

A New “Slant” on *Pacifica*?

BY LEITA WALKER AND MICHAEL GIUDICESSI

To paraphrase one observer: somewhere up there, George Carlin is smiling.¹

First, in June 2017, in *Matal v. Tam*,² the Supreme Court struck as unconstitutional the Lanham Act’s prohibition on the registration of “disparaging” trademarks, ruling that “[s]peech may not be banned on the ground that it expresses ideas that offend.”

Then, in December 2017, the Federal Circuit decided *In re Brunetti*,³ striking a similar prohibition barring registration of “immoral” or “scandalous” marks—terms the court held were synonymous with “vulgar.” *Brunetti* held the government lacked a substantial interest in “suppressing speech because it is off-putting.” Even if it had such an interest, the court quipped, “[i]n this electronic/Internet age . . . it has completely failed.”

Actually, what Carlin would say—and, in fact did say, mercilessly and with bug-eyes—is, “There is no ‘up there’ for people to be smiling down from.”⁴

Moreover, he might point out that, while making these modern-day assessments of values and effectiveness, *Brunetti* also attempted to distinguish *FCC v. Pacifica Foundation*⁵—the case arising out of an afternoon radio broadcast of Carlin’s “Filthy Words” monologue. “The government’s interest in protecting the public from profane and scandalous marks is not akin to the government’s interest in protecting children and other unsuspecting listeners from a barrage of swear words over the radio

in *Pacifica*,” the Federal Circuit tried to explain.⁶

Even so, there’s hope for vulgarity-loving true believers (a small but fierce contingent, we imagine) that Carlin may freely shout his seven dirty words from the afterlife with the metaphysical knowledge that, “in this electronic/Internet age,” Federal Communications Commission (FCC) licensees may broadcast them without fear or sanction.

The hope stems in part from Associate Justice Ruth Bader Ginsburg’s public statement that *Pacifica* “was wrong when it issued” and should be revisited given “[t]ime, technological advances,” and recent rulings of the FCC.⁷ Further, the sweeping, pro-speech declarations *Tam* and *Brunetti* relied on to invalidate prohibitions on the registration of disparaging and immoral and scandalous (i.e., vulgar) trademarks stand irreconcilable with *Pacifica* and its ruling that the FCC can regulate speech that, though not obscene, is “indecent.”

I. Background on Recent Lanham Act Decisions

A. *Matal v. Tam*

Tam arose after Simon Tam, lead singer of the rock group “The Slants,” sought federal registration of his band’s name—which he said he had adopted to “reclaim” the term and drain its denigrating force as a derogatory term for Asians.

The Patent and Trademark Office (PTO) denied Tam’s application under 15 U.S.C. § 1052(a), which prohibits the registration of trademarks that may “disparage . . . or bring . . . into contempt[t] or disrepute” any “persons, living or dead.” After Tam unsuccessfully contested the denial before the PTO’s Trademark Trial and Appeal Board (TTAB), he took his case to the Federal Circuit, which found the disparagement clause facially unconstitutional under the First Amendment.

Though its members diverged in their reasoning, the Supreme Court unanimously affirmed (Justice Gorsuch took no part in consideration or decision of the case).

The government raised three arguments in defense of the disparagement clause: (1) that trademarks are a form of government speech, rendering the First Amendment inapplicable, (2) that they are a form of government subsidy, and the government is not required to subsidize activities it does not wish to promote, and (3) that a new test—a “government-program” doctrine—should apply.⁸ The Court unanimously rejected the first argument, stating that the government does not “dream up” these marks, “edit” them, or (outside of § 1052(a)) inquire into “whether any viewpoint conveyed by a mark is consistent with Government policy or . . . that expressed by other marks” already registered.⁹ “If the federal registration of a trademark makes the mark government speech,” the Court said, “the Federal Government is babbling prodigiously and incoherently.”¹⁰

Only four justices—Alito, Thomas, Breyer, and Chief Justice Roberts—considered (and went on to reject) the government’s other two arguments. These justices also considered the argument that trademarks are commercial speech and thus subject to the relaxed scrutiny outlined in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N. Y.*¹¹ They concluded, however, that they did not need to resolve this debate because the disparagement clause could not withstand even *Central Hudson* intermediate review.

