

THE ROBERTS COURT'S LIBERTARIAN CONSTITUTIONALISM

CARLOS A. BALL*

This Article examines how important components of the Roberts Court's constitutional jurisprudence as it relates to individual rights reflect two constitutive elements of libertarian theory. The first element is the libertarian belief that laws aimed at attaining public policy objectives frequently engender injustices for regulated parties. The second element is the libertarian call for robust judicial interventions to correct those injustices.

The Article explores how the Court's Second Amendment ruling in New York State Rifle & Pistol Ass'n v. Bruen and its First Amendment decision in 303 Creative LLC v. Elenis reflect libertarianism's deep skepticism of the ability of legislatures to pursue social and economic objectives without creating injustices for regulated parties. The Article also examines how Bruen and two of the Court's Free Exercise Clause rulings assessing the constitutionality of COVID regulations rely on the type of expansive judicial power called for by libertarian theory to correct those injustices.

The Article's objective is neither to defend nor criticize the current Court's libertarian constitutionalism. The Article instead seeks to delineate its contours to better understand how significant components of the Roberts Court's constitutional jurisprudence reflect libertarian theory's values and priorities. In doing so, the Article shows how libertarian constitutionalism can manifest itself in ways other than by reviving the ghost of judicial protection for economic rights under substantive due process doctrine.

TABLE OF CONTENTS

INTRODUCTION

I. LEGISLATURES AND THE JUDICIARY IN LIBERTARIAN THEORY

A. Legislative Policy Choices as Sources of Injustices for Regulated Parties

B. Expansive Judicial Power and the Protection of Regulated Parties

II. THE GOVERNMENT IS UP TO NO GOOD: *BRUEN* AND 303 *CREATIVE*

A. The Government's Injustices in Bruen

B. The Government's Injustices in 303 Creative

III. EXPANSIVE JUDICIAL POWER TO CORRECT REGULATORY INJUSTICES

A. Bruen and Expansive Judicial Power Under the Second Amendment

* Distinguished Professor of Law and Judge Frederick Lacey Scholar, Rutgers Law School. I presented an early version of this Article at the 2024 Constitutional Law Schmooze held at the University of Maryland School of Law. Thank you to Mark Graber for inviting me to participate. Thank you as well to Carlos Gonzalez, Wendy Parmet, and Steve Ross for helpful feedback on an earlier draft.

*B. COVID Rulings and Expansive Judicial Power Under
the Free Exercise Clause*

CONCLUSION

INTRODUCTION

There is no more long-standing and unresolved question in American constitutional law than how best to limit governmental power through the exercise of judicial review.¹ The Supreme Court, in its famous footnote four in *United States v. Carolene Products*, provided an analytical framework for approaching that question.² As is well known, the footnote calls for judicial deference to legislative enactments except when they may abridge fundamental rights, interfere with democratic or political processes, or work to the detriment of “discrete and insular minorities.”³ Although *Carolene Products* can be interpreted in different ways, it is generally understood to call on courts to uphold most laws and regulations implementing social and economic policies.⁴

Libertarian constitutional theory offers an alternative to the *Carolene Products* framework. Rather than presume the constitutionality of most laws, libertarian theory calls for a presumption of unconstitutionality when regulated entities and individuals contend that the measures impermissibly restrict their liberty rights.⁵ This presumption is grounded in the libertarian view that there is unavoidable tension between the constitutional rights of individuals and the government’s efforts to use its regulatory authority to achieve social and economic objectives.⁶

Commentators have paid considerable attention to how the Roberts Court’s constitutional jurisprudence repeatedly limits the government’s regulatory authority. There is an extensive literature, for example, contending that some of the Court’s recent First Amendment rulings promote deregulatory policy objectives in ways that are reminiscent of the *Lochner* era of the early twentieth

1. See, e.g., Suzanna Sherry, *Too Clever by Half: The Problem with Novelty in Constitutional Law*, 95 NW. U. L. REV. 921, 921 (2001) (noting that “reconciling judicial review and democratic institutions is the goal of almost every major constitutional scholar writing today”).

2. 304 U.S. 144, 152 n.4 (1938).

3. *Id.*

4. See, e.g., Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 111 (noting that among *Carolene Products*’ “key prescriptions” was that the Court “should *not* strike down ordinary social and economic legislation: the sorts of laws the Court had routinely nullified in the preceding *Lochner* era”).

5. See *infra* notes 92–93 and accompanying text.

6. For comprehensive explorations and defenses of libertarian constitutional theory, see generally RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (2016); RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* (2014).

century.⁷ Much has also been written on the efforts by conservatives and libertarians to challenge foundational elements of the administrative state, many of which have found a receptive audience among a majority of the Roberts Court's members.⁸

Commentators have paid less attention to the overlap between important components of the current Court's constitutional jurisprudence and libertarian political theory. This Article is the first to link that jurisprudence to two constitutive elements of libertarian theory. The first element is the view that laws aimed at attaining public policy objectives frequently engender injustices for regulated parties.⁹ The second element is the belief that robust judicial interventions are essential to correct those injustices.¹⁰

The Article begins by describing the role that these two elements play in libertarian theory. It then proceeds to examine how they are both reflected in the methodology and reasoning of several of the Roberts Court's recent important decisions implicating the constitutional rights of individuals. The Article's objective is neither to defend nor criticize the current Court's libertarian constitutionalism. The Article instead seeks to delineate its contours to better understand how significant components of the Roberts Court's constitutional jurisprudence reflect libertarian theory's values and priorities.

Part I canvasses the writings of prominent libertarian thinkers, including the economist Friedrich Hayek and the constitutional theorist Randy Barnett, to explain how and why libertarian theory views the exercise of legislative authority aimed at attaining social and economic objectives as fonts of injustices for regulated parties. It also explains how and why libertarian theory calls for robust exercises of judicial power to remedy those injustices.

Part II explores how the Roberts Court's Second Amendment ruling in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*¹¹ and its First Amendment decision

7. See, e.g., Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179 (2018); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016); Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241 (2020); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165 (2015); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L. & CONTEMP. PROBS. 195 (2014); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133.

8. See e.g., Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371 (2022); Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1; Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

9. See *infra* Part I.A.

10. See *infra* Part I.B. I have elsewhere examined the ways in which the constitutional jurisprudence of Justice Anthony Kennedy, who served on the Roberts Court until 2018, generally abided by libertarian principles and priorities by promoting an atomistic conception of the self, a deep skepticism of government regulations, and a negative conception of individual rights. See Carlos A. Ball, *Progressive Constitutionalism and Its Libertarian Discontents: The Case of LGBTQ Rights*, 68 ST. LOUIS U. L.J. 671, 701–36 (2024).

11. 597 U.S. 1 (2022).

in *303 Creative LLC v. Elenis*¹² reflect libertarianism's deep skepticism that it is possible for legislatures to pursue social and economic objectives without engendering injustices for regulated parties. The Court, faced with individual rights claims in both cases, refused to give constitutional weight to legislative policy preferences related to gun safety and antidiscrimination objectives, respectively. Instead, the Court viewed the laws under challenge exclusively as fonts of injustices for regulated individuals.¹³

Part III examines how *Bruen* and two of the Court's free exercise rulings assessing the constitutionality of COVID regulations rely on the types of robust judicial interventions called for by libertarian theory. While other commentators have noted how the Roberts Court has expanded the judiciary's power in general,¹⁴ and its own authority in particular,¹⁵ my contribution in this Article is to examine how that expansion reflects constitutive principles of libertarian theory.

Before proceeding, it is important to make three points. First, there are additional examples of the Court's willingness to interpret the Constitution in ways that are consistent with libertarian theory beyond the ones I examine in this Article. These examples include rulings striking down campaign finance laws,¹⁶ voiding statutes protecting unions,¹⁷ prohibiting affirmative action programs,¹⁸ and rejecting regulations of arbitration agreements.¹⁹ The same is

12. 600 U.S. 570 (2023).

13. See *infra* Part II.

14. See, e.g., Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 636 (2022); Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 2.

15. See, e.g., STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (2023) (explaining how the Court in recent years has used the emergency docket to expand its power); Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022) (arguing that the Roberts Court is "implement[ing] the policy preferences of its conservative majority in a new and troubling way: by simultaneously stripping power from every political entity except the Supreme Court itself").

16. See, e.g., *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014) (striking down a federal law limiting how much money a donor could contribute to political candidates for federal office in the aggregate); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (striking down a federal law restricting the ways in which corporations and unions used their general treasury funds to try to influence federal elections in the weeks leading up to those elections).

17. See, e.g., *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021) (holding that a California regulation allowing labor groups to access agricultural property to solicit support from farm workers violates the Takings Clause); *Janus v. AFSCME, Council 31*, 585 U.S. 878 (2018) (using the Free Speech Clause to strike down a statute allowing public-sector unions to collect agency fees from non-members).

18. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (holding that admissions policies that included an affirmative action component implemented by a public university violated the Equal Protection Clause and Title VI of the Civil Rights Act of 1964 and that one implemented by a private university violated Title VI).

19. See, e.g., *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (holding that the Federal Arbitration Act preempted a West Virginia law prohibiting arbitration clauses for

true of rulings striking down health and safety regulations outside of the COVID context²⁰ and limiting the scope of antidiscrimination laws in cases other than *303 Creative*.²¹

Second, my argument is not that *all* of the Roberts Court's constitutional jurisprudence reflects a pervasive mistrust of the government's policy choices and a corresponding trust in the exercise of judicial authority. The Roberts Court sometimes defers to the government's policy preferences while calling for judicial restraint rather than intervention. This seems to be particularly true when the government is pursuing conservative rather than progressive regulatory objectives in matters related, for example, to abortion and LGBTQ rights.²²

Although these cases suggest that the Court embraces libertarian constitutionalism in a selective manner that helps attain conservative policy objectives while undermining progressive policy goals, that is not an issue I examine here. Instead, I focus on how significant (but not all) components of the Court's individual rights jurisprudence reflect the values and priorities of libertarian theory.

Finally, I do not in this Article address the question of judicial *motivations*. I do not, therefore, argue that a majority of the Roberts Court's members are

personal-injury and wrongful-death claims); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (holding that the Federal Arbitration Act preempted California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts).

20. *See, e.g.*, *Nat'l Inst. of Fam. & Life Advoc. v. Becerra*, 585 U.S. 755 (2018) (striking down a state law requiring licensed facilities providing certain medical services to inform users of abortion options); *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (striking down a state law prohibiting pharmacies from selling doctors' prescription-writing histories when that information was to be used for marketing purposes).

21. *See, e.g.*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732 (2020) (holding that the Religion Clauses prevented two elementary school teachers at Catholic schools from suing their employers for age and disability discrimination); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (holding that the Religion Clauses prevented a fourth-grade teacher at a Lutheran school from suing her employer for disability discrimination).

22. *See, e.g.*, *United States v. Skrmetti*, 605 U.S. 495 (2025) (upholding a ban on gender-affirming health care for transgender minors); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (overruling *Roe v. Wade* and upholding a 15-week abortion ban). Some commentators have argued that some libertarian thinkers, particularly Friedrich Hayek, embrace traditional understandings of morality in ways that might support the outcome of cases like *Dobbs*. *See* WENDY BROWN, *IN THE RUINS OF NEOLIBERALISM: THE RISE OF ANTIDEMOCRATIC POLITICS IN THE WEST* 13 (2019) ("Hayekian neoliberalism is a moral-political project that aims to protect traditional hierarchies by negating the very idea of the social and radically restricting the reach of democratic political power in nation-states."); MELINDA COOPER, *FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM* 312 (2017) ("Hayek is . . . clear that the neoliberal will to adapt exists side by side with an unwavering deference to historical selection—the social conventions of religion, family, and inherited wealth that are thrown up as if by chance but subsequently validated by the weight of social norms.") (endnote omitted). *See also id.* at 8–9 ("[I]t would be a mistake to think that neoliberalism is any less invested in the value of the family than are social conservatives . . . [given that] neoliberal economists and legal theorists wish to reestablish the private family as the primary source of economic security and a comprehensive alternative to the welfare state.").

politically or ideologically committed to libertarian theory. Although that might be the case, I do not explore the question here. Instead, I limit myself to examining the extent to which important aspects of the Court's recent constitutional jurisprudence reflect the two constitutive elements of libertarian theory already noted. I believe this is the case regardless of the particular political, ideological, or other views that a majority of the justices may hold.

For many decades, libertarian constitutionalism has been associated with the *Lochner* era and its (in)famous protection of the right to contract as a fundamental right under the Due Process Clause.²³ The Supreme Court has expressed no interest in returning to that understanding of libertarian constitutionalism since 1937.²⁴ But, as this Article shows, libertarian constitutionalism can manifest itself in ways other than by reviving the ghost of judicial protection for economic rights under substantive due process doctrine. The Roberts Court's libertarian constitutionalism, for better or for worse, is not restricted to your great-grandfather's *Lochnerian* constitutionalism of a century ago.

