

## CLAUSE ESSENTIALISM AND THE THIRD RECONSTRUCTION

**CONSTRUCTING BASIC LIBERTIES: A DEFENSE OF SUBSTANTIVE DUE PROCESS.** By James E. Fleming.\* Chicago: University of Chicago Press. 2022. Pp. 274. \$95.00 (hardcover), \$30.00 (paperback).

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In 2022, the conservative legal movement that emerged in the twilight years of the New Deal Order—and that was swept into power by the Reagan Revolution of the 1980s—finally secured its long-sought, crowning achievement. Stacked with a 6–3 conservative supermajority, the Supreme Court in *Dobbs v. Jackson Women’s Health Organization* overturned the right to an abortion established by *Roe v. Wade* in 1973.<sup>2</sup> In *Roe*, the Supreme Court held that women had a fundamental right to access abortion care consistent with a woman’s best medical interests as determined by the patient and her doctor.<sup>3</sup> The *Roe* Court reasoned that the right to an abortion, though not expressly protected by the Constitution’s text, was a logical outgrowth of the right to privacy established in *Griswold v. Connecticut*.<sup>4</sup> In *Griswold*, the Supreme Court rendered a decision untethered to any one constitutional clause or one narrow piece of text. The Court determined that the “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those

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2. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

3. *Roe v. Wade*, 410 U.S. 113, 163 (1973) (“[T]he attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated. If that decision is reached [prior to a fetus’ viability outside the womb], the judgment may be effectuated by an abortion free of interference by the State.”).

4. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

guarantees that help give them life and substance.”<sup>5</sup> Consequently, the *Griswold* Court expounded that the First, Third, Fourth, Fifth, and Ninth Amendments “create[d] zones of privacy” that are entitled to protection from governmental intrusion.<sup>6</sup> After determining that a right to privacy was baked in the Constitution’s overarching structure, the Supreme Court used the right to privacy to strike down a state law prohibiting contraception access as it applied to marital couples,<sup>7</sup> and later invalidated bans on providing contraception to non-married persons before extending the privacy right to abortion in *Roe*.<sup>8</sup>

In *Dobbs*, the five-Justice majority overturning *Roe* pointed out that there is no “express reference to a right to obtain an abortion” in the Constitution.<sup>9</sup> The majority reasoned that, because there was no well-established historical practice of protecting abortion access in the American constitutional tradition, a fundamental right to reproductive healthcare was not implicit in the constitutional text.<sup>10</sup> The *Dobbs* decision was the culmination of decades-long work attacking substantive due process and the constitutionalization of unenumerated rights as part of a broader agenda to undo the rights revolution brought into the constitutional canon by the New Deal Order between 1932 and 1980. However, while the unenumerated abortion right for some was a doctrine *sui generis* to other fundamental rights because it imposed a third-party harm,<sup>11</sup> others indicated *Dobbs*

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5. *Id.* at 484 (citations omitted).

6. *Id.*

7. *Id.* at 485 (describing the right to privacy as applying to the “sacred precincts of marital bedrooms”).

8. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”).

9. 597 U.S. at 215.

10. *Id.* at 231 (“We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’”) (citations omitted).

11. *Id.* at 262 (“The exercise of the rights at issue in *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* does not destroy a ‘potential life,’ but an abortion has that effect.”); *id.* at 346 (Kavanaugh, J., concurring) (“Overruling *Roe* does *not* mean the overruling of those precedents [protecting contraception, interracial marriage, or same-sex marriage], and does *not* threaten or cast doubt on those precedents.”).

might merely be the starting point for the Court's cultural revanchism.<sup>12</sup> Clarence Thomas authored a concurring opinion in *Dobbs* that blasted *Griswold's* penumbral construction of rights as one of "facial absurdity."<sup>13</sup> Thomas called into question the validity of other unenumerated rights protected in American jurisprudence beyond reproductive choice in light of *Roe's* fresh demise. Thomas suggested that the entire substantive due process line of cases be jettisoned and reconsidered under other clauses of the Constitution or outright abrogated. In attacking substantive due process, Thomas doubled down on clause essentialism—the idea that the legitimacy of rights is dispositive of where they are textually grounded:

[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is "demonstrably erroneous," we have a duty to "correct the error" established in those precedents. After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court's substantive due process cases are "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment. To answer that question, we would need to decide important antecedent questions, including whether the Privileges or Immunities Clause protects *any* rights that are not enumerated in the Constitution and, if so, how to identify those rights.<sup>14</sup>

