

*First Amendment — Federal Trademark Law —  
History and Tradition — Vidal v. Elster*

“History and tradition” has become a dominant mode of constitutional interpretation at the Supreme Court in recent Terms.<sup>1</sup> But, while the Court’s conservative Justices largely agree that history *should* be used to interpret the Constitution,<sup>2</sup> there is still disagreement as to *how* to do so. This Term, a dispute over a restriction on trademark registration at the Supreme Court generated a disproportionate amount of attention, as a potential crack-up formed among the conservative majority over the proper role of history in constitutional adjudication.<sup>3</sup> The case, *Vidal v. Elster*,<sup>4</sup> was the third in a trio of First Amendment challenges to provisions of the Lanham Act,<sup>5</sup> the primary federal trademark law, to reach the Supreme Court in recent years.<sup>6</sup> Although the Court unanimously rejected the challenge to the Lanham Act’s “names clause,”<sup>7</sup> holding it consistent with the First Amendment, the majority neglected to provide meaningful guidance for how courts should address future challenges to viewpoint-neutral, but content-based trademark regulations. The Court’s reliance on historical analogy without providing a clear framework for future cases may lead to uncertainty and inconsistency in lower courts.

In 2018, Steve Elster attempted to register a trademark for the phrase “TRUMP TOO SMALL” to print on T-shirts.<sup>8</sup> The Patent and Trademark Office (PTO) denied Elster’s registration because the Lanham Act prohibits registration of a trademark that “[c]onsists of or

---

<sup>1</sup> See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (relying on history and tradition to overrule *Roe v. Wade*, 410 U.S. 113 (1973)); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2128, 2130, 2156 (2022) (applying a “history and tradition” test for permissible regulations of the right to bear arms recognized by the Second Amendment); *United States v. Rahimi*, 144 S. Ct. 1889, 1897–98 (2024) (refining the history and tradition test from *Bruen*); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2434 (2022) (Sotomayor, J., dissenting) (accusing the majority of replacing the standard of review for Establishment Clause claims with a “history and tradition” test).

<sup>2</sup> See *Kennedy*, 142 S. Ct. at 2428; *Bruen*, 142 S. Ct. at 2126.

<sup>3</sup> See, e.g., Noah Feldman, Opinion, *Supreme Court’s Far Right Faces a Free-Speech Problem*, BLOOMBERG (June 18, 2024, 10:00 AM), <https://www.bloomberg.com/opinion/articles/2024-06-18/us-supreme-court-conservatives-face-a-free-speech-problem> [<https://perma.cc/HJ63-D9QC>].

<sup>4</sup> 144 S. Ct. 1507 (2024).

<sup>5</sup> 15 U.S.C. §§ 1051–1141n.

<sup>6</sup> See *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (finding facially unconstitutional, under the Free Speech Clause, a provision of the Lanham Act prohibiting the registration of trademarks disparaging any living or dead person); *Iancu v. Brunetti*, 139 S. Ct. 2294, 2297 (2019) (finding the Act’s prohibition on the registration of “immoral” or “scandalous” trademarks violates the First Amendment).

<sup>7</sup> 15 U.S.C. § 1052(c).

<sup>8</sup> *In re Elster*, 26 F.4th 1328, 1330 (Fed. Cir. 2022). The phrase, which brings to mind a 2016 presidential primary debate exchange between then-candidate Donald Trump and Senator Marco Rubio, is meant to “convey[] that some features of President Trump and his policies are diminutive.” *Id.* (alteration in original).

comprises a name, portrait, or signature identifying a particular living individual except by his written consent.”<sup>9</sup> The Trademark Trial and Appeal Board affirmed the denial and rejected Elster’s argument that this “names clause”<sup>10</sup> violated his First Amendment speech rights.<sup>11</sup>