I. LEGISLATURES AND THE JUDICIARY IN LIBERTARIAN THEORY

Section A provides an overview of how and why libertarian theory holds that most laws aimed at attaining social and economic policy objectives engender injustices for regulated parties. Section B explains how and why libertarian theory calls for robust judicial interventions to correct those injustices.

A. Legislative Policy Choices as Sources of Injustices for Regulated Parties

Libertarian political morality promotes a conception of human liberty that normatively prioritizes the ability of individuals to pursue their interests with minimal governmental restraint.²⁵ According to libertarian theory, the state's authority must be significantly limited to provide individuals with as much freedom as possible in economic, social, and personal spheres. This allows them to interact and bargain with each other as they deem best, free of governmental coercion.²⁶

Libertarian theory acknowledges that state mechanisms are needed to prevent violence and theft, as well as to enforce contracts and protect private

23. *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a statute prescribing maximum working hours for bakers under the Due Process Clause).

24. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (rejecting challenge to a minimum wage law under the Due Process Clause).

25. See, e.g., BRIAN DOHERTY, *RADICALS FOR CAPITALISM: A FREEWHEELING HISTORY OF THE MODERN AMERICAN LIBERTARIAN MOVEMENT* 4–5 (2007).

26. See, e.g., Randy E. Barnett & Douglas B. Rasmussen, *The Right to Liberty in a Good Society*, 69 *FORDHAM L. REV.* 1603, 1610 (2001); DOHERTY, *supra* note 25, at 3.

property.²⁷ But the theory holds that when the government goes beyond these limited goals by regulating individuals without their consent to attain social and economic objectives, it inevitably violates their liberty rights.²⁸

For libertarians, fundamental liberty rights are not derived from the government and its laws; instead, they are antecedent to the state's formation.²⁹ While libertarian theory holds that it is reasonable to assume individuals consent to the exercise of state authority to deter crime, enforce contracts, and protect private property, additional uses of governmental authority are illegitimate because they lack either the explicit or implicit consent of regulated individuals.³⁰

The fact that the government exercising regulatory authority might be democratic is generally irrelevant to libertarians.³¹ What matters instead is whether the state impermissibly tramples on pre-existing liberty rights.³² For libertarians, there is an ever-present danger that democracies will devolve into totalitarian systems due to the propensity of elected officials to use their authority to benefit particular segments of the population at the expense of others' basic liberty rights.³³

All of these principles are reflected in the writings of Friedrich Hayek, arguably the most influential libertarian economist of the twentieth century. According to Hayek, the freedom of individuals to make spontaneous decisions in unregulated economic marketplaces promotes innovation and progress.³⁴ Democratic government's exercise of regulatory authority in the pursuit of social and economic objectives inexorably replaces innumerable decisions made by private actors interacting in free markets with coercive governmental

27. See, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA*, at ix (1974).

28. See *infra* Part I.A.

29. See, e.g., BARNETT, *supra* note 6, at 23; F.A. HAYEK, *LAW, LEGISLATION, AND LIBERTY* 394 (Jeremy Shearmur ed., Univ. Chicago Press 2021) (originally published in three different volumes in 1973, 1976, and 1979, respectively).

30. The types of government action that libertarians approve emanate from agreed upon general principles of justice centered around individual liberty. From this perspective, "[o]nly if the society can form a real and durable consensus on principles of justice, principles that they can agree will control the actions of the state, can free and equal individuals confidently relinquish their right to consent or refuse to consent to laws governing their actions." Andrew C. Spiropoulos, *Rights Done Right: A Critique of Libertarian Originalism*, 78 UMKC L. REV. 661, 668 (2010).

31. See *infra* notes 45–46, 51–54 and accompanying text.

32. See *infra* notes 78–89 and accompanying text.

33. As Thomas Biebricher notes in describing what he calls neoliberal political theory, [s]imply put, the common denominator of all neoliberal views on democracy is the conviction that it poses a more or less serious problem [because it] has the potential to plunge societies into chaos and/or transform them into machineries of massive exploitation and repression that ultimately come to resemble the collectivisms that the neoliberals so vehemently oppose.

THOMAS BIEBRICHER, *THE POLITICAL THEORY OF NEO-LIBERALISM* 80 (2018). See also RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 302 (1998) (arguing that the intervention of state power to ameliorate insecurity and inequality is "far more troublesome and dangerous than the disease").

34. F.A. HAYEK, *THE ROAD TO SERFDOM* 86–88 (Bruce Caldwell ed., 2007) (1944).

mandates intended to attain public policy preferences.³⁵

When democratic governments, in seeking to attain distributive, egalitarian, and other general welfare objectives, enact and implement policies restricting the freedom of private actors, the inevitable result is a downward slide toward totalitarianism.³⁶ Hayek explained that

the more dependent the position of the individuals or groups is seen to become on the actions of government, the more they will insist that the governments aim at some recognizable scheme of distributive justice; and the more governments try to realize some preconceived pattern of desirable distribution, the more they must subject the position of the different individuals and groups to their control. So long as the belief in “social justice” governs political action, this process must progressively approach nearer and nearer to a totalitarian system.³⁷

Hayek believed that “it is the acceptance of . . . common principles that makes a collection of people a community This means that the power of the majority is limited by those commonly held principles and that there is no legitimate power beyond them.”³⁸ He also insisted that the only legitimate laws are rules of general and equal applicability that help “creat[e] conditions under which the knowledge and initiative of individuals are given the best scope so that *they* can plan most successfully.”³⁹ General rules of just conduct are legitimate because they arise from the consent of the governed.⁴⁰

In contrast, laws promoting what government officials believe is a more “rational utilization of our resources” are illegitimate.⁴¹ When elected

35. *See id.* at 71.

36. *Id.* at 67.

37. HAYEK, *supra* note 29, at 266.

38. F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 171 (Ronald Hamowy ed., 2011) (1960). Hayek added that “it is not from a mere act of will of the momentary majority but from a wider agreement on common principles that a majority opinion derives its authority.” *Id.* Wendy Brown notes that for Hayek, “[p]olitical power . . . negates . . . freedom with coercion and disturbs, suppresses, or replaces . . . evolved and tested principles of community with artifice and rationalism Thus, the political in general and democracy in particular meet their limits in the commonly held principles that make and bind communities.” BROWN, *supra* note 22, at 75.

39. *See* HAYEK, *supra* note 34, at 85.

40. HAYEK, *supra* note 29, at 363 (“[If] the consent of the people . . . approves only of the laying down and enforcement of general rules of just conduct [then] even the highest constituted power may be limited.”). According to Hayek,

[o]nly a demagogue can represent as “antidemocratic” the limitations which long-term decisions and the general principles held by the people impose upon the power of temporary majorities. These limitations were conceived to protect the people against those to whom they must give power, and they are the only means by which the people can determine the general character of the order under which they will live.

HAYEK, *supra* note 38, at 269.

41. HAYEK, *supra* note 34, at 85. *See also* HAYEK, *supra* note 38, at 221–24 (explaining why rules, in order to be true laws, must be generally applicable, a characteristic that prevents them from being arbitrary).

legislatures enact laws that go beyond rules of general conduct, the result is a “bargaining democracy” in which officials legislate to satisfy the preferences of special interests.⁴²

Hayek viewed the notion that such legislation is somehow legitimate because it reflects majoritarian will as a dangerous illusion that occludes how elected legislatures are routinely captured by narrow and self-serving interests.⁴³ This capture results in laws that no majority actually wants or desires. As he explained,

[i]t appears that we have unwittingly created a[n institutional and democratic] machinery which makes it possible to claim the sanction of an alleged majority for measures which are in fact not desired by a majority, and which may even be disapproved by a majority of the people; and that this machinery produces an aggregate of measures that is not only not wanted by anybody, but that could not as a whole be approved by any rational mind because it is inherently contradictory.⁴⁴

For Hayek, “[d]emocracy is essentially a means, a utilitarian device for safeguarding internal peace and individual freedom.”⁴⁵ What ultimately matters is not whether government officials are elected; what matters is whether they respect individual liberty. As he put it, valuing democracy over liberty

is largely responsible for the misleading and unfounded belief that, so long as the ultimate source of power is the will of the majority, the power cannot be arbitrary . . . [I]t is not the source but the limitation of power which prevents it from being arbitrary. Democratic control *may* prevent power from becoming arbitrary, but it does not do so by its mere existence. If democracy resolves on a task which necessarily involves the use of power which cannot be guided by fixed rules, it must become arbitrary power.⁴⁶

Hayek urged that as many social and economic policy issues as possible be taken away from legislators and left in the hands of private actors participating

42. HAYEK, *supra* note 29, at 456. For Hayek, “*all* government, especially if democratic, should be limited. The reason is that democratic government, if nominally omnipotent, becomes as a result of unlimited government powers exceedingly weak, the playball of all the separate interests it has to satisfy to secure majority support.” *Id.* at 456–57. *See also id.* at 450 (“So long as the present form of democracy persists, decent government cannot exist”). Thomas Biebricher argues that the “core contention of the neoliberal critique of democracy” is that it allows for “the undue influence of actors pursuing particularistic interests in the political process and the distortions that result from this influence.” BIEBRICHER, *supra* note 33, at 86.

43. HAYEK, *supra* note 29, at 362–64.

44. *Id.* at 333.

45. HAYEK, *supra* note 34, at 110.

46. *Id.* at 110–11.

in free markets. Circumscribing governmental authority in this way both promotes general well-being and protects individual liberty.⁴⁷

Hayek, unlike contemporary libertarian constitutional theorists such as Randy Barnett and Richard Epstein,⁴⁸ did not demand that the power to limit legislative authority be placed squarely in the hands of judges.⁴⁹ Instead, Hayek prioritized institutional mechanisms that separated, and therefore diluted, governmental power. With this in mind, he proposed dividing legislatures into two chambers with different responsibilities and elected by different segments of the population.⁵⁰

For our purposes, the details of Hayek's proposed institutional model of government are less important than how it reflects his belief that most laws

47. As Hayek explained, [t]he democratic and the [classical] liberal traditions . . . differ . . . on the scope of the state action that is to be guided by democratic decision. While the dogmatic democrat regards it as desirable that as many issues as possible be decided by majority vote, the [classical] liberal believes that there are definite limits to the range of questions which should be thus decided.

HAYEK, *supra* note 38, at 170. Hayek titled one of the chapters of *Law, Liberty, and Legislation* as "The Containment of Power and the Dethronement of Politics." HAYEK, *supra* note 29, at ch. 18. The political theorist Wendy Brown notes that Hayek believed that the notion of popular sovereignty "threatens individual freedom, licenses unbounded government, and confers supremacy on precisely the domain that needs to be leashed, the political." BROWN, *supra* note 22, at 69.

48. See *infra* Part I.B.

49. See *infra* notes 72–73 and accompanying text.

50. Under Hayek's proffered institutional model, one chamber, the Legislative Assembly, would be tasked with enacting laws, which for him, as already noted, see *supra* notes 39–40 and accompanying text, should be limited to rules of general conduct that apply to everyone. HAYEK, *supra* note 29, at 466. But in order to make it less likely that legislators would engage in the type of democratic bargaining that Hayek believed represented a grave threat to individual liberty and the rule of law, see *supra* notes 42–44 and accompanying text, he proposed that assembly members be restricted to 45-year olds elected only by 45-year olds to 15-year terms and that legislators, when they retired at the age of 60, be guaranteed a state job. HAYEK, *supra* note 29, at 470. The age requirement was meant "[t]o assure [that] only people who have already proved themselves in the ordinary business of life" be chosen by their age contemporaries whom Hayek believed would be the "fairest judges" of their competency. *Id.* The long, 15-year terms were intended to insulate lawmakers from the reelection pressures imposed by special interests. *Id.* Finally, the guaranteed post-retirement state job was intended to reduce the chances that legislators would be corrupted by special interests' offers of jobs and remuneration. *Id.*

Hayek proposed the creation of a second body, the Governmental Assembly, which would have the power to determine how the government operates. *Id.* at 475. The second chamber's regulatory authority would be limited significantly because it would be "bound by the rules of just conduct laid down by the Legislative Assembly, and . . . it could not issue any orders to private citizens which did not follow directly and necessarily from the rules laid down by the latter." *Id.*

As part of his proposal, Hayek suggested significant restrictions on the right to vote as a means of limiting the government's regulatory authority. *Id.* at 470, 476. For example, as already noted, Hayek proposed that only 45-year-olds be allowed to vote for the assembly tasked with writing laws. *Id.* at 470. Hayek would also deny the right to vote for a second assembly, tasked with determining how the government operates, to large segments of the population, such as "civil servants, old age pensioners, the unemployed, etc.[.]" who might use the franchise to push for greater government spending. *Id.* at 476.

enacted by contemporary democratic legislatures are sources of injustices because they impinge on the liberty rights of regulated parties.