The remaining justices—Kennedy, Ginsburg, Sotomayor, and Kagan—found no reason to wade into these issues, concluding instead that because the Court had unanimously held § 1052(a) constituted viewpoint discrimination, heightened scrutiny applied and was not satisfied.

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Justice Thomas also wrote separately. Although he agreed that the disparagement clause could not survive *Central Hudson* analysis, he wrote to express his belief that strict scrutiny should apply regardless whether the speech was commercial.¹²

B. In re Brunetti

Tam did not address another prohibition in § 1052(a)—namely, one barring registration of marks that “consist[] of or comprise[] immoral . . . or scandalous matter.” However, after *Tam*, many predicted the demise of this clause, as well. And, indeed, six months after *Tam*, the Federal Circuit struck down the scandalous clause as unconstitutional.

At issue in *Brunetti* was an attempt to register the trademark “FUCT” for use on clothing. The TTAB affirmed the PTO’s refusal to register the mark under the scandalous clause. On appeal, the Federal Circuit agreed that the FUCT mark was vulgar and therefore immoral and scandalous but concluded that the bar on registration of such marks violated the First Amendment.

Because the meanings of “vulgar,” “immoral,” and “scandalous” are similar to, and perhaps synonymous with, the meaning of the FCC buzzword “indecent,” it is worth examining how the Federal Circuit defined these words. The court began with the undisputed point that the word “fuck” is vulgar and quickly concluded that FUCT, the phonetic twin of “fucked,” is also vulgar. It then went on to hold that a vulgar mark is a scandalous mark, thereby falling within the prohibition of §1052(a). In so holding, the court pointed to definitions of “scandalous” such as “shocking to the sense of truth, decency, or propriety,” “giving offense to the conscience or moral feelings,” or “disgraceful,” “offensive,” or “disreputable.”¹³

Having concluded that the TTAB did not err in finding the trademark “FUCT” to be immoral and scandalous, the Federal Circuit turned to the constitutional issues and began by assuming, without deciding, that the scandalous clause is viewpoint neutral. The government conceded that the scandalous clause was, however, a content-based restriction, and it did

not assert that the clause could survive strict scrutiny review. Rather, refining somewhat the position it took in *Tam*, the government argued that the clause did not implicate the First Amendment because trademark registration is either a government subsidy program or a limited public forum. Alternatively, it argued that trademarks are commercial speech implicating only *Central Hudson* review.¹⁴ The court rejected all these arguments, concluding that strict scrutiny applied and that the scandalous clause could not survive intermediate scrutiny, anyway.

II. Discussion

In *Pacifica*, the Supreme Court concluded nearly 40 years ago that the First Amendment permitted the FCC to “channel” broadcasting of indecent speech to the late-night hours. In so holding, the Court did not apply either strict or intermediate scrutiny, though it acknowledged that the “Commission’s objections to the broadcast were based in part on its content” and that “the fact that society may find speech offensive is not a sufficient reason for suppressing it.”¹⁵

Instead, it engaged in a contextual analysis, concluding that the FCC’s order was justified on two grounds. “First,” the Court said, “the broadcast media have established a uniquely pervasive presence in the lives of all Americans,” meaning that when indecent material is broadcast it “confronts the citizen, not only in public, but also in the privacy of the home, where the individuals’ right to be left alone plainly outweighs the First amendment rights of an intruder.”¹⁶ “Second, it said, “broadcasting is uniquely accessible to children, even those too young to read.”¹⁷ In the Court’s view, this fact, coupled with the government’s interest in “the well-being of its youth” and “parents’ claim to authority in their own household” justified the regulation of otherwise protected expression.¹⁸

In 2018, when cable and Internet are as pervasive as broadcast radio and television, when toddlers know how to pull up YouTube videos on iPhones, and when our president drops linguistic bombs such as “shithole” and “pussy,” there is no shortage of attacks that could be

made on the logic of *Pacifica*. The recent Lanham Act decisions, however, put the decision on even shakier ground by suggesting that, one way or another, governmental regulation of scandalous and immoral—i.e., indecent—content merits strict scrutiny and under that test violates the Constitution. This article identifies two legal strategies that emerge from those decisions.

