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Forget the Fundamentals: Fixing Substantive Due Process

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INTRODUCTION

In an earlier article,[1] I argued that both constitutional theory and analysis of constitutional doctrine could benefit from paying more attention to the distinction between the actual requirements of the Constitution and the rules that courts have crafted to implement those requirements. Adopting the terminology that Mitchell Berman used, I called the former constitutional operative propositions, and the latter constitutional decision rules.[2] Put briefly, the decision rules perspective asks us to realize that most Supreme Court doctrine consists of tests that the Court has developed (the decision rules), which it applies to determine whether some other actor has complied with the actual requirements of the Constitution (the constitutional operative propositions).

The thrust of my argument was twofold. First, I claimed that we could get a better sense of the reasonableness of Supreme Court decisions by asking whether there was a good explanation for the choice of a particular decision rule as a means to implement a particular operative proposition. This analysis would put us in a better position to critique doctrine and suggest modifications.[3] In order to facilitate the analysis, I offered a list of factors that might suggest the appropriateness of particular kinds of decision rules. Those factors were, briefly put, the relative ability of courts versus other actors to get the right answer to a particular question (which I call institutional competence); the costs of different kinds of errors by the courts; the historical record of good faith or constitutional violation on the part of

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[*] Assistant Professor, University of Pennsylvania Law School. Thanks to the editors of the *Journal of Constitutional Law* for hosting this symposium, to the other participants for their insight and contributions, and to Laurence Tribe for his comments on symposium papers.

[1] Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005).

[2] *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004) (distinguishing between the judiciary's determination of what the Constitution means and doctrinal rules that the judiciary follows in determining compliance with the Constitution).

[3] *See* Roosevelt, *supra* note 1, at 1667–86 (applying the decision rules perspective to areas of criminal procedure, the Commerce Clause, equal protection, Congress's enforcement powers, and the Free Exercise Clause).

the other actor; the likelihood that the other actor will actually employ whatever institutional competence it has; the relative feasibility of judicial enforcement of different decision rules; and the need to provide guidance for other actors.[4]

Second, I described a process that has occurred repeatedly in the course of doctrinal evolution. Initially, the Court creates decision rules with an awareness of their nature and frequently explains why it has chosen a particular rule. As time goes on, however, the awareness fades. Eventually, the Court starts to mistake its decision rules for operative propositions, with predictable and unfortunate results.[5]

The second element of the argument is not really my concern in this article, though it will make a brief appearance as I try to explain why our substantive due process jurisprudence appears so vulnerable to the charge of illegitimacy. The focus of the article is on applying the methodology I described to substantive due process. This requires us first to identify the operative proposition that the Due Process Clause enacts, and then to consider the decision rules that the Court has adopted.

I. EARLY SUBSTANTIVE DUE PROCESS FROM THE DECISION RULES PERSPECTIVE

What is the constitutional operative proposition underlying the Due Process Clause? The very idea of substantive due process has been derided as oxymoronic, most famously by John Hart Ely, who likened it to "green pastel redness."[6] But there is an obvious sense in which the clause does have a substantive content. It forbids deprivations of life, liberty, or property without due process *of law*. It thus requires that the government act by means of valid laws.[7]

This is substance, but of a minimal sort. It converts the idea of substantive due process from oxymoron to pleonasm: of course the government must act by means of valid law. The Due Process Clause, on this reading, might seem to do very little. It establishes the requirement that deprivations of life, liberty, or property must be accomplished by lawful means, but it does not itself establish boundaries to the set of lawful means. It might thus seem to protect individuals only from laws that are invalid for some independent reason.

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[4] *Id.* at 1658–67.

[5] *See id.* at 1693 ("These consequences include ill-advised doctrinal reform, attempts to bind nonjudicial actors to decision rules rather than operative propositions, and an undoing of the benefits of decision rules.").

[6] JOHN HART ELY, DEMOCRACY AND DISTRUST 18 (1980).

[7] *See* LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 1332–33 (3d ed. 2000) (stating that "by 1868, a recognized meaning of the qualifying phrase 'of law' was substantive").

In fact, I think this is a good description of the early substantive due process caselaw.[8] What the due process jurisprudence of the late nineteenth and early twentieth century sought to do was to keep the government within its bounded powers—to bar it from acts that exceeded its authority and were therefore in a real sense, lawless.[9] The bounds of governmental power were derived not from the Due Process Clause, but from more basic principles, starting with the idea that the government is the agent of the people and wields only those powers they have seen fit to give it.

Justice Chase's opinion in *Calder v. Bull* puts the point neatly. "The purposes for which men enter into society[,]" Chase wrote, "will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it."[10] Thus, Chase's analysis did not rely on

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[8] It is at odds with the crude political analysis of Lochnerian jurisprudence, which sees substantive due process as motivated by a devotion to the interests of capital—or, slightly less crudely, to laissez-faire economics. *See generally* EDWARD S. CORWIN, COURT OVER CONSTITUTION (1938). It is also contrary to the conventional view that takes *Lochner* to stand for a fundamental right to liberty of contract and an antecedent of modern fundamental rights in substantive due process decisions, such as *Roe v. Wade*. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 32 (1990) ("Who says *Roe* must say *Lochner* . . . ."). It accords quite well with what has been called *Lochner* revisionism—broadly speaking, the school that sees the *Lochner*-era jurisprudence as a good-faith attempt to enforce limits on the police power. Notable contributions to this view include BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000). Revisionism has succeeded well enough that it might be called a revolution, and indeed it has inspired counterrevolutionaries, notably David Bernstein. *See* David Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L. J. 1, 6–7 (2003) (describing the increasing amounts of recent "revisionist historical scholarship about *Lochnerian* jurisprudence," which inspired "counter-revisionist literature.").

[9] *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), a case frequently cited for the creation of the "fundamental right to contract," is a perfect illustration. What was at issue in *Allgeyer* was Louisiana's attempt to regulate a contract entered into in New York. This law was deemed unconstitutional not for any reason related to liberty of contract, but because it was an attempt to project regulatory power beyond the borders of Louisiana, something the dominant territorialist view of state legislative jurisdiction held impermissible. *See id.* at 588 (noting that "the contract was made in New York, outside of the jurisdiction of Louisiana . . . ."); *id.* at 591 (noting that a state's "power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction . . . ."). The law was beyond the geographic scope of the legislature's authority, and therefore the attempt to enforce it was forbidden by the Due Process Clause. This is not at all the recognition of a fundamental right to contract; nothing in the Court's analysis suggested that New York could not have imposed the regulation that fell outside the powers of Louisiana.

