

## Say My Name: Names Clause Trumps the Free Speech Barrier in *Vidal v. Elster*

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### I. OVERVIEW OF THE CASE

Steve Elster sought to register a trademark for the words “Trump too small” to use on wearable merchandise.<sup>1</sup> The trademark was paired with a hand gesture graphic referencing a 2016 presidential primary debate between Donald Trump and Marco Rubio.<sup>2</sup> However, the United States Patent and Trademark Office (USPTO) examiner denied the registration of the trademark due to its use of President Trump’s name, which violated the names clause of the Lanham Act.<sup>3</sup> Despite Elster’s argument that the names clause infringes on the First Amendment, the Trademark Trial and Appeal Board (TTAB) upheld the USPTO’s initial rejection of the trademark.<sup>4</sup>

On appeal, the United States Court of Appeals for the Federal Circuit reversed its decision, ruling that the names clause indeed violates the First Amendment. The court concluded that the names clause is (1) viewpoint-neutral but content-based, (2) subject to review under the standard of intermediate scrutiny, and (3) does not pass muster under intermediate scrutiny such that it is constitutional.<sup>5</sup> The Supreme Court of the United States granted certiorari to determine whether the names clause violates the First Amendment and *held* that it does not.<sup>6</sup> *Vidal v. Elster*, 602 U.S. 286, 292, 309 (2024).

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1. *Vidal v. Elster*, 602 U.S. 286, 291 (2024).

2. *Id.*

3. *Id.* at 292.

4. *Id.*

5. *Id.* at 292 (citing *In Re Elster*, 26 F.4th 1328 (CA Fed. 2022)).

6. *Id.* at 292, 310.

## II. BACKGROUND

The Free Speech Clause of the First Amendment states that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”<sup>7</sup> Historically, cases like *Vidal v. Elster*, which implicate constitutional questions, have been analyzed under a series of different tiers of scrutiny.<sup>8</sup> The three tiers of scrutiny are: rational basis scrutiny, intermediate scrutiny, and strict scrutiny.<sup>9</sup>

Rational basis review provides the lowest threshold for upholding existing law.<sup>10</sup> It is highly deferential and merely requires that the legislative purpose serves a legitimate interest and that the statute’s means are rationally related to such interest.<sup>11</sup> Now considered the judicial default by some, intermediate scrutiny analysis examines whether the legislative purpose is substantially related to important governmental objectives.<sup>12</sup> Lastly, strict scrutiny presumes that the statute in question is unconstitutional.<sup>13</sup> However, a showing that the legislative purpose serves a compelling governmental interest and that the means of the statute are narrowly tailored to such interest will rebut the presumption of unconstitutionality.<sup>14</sup>

While intended to provide a formula for judges to follow in their decision-making processes, tiered scrutiny continues to involve elements of personal judgment.<sup>15</sup> Judges draw on their experiences and unconscious biases to adopt theories that guide them in determining (1) whether an interest is legitimate, important, or compelling and (2) whether the means of the statute are rationally related, substantially related, or narrowly tailored to the interest.<sup>16</sup> Some of the most notable theories used to establish the proper level of scrutiny include public

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7. U.S. CONST. amend. I.

8. See Phillip J. Closius, *Lochner’s Revenge: Tiered Scrutiny and the Acceptance of Judicial Subjectivity*, 90 U. CIN. L. REV. 779, 779 (2022) (recognizing the longstanding development of tiers of scrutiny and the modern application of the tiered framework to First Amendment cases).

9. R. George Wright, *What If All the Levels of Constitutional Scrutiny Were Completely Abandoned?*, 45 U. MEM. L. REV. 165, 169 (2014).

10. *Id.* at 169.

11. Closius, *supra* note 8, at 783.

12. *Id.* at 783, 798.

13. *Id.* at 783.