A. Strategy No. 1: Arguing That the FCC’s Indecency Regime Discriminates Based on Viewpoint

In *Tam*, Kennedy, Ginsburg, Sotomayor, and Kagan were steadfast that strict scrutiny is automatic anytime there is viewpoint discrimination,¹⁹ and in his separate concurrence Thomas expressed his belief 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.’”²⁰ Meanwhile, Alito, joined by Thomas, Breyer, and Roberts acknowledged the possibility that *Central Hudson*’s intermediate scrutiny might apply, but only because trademarks have a commercial component.²¹

Unlike trademarks, the speech targeted by the FCC’s indecency regime is purely expressive. Thus, it seems a foregone conclusion that strict scrutiny would apply if the FCC’s indecency regime is deemed viewpoint based.

So, is a ban on dirty words viewpoint discrimination? The Federal Circuit found it unnecessary to decide this issue in *Brunetti*, though it did state that it “question[ed] the viewpoint neutrality of the immoral or scandalous provision.”²² Meanwhile, it seems some Supreme Court justices—enough, with Ginsburg, to reverse *Pacifica*—might say “yes.”

“Giving offensive is a viewpoint,” Alito wrote in the plurality opinion in *Tam*.²³ The disparagement clause—he later called it a “happy-talk clause”²⁴—may “evenhandedly prohibit[] disparagement of all groups,” but it “denies registration to any mark that is offensive to a substantial percentage of the members of any group” and “in the sense relevant here, that is viewpoint discrimination.”²⁵

Commentators have questioned whether Alito and the three justices who joined him really meant what he said. Wrote Clay Calvert,

[O]ffense and viewpoint are not always the same. The word “fuck” is what gave offense in [*Cohen v. California*]²⁶, not Paul Robert Cohen’s anti-draft viewpoint. Taking offense at a word (“fuck”) is not the same as discriminating against the viewpoint in which that word is used (“fuck the draft”). “Fuck,” standing alone without “the draft,” is not a viewpoint. Giving or taking offense therefore is not always a viewpoint.²⁷

Further, there is no doubt that taking Alito at his word—and taking that word out of context—could lead to unintended consequences (or at least thorny questions). As the PTO argued in a letter brief to the Federal Circuit in *Brunetti*, to hold that the scandalous clause is anything other than viewpoint neutral might preclude the government “from restricting the use of graphic sexual images or profane language within a government program or in a nonpublic or limited-public forum”—such as advertisements on city buses.²⁸

And yet, *Tam* is not the first time that Alito has defined viewpoint discrimination broadly, which suggests he was writing carefully, not carelessly. Most notable is his dissent (joined by Roberts, Scalia, and Kennedy) in *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*²⁹—the case holding that specialty license plates are government speech and that Texas could deny an application for a design featuring the Confederate flag.

In the dissent, Alito analogized license plates to “mini billboards” and wrote, “what Texas did here was to reject one of the messages that members of a private group wanted to post on some of these little billboards because the State thought that many of its citizens would find the message offensive. That is blatant viewpoint discrimination.”³⁰ Alito pointed out that the Confederate flag means different things to different people—for some,

it “evoke[s] the memory of their ancestors and other soldiers who fought for the South;” to others, “it symbolizes slavery, segregation, and hatred.”³¹ But, he wrote, “[w]hatever it means to motorists who display that symbol and to those who see it, the flag expresses a viewpoint. The Board rejected the plate design because it concluded that many Texans would find the flag symbol offensive. That was pure viewpoint discrimination.”³²

Interesting questions follow about whether Alito would force Texas to print “Fuck the Draft” on a license plate—or whether he would compel it to print a stylized logo of just the F-word. To pick up on Calvert’s point, the argument that the government is engaged in viewpoint discrimination would seem to be at its nadir when the only “statement” at issue is comprised of a mere four letters. On the other hand, it seems obvious that a stand-alone profanity conveys *something*—perhaps, as with Brunetti’s FUCT mark, a particularly “subversive” or “in-your-face” worldview.³³ Those confronted by a license plate or t-shirt that says “fuck” may not fully understand the speaker’s intent and may reach different conclusions about her viewpoint. But according to Alito, that doesn’t matter.

