Freedom of Speech in the United States

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This update summarizes the Supreme Court's free speech decisions during the 2016–2017 term, as well as related events. The complete text of this update, links to the cases discussed, and a library of major free-speech decisions can be found on the web site for the book:

http://www.tedford-herbeck-free-speech.com

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Confirmation of Justice Neil M. Gorsuch

The most noteworthy event of the 2016–2017 Supreme Court term may have been the confirmation of Neil M. Gorsuch as a justice.

Justice Antonin Scalia died unexpectedly on February 13, 2016. Then-President Barack Obama nominated Merrick Garland, judge of the United States Court of Appeals for the District of Columbia, as Justice Scalia's successor on March 16, 2016. Although Garland was known as a moderate during his nearly two decades on the appellate court, Senate Majority Leader Mitch McConnell opposed his candidacy on the grounds that "the nomination should be made by the president the people elect in the election that's underway right now." McConnell and his Republican colleagues effectively blocked Garland's appointment, as the Constitution requires the advice and consent of the Senate for a presidential appointment to the Supreme Court.

During the 2016 presidential campaign, Republican nominee Donald Trump repeatedly promised to appoint a conservative in the "mold of Justice Scalia" to the Supreme Court. Eleven days after he was inaugurated, he nominated Neil M. Gorsuch of the United States Court of Appeals for the Tenth Circuit (based in Colorado) to fill Scalia's vacant seat on the bench. Announcing the decision during an evening ceremony at the White House, Trump proudly proclaimed, "Judge Gorsuch has outstanding legal skills, a brilliant mind, tremendous discipline and has earned bipartisan support." A former law clerk for Justices Byron White and Anthony Kennedy, Gorsuch had served as Principal Deputy Associate Attorney General of the United States from May 2005 until his appointment to the appellate court in August 2006. At 49, he had been one of the youngest appeals court judges in the country, and could easily serve on the Supreme Court for 30 or more years.

Republicans held a 52 to 48 majority in the Senate, assuring that Gorsuch's nomination would be confirmed on a Senate vote, but they did not have the 60 votes required to actually force a vote on Gorsuch. When Democrats prevented the nomination from coming to the Senate floor, Republicans invoked the "nuclear option": they amended Senate Rules to allow Gorsuch, and all future Supreme Court nominees, to be confirmed with a simple 51-vote majority. The Senate then confirmed Gorsuch on a 54-45 vote, mostly along partisan lines. Only three Democrats—Joe Donnelly of Indiana, Heidi Heitkamp of North Dakota, and Joe Manchin of West Virginia—voted for Gorsuch. (All three face reelection in 2018 in states that Trump carried in the 2016 election.)

Since Justice Sandra Day O'Connor retired in 2006, the Supreme Court has been evenly divided between four relatively conservative justices (Scalia, John Roberts, Clarence Thomas, and Samuel Alito) and four relatively liberal justices (Ruth Bader Ginsburg, Sonia Sotomayor, Elena Kagan, and Stephen Breyer). As a result, the deciding vote in many 5-4 decisions (about 20 percent of Supreme Court cases) has been cast by Justice Anthony Kennedy. Because one conservative (Gorsuch) replaced another conservative (Scalia), the ideological balance on the Court remains the same, but Justice Gorsuch's confirmation may affect the Court in other ways. For example, changing Senate Rules to allow nominees to be confirmed with a simple majority will probably make it easier for future presidents to appoint more overtly partisan nominees to the Court.

Justice Gorsuch was confirmed after oral arguments had been heard in most of the cases in the 2016–2017 term, so he did not participate in the three Supreme Court decisions featured in this update. Looking ahead to the 2017–2018 term, however, Justice Ruth Bader Ginsberg said, "we can safely predict that next term will be a momentous one." Among other things, the Supreme Court is slated to hear arguments over President Trump's travel ban, partisan gerrymandering, and business disputes ranging from corporate liability for wrongdoing abroad to arbitration and labor law. "The term that just ended," *USA Today* reported, "was the calm before the storm."

