THE FIRST AMENDMENT'S DAY IN THE SUN

By Josh Patashnik

The Supreme Court term that ended this past June may have been the calm before the storm. The Court largely shied away from high-profile cases likely to generate sharp ideological divisions, no doubt in part because the term began with a shorthanded eight-justice bench. And despite persistent rumors that he would retire at the term's end, Justice Anthony Kennedy made no such announcement, forestalling (at least for now) the intense political battle over the future of the Court that would all but certainly ensue.

In at least one respect, though, this past term was a genuinely important one: on a single day (June 19), the Court released two major opinions in First Amendment cases that, in time, may come to be seen as even more significant than they currently appear. In an era in which freedom of speech and expression is coming under increasing attack from both the right and left ends of the political spectrum, the Court unequivocally renewed its commitment to protect unpopular speech and the rights of unpopular speakers and listeners. It also may have foreshadowed the likely outcome in one of the blockbuster cases on the Court's docket for next term, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

TRAFFIC TICKETS AND ROCK BANDS

The first case, *Packingham v. North Carolina*, arose when Lester Packingham, a convicted sex offender, decided to take to Facebook to celebrate the fact that a state court had dismissed a traffic ticket he had received. "Praise be to GOD, WOW! Thanks JESUS!" he wrote. Unfortunately for Packingham, his post caught the attention of the Durham Police Department (which perhaps did not appreciate Packingham's tacky end-zone dance celebrating the dismissal of his traffic ticket). His exultant Facebook post earned him a conviction under a North Carolina statute that prohibits sex offenders from accessing social networking websites available to minors.

The Court unanimously held that Packingham's conviction violated the First Amendment. Justice Kennedy's majority opinion, joined by the four more liberal justices, is in many ways a remarkable opinion. It is barely nine pages long, yet it contains several rather sweeping statements about the nature of communication on the Internet. ("While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be.") As a matter of legal doctrine, its holding is brief but clear: even assuming North Carolina has a compelling interest in keeping sex offenders away from children, the state could not establish that its draconian means of banning the use of social media was a narrowly tailored way of achieving that goal, in light of less burdensome alternatives like simply prohibiting sex offenders from contacting minors online. Justice Samuel Alito, joined by Chief Justice John Roberts and Justice Clarence Thomas, reached the same bottom-line result, but in a separate opinion that criticized the majority's "undisciplined dicta" about online communication.

The second case, *Matal v. Tam*, involved a rock band called the Slants—a name chosen by the Asian American members of the band in order to "reclaim" that derogatory term often applied to Asian Americans. Unfortunately for the Slants, the Patent and Trademark Office (PTO) is not known either for its appreciation of antiracist literary techniques or for its taste in rock music. When the Slants applied for a trademark, the PTO denied their application on the ground that it violated a provision of the Lanham Act prohibiting the registration of any "disparag[ing]" mark.

The Court again unanimously held that this violated the First Amendment, although no opinion garnered the support of five justices. Justice Alito, writing for himself, the chief justice, Justice Thomas, and Justice Stephen Breyer, rejected the government's argument that trademarks constitute government speech or a permissible subsidy of preferred speakers. Rather, Justice Alito concluded, refusing to register "disparaging" marks impermissibly burdens protected expression, since the government has no legitimate interest in prohibiting offensive speech and the provision is not narrowly tailored to any other legitimate purpose. Justice Kennedy, writing for himself and Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, concluded that the ban on "disparaging" marks constituted impermissible viewpoint discrimination.

EASY CASES, BUT AN UNMISTAKABLE MESSAGE

On one level, *Packingham* and *Tam* were easy cases. The laws at issue in those cases were wildly overbroad, almost comically so. North Carolina's statute on its face prohibited sex offenders from accessing not just traditional social networking sites like Facebook, LinkedIn, and Twitter, but also any site that allowed underage users to create a profile and communicate with others—including (among others) Amazon, WebMD, and numerous news sites. The Lanham Act prohibited the registration of any trademark that may "disparage … or bring … into contemp[t] or disrepute" any "persons, living or dead." 15 U.S.C. § 1052(a). Taken literally, as Justice Alito's opinion noted, that would bar not just trademarks widely considered offensive, but even marks like

"Down with racists" or "James Buchanan was a disastrous president." It is not surprising the bottom-line result was unanimous in both cases.

But what is notable is that the Court did not simply invalidate these specific poorly drafted statutes while reserving the question of whether narrower restrictions on speech might have survived. (Justice Alito's concurring opinion in *Packingham* would have done so, but the majority rejected this approach.) Rather, the Court's language in each opinion emphasizes core First Amendment values in a way that makes it seem unlikely the Court would have upheld *any* significant restriction on speech in these contexts. In *Packingham*, the majority took aim at the very idea of restricting the flow of information online, even applied to convicted sex offenders, whose liberty is already curtailed in certain ways. The Court pronounced it "unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences." The Court reasoned that "[e]ven convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits" from social media, which has become an important "means for access to the world of ideas."