In any event, FTC indecency regulation—which rarely if ever involves profanities uttered in a vacuum—would seem to present an easier case for Alito and those who align with him than a stand-alone profanity on a government-issued license plate. Carlin’s monologue was a *monologue*. Though perhaps assaultive to some listeners, it was more than just the f-word droned over and over. And recent enforcement actions have involved use of profane language *emotively*, to punctuate statements about *other things*: “F*** ’em,” said Cher about her critics, in one enforcement action, while Nicole Riche asked an audience, “Have you ever tried to get cow s*** out of a Prada purse? It’s not so f***ing simple.”³⁴

These statements are hardly on par with the Gettysburg Address, but they do express a viewpoint—Cher was celebrating her staying power while dismissing her critics, while Richie was challenging the stereotype that rural life is really “simple.” And their

use of profanity perhaps conveyed their viewpoints in ways more “decent” language could not. As the Supreme Court stated in *Cohen*:

[W]e cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. . . . [I]n the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.³⁵

Likewise, in his dissent in *Pacifica*, Justice Brennan called “transparently fallacious” the “idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression.”³⁶

Thus, regardless whether “giving offense” is always a viewpoint, when offensive speech is used to express a viewpoint, it is all but impossible to disentangle vulgarity from viewpoint without changing, at least to some degree, the larger message itself. In the case of Cher and Richie, stripping their statements of the four-letter words they chose would have rendered them (at least to some) less triumphant, disdainful, funny, and rebellious—and thus less impactful. It seems unavoidable that by regulating indecent speech, the FCC is regulating the viewpoint such speech conveys. And at that point, the justices agree, strict scrutiny kicks in.

B. Strategy No. 2: Arguing That the Indecency Regime Is Unconstitutional Even If It Is Viewpoint Neutral

Although the Supreme Court's decision in *Tam* turned on the unanimous conclusion that the disparagement clause discriminated based on viewpoint, the Federal Circuit previously had subjected the disparagement clause to strict scrutiny as "either a content-based or viewpoint-based regulation of expressive speech."³⁷ Likewise, in *Brunetti*, the Federal Circuit found no reason to decide whether the scandalous clause discriminated based on viewpoint, concluding that because it regulated the expressive components of trademarks and discriminated based on content strict scrutiny applied.³⁸

Thus, if a viewpoint discrimination attack on the FCC's indecency regime were to fail, the obvious fallback position would be: It doesn't matter. The FCC's indecency regime is indisputably content based,³⁹ and strict scrutiny is thus required regardless.

That said, the Federal Circuit in *Tam* and *Brunetti* made its pronouncement that strict scrutiny always applies to content regulation in the context of the Lanham Act, not FCC indecency regulation. Meanwhile, it's never been entirely clear what sort of scrutiny should apply to the FCC's regime. Indeed, *Pacifica* does not discuss that issue at all.⁴⁰

Thus, any advocate for overturning *Pacifica* would need to pursue a third argument as well—namely, that the indecency regime cannot even survive intermediate scrutiny. The *Brunetti* opinion is helpful on this point, as well. But before discussing why the scandalous clause failed to withstand even intermediate scrutiny (and why the indecency regime might, as well), it is worth pausing to briefly consider whether the "public forum" arguments rejected in both *Tam* and *Brunetti* might fare better in a challenge to *Pacifica*. After all, the air waves belong to the public, and, in his dissent in *Pacifica*, Brennan characterized the majority's opinion as approving "time, place, and manner" regulation of broadcasters.⁴¹

1. Analogizing the Air Waves to a Limited Purpose Public Forum Subject to Reasonable Restrictions on Speech Poses Serious Doctrinal Issues

As it turns out, the idea that the public air waves constitute a limited public forum is highly problematic, as highlighted in *Arkansas Educ. Television Comm'n v. Forbes*.⁴² Indeed, the United States appeared as *amicus curiae* in that case, arguing that the Court's forum precedents should be of little relevance in the context of broadcasting.⁴³

Forbes arose from exclusion of a third-party political candidate from a debate broadcast by a public (i.e., state-owned) television station. The Court of Appeals held that his exclusion violated the First Amendment, applying public forum precedent. In reversing, the Supreme Court began by considering whether public forum principles applied at all, ultimately concluding that they were not a good fit, even in the context of a *public* broadcast.

