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SUBSTANTIVE DUE PROCESS AND DISCOURSE ETHICS: RETHINKING FUNDAMENTAL RIGHTS ANALYSIS

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I. Introduction

According to one study, an "astounding" 3,815 journal and law policymaking articles used the terms "judicial activism" or "judicial activist" during the 1990's. Since 2000, "these terms have surfaced in another 1,817 articles—an average of more than 450 per year." The interest in judicial

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2 Id.
activism demonstrated by these statistics stems from the reality that federal judges are unelected and serve for life, yet have the power to overturn decisions of the democratically elected branches of government. For a country devoted to democratic self-rule, this creates a serious tension and brings to mind Rousseau's famous announcement that he would "force them to be free." Yet despite the worry about judicial activism, or more precisely judicial policymaking, it remains vitally important to the American political system for the simple reason that for every Scott v. Sandford, there is a Brown v. Board of Education. The necessity for some types of judicial policymaking but not others makes it important to develop a coherent theory of the judiciary's proper role in shaping and responding to national debate.

This is particularly true in the area of identifying and protecting Constitutional rights. Throughout history and into today, American law has created various hierarchies of people, with individuals at each level possessing a list of rights unique to that group. The object of this paper is to show that courts can and must determine the content of those lists without at the same time undermining democratic self-rule.

In Part II, I show that rights are socially constructed through rational discourse, meaning that an individual has a right when and only to the extent people agree he or she has that right. I also show that the creation of rights often occurs outside the democratic process, and that the Constitution empowers and requires judges to protect these rights. Thus, the question is not whether we will allow the judiciary to make its grab for power, but rather since it has that power, how should judges execute it.

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3 See Cass Sunstein, The Philosopher-Justice—Farewell Rehnquist, Move Over Scalia, THE NEW REPUBLIC, Sept. 19, 2005. at 29 (book review) ("[S]ince the Court has the power to invalidate the decisions of the elected branches, it is not so easy to reconcile the magnitude of its power with the national commitment to democratic self-rule.").

4 See Stephen Breyer, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 116 (2005) ("[O]nce judges become accustomed to justifying legal conclusions through appeal to real-world consequences, they will too often act subjectively and undemocratically, substituting an elite's views of good policy for sound law.").


7 See Scott v. Sandford, 60 U.S. 393 (1856) (affirming the right of property in a slave), superseded by U.S. CONST. amend. XIII.


9 See Larry D. Kramer, The Supreme Court 2000 Term: Foreword: We The Court, 115 HARV. L. REV. 4, 169 (2001) (asking whether we should let the Supreme Court "get away with" its grab for power).
In Part III, I show that the *Lochner* era jurisprudence failed to properly execute this judicial power to identify which rights the Constitution protected. *Lochner* did not rely on principles to limit judicial discretion, but instead relied on the personal opinions of judges who did not understand the socially constructed nature of rights.\(^\text{10}\)

In Part IV, I demonstrate that modern substantive due process jurisprudence, by explicitly relying on traditionally shared social values to determine what rights are "fundamental" and require protection, has come closer to fixing the problems plaguing earlier Due Process Clause jurisprudence. This Part, however, also argues that modern substantive due process jurisprudence repeats *Lochner*’s first mistake by failing to articulate principles that limit judicial discretion when identifying which rights require protection. I also show in this part that if judges adopt Justice Scalia’s rule to refer only to the "most specific level" when identifying fundamental rights and the relevant tradition that protects them, judges will commit *Lochner*’s second error: failing to recognize the socially constructed nature of rights—that the People can and do create new rights outside the democratic process that nonetheless deserve judicial protection.

In Part V, I propose and defend a new substantive due process jurisprudence. When determining whether to uphold a litigant’s asserted right, courts should first define the asserted right using Justice Scalia’s "most specific level" rule. Judges should then uphold the claimed right if a "substantial minority" of the American people supports protecting this narrow definition of the right. In writing the opinion, judges should define the alleged right broadly, such that a tradition rooted deeply in the Nation’s history protects the litigant’s rights claim. Furthermore, judges should justify their decisions to do so by referencing the existence of the supportive substantial minority, as well as the arguments that minority advances.

II. The Need for Judicial Protection of Constitutional Rights

A. The Due Process Clause Requires the Government to Protect Both Liberty and Equality

The natural starting place for a discussion of substantive due process is the text from which it arises.\(^\text{11}\) Substantive due process finds its origins in


\(^{11}\) See Bruce Ackerman, *Robert Bork’s Grand Inquisition*, 99 Yale L.J. 1419, 1422 (1990) (book review) (arguing that according to Bork, "courts are to do no more, but no less, than effectuate the will of the Framers—as revealed by reading the constitutional text against the background provided by 'debates at the conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like.'").
the Due Process Clause of the 14th Amendment of the Constitution, which provides that no State shall "deprive any person of life, liberty, or property without due process of law." I define liberty as the right to act and decide how one is to live one's life without external interference.

Although the Due Process Clause only mentions liberty, it also necessarily requires the government to protect equality. The reason is simple: protecting one requires protecting the other. Protection of liberty requires protection of equality because applying laws equally often "serve[s] to cabin their infringement on liberty." Indeed, "the constitutional values of equality and liberty are fundamentally linked by the notion that equal access to certain institutions and services is a prime component of any meaningful liberty." Applying the same principles to everyone when determining whether to grant a liberty right prevents the law from making an improper or arbitrary distinction among groups and incorrectly revoking or refusing to recognize a liberty right.

In this way, equality becomes the criterion by which the validity of rights claims is judged; the conferral or restriction of liberty rights must be based on arguments to which everyone, including those affected, would agree. This equal distribution of rights in turn strengthens liberty by cabining the possibility of arbitrary infringements. Thus, the Due Process Clause, by expressly protecting liberty, makes equality a Constitutional principle as well because equality is necessary for obtaining a strong liberty.

To achieve the equality that protects liberty, however, the government must also provide liberty as an initial matter. Liberty is a necessary component in the process by which equality is defined and secured. The discourse ethics of philosopher Jürgen Habermas illustrate this point. Building on Austin, Habermas states that there are three fundamental types of statements: statements about the observable world of facts

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12 U.S. CONST. amend. XIV, §2.
13 See Joel Feinberg, Autonomy, Sovereignty and Privacy: Moral Ideals in the Constitution?, 58 NOTRE DAME L. REV. 445, 473 (1983) ("The reason [in general] for not interfering, unless for the sake of others, with a person’s voluntary acts is consideration for his liberty.").
15 Karlan, supra note 13, at 62.
17 See id. at 60–61 ("Roe helped to make women more equal by giving them the kind of ‘control over [their] reproductive lives’ necessary for them to ‘participate equally in the economic and social life of the Nation.’" (quoting Roe v. Wade, 410 U.S. 113 (1973))).
18 But see RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 122–23 (2000) (arguing that this framework does not "make liberty instrumental to distributional equality any more than it makes the latter instrumental to liberty: the two ideas rather merge in a fuller account of when the law governing the distribution and use of resources treats everyone with equal concern").
(cognitive-objective), statements about one's beliefs, identities and aesthetic judgments (expressive-subjective), and statements about social norms (moral-normative). 19 When they are correct, cognitive-objective statements are "true," expressive-subjective statements are "sincere" and moral-normative statements are "valid." 20

Departing from Kant and Kohlberg, however, Habermas argues that statements cannot be monologically validated. 21 Rather, statements are true, sincere, or valid only to the extent upon which people agree that they are. 22 Each type of statement has its own procedure for determining whether people agree regarding its truth, sincerity, or validity. 23 Cognitive-truth claims, claims that involve the correspondence between the world of facts and the claim, are true if people agree on the correspondence between the meaning of the words in the claim and the existence of the facts in the world to which they refer. 24 Expressive-subjective claims are sincere if people agree that the meaning of the words in the claim reflects the intentions, beliefs, and feelings of the speaker. 25 Moral-normative claims are valid if all individuals agree that the meaning of the words in the claim express the norms they signify. 26 The meaning of statements and their validity are now inextricably entwined; social agreement on a statement's meaning is necessary to determine a statement's truth, validity, or sincerity. At the same time, agreement on the truth, validity, or sincerity of a statement creates new intersubjective meanings and values. 27

Such agreement comes easily when it involves the truth of a cognitive-objective statement such as "I am not a squirrel," or expressive-subjective statements such as "I ran because I was afraid of the fire." Agreement on the validity of moral-normative claims, however, such as

19 See DAVID INGRAM, HABERMAS AND THE DIALECTIC OF REASON 20–21, 37–39 (1987) ("Buhler’s semiotic analysis of language isolated three functions common to all signs: a cognitive function (the sign as symbol of reality), an expressive function (the sign as a symptom of the sender’s inner experience), and an appellative function (the sign as a signal aimed at influencing the receiver’s behavior.").
20 Id.
21 See id. ("[S]ocial engagements of a relatively intransitory nature would presuppose at least some communicative agreement, and the meaning of action would accordingly refer to a public accomplishment rather than a private episode in the mind of the actor.").
22 Id.
23 See id. at 20 (arguing that "much of the knowledge guiding our actions consists in aptitudes, skills, and competencies- in other words, tacit know-how- that we would have difficulty describing and explaining, let alone justifying").
24 Id. at 20, 29–30, 34.
25 See id. ("Although application of the theory of worlds to social life marks an important advance in conceptualizing intentional action, it still conceives the interaction between subject, nature, and objective spirit instrumentally. . . .").
26 Id.
27 Id.
"Equality means equality of opportunity"; "The right to free exercise of religion is a fundamental right"; or "Justice is rendering to each what they are due" is more difficult because all individuals must agree the words actually signify the relevant social norm, i.e. that equality actually does mean equality of opportunity or that the right to free exercise of religion actually is a fundamental right. In a more primitive time in human history, all individuals would accept the validity of a moral-normative claim based on an appeal to mythologies, such as ethnic or religious arguments. But this did not create the universal assent Habermas states is necessary to validate a moral-normative statement because only individuals sharing that ethnic or religious background would agree with the validity of the statement.

Instead, Habermas argues that agreement must be based on reason — on reference to the best argument—because reason is the only universal basis for justifying action. "Only in a rationalized lifeworld do moral issues become independent of issues of the good life. Only then do they have to be dealt with autonomously as issues of justice, at least initially." Reason is the only universal basis because every individual is capable of accepting arguments based on reason. Habermas goes on to state that reason is the only truly universal characteristic of individuals because it is the end result of a process that all humans can go through, critical identity formation.

G.H. Mead first outlined the idea of a critical process of identity formation, which argues that the inter-subjective creation of values and meaning through communication both enables and forces children to create individual identities.

