Understanding Constitutional Law

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Table of Contents

Chapter 2. The Courts and Judicial Review

§ 2.8 Justiciability Doctrines

[3] Standing

[a] Constitutional Requirements

Insert at page 55, after the first full paragraph:

Despite cases such as *Havens*, in recent years the Court has been more cautious about allowing Congress to bestow upon persons a statutory right, the deprivation of which necessarily constitutes Article III injury. A notable example of such cases is *TransUnion LLC v. Ramirez*.[1] *TransUnion* involved a class of plaintiffs whose credit files contained inaccurate information, who sued under a federal law giving them a cause of action against credit reporting companies that failed to exercise adequate care to ensure that their credit files were accurate. Some members of the class had had their inaccurate credit information transmitted to third parties, such as retail outlets doing credit checks on their customers. The Court agreed that those class members had indeed suffered the concrete injury Article III demands.

However, five justices concluded that the other class members—those whose inaccurate credit information had not been transmitted to third parties—had not suffered Article III injury. Speaking for those justices, Justice Kavanaugh explained that, in determining whether a plaintiff has suffered a concrete injury adequate for Article III purposes, "courts should assess whether the alleged injury to the plaintiff has a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts."[2] Applying this historical test, he concluded that the class members who had had their inaccurate credit information transmitted to third parties had suffered an injury akin to the common law tort of defamation, and for that reason had suffered Article III "injury." By contrast, the class members whose information had not been transmitted had not suffered such a traditionally recognized harm.

To be sure, Congress had given that latter group of persons the same right to sue as it had given the former. But the mere fact that Congress had acted to protect a given interest did not mean that the deprivation of that interest constituted Article III injury. As Justice Kavanaugh explained:

> In determining whether a harm is sufficiently concrete to qualify as an injury in fact, the Court in *Spokeo* [*v. Robins*, 578 U.S. 330 (2016),] said that Congress's views may be "instructive." Courts must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a

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[1] 141 S.Ct. 2190 (2021).

[2] *Id.* at 2204.

> plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation. *See id.* In that way, Congress may "elevate to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law." *Id.* But even though Congress may elevate harms that exist in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is.[3]

Four justices (Thomas, Breyer, Sotomayor, and Kagan) dissented. Writing for all four, Justice Thomas argued that, historically, legislatively granted causes of action were adequate to establish standing when the claims involved a right contested by two private parties. Because the right in *TransUnion* met this description, he argued that the congressionally granted cause of action should have bestowed standing on all the class members. Justice Kagan wrote a short, separate dissent for herself and Justices Breyer and Sotomayor, in which she stressed the deference the Court should have accorded Congress's determination about the harmfulness of inaccurate credit information even when it remains untransmitted to third parties.

TransUnion and cases like it[4] make clear that limits exist to Congress's ability to influence the Article III standing calculus by providing statutory rights and causes of action. As the earlier block quote from *TransUnion* reveals, the Court is willing, at least ostensibly, to accord respect to Congress's determinations about what types of harms are "concrete" enough to justify allowing federal court lawsuits. But that quotation also makes clear that such deference has its limits, and that the Court itself will remain the final authority on what injuries constitute Article III "injury."

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[3] *Id.* at 2204-05.

[4] *See*, *e.g.*, Spokeo v. Robins, 578 U.S. 330 (2016) (another Fair Credit Reporting Act case, in which the Court held that the mere fact of Congress providing a person with a substantive right or a cause of action does not automatically provide a person with Article III injury when that right is violated).

Chapter 7. Commerce and the States: The Dormant Commerce Clause, Federal Preemption, and the Privileges and Immunities Clause

§ 7.04 The Modern Approach

[2] The *Pike* Balancing Test

Insert at page 199, at the end of Note 74:

For a recent judicial statement of a similar concern, see *National Pork Producers Council v. Ross*, 143 S.Ct. 1142, 1160 (2023) (plurality opinion) ("[E]ven accepting everything petitioners say [about the costs imposed and benefits bestowed by the challenged state law], we remain left with a task no court is equipped to undertake. On the one hand, some out-of-state producers who choose to comply with [the law] may incur new costs. On the other hand, the law serves moral and health interests of some (disputable) magnitude for in-state residents. Some might reasonably find one set of concerns more compelling. Others might fairly disagree. How should we settle that dispute? The competing goods are incommensurable. Your guess is as good as ours.").

