repeatedly seek to apply the concept of proportionality"[171] and that are "closer to those adopted

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[163] *See supra* notes 108–62 and accompanying text. Alito and Kennedy were also at loggerheads in prior free speech cases. *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 730, 739 (2012) (striking down the Stolen Valor Act for violating the First Amendment, and involving a plurality opinion penned by Justice Kennedy concluding the "Act infringes upon speech protected by the First Amendment" and a dissent authored by Justice Alito "uphold[ing] the constitutionality of this valuable law").

[164] *See generally* 137 S. Ct. 1144, 1146 (2017) (identifying the justices that joined with Chief Justice Roberts's opinion for the Court).

[165] *Id.* at 1152 (Breyer, J., concurring in the judgment).

[166] *Id.* at 1153 (Sotomayor, J., concurring in the judgment).

[167] Chief Justice Roberts wrote for the majority that "[i]n regulating the communication of prices rather than prices themselves, § 518 regulates speech." *Id.* at 1151 (majority opinion). Justice Breyer "agree[d] with the Court that New York's statute regulates speech." *Id.* at 1152 (Breyer, J., concurring in the judgment).

[168] Mark Tushnet, *Justice Breyer and the Partial De-Doctrinalization of Free Speech Law*, 128 HARV. L. REV. 508, 514 (2014).

[169] Benjamin Pomerance, *An Elastic Amendment: Justice Stephen G. Breyer's Fluid Conceptions of Freedom of Speech*, 79 ALB. L. REV. 403, 506 (2016).

[170] Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, 59 AM. J. COMP. L. 463, 465–66 (2011).

[171] Floyd Abrams, Keynote Remarks, *Free Speech Under Fire: The Future of the First Amendment*, 25 J.L. & POL'Y 47, 58 (2016).

in European nations in interpreting their more limited free speech protections under the European Convention on Human Rights."[172] Indeed, as Professors Vikram David Amar and Alan Brownstein assert, Breyer writes in cases such as *United States v. Alvarez*[173] "as if there were no formal free speech doctrine currently in use that constrains judges' assessments of free speech claims"[174] and embraces a more "free-form balancing approach."[175]

Breyer was true to his doctrine-questioning form in *Expressions Hair Design*, attacking the traditional dichotomy between speech and conduct.[176] He opined that "because virtually all government regulation affects speech, . . . it is often wiser not to try to distinguish between 'speech' and 'conduct.'"[177] Breyer wrote that "determining the proper approach is typically more important than trying to distinguish 'speech' from 'conduct.'"[178]

Determining which approach is proper, Breyer declared, involves a trio of considerations.[179] First, if a statute "negatively affects the processes through which

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[172] *Id.*

[173] 567 U.S. 709 (2012). In *Alvarez*, the Court struck down the Stolen Valor Act, which made it a crime to falsely claim having won a Congressional Medal of Honor. *Id.* at 730. Justice Breyer concurred in the judgment, but wrote that "I do not rest my conclusion upon a strict categorical analysis." *Id.* (Breyer, J., concurring in the judgment). Instead, Breyer simply considered "whether it is possible substantially to achieve the Government's objective in less burdensome ways." *Id.* at 737. Reflecting the concept of proportionality, Breyer concluded the Stolen Valor Act was unconstitutional because it "works disproportionate constitutional harm." *Id.* at 739.

[174] Vikram David Amar & Alan Brownstein, *The Voracious First Amendment:* Alvarez *and* Knox *in the Context of 2012 and Beyond*, 46 LOY. L.A. L. REV. 491, 497 (2013).

[175] *Id.*

[176] *See* Randall P. Bezanson, *Is There Such a Thing as Too Much Free Speech?*, 91 OR. L. REV. 601, 601 (2012) ("From its beginning, the First Amendment speech guarantee has rested on two fundamental boundaries: speech versus conduct and liberty versus utility."); Diahann DaSilva, *Playing a "Labeling Game": Classifying Expression as Conduct as a Means of Circumventing First Amendment Analysis*, 56 B.C. L. REV. 767, 769–70 (2015) (noting "the speech versus conduct dichotomy" and examining "the distinction between speech and conduct, the implications of that distinction, and how courts have classified various activities as speech or conduct"); Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 188 (2015) ("The notion that there is a distinction between laws that regulate speech and laws that regulate conduct with merely an incidental effect on speech is well established.").

The U.S. Supreme Court recognizes that some types of conduct can rise to the level of speech for First Amendment purposes under the symbolic speech doctrine. As Justice Sandra Day O'Connor observed when recognizing cross burning as a form of speech, "[t]he First Amendment affords protection to symbolic or expressive conduct as well as to actual speech." Virginia v. Black, 538 U.S. 343, 358 (2003).

[177] Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1152 (2017) (Breyer, J., concurring in the judgment).

[178] *Id.*

[179] *Id.*

political discourse or public opinion is formed or expressed,"[180] then the Court should "scrutinize that regulation with great care."[181] Importantly, Breyer avoided using the term strict scrutiny, the traditional doctrinal moniker for the Court's most rigorous form of review.[182] Second, Breyer asserted that if the "'informational function' provided by truthful commercial speech" is restricted by a statute, then this triggers "a 'lesser' (but still elevated) form of scrutiny."[183] Here, he sidestepped using the term intermediate scrutiny, the label typically attached to commercial speech analyses under the test created in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[184] Third and finally, Breyer contended that regulations that either compel disclosure of purely factual information in a commercial speech setting or simply affect regular commercial transactions are subject to rational basis review.[185]

In contrast to the opinions of Justices Roberts and Breyer in *Expressions Hair Design*, Justice Sotomayor agreed with the majority's judgment to remand the case to the U.S. Court of Appeals for the Second Circuit, but *not* for purposes of having it resolve the statute's constitutionality.[186] Instead, she called for the Second Circuit to certify the case to New York's highest appellate court, the New York Court of Appeals, to resolve the ambiguity of precisely what the statute regulates.[187] This was

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[180] *Id.*

[181] *Id.*

[182] *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799 (2011) (describing "strict scrutiny" as "a demanding standard" that requires a statute to be "justified by a compelling government interest and . . . narrowly drawn to serve that interest").

[183] *Expressions Hair Design*, 137 S. Ct. at 1152 (Breyer, J., concurring in the judgment).

[184] 447 U.S. 557 (1980); *see* Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 173 (2015) ("Beguiled by the abstract generalities of the *Central Hudson* test, judges have become captivated by the generic idea of 'intermediate scrutiny' rather than by the specific question of whether government regulations of commercial speech unduly impair public access to accurate information." (internal citations omitted)); Sherman, *supra* note 176, at 198 (describing "the intermediate scrutiny set forth in *Central Hudson Gas & Electric Co. v. Public Service Commission*").

[185] *Expressions Hair Design*, 137 S. Ct. at 1152 (Breyer, J., concurring in the judgment).