The economist Milton Friedman, another leading and highly influential twentieth-century libertarian thinker, was similarly distrustful of laws aimed at attaining distributive and egalitarian objectives. Like Hayek, Friedman viewed such efforts as intrinsic threats to economic liberty, which is “an essential requisite for political freedom.”⁵¹ Friedman’s writings do not distinguish between laws enacted through democratic processes and those adopted in other ways. Instead, he decried the fact that in democracies like those of the United Kingdom and the United States, “[t]he view that government’s role is to serve as an umpire to prevent individuals from coercing one another was replaced [in the twentieth century] by the view that government’s role is to serve as a parent charged with the duty of coercing some to aid others.”⁵² For Friedman, as for Hayek, most government regulations are sources of injustices because they trample on individual liberty. The key to preserving economic freedom, and therefore political freedom, is to demand strict limits on the government’s authority, whether democratic or otherwise.⁵³

Like Hayek, Friedman believed that the government represents a constant threat to freedom because of its power to coerce, and this is no less true of democratic and representative government than of monarchical, dictatorial, or oligarchical government.⁵⁴ To limit the government’s coercive powers, therefore, it is essential to remove “economic activity from the control of political authority.”⁵⁵ In this way, economic freedom serves as a check on political authority.⁵⁶

Friedman believed that protecting individuals’ economic decisions keeps government power in check. However, he rejected the converse, that is the notion that such power should be exercised to limit economic freedom. Although Friedman conceded that “[m]ajority rule is a necessary and desirable expedient,” he believed that economic marketplaces more accurately reflect individuals’ preferences than do voting booths.⁵⁷ If the objective is to distribute society’s resources in ways that reflect the preferences of its members, then we should encourage unrestricted economic exchanges and limit the scope of legislation and other exercises of governmental authority.⁵⁸

Like Hayek, Friedman called for denying government the authority to regulate in as many spheres as possible to leave distributive and other objectives

51. MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 2 (1980).

52. *Id.* at 5.

53. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 4 (4th ed. 2020) (arguing that to preserve freedom, “the scope of government must be limited”).

54. *Id.* at 19.

55. *Id.* at 20.

56. *Id.*

57. FRIEDMAN & FRIEDMAN, *supra* note 51, at 65.

58. *Id.* at 65–66.

to the market.⁵⁹ Friedman explained that “the market . . . reduce[s] greatly the range of issues that must be decided through political means, and thereby . . . minimize[s] the extent to which government need participate directly in the game.”⁶⁰

According to Friedman, relying on the market, rather than on politics and majoritarian democratic rule, reduces social strains while dispensing with the need for agreement or consensus on the acceptability of any given outcome.⁶¹ As he explained, “[t]he wider the range of activities covered by the market, the fewer are the issues on which explicitly political decisions are required and hence on which it is necessary to achieve agreement.”⁶²

In the end, Friedman’s normative political vision was simple: promote individual freedom by relying on markets as much as possible and prevent coercion by relying on government, whether democratically chosen or not, as little as possible.

In similar ways, the libertarian economist James Buchanan, a leading proponent of public choice theory, urged citizens not to be fooled by the “romance” of majoritarian government.⁶³ According to Buchanan, legislators rationally seek to maximize their chances for reelection by promoting the interests of the pressure groups that have the greatest power and influence.⁶⁴ From his perspective, the political sphere is not different from the economic one,

59. Most of Friedman’s book *Capitalism and Freedom* consists of arguments regarding why large spheres of human conduct and interactions must be taken away from political and democratic domains and handed over to the self-regulation of private parties exchanging goods and services in unrestrained economic marketplaces. In the book, Friedman advocates, for example, for the elimination of antidiscrimination laws, FRIEDMAN, *supra* note 53, at 134–38, social security programs, *id.* at 218–26, minimum wage laws, *id.* at 216–17, public housing programs, *id.* at 213–16, the governmental administration (if not necessarily the funding) of public education, *id.* at 103–17, and the state licensing of occupations including medical professions, *id.* at 165–90. His book *Free to Choose*, co-written with his wife Rose Friedman, additionally calls for *inter alia* eliminating the government’s role in consumer protection and workplace safety, FRIEDMAN & FRIEDMAN, *supra* note 51, at 189–213 and 222–47, while advocating for significant reductions in the regulation of industry to protect the environment. *Id.* at 213–18. Friedman, in both books, failed to give *any* weight to the fact that the laws and policies that he urged be replaced with the full unleashing of market forces were developed and implemented by democratic governments.

60. FRIEDMAN, *supra* note 53, at 19.

61. *Id.* at 30.

62. *Id.*

63. As Buchanan put it,

[p]ublic choice theory has been the avenue through which a romantic and illusory set of notions about the workings of governments and the behavior of persons who govern has been replaced by a set of notions that embody more skepticism about what governments can do and what governors will do, notions that are surely more consistent with the political reality that we may all observe about us.

James M. Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, in 1 *THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL LIBERTY: THE COLLECTED WORKS OF JAMES M. BUCHANAN* 46 (1999).

64. See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 283–95 (paperback ed. 1965).

as legislators and interests groups work not to advance the general welfare, but instead to promote their private interests.⁶⁵ Public choice theorists such as Buchanan “regard the state not as something ‘organic,’ something that just grows, with a life and purposes of its own. Rather, they see government as simply a means by which rational, self-interested individuals combine to promote their personal interests through collective action.”⁶⁶ Although progressives blame many of society’s ills on market failures, public choice theorists like Buchanan argue that those ills are instead caused by the failures of democratic governments.⁶⁷

According to Buchanan, majority rule inevitably results in the unequal treatment of minorities whose interests and preferences are not reflected in laws enacted by legislators.⁶⁸ As he explained, “[t]he elementary logic of majority rule . . . dictates that members of majority coalitions are differentially advantaged relative to members of the polity outside these coalitions; majoritarian democracy is necessarily discriminatory in its operation, until and unless this feature is explicitly constrained.”⁶⁹

It is possible, of course, to take issue with and critique the libertarian theory summarized here. To provide just one line of argument as an example, the political theorist Thomas Biebricher criticizes the ways in which the theory views democracy only “as a source of potential dangers, rarely as a context of cooperation, fostering mutual understanding and learning about ourselves and others by having our minds changed in the course of the democratic process.”⁷⁰ He adds that “[i]t may thus turn out that realizing our initial preferences is not the only issue of importance in a democracy; democracy could also turn out to be just as important as a context of discovery and reinterpretation of these preferences in exchange with others.”⁷¹

I do not here explore this and other critiques of libertarian political theory because this Section’s purpose has not been to normatively assess it. Instead, the objective has been to explain why libertarian theory is so mistrustful of legislatures’ policy choices. In Part II, I provide examples of how important components of the Roberts Court’s constitutional jurisprudence reflect libertarianism’s deep skepticism of legislative policy preferences, frequently viewing them exclusively as fonts of injustices for regulated individuals. But

65. Georg Vanberg, *A Square Peg in a Round Hold: Democracy, Constitutionalism, and Citizen Sovereignty*, 18 GEO. J.L. & PUB. POL’Y 655, 658 (2020) (“The aim of Buchanan’s political theory is to . . . view the political process as a means by which individuals seek to advance their separate individual interests and values by engaging in ‘political exchange’ with others.”).

66. EAMONN BUTLER, *PUBLIC CHOICE: A PRIMER* 41 (2012).

67. *Id.* at 34.

68. JAMES M. BUCHANAN & ROGER D. CONGLETON, *POLITICS BY PRINCIPLE, NOT INTEREST: TOWARD NONDISCRIMINATORY DEMOCRACY* 15–26 (1998).

69. James M. Buchanan, *Generality as a Constitutional Constraint*, in 1 *THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL LIBERTY: THE COLLECTED WORKS OF JAMES M. BUCHANAN* 423 (1999).

70. BIEBRICHER, *supra* note 33, at 102.

71. *Id.* (citation omitted).

before I do, I next describe how and why libertarian theory assigns to judges expansive powers to correct those injustices.

B. Robust Judicial Power and the Protection of Regulated Parties

Hayek was skeptical that the robust exercise of judicial authority could legitimately constrain the government's regulatory powers. In his book *The Constitution of Liberty*, Hayek criticized the Supreme Court's use of the Due Process Clause during the *Lochner* era to strike down economic regulations.⁷² Hayek opined that, in granting itself the authority to assess the reasonableness of legislation given its purported ends, "[t]he Court was clearly overstepping its proper judicial functions and arrogating what amounted to legislative powers."⁷³

In contrast, contemporary libertarian constitutional theory brooks no patience for judicial restraint.⁷⁴ Indeed, the libertarian constitutionalism of today, like that of the *Lochner* era, calls for repeated and vigorous judicial policing of how and why legislatures exercise their authority on social and economic issues.⁷⁵ For libertarian constitutionalism, there is no such thing as judicial review's counter-majoritarian difficulty because it is never appropriate for judges to defer to majoritarian policy preferences when regulated parties challenge laws on liberty grounds.⁷⁶ While libertarian theory is highly skeptical of legislatures' use of their powers to pursue social and economic objectives, it is highly trustful of judicial efforts to protect individuals' liberty rights.⁷⁷

It is for this reason that the libertarian constitutional theorist Randy Barnett, for example, places judges at the center of his vision of a republican (read: libertarian) Constitution. Barnett views the sovereignty of "We the People" as residing not in a majoritarian and democratic *collective* but "in the people as *individuals*."⁷⁸ From his perspective, the reason why the Constitution delegates powers to the federal government "is not to reflect the people's will or desire—which in practice means the will or desires of the majority—but to secure the

72. HAYEK, *supra* note 38, at 282–83.

73. *Id.* at 283. *See also id.* at 284 (describing the Supreme Court's jurisprudence during the *Lochner* era as "extreme").

74. *See, e.g.,* BARNETT, *supra* note 6, at 224 (arguing that judicial "reticence . . . has undermined the rights of the sovereign people"); CLINT BOLICK, DAVID'S HAMMER: THE CASE FOR AN ACTIVIST JUDICIARY 28 (2007) ("Given the explosive expansion of government power, what is remarkable and lamentable is not how many abuses of executive and congressional power have been struck down but how few.").

75. *See infra* notes 77–108 and accompanying text.

76. *See infra* notes 77–108 and accompanying text.

77. *See, e.g.,* Ilya Somin, *Libertarianism and Judicial Deference*, 16 CHAP. L. REV. 293, 294 (2013) ("[S]kepticism about judicial deference is a distinctively libertarian contribution to constitutional theory. It is a logical extension of libertarian skepticism about government power and the political process.").

78. BARNETT, *supra* note 6, at 22. As we have seen, Hayek also criticized the notion of popular sovereignty. *See supra* note 45–47 and accompanying text.

pre-existing rights of We the People, each and every one of us.”⁷⁹

Barnett rejects the descriptive accuracy and normative appeal of the concept of popular sovereignty.⁸⁰ According to Barnett, a democratic and majoritarian understanding of the Constitution is deeply flawed because it suggests that “first comes government and then come rights.”⁸¹ Under this constitutional understanding, “[w]e have moved . . . from securing the *rights* of the people, each and every one, to honoring the *will* of the people, as expressed by a majority of a handful of ‘legislators’—the will of the people to which the individual must yield or be forced to comply.”⁸²

For Barnett, pre-government rights, like Hayek’s common principles,⁸³ play a crucial role in limiting the authority of democratic government. The Constitution’s purpose is not to aid majoritarian will, but is instead to limit the power of democratic government to narrowly circumscribed spheres aimed solely at protecting the pre-existing liberty rights of individuals.⁸⁴ For Barnett, the “proper purpose of [government] regulation must be limited to the equal protection of the rights of every person. Any law that does not have this as its purpose is beyond the just powers of a republican legislature to impose on the citizenry.”⁸⁵

Barnett rejects judicial restraint and calls instead for vigorous “judicial engagement.”⁸⁶ He emphasizes that judges’ “primary duty is to adhere to the law of the Constitution above any statute enacted by Congress or the states.”⁸⁷ For Barnett, it is vitally important “to empower some group of servants [i.e., judges] to identify and directly protect the rights retained by the people.”⁸⁸

According to Barnett’s libertarian constitutionalism, the fact that sovereignty lies with “we the people” as individuals requires that judges vigorously enforce the Constitution’s liberty rights. He argues that “[a] skeptical judiciary” is essential to protect “[we] the people” as individuals from “[we] the people” as a collective.⁸⁹

For this reason, Barnett rejects *in toto* the notion that judges should presume

79. BARNETT, *supra* note 6, at 23.

80. Barnett criticizes what he calls a democratic understanding of the U.S. Constitution, one that understands its opening phrase of “We the People” as representing the American people as a collective body. *Id.* at 20–21. As he puts it, “what I am calling the Democratic Constitution is one way to address the problem of how the sovereign people can be said to rule. If sovereignty is conceived as residing in the people collectively, then popular sovereignty means rule by the people as a *body*. And rule by the people as a body then means rule according to the ‘will of the people.’” *Id.* at 20.