Chapter 9. Liberty and Property: The Due Process, Takings, and Contracts Clauses

§ 9.04 Non-Economic Liberties

[3] Abortion

[h] *Dobbs* and the End of the Abortion Right

Insert at page 285, before sub-section [4]:

In 2022, the Court, now including several newly-appointed justices, returned to the abortion issue. *Dobbs v. Jackson Women's Health Organization*[5] involved a challenge to a Mississippi law that, with limited exceptions, banned abortion after fifteen weeks. The Mississippi law clearly violated the standards set forth in *Casey*, and the state's primary argument was that *Casey* and *Roe* should be overruled.

A five-justice majority agreed with the state and upheld the law, overruling *Casey* and *Roe*. Writing for that majority, Justice Alito argued that the unenumerated nature of substantive due process rights, and the resulting temptation to find such rights when they corresponded to a judge's own subjective preferences, required that, in order to be recognized, such rights had to be "deeply rooted in history" and "essential to our Nation's scheme of ordered liberty."[6] Applying those requirements, he found that abortion was not a deeply rooted right, given the historical tradition of regulating abortion, especially around the time the Fourteenth Amendment was ratified. The majority rejected identifying substantive due process liberty in ways that turned on ideas such as bodily autonomy, concluding that they were too broad and would sanction constitutional protection for a host of conduct, such as drug use and prostitution, that had long been prohibited.

After critiquing *Roe* on the merits, Justice Alito then concluded that the standard criteria governing the application of *stare decisis* did not require reaffirming *Casey* and *Roe*. He critiqued *Roe* as being poorly reasoned, and noted that *Casey* did not defend that reasoning, instead reaffirming *Roe* purely as a matter of *stare decisis*. He also critiqued *Casey*'s "undue burden" standard as unworkable, and dismissed any reliance interests that *Casey* and *Roe* may have engendered. When considering the relationship of the abortion right to other constitutionally-recognized bodily autonomy rights, such as the right to contraception and same-sex intimacy, Justice Alito concluded that abortion was unique because it involved the destruction of a fetus. For that reason, he insisted that overruling *Casey* and *Roe* did not thereby call into question cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding that married couples had a constitutional right to possess contraceptives), and *Lawrence v. Texas*, 539 U.S. 558 (2003) (finding that LGBT persons had a constitutional right to engage in same-sex

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[5] 142 S.Ct. 2228 (2022).

[6] *Id.* at 2246.

sexual intimacy). However, Justice Thomas, who joined the majority opinion, wrote a concurring opinion questioning those precedents.

Chief Justice Roberts concurred in the result upholding the Mississippi law. However, he disagreed with the majority's decision to overrule *Roe*. Instead, he would have decided the case based on whether the challenged law allowed pregnant persons "a reasonable opportunity"[7] to decide whether or not to carry the pregnancy to term. He concluded that the Mississippi law's fifteen-week limit afforded them that opportunity.

A joint dissent written by Justices Breyer, Sotomayor, and Kagan stressed their disagreement with the majority's purely historical approach to substantive due process. Instead, they called for an interpretive methodology that allowed for an evolutionary understanding of constitutional meaning, especially as it pertained to open-ended concepts such as due process liberty. Explaining how such an approach nevertheless cabined judicial discretion, the dissent cited Justice Harlan's dissenting opinion in *Poe v. Ullman*, 367 U.S. 497 (1961), as providing a method that respected both historical tradition and social change while limiting free-wheeling judicial discretion.

The dissent also stressed how *Roe*'s and *Casey*'s recognition of the right to abortion was consistent with the fabric of the Court's substantive due process jurisprudence more generally, in particular its recognition of the rights to contraception, sexual intimacy, and same-sex marriage. The dissent also argued that *stare decisis* counseled in favor of retaining *Roe* and *Casey*, especially given that American women over the last fifty years had structured their lives around the assumption that they could procure an abortion if they encountered an unwanted pregnancy.

Dobbs raises many questions. Its seeming clear endorsement of state laws regulating abortion, up to the point of fully prohibiting it, would appear to have removed any federal constitutional obstacle to state prohibitions on that practice. Nevertheless, after *Dobbs* abortion-rights plaintiffs have attacked state abortion restrictions as violating state constitutional guarantees[8] as well as federal health care statutes requiring hospitals to provide emergency care.[9] Perhaps most notably for current purposes, federal constitutional issues surrounding abortion may yet arise as states attempt to prohibit and punish their residents who travel out-of-state to obtain abortions.[10] While those latter issues may ultimately sound more in federalism, and in

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[7] *Id.* at 2310 (Roberts, C.J., concurring in the judgment).