The public forum doctrine arose in the context of streets and parks, the Court explained, where open access and viewpoint neutrality is "compatible with the intended purpose of the property."⁴⁴ However, in the case of television broadcasting, "broad rights of access for outside speakers would be antithetical . . . to the discretion that stations and their editorial staff must exercise to fulfill their journalist purpose and statutory obligations."⁴⁵ This discretion, the Court continued to explain, inevitably results in choosing among speakers and viewpoints—i.e., in viewpoint discrimination.⁴⁶

But of course, even in a limited public forum, viewpoint discrimination is unconstitutional.⁴⁷ Thus, although a holding that the public airwaves are some sort of limited public forum might mean that the FCC would face a less demanding degree of scrutiny when imposing restrictions on its licensees, such holding would also mean that no viewpoint discrimination can occur on said air waves.⁴⁸ And that holding would, in turn, "obstruct the legitimate purposes of television broadcasters" and would require courts "'to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or

group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired."⁴⁹

This level of government interference/oversight simply would not be consistent with Congress' goals in adopting the modern system of broadcast regulation.⁵⁰ Along similar lines, any rule that encourages licensees to "exclud[e] partisan voices" and present views "in a bland, inoffensive manner would run counter to the 'profound national commitment that debate on public issues should be uninhibited, robust, and wide-open.'"⁵¹

Thus, although the *Forbes* court ultimately concluded that certain constitutional constraints were applicable in the context of a political debate sponsored by a public broadcaster, it went out of its way to state that "public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine."⁵² The same is certainly true of private broadcasting, which even the FCC recognized more than 30 years ago is a different medium than at the time of *Red Lion*.⁵³

2. *Brunetti's* Conclusion That the Scandalous Clause Could Not Survive Intermediate Scrutiny Suggests the FCC's Indecency Regime Cannot, Either

Turning back to *Brunetti's* discussion of intermediate scrutiny, the Federal Circuit applied the four-factor test applicable to commercial speech under *Central Hudson*: whether (1) the speech concerns lawful activity and is not misleading, (2) the asserted government interest is substantial, (3) the regulation directly advances that government interest, and (4) the regulation is no more extensive than necessary.⁵⁴ That test is not a perfect fit for the noncommercial speech regulated by the FCC's indecency regime; nevertheless, the court's analysis of the factors suggests that the FCC's regime would have difficulty surviving intermediate scrutiny, much less strict scrutiny.

The *Brunetti* court characterized the government's interest in prohibiting the registration of scandalous marks as "protecting public order and morality" and then deemed such interest not sufficiently substantial.⁵⁵ The Federal Circuit explained,

Supreme Court precedent makes clear that the government's general interest in protecting the public from marks it deems "off-putting," whether to protect the general public or the government itself, is not a substantial interest justifying broad suppression of speech. "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it."⁵⁶

It then went on to conclude that even if the government had a substantial interest in protecting the public from scandalous or immoral marks, the government could not establish that its ban on the registration of such marks advanced that interest:

Regardless of whether a trademark is federally registered, an applicant can still brand clothing with his mark, advertise with it on the television or radio, or place it on billboards along the highway. In this electronic/Internet age, to the extent that the government seeks to protect the general population from scandalous material, with all due respect, it has completely failed.⁵⁷

Finally, the Federal Circuit concluded that the scandalous clause was not narrowly tailored because it gave too much discretion to the examining attorney at the PTO, noting that "[n]early identical marks have been approved by one examining attorney and rejected as scandalous or immoral by another."⁵⁸

As noted above, the *Brunetti* court attempted to distinguish *Pacifica*, in which the articulated government interest was to protect Americans, especially children, from indecency in the privacy of their own homes, given the "uniquely pervasive presence" of radio. From the outset, the dissenting justices disputed that such interest was sufficient to justify the outcome in *Pacifica*. But even if protecting solicitude and children is a substantial interest, it is hard to see how, in 2018, the regime advances that interest in a narrowly tailored way.

Over-the-air, broadcast radio (or

television, for that matter) no longer has a "uniquely pervasive presence" in American life. It now competes—or perhaps has been usurped by—YouTube, Internet radio, satellite radio, podcasts, Facebook, cable television, and other media where all sorts of profanities and perversions are readily available.⁵⁹ The FCC does not regulate these media. Thus, its regulation of broadcast radio and television does little to advance its purported interest.