81. *Id.* at 21 (emphasis omitted).

82. *Id.* at 126–27.

83. *See supra* note 38 and accompanying text.

84. BARNETT, *supra* note 6, at 23–24.

85. *Id.* at 25.

86. *See, e.g., id.* at 225–33.

87. *Id.* at 24.

88. *Id.* at 169 (emphasis omitted).

89. *Id.* at 245.

that laws enacted by democratically elected legislatures are constitutional.⁹⁰ To so presume is to abdicate judicial functions and duties.⁹¹ Instead of a presumption of constitutionality, Barnett urges judges to apply a presumption of liberty, and a corresponding presumption of unconstitutionality, whenever a regulated party challenges a law on liberty grounds.⁹² As he explains, “being able to challenge any restriction on the liberties of the people as irrational or arbitrary before an independent and impartial judge is a vital structural means to secure the sovereignty of the people, each and every one.”⁹³

To the criticism that libertarian constitutionalism grants judges too much discretion, Barnett responds by arguing that such discretion can only be effectively cabined by *expanding* judicial power.⁹⁴ The reasoning here is that if judges vigorously apply a presumption of liberty in *all* cases challenging the constitutionality of laws, they will be less free to strike down laws based on their preferred policy outcomes.⁹⁵ A presumption of unconstitutionality also dispenses with the risk that judges will “selectively identify” preferred groups for heightened constitutional protection.⁹⁶

James Buchanan also urged the vigorous use of judicial power to keep legislatures from infringing on individuals’ liberty rights. In doing so, he called on judges to strictly enforce what he called the “generality constraint” principle.⁹⁷ Under this principle, the government can regulate individuals only through laws that apply equally to everyone in society.⁹⁸ As a result, any law that has the purpose or effect of burdening or benefiting a particular group is illegitimate and unconstitutional.⁹⁹

The strict judicial enforcement of the generality constraint principle serves to strictly limit the government’s size and authority, rendering unconstitutional “any particularized regulation or restriction on this or that market”¹⁰⁰

90. *Id.* at 222–45.

91. *Id.*

92. *Id.*

93. *Id.* at 245. See also Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21, 37 (“Liberty is and always has been the properly defined exercise of freedom [T]he existence of a right to liberty places a burden on the government to justify any regulations of liberty as necessary and proper.”) (emphasis omitted).

94. BARNETT, *supra* note 6, at 244.

95. *Id.* (arguing that any lower court judge should be able to “find any restriction of liberty to be unconstitutional if it is irrational or arbitrary without the need for the Supreme Court to bless a right as fundamental or decide that an identifiable group merits heightened protection”).

96. *Id.* See also Barnett, *supra* note 93, at 41 (“The more liberties the Court protects, the less ideological it will be and the more widespread political support it will enjoy When the Court plays favorites with liberty, as it has since the New Deal, it loses rather than gains credibility with the public, and undermines its vital role as the guardian of the Constitution.”).

97. Buchanan, *supra* note 69, at 428. For a detailed explanation of why the workings of democratic governments should be limited by a generality constraint principle, see generally BUCHANAN & CONGLETON, *supra* note 68.

98. Buchanan, *supra* note 69, at 428.

99. *Id.*

100. *Id.* at 426.

Buchanan added that “[i]f government is to regulate or to protect one industry, profession, or product category, [the generality] constraint would require that all comparable groups be treated similarly.”¹⁰¹ In this way, the “constraint would, almost immediately, remove all pressures toward market restrictions, since those who seek to secure differential benefits do so in the expectation that their group will be treated advantageously relative to other groups.”¹⁰²

Buchanan believed that “[a]ny legislatively orchestrated change that upsets the legitimately held expectations of citizens should be interpreted as a change in the constitutional structure, and, as such, should be prevented by the courts.”¹⁰³ It was his hope that “an activist judiciary . . . might rediscover in the American constitutional documents a more robust generality constraint than modern courts are likely to enforce[,]” similar to the one that prevailed in the nineteenth century.¹⁰⁴

The principle that courts should never defer to elected branches of government in their pursuit of social and economic objectives runs throughout the libertarian legal literature. This is what Professor Richard Epstein, for example, calls for in his book *The Classical Liberal Constitution* when he contends that “there are virtually no cases, except perhaps on some narrow national security questions, where rational basis sets the right standard of review.”¹⁰⁵ Similarly, Clint Bolick, the former director of the Goldwater Institute Center for Constitutional Litigation and current justice on the Arizona Supreme Court, in his book *David’s Hammer: The Case for an Activist Judiciary*, argues that “[e]xcessive deference to government power equals judicial abdication of constitutional duties and results in tyranny meant not to be tolerated in our constitutional system.”¹⁰⁶ Bolick adds that “[g]iven the explosive growth of government at every level and the resulting erosion of freedom, the problem with judicial activism” is not that there is “too much of it but too little.”¹⁰⁷ Like Barnett, Bolick insists that the raising of constitutional liberty claims “require[es] judges to indulge not a presumption in favor of government power to which individual rights are the exception, a concept alien to the Framers, but the presumption in favor of liberty reflected in the words of the Constitution.”¹⁰⁸

For his part, Clark Neily of the libertarian Cato Institute and former litigator

101. *Id.*

102. *Id.*

103. James M. Buchanan, *Contractarian Political Economy and Constitutional Interpretation*, 78 AM. ECON. REV. 135, 139 (1988).

104. Buchanan, *supra* note 69, at 428.

105. EPSTEIN, *supra* note 6, at 311.

106. BOLICK, *supra* note 74, at 154.

107. *Id.* at 5.

108. *Id.* at 154. As part of their promotion of “judicial engagement,” libertarians have sought to defend and rehabilitate the so-called *Lochner* approach to substantive due process. See, e.g., Randy Barnett, *What’s So Wicked About Lochner?*, 1 N.Y.U. J.L. & LIBERTY 325 (2005); DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011); DAVID N. MAYER, *LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT* (2011).

at the similarly libertarian Institute for Justice, complains that contemporary “[c]ourts simply refuse to enforce [constitutional limits on government power] in any meaningful way, deferring instead to public officials at the expense of individual liberty. The term for that practice is ‘judicial abdication,’ and it is why we have far more government at every level today than the Constitution permits.”¹⁰⁹

As with libertarian theory’s understanding of democracy, it is possible to critique its abiding trust in robust forms of judicial review.¹¹⁰ However, my objective has not been to normatively assess libertarianism’s call for expansive judicial power when adjudicating liberty claims brought by regulated parties. Instead, my objective has been to explain how and why libertarian constitutional theory demands vigorous forms of judicial review. To put it succinctly, libertarian theory holds that judges have the constitutional authority and obligation to repeatedly void legislative measures aimed at pursuing social and economic policy preferences to remedy unjust deprivations of the liberty rights of regulated parties.

II. THE GOVERNMENT IS UP TO NO GOOD: *BRUEN* AND 303 CREATIVE

Libertarian theory places a great deal of trust in the operation of economic markets while being deeply mistrustful of government regulation.¹¹¹ The libertarian constitutionalism of the early twentieth century, as implemented by the Court during the *Lochner* era, used substantive due process doctrine to protect economic rights as fundamental rights.¹¹² The Court dispensed with such use of the doctrine almost a century ago and has expressed no interest in returning to it.¹¹³

However, outside of the context of economic rights claims, the Court in recent years has frequently embraced a constitutionalism that reflects libertarian theory’s deep mistrust of legislative policy preferences.¹¹⁴ In some of these rulings, the Court has viewed the legislative measures under challenge

109. CLARK M. NEILLY III, *TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION’S PROMISE OF LIMITED GOVERNMENT* 3 (2013) (endnote omitted).

110. For a conservative critique of libertarianism’s call for expansive forms of judicial engagement, see, e.g., Mark Pulliam, *Unleashing The “Least Dangerous” Branch: Quis Custodiet Ipsos Custodes?*, 22 TEX. REV. L. & POL. 423 (2018). For a progressive critique of judicial activism more generally, see, e.g., MARK TUSHNET, *TAKING BACK THE CONSTITUTION: ACTIVIST JUDGES AND THE NEXT AGE OF AMERICAN LAW* (2020).

111. See *supra* Part I.A.

112. See sources cited *supra* note 108.

113. Ball, *supra* note 10, at 735–36.

114. In addition to the cases explored in this Section, see also cases cited in *supra* notes 16–21. In previous work, I have noted the ways in which Justice Anthony Kennedy, whose constitutional jurisprudence largely tracked libertarian ideology, see Ball, *supra* note 10, at 701–36, paid relatively little attention to the need to account for legislatures’ policy preferences. Carlos A. Ball, *The Judicial Activism of Justice Anthony Kennedy*, 72 AM. U. L. REV. 1501, 1543–70 (2023).

exclusively as fonts of injustices for regulated parties in ways that reflect the normative priorities of libertarian theory.

This Part examines two such rulings. Section A explores how the Court in its Second Amendment opinion in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*¹¹⁵ gave no constitutional weight to the government’s interests in promoting gun safety. At the same time, the Court focused extensively on how the challenged law regulated gun owners in what it deemed to be unjust ways.

Section B examines how the Court in its First Amendment ruling in *303 Creative LLC v. Elenis*¹¹⁶ did not give any constitutional weight to the government’s objective of prohibiting discrimination. Instead, the Court focused exclusively on how the antidiscrimination statute at issue regulated religious business owners in what it viewed as unfair ways.

The claimants in *Bruen* and *303 Creative* did not raise economic liberty arguments. If they had asked the Court to rediscover the constitutional validity of *Lochner*, they would have lost their claims in all likelihood. But *Bruen* and *303 Creative* show how the Court can decide constitutional cases implicating individual rights in ways that reflect important elements of libertarian theory without having to recognize a fundamental right to freely participate in market transactions and, therefore, without directly resuscitating *Lochner*’s ghost.

A. The Government’s Injustices in Bruen

At issue in *Bruen* was a New York statute, in place for more than a century, requiring gun owners to get licenses before they could carry concealed handguns in public.¹¹⁷ The statute set forth eligibility criteria (such as age and a lack of felony convictions) that, if satisfied, automatically entitled persons with certain jobs, such as judges and law enforcement officers, to licenses.¹¹⁸ But most individuals also had to show “proper cause” before the license would issue.¹¹⁹ The plaintiffs in *Bruen* argued that this additional requirement violated their Second Amendment rights.¹²⁰ The Court struck down the legislation after concluding that there was no historical tradition of analogous regulations before, during, and after the adoption of the Second and Fourteenth Amendments.¹²¹

115. 597 U.S. 1 (2022).

116. 600 U.S. 570 (2023).

117. *Bruen*, 597 U.S. at 11.

118. *Id.*

119. *Id.* at 12.

120. *Id.* at 16.

121. *Id.* at 38 (“[T]he historical record compiled by respondents does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense. Nor is there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense.”).

Bruen has engendered a vast literature.¹²² My focus here is on how the ruling reflects a deep judicial skepticism of legislative efforts to attain public policy objectives. This skepticism led the Court to view the statute exclusively as a font of injustices for regulated individuals.

The State argued in *Bruen* that, as the U.S. Court of Appeals for the Second Circuit had explained in an earlier case, “widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces.”¹²³ But the Court, reflecting the little weight that libertarian theory gives to legislative objectives in the face of liberty challenges, reasoned that whether there was an important public interest behind the statute under challenge was constitutionally irrelevant.¹²⁴ As Justice Clarence Thomas explained in his majority opinion, the Court would no longer permit the government to rely on the claim that a challenged gun safety law “promotes an important interest” in applying the Second Amendment.¹²⁵ Instead, *Bruen* now required the government to prove that its measure “is consistent with this Nation’s historical tradition of firearm regulation.”¹²⁶

Justice Thomas made clear that, going forward, lower courts in Second Amendment cases were prohibited from giving any constitutional weight to the public’s interest in protecting itself from the harms of gun violence.¹²⁷ In doing so, he explicitly rejected the applicability of means-end tests, commonly used

122. See, e.g., Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67 (2023); Brannon P. Denning and Glen H. Reynolds, *Trouble’s Bruen: The Lower Courts Respond*, 108 MINN. L. REV. 3187 (2024); Nelson Lund, *Bruen’s Preliminary Preservation of the Second Amendment*, 23 FEDERALIST SOC’Y REV. 279 (2022); Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88 BROOK. L. REV. 797 (2023); Eugene Volokh, *Implementing the Right to Keep and Bear Arms After Bruen*, 98 N.Y.U. L. REV. 1950 (2023); Timothy Zick, *Second Amendment Exceptionalism: Public Expression and Public Carry*, 102 TEX. L. REV. 65 (2023).

