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## The Rise of the Viewpoint-Discrimination Principle

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## THE RISE OF THE VIEWPOINT-DISCRIMINATION PRINCIPLE

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### TABLE OF CONTENTS

- I. DEVELOPMENT OF THE VIEWPOINT–DISCRIMINATION PRINCIPLE
- II. CONTOURS OF THE VIEWPOINT–DISCRIMINATION PRINCIPLE
- III. JUSTIFICATION OF THE VIEWPOINT–DISCRIMINATION PRINCIPLE
- IV. APPLICATION OF THE VIEWPOINT–DISCRIMINATION PRINCIPLE

The Supreme Court’s freedom-of-speech jurisprudence is complicated. There are few hard and fast rules. One is that judicially imposed prior restraints on speech are hardly ever permissible. In recent years, another hard and fast rule appears to have developed. It is that the government may never prohibit speech simply on account of its viewpoint. It remains unclear whether this is a per se prohibition or whether such viewpoint-focused regulation must overcome the all but insurmountable burden of serious strict scrutiny. In any event, any governmental rule that attempts to regulate speech based on its point of view will almost certainly be invalidated.

The anti-viewpoint-discrimination principle is of relatively recent origin. The recent decisions in *Matal v. Tam*<sup>1</sup> and *Iancu v. Brunetti*<sup>2</sup> have especially invigorated it, suggesting that a majority of the Court is prepared to apply it rigorously. This article will describe the origin of the anti-viewpoint-discrimination principle, define and consider its contours, develop the theory behind the principle, and attempt to explain why it has recently emerged as a focal point of free speech jurisprudence.<sup>3</sup>

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1. 137 S. Ct. 1744 (2017).

2. 139 S. Ct. 2294 (2019).

3. See generally Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99 (1996), for an analysis of the caselaw, especially federal circuit court caselaw, as of 1996. See also Maura Douglas, Comment, *Finding Viewpoint Neutrality in Our Constitutional Constellation*, 20 U. PA.

As the Court has explained, viewpoint discrimination is a subset of content discrimination.<sup>4</sup> As a matter of free speech law, content discrimination is very troublesome, generally giving rise to strict scrutiny.<sup>5</sup> Viewpoint discrimination is significantly worse, often leading to per se invalidation. The Court's concern with content discrimination predates the focus on viewpoint discrimination, although several of the early content discrimination cases were actually instances of unacknowledged viewpoint discrimination. Well before the Court began to focus on either content or viewpoint discrimination, some of the laws it either upheld or invalidated could have readily been analyzed as one or both. For instance, the Court's free speech jurisprudence was kickstarted by the famous seditious speech cases of 1919. *Abrams v. United States* affirmed a conviction under the 1917 Espionage Act, as amended in 1918, which made it a crime to publish "disloyal, scurrilous and abusive language" about the United States when it is at war.<sup>6</sup> The conviction was upheld. Today, were the statute still in effect, in addition to the Court's significantly more protective seditious speech standard of *Brandenburg v. Ohio*, the statute itself would be invalidated as patent viewpoint discrimination.<sup>7</sup>

#### I. DEVELOPMENT OF THE VIEWPOINT-DISCRIMINATION PRINCIPLE

*West Virginia Board of Education v. Barnette*,<sup>8</sup> arguably the most stirring and oft-quoted free speech case, was a forerunner of the more recent viewpoint-discrimination principle. In the course of invalidating the school board's mandatory flag salute rule, Justice Jackson declared, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."<sup>9</sup> This is not quite a statement of the viewpoint-discrimination principle, but it does highlight the fear of government manipulation of the marketplace of ideas that informs it.

*Cohen v. California*, which predated the explicit viewpoint discrimination cases, also provides significant support for the principle.<sup>10</sup> There, the Court overturned a conviction of a man who carried a jacket bearing the message "Fuck the Draft" into a courthouse under a statute that prohibited "maliciously or willfully disturb(ing) the peace or quiet of any neighborhood or person . . . by . . . offensive conduct."<sup>11</sup> In striking down the statute, Justice Harlan noted that the First Amendment puts "the decision as to what views shall be voiced largely into the hands of each of us."<sup>12</sup> He expressed concern that "governments might soon seize

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J. CONST. L. 727, 744-54 (2018), for a more recent discussion of the caselaw.

4. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination.").

5. See, e.g., *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

6. *Abrams v. United States*, 250 U.S. 616, 624 (1919).

7. *Brandenburg v. Ohio*, 395 U.S. 444, 452 (1969) (per curiam).

8. 319 U.S. 624 (1943).

9. *Id.* at 642.

10. *Cohen v. California*, 403 U.S. 15, 18-19 (1971).

11. *Id.* at 16.

12. *Id.* at 24.

upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”<sup>13</sup> In *Cohen*, Justice Harlan wrote a brilliant opinion highlighting several deficiencies with the law. Today, the focus on “offensive conduct” would almost certainly condemn it as well under the viewpoint-discrimination principle.

The Court’s concern with discrimination based on the content of speech began to come into focus in the early 1970s. In the companion cases of *Police Department of Chicago v. Mosley*<sup>14</sup> and *Grayned v. City of Rockford*,<sup>15</sup> decided in 1972, the Court invalidated ordinances that prohibited picketing near a school during the time when school was in session with an exception for picketing with respect to a labor dispute.<sup>16</sup> In *Mosley*, the Court struck down the statute on the grounds that the content-based discrimination, exempting picketing for labor disputes, was unjustified by the purpose of avoiding disruption of the educational process.<sup>17</sup> This launched the Court’s modern concern about content-based discrimination under the First Amendment. Although the ordinance seemed to discriminate on the basis of content (labor picketing) rather than viewpoint (opposition to management practices), Justice Marshall employed language which would help explain the Court’s subsequent strong concern with viewpoint-based discrimination as well. He wrote:

[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. . . . There is an “equality of status in the field of ideas,” and government must afford all points of view an equal opportunity to be heard.<sup>18</sup>

With this, the Court’s concern with content, if not viewpoint-based discrimination, was set in motion.

Building on *Mosley*, in 1980 in *Carey v. Brown*, the Court invalidated an Illinois statute that banned picketing in front of a private residence but exempted labor picketing.<sup>19</sup> For the majority, Justice Brennan noted that “it is the content of the speech that determines whether it is within or without the statute’s blunt prohibition.”<sup>20</sup> Then, in a footnote, he declared that it is “no answer to assert that the Illinois statute does not discriminate on the basis of the speaker’s viewpoint, but only on the basis of the subject matter of his message,”<sup>21</sup> seemingly recognizing that this was a distinction that could matter in subsequent cases.

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13. *Id.* at 26.

14. 408 U.S. 92 (1972).

15. 408 U.S. 104 (1972).

16. *Mosley*, 408 U.S. at 101-02; *Grayned*, 408 U.S. at 107.