Chapter 5: Defamation

Defamation Law in the Age of Trump

As a candidate for the presidency, Donald Trump aggressively campaigned against the news media. He regularly complained about "hit pieces" and purposely "negative and horrible and false" articles, repeatedly denounced the "failing *New York Times,*" and often railed against so-called "fake news." As president, he promised the situation would change. "We're going to

open up those libel laws," he pledged. "So when *The New York Times* writes a hit piece which is a total disgrace or when *The Washington Post,* which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they're totally protected."

It is true that, under the Supreme Court decision in *New York Times v. Sullivan,* it is extremely difficult for an elected public official to recover damages for a defamatory statement. To prevail in court, a public official must prove that something false was said about him or her, that the defamatory statement harmed his or her reputation, and that the speaker acted with "actual malice": that is, that the speaker made the statement with "reckless disregard for the truth." As a result, few public figures file defamation suits; when they do, they seldom recover damages.

In escalating attacks, President Trump referred to the media as an "enemy of the people" and the "opposition party." He is unlikely to succeed in changing the law to make it easier for elected officials to recover damages, however, for two reasons.

First, defamation lawsuits are filed under state law, even in instances where jurisdictional issues require the suit to be initiated in federal court, and the Constitution does not give the president the power to change state laws. The federal government is only involved because the Supreme Court has developed First Amendment standards for assessing defamation claims. For example, in *New York Times v. Sullivan,* the Supreme Court extended First Amendment protection to a class of defamation (that which is directed at government officials) and overturned the decision of an Alabama jury.

Second, the president does not have Constitutional authority to overturn Supreme Court decisions. The president does have the power to nominate federal judges, however, including trial judges for federal district courts, judges for the federal appellate courts, and United States Supreme Court justices, but it would be difficult for the president to screen prospective appointments to ascertain whether they might be sympathetic to changing libel laws. Further complicating matters, the Roberts Court has been a staunch defender of the First Amendment. In recent terms, it has rejected government efforts to create new exceptions to the First Amendment or to limit the protection provided to free speech.

For these reasons, most commentators believe President Trump's efforts to reform libel law will fail. Nevertheless, his criticism of the media and threats of ligation has consequences. In conflating negative coverage with false statements, he undermines the important role that free speech plays in a democratic society.

Chapter 6: Religio-Moral Heresy: From Blasphemy to Obscenity

U.S. Supreme Court

Case: *Packingham v. North Carolina,* 137 S.Ct. 1730, 2017 U.S. LEXIS 3871 (June 19, 2017); reversing and remanding the North Carolina Supreme Court decision in *State v. Packingham,* 368 N.C. 380, 2015 N.C. LEXIS 1061 (N.C. 2015).

Subject: A North Carolina law that makes it a felony for sex offenders to access a social network web site restricts lawful free speech, in violation of the First Amendment.

Summary of Decision: In 2002, Lester Gerard Packingham, a 21-year old college student, was convicted of "taking indecent liberties with a minor" for engaging in sex with a 13-year-old girl he was dating. He was sentenced to 10 to 12 months in jail. Because

Packingham claimed he had not known the girl's age, the judge suspended his sentence. Packingham completed two years of supervised release without incident, though he was still required to register as a sex offender.

In 2008, six years after Packingham's conviction, the North Carolina legislature adopted a law that made it a felony 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." Under this law, a commercial social networking web site had four distinct attributes: (1) it "[i]s operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site," (2) it "[f]acilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges," (3) it "[a]llows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site," and (4) it "[p]rovides users or visitors . . . mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger." The statute was intended, its proponents argued, to prevent registered sex offenders from "gathering information about minors on the Internet" and using that information to make inappropriate contact with those minors.

The North Carolina statute had two notable exceptions. It did not extend to web sites that "provide only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform." It also did not cover web sites that have as their "primary purpose the facilitation of commercial transactions involving goods or services between [their] members or visitors."

According to court records, the state had prosecuted more than 1,000 of the 20,000 registered sex offenders in North Carolina for illegally using social network web sites. As part of the state's enforcement effort, the Durham Police Department actively investigated registered sex offenders who were suspected of violating the law. During one investigation, an officer noticed that in 2010 the state had dismissed a traffic citation against J. R. Gerrard, who had responded with a triumphant post on his Facebook profile: "Man God is Good! How about I got so much favor they dismiss the ticket before court even started. No fine, No court costs, no nothing spent. . . . Praise be to GOD, WOW! Thanks JESUS!" Suspecting that "Gerrard" was a pseudonym that Packingham was using, the officer checked court records and learned that a traffic citation for Packingham had been dismissed about the time of Gerrard's Facebook post. Based on this information, the Durham Police Department obtained a search warrant and confirmed the officer's suspicion: Packingham had been posting to Facebook under the name "Gerrard."