[10] 3 U.S. (3 Dall.) 386, 388 (1798) (emphasis removed). *See also* Fletcher v. Peck, 10 U.S. 87, 135 (1810) ("It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power . . . .").

affirmative rights, but rather absences of power. There were some things, he reasoned, that the people forming a government would simply not want that government to do, and they would not delegate it the necessary power. "It is against all reason and justice," he wrote, "for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it."[11]

This limit to governmental power was the constitutional operative proposition that the *Lochner*-era courts sought to enforce. Like all courts, they confronted the question of what decision rules should be employed to determine whether the legislature had exceeded the scope of its authority. As is characteristic of courts in the early stage of jurisprudential evolution, they attempted, essentially, to enforce the operative proposition directly.[12] As Stephen Siegel has put it, *Lochner*-era constitutional adjudication was marked by constitutional conceptualism: the belief "that courts could and should use fairly abstract concepts, definitions, and principles to resolve legal disputes[,]" and that these concepts "must be contained in the Constitution, or must so clearly effectuate goals contained in the Constitution that for all intents and purposes they may be conceived of as being contained in the Constitution."[13]

What sorts of acts might fall outside the scope of delegated power? Justice Chase gives examples: to punish citizens for innocent acts, to make a man a judge in his own case, to take property from A and give it to B.[14] This last theme recurs in the substantive due process jurisprudence, where it gradually transmutes into the idea that governmental action must serve a public purpose, or promote the public interest, rather than benefiting (or burdening) a discrete segment of

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[11] *Calder*, 3 U.S. (3 Dall.) at 388. *See also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 410-11 (1891) (discussing the inherent limits of legislative power).

[12] For a description of the characteristic evolution of decision rules, see Roosevelt, *supra* note 1, at 1658–67.

[13] Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 23–24 (1991).

[14] *Calder*, 3 U.S. at 388. Chase here is doing general constitutional law, which could also be called natural law or political philosophy. *See generally* Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263 (2000). General constitutional law was part of the general common law. Read into state constitutions by federal courts exercising diversity jurisdiction (and therefore authorized to decide nonfederal questions), it was superior to ordinary state law, and state courts were not authoritative as to its meaning. However, it was not federal in nature, and state laws in conflict with general constitutional law could not be challenged as violations of federal rights. The Due Process Clause of the Fourteenth Amendment was understood to federalize the general constitutional law, making it a resource courts could use to strike down state laws in the exercise of federal question jurisdiction. *See id.* at 1296. *See also* Kermit Roosevelt III, *Light From Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 COLUM. L. REV. 1888, 1896–97 (2003) (describing role of general constitutional law in diversity actions).

the population.[15] Other bounds on permissible legislation were discerned through conceptual analysis of the police power—the general governmental authority to act in order to promote the public health, safety, and morals.[16] Also active was a theory that took literally the idea that the government wielded delegated private power. If this is so, then one might look to the rights that people could assert against each other at common law to gain a sense of the powers that they could give to the government. Thus, for instance, the government's power to abate a nuisance was generally considered to be the aggregated power of private citizens and subject to the same constraints. Likewise, the permissibility of governmental attempts to redress inequalities in the bargaining process was limited to those situations in which the common law of contracts perceived an inequality.[17] (Police power regulations, which might incidentally impinge on contractual freedom, would not be subject to this restraint.) These are decision rules, but they are decision rules that stay quite close to the operative proposition.

Why did the courts think that attempting to track the operative propositions was a good idea? In large part, the answer comes from a consideration of the factors mentioned in the introduction—most notably, institutional competence. Constitutional adjudication in the late nineteenth and early twentieth centuries was seen essentially as categorization.[18] Activities were classified as public or private and sub-

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[15] *See* JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 51–73 (2003) (exploring "from A to B" jurisprudence and its evolution into a protector of the public interest). *See also, e.g.*, Vanzant v. Waddel, 10 Tenn. 260, at *60 (1829) ("A law which is partial in its operation, intended to affect particular individuals alone, or to deprive them of the benefit of the general laws, is unwarranted by the constitution, and is void.").

[16] As influential commentator Christopher Tiedeman put it, "[t]his police power of the State extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State." CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF THE POLICE POWER IN THE UNITED STATES 4 (1886) (citing Thorpe v. Rutland R.R., 27 Vt. 140, 150 (1855)). A somewhat broader view is suggested by *Munn v. Illinois*, 94 U.S. 113, 125 (1876) (describing police powers as used by the government to "regulate[] the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good."). For a discussion of different concepts of the police power, see Glenn H. Reynolds & David B. Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 HASTINGS CONST. L.Q. 511 (2000) (contrasting the *sic utero* and *salus populi* versions of police power).

[17] *See* Roscoe Pound, *Liberty of Contract*, 18 YALE L. J. 454, 467 (1908) (describing judges as evaluating statutes "by the measure of common law doctrines rather than by the Constitution"). Of course this looks entirely incoherent if the common law itself is a creation of the government; however, judges of the *Lochner* era did not think it was. And the discovery that common law is, in fact, state law—a revelation canonically associated with *Erie*—is part of the reason that this line becomes impossible to maintain.

[18] *See generally* WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937 (1998).

ject to varying degrees of regulation on that basis.[19] Regulations were classified as falling within the police power, hence valid, or exceeding it, and hence invalid. Or the question might be whether the law served a public purpose (permissible) or a private one (impermissible);[20] or whether it was general (permissible) or partial (suspect).[21] And categorization, as the essence of adjudication, was seen as a task within the judicial competence. Courts did not, as *Lochner* itself insisted, sit to judge the wisdom or expediency of legislation.[22] They simply marked out the boundaries of state power. Within those boundaries the state could do essentially as it wished.

II. THE SHORT DEATH OF SUBSTANTIVE DUE PROCESS

The *Lochner* jurisprudence did not, of course, persist. Many explanations have been given for its demise. The one I offer here is consistent with some, notably the revisionist account. It shifts focus somewhat, however, in that it operates in terms of the factors driving the creation of decision rules. What happened to the *Lochner* jurisprudence, generally speaking, was that the distinctions it sought to maintain came to seem either incoherent or within the competence of the legislature to discern. The process was driven by a number of distinct, but related, developments.

One was primarily factual. The economic turmoil of the 1930s challenged the idea that redistributive legislation was never in the public interest and therefore could be placed categorically outside the bounds of legislative power. A general economic collapse was clearly not in the public interest, and to the extent that redistribution was needed to maintain the viability of the larger economic system, it became impossible for the Court to assert that the people would never have entrusted the legislature with such power. Thus, the decision rules the Court had adopted came to seem implausible as a means of implementing the underlying requirement that legislation

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[19] *See, e.g.*, *Munn*, 94 U.S. at 126 ("Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.").

[20] *See* Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 661 (1874) (holding that a tax is void if it is exercised only to aid a private enterprise—i.e. not for public use).

[21] *See, e.g.*, G. Edward White, *Revisiting Substantive Due Process and Holmes's* Lochner *Dissent*, 63 BROOK. L. REV. 87, 88 (1997) ("[T]he principle [was] that no legislature could enact 'partial' legislation, legislation that imposed burdens or conferred benefits on one class of citizens rather than the citizenry as a whole.").