17. *Mosley*, 408 U.S. at 95, 100.

18. *Id.* at 95-96 (internal citations omitted).

19. *Carey v. Brown*, 447 U.S. 455, 470-71 (1980).

20. *Id.* at 462.

21. *Id.* at 462 n.6.

Two years later, in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, the Court set forth its tripart structure for analyzing the government's ability to prohibit speech on government property.<sup>22</sup> It divided such property into three categories: traditional public forums, dedicated public forums, and nonpublic forums.<sup>23</sup> In traditional or dedicated public forums, regulation based on the content of the speech would be subject to strict scrutiny.<sup>24</sup> In nonpublic forums, the Court would demand only that the regulation be reasonable "and not an effort to suppress expression merely because public officials oppose the speaker's view."<sup>25</sup> The Court held that the teachers' mailboxes at the heart of the controversy in *Perry* were a nonpublic forum, upheld the regulation prohibiting an unrecognized union from using the mailboxes to communicate with the teachers, and concluded that there was "no indication that the school board intended to discourage one viewpoint and advance another."<sup>26</sup> The majority seemed to distinguish regulation of content, which would be subject to strict scrutiny, from the regulation of viewpoint, which would be prohibited per se.

Justice Brennan, filing a dissent joined by three other Justices, picked up on this distinction, arguing that, "[o]nce the government permits discussion of certain subject matter, it may not impose restrictions that discriminate among viewpoint on those subjects whether a nonpublic forum is involved or not."<sup>27</sup> He declared, "Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'"<sup>28</sup> Justice Brennan would have found that the regulation was in fact viewpoint-based discrimination in that it had the intent and effect to close the mailboxes to a union with a different point of view on labor relations.<sup>29</sup> In a footnote, the majority responded that there was no evidence in the record that the policy was adopted with the intent to freeze out contrary viewpoints nor was it aimed specifically at the challenger union.<sup>30</sup> It would appear that all members of the Court agreed that viewpoint discrimination was forbidden but disagreed as to whether it was present on the facts of the case. *Perry* established that the Court clearly considers regulation that discriminates based on point of view to be an even more serious threat to freedom of speech than mere content discrimination.

Three years later in *Pacific Gas & Electric Co. v. Public Utility Commission*, a four-Justice plurality, in an opinion by Justice Powell, invalidated a regulation in part because it discriminated on the basis of viewpoint.<sup>31</sup> The commission had promulgated an order requiring a public utility company to insert statements in

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22. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-47 (1983).

23. *Id.* at 45-46.

24. *Id.*

25. *Id.* at 46.

26. *Id.* at 49.

27. *Id.* at 61 (Brennan, J., dissenting).

28. *Id.* at 62.

29. *Id.* at 65.

30. *Id.* at 49 n.9 (majority opinion).

31. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 20-21 (1986) (plurality opinion).

its billing envelopes that disagreed with the company's positions.<sup>32</sup> The plurality declared that the order "discriminate[d] on the basis of the viewpoints of the selected speakers."<sup>33</sup> Further, the order "impermissibly burden[ed] appellant's First Amendment rights because it force[d] appellant to associate with the views of other speakers, and because it select[ed] the other speakers on the basis of their viewpoints."<sup>34</sup> Chief Justice Burger concurred, joining the opinion but limiting his concurrence to the forced-association ground.<sup>35</sup> Justice Marshall concurred in the judgment.<sup>36</sup> For at least four Justices, it would appear that viewpoint-based discrimination was a per se violation of the First Amendment. There was no consideration in the Powell plurality of strict scrutiny or interest balancing.

In *Texas v. Johnson*, decided in 1989, the Court effectively relied on the anti-viewpoint-discrimination principle to strike down a Texas statute that made it a crime to desecrate a venerated object, including a state or national flag.<sup>37</sup> Johnson had burned an American flag while participating in a political demonstration.<sup>38</sup> In the course of his opinion invalidating the statute, Justice Brennan declared that, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>39</sup> This was a strong endorsement of the anti-viewpoint-discrimination principle. The following year in *United States v. Eichman*, the Court invalidated a federal statute passed in response to *Johnson* that effectively only prohibited disrespectful destruction of the flag.<sup>40</sup> Quoting the above sentence from *Johnson*, the Court concluded that Congress had not avoided the constitutional defect that had doomed the Texas statute.<sup>41</sup>

The following year, in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, the Court invalidated the New York "Son of Sam" law, which required entities that contracted to produce a book by a person convicted of a crime to deposit in escrow any proceeds from the sale of the book to compensate victims of the crime.<sup>42</sup> The Court categorized the statute as content discrimination (though not viewpoint-based) and struck it down for failure to satisfy the narrow tailoring requirement of strict scrutiny.<sup>43</sup> The case is especially significant on account of Justice Kennedy's concurrence in which he argued that a statute discriminating against speech on the basis of its content should be considered per se unconstitutional and, thus, was inappropriate to apply strict scrutiny.<sup>44</sup> That position has not prevailed with respect to content-based discrimination, but it may

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32. *Id.* at 6.

33. *Id.* at 12.

34. *Id.* at 20–21.

35. *Id.* at 21 (Burger, C.J., concurring).

36. *Id.* (Marshall, J., concurring).

37. *Texas v. Johnson*, 491 U.S. 397, 420 (1989).

38. *Id.* at 394.

39. *Id.* at 414.

40. *United States v. Eichman*, 496 U.S. 310, 318–19 (1990).

41. *Id.* at 319.

42. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108 (1991).

43. *Id.* at 116, 118, 123.

44. *Id.* at 124 (Kennedy, J., concurring).

very well be the case with regulation that discriminates on the basis of viewpoint.

*R.A.V. v. City of St. Paul*,<sup>45</sup> decided in 1992, is one of the most significant opinions explicating the anti-viewpoint-discrimination principle. There, the Court unanimously struck down a St. Paul, Minnesota ordinance that made it a criminal offense to place on private property a symbol (such as a burning cross as appellant had done) that one knows or reasonably should know “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”<sup>46</sup> Four Justices would have invalidated the ordinance for overbreadth.<sup>47</sup> However, Justice Scalia, writing for the majority, struck it down on the ground that it discriminated on the basis of viewpoint.<sup>48</sup> Justice Scalia conceded that the Minnesota Supreme Court justified the statute as an attempt to regulate “fighting words” that were beyond the scope of First Amendment protection.<sup>49</sup> Accepting that, Justice Scalia nevertheless argued that the anti-viewpoint-discrimination principle was so important to free speech jurisprudence that it applied even to speech that was otherwise excluded from First Amendment protection.<sup>50</sup> That would presumably not be the case with most other First Amendment doctrines, highlighting the preeminence of the anti-viewpoint-discrimination principle in free speech jurisprudence. Justice Scalia’s analysis would suggest that this principle is at the very heart of serious free speech protection.