[186] Sotomayor concluded:

> "The complexity" of this case "might have been avoided," had the Second Circuit certified the question of § 518's meaning when the case was first before it. The Court's opinion does not foreclose the Second Circuit from choosing that route on remand. But rather than contributing to the piecemeal resolution of this case, I would vacate the judgment below and remand with instructions to certify the case to the New York Court of Appeals to allow it to definitively interpret § 518. I thus concur only in the judgment.

Id. at 1159 (Sotomayor, J., concurring in the judgment) (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 79 (1997)).

[187] *Id.*

necessary, Sotomayor averred, because the statute, given what she called its "elusive nature,"[188] is subject "to at least three interpretations."[189]

The problem of interpretation was compounded because the Second Circuit had only ruled on one possible meaning of the statute—namely, that it applied to single-sticker pricing schemes "where merchants post one price and would like to charge more to customers who pay by credit card."[190] Under that interpretation, the Second Circuit held that the statute "does not regulate speech."[191] This, in turn, was the only interpretation of the statute the U.S. Supreme Court considered.[192]

Problematically, the Second Circuit punted on whether the New York statute also raised First Amendment concerns as applied to two-sticker price schemes.[193] As Chief Justice Roberts noted for the majority, "the Court of Appeals abstained from reaching the merits of the constitutional question beyond the single-sticker context."[194]

Sotomayor was unsatisfied by the Second Circuit's "partial decision,"[195] blasting it as "neither required nor right."[196] Rather than abstaining from issues beyond the single-sticker context, "[t]he Second Circuit should have exercised its discretion to certify the antecedent state-law question here: What pricing schemes or pricing displays does § 518 prohibit? Certification might have avoided the need for a constitutional ruling altogether."[197] Sotomayor went so far as to accuse the Second Circuit of committing "an abuse of discretion" when it failed to certify the question regarding the meaning of the statute to the New York Court of Appeals "because [the Second Circuit] viewed the 'state of the record' as too underdeveloped."[198] This was a mistake, Sotomayor asserted, because the meaning of the statute and whether it violates the First Amendment "are pure questions of law" not dependent on an extensive factual record.[199]

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[188] *Id.* at 1155.

[189] *Id.* at 1154.

[190] *Id.* at 1148 (majority opinion).

[191] Expressions Hair Design v. Schneiderman, 808 F.3d 118, 130 n.7 (2d Cir. 2015), *vacated*, 137 S. Ct. 1144 (2017).

[192] As Chief Justice Roberts wrote for the Court, "[W]e limit our consideration to the single-sticker pricing regime for present purposes." *Expressions Hair Design*, 137 S. Ct. at 1149 n.1.

[193] The Second Circuit opined:

> We now turn to the balance of Plaintiffs' First Amendment challenge, which is premised on the assumption that Section 518 applies to sellers who do not post single sticker prices. Because this portion of Plaintiffs' challenge turns on an unsettled question of state law, we do not reach the merits.

Expressions Hair Design, 808 F.3d at 135.

[194] *Expressions Hair Design*, 137 S. Ct. at 1148–49.

[195] *Id.* at 1156 (Sotomayor, J., concurring in the judgment).

[196] *Id.*

[197] *Id.* at 1158.

[198] *Id.* (quoting *Expressions Hair Design*, 808 F.3d at 141).

[199] *Id.*

Sotomayor also jabbed at the Court's opinion written by Roberts. "The Court addresses only one part of one half of petitioners' First Amendment challenge to the New York statute at issue here. This quarter-loaf outcome is worse than none," she opined.[200] Perhaps more charitably put, the outcome in *Expressions Hair Design* can be dubbed "minimalist."[201]

To a large extent, this objection taps into Sotomayor's concerns expressed in *Perez* regarding the Court's *Elonis* decision regarding true threats addressed earlier.[202] *Elonis*, to continue the bread analogy, can also be considered quarter-loaf. Why? Because the *Elonis* Court only addressed the federal statutory issue, not the First Amendment one, and still then only held on the statutory issue that something more than a reasonable-person, negligence standard was required by the statute, failing to specify precisely what the proper mens rea level is.[203] Suffice it to say, when reading her opinions in *Perez* and *Expressions Hair Design*, Sotomayor is not a fan of decisions that fail to fully enlighten or elucidate larger principles. Interestingly, Alito joined Sotomayor's concurrence in *Expressions Hair Design*, thus distancing himself again from Kennedy, who joined in Roberts's opinion for the Court.

The bottom line from *Expressions Hair Design* is that although the Court handed New York merchants a victory by holding that First Amendment interests are at stake and vacating the Second Circuit's decision to the contrary,[204] not all the justices were pleased. Breyer groused and grumbled about the speech-conduct dichotomy and when various levels of judicial scrutiny should apply.[205] Sotomayor, in turn, was perturbed both at the Court's "quarter-loaf" decision and the Second Circuit's failure to certify the statutory question.[206]

Ultimately, although *Tam*, *Packingham*, and *Expressions Hair Design* were rendered without dissents, the justices failed to be on the same page in each case.[207] Whether attributable to matters of doctrine, dicta or otherwise, the seemingly united free-speech front of the Roberts Court is more façade than reality. Significantly, both *Tam* and *Packingham* revealed a consistent divide between a bloc comprised of Kennedy, Ginsburg, Sotomayor, and Kagan, on the one hand, and a group made

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[200] *Id.* at 1153.

[201] Mark Chenoweth, Expressions Hair Design*: Detangling the Commercial-Free-Speech Knot*, 2016–2017 CATO SUP. CT. REV. 227, 245 (2017).

[202] *See* discussion *supra* Part I.

[203] *See* Cameron L. Fields, *Unraveling a Ball of Confusion: Layers of Criminal Intent, Facebook, Rap, and Uncertainty in* Elonis v. United States*, 135 S. Ct. 2001 (2015)*, 36 MISS. C. L. REV. 133, 137 (2017) (noting that the Court in *Elonis* "did not define what constituted a true threat and seemingly rejected the objective standard the majority of the courts of appeals had applied—but left nothing in its place" and adding that "[t]he Court furthermore did not address the First Amendment issues involved in this case; it only analyzed the federal statute").

[204] *See generally Expressions Hair Design*, 137 S. Ct. 1144.

[205] *See id.* at 1152–53 (Breyer, J., concurring in the judgment).

[206] *See id.* at 1153 (Sotomayor, J., concurring in the judgment).