[8] *See*, *e.g.*, Planned Parenthood South Atlantic v. State, 882 S.E.2d 770 (South Carolina 2023) (holding that a post-*Dobbs* abortion restriction violated the state constitution's privacy guarantee).

[9] *See*, *e.g.*, United States v. Idaho, 623 F.Supp.3d 1096 (D. Idaho 2022) (holding that the federal emergency care treatment law preempted Idaho's law criminalizing most abortions).

[10] *See* David S. Cohen, Greer Donley, and Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023).

particular federal constitutional limits on state regulation of conduct outside its borders, the fact remains that, despite appearances, *Dobbs* may not be the Court's last word about the federal constitutional status of abortion restrictions.

Going beyond *Dobbs* there remains the question of other substantive due process rights, and the fate of substantive due process more generally. Even leaving aside Justice Thomas's explicit willingness to reconsider cases such as *Griswold* and *Lawrence*, Justice Alito's analysis in *Dobbs*—in particular, his insistence that claimed due process rights must be historically grounded at a precise level of specificity—would seem to call into question those decisions as well as others that have protected conduct that was unprotected in 1868. Whether the Court takes up *Dobbs*' implicit invitation to reconsider those precedents remains for now an unanswered but highly important question.

Chapter 10. Equal Protection

§ 10.04 Race Equality

[3] Affirmative Action

[a] Higher Education

Insert at page 365, at the end of sub-section [a]:

In 2023, five years before the expiration of the 25-year period the Court identified in *Grutter*, the Court decided an important affirmative action case that severely cut back on the degree to which universities could consider race as part of their admissions decisions. *Students for Fair Admissions v. President and Fellows of Harvard College*[11] considered challenges to the admissions policies of Harvard and the University of North Carolina.[12] Those policies involved some consideration of race, which the university defendants argued was consistent with the Court's statements in *Grutter* and *Fisher II*.

Writing for a six-Justice majority, Chief Justice Roberts concluded that those plans violated the Fourteenth Amendment for several reasons. First, he argued that they failed strict scrutiny because they relied on a variety of diversity-related justifications (such as "acquiring new knowledge based on diverse outlooks") that were too vague to be measured precisely, as strict scrutiny demanded. Second, he concluded that those plans were not narrowly tailored to achieve any such goals, because they used overbroad and arbitrary racial categories—for example, an undifferentiated category of "Asian" students, rather than more precise categories. He also argued that the plans violated the Court's previous statements on affirmative action because they necessarily harmed applicants who did not benefit from race-based admissions preferences, and thus used race as a negative in those admissions decisions. He also argued that the plans rested on stereotypes of what applicants of particular races and ethnicities thought. Finally, he observed that neither university had identified an endpoint to their planned use of race, in violation of what he described as *Grutter*'s requirement of such an endpoint.

Despite these critiques, toward the end of its opinion the majority conceded that universities could still consider applicants' statements, for example, made in their admissions essays, about how they have overcome challenges in their lives, including challenges based on racial discrimination and exclusion. But it cautioned universities using such statements in ways that essentially replicated the policies the Court was outlawing.

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[11] 143 S.Ct. 2141 (2023).

[12] While Harvard, a private institution, is not subject to the Fourteenth Amendment, it is subject to a federal law prohibiting racial discrimination by institutions receiving federal funding; the Court very quickly noted that that law imposes the same requirements as does the Fourteenth Amendment. *See id.* at 2156 n.2.

Justice Thomas joined the majority and also wrote a separate concurrence, in part to argue that the original meaning of the Equal Protection Clause required government to act in a colorblind way.[13] Justices Sotomayor and Jackson wrote dissents, each of which was joined by Justice Kagan and each other. The dissents argued that the universities' use of race complied with the requirements the Court set out in *Grutter* and *Fisher II*. Justice Jackson also argued that the history of discrimination suffered by Black persons and other racial minorities created disparities in income, health, and education that justified some race-based preferences. She also took issue with Justice Thomas's originalist analysis, arguing that Reconstruction-era federal laws enacted contemporaneously with the Fourteenth Amendment demonstrated that Congress did not intend for the Fourteenth Amendment to prohibit race-conscious legislation designed to promote equality.