It is in this moment, arguably the nadir for unenumerated rights in the constitutional order since 1973, that James Fleming offers a robust defense of progressive substantive due process in *Constructing Basic Liberties*. Fleming classifies the three strands of substantive due process the Supreme Court has employed in the past to identify what kind of claims are worthy of protection as non-express rights. In the past, the Court has looked toward: (1) abstract aspirational principles to expand liberty-based claims,

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12. Texas Attorney General Ken Paxton, for example, appeared comfortable revisiting gay rights precedents in the aftermath of the *Dobbs* decision. See Timothy Bella, *Texas AG Says He'd Defend Sodomy Law If Supreme Court Revisits Ruling*, WASH. POST (June 29, 2022), <https://www.washingtonpost.com/politics/2022/06/29/texas-sodomy-supreme-court-lawrence-paxton-lgbtq/>.

13. *Dobbs*, 597 U.S. at 332 n.\* (Thomas, J., concurring).

14. *Id.* at 332–33 (Thomas, J., concurring) (citations omitted).

(2) concrete historical practices that form a preexisting legal culture and tradition entitled to constitutionalized safeguards, and (3) a rational continuum approach that builds on itself through time and new social understandings to protect liberty interests as part of a natural evolution of legal norms (p. 28).

It is this last kind of rights-making that Fleming endorses as the best way to “face up to the responsibility to give full meaning to our constitution of principle” (p. 44). *Constructing Basic Liberties* is a call for lawyers and academics to confidently follow the model of constitutional development laid out by Justice John Marshall Harlan II in his *Poe v. Ullman* dissent. Famously, Harlan urged for a common-law framework to assess rights claims whereby judges would evaluate the claim against enduring constitutional principles and apply educated reasoning. This forward-looking approach starkly contrasts with the thinking that has had a stranglehold on conservative legal thought for decades, by which heightened judicial protection for non-explicit rights are limited to granular-level concrete historical practices.<sup>15</sup> Harlan wrote, “Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed.”<sup>16</sup> Under Harlan’s approach, rights will tend to be a one-way ratchet that are strengthened by new social understandings and avoid the hazard of choking off new constitutional rights under the misguided justification of “well, we’ve always done it this way.”

The strength of Fleming’s book is also the work’s greatest disappointment, in a sense. Reading *Constructing Basic Liberties*,

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15. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality) (proffering the substantive due process’ ambit only protects practices “deeply rooted in this Nation’s history and tradition”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 952 (1992) (Rehnquist, J., concurring), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (arguing that *Roe* was incorrectly decided for want of a “deeply rooted tradition of relatively unrestricted abortion in our history”); *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997) (applying the principle that “concrete examples involving fundamental rights found to be deeply rooted in our legal tradition” are required to extend due process guarantees); *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (“[A]n ‘emerging awareness’ is by definition not ‘deeply rooted in this Nation’s history and tradition[s],’ as we have said ‘fundamental right’ status requires. Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior.”). The 2022 *Bruen* decision illustrates this point nicely. See *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022) (“[T]he government must demonstrate that the [firearms] regulation is consistent with this Nation’s historical tradition of firearm regulation.”).

16. *Poe v. Ullman*, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting).

one greatly appreciates how Fleming's defense of substantive due process is doctrinally grounded. The book focuses on case law development in the Supreme Court rather than attempting to create some new constitutional theory from the 40,000-foot level to advance common law constitutionalism. The book deftly articulates a defense of a liberal constitutional order, sensitive and receptive to new rights claims, without droning on and waxing philosophical. Nevertheless, setting the book down, I had hoped for something a little more shiny and new. Perhaps, I was slightly let down because I (and other liberals) have been longing for something catchy like "originalism" to serve as a counterweight to the conservative legal movement, which has pilloried living constitutionalism and substantive due process as unprincipled and wishy-washy. But, then again, there might be a lesson in this reader's experience. I pondered whether there was any real value in the hunt for a bumper sticker theory. Perhaps, liberals should stop cowering to conservatives as if there is something wrong with a Harlan-style constitutional vision and boldly defend it on its own terms. Indeed, if liberals are comfortable with seeing public policy more generally as a response to multi-causal events necessitating nuanced, reasoned solutions, why should constitutional decision-making be any different? I did not walk away from the book entirely convinced that liberals should stop pining for a refurbished constitutional vision. However, I inched toward finding some peace in defending the tried-and-true sans flashy new branding.