The Federal Circuit reversed and held that the names clause violated the First Amendment.<sup>12</sup> Writing for the panel, Judge Dyk said that while the names clause is not viewpoint discriminatory like the provisions of the Lanham Act the Supreme Court recently held unconstitutional in *Matal v. Tam*<sup>13</sup> and *Iancu v. Brunetti*,<sup>14</sup> “as applied in this case, [the names clause] involve[d] *content-based* discrimination that [was] not justified by either a compelling or substantial government interest.”<sup>15</sup> The court rejected the government’s arguments that restrictions on trademark registration are conditions on government benefits or akin to speech restrictions in public fora.<sup>16</sup> The court declined to decide whether a “viewpoint-neutral, content-based restriction[] in the trademark area” is subject to strict scrutiny or intermediate scrutiny,<sup>17</sup> holding that regardless of the test applied “the government does not have a privacy or publicity interest in restricting speech critical of government officials or public figures in the trademark context.”<sup>18</sup> The Supreme Court granted certiorari.<sup>19</sup>

The Supreme Court reversed.<sup>20</sup> Writing for the Court, Justice Thomas<sup>21</sup> began by distinguishing between content-based and content-neutral regulations of speech: “A content-based regulation ‘target[s] speech based on its communicative content,’ restricting discussion of a subject matter or topic.”<sup>22</sup> In general, content-based regulations of speech are “presumptively unconstitutional and may be justified only if the government proves that [they are] narrowly tailored to serve compelling state interests.”<sup>23</sup> Justice Thomas noted Supreme Court

---

<sup>9</sup> *Id.* at 1331 (alteration in original) (quoting 15 U.S.C. § 1052(c)). The PTO separately denied the registration under the Lanham Act’s false association clause. *Id.* at 1330; *see also* 15 U.S.C. § 1052(a).

<sup>10</sup> *Elster*, 144 S. Ct. at 1513.

<sup>11</sup> *Id.*

<sup>12</sup> *In re Elster*, 26 F.4th at 1329–30.

<sup>13</sup> 137 S. Ct. 1744 (2017).

<sup>14</sup> 139 S. Ct. 2294 (2019).

<sup>15</sup> *In re Elster*, 26 F.4th at 1331 (emphasis added).

<sup>16</sup> *Id.* at 1332–33.

<sup>17</sup> *Id.* at 1333.

<sup>18</sup> *Id.* at 1339.

<sup>19</sup> *Elster*, 144 S. Ct. at 1514.

<sup>20</sup> *Id.* at 1524.

<sup>21</sup> Justice Thomas was joined by Justices Alito and Gorsuch in full, by Chief Justice Roberts and Justice Kavanaugh as to Parts I, II, and IV, and by Justice Barrett as to Parts I, II-A, and II-B.

<sup>22</sup> *Elster*, 144 S. Ct. at 1514 (alteration in original) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)).

<sup>23</sup> *Id.* (quoting *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018)).

precedents further distinguish “viewpoint discrimination” as a “particularly ‘egregious form of content discrimination’” that targets not just subject matter but also views taken on a subject.<sup>24</sup> Both content- and viewpoint-based distinctions are analyzed under heightened scrutiny, “though viewpoint discrimination’s ‘violation of the First Amendment is . . . more blatant.’”<sup>25</sup>

Justice Thomas then distinguished the names clause from the provisions of the Lanham Act held to be viewpoint discriminatory in *Tam* and *Brunetti*. In *Tam*, the Lanham Act’s bar on registering disparaging trademarks violated the First Amendment “because it prohibited trademarks based only on one viewpoint: ‘[g]iving offense.’”<sup>26</sup> In *Brunetti*, the Court held the bar on scandalous or immoral trademarks unconstitutional for the same reason.<sup>27</sup> Unlike those provisions, the Court held “[t]he names clause does not facially discriminate against any viewpoint” in that it prevents the trademarking of an individual’s name without their consent regardless of the message the registrant wishes to convey.<sup>28</sup> Though the Court found the names clause was not viewpoint discriminatory, the Court still found the clause to be content based because the applicability of the clause “turns on the content of the proposed trademark — whether it contains a person’s name.”<sup>29</sup>