Meanwhile, what is indecent—just like what is scandalous—is subject to the whims of regulators. As the Second Circuit wrote in its first opinion in the *Cher/Richie* case:

Although the Commission has declared that all variants of "fuck" and "shit" are presumptively indecent and profane, repeated use of those words in "Saving Private Ryan," for example, was neither indecent nor profane. And while multiple occurrences of expletives in "Saving Private Ryan" was not gratuitous, a single occurrence of "fucking" in the Golden Globe Awards was "shocking and gratuitous." Parental ratings and advisories were important in finding "Saving Private Ryan" not patently offensive under contemporary community standards, but irrelevant in evaluating a rape scene in another fictional movie. The use of numerous expletives was "integral" to a fictional movie about war, but occasional expletives spoken by real musicians were indecent and profane because the educational purpose of the documentary could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives." The "S-Word" on *The Early Show* was not indecent because it was in the context of a "bona fide news interview," but "there is no outright news exemption from our indecency rules."⁶⁰

In sum, even if safeguarding solicitude and protecting children from indecent speech are substantial government interests, *Brunetti's* acknowledgement of the realities of modern life and the idiosyncrasies of

regulators apply as much to indecent broadcasts as to scandalous marks. It is difficult to see how the FCC's regime advances the government's interest in a narrowly tailored way any more than the scandalous clause did.

III. Conclusion

The call to apply strict scrutiny to the FCC's indecency regime is hardly new. Indeed, the Second Circuit said more than seven years ago in the *Cher/Richie* case that it can "think of no reason why" strict scrutiny should not apply . . . except, of course, the binding precedent of *Pacifica*.⁶¹ The recent Lanham Act decisions suggest that the Supreme Court is more ready than ever to strike that precedent down, and they provide free-speech advocates with an arsenal of arguments to use in pursuit of that objective.

Endnotes

1. Scott Graham, "Federal Circuit Wrestles with Vulgar Trademarks in 'FUCTION' Case," Corporate Counsel (Aug. 30, 2017), <https://www.law.com/insidecounsel/2017/08/30/federal-circuit-wrestles-with-vulgar-trademarks-in/?slreturn=20171118170233>.
2. 137 S. Ct. 1744, 1751 (2017).
3. 877 F.3d 1330, 1352–53 (Fed. Cir. 2017).
4. See <https://www.youtube.com/watch?v=3PiZSFIVFiU> for Carlin's thoughts on death and the afterlife.
5. 438 U.S. 726 (1978).
6. *Brunetti*, 877 F.3d at 1353.
7. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 259 (2012) (Ginsburg, J., concurring).
8. 137 S. Ct. at 1757.
9. *Id.* at 1758.
10. *Id.*
11. 447 U.S. 557 (1980).
12. 137 S. Ct. at 1769 (Thomas, J., concurring).
13. *Brunetti*, 877 F.3d at 1339.
14. *Id.* at 1340.
15. *Pacifica*, 438 U.S. at 744, 745.
16. *Id.* at 748. This rationale mirrors the justifications cited in *Red Lion Broadcasting, Co. v. FCC*, 395 U.S. 367 (1969) (upholding the fairness doctrine based on characteristics of broadcasting as the "new media" and a scarcity theory).
17. *Id.* at 749.
18. *Id.* at 749–50 (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)).
19. 137 S. Ct. at 1750.
20. *Id.* at 1769 (Thomas, J., concurring).

21. *Id.* at 1749.

22. *Brunetti*, 877 F.3d at 1341. Later in its opinion, however, the Federal Circuit seemed to take a narrower view of viewpoint discrimination when it discussed *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), and stated that the parody of Jerry Falwell’s “first time” did “not clearly involve the expression of beliefs, ideas, or perspectives.” *Brunetti*, 877 F.3d at 1352.

23. 137 S. Ct. at 1763.

24. *Id.* at 1765.

25. *Id.* at 1763.

26. 403 U.S. 15 (1971).

27. Clay Calvert, “Beyond Trademarks and Offense: *Tam* and the Justices’ Evolution on Free Speech,” Cato Institute: Supreme Court Review at 53 (2016–17), available at <https://www.cato.org/supreme-court-review/2016-2017>.

28. PTO Letter Brief at 3, *In re Brunetti*, No. 2015-1109 (Fed. Cir. July 20, 2017); see also *id.* at 14.

29. 135 S. Ct. 2239 (2015).

30. *Id.* at 2255–56 (Alito, J., dissenting) (emphasis added); see also *id.* at 2262 (Alito, J., dissenting) (“The Board rejected Texas SCV’s design, “specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable.’ . . . These statements indisputably demonstrate that the Board denied Texas SCV’s design because of its viewpoint.”).