14. Closius, *supra* note 8, at 779, 783.

15. Wright, *supra* note 9, at 165, 171.

16. *Id.* at 171, 177 (“The murkification, . . . is ongoing.”) (internal quotations omitted).

meaning originalism, living constitutionalism, and a newer theory of constitutional analysis: history and tradition.<sup>17</sup>

Courts utilize at least three distinct usages of the word “history.”<sup>18</sup> First, “historical practice” refers to legislative and executive actions accompanied by constitutional consequences.<sup>19</sup> Second, the “historical doctrine” indicates precedent established through judicially binding conclusions (otherwise known as *stare decisis*).<sup>20</sup> Third, “historical narratives” refer to stories recounting the origination, development, and consequences of constitutional actions.<sup>21</sup> Historical narratives may further be divided into three functions: causal, normative, and hermeneutic.<sup>22</sup> Causal historical narratives identify the circumstances underlying constitutionally significant actions.<sup>23</sup> Normative historical narratives morally or legally evaluate constitutional action.<sup>24</sup> Hermeneutic historical narratives reinforce meaning by interpreting constitutional provisions.<sup>25</sup> Tradition’s constitutional usage, on the other hand, is entirely encompassed by its common sense definition as “[a]ny practice or custom which is generally accepted and has been established for some time within a society, social group, etc. . . .”<sup>26</sup> Thus, while history and tradition are conceptually distinct, there is an undeniable interaction between the two.<sup>27</sup>

In the context of modern First Amendment challenges to existing statutes, the traditional intermediate scrutiny doctrine generally applies only if the regulation is content-neutral and provides “ample alternative channels of communication.”<sup>28</sup> Content-based regulations, on the other hand, are generally treated as presumptively unconstitutional and analyzed under a strict scrutiny framework.<sup>29</sup>

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17. Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U.L. REV. 433, 446 (2023); *see id.* at 436-37 (providing a detailed description of public meaning originalism); *see also id.* at 451-52 (providing an overview of living constitutionalism and the distinction between progressive and conservative constitutional pluralism).

18. Barnett & Solum, *supra* note 17, at 440.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* 433, 441.

23. *Id.*

24. *Id.*

25. *Id.* at 442.

26. *Id.*

27. *Id.* at 445.

28. Closius, *supra* note 8, at 779, 813 (2022).

29. *Id.* at 814; *see* Marc Jonathan Blitz, *The Pandora’s Box of 21st Century Commercial Speech Doctrine: Sorrell, R.A.V., and Purpose-Constrained Scrutiny*, 19 NEXUS: CHAP. J. L. &

On one hand, the language of the Free Speech Clause forbids regulations that stifle freedom of speech.<sup>30</sup> On the other hand, “The term ‘trademark’ includes any word, name, symbol, or device . . . which a person has a bona fide intention to use in commerce . . . to identify and distinguish his or her goods . . .”<sup>31</sup> A direct comparison between the language of the First Amendment and the definition of a trademark illustrates that the principle of trademark registration is, *per se*, in conflict with the goal of the First Amendment.<sup>32</sup> However, the names clause explicitly requires trademarks to be approved on the principal register unless they “[c]onsist[] of or comprise[] a name, portrait, or signature identifying a particular living individual” without written consent.<sup>33</sup> The default of trademark eligibility serves as a general rule, to which the names clause is an exception that narrows eligibility based on the content of the mark.<sup>34</sup> Although content-based regulations are presumptively unconstitutional, regulations on commercial speech are a narrow exception that allows for the restriction of such speech if it creates consumer confusion.<sup>35</sup> The rule thus shifts: It is constitutional to regulate commercial speech based on content, so long as it does not bar commercial speech based on viewpoint and/or messaging.<sup>36</sup>

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POL’Y 19, 25 (2013/2014) (noting that content-based commercial speech regulations may be analyzed under a lower standard of scrutiny because there is greater interest in providing the government leeway to create policies that aim to eradicate the risk of consumer confusion or fraud); *see also Commercial Speech*, LEGAL INFORMATION INSTITUTE (2022), [https://www.law.cornell.edu/wex/commercial\\_speech#:~:text=Primary%20tabs,than%20other%20forms%20of%20speech](https://www.law.cornell.edu/wex/commercial_speech#:~:text=Primary%20tabs,than%20other%20forms%20of%20speech). (“Commercial speech refers to any speech which promotes at least some type of commerce.”).

30. U.S. CONST. amend. I.

31. 15 U.S.C. § 1127 (2012).

32. *See Blitz, supra* note 29, at 24.

33. 15 U.S.C. § 1052(c) (2006); *see* 15 U.S.C. § 1091(a) (2002) (explaining that any lawfully used mark capable of distinguishing goods and in commercial use that is *not* registrable on the principal register may be registered on the supplemental register); *see also* 4 Anne Gilson LaLonde, *Gilson on Trademarks* § 20.01 (2024) (noting that supplementally registered trademarks are not “published for or subject to opposition.”).