123. Brief for Respondents at 43–44, *N.Y. State Rifle & Pistol Ass’n, Inc.*, 597 U.S. 1 (2022) (No. 20-843), 2021 WL 4245013, at *43–44 (quoting *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012)).

124. *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022). See also *id.* at 83–84 (Breyer, J., dissenting) (“[The majority] refuses to consider the government interests that justify a challenged gun regulation, regardless of how compelling those interests may be.”); Smith, *supra* note 122, at 798–99 (“The *Bruen* Court’s historical tradition approach abandons all considerations of government interests and whether a law or regulation accomplishes government interests. By adopting a historical tradition approach, the Court ruled that considerations with the aim of harm reduction are irrelevant to the constitutional inquiry.”); (footnote omitted); Zick, *supra* note 122, at 103 (“By rejecting interest balancing and intermediate scrutiny, *Bruen* appears to prohibit any consideration of the current public safety effects of public carry.”).

125. *Bruen*, 597 U.S. at 17.

126. *Id.*

127. *Id.* (“To justify its regulation, the government may not simply posit that the regulation promotes an important interest. . . . Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s unqualified command.”) (internal citation omitted).

in constitutional law,¹²⁸ to Second Amendment disputes.¹²⁹

In assessing the constitutionality of gun safety laws following the Court's holding in *District of Columbia v. Heller*¹³⁰ that individuals have a constitutionally protected right to possess firearms for self-defense, the federal appellate courts had applied either strict or intermediate scrutiny.¹³¹ These means-end tests required the government to show either that the gun safety measure was "narrowly tailored to achieve a compelling governmental interest" or that it was "substantially related to the achievement of an important governmental interest."¹³² But for the *Bruen* majority, both of these tests rendered relevant that which it deemed to be constitutionally irrelevant: the public's interest in having legislators enact laws aimed at protecting its safety in public places. *Bruen*'s constitutional bracketing of the public's interests in promoting gun safety reflects libertarian theory's deep mistrust of the validity of using legislative measures to promote the public good in the face of liberty challenges by regulated parties.¹³³

Justice Thomas's majority opinion provided a lengthy review of the history of concealed handgun regulations—from the Middle Ages through the nineteenth century—extending to almost forty pages of text.¹³⁴ That review paid a great deal of attention to the *scope* of regulations adopted in earlier centuries, while saying little about their *objectives*. Although Justice Thomas asserted that what mattered in the now mandated historical analysis was "how and why the regulations burden a law-abiding citizen's right to armed self-defense,"¹³⁵ his historical review was largely limited to the "how" with little discussion of the "why."¹³⁶

128. See, e.g., *Boos v. Barry*, 485 U.S. 312, 321 (1988) (applying strict scrutiny in First Amendment case); *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989) (applying intermediate scrutiny in First Amendment case); *Heller v. Doe*, 509 U.S. 312, 319–20 (1993) (applying rational basis review in Equal Protection Clause case).

129. *Bruen*, 597 U.S. at 19.

130. 554 U.S. 570, 635 (2008).

131. *Bruen*, 597 U.S. at 17–19.

132. *Id.* at 19–20 (internal citations omitted).

133. See *supra* Part I.A.

134. *Bruen*, 597 U.S. at 31–70.

135. *Id.* at 29.

136. See, e.g., *id.* at 48 ("The [colonial era] law restricted only concealed carry, not all public carry, and its restrictions *applied only* to certain 'unusual or unlawful weapons,' including 'pocket pistol[s].' It also *did not apply* to all pistols, let alone all firearms.") (emphases added) (internal citations omitted); *id.* at 50 ("Only after the ratification of the Second Amendment in 1791 did public-carry restrictions proliferate. Respondents rely heavily on these restrictions, which generally fell into three categories: common-law offenses, statutory prohibitions, and 'surety' statutes. None of these restrictions *imposed a substantial burden on public carry* analogous to the burden created by New York's restrictive licensing regime.") (emphasis added); *id.* at 56 ("While New York presumes that individuals have no public carry right without a showing of heightened need, the surety statutes presumed that individuals had a right to public carry that could be *burdened* only if another could make out a specific showing of 'reasonable cause to fear an injury,

But even if Justice Thomas had given more weight to the “why” of gun safety regulations, that consideration would not have included how the law helped prevent deaths and injuries. Instead, the “why” would have mattered only in the narrow sense of whether it overlapped with the “why” of laws enacted in earlier centuries.¹³⁷

Bruen has significant deregulatory implications. The government in the twenty-first century regulates vastly greater areas of human conduct than it did in the eighteenth and nineteenth centuries. If the scope of regulations from centuries ago, as understood by judges,¹³⁸ marks the outer limit of contemporary government’s regulatory authority then that limit, by definition, serves to constrain state power in ways that are consistent with libertarian values and priorities.¹³⁹

Bruen’s rejection of the constitutional relevance of the government’s public safety objectives is also reflected in how it referred to the harms associated with gun violence in the United States. The ruling describes “firearm violence in densely populated communities” as an “*alleged* societal problem” or a

or breach of the peace.”) (emphases omitted and emphasis added) (citation omitted); *id.* at 57 (“[U]nlike New York’s regime, a showing of special need was required only after an individual was reasonably accused of intending to injure another or breach the peace. And, even then, proving special need simply avoided a fee rather than a ban.”); *id.* (“[T]he burden these surety statutes may have had on the right to public carry was likely too insignificant to shed light on New York’s proper-cause standard.”) (emphasis added); *id.* (“[R]espondents offer little evidence that authorities *ever enforced* surety laws.”) (emphasis added); *id.* at 59 (“[T]he overlapping *scope* of surety statutes and criminal statutes suggests that the former were not viewed as substantial restrictions on public carry.”) (emphasis added).

137. See *supra* notes 134–36 and accompanying text.

138. I return to the judge-empowering components of *Bruen* in *infra* Part III.A.

139. Critics of *Bruen* have argued that it makes no sense to constrain contemporary governmental authority by using the priorities of legislators who lived centuries ago as the constitutional ceiling for permissible regulation. Professor Jacob Charles, for example, complains that under *Bruen*, “the dead hands of the past bind not just through their actions but through their omissions. If the nation’s Founding generations declined to act, without regard to the grounds or reasons for their inaction, then contemporary lawmakers are shackled.” Charles, *supra* note 122, at 71 (footnotes omitted). Professor Charles adds that making the existence of historical laws necessary for contemporary analogs to be constitutional “assume[s] that historical legislatures always legislated to the maximum extent of their constitutional authority, at least with respect to guns. Without that assumption, the absence of past regulation tells us nothing about what our ancestors thought their elected representatives *could* do.” *Id.* at 111 (footnotes omitted). See also Lund, *supra* note 122, at 293–94 (“There were very few restrictions on weapons in the founding period, but that might have been because legislatures saw no need for them. The absence of a regulation does not necessarily imply the absence of a power to adopt that regulation.”). Professor Michael Smith notes the dichotomy between the Court’s reasoning in *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022), and its reasoning in *Bruen*. As he explains, “[i]n [the] two cases, issued a day apart, the Supreme Court took diametrically opposed approaches over what inferences to draw from the lack of historical restrictions on a particular behavior. In *Dobbs*, the Court inferred that the absence of regulation was not evidence that the government could not restrict a particular behavior. But in *Bruen*, the Court inferred the opposite, concluding that the absence of regulation, or the partial restriction of the concealed carrying of firearms, inferred the existence of a right to carry firearms.” Smith, *supra* note 122, at 817 (footnotes omitted).

“perceived societal problem.”¹⁴⁰

For the recognition that legislatures have a legitimate role to play in crafting policies that account for both the proper and improper uses of firearms, one has to turn to Justice Stephen Breyer’s dissent.¹⁴¹ One also has to turn to the dissent to read about the human and social harms caused by gun violence in the United States.¹⁴² Since *Bruen* deemed the government’s interests to be constitutionally irrelevant, the majority found no reason to mention, much less grapple with, the deaths, injuries, and other harms engendered by the (mis)use of guns.

By refusing to incorporate the extent of harms inflicted by the (mis)use of guns in public places into its constitutional analysis, the majority implicitly deemed them irrelevant. In contrast, Justice Alito’s concurrence did so explicitly by criticizing Justice Breyer’s dissent for raising facts, data, and reports related to gun violence.¹⁴³ As Justice Alito noted, “[t]he dissent cites statistics on children and adolescents killed by guns, but what does this have to do with the question whether an adult who is licensed to possess a handgun may be prohibited from carrying it outside the home?”¹⁴⁴ Justice Alito’s view was that “mass shootings that have occurred in recent years” and “statistics about the use of guns to commit suicide” were constitutionally irrelevant to deciding the

140. *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 27 (2022) (emphases added).

141. As Justice Breyer explained,

[b]alancing . . . lawful uses against the dangers of firearms is primarily the responsibility of elected bodies, such as legislatures. It requires consideration of facts, statistics, expert opinions, predictive judgments, relevant values, and a host of other circumstances, which together make decisions about how, when, and where to regulate guns more appropriately legislative work. That consideration counsels modesty and restraint on the part of judges when they interpret and apply the Second Amendment.

Id. at 89 (Breyer, J., dissenting).

142. Justice Breyer noted that:

In 2017, there were an estimated 393.3 million civilian-held firearms in the United States, or about 120 firearms per 100 people. That is more guns per capita than in any other country in the world Unsurprisingly, the United States also suffers a disproportionately high rate of firearm-related deaths and injuries. In 2015, approximately 36,000 people were killed by firearms nationwide. Of those deaths, 22,018 (or about 61%) were suicides, 13,463 (37%) were homicides, and 489 (1%) were unintentional injuries. On top of that, firearms caused an average of 85,694 emergency room visits for nonfatal injuries each year between 2009 and 2017. Worse yet, gun violence appears to be on the rise. By 2020, the number of firearm-related deaths had risen to 45,222 or by about 25% since 2015. That means that, in 2020, an average of about 124 people died from gun violence every day [G]un violence has now become the leading cause of death in children and adolescents, surpassing car crashes, which had previously been the leading cause of death in that age group for over 60 years. And the consequences of gun violence are borne disproportionately by communities of color, and Black communities in particular.

Id. at 84–86 (internal citations omitted).

143. *Id.* at 71–72 (Alito, J., concurring) (“[I]t is hard to see what legitimate purpose can possibly be served by most of the dissent’s lengthy introductory section” discussing gun violence in the United States) (internal citation omitted).

144. *Id.* at 72–73 (internal citations omitted).

Second Amendment case.¹⁴⁵

Rather than give any constitutional weight to the claimed public safety considerations behind the law under challenge, the justices in the majority insisted on viewing the statute exclusively as a font of injustices for regulated individuals. According to Justice Thomas, the statute was a misguided effort by an overreaching legislature to impose what the majority deemed to be highly subjective licensing obstacles on regulated parties without adequate judicial review.¹⁴⁶ This meant that the challenged law unjustly and unnecessarily regulated individuals who wanted to use firearms for self-defense in public places.¹⁴⁷

In his concurrence, Justice Alito emphasized another way in which the statute was unjust to regulated individuals: it prevented them from protecting themselves from physical harms threatened by others. To make this point, Justice Alito described two reported instances in which individuals had used guns to protect themselves from attackers.¹⁴⁸ For Justice Alito, those two incidents were more constitutionally relevant than all the data and studies marshalled by Justice Breyer regarding the injuries and deaths caused by gun violence because the pair of incidents reflected the injustices perpetrated by New York's statute on regulated individuals.¹⁴⁹ As he put it, "while the dissent seemingly thinks that the ubiquity of guns and our country's high level of gun violence provide reasons for sustaining the New York law, the dissent appears not to understand that it is these very facts that cause law-abiding citizens to feel the need to carry a gun for self-defense."¹⁵⁰

It bears noting that the Court decided *Bruen* based on the pleadings without the benefit of discovery and evidentiary hearings. It is reasonable to believe that allowing the litigation to proceed before reaching the merits of the Second Amendment claim would have provided the justices with more information about why the law was enacted, the ways in which it might have promoted public safety, and how state officials were applying it.¹⁵¹ But the Court was

145. *Id.* at 72.

146. *Id.* at 12–13 (majority opinion) (noting that no New York law defined "proper cause"; that the regulatory regime provided "officials [with the] discretion to deny licenses based on a perceived lack of need or suitability"; and that judicial review of a license denial is "limited").

147. *See id.* at 13 ("The rule leaves applicants little recourse if their local licensing officer denies a permit."); *id.* at 12 (categorizing the licensing standard as "demanding").

148. *Id.* at 75 (Alito, J., concurring).

149. The law under challenge, Justice Alito reasoned, placed constitutionally impermissible burdens on individuals who live "in high-crime neighborhoods" and "must traverse dark and dangerous streets in order to reach their homes after work or other evening activities." *Id.* at 74. These individuals "reasonably believe that unless they can brandish or, if necessary, use a handgun in the case of attack, they may be murdered, raped, or suffer some other serious injury." *Id.*

150. *Id.* at 73–74.