Although content-based regulations of speech are presumptively unconstitutional, Justice Thomas noted “trademark rights have always coexisted with the First Amendment, despite the fact that trademark protection necessarily requires some content-based distinctions.”<sup>30</sup> This fact “counsel[ed] against a *per se* rule of applying heightened scrutiny to viewpoint-neutral, but content-based trademark regulations.”<sup>31</sup> Justice Thomas then recounted some of the early history of trademark restrictions in England and the United States,<sup>32</sup> observing that many of

<sup>24</sup> *Id.* (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

<sup>25</sup> *Id.* (alteration in original) (quoting *Rosenberger*, 515 U.S. at 829).

<sup>26</sup> *Id.* (alteration in original) (quoting *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality opinion)).

<sup>27</sup> *Id.* (citing *Iancu v. Brunetti*, 139 S. Ct. 2294, 2297 (2019)).

<sup>28</sup> *Id.* The Court also rejected Elster’s argument that the names clause is viewpoint discriminatory in practice, even if not facially. *Id.* at 1515. While the Court acknowledged that a facially neutral law “can discriminate based on viewpoint in its practical operation,” *id.* (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992)), here, there were many hypothetical reasons why a person would refuse to consent to their name’s use in a trademark separate from whether the trademark is complimentary or disparaging, *id.* (“Even when the trademark’s message is neutral or complimentary, a person may withhold consent to avoid any association with the goods, or to prevent his name from being exploited for another’s gain.”).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (citing *Tam*, 137 S. Ct. at 1744; *Trade-Mark Cases*, 100 U.S. 82, 92 (1879)).

<sup>31</sup> *Id.*

<sup>32</sup> According to Justice Thomas, “[m]uch of early American trademark law ‘was lifted essentially from that of England.’” *Id.* at 1516 (quoting Beverly W. Pattishall, *The Constitutional Foundations of American Trademark Law*, 78 TRADEMARK REP. 456, 457 (1988)).

those restrictions were triggered by the content of the mark.<sup>33</sup> The Court also acknowledged there was no federal trademark law in the early United States, and “trademark law fell largely within ‘the province of the States’ for the 18th and most of the 19th century.”<sup>34</sup> In 1870, Congress enacted its first federal trademark law “‘to provide a degree of national uniformity’ for trademark protection.”<sup>35</sup> The initial 1870 law included “prohibitions on what could be protected as a trademark,” and “[t]hroughout its development, trademark law [continued to] require[] content-based distinctions.”<sup>36</sup> Justice Thomas called attention to the fact that when Congress enacted the Lanham Act in 1946, the Act included restrictions on what could be registered: For example, it “bar[red] the registration of ‘a mark which so resembles [another’s] mark . . . as to be likely . . . to cause confusion, or to cause mistake, or to deceive.’”<sup>37</sup> As Justice Thomas pointed out, “[i]t is impossible to determine whether one trademark is the same as (or confusingly similar to) another without looking at the content of the two marks.”<sup>38</sup> Citing the “uniquely content-based nature of trademark regulation” and the historical pedigree of such regulations, the Court declined to apply heightened scrutiny to content-based trademark restrictions.<sup>39</sup>

Rather than “delineate an exhaustive framework” for when content-based trademark restrictions violate the First Amendment, Justice Thomas looked to the “history and tradition” of similar trademark restrictions to conclude that the names clause was constitutional.<sup>40</sup> First, the Court identified a common law history “restrict[ing] the trademarking of names”: A person could not trademark a name — even his own — by itself and “could not use a mark *containing* his name to the exclusion of a person with the *same* name.”<sup>41</sup> The Court then noted that this common law understanding was ported into federal statutory trademark law.<sup>42</sup> Justice Thomas pointed out how the names clause “reflects trademark law’s historical rationale of identifying the source of goods” and “respects the established connection between a trademark and its protection of the markholder’s reputation.”<sup>43</sup> Because of this longstanding tradition, the Court held the names clause constitutional.<sup>44</sup>

---

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (quoting *Tam*, 137 S. Ct. at 1751).