34. *See* 15 U.S.C. § 1052(c).

35. *See* 3 Anne Gilson LaLonde, *Gilson on Trademarks* § 13.24(3)(a) (2024) (recognizing that restrictions on the content of commercial speech are generally constitutional if they meet the intermediate scrutiny standard); *see also* 15 U.S.C. § 1127 (indicating that trademarks serve to distinguish goods).

36. *See* Matal v. Tam, 582 U.S. 218, 247 (2017) and Iancu v. Brunetti, 588 U.S. 388, 399 (2019) (both holding that viewpoint-based trademark bars are unconstitutional); *Blitz, supra* note 29, at 19, 22.

### III. COURT'S DECISION

In the noted case, the Supreme Court examined the nature of the names clause to determine that analyzing history and tradition was the proper methodology for answering the question of whether the names clause violates the Free Speech Clause of the First Amendment.<sup>37</sup> In determining the proper analysis, the Court discussed two critical distinctions: the distinction between content-based and content-neutral speech restrictions and the distinction between content-based and viewpoint-based trademark bars.<sup>38</sup>

The Court first determined that the names clause is viewpoint-neutral because it prohibits the trademark of any living person's name without consent, regardless of whether their name is associated with a positive, neutral, or negative message.<sup>39</sup> Conversely, the Court found the clause to be content-based because its broad scope encompassing "an[y] living person's name" leads to inevitable differential treatment between trademarks that do or do not contain particular content; in *Vidal*, we have a living person's name.<sup>40</sup> The Court acknowledged that typically, both content-based and viewpoint-based regulations are treated as presumptively unconstitutional and thus subject to a standard of strict scrutiny.<sup>41</sup> However, it also recognized that because the names clause is viewpoint-neutral, it may not require strict scrutiny.<sup>42</sup>

By overriding the possibility of applying strict constitutional scrutiny to evaluate the compatibility of the names clause with the First Amendment, the Court shifted focus to a broad discussion of the overall development of trademark law alongside the First Amendment.<sup>43</sup> It noted that "trademark rights have always coexisted with the First Amendment, despite the fact that trademark protection necessarily requires content-based distinctions."<sup>44</sup> The inherent necessity for content-based discrimination in trademark law, the Court asserted, is supported by the historical acknowledgment of the trademark as a symbol of distinction in

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37. *Vidal*, 602 U.S. at 292-301; See 15 U.S.C. § 1052(c); see also U.S. CONST. amend. I.

38. *Vidal*, 602 U.S. at 292-95. Note that the usage of the language 'trademark bar(s)' herein shall be a term of art referring to the denial of a trademark application by the USPTO, and subsequently, the TTAB.

39. *Id.* at 293-94.

40. *Id.* at 294-95, 307; 15 U.S.C. § 1052(c).

41. *Id.* at 292-93.

42. *Id.* at 295.

43. *Id.* at 295-300.

44. *Id.* at 295.

the earliest recorded cases decided by both state and federal courts.<sup>45</sup> Without content-based discrimination, achieving the primary objective of trademarks—providing clear identification of both the vendors and manufacturers of goods sold in an open marketplace to ultimately prevent consumer confusion—would be impossible.<sup>46</sup> While content is a critical aspect of federal trademark law, the Court observed that the historical analog was silent concerning First Amendment challenges to content-based trademark restrictions.<sup>47</sup> As a result, it concluded that an examination of history and tradition shows the names clause does not threaten the First Amendment right to free speech.<sup>48</sup>

Instead of concluding its analysis there, the Court further detailed its point, focusing more closely on the common law development of trademark law.<sup>49</sup> The majority noted that the Lanham Act further codified the common law's limitation on trademarking an individual's name if the right to exclusive use comes at the expense of another person's right to their name.<sup>50</sup> Another reason the Court cited to justify the constitutionality of the names clause was a concern for the protection of reputation.<sup>51</sup> With little else to add, the Court concluded that “a tradition of restricting the trademarking of names has coexisted with the First Amendment, and the names clause fits within that tradition.”<sup>52</sup> The majority saw “no reason to disturb this longstanding tradition, which supports the restriction of the use of another person's name in a trademark.”<sup>53</sup> As a consequence, the Court held that the names clause does not violate the First Amendment and reversed the judgment of the Federal Circuit.<sup>54</sup>

