Understanding Constitutional Law

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Chapter 2. The Courts and Judicial Review

§ 2.07 Non-Article III Adjudication

Insert at page 51, before Section 2.08

As the above discussion makes clear, a major factor in the constitutionality of Article I adjudication schemes is the nature of the right the particular Article I court is authorized to adjudicate. Historically, public rights—which, again, are generally susceptible to Article I adjudication—were defined, at least in part, as rights that existed between a private party and the federal government. However, in 2024, the Supreme Court decided in *Securities and Exchange Commission v. Jarkesy*[1] that the SEC's prosecution of a private party for violating the anti-fraud provisions of federal securities statutes was subject to the Seventh Amendment's civil jury trial right because it implicated a private right. For that reason, that prosecution had to be adjudicated in an Article III court if the defendant demanded a jury trial.

Note that the claim in *Jarkesy* was *not* that Article III itself required the agency's claim against the defendant to be heard in an Article III court. Instead, the claim was that the Seventh Amendment's jury trial right applied in Jarkesy's case, because that case implicated a private right. Thus, while the Article III court issue raised in cases such as *Northern PipeLine* and *Schor* is distinct from the Seventh Amendment right raised in *Jarkesy*, both issues turned, at least in part, on whether the right at issue was public or private. Thus, it matters for the Article III issue that the *Jarkesy* Court defined private rights in a particular way.

In deciding that the right in *Jarkesy* was indeed a private one, the Court focused heavily on the common law origins of the securities statutes' anti-fraud provisions. That common law foundation rendered the agency's statutory claims similar to the type that historically had been adjudicated by Article III courts. For that reason, the Court held that it was a private right to which the Seventh Amendment applied.

But wait. Recall that the cases in this section often suggested that public rights included, at a minimum, rights between a private party and the U.S. Government. The securities fraud claim in *Jarkesy* was just such a claim, as the government was the prosecutor in the case. Nevertheless, Chief Justice Roberts' opinion for six justices discounted that fact, writing that: "what matters is the substance of the suit, not where it is brought, *who brings it,* or how it is labeled." (emphasis added). *Jarkesy* thus greatly expands the category of private rights. In turn, that fact both expands the scope of the Seventh Amendment jury trial right and also presumably restricts Congress's ability more generally to give Article I courts broad jurisdiction. The *Schor* balancing test remains good law; thus, *Jarkesy* by itself does not mean that challenges to Article I adjudication schemes will automatically succeed if the right at issue satisfies *Jarkesy*'s historical test as private. Nevertheless, since the nature of the right is an important factor in that balancing

[1] 144 S.Ct. 2117 (2024).

test, *Jarkesy* surely means that such schemes are now of more questionable constitutionality, even leaving aside the Seventh Amendment issue.[2]

§ 2.08 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*.[3] *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."[4] 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 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

[2] By contrast, if an agency prosecution implicates a private right covered by the Seventh Amendment, a defendant's demand for a jury trial *automatically* requires the case to be transferred from an Article I to an Article III court, given the generally accepted idea that Article I courts lack the authority to conduct jury trials.

[3] 141 S.Ct. 2190 (2021).

[4] *Id.* at 2204.

> 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.[5]

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[6] 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."

[4] Timing Doctrines

[b] Mootness

Insert at page 65, before sub-section [5]:

In 2024, the Court explained how difficult it can be for a defendant to succeed on a claim that its change in conduct mooted a case challenging that conduct. In *Federal Bureau of Investigation v. Fikre*,[7] the Court rejected the government's argument that the rescission of a previous decision and an official's statement that it would not reinstate that decision "based on the currently available information" mooted the plaintiff's case. *Fikre* arose when a Muslim U.S. citizen was placed on a terrorist no-fly list. The individual sued, claiming both that the government had a constitutional obligation to provide him a reason for its decision, and that that decision violated his equal protection and religious freedom rights. While litigation was pending, the government agreed to remove him from the no-fly list and provided the statement noted above, agreeing not to return him to that list "based on the currently available information."

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

[6] *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).

[7] 601 U.S. 234 (2024).