<sup>35</sup> *Id.* at 1517 (quoting *Tam*, 137 S. Ct. at 1751–52).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 1518 (second alteration in original) (quoting 15 U.S.C. § 1052(d)).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1519 (first emphasis added).

<sup>42</sup> *Id.* at 1520.

<sup>43</sup> *Id.* at 1521.

<sup>44</sup> *Id.* at 1523–24. Justice Thomas also briefly addressed the arguments in Justices Sotomayor’s and Barrett’s concurrences, arguing that the analogies they would apply to trademark

Justice Kavanaugh concurred in part.<sup>45</sup> He wrote separately to note that a “viewpoint-neutral, content-based trademark restriction might well be constitutional even absent such a historical pedigree.”<sup>46</sup>

Justice Barrett also concurred in part, joined in full by Justice Kagan and joined partially by Justices Sotomayor and Jackson.<sup>47</sup> Justice Barrett noted her disagreement with the Court’s reasoning, in particular its use of “history and tradition” to resolve the constitutionality of the names clause.<sup>48</sup> First, Justice Barrett pointed out that the Court’s historical evidence “consisting of loosely related cases . . . does not establish a historical analogue for the names clause,” and second, she questioned the Court’s methodology of “hunting for historical forebears on a restriction-by-restriction basis.”<sup>49</sup> Rather, Justice Barrett would have upheld the names clause, and any such restrictions, “whether new or old, . . . so long as they are reasonable in light of the trademark system’s purpose.”<sup>50</sup> For Justice Barrett, the history of courts and legislatures discriminating based on content in the trademark context was “necessary for [trademark’s] purposes and limitations.”<sup>51</sup> Thus, her agreement with the majority that the Court should “not treat content-based trademark registration restrictions as presumptively unconstitutional” followed from a conviction that content discrimination is essential to effectuating the purpose of trademark law, rather than from the weight of any particular historical antecedent.<sup>52</sup> Though she would not subject content-based trademark restrictions to strict scrutiny, Justice Barrett would still subject them to “judicial review.”<sup>53</sup> She would analyze the trademark restrictions as a kind of limited public forum, where the courts evaluate restrictions as to “whether they are reasonable in light of the purpose which the forum at issue serves.”<sup>54</sup> Under this test, Justice Barrett would uphold the names clause.<sup>55</sup>

Justice Barrett further criticized the majority’s “history and tradition” methodology. She argued that the historical “record [did] not support the Court’s conclusion,” and she also disagreed with the Court’s treatment of “tradition as dispositive of the First Amendment issue.”<sup>56</sup>

---

restrictions — viewing such restrictions as a condition on government benefits or as constituting a limited public forum — were inapt. *Id.*

<sup>45</sup> Justice Kavanaugh was joined by Chief Justice Roberts.

<sup>46</sup> *Id.* at 1524 (Kavanaugh, J., concurring in part).

<sup>47</sup> *Id.* (Barrett, J., concurring in part). Justice Sotomayor joined as to Parts I, II, and III-B, and Justice Jackson joined as to Parts I and II.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 1524–25.

<sup>50</sup> *Id.* at 1525.

<sup>51</sup> *Id.* at 1527 (alteration in original) (quoting *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543 (2001)).

<sup>52</sup> *Id.* at 1528.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (quoting *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 49 (1983)).

<sup>55</sup> *Id.* at 1529.