The second aspect of *R.A.V.* that is significant is that it was the first case in which the Court attempted to define the viewpoint-discrimination principle. That is, how exactly does viewpoint discrimination differ from mere content discrimination? Justice Scalia defined viewpoint discrimination as “hostility—or favoritism—towards the underlying message expressed,”<sup>51</sup> citing *Carey*.

He immediately recognized that, in order to square his opinion with existing precedent, he needed to recognize several exceptions. First, Justice Scalia noted that, where the basis of content discrimination is the very reason why particular content may be punished, there would be a slight chance of viewpoint discrimination.<sup>52</sup> Once again this signaled that viewpoint discrimination is a far more serious offense to freedom of speech than content discrimination. An example of this would be criminalizing only those threats against the President.<sup>53</sup> A second exception would be for regulation aimed at conduct that could have a secondary or incidental effect on speech, such as adult business zoning laws or sexually derogatory fighting words, which could constitute gender-based discrimination.<sup>54</sup>

Returning to the question of defining viewpoint discrimination, Justice Scalia explained that the law clearly discriminated on the basis of viewpoint by only

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45. 505 U.S. 377 (1992).

46. *Id.* at 380.

47. *Id.* at 397 (White, J., concurring).

48. *Id.* at 391 (majority opinion).

49. *Id.* at 392.

50. *Id.* at 384–85.

51. *Id.* at 386 (citing *Carey v. Brown*, 447 U.S. 455 (1980)).

52. *Id.* at 388.

53. *See id.*

54. *Id.* at 389.

criminalizing fighting words based on race, color, creed, religion, or gender.<sup>55</sup> Justice Scalia assumed that in a situation of debate, viewpoint discrimination would exist when one side is handicapped on the basis of what it can say. As he noted, the state may not “license one side of a debate to fight free style, while requiring the other to follow Marquis of Queensberry rules.”<sup>56</sup>

The city argued that the statute could pass strict scrutiny as necessary to serve the compelling state interest of helping members of traditionally discriminated against groups to live in peace.<sup>57</sup> Conceding that this was a compelling interest, Justice Scalia rejected the argument that a statute only prohibiting certain epithets was narrowly tailored.<sup>58</sup> He recognized that St. Paul was attempting to make a strong statement about race, religious, or gender-based discrimination; however, “[t]hat is precisely what the First Amendment forbids.”<sup>59</sup> This final paragraph of the Scalia opinion might suggest that, at least with respect to speech otherwise excluded from First Amendment protection, regulation discriminating on the basis of viewpoint is not forbidden per se but must instead be subjected to strict scrutiny. That is cold comfort, however, since the opinion seems to conclude that viewpoint-discriminatory regulation will never be narrowly tailored.

*R.A.V.* involved a municipal attempt to prohibit hate speech. The concurring Justices would have invalidated the law based on overbreadth, leaving open the possibility that more narrowly drawn hate speech regulation might be constitutional. Justice Scalia’s opinion for the majority seemed to go out of its way to derail that possibility. Under *R.A.V.*, regulation that bans hate speech with respect to certain protected groups will violate the anti-viewpoint-discrimination principle. Two of the primary defenses for hate speech laws were confronted and rejected in *R.A.V.* Some hate speech regulation had been based on the theory that fighting words were excluded from First Amendment protection. So, as long as the regulation was limited to fighting words, there would be no problem. Justice White, writing for three Justices, took that approach.<sup>60</sup> As noted above, writing for the majority, Justice Scalia maintained that the anti-viewpoint-discrimination principle applied to speech that was otherwise excluded from First Amendment protection.<sup>61</sup>

Another defense of hate speech regulation proceeded from the premise that the harm caused by hate speech was qualitatively distinct and more serious than the harm caused by other offensive speech, and, therefore, the state had a specific interest in prohibiting it while not prohibiting other fighting words or personally-insulting speech. Justice Stevens, writing for three Justices, took this approach.<sup>62</sup> Justice Scalia confronted this argument and rejected it, characterizing it as “word play.”<sup>63</sup> He explained that the reason why racial hate speech might cause

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55. *Id.* at 391.

56. *Id.* at 392.

57. *Id.* at 395.

58. *Id.* at 395-96.

59. *Id.* at 396.

60. *Id.* at 401-02 (White, J., concurring).

61. *Id.* at 384-85 (majority opinion).

62. *Id.* at 433 (Stevens, J., concurring).

63. *Id.* at 392 (majority opinion).

distinctive harm is due to the viewpoint, and, consequently, this theory essentially boils down to an attempt to prohibit speech on account of discomfort with its message.<sup>64</sup> By explicitly rejecting these two arguments, the Court made it difficult, if not impossible, for a state actor to enact any significant prohibition of hate speech that focused on specific types of speech or protected groups.

The following year in *Lamb's Chapel v. Center Moriches Union Free School District*, the Court invalidated a ruling by a local school board that banned the showing of a film addressing issues of family and childbearing. The Court did so on the grounds that the ruling violated a rule prohibiting the use of school premises for religious purposes in view of a state law permitting the use of school premises for social, civic, and recreational meetings.<sup>65</sup> The Court unanimously struck this ruling down as prohibited viewpoint-based discrimination, which was impermissible in a dedicated public forum.<sup>66</sup> The Court seemed to consider this a *per se* violation of First Amendment freedom of speech, rejecting an Establishment Clause defense. *Lamb's Chapel* is further proof that, at least in a public forum, viewpoint discrimination is flatly prohibited.

Two years later, again in the context of religious speech, in *Rosenberger v. Rector & Visitors of the University of Virginia*, the Court again relied on the anti-viewpoint-discrimination principle to invalidate a university regulation that prohibited reimbursement of expenses to a student newspaper<sup>67</sup> that “primarily promotes or manifests a particular belief in or about a deity or an ultimate reality.”<sup>68</sup> *Wide Awake* offered “a Christian perspective on both personal and community issues,” challenged students “to live, in word and deed, according to the faith they proclaim,” and encouraged students “to consider what a personal relationship with Jesus Christ means.”<sup>69</sup>

Like *R.A.V.*, *Rosenberger* is especially significant because the Court again made an effort to distinguish viewpoint discrimination from content discrimination. In reviewing the precedent, including *Mosley*, *Perry*, and *R.A.V.*, the Court declared: “Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”<sup>70</sup> In a limited public forum, such as that created by the university, content restrictions consistent with the purposes of the forum are permissible while distinctions based on viewpoint are “presumed impermissible.”<sup>71</sup> The Court conceded that the distinction between content and viewpoint could be “imprecise.”<sup>72</sup> Nevertheless, it concluded that prohibiting religious perspectives as opposed to religious subject matter focused on viewpoint

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64. *Id.* at 392–93.

65. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395–97 (1993).

66. *Id.* at 394.

67. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830–32 (1995).

68. *Id.* at 823.

69. *Id.* at 826 (internal quotation marks omitted).

70. *Id.* at 829.

71. *Id.* at 830.

72. *Id.* at 831. See Kent Greenawalt, *Viewpoints from Olympus*, 96 COLUM. L. REV. 687, 702–06 (1996), for criticism of the Court's viewpoint-doctrine analysis in *Rosenberger*.

as opposed to content.<sup>73</sup> The Court found viewpoint discrimination in *Rosenberger* exclusively based on the text and application of the rule without any reference to evidence of the university's motivation. Although noting that the state had abandoned the argument, the Court rejected the claim that the university's policy was necessary to avoid violating the Establishment Clause.<sup>74</sup> Most of Justice Souter's dissent focused on the Establishment Clause issue; however, he also argued that the Court's approach effectively erased the distinction between content and viewpoint discrimination.<sup>75</sup> Justice Kennedy responded that the dissent mistakenly addressed viewpoint discrimination by assuming a bipolar debate.<sup>76</sup> However, Justice Kennedy argued that the exclusion of multiple viewpoints still constituted viewpoint discrimination.<sup>77</sup> Since the university's focus was on perspective, it was going well beyond simply restricting speech based on its subject matter.<sup>78</sup> This was a significant clarification of the nature and breadth of the viewpoint-discrimination principle.

*Good News Club v. Milford Central School*, decided in 2001, is yet another decision in which the Court relied on the anti-viewpoint-discrimination principle to strike down a school regulation discriminating against religious speech.<sup>79</sup> Not surprisingly, it relied heavily on *Lamb's Chapel* and *Rosenberger* to support its decision.<sup>80</sup> There, a school district that permitted the use of its facilities for extracurricular activities of an educational, civic, and social nature prohibited the use by a club that intended to engage in religious instruction and Bible study. Given that the school district had created a limited public forum, the Court invalidated the restriction as viewpoint discrimination.<sup>81</sup>

In 2015, in *Walker v. Sons of Confederate Veterans, Inc.*, the Court upheld the Texas Department of Public Safety's rejection of an application for a specialty license plate featuring the Confederate battle flag.<sup>82</sup> As Justice Alito argued in dissent, had the Court considered the specialty license plate program (which had approved over 300 different designs) to be a dedicated public forum, the refusal would almost certainly have constituted prohibited viewpoint discrimination given that the application was rejected on the ground that the flag was offensive.<sup>83</sup> The Court avoided this result by characterizing license plates, including specialty license plates, as government speech.<sup>84</sup> The Court had previously recognized that, as a speaker, the government is under no duty to be neutral among viewpoints.<sup>85</sup> The government-speech doctrine could impose a significant limitation on the anti-

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73. *Rosenberger*, 515 U.S. at 831.

74. *Id.* at 845.

75. *Id.* at 898-99 (Souter, J., dissenting).

76. *Id.* at 831 (majority opinion).

77. *Id.*

78. *Id.* at 832.

79. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 120 (2001).

80. *Id.* at 107.

81. *Id.*

82. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015).

83. *Id.* at 2255 (Alito, J., dissenting).

84. *Id.* at 2249 (majority opinion).

85. *See id.* at 2247.

viewpoint-discrimination principle if broadly construed.

In *Reed v. Town of Gilbert*,<sup>86</sup> another 2015 case that clearly did not involve viewpoint-based discrimination, the Court nevertheless emphasized the strength of the principle. The Court applied strict scrutiny to invalidate a local ordinance that subjected different types of temporary directional signs to distinct regulatory burdens.<sup>87</sup> The Court concluded that the regulation was content based, though viewpoint neutral.<sup>88</sup> In the course of striking it down, Justice Thomas noted that “[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech.”<sup>89</sup> In other words, the fear of viewpoint discrimination is so strong that even relatively innocuous laws such as the one in *Gilbert*, which imposed a heavier regulatory burden on “temporary directional signs” than on “political or ideological signs,” are subject to extremely searching review.

The Court’s 2017 decision in *Matal v. Tam*—invalidating on its face a federal statute that prohibited registration of trademarks that disparage or bring into contempt or disrepute any person living or dead (the Disparagement Clause)<sup>90</sup>—is the Court’s most important decision in the anti-viewpoint-discrimination line of cases. The case was brought by an Asian-American band, the Slants, following a refusal by the Patent and Trademark Office to grant a trademark for the band’s name on the ground that it was disparaging to Asians. Justice Alito wrote an opinion for a majority, in part, and for a four-Justice plurality. Justice Kennedy wrote a concurrence for a four-Justice plurality. Significantly, all eight Justices participating declared that the provision constituted unconstitutional viewpoint-based discrimination. All eight agreed that the provision did not constitute government speech immune from the viewpoint-discrimination principle under *Walker*. Indeed, Justice Kennedy’s concurrence characterized the government speech doctrine as the “one narrow situation in which viewpoint discrimination is permissible.”<sup>91</sup> The Kennedy four only joined that portion of the Alito opinion that rejected the argument that the Disparagement Clause constituted government speech.<sup>92</sup>

Much of Justice Alito’s discussion of viewpoint discrimination came during the portions of his opinion rejecting the government’s “government program” defense (III-C) and its commercial-speech defense (IV).<sup>93</sup> In responding to the argument that viewpoint discrimination was permissible as part of a government program, the Alito plurality declared that, although the clause prohibited disparagement of any group, be it “Democrats and Republicans, capitalists and socialists,” prohibiting disparagement was still a viewpoint-based prohibition.<sup>94</sup> As

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86. 135 S. Ct. 2218 (2015).

87. *Id.* at 2231.

88. *Id.* at 2230.

89. *Id.* at 2229.

90. *Matal v. Tam*, 137 S. Ct. 1744, 1764–65 (2017).

91. *Id.* at 1768 (Kennedy, J., concurring).

92. *Id.* at 1765.

93. *Id.* at 1761, 1763 (majority opinion).

94. *Id.* at 1763.

Justice Alito summed it up, “Giving offense is a viewpoint.”<sup>95</sup> This would seem to be a major step beyond *R.A.V.* There, the Court seemed to suggest that a law that banned hateful fighting words aimed at specified groups would constitute viewpoint-based discrimination; however, the violation could be cured by simply banning all hateful fighting words regardless of the target. In other words, a categorical prohibition would constitute viewpoint discrimination while a noncategorical ban would not. The Alito plurality appeared to reject any such distinction if “giving offense” itself is a viewpoint. It would seem that the plurality went out of its way to suggest that even noncategorical hate speech prohibitions, as suggested by Justice Scalia in *R.A.V.*, would also constitute prohibited viewpoint discrimination. Perhaps a distinction might be drawn between speech that is otherwise excluded from First Amendment protection where noncategorical prohibition might be permissible (*R.A.V.*) and otherwise protected speech (*Matal*) where it would not be. However, given the strength of the anti-viewpoint-discrimination principle as expounded by the Court, such a distinction makes little sense.