An infant’s, toddler’s, and child’s communication with others such as mothers, grandparents, and friends requires that child to adopt the roles of speaker and listener vis à vis those other individuals. By adopting the role of listener, a child is taught the initial values and meanings the community shares. These values and meanings provide a child with the tools and building blocks necessary for creating an identity. By adopting the role of the speaker, the child also acts on the world outside her, deciding how to act based on her own interpretation of values and meanings that she received as a listener. Thus, through acting or speaking, the child first determines the

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28 See id. at 34 (discussing the idea that individuals act by accepting or rejecting the validity of certain values or meanings).
30 Ingram, supra note 18, at 104-05.
31 JOHANNA MEEHAN, FEMINISTS READ HABERMAS, 3 (1995); see also Ingram, supra note 18, at 104-05, 109 (discussing Habermas’ idea that critical identity formation is a process undergone by all humans and that reason is the end result of this process).
32 Meehan, supra note 30, at 3.
validity of the values and meanings for herself, and enters the world of meaning and value creation as an individual.\textsuperscript{33}

Notice, that this means Habermas is able to assert that when individuals act, they do so for a reason. Individuals act by first either accepting or rejecting the validity of certain values or meanings.\textsuperscript{34} Thus, human interaction gives rise to and maintains individual and social identities "by organizing action around shared values, so as to reach agreement over criticizable validity claims."\textsuperscript{35} For example, a child justifies actions, thereby creating and maintaining an identity, from compulsion.\textsuperscript{36} A child’s parents teach him not to yell in the library, and the child, before yelling in the library, decides how to act based on his interpretation of the values and meanings he received as a listener. Having determined that this yelling generates punishment and avoids reward, the child decides not to yell. This decision itself reinforces the shared value that yelling in the library is bad.

As a child grows older, she encounters more shared values, more criticizable validity claims, and more abstract identities and roles. As a result, children are able and forced to accept or reject shared values or meaning for increasingly abstract reasons, such as ethnic or religious grounds and are able and forced to adopt more abstract identities and roles.\textsuperscript{37} At adolescence, individuals critically analyze the roles assigned to them and either accept them or reject them as a basis for action.\textsuperscript{38} Such individuals, however, still justify action based on compulsions they encounter in their individual, particularized lives, rather than on universal bases applicable to all individuals at all times. Habermas argues that an individual who justifies action by rejecting or accepting the validity of moral-normative claims on compulsion, rather than universal bases, cannot determine the validity of moral-normative statements, claims that must be agreed upon by all in order to be valid.\textsuperscript{39} Only a person justifying actions based on reason—someone with the "specific cognitive and communicative skills needed to recognize and redeem normative claims"—can create and critique the validity of moral-normative claims.\textsuperscript{40}

An individual justifies action based on reason only by adopting the perspective of the "generalized other," a perspective in which an individual decenters her understanding of reality away from an egocentric perspective.

\textsuperscript{33} Id.
\textsuperscript{34} Ingram, supra note 18, at 27–28.
\textsuperscript{35} Id. at 115.
\textsuperscript{36} Id. at 27, 107–109.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Habermas, supra note 28Error! Bookmark not defined., at 57–58, 178.
\textsuperscript{40} Meehan, supra note 30, at 2; Habermas, supra note 28, at 3, 17, 57.
and critiques moral-normative statements from another person’s perspective. Decentering requires an individual to "transcend one’s parochial prejudices in reflection and ground one’s judgments in first principles." This transcendence allows an individual to recognize that identity roles, and the communicative interactions that create them, are socially constructed through argument, rather than intrinsic to being. A decentered individual breaks free of the socially constructed nature of these identity constraints and becomes a fully autonomous individual, one who chooses solely on rationally justifiable reasons, "by force of the better argument." This, in turn, enables the individual to engage in the argument over the validity of moral-normative claims requiring agreement from all individuals such as the definition and content of "equality" or "fundamental rights."

If individuals can engage in the debate over the definition and content of "equality" only from the decentered point of view, one can now see why liberty is necessary to protect equality; liberty is a necessary component of the dialogic process by which equality is defined and assured. Because equality is necessary to protect liberty, the Due Process Clause protects those liberties that enable individuals to engage in the debate over the definition of equality.

The Lochner era of cases provide a clear example of the full relationship between liberty and equality. In Coppage v. Kansas, the Court struck down a statute making it a criminal offense for an employer to prohibit, as a condition for employment, an employee from becoming a member of a union. This law ostensibly would have helped employees’ bargain for better conditions of employment. Although the employer admittedly had the superior bargaining position, the Court reasoned it was "from the nature of things impossible to uphold freedom of contract and the right of private property without recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights." Because the Court ruled the inequality of bargaining position was a natural and necessary result of a liberty of contract without need for government

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41 Ingram, supra note 18, at 30–31; Meehan, supra note 30, at 3.
42 Ingram, supra note 18, at 131.
43 Id. at 20, 129–130.
44 Id. at 27, 30–31, 131.
45 Dworkin, supra note 17, at 122–23.
46 Coppage v. Kansas, 236 U.S. 1 (1915), abrogated by Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).
47 Id. at 26.
48 Id. at 17.
correction, the state could not interfere with the employer's and employee's liberty of contract in order to remedy the employee's bargaining position.\textsuperscript{49}

Justice Holmes disagreed, reasoning that a state could restrict the liberty of contract if the restriction would "establish the equality of position between the parties in which liberty of contract begins."\textsuperscript{50} Holmes realized that real contracts do not contemplate the exploitation of one party by another but are an exchange into which the parties would not enter unless both were better off after the exchange. Rules establishing equality of bargaining rights would allow people to make real contracts, an enhancement of each party's liberty of contract.\textsuperscript{51} Justice Holmes' argument can be reframed as stating that in some instances, providing equality through the conferral of new liberties, such as the right to join a union, protects other liberties, such as the right of contract.\textsuperscript{52} At the same time, Justice Holmes' sophisticated understanding of the role of equality in the liberty to contract came about only through the freedom found in discourse between decentered individuals.

\textit{B. The Socially Constructed Nature of Rights and The Judiciary's Role in Protecting Them in a Democracy}

There is a precarious balancing act for our democratic government to perform in fulfilling its Constitutional obligation to protect equality and liberty. Equality does not demand that every alleged rights claim be granted because not all rights claims are based on arguments to which everyone, including those affected, would agree. For instance, in a perfectly working system, blind people would limit their ability to fly planes\textsuperscript{53} and AIDS patients would limit their ability to give blood, because these individuals would subordinate their desire to engage in these activities to arguments supporting keeping society safe. Therefore, not all rights claims strengthen liberty overall by providing equality. Thus, the government must distinguish constitutionally protected, valid rights it cannot infringe from constitutionally unprotected, invalid rights it can infringe.\textsuperscript{54} The supposed salvation of our

\begin{flushright}
\textsuperscript{49} Id.
\textsuperscript{50} Id. at 27 (Holmes J. dissenting).
\textsuperscript{52} Id.
\textsuperscript{53} See C. Edwin Baker, \textit{Outcome Equality or Equality Of Respect: The Substantive Content Of Equal Protection}, 131 U. PA. L. REV. 933, 937 (1983) (stating that a blind person can be forbidden from flying a plane because of what he or she cannot do, that is, see).
\textsuperscript{54} As noted earlier, valid rights are those liberties which promote equality, as defined by arguments to which all individuals can agree. \textit{Supra} p. 4.
\end{flushright}
democracy is that the government will never get this calculus wrong because government-imposed limits on liberty will apply to everyone, including those that make the rule.\textsuperscript{55} Put in terms of Habermas' discourse ethics, individuals justify particular legislation—as with all action—on the basis of shared values, and one group of individuals will not limit the liberty of another group unless they would limit their own liberty in the same way. Democratically enacted legislation will create only those rights that all people agree meet the criterion of equality, thereby securing liberty as the Due Process Clause demands.

This view assumes, however, that people, when imposing limits, actually legislate on the basis of shared values, from the perspective of the generalized other/decentered point of view. Assuming that the participants in our democracy operate from this perspective takes a gigantic leap of faith, and indeed is not empirically true.\textsuperscript{56} Instead, our democracy enables the majority to (1) limit the rights of minorities in ways they would not limit themselves, and (2) provide benefits to themselves that they withhold from the minorities, thereby creating an inequality of liberty rights. Thus, as Rebecca Brown acutely notes, "[W]hat kind of salvation is it if a lack of shared values makes it possible for one group to decide that something deeply valued only by another is not worth protecting?"\textsuperscript{57}

Taking this a step forward, it is insufficient for government merely to protect rights granted by the People democratically, that is, politically. Rather, as Habermas shows, the moral-normative statement "(Group) X has Y right" is valid not when recognized by some democratically elected legislature, but when all individuals can agree the meaning of the words in the claim express the norms they signify. Therefore, rights are socially constructed and exist to the extent individuals in the decentered point of view agree they exist. Just as importantly, individuals in the decetered point of view will confer and limit liberty rights based only on arguments to which everyone, including those affected, would agree. Thus, decentered individuals identify only those rights that meet the criterion of equality and actually strengthen liberty overall.

This analysis has Constitutional implications. As shown above, the Due Process Clause protects those liberty rights that meet the criterion of

\textsuperscript{55} See Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 300 (1990) (Scalia, J. concurring) (noting that the "salvation" for protection of individual liberties in America is the Equal Protection Clause, which "requires the democratic majority to accept for themselves and their loved ones what they impose on [the American people]," justifying non-intrusion by the government into "every field of human activity where irrationality and oppression may theoretically occur").

\textsuperscript{56} See Dred Scott v. Sandford, 60 U.S. 393 (1856) (showing that democracy, in the past, has not institutionalized the decentered point of view); Loving v. Virginia, 388 U.S. 1 (1967) (showing that even this century, the People are not as decentered as one would hope).

equality, and whose conferral strengthens the liberty of all. Correspondingly, the rights identified by individuals from the decentered point of view are rights that meet that criterion. The Due Process Clause obligates government to protect these rights, even if they are not enshrined in democratic legislation. Yet, as explained previously, democracy often fails to protect these rights through legislation, even though individuals from the decentered point of view have already identified the rights claim as increasing equality and protecting liberty.

In a democracy, judicial policymaking is often the only governmental mechanism for protecting these rights. Contrary to Justice Scalia's pronouncements that the Due Process Clause is meant to prevent the Court from protecting minority rights, the Due Process Clause requires the judiciary to protect even those minority rights that are not enshrined in democratically passed legislation. The failure of democratic process to do so is precisely "the failure that judicial policymaking can alleviate."

Practically, courts can identify an asserted right as one of these discursively created rights by identifying "substantial minorities" of people who agree the asserted right should be protected. A "substantial minority" is a number of people such that support for the social movement advancing the right has passed a "tipping point" and will not regress. Because a right exists to the extent that it is based on arguments to which everyone would agree, the asserted right effectively exists at the point a right has the support of this substantial minority. Further, the fact that the movement will not regress in support verifies the rationality of the arguments underlying the movement's rights claims and shows it is a matter of when, not if, all individuals will come to agree that the asserted right meets the criterion of equality and therefore strengthens liberty. Because these asserted rights meet the criterion of equality and strengthens liberty overall, the Due Process Clause demands that the judiciary protect new rights claims supported by substantial minorities. This is especially so when the call is a close one because the preferable choice is to force the discriminating majority to convincingly win the dialogue "rather than to risk allowing an intrusive statute to stand."

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58 See Michael H. v. Gerald D., 491 U.S. 110, 123 n.2 (1989) ("[The Due Process Clause's] purpose is to prevent future generations from lightly casting aside important traditional values—not to enable this Court to invent new ones.").