151. Justice Breyer complained in dissent that "there is no record to support the Court's negative characterizations [of the statute under challenge], as we know very little about how the

clearly not interested in any of that additional evidence.¹⁵² This was the case because, as already noted, the Court deemed the challenged law's public benefits to be constitutionally irrelevant.¹⁵³ The Court was also of the view that the "proper cause" requirement, regardless of its policy purposes, unjustly burdened regulated parties.¹⁵⁴ It does not appear that any evidence of either the importance of the legislature's public safety objectives or of how state officials were enforcing the statute would have persuaded a majority of justices of the law's constitutionality.

In short, *Bruen* bracketed the relevance of the public's interests in enacting the challenged statute, while emphasizing the unjust burdens it imposed on gun owners. In this way, the Court's constitutional approach reflects the libertarian view that legislative provisions be measured according to the injustices they engender for regulated individuals without accounting for the importance of their public welfare objectives.

Bruen constitutionally operationalizes libertarian theory's deep mistrust of legislative measures seeking to advance public policy objectives. At the end of the day, what mattered constitutionally in *Bruen* were not what the Court deemed to be the "alleged societal problems" associated with gun violence,¹⁵⁵ but were instead the ways in which the statute unjustly burdened regulated individuals.

B. The Government's Injustices in 303 Creative

Although the legal issues raised in the First Amendment case of *303 Creative LLC v. Elenis*¹⁵⁶ were different from those in *Bruen*, the Court's constitutional *modus operandi* was the same in both cases. Like *Bruen*, *303 Creative* gave no constitutional weight to the government's policy objectives behind the statute under challenge.¹⁵⁷ In addition, as in *Bruen*, *303 Creative* viewed the law at issue exclusively as a source of injustices for regulated

law has actually been applied on the ground." *Id.* at 95 (Breyer, J., dissenting). He added that "[w]ithout an evidentiary record, there is no reason to assume that New York courts applying [the statute's] standard fail to provide license applicants with meaningful review." *Id.* at 96. Furthermore, "[b]ased on the pleadings alone, we cannot know how often New York courts find the denial of a concealed-carry license to be arbitrary and capricious or on what basis. We do not even know how a court would have reviewed the licensing officer's decisions in [the plaintiff's] cases because they do not appear to have sought judicial review at all." *Id.*

152. *See id.* at 76 (Alito, J., concurring) (noting that while the dissent "chastises the Court for deciding this case without a trial and factual findings about just how hard it is for a law-abiding New Yorker to get a carry permit[,] [t]he record before us . . . tells us everything we need on this score").

153. *See supra* notes 124–40 and accompanying text.

154. *See supra* notes 146–50 and accompanying text.

155. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 27 (2022).

156. 600 U.S. 570 (2023).

157. *See infra* notes 164–74 and accompanying text.

individuals.¹⁵⁸ Both of these interpretative choices reflect the principles and priorities of libertarian theory.¹⁵⁹

In *303 Creative*, the owner of a website design company in Colorado wished to expand her business by offering wedding-related design and marketing services to the general public.¹⁶⁰ But the owner only wanted to provide the services to heterosexual couples because doing so for same-sex couples was inconsistent with her religious views.¹⁶¹ She claimed that the First Amendment barred the state from enforcing its law prohibiting sexual orientation discrimination against her for turning same-sex couples away.¹⁶² The Court agreed, holding that applying the statute would compel the business owner to speak in ways she did not want to speak in violation of the Free Speech Clause.¹⁶³

Even though *303 Creative* acknowledged “the vital role public accommodations laws play in realizing the civil rights of all Americans,”¹⁶⁴ it gave no constitutional weight to that role. As in *Bruen*,¹⁶⁵ the Court in *303 Creative* found it unnecessary to account for the government’s interests in deciding the constitutional dispute. Doing so would have required the Court to balance the state’s antidiscrimination objectives against the challengers’ constitutional rights to be free of the governmental regulation at issue. As Justice Thomas’s majority opinion had done in *Bruen*,¹⁶⁶ Justice Neil Gorsuch’s ruling on behalf of the Court in *303 Creative* refused to apply a balancing or means-end test. Even strict scrutiny, which strongly presumes the unconstitutionality of the challenged law, would have apparently afforded too much weight to the government’s interest. As a group of commentators notes, “*303 Creative* . . . refused to consider whether the state interest in preventing harm to third parties was strong enough to withstand strict scrutiny. Instead, the Court deemed a public-accommodations law unenforceable against a covered business without seriously discussing the state’s interest in nondiscrimination mandates.”¹⁶⁷

There are other similarities between *Bruen* and *303 Creative*. In the same way that *Bruen*’s analysis made no room for the harms engendered by gun violence,¹⁶⁸ there is no mention in *303 Creative* of the history, existence, or

158. See *infra* notes 175–88 and accompanying text.

159. See *supra* Part I.A.

160. *303 Creative*, 600 U.S. at 579.

161. *Id.*

162. Petition for Writ of Certiorari, *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023) (No. 21-476).

163. *303 Creative*, 600 U.S. at 602.

164. *Id.* at 590.

165. See *supra* notes 124–45 and accompanying text.

166. See *supra* notes 127–33 and accompanying text.

167. Rebecca Aviel et al., *From Gods to Google*, 134 YALE L.J. 1269, 1340 (2025). I have argued elsewhere that the Court has generally ignored the government’s interests in addressing discrimination in its sexual orientation exemption cases. Carlos A. Ball, *Supreme Court LGBTQ Orthodoxy*, 90 MO. L. REV. 751, 763–75 (2025).

168. See *supra* notes 124–45 and accompanying text.

relevance of discrimination against LGBTQ individuals. There is also no discussion of the economic, dignitary, and psychological injuries that discrimination imposes on such individuals. Indeed, Justice Gorsuch criticized the dissent for insisting on accounting for the reasons why the Colorado legislature had chosen to enact the law under challenge, reasons that the majority deemed to be irrelevant to the constitutional analysis.¹⁶⁹ To account for the reasons why the legislature had enacted the antidiscrimination law would have granted constitutional credit to the challenged provision, a credit that the Court was unwilling to award in the face of a regulated party's compelled speech claim.

It may seem surprising—perhaps even shocking—that *303 Creative* decided a dispute about the scope of antidiscrimination laws without discussing or examining, much less giving constitutional weight to, their objective of addressing and minimizing the harms caused by discrimination. As Professor Kenji Yoshino notes, “[o]ne wonders how it could possibly strike a reader as irrelevant to discuss the infinite everyday dignitary harms experienced by a community in public accommodations in a case that could dramatically increase such harms.”¹⁷⁰

I have elsewhere explained and criticized the ways in which *303 Creative* departs from Supreme Court cases, decided in the 1970s and 1980s,¹⁷¹ which gave considerable weight to the state's interest in addressing race or sex discrimination when assessing the scope of First Amendment exemptions.¹⁷² But my point here is simply that, as a descriptive matter, *303 Creative*'s refusal to give any constitutional weight to the statute's antidiscrimination objectives is consistent with the lack of importance that libertarian theory gives to the legislative pursuit of public policy objectives in the face of liberty claims raised by regulated individuals.¹⁷³

303 Creative, like *Bruen*, deemed it necessary to entirely ignore the government's interests in addressing social harms while focusing only on what it deemed to be the harms imposed by that law on regulated parties.¹⁷⁴ This approach reflects the libertarian view that much of contemporary governmental regulations engender injustices for those subject to them.¹⁷⁵

According to the Court, the government in *303 Creative* engendered

169. See *303 Creative LLC v. Elenis*, 600 U.S. 570, 597 (2023) (complaining that “[i]t is difficult to read the dissent and conclude we are looking at the same case” and that the dissent “reimagines the facts of this case from top to bottom”). In contrast to the majority opinion, Justice Sonia Sotomayor's dissent examined the history of discrimination against LGBTQ people. *Id.* at 615–18 (Sotomayor, J., dissenting). It also accounted for the state's interests in ensuring equal access to goods and services and equal dignity in the common market. *Id.* at 607–09.

170. Kenji Yoshino, *Rights of First Refusal*, 137 HARV. L. REV. 244, 286 (2023).

171. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

172. Ball, *supra* note 167, at 757–60.

173. See *supra* Part I.A.

174. See *supra* notes 176–90 and accompanying text.

175. See *supra* Part I.B.

injustices by using the sexual orientation antidiscrimination law to compel the regulated party to adopt “its preferred message” on marriage equality.¹⁷⁶ In making this point, the Court repeatedly analogized between the application of the Colorado antidiscrimination law to business owners like the challenger and the application of World War II-era laws, struck down by the Court in *West Virginia Board of Education v. Barnette*,¹⁷⁷ threatening schoolchildren with expulsion from school, or their parents with jail time, if they refused to salute the U.S. flag or recite the Pledge of Allegiance.¹⁷⁸ For the Court, *303 Creative* was not about a law aimed at providing LGBTQ individuals equal access to economic marketplaces;¹⁷⁹ instead, the case, like *Barnette*, was about government officials seeking to “test [free speech] foundational principles.”¹⁸⁰

According to Justice Gorsuch, Colorado was not seeking to enforce the antidiscrimination law to advance equality objectives, but was rather aiming to “test[]” the “boundaries” of constitutional free speech protections.¹⁸¹ More specifically, he claimed that “Colorado seeks to compel this speech *in order* to ‘excis[e] certain ideas or viewpoints from the public dialogue.’”¹⁸² For the majority, “the coercive ‘[e]liminat[ion]’ of dissenting ideas about marriage constitutes Colorado’s ‘very purpose’ in seeking to apply its law to Ms. Smith.”¹⁸³

Justice Gorsuch added that if the Court failed to intervene by ordering the constitutional exemption, it would allow “a government to coerce an individual to speak contrary to her beliefs on a significant issue of personal conviction, all in order to eliminate ideas that differ from its own.”¹⁸⁴ For the majority, it was a “fact [that] Colorado seeks to use its [antidiscrimination law] to compel speech in order to ensure conformity to its own views on a topic of major significance,” a “fact” that rendered “the First Amendment implications . . . obvious.”¹⁸⁵ For the Court, therefore, the question before it was a simple one: “Can a State force someone who provides her own expressive services to abandon her conscience and speak *its* preferred message instead?”¹⁸⁶

176. *303 Creative LLC v. Elenis*, 600 U.S. 570, 598 (2023) (emphasis omitted).

177. 319 U.S. 624 (1943).

178. *Id.* at 629.

179. I elaborate on this point in Ball, *supra* note 167, at 774–76.

180. *303 Creative*, 600 U.S. at 585 (emphasis added). Justice Gorsuch’s majority opinion cited *Barnette* seven times. *Id.* at 584–85, 585, 589, 596, 600, 601, and 601–02. For an exploration of the role that *Barnette* played in *303 Creative*, see generally Linda C. McClain, *Do Public Accommodations Law Compel “What Shall Be Orthodox”? The Role of Barnette in 303 Creative LLC v. Elenis*, 68 ST. LOUIS U. L.J. 755 (2024).

181. *303 Creative*, 600 U.S. at 603.

182. *Id.* at 588 (emphasis added) (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994)).

183. *Id.* (alteration in original) (citation omitted).

184. *Id.* at 598.

185. *Id.* at 598 n.5. I criticize *303 Creative*’s deployment of this “fact” in Ball, *supra* note 167, at 77.

186. *Id.* at 597.

In deeming the antidiscrimination law to be a font of injustices for regulated individuals, the Court did not focus only on how it purportedly compelled her to speak against her will. As it had done in *Bruen*,¹⁸⁷ the Court in *303 Creative* also emphasized the statute's administrative burdens on regulated parties.¹⁸⁸ Justice Gorsuch noted, for example, that the antidiscrimination law made it possible for the state or private parties to sue owners of public accommodations and subject them to fines and cease-and-desist orders.¹⁸⁹ The challenged law, he added, allowed the government to require violators to “participat[e] in mandatory educational programs and . . . submi[t] . . . ongoing compliance reports to state officials.”¹⁹⁰

From *303 Creative*'s perspective, then, the law was not a source of justice for LGBTQ individuals; instead, it was a source of injustices for regulated parties. The Court's approach reflects libertarian values by focusing exclusively on what the majority believed are the unjust burdens that the law under challenge imposes on regulated individuals. The Court's ruling also reflects libertarian priorities by refusing to give any constitutional weight to the government's interests in pursuing its policy objectives.