However, neither action sufficed to moot the case. Writing for a unanimous Court, Justice Gorsuch wrote that a defendant's claim that its change of course mooted the case faced "a formidable burden" in proving that "no reasonable expectation remains that [the defendant] will return to its old ways." Applying those principles to the case before it, the Court concluded that the government had failed to satisfy that burden. Among other things, Justice Gorsuch observed that the government official's declaration left room for the government to return the plaintiff to the no-fly list if he again did the things he did (such as attending a particular mosque) that the plaintiff alleged caused his placement on the list in the first place.

Chapter 3. Executive Power and the Separation Between Executive and Congressional Power

§ 3.11 Presidential Litigation Immunities

[2] Executive Privileges and Immunities

Insert at page 113, at the end of the page:

President Trump's struggles with Congress and the courts produced a trio of significant Supreme Court decisions considering the scope of presidential immunities. In *Trump v. Mazars USA, LLP*,[8] the Court considered a struggle between President Trump and a congressional committee that subpoenaed certain of his private financial records, ostensibly as an aid to the committee's consideration of new legislation. Writing for seven justices, Chief Justice Roberts directed the lower court to apply a multi-factor test that sought to ensure that Congress had a real and specific need for the information, balanced against the burdens the subpoena imposed on the president. However, he also cautioned that such inter-branch disputes should normally be settled politically, as they usually had been in the past.

Decided the same term as *Mazars*, *Trump v. Vance*[9] considered a state grand jury's subpoena of some of the president's financial records, as part of the grand jury's criminal investigation of Trump's private conduct. Again speaking for seven justices, Chief Justice Roberts rejected Trump's immunity claim, noting that the president had conceded the constitutionality of the investigation itself and concluding that the additional burden imposed by the subpoena did not amount to an unconstitutional interference with the president's ability to conduct the affairs of his office. He also noted that the president could always seek a court order stopping any use of the grand jury's subpoena power that was intended to harass him.

Finally, the events of January 6, 2021 and more generally President Trump's alleged involvement in illegal schemes to present invalid presidential electoral votes to Congress triggered an unprecedented federal criminal prosecution of a former president. In turn, that prosecution prompted President Trump to argue that, as president, he enjoyed an immunity from prosecution. In *Trump v. United States*,[10] a six-justice majority speaking through Chief Justice Roberts held that the president is largely, though not fully, immune for official actions he took that allegedly violate criminal law. Relying heavily on the president's asserted need to be "bold and unhesitating" when carrying out his duties, the Court held that when the president was acting within the "core" of his powers he was absolutely immune from criminal prosecution. By contrast, when he was acting within an area in which he shared constitutional authority with Congress, his immunity was only "presumptive"; even then, however, that presumption could be overcome only if the prosecutor showed that the prosecution presented "no dangers of intrusion on the authority and functions of the Executive Branch." While the Court held that the president enjoyed no immunity from prosecution for unofficial acts, five of the six justices in the majority

[8] 591 U.S. 848 (2020).
[9] 591 U.S. 786 (2020).
[10] 144 S.Ct. 2312 (2024).

further held that even such unofficial act prosecutions could not introduce evidence of the president's official acts in order to prove the president's guilt.[11]

Justice Sotomayor registered a heated dissent for three justices. She accused the majority of ignoring its own recent precedents focusing heavily on constitutional text and history, both of which, she argued, indicated a lack of presidential immunity at least when he was not acting within his core powers. She also criticized the breadth of the majority's description of those core powers, noting that it identified as a core power the president's power to execute the laws. As an example of that breadth, Justice Sotomayor posited a presidential directive to the Justice Department to use false evidence to prosecute someone as the sort of corrupt law executing that was immune from prosecution under the majority's theory. More generally, she accused the majority of setting the president above the law, a development she described as antithetical to the nation's republican character.