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45. *Id.* at 297-98 (citing *Thomson v. Winchester*, 36 Mass. 214, 216 (Mass. 1837), the first domestically reported trademark decision, and *Taylor v. Carpenter*, 23 F. Cas. 742 (D. Mass. 1844), the first domestically reported trademark decision in a federal court); *see* 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 5:3 (5th ed. 2024) (recognizing that the Act of July 8, 1870 was the first federal trademark protection statute and that while it was ruled unconstitutional shortly after its passage, common law continues to characterize trademarks as an exclusionary right that is not grounded in federal registration itself, but rather afforded additional benefits by virtue of such registration).

46. *Vidal*, 602 U.S. at 299-300.

47. *Id.* at 295-96.

48. *Id.* at 301.

49. *Id.* U.S. at 301-10.

50. *Id.* at 302-03 (referencing *McLean v. Fleming*, 96 U.S. 245, 252 (1878)) (a trademark on the exclusive use of a name is prohibited in the absence of more information signifying the producer of the product); *see* 15 U.S.C. § 1052(e)(4) (2006).

51. *Vidal*, 602 U.S. at 305.

52. *Id.* at 307.

53. *Id.* at 308.

54. *Id.* at 310-11.

In the first concurrence, Justice Kavanaugh, joined by Chief Justice Roberts, expressed that viewpoint-neutral, content-based trademark restrictions like the names clause may still prove to be constitutional without a historical record.<sup>55</sup>

The second concurrence was authored by Justice Barrett, who was fully joined by Justice Kagan and partially joined by Justices Sotomayor and Jackson.<sup>56</sup> Justice Barrett advocated for a system that permits trademark restrictions if they reasonably align with the goals of the broad regulatory framework of trademark law.<sup>57</sup> While she concurred with the majority's argument that history undermines the presumption of a trademark's unconstitutionality despite its content-based nature, she did not believe that history alone suffices in every case.<sup>58</sup> Rather, she asserted that "relying exclusively on history and tradition may seem like a way of avoiding judge-made tests. But a rule rendering tradition dispositive is itself a judge-made test."<sup>59</sup> Justice Barrett aimed to elaborate on the majority's framework by emphasizing the purpose of federal trademark law, which is to enhance legal protections for markholders.<sup>60</sup> Under Justice Barrett's test, which closely resembles rational basis scrutiny in form, the names clause meets the standards because the prohibition of registering another person's name is likely to prevent consumer confusion and preserve "producer goodwill."<sup>61</sup>

In the third concurrence, Justice Sotomayor, joined by Justice Kagan and Justice Jackson, noted that *Vidal* was the first case in which the Supreme Court assessed a free speech challenge using the history and tradition test.<sup>62</sup> She rejected this test in favor of the reasonableness test already utilized in First Amendment jurisprudence.<sup>63</sup> The test established by Justice Sotomayor is twofold: It examines whether the provision targets the speaker's viewpoint, and if so, whether the trademark bar is reasonable considering the broader purpose of the trademark system.<sup>64</sup> If the provision is both viewpoint-neutral and identifies or distinguishes goods for the public, it does not violate the Free Speech Clause.<sup>65</sup> Further

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55. *Id.* at 311 (Kavanaugh, J., concurring).

56. *Id.* at 311-25 (Barrett, J., concurring).

57. *Vidal*, 602 U.S. at 312.

58. *Id.* at 313.

59. *Id.* at 324.

60. *Id.* at 316; see 15 U.S.C. §1125(a)(2012).

61. *Vidal*, 602 U.S. at 318-19.

62. *Id.* at 327 (Sotomayor, J., concurring).

63. *Id.* at 329.

64. *Id.* at 329.