[207] *See supra* notes 108–206 and accompanying text.

up of Roberts, Alito, and Thomas, on the other.[208] As noted earlier, Breyer joined the latter coalition in *Tam*, but pivoted away to join the former in *Packingham*.[209]

III. DANGEROUS DICTA OR FREE-SPEECH FOUNTAINHEAD? A CLOSER REVIEW OF KENNEDY'S *PACKINGHAM* "MUSINGS"[210] REGARDING ACCESS TO ONLINE SOCIAL NETWORKS

"Dicta," as Professor Michael Dorf writes, "typically refers to statements in a judicial opinion that are not necessary to support the decision reached by the court."[211] "Holdings," in contrast, "carry greater precedential weight than dicta."[212] Professor Randy Kozel concisely describes the precedential difference, at least in theory, as "binding 'holdings' and dispensable 'dicta.'"[213]

Yet, in reality, the distinction between dicta and holdings is increasingly blurry. Judge Pierre Leval of the U.S. Court of Appeals for the Second Circuit, for example, asserts that:

> The problem is that dicta no longer have the insignificance they deserve. They are no longer ignored. Judges do more than put faith in them; they are often treated as binding law. The distinction between dictum and holding is more and more frequently disregarded. . . . Today more and more, dicta flex muscle to which, I submit, they are not entitled by constitutional right.[214]

Dicta, in fact, have long played important roles in First Amendment free-speech jurisprudence. For example, there was Chief Justice Charles Evans Hughes's "famous dicta"[215] in *Near v. Minnesota ex rel. Olson*[216] articulating the limited times when prior restraints might be permissible.[217] Justice William Brennan later used part of that

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[208] *See supra* discussion Sections II.A–B.

[209] *See supra* notes 111, 123, 128 and accompanying text (describing the alignment of Justice Breyer in *Tam* and *Packingham*).

[210] Packingham v. North Carolina, 137 S. Ct. 1730, 1738 (2017) (Alito, J., concurring in the judgment).

[211] Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000 (1994).

[212] *Id.*

[213] Randy J. Kozel, *Stare Decisis in the Second-Best World*, 103 CALIF. L. REV. 1139, 1143 (2015).

[214] Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1250 (2006).

[215] Christopher Dunn, *Balancing the Right to Protest in the Aftermath of September 11*, 40 HARV. C.R.-C.L. L. REV. 327, 329 (2005).

[216] 283 U.S. 697 (1931).

[217] *See id.* at 716 (identifying times of war, "obscene publications," and "incitements to acts of violence and the overthrow by force of orderly government" as the "exceptional" cases when a "previous restraint" may be permissible).

dicta to support his stance in *New York Times Co. v. United States*[218] that "only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order."[219] Indeed, as Professor Michael Meyerson points out, "[t]he usual starting point for analyzing the exceptions to the prior restraint doctrine is the dicta from *Near*."[220]

Another example of dicta influencing free-speech jurisprudence stems from *Chaplinsky v. New Hampshire*.[221] There, as Professor Brooks Fuller observes, the Court "outlined several categories of unprotected speech under the First Amendment in *dicta*."[222] This "infamous dicta,"[223] penned by Justice Frank Murphy in 1942, reads:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[224]

The latter part of that dicta spawned the low-value theory in First Amendment jurisprudence.[225] It proved highly influential.[226] Attorney John Wirenius asserts:

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[218] 403 U.S. 713 (1971) (per curiam).

[219] *Id.* at 726–27 (Brennan, J., concurring); *see* Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 279 (2008) (noting that "Brennan drew this standard from dicta in the Court's prior opinion in *Near v. Minnesota*" and, in particular, the *Near* Court's statement "that prior restraints are permissible in cases involving 'actual obstruction to [the government's] recruiting service or the publication of the sailing dates of transports or the number and location of troops'" (alteration in original) (quoting *Near*, 283 U.S. at 716)).

[220] Michael I. Meyerson, *Rewriting* Near v. Minnesota*: Creating a Complete Definition of Prior Restraint*, 52 MERCER L. REV. 1087, 1106 (2001).

[221] 315 U.S. 568 (1942).

[222] P. Brooks Fuller, *The Angry Pamphleteer: True Threats, Political Speech, and Applying* Watts v. United States *in the Age of Twitter*, 21 COMM. L. & POL'Y 87, 87 n.1 (2016).

[223] Stephen Fraser, *The Conflict Between the First Amendment and Copyright Law and Its Impact on the Internet*, 16 CARDOZO ARTS & ENT. L.J. 1, 6 n.32 (1998).

[224] *Chaplinsky*, 315 U.S. at 571–72 (footnotes omitted).

[225] *See* Enrique Armijo, Reed v. Town of Gilbert*: Relax, Everybody*, 58 B.C. L. REV. 65, 73 (2017) (noting "the traditional low-value categories of speech derived from the Court's 1942 decision in *Chaplinsky v. New Hampshire* that have long been thought to rest outside of the First Amendment's protection"); Christopher M. Schultz, *Content-Based Restrictions on Free*

"What is astonishing about this dictum is the casual ease with which the Court brushes aside the constitutional question, and the breadth of its doctrine. With a single stroke, the Court purports to settle not only the case at hand, but the questions of obscenity, libel and 'lewd' speech."[227] He adds that *Chaplinsky*'s impact "cannot be overestimated. The slowly maturing, and essentially coherent functional tradition . . . was shattered at a blow, and replaced with a highly subjective jurisprudence, which ranked speech by its 'value' (in the opinion of the individual justices on the Court at the time)."[228] It was not until the Court's 2010 decision in *United States v. Stevens*[229] that the Court made evident that the value of speech is not determinative of whether it receives First Amendment protection.[230]

When it comes to libel, Professors Alan Chen and Justin Marceau wrote that "[t]he Court strongly suggested in its *Chaplinsky* dicta that libel has no First Amendment value because defamatory statements serve no truth finding function and also cause harm to those whose reputations are damaged by them."[231] Professor Genevieve Lakier concurs, noting that "the *Chaplinsky* Court only suggested in dicta" that libel is not protected by the First Amendment.[232] This would change, of

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Expression: Reevaluating the High Versus Low Value Speech Distinction, 41 ARIZ. L. REV. 573, 577 (1999) ("The 'low value theory' first appeared in *Chaplinsky v. New Hampshire* . . . .").

[226] *See* Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 177 n.73 (1997) (observing that "the *Chaplinsky* language, or variants thereof, has appeared in almost all of the low-value speech cases").

[227] John F. Wirenius, *The Road Not Taken: The Curse of* Chaplinsky, 24 CAP. U. L. REV. 331, 332–33 (1995).

[228] *Id.* at 333 (emphasis removed).

[229] 559 U.S. 460 (2010).

[230] Chief Justice John Roberts explained for the *Stevens* majority:

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

Id. at 470. Roberts added that the descriptions in *Chaplinsky* and related cases do "not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor." *Id.* at 471; *see* Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 WASH. L. REV. 445, 460 (2012) (noting that the Court in *Stevens* "acknowledged that *Chaplinsky* seemed to suggest such a balancing inquiry, but denied that this formula should be applied to each new proposed category," and adding that the *Stevens* "Court refused to engage in an interest-balancing inquiry in order to determine which categories of speech fall into the low-value category").

[231] Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1447 (2015).