Presidential immunity from criminal prosecution presents a deeply difficult question. The cases in this section recognize the unusually fraught nature of litigation against the president, especially if that litigation absorbs his (scarce) time and encourages him and his subordinates to be overly cautious in taking actions they believe to be best for the nation. On the other hand, it is true that, as Justice Sotomayor argued in dissent, the framers provided members of Congress an immunity, via the Speech and Debate Clause of Article I, Section 6, clause 1; thus, one might argue that their failure to provide a similar immunity to the president was intentional. Indeed, early commentary on *Trump* has drawn a parallel between the majority's analysis in that case and the Court's analysis, since discredited, in *Roe v. Wade*,[12] the 1973 case recognizing a right to an abortion until its overruling in 2022.[13] Like *Roe*, *Trump* could be understood as creating a pragmatic, legislative-type legal structure rather than reflecting constitutional principle, and indeed, a structure that is unsupported by either constitutional text or history. On the other hand, Chief Justice Roberts' opinion in *Trump* explained that the opinion was indeed grounded in the constitutional principle that the president was intended to have broad power to act boldly within the scope of his power, a commitment that, he argued, required the tiered immunity he described in his opinion.

As a practical matter, *Trump* did not end discussion of the scope of presidential immunity, and, indeed, the extent to which that immunity applied in the various prosecutions pending against him as of 2024. Questions remain, both at the general level and also the level of these particular prosecutions, about which alleged presidential actions fall within the three categories the Court identified ("core" presidential powers, other official actions, and unofficial actions). At present, it remains unclear whether these questions ever get fully answered, or whether instead the rarity of criminal prosecutions of former presidents means that these ambiguities will never be fully fleshed out.

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[11] Justice Barrett, who otherwise joined the majority, dissented from this holding.
[12] 410 U.S. 113 (1973).
[13] *See* Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022). *Roe* and *Dobbs* are discussed in Section 9.04[3] of this treatise.

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

§ 7.04 The Modern Approach

Insert at page 193, after the first sentence of the last paragraph:

(It used to be thought that there might be a preliminary question, asking whether the challenged law regulates extraterritorially—that is, whether it regulates conduct beyond the state's boundaries—but in 2023 the Court rejected this doctrinal test.)[14]

[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*, 596 U.S. 358, 382 (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.").

[14] *See* National Pork Producers Council v. Ross, 596 U.S. 358 (2023).

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

§ 9.02 Regulation of Business and Other Property Interests

[3] The Takings Clause

[c] Taking as a Government Condition for Granting a Permit

Insert at the bottom of page 258:

Nollan and *Dolan* both dealt with administrative agency decisions imposing the challenged conditions on property development. In 2024, the Court held that an act of a legislature could also be challenged if it allegedly failed the *Nollan*/*Dolan* test.[15]

§ 9.04 Non-Economic Liberties

[3] Abortion

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

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

In 2022, the Court, now including several newly appointed justices, returned to the abortion issue. *Dobbs v. Jackson Women's Health Organization*[16] 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."[17] 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, which 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-

[15] *See* Sheetz v. County of El Dorado, 601 U.S. 267 (2024).
[16] 142 S.Ct. 2228 (2022).
[17] *Id.* at 2246.

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 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"[18] 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[19] as well as federal health care statutes requiring hospitals to provide emergency care.[20] 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

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

[19] *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).

[20] *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).

abortions.[21] While those latter issues may ultimately sound more in federalism, and in 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.

In the first major post-*Dobbs* due process case, the Court suggested that, indeed, *Dobbs*'s restrictive history-and-tradition test would govern due process cases beyond the abortion context. In *Department of State v. Munoz*,[22] the Court applied *Glucksberg*'s history-and-tradition test to conclude that a U.S. citizen-wife lacked a fundamental liberty interest requiring a government explanation for its refusal to grant her non-citizen husband a visa allowing him to live with her in the United States. Following *Glucksberg*, the Court defined the asserted due process interest narrowly, not as the plaintiff-wife's simple right to marry but instead as "the right to *reside with her noncitizen spouse in the United States*." (emphasis in original). Again following *Glucksberg*, the six-justice majority concluded that the history of federal immigration law limiting entry into the nation and generally not making exceptions for spouses of U.S. citizens demonstrated the absence of any deeply-rooted history or tradition recognizing that right.