<sup>56</sup> *Id.*

For one, Justice Barrett did not see the majority's common law evidence as analogous to the names clause.<sup>57</sup> She further identified several nineteenth-century state court rulings allowing for the registration of trademarks including famous persons' names to denote fanciness.<sup>58</sup> Justice Barrett went on to say that "[e]ven if the Court's evidence were rock solid, [she] still would not adopt this approach."<sup>59</sup> She noted that while "[r]elying exclusively on history and tradition may seem like a way of avoiding judge-made tests . . . a rule rendering tradition dispositive is *itself* a judge-made test."<sup>60</sup> Thus, Justice Barrett would have proceeded by general principle, writing that the Court's "approach merely delays the inevitable: Eventually, the Court will encounter a restriction without a historical analogue and be forced to articulate a test for analyzing it."<sup>61</sup>

Justice Sotomayor concurred in the judgment, joined by Justices Kagan and Jackson.<sup>62</sup> Justice Sotomayor would eschew the majority's focus on history and instead decide the case based on "trademark law and settled First Amendment precedent."<sup>63</sup> In Justice Sotomayor's view, federal trademark registration confers a benefit on the trademark holder, and thus the government can condition that benefit on "reasonable, viewpoint-neutral content regulations."<sup>64</sup> Echoing Justice Barrett, Justice Sotomayor criticized the Court's reliance on history, arguing that the "back-and-forth [between Justices Thomas and Barrett] highlights the indeterminacy of the Court's history-and-tradition inquiry."<sup>65</sup> She further criticized the majority for drawing conclusions from historical evidence not presented by the litigants or the court below.<sup>66</sup>

The Court unanimously reached the reasonable conclusion that the federal government can set limitations, like the names clause, on trademark registration. Though the majority of the Court signed onto Justice Thomas's opinion relying on history and tradition, and all of the Court's

---

<sup>57</sup> *Id.* at 1530 ("In *Thaddeus Davids Co. v. Davids Mfg. Co.*, this Court explained that the 1905 federal trademark statute contained 'a fairly complete list of the marks used by dealers in selling their goods, which are not valid trademarks at common law.' Notably, this statute did not include the names clause or any rough equivalent." (citations omitted) (quoting *Thaddeus Davids Co. v. Davids Mfg. Co.*, 233 U.S. 461, 467 (1914))).

<sup>58</sup> *Id.* (citing *Barrows v. Knight*, 6 R.I. 434, 438 (1860); *Messerole v. Tynberg*, 4 Abb. Pr. (n.s.) 410, 414 (N.Y. Ct. Com. Pl. 1868); *Medlar & Holmes Shoe Co. v. Delsarte Mfg. Co.*, 46 A. 1089, 1089 (N.J. Ch. 1900)).

<sup>59</sup> *Id.* at 1531.

<sup>60</sup> *Id.* at 1532.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* (Sotomayor, J., concurring in the judgment).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1533 (quoting *Iancu v. Brunetti*, 139 S. Ct. 2294, 2317 (2019) (Sotomayor, J., concurring in part and dissenting in part)).

<sup>65</sup> *Id.* at 1534.

<sup>66</sup> *Id.* ("That stark departure from settled principles of party presentation and adversarial testing in favor of in-chambers historical research by nonhistorians raises more questions than answers." (citing *Maslenjak v. United States*, 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring in part and concurring in the judgment))).

conservative Justices have expressed a willingness to use history in constitutional jurisprudence,<sup>67</sup> the diverging methodologies in *Elster* highlight the difficulty in operationalizing history as a methodological tool. While attempting to ground constitutional interpretation in history, the majority's approach in *Elster* — relying exclusively on history rather than establishing a generalizable framework for lower courts to resolve future cases — may ultimately undermine the goals originalism initially sought to achieve: consistency, predictability, and judicial restraint.

Since its debut as a premier method of constitutional jurisprudence,<sup>68</sup> history and tradition has operated differently across contexts. For example, in *New York State Rifle & Pistol Ass'n v. Bruen*,<sup>69</sup> the Court looked for Founding-era regulations to determine the contours of the Second Amendment right,<sup>70</sup> while in *Dobbs v. Jackson Women's Health Organization*,<sup>71</sup> the Court looked at pre- and post-ratification history to refute the existence of a tradition sufficient to support an unenumerated right.<sup>72</sup> Thus, in the Second Amendment context, history and tradition operated to delineate the scope of a right (previously demarcated via originalist methodologies<sup>73</sup>), whereas in the substantive due process context, history and tradition would have been necessary to support the existence of a right. In *Elster*, the Court looked for pre- and post-ratification history to determine the contours of the Free Speech Clause.<sup>74</sup>