65. *Id.*

expanding on Justice Barrett's analysis of the co-development between the First Amendment and trademark law, Justice Sotomayor reaffirmed three principles of trademark law recognized by the majority.<sup>66</sup> First, the primary purpose of a trademark is to identify the source of a product.<sup>67</sup> Second, trademarks are not inherently rooted in federal law.<sup>68</sup> Third, trademark registration does not confer the right to use; rather, it provides additional protections for the markholder.<sup>69</sup> Sotomayor's interpretation of these principles was that the USPTO's trademark bar functioned not to prevent Elster from disseminating his message, but rather to prevent him from obtaining an exclusive right to the unlawful use and commodification of another living person's name.<sup>70</sup>

#### IV. ANALYSIS

Although the majority succeeded in their goal of preserving the future of federal trademark law, the highly divided bench indicates that the analysis of history and tradition was the incorrect methodology for reaching their final decision. In *Vidal*, the majority failed to offer a compelling reason for abandoning the longstanding and well-established tiered scrutiny methodology in favor of the history and tradition analysis. The majority avoided addressing concerns over tiered scrutiny simply by expressing reluctance to "delineate an exhaustive framework" for deciding whether content-based trademark restrictions align with the First Amendment—an unsatisfactory approach.<sup>71</sup> Furthermore, their reliance on history and tradition depended on a long history of compatibility between trademark law and the First Amendment doctrine.<sup>72</sup>

First, it is essential to note that First Amendment challenges to trademark regulation represent a relatively new area of litigation and legal discourse.<sup>73</sup> Accordingly, *Vidal* is the first case of its kind, raising a question about the constitutionality of a viewpoint-neutral, content-based

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66. *Id.* at 333.

67. *Vidal*, 602 U.S.

68. *Id.*

69. *Id.* at 333-34.

70. *Id.* at 335.

71. *Id.* at 301.

72. *Id.* at 296.

73. See Claire Bosarge, 'Iancu v. Brunetti': The First Amendment Takes Precedence over Lanham Act's Prohibition of Trademarks Composed of Immoral or Scandalous Matter, TUL. J. TECH. & INTELL. PROP. 225, 230 (2020) (noting that *Matal*, 582 U.S. 218 (2017), was the first-ever Supreme Court of the United States decision raising a First Amendment challenge to a trademark registration restriction).

trademark restriction.<sup>74</sup> Second, with this information in mind, recall that the majority attempted to employ a historical narrative to justify trademark regulation based on an extensive discussion of the circumstances surrounding the origin and development of federal trademark law.<sup>75</sup> The historical narrative employed was causal in nature as it aimed to identify the overall policy objectives behind the creation of federal trademark protection.<sup>76</sup>

While there is nothing particularly objectionable about the majority's use of history and tradition to align the interests of the Free Speech Clause with content-based trademark regulations, the inherent issue with the test lies in its case-by-case application. The lack of a clear-cut rule to determine the constitutionality of all content-based but viewpoint-neutral regulations has resulted in a landscape where the Court has granted itself unchecked power to apply the same test differentially, reaching different conclusions on similar issues. Combined with the new precedential significance of invoking history and tradition, this power of differential application could be perilous, as it may conceal each justice's personal moral beliefs. Therefore, in opting to address the issue presented through the lens of history and tradition, the majority essentially employed a judge-made test.<sup>77</sup>

While tiered scrutiny is not without its flaws, it certainly offers more objective and ascertainable criteria than history and tradition alone. A more favorable test that the majority could have utilized is the two-pronged analysis that Justice Sotomayor advocated for.<sup>78</sup> The majority contends that the legislative history of the Lanham Act implies that the "longstanding, harmonious relationship [between trademark law and the First Amendment] suggests that heightened scrutiny need not always apply in this unique context."<sup>79</sup> The primary concern of the majority appears to be the application of a *per se* rule that ties heightened scrutiny to challenges of trademark law. However, this concern is mitigated and effectively rebutted by employing Justice Sotomayor's analysis, as the prongs allow for the flexibility to apply either intermediate scrutiny or rational basis review to the immediate inquiry.<sup>80</sup> The two-pronged analysis simultaneously offers more flexibility and clarity to the

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74. *Vidal*, 602 U.S. at 325 (Sotomayor, J., concurring).

75. *Id.* at 295-301; Barnett & Solum, *supra* note 17, at 433, 440 (2023).

76. *Vidal*, 602 U.S. at 305; Barnett & Solum, *supra* note 73, at 441.

77. *Vidal*, 602 U.S. at 324 (Barrett, J., concurring).

78. *See id.* at 329 (Sotomayor, J., concurring).

79. *Id.* at 299.

80. *Id.* at 329 (Sotomayor, J., concurring).

constitutional examination of content-based and viewpoint-neutral trademark regulations. Consequently, restructuring the analytical framework for future regulations (similar in form to the names clause) will provide a solid foundation in an era of new technologies and rapid developments where trademark law will continue to flourish.

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