Munoz was in some ways an unusual case, in that the plaintiff claimed not a *substantive* due process right to her husband's legal presence in the United States, but instead a *procedural* due process right to a sufficient explanation for the government's visa denial. Nevertheless, its use of *Glucksberg*'s history-and-tradition test suggests that the Court's use of that test in *Dobbs* was not a one-off confined to abortion cases, but instead reflected a methodology applicable to due process claims more generally.

§ 9.05 The Second Amendent

Insert at page 301, after the first full paragraph:

After incorporating the Second Amendment in *McDonald*, the Court entered a period in which it largely avoided Second Amendment cases.[23] That period ended in 2022, when it decided

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[21] *See* David S. Cohen, Greer Donley, and Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023).
[22] 144 S.Ct. 1812 (2024).
[23] For one relatively trivial exception to this pattern, see *Caetano v. Massachusetts*, 577 U.S. 411 (2016) (*per curiam*) (holding that possession of stun guns is protected by the Second Amendment).

New York State Rifle & Pistol Ass'n v. Bruen.[24] In *Bruen* a six-justice majority struck down New York's law requiring persons wishing to carry a gun in public to obtain a license based on the individual's demonstration of a "special need" for protection above and beyond that of the general public. But more important than *Bruen*'s result was its methodology. Prior to *Bruen*, many lower courts deciding Second Amendment cases had performed a two-step test, first inquiring whether the gun-related conduct at issue was protected by a historical understanding of the Second Amendment, and second, if it was, balancing that Second Amendment interest with any legitimate interest the government had in restricting that conduct.

Bruen rejected what it called that second step's "interest balancing." Instead, it announced that Second Amendment claims should be decided purely by a historical approach that asked whether the relevant framing era—either the late 18th century period in which the amendment itself was enacted and ratified, or the analogous 19th century period surrounding the enactment and ratification of the Fourteenth Amendment—featured restrictions on gun possession analogous to the challenged law. Applying that test, the Court found that New York's law did not have a relevant historical analogue. In doing so, the Court acknowledged that modern gun laws did not have to be "dead ringers" for laws in effect during those historical periods. Nevertheless, for any modern gun regulation implicating the right recognized by the text and history of the Second Amendment, there had to be a historical record of legislative regulation of that conduct.

Bruen raised difficult questions about how courts should perform the historical analysis the Court required. Beyond the obvious question whether generalist judges could find legally-satisfying conclusions from complex and often contradictory historical records, *Bruen* left courts unsure how just how precise a historical analogue had to be in order for a modern gun regulation to satisfy Second Amendment scrutiny. Two years after *Bruen*, the Court, on an 8-1 vote reversed a lower court decision that, performing that historical inquiry, struck down a federal law authorizing the disarming of an individual who was the subject of a domestic violence restraining order. In his opinion for the majority in *United States v. Rahimi*,[25] Chief Justice Roberts chided the lower court for seeking "a historical twin" to the challenged federal law. Instead, he concluded that historical regulation of armed persons who posed a menace to others—expressed both by laws preventing such menacing and also "surety" laws requiring persons suspected of posing such a threat to post a security bond against their behavior—were adequately analogous to the modern law as to justify upholding it.

Justice Sotomayor, who had dissented in *Bruen*, wrote a concurring opinion joined by the other remaining *Bruen* dissenter (Justice Kagan) and also by Justice Jackson. Her opinion again critiqued *Bruen*'s purely historical methodology, arguing that it deprived modern legislatures of tools necessary to confront modern gun-related regulatory issues. Justice Barrett, who joined the *Bruen* opinion, also wrote a separate concurrence to note her disagreement with what she considered the lower court's too-strict examination of the historical record in search of "overly specific [historical] analogues" to the challenged law. Justice Jackson, who was not on the Court

[24] 597 U.S. 1 (2022).
[25] 144 S.Ct. 1889 (2024).

when it decided *Bruen*, also wrote separately to critique that case's historical emphasis, which she argued had caused lower court confusion and disagreement and exceeded generalist judges' capabilities to perform sophisticated historical analysis. Only Justice Thomas, *Bruen*'s author, dissented, arguing that the domestic abuser disarmament statute lacked the requisite historical analogue.