Considering trademarks as commercial speech, the Alito plurality concluded that the Disparagement Clause could not satisfy the intermediate standard of review.<sup>96</sup> Once again, perceived viewpoint discrimination proved fatal. The plurality declared that the asserted government interest in preventing offensive speech was in itself inconsistent with core viewpoint-neutrality principles of the First Amendment. As for the asserted interest in promoting commerce by discouraging speech that disparages minorities, the plurality rejected this on the ground that “[i]t is not an anti-discrimination clause; it is a happy-talk clause.”<sup>97</sup>

Justice Kennedy, also writing for a four-Justice plurality, concurring condemned the Disparagement Clause as prohibited viewpoint discrimination.<sup>98</sup> He noted “[t]he law . . . reflects the Government’s disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination.”<sup>99</sup> In response to the government’s argument that the clause is content neutral because it applies to any disparaging trademark, Justice Kennedy replied, “[T]o prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so.”<sup>100</sup> This built on the analysis in *Rosenberger*, which Kennedy cited at this point.<sup>101</sup>

Justice Kennedy then expanded on the very nature of the viewpoint-discrimination principle, noting that:

The First Amendment’s viewpoint neutrality principle protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses. By mandating positivity, the law here might silence dissent and

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95. *Id.*

96. *Id.* at 1764.

97. *Id.* at 1765.

98. *Id.* (Kennedy, J., concurring).

99. *Id.* at 1766.

100. *Id.*

101. *Id.* (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831–32 (1995)).

distort the marketplace of ideas.<sup>102</sup>

Justice Kennedy also explained that it did not matter that the government itself was not proceeding from hostility to a certain message but was only concerned with the reaction of those who were confronted with it.<sup>103</sup> As with *R.A.V.*, Justice Kennedy refused to accept this argument, noting that “[t]he government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker’s audience.”<sup>104</sup>

Justice Kennedy declared that viewpoint discrimination warrants strict scrutiny even when commercial speech is involved.<sup>105</sup> Presumably, this is why Kennedy declined to join section IV of the Alito plurality applying the intermediate standard of review. However, he never attempted to apply strict scrutiny to the facts. Rather, it appears that the presence of viewpoint discrimination doomed the regulation no matter what.

The opinions in *Matal* emphasize the potency of the viewpoint-discrimination principle as perhaps no other case has. Both the opinions of Justices Alito and Kennedy confirmed that the viewpoint-discrimination principle applies with respect to governmental creation of categories of unprotected or less-protected speech and that it is no defense to claim that the regulation is viewpoint neutral within the category. This should have been clear from *Lamb’s Chapel* and *Rosenberger*; however, all eight Justices participating in *Matal* emphasized it. The Court in *Rosenberger* divided 5–4 on this point. *Matal* affirmed it 8–0.

Next, both opinions tied viewpoint discrimination directly to government censorship, an anathema to First Amendment values. Justice Kennedy tied the viewpoint-discrimination principle to acknowledged free speech justifications including the marketplace of ideas and speaker autonomy.<sup>106</sup> This emphasized how very close this principle is to the core of First Amendment values.

*Matal* failed to resolve the question of whether viewpoint discrimination constitutes a per se violation of the First Amendment or whether it simply leads to the application of strict scrutiny. The Kennedy plurality stated that viewpoint discrimination gave rise to heightened review but then made no attempt to apply it, seemingly treating it as automatically unconstitutional. Perhaps it makes little difference since it appears that the Court will not find the strict standard satisfied once it has characterized a regulation as viewpoint discriminatory.

The Justices also emphasized the breadth of the viewpoint-discrimination principle. To guard against any expansion of the *Walker* exception, Justice Kennedy characterized government speech as “just one narrow situation in which viewpoint discrimination is permissible . . . .”<sup>107</sup> And both the Alito and Kennedy opinions indicated that the principle applied to commercial speech as well. Indeed, Justice Kennedy declared that the presence of viewpoint discrimination

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102. *Id.*

103. *Id.* at 1766–67.

104. *Id.* at 1766.

105. *Id.* at 1767.

106. *Id.* at 1767–68.

107. *Id.* at 1787.

would raise the standard of review in the commercial speech area from intermediate to strict.<sup>108</sup> As with *R.A.V.*, where the majority applied the viewpoint-discrimination principle to otherwise unprotected speech, *Matal* suggests that this is a meta-principle of free speech jurisprudence that defies ordinary doctrinal categorization.

Two years after *Matal*, in *Iancu v. Brunetti*, the Court invalidated another provision of the Trademark Act prohibiting the registration of “immoral” or “scandalous” trademarks.<sup>109</sup> All nine Justices agreed that the ban on “immoral” marks constituted unconstitutional viewpoint discrimination. Justice Kagan, writing for six Justices, invalidated the ban on “scandalous” marks as well as forbidden viewpoint-based discrimination.<sup>110</sup> Justices Sotomayor, Breyer, and Roberts would have upheld the prohibition of scandalous marks as focused on the mode of communication rather than the ideas communicated.<sup>111</sup> As with *Matal*, however, the Justices were unanimous on the principle that viewpoint-discriminatory regulation was unconstitutional. Justice Kagan noted that the Patent and Trademark Office has treated “immoral” and “scandalous” as one phrase and thus synonymous.<sup>112</sup> She also quoted dictionary definitions of the words suggesting that both were concerned with the impropriety of the ideas expressed.<sup>113</sup> Consequently, both terms, whether read together or separately, fell afoul of the viewpoint-discrimination principle. Justice Kagan made no attempt to apply strict scrutiny to the law. Rather, referring to *Matal* and rejecting the government’s plea for overbreadth analysis, Justice Kagan wrote, “The Court’s finding of viewpoint bias ended the matter.”<sup>114</sup> The majority’s approach in *Iancu* indicated that governmental viewpoint discrimination is a per se violation of the First Amendment. Justice Alito, the author of one of the plurality opinions in *Matal*, added a short concurrence in which he declared, “Viewpoint discrimination is poison to a free society.”<sup>115</sup> As with his opinion in *Matal*, Justice Alito seemed to emphasize that the Court’s vigorous stance against viewpoint-based regulation of speech was intended to have societal impact well beyond the Trademark Act. He wrote: “[Viewpoint] discrimination has become increasingly prevalent in this country. At a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination.”<sup>116</sup> Clearly, Justice Alito was taking aim at attempts to stifle particular viewpoints on college campuses and elsewhere and indicating that the Court stood ready to intervene to protect freedom of speech against viewpoint discrimination by any public entities.

All three dissenters accepted the principle that government discrimination on

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108. *Id.* at 1767.

109. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2297 (2019).