Although there was no evidence that Packingham had contacted a minor or committed an illicit act, he was charged with violating the North Carolina law. The trial court denied a motion to dismiss his indictment as a violation of his First Amendment rights. A state appellate court reversed this decision, but the North Carolina Supreme Court held that the law was "constitutional in all respects." In particular, the North Carolina Supreme Court noted, the law is "carefully tailored . . . to prohibit registered sex offenders from accessing only those Web sites that allow them the opportunity to gather information about minors."

All eight U.S. Supreme Court justices thought the North Carolina statute was "unprecedented in the scope of First Amendment speech it burdens." The justices differed, however, in their approaches to the case. Justice Anthony Kennedy (writing for himself and Justices Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan, and Sonia Sotomayor) penned a sweeping opinion that framed the *Packingham* outcome as an important decision. Justice Samuel Alito, Jr., filed a concurring opinion (joined by Chief Justice John Roberts, Jr., and Justice Clarence Thomas) that took a more restrained approach and chastised the dramatic language employed in the majority opinion. (Justice Neil Gorsuch did not participate in the *Packingham* decision.)

Justice Kennedy's opinion began by reviewing the facts in the case. He then identified the First Amendment issues. "In the past," Justice Kennedy wrote, "there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of ideas, [but] today the answer is clear. It is cyberspace—vast democratic forums of the Internet . . . and social media in particular." Although we are starting to recognize the importance of the Internet, Justice Kennedy continued, "We cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The force and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow."

Justice Kennedy then conducted a traditional First Amendment analysis. Because the North Carolina law is content neutral, he noted, it is subject to intermediate scrutiny to determine whether the law is "narrowly tailored to serve a significant government interest." The law was flawed, he concluded, because it "enacts a prohibition unprecedented in the scope of First Amendment speech it burdens." By prohibiting registered sex offenders from using social media, the law "bars access to what for many are the principal source for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanism available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to become a town crier with a voice that resonates farther than it could from any soapbox."

Justice Kennedy acknowledged that the state had a compelling interest in protecting minors from sexual predators, but said the law was unconstitutional because it went too far in enacting a "complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture." It is a well-established rule, Justice Kennedy concluded, that "the government may not suppress lawful speech as the means to suppress unlawful speech. That is what North Carolina has done here. Its law must be held invalid."

Justice Alito, in his concurring opinion, agreed with the majority's conclusion that the North Carolina law violated the Free Speech Clause of the First Amendment. "I cannot join the opinion of the Court," he lamented, "because of its undisciplined dicta" (the extraneous parts of the opinion that do not speak to the underlying legal issue). In particular, he objected to Justice Kennedy's attempt to "equate the entirety of the Internet with public streets and parks." Justice Alito feared that this expansive approach was dangerous: if the First Amendment protected the "entirety of the Internet," he said, the states would have "little ability to restrict the sites that may be visited by even the most dangerous sex offenders." He admonished the Court to be more "cautious in applying our free speech precedents to the Internet." Rejecting the "loose rhetoric" he found in the majority opinion, Justice Alito argued that the Court should act with caution and proceed "one step at a time." The North Carolina

law was clearly unconstitutional, but that did not mean the Supreme Court had to embrace the "full dimensions and vast potential" of "the Cyber Age" that Justice Kennedy championed.

Chapter 8: Commercial Speech

U.S. Supreme Court

Case: *Expressions Hair Design v. Schneiderman,* 137 S.Ct. 1144, 2017 U.S. LEXIS 2186 (March 29, 2017); vacating and remanding the Second Circuit Court of Appeals decision in *Expressions Hair Design v. Schneiderman,* 808 F.3d 118, 2015 U.S. App. LEXIS 21521 (2d Cir. 2015).