60 Brown, supra note 56, at 1546.

61 Spitko, supra note 58, at 1347.
III. Early Judicial Policymaking and Substantive Due Process

A. The Problems With Lochner: Too Much Judicial Discretion and a Failure to Protect Socially Constructed Rights

In fact, American courts have always claimed the power and duty to prevent the unconstitutional violation of an individual's rights. In 1798, the Supreme Court, in striking down an ex post facto law, stated "[a] law that punished a citizen for an innocent action...or a law that takes property from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers." Twelve years later, the Supreme Court affirmed its duty to review such legislation and noted the great care required of a judge when using his or her power to prevent legislative misuse of government power, stating:

The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of such delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes... The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

Whether a current law is incompatible with the Constitution is a question of delicacy because federal judges are unelected and serve for life, yet they have the power to overturn the decisions of democratically elected branches of government. The judiciary "is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution." The job of judges "is to make sense of the legally relevant sources, recognizing that the messages they receive may prove inconsistent with their personal or political morality..." and then decide only on the basis of the legally relevant sources.

Due to the indeterminacy of textual meaning, however, the judiciary

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63 Fletcher v. Peck, 10 U.S. 87, 128 (1810).
64 See Sunstein, supra note 3, at 29 ("Since the Court has the power to invalidate the decisions of elected branches, it is not easy to reconcile the magnitude of its power with the national commitment to democratic self-rule."); see also Breyer, supra note 4, at 119.
66 Ackerman, supra note 10, at 1420.
cannot assert that, "as it once did, statutory term[s] . . . convey unique intrinsic meanings that courts can implement without the need for interpretation." The primary legally relevant sources (legal texts) are often of limited help in guiding judges trying to differentiate between the legal answer and the answer based on personal or political morality. Rather, principles of interpretation are needed that help the judge differentiate between political and legal answers. These principles restrain judicial discretion and, if properly articulated, will lead judges to correct legal answers, protecting only those rights that actually enhance equality and liberty (and are therefore protected by the Due Process Clause).

Looking to the mistakes and successes of past theories enables modern scholars to develop such principles. To this end, I will show that the Court's early Due Process Clause jurisprudence (1) failed to develop principles that limited judicial discretion and (2) did not recognize the dialectic role citizens play in forming the content of law and rights.

The first attempt to develop principles for interpreting the Due Process Clause occurred when legislatures passed economic regulation in the late nineteenth century. The difficulty for judges was determining how to "analyze . . . what would come to be perceived as an irreconcilable contradiction between regulation and takings." Although the Court had already held in Calder v. Bull that the Constitution prohibited class legislation that took from A and gave to B without due process, courts were left without a strong theory of what due process meant. This is also to say

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68 See id. at 2395 n.29 ("Even the strictest modern textualists accept Wittgenstein's premise that, because words lack intrinsic meaning, communication depends on a community's shared linguistic practices and understandings.").
69 Ackerman, supra note 11, at 1420.
70 Margaret Jane Radin, Can the Rule of Law Survive Bush v. Gore?, in BUSH V. GORE: THE QUESTION OF LEGITIMACY 110, 124 (Bruce Ackerman ed., 2002) ("The relationship between law and particular cases is dialectical, not a version of strict entailment . . . . Legal rules are enacted not only to achieve ends in a narrow sense, but also to make text of our commitments—to teach us who we are as citizens, to exhort us to live up to the values we profess, to express who we are and what we value.") (emphasis added).
71 See generally John V. Orth, DUE PROCESS OF LAW: A BRIEF HISTORY 50 (2003) (reviewing how due process jurisprudence was analyzed in the late nineteenth century when legislation threatened vested interests and individual entrepreneurship).
74 Id. at 388.
75 See Howard Gillman, The Constitution Besieged 65 (1993) (stating without natural law, a refinement of principles by improving the sophistication of distinctions and vocabulary was a logical way in which to approach right answers). This remains a good approach. Even though the mythology of objective truth is dead, it still seems possible to get closer to right answers through more sophisticated dialogue and refined vocabulary. Like an algorithm approaching zero, knowing we will never touch the line, we at least always get closer to truth by half.
that courts were without a theory to describe when granting a previously
unrecognized right would lead to equality, thereby strengthening liberty in
general.

At the time, the Court had developed two theories for determining
when it should recognize a Due Process rights claim. First, the Court
developed a principle of differentiating between rights "affected with a
public interest" and private rights. Under this line of cases, legislation
satisfied the Due Process Clause even if it infringed individuals' private
rights to property or liberty as long as the legislation was an exercise of a
right "affected with a public interest." This public/private interest principle
left judges to determine whether a given right was "affected with a public
interest." Second, the Court concurrently used the general welfare principle,
which held that legislation was proper, despite infringing on individuals' liberty
rights, if it was good-faith legislation for the public health, morals,
and safety. Again, the theory left judges to determine whether the
legislature reasonably believed the legislation promoted the general welfare.

The line of cases implementing the public/private interest principle
began with *Citizens' Savings & Loan Association v. Topeka*, decided in
1874. In *Loan Association*, the Supreme Court struck down legislation
passed by the Kansas legislature authorizing municipalities to issue bonds
and use the money to help local businesses. Citizens and a loan association
sued a municipality issuing bonds under the act, arguing the city was simply
taking money from them and giving it to private business owners. They
argued it was a violation of the naked takings doctrine, expressed in *Calder*,
prohibiting class legislation that limited one party's liberty to contract and
right to property for the benefit of another group of people. Creating such
perceived inequality of liberty, they argued, was outside the scope of
Congress' proper police powers.

The Court struck down the act as an improper taking but created an
exception to *Calder*’s strict prohibition on class legislation. In deciding
*Loan Association*, the Court held that the Due Process Clause permitted
naked takings if the taking was the result of an exercise of a right "affected

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76 *Citizens' Savings & Loan Ass'n v. Topeka*, 87 U.S. 655 (1874).
77 Horwitz, *supra* note 71, at 28.
78 *Citizens' Savings & Loan Ass'n* 87 U.S. 655.
79 *Id.* at 659–60.
80 *Id.* at 659.
81 *Id.*; see also *Fletcher v. Peck*, 10 U.S. 87, 138 (1810) (stating that no State shall pass any bill
of attainder, ex post facto law, or any law impairing the obligation of contracts); *Calder v. Bull*, 3 U.S.
386, 388 (1798) (stating that a law that takes property from A and gives it to B is a law that must be
prohibited by legislation as forbidden by general principles of law and reason).
82 *Id.*
83 *Id.* at 661.
with a public interest;" defining a right "affected with a public interest" as one held by the People and exercised for their benefit. In effect, the Court's determination that the right was affected with a public interest served to distinguish legitimate legislation from legislation that was actually a private taking meant to benefit one specific class.

The Court in Loan Association found that the legislation sought to help businesses "not of a public character," and therefore held that the municipality was not exercising a right "affected with a public interest." The Court upheld the citizens' right to property and determined "that in this class of cases the right to contract must be limited by the right to tax" because such laws "pervert[ed] the right of taxation, which can only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain." Thus, the Court had established that (1) legislation was an exercise of a right "affected with a public interest" if it regulated or benefited a public, rather than private, business, and (2) the exercise of such a right trumped individuals' private rights.

Two years later, the Court again used this public/private interest principle in Munn v. Illinois to uphold legislation fixing maximum prices for the storage of grain in warehouses. Grain warehouse operators claimed this violated their right to contract freely with their laborers. The majority of the Court disagreed, noting that "when private property is devoted to a public use, it is subject to public regulation," and analogized grain warehouse operators to individuals in traditionally public and regulated industries such as "the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the carman, or the hackney-coachman." The majority concluded that the public's right to control property in which it had an interest trumped grain warehouse operators' right to property and contract. Grain warehouse operators had to "submit to be controlled by the public."

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84 Id. at 662.
85 Id. at 662.
86 Classic examples are the right of municipalities to tax their residents to raise funds for trash collection, or the right of government to regulate power utilities companies.
87 Citizens' Savings & Loan Ass'n v. Topeka, 87 U.S. 655, 659 (1874).
88 Id.
89 Munn v. Illinois, 94 U.S. 113 (1876).
90 Id. at 135–36.
91 Id. at 118.
92 Id. at 131–32.
93 Id.
94 Id. at 133.
95 Id. at 124.
In an all too common display of the looseness of analogy, the dissent did not attack the majority's theory of the legislature's police power but rather disagreed with the majority's application of the law to the facts. The dissent found that grain warehouses were not an industry affected with a public interest because, unlike the common carrier who depended on the use of the King's road or the miller in hoary England who depended on the use of the lord of the manor's mill, grain warehouse operators did not use any rights or privileges conferred by the government. As a result, the dissent held the maximum hours legislation was not the exercise of a right "affected with a public interest," and was prohibited by the Due Process Clause. Barely in its infancy, the public/private interest principle already showed its weakness as a comprehensive theory for differentiating between constitutionally protected and unprotected rights.

Over the course of the next fifty years the American economy demanded more regulation in response to increased industrialization and inequality in the workplace. The corresponding diversity of cases coming before the Court pushed the Court's application of the principle towards licentiousness. The Court recognized this problem in Tyson & Bro. - United Theatre Ticket Offices v. Banton, stating that the distinction "furnishes at best an indefinite standard, and attempts to define it have resulted, generally, in producing little more than paraphrases, which themselves require elucidation." Still, the Court went on in United Theatre to strike down a law regulating the resale of theater tickets because theaters were not public businesses.

In New State Ice Co. v. Liebmann, Justice Brandeis attempted to show the absurdity the approach had reached by the time he came to the bench. He conducted a lengthy and fact-filled analysis of the importance of the ice-making industry to Oklahoma to determine whether it was a public or private business. Noting that the mean nominal temperature in Oklahoma during January was thirty-eight degrees, and that "so far as appears no natural ice is harvested in the state for commercial purposes," Justice

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95 See Kathleen Sullivan, Post-Liberal Judging: The Roles of Categorization and Balancing, 63 U. COLO. L. REV. 293, 297 (1993) (discussing the numerous different applications of intermediate scrutiny).
96 Munn v. Illinois, 94 U.S. 113, 145 (1876).
97 Id. at 148-49.
98 Id. at 151-52.
99 See Horwitz, supra note 71, at 30 (discussing how judges came to view the law and the courts to be an instrument of policy that can bring about social change).
101 Id. at 430.
102 Id. at 445.
104 Id. at 277-78.
Brandeis concluded that ice making was a public business in Oklahoma and the legislature could regulate the industry. Due to the increased variety of cases forced by the changing social values and circumstances, the Court discarded the distinction two years later in *Nebbia v. New York*.

As noted, the Court had contemporaneously developed a "general welfare" principle to identify those rights claims the Due Process Clause protected from legislative infringement. In *Mugler v. Kansas*, the Court upholding a temperance law in 1887, concluded that legislation was proper despite infringing on individuals' Constitutional rights to property and contract, if (1) it was good-faith legislation for the public health, morals, and safety, and (2) was reasonably tailored to protect the public health, morals, and safety. If the legislature could reasonably believe the legislation benefited society as a whole rather than one class of people, courts were to uphold the legislation. This test of reasonableness served to ensure that legislation facially providing for the general welfare was not legislation whose "real object is not to protect the community, or promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law." *Mugler* was thus interested in prohibiting class legislation that was precluded by Calder's prohibition on naked takings, but allowed taking from an individual for the benefit of society as a whole.