110. *Id.* at 2302.

111. *Id.* at 2303–04 (Roberts, C.J., concurring); *id.* at 2304–08 (Breyer, J., concurring); *id.* at 2308–18 (Sotomayor, J., concurring).

112. *Id.* at 2301–02 (majority opinion).

113. *Id.* at 2299–300.

114. *Id.* at 2302.

115. *Id.* (Alito, J., concurring).

116. *Id.* at 2302–03.

the basis of viewpoint violates the First Amendment. They argued, however, that the term “scandalous” should be read separately from “immoral” and that it could reasonably be understood as banning the manner of speech—profanity—as opposed to the ideas presented by the speech.

## II. CONTOURS OF THE VIEWPOINT-DISCRIMINATION PRINCIPLE

As an explicit principle of First Amendment jurisprudence, viewpoint discrimination is approximately forty-five years old, although its roots extend further back. It was first recognized as a particularly egregious subset of the broader but less severe content-discrimination principle. It would be fair to say that over time the viewpoint-discrimination principle has grown to subsume more of what might earlier have been characterized as mere content discrimination. The obvious though difficult question is how to determine whether viewpoint discrimination exists. This is best understood at the outset by concentrating on explicit viewpoint discrimination on the face of regulation and then later inquiring as to whether implicit viewpoint discrimination is also problematic.

The easiest and yet the most unusual case would arise when a statute prohibited one side of a defined controversy, such as whether racial preferences in college admissions should be permissible. A regulation that prohibited anyone from propounding any position on this debate would be a clear example of viewpoint discrimination and would implicate all the reasons why viewpoint discrimination should be prohibited. Society has generally internalized this as a matter of social norm, and, consequently, this type of blatant viewpoint discrimination rarely occurs. The opponents of viewpoint-discrimination analysis in a particular case will often argue that the absence of any attempt to ban a particular viewpoint in the course of a specific debate indicates that there has been no viewpoint discrimination. However, the Court has not construed the principle so narrowly.

Rather, most cases of viewpoint discrimination involve regulations that prohibit a particular perspective, subject matter, or speaker. The Court has treated these as if they effectively discriminated on the basis of a particular viewpoint.

Most viewpoint discrimination cases have involved governmental attempts to prohibit a particular perspective. This was true of virtually all of the cases involving bans on religious-oriented speech, including the leading cases of *Lamb’s Chapel* and *Rosenberger*. If regulation prohibits or penalizes speech that takes a religious perspective, it does not necessarily prohibit one side of a particular debate from making its case. For instance, critics could allege that the regulation would ban both religious-based arguments favoring, as well as opposing, abortion. However, as Justice Kennedy recognized in his *Matal* concurrence, this is even worse in that it eliminates even more potential arguments from the marketplace of ideas. The Court has recognized that perspective-based prohibitions are often in fact aimed at anticipated arguments that might flow from the particular perspective banned. In other words, banning a perspective is often a thinly disguised method of effectively banning a specific viewpoint. But even when the regulation is indeed a good faith effort to prohibit a particular perspective rather than a concealed attempt to suppress a specific viewpoint, it still implicates the reasons why pure viewpoint discrimination is off limits in that it involves governmental restriction

of the ideas which may be discussed.

*Matal* also involved an example of perspective-based discrimination, which the Court unanimously rejected. The statute attempted to prohibit “disparaging” trademarks (speech). Critics could argue that within the context of a specific debate this would ban disparaging speech on different sides of the question. However, the Court definitively rejected this approach. Characterizing this as a “happy-talk” provision, Justice Alito recognized that it cut deeply into the ability of the speaker to express his or her message or point of view. Justice Kennedy agreed. As the Court recognized in *Cohen* and *Johnson*, governmental restriction of the manner of speech will inevitably affect its content. Similar, but perhaps slightly different, is the ban on particular language or form of argument as was involved in *R.A.V.* Prohibiting fighting words based on race does not necessarily disable a particular position in a specific debate as Justice Stevens argued. The ban presumably would apply to both sides. However, it does restrict the individual who has concluded that the use of race-based fighting words is the best way to make a point. In that sense, as Justice Scalia recognized, the regulation does handicap at least some speakers and as such creates the very problem that the viewpoint-discrimination principle is intended to prohibit.

Yet another question arises when the regulation applies unequally to all seemingly related speech. The cases in which labor picketing was exempted from statutes prohibiting picketing near a school or residence exemplify this. On their face, these would seem to be clear cases of content or subject-matter discrimination rather than viewpoint discrimination. Even as such, they will be subjected to demanding review and will usually be invalidated. Often, however, such regulation might be perceived as concealed viewpoint-based discrimination, thereby presenting the same problems. For instance, with respect to the exceptions for labor picketing, it is likely that regulators probably believed that most of the time labor picketing would exhibit a pro-labor rather than a pro-employer viewpoint. If so, what appears to be a subject matter distinction may well be a disguised viewpoint-based distinction as well.

There is also speaker-based regulation that may likewise be concealed viewpoint discrimination or at least raise the same concerns. That was the case in *Perry*, in which the Court first articulated the concept of viewpoint discrimination but then concluded that a regulation that only permitted the recognized union to utilize the school’s mail system was a permissible speaker-based distinction in a nonpublic forum. Justice Brennan wrote a powerful dissent arguing that the regulation should be invalidated as impermissible viewpoint discrimination considering that the rival union desired to use the mail system to present a different viewpoint on the subject of union representation.<sup>117</sup> Given the development of the viewpoint-discrimination principle over the past thirty-five years, *Perry* should have come out the other way and hopefully would if presented to the Court anew today. There is of course the possibility that speaker-based exclusions are simply thinly-disguised attempts at viewpoint discrimination. The Court recognized as much in *Cornelius v. NAACP Legal Defense & Education Fund*,

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117. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 55, 57, 65 (1983) (Brennan, J., dissenting).

*Inc.*<sup>118</sup> There, the Court held that participation in a federal government fundraising campaign was a nonpublic forum and that the government could reasonably exclude organizations like the NAACP, which were raising funds for the purpose of sponsoring litigation.<sup>119</sup> Still, the Court noted that on remand the lower court should explore whether the facial ban of organizations that intended to “influence . . . public policy through political activity or advocacy, lobbying, or litigation” was in fact concealed viewpoint-based discrimination.<sup>120</sup>

So far, all cases of viewpoint discrimination have been based on distinctions that have been drawn on the face of the statutes themselves. That is as it should be. Attempts to delve into the motivation of legislatures in the absence of any suspicious statutory distinctions would seem to be scarcely worth the institutional cost. However, when a statutory distinction based on subject matter or speaker identity raises the possibility that it has either the intent or will have the effect of resulting in viewpoint-based discrimination or will present the same threats to free speech values, then it is appropriate to treat it as viewpoint discriminatory without consideration of actual legislative intent.