Subject: A New York law that regulates the advertising of cash discounts and credit card surcharges is a regulation of speech that is protected by the First Amendment.

Summary of Decision: Merchants who accept credit cards often charge consumers who pay with credit cards a higher price than consumers who pay with cash. This surcharge, generally 2 or 3 percent of the transaction, allows the merchant to recover the extra costs (sometimes referred to as "swipe fees") associated with accepting payment by credit cards. New York and ten other states adopted laws that required merchants to explain the price difference as a cash discount rather than as a credit card surcharge. Whether the charge is called a discount or a surcharge, of course, the effect is the same: customers are charged for the privilege of paying with plastic.

These laws were ignored for many years because the credit card networks (Visa, Mastercard, etc.) prohibited merchants from discriminating against consumers who pay with their cards. In recent years, however, the networks have relaxed these prohibitions because of antitrust considerations. As a result, the state statutes became important constraints on merchant behavior.

Five businesses in New York State that wanted to impose surcharges on credit card sales challenged the law, on the grounds that it violated their freedom of speech by restricting what they could say about their prices. The merchants argued that they were providing truthful speech, conveying information about the price of legal goods and services, and that the provision of the law distinguishing between discounts and surcharges was unconstitutionally vague. A federal district court was sympathetic to the merchants, but the Second Circuit Court of Appeals was not. The Appellate Court summarily dismissed the suit, concluding that the regulation of a "price practice" deals with conduct, and thus did not threaten the merchants' right to free speech.

The Supreme Court granted certiorari. After hearing oral arguments, the justices held that the New York law regulated speech on an 8-0 decision. There was, however, disagreement as to the scope of the decision. Chief Justice John Roberts (joined by Justices Anthony Kennedy, Clarence Thomas, Ruth Bader Ginsburg, and Elena Kagan) crafted a narrow opinion favoring the merchants. Justices Stephen Breyer and Sonia Sotomayor (joined by Justice Samuel Alito) filled broader concurring opinions. (Justice Neil Gorsuch did not participate in the decision.)

Writing for the majority, Chief Justice Roberts reduced the case to a single point. Unlike earlier cases that regulated the amount a store could collect, he said, the New York law was "different" because it "tells merchants nothing about the amount they are allowed to collect from a cash or credit card payer. Sellers are free to charge $10 for cash and $9.70, $10, $10.30,

or any other amount for credit. What the law does regulate," he continued, is "how sellers may communicate their prices. A merchant who wants to charge $10 for cash and $10.30 for credit may not convey that price in any way he pleases. He is not free to say '$10 for credit with a 3% credit card surcharge' or '$10 plus $0.30 for credit.'" Because the law regulated the "communication of prices rather than prices themselves," Chief Justice Roberts concluded, "It regulates speech."

The distinction was crucial because the Second Circuit, which had concluded that the New York law regulated *conduct,* had not considered whether the law was a valid regulation on commercial *speech.* "We are a court of review, not of first view," Chief Justice Roberts declared. "We decline to consider those questions in the first instance. Instead, we remand for the Court of Appeals to analyze [the New York law] as a speech regulation."

The very narrow approach that Chief Justice Roberts offered did not go far enough for Justices Breyer, Sotomayor, or Alito. In his concurring opinion, Justice Breyer expressed ongoing reservations about applying heightened First Amendment scrutiny to laws that regulate purely economic matters. "I agree with the Court that New York's statute regulates speech," Justice Breyer observed. "But that is because virtually all government regulation affects speech. Human relations take place through speech. And human relations include community activities of all kinds—commercial and otherwise."

In her concurring opinion, Justice Sotomayor complained, "The Court only addresses 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 argued that the Court should have addressed all the issues raised by a confusing statute, including the vagueness question. To help frame these issues, she would have asked the lower federal court to ask the New York high court for a definitive interpretation (referred to as a "certification") of the state law.

The Supreme Court decision in *Expressions Hair Design v. Schneiderman* vacated the Second Circuit Court of Appeals dismissal of the case. This decision does not mean the New York law that the merchants challenged is necessarily unconstitutional. The Court simply directed the Appellate Court to assess the New York law using the commercial speech doctrine. Consequently, there will probably be another round of arguments about the New York statute in the federal courts.

