

Contents

1	Introduction: The Role of the Courts in Affirming Fundamental Human Rights as Essential to Democracy	1
1.1	Introduction: Overview of the Monograph Objectives	1
1.2	Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health et al. v Jackson Women's Health Organization et al. (United States Supreme Court) No. 19-1392 October Term 2021, Decided June 24, 2022	3
1.2.1	Substantive Due Process Rights: Historic Lessons from Dred Scott on the Risks of Their Disavowal	9
1.3	Selected Comparative Law Cases in Which the Court Rejects Reframing of Fundamental Rights Issues as Purely Political Questions	13
1.3.1	Sejdic & Finci v. Bosnia and Herzegovina, European Court of Human Rights (Applications Nos. 27996/06 and 34836/06) Grand Chamber Judgement 22 December 2009	13
1.3.2	New Zealand Youth Voting Rights Case	16
1.4	Concluding Comment	22
	Materials	23
	United States Supreme Court Case Law	24
	Canadian Case Law	25
	European Case Law	25
	New Zealand Case Law	25
	References	25
2	Litigating the Politics of Religious Conservatism in Public Life	27
2.1	303 Creative, Lori Smith v Aubrey Elenis et al. (United States Supreme Court)	27
2.2	Comparative Law Perspectives on Free Expression and Internet Site Access	52

2.2.1	Lee v United Kingdom (Application No. 18860/19) European Court of Human Rights Judgment of 23 March 2020	52
2.2.2	Gachechiladze v. Georgia (Application 2591/19) European Court of Human Rights, Judgment of 22 July 2021	62
2.2.3	Case of Cengiz and Others v Turkey (Applications 48226/10 and 14027/11) European Court of Human Rights Judgement of 1 December, 2015	64
2.2.4	Orlandi and Others v Italy European Court of Human Rights (Application No. 26431/12) Judgment of 14 December 2017 and Vallianatos and Others v Greece European Court of Human Rights (Applications 29381/09 and 32684/09) Grand Chamber Judgment of November 7, 2013	65
2.2.5	Concluding Comment	66
	References	67
	Materials	67
	United States Supreme Court Cases	68
	European Court of Human Rights Cases	68
	European Court of Justice Cases	69
	United Kingdom Supreme Court Cases	69
3	US Education Culture Wars: Freedom of Expression, Race, Gender and Revisionist History	71
3.1	Barring Discussions of Critical Race Theory and Gender in the Classroom: Contributions to Revisionist History	71
3.1.1	Introduction	71
3.1.2	Black Emergency Response Team et al. v John O'Connor, Attorney General of Oklahoma et al. US District Court for the Western District of Oklahoma Case No. 5:21-cv-1022-G (Before Hon. Charles B. Goodwin)	72
3.1.3	The Oklahoma Law in Dispute That Constrains Discussion on Race and Gender in the Classroom	73
3.2	Comparative Law Perspectives on Freedom of Speech, Discrimination and Hate Speech	76
3.2.1	Carl Jóhann Lillíendahl v Iceland (European Court of Human Rights) (Application No. 29297/18) Judgment 11 June 2020	76
3.2.2	Pastors v Germany (European Court of Human Rights) (Application No. 5525/14) Judgment 3 October 2019	78

3.2.3	Kaboglu and Oran v Turkey (European Court of Human Rights) (Application Nos. 1759/08, 50766/10 and 50782/10) Judgment 30 October 2018	81
3.3	Revisionist History as Reflected in the Struggle to Eliminate Affirmative Action in US University Admissions	83
3.3.1	Introduction	83
3.3.2	(United States Supreme Court) Students for Fair Admissions, Inc. v President and Fellows of Harvard University: On Whether ‘Colour Blind’ University Admissions Is Possible or Equitable	85
3.3.3	(United States Supreme Court) Students for Fair Admissions, Inc. v President and Fellows of Harvard University: Overturning Precedent	89
3.3.4	The Purported ‘Separate but Unequal’ Issue in the University Fair Admission Cases	91
3.4	Comparative Law Perspective on Affirmative Action	94
3.4.1	Judgment of the European Court of Justice 11 November 1997 Case C-409/95: Hellmut Marschall v Land Nordrhein-Westfalen (Germany) Reference for a Preliminary Ruling Regarding Affirmative Action for Women	94
3.4.2	Affirmative Action as Remedial to Address Historical Injustice: A Notion Incorporated into the Canadian Charter of Rights and Freedoms	98
3.5	Concluding Comment on the Harvard Students for Fair Admissions Case	100
3.6	Lawyers for Civil Rights’ Complaint Concerning Harvard’s Legacy Admissions	101
	Materials	101
	United States Supreme Court Cases	103
	United States Lower Court Cases	104
	European Court of Human Rights Cases	105
	European Court of Justice Cases	105
	References	105

