

The Constitutional Law and Politics of Fundamental Rights: Lessons from the Contemporary Substantive Due Process Jurisprudence in the United States

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Abstract

In a liberal constitutional democracy that recognizes and protects rights not specifically identified in the written Constitution, how should the courts work with the political branches when an unenumerated right is at issue? When it comes to such controversial issues as abortion and same-sex marriage, what division of labor between judicial review and ordinary political process works best to honor and implement the dual commitment of liberal democracy—i.e., a constitutional order that strives to be both liberal and democratic? These questions have been heatedly debated in the contemporary substantive due process jurisprudence in the United States, and the traditionalism vs. rationalism debate invites us to rethink and reimagine the kind of liberal constitutional democracy we want to achieve. The traditionalists argue that the fundamental rights that warrant substantive due process protection must be “deeply rooted in the Nation’s history and tradition and implicit in the concept of ordered liberty.” In addition, the traditionalists contend that such fundamental rights must be carefully described and can only function as protections against government intrusion. The rationalists, on the other hand, argue that the recognition of fundamental rights call upon the courts to exercise “reasoned judgment” in light of the constitutional morality as entailed in the concept of ordered liberty. The rationalists refuse to take for granted the epistemic

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authority of the history and tradition. They also embrace the idea of “living tradition.”

This article details how this doctrinal debate has shaped the modern substantive due process jurisprudence of the U.S. Supreme Court. It also seeks to draw lessons from the development of American constitutionalism to inform our normative considerations about written constitutionalism and unenumerated rights in constitutional theory. This article argues that the revitalization of the due process rationalism serves to level the playing field of judicial contestation over fundamental rights. The balancing approach also enables us to strike a proper balance between liberalism and democracy. This article further concurs with the democratic constitutionalism as proposed by Robert Post and Reva Siegel, and calls for an enlarged understanding of the politics of fundamental rights. In view of the respective politics of gay rights in the United States and Taiwan, this article examines and affirms the moral legitimacy and political wisdom of the *Obergefell v. Hodges* (2015) and the J.Y. Interpretation No. 748 (2017), the two landmark rulings for same-sex marriage in these two countries.

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