[22] *See* Lochner v. New York, 198 U.S. 45, 56–57 (1905) ("This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law.").

be in the public interest.[23] In a series of cases, the Court abandoned its categorical prohibitions in favor of more fact-dependent balancing tests.

Some degree of governmental interference with the workings of the market had always been permitted: even price controls were allowed for businesses that were "affected with a public interest." The origin of this particular categorical distinction is somewhat obscure. Although in *Munn,* the Court attempted to offer a functional definition that turns on state-granted privileges or obvious market failures, the phrase "affected with a public interest" came from a seventeenth century treatise on seaports by Sir Matthew Hale.[24] And in 1934, *Nebbia v. New York* admitted that the set of businesses affected with a public interest was "not a closed category" and indeed that the category itself had no analytic content, being simply shorthand for the conclusion that such businesses were "subject to control for the public good."[25]

As it did in other doctrinal areas (notably the Commerce Clause),[26] the shift from categorization to balancing located the decisive question within the legislative competence. "In subjecting the price-structure of an industry to control," Walton Hamilton wrote, "the division of labor between the legislature and the court seems clearly marked. The discretion must belong to the law-making body, a restrained power of review to the judiciary."[27] The reason Hamilton gave is one purely of institutional competence: "To the primary question of the necessity for regulation the courts cannot easily give a right answer. . . . The questions which focus about need, a scheme of control, and expected performance are very intricate and highly technical."[28]

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[23] As Hamilton put it, "the economic order is rapidly changing; as our knowledge of it[] . . . grows, our conceptions of how it works are subject to amendment or replacement. . . . A newer and more realistic conception of competition suggests, not a new end for public policy, but another means for reaching a recognized end." Walton H. Hamilton, *Affectation With Public Interest*, 39 YALE L.J. 1089, 1108–09 (1930).

[24] *Id.* at 1089. Why this concept seemed appropriate to the regulation of a twentieth century economy is not obvious, and one explanation of its introduction is that the Court was simply looking for a test that fell within judicial competence and thus allowed for non-deferential enforcement. Likewise, a focus on formal equality of contractual capacity rather than substantive equality of bargaining power allowed lines to be drawn on a legal, rather than a factual basis, ensuring that the doctrinal test remained within the realm of judicial expertise. As Pound put it, courts adopted a rule under which "the legislature cannot take notice of the *de facto* subjugation of one class of persons to another in making contracts of employment in certain industries, but must be governed by the theoretical, jural equality." Pound, *supra* note 17, at 466.

[25] 291 U.S. 502, 536 (1934).

[26] *See* Roosevelt, *supra* note 1, at 1673–76 (describing the relationship between balancing and deference in Commerce Clause cases).

[27] Hamilton, *supra* note 23, at 1111.

[28] *Id.*

The categorical nature of limits on the police power eroded in a similar way. The ability of the state to legislate for the protection of the health of its citizens had always required the judiciary to assess the reality of the alleged threat and the efficacy of the legislative solution. As long as this could be done via more or less abstract reasoning, it could be portrayed as a question within the judicial competence. Thus the *Lochner* majority, confronting the question of whether the trade of baking was unhealthy, commented from its armchair that "[t]o the common understanding the trade of a baker has never been regarded as an unhealthy one."[29] Justice Harlan, dissenting, brought a medical treatise to bear.[30] The famous Brandeis briefs employed heavier weapons: mountains of empirical and statistical evidence in support of the legislative conclusion.[31] Armchair reasoning could not stand against this assault; indeed, once the question was understood as one that turned on hard facts, it shifted decisively into the sphere of legislative competence. The Court seemed to be second-guessing the wisdom of the legislative decision, and second-guessing a decision within the legislative competence.

On a more theoretical level, the realization that the common law was in fact state law suggested that identifying partial state interventions in the market was simply impossible. The common law regime is just as much a product of state action as the common law plus minimum wage regime. If each set of entitlements is a product of state action, the idea that one and not the other can be deemed unconstitutional state favoritism is incoherent. Either regime can be viewed as providing a subsidy, one to workers and one to employers,[32] and that, of course, is precisely what the Court recognized in *West Coast Hotel Co. v. Parrish*.[33]

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[29] Lochner v. New York, 198 U.S. 45, 59 (1905). This follows a rather offhand reference to "looking through statistics regarding all trades and occupations." *Id.* As Pound put it, courts assumed that "questions which analytically are pure questions of fact, when they become questions for the court to decide, must be looked at in a different way from ordinary questions of fact and must be dealt with in an academic and artificial manner because they have become questions of law." Pound, *supra* note 17, at 468.

[30] *Lochner*, 198 U.S. at 70 (Harlan, J., dissenting) (quoting a medical treatise about the difficult working conditions of bakers).

[31] *See, e.g.*, NANCY WOLOCH, *MULLER V. OREGON*: A BRIEF HISTORY WITH DOCUMENTS 109–33 (1996) (excerpting Brandeis's brief, which included a lengthy section on the "dangers of long hours").

[32] Assuming, of course, that minimum wage laws have the desired effect.

[33] 300 U.S. 379, 399 (1937) (recognizing that states can choose to pass minimum wage laws and are not required to subsidize "unconscionable employers" by allowing low wages). *See also* Cass Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 876 (1987) (discussing *West Coast Hotel* and the Court's radically changed view about the appropriateness of subsidies). *Miller v. Schoene*, 276 U.S. 272 (1928), is another case of similar vintage which reflects the recognition that departing from the common law baseline is not different in kind from adhering to it. Ac-

Without the set of common law entitlements as a neutral baseline by which to measure governmental intervention, the idea of the public interest as something courts could identify and protect becomes much harder to make out. With no constraint on redistribution, any law that provides net social benefits is arguably in the public interest. But if the test is simply whether the benefits of a law exceed its costs, it falls within legislative competence, and judicial enforcement looks like usurpation of the legislature's policymaking role.

With these new understandings ascendant, *Lochner*-era judicial review came to seem not simply misguided, but also illegitimate. When the categorical lines the Court had sought to maintain broke down, retrospective assessments suggested that it had simply been substituting its policy preferences for those of the legislature—a venture unjustified in terms of institutional competence, and unjustifiable in terms of democratic self-governance. The post-*Lochner* Court renounced all claims to judicial superiority in the definition of the public interest; as *Berman v. Parker* put it, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[34]

Deference to legislative assessment of the public interest made the police power essentially unbounded. Because almost any law could be rationally related to a legitimate state interest, almost any law would fall within the police power.[35] *Lochner*-era police power jurisprudence was dead as a meaningful constraint.[36]

What, then, remained for substantive due process? The kernel from which the specific prohibitions had grown was the idea that the government must act in the public interest, or to promote the gen-

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cording to the Court, "[i]t would have been none the less a choice" had the state decided not to intervene and change the baseline of property law. *Id.* at 279.

