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## Preface

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# PREFACE

*Christopher T. Nace\**

On March 31 & April 1, 2023, the National Civil Justice Institute and SMU Dedman School of Law co-sponsored a provocative and insightful academic symposium called *The Future of Substantive Due Process: What Are the Stakes?* The conference was held on the SMU Law campus in Dallas, and was open to attorneys, law professors and students, judges and law clerks, nonprofits, and public officials. An outstanding faculty explored original research prepared for the Symposium, and debated a multitude of topics regarding the future of substantive due process rights in America.

In the words of Dean Erwin Chemerinsky of Berkeley Law (who delivered the Symposium's keynote address),

There is no concept in American law that is more elusive or more controversial than substantive due process. Substantive due process has been used in [the 20th] century to protect some of our most precious liberties. . . .

. . . .

Substantive due process asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose.<sup>1</sup>

Today, constitutional rights that have until recently been treated as matters of settled law are under serious threat. Justice Clarence Thomas, concurring in *Dobbs v. Jackson Women's Health Organization*, wrote,

in future cases, we should reconsider all of [the U.S. Supreme] 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.<sup>2</sup>

The Symposium examined numerous aspects of substantive due process (SDP) and areas in which it has been invoked, including: the importance of the SDP doctrine to our democracy; a historical analysis of SDP; secrecy

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1. Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501 (1999).
2. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2301–02 (2022) (Thomas, J., concurring) (internal citations omitted).

and transparency in SDP litigation; the role of state courts and state constitutions; challenges in litigating civil rights claims; the substance of rights to and in courts; end-of-life care; individual vs. states' rights in gender/reproductive issues; the civil right to counsel; academic freedom in public universities; and the "originalist" perspective that is sometimes invoked in constitutional litigation. Information on the Symposium faculty members, as well as video of the Symposium proceedings, may be found on NCJI's website.<sup>3</sup>

The National Civil Justice Institute is a national legal nonprofit created by trial attorneys in 1956 to support the U.S. civil justice system, access to justice for all Americans, and the rule of law, including the critical right to trial by jury. Our programs and publications provide a balanced view of the role of the civil courts in sustaining American democracy. The Institute promotes open, ongoing dialogue with the academic and judicial communities, and the public, on issues critical to protecting and strengthening the civil justice system. NCJI has a membership largely consisting of plaintiffs' trial attorneys, many of whom are active in protecting the constitutional rights of Americans.

The Dallas program was the eighth academic symposium we have co-sponsored with law schools. Our past conferences have addressed mandatory arbitration, medical malpractice litigation, the "war" on the U.S. civil justice system, the state of the workers compensation system, constitutional jury trial and remedy guarantees, the future of aggregate litigation, and the Internet and the law.

We are grateful for the hospitality of SMU Law, and particularly for the dedicated work of the Symposium's faculty chair, Thomas Wm. Mayo, Senior Associate Dean for Academic Affairs & Professor of Law at SMU Law, in recruiting many of the outstanding legal minds that made the Symposium so special. We are particularly indebted to Institute board members Ellen Presby and Peggy Wedgworth for their help in developing this program, as well as to our Executive Director, Mary Collishaw, who planned, organized, and executed the program.

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3. *The Future of Substantive Due Process: What Are the Stakes?*, NAT'L CIV. JUST. INST., <https://ncji.org/the-future-of-substantive-due-process> [<https://perma.cc/4ZSY-46ZU>].