This inner turmoil I experienced reading the book also prompted me to wonder who Fleming's intended audience was. Surely, liberals already agree with Fleming's premise and conservatives will vigorously dissent. As a liberal myself, I often nodded along as if I was a reassuring audience member participating in a faculty lecture. Several times I muttered, "Sure, that makes sense," or after coming across an idea nicely encapsulated by the text, "Oh, that's a smarter, cleaner way to put that!" But, considering the *Dobbs* decision and looking back on the conservative legal movement's dominance over our constitutional culture, I think Fleming's goal is quite different than to bring the reader down the Road to Damascus. The book is an appeal for liberals to be unafraid of substantive due process and to embrace it as a legitimate form of judging—to lean into their inclinations rather than rummage for victories in so-called

liberal originalism or a new constitutional theory. Just as “liberal” may no longer be the dirty word it was during the Reagan regime and for the last four decades, progressive and left-of-center scholars should no longer shirk in their defense of substantive due process.

Again, much of Fleming’s focus is on doctrine, providing a significant and valuable contribution to the literature and contemporary legal debates. However, a juricentric approach to constitutionalism may doom liberals for the foreseeable future while also ignoring the truth about American constitutional development: it is the byproduct of an evolving dialogue between institutions, social movements, and dominant political playmakers. Fleming does not gloss over this point by any means, though there is a slight whiff of irony that a book dedicated to Supreme Court doctrine almost in its entirety concedes it may be best for liberals to abandon all hope for the time being on that front. Indeed, in a rallying cry reminiscent of Justice Brennan’s famous attempt to galvanize liberals to forge progressive state constitutionalism in anticipation of conservatives’ path to power,<sup>17</sup> Fleming points out that liberals should double down on efforts to challenge the Supreme Court in Congress and forge a constitutional order through public policy in state legislatures and robust state constitutionalism (pp. 223–27).

Presciently, Fleming urged liberals before *Dobbs* to shore up the rights of gay, lesbian, bisexual, and transgender persons and reproductive freedom against the possibility of judicial retrenchment (p. 224).<sup>18</sup> The electorate heeded that call, providing Democrats with the best midterm election performance since the New Deal for liberals and securing major abortion rights victories through the adoption of express provisions protecting reproductive choice in the state constitutions of California, Michigan, and Vermont, and rejecting measures that would have

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17. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (arguing that state-level practitioners and judges should construct state constitutional doctrine consistent with their own reasoned judgment and provide greater protections than federal constitutional law where they find arguments for more expansive rights persuasive).

18. To this point, Fleming offers the following: “Furthermore, [liberals] need to attempt to protect reproductive freedom on the state level in the event *Roe* and *Casey* are overturned or narrowed further, just as they need to protect gay and lesbian rights, along with other gender identity rights, at the state level in the case *Lawrence* and *Obergefell* are overturned or at the end of the line for such federal constitutional rights rather than the beginning” (p. 224).

narrowed abortion rights in Kansas and Kentucky.<sup>19</sup> And in December 2022, Congress passed the Respect for Marriage Act,<sup>20</sup> repealing the 1996 law that prohibited federal recognition of same-sex marriages and requiring interstate recognition of same-sex marriages and interracial marriages, mainly in response to *Dobbs* and the outcry stirred by Clarence Thomas's *Dobbs* concurrence calling for a wholesale review of all substantive due process jurisprudence.<sup>21</sup>

While Fleming's entreaty to liberals to create state-level constitutional orders in their vision and push back against the Court in Congress by passing substantive legislation is essential, it can barely be called constitutional hardball. Fleming encourages liberals and progressives to not forget the harms conservatives have inflicted upon the Supreme Court's legitimacy through *Bush v. Gore*.<sup>22</sup> Fleming says liberals should be mindful of recent nomination politics and Republican hypocrisy. There is a place for complaints about stolen seats after Senate Republicans refused to confirm Barack Obama's pick to succeed Antonin Scalia, Merrick Garland, in 2016, citing the upcoming presidential election, and when Senate Republicans rushed to confirm Amy Coney Barret after Ruth Bader Ginsburg's death just weeks before a presidential election in 2020.<sup>23</sup> Fleming urges liberals and progressives not to "get over it" but "move on" and accept that Americans "are stuck with a packed Republican Supreme Court for the foreseeable future" (p. 223). But why? If liberals have any hope of bringing substantive due process back in vogue in our lifetimes, why concede any institutional legitimacy to the Supreme Court?

