

Constructing Basic Liberties: A Defense of Substantive Due Process

John Hart Ely famously quipped that substantive due process—the protection of substantive liberties such as privacy or autonomy under the Due Process Clauses of the U.S. Constitution—is a contradiction in terms. Justice Antonin Scalia, the most prominent judicial critic of the doctrine, castigated it as hopelessly indeterminate and irredeemably undemocratic—most notably in *Planned Parenthood v. Casey* (1992), which reaffirmed the central holding of *Roe v. Wade* (1973) that the Due Process Clause protects the right of women to decide whether to terminate a pregnancy, and *Obergefell v. Hodges* (2015), which held that the fundamental right to marry extends to same-sex couples. In dissent in *Obergefell*, Chief Justice John Roberts, joined by Justice Scalia, argued that the majority opinion has no basis in the Constitution or this Court’s precedent and that it revived the grave errors of *Lochner v. New York* (1905).

Donald Trump campaigned on a promise to appoint justices to the Supreme Court like Justice Scalia who would overrule *Roe/Casey* and *Obergefell*. Indeed, Neil Gorsuch and Brett Kavanaugh may be such justices. Given the emergence of the possibility of the death of substantive due process, it is timely to assess it. My book develops a vigorous defense of it, showing that the practice of constructing basic liberties in building out our commitment to ordered liberty is deeply rooted in our history and tradition and arguing that it is coherent and integral to our form of constitutional self-government. I show that, despite recurring criticisms, judicial interpretation of the Constitution to protect substantive liberties has proven to be a durable and attractive feature of American constitutional practice.