So, what standard does apply to viewpoint-discriminatory regulation? At the outset, it should be noted that the Court has never sustained a regulation that it has characterized as viewpoint discriminatory. This suggests that, as a practical matter, there is a *per se* rule against viewpoint discrimination. In the public forum context, the Court has stated that regulations based on content will be subjected to strict scrutiny while noting that viewpoint discrimination is particularly troubling. Regulation of speech in nonpublic forums is subject only to rationality analysis, as long as the regulation is not viewpoint discriminatory.<sup>121</sup> The inference is that viewpoint-discriminatory regulation in a nonpublic forum would raise the standard of review to at least strict scrutiny if not resulting in *per se* invalidation.

In *Pacific Gas*, a four-Justice plurality invalidated a regulation that it deemed to be viewpoint discriminatory after applying strict scrutiny.<sup>122</sup> In *R.A.V.*, once the Court concluded that the ordinance was viewpoint discriminatory, it found it to be unconstitutional *per se* with no explicit reference to strict scrutiny.<sup>123</sup> In *Lamb’s Chapel*, *Rosenberger*, and *Good News Club*, the Court struck down regulations, at least as applied, in which schools engaged in religious discrimination against religious speech.<sup>124</sup> In each, the Court seemed to conclude that the viewpoint discrimination constituted a *per se* violation of freedom of speech. However, each rejected the school’s attempted Establishment Clause defense. It was unclear whether this was raised and considered as an independent defense or whether the school was in effect arguing that strict scrutiny was applicable and the Establishment Clause constituted a compelling state interest. In *Matal*, both the

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118. 473 U.S. 788 (1985).

119. *Id.* at 811.

120. *Id.* at 793, 812–13.

121. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992).

122. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 20–21 (1986) (plurality opinion).

123. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391, 395–96 (1992).

124. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 120 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830–32 (1995); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395–97 (1993).

Alito and Kennedy pluralities, after condemning viewpoint discrimination as inconsistent with the values and purpose of the First Amendment, invalidated the Disparagement Clause as incapable of satisfying either intermediate or strict scrutiny.<sup>125</sup> In *Iancu*, Justice Kagan assumed that proof of viewpoint discrimination resulted in automatic invalidation of the law.<sup>126</sup> Following *Matal* and *Iancu*, it seems clear that the Court has fashioned a per se rule against viewpoint-discriminatory regulation with no opportunity for the government to save the law by satisfying strict scrutiny. That may not always have been the case as the principle developed, but it seems to be where the Court has ended up.

The language in the cases seems to indicate that viewpoint-discriminatory regulation is in complete conflict with the First Amendment. As Justice Alito noted in *Iancu*, “Viewpoint discrimination is poison to a free society.”<sup>127</sup> Even if strict scrutiny applies, the regulation will inevitably be invalidated. Certainly, the desire to foreclose a particular viewpoint from the marketplace of ideas could not qualify as a compelling interest. Indeed, it is so inconsistent with First Amendment values that it would not even qualify as a legitimate interest capable of satisfying the lowest level of judicial scrutiny. Moreover, it is highly unlikely that viewpoint-based discrimination could ever satisfy the narrow tailoring requirement since, in almost every instance, the government could presumably serve whatever compelling interest it put forth with non-viewpoint-discriminatory regulation. At least, that’s how the law has developed so far. Thus, as a doctrinal matter, viewpoint discrimination is either prohibited per se or subjected to scrutiny that is strict in theory but fatal in fact, which comes out to the same place.

So, the next question—perhaps the most essential question—is why is this so? Why has the viewpoint-discrimination principle become a virtual meta-principle of free speech jurisprudence, similar to the effective prohibition of judicial prior restraint? And, if this is so, is it justified by free speech theory?

### III. JUSTIFICATION OF THE VIEWPOINT-DISCRIMINATION PRINCIPLE

The viewpoint discrimination cases do explain why the principle is so deeply embedded in free speech jurisprudence. In the early viewpoint discrimination cases, the Court proclaimed that “the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”<sup>128</sup> However, the Court did not explain why this was so. Justice Kennedy’s concurrence in *Matal* is perhaps the best attempt to explain why viewpoint discrimination is particularly inconsistent with free speech values. One of the most well-recognized justifications for vigorous protection of freedom of speech is

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125. *Matal v. Tam*, 137 S. Ct. 1744, 1764–65 (2017) (plurality opinion) (finding the Disparagement Clause was not narrowly drawn to satisfy intermediate scrutiny, if viewed as commercial speech); *id.* at 1767 (Kennedy, J., concurring) (holding that, as viewpoint discrimination, the regulation must be subjected to “rigorous constitutional scrutiny”).

126. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019).

127. *Id.* (Alito, J., concurring).

128. *Lamb’s Chapel*, 508 U.S. at 394 (quoting *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

the “search for truth”/“marketplace of ideas” theory popularized by John Stuart Mill and embedded in First Amendment jurisprudence by Justice Holmes in his classic dissent in *Abrams*.<sup>129</sup> Justice Kennedy relied on this theory in his *Matal* concurrence, declaring, “The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate.”<sup>130</sup> Thus, any attempt to skew the marketplace of ideas, especially with respect to a specific point of view or argument, is in conflict with this justification. The same would hold with the self-government theory propounded by Alexander Meiklejohn and adopted by the Court most explicitly in *New York Times Co. v. Sullivan*.<sup>131</sup> At least with respect to speech that is at all relevant to public issues, governmental-viewpoint discrimination would deprive citizens of access to information essential to their obligations as citizens. The same would be true of the third primary justification for protection of free speech—the liberty/autonomy theory. There are several variations of this theory; however, the central theme is that it is for the individual, not the government, to choose what to say and how to say it, as well as what to hear.<sup>132</sup> Justice Kennedy recognized this in his *Matal* concurrence, noting that the viewpoint-neutrality principle “protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses.”<sup>133</sup> By restricting or prohibiting certain viewpoints, the government undermines such autonomy.

There is yet another principle that looms large in explaining the Court’s hostility to viewpoint discrimination: the anti-censorship principle. It can be derived from and is supportive of the three primary justifications for freedom of speech. It is that it is for the individual and not the government to determine what is said, where and how it is said, and who may say it and hear it. To a large extent, it is derived from historical experience that the government simply can’t be trusted to censor speech given that it has strong incentives to restrict speech in order to serve its own interests.<sup>134</sup> The Court has recognized this principle to be central to its prohibition of viewpoint discrimination. As Justice Brennan recognized in his dissent in *Perry*, “Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of ‘free speech.’”<sup>135</sup> Justice Kennedy picked up this theme in *Matal*. In the course of rejecting a commercial speech exception for viewpoint discrimination, he pointed out that “[t]o permit viewpoint discrimination in this context is to permit Government censorship.”<sup>136</sup> He also declared that government hostility to speech based on perceived audience reaction

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129. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). See generally Lackland H. Bloom, Jr., *The Lessons of 1919*, 72 SMU L. REV. 361 (2019).