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> *— Justice Anthony Kennedy*

If anything, the opinions in *Tam* were even more emphatic. The government defended the Lanham Act's disparagement clause on the ground that it protected "underrepresented groups" from "demeaning messages in commercial advertising"—an argument the Court rejected across the board in no uncertain terms. The notion that the government "has an interest in preventing speech expressing ideas that offend," Justice Alito wrote, quoting Justice Oliver Wendell Holmes, Jr.'s, dissenting opinion in a 1929 case, "strikes at the very heart of the First Amendment. … [T]he proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" Justice Kennedy's opinion similarly concluded that the disparagement clause was "the essence of viewpoint discrimination" because it "reflects the Government's disapproval of a subset of messages it finds offensive." And outside the narrow context of the government's own speech—a line of cases the Court deemed inapposite in the trademark setting—restrictions that discriminate based on the speaker's viewpoint are categorically impermissible.

One must always be careful about reading too much between the lines of Supreme Court opinions, but the Court's full-throated reaffirmation of these core First Amendment principles *now* may not be a coincidence. It is a foreboding time for defenders of free speech, not just in the United States but around the globe as well. President Donald Trump, as you might have heard, is not a big fan of the news media. He also makes no effort to hide his admiration for foreign leaders who crack down forcefully on dissent, in countries like Saudi Arabia, Egypt, Turkey, and (of course) Russia. That surely does not sit well with the justices—especially Justice Kennedy—who care passionately about promoting civil liberties and the rule of law abroad.

The left, for its part, seems to have stepped back significantly from its traditional support for free speech. One prominent constitutional law professor told me recently that this year, for the first time in his decades of teaching, multiple students were shocked and dismayed to discover that "hate speech" is protected by the First Amendment. The past year has also seen a number of high-profile efforts by some on the left to silence controversial speakers on cam-

pus, like Charles Murray at Middlebury College and Milo Yiannopoulos at UC Berkeley. Survey data bear out these anecdotes: the Pew Research Center reported in 2015 that 40 percent of millennials in the United States think the government should be able to ban people from making public statements offensive to minorities, compared to just 12 percent of elderly Americans.[1]

These sentiments, though, have so far gained virtually no traction in the judiciary. In recent years, the Supreme Court has emphasized time and again that the First Amendment protects all sorts of nasty, demeaning, and seemingly valueless speech, such as dogfighting videos (*United States v. Stevens* (2010)), homophobic protests at military funerals (*Snyder v. Phelps* (2011)), and false claims of having won military medals (*United States v. Alvarez* (2012)). The opinions this term in *Packingham* and *Tam* signal that the Court is sticking to its guns, regardless of which way the winds are blowing in society at large. Indeed, one of the main beneficiaries of the Court's opinion in *Tam* is an entity whose brand is increasingly viewed as racist: the Washington Redskins football team. Their trademark is now safe from challenge in a court of law, if not in the court of public opinion.

A LOOK AHEAD: *MASTERPIECE CAKESHOP*

These recent opinions may also shed some light on what the Court will do in one of the upcoming term's most closely watched cases, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*. In *Masterpiece Cakeshop*—which the Court finally agreed to hear in June after pondering the cert petition for more than six months—the Colorado Civil Rights Commission ordered Jack Phillips, a Christian baker, to provide a wedding cake for a same-sex marriage under the state's public accommodations law. Phillips and his bakery contend the order violates both the free speech and free exercise clause of the First Amendment.

The case has been billed, understandably, as a showdown between religious freedom and antidiscrimination law. But it may turn out to be less about that and more about the art of designing and baking cakes. The bakery's free exercise claim faces a major obstacle—namely, Justice Antonin Scalia's opinion for the Court in *Employment Division v. Smith* (1990), which held that neutral laws of general applicability ordinarily do not violate the free exercise clause. But the bakery's free speech claim appears to be stronger. There may well be five (or more) justices who would hold that a baker, of whatever religion, cannot be compelled to create a cake containing expressive content—whether it be a design showing two grooms dressed in tuxedos or simply a message congratulating a couple on their marriage. That would be a way to resolve the case narrowly on grounds that may command a broad consensus on the Court, protecting the free speech rights of a small category of vendors engaged in artistic expression (specialty bakers, florists, wedding planners, and so on), while making clear that those not engaged in such expression (shuttle companies, hotels, bakers selling generic premade cakes, and the like) must serve same-sex couples and opposite-sex couples equally. (Surely, all couples deserve the opportunity to be ripped off by overpriced wedding vendors.)

Of course, only time will tell if the Court opts for this approach. But it would be in keeping with the Court's recent First Amendment cases, and would also be a fitting capstone to Justice Kennedy's career, which has blazed new paths in both free speech and gay and lesbian rights. Same-sex marriage is the law of the land, and those who continue to oppose it may well find that their views are widely regarded as wrongheaded, even bigoted. But just as government officials in a free society cannot force a rock band to stop using an offensive name, so too they may not dictate to individuals and communities of faith what to believe or say about the nature of marriage.

Josh Patashnik is an associate at Munger, Tolles & Olson and clerked for Justice Anthony Kennedy in October Term 2012.

Note

1. http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/.