

Failures in the Laboratories of Democracy and Substantive Due Process

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Abstract

States, it has long been said, serve as “laboratories of democracy” in our scheme of government. Today, many of those democratic experiments are teetering on the verge or have already failed. Voting restrictions and gerrymandering now allow many state legislators to choose their own electorate, creating “minoritarian” legislatures. Many state legislatures today override the popular will of the electorate voiced in state-wide referenda. Some politicians have even given up on the idea of democracy entirely, viewing it simply as an obstacle to their preferred policy outcomes, and implicitly asserting that those policy preferences are somehow immutable at the statewide level despite the democratic process.

These structural failures are evident and worrying. But there are also less evident failures of democracy at the state level that, while being less overtly and explicitly political, also implicate the necessary conditions for the sort of democratic practice always contemplated by Americans, from the Founders to the present. Inter-group hatred and violence—now routinely on display in all realms of American life, from town halls to social media—has diminished Americans ability to converse and debate about matters of public importance. The politicization of public education and government protection of misinformation chips away at an informed electorate. And, unlike the failures linked directly with the political process, these failures are not contained within the States where they occur. In an age when millions of Americans relocate interstate every year, and ideas traverse the internet almost instantaneously, these democratic failures can quickly spill over into other labs, contaminating those experiments as well.

At a time when the Supreme Court is poised to further roll back substantive due process protections in the wake of the *Dobbs* decision, and democratic norms are already under strain, it is critical to recognize the key role that substantive due process has played historically in enhancing democratic practice in the States—and the destructive effect its potential roll-back would invariably have on American democracy. By serving as the basis of the incorporation doctrine, substantive due process is quintessential to protecting democracy in the States, especially in the form of an incorporated First Amendment. This is manifestly true for the certain forms of direct political participation, such a voting, protesting, and petitioning the government—which is what most people have in mind when they think of *Carolene Products*’ famous footnote 4 or John Hart Ely’s special solicitation for “rights of political access” that is based on it.

But when considering whether an asserted substantive due process right reinforces political representation per *Carolene Products*, scholars, courts, and the public need to broaden our view to also include the effect of so-called “incorporated” provisions of the Bill of Rights, such as the First Amendment, on conditions necessary to democratic practice that are one-step removed from the political process itself: (1) inclusive fora for public debate and discourse, and (2) an informed electorate. In practice, the First Amendment has proven critical in preventing States from acting

on anti-democratic impulses that run contrary to those necessary conditions. Many of the Supreme Court’s substantive due process precedents also consider the effect of First Amendment (or equivalent) rights on democratic practice, and have had vital democracy-buttressing effect in practice. Ely himself recognized this in a chapter of his seminal work, *Democracy and Distrust*, that is largely devoted to freedom of speech. Jettisoning substantive due process would therefore have a devastating effect on already-strained contemporary democratic practice in the States because of the loss of First Amendment protections that are fundamental not only to direct political participation, but also to the necessary pre-conditions for high-quality democracy in the first place. Today, one need look no further than Florida to see this clear and present danger.

Because substantive due process analysis requires courts to decide the inherently philosophical question of whether an asserted liberty right—enumerated in the Bill of Rights or otherwise—qualifies for substantive due process treatment, courts should begin to recognize that their current jurisprudence is disconnected from the Constitution’s vision of the relationship between States and their citizens. That vision is reflected in the Guarantee Clause, which “guarantee[s] to every State in this Union a Republican Form of Government,” and the Reconstruction Amendment’s joint commitment to republican government for a diverse society. In light of this, courts should consider re-grounding their analytical approach to substantive due process in those animating principles. The doctrine’s present focus on nebulous concepts of abstract liberty eschews the very real-world effects that recognizing, or not, an asserted right has on democratic practice in the States. Courts may better honor the Constitution’s vision by assessing whether an asserted liberty interest furthers or hinders our constitutional aspiration to republican government for a diverse society, both in terms of direct political participation, and the inclusive political discourse by an informed electorate which ultimately makes direct political participation a meaningful exercise of popular sovereignty.