Nine years later, the landscape changed dramatically with *Holden v. Hardy*. In *Holden*, the Court upheld a Utah law limiting the maximum number of hours miners could work in a day as good-faith legislation for the public health. Strict adherence to Calder's or Mugler's public welfare
principle would have required striking down the legislation because the Utah statute infringed the rights of one class of citizens (the employers) to improve the rights of another class of citizens (the miners), rather than the general public. Instead, the Court held that the test for whether legislation violated the Due Process Clause was not whether the legislation indiscriminately and reasonably protected health of the general public, but whether "the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination." The Court went on to uphold the maximum hours law, even though it only benefited miners.

Holden was a significant shift. The addition of the qualifier "unjust" to the word "discrimination" fundamentally altered Mugler's general welfare principle. Under Mugler, the fact that legislation affected a select group of people rather than the general public made the legislation per se unconstitutional. But increased industrialization and inequality, demanding more regulation, changed the Court's understanding of the nature of the liberty of contract. Justice Brown, writing for the majority in Holden, stated that the use of the police powers "has doubtless been greatly expanded . . . owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employees as to demand special precautions for their well-being and protection." With this change of understanding and circumstance, there came a need for readjusting the balance of the opposing values within the general welfare principle. Thus, in response to a changing social and economic landscape, the Court developed the reasonable legislation test in Holden.

Now, under Holden, if the legislation was "reasonable," meaning likely to improve the health, safety, or welfare of a group who, in the Court's opinion, needed the legislature's help, the law would not be unjust
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discrimination, and the law would be upheld despite the fact that it might benefit only one group of society.  

Holden left it to judges to determine the "reasonableness" of legislation, but, by allowing class legislation as long as the Court found it to be reasonable and not "undue," Holden's reasonableness principle enabled the Court to alter its understanding of the content of rights, such as the liberty of contract, as it saw necessary to give greater weight to newly arising equality values (which were often reflected in class legislation).  

The Court later took advantage of the flexibility found in Holden's reasonableness principle and upheld maximum hours legislation for manufacturing laborers, and upheld legislation that limited how many hours women could work because it protected "not merely her own health, but the well-being of the race," which at the time many feminists considered a progressive victory.  

Eventually, the Court broadly expanded the protection of the Due Process Clause by applying Holden's reasonableness principle to non-economic cases. In Meyer v. Nebraska, and then in Pierce v. Society of Sisters, the Court held the Constitution protected parents' right to control the education of their children. In Meyer,
the Court held that legislation prohibiting schools from teaching languages other than English was unconstitutional because the legislation was unreasonable, stating "[m]ere knowledge of the German language cannot reasonably be regarded as harmful."\textsuperscript{131} Similarly, in \textit{Pierce}, the Court held that legislation prohibiting parents from sending their children to private school was unconstitutional because the legislation was unreasonable,\textsuperscript{132} stating "the [legislation at issue] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."\textsuperscript{133}

Thus, even though this approach allowed judges greater discretion, it had the advantage of enabling judges to change with context, time and their increasingly sophisticated understanding of the relationship between liberty and equality. The decisions were also not completely unrestrained; all of these decisions were modifications of \textit{Mugler}'s general welfare principle.

However, other rulings after \textit{Holden}'s divergence from \textit{Mugler} show it granted judges too much discretion (and too little guidance) in identifying and granting rights protected by the Due Process Clause.\textsuperscript{134} The Court withdrew protective legislation for women, citing improvements in the equality of women,\textsuperscript{135} and upheld the forced sterilization of an inmate because "three generations of imbeciles are enough."\textsuperscript{136} Thus, the cases coming after \textit{Holden} indicate the principle sometimes threatened to undo any limits on the police power and failed to establish principles giving judges proper guidance.\textsuperscript{137} Without guiding principles, judges were unable to distinguish between political answers and legal answers, instead rendering decisions based on their own opinions and desires.

This problem came to a head in \textit{Lochner v. New York}.\textsuperscript{138} In \textit{Lochner}, not only were the Justices left to their own opinions and beliefs (and therefore unable to distinguish the political answers from the legal ones), but

\begin{footnotesize}
\begin{enumerate}
\item Meyer, 262 U.S. at 400.
\item Pierce, 268 U.S. at 536.
\item Id. at 534.
\item Meyer, supra note 122, at 920
\item See \textit{Adkins v. Children's Hospital of the District of Columbia}, 261 U.S. 525, 554 (1923) (declaring the Act of September 19, 1918, unconstitutional on the basis that parties have an equal right to obtain from each other the best terms they can as a result of private bargaining). Although an argument could be made that \textit{Adkins} was struck down because it was a minimum wage law, whereas \textit{Muller} was a maximum hours law that intruded less on the employer's and employee's liberty to contract, this distinction was only raised by Chief Justice Taft in the dissent in \textit{Adkins}. The majority in \textit{Adkins} focused more on the fact that women no longer needed protection, yet the legislation continued to abridge their liberty to contract.
\item Buck v. Bell, 274 U.S. 200, 207 (1927).
\item See Gillman, supra note 74, at 124 (recognizing that "[e]xpanding the police powers to justify legislation that advanced the physical well-being of only certain workers threatened to explode the prevailing distinction between legitimate and illegitimate uses of the police power.").
\item Lochner v. New York, 198 U.S. 45, 72 (1905) (Harlan, J., dissenting).
\end{enumerate}
\end{footnotesize}
they failed to understand the socially constructed nature of rights. As a result, the Justices, left to their own discretion, refused to protect rights that the Due Process Clause required them to protect.

In *Lochner*, the New York legislature had implemented new legislation, similar to that found in *Holden*, limiting the number of hours bakers could work in a day.\(^{139}\) This legislation was a response to the growing inequality of bargaining positions between employers and employees and was the result of the public’s recent recognition that granting contract rights to employee’s was necessary to improve the equal application of law (thereby protecting liberty overall). The Court could have upheld the legislation as "reasonable" under *Holden*. However, the majority refused to extend the protection afforded to miners in *Holden* and struck down the law.\(^{140}\) The Court reasoned that even though the People, through discourse and political action, had clearly created new liberty rights that strengthened equality, the legislature unreasonably infringed on the employer’s and employee’s rights to contract because the inequality of bargaining position was a natural and necessary part of the right to contract.

Professor Strauss correctly states that the majority’s opinion was the result of "a lack of humility: an inability, or refusal, to understand that although they were vindicating an important value, matters were more complicated than they thought."\(^{141}\) The Justices failed to recognize that the People had decided the inequality of bargaining positions was not natural, and that true contracts do not contemplate exploitation. Unaware that rights exist when a substantial minority has decided that the right promotes equality, thereby strengthening liberty overall, and unguided by limiting principles that could have corrected this unawareness, the majority found that the legislation was unreasonable because baking, unlike mining, was not dangerous enough to warrant protective legislation. This hubris and lack of principles prevented the Justices from rendering a decision recognizing that the People had created new rights to counteract the growing inequality wrought by industrialization, and that as a result, the Due Process Clause demanded protection of these rights.

Thus, *Lochner’s* mistake was two fold. First, because the *Holden* analysis was limited only by what judges determined was "reasonable" legislation, it gave judges too much discretion.\(^{142}\) Second, the Justices

\(^{139}\) *Id.* at 52.

\(^{140}\) See *id.* at 64 (finding a state law that mandated maximum hours for bakers unconstitutional).

\(^{141}\) *Strauss,* *supra* note 50, at 386 (concluding "that is why *Lochner* deserves the reputation it has today").

\(^{142}\) See Meyer, *supra* note 122, at 920 ("For White, this had been the lesson of the *Lochner* era, in which the Supreme Court enforced the Justices’ own notions of ‘reasonable’ lawmakers under the guise of substantive due process, invalidating wide swaths of employment and economic regulations now
misused this discretion in *Lochner* because they failed to recognize that the Due Process Clause requires the judiciary to protect new rights created by the People, even those not yet made law through democratic processes. By the time *West Coast Hotel Co. v. Parrish* overturned the *Holden* era of cases in 1938, scholars had lost faith in the Court's ability to engage in substantive due process.

**B. The Failure of Procedural Due Process**

Frustrated with the *Mugler/Holden* line of cases, scholars advocated procedural due process in an attempt to rein in judicial power and discretion. "The idea seems as simple as it sounds reasonable: governmental action that burdens groups effectively excluded from the political process is constitutionally suspect." Variations on this theory of judicial policymaking appeared as the antidiscrimination principle and equal protection analysis, which go into further detail about how to identify governmental action burdening groups, such as homosexuals, that are effectively excluded from the political process, but not groups who are "just a temporary political loser," like burglars or insurance salesmen. These considered routine and ultimately provoking a humbling 'face-off between the Executive and the Court in the 1930's.'


144 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

145 See Cushman, supra note 105, at 82–83 (discussing this view held by a "bevy of [then] contemporary Court-watchers").

146 See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 6 (1980) (discussing the role of procedural due process in the Supreme Court today).


148 Guido Calabresi makes two good points, noting that equal protection as practiced by the Court is more narrow than both the antidiscrimination and Ely's approach, and that one way to tell when a group is improperly singled out by the political process is to identify burdens that group bears that other groups do not.

I should emphasize here that the principle . . . is antidiscrimination, not equal protection. The issue is one not of equality, but of when the people put burdens on themselves, on those who by and large can protect their fundamental interests through the legislative process, and when, instead, the people put burdens on those whose fundamental interests the legislature can readily ignore. As a result, Type II judicial review does not have any difficulty, in principle, with affirmative action or even with so-called reverse discrimination.

Guido Calabresi, Antidiscrimination And Constitutional Accountability (What The Bork-Brennan Debate Ignores), 105 HARV. L. REV. 99–100 (1991). As an aside, Judge Calabresi is correct in noting the differences between the approaches, but this seems to be the result of the Court's application of equal protection, rather than any theoretical problem within equal protection analysis. Viewed through the lens of positive rights, it is arguable that there is no theoretical barrier to upholding affirmative action under the equal protection clause.
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methods seem to require judges to make merely descriptive, rather than normative claims: this law burdens one group differently than others in a fundamental manner and so must be struck down.  

However, none of these theories prevent judges from making normative substantive decisions. As Professor Tribe notes, "any constitutional distinction between laws burdening homosexuals and laws burdening [burglars], must depend on a substantive theory of which groups are exercising fundamental rights and which are not." Sincere moral feeling cannot help us make the distinction because it is often sincere moral belief that justifies the improper stereotypes on which improperly discriminatory laws are based.

Even though Rebecca Brown argues that whether a manner is fundamental can be found by determining whether the group making the rule would similarly burden themselves, she notes that the problem simply becomes defining the level of generality at which the burden should be defined. Should the burden be defined as being forced to refrain from homosexual sodomy, or to refrain from having privacy? Each of these determinations is a substantive one, and procedural due process is unable to vitiate normative decision-making from the judicial process as it claims it does. In fact, rooting a decision in procedural due process or equal protection, by proclaiming that everyone has this individual's liberty right

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149 See Brown, supra note 56, at 1553 (discussing the notion that the determination that a rule-making group would put the burden on themselves is sometimes difficult, as in the case of abortion, where men are making a rule they could not possibly impose on themselves). This is purportedly solved by resort to analogy: does the law similarly require men to donate organs to the sick? However, this can lead to an analogical crisis, a situation where there is a reasonable disagreement over the proper analogy. This problem traces itself back to the more general problems with process review discussed in this paper, i.e. the problems of level of generality and identification of the group burdened.