In the end, the Court's constitutional analysis in both *Bruen* and *303 Creative* gave precisely zero weight to the interests of individuals whom the legislatures intended to benefit or protect through the challenged statutes—members of the general public who are vulnerable to gun violence in public places and who do not wish to carry weapons for self-defense in *Bruen* and LGBTQ individuals subjected to discrimination in economic marketplaces in *303 Creative*. In neither case did the Court give any constitutional weight to the respective legislative efforts to address or mitigate those harms. Instead, the Court concluded, in paradigmatic libertarian fashion, that the only constitutionally relevant harms were those associated with the injustices perpetrated by the government, through the application of its statutes, on regulated parties.

III. EXPANSIVE JUDICIAL POWER TO CORRECT REGULATORY INJUSTICES

This Part explains how some of the Roberts Court's recent rulings reflect libertarian demands for robust judicial interventions to correct claimed regulatory injustices. Section A returns to *Bruen* to delineate the expansive understanding of judicial power called for by that ruling. Section B examines two free exercise cases assessing the constitutionality of COVID regulations

187. *See supra* notes 146–47 and accompanying text.

188. *303 Creative LLC v. Elenis*, 600 U.S. 570, 581 (2023).

189. *Id.*

190. *Id.* (citation omitted). *See also id.* at 589 (claiming that Colorado was seeking to compel the plaintiff to speak “or face sanctions for expressing her own beliefs, sanctions that may include compulsory participation in ‘remedial . . . training,’ filing periodic compliance reports as officials deem necessary, and paying monetary fines”).

that reveal a similarly capacious understanding of judicial authority.

A. Bruen and Expansive Judicial Power Under the Second Amendment

We have already seen how *Bruen* viewed the statute under challenge exclusively as a font of injustices for regulated parties in ways that are consistent with the values and priorities of libertarian theory.¹⁹¹ The ruling also reflects that theory's call for granting judges expansive powers to correct those claimed injustices.

Bruen contended that lower courts, in Second Amendment cases, had applied means-end tests in ways that were too deferential to the government.¹⁹² For the Court, the application of balancing tests in this context is problematic because they are “judge-empowering.”¹⁹³ As Justice Alito explained in his concurrence, the tests “place[] no firm limits on the ability of judges to sustain any law restricting the possession or use of a gun.”¹⁹⁴ The Court, therefore, rejected balancing tests in Second Amendment cases in favor of a historical test inquiring whether the statute under challenge “is consistent with this Nation's historical tradition of firearm regulation.”¹⁹⁵

The Roberts Court's application of originalist methodology to determine the meaning and scope of constitutional provisions has been the subject of immense attention by commentators.¹⁹⁶ But regardless of whether the Court's originalist

191. See *supra* Part II.A.

192. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 26 (2022) (“If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of ‘intermediate scrutiny’ often defer to the determinations of legislatures.”).

193. *Id.* at 22 (citation omitted).

194. *Id.* at 77 (Alito, J., concurring). Justice Alito provided two examples of judicial opinions in Second Amendment cases that he argued showed inappropriate deference to the government. *Id.* The first was the ruling by the U.S. Court of Appeals in *Bruen*. *Id.* (citing *N.Y. State Rifle & Pistol Ass'n, Inc. v. New York*, 883 F.3d 45 (2d Cir. 2018)). The second was Justice Breyer's dissent in *Heller*. *Id.* (citing *District of Columbia v. Heller*, 554 U.S. 570, 574–76 (2008) (Breyer, J., dissenting)). Professors Darrell Miller and Joseph Blocher have criticized Justice Alito's tiny sample of evidence of undue deference to the government by the lower courts: “Considering that more than 1,000 Second Amendment challenges were resolved in the eight years after *Heller*—and probably more than 1,500 by the time *Bruen* was decided—one might expect more than two examples to sustain such a broad generalization, much less justify the doctrinal chaos *Bruen* threatens to unleash.” Darrell A.H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49, 76.

195. *Bruen*, 597 U.S. at 17.

196. For defenses of originalism, see, e.g., JOHN O. MCGINNIS AND MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (2013); Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215. For critical views, see, e.g., ERWIN CHERMERINSKY, *WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM* (2022); JONATHAN GIENAPP, *AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE* (2024).

methodology in *Bruen* should be praised or criticized,¹⁹⁷ it can hardly be categorized as a judicially restrained one.

Bruen's historical test is not any less "judge-empowering" than the means-end tests that it replaces.¹⁹⁸ *Bruen* grants judges the power to strike down laws that, in their sole discretion, are insufficiently analogous to centuries-old gun regulations.¹⁹⁹ More specifically, *Bruen* empowers judges to void laws on the ground that their scope, purposes, or effects go beyond those of regulations enacted in earlier centuries.²⁰⁰

Bruen, in other words, calls on judges to determine when contemporary gun safety laws are historical outliers. According to the Court, the New York statute was a regulatory outlier because, for example, only six states and the District of Columbia had "may issue" concealed gun licensing laws, while forty-three states had "shall issue" laws.²⁰¹ But, as Professors Darrell Miller and Joseph Blocher note, *Bruen* failed to explain why the number of states, rather than the size and density of the regulated population, was the proper baseline for determining what is a regulatory outlier.²⁰² They add that "[i]f the Court had used population as the relevant denominator, then New York's law is not an outlier—good cause permitting covers fully a quarter of the American population, including some of the highest population densities in the country."²⁰³

The point, for our purposes, is not that the Court necessarily got its regulatory outlier analysis wrong regarding gun licensing laws. Instead, the point is that *Bruen* granted judges unfettered discretion to determine what constitute regulatory outliers. *Bruen*'s originalist methodology may be wise or misguided, but it is nothing if not judge-empowering.²⁰⁴

Critics of *Bruen* have complained that its "history and tradition" standard is indeterminate and vague, and thus fails to give sufficient guidance to lower courts on how to apply it.²⁰⁵ Professor Jacob Charles notes, for example, that

197. For praise of *Bruen*'s originalism, see, e.g., Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433 (2023). For criticism of that originalism, see, e.g., Joseph Blocher & Eric Ruben, *Originalism-By-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99 (2023).

198. *Id.* at 22. See *Vidal v. Elster*, 602 U.S. 286, 324 (2024) (Barrett, J., concurring) ("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.").

199. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 19 (2022).

200. *Id.*

201. *Id.* at 13–14.

202. Miller & Blocher, *supra* note 194, at 65.

203. *Id.*

204. An empirical analysis of reported gun-rights decisions by lower federal courts issued between 2000 and 2023 concluded that the application of *Bruen*'s "history-and-tradition" test granted judges significantly more discretion than the means-end tests it replaced. Rebecca L. Brown, Lee Epstein, & Matt Gulati, *The Constraining Effect of "History and Tradition": A Test*, 713 ANNALS AM. ACAD. POL. & SOC. SCI. 200 (2024).

205. See, e.g., Charles, *supra* note 122, at 76; Miller & Blocher, *supra* note 194, at 62. See also Adam Liptak, *Supreme Court's Gun Rulings Leave Baffled Judges Asking for Help*, N.Y.

“*Bruen* did not define the concept [of tradition] or provide guidance to lower courts tasked with finding traditions.”²⁰⁶ Relatedly, there is no discussion in *Bruen* of how long laws must be in place in order for them to count as a “tradition.”²⁰⁷ Professor Charles adds that *Bruen* does not address, much less answer, questions related to when laws have been enforced with sufficient frequency that they can be said to have gained broad acceptance to be admitted to the constitutionally privileged pantheon of “this Nation’s historical tradition” of firearm regulation.²⁰⁸ As Professors Allen Sumrall and Beau Baumann note, “creating vague judicialized standards that ensure courts are future arbiters” is one of the common features of judicial aggrandizement.²⁰⁹

Bruen also empowers judges by asking them to take positions on contemporary policy disputes. There are ongoing debates, for example, on the extent to which firearm restrictions advance public safety objectives.²¹⁰ There are also disagreements about the extent and effectiveness of individuals’ use of firearms for purposes of self-defense.²¹¹ The New York legislature had made a

TIMES (Sep. 23, 2024), <https://www.nytimes.com/2024/09/23/us/supreme-court-guns-second-amendment.html> (canvassing confusion by lower court judges in applying *Bruen*).

206. Charles, *supra* note 122, at 101.

207. *Id.* at 106.

208. *Id.* at 87, 107. Justice Breyer noted the vagueness and imprecision that inhered in the majority’s methodological approach when he noted that:

In each instance, the Court finds a reason to discount the historical evidence’s persuasive force. Some of the laws New York has identified are too old. But others are too recent. Still others did not last long enough. Some applied to too few people. Some were enacted for the wrong reasons. Some may have been based on a constitutional rationale that is now impossible to identify. Some arose in historically unique circumstances. And some are not sufficiently analogous to the licensing regime at issue here. But if the examples discussed above, taken together, do not show a tradition and history of regulation that supports the validity of New York’s law, what could? Sadly, I do not know the answer to that question. What is worse, the Court appears to have no answer either.

N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen, 597 U.S. 1, 130 (2022) (Breyer, J., dissenting). See also United States v. Rahimi, 602 U.S. 680, 743 (2024) (Jackson, J., concurring) (noting that, following *Bruen*, lower courts “have come to conflicting conclusions on virtually every consequential Second Amendment issue to come before them”) (citation omitted).

209. Allen C. Sumrall & Beau J. Baumann, *Clarifying Judicial Aggrandizement*, 172 U. PA. L. REV. ONLINE 24, 39 (2023).

210. See, e.g., *What Science Tells Us About the Effects of Gun Policies*, RAND (July 16, 2024), <https://www.rand.org/research/gun-policy/key-findings/what-science-tells-us-about-the-effects-of-gun-policies.html> [<https://perma.cc/8MPH-UU7F>] (reviewing the scientific literature on the effectiveness of gun safety regulations); April M. Zeoli, Alexander D. McCourt, & Jennifer K. Paruk, *Effectiveness of Firearm Restriction, Background Checks, and Licensing Laws in Reducing Gun Violence*, 704 ANNALS AM. ACAD. POL. & SOC. SCI. 118, 120 (2022) (“Research has shown that well-implemented firearm policy that is based on evidence-based risk factors can be effective in reducing all types of firearm injury.”).

211. See, e.g., *The Challenges of Defining and Measuring Defensive Gun Use*, RAND (Mar. 2, 2018), <https://www.rand.org/research/gun-policy/analysis/Articles/defensive-gun-use.html> [<https://perma.cc/NGH7-JDVS>] (reviewing empirical studies on defensive gun use); Michael D.

judgment that its licensing regime appropriately balanced public safety considerations against individuals' interests in possessing weapons in public places for self-defense.²¹² *Bruen* replaced that legislative judgment with a judicial one by concluding that individuals are entirely justified in carrying weaponry in public for self-defense because "[m]any Americans hazard greater [crime-related] danger outside the home than in it."²¹³

Similarly, Justice Alito in his concurrence deemed it appropriate to judicially determine the dangers to which individuals expose themselves by being in public without firearms for self-defense.²¹⁴ Justice Alito also took it upon himself to assess the effectiveness of the New York law under challenge, which he found lacking.²¹⁵

Again, my objective here is not to question the particular empirical conclusions reached by the justices in the *Bruen* majority regarding whether the greater availability of and easier access to firearms in public places advances or hinders public safety goals. I am also not here taking issue with their empirical conclusion that the New York law was ineffective in achieving its public safety objectives. My point instead is that a majority of the justices believed it both appropriate and necessary for *judges* to make these assessments.

By granting judges expansive authority to veto legislative judgments on how best to achieve public policy objectives while correcting claimed injustices for regulated parties, *Bruen* closely tracks libertarian values and priorities. In

Anestis et al., *Lifetime and Past-Year Defensive Gun Use*, JAMA NETW. OPEN, Mar. 14, 2025, at 4 (finding that most survey respondents who had access to guns reported lifetime gun violence exposure but not defensive gun use).

212. In his dissent, Justice Breyer noted that "[a] State like New York, which must account for the roughly 8.5 million people living in the 303 square miles of New York City, might choose to adopt different (and stricter) firearms regulations than States like Montana or Wyoming, which do not contain any city remotely comparable in terms of population or density." *Bruen*, 597 U.S. at 91 (Breyer, J., dissenting) (citation omitted). He added that "[f]or a variety of reasons, States may also be willing to tolerate different degrees of risk and therefore choose to balance the competing benefits and dangers of firearms differently." *Id.*

213. *Id.* at 33 (majority opinion). To support this claim, Justice Thomas cited to a ruling by the U.S. Court of Appeals for the Seventh Circuit in which it stated that a "Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower." *Id.* (quoting *Moore v. Madigan*, 702 F.3d 933, 937 (7th Cir. 2012)).

214. As he put it, "[t]oday, unfortunately, many Americans have good reason to fear that they will be victimized if they are unable to protect themselves." *Id.* at 79 (Alito, J., concurring). For Justice Alito, the large number of illegally held guns in New York City, in particular, meant that "some [of its residents] must traverse dark and dangerous streets in order to reach their homes after work or other evening activities." *Id.* at 74.