[34] 348 U.S. 26, 32 (1954).

[35] Importantly, however, the relaxation of constraints occurred in terms of decision rules, not operative propositions. That is, in upholding laws that looked like naked favoritism, such as the statutes challenged in *Williamson v. Lee Optical* and *Railway Express Agency v. New York*, the Court did not say that the Constitution allowed naked favoritism. Instead, it stretched to extreme lengths to find a public-regarding explanation for the laws—it applied an extremely deferential decision rule to enforce the same operative proposition as the *Lochner* Court. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483 (1955) (upholding a statute that favored ophthalmologists and optometrists); Ry. Express Agency, Inc. v. New York, 336 U.S. 106 (1949) (upholding a statute that favored vehicles displaying advertisements of products sold by owner).

[36] One way of stating the consequence is that since it became impossible to argue that a governmental act fell outside the police power, courts were forced to identify individual rights that could defeat valid exercises of state power—rights as trumps, in Dworkin's phrase. I will argue that understanding substantive due process in terms of fundamental rights is mistaken. *See infra* text accompanying notes 64–71.

eral welfare.[37] Even this nucleus had eroded. Once it had suggested that legislation must distribute its benefits widely—serve the interests of the broad public, rather than a narrow group. That requirement was gone. A conception of the legislative process as interest-group pluralism suggested that legislation that benefited one segment of society at the expense of another might still promote the public interest in the long run. As long as the benefits of each law exceeded its burdens, shifting coalitions would guarantee that in the end each interest group would get its turn in the sun.[38] What remained, then, was only the idea that the benefits of a law should exceed its burdens. If that condition was satisfied, concerns about distribution were irrelevant. In the fullness of time, everyone would be better off.

At least, everyone who had a chance to participate in the give and take of interest group bargaining on equal terms would be better off. Some groups might not; some groups might be the targets of a legislature that sought to harm them without tangible benefits to anyone else. Or they might find themselves unable to form coalitions, with the result that even a succession of welfare-enhancing laws would leave them worse off, as their interests were repeatedly sacrificed to benefit others. These are the groups that *Carolene Products* swore to defend.[39] The *Carolene* Court recanted the decision rules that had proven unworkable or unwise; but at the same time, like Galileo before the Inquisition, it reaffirmed its commitment to the operative proposition. Footnote four—and the political process theory that John Hart Ely drew from it—can be understood as the attempt to craft new decision rules to enforce the original proposition that legislation should produce net benefits to society. That proposition is the heart of substantive due process, and it can be derived both easily and

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[37] *See* GILLMAN, *supra* note 8 (arguing that a guiding principle in *Lochner*-era decisions was to promote general welfare by striking down legislation that was deemed to advance special interests of particular groups or classes).

[38] Not coincidentally, interest group pluralism became more popular in political science at the same time. *See, e.g.*, Alfred L. Brophy, *Race, Class, and the Regulation of the Legal Profession in the Progressive Era: The Case of the 1908 Canons*, 12 CORNELL J.L. & PUB. POL'Y 607, 622 n.65 (2003) (noting the "fundamental transformations in American jurisprudence and legal practice that occurred during the first several decades of the twentieth century", including "the replacement of notions of a consensual 'public interest' with ideas of interest group pluralism") (quoting Susan D. Carle, *From* Buchanan *to* Button: *Legal Ethics and the NAACP (Part II)*, 8 U. CHI. L. SCH. ROUNDTABLE 281, 282 (2002)); Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970*, 53 VAND. L. REV. 1389, 1399–1400 (2000) (describing the enthusiasm social scientists had for interest group pluralism during the 1940s). Schiller quotes John Chamberlain, writing in 1940, cheerfully describing interest groups as "the corporate age's analogue to the individual freeholder of Jeffersonian times." *Id.* at 1399 (quoting JOHN CHAMBERLAIN, THE AMERICAN STAKES 28 (1940)).

[39] 304 U.S. 144, 152 n.4 (1938) (suggesting heightened scrutiny as a response to "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities").

directly from Chase's account. One thing the people plausibly would not want the government to do is to enact laws that do not make society better off.

One of the odd twists of our constitutional history, of course, is that it fell to the Equal Protection Clause to fulfill the promise of footnote four. This is a mistake and, I will argue, a serious one; it has produced deformations in our jurisprudence comparable (and, I will suggest, related to) those that stem from the use of the Due Process Clause to enforce the Bill of Rights against the states. Substantive due process, after a brief period of dormancy, returned in a different form. In the modern era, its most salient and most controversial function is to protect unenumerated "fundamental" rights from governmental interference.

This modern jurisprudence has been criticized frequently and vociferously. I will consider two main bases for the criticism, with the aim of showing that the modern approach is at least partly defensible. The first criticism is that the text of the Due Process Clause says nothing about fundamental rights. The second is that even if the clause should be interpreted as protecting certain fundamental rights, judges have no greater ability than legislatures or ordinary citizens to identify unenumerated rights as fundamental. These criticisms correspond to the two main perceived failings of *Lochner*-era due process: that the Court took on a task for which it had neither authority nor competence.

The first criticism is well-founded as stated. The Due Process Clause certainly does not make any obvious reference to fundamental rights, and the early due process jurisprudence was less concerned with deciding the fundamentality of an asserted right than with setting boundaries to the police power. One might well wonder how the notion of constitutionally special "fundamental rights" entered due process jurisprudence, and whether we might be better off without it. But leaving those questions aside for the moment, accepting this criticism does not mean that modern substantive due process decisions are entirely unjustified.

Fundamental rights may not be hiding in the Due Process Clause, but the idea that governmental acts must be in the public interest is there, and heightened scrutiny of laws infringing on important interests is a plausible decision rule to adopt as a means of implementing this proposition. The justification for such a decision rule relates to the costs of error and the likelihood of unconstitutional action. If a governmental act imposes especially high costs on the individuals it affects, it is less likely, all other things being equal, to produce a net benefit to society—less likely, that is, to comply with the underlying operative proposition. Moreover, erroneously allowing such a law to stand may be an error with higher than normal costs—higher costs

than upholding a law with no legitimate benefits but minimal burdens, for example.

What about the argument that judges have no greater ability than legislatures or ordinary citizens to identify fundamental rights, or interests whose infringement imposes especially high burdens on individuals? The cost-of-error justification may do some work here as well. Even if the courts are no better at identifying rights or balancing interests, the availability of judicial review as a second screening device will weed out some unconstitutional laws that would otherwise be enforced. Whether that benefit is enough to justify an antideferential decision rule depends on our assessment of the relative costs of striking constitutional laws and allowing unconstitutional ones to stand.