At the very least, *Students for Fair Admissions* ratcheted up the de facto level of scrutiny accorded to universities' use of race in university admissions. Indeed, the majority opinion's application of strict scrutiny arguably overruled most or all of *Grutter*. Interestingly, however, the universities in *Students for Fair Admissions* did not rely on the "critical mass" theory that was the foundation for the Court's upholding of the University of Texas admissions plan in *Fisher II*. Moreover, in a footnote the Court explained that it was not deciding whether the federal military academies were similarly limited in their ability to use race, explaining that those institutions might be able to cite distinct interests justifying their race-conscious admissions programs.[14]

Nevertheless, *Students for Fair Admissions* clearly made it much harder for universities to use race in admissions decisions. In particular, its skepticism about the precision and measurability of the diversity interest and its requirement that the racial and ethnic categories universities used be more narrowly focused reflect a version of strict scrutiny that is far tougher than the "strict scrutiny lite" that many commentators perceived in *Grutter*.[15] Moreover, the majority's insistence that giving favorable consideration to some applicants based on their race necessarily meant burdening others because of their race places an even heavier burden on universities that wish to use race going forward. It is an open question whether universities will be able to make effective use of either *Fisher II*'s "critical mass" theory or the majority opinion's acknowledgement that they can use individual applicant statements about how race affected their lives or outlook, or whether in future cases the Court will also shut the door on those uses of race.

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[13] Justice Gorsuch also joined the majority opinion and wrote a concurrence, focusing on the statutory non-discrimination issue. *See supra* note 12.

[14] *See id.* at 2166 n.4.

[15] *See*, *e.g.*, Stephen Feldman, *The Rule of Law or the Rule of Politics: Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 L. & SOCIAL INQUIRY 89, 94 (2005).

Chapter 11. Freedom of Speech, Press, and Assembly

§ 11.01 The Fundamentals of Free Speech Law

[3] The Content Neutrality Rule

[b] Identifying Content Discrimination

Insert at page 445, immediately before sub-section [c]:

Perhaps recognizing the difficulties caused by an overly rigid reading of *Reed*'s definition of content neutrality, in 2022 the Court inserted some flexibility into that definition. In *City of Austin v. Reagan National Advertising*,[16] the Court considered the proper understanding of a city ordinance regulating billboards. The ordinance imposed restrictions on "off-premises" billboards —that is, billboards that advertised goods or services not located on the premises where the billboard was located—that it did not impose on on-premises billboards. The lower court, confronted with a billboard company's First Amendment challenge, concluded that under *Reed* the ordinance was content based, because it required an observer to read the billboard (to discern whether it referred to a good or service located somewhere else) to determine whether it was subject to the ordinance's restrictions.

A six-justice majority reversed the lower court, with five of those justices concluding that the lower court had misinterpreted *Reed*. Speaking for those five justices, Justice Sotomayor explained that the ordinance in *Reed* distinguished among signs based on their subject-matter. By contrast, she wrote the following about the billboard ordinance: "The message on the [billboard] matters only to the extent that it informs the [billboard's] relative location. The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions."[17] Three justices, speaking through Justice Thomas, insisted that the ordinance was content-based under *Reed*, essentially adopting the lower court's understanding of *Reed*. The ninth justice (Justice Alito) voted to reverse the lower court on a different ground.

The disagreement in *Reagan National* over how to determine whether a law is content-based reveals how a seemingly straightforward inquiry is in fact not straightforward at all. While the majority may have hoped to soften what would otherwise be *Reed*'s stringent standard for identifying content discrimination, and thus to limit the circumstances in which strict scrutiny applies to everyday government regulation, its test may be susceptible to Justice Thomas's critique of it as "incoherent and malleable."[18] No doubt, litigation will continue to arise in which

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[16] 142 S.Ct. 1464 (2022).

[17] *Id.* at 1473. So-called time, place, and manner speech regulations are considered at Section 11.01[4][a] of this treatise.

[18] 142 S.Ct. at 1481 (Thomas, J., dissenting).

litigants probe both the majority's more nuanced test for content discrimination and Justice Thomas's more rigid one, both of which raise difficult issues.

§ 11.02 Special Doctrines in the System of Free Expression

[3] Compelled Expression

[a] Compelled Speech

Insert at the end of page 475:

In recent years, compelled speech claims have arisen in the context of state attempts to enforce so-called public accommodations laws. Public accommodations laws are laws that require businesses ("public accommodations") to serve all customers equally, without discrimination. As those laws have expanded to include sex and especially sexual orientation as prohibited grounds for discrimination, claims have arisen that application of those laws to businesses that have an expressive element—for example, a photographer or website designer—unconstitutionally compel the business owner to engage in speech she would prefer not to utter.