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19. Mitch Smith & Ava Sasani, *Michigan, California and Vermont Affirm Abortion Rights in Ballot Proposals*, N.Y. TIMES (Nov. 9, 2022), <https://www.nytimes.com/2022/11/09/us/abortion-rights-ballot-proposals.html>; Mitch Smith & Katie Glueck, *Kansas Votes to Preserve Abortion Rights Protections in Its Constitution*, N.Y. TIMES (Aug. 2, 2022), <https://www.nytimes.com/2022/08/02/us/kansas-abortion-rights-vote.html>.

20. Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022).

21. Stephanie Lai, *House Moves to Protect Same-Sex Marriage from Supreme Court Reversal*, N.Y. TIMES (Jul. 19, 2022), <https://www.nytimes.com/2022/07/19/us/politics/house-gay-marriage-bill.html>.

22. 531 U.S. 98 (2000) (ending a recount of votes in Florida during the election of 2000 and handing over the presidency to George W. Bush).

23. See Aaron Blake, *How the GOP Is Trying to Justify Its Supreme Court Reversal*, WASH. POST (Sept. 21, 2020), <https://www.washingtonpost.com/politics/2020/09/21/how-gop-is-trying-justify-its-supreme-court-reversal/> (describing the tortured justifications Senate Republicans offered for blocking Obama's nominee in 2016 but not Trump's nominee in 2020).

In my view, liberals taking their lumps at the Supreme Court and pressing on elsewhere in the constitutional system without demanding institutional rearrangement is the wrong answer.<sup>24</sup> Donald Trump’s bungled presidency, the election of Joe Biden to the White House, the mass backlash to the *Dobbs* decision, the success liberals enjoyed in the 2022 midterms, and the emerging alignment of voting blocks that could form a long-lasting, multi-racial coalition of urban, suburban, and exurban voters presents an opportunity to forge a liberal political order—one that would gladly adopt Fleming’s constitutional view. Permitting this Supreme Court to retain its legitimacy without challenging its current institutional arrangement will relegate Fleming’s project to the back burner for far too long. Instead, liberals should go for the Court’s legitimacy directly and attack it with legislation expanding the Court’s membership, stripping the Court of jurisdiction, imposing term limits, and making the Justices’ work as uncomfortable as possible until the Justices bend to liberals’ will. And to those who say that these measures undermine the rule of law, I would simply point to the substantive due process cry of conservatives like Samuel Alito and Clarence Thomas, with the reply: “But history and tradition!” In truth, American history is replete with moments of political pressure thrust on the Court to make it cave to dominant political winds: Congress canceled a Supreme Court term in 1803 to squeeze the Marshall Court,<sup>25</sup> Congress denied the Court jurisdiction and abolished seats to impose its will during the Reconstruction years,<sup>26</sup> and liberals ratcheted up pressure on the Court during the mid-1930s to back off its resistance to New Deal priorities.<sup>27</sup>

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24. Fleming is explicit in his position that liberals should not forget the legitimacy crisis. I read his argument urging liberals and progressives to “move on” as a warning against falling into the politics of grievance at the expense of advancing a strong counteroffensive to combat the current Court. My view is perhaps a little less binary: liberals and progressives must simultaneously offer a substantive legal vision while continuously attacking the Court’s legitimacy, so long as the rigged Republican supermajority continues to dominate American constitutional law.

25. See JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* 73 (2012) (describing the efforts of Jeffersonians to undermine the federal judiciary and undercut Federalist aligned judges).

26. See BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 241–244 (2000) (explaining Congress’ efforts to wrestle power from President Andrew Johnson and the Supreme Court to implement Radical Reconstruction).

27. See WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1996) (detailing the political tension between the Hughes Court and Democrats during Franklin D.



Each of these tension-filled moments in the Court's history have been accompanied by a political movement demanding a wholesale resetting of the terms and conditions of governing, which feels somewhat anathema to the common law constitutionalism that substantive due process might lend itself to consistent with the book's premise. The Reagan Revolution, the last great reset in the American political order, drove people like Samuel Alito, John Roberts, and Clarence Thomas into power. These movement conservatives were laser-focused on rejecting the legitimacy of the New Deal Order that preceded it and the jurisprudence that represented the peak of the rights revolution, like *Griswold* and *Roe*, before its undoing. This is precisely why, in Chief Justice Roberts' dissent in *Obergefell*, Roberts claimed that extending marital rights to same-sex couples was an "aggressive application of substantive due process [that] br[oke] sharply with decades of precedent."<sup>28</sup> Fleming criticizes Roberts as "part[ying] like it's 1973," noting that Roberts failed to acknowledge the evolving jurisprudence around privacy and intimacy, like when the Court reaffirmed the bodily autonomy of women to seek abortion care in *Planned Parenthood of Se. Pa v. Casey*,<sup>29</sup> the right of sexual minorities to participate in the political process in *Romer v. Evans*,<sup>30</sup> and the right of citizens to choose intimate partners of their choice without regard to their sex in *Lawrence v. Texas* (p. 33).<sup>31</sup> A similar critique can apply to Samuel Alito's opinion overturning *Roe* in *Dobbs*—it is certainly fitting for the now infamous Thomas concurrence in *Dobbs*.