Reasonable people may differ on how that balance should be struck. There is, however, a bit more to be said. Even if courts are no better at identifying fundamental rights or important interests, they may be better at defending them against the temporary excesses of popular sentiment that predictably overwhelm legislatures. Moreover, there may be other ways to identify circumstances in which the legislative assessment of benefits and burdens is not to be trusted. Thus, understanding due process jurisprudence as a means of enforcing the requirement that laws be in the public interest offers at least a partial defense of current doctrine. What it does not explain is the sharp bifurcation between "fundamental rights" and mere liberty interests. I will claim later that this dichotomy should be rejected.

What I have argued thus far is that the decision rules perspective discloses a somewhat different story of substantive due process than the standard narrative. It gives us an understanding of the *Lochner* era as a relatively principled and good-faith attempt to implement a plausible constitutional operative proposition, one that the Court continues to invoke today.[40] It explains why that era's doctrine proved unsustainable and it offers a partial defense of current substantive due process jurisprudence. The defense is only partial because the primary factor I have identified as supporting aggressive judicial review of legislation infringing on important interests does not provide a full explanation: the high cost of error does not by itself give a reason to allocate decisionmaking authority to courts rather than legislatures. In the next Part, I will explain how the decision

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[40] Invocation is not enforcement, of course, and it is commonplace that much special interest legislation survives rational basis review. What this means, however, is not that the Court has decided that naked transfers are permissible, but that primary responsibility for enforcing this requirement must lie with the legislature. That is why, in the cases upholding what seem to be such transfers, the Court goes to such lengths to concoct fanciful explanations that are consistent with the public interest. *See* cases cited *supra* note 35.

rules perspective suggests that substantive due process jurisprudence might be improved.

III. A BETTER FUTURE: THE STRANGE FATE OF FOOTNOTE FOUR

Lochner-era substantive due process, I have argued, can be understood as a judicial attempt to restrict government to its proper sphere and purposes. The attempt failed because the boundaries the judiciary sought to maintain—between private economic enterprises and those affected with a public interest; between legislation serving the public interest and impermissible attempts to redistribute—came to seem either incoherent or within the legislative competence. Nondeferential decision rules thus came to seem an intolerable usurpation of legislative authority. Yet when the Court abjured the venture in *Carolene Products*, it promised to continue fairly aggressive supervision of governmental action in a certain class of cases: those set out in footnote four, in which the government infringed on a textually protected right, targeted a minority, or burdened a group whose interests the political process could not be trusted to protect.

Under what constitutional provision was footnote-four review intended to be performed? *Carolene Products*, of course, was a due process case. So, too, are most of the cases it cites as examples or forerunners of footnote-four review—obviously, all of those applying Bill of Rights provisions against the states,[41] but also those illustrating the invalidation of state attempts to target religious and national minorities.[42] Targeting of racial minorities is illustrated in *Carolene* by two equal protection cases dealing with voting rights,[43] but the support for the general methodology is located in no particular provision at all. Instead, at the end of the footnote, Stone cites *McCulloch v. Maryland*[44] and *South Carolina State Highway Department v. Barnwell Bros.*[45] These cases are not so much doctrinal precursors as illustrations of the method of analysis. Each features a situation in which legislatures

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[41] *Carolene* cited *Stromberg v. California*, 283 U.S. 359 (1931) and *Lovell v. Griffin*, 303 U.S. 444 (1938), two cases in which the Court applied the First Amendment to state action through the Due Process Clause. *Carolene*, 304 U.S. at 152 n.4.

[42] For these categories, *Carolene* cited a series of cases invalidating on due process grounds laws requiring public schooling or restricting the teaching of foreign languages or requiring English-only instruction. *See Carolene*, 304 U.S. at 153 n.4 (citing, in this order, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (striking down law requiring public schooling); Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down law requiring English-only instruction); Bartels v. Iowa, 262 U.S. 404 (1923) (same); Farrington v. Tokushige, 273 U.S. 484 (1927) (striking down law requiring English- or Hawaiian-only instruction)).

[43] *See Carolene*, 305 U.S. at 152–53 n.4 (citing Nixon v. Herndon, 273 U.S. 536 (1927), and Nixon v. Condon, 286 U.S. 73 (1932)).

[44] 17 U.S. (4 Wheat.) 316, 428 (1819).

[45] 303 U.S. 177, 184 n.2 (1938).

cannot be trusted to balance costs and benefits accurately, because the benefits go to those to whom the legislature is electorally accountable while the costs fall elsewhere.[46]

Carolene Products is now cited overwhelmingly as the source of the equal protection suspect class doctrine, by courts and academics alike.[47] But this was not always the case. The Supreme Court did not cite *Carolene* in an equal protection case until 1971,[48] and its early references came in due process cases.[49] That footnote four methodology was intended to be applied in due process cases makes perfect sense when we consider the context. The perceived sin of *Lochner*-style due process, which *Carolene* renounced, was judicial second-guessing of legislative assessments of the public interest, or balancing of costs and benefits.[50] Footnote four explains when such legislative balancing is not to be trusted; that is, it sets out conditions under which judicial second-guessing—an anti-deferential decision rule—is proper.

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[46] The cited passage in *McCulloch* is a rejection of what might be called the political safeguards of nationalism—Maryland's assertion that the power to tax federal instrumentalities might be left with the states in the confidence that it would not be abused. Marshall quite sensibly responded that if Maryland could draw its tax revenues from the federal government, it would plainly be tempted to overtax. *See McCulloch*, 17 U.S. (4 Wheat.) at 428 (stating that the federal government has no safeguards against an individual state's likely abuse of the power to tax). *Barnwell Bros.* is a dormant Commerce Clause case, likewise observing that state legislatures are not to be trusted when benefits accrue within the state and costs fall outside it. *See Barnwell Bros.*, 303 U.S. at 184 n.2 (stating that state regulations which affect interstate commerce and benefit in-state residents at the expense of out-of-state residents are thought to be unconstitutional).

[47] *See, e.g.*, Toll v. Moreno, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring) (describing *Carolene Products* as "the moment the Court began constructing modern equal protection doctrine"); Robert J. Cynkar, *Dumping on Federalism*, 75 U. COLO. L. REV. 1261, 1297 (2004) (describing *Carolene Products* footnote four as "a statement from the Court of perhaps the single most important element of equal protection doctrine"); Lawrence Schlam, *Equality in Culture and Law: An Introduction to the Origins and Evolution of the Equal Protection Principle*, 24 N. ILL. U. L. REV. 425, 440–41 (2004) (describing *Carolene Products* as "a seemingly innocuous 'economic due process' opinion, [that] would ultimately (and radically) re-structure equal protection doctrine"). *See generally* Felix Gilman, *The Famous Footnote Four: A History of the* Carolene Products *Footnote*, 46 S. TEX. L. REV. 163 (2004) (discussing the historical context of footnote four and its impact on courts and academics).