150 See Karlan, supra note 13, at 59 ("Moreover, I think that many scholars may be overstating the sharpness of the line drawn between substantive due process claims and equal protection claims.").


152 See Paul Brest, The Substance of Process, 42 OHIO ST. L.J. 313, 139 (1981) (discussing the repercussions in the event that the sincere assertion of a moral belief were to end legal inquiry).

153 See Brown, supra note 56, at 1546 ("The antidote, then, would be for a court ... to adjust the level of generality at which the restriction is imposed in an effort to test the legislators' true willingness to live under the laws they pass.").

154 See id. (discussing at what level of generality a burden should be defined).
(however defined), actually gives greater protection to the liberty claim and enhances the power of jurists' substantive normative decisions.\footnote{See Sandel, supra note 150, at 531–31 (discussing the minimalist's case for neutrality).}

IV. The Modern Approach: Explicitly Relying on Socially Constructed Shared Values, But Repeating the Mistakes of Lochner

Due to procedural due process' failure, we see that legal scholarship has returned to the conclusion from which it has run for the past one hundred years.\footnote{See Robert C. Post, The Supreme Court, 2002 Term: Foreword, 117 HARV. L. REV. 4, 10 (2003) (discussing the relationship between constitutional law and culture). In fact, many scholars have noted legal scholarship's seemingly cyclical return to early twentieth century jurisprudence. See Barry Friedman, Conservative and Progressive Legal Order: The Cycles Of Constitutional Theory, 67 LAW & CONTEMP. PROB. 149, 150 (2004) (“Progressives at the turn of the twenty-first century are echoing criticisms offered by Progressives one hundred years earlier.”); see also Strauss, supra note 50, at 386 (stating that “[t]he failings of the Lochner era may, in the end, have been more quotidian than is generally supposed. The problem was not that the Court misconceived the judicial role or did not understand how to interpret the Constitution.”).} Judges not only can, but must engage in substantive due process. Thus, today "[w]e find a Court that may vigorously divide on how and when to exercise the authority of judicial policymaking, but that no longer seems to question the prerogatives of that authority as such."\footnote{Post, supra note 155, at 10.} If the debate about whether judges can engage in substantive due process is over, theory must still explain when and how judges should engage in substantive due process.\footnote{See id. at 84 (arguing that "[i]nstead of pursuing the chimerical objective of neutrality, the Court would do better to analyze the conditions under which courts should properly make cultural judgments.").} Responding to this challenge, the Court has developed a modern substantive due process jurisprudence.

The modern approach to substantive due process, first conceived in Justice Harlan's dissent in Poe v. Ullman\footnote{Poe v. Ullman, 367 U.S. 497 (1961).} as the Court marking "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,"\footnote{Id. at 542 (Harlan, J., dissenting).} is well-articulated in Washington v. Glucksberg.\footnote{521 U.S. 702 (1997).} The established method of substantive due process analysis has two primary features: the Due Process Clause "specially protects those fundamental rights and liberties which are, objectively, [1.] ‘deeply rooted in this Nation's history and tradition,’” (so rooted in the traditions and conscience of our people as to be ranked as fundamental,) and [2.] "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they
were sacrificed." If the asserted liberty interest is deeply rooted in the country's history and tradition, or implicit in the concept of ordered liberty, the state has to show a compelling reason for narrowly tailoring a limit on the exercise of the right. That is, the State's limitation of the right must pass "strict scrutiny." Strict scrutiny is often referred to as being strict in theory, but fatal in fact because the Court has rarely found any State interest compelling enough to limit fundamental rights. If the asserted liberty interest is not fundamental, the State need only show a rational reason for limiting the exercise of the right or pass "rational basis" scrutiny.

This approach is a great improvement over the jurisprudence the Court developed in Loan Association, Mugler, and Holden. The early substantive due process jurisprudence relied solely on judges to determine whether legislation properly limited a claimed right. This jurisprudence failed to properly restrain judicial discretion, resulting in conflicting decisions such as Holden and Lochner.

The modern approach similarly recognizes the need for judicial policymaking but, at the same time, limits judicial discretion by forcing judges to look to an objective, external factor in determining the proper Constitutional bounds of governmental power; judges look to whether the People themselves have decided the claimed right is an important one the Constitution protects. The relative constitutional importance and validity of the claimed right, as determined by the People rather than judges, then determines in large part the reasonableness of the legislation (or at least identifies the proper standard of reasonableness by which to judge the legislation). This is a good approach because, as shown in Part II, "the Constitution signifies that the political choice collectively made by the American people should inform the Court's vision of law." The People are the initial definers and creators of Constitutional rights, and "[i]t makes no sense to imagine constitutional law as an enterprise distinct from politics...it would be monstrous to imagine such law as wholly divorced from the political perspectives of the American people." By explicitly

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162 Id. at 720-21 (citing Planned Parenthood v. Casey, 505 U.S. 833 (1992); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)).
163 Id. at 702.
164 See Angelo N. Ancheta, Contextual Strict Scrutiny and Race-Conscious Policymaking, 36 Loy. U. Chi. L.J. 21, 21 (2005) ("The Court's most exacting standard of judicial review reflected a 'scrutiny that was 'strict' in theory and fatal in fact.'").
165 See Gregory C. Cook, Footnote 6: Justice Scalia's Attempt To Impose A Rule Of Law On Substantive Due Process, 14 Harv. J.L. & Pub. Pol'y. 853, 865-66 (1991) ("[f]ollowing...specific tradition will force the Court to consult the nation's morality rather than its own, providing a more legitimate decision.").
166 See Post, supra note 155, at 102.
recognizing this, the modern approach takes a large step towards limiting judicial discretion, while making the judiciary's exercise of power more compatible with democracy.

Although this seems straightforward enough, there is a crucial ambiguity remaining in need of clarification. As the Court has stated it, "we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest."\(^\text{168}\) The Court has claimed that such 'careful descriptions' are necessary to avoid the drawing of arbitrary lines and instead provide "[a]ppropriate limits on substantive due process."\(^\text{169}\) Ironically, this process of "careful description of the asserted fundamental liberty interest" actually voids any limits on substantive due process by introducing a tremendous amount of judicial discretion into the calculus.

As many scholars have noted, the process of defining a right "can never be performed as a matter of pure logic; it will always involve judgment."\(^\text{170}\) Judges' "careful descriptions" are inseparable from individual judge's value judgments. Yet how a judge articulates these descriptions often ends the litigation.\(^\text{171}\) The more broadly the asserted right is described, the more likely a judge can identify the alleged right as either implicit in the Nation's ordered liberty or protected by a relevant tradition rooted in the Nation's history, and deem the asserted right fundamental.\(^\text{172}\) That is, the more broadly the asserted right is defined, the more likely strict scrutiny applies to limitations on the asserted right. Because the application of strict scrutiny versus rational basis is often the end of the matter,\(^\text{173}\) whether a claimed right is defined narrowly or broadly will often settle the litigation.\(^\text{174}\) Yet modern substantive due process jurisprudence fails to inform judges of either when to describe asserted fundamental rights and extant traditions narrowly or broadly, or "how much weight should be assigned to rule-of-law

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\(^{171}\) See Glucksberg, 521 U.S. at 762 (Souter, J., concurring) (stating that "the kind and degree of justification that a sensitive judge would demand of a State would depend on the importance of the interest being asserted by the individual").
\(^{172}\) See Erwin Chemerinsky, History, Tradition, the Supreme Court, and the First Amendment, 44 Hastings L.J. 901, 917 (1993) (discussing the "need to choose the level of abstraction" when identifying rights).
\(^{173}\) Supra, p. 25.
\(^{174}\) See Spitko, supra note 58, at 1338 ("The level of generality at which the Supreme Court defines liberty interests is important because it, along with the Court's definition of tradition, wholly determines whether the due process clause protects an asserted liberty interest.").
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virtues, as opposed to constitutional culture," when describing those rights. As a result, it allows "careful descriptions" inherently and heavily tinged with the judge’s value judgments to adjudicate claims of asserted rights, failing to adequately limit judicial discretion.

For example, in Casey, the Court considered several limitations placed on the abortion right, upholding 24-hour waiting periods, parental consent provisions, and recordkeeping procedures, while striking down spousal notifications as an undue burden on the right of privacy. Justice Kennedy famously described the asserted fundamental liberty right broadly, stating the Constitution protects the right of an individual "to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Because the spousal notification legislation limited this broadly defined right, the Court struck down the legislation. Yet for reasons unarticulated at best and unconvincing at worst, a unanimous Court in Glucksberg failed to similarly define the right to die, a right involving issues over the meaning of life substantially comparable to the abortion right of privacy. By narrowly defining the right without specifying a principle for why it did so, the Court not only betrayed Justice Kennedy’s liberal vision, but also showed how the modern substantive due process approach of "careful descriptions" invites the same unrestrained decision-making as the Lochner Court.

Justice Scalia attempted to resolve this problem in footnote six of Michael H. v. Gerald D. There, Justice Scalia put forth the claim that the Constitution requires judges, when defining rights, to "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." His justification for this rule is "narrowly pragmatic: It will keep activist judges in line." Justice Scalia argues that any other rule, either allowing judges to decide the level of generality themselves or allowing judges to define the right and relevant tradition broadly, will "permit judges to dictate rather than discern the society’s views."

While Justice Scalia’s approach is laudable because it retains modern
substantive due process' attempt to restrain judges by reference to the external criterion of the People’s political perspective, there are two problems with his approach. First, defining the right narrowly merely exacerbates the hermeneutic problem judges already face under the modern approach. Second, narrowly defining these rights forces judges to abdicate their constitutional role.

Part II of this article provides the basis for the first of these critiques, the "hermeneutic problem." As shown in Part II, individuals' understandings of the world and words cannot exist apart from the context in which those individuals form. However, modern substantive due process jurisprudence requires judges to abandon this context in their attempt to identify the traditions rooted in our Nation's history. More disturbingly, it is necessary for judges not only to engage in the impossible task of ignoring their own context and understanding, but also to recreate the global understandings those past individuals possessed. Such creativity is the only way "to bridge the gaps between that world and ours." This creativity introduces the very judicial discretion that Justice Scalia's approach intends to restrain.

Although the hermeneutic problem affects the modern approach no matter how the claimed right and relevant tradition are defined, defining the right narrowly as Justice Scalia advocates exacerbates the problem. It is much harder to determine whether society in the past protected the right of minor immigrants to be released to the temporary custody of responsible adults, than to determine whether society protected the right to be free from incarceration without due process of law. Justice Scalia's approach invites, rather than excoriates, judicial discretion.