130. *Matal*, 137 S. Ct. at 1767 (Kennedy, J., concurring).

131. 376 U.S. 254, 269–80 (1964).

132. See, e.g., Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992).

133. *Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring).

134. FLOYD ABRAMS, *SPEAKING FREELY* 245 (2005); KENT GREENAWALT, *FIGHTING WORDS* 4 (1995); FRED SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 81 (1982).

135. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting).

136. *Matal*, 137 S. Ct. at 1768 (Kennedy, J., concurring).

is at the heart of why viewpoint-based discrimination is prohibited.<sup>137</sup>

Thus to distill the Court's settled rejection of viewpoint discrimination, it continues to believe that free speech is crucial to public debate in the marketplace of ideas, essential to self-government, and that decisions as to the nature of speech must be made by the individual rather than the state. Government censorship of viewpoints threatens each of these interests and raises the very distinct possibility of governmental manipulation of speech to serve its own interests. As such, the principle has emerged that viewpoint discrimination is effectively per se unconstitutional. As Justice Brennan recognized in his *Perry* dissent, to permit viewpoint discrimination "threatens the continued vitality of 'free speech.'"<sup>138</sup> In other words, given the basic premises of First Amendment jurisprudence, anything other than a rigorous prohibition of viewpoint discrimination would be unthinkable.

#### IV. APPLICATION OF THE VIEWPOINT-DISCRIMINATION PRINCIPLE

Considering that the viewpoint-discrimination principle has been clearly embodied in free speech theory both as a matter of precedent and as free speech has become popularly understood, it is not surprising that instances of explicit viewpoint discrimination have become the exception. As the cases indicate however, there are two areas in which the issue does arise. The first that has hopefully been put to rest is a prohibition of religious speech in the educational context as was the case in *Lamb's Chapel*, *Rosenberger*, and *Good News Club*. To some extent this may have been the result of governmental hostility to religious speech; however, it is more likely the result of misplaced and excessive concern as to the avoidance of potential Establishment Clause violations by schools. Presumably, the Court has dispelled this fear.

The second and perhaps continuing area in which viewpoint discrimination can arise is the regulation of hate speech. Most hate speech regulation, by its very nature, will be viewpoint discriminatory. This will be attributable to the fact that the government desires to protect certain specified groups against speech that is deemed to be especially harmful or because the government wishes to make a strong symbolic statement as to the extent to which it deprecates such speech. The movement to ban hate speech reached a zenith in the 1990s and was arguably squelched by the Court's decision in *R.A.V.*, which explicitly rejected a particular variation of hate-speech regulation as viewpoint discriminatory. However, in the past decade, attempts to regulate hate speech, especially on college campuses, have seen new life. This may be attributable to the fact that outside of the United States, hate speech is banned in much of the rest of the world,<sup>139</sup> as well as to the influence of the critical race studies movement.<sup>140</sup> To the extent that hate speech

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137. *Id.* at 1764.

138. *Perry*, 460 U.S. at 62 (Brennan, J., dissenting).

139. See ERIC BARENDT, *FREEDOM OF SPEECH* 177-86 (2d ed., 2005); SAMUEL WALKER, *HATE SPEECH* 1-3 (1994).

140. See generally MARI MATSUDA, CHARLES B. LAWRENCE III, RICHARD DELGADO & KIMBERLÉ WILLIAMS CRENSHAW, *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993).

is banned by private institutions, in the absence of state action, no First Amendment issue is raised. However, with respect to public institutions, the viewpoint-discrimination principle will be presented. *R.A.V.* seemed to establish the principle that what was characterized as “categorical” hate speech regulation was forbidden as viewpoint discrimination. Categorical regulation specified particular subjects such as race or religion that were off limits. Justice Scalia concluded that focusing on particular subjects which could not be used as fighting words inevitably discriminated on the basis of viewpoint. He seemed to acknowledge, at least in the context of otherwise unprotected fighting words, that a noncategorical ban would be permissible as a less-restrictive alternative.

*Matal* arguably rejected this interpretation, extending the viewpoint-discrimination principle to noncategorical hate speech as well. The statute involved there did not simply prohibit trademarks that disparaged on the basis of race or other specified categories. Rather, it was noncategorical in nature, prohibiting the registration of all disparaging trademarks, period. After explicitly recognizing that the statute “evenhandedly prohibits disparagement of all groups,” Justice Alito declared, “Giving offense is a viewpoint.”<sup>141</sup> Justice Kennedy made the same point, noting that “[t]o prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so.”<sup>142</sup> Granted, these statements can be reconciled with *R.A.V.* on the ground that *R.A.V.* involved otherwise unprotected speech while *Matal* involved speech that fell within the First Amendment’s domain, thus resulting in a more severe rule with respect to the latter than the former. Even so, both opinions in *Matal*, representing all eight Justices who participated, went out of their way to reject the categorical-noncategorical distinction. As such, hate speech was not before the Court. However, the Disparagement Clause, as applied to racially derogatory trademarks, was closely related to hate speech regulation. Both pluralities seemed to stress that even noncategorical regulation of hateful, insulting, or otherwise offensive speech is likely to be invalidated under the viewpoint-discrimination principle. While this is mere speculation, it was as if the Court was sending a message to public institutions, especially universities, regarding potential hate speech regulation. The message was, “Don’t go there—you have no hope.” In other words, the Court may have been engaged in a preemptive strike. Justice Alito reinforced the message in his concurrence in *Iancu*, noting that “free speech is under attack” and that the Court must stand strong against viewpoint discrimination.<sup>143</sup> A Justice could hardly have issued a clearer warning to public entities contemplating viewpoint-based regulation, which hate speech laws all but certainly are. Consequently, counsel for public institutions are likely to advise that under the law as it now stands, attempts to regulate or prohibit hate speech are likely to be invalidated in federal court. As long as the lower courts follow the law, the Supreme Court won’t even need to get involved. Thus, *Matal* and *Iancu* should be read as an attempt by the Court to end the argument over the constitutionality of hate speech regulation once and for all.

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141. *Matal*, 137 S. Ct. at 1749.

142. *Id.* at 1766 (Kennedy, J., concurring).

143. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302–03 (2019) (Alito, J., concurring).

As an explicit doctrine, the viewpoint-discrimination principle is relatively recent in origin. Its roots in free speech jurisprudence are quite deep, however. Over time, the Court has broadened and strengthened it. The viewpoint-discrimination principle is quite consistent with free speech jurisprudential principles and values. In an area in which there are very few clear rules, the principle that it is impermissible for the state to discriminate against speech based on its viewpoint, as broadly construed, seems to be quite properly embedded in the law.