[48] *See* Graham v. Richardson, 403 U.S. 365, 372 (1971) (citing *Carolene Products* while labeling aliens as a class "a prime example of a 'discrete and insular' minority").

[49] *See, e.g.*, Am. Fed'n of Labor v. Swing, 312 U.S. 321, 325 (1941) (citing *Carolene Products* footnote four for reviewing actions implicating the right to free speech with a "jealous eye"). In *Skinner v. Oklahoma ex rel Williamson*, 316 U.S. 535, 544 (1942) (Stone, C.J., concurring), Chief Justice Stone cited his footnote while asserting that the case should be decided on due process, and not equal protection grounds. Stone did not seem to be asserting a law-trumping fundamental right not to be sterilized; he endorsed the proposition that states may interfere with an individual's liberty to prevent the "transmission of his socially injurious tendencies." *Id.* at 544 (citing Buck v. Bell, 274 U.S. 200 (1927)). Rather, he argued that when important interests are at stake, narrow tailoring, possibly by individualized hearings, is required. *Id.*

[50] That was not what the *Lochner* Court saw itself as doing, but I have argued that this perception became inescapable once the categorical questions the Court saw itself as answering were revealed as empirical questions, or, worse, problems of balancing conflicting policy goals.

Yet when a case presenting the opportunity to apply footnote four review came, the Court blinked. Not in the sense that its nerve wavered, for it adopted an approach much harder to defend in order to achieve the desired result, but in the sense that it lost sight of the promise of *Carolene*. The case was *Bolling v. Sharpe*,[51] a challenge to the federal segregation of the District of Columbia's public schools, decided the same day as *Brown v. Board of Education*.[52] Chief Justice Stone had been retired since 1946 (he died that same year), and the author of *Bolling* was Chief Justice Earl Warren.

Warren's opinion in *Bolling* is strikingly devoid of analysis. It incorporates (or rather, reverse-incorporates) the Equal Protection Clause into the Fifth Amendment Due Process Clause with the observation that, in view of the decision in Brown, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."[53] Like *Bolling*'s explanation of strict scrutiny,[54] this displays a remarkable insensitivity to history. The states, or some of them, enslaved people and fought a war to defend their right to do so. The national government fought a war to end slavery and forced the Thirteenth and Fourteenth Amendments upon the defeated South. It is not at all unthinkable that the Reconstruction Congress would believe the national government deserved greater trust and less restraint than the states with respect to discrimination.[55] Nor, of course, are racial classifications contrary to our traditions—they are suspect precisely because invidious racial discrimination is such a central feature of American history.

The argumentation in *Bolling*, then, is somewhat less than satisfactory. The fact has been widely noted. John Hart Ely called reverse incorporation "gibberish both syntactically and historically,"[56] and Lawrence Lessig complained of an "embarrassing textual gap."[57] Richard Primus summarizes and glosses the objections: "The syntactical problem to which Ely refers is that if 'Due Process of Law' in-

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[51] 347 U.S. 497 (1954).

[52] 347 U.S. 483 (1954).

[53] *Bolling*, 347 U.S. at 500.

[54] *Id.* at 499 ("Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.").

[55] This is, however, not to say that the federal government is allowed to engage in invidious discrimination. At the level of constitutionally operative proposition, the Due Process Clause forbids it, and in that sense *Bolling*'s statement is correct. The point is rather that decision rules might plausibly grant more deference to the federal government than they do to the states, something the Court (or at least Justice Scalia) used to recognize. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 522–23 (1989) (Scalia, J., concurring) (noting historical and structural arguments for greater deference to the federal government).

[56] ELY, *supra* note 6, at 32.

[57] Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 409 (1995).

cludes equal protection, the Fourteenth Amendment's separate guarantees of due process and equal protection are redundant. The historical problem is that a text ratified in 1791 cannot 'incorporate' a text written in 1868."[58]

But my aim is not to reiterate the received wisdom. To the contrary, my claim is that *Bolling* is an easy case. A straightforward due process application of footnote four tells us that this is a situation in which the legislative balancing of costs and benefits cannot be trusted—not only because the black residents of Washington, D.C. were a politically weak minority subject to prejudice, but also because they were completely unrepresented in Congress.[59] (Today, the official D.C. license plate reads "Taxation Without Representation.") If segregated schooling burdens the interests of blacks, either through stigma or inherent inequality, footnote four authorizes courts to revise the legislative judgment.[60]

Ironically, then, in its haste to incorporate the Equal Protection Clause proper into the Fifth Amendment, the Court discarded the equality norm already present within due process jurisprudence—not an anti-classification equality norm, but a norm of equal concern and respect.[61] The due process demand that legislation promote the public interest can be cashed out in various ways, of which one is the de-

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[58] Richard A. Primus, Bolling *Alone*, 104 COLUM. L. REV. 975, 977 n.7 (2004) (citations omitted). For a defense of *Bolling* as the legitimate protection of a due process liberty interest, see David E. Bernstein, Bolling, *Due Process, Equal Protection, and* Lochner*phobia*, 93 GEO L. J. 1253, 1261–74 (2005).

[59] From a perspective concerned only about representation in the political process, *Bolling* is, in fact, even easier than *Brown*.

[60] It is worth mentioning in passing, that, while I think footnote four's due process analysis was the best path in *Bolling*, the difficulties of reverse incorporation are exaggerated. Suppose, as the critics do, that the Due Process Clause protects fundamental rights. The obvious fundamental rights are those that are textually enumerated—for instance, in the Bill of Rights. The Equal Protection Clause is also textually enumerated, however, so it is just as easy to apply it against the federal government as it is to apply the speech clause against the states. This argument also handles the redundancy objection—if due process includes equal protection because it is a fundamental right, rather than because it is somehow inherent in the concept of due process, then the Equal Protection Clause is necessary to make clear equality's fundamental status. As for history, there is no real reason to suppose that an earlier text cannot incorporate a later one. If what the Due Process Clause does is protect fundamental rights, it is perfectly reasonable to suppose that as rights attain fundamental status through textual specification, they come within the scope of the clause. The conceptual problem here is that originalists and non-originalists alike seem to suppose that fidelity to the original meaning of the Constitution requires that cases be decided as they would have been at the time of the ratification of the relevant constitutional provision. This supposition is quite mistaken. *See* KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS 47 (forthcoming 2006) (arguing against this version of originalism).

[61] The cause for the Court's failure to rely more clearly on due process proper appears to be a desire to avoid association with the discredited *Lochner* decision, a desire voiced strongly by Justice Black. *See* Bernstein, *supra* note 57, at 1276-79 (discussing Warren's original draft of the *Bolling* opinion).

mand that the government, in assessing costs and benefits, not weigh some people's interests more heavily than others.