[232] Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2174 (2015).

course, with the Court's 1964 decision in *New York Times Co. v. Sullivan*[233] adding the actual malice standard as a layer of First Amendment protection in libel cases brought by public officials.[234]

Chaplinsky's dicta was quoted favorably in 1957 by the U.S. Supreme Court in *Roth v. United States*[235] to support the proposition that obscene speech falls outside the scope of First Amendment protection.[236] Obscenity[237] remains unprotected today.[238]

Beyond the Free Speech Clause, as Professor RonNell Andersen Jones carefully chronicles, the Court has engaged in an "unusual pattern of excessive dicta" expressing "the unique role of the press in society and the democratic function that it serves" as safeguarded by the Free Press Clause.[239] As she puts it, the Court's "substantial dialogue about the media's democratic traits and positive characteristics is nonbinding dicta."[240] Andersen Jones contends "that the Court's patterns of tangentially praising or criticizing the press and opining about its role in a democracy in cases not squarely reaching a Press Clause holding are jurisprudentially dangerous."[241]

And just as it is not unusual for scholars like Andersen Jones to criticize the Court's use of dicta in First Amendment cases, so too is it not rare for the justices to disparage each other for authoring dicta. Recently, for example, Justice Scalia derided Chief Justice Roberts for writing "seven pages of the purest dicta" in the abortion-facility, buffer-zone case of *McCullen v. Coakley*.[242]

As described in Section II.B, Justice Alito complained about Justice Kennedy's *Packingham* dicta equating the Internet and online social networks with streets and parks as venues for expression.[243] Kennedy's dicta stressed the importance of

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[233] 376 U.S. 254 (1964).

[234] Justice William Brennan explained in *Sullivan* that:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279–80.

[235] 354 U.S. 476 (1957).

[236] Specifically, the *Roth* Court cited *Near*, as well as other decisions, to support its assertion that "expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press." *Id.* at 481.

[237] The Court currently uses a three-part test for determining if sexually explicit speech is obscene. *See* Miller v. California, 413 U.S. 15, 24 (1973) (setting forth the test for obscenity).

[238] *See* United States v. Alvarez, 567 U.S. 709, 717 (2012) (plurality opinion) (identifying obscenity as one of the historically unprotected categories of speech).

[239] RonNell Anderson Jones, *The Dangers of Press Clause Dicta*, 48 GA. L. REV. 705, 707 (2014).

[240] *Id.* at 714.

[241] *Id.* at 727.

[242] 134 S. Ct. 2518, 2541 (2014) (Scalia, J., concurring in the judgment).

[243] *See supra* notes 143–49 and accompanying text (summarizing Alito's criticisms of Kennedy's dicta).

citizens having access to online social networks as fora "for the exchange of views," including engagement with "their elected representatives."[244]

Alito worried Kennedy's language would hamstring lawmakers' ability to ban pedophiles from accessing websites where they could prey on minors.[245] Yet there is an exceedingly positive flipside to the dicta. Specifically, the more important and decidedly constructive ramification of Kennedy's words is to provide theoretical footing for recognizing a First Amendment right to access government officials' Twitter and Facebook accounts.

Especially vital in this latter, more hopeful scenario, is the connection among three Kennedy statements in *Packingham*. First, he called it "[a] fundamental principle of the First Amendment . . . that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more."[246] In brief, public access to fora for exchanges of expression is "fundamental."[247] Second, Kennedy stressed that online social networks now constitute "the most important places" for such exchanges.[248] In other words, social networks are modern-day communicative fora. Third, Kennedy observed that "on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all [fifty] States and almost every Member of Congress have set up accounts for this purpose."[249]

These three statements, when viewed in the larger context of the privileged position political speech takes in First Amendment jurisprudence,[250] lay the foundation for a right to access the social media accounts of government officials. Kennedy, in other words, logically bridged three key variables: (1) a First Amendment right of public access to fora for communicative exchanges; (2) recognition that online social networks are such fora; and (3) the use of such fora by government officials for communicative interactions with the public.

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[244] Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).

[245] *See id.* at 1743 (Alito, J., concurring in the judgment) (contending that, in light of Kennedy's dicta, "States may have little ability to restrict the sites that may be visited by even the most dangerous sex offenders," and questioning whether, based on Kennedy's opinion, "a State [may] preclude an adult previously convicted of molesting children from visiting a dating site for teenagers").

[246] *Id.* at 1735 (majority opinion).

[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 349 (2010) ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest."); Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) (asserting that when it comes to the First Amendment freedom of speech, "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office").

Whether a First Amendment right to access the social network accounts of government officials exists is now squarely at issue in *Knight First Amendment Institute at Columbia University v. Trump*.[251] It was filed in July 2017 in federal court in the Southern District of New York.[252] The lawsuit, brought on behalf of multiple Twitter users blocked from President Donald J. Trump's personal @realDonaldTrump account after criticizing him,[253] quotes several statements by Kennedy in *Packingham*.[254] In addition to mentioning Kennedy's observation noted above regarding how multiple politicians use Twitter,[255] the complaint cites Kennedy's remark that social media websites can provide "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."[256]

The *Knight* plaintiffs argue, among other things, that "[b]ecause of the way in which President Trump uses @realDonaldTrump, the account has become an important channel for news about the presidency and the U.S. government. Those who are blocked from the account are impeded in their ability to learn information that is shared only through that account."[257] The complaint adds that the President's personal Twitter account constitutes "a kind of *digital town hall* in which the President and his aides use the tweet function to communicate news and information to the public, and members of the public use the reply function to respond to the President and his aides and exchange views with one another."[258]

Although the complaint neither cites nor quotes Alexander Meiklejohn, its reference to a "digital town hall"[259] readily evokes Meiklejohn's discussion "of the traditional American town meeting."[260] Meiklejohn used the town meeting to describe the purpose of free speech—namely, producing "the voting of wise decisions"—as well as the limits that may be imposed on free expression.[261] As Meiklejohn put it:

> Every man is free to come. They meet as political equals. Each has a duty to think his own thoughts, to express them, and to listen to the arguments of others. The basic principle is that the freedom of speech shall be unabridged. And yet the meeting cannot even be opened unless, by common consent, speech is abridged.[262]

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[251] Complaint for Declaratory & Injunctive Relief, Knight First Amendment Inst. at Columbia Univ. v. Trump, No. 1:17-cv-05205 (S.D.N.Y. July 11, 2017) [hereinafter Knight Complaint].
[252] *Id.* at 1.
[253] *Id.*
[254] *Id.* at 1–2.
[255] *Id.* at 2.
[256] *Id.* at 1 (quoting Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017)).
[257] *Id.* at 16.
[258] *Id.* (emphasis added).
[259] *Id.*
[260] MEIKLEJOHN, *supra* note 139, at 22.
[261] *Id.* at 25.
[262] *Id.* at 22.