Second, even assuming Justice Scalia’s approach could overcome the hermeneutic problem, Lochner teaches a lesson to judges who might

184 See Spitko, supra note 58, at 1351 ("[B]ecause broader principles are more easily applied and more certainly ascertainable than are narrow principles, Justice Scalia's approach exacerbates the uncertainty inherent in any tradition-based analysis . . . .").
185 Supra pp. 3–9.
186 See Mark Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 HARV. L. REV. 781, 799 (1983) ("The ways in which people understand the world give meaning to the words that they use, and only by recreating such global understandings can we interpret the document the framers wrote.").
187 Id. at 800.
188 See Spitko, supra note 58, at 1351 (stating critics' argument that the hermeneutic approach fails as a limitation on the judiciary because a juror reconstructs the world of the past by using his own contemporary world view).
189 See Reno v. Flores, 507 U.S. 292, 303 (1993) (stating that such a right is rationally connected to a governmental interest in promoting and preserving the welfare of the child).
190 Id. at 341 (Stevens, J., dissenting).
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follow Justice Scalia's approach if they are concerned about their legacy, not to mention their portraits. If the alleged right is initially defined narrowly as Justice Scalia would have it, judges run the risk of abdicating their Constitutional role as the Court did in *Lochner*. Justice Scalia's approach ignores the reality that the rights originate in the People's values, developed through discourse, and the Constitution demands protection of these rights. Narrow definitions have this effect because an asserted right is protected under modern due process only if it is fundamental, if it is deeply rooted in this Nation's history and traditions. Yet protecting tradition means protecting the status quo. A claimed right to act is part of the Nation's "tradition" "only if it is supported by a stable consensus for a substantial period of time," and a consensus exists "only if virtually everyone accepts it." In other words, "traditions require the continuous support of a supermajority." Under this framework, narrow definitions limit courts' ability to protect rights. Often, the claimed right, narrowly defined, is the result of new developments in society, a society that did not exist in the Nation's "history." For example, in *Glucksberg*, a case involving the right to physician-assisted suicide, the Court noted that the litigants were in court simply for the reason that "[b]ecause of advances in medicine and technology, Americans today are increasingly likely to die in institutions, from chronic illnesses." Also, the litigant is in court because they are

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191 This is a blithe reference to the "Dorian Gray Theory of Constitutional Jurisprudence." See Christopher Eisgruber, Comment, *Dred Again: Originalism's Forgotten Past*, 10 CONST. 37, 37-38 (1993) ("The jurisprudential sins of judges are, apparently, visited on their portraits.").

192 See Sunstein, supra note 3, at 876-77 (stating that Lochner embodies less an active judicial rule and more conceptions of neutrality and has not been entirely overruled); *Supra*, pp. 9-10.

193 See Greenberger, supra note 169, at 1023 ("[A]ppeals to tradition are backward-looking and tend to enshrine the status quo . . . ."); see also, Eric J. Segall, *Justice Scalia, Critical Legal Studies, and The Rule Of Law*, 62 GEO. WASH. L. REV. 991, 1001-16 (1994) ("[A]ccording to Justice Scalia, the purpose of substantive due process 'is to prevent future generations from lightly casting aside important traditional values—not to enable this Court to invent new ones.'").


195 *Id.* at 553.

196 See *id.* at 917 ("If the focus is on tradition at the most specific level of analysis, there will be relatively little judicial protection of rights."); see also Robin West, *The Ideal of Liberty: A Comment on Michael H. v. Gerald D.*, 139 U. PA. L. REV. 1373, 1374 (1991) ("The interpretation of liberty and hence of substantive due process espoused by Justice Scalia in *Michael H.* is so narrow that if embraced by the Court it would lead to the effective end of the doctrine."). Novel claims can be wedged into traditional notions of rights if both the asserted rights and extant traditions are defined broadly, such as the right to liberty. See Chemerinsky, supra note 171, at 910 ("At the highest level of abstraction, the framers sought to protect values such as liberty and equality; and virtually any decision can be reconciled with this abstract intent.").

197 Washington v. Glucksberg, 521 U.S. 702, 716 (1997); see also Reno v. Flores, 507 U.S. 292, 302 (1993) (describing the right of immigrant minors to be temporarily release from state custody into the custody of a responsible adult versus the right to be free of physical restraint); Moore v. East City of
seeking to engage in previously unprotected activity. Such activity, defined narrowly, is by definition not part of tradition; if the right were already traditionally protected, the litigant would have no need to be in court. 198

Justice Scalia’s approach, by immediately and exclusively defining the claimed right and relevant tradition narrowly, prevents judges from giving effect to the People’s changing definitions of rights because these changes are inherently not rooted in tradition. The protection of the status quo is antithetical to the judiciary’s duty to properly balance the Constitutional principles of liberty and equality, and abdicates the institutional role the Constitution assigns to the judiciary. 199 This was the same mistake the Lochner court made. 200 For these reasons, I answer Professor Chemerinsky’s question "[i]s it a sufficient justification for the rejection of a constitutional right that it has not been traditionally safeguarded?" in the negative under Justice Scalia’s approach. 201

As Justice Souter pointed out in his concurrence in Glucksberg, 202 a survey of modern due process cases, starting with Griswold v. Connecticut, bears out that narrow definitions of asserted rights and extant traditions stifles judicial protection of rights. 203 In Griswold, the Appellants were convicted under a statute prohibiting any person to give information, instruction, or medical advice about contraceptives, or the contraceptive itself to anyone else. 204 The Appellants claimed that this statute violated the Fourteenth Amendment. Reversing their conviction, the Court found that "specific guarantees in the Bill of Rights have penumbras, formed by

Cleveland, 431 U.S. 494, 506 (1977) (finding that a housing ordinance that expressly selects certain categories of relatives who may live together and declares that others may not is unconstitutional). 198 See Michael H. v. Gerald D., 491 U.S. 110, 140–41 (1989) ("[T]he plurality acts as if the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of the States.") (Brennan, J., dissenting); see also Chemerinsky, supra note 171, at 903 ("[I]ncreasingly, the Court uses tradition as a limit on the Constitution’s meaning."). 199 See supra pp. 2–3; see also Spitko, supra note 58, at 1353 ("The fourteenth amendment was meant to protect minorities from oppression by the majority."). 200 Supra, Part III.

201 Chemerinsky, supra note 171, at 907.

202 See Glucksberg, 521 U.S. at 765 (Souter, J., concurring) ("[T]he balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing." (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting))).

203 See Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (finding that the Connecticut law forbidding use of contraceptives unconstitutionally intruded upon the right of marital privacy because such a relationship was “intimate to the degree of being sacred”). In Griswold, defendants appealed convictions of violating the Connecticut birth control law. Id. at 480. The Appellants claimed that this statute violated the Fourteenth Amendment. Id. Reversing their conviction, the Court found that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Id. at 484. These various guarantees create zones of privacy protected from governmental intrusion, because without the peripheral rights of privacy, "the specific rights would be less secure." Id. 204 Id. at 480.
emanations from those guarantees that help give them life and substance." \textsuperscript{205} These various guarantees create zones of privacy protected from governmental intrusion, because without the peripheral rights of privacy, "the specific rights would be less secure." \textsuperscript{206} Finally, the Court ruled that the criminal statute involved concerned and limited a relationship lying within one of these zones of privacy, the marital relationship. Because such a relationship was "intimate to the degree of being sacred," the statute improperly limited a "right of privacy older than the Bill of Rights." \textsuperscript{207}

However, there was a strong tradition in the Nation's history of prohibiting the use of contraceptives. \textsuperscript{208} Although Justice Scalia, in Michael H., argued that he could have upheld the decision in Griswold because the statutes had not been recently enforced and did not represent a "still extant" tradition, \textsuperscript{209} the facts of the case before him belie these very claims. \textsuperscript{210} The litigants were in court precisely because the statutes prohibiting the use of contraceptives had been enforced. Faithful adherence to Justice Scalia's approach calls for overturning Griswold.

Nor could Justice Scalia have struck down the anti-miscegenation law involved in the 1967 case Loving v. Virginia. \textsuperscript{211} Had the Court identified the right involved at its most specific level, the right to interracial marriage, and ended there, the Nation's traditions and history of prohibiting such marriages would have forced the Court to uphold the law. Instead, the Court recognized that the People no longer accepted such limitations on marriage (only 16 states still prohibited miscegenation), defined the right involved broadly as the right to marry, and struck the law down. \textsuperscript{212}

Justice Scalia's approach would have likewise reversed the decision

\textsuperscript{205} Id. at 484.
\textsuperscript{206} Id. at 483.
\textsuperscript{207} Id. at 486.
\textsuperscript{208} See id. at 498 (Goldberg, J., concurring) (describing the state interest in safeguarding marital fidelity).
\textsuperscript{209} See Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) ("[N]one of those cases acknowledged a longstanding and still extant societal tradition withholding the very right pronounced to be the subject of a liberty interest and then rejected it.").
\textsuperscript{210} Given that anti-sodomy laws were almost never enforced from their start, much less recently, one also wonders why, if Justice Scalia was honest in Micheal H. about this, he voted in Lawrence as he did.
\textsuperscript{211} See Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that miscegenation statutes adopted by Virginia to prevent marriages between persons solely on basis of racial classification violate the equal protection and due process clause of Fourteenth Amendment). In Loving, the proceeding was on a motion to vacate sentences for violating state ban on interracial marriages. Id. at 3. The Virginia Supreme Court of Appeals affirmed the convictions. Id. The Supreme Court, in reversing the convictions, found that miscegenation statutes adopted by Virginia to prevent marriages between persons solely on basis of racial classification violate equal protection and due process clauses of the Fourteenth Amendment. Id. at 12.
\textsuperscript{212} Id.
in *Moore v. City of East Cleveland.* In *Moore,* the Court struck down a housing ordinance limiting the occupancy of a dwelling unit to members of a single family as applied to a woman living with her son and two grandsons, one of whom was the son’s nephew. Because there was no tradition of protecting the narrowly defined right, the right of an elderly woman to permanently "share a single kitchen and a suite of contiguous rooms with some of her relatives," the Court, using Justice Scalia’s approach, would have been unable to uphold the broader rights of using one’s property as one sees fit, or the right to live together as a family.

The seminal case displaying the inadequacies of Justice Scalia’s approach is *Bowers v. Hardwick.* In *Bowers,* a practicing homosexual man brought an action challenging the constitutionally of a Georgia statute prohibiting homosexual sodomy. The Court, effectively using Justice Scalia’s approach, defined the claimed right as the right to engage in homosexual sodomy, rather than a broader right to dictate the form of one’s intimate relations or right to liberty in personal relationships. Finding no tradition prohibiting limits of the narrowly defined right, the Court upheld the statue despite evidence that a substantial minority of Americans disagreed with the decision.

In fact, Justice Scalia’s approach effectively requires minorities to obtain a supermajority to gain its rights through judicial policymaking. In such a case, the minority will get their rights only through democratic action, if ever. Yet the Constitution demands that our government protect these rights far before this point precisely because such democratic action might not take place, even though the People have created the right through

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213 *See* Moore v. City of East Cleveland, 431 U.S 494, 506 (finding that the ordinance in question, violated due process). In *Moore,* a homeowner was convicted in Ohio court of violating East Cleveland housing ordinance which limits occupancy of a dwelling unit to members of a single family and recognizes as a “family” only a few categories of related individuals. *Id.* at 496. The Court of Appeals of Ohio, Cuyahoga County, affirmed, and the homeowner appealed. The Supreme Court reversed the conviction and held that the ordinance in question, under which it was crime for homeowner to have living with her a son and grandson plus a second grandson who was cousin of her first grandson, violated due process. *Id.* at 506.

214 *Id.* at 537 (Stewart, J., dissenting).

215 *Id.* at 513 (Stevens, J., concurring).

216 *Id.* at 500 (majority opinion).


218 *Id.* at 189.

219 *See* id. at 190 (finding that the Federal Constitution does not allow the right of privacy to extend to homosexual sodomy).