While some originalists may argue that *Bruen*'s methodology is compatible with originalism, its use in *Elster* is distinct, making history and tradition's newest manifestation an unhappy pairing with originalist principles and goals. Professors Lawrence Solum and Randy Barnett note that, consistent with originalism, history and tradition could be used as a “method for constitutional construction in cases of underdeterminacy.”<sup>75</sup> They contrast this methodological approach with one that treats history and tradition as the “direct source of constitutional construction,” especially one that relies on “practices arising well after the adoption of the constitutional provision.”<sup>76</sup> History and tradition in *Elster* was more like this second approach: Justice Thomas did not claim

---

<sup>67</sup> Randy E. Barnett, Opinion, *Somewhere, Robert Bork Is Smiling*, WALL ST. J. (July 10, 2024, 4:24 PM), <https://www.wsj.com/articles/somewhere-robert-bork-is-smiling-originalism-court-gorsuch-constitution-9571dd51> [<https://perma.cc/C9GT-9ZG8>]; see also *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

<sup>68</sup> See Emily Bazelon, *How “History and Tradition” Rulings Are Changing American Law*, N.Y. TIMES MAG. (Apr. 29, 2024), <https://www.nytimes.com/2024/04/29/magazine/history-tradition-law-conservative-judges.html> [<https://perma.cc/W3SL-86DG>].

<sup>69</sup> 142 S. Ct. 2111 (2022).

<sup>70</sup> *Id.* at 2130–31.

<sup>71</sup> 142 S. Ct. 2228 (2022).

<sup>72</sup> *Id.* at 2248–53.

<sup>73</sup> *District of Columbia v. Heller*, 554 U.S. 570, 614, 625 (2008).

<sup>74</sup> *Elster*, 144 S. Ct. at 1516–17.

<sup>75</sup> Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 448 (2023).

<sup>76</sup> *Id.* at 449.

to use history and tradition as evidence of the original meaning of the Free Speech Clause. Nor could he, because as Justice Barrett pointed out, “federal trademark law did not exist at the founding.”<sup>77</sup> In *Elster*, history and tradition operated on their own as sources of the judicial decision — the Court “present[ed] tradition itself as the constitutional argument.”<sup>78</sup> Thus, unlike the Court’s methodology in *Bruen*,<sup>79</sup> the use of history and tradition in *Elster* operated as an independent constitutional theory. This theory cannot be squared with originalism, for it abandons the core notion that judges should be constrained by the original meaning of the Constitution.<sup>80</sup>

There is also fundamental tension between the Court’s approach in *Elster* and the putative goals of the originalist project of the last several decades. Legal conservatives have long extolled originalism as a methodology that eliminates judicial discretion by providing judges with neutral principles by which to resolve legal disputes.<sup>81</sup> For then-Professor Robert Bork, the goal of his proto-originalism<sup>82</sup> was to “take from the [Constitution] rather specific values that text or history show the framers actually to have intended and *which are capable of being translated into principled rules*.”<sup>83</sup> Similarly, in 1989, Justice Scalia differentiated his jurisprudential preference for clear rules against a “common-law, discretion-conferring approach” that he considered “ill suited . . . to a legal system in which the supreme court can review only an insignificant proportion of the decided cases.”<sup>84</sup> Now, with originalism in many ways ascendant at the Supreme Court,<sup>85</sup> the conservative majority has to operationalize historical methodology. But in *Elster*, Justice Thomas’s approach closer resembled a kind of common law jurisprudence than a

---

<sup>77</sup> *Elster*, 144 S. Ct. at 1525 (Barrett, J., concurring in part).

<sup>78</sup> *Id.* at 1532.