4	The Abortion Culture War and De-Democratization: States as Final Arbiters of Fundamental Human Rights and the Privatization of Abortion Restriction Enforcement	107
4.1	Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health et al. v Jackson Women’s Health Organization et al. United States Supreme Court 597 U. S. ____ (2022)	107
4.2	Comparative Law Perspectives on the Right to Privacy and the Abortion Issue	122
4.2.1	Introduction	122

4.2.2	Contemporary Highly Restrictive Polish Law on Abortion	123
4.2.3	SFK v Russia (Application 5578/12) European Court of Human Rights Judgment 11 October 2022	126
4.2.4	RR v Poland (Application 27617/04) Judgment May 26, 2011 European Court of Human Rights: Highly Restrictive Abortion Law as an Affront to Human Dignity	128
4.3	Concluding Comment	129
	Materials	129
	United States Supreme Court Cases	130
	United States Lower Court Cases	131
	European Court of Human Rights Cases	131
	UN Human Rights Committee	132
	UN Committee on the Elimination of Discrimination Against Women	132
	References	132
5	US Education Culture Wars: The Right in a Democracy to Exposure to a Plurality of Views	135
5.1	Kennedy v Bremerton School District (Supreme Court of the United States) No. 21-418. Argued April 25, 2022—Decided June 27, 2022	135
5.2	City of Ocala, Florida v Art Rojas et al. (Supreme Court of the United States) On Petition for a Writ of Certiorari to the US Court of Appeals for the Eleventh District No. 22-278. Decided March 6, 2023	141
5.3	Comparative Law: The Freedom of Expression of Public Authorities and the Vulnerability of Students as Audience	144
5.3.1	Perovy v Russia Application 47429/09 (European Court of Human Rights) Judgment 19 April 2021	144
5.3.2	Konrad v. Germany, European Court of Human Rights (Fifth Section), (Application 35504/0311) September 2006	147
5.4	The Scope of Children's Right to Education: A Contrasting Landmark US Supreme Court Case: Yoder v Wisconsin 406 U.S. 205 (1972)	150
5.5	Lautsi and Others v Italy	151
5.5.1	Lautsi and Others v Italy: Procedural History in the Domestic Courts and the Chamber of the European Court of Human Rights	151
5.5.2	Lautsi and Others v Italy: European Court of Human Rights, Grand Chamber Judgement	153

5.6	Grzelak v Poland European Court of Human Rights (Application 7710/02) Judgment 15 June 2010	157
5.7	Concluding Comment	159
	References	160
	Materials	160
	United States Supreme Court Cases	160
	US Lower Court Cases	161
	European Court of Human Rights Cases	161
6	Selected US Culture Wars Involving the Scope of Authorities of Competing Sovereign Powers: The Court's Role	163
6.1	Introduction	163
6.2	Competing Sovereign Powers in the US Indigenous Child Welfare Context: Brackeen v. Haaland 994 F.3d 249 (<i>en banc</i> Fifth Circuit Court of Appeals) Decided Apr 6, 2021	167
6.2.1	Haaland v Brackeen 599 U. S. ____ (2023) (Supreme Court of the United States)	171
6.2.2	Indigenous Tribal Status as a 'Political Status'	175
6.2.3	Sidestepping the Foundational Equal Protection Rights Issue in Haaland	176
6.3	Comparative Law: Commentary on Attorney General of Québec, et al. v. Attorney General of Canada, et al., Quebec Court of Appeal Advisory Opinion	186
6.4	Competing US Sovereign Powers and 'The Independent State Legislature Theory'	191
6.4.1	Moore v Harper (North Carolina's Independent State Legislature Challenge)	191
6.4.2	Singleton et al., v. Allen et al. and Milligan et al., v Allen et al., and Allen v. Milligan et al. (Alabama's Independent State Legislature Challenge)	192
6.5	Concluding Comment	193
	Materials	194
	United States Supreme Court Cases	195
	United States Lower Court Cases	196
	Canadian Case Law	196
	Reference	196