215. According to Justice Alito, the law under challenge was ineffective because, although "[n]o one apparently knows how many of the 400 million privately held guns [in the United States] are in the hands of criminals, . . . there can be little doubt that many muggers and rapists are armed and are undeterred by" the New York gun licensing statute. *Id.* To Justice Alito, it was also clear that the New York law under challenge was ineffective because one of the mass murders noted by Justice Breyer in his dissent had taken place in Buffalo. "The New York law at issue in this case," Justice Alito reasoned, "obviously did not stop that perpetrator." *Id.* at 72.

doing so, *Bruen* does precisely what libertarian theory calls for: it prioritizes judicial assessments over legislative preferences. *Bruen* grants judges wide-ranging power to void legislative policy choices and thus reflects the expansive understanding of the judicial function called for by libertarian constitutionalism.²¹⁶

*B. COVID Rulings and Expansive Judicial Power Under
the Free Exercise Clause*

The Roberts Court's extensive understanding of judicial power, which is consistent with libertarian theory's values and priorities, was also evident in its emergency docket ruling in *Roman Catholic Diocese of Brooklyn v. Cuomo* (*RCD*).²¹⁷ That dispute arose after New York Governor Andrew Cuomo issued an executive order in the early days of the COVID pandemic intended to curb the transmission of the virus in areas where contagion was spiking.²¹⁸ The order imposed restrictions on a variety of activities in public places, including a 10- or 25-person cap (depending on the contagion rate in the area) on the number of individuals who could congregate in houses of worship.²¹⁹ The question in *RCD* was whether it was sufficiently likely that the executive order violated the Free Exercise Clause to justify the issuing of an emergency injunction pending appeal.²²⁰ By the time the case reached the Court, the order no longer applied to the plaintiffs' houses of worship because of reduced COVID-transmission rates in their areas.²²¹ Nonetheless, the Court, in a per curiam decision and without the benefit of full briefing and argument, enjoined the executive order's enforcement.²²²

RCD determined that the crucial question was whether the religious facilities that were potentially subject to the reimposition of the executive order were comparable, from a COVID-transmission perspective, to secular facilities exempted from that order.²²³ In his dissent, Justice Breyer contended that government officials were in a better position than judges to assess different degrees of risk presented by the different uses of different public places in the middle of a deadly virus epidemic.²²⁴ But a majority of the Court rejected any deference to public health risk assessments made by government officials in the

216. *See supra* Part I.B.

217. 592 U.S. 14 (2020).

218. *Id.* at 15–16.

219. *Id.* at 17.

220. *Id.* at 16–18.

221. *Id.* at 20.

222. *Id.* at 21.

223. *Id.* at 16–18.

224. *Id.* at 37–38 (Breyer, J., dissenting). *See also id.* at 40 (Sotomayor, J., dissenting) (“Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environments in which a contagious virus, now infecting a million Americans each week, spreads most easily.”).

face of a free exercise challenge.²²⁵ The Court issued an injunction after concluding that risks of virus transmission in houses of worship were similar to those in secular facilities exempted from the executive order.²²⁶

RCD did not explain “how the Court should determine which favored classes of businesses [not subject to the challenged regulation] were comparable to worship.”²²⁷ The majority also did not cite to any studies or evidence to support its conclusion that the risks of virus transmission in houses of worship were comparable to those in facilities, such as factories and retail stores, that were not similarly restricted.²²⁸ As a result, it is impossible to assess the factual accuracy of *RCD*'s risk assessments.

What is clear is that the Court, rightly or wrongly, granted itself the authority to reach independent conclusions regarding the different degrees of risk presented by different activities in different public facilities. In the same way that *Bruen* replaced government assessments regarding how best to protect public safety with judicial ones,²²⁹ *RCD* replaced government assessments of how best to protect public health with judicial ones.²³⁰ In concluding that the

225. *Id.* at 16–18 (majority opinion).

226. *Id.*

227. Wendy Parmet, *From the Shadows: The Public Health Implications of the Supreme Court's COVID-Free Exercise Cases*, 49 J.L. MED. & ETHICS 564, 570 (2021) (internal quotation omitted).

228. Wendy Parmet notes that the Court decided *RCD* without “consider[ing] any scientific evidence in determining which secular activities were comparable to religious services.” WENDY E. PARMET, CONSTITUTIONAL CONTAGION: COVID, THE COURTS, AND PUBLIC HEALTH 84 (2023) (footnote omitted). It did not matter to the Court's analysis that, under the challenged executive order, “some secular businesses such as movie theaters [had to] remain closed and were thus treated less favorably than houses of worship.” *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 29 (2020) (Kavanaugh, J., concurring).

229. *See supra* notes 200–16 and accompanying text.

230. Less than three months after *RCD*, the Court in *S. Bay United Pentecostal Church v. Newsom* (*South Bay II*), 141 S. Ct. 716 (2021) (mem.), issued another per curiam emergency order that, without any explanation, prohibited California from enforcing an indoor gathering ban as applied to houses of worship even “when Covid rates are highest.” *Id.* at 721 (Kagan, J., dissenting). The regulation in question applied not just to “attending a worship service,” but also to attending “[a] political meeting; going to a lecture, movie, play, or concert; and frequenting a restaurant, winery, or bar.” *Id.* In criticizing the majority's unexplained action, Justice Elena Kagan highlighted both the extensive public health justifications for the regulation offered by the state, as well as the majority's refusal to justify its granting of the emergency petition. *Id.* at 722. As she noted:

The Court has decided that the State must exempt worship services from the strictest aspect of its regulation of public gatherings. No one can know, from the Court's 19-line order, exactly why: Is it that the Court does not believe the science, or does it think even the best science must give way?

Id. A clearly troubled Justice Kagan added that

[t]he Court's decision leaves state policymakers adrift, in California and elsewhere. It is difficult enough in a predictable legal environment to craft COVID policies that keep communities safe. That task becomes harder still when officials must guess which

determination of what constitutes comparable risks of virus transmission is one for judges to make without accounting for the views of government officials, *RCD* implemented the type of robust understanding of judicial power called for by libertarian theory in the face of a constitutional challenge brought by a regulated party.²³¹

Several months after *RCD*, the Court issued another per curiam order from its emergency docket in *Tandon v. Newsom* enjoining the enforcement of another COVID-related order issued by a governor.²³² The dispute arose after California Governor Gavin Newsom, aiming to reduce virus transmission rates, limited gatherings in private homes to individuals who belonged to no more than three different households.²³³ The plaintiffs wished to worship in their homes with people from more than three households.²³⁴ The challengers argued that the enforcement of the order against them violated their rights under the Free Exercise Clause because California law allowed more people from more households to congregate in certain public settings such as retail stores and restaurants.²³⁵

Tandon concluded that visiting stores and restaurants presented similar risks of virus transmission as did congregating in homes for religious exercise.²³⁶ As in *RCD*,²³⁷ the *Tandon* Court granted itself the authority to make independent judicial assessments regarding comparable risks of virus transmission arising in different settings.²³⁸ Furthermore, as in *RCD*,²³⁹ the Court in *Tandon* did not articulate a standard to determine which activities and settings present comparable risks of transmission, nor did it cite to any studies or evidence related to transmission rates in different places.

What *Tandon* did do is hold that strict scrutiny is required whenever government regulations “treat *any* comparable secular activity more favorably

restrictions this Court will choose to strike down. The Court injects uncertainty into an area where uncertainty has human costs.

Id. at 723.

231. *See supra* Part I.B.

232. 593 U.S. 61 (2021) (per curiam). For similar rulings in free exercise cases challenging COVID-19 restrictions issued from the emergency docket, *see* *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021) (mem.); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020) (mem.).

233. *Tandon*, 593 U.S. at 63.

234. *Id.* at 63–64.

235. *Id.*

236. *Id.* at 63.

237. *See supra* notes 224–32 and accompanying text.

238. *Tandon v. Newsom*, 593 U.S. 61, 63 (2021) (“California treats some *comparable* secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time.”) (emphasis added) (citation omitted).

239. *See supra* notes 228–29 and accompanying text.

than religious exercise.”²⁴⁰ Since some commercial activities in public places were not restricted in the same way as religious practices in private homes, and since the majority concluded that such practices were comparable to commercial activities in terms of virus transmission risks, the Court deemed it necessary to apply strict scrutiny.²⁴¹

Under the Court’s reasoning, the fact that secular and religious activities in homes were restricted in precisely the same ways was irrelevant. This was because the comparability analysis was determined by the “risks various activities pose, not the reasons why people gather.”²⁴² It was for the Court to determine the extent of those risks without any deference to government public health experts.²⁴³ The judicial assessment of the degrees of risk trumped that of government officials, including the politically accountable governor.²⁴⁴

As in my earlier discussion of *Bruen*,²⁴⁵ my objective here is not to establish that the Court was mistaken in its judicial assessments of risks of harm arising from the regulated conduct. Instead, my goal is to bring attention to the extent to which the Court’s methodology and reasoning in *RCD* and *Tandon* placed an immense deal of trust in judges’ abilities to make correct assessments regarding the different COVID contagion risk profiles of different activities in different settings. Once religious plaintiffs in the two disputes claimed that the public health measures substantially burdened their religious exercise (claims that were

240. *Tandon*, 593 U.S. at 62 (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020)).

241. *Id.* at 63, 65. Justice Kagan’s dissent, in reasoning that the appropriate comparator for assessing restrictions on religious gatherings in private homes were secular activities in such homes rather than secular activities in commercial spaces, pointed to the district court’s factual findings “based on the uncontested testimony of California’s public-health experts.” *Id.* at 66 (Kagan, J., dissenting) (citation omitted). She added that, “[n]o doubt this evidence is inconvenient for the *per curiam*’s preferred result. But the Court has no warrant to ignore the record in a case that (on its own view) turns on risk assessments.” *Id.* (citation omitted).

242. *Id.* at 62 (majority opinion) (citation omitted). In criticizing the Court’s COVID cases, Professor Wendy Parmet argues that if the reasons why people congregate are constitutionally irrelevant in free exercise challenges to public health measures, then “as long as hospitals pose as . . . great a risk of transmission as in-person worship (a likely assumption early in a pandemic), a court might treat the two activities as comparable, requiring the state to defend, subject to strict scrutiny, its decision to allow the former but not the latter.” Parmet, *supra* note 227, at 573. See also Leah L. Litman, *Disparate Discrimination*, 121 MICH. L. REV. 1, 5 (2022) (“[I]f a law cannot regulate religious activity if it fails to regulate not-all-that comparable secular activity, then many laws will be vulnerable to constitutional challenges.”).

243. The Court chose to compare virus transmission risks without the assistance of full briefing and argument by the parties. For a critique of the use of the emergency docket in COVID litigation to address free exercise issues, see generally Stephen I. Vladeck, *The Most-Favored Right: COVID, The Supreme Court and the (New) Free Exercise Right*, 15 N.Y.U. J.L. & LIBERTY 699 (2022).

244. Professor Parmet argues that “individuals who object to public health laws on free exercise grounds now hold a trump card. If they can convince the Court that a health order . . . burdens their free exercise of religion, the Court is unlikely to grant deference to either the relevant experts or the factual findings of a lower court. Instead, as in *Lochner*, the Court will rely on its own intuitions to safeguard one type of liberty” PARMET, *supra* note 228, at 90.

245. See *supra* Part III.A.

uncontested by state officials), what controlled were judicial determinations of harms and risks.

This robust understanding of the judicial function reflects the values and priorities of libertarian theory. It assigns to judges the power to repeatedly and vigorously police the government's pursuit of public policy objectives in order to protect the liberty interests of regulated parties. In doing so, it makes it significantly more difficult for government to regulate in order to advance its understandings of public welfare and the common good. As such, it does what libertarian constitutionalism demands.

CONCLUSION

Whether one is pleased or troubled by the ways in which several recent constitutional rulings issued by the Roberts Court reflect constitutive elements of libertarian theory will undoubtedly depend on one's views about the merits of that theory. I believe that however one comes out on normative debates over the appeal of libertarian values and priorities, it is helpful for everyone who participates in those debates to have a clear understanding of the extent to which libertarian ideas are reflected in some of the Roberts Court's most important individual rights rulings of recent years.

It is for this reason that I have sought in this Article to show the degree to which those rulings reflect libertarian theory's deep mistrust of government officials' ability to pursue social and economic objectives without engendering injustices for regulated parties. It is also for this reason that I detailed the ways in which the recent rulings reflect libertarianism's strong and abiding trust in expansive understandings of judicial power as necessary and appropriate means to correct those injustices.

It is a mistake to confine our understandings of libertarian constitutionalism to a *Lochner*-inspired framework that focuses only on constitutional claims for the deregulation of economic marketplaces. As this Article has shown, significant components of the Roberts Court's constitutional jurisprudence reflect libertarian theory's values and priorities without needing to resuscitate *Lochner*'s recognition of substantive due process rights to economic liberty.