This demand has dropped out of the due process equation. When the clause came back to life with *Griswold* and its progeny, it was focused on fundamental rights that trumped otherwise valid state laws. Why it took this form is a question with no clear answer. My admittedly tentative guess is that it was related to the application of Bill of Rights liberties against the states. "Incorporating" Bill of Rights provisions into the Due Process Clause while following the *Lochner* limited government model of due process would do very little, because *Lochner* jurisprudence did not understand due process liberties as trumps. That sort of incorporation would thus have given individuals a free speech right, for instance, that could be curtailed by any valid exercise of the police power. (Indeed, this anemic First Amendment is exactly what we see in the early incorporation cases, such as *Gitlow*.[62]) Because this sort of incorporation would effectively do nothing at all, and because Bill of Rights liberties are plausibly understood as trumps, the Court may have been led to think of their incorporated versions as trumps as well. And from that, it seems to follow that the purpose of the Due Process Clause is to protect such "fundamental" rights—both those specified by constitutional text and whatever other ones might be identified by some appropriate method.

I have argued already that this approach is mistaken in its understanding of the operative proposition underlying the Due Process Clause, which is not about fundamental rights.[63] But the decision rules it has led us to are not necessarily unjustified. There are, indeed, reasons for judges to defer less to legislative decisions to restrict highly important liberties. What I want to suggest here is that focusing on the actual operative proposition and restoring footnote four

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[62] Gitlow v. New York, 268 U.S. 652, 667 (1925) ("That a State in the exercise of its police power may punish those who abuse [the freedom of speech] by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question.").

[63] *Bolling*, by missing an opportunity to explain due process in terms of footnote four, bears some of the blame for this mistake. More significant is probably the decision in *The Slaughter-house Cases*, 83 U.S. (16 Wall.) 36 (1872), which drove later Courts to pursue incorporation through the Due Process Clause by rejecting the idea that Fourteenth Amendment "privileges or immunities" included the Bill of Rights's guarantees. *See id.* at 79 (construing federal privileges and immunities as pre-existing federal rights against states). *But see id.* at 118 (Bradley, J., dissenting) (listing Bill of Rights provisions as privileges or immunities of national citizenship). That the incorporation venture could more profitably have been undertaken under the Privileges or Immunities Clause is probably well-enough accepted to count as conventional wisdom among law professors. Akhil Amar gives a particularly trenchant statement of this argument. *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

to its proper place could produce a fully-justified due process jurisprudence.[64]

The first thing to do is to stop fetishizing fundamentality. The idea that judges can identify non-textual fundamental rights protected by the due process clause has been the main target of critics of substantive due process. This criticism has substantial merit. If due process jurisprudence is conceptualized as enforcing constitutional operative propositions related to the specific fundamental rights that the Court has identified, it does look remarkably free-wheeling and antidemocratic.

It is not necessarily illegitimate in its entirety: the Ninth Amendment suggests that such unenumerated rights exist, and given the modern embrace of judicial supremacy, it might be supposed that judges are the proper enforcers. One might also argue that these rights are among the privileges and immunities of the Fourteenth Amendment. Battle lines tend to be drawn over how such rights are to be identified, and the struggle to confine or justify judicial creativity in this regard is the story of most of the modern cases.[65]

But the debate over whether a particular right is "fundamental" in some uniquely constitutional sense is one that need not be engaged in at all. If the Court is in fact identifying such rights, it is engaged at best in an aggressive Ninth Amendment or Privileges and Immunities Clause jurisprudence. The focus on fundamentality is not a plausible due process approach because the operative proposition behind the Due Process Clause, as I have described it, is not about fundamental rights at all.[66] Instead, it is about the government's duty to act in the public interest—to promote the general welfare, either through laws whose benefits are available to all, or at least through laws whose benefits exceed their costs.[67] The question for crafting due process

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[64] Thus, one of my conclusions is that those asserting that *Roe* should have rested on the Equal Protection Clause are barking up the wrong tree. The truth is that due process should be an equality-oriented doctrine, as it used to be. The problem with *Roe* is not that it was decided under the wrong clause; it is that the right clause has been misunderstood.

[65] The central fault line here is the role of tradition and the degree of generality at which to describe an asserted right. *Compare* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (arguing for specific description of rights), *with* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990) (criticizing Justice Scalia's opinion in *Michael H.*). Conservatives appeared to have won with *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), in which the Court accepted the necessity of "a 'careful description' of the asserted fundamental liberty interest." *See* Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 666 (suggesting that with *Glucksberg*, "the *Roe* era came to an end."). *Lawrence v. Texas*, 539 U.S. 558 (2003) has confused the picture.

[66] *See supra* text accompanying notes 36–38. I believe that a sensitive reading of the *Lochner*-era cases bears this out. *See supra* notes 12–40 and accompanying text.

[67] In fact, even Kaldor-Hicks efficiency is probably not necessary. It is imaginable that in some circumstances, a concern for equality could justify a legislative judgment that non-cost-

decision rules is how to decide when the legislative assessment of costs and benefits cannot be trusted. When should courts decline to defer?

Modern substantive due process, in giving strict scrutiny to laws infringing "fundamental rights" could be understood as answering this question: the legislature is not to be trusted to strike the right balance when dealing with highly important interests. But by phrasing the matter in terms of fundamental rights that the Constitution protects, it has muddled the issue and delegitimized the venture, for it is perfectly clear that not all highly important interests are constitutionally shielded from legislative interference—at least, not by decision rules that give primary authority to judges. The modern Court, just like the *Lochner* Court, appears to be substituting its judgment about good policy for that of the legislature, and just like the *Lochner* Court, it has been unable to explain why.[68]

That explanation is what footnote four gives. A better approach to substantive due process would resemble the following. Ordinarily, the legislature is trusted to balance costs and benefits in promoting the public interest. In some cases, where highly important interests are at stake, somewhat less deferential judicial review is justified as a second negative, allowing for the possibility that the legislature has made a patently unreasonable decision imposing unacceptably high costs. (To this extent, my reconstruction resembles the approach endorsed by Justice Souter in *Washington v. Glucksberg*,[69] and the second Justice Harlan in *Poe v. Ullman*.[70]) In other circumstances, particular factors suggest that the legislative judgment is not to be trusted, because the burden of the law falls on people whose interests the legislature might count less highly. There, judicial review need not be particularly deferential; if the ordinary legislative competence

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benefit-justified redistribution could serve the public interest. But for the purposes of this Section, I will assume a simple cost-benefit requirement.

[68] A different way of describing the problem is that having ceded the definition of the public interest to the legislature, the Court had to find something that could defeat an otherwise valid law. Constitutionally-protected rights are the answer. But the demand that the interests protected by the Due Process Clause be constitutionally special brings up the question of how to identify such interests—and pushes aside the question of when the legislature can be trusted.