220 *See* Lawrence v. Texas, 539 U.S. 558, 572 (2003) (noting that the number of states with sodomy laws was decreasing dramatically at the time *Bowers* was handed down, and these laws in effect were rarely enforced).

221 *See* Stacy, supra note 193, at 553 (stating that a practice growers support only when everyone accepts it).
agreement in discourse. Thus, Justice Scalia’s answer to the levels of generality problem is insufficient to avoid the lessons of *Lochner*: judicial discretion must be restrained, and judges must recognize that the People create rights, even rights not reflected in democratic action.

The Court explicitly rejected Justice Scalia’s approach in *Casey*. Yet it did so without offering a substitute that would adequately rein in judicial discretion, instead, as shown, leaving it up to judges themselves to define the right narrowly or broadly. And courts should not adopt the opposite approach, initially and exclusively defining the claimed right and relevant tradition broadly, because it is as equally unworkable as Justice Scalia’s approach. If judges define the right and tradition broadly, they will simply grant every claim that comes forward as falling under the traditionally protected "right to liberty." "Rights do not become fundamental simply because they are asserted by nonconformist groups." What is needed is a rule that reins in judicial discretion more than the modern approach, but still gives protection to rights newly created by the People through discourse.

V. A New Approach: Using Culture to Determine Whether to Define the Right Narrowly or Broadly

To reconcile the still unresolved tensions inherent in modern substantive due process jurisprudence, judges should be cautious and "participate, with sensitivity to [their] own role and [their] limits, in the ongoing social process of structuring the roles of others in accord with the contemporary significance of our collective past, called the Constitution." To thus sensitively participate, I propose a theory, cultural substantive due process, of how judges should decide whether to define a claimed right and its relevant tradition broadly or narrowly.

In any given case, judges should initially define the claimed right and tradition as Justice Scalia would, referring "to the most specific level at

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222 Supra, pp. 9–10.
223 See Sullivan, supra note 94, at 79 (noting that "[t]he Casey joint opinion explicitly rejected Justice Scalia’s ‘specific tradition’ rule in favor of Justice Harlan’s more standard-like interpretative method"); see also Chemerinsky, supra note 171, at 903 (stating that the Supreme Court opinions tend to place greater reliance on history and tradition for their constitutional interpretations and "the Court uses tradition as a limit on the Constitution’s meaning").
224 See Chemerinsky, supra note 171, at 910 (noting that the framers’ specific intent did not contemplate modern issues).
225 Cook, supra note 164, at 867.
which a relevant tradition protecting, or denying protection to, the asserted right can be identified. 227 Using this definition of the right, judges should look to the current views of the People, not tradition, and determine to what extent and in what number the People have decided, through agreement from discourse, the claimed right is actually a Constitutional right an individual possesses. If a substantial minority of the People agree that the right narrowly defined should be protected, judges should uphold the right. I define a substantial minority as the number of people agreeing with the arguments of the social movement advancing the right such that support for the movement has passed a "tipping point" and will not regress. When writing the opinion, judges should define the right broadly and link it to broad, traditionally protected rights, such as the right to liberty or the right to "determine the meaning of the universe." To justify these conclusions, the judges should use arguments advanced by the substantial minority, as well as a discussion of the current social consensus on the issue. If the claimed right does not enjoy such popular support, judges, when writing the opinion, should define the right narrowly and find no relevant tradition protecting it. To justify these conclusions, judges should use arguments advanced by the discriminating majority and a discussion of the lack of social consensus. Such an approach limits the discretion of judges by creating a constitutional law rooted in culture. As a result, it protects liberty and advances equality in the manner the Constitution demands of the judiciary.

Adjusting the modern substantive due process jurisprudence in this way enables the Court to avoid Lochner’s mistakes. First, this approach retains appeals to social consensus as an external, objective restraint on judicial discretion because it relies on the political perspective of the People in determining the Constitutional scope of governmental power. Secondly, by acting on behalf of an individual in the place of static executive or legislative branches, the cultural substantive due process approach allows the Court to fulfill its institutional duty, as articulated in Part II, and properly balance the Constitutional principles of liberty and equality. 228 Rather than shutting the government down, a hostile judiciary forces the government and people to act: 229 the discriminating majority either convinces individuals within the substantial minority that the right they claim is invalid such that the minority becomes insubstantial, or the majority recognizes the errors of

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228 See Keith Whittington, Yet Another Constitutional Crisis?, 43 WM. AND MARY L. REV. 2003, 2103 (2002) ("[G]iven the fixed term of presidential office and independent electoral mandate, it is possible that a president can survive alongside hostile legislatures, leading to stalemates between the executive and the legislative branch. . . . Under such conditions, no one can govern.").
229 Id. at 2133.
its ways and capitulates. Thus, the cultural substantive due process principle requires the People, through the legislature and executive, to act both discursively and politically when limiting a group’s or individual’s liberty.

Although this may run the risk of strengthening the political will of the entrenched majority, as many argue Roe did, the benefits of the judiciary’s protection of the right and invalidation of an intrusive statute while the People engage in debate over its validity far outweigh the costs. Further, this invigoration of the People’s debate is precisely what the cultural substantive due process approach intends, regardless of which side is motivated to intensely engage in the debate.

This very debate provides a response to another critique of the cultural substantive due process approach, namely, that having such an active judiciary will incentivize the legislature to abdicate its law-making role. This argument holds that legislatively made law is the product of a complex legislative process that involves "committees, fighting for time on the floor, compromise because some members want some unrelated objective, passage, [and] exposure to veto." However, if Congress legislates with a presumption that courts will fill in gaps in legislation concerning the rights of substantial minorities, Congress "will be less likely to deliberate, at least on the margins."

This overlooks a primary benefit of the cultural substantive due process approach; just as easily as active courts can discourage Congressional deliberation, they can also spur the People’s debate and dialogue. A judicial decision can force the discriminating majority to decide if it really believes the legislation is necessary. In addition, it protects the

230 Calabresi, supra note 147, at 107.
231 But see Abner J. Mikva, Why Judges Should Not Be Advicegivers: A Response to Professor Neal Katyal, 50 STAN. L. REV. 1825, 1828 (1998) (discussing his belief that judges in the role of advice givers does not promote democracy or the effectiveness of policymaking).
232 See Laurence H. Tribe, Abortion: The Clash of Absolutes 139–96, 237–42 (W. W. Norton & Company 1990) (discussing the effects of Roe, its historical significance and whether or not the topic of abortion should be controlled by a majority vote or should be subject to Constitutional scrutiny, as interpreted by the judiciary, beyond the "reach of all except the sort of supermajority it takes to amend the Constitution").
233 See Planned Parenthood v. Casey, 505 U.S. 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.").
234 See Manning, supra note 66, at 2410 (noting that the legislative process is too complex to allow judges to reconstruct whether Congress would have interpreted statutory construction differently from the way it was clearly written).
235 Id. at 2409.
236 Id. at 2439.
minority’s rights in the meantime. Further, quiet courts stifle Congressional deliberation. In the absence of court decisions, Congress has no incentive to deliberate on minority issues, and will not bring new protective legislation. In effect, quiet courts enable Congress to legislate with a presumption that the status quo, rather than the courts, will fill in gaps in rights legislation.

Also, the cultural substantive due process approach avoids the objection that, in a democracy, the judiciary lacks a proper basis of authority to require Congress to take a second look; the authority of the judiciary to require a second look under the cultural substantive due process approach is based on the views of the People, rather than judges. Thus, judges can protect the rights of individuals without destroying the idea of self-rule that is so crucial to democracy, and they avoid the mistake of Lochner. In short, this approach enables courts to ensure the law enshrines the People’s vision of a "citizen," while at the same time allowing judges to ensure the law tells the discriminating majority what a citizen is.

Further, judges are able to engage in the cultural substantive due process approach. Although formulating the "most specific level" of the claimed right is a value-laden judgment that seemingly fails to rein in judicial discretion and undermines the rule of law because it "excuses the need to justify the value judgments which are actually being made and would otherwise be difficult to defend," some ways of defining rights are more specific than others. Taking the right at issue in Michael H. as an example: "[a]dulterous natural fathers’ is more specific than ‘natural fathers,’ ‘parents,’ or ‘family.” While there may be some room for disagreement at the margins, the amount of discretion granted to judges at this level of the cultural substantive due process approach is far from unlimited, significant, or substantial. The cultural substantive due process approach requires judges to be intellectually honest and adopt the most specific description that describes the situation.

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237 See supra p. 10 (stating especially when the call is a close one, the preferable choice is to force the discriminating majority to convincingly win the dialogue rather than to risk allowing an intrusive statute to stand).

238 Mikva, supra note 230, at 1825.

239 See Radin, supra note 69, at 124 (describing the relationship between laws and citizens in that legal rules teach citizens who they are in order to encourage them to live up to the values they profess are important to them and to aid in the expression of who they are and what they value. "In our democracy, the relationship between government and citizens is not just the 'we—they' relationship embodied in the traditional rule of law. Rather 'we'—in some sense that we don't want to lose—are still 'We the People,' the governors as well as the governed").

240 Greenberger, supra note 169170, at 1029.

241 Id. at 984.

Further limiting this modest amount of discretion is the fact that judges are concerned with the legacy they leave to history, and they do not want their decisions to be overturned. In short, they want to make "right" decisions. Yet under Justice Scalia’s approach, there is no way to determine whether or not a given judge’s definition of the right is correct. To use Habermas, there is no fact external to the judge’s statement to which we can point to show a given judge’s reinterpretation of history or definition of the right is true. It is simply a subjective-emotive statement that is either sincerely made or not. But it is not true. Thus, the desire to make "right" decisions does not constrain a judge under Justice Scalia’s approach. If anything, it encourages the judge to rule as a plutocrat.

Under the cultural substantive due process approach, however, there is such an external validating reference: the continued existence, or non-existence, of the substantial minority at issue. A description of the asserted right that is too narrow causes the judge to undercount the number of people supporting that right. This, in turn, causes a judge to deny the asserted right even though a substantial minority supports it. Because a substantial minority is a social movement that will not regress in support, the continued existence and growth of the group asserting the right even after an unfavorable decision verifies that a judge’s definition of the asserted right was too narrow. Likewise, the continued existence of a substantial minority after a judge upholds an asserted right evinces that a judge’s definition of the asserted right was correct. Unlike Justice Scalia’s approach, the cultural substantive due process approach constrains judges by their desire to make "right" decisions.

Finally, the hermeneutic problem applies only to Justice Scalia’s approach. The use of a narrow definition of the right under the cultural substantive due process approach is justified by the need to adequately determine what the People’s conclusions from discourse today have to say about the specific case before a court. It is not used, unlike Justice Scalia’s approach, to determine what the People’s conclusions were in cases from the far distant past.

243 See Jonathan T. Molot, Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles, 90 VA. L. REV. 1753, 1757-58 (2004) ("A judge’s place in the constitutional structure and judicial hierarchy, a judge’s relationship with litigants and lawyers, and a judge’s stature in the legal community and broader polity help to explain both why judges tend to limit themselves to the cases before them and why judges are constrained by existing legal materials in the course of deciding those cases.").