In addition to playing a key role in the Knight First Amendment Institute's lawsuit against Trump, *Packingham*'s dicta are central to the case of *Leuthy v. LePage*.[263] It was filed in federal court by the American Civil Liberties Union (ACLU) of Maine in August 2017.[264] The *Leuthy* complaint argues that Maine Governor Paul LePage violated the First Amendment rights of both speech and petition of two Pine Tree State residents when he banned them from his Facebook page and censored their comments.[265] Quoting *Packingham*, the *Leuthy* plaintiffs averred:

> As the Supreme Court stated last month, Facebook, Twitter, and other social media platforms provide "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." The Supreme Court additionally stated that these platforms are "revolution[ary]" in their ability to increase civic engagement with elected officials through the instantaneous and direct communication opportunities provided by these platforms.[266]

A similar lawsuit, *Laurenson v. Hogan*,[267] was filed in federal court in August 2017 against Maryland Governor Lawrence Hogan.[268] According to the *Washington Post*, "Hogan's staff has blocked and deleted the posts of at least 450 people who voiced their opinions on his official Facebook page."[269] The *Laurenson* complaint cites Kennedy's dicta from *Packingham* praising the merits of online social media as fora for the exchange of ideas.[270] The *Laurenson* plaintiffs contend Hogan "and his staff recently promulgated a vague, broadly worded 'Social Media Policy' that

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[263] Complaint: Declaratory & Injunctive Relief Requested at 2, Leuthy v. LePage, No. 1:17-cv-00296-JAW (D. Me. Aug. 8, 2017) [hereinafter Leuthy Complaint].

[264] *Id.* at 1.

[265] The complaint provides, in key part, that:

> Plaintiffs include the Governor's constituents from who have been banned from interacting on his page and have had their comments deleted due to their criticism of the Governor and his policies. As a result of their criticism, Plaintiffs have been impeded from commenting on the Governor's posts, sharing his posts, or having any type of discussions on his posts. As a limited public forum, especially one in which individuals are participating in political speech, the Plaintiffs' are protected by the First Amendment, and the Governor's actions constitute unlawful, viewpoint-based exclusion.

Id. at 3.

[266] *Id.* at 2 (alteration in original) (quoting Packingham v. North Carolina, 137 S. Ct. 1730, 1736–37 (2017)).

[267] Complaint for Injunctive & Declaratory Relief & Damages, Laurenson v. Hogan, No. 8:17-cv-02162-DKC (D. Md. Aug. 1, 2017) [hereinafter Laurenson Complaint].

[268] *Id.* at 1.

[269] Petula Dvorak, *Why Blocking Facebook Critics Could Leave Us 'Dumb & Silent*,' WASH. POST, Aug. 4, 2017, at B1.

[270] Laurenson Complaint, *supra* note 267, at 3, 19, and 21.

purports to authorize the deletion of comments that are somehow 'inappropriate,' or that are not 'about' something the Governor has posted, and the blocking of posters who make such comments."[271]

Additionally, in *Morgan v. Bevin*[272] the ACLU sued Kentucky Governor Matt Bevin on behalf of two Bluegrass State residents.[273] Specifically, Drew Morgan and Mary Hargis allege they were "permanently blocked from one of the Governor's social media sites thus preventing them from contributing to the political dialogue occurring in those public forums and, in the case of Twitter, viewing the content posted by the Government or the comments of others."[274] Unlike *Knight*, *Leuthy*, and *Laurenson*, however, the complaint in *Morgan* does not cite Kennedy's *Packingham* dicta.[275] The gist, however, is substantially the same. As the *Morgan* complaint claims, "permanently barring individuals and organizations from being able to post comments on his [Governor Bevin's] official Twitter and Facebook accounts is an unconstitutional restriction on their right to engage in speech."[276]

At the heart of all of these lawsuits is the nexus of: (1) access; (2) free speech; (3) the right to petition government officials; and (4) new communications technology. As Deborah Jeon, Legal Director for the Maryland ACLU, remarked about the lawsuit against Governor Hogan, "[t]he highest purpose of the First Amendment is to protect the right of Americans to engage in political speech and to petition the government to address their concerns."[277]

An additional aspect of the Knight First Amendment Institute's complaint—namely, its focus on viewpoint discrimination—is important as it relates to one of the Supreme Court's decisions from the first half of 2017.[278] Specifically, the *Knight* complaint contends that Trump's "blocking of the Individual Plaintiffs from the @realDonaldTrump account violates the First Amendment because it imposes a viewpoint-based restriction on the Individual Plaintiffs' participation in a public forum."[279] The complaint adds that Trump's blocking also "violates the First Amendment because it imposes a viewpoint-based restriction on the Individual Plaintiffs' ability to petition the government for redress of grievances."[280] Indeed, as Dean Erwin Chemerinsky tidily sums up the viewpoint discrimination in all of

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[271] *Id.* at 2.

[272] Verified Complaint, Morgan v. Bevin, No. 3:17-cv-00060-GFVT (E.D. Ky. July 31, 2017) [hereinafter Morgan Complaint].

[273] *See generally id.*

[274] *Id.* at 2.

[275] *See generally id.*

[276] *Id.* at 12.

[277] Ovetta Wiggins, *Blocked by Hogan on Facebook, 4 File Suit*, WASH. POST, Aug. 2, 2017, at B1.

[278] *See* Matal v. Tam, 137 S. Ct. 1744, 1763, 1765 (2017).

[279] Knight Complaint, *supra* note 251, at 24.

[280] *Id.*

these cases, "[t]hese are government officials communicating about government business. They can't pick or choose based on who they like or who likes them."[281]

As analyzed earlier, viewpoint discrimination played a key role in the Court's decision in *Matal v. Tam*.[282] Yet, the justices fractured four-to-four on that doctrine's meaning and importance.[283] Such differences, which are the focus of the next part of this Article,[284] could play a key role in the resolution of cases such as *Knight First Amendment Institute* and *Leuthy*.

For now, it is clear that while Alito fretted over the possibly deleterious impact of Kennedy's "loose rhetoric"[285] and "undisciplined dicta"[286] in *Packingham*,[287] the same language is already playing a vital role in right-of-access cases pivoting on the social media accounts of government officials.[288] Kennedy's dicta from *Packingham*, for example, were cited multiple times by U.S. District Judge James Cacheris in his July 2017 opinion in *Davison v. Loudoun County Board of Supervisors*.[289] Cacheris held that the Facebook account of a local government official was subject to the First Amendment.[290] Among other things, the Judge approvingly cited *Packingham* for "comparing social media to traditional public fora such as parks and streets."[291] That, ironically, is the precise comparison to which Justice Alito so vehemently objected.[292] Whether Kennedy's "exuberant celebration of social media's place in the First Amendment"[293] ultimately proves as powerful or important as the dicta described earlier in either *Near*[294] or *Chaplinsky,*[295] of course, remains to be seen.

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[281] Brady McCombs, *Social Media Blocking Ignites Debate: Lawsuits Say Online Actions of Politicians Violate Free Speech*, PANTAGRAPH (Bloomington, Ill.), Aug. 11, 2017, at A1.

[282] *See* discussion *supra* Section II.A.

[283] *See* discussion *supra* Section II.A.

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

[285] Packingham v. North Carolina, 137 S. Ct. 1730, 1743 (2017) (Alito, J., concurring in the judgment).

[286] *Id.* at 1738.