[69] 521 U.S. at 762 (Souter, J., concurring) (describing substantive due process as "a judicial obligation to scrutinize any impingement on such an important interest with heightened care."); *id.* at 764 ("[T]he business of such review is not the identification of extratextual absolutes but scrutiny of a legislative resolution (perhaps unconscious) of clashing principles . . . . [J]udicial review still has no warrant to substitute one reasonable resolution of the contending positions for another, but authority to supplant the balance already struck between the contenders only when it falls outside the realm of the reasonable.").

[70] 367 U.S. 497, 522 (1961) (Harlan J., dissenting) ("The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.").

is suspect, judicial second-guessing of policy choices (a non-deferential decision rule) is justified.[71] In circumstances where both factors are present—a high-cost law and a doubtful legislative competence—strict scrutiny (an anti-deferential decision rule) would be appropriate.[72]

This approach requires judges to identify two things: high-cost laws and circumstances where the legislative judgment is suspect. Each, I think, can be done with more confidence than the identification of unenumerated fundamental rights, and with less intrusion into the legitimate sphere of legislative competence. The degree to which an interest is important can be ascertained by defining it at a level of generality adequate enough to attribute it to society at large, or at least the politically dominant group, and then asking what justifications are deemed sufficient to restrict the interest. Thus, the interest in contraception can plausibly be analyzed as contraception. Homosexual sodomy has to be expanded to sexual liberty, and abortion to bodily autonomy.[73] If society generally seems to require highly

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[71] Such an approach would mark the return of footnote four, and also, of course, something akin to Ely's process theory. It has also been recommended, in a version more closely resembling this one, by Guido Calabresi and, more recently, Rebecca Brown. *See generally* Rebecca Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491 (2002); Guido Calabresi, *Foreword: Anti-discrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80 (1991).

[72] This general approach to the creation of decision rules can be seen in a number of different doctrinal areas. In addition to the areas analyzed in Roosevelt, *supra* note 1, First Amendment jurisprudence can be understood as tailoring decision rules in a similar fashion, by allocating heightened scrutiny on the basis of both high-cost laws and skepticism about legislative good faith. Stricter scrutiny for content-based restrictions on speech makes sense both because such restrictions are likely to have a higher than normal cost in terms of skewing debate, and because they are the most obvious form that governmental attempts to censor ideas would take. *E.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996) (regarding the Court's review as one of scanning the government's motive for illegitimacy).

Interestingly, David Strauss has suggested that the *Lochner* Court might have succeeded in creating a durable liberty of contract jurisprudence had it produced something like the complicated and context-sensitive First Amendment analysis, rather than its bright-line categorizations. *See* David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 375 (2003) (suggesting that the Lochner court would have drawn less criticism if it had instead championed the freedom of contract in a "limited and qualified way").

[73] Increasing the level of generality until a majoritarian analog can be found might seem to load the dice in favor of a claimed liberty, in somewhat the opposite of the way in which Scalia's suggested specificity loads the dice against it. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (criticizing Justice Brennan's approach to considering claimed liberties from a high level of generality). In fact, this is not the case. Articulating a claimed liberty at the highest level of generality will indeed produce the conclusion that society recognizes such a liberty, but it will also tend to produce the conclusion that the liberty can be restrained for relatively insignificant reasons. As Justice Holmes observed in *Lochner*, "[t]he liberty of the citizen . . . is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not." Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

significant justifications to burden a particular interest, that is good evidence that such laws should be considered high cost.

The factors suggesting that legislative balancing may be doubted have already been mentioned and need not be repeated at length. Briefly, if the law's burdens fall on a group to which the legislature can be expected to be less than responsive, there is reason to suppose that it will discount those interests. Identifying such cases is something that courts can do; it is exactly what they used to do in deciding whether a particular group should be considered a "suspect class" for equal protection analysis.[74] Faced with such circumstances, courts should examine the justifications deemed sufficient to burden an interest asserted by the majority, in order to determine whether lesser justifications have been accepted as adequate to burden a weaker group's enjoyment of that interest.[75] This, again, is not only something that courts can do but something that the Supreme Court actually does. In Free Exercise cases, it regularly looks at the value that the state asserts as a justification for a law burdening religious exercise, and then at how the state treats that value in other contexts. For example, the Court considers what nonreligious interests the state restricts in the name of the asserted value, and what exceptions it will allow. That is, it looks at how the state strikes the balance in other contexts as a means of determining whether it has granted enough weight to religious liberty.[76]

This approach would replicate much, though perhaps not all, of the modern Court's substantive due process jurisprudence. The outcomes of particular cases may be debatable, and they should not be a litmus test in any event.[77] The superiority of this approach is that it

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[74] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (enunciating criteria for "suspect class" status); Frontiero v. Richardson, 411 U.S. 677 (1973) (same).

[75] This is essentially the methodology suggested by Calabresi as a means of reviewing legislative cost-benefit analysis. *See* Calabresi, *supra* note 70.

[76] In *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), Justice Kennedy noted that the city of Hialeah's prohibition on the killing of animals allowed exceptions for kosher butchering, hunting, and other activities, suggesting that it was weighing the Santerians' exercise of religious liberty less heavily than other relatively weak interests. Other free exercise cases are similar; indeed, the practice of testing the legitimacy of the refusal to grant a religious exemption by considering what other exemptions are allowed is standard. As mentioned, this is essentially the methodology suggested by Calabresi as a means of reviewing legislative cost-benefit analysis.

[77] It does bear mention, though, that this approach would give heightened scrutiny to laws having a disparate impact on politically weak groups, something currently achieved under neither due process nor equal protection. I believe this would be a significant improvement. It might also expand congressional power under Section five of the Fourteenth Amendment, though simply understanding the distinction between decision rules and operative propositions would do so as well. *See* Roosevelt, *supra* note 1, at 1668. Also, it might suggest that *Graham v. Connor*, 490 U.S. 386 (1989), is wrong: due process analysis should be available regardless of whether another constitutional provision appears to set out relevant standards.

does two things that modern substantive due process notably does not. It identifies a constitutional operative proposition that the Court can legitimately claim to be enforcing, and it gives reasons why the Court might be justified in not deferring to a legislative determination that a law complies with the operative proposition. It is an illustration, in short, of how attention to operative propositions and the factors supporting the creation of non- or anti-deferential decision rules can rationalize tangled areas of law.

CONCLUSION

The perceived illegitimacy in substantive due process jurisprudence stems in large part from the fact that the Court has attempted to justify its decision rules as constitutional operative propositions: It has characterized modern substantive due process decisions as protecting certain interests because they are constitutionally special "fundamental rights." It is this characterization that gives force to the crude objection that the Constitution says nothing about privacy or abortion, as well as the more sophisticated objection that the Court has failed to articulate a plausible method for identifying such rights, much less a method within judicial, rather than legislative, competence. Both objections can be avoided by shifting the focus of due process jurisprudence away from fundamental rights and back to the public interest. The best future for unenumerated rights, as far as the Due Process Clause is concerned, is one in which we stop thinking about them as rights.