244 Further, because the cultural substantive due process approach simply calls on judges to identify social movements that have already crossed the threshold of not declining, judicial decisions will not be determinative of which social movements survive and which do not. "The Supreme Court...speaks in the collective name of the People; it interprets the People's past achievements and does not try to speculate about the unknowable future." Ackerman, supra note 11, at 1438.
The cultural substantive due process approach does create the possibility that judges might improperly overturn democratic legislation by simply misjudging whether a substantial minority exists, undermining both the judiciary's Constitutional role and the foundation of our government. Yet this overemphasizes the judiciary.

First, although there is no magic amount of political support a case needs for a judge to ascertain whether it can grant a rights claim, giving the fecund and sagacious judges of the judiciary this level of responsibility for fact finding is but a trifle conveyance of political power. Judges make findings of fact all the time and are as able to participate in and understand political culture as legislators or executives. The small risk that judges will incorrectly determine whether a substantial minority exists is greatly outweighed by the large benefits of this principle, namely that it both limits judicial discretion and allows the judiciary to fulfill its Constitutional duty to balance equality and liberty.

Second, it is important to note that even though the Supreme Court still exercises judicial and political discretion to grant certiorari under the cultural substantive due process approach, federal district courts and state courts do not. Those courts must instead rely on individuals, members of democratic society, to bring claims before them. These individuals will in turn make a political calculus as to whether it is advantageous to their cause to bring a Constitutional claim. For instance, Matthew Coles, director of the ACLU's Lesbian and Gay Rights Project, has said although there is no "magic number" of states that need to approve same-sex marriage before the issue should go before the Supreme Court, this bears heavily on his decision as to whether to bring a claim or not. "We think, strategically, bringing a federal claim for marriage now is not a wise idea," Coles said. "The Supreme Court is the country's institutional conscience, and if you lose there, I think that sets you back." Often, judges will only be reviewing cases in which a substantial minority exists, or at least thinks it exists. This built-in filter will limit the opportunity for mistake.

Third, Lochner illustrates judicial decisions are often unable to affect profoundly the direction of society. Lochner neither caused nor could have prevented the Great Depression, even though, as Justice Brandeis points out, the philosophy underpinning the decision may have. Rather, judicial

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247 See New State Ice Co. v. Liebmann, 285 U.S. 262, 307 (1932) (Brandeis, J., dissenting) (stating in 1932 that "most [economists] realize that failure to distribute widely the profits of industry has been a prime cause of our present plight.").
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decisions are made in time, scholars and society develop new understandings of the way the world works, and no one case or philosophy lasts forever. History will moderate decisions over time. A miscalculation by judges will simply force the majority to become more active in developing arguments showing why the substantial minority’s claims are unreasonable. In other words, a miscalcation will simply spur democratic action and debate. If the discriminating majority’s reasons for discriminating are indeed the best arguments, they will win in the discourse and the substantial minority will disappear as individuals defect from the cause. When this minority disappears, the discriminating majority can again pass discriminating legislation and defend it in court. For these reasons, the fear that “for every Brown v. Board of Education there is a Dred Scott or a Plessy,” rings hollow.

This last suggestion may lead some to argue that the cultural substantive due process approach invites too frequent legal change. At first blush, the cultural substantive due process approach seems to enable the discriminating majority to simply reenact discriminatory law (requiring minorities to relitigate the protection of their right) until public opinion has changed such that courts overthrow themselves and uphold the legislation. Precedent carries no weight, and courts can overrule itself with impunity, creating inconsistency. This will all result in a judiciary that can no longer command respect from the other branches of government. This is a long way of arguing the cultural substantive due process approach violates the Rule of Law, which requires judges to create consistent rules, based on publicly articulated reasons, that are capable of guiding individuals’ actions.

248 See MAURICE MERLEAU-PONTY, ADVENTURES OF THE DIALECTIC 72 (J. Bien trans., Northwestern University Press 1973) (1955) in Steven Winter, Indeterminancy and Incommensurability in Constitutional Law, 78 CAL. L. REV. 1441, 1540 (1990) (stating that “history eliminates the irrational; but the rational remains to be created and to be imagined.”); see also Molot, supra note 242, at 1758 (stating “when one looks beyond the institutional setting in which judges approach pending cases and considers the evolution of legal doctrine over time, one finds a system that minimizes the harm that any single judge, or generation of judges, may do.”).

249 See Whittington, supra note 227, at 2133 (noting that Franklin Roosevelt was ultimately successful in overcoming the Supreme Court’s resistance to New Deal policies).

250 Historically, the majority has always fought to maintain the status quo. See Eskridge, supra note 126, at 2065 (“At every stage, [social movements] were confronted with a politics of preservation . . .”).

251 Friedman, supra note 8, at 1270–71.

252 See Breyer, supra note 4, at 119 (“Too radical, too frequent legal change has . . . a tendency to undercut . . . important law-related human needs,” such as the “need for predictability, the need for stability,” and the “need to plan in reliance upon law.”).


254 See Owen Fiss, The Fallibility of Reason, in BUSH v. GORE: THE QUESTION OF LEGITIMACY 84, 94 (Bruce Ackerman ed., 2002) (“The strength of a decision, its authoritative character, and its claim
This criticism is trenchant, but again misses the mark. The requirement that judicial decisions be principled or consistent sets the bar rather low. "[A]n opinion that holds that the rich must always win (or always lose, for that matter) is not unprincipled." It may be a terrible principle, "[b]ut its problem is not that it is lacking in principle." The cultural substantive due process approach, then, does not violate the rule of law because it does set out a consistent principle by which judges should make substantive due process decisions. Judges will always uphold an alleged right which is backed by a substantial minority that has reached the "tipping point" after which it is unlikely the minority will lose ground in the People's discourse. In turn, this can guide individual action because the People can gauge popular support for a claimed right themselves, and can thus predict a judge's decision. Yet this is not quite a satisfactory answer.

Rather, it is precisely well-principled consistency, the "rationality intrinsic to the form of law itself that secures the legitimacy of power exerted" in a judicial decision, that gives a decision "[its] strength... its authoritative character, and its claim for respect." By frankly acknowledging the political underpinnings of a judge's decision, one might argue the cultural substantive due process approach may "simultaneously undermin[e] the [judiciary's] authority to speak as the 'instrument [J]' of a law that is known and fixed, in which 'principle and logic' entirely determine 'the decisions of [courts]'". However, for two reasons, it improves the ability of the judiciary to speak as the authoritative instrument of law.

First, as Part II explains, and as critical legal studies and legal realism attest, it is far from clear that judicial decisions rest on principles of reason and logic as opposed to political calculations. Current approaches, which refuse to recognize this fact, produce unflinchingly authoritative

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255 See Segall, supra note 192, at 995. (noting that "law should be such that people will be able to be guided by it" (citing JOSEPH RAZ, The Rule of Law and its Virtue, in THE AUTHORITY OF LAW 213 (1979))).


257 Id. at 72.

258 Jürgen Habermas, Law and Morality, Address at The Tanner Lectures on Human Values, Harvard University (Oct. 1-2, 1986) (Kenneth Baynes, trans.).

259 Fiss, supra note 253, at 94; see also Meyer, supra note 122, at 920 ("'The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.' If people come to believe that the Court's constitutional command, overturning their own democratic choices, rests on nothing more than the Justices' personal will, the judiciary invites defiance." (quoting Bowers v. Hardwick, 478 U.S. 186, 190 (1986))).

260 Post, supra note 155, at 111.

261 The Court could not have decided Brown v. Board of Education in 1890. See Tushnet, supra note 185, at 800-801; Post, supra note 155, at 111.
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statements of law, hiding the political undercurrents of Constitutional law behind inconsistently applied principles. One need only compare the reasoning of Holden and Lochner, as Part III does, to recognize this.

However, by openly discussing the role of the People in forming rights, courts will actually gain credibility in a way the current approaches never can. As judges correctly pick social movements that do not disappear and instead become part of mainstream culture, the judiciary will emerge as an authoritative voice as to which social movements demand respect. More importantly, as argued in Part II, social movements will survive to the extent they articulate arguments that are agreed upon by all and win recognition of their claimed rights for these reasons. To the extent judges pick social movements correctly and use its arguments to justify the result, courts will develop a coherent theory as, case by case, arguments upon which all individuals can agree become folded into the judiciary's precedent. The judiciary effectively builds in a coherent theory based on principle and logic by incorporating the arguments of minority groups that win in the dialectic. In this way, judges avoid being too positivistic; over time a moral core and reasoning will develop in the case law.

In fact, the Court applied an approach similar to the cultural substantive due process approach in Lawrence v. Texas,\(^2\) in which the Court overruled Bowers\(^3\) and struck down a law criminalizing sodomy. In Lawrence, John Lawrence and Tyron Garner sought to overturn their convictions under Texas' anti-homosexual sodomy law. First, the Court gave a short exegesis on its substantive due process history, framing each case as protecting activity central to a broad right to liberty, autonomy, and personal dignity. The Court then turned to describing the activity in which Lawrence and Garner claimed a right to engage. Recognizing that "our laws and traditions in the past half century are of most relevance here," the Court found these laws and tradition "show an emerging awareness that liberty gives substantial protection to adult persons in how to conduct their private lives in matters pertaining to sex."\(^4\) In other words, the current culture believed the claimed right, narrowly defined, deserved protection because it fell under the People's notion of "liberty." The Lawrence Court realized it had to give a voice to this substantial minority (if not majority).

The Court then defined Lawrence's asserted right extremely broadly, as the right to make choices central to personal dignity and autonomy, rather than simply the right to engage in homosexual sodomy. The Court held that Lawrence's and Garner's actions were activity within the "liberty protected

\(^3\) Bowers, 478 U.S. 186 (1986).
\(^4\) Id. at 559.
by the Constitution."\textsuperscript{265} The Court, using arguments put forward by Lawrence and Garner,\textsuperscript{266} then justified this broad definition that to do otherwise "demeans the claim the individual put forward."\textsuperscript{267} The claimed right sought protection of more than the right to engage in particular sexual activity; it sought to protect the creation of a personal bond in which the sexual activity "can be but one element."

By explicitly recognizing the importance modern attitudes play in protecting rights, \textit{Lawrence} implemented the coherent and stable approach to substantive due process for which this paper argues. The Court limited its discretion while still fulfilling its Constitutional role by upholding a claimed minority right only after analyzing the current social consensus surrounding protection of the right. Additionally, the Court justified this outcome using not only arguments advanced by the substantial minority, but also an explicit discussion of the opinion’s political underpinnings.

\textbf{VI. Conclusion}

Throughout this paper, I have argued that the revelations of discourse ethics have profound implications for the Court’s substantive due process analysis. The People create rights through discourse, yet not all of these rights are protected through democratic processes. The Constitution, however, viewed through a dialectic lens, demands that the Court protect rights claims before the democratic process protects them. To fulfill this duty without losing important limits on judicial discretion, the judiciary can no longer proceed as if its Constitutional decision-making is completely detached from politics. By recognizing this and explicitly acknowledging it in its opinions, the judiciary will be able to fulfill its Constitutional obligation to protect minority rights in a restrained manner compatible with a democratic society.

\textsuperscript{265} Lawrence, 539 U.S. at 566–67.

\textsuperscript{266} Brief of Petitioners at 11–13, Lawrence, 539 U.S. 558, No. 02-102 (2003).

\textsuperscript{267} Lawrence, 539 U.S. at 566–67.

\textsuperscript{268} Id. at 567.