<sup>79</sup> *Bruen*’s methodology can be reconciled with originalism as a method for discerning original public meaning, Barnett & Solum, *supra* note 75, at 446–48, or as a “method for constitutional construction,” *id.* at 448.

<sup>80</sup> *Id.* at 453.

<sup>81</sup> In 1971, then-Professor Robert Bork criticized the Warren Court for its unprincipled decision-making and endorsed a mode of constitutional interpretation based on textual and historical rigidity. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 9 (1971) (“We are left with no idea of the sweep of the right of privacy and hence no notion of the cases to which it may or may not be applied in the future. The truth is that the Court could not reach its result in [*Griswold v. Connecticut*, 381 U.S. 479 (1965)] through principle.”).

<sup>82</sup> Bork’s 1971 article “is sometimes considered the opening move in the development of contemporary originalist theory.” Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 12, 16 (Grant Huscroft & Bradley W. Miller eds., 2011).

<sup>83</sup> Bork, *supra* note 81, at 17 (emphasis added).

<sup>84</sup> Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 *U. CHI. L. REV.* 1175, 1178 (1989).

<sup>85</sup> See Elias Neibart, *Methodological Convergence in Community Financial Services*, *HARV. L. REV. BLOG* (May 26, 2024), <https://harvardlawreview.org/blog/2024/05/methodological-convergence-in-community-financial-services> [<https://perma.cc/Y5V4-4ZZV>].

“law of rules.”<sup>86</sup> It requires judges to look for historical analogues in the case at hand without providing a generalizable framework for how to analyze potential analogues.

Justice Thomas’s quick dismissal of Justice Sotomayor’s and Justice Barrett’s proposed frameworks was sorely lacking in explanation and was equally applicable to his own opinion. Justice Thomas gave two main justifications for rejecting his colleagues’ approaches: First, the analogies they offered were not “compelling”;<sup>87</sup> and second, under either approach, the “test would boil down to what a judge believes is ‘reasonable in light of the purpose’ of trademark law.”<sup>88</sup> While the first criticism is a question of fit, the second is one of principle. Justice Thomas believed the frameworks offered would give too much discretion to judges to determine what is reasonable.<sup>89</sup> This position largely aligns with the stated goal of generations of originalists.<sup>90</sup> However, Justice Thomas’s methodology, which ignores the indeterminacy of history and gives no guidance for lower courts as to which historical evidence is sufficient to validate “presumptively unconstitutional”<sup>91</sup> content-based restrictions,<sup>92</sup> is plagued by the same problems he identifies in discretion-conferring reasonableness tests.<sup>93</sup>

In her concurrence in this Term’s *United States v. Rahimi*,<sup>94</sup> Justice Jackson highlighted the difficulty that lower courts have had in applying

---

<sup>86</sup> For an approach to constitutional interpretation that gives judges the latitude to derive the law from “understandings that evolve over time,” see David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996).

<sup>87</sup> *Elster*, 144 S. Ct. at 1523.

<sup>88</sup> *Id.* (quoting *id.* at 1535 (Sotomayor, J., concurring in judgment)).

<sup>89</sup> Justice Thomas has previously argued against jurisprudential methods conferring too much discretion on judges. See Clarence Thomas, Assoc. Just., U.S. Sup. Ct., *Be Not Afraid*, Speech at the American Enterprise Institute, Washington, D.C. (Feb. 13, 2001), <https://americanradioworks.publicradio.org/features/sayitplain/cthomas.html> [<https://perma.cc/JB58-NZDZ>] (“[J]udges should adopt principles of interpretation and methods of analysis that reduce judicial discretion. Reducing discretion is the key to fostering judicial impartiality. The greater the room for judicial discretion, the greater the temptation to write one’s personal opinions into the law.”).

<sup>90</sup> *E.g.*, Scalia, *supra* note 84, at 1179. Justice Scalia believed that adopting a general rule like originalism would restrain lower courts and himself because “[i]f the next case should have such different facts that [his] political or policy preferences regarding the outcome are quite the opposite, [he would] be unable to indulge those preferences” having already “committed [himself] to the governing principle.” *Id.*

<sup>91</sup> *Elster*, 144 S. Ct. at 1514 (quoting *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018)).