Introduction

- A. Many States have failed as “laboratories of democracy.”
 - 1. There are evident structural failures in democratic practice in the States:
 - a. Gerrymandering has created minoritarian legislatures.
 - b. Legislatures commonly override popular initiatives/referenda.
 - i. Direct overrides
 - ii. Structural changes to future initiatives/referenda
 - c. Some politicians now openly discuss non-democratic ideals and ascendancy of policy goals over the democratic process.
 - i. Senator Lee: “Of course we’re not a democracy.”
 - ii. Representative Greene’s notion of a “national divorce” between “Red States” and “Blue States” is based on supposedly *irreconcilable* policy differences between States, even though States may come to favor new policies at any time through the democratic process.
 - 2. There are also less evident structural failures, slightly more removed from direct political participation, that have also led to this result. We

can think of these as similar to the “second-generation barriers” in the voting rights context, in that they do not directly obstruct access to the political process, but nevertheless have a profound effect on it.

- a. Inter-group hatred and violence, from town halls to social media
 - b. Misinformation and politicization of information (social media, education, online news)
3. These “second-order” failures are especially dangerous because they are not, like the “first-order” structural failures discussed above, easily constrained to the single “laboratory” in which they occur.
 - a. Population mobility across State borders
 - b. Online communication through digital public fora (social media)

B. Substantive Due Process on the Cutting Block: The *Dobbs* Decision

1. Justice Thomas’s concurrence specifically threatened certain substantive due process rights relating to personal relationships and reproduction (i.e., birth control, same-sex sexual relations, same-sex marriage).
2. But Thomas’s threat plainly extends to “all of [the] Court’s substantive due process precedents,” including the Court’s “incorporation” cases, where it has found that the “liberty” interest protected by the due process clause includes a substantive right already applied against the federal government by the Bill of Rights.
3. Both academics and members of the Supreme Court have recognized that incorporation *is* a subtype of substantive due process.
 - a. Erwin Chemerinsky, *Substantive Due Process*, 15 *Touro L. Rev.* 1501, 1508 (1999) (“How, was the Bill of Rights applied to state and local governments? Through the due process clause of the Fourteenth Amendment. Justice Douglas used substantive due process [in *Griswold*] even though at the time he denied that was what he was doing.”); *id.* at 1507 (noting that Justice Douglas found privacy in the “penumbras” of the Bill of Rights).
 - b. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (Scalia, J., dissenting) (“Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court’s incorporation of certain guarantees in the Bill of Rights ‘because it is both long established and narrowly limited.’”); *id.* at 811 (Thomas, J., dissenting) (noting the plurality opinion makes an “effort to impose principled restraints on” the “Court’s substantive due process doctrine”); *id.* at 861, 871 (Stevens, J., dissenting) (“This is a substantive due process case. . . . “[S]ubstantive due process analysis generally requires us to consider the term ‘liberty’ in the Fourteenth Amendment, and that this inquiry may be informed by, but does not depend upon, the content of the Bill of Rights.”).

- C. Thinking about substantive due process after *Dobbs*: We need to appreciate the full breadth of *Carolene Products*' footnote 4.
1. One liberal view, attributed to John Hart Ely's *Democracy & Distrust: A Theory of Judicial Review* (1980), is that political-representation-reinforcing rights are superior to, and distinguishable from, other substantive due process rights, based on *Carolene Prods.* n.4.
 - a. That solicitation has historically been grounded, in part, in a concern for the basic principles of our republican democracy (right to vote, restraints upon dissemination of information, interferences with political organizations, prohibitions on peaceful assembly).
 - b. Footnote 4 is political theory: in our republican democracy, the Constitution rules supreme. Because the Fourteenth Amendment guarantees the liberty rights of citizens vis-à-vis their States, courts were instructed in footnote 4 to be concerned with the disruption of political processes between citizens and their states, which included *impermissible prejudice affecting the lawmaking process* in the States.
 2. Professors NeJaime & Siegel's recent work explains why "private" substantive due process rights (*e.g.*, same-sex marriage) are *also* political-representation-reinforcing: because they enhance dignity and equality of members of the demos (and also provide a judicial forum for hearing challenges to the status quo, which helps minority groups buy into majoritarian decision-making). *See* We agree, and seek to further expand the lens of what is political-representation-reinforcing.
 3. The First Amendment, as incorporated against the States through substantive due process, is also *indirectly* political-representation-reinforcing because it helps maintain necessary preconditions for democratic practice: an informed electorate and inclusive fora for public discourse. Eliminating substantive due process would create the conditions for major attacks on democratic practice by States seeking to enact anti-democratic policies.
 - a. This approach is firmly grounded in footnote 4: even the political process cases cited are, predominantly, based in a substantive due process freedom-of-speech liberty that does not directly implicate political participation or representation.
 - b. In *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697 (1931), involving restraints upon the dissemination of information, the Court expressed concerns with ensuring that elected officials may be held accountable to their constituents. *See id.* at 713–14, 719–20, 722.
 - c. Same with *Grosjean v. Am. Press Co.*, 297 U.S. 233, (1936), which involved interferences with political organizations. *See id.* at 249–50 ("Judge Cooley has laid down the test to be applied: 'The

evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.’).

- d. Same with *DeJonge v. Oregon*, 299 U.S. 353 (1937), involving prohibitions of peaceful assemblies, where the Court held that “[t]he very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.” *Id.* at 364.

Part I: The Traditionally Narrow Focus on Political-Representation-Reinforcing Rights

- A. There has traditionally been a narrow focus on the political process and direct political participation themselves:
 1. “Republican” → representative political process (structure)
 2. “Democratic” → political sovereignty (franchise)
- B. Political Participation Under Assault
 1. Voting: Florida legislation limiting felon re-enfranchisement (after popular vote)
 2. Redistricting: DeSantis’s unconstitutional gerrymander of pre-2022 District 5, which violated the Florida constitution’s prohibition on political gerrymandering (added by voters in 2010 as FairDistricts Amendments to Fla. Const. art. III, §§ 20 & 21)
 3. Protesting: Florida anti-protest statute
 4. Participation: Stripping Disney of special status for supporting LGBTQ rights will cause many people who identify as such to feel alienated and excluded from the citizenry.
- C. Substantive due process, including an incorporated First Amendment, can provide a check against these impulses.
 1. Fundamental right to vote (*Reynolds v. Sims*; *Yick Wo*)
 2. First Amendment right to protest / petition the government
 3. Recognition of “private” substantive due process rights help create conditions for equal participation by equalizing dignity between groups. (Professors NeJaime and Siegel explained this in a recent article; we agree.)

Part II: Broadening the Traditional Focus on Political-Representation-Reinforcing Rights Showcases the Vital Importance of an Incorporated First Amendment for Creating Conditions Necessary for Democratic Practice

- A. This traditionally narrow focus on *direct* involvement in the political process identifies some serious problems today in many States, but it also eschews other important components / pre-conditions for democratic practice that are also under

assault. Because political process and franchise matter little to democratic practice without these pre-conditions, we need to open the lens of political-participation-reinforcing rights more broadly to include these other core components:

1. Public fora for open debate (“marketplace of ideas”)
2. Informed electorate. *See* Franklin Delano Roosevelt, Fireside Chat (Apr. 14, 1938), in FDR's Fireside Chats 111, 118 (Russell D. Buhite & David W. Levy eds., Univ. of Okla. Press 1992) (“Therefore, the only sure bulwark of continuing liberty is a government strong enough to protect the interests of the people, and a people *strong enough and well enough informed to maintain its sovereign control over its government.*” (emphasis added)) (from Robert L. Tsai, *Democracy's Handmaid*, 86 B.U. L. Rev. 1, 3 (2006)); *United States v. Caldwell*, 408 U.S. 665, 723 (1972) (Douglas, J., dissenting) (“A popular Government, without population information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge brings.” (quoting 9 Writings of James Madison 103. (G. Hunt ed. 1910))).

B. Public Fora Suitable for Open Debate:

1. Example #1: Legislation barring social media companies from de-platforming hate speech prevents them from creating hate-speech-free fora that don't depress participation.
2. The First Amendment gives platforms a right to *not* speak in those circumstances.