[287] *See id.* (contending that Kennedy's "language is bound to be interpreted by some to mean that the States are largely powerless to restrict even the most dangerous sexual predators from visiting any internet sites, including, for example, teenage dating sites and sites designed to permit minors to discuss personal problems with their peers").

[288] *See supra* notes 251–81 and accompanying text.

[289] No. 1:16cv932, 2017 U.S. Dist. LEXIS 116208 (E.D. Va. July 25, 2017).

[290] *See id.* at *30–31 (citing *Packingham*, 137 S. Ct. 1730).

[291] *Id.* at *26.

[292] *See Packingham*, 137 S. Ct. at 1738 (Alito, J., concurring in the judgment) ("I cannot join the opinion of the Court, however, because of its undisciplined dicta. The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks.").

[293] David T. Goldberg & Emily R. Zhang, *Our Fellow American, the Registered Sex Offender*, 2016–2017 CATO SUP. CT. REV. 59, 96 (2017).

[294] *See supra* notes 215–20 and accompanying text (addressing the dicta in *Near*).

[295] *See supra* notes 221–38 and accompanying text (addressing the dicta in *Chaplinsky*).

IV. DIFFERENT VIEWPOINTS ON VIEWPOINT DISCRIMINATION: A CLOSER LOOK AT THE FRACTURE IN *TAM*

Free-speech jurisprudence generally hinges on a distinction between content-neutral laws and those that discriminate against particular types of content, with the former deemed less problematic than the latter.[296] The U.S. Supreme Court has held that "[c]ontent-based regulations are presumptively invalid"[297] and typically subject to strict scrutiny review.[298]

Content-neutral laws, as Professor Geoffrey Stone spells out, "limit communication without regard to the message conveyed,"[299] while content-based statutes "limit communications because of the message conveyed."[300]

Viewpoint discrimination, in turn, constitutes what the Court more than twenty years ago called "an egregious form of content discrimination."[301] It explained then that "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."[302] It is a dangerous "subset or particular instance of the more general phenomenon of content discrimination."[303] In brief, as Justice Ginsburg wrote in 2014, "[t]he First Amendment, our precedent makes plain, disfavors viewpoint-based discrimination."[304]

What, then, is viewpoint discrimination? Professor Erica Goldberg recently articulated that "[t]he difference between content discrimination and viewpoint discrimination is not precise, but viewpoint discrimination is considered the most pernicious subset of content discrimination. If a restriction against lobbying exemplifies content-based discrimination, a restriction against lobbying in favor of animal rights is an example of viewpoint-based discrimination."[305] A law targeting all speech

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[296] *See* Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953, 967 (2016) ("The most salient pivot in free-speech jurisprudence today is the distinction between laws that are based on the content of speech and those that are neutral with respect to content. While content-neutral laws are generally tolerated, current law proclaims that government may not regulate speech based on its content." (footnotes omitted)); Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 235 (2012) (explaining that the two primary rationales "behind the content-discrimination principle are that it is usually wrong for the government to regulate speech because of what it is saying and that it is usually acceptable, as a First Amendment matter, for the government to regulate speech for reasons other than what it is saying").

[297] R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

[298] *See supra* note 118 and accompanying text (addressing the strict scrutiny test).

[299] Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189 (1983).

[300] *Id.* at 190.

[301] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

[302] *Id.*

[303] *Id.* at 831.

[304] Wood v. Moss, 134 S. Ct. 2056, 2061 (2014).

[305] Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 743 n.287 (2016).

about abortion from occurring in public thus is content-based but not viewpoint-based because, as Professor Alan Chen notes, it does "not matter whether one's view is pro-choice, anti-abortion, neutral, or even non-political (e.g., scientific), as the topic is simply off limits."[306]

In *Matal v. Tam*, all eight justices agreed the disparagement clause was viewpoint based.[307] Justice Alito, joined by Chief Justice Roberts and Justices Thomas and Breyer, wrote that "[o]ur cases use the term 'viewpoint' discrimination in a broad sense."[308] He failed, however, to articulate a test or rule for determining when a law is viewpoint based.[309] Alito merely concluded the disparagement clause is viewpoint based because "[i]t denies registration to any mark that is offensive to a substantial percentage of the members of any group" and, in turn, "[g]iving offense is a viewpoint."[310] The entire analysis of viewpoint discrimination spanned a mere two paragraphs.[311] And although the Alito bloc found the clause was viewpoint based, it nonetheless applied a lax, intermediate scrutiny standard of review to analyze its constitutionality.[312]

Justices Kennedy, Ginsburg, Sotomayor and Kagan did not join with the Alito bloc's brief analysis of viewpoint discrimination.[313] Instead, Kennedy penned a concurrence for the quartet to explain "in greater detail why the First Amendment's protections against viewpoint discrimination apply to the trademark here" and to illustrate why "the viewpoint discrimination rationale renders unnecessary any extended treatment of other questions raised by the parties."[314]

Kennedy articulated a crisp, easy-to-understand test for deciphering when viewpoint discrimination exists: "whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed."[315] This comports squarely with the principle described above that viewpoint discrimination is a subset of content discrimination.[316] Applying this rule to the facts in *Tam*, Kennedy concluded the disparagement clause constitutes "the essence of viewpoint discrimination"[317] because, within the subject matter of trademarks

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[306] Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 39 n.42 (2003).

[307] *See generally* 137 S. Ct. 1744 (2017).

[308] *Id.* at 1763 (plurality opinion).

[309] *Cf. id.*

[310] *Id.*

[311] *Id.*

[312] *See id.* at 1763–64 (applying the intermediate scrutiny standard used to analyze restrictions on commercial speech).

[313] Alito's analysis of viewpoint discrimination takes place in Part III, Section C of the opinion. *Id.* at 1761–63; *see id.* at 1750 (noting that only Roberts, Thomas, and Breyer joined Alito in Section III.C).

[314] *Id.* at 1765 (Kennedy, J., concurring in part and concurring in the judgment).

[315] *Id.* at 1766.

[316] *See supra* notes 299–306 and accompanying text.

[317] *Tam*, 137 S. Ct. at 1766 (Kennedy, J., concurring in part and concurring in the judgment).

regulated by the clause (marks pertaining to persons, institutions, beliefs, and national symbols), "an applicant may register a positive or benign mark but not a derogatory one. The law thus reflects the Government's disapproval of a subset of messages it finds offensive."[318]

Because the clause was viewpoint based, Kennedy's cohort found it "necessarily invokes heightened scrutiny," regardless of whether it regulated commercial speech.[319] Recall the Alito group was willing to apply intermediate scrutiny.[320] The only time, in fact, that a viewpoint-based law is permissible, according to Kennedy, is when the government either is the speaker or is using others to speak on its behalf.[321]

The differences in emphasis between the Alito and Kennedy blocs are clear. Whereas Alito, in announcing the judgment of the Court, began by stressing that the disparagement clause was unconstitutional because offensive speech is protected under the First Amendment,[322] Kennedy launched his concurrence by concentrating on the fact that the clause was invalid because the First Amendment generally bars viewpoint discrimination.[323] The clause, Kennedy wrote, "constitutes viewpoint discrimination—a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny. The Government's action and the statute on which it is based cannot survive this scrutiny."[324]

The contrast in approaches to *Tam* may be important. Was *Tam* a case about protecting offensive speech (Alito) or was it a case about thwarting viewpoint discrimination (Kennedy)? To wit, Alito quotes the Court's observation in the flag-burning decision of *Texas v. Johnson*[325] that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[326] Kennedy omits any reference to *Johnson*. Similarly, Alito quotes the *Street v. New York*[327] sentiment "public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[328] Kennedy fails to cite,

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[318] *Id.*

[319] *Id.* at 1767.