31. *Id.* at 2262 (Alito, J., dissenting).

32. *Id.* (emphasis added).

33. *Brunetti* Letter Brief at 9, *In re Brunetti*, No. 2015-1109 (Fed. Cir. Aug. 9, 2017).

34. *Fox*, 567 U.S. at 247.

35. *Cohen*, 403 U.S. at 25–26.

36. *Pacifica*, 438 U.S. at 773 (Brennan, J., dissenting).

37. *Brunetti*, 877 F.3d at 1340 (citing *In re Tam*, 808 F.3d 1321, 1339 (Fed. Cir. 2015)) (emphasis added).

38. *Id.* at 1342, 1348–49.

39. *Pacifica*, 438 U.S. at 744 (“The words of the Carlin monologue are unquestionably ‘speech’ within the meaning of the First Amendment. It is equally clear that the Commission’s objections to the broadcast were based in part on its content.”).

40. Some commentators seem to take for granted that strict scrutiny applies and always has. See Lili Levi, “The FCC’s Regulation of Indecency,” First Amendment Center: First Reports at 7 (2008), available at <http://www.newseuminstitute.org/first-amendment-center/publications/> (“Ultimately,

the FCC’s indecency regime must pass strict scrutiny under the First Amendment because it is fundamentally content-based regulation.”). Courts, however, have expressed doubt. See, e.g., *Fox Television Stations v. FCC*, 489 F.3d 444, 464 (2d Cir. 2007) (*Fox I*) (recognizing “some tension in the law regarding the appropriate level of First Amendment scrutiny”), *rev’d and remanded*, 556 U.S. 502 (2009); see also *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 326 (2d Cir. 2010) (*Fox II*) (“While *Pacifica* did not specify what level of scrutiny applies to restrictions on broadcast speech, subsequent cases have applied something akin to intermediate scrutiny.”), *vacated and remanded*, 567 U.S. 239 (2012). Meanwhile, the FCC itself has taken the position that broadcasting is different than other media and that “something less than First Amendment strict scrutiny should apply to the review of the agency’s indecency regulation.” *Levi, supra*, at 42.

41. *Pacifica*, 438 U.S. at 763 (Brennan, J., dissenting).

42. 523 U.S. 666 (1998).

43. *Id.* at 672.

44. *Id.* at 673 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 49 (1983)).

45. *Id.*

46. *Id.* at 673–74.

47. *Tam*, 137 S. Ct. at 1764; *Brunetti*, 877 F.3d at 1346 (“As with traditional and designated public forums, regulations that discriminate based on viewpoint in limited public forums are presumed unconstitutional.”).

48. See, e.g., *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 140 (1973) (Stewart, J., concurring) (“If, as the dissent today would have it, the proper analogy is to public forums—that is, if broadcasters are Government for First Amendment purposes—then broadcasters are inevitably drawn to the position of common carriers.”); *id.* at 143 (“Were the Government really operating the electronic press, it would, as my Brother Douglas points out, be prevented by the First Amendment from selection of broadcast content and the exercise of editorial judgment. It would not be permitted in the name of ‘fairness’ to deny time to any person or group on the grounds that their views had been heard ‘enough.’ Yet broadcasters perform precisely these functions and enjoy precisely these freedoms under the Act.”).

49. *Forbes*, 523 U.S. at 674 (quoting *CBS*, 412 U.S. at 127).

50. See *CBS*, 412 U.S. at 110 (reviewing

legislative history and concluding that “Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations”).

51. *Id.* at 112 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

52. *Forbes*, 523 U.S. at 675.

53. See *Inquiry into § 73.910 of the Comm’n’s Rules & Regulations Concerning the Gen. Fairness Doctrine Obligations of Broad. Licensees*, 102 FCC 2d 143 (1985).

54. *Brunetti*, 877 F.3d at 1350.

55. *Id.*

56. *Id.* at 1351 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)).

57. *Id.* at 1353.

58. *Id.*

59. See, e.g., *Fox II*, 613 F.3d at 326 (“[W]e face a media landscape that would have been almost unrecognizable in 1978.”).

60. *Fox I*, 489 F.3d at 463 (citations omitted).

61. *Fox II*, 613 F.3d at 327.