One such case, *303 Creative v. Elenis*,[19] involved application of a state's public accommodations law to a business that created websites celebrating weddings. The business owner argued that it would violate her First Amendment rights if she was compelled to create such websites for same-sex couples, as it would effectively require her, against her beliefs, to speak favorably of such weddings. By a 6-3 vote, the Court agreed with her. Writing for the majority, Justice Gorsuch stressed that the parties—the business owner and the state—had stipulated to a set of facts that included the fact that the designer's websites reflected her own expression about marriage. Given such facts, he concluded that applying the state's public accommodations law to the website designer's refusal to create same-sex wedding websites would force her to express a view of marriage that she did not wish to express. Notably, the majority did not explicitly state a standard of review by which such speech compulsions would be judged. However, its judgment apparently rejected the lower court's conclusion that compelling a business to provide services on a non-discriminatory basis was a narrowly tailored way of ensuring access to services when such services are unique and thus unavailable elsewhere.

The three dissenters (Justice Sotomayor, joined by Justices Kagan, and Jackson) argued that any compelled expression was simply a collateral effect of regulating the business's conduct —that is, its discriminatory refusal to serve same-sex couples. They thus argued that the case was controlled by *FAIR*, which had relied on a similar theory in rejecting the free speech claim made in that case.

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[19] 143 S.Ct. 2298 (2023).

303 Creative, along with religious freedom cases such as *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[20] reflect the tension that has arisen with increasing public acceptance of gay rights equality claims. With that acceptance—exemplified most notably by the Court's recognition of same-sex couples' right to marry[21]—came clashes that arose when traditionalists objected to having to, in their view, endorse same-sex marriage by providing goods and services supporting such marriages, for example wedding cakes[22] and websites.[23] The resulting clash between LGBT equality claims—whether constitutional or, as in *303 Creative*, statutory—and First Amendment claims—whether grounded, as in *303 Creative*, in free speech or, as in *Masterpiece Cakeshop*, in free religious exercise—will likely persist as long as different social groups continue to hold incompatible views about same-sex marriage and similar issues.[24] More generally, these cases reflect a fundamental tension between legal demands for equal treatment for members of historically-oppressed groups and claims of individual conscience, whether expressed via the constitutional guarantees of freedom of speech or freedom of religion. That tension also implicates an even more fundamental question about the scope of individual conscience rights when those rights are asserted in the context of marketplace transactions that are normally subject to extensive government regulation.[25]

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[20] 138 S.Ct. 1719 (2018). *Masterpiece Cakeshop* is discussed in Chapter 12's examination of the First Amendment's Free Exercise Clause. *See* Section 12.03[2][c].

[21] *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

[22] *See Masterpiece Cakeshop*, 138 S.Ct. 1719.

[23] *See 303 Creative*, 143 S.Ct. 2298.

[24] *See*, *e.g.*, Fulton v. City of Philadelphia, 141 S.Ct. 1868 (2021) (finding a violation of the Free Exercise Clause when a city withdrew from an adoption services contract with a Catholic charity because the charity would not place adoptive children with same-sex couples, in violation of the city's non-discrimination policy).

[25] *See generally* Section 9.02 (discussing the latitude government enjoys to regulate economic transactions).

Chapter 12. Government and Religious Freedom

§ 12.04 The Relationship Between the Establishment and Free Exercise Clauses

Insert at the end of page 596:

In 2022, the Court continued to limit the space for the play in the joints between the two religion clauses. *Carson v. Makin*[26] considered a Maine law that limited the state's responsibility to pay for a student's education when the student could not attend high school within her own school district, owing to the lack of a high school within the student's sparsely-populated home district. Normally, the state would pay tuition for such a student to attend a nearby high school; however, the law at issue in *Carson* exempted the state from that responsibility when the student chose to attend a religious high school. In *Carson*, the Court struck down that exemption as unconstitutionally discriminating against religion. Chief Justice Roberts, writing for the six-Justice majority, rejected the state's argument that the play in the joints idea allowed it to refrain from subsidizing religious education even if the Establishment Clause allowed such subsidization.

In his dissent for himself and Justices Sotomayor and Kagan, Justice Breyer cautioned about the implications of the majority's reasoning. In particular, he wondered whether that reasoning would require a state to subsidize religious instruction as long as it chose to maintain a system of secular public schools. Such a result would all-but require significant government assistance to religion, and would render nearly meaningless any play in the joints between the Establishment and Free Exercise Clauses.

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[26] 142 S.Ct. 1987 (2022).