[320] *See supra* note 110 and accompanying text.

[321] *Tam*, 137 S. Ct. at 1768 (Kennedy, J., concurring in part and concurring in the judgment) ("It is telling that the Court's precedents have recognized just one narrow situation in which viewpoint discrimination is permissible: where the government itself is speaking or recruiting others to communicate a message on its behalf.").

[322] Alito, in the second paragraph of the opinion, wrote that the disparagement clause "violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." *Id.* at 1751 (majority opinion).

[323] *Id.* at 1765 (Kennedy, J., concurring in part and concurring in the judgment).

[324] *Id.*

[325] 491 U.S. 397 (1989).

[326] *Tam*, 137 S. Ct. at 1763 (plurality opinion) (quoting *Johnson*, 491 U.S. at 414).

[327] 394 U.S. 576 (1969).

[328] *Tam*, 137 S. Ct. at 1763 (plurality opinion) (quoting *Street*, 394 U.S. at 592).

much less to quote, *Street*. The same holds true for the Court's offensive speech case of *Hustler Magazine, Inc. v. Falwell*[329]—Alito cites it,[330] Kennedy does not.

All of this leads to a big-picture question: is the doctrine against viewpoint discrimination—the doctrine to which Kennedy's bloc devoted its concurrence—separate and distinct from a right-to-offend doctrine[331] on which Alito concentrated? Or, is *Tam* simply one case in which the two doctrinal threads are woven together? To the extent that "disparage" means to offend (rather than to praise or laud), then the disparagement clause seemingly taps into both doctrines.

But surely Alito's contention that the clause constitutes viewpoint discrimination because "[g]iving offense is a viewpoint"[332] is a vast oversimplification. Seeing the unclothed genitals and pubic area of an adult in a public place may offend someone despite the fact that the unclothed genitals and pubic area express no viewpoint and are not intended to convey any meaning by the naked individual.[333] Similarly, hearing the word "shit" in a public place may offend, but the word "shit" is not a viewpoint on excrement or anything.[334] In brief, a word may offend a person's sensibilities without conveying a viewpoint on any subject matter. Viewpoint discrimination, in Kennedy's more accurate and complete articulation, initially requires there be a topic or subject matter under consideration and then that the government permits only certain views on that topic or subject matter.

Ultimately, Kennedy's bloc in *Tam* provides a clear formula for ferreting out the existence of viewpoint discrimination. Additionally, Kennedy's position that viewpoint discrimination is fatal unless the government is speaking draws a clear line around it as verboten. This is a decidedly free-speech friendly doctrinal stance—one much more favorable to First Amendment interests than the position and understanding of viewpoint discrimination embraced by Justice Alito. Given the four-to-four split between the Kennedy and Alito blocs on this matter in *Tam*, however, problems could lie ahead in future cases when viewpoint discrimination is alleged.

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[329] 485 U.S. 46 (1988).

[330] *Tam*, 137 S. Ct. at 1763 (plurality opinion).

[331] *See* Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1357 (2001) ("The constitutional rule is clear: the government, and the public that it serves, must tolerate even 'outrageous' and 'offensive' speech to fulfill the First Amendment's guarantee of a robust and wide open marketplace of ideas." (footnotes omitted)); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1304 (2005) (asserting that: [T]he right to free speech is at its core the right to communicate—to persuade and to inform people through the content of one's message. The right must also generally include in considerable measure *the right to offend people* through that content . . . .") (emphasis added)).

[332] *Tam*, 137 S. Ct. at 1763 (plurality opinion).

[333] *But see* Erznoznik v. City of Jacksonville, 422 U.S. 205, 208–12 (1975) (holding that nudity was a viewpoint in the context of films).

[334] *But see generally* Cohen v. California, 403 U.S. 15 (1971) (holding that the state could not regulate the content of speech merely because language offends).

CONCLUSION

This Article explored four important facets of the U.S. Supreme Court's rulings affecting free speech from the first six months of 2017. First, it examined Justice Sotomayor's solo concurrence in *Perez v. Florida*.[335] Her opinion vents frustration with the Court's failure to clarify the intent requirement of the true threats doctrine.[336] Sotomayor also expressed concern with the real-world consequences of that failure on individuals like Robert Perez. Not only did she call on the Court to clarify the intent issue, but Sotomayor intimated she would adopt a different standard of intent than that advocated by either Justice Alito or Justice Thomas in the Court's 2015 decision in *Elonis v. United States*.[337] Unfortunately, the Supreme Court in October 2017 passed on yet another opportunity to revisit the true threats doctrine when it denied Anthony Elonis's petition for a writ of certiorari to review the Third Circuit's 2016 ruling affirming his prior conviction.[338]

Second, this Article punctured the superficial appearance of agreement among the justices in the dissent-free First Amendment victories of *Tam*, *Packingham*, and *Expressions Hair Design*.[339] Although the trio of cases was handed down with nary a dissent, not one was unanimous.[340] The multiple concurring opinions revealed fractures among the justices' views on doctrines such as commercial speech and viewpoint discrimination, as well as objections to both "undisciplined dicta"[341] and a "quarter-loaf outcome."[342] In brief, the justices are not on the same page in their First Amendment playbooks, be it doctrinally or otherwise.

Third, this Article delved into Justice Kennedy's dicta in *Packingham*. This Article explored its almost immediate impact in a quartet of cases—*Knight First Amendment Institute*, *Leuthy*, *Laurenson*, and *Davison*—regarding access to the social media accounts of government officials.[343] This comes despite Justice Alito's near panic over how the dicta might harm the ability of states to restrict sexual predators' access to social networks frequented by minors.[344] Just as Supreme Court dicta in *Near* and *Chaplinsky* durably impacted First Amendment jurisprudence,[345] so too

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[335] *See* discussion *supra* Part I.

[336] *See* discussion *supra* Part I.

[337] *See* discussion *supra* Part I.

[338] United States v. Elonis, 841 F.3d 589 (3d Cir. 2016), *cert. denied*, 138 S. Ct. 67 (2017).

[339] *See* discussion *supra* Part II.

[340] *See* discussion *supra* Part II.

[341] Packingham v. North Carolina, 137 S. Ct. 1730, 1738 (2017) (Alito, J., concurring in the judgment).

[342] Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1153 (2017) (Sotomayor, J., concurring in the judgment).

[343] *See* discussion *supra* Part III.