Like *Bruen*, *Rahimi* is important not just for its result but for the message it sends about the proper way to do constitutional analysis. In particular, *Rahimi*'s seemingly more flexible approach to finding historical analogues to modern-day challenged gun regulations suggests that that historical approach cannot be appropriately performed in the strict way Justice Thomas seemed to insist on in *Bruen*—essentially, an approach that, despite his protestations in *Bruen*, seems to require a historical "twin" to a modern law, rather than a historical tradition that reflects the same basic principles as the challenged modern law. Of course, the more flexible the search becomes for historical analogues, the more disagreement and confusion can be expected at the lower court level. It may well be that the Court's recent turn to history, reflected in *Bruen*, *Dobbs*, and other cases, will have to be refined in order to prevent the kind of disorder that followed in *Bruen*'s wake.

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*[26] considered challenges to the admissions policies of Harvard and the University of North Carolina.[27] 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.

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.[28] Justices Sotomayor and Jackson wrote dissents, each of which was joined by Justice Kagan

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[26] 143 S.Ct. 2141 (2023).

[27] 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.

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

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.[29]

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*.[30] 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.

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

[30] *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*,[31] 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."[32] 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."[33] No doubt, litigation will continue to arise in which 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.

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[31] 142 S.Ct. 1464 (2022).

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

[33] 142 S.Ct. at 1481 (Thomas, J., dissenting).

§ 11.02 Special Doctrines in the System of Freedom of 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*,[34] 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.

303 Creative, along with religious freedom cases such as *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[35] 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[36]—came clashes that arose when traditionalists objected to having to, in their view, endorse same-sex marriage by providing goods

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[34] 143 S.Ct. 2298 (2023).

[35] 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].

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

and services supporting such marriages, for example wedding cakes[37] and websites.[38] 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.[39] 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.[40]

§ 11.03 Government and the Press: Print and Electronic Media

[7] Medium-Specific Standards for Government Regulation

[c] The Internet

Insert at page 537, at the end of the page:

In 2024, the Court again considered the applicability of basic First Amendment doctrine to social media sites. In *Moody v. NetChoice, LLC*,[41] the Court considered challenges to Texas and Florida statutes that both limited the ability of social media platforms to "curate" the content users encountered (for example, by applying algorithms that showed that user more of the same type of content the user had previously spent time viewing) and also required them to provide explanations when they "deplatformed" users by restricting their ability to post content. Writing for five (and at times, six) justices, Justice Kagan explained that those platforms' curation decisions reflected their editorial judgment and thus were protected by basic First Amendment principles, under a long line of cases recognizing the rights of media such as newspapers and cable companies to control the content of their own expression. The Court then remanded the two cases to their respective lower courts for them to apply those principles.

While it did not mention the term specifically, Justice Kagan's analysis seemed to reject the argument, made by Justice Thomas in an earlier opinion speaking only for himself,[42] that social media platforms should be thought of as "common carriers": that is, entities, like the old Bell Telephone System, whose broad reach and status as quasi-public utilities justified requiring them

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

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

[39] *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).

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

[41] 144 S.Ct. 2383 (2024).

[42] *See* Biden v. Knight First Amendment Institute at Columbia University, 141 S.Ct. 1220 (2021) (Thomas, J., concurring in grant of certiorari).

to carry any speech that any customer wished. Justice Alito, joined by Justices Thomas and Gorsuch, concurred only in the judgment in *NetChoice*. Among other things, they called for a more careful consideration of the common carrier idea.

One reason the majority remanded these cases rather than deciding them was that the plaintiffs had brought facial challenges to the Texas and Florida laws. This meant that the lower courts had to consider the application of those laws to the extremely large and varied population of social media platforms—everything from classic (and massive) platforms such as Facebook to consumer sites such as Etsy and Uber and possibly even to email platforms like Gmail. Clearly, these types of platforms differ greatly from each other, including in how basic First Amendment principles would apply to the facts of how those platforms operate. This reality strongly suggests that applying foundational First Amendment principles to social media platforms will require courts to consider carefully the details of those platforms' operations.

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*[43] 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.

[43] 142 S.Ct. 1987 (2022).