C. Informed Electorate:

1. Example #1: The Stop W.O.K.E. Act and other viewpoint discrimination (AP African-American Studies course).
 - a. This is impermissible viewpoint discrimination in the “free market of ideas” under the First Amendment *See Pernell v. Fla. Bd. of Governors* (11th Cir.).
2. Example #2: Social media law preventing companies from de-platforming hate speech and misinformation.
 - a. The First Amendment prevents the States from impermissibly compelling (amplification of) false or misleading speech. This is the point of the First Amendment press freedom—for the people to be able to obtain objective information to make informed decisions and hold their elected representatives accountable.
 - b. *United States v. Caldwell*, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting) (“The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know. The right to know is crucial to the

- governing powers of the people, to paraphrase Alexander Meiklejohn. Knowledge is essential to informed decisions.”)
- c. *Cf. Columbia Broad. Sys., Inc. v. Democratic Nat. Comm.*, 412 U.S. 94, 153 (1973) (Douglas, J., concurring in the judgment) (noting that “our liberty depends on the freedom of the press,” and contrasting salubrious editorial freedom, by which although “one publisher [] may suppress a fact, there are many who will print it,” and governmental editorial decisions, whereby “administrative fiat, not freedom of choice, carries the day”).
 - d. YouTube is not a government entity; if, as a non-state actor, it doesn’t want to give a platform to people who deny that the Holocaust occurred, it violates the compelled speech doctrine for Florida to say that it must do so.
3. Example #3: Seeking to depress government critics by forcing them to register and accept liability.
- a. The First Amendment prevents the States from curbing factual criticism of government officials and policies.
 - b. *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (“In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. . . . The press was protected so that it could bare the secrets of government and inform the people. . . . And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people . . .”).

Conclusion: Republican Democracy for a Diverse Society as the Animating Principle for Substantive Due Process

- A. In practice, whether intentionally or accidentally, the Supreme Court *has* enhanced democratic practice in the States by finding that the liberty interests protected by substantive due process include First Amendment (or equivalent) rights.
- B. As scholars, courts, and the public think about further challenges to substantive due process, they should bear in mind the dangerous effect that rolling back the doctrine would invariably have on democratic practice in the United States. Whether a right is identified in the Bill of Rights or not, a court still must find that it is a substantive “liberty” interest within the meaning of the Due Process Clause—just as it would with any other asserted right not included in the Bill of Rights. *See* 561 U.S. at 871.
- C. As many of the Supreme Court’s substantive due process cases suggest, courts can better ground substantive due process jurisprudence in the Constitution’s vision for the relationship between States and their citizens. That vision is

enshrined in the Guarantee Clause, which “guarantee[s] to every State in this Union a Republican Form of Government,” and the Reconstruction Amendment’s joint commitment to republican government for a diverse society.

1. Members of the Supreme Court across the liberal-conservative spectrum agree with seeking a more principled framework for substantive due process jurisprudence. 561 U.S. at 812 (Thomas, J., concurring) (“[T]he plurality’s effort to cabin the exercise of judicial discretion under the Due Process Clause by focusing its inquiry on those rights deeply rooted in American history and tradition invites less opportunity for abuse than the alternatives.”); 503 U.S. at 125 (Stevens, J.) (“As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.”).
2. This is similar to what Professor Elmendorf has posited in the statutory interpretation context: that an “effective accountability norm” could be based, in part, on the Guarantee Clause, without applying it to litigation directly. *See* 95 *Corn. L. Rev.* at 1084–86.
3. Others have suggested that the Guarantee Clause might support individual rights ranging from universal free public education to DC self-government. *See* 132 *Harv. L. Rev.* at 606 nn. 23 & 24.

D. Current substantive due process doctrine focuses on nebulous concepts of abstract liberty. *see, e.g.*, 521 U.S. at 721 (due process clause protects rights “‘implicit in the concept of ordered liberty’ such that ‘neither liberty nor justice would exist if they were sacrificed’”); 391 U.S. at 149 (due process clause protects rights “fundamental to the American scheme of justice”); 333 U.S. at 273 (due process clause protects rights that are “basic in our system of jurisprudence”); 287 U.S. at 67 (due process clause protects rights that are among those “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions”). This has the practical effect of eschewing the very real-world effects that recognizing, or not, an assert right has on democratic practice in the States.

E. Courts can better honor the Constitution’s vision by assessing whether an asserted liberty interest furthers or hinders our constitutional aspiration to republican government for a diverse society at the four levels discussed in this article:

1. Direct political participation (Ely)
2. Inclusive political discourse
3. Informed electorate
4. Feeling of belonging in demos (NeJaime & Siegel)