[344] *See* discussion *supra* Part III.

[345] *See supra* notes 215–38 and accompanying text.

might Kennedy's judicial detour into the wonders of online social networks prove powerful and permanent.

Fourth and finally, this Article analyzed the differences in *Tam* between competing four-Justice blocs on the subject of viewpoint discrimination.[346] For Justice Kennedy's coalition, viewpoint discrimination triggers strict scrutiny even when commercial speech is regulated.[347] For Justice Alito's bloc, that is not the case and intermediate scrutiny still applies.[348]

There are, of course, other important aspects of the cases not explored in this Article. Two readily come to mind. First, all eight justices in *Tam* joined in part of the opinion pushing back against further expansion of the nascent and troublesome government speech doctrine[349] after the 2015 decision in *Walker v. Texas Division, Sons of Confederate Veterans*.[350] Justice Alito wrote in *Tam* that *Walker* "likely marks the outer bounds of the government-speech doctrine."[351] The *Tam* Court's analysis of the government speech doctrine, however, is already adequately addressed elsewhere.[352]

Second, a different facet of Justice Kennedy's dicta in *Packingham* already was used by one federal district court. Specifically, Kennedy parenthetically wrote that "[o]f importance, the *troubling fact* that the law imposes *severe restrictions* on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system is also *not an issue before the Court*."[353]

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[346] *See* discussion *supra* Part IV.

[347] *See* discussion *supra* Part IV.

[348] *See* discussion *supra* Part IV.

[349] *See* Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. CIN. L. REV. 353, 373–74 (2017) ("The contours of the government speech doctrine are not well defined because the case law is limited."); Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1976 (2011) (describing the government speech doctrine as "lacking in coherence—to put it mildly"); Derek T. Muller, *Ballot Speech*, 58 ARIZ. L. REV. 693, 733 (2016) ("Admittedly, the contours of the government speech [doctrine] are notoriously unclear."); Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1846 (2017) ("The precise contours of the government speech doctrine are unclear, but the basic idea is that the First Amendment does not apply when the government itself is speaking.").

[350] 135 S. Ct. 2239 (2015). A five-Justice majority in *Walker* held that "specialty license plates issued pursuant to Texas's statutory scheme convey government speech." *Id.* at 2246. As such, Texas could permissibly refuse to grant the Sons of Confederate Veterans a specialty plate featuring Confederate Battle Flag imagery. *Id.* at 2253. Justice Alito, joined by Chief Justice Roberts and Justices Scalia and Kennedy, dissented. *Id.* at 2254 (Alito, J., dissenting). Alito wrote that "[m]essages that are proposed by private parties and placed on Texas specialty plates are private speech, not government speech. Texas cannot forbid private speech based on its viewpoint. That is what it did here. Because the Court approves this violation of the First Amendment, I respectfully dissent." *Id.* at 2263.

[351] Matal v. Tam, 137 S. Ct. 1744, 1760 (2017).

[352] *See* Clay Calvert, *Beyond Trademarks and Offense:* Tam *and the Justices' Evolution on Free Speech*, 2016–2017 CATO SUP. CT. REV. 25, 39–46 (2017) (analyzing the *Tam* Court's examination of the government speech doctrine).

[353] Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) (emphases added).

In August 2017, Senior U.S. District Judge Richard Matsch quotes this statement in *Millard v. Rankin*,[354] calling it "significant."[355] That's because the Colorado statute at issue in *Millard* requires registered sex offenders who have successfully completed both their incarceration and probation[356] to, among other items, register their email accounts and online identities with the government.[357] The plaintiffs challenged this for violating "the Eighth Amendment's proscription against cruel and unusual punishment and the Fourteenth Amendment's requirements of procedural and substantive due process."[358]

Judge Matsch reasoned that the Colorado statute imposed "a 'severe restriction' like the provisions in *Packingham*."[359] He found that the statute "provides law enforcement a supervisory tool to keep an eye out for registered sex offenders using email and social media. That is one more restrictive and intrusive provision that resembles the supervisory aspects of parole and probation . . . ."[360] Matsch ultimately concluded the statute, indeed, imposed cruel and unusual punishment on the plaintiffs.[361] In brief, Kennedy's *Packingham* dicta calling "troubling"[362] restrictions on social media use *after* individuals have completed prison time carries not only First Amendment consequences, but also Eighth Amendment ramifications.

Ultimately, despite Dean Erwin Chemerinsky's blunt questioning more than a half-decade ago of whether the Roberts Court "is strongly protective of speech,"[363]

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[354] 265 F. Supp. 3d 1211 (D. Colo. 2017), *appeal filed*, No. 17-1333 (10th Cir. Sept. 21, 2017).

[355] *Id.* at 1228.

[356] The lead plaintiff, David Millard, is a registered sex offender who completed "a sentence of 90 days jail work release and eight years probation." *Id.* at 1217.

[357] *Id.* at 1228.

[358] *Id.* at 1223. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment's prohibition against cruel and unusual punishment has been incorporated through the Fourteenth Amendment's Due Process Clause to apply to state governments. Robinson v. California, 370 U.S. 660, 666–67 (1962).

[359] *Millard*, 265 F. Supp. 3d at 1228 (quoting Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017)).

[360] *Id.*

[361] *Id.* at 1235.

[362] *Packingham*, 137 S. Ct. at 1737.

[363] Erwin Chemerinsky, Lecture, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 724 (2011). Chemerinsky concludes "that the Roberts Court's overall record suggests that it is not a free speech Court at all." *Id.* Specifically, Chemerinsky points out that:

> The Roberts Court has consistently ruled against free speech claims when brought by government employees, by students, by prisoners, and by those who challenge the government's national security and military policies. The pattern is uniform and troubling: when the government is functioning as an authoritarian institution, freedom of speech always loses.

Id. at 725.

the first half of 2017 revealed it to be pro–free speech in terms of the outcomes in *Tam*, *Packingham*, and *Expressions Hair Design*. And as Part III made clear, *Packingham* already is profoundly impacting a series of new cases asserting a First Amendment right of citizens to access the social media accounts of government officials. More generally, *Packingham* already has been cited by one federal appellate court for the proposition that "[s]ex offenders have free-speech rights."[364]

Yet, the Court's decision to pass on hearing *Perez* leaves the true threats doctrine languishing in disarray.[365] Furthermore, each of the big three cases that it did hear produced multiple opinions. So, while the initial six months of 2017 revealed the Court generally to be free-speech friendly, the justices' lack of unanimity augurs future problems for First Amendment jurisprudence.

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[364] United States v. Cox, 871 F.3d 479, 494 (6th Cir. 2017) (Sutton, J., concurring), *cert. denied*, 138 S. Ct. 754 (2018).

[365] Wayne Batchis, *On the Categorical Approach to Free Speech—And the Protracted Failure to Delimit the True Threats Exception to the First Amendment*, 37 PACE L. REV. 1, 47 (2016) (describing "how doctrinally under-theorized and woefully neglected the true threats category has been, and remains").