Chapter 13: Copyright

U.S. Supreme Court

Case: *Matal v. Tam,* 137 S. Ct. 1744, 2017 U.S. LEXIS 3872 (June 19, 2017); affirming the United States Court of Appeals for the Federal Circuit decision in *In re Tam,* 808 F.3d 1321, 2015 U.S. App. LEXIS 22593 (Fed. Cir. 2015).

Subject: The Disparagement Clause of the Lanham Act violates the First Amendment.

Summary of Decision: Simon Tam is the lead singer of an Asian-American rock band from Portland, Oregon, that calls itself "The Slants." Many people view the term "slants" as a racial slur against Asians, but Tam said the band was attempting to reappropriate the term, just as the LGBT community has reclaimed the term "queer." When Tam attempted to formally register the band's name as a trademark in 2011, the U.S. Patent and Trademark Office (PTO) denied his application on the grounds that the name violated the Disparagement Clause of the Lanham Act. Under this provision, the PTO may refuse to register a trademark that "consists

of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." According to the PTO, registering "The Slants" would be disparaging to "persons of Asian descent."

Tam appealed in federal court, on the grounds that the PTO's decision violated his freedom of speech. The Federal Circuit Court of Appeals sided with the Slants and struck down the Disparagement Clause on the grounds that it violated the First Amendment. "The government cannot refuse to register disparaging marks because it disapproves of the expressive message conveyed by the marks," the court held. "It cannot refuse to register marks because it concludes that such marks will be disparaging to others."

The PTO appealed to the Supreme Court, arguing, among other things, that the refusal to register "The Slants" as a trademark did not restrict Tam's freedom of speech. After all, Tam and the band were still free to call themselves "The Slants" and to use the name to promote their music and events. The PTO argued it was simply enforcing the rules necessary to run a trademark registration program. Furthermore, the PTO argued, forcing the agency to register a trademark for "The Slants" was akin to compelling the government to speak. To support its position, the PTO cited the Supreme Court decision in *Walker v. Texas Sons of Confederate Veterans,* in which the Court had held that the state of Texas could not be compelled to issue a specialty license plate, bearing an image of the Confederate flag, that had been requested by the Sons of Confederate Veterans. On a 5-4 vote, the justices held that the Texas Department of Motor Vehicles did not violate the First Amendment in refusing to grant the request for the specialty license plate. If Texas was required to issue the plates, the majority held, it would force the government to speak on an issue.

In *Matal v. Tam,* the eight U.S. Supreme Court justices all sided with Tam and "The Slants." They differed, however, on the underlying reasoning. In an opinion by Justice Samuel Alito (joined by Chief Justice John Roberts, Justice Clarence Thomas, and Justice Stephen Breyer), the majority declared that the idea that the government may restrict offensive speech "strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate."

In a concurring opinion, Justice Anthony Kennedy (joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan) emphasized that the law was a form of content discrimination: "A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society." (Justice Neil Gorsuch did not participate in the *Matal v. Tam* decision.)

Although their reasoning differed, the justices were in agreement on the key point: The Disparagement Clause prohibition on trademarks that disparage members of racial or ethnic groups violated the First Amendment. Writing for the majority, Justice Alito also rejected the government speech argument. "If the federal registration of a trademark makes the mark government speech, the federal government is babbling prodigiously and incoherently," Justice Alito continued. "It is saying many unseemly things. It is expressing contradictory views. It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public."

The Supreme Court decision in *Matal v. Tam* was clearly a victory for "The Slants," as the band can now formally register their mark. The decision is also a victory for the owner of the Washington Redskins, Dan Snyder, who is likely to prevail in his battle with the PTO over the "Redskins" trademark as a consequence of the *Matal v. Tam* decision. Just as the PTO had ruled against "The Slants," the PTO had also rejected the team's application for a trademark on "Redskins" as a violation of the disparagement clause. Allowing "The Slants" to trademark the band's name should mean Snyder and the team can trademark the "Redskins" name. There is some irony in this result, as Tam himself hates the football team's name. Writing on his blog, Tam notes "Redskins always has been used as a racial slur and has a long history of demeaning Native Americans. 'Slant' has not."