The Chief Justice's misplaced characterization of *Obergefell* was not so much a willful blindness to the past thirty years of cultural change, but rather a reflection of the Reagan regime that made him, which aimed to stand athwart the rights revolution. Roberts and his ideological kin never fully accepted the legitimacy of the rights revolution, and certainly not the tail end of it in the 1970s. If liberal and progressive thought are on the long-term ascendancy (emphasis on *if*) and younger generations are on the hunt to reject Reaganism and all its works, will a warm return to substantive due process be sufficient for a Third

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Roosevelt's Administration to establish New Deal programs in response to the Great Depression).

28. *Obergefell v. Hodges*, 576 U.S. 644, 699 (2015) (Roberts, C.J., dissenting).

29. 505 U.S. 833 (1992).

30. 517 U.S. 620 (1996).

31. 539 U.S. 558 (2003).

Reconstruction?<sup>32</sup> Won't left-leaning lawyers and judges want their moment to reset the constitutional order and besmirch much of the Rehnquist and Roberts courts' anti-civil rights work as illegitimate? I find myself, once again, returning to the question that I thought I was able to unstick myself from earlier: should liberals not aspire to something bigger and different than a return to the Warren Court?

Fleming rounds out the book parsing the virtues of grounding fundamental values in the Due Process Clause versus the Equal Protection Clause (pp. 173–200). I do not take this framing as a suggestion that there is some imperative for rights claims to necessarily find a home under only one piece of constitutional text. Indeed, Fleming indicates—and I agree wholeheartedly—that constitutional rights can and should be rooted in more than one constitutional provision or value (p. 185) though he conceded that practically “even when both due process and equal protection arguments are available, it might seem to the Court that one ground is more persuasive than the other for certain rights in certain circumstances” (pp. 179–80). However, it seems that legal academics, law students, and lawyers have been unnecessarily conditioned into believing in clause essentialism and to scoff at the more holistic approach represented by the *Griswold* penumbra. This clause essentialism pathology is on full display in Thomas's *Dobbs* concurrence. Liberals should aspire to stay clear of a tired fixation on clause or amendment choice.

The juxtaposition of due process and equal protection as currently conceived neglects the possibility of bringing Substantive Equal Protection into the American constitutional tradition, which might impose affirmative obligations on government to protect the vulnerable in a way formal equality does not. If in the near future there is a Third Reconstruction in the works that can bring a new understanding of how the law should protect human dignity, it might well be true that substantive due process should be fashionable again, but perhaps holistic constitutional interpretation and a renewed vision of equality itself must come with it in order to usher in a

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32. The Third Reconstruction is a reference to the idea that the United States must embrace a transformative political moment akin to the Reconstruction era after the Civil War and the Civil Rights Movement of the 1950s and 1960s to bring about meaningful change to American political and legal culture and fulfill the unachieved egalitarian aspirations liberals in those prior periods envisioned for the constitutional order.

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transformative vision on par with Radical Republicans, New Deal Democrats, and Reagan revolutionaries. Perhaps, this can come in the way of a right to healthcare, a right to education, a right to be rescued from harm, or a right to basic needs for those in poverty that implicate fundamental liberty interests as well as basic principles of equity.

Ultimately, liberals and progressives need to robustly defend the types of jurisprudential decision-making like substantive due process that have been tepidly embraced by left-of-center academics, lawyers, and judges, and mocked by legal conservatives. James Fleming's *Constructing Basic Liberties* is a fresh and much needed defense of substantive due process at a time in which the rights revolution seems ever more imperiled. Fleming provides a rich and thoughtful analysis that grapples with the challenges of American constitutional law's future in an honest way and with a useful focus on legal precedent rather than abstract philosophical theory. Fleming produced a real triumph. The book employs engaging prose to provoke considerable thought. The book's arguments should be taken seriously and mulled over, but at the same time liberals and progressives should ask themselves as they digest Fleming's excellent points if they want a substantive due process renewal *and* more. In this reader's view, they should.