<sup>92</sup> *Id.* at 1514.

<sup>93</sup> See Noah Feldman, Opinion, *The Supreme Court’s Religious Crusade Found Its Soldiers*, BLOOMBERG (July 14, 2024, 8:00 AM), <https://www.bloomberg.com/opinion/articles/2024-07-14/supreme-court-religion-ruling-rallied-louisiana-and-oklahoma-republicans?srnd=undefined> [<https://perma.cc/49AR-PP47>] (“The Gorsuch opinion in the [*Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022)] case operated like a bat signal to conservative Christian activists . . . . Go right ahead and enact laws and practices that would have been unconstitutional before. When they are inevitably challenged, the lower courts will have to start from scratch and try to ascertain what history and tradition requires; some of the cases will be decided by conservative judges interested in rewriting history; and ultimately, the Supreme Court will decide.”).

<sup>94</sup> 144 S. Ct. 1889 (2024).

the Court's "history and tradition" test in Second Amendment cases.<sup>95</sup> She further noted that "[s]cholars report that lower courts applying *Bruen*'s approach have been unable to produce 'consistent, principled results.'"<sup>96</sup> She argued that the "Rule of Law" suffers without "legal standards that foster stability, facilitate consistency, and promote predictability."<sup>97</sup> At its worst, the indeterminacy associated with applying history and tradition allows judges to rule based on their preferences rather than principle.

This same criticism is even more salient in the First Amendment context, where consensus as to the original meaning has been especially difficult to reach. Professor Jud Campbell has argued that at the Founding, the First Amendment "stood for a general principle — one that left room for considerable debate about how it should be applied in practice — and also for the entrenchment of more specific settled principles."<sup>98</sup> For the Founding generation, the assumption was that "judges could not create new limits on governmental authority."<sup>99</sup> Thus, historical evidence, like judicial opinions finding fraud when a person sold goods with another's name on them, tells us nothing about the scope of the First Amendment.<sup>100</sup> The judges adjudicating these cases would not have thought the First Amendment was implicated at all.

*Elster* may presage further litigation challenging trademark restrictions. This was the third in a trio of First Amendment challenges to provisions of the Lanham Act in recent years to reach the Supreme Court. But the Lanham Act has far more restrictions on trademark registration than the three provisions challenged in *Tam*, *Iancu*, and *Elster*.<sup>101</sup> Without a clear rule defining the limits on permissible trademark restrictions, the enterprise that the Court began in *Tam* may ultimately necessitate litigating each provision of the Lanham Act to determine which operate within the permissive bounds of historical practice. If the historical methodology applied in *Elster* continues to govern, only the Supreme Court can be the ultimate arbiter of what history counts as sufficiently analogous.

---

<sup>95</sup> *Id.* at 1927 (Jackson, J., concurring) ("The message that lower courts are sending now . . . could not be clearer. They say there is little method to *Bruen*'s madness.")

<sup>96</sup> *Id.* (quoting Brief for Second Amendment Law Scholars as Amici Curiae in Support of Petitioner at 4, *Rahimi*, 144 S. Ct. 1889 (No. 22–915), 2023 WL 5489050, at \*4).

<sup>97</sup> *Id.* at 1929.

<sup>98</sup> Jud Campbell, *What Did the First Amendment Originally Mean?*, RICH. L. MAG., Summer 2018, at 19, 22.

<sup>99</sup> *Id.*

<sup>100</sup> *But see Elster*, 144 S. Ct. at 1520.

<sup>101</sup> *See, e.g.*, 15 U.S.C. § 1052(b) (restricting trademarks "[c]onsist[ing] of or compris[ing] the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof"); *id.* § 1052(c) (restricting trademarks "[c]onsist[ing] of or compris[ing] . . . the name, signature, or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow").