Understanding Liberty: The Constitution’s Neoliberal Turn

Amanda Shanor
Yale University Graduate School of Arts and Sciences, amanda.shanor@gmail.com

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Abstract

Understanding Liberty: The Constitution’s Neoliberal Turn

Amanda W. Shanor

2022

The three major essays and two smaller pieces that form this dissertation focus on the recent deregulatory turn in U.S. constitutional law. They analyze changing, and often competing, understandings of liberty and its relationship to concepts of welfare, choice, democracy, and the purposes of the state.

Over the past forty years plaintiffs have increasingly invoked the Constitution, and the free speech clause in particular, in efforts to avoid economic regulation. Areas of life that were once thought irrelevant to the Constitution have become the fodder of pitched litigation, circuit splits, top appellate practices, and United States Supreme Court review. This dissertation traces the origins of that emerging constitutional revolution, which I describe as the Constitution’s neoliberal turn, and analyzes its implications for administrative practice, theories of democratic legitimacy, and constitutional change. The dissertation is animated by several questions: How do social processes structure law, and how is it structured by them? How does the law conceive of the person, liberty, welfare, democratic participation and legitimacy, and the purposes of the state? The essays herein are prominently informed by both doctrinal and legal realist perspectives. Several draw strongly on social science research, particularly in psychology and behavioral law and economics.

The first major essay, The New Lochner, traces two of the key forces that have led to greater conflict between the First Amendment and modern administrative state: (1) a business-led social movement has fostered a deregulatory turn in commercial speech law and (2)
administrative law and practice have shifted toward lighter-touch forms of governance that appear more speech-regulating. While a number of scholars have labeled the deregulatory use of the First Amendment a type of *Lochnerism*, this piece analyzes that analogy to identify the distinctive features of contemporary constitutional deregulation. Those distinctive features include: (1) Different scopes—contemporary constitutional deregulation is broader more trump-like than *Lochner*-era economic liberty. (2) Different theoretical justifications—where *Lochner* was based in the theory of Adam Smith and laissez-faire capitalism, advocates of the new *Lochner* largely base their arguments on the idea that “all speech is speech.” And (3) different baselines—where *Lochner* rested on the common law distribution of entitlements, the new *Lochner* largely rests on the apparent obviousness of what constitutes speech.

The paper argues that because of the pervasiveness of speech and expression, the First Amendment sets the fullest boundary line of state power. As a result, if taken to its logical conclusion, the argument advanced by advocates of First Amendment deregulation—that all expression is speech for constitutional purposes, and all speech should be subject to the same stringent level of judicial scrutiny—would render democratic self-governance impossible.

The first shorter essay, *Adam Smith’s First Amendment*, which was co-authored with former Dean Robert Post, provides a theorization of the democratic purpose of the First Amendment that, we argue, the First Amendment’s recent deregulatory turn subverts.

The second major paper is *First Amendment Coverage*. First Amendment coverage—the term for the practices to which “the freedom of speech” extends—has been notoriously resistant to both description and theorization. At the same time, First Amendment coverage is currently undergoing great transformations: more of the regulation of economic life is seen in U.S. legal culture as of constitutional moment. This piece provides, first, a positive account of coverage. I demonstrate that while the First Amendment is often thought of as libertarian,
its scope reflects the reverse: the social logic of and need for cohesive norm communities. Second, the piece provides a proscriptive argument about how we should approach First Amendment coverage, namely with consideration of those social and institutional contexts.

In *Business Licensing & Constitutional Liberty*, the second shorter essay, I present current constitutional claims about business licensing in the context of the abovementioned trends. I argue that the important thing about these cases has little to do with licensing per se, but instead relates to the expansion of the Constitution and competing substantive understandings of liberty and the proper roles of the state and judiciary within U.S. legal culture.

The last paper, *The Tragedy of Democratic Constitutionalism*, analyzes the broader shift towards a vision of liberty that is defined as freedom from the state and that views market ordering as central to the meaning and operationalization of constitutional liberty. This shift, the paper documents, is occurring not only under the Speech Clause but across a range of constitutional doctrines.

The paper critiques the three major justifications for the emergent view of constitutional liberty—one from classical economics, one from originalism, and one from libertarian philosophy: (1) The paper notes that we might contest the importation of neoclassical principles into constitutional law on the grounds articulated by behavioral law and economics scholars. Even bracketing the empirical question of whether people act in consistently rational, wealth-maximizing ways, however, the justification from classical economics faces a steep challenge on its own terms. Namely, rational self-interest, even if stipulated, may not lead to optimal social welfare outcomes, as Garrett Hardin observed in *The Tragedy of the Commons*. (2) I argue that the living constitutionalist means by which the emergent model is being constructed is also contrary to the methodology from which originalism derives its normative force. (3) The justification from libertarian philosophy fails, too, because it
offers no reason that its version of liberty should supplant others in constitutional law, particularly in a country of diverse values. And it ignores both the ways in which non-governmental forms of power structure choice, as Robert Hale observed, and the dimensions of lived freedom that depend on social interdependence rather than autonomy.

The paper then situates the emergent constitutional shift within broader theories of constitutional change. It builds off the fact that the U.S. constitutional system is one of open-textured rights, the meanings of which are sensitive to litigant advocacy and norm change, as a deep literature in democratic constitutionalism has traced. Against the backdrop of a highly unequal world, the paper argues, this sensitivity exerts a system-tilt towards constitutional visions of liberty, like the emergent one, that entrench existing distributions of wealth, power, and status—as a product of contingent, if persistent, institutional, and cultural arrangements. That same sensitivity of the U.S. constitutional system to social forces, however, makes the trend toward status-quo-entrenching understandings of liberty one that a sufficiently mobilized populace can overcome.
Understanding Liberty:
The Constitution’s Neoliberal Turn

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By
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This dissertation is dedicated to all of you.
I. The New Lochner

INTRODUCTION

Commercial interests are increasingly laying claim, often successfully, to First Amendment protections.\(^1\) One corner of the First Amendment—its interface with commercial regulation—is a critical front in this development, and one with great implications for modern governance in domains from consumer protection to public health to foreign affairs.\(^2\) Once the mainstay of political liberty, the First Amendment has emerged as a powerful deregulatory engine. This Article identifies this important development as a growing constitutional conflict between the First Amendment and the modern administrative state and analyzes its origins and implications.

The Article pinpoints two opposing trends that have led to the growing constitutional conflict between the First Amendment and the regulatory state. First, a largely business-led social movement has mobilized to embed libertarian-leaning understandings of the First Amendment in constitutional jurisprudence. At the same time, federal and state administrative regimes have moved towards lighter-touch, often information-based, forms of governance, either in place of or in addition to command-and-control regulation. What makes the tools of


\(^2\) See, e.g., Sorrell, 131 S. Ct. 2653; Am. Meat Inst. v. USDA, 760 F.3d 18 (D.C. Cir. 2014) (en banc); Edwards, 755 F.3d 996; Nat’l Ass’n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015); Kagan v. City of New Orleans, 753 F.3d 560 (5th Cir. 2014), cert. denied, 135 S. Ct. 1403 (2015); United States v. Caronia, 703 F.3d 149 (2d Cir. 2012); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012); Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012); Pharm. Care Mgmt. Ass’n v. Rovv, 429 F.3d 294 (1st Cir. 2005); Nordyke v. Santa Clara Cnty., 110 F.3d 707 (9th Cir. 1997).
modern governance—such as mandated disclosures—lighter-touch, however, makes them appear more speech-regulating than earlier conduct regulations, thereby rendering them more susceptible to First Amendment challenge. Together, these trends have brought the First Amendment into greater conflict with the modern administrative state.

The stakes of this conflict are high. For the often-overlooked reason that nearly all human action operates through communication or expression, the contours of speech protection—more than other constitutional restraint—set the boundary of permissible state action. Put differently, the First Amendment possesses near total deregulatory potential.

The academic literature is only just beginning to address this burgeoning constitutional and inter-branch conflict. But a growing number of scholars, commentators, and judges have likened aspects of recent First Amendment jurisprudence to *Lochner v. New York*’s anticanonical liberty of contract. This Article analyzes that parallel as a way to unearth what is unique about contemporary constitutional deregulation. While this modern form of...

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4 198 U.S. 45 (1905).

deregulation resonates with earlier constitutional protection of economic liberty, it differs in significant aspects. Speech protection possesses broader deregulatory capacity; and, where earlier constitutional deregulation rested on the apparent naturalness of common law baselines, First Amendment deregulation—what I term the new *Lochner*—largely rests on the apparent obviousness of what constitutes speech. By grounding itself in the First Amendment, the new *Lochner* benefits from a cross-ideological coalition formed around earlier uses of the First Amendment while allowing *Lochner* itself to remain in the anticanon.

By elaborating on the growing conflict between the First Amendment and the broader undertaking of the information-based state, this Article casts light on unexplored linkages between theories of the First Amendment and administrative law and highlights the implications of this unfolding constitutional conflict for understandings of democracy, choice, and constitutional change. It argues that differing administrative regimes and understandings of the First Amendment embrace competing substantive visions of democracy and choice. And, it demonstrates that a changing legal culture can alter constitutional principles absent Article V amendment—indeed, not just as to their substantive content, but also with regard to constitutional salience (meaning whether the Constitution applies at all),6 the distribution of powers among the branches, and the shape of American administration and its grounds of legitimation. In so doing, this Article reveals some of the mechanisms by which social actions become constitutional ones and the processes by which the boundaries of the First Amendment are charted.

This examination shows that advocates of the new *Lochner* are forwarding a formal concept of liberty that has no apparent limiting principle. They contend that all speech is

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speech and equally subject to stringent constitutional scrutiny. Given the pervasiveness of speech and expression, taken to its logical conclusion, this contention would render democratic self-government impossible. Contextualizing the new

Lochner in this historical and conceptual framework, I argue that this new form of formal liberty must be rejected.

The Article proceeds in four parts. Part I maps out the relatively short history of the First Amendment commercial speech doctrine and the doctrinal contours and changes that have paved its path toward conflict with the modern regulatory state. I offer a new way to view the currently under-theorized commercial speech cases: through a change in legal culture spurred in part by the mobilizing force of a business-led social movement, itself a part of the shifting roles of the corporation, and commercial speech, within contemporary American society. Part I also traces the rise of the modern information state, the hallmark of which is ‘lighter-touch’ forms of governance through tools such as disclosure requirements rather than mandates or bans on conduct. I argue that this shift has made much of modern regulation appear more speech-regulating than traditional command-and-control regulation. Together, these two trends have increased conflict between the modern administrative state and the First Amendment.

Part II elaborates what is at stake in that conflict. It develops the insight that because nearly all human action—and all state regulation—operates in whole or in part through language, the scope of First Amendment protection, more so than other constitutional restraints, tracks the boundaries of the constitutionally permissible administrative state.

Part III analyzes the ways in which the First Amendment’s recent libertarian turn resonates with—and diverges from—Lochner itself. Courts’ growing protection of commercial speech threatens to revive a sort of Lochnerian constitutional economic deregulation embedded not in substantive due process but the First Amendment. The similarities between the current
trend in commercial speech doctrine and *Lochner* itself are pronounced. Both pit business freedom to choose against government structuring or facilitation of choice. Both privilege the negative over the positive state. And both render courts, not the political branches, the arbiters of our economic life. But, while this modern form of constitutional deregulation resonates with *Lochner*, the two differ in significant aspects. Commercial speech protection possesses broader deregulatory capacity and whereas *Lochner* relied on the apparent naturalness of the common law’s distribution of entitlements, the new *Lochner* takes as its baseline the naturalness of what constitutes ‘speech.’ By embedding economic rights in the more textually grounded, if capacious, First Amendment, the new *Lochner* allows *Lochner* itself to remain in the anticanon.

Part IV casts light on the implications of this conflict for accounts of democracy, choice, and constitutional change. This Part further illustrates that commercial speech advocates are mobilizing a formal concept of liberty that has no apparent limiting principle. Their core contention is that all speech is speech and, consequently, all regulation of speech should be equally subject to stringent constitutional scrutiny. I argue that this form of ‘liberty’ must be rejected because if taken to its analytical conclusion, the new *Lochner* would render self-government impossible.

I. THE ORIGINS OF THE NEW *LOCHNER*

Perhaps the most dynamic area of First Amendment law today is the commercial speech doctrine. That doctrine is not coincidentally also the key site of dispute in the constitutional contest between the First Amendment and the modern regulatory state. The D.C. Circuit recently sat en banc to consider the constitutionality, under the First Amendment, of commercial speech challenges under the doctrine for expressive conduct and incidental burdens are a related and overlapping site of conflict also addressed in this Part. *See infra* note 75.

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7 Commercial challenges under the doctrine for expressive conduct and incidental burdens are a related and overlapping site of conflict also addressed in this Part. *See infra* note 75.
of a country-of-origin label that the U.S. Department of Agriculture requires be placed on certain meat products sold in the United States. The majority of circuits have reviewed similar First Amendment challenges to what would once have been understood as routine economic regulation subject to rational basis review under black letter constitutional law—in diverse areas from nutritional and tobacco labeling to regulations regarding prescription drugs, credit cards, insurance, and business licensing. As John Coates has empirically demonstrated, free speech challenges by commercial entities have proliferated markedly since the mid-1970s, and businesses have increasingly displaced individual litigants as the beneficiaries of First Amendment rights.

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8 Am. Meat Inst. v. USDA, 760 F.3d 18 (D.C. Cir. 2014) (en banc).


10 Coates, supra note 1.
It was not always this way. The Supreme Court explicitly declined to extend the First Amendment to commercial speech less than seventy-five years ago during its immediate turn away from the \textit{Lochner} era’s protection of economic rights under substantive due process. This section paints the doctrinal and administrative history that gave rise to the current conflict between the First Amendment and the regulatory state.

\textbf{A. The Arc and Architecture of the Commercial Speech Doctrine}

The First Amendment right of free speech, as is often noted, is of recent advent. It has risen to prominence in tandem with the prominence and scope of the modern regulatory state. Not until the early twentieth century did the Supreme Court provide any protection for free speech and when it did so that protection largely prohibited the regulation of political expression. Within this relatively new constitutional domain, protection for commercial—as opposed to political—speech is of even more recent origin.

As elaborated below, commercial speech was not deemed ‘speech’ as far as the First Amendment was concerned until 1976. Despite its recent inception, commercial speech protection has been characterized by remarkable dynamism. This section traces the evolution of the commercial speech doctrine against the backdrop of protections for non-commercial speech. When the Supreme Court first protected commercial speech, it had in mind the exact deregulatory puzzle now ensnaring the courts. It protected commercial speech for a single reason, structurally striking within First Amendment doctrine: the value of the information contained in commercial speech to the listening and consuming public. The first aim of this Article is to elucidate why commercial speech became covered in this way at all and second, why the initial settlement between constitutional coverage of commercial speech and the regulatory state has begun to buckle at the seams.
1. THE ORIGIN & EVOLUTION OF COMMERCIAL SPEECH PROTECTION

Despite its recent importance, the commercial speech doctrine is quite young. In 1942, the Supreme Court explicitly placed commercial speech beyond constitutional protection. While the Court had addressed a small handful of proto-commercial speech cases in the late nineteenth century and early twentieth century, its first serious treatment of the issue was in Valentine v. Chrestensen, a case involving advertising for a submarine exhibition.

Chrestensen wanted to advertise his submarine exhibit in New York City to drum up business. The City code forbade the distribution of business advertising materials, however, and after being found in violation of the ordinance, he sued. The Supreme Court upheld the City’s restriction in a terse opinion released less than two weeks after argument, saying it was “clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.” Instead, “[w]hether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment.” Chrestensen’s cursory holding explicitly placed commercial speech beyond the Constitution’s ambit—

11 16 U.S. 52 (1942).


13 Chrestensen, 316 U.S. at 53 n.1.

14 Id. at 54.

15 Id.; see also Breard v. Alexandria, 341 U.S. 622, 644–45 (1951) (upholding a prohibition on door-to-door solicitation of magazine subscriptions on similar grounds).
essentially categorizing it as wholly unprotected expression, like fighting words or obscenity, or perhaps understanding the “promot[ion] or pursu[it of] a gainful occupation in the streets” as a type of commercial conduct.

*Chrestensen* occurred in the initial wave of the Court’s turn away from *Lochner*, as Judge Alex Kozinski and Stuart Banner have observed. The case came to the Court in 1942—a mere five years after *West Coast Hotel v. Parrish*, in which Justice Roberts’s famous “switch in time” brought the *Lochner* era to a close. The case was likewise decided only four years after the Court, in *United States v. Carolene Products Co.*, announced that “regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless” it fails to “rest[] upon some rational basis.” Chrestensen’s challenge to the City’s restriction was in fact not brought as a First Amendment claim but as a substantive due process challenge. And it was Justice Roberts himself who penned *Chrestensen’s* cursory rejection of that claim. The Court’s initial exclusion of commercial speech from constitutional protection, then, was a part of the Court’s revolutionary turn away from *Lochner*.

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17 *Chrestensen*, 316 U.S. at 54.


19 300 U.S. 379 (1937).

20 *Id.* at 400.

21 304 U.S. 144 (1938).

22 *Id.* at 152.

23 *Chrestensen*, 316 U.S. at 54.
Commercial speech jurisprudence changed course in the 1960s, as one facet of a progressively led rights revolution. In a watershed decision in 1976, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court squarely addressed the continuing validity of *Chrestensen* and “whether there is a First Amendment exception for ‘commercial speech.’” The Court struck down a Virginia law barring pharmacists from advertising the prices of drugs. It overruled *Chrestensen*, thereby creating the modern commercial speech doctrine.

The Court’s animating rationale is striking. It reasoned that a “consumer’s interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate” and “society also may have a strong interest in the free flow of commercial information.” The constitutional protection of commercial speech, then, is due to its value to its audience, not its speaker. As *Virginia Board of Pharmacy* teaches,

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.

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26 Id. at 760.

27 See id. at 758, 770.

28 Id. at 763–64.

29 Id. at 765 (citations omitted).
The Court stressed that the logic of Virginia’s advertising ban was based upon assumptions about the bad effects of providing pricing information and that the public’s best interest is forwarded “if they are not permitted to know who is charging what.”\textsuperscript{30} The Court rejected that “highly paternalistic approach” in favor of the presumption “that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them,”\textsuperscript{31} saying that “[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.”\textsuperscript{32}

The commercial speech doctrine was forged as a tool of consumer protection to secure the value of commercial speech to society, not to ensure the autonomy interests of commercial speakers.\textsuperscript{33} It is noteworthy that commercial speech was drawn within the First Amendment’s ambit at a moment when the consumer protection movement was arguably at its peak.\textsuperscript{34} While the early 1900s and 1930s had seen considerable consumer mobilization, in the 1960s and 1970s that movement gained renewed prominence. President Kennedy delivered a Consumer Message to Congress in the spring of 1962 that included a Consumer Bill of Rights that emphasized, among other things, the right to be informed and the right to choose.\textsuperscript{35} In the

\textsuperscript{30} Id. at 770.

\textsuperscript{31} Id.

\textsuperscript{32} Id.

\textsuperscript{33} See Post & Shanor, supra note 3, at 170, 172 (elaborating on the listener orientation of the commercial speech doctrine); Post, supra note 3, at 872–73 (same).


\textsuperscript{35} President John F. Kennedy, Special Message to the Congress on Protecting Consumer Interest (Mar. 15, 1962), http://www.presidency.ucsb.edu/ ws/?pid=9108; President John F. Kennedy, Papers Regarding the Special
mid-1960s, President Johnson created a new position of the Special Assistant for Consumer Affairs and urged the passage of over a dozen consumer protection laws, from truth in lending to food and drug inspection. In 1968, a nationwide network of consumer organizations, the Consumer Federation of America, was created, and state and local consumer groups proliferated. Ralph Nader founded Public Citizen in 1971—one of several such organizations that he established around the same time, including the Center for Study of Responsive Law and the Public Interest Research Group (PIRG)—as part of that growing consumer advocacy movement.

The Public Citizen Litigation Group, co-founded by Nader and Alan Morrison in 1972, litigated Virginia Board of Pharmacy itself. As David Vladeck, a litigator who joined the Litigation Group in the mid-1970s and now Georgetown Law professor describes, the goal of that litigation was to dislodge guild practices that hurt consumers by stifling competition. Because a small pharmacy had unsuccessfully challenged anti-competitive state laws on due process and equal protection grounds and state action defenses were developing to block

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36 Consumer Movement History, supra note 34, at 591.


antitrust challenges, the First Amendment was the only viable option. The Court’s rejection of the due process challenge to anti-competitive state pharmacy laws explicitly grounded itself in the turn from *Lochner*; in some sense it was *Lochner* itself that prompted the consumer movement to resort to the First Amendment. And consumer protection, not the free speech rights of purveyors, was the operating logic of the early commercial speech cases.

The doctrinal revolution in commercial speech came over the strenuous opposition of the Court’s conservatives. Justice Rehnquist penned a fiery dissent in *Virginia Board of Pharmacy*, criticizing the majority for “elevat[ing] commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas.” He quipped that he had understood the First Amendment to “relate to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo.”

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43 *Snyder’s Drug Stores*, 414 U.S. at 164–67 (“We refuse to sit as a ‘superlegislature to weigh the wisdom of legislation,’ and we emphatically refuse to go back to the time when courts used the Due Process Clause ‘to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.’ . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. . . . [R]elief, if any be needed, lies not with us but with the body constituted to pass laws for the State . . . .” (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 731–32 (1963))).


45 *Id.* at 781 (Rehnquist, J., dissenting).

46 *Id.* at 787 (Rehnquist, J., dissenting).
One need not disagree with the majority’s view that consumers and society have a strong interest in the free flow of information, Justice Rehnquist maintained, to believe that that question should presumptively be left to the political branches: 47

The Court speaks of the importance in a “predominantly free enterprise economy” of intelligent and well-informed decisions as to allocation of resources. While there is again much to be said for the Court’s observation as a matter of desirable public policy, there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession. 48

It was not apparent to Justice Rehnquist how the pharmacists in that case were any “less engaged in a regulatable profession than were the opticians in Williamson v. Lee Optical Co., 348 U.S. 483 (1955)].” 49

When it first extended First Amendment protection to commercial speech, both the Court and Justice Rehnquist in dissent recognized the need to avoid a major clash between a twentieth-century managed economy and a robust First Amendment commercial speech right. The Court therefore built three related limiting features into its protection of commercial speech.

First, and most fundamentally, the Court framed the protection of commercial speech as a listener-based right. The Court has repeatedly affirmed the principle that “[t]he First Amendment’s concern for commercial speech is based on the informational function of advertising,” not the autonomy of the commercial speaker, including in its leading commercial speech case, Central Hudson Gas & Electric Corp. v. Public Service Commission. 50 By contrast,

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47 Id. at 783–84 (Rehnquist, J., dissenting).
48 Id. (Rehnquist, J., dissenting) (citations omitted).
49 Id. at 785 (Rehnquist, J., dissenting).
paradigmatic First Amendment speech is generally protected not because of the value of the speech to its audience but due to the right of the speaker to speak. One of the most important values animating the free speech clause is the protection of political speech because of its importance to democratic self-determination.\(^{51}\) When speakers participate in public discourse, paradigmatic First Amendment doctrine protects not only their liberty to speak but also the manner in which they choose to do so.\(^{52}\) Hence, paradigmatic First Amendment doctrine protects the speech of citizens as an autonomy right.

Second, the Court stressed that “‘commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,’ and is subject to ‘modes of regulation that might be impermissible in the realm of noncommercial expression.’”\(^{53}\) Due to commercial speech’s subordinate status and because it is not a speaker-oriented autonomy right, the state may regulate it in ways that are content-discriminatory.\(^{54}\)

Commercial speech regulation is by its nature content-based. Such regulations definitionally target commercial speech and normally certain forms of commercial expression (for example, by prohibiting fraud or mandating financial or product-related disclosures). Until recently, the political branches could generally conclude that some forms of commercial speech were regulatable precisely because of their message (or their failure to disclose a particular


message) without increasing constitutional scrutiny.\textsuperscript{55} By contrast, in non-commercial political speech cases, content discrimination has long prompted the most exacting review.\textsuperscript{56} Whereas the government has traditionally had authority to outright ban false or misleading commercial speech without triggering the First Amendment at all,\textsuperscript{57} paradigmatic First Amendment speech may be protected even if it is deliberately false.\textsuperscript{58}

Third, the Court created a sharp asymmetry between regulations that restrict commercial speech and those that compel it. Bans on commercial speech receive a type of intermediate scrutiny under \textit{Central Hudson},\textsuperscript{59} whereas compelled commercial speech must meet something more akin to rational basis review under \textit{Zauderer v. Office of Disciplinary Counsel}.\textsuperscript{60} \textit{Zauderer} held that the commercial interest in refusing to provide government mandated factual information was “minimal” and requires only that disclosures be reasonably related to the state’s interest and not be unjustified or unduly burdensome.\textsuperscript{61}

\begin{itemize}
  \item \textsuperscript{55} \textit{See id.} at 564 n.6. \textit{But see Sorrell v. IMS Health Inc.}, 131 S. Ct. 2653, 2664, 2667 (2011) (stating that “[t]he First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys” and that “[c]ommercial speech is no exception” (internal quotation marks omitted)).
  \item \textsuperscript{56} \textit{See, e.g.}, \textit{Turner Broad. Sys., Inc. v. FCC}, 512 U.S. 622, 642 (1994).
  \item \textsuperscript{57} \textit{Central Hudson}, 447 U.S. 557.
  \item \textsuperscript{58} \textit{See, e.g.}, \textit{United States v. Alvarez}, 132 S. Ct. 2537 (2012).
  \item \textsuperscript{59} 447 U.S. at 566. \textit{Central Hudson} articulated the following four-part analysis:
    \begin{quote}
      At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.
    \end{quote}
    \textit{Id.}
  \item \textsuperscript{60} 471 U.S. 626, 651 (1985) (“Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant’s constitutionally protected interest in \textit{not} providing any particular factual information in his advertising is minimal. . . . [W]e hold that an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest . . . .” (citation omitted)).
  \item \textsuperscript{61} \textit{Id.}
\end{itemize}
This sharp asymmetry in the level of scrutiny makes sense because the constitutional value in commercial speech is that it can provide information to the public so that the public may make more intelligent decisions. Restrictions on commercial speech are thus necessarily more constitutionally suspect than mandated disclosures. Ordinary First Amendment jurisprudence, by contrast, incorporates the principle that “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”  

The early division between Justice Rehnquist and the majorities that extended First Amendment protection to commercial speech turned on whether those distinctions were sturdy enough to ensure that the First Amendment would not paralyze the operation of the modern state or inappropriately undermine the choices of democratically accountable political branches. Justice Rehnquist’s dissent in *Central Hudson* makes this clear:

> The Court’s decision today fails to give due deference to this subordinate position of commercial speech. The Court in so doing returns to the bygone era of *Lochner v. New York*, in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court’s own notions of the most appropriate means for the State to implement its considered policies.

> I had thought by now it had become well established that a State has broad discretion in imposing economic regulations. As this Court stated in *Nebbia v. New York*: “[T]here can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects. . . .”

> By the mid-1990s, however, the valance of commercial speech shifted, and the Court’s conservatives were animated less by the federalism and democratic deference concerns of

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Justice Rehnquist. They instead began to embrace the First Amendment as a deregulatory tool.  

Justice Thomas has authored a number of separate opinions in recent years calling for commercial speech to be treated on par with political speech. He has argued that there is no “philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial’ speech” and expressed doubts about “whether it is even possible to draw a

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Jack Balkin anticipated over twenty-five years ago that conservatives would leverage libertarian understandings of the First Amendment that had earlier been advanced by left-leaning advocates. See J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375; see also Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935, 942, 951, 957 (1993) (exploring the causes of the “noticeable rightward movement in the political center of gravity of free speech argumentation in the United States” “in the last fifteen years [prior to 1993],” noting that “there may be a closer affinity between free speech libertarianism and economic libertarianism or libertarianism simpliciter than has traditionally been supposed,” and arguing that “there may be reason to believe that those who are politically or socially disadvantaged would urge this broader protection [of free speech] with caution, and that those who are politically or socially advantaged would welcome this greater protection with some enthusiasm”).

65 *Lorillard Tobacco*, 533 U.S. at 572–90 (Thomas, J., concurring in part and concurring in judgment); *id.* at 575 (“I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as ‘commercial.’”); *Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 518–28 (1996) (Thomas, J., concurring in part and concurring in judgment); *id.* at 518 (“In cases such as this, in which the government’s asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in *Central Hudson* . . . should not be applied, in my view. Rather, such an ‘interest’ is per se illegitimate and can no more justify regulation of ‘commercial’ speech than it can justify regulation of ‘noncommercial’ speech.”).

66 *Liquormart*, 517 U.S. at 522 (Thomas, J., concurring in part and concurring in judgment).
coherent distinction between commercial and noncommercial speech.”

Animating his concerns is a particular vision of free consumer choice. He has stated that he does not believe that “the only explanations that the Court has ever advanced for treating ‘commercial’ speech differently from other speech can justify restricting ‘commercial’ speech in order to keep information from legal purchasers so as to thwart what would otherwise be their choices in the marketplace.” Justices Thomas, Kennedy, and Scalia have additionally questioned whether the commercial speech doctrine’s core precedents should be retained. This gradual shift in the Court’s conservatives’ approach to commercial speech arguably echoes larger developments in the dominant forces of the Republican Party from an emphasis on judicial deference to one focusing on economic libertarianism following the Reagan Revolution.

The Supreme Court’s most recent commercial speech case goes the furthest in chipping away the initial architecture of the commercial speech doctrine and in undermining the features that the Court that created the doctrine put in place to ensure that the First Amendment would not be the undoing of the regulatory state. In Sorrell v. IMS Health Inc.,

the Court addressed a challenge to a state law restricting the sale, disclosure, and use of

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67 Lorillard Tobacco, 533 U.S. at 575 (Thomas, J., concurring in part and concurring in judgment).

68 44 Liquormart, 517 U.S. at 522–23 (Thomas, J., concurring in part and concurring in judgment).

69 Lorillard Tobacco, 533 U.S. at 571–72 (Kennedy, J., joined by Scalia, J., concurring in part and concurring in judgment) (expressing “continuing concerns that the [Central Hudson] test gives insufficient protection to truthful, nonmisleading commercial speech” but finding it unnecessary “to consider whether Central Hudson should be retained in the face of the substantial objections that can be made to it”); id. at 572–90 (Thomas, J., concurring in part and concurring in judgment); Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 504 (1997) (Thomas, J., dissenting) (“I continue to disagree with the use of the Central Hudson balancing test and the discounted weight given to commercial speech generally.”); 44 Liquormart, 517 U.S. at 518–28 (Thomas, J., concurring in part and concurring in judgment); id. at 517–18 (Scalia, J., concurring in part and concurring in the judgment) (“I share Justice Thomas’s discomfort with the Central Hudson test, which seems to me to have nothing more than policy intuition to support it. . . . Since I do not believe we have before us the wherewithal to declare Central Hudson wrong—or at least the wherewithal to say what ought to replace it—I must resolve this case in accord with our existing jurisprudence . . . .”).


71 131 S. Ct. 2653 (2011).
pharmacy data revealing prescribing practices of doctors without their consent. Justice
Kennedy, writing for the Court, gestured toward the notion that commercial speech is
protected due to the autonomy interest of commercial speakers, not due to the value of
commercial information to the public. \footnote{72}{See, e.g., id. at 2663 (“The law on its face burdens disfavored speech by disfavored speakers.”); id. at 2672 (“The State has burdened a form of protected expression that it found too persuasive. At the same time, the State has left unburdened those speakers whose messages are in accord with its own views. This the State cannot do.”); see also Tamara R. Piety, “A Necessary Cost of Freedom”? The Incoherence of Sorrell v. IMS, 64 ALA. L. REV. 1 (2012).} \footnote{73}{131 S. Ct. at 2664 (“The First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys. . . . Commercial speech is no exception.” (internal quotation marks omitted)); see also infra notes 191–194 and related text (discussing arguments that the change in the definition of content discrimination adopted in Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015), eliminated any distinction between commercial and noncommercial speech).} Sorrell, moreover, suggested that content discrimination regarding commercial speech restrictions raises constitutional concern.\footnote{74}{Id. at 2667.} While declining to decide if Central Hudson’s intermediate scrutiny or some stricter form of review applied, it noted that “[i]n the ordinary case, it is all but dispositive to conclude that a law is
content-based.”\footnote{75}{The vast majority of these are formally analyzed under the commercial speech doctrine, while a small handful are litigated under the test announced in United States v. O’Brien, 391 U.S. 367 (1968), for expressive conduct and incidental burdens. Both sets of cases are in functional respects of the same cloth. Compare, e.g., Edwards v. District of Columbia, 755 F.3d 996 (D.C. Cir. 2014), with R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012). Both sub-doctrines analyze regulations of commercial speech under a type of First Amendment intermediate scrutiny that was, in origin, imported from Equal Protection doctrine. Compare Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, 447 U.S. 557, 566 (1980), with O’Brien, 391 U.S. at 377. This perhaps explains in part the bleed between the two formally distinct sub-doctrines. See also Post & Shanor, supra note 3 (analyzing overlap).}

But, of course, the very category of commercial speech is a content-based
category.

The emergent revolution in commercial speech jurisprudence is not confined to the
Supreme Court. First Amendment challenges to economic regulations are proliferating across
the country.\footnote{76}{Id. at 2667.} Commercial plaintiffs have mounted cases against economic regulations
ranging from the more quotidian—such as tour guide licensing, required country-of-origin
labels on meat products, and a prohibition on the sale of guns at a county fair—to laws implicating weightier matters such as public health and foreign affairs—including the Food and Drug Administration’s graphic cigarette warnings, the Food, Drug, and Cosmetic Act’s ban on the off-label promotion of drugs, and the Securities and Exchange Commission’s required reporting of whether a company’s products contain minerals sourced from the armed conflict in the Democratic Republic of Congo.\footnote{See cases cited \textit{supra} notes 8–9.}

Faced with these cases, some circuits have implied or assumed that the First Amendment grants commercial speakers an autonomy right. Two D.C. Circuit opinions authored by Judge Brown are exemplars: \textit{Edwards v. District of Columbia},\footnote{755 F.3d 996 (D.C. Cir. 2014).} a case in which the court invalidated the District of Columbia’s business licensing scheme for tour guides as violating the First Amendment, and \textit{R.J. Reynolds Tobacco Co. v. FDA},\footnote{696 F.3d 1205 (D.C. Cir. 2012), overruled in part by \textit{Am. Meat Inst. v. USDA}, 760 F.3d 18 (D.C. Cir. 2014) (en banc).} in which a panel held the FDA’s graphic cigarette warning labels unconstitutional, but which has since been abrogated in part by the en banc court. \textit{R.J. Reynolds}, for instance, relied on paradigmatic speech cases in articulating the rule in a commercial speech case. Citing cases such as \textit{West Virginia State Board of Education v. Barnette},\footnote{319 U.S. 624 (1943).} which addressed whether students could be forced to salute the flag and recite the Pledge of Allegiance, the court transformed commercial speech protections into a speaker-based right.\footnote{\textit{R.J. Reynolds}, 696 F.3d at 1211 (“The general rule ‘that the speaker has the right to tailor the speech’ applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.’ . . . This holds true whether individuals . . . or corporations . . . are being compelled to speak.” (citations omitted)).}
Several circuits have likewise questioned whether the government has a freer hand to discriminate with regard to content in the context of commercial speech. In *United States v. Caronia*, the Second Circuit held unconstitutional the use of speech as evidence of criminal misbranding under the Federal Food, Drug, and Cosmetic Act, after noting that laws that impose content-based restrictions on commercial speech are subject to heightened review.

And while the Supreme Court recently affirmed the asymmetry of constitutional protection that applies to regulations that compel rather than restrict commercial speech in *Milavetz, Gallop & Milavetz, P.A. v. United States*, some circuit court decisions have not been so clear. Sitting en banc, the D.C. Circuit in *American Meat Institute v. United States Department of Agriculture*, in addressing the constitutionality of required country-of-origin labeling for certain meat products, described *Zauderer* as an “an *application of Central Hudson, where several of Central Hudson’s elements have already been established,*” arguably blurring the line between the two tests. The Tenth Circuit in *United States v. Wenger* followed a similar approach.

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81 703 F.3d 149 (2d Cir. 2012).

82 *Id.* at 163–64.

83 559 U.S. 229 (2010).

84 760 F.3d 18 (D.C. Cir. 2014) (en banc).

85 *Id.* at 26–27 (quoting Supplemental Brief for Appellants at 9, *Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (en banc) (No. 13-5281), 2014 WL 1600434, at *9). The court left open the door to further entangle the tests by holding that because the country-of-origin labels were justified by “substantial” state interests, as is required under *Central Hudson*, it “need not decide whether a lesser interest could suffice under Zauderer.” *Id.* at 23.

86 427 F.3d 840 (10th Cir. 2005).

87 *Id.* at 849 (“*Zauderer, therefore, eases the burden of meeting the Central Hudson test. In assessing disclosure requirements, Zauderer presumes that the government’s interest in preventing consumer deception is substantial, and that where a regulation requires disclosure only of factual and uncontroversial information and is not unduly burdensome, it is narrowly tailored.*”).
And two Justices, Ginsburg and Thomas, have indicated a desire to revisit the continuing validity of *Zauderer*, which created that distinction.88

* * *

Two points should become evident from this brief history: courts across the country are increasingly faced with First Amendment challenges to economic regulation and, at the same time, are inconsistent in adhering to the only constitutional rationale the Supreme Court has articulated for the protection of commercial speech. That rationale was that such speech is protected due to the interest the listening public has in receiving commercial information, from which a number of doctrinal features flow, including less concern about content discrimination and compelled speech. The Court has not to date, however, articulated a new or additional rationale to justify the constitutional protection of commercial speech or explained how commercial speaker autonomy, or even quasi-autonomy, can be squared with the modern regulatory state with its pervasive disclosure requirements and restrictions on false and misleading commercial speech. And what effect the passing of Justice Scalia will have on these trends is an open question—if one already subject to media speculation.89

The potential of the First Amendment to undermine the regulatory state—and revive a new *Lochner* era—has not gone unnoticed by the Supreme Court. Justice Breyer in dissent in *Sorrell* strenuously protested the undoing of the key distinctions that have been the touchstones of the commercial speech doctrine since its origin:

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The Court reaches its conclusion through the use of important First Amendment categories—“content-based,” “speaker-based,” and “neutral”—but without taking full account of the regulatory context, the nature of the speech effects, the values these First Amendment categories seek to promote, and prior precedent. At best the Court opens a Pandora’s Box of First Amendment challenges to many ordinary regulatory practices that may only incidentally affect a commercial message. At worst, it reawakens Lochner’s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue.\textsuperscript{90}

The majority in Sorrell provocatively responded that while “[t]he Constitution ‘does not enact Mr. Herbert Spencer’s Social Statics,’” “[i]t does enact the First Amendment.”\textsuperscript{91}

2. A CHANGING LEGAL CULTURE & A BUSINESS-LED SOCIAL MOVEMENT

Turning outside the courts allows us to identify one cause of the recent libertarian turn in commercial speech jurisprudence: a changing legal culture informed by a savvy business-led social movement that began well before the birth of the modern commercial speech doctrine. The First Amendment’s libertarian turn can be traced to the concerted organization of the business community to influence the law and hem in the growing regulatory state beginning in the early 1970s.

The origins of that mobilization are often attributed to Justice Lewis Powell. Two months before ascending to the bench in 1971 and while a private attorney in Virginia, the future Justice penned a memo to his neighbor and the Chairman of the Education Committee of the U.S. Chamber of Commerce, Eugene Sydnor, outlining a strategy for business-friendly advocacy.\textsuperscript{92} “No thoughtful person can question that the American economic system is under


\textsuperscript{91} Id. at 2665 (quoting Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)).

broad attack,”

Powell began his analysis. “[T]he time has come – indeed, it is long overdue – for the wisdom, ingenuity and resources of American business to be marshaled against those who would destroy it.”

The Powell Memo outlined a strategy for the business community to ensure the “survival of what we call the free enterprise system.” As for individual corporations, Powell recommended an increased emphasis on public relations and governmental affairs. “But independent and uncoordinated activity by individual corporations, as important as it is, will not be sufficient,” he contended. Instead, coordinated action by the National Chamber of Commerce and other industrial and commercial groups was needed. “Strength lies in organization, in careful long-range planning and implementation, in consistency of action over an indefinite period of years, in the scale of financing available only through joint effort, and in the political power available only through united action and national organizations.” The Powell Memo includes dozens of concrete organizing suggestions, including building more intellectual support at major universities, monitoring and responding to media attacks on free enterprise, and a full throated public media campaign ranging from public lectures and academic journals to paid advertisements. But in the final analysis, Powell concluded, the payoff for business “is what government does.”

One should not postpone more direct political action, while awaiting the gradual change in public opinion to be effected through education and

93 Id. at 1.
94 Id. at 9.
95 Id. at 10.
96 Id. at 11.
97 Id.
98 Id. at 24.
information. Business must learn the lesson, long ago learned by Labor and self-interest groups. This is the lesson that political power is necessary; that such power must be assiduously cultivated; and that when necessary, it must be used aggressively and with determination – without embarrassment and without the reluctance which has been so characteristic of American business.99

Most importantly, Powell asserted that business must seize a neglected opportunity in the courts, noting that “[u]nder our constitutional system, especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change.”100

Powell closed his memo with a section entitled “Relationship to Freedom.”101 “The threat to the enterprise system is not merely a matter of economics. It is also a threat to individual freedom. It is this great truth . . . that must be reaffirmed if this program is to be meaningful.”102 The alternatives to the free enterprise system, according to Powell, were “varying degrees of bureaucratic regulation of individual freedom.”103

While no mention of the Powell Memo was made during the Justice’s confirmation hearings, a copy was leaked to the press by a member of the Chamber’s staff after Powell was seated. The leaked memo prompted significant press coverage104 as well as requests for copies of the memo from individual businessmen and local and state chambers of commerce. In a

99 Id. at 25–26.
100 Id. at 26.
101 Id. at 32.
102 Id.
103 Id.
representative request, a southern regional manager for Uniroyal Chemical wrote that he felt “a national movement is needed at all levels to make people become more aware and to GET INVOLVED.”\footnote{105} According to a letter Eugene Sydnor sent to Justice Powell in 1972, this attention prompted the Chamber to reprint and distribute the Powell Memo “on a very wide scale throughout the country”\footnote{106} and build a public relations and organizational campaign around it.\footnote{107} As Sydnor described:

> The response to the mailing of the [Powell] memorandum by the Chamber to its full membership has been tremendous. . . . I am delighted that the Chamber organization is now gearing up to do something actively in this field, perhaps in concert with the National Council of Better Business Bureaus which has already begun to mount a campaign aimed particularly at consumers across the country.\footnote{108}

The Chamber boomed as a result. It doubled its membership between 1974 and 1980,
and it tripled its budget.\textsuperscript{109} Powell’s memo additionally spurred the creation of the U.S. Chamber of Commerce’s Litigation Center.\textsuperscript{110} Through litigation and lobbying, the Litigation Center and a range of coordinated advocacy organizations have been at the forefront of urging commercial speech protection—and they include some of the most successful Supreme Court litigators in the nation.\textsuperscript{111}

But Justice Powell and the Chamber of Commerce form only part of the story. As historians, political scientists, and sociologists have observed, starting in the 1970s and 1980s, “[b]usiness organized across a broad front to seek a reorientation of American politics.”\textsuperscript{112} That included the efforts of the Business Roundtable, which became a premier business lobbying organization.\textsuperscript{113} Many of the businessmen and organizations involved in this movement “believed their main problems came not from international competition or labor but from government and a democratic political system.”\textsuperscript{114} Their concern was with the expansion of the regulatory state, and, as Thomas Edsall has written, for the first time in the “1970s, business refined its ability to act as a class, submerging competitive instincts in favor


\textsuperscript{110} See, e.g., Joan Biskupic et al., The Echo Chamber, REUTERS INVESTIGATES (Dec. 8, 2014, 10:30 AM), http://www.reuters.com/investigates/special-report/scotus/.


\textsuperscript{112} JEROME L. HIMMELSTEIN, TO THE RIGHT: THE TRANSFORMATION OF AMERICAN CONSERVATISM 132 (1990); see also, e.g., THOMAS BYRNE EDSELL, THE NEW POLITICS OF INEQUALITY 129 (1984); KIM PHILLIPS-FEIN & JULIAN E. ZELIZER, WHAT’S GOOD FOR BUSINESS: BUSINESS AND AMERICAN POLITICS SINCE WORLD WAR II 234–35 (2012).

\textsuperscript{113} See, e.g., HACKER & PIERSON, supra note 109, at 120; HIMMELSTEIN, supra note 112, at 139–40; PHILLIPS-FEIN & ZELIZER, supra note 112, at 237–38, 250.

\textsuperscript{114} HIMMELSTEIN, supra note 112, at 135–38.
of joint, cooperative action.”\(^{115}\) The growing rise in deregulatory First Amendment cases is one product of that concerted cooperative action.

This story is intertwined with the resurgence of the American conservative movement—and conservative public interest lawyering—more broadly. In 1960, an Indianapolis businessman named Pierre Goodrich founded the Liberty Fund as a free-market think tank committed to an ideal of individual liberty.\(^{116}\) In the late 1970s, the Liberty Fund hosted two conferences on the use of rights as deregulatory tools and as a method of promoting economic liberty. One, convened at the University of Miami School of Law in 1976, was titled Advertising vs. Free Speech: Dilemma or Invention. It explored the question of whether the courts should restrain Congress and the state legislatures from enacting laws regulating commercial speech.\(^{117}\) Later that year, Edwin Baker, a First Amendment scholar who was in attendance, described the conference:

> [T]he central presentation, which set the tone of subsequent discussion, viewed the commercial speech issue to be merely one example of the ill effects of governmental regulation in general; the speaker concluded with a plea that regulation in all marketplaces be put on an equal footing, with the presumption being that regulation is unjustified. This defense of commercial speech was quickly viewed by those attending the conference to be based on a desire to return to a *Lochner* type of protection of property rights.\(^{118}\)

At another Liberty Fund conference in 1979 on the “Modern Rights Theory,” a central focus

\(^{115}\) *EDSALL*, *supra* note 112, at 128; see also *HACKER & PIERSOHN*, *supra* note 109, at 118 (“The organizational counterattack of business in the 1970s was swift and sweeping—a domestic version of Shock and Awe. The number of corporations with public affairs offices in Washington grew from 100 in 1968 to over 500 in 1978... . What the numbers alone cannot show is something of potentially even greater significance: Employers learned how to work together to achieve shared political goals. As members of coalitions, firms could mobilize more proactively and on a much broader front.”).


was re-grounding constitutional property rights.  

During the same period, Bernard Siegan—the prominent libertarian theorist whose unsuccessful nomination to the Ninth Circuit was described by the *New York Times* as “one of the most bitterly disputed judicial nominations of the Reagan era”\(^{120}\)—penned a number of influential libertarian works and was well-known for his ardent attack on footnote four of *Carolene Products* and his assertion that courts should abandon the rational basis test in favor of a return to the standard of review articulated in *Lochner v. New York*.  

As described by Edwin Meese III, President Reagan’s Attorney General, the broader “freedom-based public interest law movement,” of which the Liberty Fund was a part, was forged in the 1970s in response to the success of predominantly left-leaning impact litigation by groups such as the American Civil Liberties Union and the NAACP Legal Defense Fund.  

On the account of Lee Edwards, the Heritage Foundation’s historian of the conservative movement, this “freedom-based public interest law movement was born in the early 1970s in reaction to several accelerating trends in America” including not only “an expanding liberal public interest law coalition” but also “an intrusive regulatory government.”  

This cadre of lawyers, political operatives, and activists had a range of objectives and interests—a key fulcrum of which was economic liberty and property rights.  

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123 Lee Edwards, *The First Thirty Years, in Bringing Justice to the People*, supra note 119, at 1, 1.

124 *Id.* at 20–22.
One wing of this movement was the National Center for the Public Interest, which was founded in 1975 as a network of freedom-based public interest organizations around the country, including the Atlantic Legal Foundation, the Mountain States Legal Foundation, the Southeastern Legal Foundation, and what would become the Landmark Legal Foundation. After establishing this network in the mid-1970s, the National Legal Center relocated to Washington, D.C. and began a campaign promoting “individual rights, free enterprise, private property, [and] limited government.” It focused on the interests and concerns of corporate general counsel and business lawyers, and as its president of over two decades explained, its primary audience was “the private sector—business, industry, and agriculture.”

By the late 1970s, critics within the conservative movement argued that its public interest lawyering was too deeply intertwined with the American business community to be meaningfully in the public interest. Most prominent among these was Michael Horowitz, who would later go on to become the General Counsel of the Office of Management and Budget under President Reagan. Horowitz argued in a report for the Scaife Foundation in the late 1970s that “the conservative public interest movement will make no substantial mark on the American legal profession or American life as long as it is seen as and is in fact the adjunct of a business community possessed of sufficient resources to afford its own legal


126 Edwards, supra note 125, at 91.

Among other factors, such criticism led many foundations to withdraw support from conservative public interest organizations focusing on deregulatory work for some time—leaving economic liberty litigation, including in its First Amendment instantiations, largely in the hands of private industry itself. But by the mid-1980s, some conservative public interest organizations supported an economic-rights driven approach to the First Amendment based on conservative ideals, not simply the defense of particular interests. The Center for Applied Jurisprudence, for instance, assembled task forces of lawyers and intellectuals on economic liberty, property rights, and the First Amendment—the latter devoted in part to expanding commercial speech protections.

This history is reflected in the makeup of the present-day leaders of the commercial speech movement. They are, in the main, individual commercial plaintiffs and public interest organizations that grew out of the freedom-based conservative public interest movement’s genesis in the 1970s. Businesses and private industry groups, often represented by some of the most prominent Supreme Court and appellate advocates, including Theodore Olson, Floyd Abrams, and Noel Francisco, have brought the majority of recent cases. Others have

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129 TELES, supra note 128, at 68–69, 73; Edwards, supra note 125; Southworth, supra note 125, at 1241–43. It is perhaps noteworthy in this regard that the First Amendment rights of businesses was not one of the legal issues focused on in the Reagan Administration’s legal policy report, The Constitution in the Year 2000. See OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION (Oct. 11, 1988).

130 TELES, supra note 128, at 82–84.

been litigated by public interest organizations such as the Institute for Justice. The Chamber of Commerce has filed amicus briefs in many of these cases, as have a number of conservative public interest organizations such as the Washington Legal Foundation, the Cato Institute, the Institute for Justice, and the Pacific Legal Foundation, along with various private industry associations.

What emerges from this history is not a simple account of political capture by economic elites, but instead a complex picture of increasingly well-organized business actors and conservative movement lawyers acting in a multifaceted approach over decades to influence the meaning and constitutional salience of free speech protections. To be sure, that success was not immediate. And while it originated in no small part with Justice Powell—whose tenure on the Supreme Court saw the creation of the commercial speech doctrine—


and many of its central precedents,\textsuperscript{135} as well as the greatest increase in business-brought First Amendment claims heard by the Supreme Court\textsuperscript{136}—Powell was in many ways an intermediate figure, working in the more recent shadow of the Supreme Court’s turn away from economic substantive due process and at the beginning of a movement that only decades later would come to ascendency.

Causation is difficult to tease from historical correlation, and this account faces the endogeneity challenge faced by any study of the influence of social movements on legal culture and the law. But we can appreciate that the seeds of ideas planted in the 1970s and cultivated by tenacious business lawyers form part of the story of the recent libertarian turn in the commercial speech doctrine.

\textit{B. The Rise of the Information State}

This section maps the rise of the information state and its distinctive use of what are often termed lighter-touch regulatory tools—such as mandated disclosures—in place of or in addition to command-and-control regulation. This section sketches the animating rationale of information regulation: a concept of disaggregated democracy fueled through individual (often consumer) action. And it describes a range of phenomena—including behavioral law and economics research, the business-led social movement described above, and quintessentially contemporary policy concerns, such as supply chains that span borders—that have encouraged the use of lighter-touch, often information-based, regulation by modern legislators and administrators.


\textsuperscript{136} See Coates, \textit{supra} note 1, at 251 fig.2; see also, e.g., \textit{First Nat’l Bank of Boston v. Bellotti}, 435 U.S. 765 (1978) (Powell opinion extending First Amendment protection to corporate expression of views on issues of public importance).
In this section, I make three claims. First, the very features that make modern regulatory tools ‘lighter-touch’ render them more prone to appear speech-regulating than the traditional regulatory levers of mandates and bans on conduct. Second, by leveraging human behavioral patterns such as biases and heuristics, information regulation may raise a disquiet about paternalism that resonates with, if also differs from, one traditional First Amendment concern: paternalism of thought. Third, together, these trends in administrative law, features of contemporary regulation, and economic trends have placed the modern regulatory state in greater potential tension with the First Amendment.

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Running in tandem with the developments in First Amendment jurisprudence described above, since at least the Reagan Administration, administrative regimes at both the federal and state levels have taken a general turn away from direct mandates and bans towards lighter-touch forms of regulation. Lighter-touch regulation, broadly conceived, is the use of incentives to promote desired behavior instead of direct mandates or bans of conduct. Lighter-touch regulation comes in many forms, including permits and fees or providing or regulating information upon which the public can make, often commercial, choices. I refer to this last subset of lighter-touch regulation as information regulation—meaning the regulation or required disclosure of information upon which the public can make choices.

While information regulation is far from new—from the securities disclosures enacted in the 1930s\(^\text{137}\) to the 1960s truth-in-lending mandates\(^\text{138}\)—it has recently taken on new forms and priority that place the regulatory state in greater conflict with the First Amendment.


Although a full history of this administrative revolution is beyond the scope of this Article, this section draws a sketch of this trend and identifies several of the factors that have given rise to it.

As Justice Kagan has observed, policy control over the federal administrative state has become increasingly consolidated in the President and his staff since the Reagan Administration. The turn to lighter-touch federal administration forms one facet of that trend. In the early to mid-1980s, President Reagan issued two executive orders, Executive Orders 12,291 and 12,498, that among other things formalized the role of the White House’s Office of Management and Budget in reviewing federal regulations and established a number of guiding principles that agencies are directed to follow when developing regulations, including the use of cost-benefit analysis. In 1993, President Clinton replaced President Reagan’s twin executive orders with Executive Order 12,866, which has since served as the cornerstone to federal administrative policy. This Order retained the foundations of centralized review adopted by President Reagan, but expressly required agencies to identify and assess alternatives to command-and-control regulation.

President Obama extended and further clarified these principles in Executive Order 13,563, which requires every agency to “identify and assess available alternatives to direct regulation, including . . . providing information upon which choices can be made by the

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142 Exec. Order No. 12,866, 3 C.F.R. 638 (1994) (“Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.”).
public” and “[w]here relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, . . . identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public,” including “warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible.” The President’s more recent Executive Order, Using Behavioral Science to Better Serve the American People, elaborates the directive to use behavioral science to implement policy, including prominently through providing information to facilitate citizen choice.

Information regulation has proliferated at the federal level in recent decades. Much of the response to the financial crisis has taken the form of mandated disclosures, as has the regulation of consumer protection, campaign finance, and public health. From your cell phone bill to your food packaging to your retirement plan, the signs of information regulation are nearly inescapable. The FDA’s graphic cigarette warning labels are a striking example. Neither Congress nor the FDA banned the sale or possession of cigarettes or smoking—instead, at the direction of Congress, the FDA issued a rule requiring cigarette manufacturers to label their products with one of nine graphic warning labels and a phone number for a hotline offering help to quit smoking.

States and municipalities, too, have robustly embraced information regulation. Almost


fifty states, along with the District of Columbia, Guam, Puerto Rico, and the Virgin Islands, require companies to disclose to customers security breaches involving their personally identifiable information. New York has mandated that nutritional information be displayed in many restaurants, and the cities of San Francisco and Berkeley have both required cell phone retailers to provide disclosures about the radiofrequency radiation that cell phones emit. Berkeley has additionally proposed mandated disclosures on gas pumps regarding the contribution of fossil fuels to climate change.


148 See N.Y.C. HEALTH CODE § 81.50 (requiring food service establishments with fifteen or more locations to prominently post calorie information on menus and menu boards); see also N.Y. STATE REST. ASS’N v. N.Y.C. Bd. of Health, 556 F.3d 114 (2d Cir. 2009).

149 See CTIA–The Wireless Ass’n v. City & Cnty. of S.F., 494 F. App’x 752 (9th Cir. 2012) (holding San Francisco cell phone disclosure requirement unconstitutional). The constitutionality of Berkeley’s cell phone disclosure requirement is currently being litigated in CTIA–The Wireless Ass’n v. City of Berkeley, No. C-15-2529 EMC, 2015 WL 5569072 (N.D. Cal. 2015), appeal docketed, No. 16-15141 (9th Cir. Feb. 1, 2016), a case in which I am involved. San Francisco’s ordinance requiring a public health–based disclosure on sugar-sweetened beverages has likewise already faced First Amendment challenge, Am. Beverage Ass’n v. City & Cnty. of S.F., No. 3:15-cv-03425 (N.D. Cal. filed July 24, 2015), as have dozens of other state and local ordinances, see, e.g., PSE&G Long Island LLC v. Town of N. Hempstead, No. 15-cv-0222, 2016 WL 423635 (E.D.N.Y. Feb. 3, 2016).

The animating logic of lighter-touch regulations such as these is one of disaggregated democracy fueled through individual, often citizen consumer, action. Information regulation seeks to regulate more lightly—meaning to enhance the public’s power of choice by eschewing the sometimes costly, inefficient, and heavy-handed burden of direct regulation of behavior.  

Instead of consolidating decision-making about substantive policy decisions as fully in the administrator or legislator, lighter-touch regulation disaggregates choice, if incompletely, in the public and those who would otherwise be directly regulated. To what degree should smoking or fossil fuel consumption be reduced, with their attendant budgetary, health, foreign affairs, and environmental effects? The choice is left in large part to the aggregate of citizen consumers. Lighter-touch regulation aims to affirm individual choice, and in so doing it embraces a disaggregated path to democratic legitimacy. And, whether or not lighter-touch regulation is in fact as choice-affirming as announced, and whether choice necessarily enhances welfare, the affirmation and appearance of choice has contributed to the political popularity of lighter-touch regulation.

The general trend of administrative regimes towards information regulation has been spurred by a number of forces in addition to this political appeal. Most recently, the use of lighter-touch regulatory tools by federal agencies, including altering defaults and mandating disclosures, has been encouraged by behavioral law and economics scholarship and one of its


pioneers, Cass Sunstein, President Obama’s head of OMB’s Office of Information and Regulatory Affairs from 2009 to 2012. Behavioral law and economics research has identified tools, such as defaults, disclosures, and salience effects, that regulators can use to markedly alter behaviors without conduct rules.

The turn towards lighter-touch regulation was likewise encouraged by many of the same business advocates now litigating against the constitutionality of lighter-touch regulatory regimes. The New Deal response to the Great Depression in programs from the Agricultural Adjustment Act to the Social Security Act, and the Rural Electrification Administration to the Tennessee Valley Authority greatly expanded the reach and function of the American regulatory state. The Great Society programs passed during the 1960s and 70s—including framework statutes such as the Civil Rights Act, the Occupational Safety and Health Act, the Clean Air Act, and the Environmental Policy Act—further broadened its reach. And just as business organized in the courts to respond to this regulatory expansion beginning in the 1970s, it mobilized against regulation by the political branches, spurring lighter-touch regimes in the process.

The history of tobacco regulation is illustrative. While Congress has mandated health warnings on cigarettes since 1966, it did not authorize the FDA to directly regulate tobacco products until 2009. In the intervening decades, the tobacco industry and the Chamber of

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Commerce staunchly opposed direct regulation of tobacco products, such as bans on certain products or the regulation of the level of nicotine that they may contain, while reaching at least occasional compromises on product warning labels.\(^{157}\) Opposition to direct regulation may more generally leave lighter-touch administration as a more politically viable alternative. It is these same sorts of warnings that the tobacco industry has more recently challenged on First Amendment grounds.\(^{158}\)

A concomitant growth of a range of contemporary concerns—from big-data privacy to supply chains that span borders—has further prompted the use of information regulation by contemporary administrators and legislators. The regulation at the center of the D.C. Circuit’s recent *National Association of Manufacturers v. SEC*\(^ {159}\) decision provides an apt example. Encouraged by staff at the State Department, Congress in Dodd-Frank directed the Securities and Exchange Commission to require firms to disclose whether minerals used in their products were sourced from the area of the armed conflict in the Democratic Republic of

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159 800 F.3d 518 (D.C. Cir. 2015).
Congo or nearby states. The SEC in turn required firms to file conflict minerals reports describing their supply chain sources and to disclose if any minerals used had “not been found to be ‘DRC conflict free.’” The aim of the regulation was two-fold. First, the required disclosure might deter firms from sourcing minerals from the DRC or neighboring regions because of the negative publicity (and potential stock-price decline) they might face. Second, the disclosures might influence shareholder and consumer choices in a way that would indirectly influence corporate mineral-sourcing behavior. These first- and second-order aims were only means, however, to accomplish the higher order policy goal of influencing the conflict in the DRC by drying up sources of revenue to fighters there, so as to advance American foreign affairs and humanitarian goals in East Africa. Direct military intervention by the United States or sanctions (such as outright forbidding firms from sourcing from the conflict in the DRC) or legal or military order imposed by the DRC or neighboring countries were not feasible or politically attractive. Information regulation, then, was an indirect means to accomplish similar foreign policy goals.

The tools of lighter-touch regulation may be the policy options of choice, if not necessity, in regulatory arenas where direct mandates are not possible—either because they are beyond the power of the government or outside of its knowledge. Many economic foreign policy issues, including foreign labor, industrial, and banking practices, share this characteristic. Information disclosure may be one of the only tools the state has to gain knowledge about data practices that may in turn raise privacy, disparate impact, cyber security, or other concerns that the state might later target with substantive regulation. We might view similarly the efforts

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of some states—in the face of the unconstitutionality of outright banning abortion—to attempt to discourage it by way of mandated ultrasounds or required disclosures by abortion-providing doctors.\textsuperscript{162}

Whatever its causes, the modern state regulates in ways that appear, or are more prone to appear, speech-regulating than earlier forms of administration. This is because much modern regulation operates through systemic human behaviors, incentives, and market pressures created by altering the information landscape (or choice architecture) relevant to the targeted behavior, instead of simply mandating or banning that behavior. Rather than banning cigarettes or sodas, for instance, the state might require a warning or the disclosure of nutrition information. Instead of banning the prescription of drugs for off-label purposes, it might prohibit their off-label marketing. Or in the absence of a ban on the sourcing of conflict minerals, it might require disclosure of supply chain information to investors. A warning or disclosure, or a ban on certain methods of advertising or information dissemination, appears more speech-regulating than a ban on sales or purchasing practices. The very feature that makes modern forms of regulation ‘lighter-touch’ is what brings it in greater potential conflict with the First Amendment.

At the same time as lighter-touch regulation has emerged as more apparently speech regulating, the objects of modern regulation themselves increasingly appear speech-like. This change is due, at least in part, to the shift from an industrial towards an information-based economy. Manufacturing jobs have disappeared in favor of industries that involve data and run on information. This has meant that many of the targets of regulation now involve greater components of information, communication, and indicia of knowledge creation or its

\textsuperscript{162} See, e.g., \textit{Stuart v. Camnitz}, 774 F.3d 238 (4th Cir. 2014); \textit{Planned Parenthood of Minn. v. Rounds}, 530 F.3d 724 (8th Cir. 2008) (en banc).
potentiality. These trends have caused the objects of modern regulation to more often appear speech-like and data and information-laden than in moments, and economies, past. And the larger importance of informational goods and services to our political economy has both trained regulatory attention on information-based activities and raised the economic stakes for those regulated. As Julie Cohen has observed, “contests over the substance of regulatory mandates and the shape of regulatory institutions are most usefully understood as moves within a larger struggle to chart a new direction for the regulatory state in the era of informational capitalism.” It is against those economic changes and that political economy that regulation—and resistance to it—is undertaken.

Lighter-touch regulation may moreover raise a type of paternalism concern that strikes closer to the core of the First Amendment’s animating rationales than do mandates or bans on conduct. More flexible regulation, such as defaults or disclosure requirements that provide information to the public, is often heralded as choice affirming. I may choose to opt-out of a default or alter a decision based upon a required disclosure, and in that sense modern regulation may enhance consumer choice. But defaults are often quite sticky—indeed, their


164 The conflict in Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011), over state limits on the distribution of pharmaceutical marketing data offers a fitting example. Unlike in an earlier economy, such as at the time of Virginia Board of Pharmacy, the pharmaceutical industry is now one that runs critically on the information it tracks about customers and their habits—raising the economic and social stakes of regulation of that information.

165 Cohen, supra note 163 (manuscript at 2).

166 See, e.g., Sunstein, supra note 154, at 1349.
effectiveness may depend on this stickiness—and warnings or disclosures, while often ignored, may cause salience or framing effects that systematically affect citizen and consumer behavior, some through unconscious or non-rational means. \textsuperscript{167}

A key question in First Amendment jurisprudence and theory has been whether, and if so on what grounds, paternalism of thought is distinguishable from other forms of paternalism. \textsuperscript{168} Lighter-touch regulation may raise a related anxiety: namely, whether the government is altering behavior by way of a form of untoward influence. The possible concern raised by regulatory tools such as mandatory disclosure is certainly a far cry from the sort of paternalism of thought associated with totalitarian regimes and the limitations on expression that marked McCarthyism and other times of crisis. It is instead a more subtle form of influence exerted by dint of patterns in human behavior, such as heuristics and biases. Whether or in what contexts lighter-touch regulation might properly raise First Amendment alarm on these grounds is beyond the scope of this Article. But the soft, perhaps invisible, forms of behavior-influence that are at once often considered the choice-affirming virtues of modern regulation may appear not only more speech-regulating than earlier forms of regulation but also raise unease about freedom of thought and paternalism of the mind that resonate with anxieties long at the center of the First Amendment’s focus, and in so doing draw the modern regulatory state in greater possible conflict with the First Amendment.

The contemporary state regulates in ways that may generally appear more speech-regulating and operate by way of less overt rules, but modern regulation is made up of a rich

\textsuperscript{167} See, e.g., Bubb & Pildes, supra note 152, at 1625–26.

tapestry of methodologies—and not all are likely to pose equal First Amendment concern. We might think of this diversity of tools and approaches in five stylized categories, ordered roughly in their likelihood of conflict with the First Amendment:

*Speech Limitations.* Legislators and administrators often place limits on the information that private actors can publish or disseminate or the manner in which they may present it. Examples of this regulatory tool include prohibitions on fraud and misrepresentation (including bans on insider trading and securities fraud and truth-in-lending and truth-in-advertising laws); much of federal antitrust and prescription drug regulation; bans on conspiracy, solicitation, and malpractice; limitations on advertising to children and bans on child pornography; and a considerable portion of the prohibitions on discrimination in the workplace and by common carriers and in public accommodations. Contemporary administrators often regulate commercially relevant expression as a method of affecting a given market (from markets for prescription drugs to terrorist financing), including with the aim of discouraging certain practices or purchases.169

Regulations such as these that place—or could be conceived of as placing—limits on the free flow of information, including commercial information, have the potential to trigger robust First Amendment push back. They also generally face a relatively more demanding constitutional test than speech compulsions.170 This is not to suggest, however, that speech restrictions will not be upheld even if they are subject to intermediate, or stricter, scrutiny,

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170 See, e.g., *Sorrell*, 131 S. Ct. at 2664; *Central Hudson*, 447 U.S. at 566.
depending on the strength of the government’s interest and less restrictive alternatives. And while the regulations enumerated above all involve the regulation of ‘speech’ in any colloquial sense, the courts have not found First Amendment concern, or even speech, in a number of them.  

_Speech Compulsions._ Disclosure requirements are one of the most prevalent, if debated, modern regulatory tools. From graphic tobacco warnings to mandated nutritional information disclosures, miles per gallon, and energy efficiency ratings to country-of-origin labeling and financial disclosures to drug warnings—mandated disclosures are pervasive. Because they typically involve words or pictures, disclosure requirements are often easily understood to raise First Amendment concern. Mandated commercial disclosures face laxer constitutional review and may be a less restrictive alternative to limitations on speech. At the same time, many types of commercial speech compulsions, such as mandated tax filings, are not often viewed as ‘speech’ or challenged on free speech grounds.

_Incentives and Conditions._ Another common lighter-touch regulatory tool involves the use of incentives and conditions on governmental licenses or grants. Reflecting the “view that government may not do indirectly what it may not do directly,” the doctrine of unconstitutional conditions may invalidate regulatory incentives and conditions if they require a beneficiary to surrender a constitutional right. The important point for our purposes is

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174 We might question whether incentives and conditions, and perhaps other forms of modern governance, are truly ‘lighter-touch’ or lighter-touch in all contexts, but I retain the umbrella term for ease.

that the constitutionality of a condition rises or falls on the existence and recognition of an underlying constitutional right. For example, as Kathleen Sullivan has observed, “conditioning federal education funding on private recipients’ cessation of race or sex discrimination surely pressures the recipients’ private associational choices, but unless forbidding private race or sex discrimination would violate the first amendment, conditions tending to produce the same result are not unconstitutional.”

Some incentives and conditions may be more likely to conflict with the First Amendment than others. Some, like the federal requirement at issue in *Agency for International Development v. Alliance for Open Society International, Inc.*, which conditioned federal funding on organizations’ adoption of an express policy opposing prostitution and sex trafficking, are more likely to invite First Amendment challenge. But many incentives and conditions are unlikely to appear to impinge on speech at all. Benefits that are contingent on actions that appear more conduct-like, such as the condition of federal funding on a state desegregating its public schools, are doubtful to raise First Amendment concern.

Defaults & Choice Architecture. Robust social science evidence demonstrates that defaults, or starting points, such as automatic enrollment in a retirement savings plan, can affect behavioral outcomes. Defaults are one of the strongest policy levers in the broader

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176 Id. at 1427.

177 133 S. Ct. 2321 (2013).

178 Id. at 2324–25.


180 See, e.g., Sunstein, *supra* note 154, at 1350.
toolbox of choice architecture. Like incentives and conditions, many defaults and alterations to choice architecture are less likely to conflict with First Amendment principles. But insofar as a required default calls on a commercial entity to use language—say, to effectuate automatic enrollment in a retirement savings plan—a colorable First Amendment challenge might exist. Defaults and other regulation based on systematic patterns in decision-making may also raise a paternalism concern that resonates with First Amendment principles.

*Mandates and Bans on Conduct.* Finally, though the use of lighter-touch forms of regulation have proliferated, the traditional policy levers of mandates or bans on conduct continue to be employed. As discussed below, conduct mandates and bans are generally the least susceptible to First Amendment challenge. However, because much human conduct involves words, and the state’s decision to ban or mandate a behavior nearly inevitably expresses a message about the targeted behavior or those who engage in it, even conduct rules may be susceptible to First Amendment challenge.

The two concomitant trends sketched above—in administrative law and practice on the one hand and First Amendment jurisprudence on the other—have increased the potential conflict, if heterogeneously, between the First Amendment and the modern administrative state.

**II. SPEECH PROTECTION AS THE BOUNDARY LINE OF STATE ACTION**

The stakes of this burgeoning constitutional conflict are high due to a simple but often overlooked fact: because nearly all human action—and so state regulation—operates through communication, the First Amendment possesses near total deregulatory potential. For this

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reason, the scope of First Amendment protection uniquely tracks the boundary of the constitutionally permissible administrative state. This section elaborates those contentions and paints the stakes of the growing conflict between the First Amendment and the administrative state.

Nearly all human action operates in whole or in part through speech, or at least in such a fashion that another human being could understand it as expressive. A few examples should illustrate the deep sense in which man is a speaking animal, including in his economic affairs. The conduct of buying a car, for instance, involves conversations with the dealer, the offer of a price, and the signing of a contract that is written in words. So, too, the conduct of robbing a bank or flying on a plane. A bank robber must demand cash from the cashier. Before I can take a plane I must first purchase a ticket, reading the price and terms (written in words), agree to that price and terms in a contract (likewise written in words), and make the purchase using a credit card that I acquired through signing a contract (written in words). When I arrive at the airport, I speak with the TSA representatives and flight attendants, who permit me, I hope, to move to the next stage of the activity. From its inception, each of these forms of conduct, like a multitude of others, are constituted by and intertwined with words, speech, and expressive conduct.

Just as most conduct operates in whole or in part through speech, most conduct can be expressive. The 9/11 bombings were certainly expressive, if also shocking and horrifying, in part because of their expressive character. A shoulder shrug, cutting someone off in traffic, the creation of a beautiful painting or an ugly one, a fist pounded on a boardroom table, and blowing a kiss—all of these ‘actions’ contain some element of expressive meaning. Humans are embedded in expression and their conduct is intertwined with speech.

For the same reason, almost all regulation is or could be understood to regulate speech
or expression. The tax forms you file contain written speech in some basic sense. Security and Exchange Commission disclosures, too, involve speech in an idiomatic sense. Limitations on fraud, nutrition label requirements, anti-trust regulation, and prohibitions on work-place harassment and conspiracy, to name but a few, all implicate the written or spoken word. The Enron defendants were prosecuted on conspiracy, securities and wire fraud, and insider trading counts, all involving speech.

Frederick Schauer has observed that First Amendment litigation is often opportunistic, meaning that litigants turn to the First Amendment as their authority of choice when little other authority is on point.¹⁸² Schauer concludes that this opportunism evinces the “power of the First Amendment today as a political force and a rhetorical device in the United States.”¹⁸³ The availability of a First Amendment claim for opportunistic use, however, springs from the pervasiveness of speech and expression. It is this pervasiveness that allows the First Amendment to be “both the first and the last refuge of saints and scoundrels alike.”¹⁸⁴ And it is this pervasiveness that makes the First Amendment’s deregulatory potential so sweeping.

A few recent cases clarify the potential reach of the new Lochner. The Supreme Court’s 2011 decision in Sorrell is illustrative. In that case, Vermont data miners and an association of pharmaceutical manufacturers challenged a state law restricting the sale, disclosure, and use of pharmacy data revealing prescribing practices of doctors without their consent.¹⁸⁵ The Court concluded that there is a “strong argument” that such information is speech for First Amendment purposes but held the law unconstitutional even if the data was treated as a “mere


¹⁸³ Id. at 191.

¹⁸⁴ Id. at 193.

commodity.”186 “Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs.”187 But if information is speech (or even simply a commodity whose regulation alters others’ speech), it is not clear what the First Amendment does not cover or protect with *Sorrell’s* level of scrutiny. Certainly, a business license or tax filing could be considered a regulation of information. Insider trading restrictions, too, regulate when certain information can be disclosed. The Federal Rules of Evidence prescribe what sorts of information may be admitted at trial or required to be disclosed in discovery. Countless examples of the regulation of “information” spring to mind.

*Sorrell* moreover held that content-based restrictions that burden speech are subject to “heightened” scrutiny, adding that “[c]ommercial speech is no exception.”188 The Court emphasized that “[i]n the ordinary case it is all but dispositive to conclude that a law is content-based.”189 But could this really be so? If such a principle was extended, it would invalidate all mandated commercial disclosures. By definition, all mandatory disclosures require some defined class to say something rather than something else. Were this contention accepted, *every* mandated disclosure would be subject to searching constitutional review. This would “all but dispositive[ly]” render unconstitutional all warning labels, securities disclosure statements, even the mandatory filing of tax returns. Bans on false and misleading commercial speech are likewise patently content-based. Taken literally, *Sorrell* suggests that the First Amendment impedes the government from banning outright fraud because fraud is banned precisely

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186 *Id.* at 2667.
187 *Id.*
188 *Id.* at 2664.
189 *Id.* at 2667.
because it is based on false representations, a content-based restriction. This would render much of the work of the Securities and Exchange Commission and Federal Trade Commission unconstitutional.

The Supreme Court’s recent decision in Reed v. Town of Gilbert expanded the definition of content discrimination in ways that commercial speech advocates likewise contend renders all commercial speech subject to strict scrutiny. The Court announced that a government regulation of speech is content-based, and so presumptively unconstitutional, if it “applies to particular speech because of the topic discussed or the idea or message expressed . . . regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.”

Commercial speech advocates have since argued that because commercial speech regulation necessarily targets speech because of the topic discussed, namely its commercial content, Reed requires strict scrutiny of all commercial speech. On this view, Reed sub silentio overruled decades of commercial speech precedent, including landmark commercial speech cases such as Central Hudson and Zauderer. While it strains credulity, in the words of the late Justice Scalia, to suggest that the Supreme Court hid such an elephant in the mouse hole of

190 See infra note 246 and accompanying text.
192 Id. at 2227–28.
193 See, e.g., Transcript of Proceedings Held on 8/20/15 at 14, CTLA–The Wireless Ass’n v. City of Berkeley, 2015 U.S. Dist. LEXIS 126071 (N.D. Cal. Sep. 21, 2015) (No. 50) (The Court: “[I]t seems to me that [under your argument] every disclosure case would—is content and viewpoint—contains viewpoint and distinctions and discrimination. It can’t be the law that every disclosure requirement is suddenly subject to strict scrutiny . . . because it has a built-in—I mean, the line between commercial speech and noncommercial speech is itself [a] content-driven distinction.” Mr. Theodore Olson: “We submit under the Supreme Court’s most recent ruling, Reed vs. Town of Gilbert . . . that requires the application of strict scrutiny.”).
a relatively obscure case about an Arizona sign ordinance, *Reed*, like *Sorrell*, signals growing tension between various First Amendment sub-doctrines. And were *Reed* applied universally as advocates urge, the commercial speech doctrine—along with other topic-based sub-doctrines such as those that currently permit the greater regulation of child pornography, obscenity, fraud, perjury, price-fixing, conspiracy, or solicitation—would be rendered obsolete, thereby rendering large swaths of the administrative state presumptively unconstitutional.

A recent Sixth Circuit case further illuminates the potential scope of the new *Lochner*.

In *Liberty Coins, LLC v. Goodman*195 the court reviewed a First Amendment challenge to the Ohio Precious Metals Dealers Act, which provided that “no person shall act as a precious metals dealer without first having obtained a license from the division of financial institutions in the department of commerce.”196 The Act applied to any party that held itself out to the public as willing to purchase precious metals. The plaintiffs were buyers, sellers, and traders of gold and silver jewelry and related items. They contended that the Act was facially void under the First Amendment because only those engaged in commercial speech—that is, those who held themselves out as willing to purchase precious metals—were subject to its licensing requirement. While the Sixth Circuit rejected that claim, concluding that business licensing is subject only to rational basis review as an economic activity, the district court found that *Liberty Coins* had a strong likelihood of success on the merits because it concluded that “holding [oneself] out” as a precious metals dealer was a form of speech subject to intermediate scrutiny.197

195 748 F.3d 682 (6th Cir. 2014).
196 Id. at 686 (quoting *Ohio Rev. Code Ann.* § 4728.02 (West 2014)).
The D.C. Circuit, too, recently invalidated a business licensing scheme for tour guides under the First Amendment on the basis that tour guides speak for a living, leading the court to conclude that requiring a tour guide to first obtain a business license impermissibly burdened speech. Nearly any business licensing scheme or regulation might be swept within this logic. How do we know that a pharmacist or an accountant, for instance, is a pharmacist or an accountant—and so subject to a given type of regulation? Because they engage in activities related to pharmacy or accountancy and hold themselves out with words as such. Because most, if not all, commercial services operate at least in part through the use of words, all business licensing schemes are in principle susceptible to First Amendment challenge.

We might think that First Amendment suits are only likely to be viable against mandated disclosures or regulations of industries that seem more speech dependent, such as consultants, real estate agents, accountants, tour guides, doctors, or lawyers. Certainly, some forms of regulation or industries appear more speech-like than others. But it is not only mandated disclosures or regulations of particularly ‘speech-heavy’ industries that are susceptible to First Amendment challenge. An example undermines the contention that some commercial undertakings or regulations are more communication-heavy than others in any analytically rigorous sense.

In *Nordyke v. Santa Clara County*, the Ninth Circuit addressed a challenge to an addendum that the County added to its lease with the Santa Clara Fairgrounds Management

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199 A recent White House report suggests that the issue of occupational licensing may be in play not just in the courts but in the political branches as well. OFFICE OF ECON. POLICY, DEPT OF THE TREASURY ET AL., OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 22 (2015), https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.

200 110 F.3d 707 (9th Cir. 1997).
Corporation. That addendum banned gun shows on fairground premises by prohibiting “any person from selling, offering for sale, supplying, delivering, or giving possession or control of firearms or ammunition to any other person at a gun show at the fairgrounds.” The Ninth Circuit struck down that ban as violative of the First Amendment on the basis that prohibiting the offer of firearms or ammunition for sale was a regulation of commercial speech. But of course any sale or contract involves the communicative elements of offer and acceptance. And if banning sales—under the logic that they involve the communicative elements of offer and acceptance—triggers First Amendment review, little if any commercial activity falls outside of the First Amendment’s ambit.

A thoughtful reader may question whether the First Amendment could indeed extend to activities that appear even less speech-like, such as a ban on jaywalking or a regulation mandating that cars meet a certain fuel standard. The First Amendment could come into play in such cases along two routes. First, just as hate crimes or the 9/11 bombings expressed a certain message, the conduct of jaywalking may carry with it an intent to express one’s, say, nonconformist identity, haste, or disrespect for authority. Depending on the shared norms of the audience viewing the jaywalker, this message may be more or less legible. The refusal to produce a car meeting a mandated fuel standard, too, might be viewed as a political protest.

At a deep level, any conduct could be expressive depending on the actor and audience of the “conduct.” The plaintiffs in *Spirit Airlines, Inc. v. United States Department of Transportation* made a not dissimilar argument. They contended that the First Amendment shielded them from including government taxes within the most prominent sale price they

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201 Id. at 708–09.

202 687 F.3d 403 (D.C. Cir. 2012).
advertised on the basis that they had a right to inform the public of the tax burden imposed on air travel. Hate crimes legislation faced a similar First Amendment challenge. Alternately, regulation of “conduct” could be understood as a form of government expression or “opinion,” triggering a different variety of First Amendment concern. But of course the decision to impose any sort of regulation—either a disclosure or a mandate—reflects some sort of government sentiment that the regulation is needed or the behavior it seeks to alter is harmful, dangerous, or the like.

The stakes of the conflict between the First Amendment and the executive and legislative power could not be higher. Other constitutional requirements, such as the Fourth and Fifth Amendments, by limiting governmental action with regard to searches and seizures and due process, circumscribe partial limits on state action. Due to the pervasiveness of speech and expression, particularly in the information age, the coverage and level of protection for speech uniquely constitute the fullest boundary line of constitutional state action. If the First Amendment were to monolithically protect speech “as such,” governance would be impossible. Because of the radical deregulatory potential of free speech claims, the resolution of this constitutional conflict bears on the people’s ability to govern by representative government at all.

III. ECHOES OF LOCHNER

In a certain sense, protection for commercial speech is quite new, and the libertarian

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203 Id. at 411–12.


turn in commercial speech doctrine of even more uniquely modern coinage. In another, however, this is a story of constitutional conflict that has been told, if slightly differently, once before. A number of scholars, commentators, and more than one Supreme Court Justice have suggested that courts’ growing protection for commercial speech threatens to revive a new form of *Lochnerian* constitutional economic deregulation. This Part analyzes that contention to illuminate the ways in which this contemporary form of constitutional deregulation is uniquely modern.

The similarities between the new commercial speech doctrine and *Lochner* itself are pronounced. Both pit business freedom against the government’s ability to structure or facilitate citizen choice. Both privilege the negative over the positive state. And both render courts, not the political branches, the key arbiters of our economic life.

206 See, e.g., sources cited supra note 5.

207 This Article focuses on the parallels and dissimilarities between free speech claims and earlier *Lochnerism*. But understood in the aforementioned senses, First Amendment *Lochnerism* is not limited to First Amendment speech cases. Nor is it necessarily limited to First Amendment constitutional claims as opposed to statutory ones under the Religious Freedom Restoration Act. See supra note 5 (collecting scholarship and commentary including beyond speech claims).

Following *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), for instance, the courts of appeals diverged on whether that case requires the judiciary to defer to a claimant’s assertion that a law or policy substantially burdens its religious exercise under RFRA. *Compare Sharpe Holdings, Inc. v. U.S. Dep’t of Health & Human Servs.*, 801 F.3d 927, 941 (8th Cir. 2015) (“As *Hobby Lobby* instructs . . . we must accept [Plaintiffs’] assertion that self-certification under the accommodation process . . . would violate their sincerely held religious beliefs.”), *petition for cert. filed*, No. 15-775 (U.S. Dec. 15, 2015), with *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1176 (10th Cir. 2015) (“[C]ourts—not plaintiffs—must determine if a law or policy substantially burdens religious exercise.”), *cert. granted*, 136 S. Ct. 446 (2015) (mem.), and *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 612 (7th Cir. 2015), *petition to extend time to file petition for cert. granted*, No. 15A365 (U.S. Oct. 6, 2015), and *Geneva Coll. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 778 F.3d 422, 436 (3d Cir. 2015), *cert. granted*, 136 S. Ct. 445 (2015) (mem.), and *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229, 247 (D.C. Cir. 2014), *cert. granted*, 136 S. Ct. 446 (2015) (mem.). If courts must defer to a faithful litigant’s belief that its religion is substantially burdened regardless of the regulatory scheme, that could be equivalent to permitting deregulation based upon the regulated party’s say-so. While not analytically equivalent to deregulatory claims in the instance of ‘speech as such,’ these inquiries are not wholly dissimilar. And some of the religious accommodation cases arguably marshal RFRA to advance market libertarianism by reference to certain entitlement baselines—though likely while naturalizing different baselines than the speech cases. See Sepper, supra note 5; Tebbe et al., supra note 5.

The application of the First Amendment right of association in recent labor union agency fees share cases also exhibits some *Lochnerian* qualities, if defined as advancing economic libertarianism. See, e.g., *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Friedrichs v. Cal. Teachers Ass’n*, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *cert. granted*, 135 S. Ct. 2933 (2015) (mem.). As do libertarian association claims in the context of public
But, while this modern form of constitutional deregulation resonates with *Lochner*, it differs in significant aspects. First, commercial speech protection possesses broader deregulatory capacity. While all contracts operate through speech, not all speech is a contract. All commercial communication—the filing of a tax form, a required warning or nutritional label, any sale or advertisement, a malpractice suit, or a business licensing scheme—might plausibly come within the First Amendment’s ambit. One might have thought that the First Amendment would be a more limited restriction on state power than the *Lochner* era’s substantive due process because of its textual hook. Free speech is an enumerated right, while liberty of contract is not. As the last section demonstrated, however, the textually grounded “freedom of speech” is potentially profoundly capacious, outstripping even liberty of contract’s deregulatory potential—and permitting judges to engage in “*Lochner’s* error of converting personal preferences into constitutional mandates.”

Second, the new *Lochner* is, in a more nuanced way, more robust because the notion of right it defends is stronger than that which prevailed during the *Lochner* era. As Victoria accommodations, as Samuel Bagenstos has aptly argued. See Bagenstos, *supra* note 5. Indeed, one provocative question is why speech claims, not association claims, have been more often invoked for contemporary deregulatory purposes, despite the similar elasticity of the right of association. Perhaps most importantly, the developments I discuss is a piece of the larger phenomenon of neoliberal constitutionalism along with campaign finance cases such as *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Citizens United v. FEC*, 558 U.S. 310 (2010), which Jedediah Purdy has so thoughtfully explored. See Purdy, *supra* note 5; Jedediah Purdy, *That We Are Underlings: The Real Problems in Disciplining Political Spending and the First Amendment*, 30 CONST. COMMENT. 391 (2015); Jedediah Purdy, *The Roberts Court v. America: How the Roberts Supreme Court Is Using the First Amendment to Craft a Radical, Free-Market Jurisprudence*, 23 DEMOCRACY: J. IDEAS 46 (2012); Jedediah Purdy, *Wealth and Democracy* 13–14 (Duke Law Sch. Publ. Law & Legal Theory Series, Paper No. 2015-38, May 13, 2015), available at http://ssrn.com/abstract=2641121.

Plainly, neoliberal constitutionalism and First Amendment *Lochnerism*, depending on how defined, are more far-reaching than free speech claims in ways that demand more sustained scholarly attention. My focus on free speech jurisprudence here, and commercial speech in particular, is not to suggest that either is necessarily limited to speech cases, at least if we understand them in the important if thinner sense that it privileges economic libertarianism and the judiciary over the regulatory choices of the political branches. Rather, my aim is to identify what is most distinctive about modern speech-based constitutional deregulation. Speech claims, and association claims to an extent that I do not explore here, also bear a relationship to the administrative state that is analytically different than religious accommodation claims.

Nourse has captured, the understanding of rights and police power predominant at the time of *Lochner* in the early 1900s was not the rights-as-trumps understanding of individual rights versus state action familiar to modern constitutional law.\(^{209}\) Substantive due process, while far from a weak tool of deregulation, was not used to strike down the number of laws that some imagine.\(^{210}\) Commercial speech advocates, and supporters of a libertarian First Amendment more generally, have been only partially successful in realizing the First Amendment’s deregulatory potential. But because the contemporary form of right the First Amendment now protects is closer to the concept of right-as-trump,\(^{211}\) contemporary First Amendment litigation has the potential to be a heavier deregulatory hammer than was the right to contract.

Third, while *Lochner* epitomized early-twentieth century attempts to prevent the expansion of the regulatory state, the current contest reflects efforts to whittle it down in size. The *Lochner* era involved litigation aimed to impede the creep of the public sphere into new domains of previously private ordering, such as early minimum wage and maximum hour legislation. The new *Lochner*, by contrast, occurs against the backdrop of an already robust regulatory state that is near ubiquitous in its involvement in economic affairs—from the regulation of vehicle emissions to trans fats to debt collection practices. In this way, the new *Lochner* takes an offensive rather than defensive posture and is distinctively neo-liberal.\(^{212}\) It

\(^{209}\) Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 79 CALIF. L. REV. 751, 753 (2009) (“Today, no constitutionalist would mistake rational basis for strict scrutiny, but this is precisely what we do when we assume that Lochner-era courts adopted a strong, trumping view of fundamental rights.”).


\(^{211}\) See, e.g., Ronald Dworkin, *Taking Rights Seriously*, at xi (1977); Nourse, supra note 209, at 752–53. For histories demonstrating that the First Amendment was not always the robust trump it is today, see Lakier, supra note 12, at 2168, and Kozinski & Banner, supra note 12, at 749, 761.

seeks to reconfigure regulation to permit and support different forms of economic ordering—instead of attempting to prevent the state from entering theretofore private domains in the first instance. This distinction is mirrored in the types of rules typically challenged by each form of constitutionalism: largely legislative mandates during the *Lochner* era, in contrast to administrative (often lighter-touch) regulation today—though these are rough, not necessary, categories. In this way, *Lochner* typified a conflict between courts and legislatures, while the current contest largely opposes courts and agencies.

Fourth, the animating concepts of the two moments of conflict between the regulatory state and the Constitution differ. *Lochnerian* substantive due process was not monolithic in its underlying justification or consistent in its application. It further passed through rough stages as it bridged the common law and modern eras. The late nineteenth century through approximately 1912, in which *Lochner* itself as well as *Adair v. United States* and *Allgeyer v. Louisiana* were decided, witnessed a more radical libertarian form. The period until the early 1920s observed a more moderate form of liberty of contract, which permitted the state police power greater inroads into economic ordering. And the early 1920s through 1937 saw a more robust version of liberty in which the four horsemen—Justices McReynolds, Butler,

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214 208 U.S. 161 (1908).

215 165 U.S. 578 (1897).

216 See, e.g., *Bunting v. Oregon*, 243 U.S. 426, 433–34 (1917) (upholding a law limiting the work day to ten hours and imposing certain overtime pay requirements).
Sutherland, and Van Devanter—faced off against the burgeoning New Deal state. In the main, though its configurations differed, the *Lochner* era equated constitutional liberty with the free hand of the market and was bolstered by an intellectual movement espousing the theories of Adam Smith.

Just as the late nineteenth and early twentieth century witnessed several moments of *Lochnerism*, we can begin to identify phases of the new *Lochner* and its animating bases. At present, the new *Lochner* resonates with Smithian ideology, and indeed some opinions have drawn explicit connections between the deregulatory use of the First Amendment and Smithian philosophy. The animating justification of the movement to protect commercial speech—or at least its litigation strategy—however, is not so richly theorized. It largely relies on the notion that the First Amendment protects speech as such and the autonomy of all speakers regardless of context.

We could view the current instantiation of the new *Lochner* as undertheorized, perhaps due to its more recent advent or the failure of its advocates or the judges implementing its claims to grapple with its full logical implications. While either of these might be correct, more important for our purposes is that in not being as visibly tethered to a certain animating ideology, the new *Lochner* may be more broadly attractive, particularly to more ‘progressive’ jurists who associate a libertarian First Amendment with its mid-century use to protect the free speech of social and political dissidents.

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217 See, e.g., *Adkins*, 261 U.S. at 548–51 (1923) (holding that *Bunting* did not overrule *Lochner*).


220 See infra notes 236–237 and accompanying text.

litigation strategy or attractive type of judicial rationale because of its ability to bridge multiple substantive justifications and understandings of the animating values of the First Amendment.

The less-visible ideology of the new *Lochner* points to the fifth of its features: its naturalization of speech. *Lochner*-era governance relied on the naturalization of a certain division of public and private spheres and, as Cass Sunstein has argued, the existing distribution of wealth and entitlements under the common law baseline as something that was viewed as pre-politically “there.” This naturalization supported the exclusion of the state from private choices in economic ordering. The new *Lochner*, by contrast, relies on the apparent natural existence of ‘speech’ without its social, cultural, or economic context. These logics are similar. Just as there is no naturally operative market without state intervention in domains from property law to policing, there is no ‘speech’ for constitutional purposes or meaning without social and cultural context.

Smithian philosophy and *Lochner*-era governance were of course not unified in their theoretical understandings. In the main, however, they embraced a concept of the division of public and private spheres and a view of the market as working, and working at its best, independently from state intervention. The naturalization of speech depends on no such overarching explanation or ideology. At least at present, it is easier to argue that instances of ‘speech’ are self-evidently ‘speech’ for purposes of the First Amendment. The naturalization of speech, then, is presently an easier argument to make than attempting to revive a previously

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culturally self-evident division of public and private or account of the *laissez-faire* market. Post–New Deal, a revival of the old forms of naturalization that underpinned the *Lochner* era is at present not so viable.

The naturalization of ‘speech,’ and the new *Lochner*’s thinner theoretical underpinning, moreover, permit a more selective mobilization of its notion of free choice within the marketplace. Commercial speech advocates need not defend a robust philosophy of the market, the need for freedom therein, or of economic deregulation more generally. Indeed, it is by keeping these very questions *out of view* that commercial speech advocates may be most successful. Instead, such advocates need only tap into common cultural notions that speech is speech. Some scholars have argued that this sort of depoliticalization is one, if not the central, feature of neoliberalism.\(^{225}\) The animating rationale of commercial speech advocacy arguably lends further support to that contention.

The new *Lochner*’s reliance on the naturalization of a quite basic cultural practice (speech generally versus economic decisionmaking), allows its advocates to mobilize its claim to freedom more opportunistically and avoid defending (or even bringing to view) the near-complete deregulation that is its logical conclusion. This feature of the new *Lochner* reflects, too, the modern business community’s interest in and dependence on some forms of state intervention and regulation. Just as pre–New Deal economic actors depended on certain forms of state action in the ‘private’ sphere, including most obviously the state protection of property rights, the engines of the modern economy rely critically on state intervention. The pervasiveness of ‘speech’ permits selective claims to deregulation.

Sixth, the new *Lochner* allows *Lochner* itself to remain anticanonical while permitting its

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largely discredited economic rights to be repackaged in the First Amendment. This is critical because noteworthy conservative jurists, including Chief Justice Roberts, have denounced *Lochner’s* approach as “discredited” and “unprincipled” and as improperly enshrining the “naked policy preferences” of the Justices into the Constitution. Chief Justice Roberts’s dissent to the Supreme Court’s recent recognition of gay marriage in *Obergefell* was devoted almost exclusively to a comparison of the majority’s decision to *Lochner’s* approach. It argued that the majority’s extension of due process protection to gay marriage “had nothing to do” with the Constitution, just as *Lochner’s* protection of economic rights had not. The power of this dissent lies in the continuing anticanonical status of *Lochner* itself. To be sure, a growing number of commentators, scholars, and judges have recently advocated the revival of substantive due process protection for economic rights, including most prominently Richard Epstein and George Will. But the new *Lochner* permits commercial speech

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228 Id. at 2626.

229 RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION 305 (2014) (arguing for the revitalization of the protection of economic rights, against the wealth transfers caused by market regulation, and for “all individual interests, whether they are classified as economic, expressive, or intimate” to be treated the same); George F. Will, The 110 Year-Old Case that Still Inspires Supreme Court Debates, WASH. POST (July 10, 2015), https://www.washingtonpost.com/opinions/110-years-and-still-going-strong/2015/07/10/f30bfe10-2662-11e5-a2e-6e4f9b050aa_story.html (arguing that “the United States urgently needs many judicial decisions as wise as *Lochner*” and that “[t]he next Republican president should ask this of potential court nominees: Do you agree that *Lochner* correctly reflected the U.S. natural rights tradition and the Ninth and 14th amendments’ affirmation of unenumerated rights?”); see also *Hettinga v. United States*, 677 F.3d 471, 480–83 (D.C. Cir. 2012) (Brown, J., concurring) (“[G]overnment is a broker in pillage, and every election is a sort of advance auction sale of stolen goods.” . . . Rational basis review means property is at the mercy of the pillagers. The constitutional guarantee of liberty deserves more respect—a lot more.” (quoting H.L. MENCKEN, ON POLITICS: A CARNIVAL OF Buncombe 331 (1996))); Colby & Smith, supra note 70, at 602 (describing changes in conservative legal philosophy that have led next-generation originalists to “stand poised to move conservative legal thought about
advocates to sidestep this high-stakes debate. They may take for granted the discredited nature of *Lochner* and its “freewheeling” elevation of judges’ “own policy judgments to the status of constitutionally protected ‘liberty.’” And they may assume that the bifurcation of economic and personal rights adopted in *Carolene Products* remains black letter constitutional law as it has since the late 1930s, while encouraging the practical punch of economic liberties to be swung by the First Amendment’s ‘personal’ right. That the First Amendment is an enumerated right—if a capaciously open ended one—unlike *Lochner*’s liberty of contract, further renders it more attractive to textualists concerned with judicial discretion unmoored from text.

Though as discussed above, because speech and expression are pervasive, this textual grounding provides little practical limitation.

The new *Lochner* is, seventh, at least currently facilitated by the cross-ideological coalition that has supported robust First Amendment freedoms following the Vietnam War. This coalition ranges from organizations such as the American Civil Liberties Union and Cato Institute to the U.S. Chamber of Commerce. The use of the First Amendment as an economic rights forward: by taking it back a hundred years”); Suzanna Sherry, *Property is the New Privacy: The Coming Constitutional Revolution*, 128 HARV. L. REV. 1452, 1452–53 (2015) (noting the lack of progressive scholarly response to the conservative movement “to ensure that economic rights receive the same level of judicial protection as non-economic or personal rights, and thus to make it much more difficult for the government to regulate economic activity”).


A deregulatory tool brings together progressive-leaning organizations and judges that associate its freedoms with protections of political dissidents along with more conservative judges and organizations that find it resonant with libertarian values or religious protection. An open question of the new *Lochner* is whether its strong deregulatory effects, particularly in light of progressive opposition to *Citizens United v. FEC* and high levels of economic inequality, will strain this coalition to breaking. At some point, the coalition that currently supports the deregulatory use of the First Amendment may not defend its fullest potential reach. The new *Lochner*’s logical elasticity may be its undoing.

Finally, the practical controversies and doctrinal bases that gave rise to each form of *Lochnerism* reflect their different historical moments. I argued in Part II that the First Amendment presently operates as a distinctively full boundary to state power, due to speech’s pervasiveness and trends in constitutional interpretation since the 1920s. But conceptions of liberty always partially bound the state’s power in constitutional democracies to greater or lesser degrees. The site of dispute between the state and those conceptions of liberty are historically bound. A core social and political concern of the *Lochner* era was the rise of the administrative state and the shifting of the line between private and public ordering. Liberty of contract and conflicts over where it set the boundary on police power embodied this dispute. Today’s most debated issues are distinctive to the information age: questions of choice, voice, opportunity, access, and economic efficiency and inequality. It is perhaps not surprising that the First Amendment, which rose to prominence in tandem with the expansion

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speech-puzzle/; *Wu*, supra note 5. This current cross-ideological support further helps to explain the First Amendment opportunism Schauer identifies. *See Schauer*, supra note 182.


235 Due process could, in theory, operate as a quite full boundary to permissible state power, especially if embraced in both robust substantive and procedural forms. But it has not historically demonstrated the deregulatory potential that the First Amendment has of late.
of the regulatory state, has evolved into its most potent limit and the ground of today’s liberty disputes.

IV. DEMOCRACY, CHOICE & CONSTITUTIONAL CHANGE

The current movement for robust commercial speech rights is premised on the notion that all speech is speech and so entitled to equal constitutional protection. In the words of one advocate on the heels of the Supreme Court’s decision in Sorrell, “A free society would be better served by striving to achieve First Amendment parity among forms of speech that are occasionally treated differently through artificial, illogical, and increasingly unenforceable distinctions. Thankfully, the Supreme Court appears to be heading in that direction by acknowledging that speech is speech.”

Floyd Abrams, the preeminent First Amendment advocate, captured the concept perhaps most compellingly: “Liberty is [l]iberty . . . . [and] the First Amendment is about liberty.”

Due to the pervasiveness of speech and expression, that


contention, however attractive, has no principled limit. Because of that pervasiveness, the logical conclusion of the notion that ‘speech is speech’ and liberty, liberty is a radical reconfiguration of governmental power.

Take much of the work of the Securities and Exchange Commission, Consumer Financial Protection Bureau, or Federal Drug Administration. Each agency requires hundreds if not thousands of mandated disclosures about matters from financial statements to mortgage conditions to drug contents and warnings. Under a ‘speech is speech’ theory, all of these mandates would be subject to strict scrutiny. As the First Circuit observed:

There are literally thousands of similar regulations on the books—such as product labeling laws, environmental spill reporting, accident reports by common carriers, SEC reporting as to corporate losses and (most obviously) the requirement to file tax returns to government units who use the information to the obvious disadvantage of the taxpayer.238

The approach of commercial speech advocates would subject innumerable laws to strict scrutiny—including those that require nutritional labels,239 disclosure of information related to securities,240 Truth in Lending Act disclosures,241 disclosures in prescription drug advertisements,242 warnings for pregnant women on alcoholic beverages,243 airplane safety information,244 and required exit signs.245 Not only that, but a ‘speech is speech’ theory would

238 Pharm. Care Mgmt. Ass’n v. Rowe, 429 F.3d 294, 316 (1st Cir. 2005).
244 14 C.F.R. § 135.117 (2015).
subject deliberately false commercial statements—that is, outright fraud—to ‘fatal in fact’ review on the basis that the distinction between false and true statements is content discrimination. It would constitutionalize ordinary contract law and the filing of tax returns.

There is, in short, no logical limit to the new Lochner. As I argue below, such a limitless contention cannot be required by the First Amendment. But before turning to that argument, this Part will explore the implications of the current contest between the First Amendment and the modern regulatory state.

Will the judiciary accept that the First Amendment demands full deregulation or even that all ‘speech’ must receive searching constitutional scrutiny? It is too soon to tell. But despite the First Amendment’s deregulatory potential, it is highly unlikely. The First Amendment will instead stand ready to be mobilized against particularly controversial regulations. To understand why this is likely the case, it is helpful to recognize that while the First Amendment has always had the potential to be invoked nearly everywhere, it has not historically always appeared. The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” But, as demonstrated above, were the First Amendment to extend to all ‘speech’ or ‘expression’ as such, nearly the entire regulatory state and criminal law would come under constitutional scrutiny—a situation that even the most casual observer knows is not currently the case. The First Amendment has never before protected expression in its totality.

246 This would be the result of extending the principle articulated in United States v. Alvarez, 132 S. Ct. 2537 (2012), that deliberately false political speech is protected by the First Amendment, to the commercial realm.

247 U.S. CONST. amend. I.

As a number of scholars have pointed out, much is excluded from the coverage of the First Amendment—meaning what sort of speech acts it protects at all—either in categories that First Amendment doctrine expressly excludes or that courts (and litigants) implicitly exclude as self-evidently not covered. Many acts that we colloquially call ‘speech’ are not protected by the First Amendment. Indeed, in many cases involving speech, the First Amendment does not even come into play. If your doctor incorrectly recommended cutting off your leg, and you subsequently sued her for malpractice, she would almost certainly not point to the First Amendment as a defense, even though her recommendation was nothing other than speech in any normal sense. It is not that she would invoke the First Amendment and lose—the First Amendment would likely not appear at all. Likewise, if your employer fired you, saying he did so because you were African American, he would not have a First Amendment defense, even though his statement was in every sense ‘speech.’ These are a few of the boundaries of First Amendment coverage, and those boundaries change across time. Motion pictures, for instance, were expressly excluded from the First Amendment’s coverage in 1915, but later covered in 1952. Similarly, as discussed above, commercial speech was implicitly excluded from First Amendment coverage before 1942, expressly


250 See Richard H. Fallon, Jr., Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn’t Bark, 1994 SUP. CT. REV. 1, 13–14 (noting that the courts generally treat it as self-evident that the First Amendment does not protect certain speech acts and concluding that the Court’s failure to notice a First Amendment question with regard to the regulation of sexually harassing workplace speech under Title VII indicated that such speech “was so clearly unrelated to the First Amendment’s purposes that it should not be dignified [sic] with an explanation as to why it constituted an ‘exception’”).


253 The handful of proto–commercial speech cases arguably problematize this characterization. See supra note 12 and related text.
excluded between 1942 and 1976, and then covered in 1976.

As is well recognized, the boundaries of First Amendment coverage are under-theorized, as are the mechanisms of their change. Although,

questions about the involvement of the First Amendment in the first instance are often far more consequential than are the issues surrounding the strength of protection that the First Amendment affords the speech to which it applies, . . . the question whether the First Amendment shows up at all is rarely addressed, and the answer is too often simply assumed.254

Perhaps it is the pervasiveness of speech and the vastness of types of expressive acts that have posed challenges to a theory of coverage and its change. Or perhaps it is the naturalness—and so invisibility—of how we understand certain speech acts to operate in our culture that makes it more or less obvious that the First Amendment should (or should not) extend to them.

A second feature of First Amendment doctrine is that within its coverage, levels of constitutional protection, meaning scrutiny, vary depending on the constitutional value of the speech in question. These levels of protection range from the most stringent, which are provided to paradigmatic, largely political, speech;255 to the wide number of intermediate scrutiny tests found in domains from the Central Hudson test for commercial speech restrictions;256 to the level of review for time, place, and manner regulations;257 to O'Brien’s test for expressive conduct;258 to, finally, the laxer level of review extended to compelled

254 Schauer, supra note 6, at 1767; see also Post, supra note 224, at 1250–60 (incisively demonstrating the incoherence of the Supreme Court’s test for coverage announced in Spence v. Washington, 418 U.S. 405 (1974)).


commercial speech reflected in Zauderer’s near rational basis standard. Some cases formally apply one level of protection while arguably reflecting another—but in any case, these are issues of protection.

With this framework in mind, we can see that courts have two central levers with which to limit the deregulatory potential of the First Amendment. They could extend a lower level of protection to a category of expression, as the Supreme Court has to commercial speech since Virginia Board of Pharmacy. Regulations of this lower-value speech would then trigger less concern about speaker autonomy, content discrimination, and compelled speech. Such an approach requires courts to define a certain social space (say ‘commercial speech’) to which the lower level of protection applies, which may itself pose a vexing line-drawing question.

Alternatively, courts could view certain forms of commercial speech, such as a mandated tax filing or a ban on the sale of certain goods, as economic practice (not ‘speech’), warranting only rational basis review. This approach is likely when a given ‘speech’ act appears culturally less appropriate for First Amendment protection. The Supreme Court’s failure to


260 As Robert Post and I have recently argued, Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010), a speech and association challenge to the statute prohibiting material support for terrorism, is such a case. Post & Shanor, supra note 3, at 179–81 (arguing that while in Humanitarian Law Project, the Court formally applied a stringent level of protection, which it has later described as strict scrutiny, its level of scrutiny was anything but strict, given the level of deference the Court gave to the government’s factual conclusion about whether the speech and association in question materially supported terrorism). I was involved in the litigation of Humanitarian Law Project with David Cole before the Supreme Court.
identify a First Amendment issue with Title VII’s prohibition on sexually harassing workplace speech could be seen as an example of that very sort of judgment, as Richard Fallon aptly concluded.\footnote{Fallon, supra note 250.} The Sixth Circuit’s decision to apply rational basis review to Ohio’s precious metal dealers licensing scheme in \textit{Liberty Coins} could be seen as another.\footnote{\textit{Liberty Coins}, I.L.C. v. Goodman, 748 F.3d 682, 693–97 (6th Cir. 2014); see also \textit{Kagan v. City of New Orleans}, 753 F.3d 560 (5th Cir. 2014) (reviewing a licensing scheme for tour guides). It is interesting to note that the D.C. Circuit took a nearly opposite approach and concluded that licensing of tour guides requires intermediate scrutiny and that the District of Columbia’s licensing scheme violated the First Amendment. \textit{Edwards v. District of Columbia}, 755 F.3d 996 (D.C. Cir. 2014). The Supreme Court declined to review \textit{Kagan} despite this circuit split, 135 S. Ct. 1403 (2015) (mem.).} These two approaches are, of course, stylized and not mutually exclusive categories.

We might speculate that because the Supreme Court arguably cast a shadow on commercial speech’s lower-value status in \textit{Sorrell}, increasing pressure will be placed on the speech/conduct distinction to limit the First Amendment’s deregulatory reach. Courts may increasingly be called on to decide ultimately sociological speech/conduct questions based upon their contextual understanding of given speech acts. Is offering a gun for sale a speech act or conduct? The outcome depends on the judicial audience and its view of certain social practices. The argument that a given social activity is expressive may be in general easier to make than the reverse. If my prediction is correct, the new \textit{Lochner} threatens not only broad deregulation, but also the challenges that doctrinal incoherence pose to rule of law and predictability values.

The judiciary’s response to increasing First Amendment challenges will, regardless, influence the resultant form of our democracy and the vision of democratic legitimacy understood to ground it. Institutionally, the degree of the First Amendment’s \textit{Lochnerian} turn will no doubt affect the character and scope of our democracy and regulation within it.
Increased constitutional scrutiny will tend to transfer decisions about the proper mode and extent of economic regulation from administrators and legislatures to courts, in what Justice Scalia has trenchantly termed a “black-robed supremacy,” or even free speech claimants. Constitutional scrutiny and litigation will raise the cost of lighter-touch information regulation. Greater protections for commercial speech may therefore reduce the role of many of the tools of behavioral law and economics based regulation—either producing deregulatory outcomes or, paradoxically, incentivizing mandates.

More aggressive First Amendment commercial speech protection may prove to be a deregulatory boon as its advocates hope. There is some indication that this will be the trend. Increased constitutional scrutiny may relatedly incentivize different, and perhaps less transparent, regulatory decision-making by spurring regulators to develop sturdier governmental interests and build administrative records to support them.

Litigation and judicial invalidation of economic regulations may instead, however, trigger a turn back towards mandates. Federal agencies are required by Executive Order 13,563 to “identify and assess available alternatives to direct regulation, including . . . providing information upon which choices can be made by the public” and “[w]here relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law . . . identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public,” including “warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and


264 See, e.g., Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011); United States v. Caronia, 703 F.3d 149 (2d Cir. 2012); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012).
intelligible.”

Where constitutional barriers prevent such ‘lighter-touch’ regulation, mandates may be the most feasible regulatory response. Of course, mandates or bans may require more political power than disclosures—particularly to spur legislation instead of administrative action. It might not be politically feasible to ban cigarettes but possible to impose stringent warnings. We may therefore see fewer mandates even if mandates are the result of increased First Amendment litigation. What would be the hydraulic result if mandates become the counter-intuitive outcome of the libertarian turn in free speech jurisprudence? It is too early to tell, but mandates might offer commercial litigants the opportunity to argue more expansive First Amendment theories, focusing on the ways that a greater range of regulations stifle expressive business conduct or are communicative of impermissible governmental ‘opinions’ about regulated entities or consumer behavior.

At a deeper level, the constitutional conflict between the First Amendment and the regulatory state implicates the relationship of democratic legitimacy and choice—and is entangled with the future of behavioral law and economics based policy and debates over to what extent it can or should be libertarian. To practical effect, the courts’ assessment of deregulatory free speech cases affects the balance between the state’s ability to affect public decision-making and enforce substantive policy goals through structuring choice and the people’s ability to govern by representative governance at all.

At the same time, the new Lochner is a key site of contest between three differing conceptions of democratic legitimacy:


266 Bubb & Pildes, supra note 152.
First, oxymoronically or not,267 the understanding of democracy embraced by modern administration is of consumer-like citizen choice that occurs in response to regulation, such as the decision to opt out of a default regarding retirement savings or choose to smoke (or not) in response to a warning label.268 This view of democratic legitimacy resonates with Philip Bobbitt’s argument that we are in an era of the market state, in which the government’s legitimacy is grounded in its ability to maximize the opportunity for its citizens to achieve their own preferred worlds.269 This understanding of democracy likewise bears a striking resemblance to that embraced by *Virginia Board of Pharmacy*, which identified the value of commercial speech to ensuring that the public’s economic decisions were “in the aggregate, . . . intelligent and well informed” and “to the formation of intelligent opinions as to how that [free enterprise] system ought to be regulated or altered.”270

We might debate whether *Virginia Board of Pharmacy* found constitutional value in commercial speech only insofar as it enhances the public’s ability to evaluate public policies about market affairs—or also to make well-informed choices about commercial decisions such as the choice of shampoo.271 But the space, if any, between those two may be less great than

267 *Compare, e.g., id., with Sunstein & Thaler, supra note 151.*

268 *In part based on empirical studies undercutting classical law and economics’ central assumption of the rationality of choice and stable preferences, some modern information regulation is based on the premise that ‘choice’ is largely an illusion. There are noteworthy challenges to this proposition and the empirical studies that support it. See, e.g., Gregory Klass & Kathryn Zeiler, *Against Endowment Theory: Experimental Economics and Legal Scholarship*, 61 UCLA L. Rev. 2, 58–59 (2013); Schwartz, supra note 152. And much information regulation is supportable by classical economic rationales.*


271 *See id. at 787 (Rehnquist, J., dissenting).*
it might first appear because modern administration enlists citizens to effectuate public policies through their market choices. Citizens in the modern administrative state are consumers not just of market goods but of public policies, and their individual (often market) choices play a role in determining collective outcomes. Modern administration’s vision, then, is of partially disaggregated democracy. But it nonetheless places the public in a central role in collective decision-making—at once through delegated authority to governmental actors by way of elections and again through citizen participation in the space for individual choice given by modern regulators.

Second, the movement for commercial speech, by contrast, appears to view all challenged regulation as paternalist and therefore unconstitutional. If taken to its logical conclusion, this or any speech-as-such approach has the capacity to undo the state and transfer control of market regulation from the political branches to the judiciary, if not ultimately to the hands of free speech claimants. The vision of democracy underlying the new *Lochner* is robustly counter-majoritarian and staunchly judicially—or, perhaps more accurately, privately—controlled. For, the new *Lochner* in one sense aggrandizes the judiciary against the political branches. But in another, because free speech claims can be so opportunistically invoked, it places considerable choice about policy invalidation in the hands of free speech challengers. This is a different vision of democracy than that envisioned by modern administration or *Virginia Board of Pharmacy*. It is not one in which citizens are armed with

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273 See Schauer, supra note 182, at 176, 192.
information so as to make intelligent choices about products or policy. It is one in which commercial actors limit regulation through targeted constitutional litigation. The class of individuals who have the ability, knowledge, and access to that sort of litigation is more limited\textsuperscript{274} than the set that can vote; benefit from a listener-oriented commercial speech regime so as to make more intelligent policy decisions; or respond to a mandated disclosure regarding, for example, miles per gallon or fair lending, so as to influence the effect of those regulatory schemes. The new \textit{Lochner} thus displaces the policy preferences and the mechanisms for intelligent policy-preference development of a broader public with those of a smaller elite.

The new \textit{Lochner} does not, however, \textit{expressly} adopt an entirely new vision of the citizen claimant.\textsuperscript{275} Deregulatory First Amendment advocates embrace a vision of democracy that at first blush appears generally applicable—in fact \textit{more} generally applicable than that adopted by \textit{Virginia Board of Pharmacy} and modern administration. They argue that commercial speakers, not only consumer listeners, are entitled to equal First Amendment protection.\textsuperscript{276} The new \textit{Lochner} asks simply to expand free choice, and the legitimate free speech claimant, from the listening public to the speaking seller. But because of the realities of who can bring constitutional claims, while this vision of democracy has the veneer of general, even populist, application, in practice it curtails public participation in determining public policies. Commercial speech advocates thus advance a version of democracy that privileges elite over

\textsuperscript{274} See Michael McCann, \textit{Litigation and Legal Mobilization, in The Oxford Handbook of Law and Politics} 522, 529 (Keith E. Whittington, R. Daniel Kelemen, & Gregory A. Caldeira eds., 2008).

\textsuperscript{275} Cf. Wendy Brown, \textit{Undoing the Demos: Neoliberalism's Stealth Revolution} (2015) (arguing that neoliberalism is a form of rationality that embraces an understanding of the citizen as an economic actor, not a political one).

\textsuperscript{276} See, e.g., Brief For Respondent at 13, \textit{Sorrell v. IMS Health Inc.}, 131 S. Ct. 2653 (2011) (No. 10-779) (“No one would doubt that the First Amendment would apply fully if Vermont sought to prohibit the other party to the transaction—the patient—from discussing the fact of the prescription. There is no logical basis for treating the expression of the pharmacy, insurer, or the Publisher Respondents as categorically different.”); \textit{Sorrell}, 131 S. Ct. 2653.
public preferences, but one cloaked in a universalist liberty claim. It is noteworthy in this regard that some of the organizations that advance the most robust protections for commercial speech, such as the Institute for Justice, do so on expressly populist grounds, while being funded by a handful of the nation’s wealthiest individuals.277

Third, if the First Amendment’s libertarian turn fuels a return to direct mandates, this would substantiate an older vision of the legitimacy of state action grounded in the validating power of elections prior to regulatory enactment and the delegation of authority from voters to state actors. That is a world of aggregated state power and more unitary governmental decision-making.

The outcome of the current conflict between the First Amendment and the regulatory state will directly inform the shape of American democracy and administration and with it the practical forms of their legitimation.

A feature of the new Lochner additionally contributes to our understanding of the processes and mechanisms of constitutional change. The importance of a business-led social movement in the First Amendment’s recent deregulatory turn again demonstrates how social movements can alter constitutional principles absent Article V amendment. Leading scholars of democratic constitutionalism such as Reva Siegel, Robert Post, William Eskridge, Jr., and David Cole, have vitally contributed to our understanding of the role of social mobilization in

277 These include Charles and David Koch and the Walton Family. Compare Quotable Quotes: ABA Journal Spotlights 50 Innovators, Mavericks and Pathfinders of the Legal Profession, LIBERTY & L., Dec. 2009, at 15 (Institute for Justice bimonthly newsletter, quoting ABA Journal article on founder Chip Mellor: “Mellor’s typical client is someone who lacks the means to fight in court. . . . In a David and Goliath fight, Mellor sees himself as the equalizer.”), with Ctr. for Media & Democracy, Institute for Justice, SOURCEWATCH, http://www.sourcewatch.org/index.php/Institute_for_Justice (last visited Feb. 5, 2016) (listing the Walton Foundation as one of IJ’s major funders, noting IJ’s public thanks to Charles Koch for providing its initial seed funding and to David Koch for being a “generous benefactor each year of IJ’s first decade,” and detailing hundreds of thousands of dollars in Koch support).
the transformation of constitutional norms. The influence of a business-led social movement in the turn in commercial speech jurisprudence lends additional support for the existence of this form of constitutional change as well as power to the assertion of its importance in American constitutional law.

The history detailed above demonstrates the ability of social movements to influence not only the content of substantive constitutional norms, as constitutional scholars have previously documented but also their constitutional salience, the allocation of their interpretation and enforcement among the branches, and the vision of democratic legitimacy upon which those institutional arrangements depend. The new *Lochner* thus deepens our understanding of the influence of changing legal cultures not only on constitutional interpretation but also on the separation of powers and shape of American democracy and administration.

While the theorization of the pluralism effects of various forms of social mobilization on democratic constitutionalism is beyond the scope of this Article, the new *Lochner*

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280 See sources cited supra notes 269, 278.

281 Productive questions might be raised about the form of the new *Lochner*’s social movement—as a partially business-led, instead of identity-based, movement—and the status and democratic legitimacy of various forms of movement-based constitutional change. Certain movements may be relatively more pluralism enhancing. And certain communities may be more or less likely or able to participate in the forms of social mobilization that democratic constitutionalism more broadly, and the new *Lochner* specifically, demonstrates are influential to constitutional meaning, the distribution of branch powers, and the metric of democratic legitimacy. As leading political scientists have pointed out, the unorganized are less able to capture political power. HACKER & PIERSON, supra note 109; Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 PERSP. ON POL. 571, 591 (2012). The new *Lochner* might provoke us to ask whether the same can be
highlights the importance of organized mobilization for American constitutional law and the significance of the legal, institutional, and social conventions that encourage, shape, and channel those modes of participation.

The history sketched above additionally contributes to our understanding of the mechanisms and dynamics of First Amendment coverage and protection change. *Virginia Board of Pharmacy*’s inclusion of some forms of commercial speech within the First Amendment’s ambit at the height of the consumer movement in the 1970s suggests that changing legal culture, social movements, and impact litigation play a role in altering the First Amendment’s coverage. Likewise, the role of a business-led social movement in the recent libertarian turn in commercial speech doctrine suggests that changing legal culture can play a part in altering levels of First Amendment protection.

Coverage and protection are also linked within the domain of commercial speech. In reformulating the rules of protection and constitutional values underlying that protection, courts may affect what sorts of speech acts fall within the category of covered ‘commercial speech.’ If commercial speech is protected due to its informational value to the public—as has been the case since the doctrine’s inception in *Virginia Board of Pharmacy*—then only colorable claims that regulations impinge on the public’s access to commercial information should properly be subjected to constitutional review and protection. If, however, commercial speech is protected to advance the autonomy interests of commercial speakers to say (or not say) what they want, when they want to—as paradigmatic First Amendment speech is—a larger range of marketplace speech may be covered. The regulation of contracts, for instance, is generally not subject to First Amendment review. The constitutional salience of the firearm regulation

said of social movement influence on the courts and to question the implications of any such findings for popular constitutionalism.
in *Nordyke*, however, demonstrates that reorienting the architecture of protection from a listener-based to a speaker-based right may expand the boundaries of commercial speech coverage. First Amendment coverage and protection, then, can affect each other and, in turn, jointly determine the boundary of permissible state action and the relative distribution of decision-making about market regulation among the branches.

A further lesson can be drawn from the comparison of the two forms of *Lochnerism*: the notion of formal liberty is persistently compelling. Claims to it have historically been wildly popular, and it has proved to be a robust frame for social mobilization and successful law reform agendas for a range of ideological valances. Formal liberty claims are a hallmark of modern social movements, including the business-led social movement that has contributed to the First Amendment’s recent libertarian turn. The prominent identity-based movements of the twentieth and twenty-first centuries—including the civil rights, women’s rights, and gay rights movements—have made prominent use of formal or *de jure* liberty claims. But the formal freedom claims of twentieth century identity-based movements are structurally different from those of contemporary libertarian free speech advocates. Because of the pervasiveness of speech, the most formal speech protection is tantamount to full deregulation. Identity-based movements, by contrast, gain their more limited freedoms through *de jure* rights. Identity-based movements face the challenges of seeking less—bright line entitlements only after gaining formal liberties. This is the work of positive rights entrenchment in regulatory

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282 *Nordyke v. Santa Clara Cnty.*, 110 F.3d 707, 713 (9th Cir. 1997).

283 Social science research suggests that it may be the bright-line clarity of these sorts of claims that make them so salient. See generally Stephen C. Wright et al., *Responding to Membership in a Disadvantaged Group: From Acceptance to Collective Protest*, 58 J. PERSONALITY & SOC. PSYCHOL. 994 (1990) (noting that while unequal distribution of resources among groups exists at all levels of social organization, members of disadvantaged groups generally accept that distribution or pursue individual action and only favor collective action when told that a high-status group is completely closed to them).
and statutory regimes.\textsuperscript{284}

**CONCLUSION**

This returns us to the question: is the new *Lochner*’s absolutist ‘speech is speech’ argument viable? Asking why *Lochner* was relegated to the anticanon offers insight. As Jamal Greene has observed, anticanonical cases such as *Lochner* did not reach that status because they were particularly poorly reasoned.\textsuperscript{285} Roscoe Pound’s explanation of the problems with *Lochnerism* on the eve of the Realist revolution suggests a better explanation. Pound began his *Liberty of Contract* with the following:

> “The right of a person to sell his labor,” says Mr. Justice Harlan, “upon such terms as he deems proper, is in its essence, the same as the right of the purchaser of labor and to prescribe the conditions upon which he will accept such labor from the person offering to sell it. . . . In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land.” \textsuperscript{286}

Why, Pound asked, do courts “force upon legislation an academic theory of equality in the face of practical conditions on inequality?” \textsuperscript{287} His answer was mechanistic jurisprudence, a type of academic formalism that rendered the liberty that freedom of contract averred to protect utterly hollow.\textsuperscript{288} *Lochner*’s freedom of contract was rejected in part because it enacted a sort of ‘formal’ liberty that was at odds with the realities of social relationships. It

\textsuperscript{284} See ESKRIDGE & FEREJOHN, supra note 269.


\textsuperscript{287} Id.

\textsuperscript{288} Id. at 471–72 (“Necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them.” (quoting *Vernon v. Bethell*, (1762) 28 Eng. Rep. 838 (Ch.) 839; 2 Eden, 110)).
equated the ‘liberty’ of the employee with that of the employer when their lived freedoms were anything but equal.

The new *Lochner* embraces a similarly formal, and hollow, notion of liberty. It equates all ‘speech’ as constitutionally equal regardless of the social reality. To the new *Lochner*’s advocates, a cigarette warning label is equivalent to a compulsion to salute the flag and recite the pledge of allegiance. A restriction on marketing information is equivalent to a ban on anti-war speech. Just as *Lochner* failed to recognize the social realities of contracting, the new *Lochner*’s absolutist understanding of free speech fails to recognize the social realities of different expressive acts.²⁸⁹

But the institutional implications of this distinctively modern formalist contention go beyond those of *Lochner* itself. Whereas freedom of contract was at least theoretically bounded by the notion of contract, the new *Lochner*’s rationale, taken to its logical conclusion, would affect all aspects of the administrative state. It would presumptively preclude regulation of fraud, malpractice, business licensing, drug warning labels, consumer and environmental spill disclosures—not to mention constitutionalize contracts and tax filings. It would run the entirety of the world’s largest economy through its courts. This argument calls on the First Amendment, long cited as the mainstay of democracy,²⁹⁰ to undo self-government.

²⁸⁹ The modern commercial speech cases reflect a second similar tension between ‘formal’ liberty of commercial choice—and with it a formal understanding of consumer choice behavior—and the ‘functional’ problems endemic to unregulated markets that challenge formal rational choice models. Behavioral research suggests that formal consumer choice may not be as freedom- or welfare-enhancing as structured choice regimes. See, e.g., Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 234–35 (2006); Christine Jolls, *Product Warnings, Debiasing, and Free Speech: The Case of Tobacco Regulation*, 169 J. INSTITUTIONAL & THEORETICAL ECON. 53, 55–56 (2013); see also Bubb & Pildes, *supra* note 152. Productive questions have been asked about whether a world in which workers are not given the free choice to accept lower than subsistence wages or excessive work weeks is functionally liberty-enhancing. So, too, we might question whether one in which the state is constitutionally permitted to structure consumer choice in the marketplace is more or less functionally liberty-enhancing.

The new *Lochner*’s absolutist ‘speech is speech’ argument must be rejected both for its lack of limiting principle and for its failure to reflect social reality. It is indeed the new *Lochner*’s formal equation of ‘speech is speech’ that leads to its lack of a limiting principle and attendant institutional effects.

Advocates of the new *Lochner* seek to remake the American administrative state. But without a principled limit, their argument pits the Constitution against democracy itself. Only by bearing in mind the words of Justice Holmes that “[t]he life of the law has not been logic: it has been experience”\(^{291}\) and recognizing that not all speech and expression are equal can we ensure that the Constitution does not destroy the very representative governance it was meant to protect. The new *Lochner* demands, in short, a new form of First Amendment realism.

* * *

The First Amendment rose to ascendancy in tandem with the modern administrative state. It now stands as government’s most potent limit. More even than freedom of contract, freedom of speech possesses a capaciousness capable of challenging the most fundamental modern institutions—a capaciousness with which the modern state and modern constitutionalism must come to terms.

\(^{291}\) Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881).
II.  
Adam Smith’s First Amendment  
(with Robert Post)∗

Until recently, Washington, D.C., maintained what most would regard as a perfectly ordinary licensing scheme for tour guides. In 2014, the D.C. Circuit declared the scheme unconstitutional under the First Amendment in a remarkable case entitled Edwards v. District of Columbia.1 The court announced that the District’s regulations must be reviewed under intermediate scrutiny because they burden speech; the regulations made it “illegal to talk about points of interest or the history of the city while escorting or guiding a person who paid you to do so” without first obtaining a license.2 Licenses were awarded to those who passed a test and paid a $200 registration fee.3

After a rather scathing review, the court concluded that the regulations failed directly to advance the government’s interest in protecting D.C. tourism from dishonest or unsatisfactory tour guides.4 It found that the private market—operating through rating sites like Yelp and TripAdvisor—was instead sufficient to turn “the coal of self-interest” into “a gem-like consumer experience,”5 thereby rendering the District’s scheme superfluous. In so holding, the court reminded the District that the “seminal work” of the “celebrated economist

∗ We wish to thank Amy Kapczynski and Jack Balkin for their invaluable assistance.

1 755 F.3d 996 (D.C. Cir. 2014).
2 Id. at 998; see also id. at 1001–02.
3 Id. at 998.
4 Id. at 1006. By contrast, the Fifth Circuit recently concluded that New Orleans’s similar tour guide licensing scheme withstood First Amendment challenge. Kagan v. City of New Orleans, 753 F.3d 560 (5th Cir. 2014), cert. denied, No. 14-585, 2015 WL 731879 (Feb. 23, 2015). See also Edwards, 755 F.3d at 1009 n.15.
5 Edwards, 755 F.3d at 1007.
and philosopher” Adam Smith had long ago “captured the essence of this timeless principle:

‘It is not from the benevolence of the butcher, the brewer or the baker that we expect our
dinner, but from their regard to their own interest.”

The court’s reasoning is startling. Until very recently, it was well accepted that purely
economic regulations are subject to rational basis review. This was the point of consigning

Lochner v. New York\(^7\) to the anticanon.\(^8\) Since the New Deal, black-letter constitutional law has
authorized the Nation to regulate the complexities of modern economic life in ways designed
to modify the unobstructed operation of the private market. As Justice Frankfurter put it in
1949, Lochner, and the substantive due process it embodied, idolized:

[T]he shibboleths of a pre-machine age and these were reflected in juridical
assumptions that survived the facts on which they were based. Adam Smith was
treated as though his generalizations had been imparted to him on Sinai and not
as a thinker who addressed himself to the elimination of restrictions which had
become fetters upon initiative and enterprise in his day. Basic human rights
expressed by the constitutional conception of “liberty” were equated with theories
of laissez faire. The result was that economic views of confined validity were treated
by lawyers and judges as though the Framers had enshrined them in the
Constitution. This misapplication of the notions of the classic economists and
resulting disregard of the perduring reach of the Constitution led to Mr. Justice
Holmes’ famous protest in the Lochner case against measuring the Fourteenth
Amendment by Mr. Herbert Spencer’s Social Statics.\(^9\)

Edwards is written as if that history never occurred. Edwards holds that regulations
burdening speech in the marketplace must convincingly demonstrate their necessity before
they can interfere with the unassisted operation of the market.\(^10\) Edwards puts the constitutional

\(^6\) Id. (quoting ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 12
(Digireads.com Publishing 2004) (1776)).

\(^7\) 198 U.S. 45 (1905).

\(^8\) See Jamal Greene, The Anticanon, 125 HARV. L. REV. 379 (2011); Cass R. Sunstein, Lochner’s Legacy, 87 COLUM.

burden of justifying regulations of marketplace speech squarely and onerously on the state.11

Because almost all commercial activity proceeds through the medium of communication, Edwards effectively revives Lochnerian substantive due process.

How could the First Amendment constitutionalize the unregulated operation of the laissez-faire commercial marketplace? How could the First Amendment require the political branches to adopt the theories of an eighteenth-century philosopher, even if, after due democratic deliberation, “We the people” have decided to reject them? We have always celebrated the First Amendment as “the guardian of our democracy.”12 Yet now, in the hands of the D.C. Circuit, the First Amendment seems to have been transformed into a straitjacket for our institutions of democratic governance.

Unfortunately, the D.C. Circuit is not alone. Across the country, plaintiffs are using the First Amendment to challenge commercial regulations, in matters ranging from public health to data privacy.13 It is no exaggeration to observe that the First Amendment has become

10 “Perhaps most fundamentally, what evidence suggests market forces are an inadequate defense to seedy, slothful tour guides? To state the obvious, [the plaintiff] Segs in the City, like an other company, already has strong incentives to provide a quality consumer experience — namely, the desire to stay in business and maximize a return on its capital investment.” Edwards, 755 F.3d at 1006.

11 Id. at 1003–07.


a powerful engine of constitutional deregulation. The echoes of *Lochner* are palpable. The Supreme Court itself recently and provocatively proclaimed that although “[t]he Constitution ‘does not enact Mr. Herbert Spencer’s Social Statics [,]’ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting),” it nevertheless “does enact the First Amendment.”¹⁴

I. COMMERCIAL SPEECH DOCTRINE

Without question, the driving force behind this striking turn in our constitutional order has been the recent and aggressive expansion of commercial speech doctrine. Until the 1970s, the First Amendment did not apply to commercial speech at all.¹⁵ In 1942, the Court explicitly placed commercial speech beyond the ambit of the First Amendment.¹⁶ But in 1976, in the watershed decision of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹⁷ the Court overruled its precedent and created modern commercial speech doctrine.¹⁸ The case held that the state of Virginia could not prohibit pharmacists from advertising drug prices.

At first, constitutional protection for commercial speech was supported by progressive jurists who were anxious to break information monopolies, particularly in the medical and

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¹⁵ See *id.* at 54 (“This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.”).

¹⁶ See *id.* at 760.


¹⁸ See *id.* at 760.
legal professions. Conservatives on the Court vigorously objected to this expansion of First Amendment rights. Justice Rehnquist expressed concern over the “far reaching” consequences of “elevat[ing] commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas.”

He observed that “there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession.” Justice Rehnquist regarded pharmacists as no “less engaged in a regulatable profession than were the opticians in Williamson [v. Lee Optical Co., 348 U.S. 483 (1955)].” He warned in 1980 that commercial speech doctrine could lead to a return:

[T]o the bygone era of Lochner v. New York, in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court’s own notions of the most appropriate means for the State to implement its considered policies.

I had thought by now it had become well established that a State has broad discretion in imposing economic regulations. As this Court stated in Nebbia v. New York: “[T]here can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects ....”

During the 1990s, however, the political valence of commercial speech doctrine shifted radically. Conservatives on the Court began to appreciate its potential as a deregulatory tool.

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21 Id. at 784.

22 Id. at 785.

In 1995, Chief Justice Rehnquist joined an opinion by Justice Thomas invalidating a statute prohibiting beer labels from displaying alcohol content.\textsuperscript{24} In more recent years, conservative Justices have been leading the charge to use commercial speech doctrine to strike down economic regulation.\textsuperscript{25}

The deregulatory potential of constitutional protection for commercial speech did not go unnoticed by the Court that had originally established the doctrine. The Court sought to avoid that potential by stressing that “‘commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,’ and is subject to ‘modes of regulation that might be impermissible in the realm of noncommercial expression.'”\textsuperscript{26} The Court held that neither overbreadth nor prior restraint


Justice Thomas has penned powerful separate opinions arguing that commercial speech ought to receive the same constitutional protections as political speech, see Lorillard Tobacco, 533 U.S. at 572–90 (Thomas, J., concurring in part and concurring in the judgment); Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457, 504–06 (1997) (Thomas, J., dissenting); 44 Liquormart v. Rhode Island, 517 U.S. 484, 517–28 (1996) (Thomas, J., concurring in part and concurring in the judgment), and Justices Kennedy and Scalia have questioned whether the commercial speech doctrine’s core precedents should be retained, see Lorillard Tobacco, 533 U.S. at 571–72 (Kennedy, J., concurring in part and concurring in the judgment); 44 Liquormart, 517 U.S. at 517–18 (Scalia, J., concurring in part and concurring in the judgment).

doctrines apply to commercial speech. It concluded that chilling-effect doctrine likewise did not apply to commercial speech and affirmed that content discrimination is permissible with regard to commercial speech because “[t]he First Amendment ... does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely.” It reasoned that commercial speakers can be compelled to disclose factual information so long as the disclosures are “reasonably related” to an appropriate state interest.

Commercial speech doctrine was invented with the clear understanding that the state would be freer to regulate in the domain of commercial speech than it was “in the realm of noncommercial expression.” This difference was justified on the ground that commercial speech was “constitutionally protected not so much because it pertains to the seller’s business as because it furthers the societal interest in the ‘free flow of commercial information.’” In the canonical case Central Hudson Gas & Electric Corp. v. Public Service Commission, the Court was explicit that “[t]he First Amendment’s concern for commercial speech is based on the informational function of advertising.” The constitutional value of commercial speech lies in

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31 Ohralik, 436 U.S. at 456.


33 447 U.S. 557 (1980).

34 Id. at 563; see also, e.g., Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977) (“Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an
the rights of listeners to receive information so that they might make intelligent and informed decisions.\textsuperscript{35}

Ordinary First Amendment doctrine, by contrast, focuses on the rights of speakers, not listeners. It protects the right of persons to engage in the formation of “that public opinion which is the final source of government in a democratic state.”\textsuperscript{36} Ordinary First Amendment doctrine protects the right to participate in “public discourse,”\textsuperscript{37} which is to say in the modes of communication constitutionally deemed necessary to form public opinion.\textsuperscript{38} This is why the First Amendment has from the very beginning been characterized as essential to our democracy.\textsuperscript{39} In one of its very first decisions upholding a First Amendment right, the Court proclaimed that “[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”\textsuperscript{40}

Ordinary First Amendment doctrine does not protect speakers’ rights merely in order to safeguard an “informational function.” We have the right to speak because we are entitled to engage in the great process of democratic self-determination, even if what we say is indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.” (citations omitted)).

\textsuperscript{35} One of us has previously labeled this value “democratic competence,” which refers to the cognitive empowerment of those who participate in public discourse. ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 27–60 (2012).

\textsuperscript{36} Masses Publ’g Co. v. Patten, 244 F. 535, 540 (S.D.N.Y.) (L. Hand, J.), rev’d, 246 F. 24 (2d Cir. 1917).


\textsuperscript{38} See ROBERT C. POST, CITIZENS DIVIDED 3–43 (2014).


\textsuperscript{40} Stromberg v. California, 283 U.S. 359, 369 (1931).
deliberately false. The First Amendment defends the prerogative of each of us to participate in the formation of public opinion in a manner of our own choosing. It does so because we can imagine public opinion responding to our views only if we are free to speak as we please.

As the Court recently proclaimed in *Citizens United v. Federal Election Commission*, “[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”

This kind of responsive democracy is in serious tension with conscripting the First Amendment to shield the undisturbed operation of the laissez faire market. Alexander Meiklejohn observed long ago that in a democracy “the governors and the governed are not two distinct groups of persons. There is only one group--the self-governing people. Rulers and ruled are the same individuals. We, the People, are our own masters, our own subjects.”

When we engage in public discourse, the First Amendment accords us the privileges of “rulers” who exercise the prerogatives of self-determination. We are given the freedom and autonomy to speak as we will. But when we engage in commercial speech, we are not participating in democratic self-determination; we are instead transacting business in the

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41 See United States v. Alvarez, 132 S. Ct. 2537 (2012). Does Sherman mean to contend that those who engage in “occupational speech,” like lawyers and doctors, have an equivalent right to engage in deliberately false speech? Compare 281 Care Comm. v. Arneson, 766 F.3d 774 (8th Cir. 2014) (striking down a state statute that criminalized the communication of false statements about proposed ballot initiatives if made knowingly or with reckless disregard for the truth), with Hughes v. Malone, 247 S.E.2d 107, 111 (Ga. Ct. App. 1978) (holding that “[a]lthough an attorney is not an insurer of the results sought to be obtained by such representation, when, after undertaking to accomplish a specific result, he then wilfully [sic] or negligently fails to apply commonly known and accepted legal principles and procedures through ignorance of basic, well-established and unambiguous principles of law or through a failure to act reasonably to protect his client’s interests, then he has breached his duty toward the client”).

42 One of us has called this constitutional value “democratic legitimation.” POST, supra note 35, at 1–25.

43 130 S. Ct. 876 (2010).

44 Id. at 898. Contrary to Sherman, supra note 26, at 196–97, we do not understand recent cases to have abandoned the democratic explanation for First Amendment doctrine.

45 MEIKLEJOHN, POLITICAL FREEDOM 12 (1960).
marketplace. We are accordingly communicating as “subjects” who are “ruled.” If we were to attribute the prerogatives of autonomy appropriate for self-governance to commercial speech, we could never govern ourselves at all. If the speech of “subjects” were confused with that of “rulers,” the First Amendment would simultaneously authorize democratic deliberation and render powerless the government produced by that deliberation.

The Court formulated commercial speech doctrine precisely to avoid this paradox. It explicitly characterized commercial speech as constitutionally valuable only because of its “informational function.” It explicitly created commercial speech doctrine to protect the rights of listeners rather than the autonomy of speakers. This conceptual architecture has fundamental constitutional implications.

It means, for example, that the state can regulate commercial speech using laws that discriminate on the basis of content. Because “[t]he First Amendment’s concern for commercial speech is based on the informational function of advertising ... there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.” Although the state cannot suppress misleading or deceptive speech in the political sphere, there is a “vast regulatory apparatus in both the federal government and the states ... to control ... potentially misleading or deceptive speech.”

46 We do not mean to suggest that the First Amendment does not extend any protection to commercial speech. We instead take a pluralistic view of the First Amendment. Our point is simply that if commercial speech is accorded the same protections as public discourse, democratic governance will not be possible.

47 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, 447 U.S. 557, 563 (1980); see id. at 564 n.6 (“In most other contexts, the First Amendment prohibits regulation based on the content of the message. Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not ‘particularly susceptible to being crushed by overbroad regulation.’”) (citations omitted).

48 Kathleen M. Sullivan, Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart, 1996 SUP. CT. REV. 123, 153. Contrary to Sherman, supra note 26, at 200, we do not understand the contemporary Court to have abandoned the proposition that the state can regulate misleading commercial speech. No one contends, however,
It also means that the state can generally compel commercial speech. Because First Amendment protections of public discourse safeguard the autonomy of persons to govern themselves, they incorporate the principle that “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’” Compelling commercial speakers to disclose factual information, by contrast, may augment the flow of information to listeners and hence enhance the “informational function” that justifies commercial speech doctrine. For this reason, compelled disclosures of commercial speech are constitutionally permissible so long as they are factual and “reasonably related” to an appropriate state interest.

II. FIRST AMENDMENT PROTECTIONS FOR COMMERCIAL SPEECH

Judicial review of regulations that constrain commercial speech should be focused primarily on the question of whether they unduly restrict the flow of reliable information to the public. Contemporary courts appear to be losing sight of this basic point. Beguiled by the abstract generalities of the Central Hudson test, judges have become captivated by the generic


52 The authoritative test for restrictions on commercial speech was set forth in Central Hudson:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.
idea of “intermediate scrutiny” rather than by the specific question of whether government regulations of commercial speech unduly impair public access to accurate information.

Courts applying *Central Hudson* ask whether government restrictions directly advance a substantial government interest and are “not more extensive than is necessary to serve that interest.” Although this test imposes a potentially serious burden of justification upon the state, it is essentially peripheral to the fundamental question of whether the state has impaired the public circulation of information. Unless courts keep this question clearly in mind, they are liable to become lost.

First Amendment doctrine must be carefully crafted to protect First Amendment values. If the relevant constitutional value is the circulation of information, courts ought to employ doctrine that focuses precisely on this issue. Otherwise constitutional review simply drifts and becomes aimlessly intrusive and confused. This is what occurred, for example, in *Nordyke v. Santa Clara County*, where the Ninth Circuit used commercial speech doctrine to strike down Santa Clara County’s attempt to prohibit gun sales at its fairgrounds. Conceding that “the act of exchanging money for a gun is not ‘speech’ within the meaning of the First Amendment,” the Ninth Circuit nevertheless held that prohibiting the offer of firearms or ammunition for sale was a regulation of commercial speech that must be subject to *Central

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447 U.S. at 566. The elements of this test are markedly abstracted from the fundamental question of whether the circulation of information has been unduly impaired. See Post, supra note 27, at 53–54.


54 E.g., Pitt News v. Pappert, 379 F.3d 96, 106 (3d Cir. 2004) (quoting *Central Hudson*, 447 U.S. at 566) (internal quotation mark omitted); see supra note 52.

55 110 F.3d 707 (9th Cir. 1997).

56 Id. at 710.
Hudson review.\textsuperscript{57} Nordyke never bothered to ask whether the County’s prohibition restricted the flow of useful information to the public.

It is true, as Paul Sherman suggests in his companion Commentary, that courts seem to be drifting into expanded protections for commercial speech. But it is false to assert that courts have abandoned the essential distinction between commercial speech and public discourse. Sherman is simply wrong to suggest otherwise. The extent of his error can be measured in the difference between “intermediate scrutiny” and the “strict scrutiny” for which he contends.

III. EDWARDS V. DISTRICT OF COLUMBIA

As a matter of technical First Amendment doctrine, Edwards does not classify itself as a commercial speech case. It does not apply the Central Hudson test. It instead employs an eccentric form of “intermediate scrutiny” fashioned by cobbling together elements of the O’Brien test\textsuperscript{58} with criteria developed in the context of content-neutral “time, place and manner” regulations.\textsuperscript{59} In the end, however, Edwards summarizes its doctrinal innovation as

\textsuperscript{57} Id. at 710–13. In its lease with the Santa Clara County Fairgrounds Management Corporation, the County had inserted an addendum providing:

It is the intention of the Board only to prohibit any person from selling, offering for sale, supplying, delivering, or giving possession or control of firearms or ammunition to any other person at a gun show at the fairgrounds. This prohibition applies to any act initiating any of the foregoing transactions with the intent of completing them at a later date. It is not the intention of the Board to prohibit the exchange of information or ideas about guns, gun safety, or the display of guns for historical or educational purposes.

\textit{Id.} at 708–09.


\textsuperscript{59} The Edwards court stated that the D.C. licensing schemes should be:

[S]ubject to intermediate scrutiny. Under this standard, a government regulation is constitutional if (1) “it is within the constitutional power of the Government”; (2) “it furthers an important or substantial governmental interest”; (3) “the governmental interest is unrelated to the suppression of free expression”; (4) “the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest,” \textit{United States v. O’Brien}, 391 U.S. 367, 377 (1968); and (5)
requiring the District of Columbia to demonstrate that its licensing requirements are “narrowly tailored to further a substantial government interest.” For all intents and purposes, Edwards applies a test that is indistinguishable from Central Hudson.

It is fascinating that Edwards characterizes its review as a form of “intermediate” scrutiny. The licensing examination administered by the District of Columbia distinguishes between right and wrong answers. It therefore obviously and patently discriminates on the basis of content. The Supreme Court long ago declared that “the most exacting scrutiny” should be applied “to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”

It does not take much legal imagination to anticipate how a court would treat a law permitting a pamphleteer to distribute a political leaflet only if she could first pass a government-administered test. No court would apply anything other than the strictest and most conclusive scrutiny. Although Edwards states that it need not employ strict scrutiny


F.3d 996, 1001–02 (D.C. Cir. 2014).

On the relationship between the O’Brien test and “time, place and manner” requirements, see Robert Post, Essay, Recuperating First Amendment Doctrine, 47 STAN. L. REV. 1249, 1263–64 (1995). There is reason to think that the Court that invented the O’Brien test would have been shocked by its characterization as “intermediate scrutiny.” See John Hart Ely, Comment, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 HARV. L. REV. 1482 (1975). The Court created the O’Brien test to brush aside First Amendment challenges to speech that was not public discourse and that the Court believed should be regulated as conduct. Similarly, the Court created doctrinal tests for “time, place and manner” regulations in order to find a way to easily hold them constitutional. See Post, supra, at 1260–65.

60 755 F.3d at 1002.


62 The court assumed, “arguendo, the validity of the District’s argument that the regulations are content-neutral and place only incidental burdens on speech” and so applied intermediate scrutiny. Edwards, 755 F.3d at 1001. Such an assumption, even in the face of a party’s argument to the contrary, would be unthinkable were the government to impose licensing requirements on political speech.
because the District’s licensing scheme fails even “intermediate” scrutiny, no court would bother with such indirection with regard to a statute seeking to license political leaflets. So why does Edwards nonetheless apply only intermediate scrutiny?

Evidently the court in Edwards is aware that there is a constitutionally significant difference between political leaflets and the speech of professional tour guides. We regard political pamphlets as public discourse, and so we jealously protect the autonomy of persons to leaflet as they think best. But we do not normally understand professional tour guides as participating in public discourse, because we do not regard their speech as an attempt to influence the content of public opinion.

We might perhaps sharpen this distinction with an example. Imagine if the Tea Party were to offer “Tea Party guides to Washington geography.” The point of the guides would be to use sightseeing as a medium to convey the Party’s interpretation of our national history and political values. Even if the Tea Party were to charge for its tours, most courts would nevertheless categorize the tours as public discourse. Courts would regard the tours as efforts to shape the content of public opinion.

If the District were to attempt to apply its licensing regime to the Tea Party tours, any court would immediately apply strict scrutiny. By contrast, Edwards did not use strict scrutiny to evaluate a licensing regime applicable to professional tour guides. What accounts for this difference? We suggest it is because the court in Edwards implicitly understood that professional tour companies were simple commercial enterprises offering a product for sale.

It is true that professional tour guides sell a particular kind of product—information.

63 Id. at 1000 (“We need not determine whether strict scrutiny applies, however, because assuming the regulations are content-neutral, we hold they fail even under the more lenient standard of intermediate scrutiny.”).
In *Sorrell v. IMS Health Inc.*, the Supreme Court used commercial speech doctrine to assess the constitutionality of state controls over information. Lower courts have also used commercial speech doctrine to assess state regulations of information transmission. This is because such controls impinge on the same constitutional value as that protected by commercial speech doctrine: the integrity of the “informational function.” By deploying a form of intermediate scrutiny analogous to *Central Hudson,* *Edwards* implicitly accepts this framework of analysis.

If this is an accurate interpretation of *Edwards*, the case should have addressed the fundamental question of whether the District’s licensing scheme materially reduced the flow of accurate information to the public. This is not an inquiry that *Edwards* ever considered.

VI. SPEECH AND CONSTITUTIONAL VALUES

Those interested in expanding First Amendment protections for what Sherman calls “occupational speech,” which includes the speech of professional tour guides, offer a very different framework of constitutional analysis. Sherman claims that the tour guide industry is constitutionally privileged because it is especially speech dependent. The argument is

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64 131 S. Ct. 2653 (2011).

65 See id. at 2667–68.

66 See, e.g., Nat’l Cable & Telecommns. Ass’n v. FCC, 555 F.3d 996 (D.C. Cir. 2009) (applying commercial speech doctrine to regulation requiring carriers to obtain opt-in consent before using, disclosing, or allowing access to customer information); Trans Union LLC v. FTC, 295 F.3d 42 (D.C. Cir. 2002) (analyzing regulations of the dissemination of consumer credit information under commercial speech doctrine); U.S. West, Inc. v. FCC, 182 F.3d 1224 (10th Cir. 1999) (subjecting use, disclosure, and access to customer proprietary network information to commercial speech review).

67 Such controls, in other words, potentially compromise democratic competence. See supra note 35.

evidently that “[w]hat tour guides do is talk for a living.... They’re just like stand-up comedians, journalists or novelists. And in this country, you don’t need a license from the government to be able to talk.”

The premise of Sherman’s approach is essentially that speech qua speech, wherever it occurs, is subject to the full panoply of ordinary First Amendment protections. By “speech,” Sherman apparently means communication through human language, which is why he strongly believes that licensing professional tour guides “should be treated just like any other content-defined category of speech.” Sherman argues that “[b]ecause occupational speech is speech, not conduct, ordinary First Amendment principles counsel that the content-based regulation of occupational speech is subject to strict scrutiny.”

The weakness of Sherman’s analysis is its failure to ask why we have a rule against content discrimination in the first place. Sherman has no account of why “ordinary First Amendment principles” assume the form that they do. In fact, First Amendment principles

69 Blinder, supra note 68 (quoting Robert Johnson, the Institute for Justice attorney behind the suit); see also Press Release, Inst. for Justice, U.S. Supreme Court Declines to Hear Tour-Guide Lawsuit (Feb. 23, 2015), http://www.ij.org/nola-tours-release-2-23-15 [http://perma.cc/AKS7-AM4F] (“Tour guides are storytellers,” explained Robert Everett Johnson, lead attorney in the Savannah case. ‘And in this country, you don’t need a license to tell a story.’); id. (“The government has no more business protecting the public from unlicensed tour guides than it does protecting the public from unfunny stand-up comedians,’ said Matt Miller, managing attorney for the Institute for Justice Texas Office.”).

70 Hence Sherman praises “the First Amendment’s uncompromising text, which contains no exemptions for commercial speech or occupational speech (or even lower-value speech like depictions of animal cruelty, violent video games, or lies about receiving military honors).” Sherman, supra note 26, at 200–01.

71 Or perhaps Sherman means to employ a slightly more expansive definition of “speech” equivalent to what the Court has called the Spence test. See Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam) (finding speech protection to apply when there was “[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it”). For a critique of the Spence test, see Post, supra note 59, at 1250–60.

72 Sherman, supra note 26, at 192.

73 Id. at 191.
prohibit content discrimination in public discourse because every person has an equal right to participate in the formation of public opinion, regardless of what they have to say. The harsh rule against content discrimination expresses the fundamental equality of democratic citizenship. But equality of democratic citizenship has little application to occupational speech, which by definition lies outside of public discourse.

Doctors cannot claim a right of political equality to give whatever opinion they choose to their patients, regardless of whether it is misleading or incompetent. If doctors can assert First Amendment rights to protect their speech to patients in the course of professional practice, it is because of the information that they convey to patients. That is why the state may require doctors to convey accurate and reliable information, which is the point of ordinary medical malpractice law. The state cannot require persons to convey accurate and reliable information in the context of public discourse, but it can and should in the context of occupational speech.

If Sherman believes that the “ordinary” rule against content discrimination should apply to occupational speech, he must also believe that every lawyer is entitled to say what she pleases to her client, regardless of professional standards and the rules of malpractice. Although Sherman may conclude that the state can in the end prohibit malpractice to protect clients from harm, his theory nevertheless requires him to affirm that courts should apply strict

74 See Post, supra note 38, at 66–68.

75 We doubt that Sherman’s distinction between ex post and ex ante regulations can bear the weight placed upon it. See Sherman, supra note 26, at 196. Does Sherman mean to imply that states cannot license medical doctors, or prosecute persons for practicing medicine without a license? Does he mean to imply that legislation prohibiting the unauthorized practice of law is inconsistent with the First Amendment? Requiring that lawyers and doctors receive licenses before practicing medicine or law is precisely ex ante. This is analogous to the context of commercial speech, where the Court has explicitly approved the enactment of prior restraints. See supra note 27.

76 See supra p. 171.
First Amendment scrutiny in *every* malpractice case.

The stakes in this debate are not, as Sherman politely puts it, “abstract” or “academic” questions of First Amendment theory. At issue is the distinction between the speech of those engaged in self-governance (public discourse) and the speech of those who are governed. Unless we can make a distinction of this kind, we cannot speak of democratic self-determination, because virtually all government regulations will, in one way or another, “burden” speech, if by speech we mean the use of human language.

Virtually everything humans do requires the use of language. Tour guides communicate no more conspicuously than do lawyers, doctors, accountants, or anyone who files tax forms, drafts corporate contracts, or sells or advertises commercial products. Taken to its logical conclusion, extending First Amendment scrutiny to every marketplace speech act would create a First Amendment question every time a lawyer is sued for malpractice for an incompetent opinion; every time a product manufacturer is sued in strict liability for an inadequate warning; every time a commercial lease is legally required to contain certain specific terms; every time a particular contract is deemed criminal under the antitrust laws.

If speech is understood to mean human communication, it is literally everywhere. If the regulation of every speech act is a constitutional question, we must hand over our government to what Justice Scalia trenchantly calls a “black-robed supremacy.” We must abandon the possibility of meaningful self-determination and turn back our democracy to the juristocracy that controlled society in the days of *Lochner*.

Sherman seems to believe that we are compelled to accept this future because of the

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77 Sherman, *supra* note 26, at 200.

78 *Id.* at 189.

Court’s recent decision in *Holder v. Humanitarian Law Project*. We should remark at the outset that *Humanitarian Law Project* is an extraordinarily obscure and perplexing decision. It says one thing, and it does another. It upholds speech restrictions primarily on the basis of deference to an Executive Branch affidavit. This is the very opposite of “strict scrutiny,” which, if it means anything at all, must require the state to meet a serious burden of persuasion.

Most importantly, *Humanitarian Law Project* goes out of its way to suggest that speech with the very same content, and potentially causing analogous harm to foreign affairs, could not be criminally punished were it to be communicated in a manner that is “independent” of a terrorist group rather than “in coordination with, or at the direction of, a foreign terrorist organization.” Although *Humanitarian Law Project* refuses to exercise independent judicial review of harm in the context of national security and foreign affairs, it would be shocking if the Court were to exercise similar deference in the context of truly independent speech. No

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80 130 S. Ct. 2705 (2010).

81 *Id.* at 2724–26. The Court announced that it would not “defer to the Government’s reading of the First Amendment,” *id.* at 2727, but then promptly gave “significant weight” — which for all practical purposes meant determinative weight — to the “judgment of Congress and the Executive that providing material support to a designated foreign terrorist organization . . . bolsters the terrorist activities of that organization,” *id.* at 2728.

82 Sherman, supra note 26, at 190 n.47 (referencing the description, in McCullen v. Coakley, 134 S. Ct. 2518, 2530 (2014), of Humanitarian Law Project as strict scrutiny). If all Sherman means to claim by way of constitutional protection for occupational speech is that such speech can be criminally prohibited on the basis of a statute and an executive affidavit affirming the government’s belief that the statute deters some harm, the stakes in his claim seem rather small.


84 130 S. Ct. at 2722. There is a striking analogy to the distinction that the Court made almost forty years ago in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), in which the Court sharply distinguished independent political speech from political speech “controlled by or coordinated with [a] candidate and his campaign . . . .” *Id.* at 46. The Court classified the latter as “contributions.” It explicitly concluded that the First Amendment more highly valued independent speech than speech coordinated with a candidate. See *id.* at 44. *Humanitarian Law Project* seems the inverse of *Buckley*: it imagines that speech “in coordination with, or at the direction of, a foreign terrorist organization” is equivalent to the contribution of a fungible sum of money to the group, and in that way an addition to the group’s resources.
court would allow speakers to be thrown in jail merely for publishing independent pamphlets supporting Hamas, even if Hamas were a designated foreign terrorist organization, and even if the “political branches” were adamant that speech supportive of Hamas provided the effective equivalent of material support for Hamas.

If this analysis is correct, Humanitarian Law Project turns essentially on the contrast between independent speech and speech “in coordination with, or at the direction of, a foreign terrorist organization.” What is the constitutional relevance of this distinction? It must be that Humanitarian Law Project imagines the former as public discourse and the latter as more closely analogous to the “occupational” speech that Sherman is concerned to defend. Whatever its self-proclaimed level of scrutiny, Humanitarian Law Project is inconsistent with the far more forceful constitutional protections that courts normally apply to public discourse.

Contrary to Sherman’s characterizations, therefore, Humanitarian Law Project actually

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85 Humanitarian Law Project, 130 S. Ct. at 2728.


87 See supra note 84. In our discussion we bracket the consistency of this distinction with the Court’s prior First Amendment freedom of association jurisprudence. One of us has previously argued that the reasoning of Humanitarian Law Project is incompatible with the Court’s precedents. See Shanor, supra note 83, at 524–28; accord Humanitarian Law Project, 130 S. Ct. at 2732–33, 2736–38 (Breyer, J., dissenting) (asserting inconsistency).

88 Consider also that Humanitarian Law Project explicitly withheld judgment about whether the statute at issue could constitutionally be applied to a domestic organization. 130 S. Ct. at 2730; accord Al Haramain Islamic Found., Inc. v. U.S. Dept of Treasury, 686 F.3d 965, 1000–01 (9th Cir. 2012) (declining to extend Humanitarian Law Project to speech coordinated with a designated domestic terrorist group). It is unclear what constitutional reasoning might support the distinction between domestic and foreign organizations. The only explanation we can conceive is that the Court believes that constitutional protections ought to apply differently to those who participate in domestic public discourse. Although many questions might be raised about how such logic can be maintained in an increasingly globalized world, it nevertheless emphasizes the close connection drawn by the Court between the strength of First Amendment rights and democratic self-government. See Bluman v. FEC, 800 F. Supp. 2d 281 (D.D.C. 2011), aff’d mem. 132 S. Ct. 1087 (2012). This connection may help to explain how Humanitarian Law Project may be reconciled with the many cases upholding rights of speech and association with regard to domestic terrorist groups such as the Communist Party. See, e.g., United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); Elfrandt v. Russell, 384 U.S. 11 (1966); Scales v. United States, 367 U.S. 203 (1961); De Jonge v. Oregon, 299 U.S. 353 (1937); see also Humanitarian Law Project, 130 S. Ct. at 2732–33, 2736–38 (Breyer, J., dissenting) (asserting inconsistency between the majority opinion and the Communist Party cases).
reinscribes the very distinction between public discourse and other forms of speech that we have insisted is so fundamental to the architecture of First Amendment doctrine.\(^8^9\)

It is frankly difficult to imagine a world without this distinction. What Sherman calls “ordinary” First Amendment doctrine creates a public space in which every person is entitled to his or her opinion. This is a space of political equality. But does anyone desire professional relationships to be constructed on this model? Does anyone believe that every Enron accountant is entitled to his or her opinion, regardless of generally accepted accounting practices? Does anyone believe that the world would be better if professionals were trustworthy only insofar as they were led to be so by market incentives? Justice White was seeking to avoid these consequences by his concurrence in \textit{Lowe v. SEC},\(^9^0\) which is why his opinion has been so influential. But we are pointed precisely to this dystopia by Sherman’s repudiation of \textit{Lowe} and by the libertarian reasoning advanced in a decision like \textit{Edwards}.

Our point, and it is fundamental, is that First Amendment doctrine is plural. There is no single structure of First Amendment doctrine. The principles that protect public discourse do not apply to commercial speech, or to professional speech, or to the speech of professional tour guides. Different kinds of speech embody different constitutional values, and each kind of speech should receive constitutional protections appropriate to the value it embodies. Because speech is everywhere, Sherman’s procrustean aspiration to subject all speech to a single set of rules can lead only to doctrinal chaos. Worse, it threatens to revive the long-lost world of \textit{Lochner} and destroy the very democratic governance the First Amendment is designed to protect.

\(^8^9\) We do not argue, as Sherman mistakenly contends, that “the justices don’t believe what they said” in \textit{Humanitarian Law Project}. Sherman, \textit{supra} note 26, at 194. Our conclusion is rather that the case simply does not mean what Sherman hopes it does.

III.
First Amendment Coverage

INTRODUCTION

The First Amendment extends to the “freedom of speech.”¹ But what is the scope of that right? Most First Amendment jurisprudence and scholarship has focused on the justification for a free speech principle and the level of constitutional protection—essentially, strength of scrutiny—that should apply in various contexts within the First Amendment’s borders. Largely ignored is the often-dispositive threshold question of whether and why the First Amendment applies at all. The animating premise of much First Amendment theory and case law is that some things are speech, which fall within the First Amendment’s ambit, and others are conduct, and so fall outside it. But the reach of the First Amendment, which is often termed First Amendment coverage, is in fact not so self-evident. Take two examples.

Jeffery K. Skilling, the former chief executive officer of the Enron Corporation, was convicted of conspiracy, securities fraud, making false representations to auditors, and insider trading after Enron spiraled into bankruptcy.² Several of those crimes turned on elements of communication, and specifically the harms that Skilling’s messages (or his failure to divulge) had on others: Skilling lied to shareholders and auditors about Enron’s fiscal health and financial dealings, he and his co-conspirators agreed to engage in fraud, and he asked his broker to sell his Enron stock based on non-public information.³ Skilling was represented by

¹ See United States v. Skilling, 638 F.3d 480, 481 (5th Cir. 2011). Skilling’s indictment included several objects of conspiracy, including securities fraud and honest-services fraud. Id. The jury returned a general verdict of guilty on the conspiracy charge, but did not specify the object(s). Id. On appeal, the Supreme Court narrowed the scope of honest-services fraud and invalidated the government’s honest-services theory, but did not reverse Skilling’s conspiracy conviction. Id. On remand, the Fifth Circuit upheld the conspiracy conviction. Id.


some of the nation’s leading appellate counsel—including Sri Srinivasan, who went on to become a judge on the United States Court of Appeals for the District of Columbia—and Skilling’s case was heard by the United States Supreme Court. But at no stage did he defend himself on the grounds that the First Amendment protected his right to say, or not say, what he did.

By something of a contrast, there is the case of Theresa Harris. Harris served as a manager at Forklift Systems, an equipment rental company. She alleged that Charles Hardy, Forklift’s president, regularly insulted and harassed her because of her gender, calling her “a dumb ass woman,” suggesting in front of other employees that the two of them “go to the Holiday Inn to negotiate [her] raise,” and asking her to retrieve coins from his front pants pockets and pick up objects he had thrown on the ground. Harris filed a Title VII suit, alleging that this constituted a hostile work environment. Forklift defended itself to the Supreme Court, including on First Amendment grounds. It argued that Title VII could not constitutionally “punish speech merely because a plaintiff found the speech offensive” and that the courts could “avoid a direct conflict with the First Amendment only by ensuring that Title VII regulates employment practices and not, as petitioner proposes, merely offensive

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7 Id.

8 Brief for Respondent at 31, Forklift, 510 U.S. 17 (No. 92-1168).
speech.” But despite briefing and argument, the Supreme Court ruled against Forklift without saying even a word on the First Amendment challenge. 

The examples of Skilling and Harris, which demonstrate the often counter-intuitive nature of the First Amendment’s borders, are far from unique. Many activities that are colloquially considered “speech” are not subject to constitutional challenge, let alone review or decision: the regulation of contracts, commercial and securities fraud, perjury, conspiracy and solicitation, workplace harassment, the compelled speech of tax returns, and large swaths of the administrative state, including antitrust, securities, and pharmaceutical regulation, to name just a few. By contrast, significant amounts of activity we might colloquially call conduct (or at least not “speech”)—from paintings and music to flag displays, cross burning, and arm-band wearing—are constitutionally protected, and their regulation prompts swift constitutional challenge. As Frederick Schauer observed, to imagine “[t]hat the boundaries of the First Amendment are delineated by the ordinary language meaning of the word ‘speech’ is simply implausible.”

9 Id. at 33.

10 Forklift, 510 U.S. at 23; see also Richard H. Fallon, Jr., Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn’t Bark, 1994 SUP. CT. REV. 1 (analyzing the Court’s decision not to address the First Amendment issue in Forklift).

11 See, e.g., KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 6–7, 41–76 (1992) (listing crimes that involve communications that generally do not generate First Amendment attention, including conspiracy, bribery and perjury, and describing categories of activities generally beyond the First Amendment’s ambit, including agreements, offers, and threats); Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 HARV. L. REV. 1765 (2004) (describing the way in which many activities that are colloquially considered speech remain untouched by the First Amendment, including antitrust and securities regulation, criminal solicitation, and most of evidence law); Mark Tushnet, The Coverage/Protection Distinction in the Law of Freedom of Speech—An Essay on Meta-Doctrine in Constitutional Law, 25 WM. & MARY BILL RTS. J. 1073, 1074 (2016) (observing that “[s]imilar examples pervade the law”).


13 Schauer, supra note 11, at 1773; see also Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 VAND. L. REV. 265, 267–82 (1981) (exploring the concept of First Amendment coverage, including its incongruence with the concept of speech in ordinary language).
This Article is concerned with understanding why the regulation of some activities is considered salient to the First Amendment and within its boundaries, while the regulation of others is not. How are the First Amendment’s boundaries set and how should courts set them?

To get purchase on these questions, it is important to recognize that the boundaries of the First Amendment are dynamic, not static. Commercial speech and even motion pictures, for example, were for decades explicitly excluded from any First Amendment review and have only more recently been extended constitutional coverage. This dynamism extends not just to what sorts of social practices courts recognize as implicating legitimate First Amendment claims, but to the sorts of cases that plaintiffs think relevant enough to the Constitution to bring in the first place. Perhaps the inapplicability of the First Amendment was so obvious in the Skilling case that his attorneys did not even raise a claim.

The First Amendment’s borders are now in a period of great transformation—largely expansion, and rapid, at that. Plaintiffs increasingly marshal the right of free speech to limit governmental power in domains from public health regulation, to pricing and minimum wage laws, to executive action in foreign affairs, to the government’s request that Apple unlock iPhones. These claims include types of activities that a generation ago would not have prompted a lawyer or court to identify any First Amendment concern. Business licenses, for

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14 See Mut. Film Corp. v. Indus. Comm’n, 236 U.S. 230 (1915) (explicitly excluding motion pictures from the protection of the First Amendment).

15 See Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (overruling Mutual Film Corp. and extending First Amendment protection to motion pictures).

16 This transformation is not wholly unidirectional. See infra Part I. National security concerns for instance are placing inward pressure on the First Amendment, particularly in the context of criminal law.

17 This Article to a more limited extent addresses the scope of the right of association, though I believe it operates, both positively and prescriptively, in much the same way.

18 See infra notes 35, 37–42 and related text (collecting cases); see also Schauer, supra note 12 (documenting the outward pressure on the First Amendment’s borders of coverage and offering possible explanations for this phenomenon).
instance, were not the fodder of free speech claims even two decades ago. Nor were warning labels and consumer disclosures—such as nutrition and cigarette labeling. Both are now the subject of some of the most pitched constitutional battles and circuit splits. More parts of social and economic life are, in short, now subject to First Amendment challenge.

This outward pressure on the First Amendment’s boundaries, coupled with the profound deregulatory potential of the strict scrutiny with which free speech claims are customarily reviewed (in contrast to the rational basis review generally provided to regulations outside its scope), have made the question of First Amendment coverage and its limits more important. And, as the First Amendment has become the key battleground for challenging the powers of the modern administrative state, the question of the First Amendment’s reach has become more pressing.

But despite this dynamism and the importance of whether the First Amendment applies in a given case to its ultimate outcome and the distribution of powers, it is well recognized that neither courts nor scholars have articulated a coherent theory of the First Amendment’s boundaries. Instead, courts and commentators alike have generally treated the question of whether an activity is “speech” salient to the First Amendment as obvious or natural, often based on no explicit argument or criteria. And the Supreme Court’s test for First Amendment

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19 See Amanda Shanor, The New Lochner, 2016 Wis. L. Rev. 133, 176–82 (arguing that the First Amendment has great deregulatory potential); see also Robert Post & Amanda Shanor, Adam Smith’s First Amendment, 128 Harv. L. Rev. F. 165, 167 (2015) (“It is no exaggeration to observe that the First Amendment has become a powerful engine of constitutional deregulation.”).

20 See, e.g., Schauer, supra note 13 (exploring First Amendment coverage); Frederick Schauer, On the Distinction Between Speech and Action, 65 Emory L.J. 427, 429 (2015) (arguing that scholars “have avoided confronting the important foundational issues about freedom of speech”); Schauer, supra note 11, at 1767–68; see also Robert Post, Recuperating First Amendment Doctrine, 47 Stan. L. Rev. 1249, 1250–60 (1995) (discussing the origins and deficiencies of the Spencer test). This is not to suggest that there has not been sustained scholarly attention on the question of coverage, which I address in Part I.

21 Schauer, supra note 11, at 1766; see also Fallon, supra note 10, at 13 (noting that courts generally treat it as self-evident that the First Amendment does not protect certain speech acts).
coverage, articulated in *Spence v. Washington*, has been analytically undone, even if not fully rejected by the courts. There is, in short, no dominant understanding of the scope of the First Amendment; instead there is still largely “disarray.”

This Article responds to that gap. It articulates a positive and sociologically-grounded account of the current state of the First Amendment’s borders and identifies the central pressures on those borders at work today. I locate an answer to why the regulation of some activities faces First Amendment scrutiny, while other regulation does not, in the social dynamics and social context of those activities. Coverage depends, I argue, on whether the social norms surrounding an activity are sufficiently cohesive to make the ways that the activity “works” self-evident.

This Article additionally supplies a prescriptive theory of how courts should approach the ever more prevalent questions about the First Amendment’s reach. I argue that a single test for what qualifies as “speech” is unlikely to be either feasible or normatively desirable. Instead, at the boundaries of the First Amendment, courts must explicitly analyze the social context of the activity in question, as well as the normative and institutional implications of altering the scope of free speech coverage. First Amendment coverage protects a space of pluralism—a domain in which the effects of expressive activity are uncertain and norms vary and can be contested, potentially in favor of social and political change. Uncovered spaces, by contrast, are those in which we have or need other forms of ordered, normed life.

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23 See Schauer, supra note 20, at 427 (“Does the First Amendment rest on a mistake? More specifically, is the First Amendment’s necessary distinction between speech and action fundamentally unsustainable?”). Compare Post, supra note 20, at 1250–60 (demonstrating the incoherence of the *Spence* test), with Cressman v. Thompson, 798 F.3d 938 (10th Cir. 2015) (applying *Spence*).

24 Post, supra note 20, at 1249.
The Article proceeds in four parts. Part I details the importance of First Amendment coverage. It demonstrates that the current central pressures on the First Amendment’s borders include the outward pressure of litigants seeking to leverage the First Amendment as a deregulatory tool, and so to assert its applicability in more contexts, as well as inward pressure largely from threats to national security, which have prompted the government to assert that the First Amendment does not apply in contexts in which it previously has. Part II provides a positive description of the scope of the First Amendment and its development and analysis in both case law and scholarship. Part III presents a prescriptive argument about how courts should approach ever more prevalent First Amendment coverage issues.

Part IV considers the implications of current First Amendment coverage questions arising in the conflict between free speech and economic regulation. It argues that the stakes of the scope of the First Amendment, however, transcend even those critical social and political questions. In setting the boundaries of the First Amendment we are required to ask: Do we need types of social interactions and relationships other than pluralistic contestation? Do we need cohesive social norms? I argue that we need both, and that the reason why the First Amendment has not, and should not, extend even to all forms of “speech” is because of that underlying sociological fact. The boundaries of the First Amendment track not only the space of pluralistic contestation, but also the expectation, and desire, for social cohesion—the drive for, in the words of Robert Cover, a “nomos.”

25 Robert Cover famously wrote that we inhabit a nomos, or normative universe, in which we “create and maintain a world of right and wrong, of lawful and unlawful, of valid and void.” Robert M. Cover, Foreword: Nomos and Narrative, 97 HARV. L. REV. 4, 4 (1983). He argued that a nomos—which includes principles of justice and the formal institutions of the law—cannot exist apart from the narrative that give it meaning; a nomos is held together by the force of interpretive commitments and interpretive communities. Id. at 4–8.
I

THE IMPORTANCE OF FIRST AMENDMENT COVERAGE

The First Amendment prohibits the abridgement of the “freedom of speech,” but it nowhere defines the “speech” that falls within that protection, as opposed to the range of activity (often termed conduct) that falls outside it. Nor does it clarify what relationship “the freedom of speech” has to “speech,” coextensive or otherwise. Against that open-ended text, First Amendment coverage denotes the scope of activities that litigants and judges consider proper targets of constitutional litigation and review. Coverage is a sociological concept: It is not the theoretical or philosophical scope of the right of free speech, but what litigants and courts in a given historical moment view as within, or plausibly within, the scope of that right.

It is the range of activities whose regulation strikes legal actors at the constitutional moment.

We might at first blush think that the First Amendment covers the set of activities that are sufficiently expressive, or speech-like, that their regulation is thought to be of constitutional concern. As Part II explores in greater depth, the speech-conduct distinction does not explain the First Amendment’s current boundaries, as prominent scholars have observed. Nor does the Supreme Court’s coverage test, articulated in *Spence v. Washington*

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26 U.S. CONST. amend. I.

27 See, e.g., Schauer, supra note 11.

28 418 U.S. 405, 409–11 (1974) (per curiam) (concluding that a flag display “was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments” because “[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it”); see also Texas v. Johnson, 491 U.S. 397, 404 (1989) (“In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether ‘[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.’” (quoting *Spence*, 418 U.S. at 410–11)). But see Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995) (“[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.” (quoting *Spence*, 418 U.S. at 411)).
and since reiterated, as Robert Post has argued.\textsuperscript{29} Much that we might colloquially consider “speech” has traditionally not been covered by the First Amendment at all. This includes the language in contracts and tax returns, commercial fraud, workplace harassment, and securities transactions—all of which are speech in any normal sense, but the regulation of none of which have historically been the subject of First Amendment suit or review.\textsuperscript{30} And by contrast, a range of conduct, cultural objects, and symbolic expressions, including paintings, music, flag waving and flag burning, have long been covered and protected by the First Amendment.\textsuperscript{31}

Part II will take up what in fact explains First Amendment coverage, if the speech-conduct distinction and \textit{Spence}'s test do not. The important point for current purposes is that the First Amendment covers a range of activity, some of which most Americans would likely describe as “speech” and some perhaps as “conduct,” that litigants and/or judges find salient to the Constitution.\textsuperscript{32}

The boundaries of the First Amendment—the leading edge of coverage—have, moreover, changed significantly over time. The Supreme Court expressly excluded motion pictures, for instance, from the First Amendment’s coverage in 1915.\textsuperscript{33} “Are moving pictures within the [free speech] principle, as it is contended they are?” the Court asked.\textsuperscript{34} “They,

\begin{itemize}
  \item \textsuperscript{29} See Post, \textit{supra} note 20, at 1252 (“The \textit{Spence} test thus appears to have enjoyed the normal life of a relatively minor First Amendment doctrine. What is curious, however, is that the doctrine is transparently and manifestly false. The test cannot plausibly be said to express a sufficient condition for bringing ‘the First Amendment into play.’” (quoting \textit{Johnson}, 491 U.S. at 404)).
  \item \textsuperscript{30} See, e.g., Schauer, \textit{supra} note 11, at 1766 (collecting examples of types of speech that do not generally generate First Amendment attention); Tushnet, \textit{supra} note 11, at 1077–83, 1086 (same).
  \item \textsuperscript{32} See Schauer, \textit{supra} note 11, at 1767–68 (articulating the concept of constitutional salience).
  \item \textsuperscript{33} See Mut. Film \textit{Corp. v. Indus. Comm’n of Ohio, 236 U.S. 230, 241–45 (1915).}
  \item \textsuperscript{34} \textit{Id.} at 243.
\end{itemize}
indeed, may be mediums of thought, but so are many things. So is the theatre, the circus, and all other shows and spectacles . . . .”35 In the Court’s view, “the exhibition of moving pictures [was] a business pure and simple, originated and conducted for profit, like other spectacles.”36 Whatever the scope of the right of free speech, motion pictures were not within its ambit in 1915. They were simple business practice. That changed nearly four decades later when the Court in 1952 expanded the First Amendment to cover movies.37 Commercial speech was likewise once explicitly excluded from First Amendment coverage altogether, but was several decades later swept within the First Amendment’s ambit.38 The scope of the First Amendment is dynamic, not static.

To understand the importance of coverage and its dynamism, it is also helpful to distinguish coverage from protection. Protection means the level of scrutiny applied to a given type of activity that falls within the First Amendment’s borders, such as denouncing Obamacare or Donald Trump on a street corner (protected as political expression, generally under principles of strict scrutiny) or advertising Coca-Cola (protected under the commercial speech’s slightly more relaxed review). Protection encompasses the question of which sub-doctrine applies—and what features that sub-doctrine should maintain—which largely

35 Id.

36 Id. at 244.

37 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952); see also United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948) (“We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.”).

depends on the constitutional value of the speech in question, meaning the reason the Constitution protects that activity in the first instance.\textsuperscript{39}

First Amendment case law and scholarship have long debated the level of constitutional protection that should apply to different types of covered speech. A debate currently rages, for instance, over whether commercial speech should be subject to the same, or a more similar, level of protection as political speech instead of the more relaxed review it has traditionally enjoyed.\textsuperscript{40} And theorists have offered famous justifications for the freedom of speech, including notably ones centering on autonomy or individual self-fulfillment, the marketplace of ideas, governance or deliberative democracy, and democratic culture.\textsuperscript{41}

\textsuperscript{39} For example, since the Supreme Court first drew commercial speech within the First Amendment’s scope, the reason it has been protected is because of the information it provides to listening consumers. As \textit{Virginia State Board of Pharmacy} teaches, society “may have a strong interest in the free flow of commercial information.” 425 U.S. at 764. The Court reasoned:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal. Id. at 765 (citations omitted); \textit{see, e.g.,} Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) (observing that “the extension of First Amendment protection to commercial speech is justified principally by the value to customers of the information such speech provides”); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, 447 U.S. 557, 563 (1980) (emphasizing the “informational function of advertising”). Commercial speech is protected because of its value to consuming listeners. By contrast, political speech, which lies at the heart of the First Amendment, is protected primarily as an autonomy right—due to its value to its speaker. \textit{See, e.g.,} Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573–74 (1995) (noting, apart from the commercial speech context, the “general rule, that the speaker has the right to tailor the speech, [which] applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid” (first citing McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 341–42 (1995); and then citing Riley v. Nat’l Fed’n of Blind of N.C., Inc., 487 U.S. 781, 797–98 (1988))); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

\textsuperscript{40} Compare, \textit{e.g.}, Am. Meat Inst. v. USDA, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc) (holding that government interests other than correcting potential deception could justify mandated disclosure of purely factual information in the commercial context), \textit{with} R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1222 (D.C. Cir. 2012) (holding that attempts by the government to compel commercial speech should be subject to strict scrutiny), \textit{overruled in part by} Am. Meat Inst., 760 F.3d at 22–23.

\textsuperscript{41} \textit{See, e.g.,} C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 6–24 (1989) (explaining the “Classic Marketplace of Ideas Theory” of the freedom of speech); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–8 (1970) (outlining four main premises on which the freedom of expression rests);
But as Frederick Schauer has most prominently observed, First Amendment coverage has been notoriously resistant to theorization:

Yet however hard we try to theorize about the First Amendment's boundaries, and however successful such theorizing might be as a normative enterprise, efforts at anything close to an explanation of the existing terrain of coverage and noncoverage are unavailing. Prescriptive theories abound, but descriptive or explanatory accounts of the existing coverage of the First Amendment are noticeably unsatisfactory. . . . [I]f there exists a single theory that can explain the First Amendment’s coverage, it has not yet been found.42

Instead, the question of whether the First Amendment applies at all, while “often far more consequential than are the issues surrounding the strength of protection . . . is rarely addressed, and the answer is too often simply assumed.”43 This in itself is significant. But the First Amendment’s coverage is currently in a period of transformation,44 making the need of a theory of the scope of free speech and its limits more pressing.

42 Schauer, supra note 11, at 1784–86; see id. at 1787 (“To put it differently, existing normative theories seem of little relevance to achieving a descriptive understanding of how the First Amendment came to look the way it does and of how it came to include what it includes and exclude what it excludes.” (footnote omitted)); see also Leslie Kendrick, First Amendment Expansionism, 56 WM. & MARY L. REV. 1199, 1218 (2015) (highlighting the difficulties in advancing a unifying theory of freedom of speech).

43 Schauer, supra note 11, at 1767; see also Post, supra note 20, at 1271 (“Contemporary First Amendment doctrine displays an image of the world in which something that can be called ‘speech’ is made salient as a generic object of First Amendment protection.”).

Due to changes in modern administration and the information economy, as well as the efforts of a sophisticated business-led social movement, the First Amendment has emerged as a potent limit to state power and democratic decisionmaking. Part of that phenomenon is that plaintiffs are seeking to expand the coverage of the First Amendment in hopes of shrinking or altering the scope of the administrative state by bringing claims about the regulation of types of activities that historically no one found salient to the First Amendment.

45 See Shanor, supra note 19, at 138–82 (arguing this point generally); see also Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053, 1068–72 (2016) (outlining three ways that freedom of speech legitimates state power); Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1496–97 (2014) (arguing that courts look to protect speech that is functional so as to “limit coverage in a way that reserves the power of the state to regulate the functional aspects of the communication process, while protecting its expressive aspects”).

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at all—from labels and disclosures to the regulation of offers, pricing, and professional practices, to minimum wage laws, among others. Indeed, the prominent Supreme Court advocate, Floyd Abrams, has argued that the constitutionality of securities regulations and the Federal Communications Act require a second look following the Supreme Court’s decision in *Reed v. Town of Gilbert*. Perhaps were Jeffery Skilling’s case brought today, he would bring a First Amendment challenge. Will future defendants begin to do so? Will they be successful?

These growing pressures on the First Amendment’s boundaries are part of larger changes occurring in free speech jurisprudence, and commercial speech case law in particular. As I have written elsewhere, those changes have the potential to remake modern administration,

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48 See *Nordyke v. Santa Clara County*, 110 F.3d 707 (9th Cir. 1997) (offer to sell firearms or ammunition).

49 See *Expressions Hair Design*, 137 S. Ct. at 1146–47 (regulation of credit card swipe fees).

50 See, e.g., *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014) (mandated physician disclosure for women seeking abortions); *Planned Parenthood v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc) (same).

51 See *Int’l Franchise Ass’n v. City of Seattle*, 803 F.3d 389 (9th Cir. 2015).


54 Federal bribery and honest services fraud defendants in Arizona have in fact recently made this defense. See *Joint Motion to Dismiss Based on First Amendment Grounds*, United States v. Norton, No. CR-17-00713-PHX-JJT (D. Ariz. March 26, 2018), ECF No. 112.

Courts have reacted to the growing number of free speech claims by categorizing some challenged regulations as not infringing “speech”—and so beyond the First Amendment’s ambit. The Ninth Circuit recently rejected a free speech challenge to Seattle’s minimum wage ordinance, concluding that it was “an economic regulation that does not target speech or
expressive conduct.”  

And the Fifth Circuit, diverging from the D.C. Circuit, suggested that a business license scheme for tour guides that regulated economic activity should not be subject to First Amendment review in the first place—while holding that even if it were, it would survive intermediate scrutiny.  

Last term, the Supreme Court heard Expressions Hair Design v. Schneiderman to resolve a circuit split over whether state statutes that prohibit retailers from charging customers a surcharge for using credit cards regulate “speech” for First Amendment purposes. The Second Circuit, like the Fifth Circuit but diverging from both the Eleventh Circuit and a district court in the Ninth Circuit, had concluded that New York’s credit card swipe fee law was beyond the First Amendment’s reach because “prices (though necessarily communicated through language) are not ‘speech’ within the meaning of the First Amendment.” After heated argument, the Court issued a narrow ruling, holding that the law in question did regulate speech, but the Court declined to articulate broader rules about how courts should

60 Int’l Franchise Ass’n v. City of Seattle, 803 F.3d 389, 408 (9th Cir. 2015).

61 Compare Kagan v. City of New Orleans, 753 F.3d 560, 561–62 (5th Cir. 2014) (stating that “New Orleans thrives, and depends, upon its visitors and tourists” and that tour guide licensing regulations “serve an important governmental purpose without affecting what people say,” belying “any claim to be made about speech being offended”), with Edwards v. District of Columbia, 755 F.3d 996, 1000 (D.C. Cir. 2014) (finding that tour guide licensing regulations “fail even under the more lenient standard of intermediate scrutiny”). As a point of comparison, the Sixth Circuit applied only rational basis review to a licensing statute held to be a valid business regulation. See Liberty Coins, LLC v. Goodman, 748 F.3d 682, 691–93 (6th Cir. 2014).


63 Expressions Hair Design v. Schneiderman, 808 F.3d 118, 131 (2d Cir. 2015), vacated, 137 S. Ct. 1144 (2017); see also Rowell v. Pettijohn, 816 F.3d 73, 80 (5th Cir. 2016) (holding law prohibiting credit card surcharges to be a regulation of conduct, and thus outside the First Amendment’s ambit), vacated, 137 S. Ct. 1431 (2017) (mem.). But see Dana’s R.R. Supply v. Att’y Gen., 807 F.3d 1235, 1251 (11th Cir. 2015) (similar law subject to First Amendment scrutiny and held unconstitutional); Italian Colors Rest. v. Harris, 99 F. Supp. 3d 1199, 1210 (E.D. Cal. 2015) (same), aff’d and modified, No. 15-15873, 2018 WL 266332 (9th Cir. Jan. 3, 2018).

64 At oral argument, Justice Breyer expressed concern about First Amendment Lochnerism. Transcript of Oral Argument at 22:20–23:6, Expressions Hair Design, 137 S. Ct. 1144 (No. 15-1391) (“It is a form of price regulation, and price regulation goes on all over the place in regulatory agencies. And so the word that I fear begins with an L and ends with an R; it’s called Lockner [sic]. . . . [I]f you want to know what’s worrying me, that’s it.”).
identify “speech” for constitutional purposes and remanded the case to the Court of Appeals
to analyze the law as a speech regulation in the first instance.\footnote{Expressions Hair Design, 137 S. Ct. at 1151.} Cases such as these suggest that
countervailing forces are pushing governments and courts to resist some outward pressure—
but they also underscore the uncertainty and flux about what constitutes “speech.”

The pressure on the First Amendment’s boundaries is not limited to attempts to whittle
the administrative state down in size, even if those claims are currently exerting a broad and
institutionally important force. As Frederick Schauer has argued, there is a more general
“outward pressure on the First Amendment’s boundaries of applicability,”\footnote{These cases resist outward pressure by arguing or concluding that the First Amendment does not apply
at all, as distinct from simply defending or ruling against the plaintiff on First Amendment grounds.} which he
attributes in part to what he terms “First Amendment opportunism,” meaning litigants’
gravitation to the First Amendment when little other authority is on point.\footnote{Schauer, supra note 12, at 1617; see also Schauer, supra note 11, at 1796–98 (discussing the “considerable
outward pressure on the boundaries of the First Amendment”).} Plaintiffs have
brought recent First Amendment challenges against things from the regulation of
panhandling\footnote{Frederick Schauer, First Amendment Opportunism, in ETERNALLY VIGILANT: FREE SPEECH IN THE
MODERN ERA 176, 191–92 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).} to the government’s demand that Apple write code to unlock the iPhone of one
of the San Bernardino shooters—\footnote{See, e.g., Norton v. City of Springfield, 806 F.3d 411 (7th Cir. 2015).}—with courts often accepting the Amendment’s applicability.
Free speech challenges have been mounted against public accommodations and anti-
discrimination laws around the country.\footnote{Apple Inc.’s Motion, supra note 44, at 32–34 (arguing that it would violate the First Amendment for
the government to be able to compel Apple to create code); see also Eric Lichtblau & Katie[nmiok] Benner, U.S.
Presses Bid to Force Apple to Unlock iPhone in New York, N.Y. TIMES (Apr. 8, 2016),
york.html (documenting similar case in New York).} The Supreme Court heard argument this term, for

\footnote{The California Supreme Court, for example, recently considered a public university’s argument that a
state anti-strategic lawsuit against public participation (SLAPP) law required the dismissal, on free expression
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example, on whether the Constitution protects a cake baker from punishment under a public accommodations law because he refused to bake a cake for a gay couple—including on the basis that baking a cake is protected expression.\textsuperscript{72} And scholars have recently argued that activities and products ranging from data to instrumental music to illegal migration should be treated as First Amendment speech.\textsuperscript{73}

At the same time, other forces are placing inward pressure on the First Amendment's boundaries—namely, to exclude from its coverage certain forms of activity and expression that are of national security concern.\textsuperscript{74} The conflict underlying the Supreme Court's first

\textsuperscript{72} See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017). I am honored to have been part of the ACLU team that litigated Masterpiece Cakeshop on behalf of the gay couple, Dave Mullins and Charlie Craig, before the Supreme Court.


\textsuperscript{74} Frederick Schauer has previously argued that there is a “relative absence of interest groups urging the constriction rather than the expansion of the First Amendment.” Schauer, \textit{supra} note 11, at 1796 n.154. By his lights, “no . . . force pushes out those issues that had previously been inside” the First Amendment—so as to \textit{constrict} its reach—in a manner “equivalent” to the forces pushing outward on the scope of coverage. \textit{Id.} at 1796. The national security cases of today present a counter example, suggesting that Schauer’s conclusion may not hold. Before those cases, prominent advocates (including most notably Catharine MacKinnon) strongly—if ultimately unsuccessfully—argued that both pornography and hate speech should be excluded from First Amendment coverage. See \textit{infra} notes 151–164 and related text. \textit{But cf.} Jane R. Bambauer & Derek E. Bambauer, \textit{Information Libertarianism}, 105 CALIF. L. REV. 335, 354 (2017) (“Since changes in free speech coverage operate as a one-way ratchet—always expanding, never contracting—expansion has profound long-term consequences,” (footnote omitted)); Toni M. Massaro, \textit{Tread on Me}, 17 U. PA. J. CONST. L. 365, 382 & n.60 (2014) (stating that “the constitutional ratchet arguably works upward only” but noting possible caveats including the weakening of protection for public employee speech).
decision to address the rights of speech and association in the context of the war on terror since the attacks of September 11, 2001, *Holder v. Humanitarian Law Project*, offers a prominent example. That case involved a challenge to the federal statute that makes it a crime, punishable by fifteen years in prison, to provide “material support” to any entity the U.S. Secretary of State has designated as a foreign terrorist organization. The case involved a retired Administrative Law Judge and a California-based NGO that conducted trainings in nonviolent dispute resolution and the use of international human rights mechanisms and wished to advocate for human rights both to and with the Kurdistan Workers’ Party, an organization on the Secretary’s list.

The Solicitor General, Elena Kagan, argued that advice provided to a designated terrorist organization to pursue nonviolent political action constituted “conduct, not speech.” She reasoned that the statute was merely a “prohibition on conduct,” namely, “the act of giving material support to terrorists—regardless whether accomplished through words.” While the United States did not explicitly argue that the First Amendment didn’t apply at all to a ban on material support that “takes the form of words,” it analogized the statute to the regulation of other “speech” wholly outside of the First Amendment, such as “[c]onspiracy . . . fraud, bribery, and extortion.” While the Supreme Court rejected the assertion that the statute regulated only conduct, it deferred so sharply to the government on the factual question of

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75 561 U.S. 1 (2010). I was honored to be a part of the team with David Cole that litigated *Humanitarian Law Project* before the U.S. Supreme Court.


77 561 U.S. at 26.


79 Id. at 47.

80 Id. at 46.
whether the plaintiffs’ speech in fact furthered terrorism\textsuperscript{81} that the opinion had a similar effect as if the Court had excluded the case from First Amendment review altogether.

More recently, the Department of Justice has brought material support charges against alleged terrorist supporters in multiple circuits, on the grounds that a variety of what we might colloquially term “speech” acts are proscribable “conduct” coordinated with a terrorist organization.\textsuperscript{82} These cases include charges against people for using “social media to receive and disseminate information about foreign terrorist groups,” and to “declare . . . support for violent jihad,”\textsuperscript{83} as well as for the use of “Twitter to provide advice and encouragement to [the Islamic State of Iraq and the Levant] and its supporters.”\textsuperscript{84}

A number of scholars have supported this inward pressure on the First Amendment’s boundaries. One, for example, has contended that the First Amendment’s protection should be relaxed in moments of crisis—such as the current conflict with ISIS—and saying that ISIS’s


\textsuperscript{84} Office of Pub. Affairs, \textit{Virginia Teen Pleads Guilty to Providing Material Support to ISIL}, U.S. DEPT OF JUST. (June 11, 2015), https://www.justice.gov/opa/pr/virginia-teen-pleads-guilty-providing-material-support-isil. Such cases are in keeping with the statement of John Carlin, the former Assistant Attorney General for National Security, that the Justice Department would consider criminal charges against individuals who are “proliferating ISIS social media sites or involved in ISIS’s social media production.” \textit{Assistant Attorney General John Carlin on Cybersecurity}, C-SPAN 2 (Feb. 23, 2015), http://www.c-span.org/video/?324471-2\textit{assistant-attorney-general-john-carlin-cybersecurity; see also Shane Harris, Justice Department: We’ll Go After ISIS’s Twitter Army}, DAILY BEAST (Feb. 23, 2015, 9:07 PM) (discussing the Justice Department’s approach and the tensions between the material support statute and First Amendment protections), http://www.thedailybeast.com/articles/2015/02/23\textit{justice-department-well-go-after-isis-twitter-army.html.
ability to spread “ideas that lead directly to terrorist attacks . . . calls for new thinking about limits on freedom of speech.” And another has called for a form of First Amendment balancing in the national security domain: “If (and only if) people are explicitly inciting violence, perhaps their speech doesn’t deserve protection when (and only when) it produces a genuine risk to public safety, whether imminent or not.”

The current pressures on the First Amendment’s scope are, in short, not unidirectional. While significant outward pressure is being placed on the boundaries of the First Amendment, largely in the context of economically salient activities, national security concerns are exerting inward pressure, mainly in criminal law domains. Because of both forces, questions of coverage are increasingly facing the courts. The threshold question of whether something falls or should fall within the First Amendment’s ambit is accordingly of ever more significant societal and institutional importance.

II
A POSITIVE ACCOUNT OF THE SCOPE OF THE FIRST AMENDMENT

Whether the First Amendment is implicated in a given case is often so obvious to both courts and litigants as to render the issue of coverage invisible. Perhaps coverage may be

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86 Cass R. Sunstein, Islamic State’s Challenge to Free Speech, BLOOMBERG VIEW (Nov. 23, 2015, 12:38 PM), http://www.bloombergview.com/articles/2015-11-23/islamic-state-s-challenge-to-free-speech. This proposal would relax the current standard for incitement under Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (permitting such a constriction of First Amendment coverage only when speech “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action” (emphasis added) (footnote omitted)).

87 Cf. Kendrick, supra note 42, at 1219 (“[A] conception—one which can comprehensively explain the relationship between ‘speech’ and ‘the freedom of speech’—is precisely what courts need to address the diverse and often novel claims that First Amendment opportunism brings their way.”).
undertheorized in part because of the general obviousness of these social judgments.\footnote{But see Schauer, supra note 11, at 1772–73 (arguing, in reference to the Fourth and Eighth Amendments, that while “[q]uestions of coverage typically remain hidden because the answers are so obvious that they attract scant controversy... [t]he First Amendment’s coverage questions are difficult because the normal tools for delineating the coverage of a constitutional rule are unavailing").} But the applicability of the First Amendment is not simply about recognizing whether “speech” is there in some objective sense—as if constitutionally salient “speech” were a pre-social object to be discovered—however natural such a judgment might seem. Recall that movies once were not considered speech salient to the First Amendment, a fact that appears strange to modern observers.\footnote{See supra notes 33–37 and related text.} Neither was commercial speech, which is now the subject of some of the most pitched constitutional battles involving the nation’s most esteemed appellate litigators.\footnote{See supra notes 38–39 and related text.}

The scope of the First Amendment instead reflects shared cultural norms about social activities and their meanings—and those norms and meanings can change based on social forces. That much may be true, if not obvious. But it still begs the question: Why do courts and litigants understand some things to be constitutionally salient and others (often obviously) beyond the First Amendment’s reach? This Part reviews the history of First Amendment coverage and its theorization to develop a descriptive answer to that question.

\section{The History of Coverage and the Speech/Conduct Distinction}

\textit{Chaplinsky v. New Hampshire} is often cited for the proposition that the Supreme Court extends First Amendment protection to all speech, except certain historically recognized excluded categories.\footnote{315 U.S. 568 (1942); see also, e.g., United States v. Stevens, 559 U.S. 460, 468–69 (2010) (quoting \textit{Chaplinsky}, 315 U.S. at 571–72); Genevieve Lakier, \textit{The Invention of Low-Value Speech}, 128 \textit{Harv. L. Rev.} 2166, 2173 (2015) (noting that “[t]he Court’s emphasis on the historical origins of the low-value categories can be traced back to \textit{Chaplinsky}”).} Chaplinsky was a Jehovah’s Witness, who was convicted of addressing
another person with offensive, derisive, and annoying words or names—namely calling the City Marshal of Rochester a “God damned racketeer” and “a damned Fascist” and asserting that “the whole government of Rochester are Fascists or agents of Fascists.”

In analyzing Chaplinsky’s First Amendment challenge in the early 1940s, the Court stated that “it is well understood that the right of free speech is not absolute at all times and under all circumstances,” and named “certain well-defined and narrowly limited classes of speech, the prevention of which and punishment of which have never been thought to raise any Constitutional problem,” including “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”

More recently, the Roberts Court has held that new categories of excluded speech cannot be added to this “well-defined and narrowly limited” list, announcing in United States v. Stevens that, in general, exceptions to First Amendment coverage must be confined to the “historic and traditional categories long familiar to the bar.”

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92 315 U.S. at 569 (internal quotation marks omitted).

93 Id. at 571 (first citing Cantwell v. Connecticut, 310 U.S. 296 (1940); then citing Herndon v. Lowry, 301 U.S. 242 (1937); then citing De Jonge v. Oregon, 299 U.S. 353 (1937); then citing Near v. Minnesota, 283 U.S. 697 (1931); then citing Stromberg v. California, 283 U.S. 359 (1931); then citing Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring); and then citing Schenck v. United States, 249 U.S. 47 (1919)); see also City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989) (“It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”); Spence v. Washington, 418 U.S. 405, 417 (1974) (Rehnquist, J., dissenting) (“The Court has long recognized . . . that some forms of expression are not entitled to any protection at all under the First Amendment, despite the fact that they could reasonably be thought protected under its literal language.” (citing Roth v. United States, 354 U.S. 476 (1957))).

94 Chaplin’s, 315 U.S. at 571–72 (citing ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 149 (1941)).

95 Id. at 571.

different and expanded list of categories than those named in Chaplinsky, “including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.” And it rejected, as “startling and dangerous,” the notion that the Court would engage in a “free-floating test for First Amendment coverage” based on “an ad hoc balancing of relative social costs and benefits.”

The Court reemphasized that approach the next year in Brown v. Entertainment Merchants Association, when it rejected the argument that violent video games were beyond the scope of the First Amendment, stressing that Stevens had “held that new categories of unprotected speech may not be added to the list,” and that “without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the ‘judgment [of] the American people,’ embodied in the First Amendment, ‘that the benefits of its restrictions on the Government outweigh the costs.”

The Court did so again in United States v. Alvarez, when it extended robust First Amendment protection to false statements in a challenge to the Stolen Valor Act. In so doing, the Court presented an even more expanded list of historical exceptions—including “advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called ‘fighting words,’ child pornography, fraud, true

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97 Id. at 468 (citations omitted).
98 Id. at 470.
99 Stevens, 564 U.S. at 791.
100 Id. at 792 (quoting Stevens, 559 U.S. at 470).
threats, and speech presenting some grave and imminent threat the government has the power to prevent.”

Genevieve Lakier has since drawn into question whether the historical record justifies the conclusion that there were ever in fact “low-value” categories of speech, the punishment of which has not, since the ratification of the First Amendment, been thought to raise constitutional concern. More fundamentally, however, the Court’s articulated list of categories (in short or long form) does not account for the far greater range of regulations of what is colloquially understood as speech or expression that have long not been subject to First Amendment challenge, let alone strict review. These categories include the speech of compulsory tax returns, perjury, the rules of evidence, malpractice, contract law, and harassing and discriminatory speech in the workplace, to name a few. The “historic and traditional categories,” in short, do not explain First Amendment coverage even with regard to types of activities most would colloquially describe as “speech.”

The test the Court has articulated for the threshold application of the First Amendment—the Spence test—fares no better in explaining its current boundaries, as Robert Post has prominently argued. The Court has recognized that the First Amendment extends to “more

102 Id. at 717 (citations omitted).

103 Lakier, supra note 91 (examining the doctrine of “low-value” speech from the eighteenth-century, through the New Deal, and into contemporary times).

104 Cf. Frederick Schauer, Out of Range: On Patently Uncovered Speech, 128 HARV. L. REV. F. 346, 347 (2015) (arguing that “the real issue is not between high- and low-value speech, but instead . . . about which forms of speech, in the ordinary language sense of that word, or which forms of communication or expression, will be understood as having nothing to do with the First Amendment” such as contract law, wills and trusts, perjury, antitrust, or the laws of evidence).


106 Post, supra note 20, at 1250–60 (discussing problems with the Spence test).
than simply the right to talk and to write.”\textsuperscript{107} But it has refused to “accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”\textsuperscript{108} In \textit{Spence}, the Court began by noting this limit and asking whether Spence’s activity “was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.”\textsuperscript{109} It framed its inquiry on characteristics of the activity in question. The Court stated that First Amendment review was triggered because Spence, who had flown an upside-down American flag bearing a peace sign to protest the then-recent “Cambodian incursion and the Kent State tragedy,” demonstrated that “[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”\textsuperscript{110} This test has come to be known as the \textit{Spence} test and reiterated in later cases up to the present.\textsuperscript{111}

As Post has explained: “What is curious, however, is that the doctrine is transparently and manifestly false. The test cannot plausibly be said to express a sufficient condition for bringing ‘the First Amendment into play.’”\textsuperscript{112} Graffiti that defaces property, he notes for instance, satisfies \textit{Spence} but is not within the First Amendment’s ambit.\textsuperscript{113} So, too, crimes motivated by

\begin{thebibliography}{9}
\bibitem{109} \textit{Spence}, 418 U.S. at 409.
\bibitem{110} \textit{Id.} at 410–11.
\bibitem{112} Post, \textit{supra} note 20, at 1252 (quoting \textit{Johnson}, 491 U.S. at 404).
\bibitem{113} \textit{Id.}
\end{thebibliography}
political views or bias—such as political assassination, the 9/11 attacks, or racially motivated violence.\textsuperscript{114} And by contrast, art that does not “convey a particularized message,”\textsuperscript{115} such as Duchamp’s \textit{The Fountain} or Warhol’s \textit{Sleep}, would not qualify—despite the Court’s insistence that such art is “unquestionably shielded.”\textsuperscript{116}

The First Amendment’s boundaries have likewise been remarkably resistant to theorization. The most prominent justifications for the freedom of speech imply (if not explicitly state) a scope of coverage. Alexander Meiklejohn, for instance, would extend First Amendment coverage to communication relevant to governance, and in so doing exclude such things as artistic and cultural production that is not related to governance or the building of the knowledge and capacity needed to govern.\textsuperscript{117} In the words of Jack Balkin, “Meiklejohn has met LOLCats, and he is not amused.”\textsuperscript{118} But putting aside whether the First Amendment’s boundaries should be set in the governance-centric way that Meiklejohn suggests, his theory is plainly not accurate as a descriptive matter.\textsuperscript{119} Similar critiques can be made of other

\textsuperscript{114} Cf. Wisconsin v. Mitchell, 508 U.S. 476, 490 (1993) (upholding as constitutional a state hate crimes law that allowed for enhanced sentencing in crimes motivated by bias, including on the basis of race or religion).

\textsuperscript{115} \textit{Spence}, 418 U.S. at 411.

\textsuperscript{116} \textit{Hurley}, 515 U.S. at 569; see also Mark Tushnet, \textit{Art and the First Amendment}, 35 COLUM. J.L. & ARTS 169 (2012) (discussing First Amendment coverage of nonrepresentational art, including how current doctrinal theories are inadequate for explaining its unquestioned coverage).

\textsuperscript{117} See Meiklejohn, supra note 41, at 255 (“The First Amendment does not protect a ‘freedom to speak.’ It protects the freedom of those activities of thought and communication by which we ‘govern.’”); id. at 256–57 (arguing that “there are many forms of thought and expression within the range of human communications from which the voter derives . . . the capacity for sane and objective judgment which, so far as possible, the ballot should express,” and which “must suffer no abridgment,” including “education,” “philosophy and the sciences,” “literature and the arts,” and “public discussions of public issues,” including “information and opinion bearing on those issues”); id. at 258–59 (stating that private defamation is an example of an activity “wholly outside the scope of the First Amendment” because it “has no relation to the business of governing”).

\textsuperscript{118} Balkin, supra note 45, at 1059 (explaining that those who ascribe to Meiklejohn’s theory “become gravely disappointed when they realize that digital technologies allow people to escape from focusing on matters they find disagreeable, annoying, or dull”).

\textsuperscript{119} See, e.g., \textit{Hurley}, 515 U.S. at 569 (stating that the First Amendment “unquestionably shield[s]” the “painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll”); Wooley v. Maynard, 430 U.S. 705, 714 (1977) (“A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.”); W. Va. State
justification-driven theories—which are over or under inclusive in their accounts of current doctrine, or often both.\footnote{120}

Against that context, recent relevant scholarship has divided into a few rough camps: those lamenting (or, rarer, lauding) contemporary First Amendment expansionism, those identifying the forces leading to its current transformations, and those analyzing the need for a coverage rule or speech/conduct type distinction.\footnote{121}

But a theory of coverage has been evasive. Why? The most serious explanations center on the inability of a single rule or justification to fully explain the basis for the freedom of speech.\footnote{122} This Article takes a different approach: Rather than attempting to justify the scope

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Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

\footnote{120} See, e.g., Schauer, supra note 13, at 271–76 (describing how both “literalist” and “definitional-absolutist” theories tend toward both over- and under-inclusiveness in different areas).

\footnote{121} A number of scholars have argued against what is—if not often identified as—First Amendment expansionism in commercial speech, including Jack Balkin, John Coates, Tamara Piety, Robert Post, Jedediah Purdy, Tim Wu, and myself. Balkin, supra note 41, at 1080–88 (arguing that commercial speech should be treated differently than ordinary public discourse not because it isn’t public discourse, but rather because it serves a different social function); Coates, supra note 58 (arguing that corporations have become the primary beneficiaries of the First Amendment and discussing how that development amounts to “socially wasteful rent seeking”); Piety, supra note 58 (analyzing what Citizens United may mean for the future of the commercial speech doctrine); Post & Shanor, supra note 19 (criticizing the return of “Lochnerian substantive due process” under the First Amendment); Purdy, supra note 56 (drawing a comparison between constitutional neoliberalism and the Lochner era); Shanor, supra note 19 (identifying and analyzing a new era of constitutional deregulation); Wu, supra note 45 (decrying the “corporate takeover of free speech” and writing that “anti-regulatory First Amendment cases . . . may weaken” the law and “intimidate legislature and agencies contemplating future regulations”). Where by contrast, Jane and Derek Bambauer argue in favor of what they call information libertarianism. Bambauer & Bambauer, supra note 74, at 340 (arguing that this expansion “improves governing no matter what the democratic goals may be”).

Frederick Schauer and Leslie Kendrick have additionally described some of the reasons and mechanisms by which First Amendment opportunism leads to First Amendment expansionism. Kendrick, supra note 42, at 1210–19 (considering cultural, political, and doctrinal reasons, as well as the inherent nature of both speech and rules); Schauer, supra note 68, at 177–90 (applying the concept to cases of libertarianism, sexual freedom, sexual orientation, and campaign finance reform). And Mark Tushnet has argued that a speech/conduct type distinction is necessary as a meta-constitutional matter, including because the lack of one may create pressure to level the protection of speech downward. Tushnet, supra note 11, at 1114–16; cf. Schauer, supra note 13, at 271–72 (“We must either water down the test for protection . . . or conclude that certain categories of speech are to be tested under drastically different standards of protection.”).

\footnote{122} Schauer, supra note 13, at 306 (noting that “[n]umerous justifications are given for a principle of freedom of speech,” and imagining a theoretical “complex code,” built into which would be “[e]very relevant and justifiable distinction, no matter how fine”). In this vein, Leslie Kendrick has insightfully argued that this is for reasons related to the nature of speech and the nature of rules. Kendrick, supra note 42, at 1212–19 (discussing the interplay between “speech” and “freedom of speech” and rules and standards). As Kendrick observes, some scholars have opted for a full coverage rule (all “speech” is covered), but with a list of exceptions. Id. at 1217–18}
of First Amendment through analytical or philosophical principles, I approach coverage as a sociological phenomenon. I identify the key social mechanisms that appear to underlie coverage. It is the social nature of coverage, I suggest, that has contributed to the difficulty of crystalizing a theory of it in legal decisionmaking and constitutional theory. But those same social mechanisms may also help us get a handle on how courts might better go about approaching coverage questions.

B. A Sociologically-Based Account of Coverage

First Amendment coverage questions arise and unfold in concrete social and institutional settings. If we look at the differences between how these settings are treated in First Amendment case law, a logic to the scope of the right emerges. Interestingly enough, it is not based, at least singularly, on shared norms about what constitutes “speech.” We might all agree that commercial or securities fraud, perjury, extortion, and conspiracy involve speech, for instance, but the First Amendment would not pop to mind if we were defending someone charged with those offenses—let alone if we were litigating an ordinary contract case, negotiating the regulation of wills and estates, or displeased with a discovery demand.

(noting that this rule “cannot avoid the difficult questions: some activities will have to be defined out, and some set of values will have to govern that process”). Eugene Volokh is the preeminent example of this approach. See EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS xiii, 1–2 (4th ed. 2011) (listing out exceptions to coverage and providing a doctrinal method for readers that entails starting with coverage and moving through the possible ways to except that coverage); Eugene Volokh, Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances” and the Uncharted Zones, 90 CORNELL L. REV. 1277, 1284 (2005) (“Neither generally applicable laws nor specially targeted laws should be allowed to restrict speech because of what the speech says, unless the speech falls within one of the exceptions to protection . . .”).

123 This approach builds off of the work of Frederick Schauer and Robert Post, who have argued that analysis of social context and social movements are necessary to understanding the animating logic of the First Amendment. See, e.g., Post, supra note 20 (critiquing current tests for First Amendment coverage and arguing that the doctrine will continue to fail until the Court takes account of various forms of social order); Schauer, supra note 11 (taking into account various factors in determining coverage).


125 Jane Bambauer has argued that Frederick Schauer and Robert Post are incorrect to state that significant amounts of “speech” falls (and has historically fallen) outside of the First Amendment. Bambauer,
The thesis of this Section is that the pattern of First Amendment coverage can be explained instead, at least in significant part, by a sort of social consequentialism, which I call “speech effects.” The case law suggests that First Amendment coverage rests on the cohesiveness of the expected social meaning of, and reaction to, the activity in question—including how a speaker will affect the behavior of or harm a listener or audience.\textsuperscript{126} Consequentialism may not be quite the right word.\textsuperscript{127} My point is that the logic and pattern of coverage rest on the strength of the social judgment about how an expressive activity works in its social context and what, if any, effect it is likely to have. The puzzle of First Amendment coverage reflects the cohesiveness of social norms—and courts’ normative judgments about whether norms should be treated as if they are cohesive.

Methodologically, I draw this thesis from both the pattern of First Amendment cases and some prominent examples of plainly uncovered speech. This review is necessarily incomplete. It does not fully canvass the great number of incidences in which individuals could theoretically have pursued a First Amendment claim but did not—either because of the sort of naturalness of the social norms relative to the interaction, or because of resource,

\textsuperscript{126}Whether a particular type of “speaker” or group is included or excluded from First Amendment protection is another type of coverage question. See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (boycotters); First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978) (corporations); De Jonge v. Oregon, 299 U.S. 353 (1937) (those who attend Communist Party meetings). This Article focuses on social practices because the lion share of coverage questions today are of that type. It argues that while the notion of norms may be somewhat analytically distinct with regard to why some speakers are or are not covered, the normative analysis is not.

\textsuperscript{127}Social meaning captures a similar idea, insofar as it connotes how words and actions are understood both to signify and shape our relationships with—and reactions to—others. The concept outlined here includes expectations about both contingent and intrinsic harms. \textit{But cf.} Robert C. Post, \textit{Blasphemy, The First Amendment and the Concept of Intrinsic Harm}, 8 Tel. Aviv U. Stud. L. 293, 294 (1988) (distinguishing between the two).
knowledge, or other constraints. Why are some sorts of interactions more likely to draw free speech claims? And what are the dynamics that lead the Speech Clause—or more broadly some constitutional rights but not others—to act as the hook for certain substantive social and political projects? How do communities differ in their judgments, interests, and ability to bring those claims? And what are the normative, institutional, and distributional effects of pulling different areas of social life within the First Amendment? Here I submit a framework through which we can consider these questions.

Courts already do, and scholars have urged them to, weigh the benefits of speech against its potential harm. After a case is filed, and both a litigant and a court decide that the First Amendment applies, the constitutional analysis often turns on understandings of the consequences of speech, as Erica Goldberg has recently analyzed. But the importance and sociology of the effects of speech go beyond the harms and benefits that Goldberg explores.

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128 See, e.g., JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 119 (2010) (discussing the legal mobilization of businesses in the 1970s); Kathleen Bawn et al., A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics, 10 PERSP. ON POL. 571, 590 (2012) (naming some of the legal issues political parties consider in running political campaigns, including First Amendment issues); Herbert M. Kritzer, Claiming Behavior as Legal Mobilization, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 261 (Peter Cane & Herbert M. Kritzer eds., 2010) (surveying some demographic analyses of the kinds of claims that are considered worth pursuing through litigation); Michael McCann, Litigation and Legal Mobilization, in THE OXFORD HANDBOOK OF LAW AND POLITICS 522 (Gregory A. Caldeira et al. eds., 2008) (addressing the reasons that some communities or individuals do not pursue remedies through legal institutions).

129 It is interesting that association claims have not recently risen to the prominence of free speech claims, particularly as a tool to challenge antidiscrimination measures. Cf. Bagenstos, supra note 71, at 1229–30 (noting that courts have not interpreted the freedom of association vis-à-vis public accommodations or antidiscrimination laws as broadly as many anticipated); Robert Post, RFRA and First Amendment Freedom of Expression, 125 YALE L.J. 387, 392 (2015) (arguing that the Religious Freedom Restoration Act should not be interpreted to extend to conduct that otherwise falls outside the ambit of the First Amendment). There are indications, however, that there may be a constituency for such claims. See supra notes 71–72 (collecting recent free speech and free exercise challenges to antidiscrimination and public accommodations laws).

130 More scholarly work, particularly empirical, is needed to develop a fuller understanding of the dynamics of First Amendment and other forms of constitutional coverage.


Assumptions about speech effects—which are based on norms about the relationships and context in which the activity occurs—are key to whether a litigant or court will identify a free speech problem in the first instance. That is, speech effects explain some of the forces underlying First Amendment coverage.

I argue that the First Amendment does not extend when there is a common norm about the social effect of the activity or when the court decides there should be such a norm. Conversely, when there is no such common norm—or the court decides there should not be one—the First Amendment extends. Contemporary First Amendment case law bears out this observation: Assumptions about the effects of speech vary within different parts of First Amendment jurisprudence, depending on the social and institutional contexts in which those cases occur.

Before delving into that claim, it is important to recognize that there is an important question of when a tipping point is reached as to sociological coverage, and how and when we should conceptualize social norms as unitary or in conflict. What community’s judgment is best considered (local or national; citizens, judges, or regulated entities; etc.), particularly when the filing or acceptance of claims or views of one community may influence another? Presumably it is not at the point a one-off litigant brings a far-fetched claim or perhaps even when the Supreme Court definitively includes or excludes an activity from the scope of the right (by analogy, we might rightly question, for example, whether Roe v. Wade signaled a national norm regarding abortion). And, of course, courts and litigants, or even the majority

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133 The existence of a norm and the court’s judgment may not be in alignment; a court may not mirror even generally held norms, as discussed below. Because of the possibility of that disjuncture, a court’s judgment is necessarily normative, not simply descriptive of social facts. The possibility of difference between the social judgments of courts and the public (or courts and minority communities) raises important questions about how social forces structure law and how law structures social forces. To what degree, for example, did the Court’s decision in Forklift to not identify a First Amendment claim affect workplace norms?
of Americans, may disagree as to whether a given activity is or should be covered. For ease of
discussion, but that alone, this Article treats coverage as a relatively unitary category, but this is
not to deny or obscure the cultural diversity and conflict that may (often) underlie it. That
diversity, or its lack, is in fact a central concept motivating this Article. It is also a subject in
need of further scholarly and empirical inquiry.

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The origins of the Supreme Court’s First Amendment jurisprudence centered on the issue
of social causation. The Court’s early cases involved charges of conspiracy and attempt, largely
to obstruct the World War I draft by use of words. Those opinions, perhaps therefore not
surprisingly, focused on speech effects. In Schenck, for example, while addressing a criminal
prosecution brought for conspiring to distribute leaflets urging resistance to the draft, the
Court explained: “Of course the document would not have been sent unless it had been
intended to have some effect, and we do not see what effect it could be expected to have upon
persons subject to the draft except to influence them to obstruct the carrying of it out.”134 It
was in that context that the Court articulated the concept of clear and present danger, saying
the First Amendment “does not even protect a man from an injunction against uttering words
that may have all the effect of force.”135 The right of free speech emerged from debates over
speech effects, and the early Court decided that the causal link between leafleting against the
draft and others obstructing it was sufficiently clear for no right to extend.

Before those cases were brought, was it so sufficiently obvious to socialized Americans
and their lawyers that urging resistance to the draft caused (or meant) its obstruction? Is that
why they did not bring First Amendment defenses? That hypothesis is consistent with the

135 Id. at 52.
history of public reaction to anti-war advocacy during that period. As John Witt has described, “many of the most spectacular episodes of intolerance and repression” in response to anti-war speech in the World War I period “were not directly the result of government action at all.”\footnote{\textsc{John Witt}, \textit{The American Fund: A Story of Money and Politics in America} 33 (forthcoming 2018) (draft on file with the author).} Instead, crowds of pro-war protesters attacked war dissenters, often injuring or killing them, sometimes even as police attempted to fend off the mob.\footnote{\textit{Id.} at 33–35.} These incidents suggest that anti-war speech had a meaning and effect that was clear enough to cause thousands of Americans to mobilize, sometimes violently, in opposition. The audience of anti-war speech was, it would seem, substantially unified in its understanding. The effects and social meaning of blasphemy were perhaps similarly once more universally accepted.

The regulation of obscenity—a category long excluded from the First Amendment’s coverage—offers another example. Obscenity refers “to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”\footnote{Miller v. California, 413 U.S. 15, 24 (1973).} This standard is explicitly tied to how “the average person, applying contemporary community standards” would assess the work.\footnote{\textit{Id.} (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972) (per curiam)).} As the Court has explained:

> Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the “prurient interest” or is “patently offensive.” . . . [O]ur Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists.\footnote{\textit{Id.} at 30.}
Obscenity jurisprudence thus protects a space of local, not national, community standards—recognizing that communities may vary as to agreed upon norms of what constitutes prurient or offensive material.141

Incitement, another historically uncovered category, is founded on a similar logic. The “constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”142 What does it mean for a fact finder to establish that a call to imminent lawless action “is likely to incite or produce such action”? It is to say, in the social context at hand, that we can determine the effects of the speech. We know how that sort of speech will operate.

The exclusion of certain common-law torts from First Amendment coverage follows a similar social logic. Why, for example, can the publication of embarrassing facts be regulated consistent with the Constitution? Robert Post’s analysis of the conceptual structure of the tort of invasion of privacy is illuminating: He argues that the tort guards social norms that protect and recognize individuals and give them identity in their communities.143 By contrast, within the public sphere, where the First Amendment generally applies, the logic is deliberately indifferent to those norms. The exclusion of common-law torts safeguards a space of cohesive social norms around what it means to treat others with dignity and respect. Underlying Post’s

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141 Id. at 32 (“It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.”). This is a different question than the one Patrick Devlin addressed in THE ENFORCEMENT OF MORALS (1965), in which he famously argued that law is justified insofar as it enforces the moral judgments of a society. See also Ronald Dworkin, Lord Devlin and the Enforcement of Morals, 75 YALE L.J. 986 (1966) (arguing that American lawyers need to pay attention to the arguments raised by Devlin in that lecture).


insight is the idea that the privacy torts protect a space of unified social norms—and a space of norm and identity development on which the functioning of the public sphere depends.

But the realm of common-law privacy is just one realm of normed social life to which the First Amendment does not generally or fully extend. Other notable spheres include organized institutional spaces—such as schools, workplaces, courthouses, and marketplaces—as well as countless instances in which individuals make promises with or rely on others.

Two classes of the most basic social relationships often fall outside of the First Amendment’s boundaries: those involving promises and those involving reliance. Contracts, conspiracy, and price-fixing offer prominent examples of the first. Contracts involve written promises, and most people understand how promises are supposed to operate. If I promise you I will sell you my TV for X dollars, the prevailing norm is that I plan to and in fact should do so. Conspiracy, which is essentially an agreement or promise to commit a crime, perhaps not surprisingly, has a similar social logic—and thus similarly is excluded from First Amendment coverage. Price-fixing, too, fits the mold of this quite basic form of social relationship: It is a promise. Promises, relative to other types of social ordering, have relatively strong norms.\footnote{See generally Luigino Bruni & Robert Sugden, Moral Canals: Trust and Social Capital in the Work of Hume, Smith and Genovesi, 16 ECON. & PHIL. 21 (2000); Daniel Kahneman et al., Fairness as a Constraint on Profit Seeking: Entitlements in the Market, 76 AM. ECON. REV. 728 (1986).}

When you make a promise, we know how those words typically work.

So, too, with fraud and malpractice—both examples of breaches of relationships are founded on trust and reliance, and are also typically outside the ambit of the First Amendment.\footnote{Jack Balkin’s proposal that parts of the digital infrastructure should be treated as information fiduciaries arguably leverages this social insight. See Jack M. Balkin, Information Fiduciaries and the First Amendment, 49 U.C. DAVIS L. REV. 1183 (2016); Free Speech is a Triangle, – COLUM. L. REV. – (forthcoming 2018) (draft on file with the author).} If you rely on the advice of a doctor or lawyer and that person misleads you (say, advising that you needed surgery when you did not), or a salesperson on whom you rely
for material commercial information lies to you (in fact that tonic will not cure cancer, or that food does contain peanuts when they explicitly state it does not), it would be clear enough that they did not abide by the appropriate norms attendant to the relationship of a doctor and patient or seller and purchaser. You relied on someone for information, and they did not participate in the social relationship you expected, as other socialized Americans observing the transaction would likely recognize. The same can be said not just of securities fraud, but of a broad range of securities regulations.

We could say similar things about the range of types of speech that are plainly uncovered that form the organizing foundations of larger social institutions, such as the rules of evidence or the failure of disgruntled public school children everywhere to bring First Amendment claims for being penalized for providing wrong answers on their exams. The rules of evidence are norms of behavior in a highly complex social institution: the courts. Within the courts, people are allowed to speak at certain times, but not others. Why do participants not view these rules as regulating “speech” for First Amendment purposes? Because they are in a court. And courts, like schools, religious, military, or penal institutions, like promises and relationships of reliance, have their own ordered norms, which we learn and on which we rely to negotiate those institutions. The rules of evidence are part of what structures the institution of a court: They are embedded in its functioning.

The Supreme Court’s decision in Forklift to decline even to comment on the potential conflict between Title VII’s regulation of harassing workplace speech and the First Amendment, even though that issue was briefed, offers another example.146 Without discussion, the Court in essence found no First Amendment coverage issue. As Richard Fallon

146 Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); see also Fallon, supra note 10 (noting that the Court ignored the First Amendment issue after it was specifically briefed).
observed, the Court’s failure to notice a First Amendment question with regard to the regulation of sexually harassing workplace speech under Title VII perhaps indicates that such speech “was so clearly unrelated to the First Amendment’s purposes that it should not be dignified with an explanation as to why it constituted an ‘exception’ [to the First Amendment’s reach].”

Decisions like *Forklift* essentially hold that speech acts in some social institutions—such as harassment in the workplace—have an obvious, norm-disrupting effect, regardless of whether that would *in fact* be the effect in every instance.

By contrast, if we see (or courts believe we should see) uncertainty around the norms of the activity, then the First Amendment generally extends its coverage. The political speech cases are emblematic in this regard. They embrace Justice Harlan’s notion in *Cohen v. California* that “one man’s vulgarity is another’s lyric”—that we do not know how an audience will view the activity. The political speech cases further generally embrace the notion that speech cannot be constitutionally curtailed due to its *potential*—and at core unpredictable—negative effects. They reflect the view that “[e]very idea is an incitement. It offers itself for belief, and, if believed, it is acted upon unless some other belief outweighs it or some failure of energy stifles the movement at its birth.”

I can urge the public to vote for Donald Trump or convert to Judaism, but we don’t know what you or others will do. Will you act upon it?

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150 T.S. Elliot’s *The Hollow Men* is brought to mind:

> Between the idea
> And the reality
> Between the motion
> And the act
> Falls the Shadow

logic is that we cannot know what the effect of my activity will be. I submit that this is because the audience is understood to come from divergent interpretive communities with different shared norms.

Debates over pornography and hate speech shed further light on this distinction—and the fact that different communities can have divergent understandings and norms. Scholars and advocates in the 1980s and 1990s sparred over whether either should be regulable under the First Amendment because of their harms.151 Catharine MacKinnon famously maintained that “[p]ornography is more act-like than thought-like” because of the harms it enacts on women.152 MacKinnon’s concern was with “what pornography does as a practice of sex discrimination.”153 She worried that “[o]nce power constructs social reality, as . . . pornography constructs the social reality of gender, the force behind sexism, the subordination in gender inequality, is made invisible.”154 When we protect pornography under the First Amendment, she argued—when we “look[] neutrally on the reality of gender so produced”—we ignore what it does.155 But of course, in her view, there is a plural audience assessing what pornography does: There are those (especially men) who see only the construction of gender so created,


152 MacKinnon, supra note 151, at 65; id. at 65 n.155 (noting, however, that she does not assert that pornography is “conduct” in a doctrinal sense, only regulable like obscenity (an uncovered category)); id. at 65 (“Segregation expresses the idea of the inferiority of one group to another on the basis of race. That does not make segregation an idea. A sign that says ‘Whites Only’ is only words. Is it therefore protected by the first amendment? Is it not an act, a practice, of segregation because of the inseparability of what it means from what it does?”).

153 Id. at 1–2.

154 Id. at 7.

155 Id. at 1–2.
which looks not like subordination but instead the appropriate recognition of sex difference,\footnote{156 \textit{Id.} at 27.} and others (women) who see and live its effects.\footnote{157 \textit{Id.} (arguing that as a social group, men are not hurt by pornography the way women are).} There is a pluralistic interpretive community that assesses differently pornography’s effects, and because of the different social positions of that community’s members, understands what it does differently.

Indianapolis adopted an anti-pornography ordinance grounded in the theory proposed by MacKinnon and Andrea Dworkin. The Seventh Circuit ruled it unconstitutional and, in so doing, it emphasized that the First Amendment “leave[s] to the people the evaluation of ideas,” regardless of what prevails.\footnote{158 Am. Booksellers Ass’n v. Hudnut, 771 F.2d 323, 327 (7th Cir. 1985).} This is because, “[b]ald or subtle, an idea is as powerful as the audience allows it to be.”\footnote{159 \textit{Id.} at 327–28; \textit{see also id.} at 332 (“Change in any complex system ultimately depends on the ability of outsiders to challenge accepted views and the reigning institutions, [and w]ithout a strong guarantee of freedom of speech, there is no effective right to challenge what is.”).} In short, we do not know the effect of pornography—that is, how powerful its audience will allow it to be—and so it falls within the First Amendment’s ambit. The Supreme Court affirmed the Court of Appeals without comment,\footnote{160 \textit{Hudnut v. Am. Booksellers Ass’n, Inc.,} 475 U.S. 1001 (1986) (mem.).} in some sense in the mirror image of \textit{Forklift}.

This fault line—between unified and plural audiences, between well-accepted norms and contested ones—is likewise evident in debates about hate speech. Mari Matsuda, for instance, has argued that racist hate speech should be excluded from First Amendment coverage, like false advertising, incitements to violence, and fighting words, because of the harms it effects on those in the target group.\footnote{161 \textit{See Matsuda, supra} note 151, at 2321; \textit{see also Richard Delgado, Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling,} 17 \textit{Harv. C.R.–C.L. L. Rev.} 133, 172–73 (1982) (noting that a tort for racial insults would be seen as content regulation and held to higher scrutiny under the First Amendment).} Matsuda advocates that speech should be constitutionally
proscribable if its message is one of racial inferiority, it is directed at a historically oppressed
group, and it is persecutorial, hateful, and degrading. But her focus, like MacKinnon’s, is on
the split reaction to hate speech between targeted communities and others. Parallel to
MacKinnon, she rejects abstract notions of neutrality and equality in favor of the particulars
of the social reality and experience of people of color: to view hate speech through the victim’s
eyes. And through those eyes, hate speech most certainly causes harm, the psychic
dimension of which Patricia Williams has described as “spirit-murder.”

Different communities, of course, may have different experiences of the same activity. The Supreme Court recognized this in *Virginia v. Black*, when it accepted that, in principle, a
state could ban cross burning because it “is often intimidating, [and] intended to create a
pervasive fear in victims that they are a target of violence,” and cross burning with the intent
to intimidate “is a type of true threat where a speaker directs a threat to a person or group of
persons with the intent of placing the victim in fear of bodily harm or death.” But the Court
refused to accept the prima facie provision of Virginia’s statute, which made the burning of a
cross prima facie evidence of the required intent to intimidate. The Court refused to accept

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163 *Id.* at 2323–24.
165 Empirical work by Dan Kahan, for example, demonstrates that whether an audience perceives an
activity as speech or conduct relates to their ideological commitments. Dan M. Kahan et al., “They Saw a Protest”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 882–83 (2012). Kahan’s research is
focused on ideology, but it suggests a broader point. Communities may differ in their perceptions of events and
the meanings they ascribe to them based on context-bound norms and understandings.
167 *Id.*
168 *See id.* at 364–67 (O’Connor, J.) (plurality opinion).
that as a general matter cross burning causes its audience to experience that sort of fear, and it did so in explicit reference to the pluralistic potential audience of such acts of hate speech. Cross burning could not be banned as a prima facie matter because the cross’s audience may or may not experience that “speech” as harm.\textsuperscript{169}

As Guy-Uriel Charles has observed, one interesting thing about the Court’s decision in \textit{Virginia v. Black} was its shift \textit{towards} the understanding of critical race theorists such as Matsuda that hate speech like cross burning does in fact cause harm.\textsuperscript{170} The Court accepted that cross burning could be banned when it did, in context, cause the harm. It accepted, as a matter of social reality, that cross burning often—but not always—\textit{works} on its audience in the way that critical race theorists, and generations of victims, have asserted. Justice Thomas, in his dissent, took the stronger position that “[i]n every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred, and the profane.”\textsuperscript{171} Cross burning, for Thomas, was a social practice that in “our culture”—our national culture—works in one way: to intimidate and inspire the fear of “[m]urder, hanging, rape, [and] lynching.”\textsuperscript{172} He wrote that “[i]n our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence,”\textsuperscript{173} such that it

\textsuperscript{169} Compare \textsc{Catharine A. MacKinnon}, \textit{Only Words} 11–15 (1993) (arguing that social inequality is substantially created and enforced—“done”—through words and images, including women’s subjugation by pornography, regardless of its audience, and that such words should be unprotected by the First Amendment), \textit{with Black}, 538 U.S. at 357, 362–63 (declining to conclude that cross burning necessarily embodies a threat without a clear intent to intimidate or threaten, because of differences in audience reception, and so finding it constitutionally protected).


\textsuperscript{171} \textit{Black}, 538 U.S. at 388 (Thomas, J., dissenting) (citations omitted).

\textsuperscript{172} \textit{Id.} at 390 (quoting United States v. Skillman, 922 F.2d 1370, 1378 (9th Cir. 1991), which quoted from the testimony of an African-American mother who had a cross burned on her lawn).

\textsuperscript{173} \textit{Id.} at 391.
can be constitutionally banned as a prohibition of “intimidating and terroristic conduct,” not expression.\textsuperscript{174}

To recap the arguments thus far: First Amendment coverage tracks judgments about whether a given expressive act operates in a way that is generally understood in the interpretive community to have a given effect. When there is a question about how the speech works, in the words of MacKinnon, about what it \textit{does}—that is, there is a pluralistic interpretive community—the First Amendment generally offers its coverage. This may help explain, in part, why an \textit{analytical} or meta-justification-driven theory of First Amendment coverage has been so evasive, and perhaps also why the First Amendment’s boundaries so easily migrate with changing underlying social and institutional arrangements and technologies.

My argument builds on Robert Post’s analysis that First Amendment doctrine is made internally incoherent by its attempt to ground itself in a generic notion of “speech.”\textsuperscript{175} From this insight, Post contends that “[s]peech does not itself have a general constitutional value, but rather we attribute to speech the constitutional values allocated to the discrete forms of social practice that speech makes possible.”\textsuperscript{176} Post identifies a number of domains that the Constitution treats differently, he says because of the distinct values of the underlying social practices. He calls for a reshaping of First Amendment doctrine based on “the necessary material and normative dimensions of these forms of social order and of the relationship of speech to these values and dimensions . . . [and] for allocating speech to these distinct forms of social orders.”\textsuperscript{177}

\begin{itemize}
  \item \textsuperscript{174} \textit{Id.} at 394.
  \item \textsuperscript{175} Post, \textit{supra} note 20, at 1273.
  \item \textsuperscript{176} \textit{Id.}
  \item \textsuperscript{177} \textit{Id.} at 1281.
\end{itemize}
My point is that while social orders are various, at the threshold, First Amendment coverage turns in significant part on the strength of the social norms of those orders. The strength of those norms indicates whether we are, or are not, in a given social order—be it contract, military service, employment, racial violence, or reliance. It is not just that contracting has a different constitutional value than arguments over Marxist theory or *Straight Outta Compton*. We know an expressive activity is potentially constitutionally salient if we do not simply take it for granted, because of the strength of the social norms surrounding that activity about how it will “work” in that setting.\(^{178}\)

Why then has a theory of coverage been so hard to come by? It is at least in part because coverage traces a myriad of social norms and community and institutional boundaries, instead of analytical categories or any single justification or distinction.\(^{179}\)

The edge of coverage, then, may be less about what constitutes “speech” versus “conduct”—or any analytically or philosophically tight distinction—than about the expected effect of an activity on its audience and whether that audience has (or courts believe it should have) cohesive or pluralistic norms. Areas of communicative social life, such as contracts and tax returns, that generally do not face First Amendment challenge and are often considered speech outside the boundaries of the First Amendment, may tell us something about what sorts of speech acts are generally considered straightforward in their effect to a national

\(^{178}\) Post argues that we can get a handle on coverage by way of a two-by-two chart that maps the existence of a “medium for the communication of ideas” with governmental intent. *Post*, *supra* note 20, at 1253–60. My argument problematizes and looks to the source of the judgment for Post’s “medium of expression.” *Id.* at 1264 (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994)).

\(^{179}\) This argument resonates with Leslie Kendrick’s point that there is something about the nature of legal rules that contributes to the difficulty of crafting a theory of coverage in legal doctrine. *Kendrick*, *supra* note 42, at 1204–06; *cf.* *Massaro*, *supra* note 74, at 387 (“Theories that are analytically crisp enough to limit applications of freedom of speech in a meaningful way often cannot be squared with a vast amount of modern doctrine and contemporary free speech intuition, which makes them practically and normatively suspect.” (footnotes omitted)). First Amendment opportunism may exacerbate this problem insofar as it has prompted courts to embed a range of values and considerations in various parts of First Amendment doctrine.
interpretive community. They may, often even, reflect the existence of an actual unitary interpretive community about how those sorts of speech acts operate. In a society where the norms of contracting are relatively unproblematic, for example, the resistance or acquiescence to a given contractual arrangement may vary within the set of familiar outcomes and within established conventions for their contestation—but not as to the existence of contract itself. As such, the contested frontiers of the First Amendment, such as warning labels and securities regulation, may reflect areas of social life in which the unity of social understandings of the effect of communicative social actions, are becoming—or being pushed to become—unsettled.

If my description is correct, moreover, we may well be in for more First Amendment expansionism. Loosening the unity of a social convention may be easier than the reverse. This may be particularly the case in an ever more diverse and global world, where the space of pluralist interaction is greater.

III
A PRESCRIPTIVE THEORY OF FIRST AMENDMENT COVERAGE

This Part shifts to a prescriptive register. In light of this Article’s explanation for the First Amendment’s current boundaries, how should courts conduct coverage analyses?

Because what falls within the First Amendment is not an obvious or foregone conclusion, we should avoid the tempting illusion that what is speech is obvious. I argue that just like “property” or “due process,” something is “speech” for First Amendment purposes if a social actor finds it constitutionally salient, litigates it, and a court recognizes it as such. That recognition may come with trade-offs—sometimes more or less weighty, sometimes more or

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180 It is perhaps notable, for example, that one of the few recent contracts cases raising free speech claims involved a claim about a stolen screenplay idea (a type of social product that has long been viewed as within the First Amendment). Jordan-Benel v. Universal City Studios, Inc., 859 F.3d 1184, 1191–92 (9th Cir. 2017).
less visible. If there is no clean analytical basis for the speech/conduct distinction, substantive
normative commitments, grounded in the range of social and institutional contexts in which
coverage questions arise, must guide our thinking.

In the Title VII context, the countervailing social interest is equality and anti-
discrimination; it is the ability to have workplaces that are organized on civil interactions.181
The Court’s exclusion of Title VII from coverage, despite litigants’ identification of a
constitutional concern, articulates a view that we should all have a shared understanding of the
effects of harassing workplace speech and the organizing norms of modern workplaces. We
should understand the workplace not as a place of ideological contest and communicative
uncertainty—like the paradigmatic realm of political speech—but instead as a space governed
by norms and practices appropriate to a modern workplace, in which harassment is
inappropriate and causes disruption and harm.

In the realm of contracts and fraud, the lack of First Amendment coverage reflects respect
for the basic social relationships of promise and reliance, respectively. The general failure of
plaintiffs to bring, or courts to recognize, claims about the multitude of regulations of speech
in public institutions, like courts and schools, reflects the existence, if not also the need for,
those different forms of ordered social life. The expansion (or contraction) of the First
Amendment may additionally implicate democratic values, as discussed more fully below.

If my diagnosis is correct, the boundaries of coverage reflect different ways of ordering—
other than the normative contestation of pluralistic audiences—and the facts and expectations
of those various orders. Courts faced with First Amendment challenges should therefore

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181 This is not to argue that the First Amendment addresses itself to equality or other non-liberty values,
which is a question of significant litigation and scholarly debate. See, e.g., Citizens United v. FEC, 558 U.S. 310,
425–46 (2010); ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION
59–60 (2014). It is to say that in defining the boundaries of the First Amendment’s sphere of liberty—even, if
not particularly, if we assume it protects liberty alone—we must consider other social values that its extension
implicates.
explicitly attend to the scope of the First Amendment’s freedom of speech. They should consider the social ordering of the context of the activity and the value of such ordering when deciding whether a given social practice—such as the language in securities prospectuses, contracts, or tax returns—comes within the First Amendment’s boundaries.

More granularly, courts and litigants must be attuned to First Amendment coverage questions not just in areas of traditionally wholly uncovered speech, but in areas where there is the potential for extension of covered categories, such as commercial speech, to types of activity that sphere has previously not covered. For instance, is a corporate tax return commercial speech or some other type of activity outside of the First Amendment’s boundaries? Second, courts should weigh (and litigants argue) not only their instincts about the speech/conduct boundary or a given practice’s fit to a recognized category of speech (e.g. commercial or political), but also the social and institutional effects of including that practice within the First Amendment’s ambit—and they should do so explicitly.182

This is not a contention that “[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.”183 It is instead a call for a context-specific inquiry into the social and institutional relationships at stake in the challenged activity and the effects and incentives of setting the First Amendment’s boundaries relative to that activity. This is the type of analysis

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182 I urge explicit judicial articulation of reasons to reshape the First Amendment’s boundaries, notwithstanding that so doing will necessarily invite a host of challenges. But, as Robert Cover argues with respect to aspects of the law of association, “that is as it should be. The invasion of the nomos of the insular community . . . ought to be grounded on an interpretive commitment that is as fundamental as that of the insular community.” Cover, supra note 25, at 67 n.195.

183 United States v. Stevens, 559 U.S. 460, 470 (2010) (quoting Brief for United States at 8, Stevens, 559 U.S. 460 (No. 08-769)).
that both realism and law and economics have made so prominent in contemporary legal analysis.\textsuperscript{184}

But are there other more attractive approaches? It may be enticing to imagine that we can sidestep these difficulties by way of the historically unprotected categories.\textsuperscript{185} But these categories, and lack of forthright explanation, cannot account for the inapplicability of the First Amendment to workplace harassment, contracts, malpractice, and perjury, to name but a few. Without explicit analysis of why a given social practice should fall within the First Amendment, we put rule of law values at risk.\textsuperscript{186} Is the regulation of the sale of a firearm speech within the scope of the First Amendment?\textsuperscript{187} It takes place through the use of words: an offer and an acceptance, likely facilitated by some form of advertising. What about the regulation of harassing workplace speech or perjury? Both operate through speech and expression in any colloquial sense. Coverage questions, and their significant social and institutional implications, cannot be left to conclusory judgments about an activity’s “speechiness.”

Should entrusting these judgments to judges raise concerns of activism? I think not. Without explicit analysis, we are left with the largely unarticulated social judgments of judges—and their potentially profound institutional implications. Those unstated social judgments have


\textsuperscript{185} Cf. Stevens, 559 U.S. at 470 (“The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.”).

\textsuperscript{186} Shanor, supra note 19, at 181–82.

\textsuperscript{187} See Nordyke v. Santa Clara County, 110 F.3d 707, 712–13 (9th Cir. 1997) (concluding that a county lease provision that prohibited “any person from selling, offering for sale, supplying, delivering, or giving possession or control of firearms or ammunition to any other person at a gun show at the fairgrounds” violated the First Amendment; cf. Tracy Rifle & Pistol LLC v. Harris, 118 F. Supp. 3d 1182, 1191–92 (E.D. Cal. 2015) (deciding a First Amendment challenge to a state restriction on handgun advertising), aff’d 637 Fed. App’x 401 (9th Cir. 2016).
the same “activist” effect. For example, take the exclusion of Title VII from First Amendment coverage. No one would suggest that the harassing speech in *Forklift* plausibly fell within one of the historically excluded categories—or that the social, economic, and institutional effect of deciding, *sub silentio*, that harassing workplace speech is not “speech” was not enormous. The courts, including the Justices in *Forklift*, are already making just these sorts of judgments, only often doing so without discussion. It is in the core competencies of judges, moreover, to articulate the scope and limits of constitutional provisions and the balance of their interactions.

The other obvious path would be to extend constitutional coverage, at least presumptively, to all manner of expression.\(^{188}\) This is essentially what Justice Roberts proposed in *United States v. Stevens*,\(^{189}\) and what Floyd Abrams has offered in response to critics of First Amendment *Lochnerism*.\(^{190}\) This approach raises several problems. First, it would constitutionalize great swaths of social life and in so doing open up plausible legal challenges to anything from ordinary contract law to the federal rules of evidence. It would, among other things, run much of the administrative state and the world’s largest economy through the courts. It would create, in short, what Mark Tushnet has called the “too much work” principle.\(^{191}\) Second, it would create predictable distributional effects. As the political science literature has captured, only certain sorts of individuals can and do bring legal challenges.\(^{192}\) By


\(^{189}\) 559 U.S. 460, 471–72 (2010).


\(^{191}\) Tushnet, *supra* note 11, at 1076 (“Doctrines that require ordinary judges to do too much work to reach obvious results ought to be avoided because too often ordinary judges will make mistakes—from the point of view of a higher court—as they try to implement the complex doctrines step by step.”); see also *id.* at 1117–20 (arguing that the “too much work” principle represents a balance of decision costs and error costs, by which higher courts avoid rules that would require lower courts to do too much work to reach the correct result, which may offer a reason to maintain the coverage/protection distinction).

\(^{192}\) See *supra* note 128.
drawing more parts of social life into the First Amendment’s ambit, we provide more contexts for First Amendment opportunism—and so more opportunities for, at least generally, certain sorts of claimants to embed their substantive policy views in the law. Third, expanding the scope of coverage may create pressure to lower levels of protection within that coverage, as others have argued.\textsuperscript{193} We may dilute free speech protection, and that dilution may spill over into traditional areas of First Amendment coverage in ways that are now difficult to anticipate.

But more fundamentally, a coverage everywhere (or everywhere except in historically exempt categories) approach does not avoid the line drawing problem: We still must identify what is “speech” and what is not for purposes of the First Amendment. As the Court noted in \textit{City of Dallas v. Stanglin}, “[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one’s friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”\textsuperscript{194} Due to the pervasive nature of speech and expression, there is still the problem of the limiting principle. Thus, even if we were to embrace a generally more capacious scope of the right,\textsuperscript{195} and perhaps particularly if we sustain a robust level of

\textsuperscript{193} \textit{See}, e.g., Reed v. Town of Gilbert, 135 S. Ct. 2218, 2234–35 (2015) (Breyer, J., concurring in the judgment) (noting that content-based categories of speech have been generally excluded from stringent—if any—First Amendment protection that the majority’s redefinition of content-based analysis would render presumptively constitutional, saying “I recognize that the Court could escape the problem by watering down the force of the presumption against constitutionality that ‘strict scrutiny’ normally carries with it. But, in my view, doing so will weaken the First Amendment’s protection in instances where ‘strict scrutiny’ should apply in full force?”); \textit{Ohralik v. Ohio State Bar Ass’n}, 436 U.S. 447, 456 (1978) (“To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment’s guarantee with respect to the latter kind of speech.”); Frederick Schauer, \textit{Commercial Speech and the Architecture of the First Amendment}, 56 \textit{CIN. L. REV.} 1181, 1194 (1988) (discussing the move of commercial speech from outside to inside the First Amendment, and arguing that “[w]here existing first amendment rules to be applied to commercial speech, we can foresee similar dangers of doctrinal dilution, where ‘doctrinal dilution’ refers to the possibility that some existing first amendment rule would lose some of its strength because of the number of unacceptable applications it would generate when its new applications were added”); Tushnet, \textit{supra} note 11, at 1086–88 (agreeing with Justice Breyer’s concurrence in \textit{Reed}).

\textsuperscript{194} 490 U.S. 19, 25 (1989).

\textsuperscript{195} For an argument in favor of this proposition, see Bambauer & Bambauer, \textit{supra} note 74, at 393–94.
protection within that ambit, we will still face limiting principle cases and need a method of approaching them.

It may be easy to understand the freedom of speech as an abstract liberty right, with its scope obvious (be it “speech,” “information,” or “expression”). But the seeming obviousness of First Amendment coverage obscures the other important social values that expanding it upsets—including normative and institutional values such as equality and workplace order (Title VII), democratic decision-making and reliance/promising norms (deregulatory First Amendment). At the frontiers of the First Amendment, we must both analyze social context carefully—and weigh the effects and normative implications of coverage decisions. This makes scope-of-the-right claims distinctive to claims in already covered spaces. It is also the beginnings of what I call a “realist approach” to the First Amendment.196

A. The Stakes of Contemporary Coverage Cases

This Section explores the stakes of current and emerging First Amendment coverage questions—now found most prevalently in conflicts between free speech and the regulatory state, and particularly the regulation of economic life. Commentators and judges alike increasingly describe these cases under the umbrella term of First Amendment Lochnerism.197 These cases include challenges to business licensing laws, a wide range of labeling and disclosure requirements in domains from health and safety to foreign affairs, to the regulation of the pharmaceutical industry’s research and development of drugs.198 And advocates of a

196 See Shanor, supra note 19, at 206. This approach is somewhat resonate with Mark Tushnet’s critical legal studies approach in Art and the First Amendment, supra note 116.

197 See supra note 58 and related text.

198 See supra note 44.
libertarian vision of the First Amendment have anticipated claims against federal and state securities laws, among others. As one libertarian free speech activist explained:

Over the past several decades, the Supreme Court has provided commercial speech more legal protection. Some on the Court have begun to accept the idea that the First Amendment does not discriminate between different forms of speech. But there is more to be done. For example, the Supreme Court and the Circuit Courts can strengthen the First Amendment by ending the exclusion of some forms of speech from constitutional protections by characterizing it as "conduct."

How should courts evaluate these proliferating claims? Is a securities registration statement "speech" for First Amendment purposes, for instance? What about a sticker price?

The interests at stake in these deregulatory First Amendment cases are at once various and the same. They span a huge range of social institutions and relationships, including the regulation of basic market norms, from business licensing requirements to reliance relationships—such as those that underlie commercial and securities fraud as well as

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199 Liptak, supra note 52. We can likewise foresee free speech challenges to disclosure mandates such as the SEC’s CEO pay ratio disclosure, Press Release, SEC, SEC Adopts Rule for Pay Ratio Disclosure (Aug. 5, 2015), https://www.sec.gov/news/pressrelease/2015-160.html, the Labor Department’s anti-union consultation disclosure, Press Release, Dept’ of Labor, New U.S. Department of Labor Rule Improves Transparency for Workers Considering Union Representation (Mar. 23, 2016), http://www.dol.gov/newsroom/releases/olms/olms20160323, and perhaps the FDA’s new warnings labels for opioid painkillers, Press Release, FDA, FDA Announces Enhanced Warnings for Immediate-Release Opioid Pain Medications Related to Risks of Misuse, Abuse, Addiction, Overdose and Death (Mar. 22, 2016), http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm491739.htm. We could quickly identify countless other potential cases. See Reed v. Town of Gilbert, 135 S. Ct. 2218, 2234–35 (2015) (Breyer, J. concurring in the judgment) (enumerating areas of governmental regulation where presumption against constitutionality has no place, such as securities regulation, energy conservation labeling-practices, regulation of prescription drugs, doctor patient confidentiality, income tax statements, and hand washing signs at petting zoos); Pharm. Care Mgmt. Ass’n v. Rowe, 429 F.3d 294, 316 (1st Cir. 2005) (“There are literally thousands of similar regulations on the books—such as product labeling laws, environmental spill reporting, accident reports by common carriers, SEC reporting as to corporate losses and . . . the requirement to file tax returns . . . . The idea that these . . . require an extensive First Amendment analysis is mistaken.”); Nat’l Elec. Mfrs. Ass’n v. Sorrell, 272 F.3d 104, 116 (2d Cir. 2001) (listing the numerous regulations that could be challenged if the court recognized a broad First Amendment right against compelled disclosures).


202 Compare Expressions Hair Design v. Schneiderman, 808 F.3d 118, 131 (2d Cir. 2015) (holding that a state law forbidding credit card surcharges was a regulation of conduct, not speech), vacated, 137 S. Ct. 1144 (2017), with Dana’s R.R. Supply v. Att’y Gen., 807 F.3d 1235, 1245–46 (11th Cir. 2015) (holding that a state law forbidding credit card surcharges was a regulation of speech).
malpractice. How do these different forms of communication, like registration statements, operate in the marketplace? Certainly registration statements provide information on which investors depend, much like patients rely on information from their doctors. Do we need or want these sorts of trust relationships in our marketplaces—or should the realm of securities transactions be a domain of free normative contestation? Does the notion that “[u]nder the First Amendment there is no such thing as a false idea” and that “[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas” make social sense in the context of securities markets?

At the same time, the deregulatory cases all implicate similar higher-level normative and institutional considerations. The coming First Amendment coverage issues point out larger normative and political questions about what role we, as a democratic society, will countenance for both courts and private parties in limiting the powers of the political branches to structure our economic and social life. Due to the pervasiveness of speech and expression, First Amendment claims can, in practice, be brought against nearly all manner of regulation. This leaves the substantive shape of economic policy, at least under a regime of relatively stringent First Amendment protections, largely in the hands of resourceful litigants. The pervasiveness of speech and expression permit selective deregulation based upon the preferences of those able and interested in bringing such challenges. This has the potential—as Maria Glover has


\footnote{Shanor, supra note 19; cf. Schauer, supra note 68, at 191–92 (noting that the First Amendment has become broad enough to cover areas that do not appear to have any clear connection to “speech” as most people would understand the term).}
argued with regard to private arbitration regimes—to erode the substantive law itself.\textsuperscript{205} The First Amendment deregulatory cases thus raise pressing questions about how much we, as a society, will acquiesce to the displacement of public decision-making by largely elite preferences.\textsuperscript{206} We might also ask what conception of the state and citizen these sorts of cases embrace or prompt us to envision.\textsuperscript{207}

But the new \textit{Lochner} cases also raise important questions beyond these democratic dimensions, about the extension of normative contestation into previously otherwise ordered domains. Michel Foucault identified something similar decades ago, saying that the “crucial problem of present-day liberalism” is “knowing how far the market economy’s powers of political and social information extend.”\textsuperscript{208} By this I mean two things, interrelated with my points about the social function and context of such things as securities registration statements and the potential of deregulatory cases to erode public decision-making. First, expanding the logic of the First Amendment political speech cases (and its traditional domain of strict scrutiny) expands the space for a type of social interaction that is not ordered. It is deliberately open to norm contestation—not just about beliefs on things from gay marriage to the best type of basketball shoe, but also how usual things are done. Do we sit down on the bus, kiss each other goodbye, or take our shoes off by the door? Do we know how promises work or

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\textsuperscript{206} \textit{Cf.} Raymond Fisman et al., \textit{The Distributional Preferences of an Elite}, 349 SCIENCE 1300 (2015) (demonstrating divergent distributional preferences of Yale Law School students from a sample drawn from the American Life Panel, which is a broad cross-section of Americans, as well as an intermediate elite drawn from the student body at U.C. Berkeley); Benjamin I. Page et al., \textit{Democracy and the Policy Preferences of Wealthy Americans}, 11 PERSP. ON POL. 51 (2013) (reporting an empirical study of the divergence of elite preferences from the general public).


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how testing functions in an educational setting? Expanding the First Amendment’s core
domain of norm contestation offsets other sorts of social orderings. Conversely, the argument
that such normative contestation should be everywhere (or presumptively everywhere outside
of the traditionally excluded categories), embraces a vision of the person and her social context
that does not need other sorts of relationships, institutions, and orders—such as reliance
relationships of trust upon a doctor’s advice or the structuring of communications in
institutions like courthouses and schools.

Second, the combination of extending coverage without consideration of the normative
and institutional consequences of doing so devolves the choice of whether a social institution
should be ordered on norms other than contestation to those who can and do invoke First
Amendment protections. This is not to say that cases which expand coverage in ways that
offset the administrative state are necessarily neoliberal (or normatively suspect or ill-
intentioned) or that the vision of the person they embrace is market-constructed. It is to say
that, due to the pervasiveness of speech and flexibility of its invocation, in coverage cases we
give over not just substantive policy decisions to free speech claimants—but also decisions
about whether norms and conventions other than contestation should structure and give
meaning to our social lives.

B. The Broader Stakes of the Boundaries of the First Amendment

“We inhabit a nomos—a normative universe,” Robert Cover began his path-breaking
work, Nomos and Narrative. We create and maintain a world about right and wrong, lawful

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209 Cf. Grewal & Purdy, supra note 56 (discussing the shift towards market-centered approaches in
different areas of law).

210 Cover, supra note 25, at 4.
and unlawful, good and bad. To Cover’s list we might add the sublime, the tedious, the uncouth, the revolutionary, the cool, and the quotidian. Law, Cover pointed out, is one of the narratives that gives the world we live in meaning.

Cover’s insight was that “[t]he normative universe is held together by the force of interpretive commitments—some small and private, others immense and public.”211 It is through their separation and interaction, through the act of constituting interpretive communities, with their common meanings, values, rituals, conventions, and narratives, that the law is created. The unity of meaning and the understanding of social life that each of these differing communities create, he says, is “shattered, in fact, with its very creation”212 through its interaction with the diversity of others, and the clash with and attempt to forge a bridge between it and other social orders.

Cover’s discussion centers on insular sects and associations—such as the Amish and Mennonite communities.213 But his analysis reaches beyond associations modeled on insular autonomy to “collective attempts to increase revenue from market transactions, to transform society through violent revolution, to make converts for Jesus, and to change the law or the understanding of the law.”214 These groups, too, “have an inner life and some social boundary.”215

Beyond such more formal associations, we might add other social institutions and relationships, such as schools, churches, the dynamics of a doctor’s office, the floor of the

211 Id. at 7.
212 Id. at 16.
213 Id. at 32–33.
214 Id. at 33–34.
215 Id. at 34.
stock market, or the commitments made in the moment of a marriage or purchasing a car. Those relationships and institutions have inner lives and boundaries, too. They adopt their own logics—some more or less complete in the worlds of meaning they plot—and thicker or thinner in the understandings of what actions and words within them mean.

Cover argues that cohesive communities are built on the background of pluralist contestation protected by the First Amendment.\textsuperscript{216} “Such is the radical message of the first amendment: an interdependent system of obligation may be enforced, but the very patterns of meaning that give rise to effective or ineffective social control are to be left to the domain of Babel.”\textsuperscript{217}

This Article’s analysis of First Amendment coverage suggests that conception is incomplete, if not reversed. The patterns of meaning that underlie our interdependent social institutions are not just created in the domain of Babel and by, as Cover says, the “problem of intelligibility among communities.”\textsuperscript{218} They are also shaped by the norms of those communities and institutions—those cohesive social orders—themselves. It is against those cohesive social orders that the boundaries of First Amendment coverage are charted, and which, in some deep sense, they defend.

\textsuperscript{216} Id. at 16–17.
\textsuperscript{217} Id. at 17.
\textsuperscript{218} Id. at 17 n.45.
CONCLUSION

Should the First Amendment extend to securities or commercial fraud, discovery rules, or conspiracy? Should it encompass ordinary contract law or malpractice? These are the sorts of questions that the current transformation of the First Amendment raises. But it also surfaces deeper normative questions about social ordering: Are securities markets, courts, or contracts the types of institutions we want defined by pluralistic contestation—or by other social structures and ordering assumptions?

In deciding coverage questions, courts and communities do not simply recognize pre-existing norms and institutions: They draw the lines of those social boundaries and form part of the forces that shape them and invite new worlds. The exclusion of Title VII from First Amendment coverage includes within workplaces individuals that otherwise would have been excluded, harassed, marginalized, or demeaned. Title VII's exclusion contributed to the forging of modern workplace norms and a different sort of workplace pluralism. The Court’s decision, whether spoken or not, was a normative one not only about what our workplaces are and how words in them work—but also about what they should be. It is those sorts of fundamentally normative decisions that drawing the First Amendment’s borders demands and, regardless, cannot avoid.

Ultimately, the boundaries of the First Amendment not only reflect the sometimes pluralistic, and sometimes unitary, understandings of human expression—but also create and maintain those communities, their boundaries, and their worlds of meaning.
IV.
Business Licensing & Constitutional Liberty

Claims that the Constitution prohibits business licensing requirements have proliferated in recent years. The U.S. Court of Appeals for the District of Columbia Circuit recently concluded that a District requirement that tour guides obtain business licenses violated the First Amendment.¹ The Sixth Circuit likewise held that a licensing scheme for funeral directors violated due process and equal protection under the Fourteenth Amendment.² These cases mark a sea change in the treatment of economic liberty claims both by the courts and in U.S. legal culture.

In this Essay, I situate debates over the constitutional treatment of business licensing schemes in larger historical context. Doing so reveals the changing treatment of these schemes to be part of a trend that goes far beyond the regulation of licensing: the Constitution is increasingly being invoked as a trump against certain types of economic regulation. My thesis is that the central arguments currently marshaled in favor of extending stringent judicial review to business licensing regulations are untenable. These lines of reasoning have no logical endpoint. Individual rights, on this view, could trump any manner of governmental regulation in favor of free-market ordering.

These business licensing cases raise deep and pressing questions about the purpose and scope of rights and constitutional judicial review more broadly today. Underlying these debates are competing conceptions of constitutional liberty. One view, perhaps the ascendant one, reflects free-market libertarian values, whereas others understand the First and

² Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002).
Fourteenth Amendments to reflect ideals such as democratic self-governance, anti-subordination, or civic republicanism. Resolving disputes about the constitutional status of business licensing requires that we grapple with those deeper questions.

I. A Brief History

In the modern era, until recently, business licensing, like most of life, was not the subject of constitutional litigation. Regulations requiring you to get a license before working as a doctor, a lawyer, or a candlestick maker (not to mention a tour guide or a securities trader), were instead part of the vast swath of non-constitutionalized economic life. If you did not like the business licensing regime in your area and asked a lawyer for advice, she would most likely have given you tips on how to achieve compliance or perhaps suggested that you organize politically to change the regulation. Challenging the licensing law under the Constitution would not have come to mind.

Part of why your lawyer would not turn to the Constitution is because, since the 1930s, it has been black letter constitutional law that economic regulation is subject only to rational basis review—generally the most lenient type of explicit constitutional scrutiny. This well-established principle was largely the result of the New Deal settlement.

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3 Cf. Slaughter-House Cases, 83 U.S. 36 (1872); Bradwell v. Illinois, 83 U.S. 130 (1872); infra note 5.

For several decades before the New Deal, however, the Constitution provided a stronger measure of defense against the regulation of economic life. Often called the *Lochner* era, that period from the end of the Gilded Age through much of the Great Depression has come to symbolize the judicial striking down of economic regulation. *Lochner*ism was an obstacle for New Dealers interested in expanding governmental intervention into economic affairs, including in response to the challenges of the Great Depression. In the late 1930s, the Court repudiated *Lochner*, thereby rejecting its prior understanding of liberty and ushering in a more active regulatory state. Ever since, it has been generally accepted—if not unchallenged—law that economic regulation is subject only to rational basis review.

The last two decades have arguably begun to unsettle that well-established principle. First and Fourteenth Amendment challenges to a wide array of economic regulations have proliferated—and many have been met with significant success. In the First Amendment context, plaintiffs across the country are increasingly invoking the Free Speech Clause as a shield against what a generation ago would have been viewed as ordinary economic regulation.

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5 *See* *Lochner v. New York*, 198 U.S. 45 (1905) (holding maximum hours law for bakers unconstitutional); *see also*, *e.g.*, Adkins v. Children’s Hosp., 261 U.S. 525 (1923) (invalidating minimum wage legislation for women); Adair v. United States, 208 U.S. 161 (1908) (striking down a federal statute that prohibited railroad companies from requiring that a worker not join a labor union as a condition for employment). In early decisions, however, the Supreme Court took a relatively flexible approach to medical licensing, finding it within the proper exercise of the police power. For example, in Dent v. West Virginia, 129 U.S. 114 (1889), the Court rejected a challenge to a state law requiring physicians to obtain a certificate from the state board of health attesting to their qualifications. And, in Hawker v. New York, 170 U.S. 189 (1898), the Court again held that a law specifying the qualifications to practice medicine was a proper exercise of the police power.

6 W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

subject to lax, if any, constitutional review. Just this term, for example, the Supreme Court granted certiorari in *Expressions Hair Design v. Schneiderman*, a First Amendment challenge to the regulation of credit card swipe fees. Fast food plaintiffs, too, brought a First Amendment challenge to Seattle’s ordinance raising its minimum wage. And a wide array of warning labels and disclosure requirements has been challenged as an infringement on speech—from nutrition labels to cigarette warning labels, to country of origin and sourcing disclosures. These examples represent only a small fraction of the recent deluge of free speech challenges to economic regulation.

At the same time, Fourteenth Amendment economic liberty claims are emerging. Although support for a return to robust substantive due process review of economic claims is

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9 At issue are regulations that require such fees to be included in the sticker price of a product so that a customer can get a discount for paying cash rather than incur a surcharge for paying credit. Expressions Hair Design v. Schneiderman, 808 F.3d 118 (2d Cir. 2015), cert. granted, No. 15-1391, 2016 WL 2855230 (Sept. 29, 2016) (mem.).

10 Int’l Franchise Ass’n, Inc. v. City of Seattle, 803 F.3d 389 (9th Cir. 2015).


12 Many, but not all, recent Fourteenth Amendment economic liberties claims involve business licensing regimes. See, e.g., Young v. Rickets, 825 F.3d 487 (8th Cir. 2016) (First and Fourteenth Amendment challenge to state real estate licensing law); Hettinga v. United States, 677 F.3d 471 (D.C. Cir. 2012) (equal protection and due process challenge to milk regulations); Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002) (substantive due process and equal protection challenge to funeral director licensing law); Complaint for Declaratory and
still not generally accepted, there are prominent voices in the conservative legal community—some in this collection—that no longer take for granted that *Lochner* is or should be anticanonical.

Recent challenges to occupational licensing regimes under the First and Fourteenth Amendments are one facet of these larger trends. Raised as free speech claims, these challenges contribute to broader efforts to expand the scope of the First Amendment in economic life. When brought under the Fourteenth Amendment, occupational licensing cases seek to reinvigorate economic substantive due process and revive *Lochner*-type principles under their original constitutional hook. In either First or Fourteenth Amendment form, these cases contribute to a moment in which advocates are seeking more stringent review of economic liberty claims.


As Victoria Nourse has aptly described, constitutional review of individual rights (such as free speech) has become more stringent than the *Lochner* era’s more flexible review. Victoria F. Nourse, *A Tale of Two Lockners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751 (2009). This means that if economic liberty claims were leveled up to today’s individual rights claims (for example, by way of the First Amendment), they would rest on an even higher plane than they did during the *Lochner* era.
Recent occupational licensing cases have provoked considerable disagreement and created several circuit splits. The Fifth Circuit and District of Columbia Circuit have diverged, for instance, over whether a requirement that tour guides acquire a business license violates the First Amendment.\textsuperscript{16} And the circuits have likewise split over whether, in the context of other business licensing regimes, a desire to favor one intrastate industry or group over another constitutes a rational basis under substantive due process.\textsuperscript{17} Occupational licensing is being pushed from being largely a non-constitutional issue to being a constitutional one.\textsuperscript{18}

What do we make of this emergent constitutional shift?\textsuperscript{19} A number of commentators and academics have critiqued these larger trends as \textit{Lochner}-esque and therefore, at least implicitly, normatively undesirable.\textsuperscript{20} That is not my point here. Like David Bernstein, Clark Neily, and a host of other commentators, I do not believe that an accusation of \textit{Lochnerism}


\textsuperscript{18} It is becoming, in the words of Frederick Schauer, constitutionally salient. \textit{See} Schauer, \textit{The Boundaries of the First Amendment}, \textit{ supra} note 4.


\textsuperscript{20} \textit{See, e.g.}, \textit{Sorrell v. IMS Health Inc.}, 131 S. Ct. 2653, 2685 (2011) (Breyer, J., dissenting).
suffices as a normative conclusion about the good of stringent constitutional review. Nor can we reach a normative judgment based solely on the historical contention that at an earlier point in history the Court rejected stringent review of the regulation of economic life. We must instead ask if, and if so why, that arrangement is justified today.

The constitutional implications of business licensing schemes present hard questions: Could the government constitutionally prohibit individuals who lack political power from pursuing any remunerative profession? Regardless of one's perspective, the answer to this question is almost certainly no. But could the government prohibit such an individual from pursuing her chosen profession? And, if so, on what grounds? Those questions present much more difficult cases.

This short piece does not endeavor to define the precise scope of, or circumstances surrounding, any limits on business licensing regimes that may be constitutionally required. Rather, I want to focus on the key constitutional arguments that advocates have marshaled in opposition to such regimes. Leading arguments currently being made—and sometimes accepted by courts—create a host of problems of their own. Resolution of the hard questions surrounding constitutional challenges to business licensing demand at once a broader and more nuanced approach.


23 See Amanda Shanor, The Expanding Constitution and the Erosion of the New Deal Settlement (Oct. 8, 2016) (unpublished manuscript) (on file with author) (providing normative arguments for an economic-sociopolitical rights distinction and arguing that historical arguments are insufficient).
II. THE UNTENABILITY OF CURRENT ARGUMENTS AGAINST THE REGULATION OF BUSINESS LICENSING

Constitutional challenges to business licensing regimes are most typically brought under the First and/or Fourteenth Amendments. This Part examines the central arguments currently being marshaled by advocates in favor of stringent review of business licensing regimes with respect to each of those constitutional hooks.24

A. Free Speech

First Amendment arguments in favor of robust rights to be free from occupational licensing requirements often focus on “speech” within the business undertaking. Advocates at the forefront of business licensing challenges have argued that certain “speaking occupations” (like, in their view, tour guides or interior designers) should uniquely qualify for stringent First Amendment scrutiny.25 These claims are based on the contention—often implicit and almost never defended—that (1) all “speech is speech,” and (2) all types of “speech” should therefore be subject to the same stringent constitutional review.

Putting aside the rather amorphous issue of what the term “speaking occupations” should be read to encompass, this position raises a serious limiting principle problem. If the “speaking” nature of a profession were sufficient to trigger stringent review of the regulation

24 My focus here is on the primary public arguments and litigation strategies surrounding these cases. A number of prominent thinkers—including Judge Alex Kozinski, Richard Epstein, Randy Barnett, George Will, and David Bernstein—have come out in favor of a return to Lochner-type review of economic regulation. See, e.g., Barnett, supra note 14; Epstein, supra note 14; Randy E. Barnett, Does the Constitution Protect Economic Liberty?, 35 HARV. J.L. & PUB. POL’Y 5 (2012); Randy E. Barnett, Foreword: Why Popular Sovereignty Requires the Due Process of Law to Challenge “Irrational or Arbitrary” Statutes, -- GEO. J.L. & PUB. POL’Y -- (forthcoming, 2016); David B. Bernstein, The Mainstreaming of Libertarian Constitutionalism, 77 L. & CONTEMP. PROBS. 43 (2014); Alex Kozinski & Stuart Banner, The Anti-History and Pre-History of Commercial Speech, 71 TEX. L. REV. 747 (1993). Their arguments are varied and more nuanced than I can do justice to in this short piece.

of that profession, professional conduct such as malpractice and fraud would be entitled to
stringent review as well. But neither has been traditionally subject to any First Amendment
scrutiny—and advocates of applying more stringent review to the licensing of “speaking
professions” generally do not seriously contend it should be.26

Let’s take an example. If I am your doctor, and I recommend we amputate your leg
(when, based on prevailing professional norms, we certainly should not), and you later sue me
for malpractice, the claim is no less based on words than a tour guide who “speaks” for a
living. “But,” you might say, “the malpractice example has a real-world harm—you cut off my
leg!” Of course, you would be right. But that harm does not have any analytically different
relationship to speech than the sorts of harms—health and safety, say—that licensing seeks to
address in the first instance. The harms that may flow from fraud or malpractice are no less
related to the “speakingness” of a “speaking occupation.”27

As I and others have explored, it has never been the case that all “speech” or
expression has been subject to constitutional review, let alone stringent scrutiny. Most of life,
including life in words and expressive activities, falls (at least as a practical, if not analytical
matter) entirely outside of the First Amendment’s ambit.28 This includes all variety of activities
from the compelled filing of tax returns to ordinary contract law to the discovery rules in
federal courts (all words on a page); the regulation of perjury, fraud, and conspiracy; rules

(analyzing the constitutional treatment of professional speech).

27 See Robert Post & Amanda Shanor, Adam Smith’s First Amendment, 128 HARV. L. REV. F. 165, 178 (2015);
Shanor, The New Lochner, supra note 4, at 181-82.

28 Frederick Schauer has termed these sorts of activities “patently uncovered speech.” See Schauer, Out of Range:
On Patently Uncovered Speech, supra note 4, at 346; see also Shanor, The New Lochner, supra note 4, at 177-83;
Shanor, The First Amendment’s Boundaries, supra note 4, at 29; Mark Tushnet, The Coverage/Protection Distinction in
about fiduciary duties; much of securities, antitrust, and trademark law; and Title VII’s workplace harassment provisions.

Given the pervasiveness of speech and expression, were it otherwise, the First Amendment could be invoked against nearly any regulation. It is not an overstatement to say that treating all words as “speech” entitled to strict constitutional scrutiny would render self-government as a practical matter impossible. In concrete terms, it would require either a radical reconfiguration of the modern administrative state—including the drastic curtailing of the work of agencies such as the Securities and Exchange Commission, Federal Trade Commission, and Consumer Financial Protection Bureau—or the significant watering down of stringent review. Advocates in favor of stringent First Amendment protection against business licensing fail to contend with this logical conclusion of their argument.

B. Substantive Due Process

Litigators of the business licensing cases today also seek to strengthen the bite of economic substantive due process by identifying crosscutting bases for economic regulation that can be deemed irrational. In so doing, they aim to do away with the rational basis test altogether in favor of more stringent review.

Their central contention is that licensing regimes implicate a sort of favoritism of one intrastate industry or group over another (say, dentists over teeth whitening businesses).


30 See Post & Shanor, supra note 27; Shanor, The New Lochner, supra note 4.

31 See sources cited supra note 17.

Advocates argue that this difference in treatment should suffice to trigger more searching constitutional scrutiny. At the least, they assert, favoritism should trigger so-called “rational basis with bite,” of the kind applied in cases like City of Cleburne v. Cleburne Living Center and Romer v. Evans in the context of regulations based on animus against a group.33

This argument that any line drawing between groups should necessarily trigger heightened constitutional scrutiny is problematic in several respects. First, if “favoritism,” defined as broadly as advocates urge, were an illegitimate legislative basis, almost any sort of regulation would be suspect. The Supreme Court confronted this issue in Fitzgerald v. Racing Association of Central Iowa, an equal protection challenge to a state law that taxed riverboat slot machines more favorably than racetrack slot machines. The Court applied ordinary rational basis principles and rejected the challenge, explaining that “[a]fter all, if every subsidiary provision in a law designed to help racetracks had to help those racetracks and nothing more, then (since any tax rate hurts the racetracks when compared with a lower rate) there could be no taxation of the racetracks at all.”34 As the Court rightly recognized, some degree of line drawing—that is, favoring one group, behavior, or activity over another—is necessary to legislate.35

Relatedly, advocates argue that restrictions on economic liberty should be treated as analogous to restrictions on other sorts of individual rights (such as political liberties), which

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34 Fitzgerald v. Racing Ass’n of Cent. Iowa, 539 U.S. 103, 108 (2003); see also Ferguson v. Skrupa, 372 U.S. 726, 730-31 (1963) (“It is now settled that States ‘have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.’”).

35 See, e.g., Sensational Smiles, LLC v. Mullen, 793 F.3d 281 (2d Cir. 2016); Powers, 379 F.3d 1208.
generally receive heightened constitutional scrutiny. All manner of “rights,” the argument goes, are equal; and all should be subject to stringent review. Evan Bernick of the Institute for Justice, for instance, has argued that “the Court must insist that the government may never restrict people’s peaceful exercise of their liberty without an honest, reasoned justification” because there should be “no such thing as a second-class right, any more than a second-class citizen.” On this view, there is no articulated limit to the opt-out “rights” that courts should recognize and subject to stringent review.

It is easy to think of examples that draw the analytical limits of this argument into serious question. Do I have a constitutional right against your employment claim because I have a liberty to racially discriminate? A right against your slip and fall suit because I have a liberty to leave puddles of water in my building? A right against a criminal fraud charge because I have a liberty to say (that is, lie about) whatever I want? The problem, which remarkably bears repeating, is that individual liberties—at least if they are treated as trumps against lawmaking and regulation—must not be infinite if we care to live in an organized, let alone just, society.

36 Evan Bernick, *Griswold at 50: An (Incomplete) Constitutional Revolution and Is Meaning Today*, HUFFINGTON POST (June 9, 2016, 11:43 AM), http://www.huffingtonpost.com/evan-bernick/griswold-at-50-an-incompl_b.7544458.html [http://perma.cc/Q75B-NENV] (arguing that the problem with *Griswold’s* protection of the right of privacy was that the unenumerated rights revolution did not go far enough). It is worth noting that Bernick’s argument is not limited to business licensing cases. This litigation strategy may have intellectual roots, in part, in the work of scholars like Richard Epstein, who has argued that “all individual interests, whether they are classified as economic, expressive, or intimate,” should be treated the same. Epstein, *supra* note 14, at 305.

37 Several prominent libertarian academics and advocates, including those who support stringent constitutional review of business licensing regimes, recognize that there must be some limit to the principle that economic rights should trump the government’s ability to regulate. See, e.g., Barnett, *supra* note 14, at 262-63 (maintaining that the government should retain its ability to regulate property, contract, and much of criminal law); Gary Johnson, *A Message from Gov. Gary Johnson for Libertarian Delegates,* FACEBOOK (May 22, 2016), http://www.facebook.com/govgaryjohnson/posts/10153109454754364 [http://perma.cc/FS62-ZC2P] (taking a position in favor of anti-discrimination laws); Epstein, *supra* note 14, at 55, 78 (arguing that prohibitions on fraud should remain permissible, as should restrictions on abortion and sexuality). Likewise, many deregulatory First Amendment litigants forswear challenging the exclusion of commercial fraud from First Amendment coverage, even though that position is not consistent with their argument that *Reed v. Town of Gilbert* should be extended to abolish the commercial speech doctrine. See, e.g., Amicus
The contention that all rights (or in the context of First Amendment arguments, all speech) must be treated the same implicates a deeper problem: the argument assumes both the scope of what constitutes a “right” and the purpose of their stringent judicial review. Even on their own terms, advocates lack accounts of why all “rights” should qualify for stringent review (that is, of the purpose of the doctrinal architecture of the First or Fourteenth Amendments), or for that matter what activities fall within the scope of the “rights” subject to that heightened review. Presumably, few of those advocates would accept positive welfare rights, for instance, as “interests” that deserve heightened constitutional scrutiny—as a civic republican view might. The broad arguments against the regulation of business licensing instead appear to presuppose that the purpose of the right invoked, be it the First or Fourteenth Amendment, is to defend market ordering unencumbered by government regulation. They reflect, in so doing, a certain vision of liberty defined by individual market choice and freedom from government. These views are, however, not the necessary or only understanding of liberty or the purpose of either the First or Fourteenth Amendments. They are also rarely if ever explicitly justified.

CONCLUSION

The fact of this conversation—of these cases, of this collection—sheds light on deep questions in constitutional discourse today. The ambit of the Constitution’s more stringent review is being pushed to expand more broadly into economic affairs. These shifts raise deep questions about our constitutional system. They challenge us to ask what sorts of activities should be devoted to politics (as protected by lax or no judicial review) versus law (as defended

by more stringent scrutiny). They challenge us to consider substantively conflicting notions of liberty and their relationship to constitutional review—including whether liberty is only freedom from regulation, or also freedom of self-government. To date, however, the chief public arguments in favor of more stringent constitutional review of occupational licensing regimes have not addressed themselves to, let alone answered, those questions.

Whether or not business licenses improve health and safety or promote protectionism are important questions for the political branches. But the fact of legislative line drawing or “speech as such” does not make them ones for heightened constitutional review. Without a principled limit on when and how the Constitution can be invoked as a shield against economic regulation, we will embrace a world sharply tilted against democratic governance.

But no matter whether we agree or disagree about the status of business licensing under various constitutional provisions or in differing contexts, these cases highlight the need to reconsider the purpose and scope of what stringently protected constitutional liberties are and should be today. Is the purpose of the First or Fourteenth Amendment market freedom? Democratic self-government? Or other ideals? To answer those questions, it is not enough to look narrowly at the issue of business licensing or to point to line drawing or speech as such. Instead, we must squarely consider competing substantive understandings of constitutional liberty within the context of broader shifts in contemporary legal culture and jurisprudence.
V.
The Tragedy of Democratic Constitutionalism

“Not everything that is faced can be changed; but nothing can be changed until it is faced.”

INTRODUCTION

We find ourselves in a turbulent period in constitutional law. In a redux of the early 1900s, antiregulatory individual rights arguments rejected in the New Deal have reemerged with shocking force. The First Amendment has been transformed into a powerful deregulatory weapon, and a growing conflict brews between various constitutional doctrines and the modern state.

In the name of individual freedom, advocates demand nothing short of the “deconstruction of the administrative state.” The dominant theme of these arguments in both the courts and the public sphere is that liberty requires freedom from all government restraint. These contentions are often loosely premised on the assumption that if the government would only step out of the way and allow individuals to pursue their own self-interest, they would be “led by an invisible hand,” as Adam Smith popularized, “to promote the public interest” in a “spontaneous order.” Related arguments from an


originalist methodology claim that the framers believed in laissez faire notions of liberty, and so those principles should guide constitutional interpretation. From both economic and originalist perspectives, critics of the administrative state, often labeled defenders of the “Constitution in Exile,” call for a return to what they describe as a pre–New Deal constitutional order.

Today’s antiregulatory arguments present a formidable challenge to a heretofore widely accepted principle in U.S. constitutional law: since *Carolene Products* and its famous footnote four, courts have roughly bifurcated the stringency of judicial review, allowing more governmental latitude with regard to economic regulation and providing more stringent review to the regulation of many political and social activities. Although it appears nowhere in the Constitution’s text, courts have applied that principle across a broad range of doctrines and it has shaped the claims legal actors find constitutionally significant in the first place. For nearly a century, there was a broad, if deeply contested, consensus that this compromise was a fundamental feature of our constitutional order.


5. Some critics taking a historical approach point to the Progressive Era, rather than the New Deal, as the point at which the administrative state made an unconstitutional turn; they call for a return to the features of nineteenth century administration. Sophia Lee has termed scholars of this perspective “foundationalists.” Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism From the Founding to the Present*, 167 U. Pa. L. Rev. 1699, 1707 (2019).


That decades-long consensus is now plainly illusory. Arguments that constitutional liberty requires freedom from all government restraint, including that economic regulation must be subject to stringent judicial review, have made significant strides in undermining the New Deal compromise, both in the courts and U.S. legal culture. Economic regulation is regularly litigated as a matter of core constitutional concern, and more capacious economic liberty claims are gaining traction in U.S. legal culture. Constitutional claims and judicial application of the Constitution’s more stringent review are expanding into areas of life long viewed as of no constitutional moment.

These trends represent an emergent constitutional revolution: the decades-long success of the New Deal settlement is rapidly unraveling. Critiques of the New Deal order now dominate popular legal discourse and challenges to it fill the U.S. Supreme Court’s docket. In the last several terms alone, the Court heard five blockbuster First Amendment deregulatory challenges—*Masterpiece Cakeshop*,⁹ *Janus*,¹⁰ *NIFLA*,¹¹ *Fulton v. City of Philadelphia*,¹² and *Americans for Prosperity v. Bonta*¹³—as well as a case that embraced a sweeping view of takings law,¹⁴ another seeking to revive the nondelegation doctrine,¹⁵ and a challenge to *Auer* deference.¹⁶

9. *Masterpiece Cakeshop*, Ltd. v. Colo. C.R. Comm’n, 138 S. Ct. 1719 (2018). I was honored to have been part of the American Civil Liberties Union (ACLU) team that represented Charlie Craig and David Mullins, the gay couple denied service by Masterpiece Cakeshop, before the U.S. Supreme Court.


15. *Gundy v. United States*, 139 S. Ct. 2116 (2019). I also filed an amicus brief on behalf of the ACLU in support of the petitioner in *Gundy*.

Together cases like these threaten to, as Justice Kagan warned in the nondelegation case, render “most of [g]overnment . . . unconstitutional.”  

At the same time, withering attacks on the New Deal legal order take center stage with influential conservative legal organizations, including the Federalist Society, a key player in the larger coalition of libertarian and socially conservative legal organizations and business leaders that have been at the forefront of the burgeoning movement for pervasive, autonomous-centered constitutional liberty—and a powerful force in shaping the federal judiciary.

17.  Gundy, 139 S. Ct. at 2130 (Kagan, J., plurality opinion); see also Janus, 138 S. Ct. at 2501–02 (Kagan, J., dissenting) (“[T]he majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy. . . . [B]ut almost all economic and regulatory policy affects or touches speech. So the majority’s road runs long. And at every stop are black-robed rulers overriding citizens’ choices.”). Justice Scalia made a similar point in Employment Division v. Smith, when he noted that a religious autonomy right could allow each person “to become a law unto himself.” Emp. Div. v. Smith, 494 U.S. 872, 885 (1990) (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)). The Petitioners in Fulton asked the Supreme Court to overturn Smith’s holding. Brief for Petitioners at 2, 18–19, 37–52, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123).

18.  In the wake of the Great Depression, the New Deal legal order rejected the then-dominant laissez-faire constitutionalism in favor of political control of economic regulation.


20.  Other key organizations include the Alliance Defending Freedom, the U.S. Chamber of Commerce, the Institute for Justice, CATO, the Heritage Foundation, the Washington Legal Foundation, the Pacific Foundation, the Business Roundtable, and various top appellate firms, to point to only a few. For a history of the role of a business-led social movement in the First Amendment’s deregulatory turn, see Amanda Shanor, The New Lochner, 2016 WIS. L. REV. 153, 154–63 (2016); see generally KIMPHILLIPS-FEIN, INVISIBLE HANDS: THE BUSINESSMEN’S CRUSADE AGAINST THE NEW DEAL (2009) (tracing the decades-long activism, organizing, and political power-building of the business community in opposition to the New Deal since its inception); infra note 268 (collecting citations about the pushback against the New Deal by business elites).
This movement for autonomy-from-the-state-as-constitutional-liberty, including in economic life, is ascendant at a moment in which the United States faces the most extreme levels of economic inequality it has seen since the Great Depression. By one measure, U.S. inequality is the highest it has been since 1928. The period of general economic equality spanning the midcentury has collapsed. These trends demand a twenty-first century reassessment of the analytic compromise at the heart of the New Deal and its emergent alternative.

Despite a growing number of trenchant criticisms of expanding protection of economic and commercial rights, there has been no meaningful defense of bifurcated judicial review. Instead, opponents of this shift have principally offered largely historical and precedential responses—as if the rejection of Lochner v. New York and longstanding consensus around the economic/political rights distinction is a sufficient legal or normative response.

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For an insightful related discussion, see Jedediah Purdy, Wealth and Democracy, 58 NOMOS 235, 237 (2017) (noting that much thinking about American democracy in “recent decades has been subtly inflected by empirical premises that seem to be turning out false”).


25. 198 U.S. 45 (1905).
The key recent, and vital, exception to settled-history argumentation is the work of scholars in the growing law and political economy movement, of which I count myself a part. Grounded in the premise that political life and the economy mutually influence one another, those scholars have begun to develop responses calling for a reassessment of the political economy of constitutional trends, including First Amendment Lochnerism.

This Article responds to the erosion of the New Deal’s basic analytical distinction by facing its emergent replacement. The unraveling of that long-prevailing distinction—once


The basis for a response to this movement in the courts (and to what is often termed First Amendment Lochnerism) has likewise been grounded to a large extent in history if addressed at all, related in part to the shifting basis for many economic liberty claims from substantive process to the First Amendment and the cross-ideological coalition that supported expanding and robust First Amendment rights midcentury. See Shanor, supra note 20.


Genevieve Lakier has also contributed important ideas to this space. She has argued that the court’s recent libertarian interpretation of the First Amendment ignores the broader, non-First Amendment, freedom of speech tradition. Genevieve Lakier, The Non-First Amendment Law of Freedom of Speech, 134 Harv. L. Rev. 2299 (2021). She has also argued that the First Amendment’s real Lochner problem is that it embraces an almost wholly negative and antiredistributive notion of freedom of speech. Genevieve Lakier, The First Amendment’s Real Lochner Problem, 87 U. Chi. L. Rev. 1241 (2020). And drawing on arguments and analyses developed in the context of equal protection, she has proposed an antisubordination theory of the First Amendment. See Genevieve Lakier, Imagining an Antisubordinating First Amendment, 118 Colum. L. Rev. 2117 (2018).
thought to be an “unchallengeable constitutional reality”\textsuperscript{29}—demands an assessment of its ascendant alternative.

The Article contributes a new critique of the emergent individual liberty shift in U.S. constitutional law, and uncovers key features that make context-independent individual liberty claims institutionally and normatively unattractive. It identifies three false and foundational assumptions of the ascendant concept of individual liberty. First, this perspective is grounded in the view that that constitutional liberty means only a simple autonomy right against state action. Constitutional liberty is defined as freedom \textit{from} government and law. A different way of stating this first assumption is that the Constitution has no normative account of liberty other than simple, anti-state autonomy.\textsuperscript{30} Second, it wrongly assumes that liberty is an unlimited, nonrivalrous resource. From this perspective, there are no normative tradeoffs between liberties. There are only legitimate liberty claims and non-liberty interests. Third, it insists that the Constitution should maximally protect liberty claims thus defined. By eroding the New Deal distinction without providing an alternative limiting principle, the movement for autonomy-centered liberty is steering us toward a world of autonomy rights everywhere.

Understood in this way, liberty is an abstract right against state action. Framed as neutral and apolitical, this view of liberty insulates itself from normative tradeoffs, claims of justice, and analyses of power. The ascendant form of negative liberty foregrounds certain interference from the state and obscures the role that law otherwise plays in structuring and

\begin{itemize}
\item \textsuperscript{29} ACKERMAN, supra note 8, at 40.
\item \textsuperscript{30} That is, the Constitution should protect liberty in a context-independent way and does not differ in the reasons \textit{why} it values or protects different types of liberties (say, political speech versus commercial speech). For a contrasting view in the First Amendment context, see, for example, Post & Shanor, supra note 7; Robert Post, \\textit{Compelled Commercial Speech}, 117 W. VA. L. REV. 867 (2015).
\end{itemize}
constructing private power, and the forms of liberty that spring from our relationships with, rather than independence from, others.

I then analyze the emergent model’s principal justifications and political economy. I show that the emergent order fails on its own market-oriented terms. The Article provides a theoretical framework for understanding this emergent constitutional shift drawn from the toolbox of advocates pressing for its adoption. The budding view of liberty—as a context-independent, simple autonomy right against state action—threatens to produce a form of constitutional tragedy.

This emergent shift in public law can be productively considered against Garrett Hardin’s *Tragedy of the Commons.* Looking at uses of common real property, Hardin observed a phenomenon that posed a fundamental challenge to the classical economic assumption that each individual, acting in his own self-interest, will maximize the public good. Famously calling this phenomenon a “tragedy of the commons,” Hardin illustrated that self-interested behavior can instead lead to the depletion of common resources in ways that injure the community as a whole. In a deep sense, this is because we are not in fact atomistic individuals, but ones deeply interdependent on others.

Hardin’s intervention has altered how legal scholars think about private and administrative law, much of which developed around or in response to classical law and economics. The consequences for constitutional law, however, remain underexplored. Now, as constitutional law and discourse have turned to and incorporated economic and


32. See infra note 254 (collecting literature analyzing the Constitution as a commons, including that of Brigham Daniels, Blake Hudson, and Carol Rose, as well as longer literature exploring the rivalrous nature of liberty in its various dimensions).
private law ideas, the insights and critiques of private law and law and economics are increasingly relevant to constitutional concerns.

I use Hardin’s framework more as an allegory than an analogy. My point is not to draw a true or tight correspondence between constitutional freedom and a physical commons, and certainly not to espouse a vision of constitutional freedom grounded in economic efficiency as such an analogy might suggest. Nor, as should be plain, do I accept Hardin’s assumptions that humans are necessarily self-interested or that tragedy, of constitutional or real property dimensions, is inevitable. But reconsidering constitutional freedoms through this lens illustrates several key points. First, like liberty in a physical commons, constitutional liberties can be, and often are, rivalrous. In simple form, this is obvious. A baker’s religious right to decline to sell a wedding cake to a gay couple is rivalrous with that couple’s right to be served. My liberty to amass great amounts of wealth may be rivalrous with the freedom of others to receive quality health care or education, and the reverse. And a business’s freedom to spew pollution when making its products may be rivalrous with your (and your children’s) freedom to avoid the effects of climate change. There are normative tradeoffs between variants of freedom—some springing from the desire for independence and others from social interdependence.

Expanding constitutional autonomy is, moreover, not always liberty enhancing, including at a societal level and contrary to the claims of many contemporary antiregulatory advocates. The prohibition on robbing, as Hardin notes, certainly limits one’s freedom to rob. But at the same time, a prohibition on robbery works to free us both from being robbed of our property and of the constant fear of being robbed. (The reduction in robbery the prohibition affects

33. See Post & Shanor, supra note 7.
also provides broad opportunity to use saved resources to pursue many other forms of life we find enhance our practical freedoms, such as a vocation or an education.) The emergent autonomy-based regime may also be less than ideal for those who at first blush might seem to benefit—including because of the growing threat of social and political instability.\[^{34}\] The emergent vision of liberty additionally threatens to drive a wedge between the interests of the diverse conservative coalition that has supported the rise of simple autonomy, namely free-market libertarians\[^{35}\] and religious conservatives.\[^{36}\] This is because many conservatives of faith,

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\[^{34}\] Prominent billionaires’ outspoken support for greater taxation and regulation may suggest some recognition of this point. See, e.g., Greg Jaffe, *Capitalism in Crisis: U.S. Billionaires Worry About the Survival of the System That Made Them Rich*, WASH. POST (Apr. 20, 2019, 4:46 PM), https://www.washingtonpost.com/politics/capitalism-in-crisis-us-billionaires-worry-about-the-survival-of-the-system-that-made-them-rich/2019/04/20/3e06cf90-5ed8-11e9-bfad-3fa7eb36cb60_story.html [https://perma.cc/8WA2-MC7N]; Ray Dalio, *Why and How Capitalism Needs To Be Reformed*, ECON. PRINCIPLES (Apr. 5, 2019), https://economicprinciples.org/Why-and-How-Capitalism-Needs-To-Be-Reformed [https://perma.cc/B65L-V5J5] (founder of Bridgewater Associates arguing for increased taxes and redistribution on the basis that “[w]hile the pursuit of profit is usually an effective motivator and resource allocator... it is now producing a self-reinforcing feedback loop that widens the income/wealth/opportunity gap to the point that capitalism and the American Dream are in jeopardy” and noting that “[w]e are now seeing conflicts between populists of the left and populists of the right increasing around the world in much the same way as... they did in the 1930s when the income and wealth gaps were comparably large”); see also, e.g., David Ignatius, Opinion, *Corporate Panic About Capitalism Could Be a Turning Point*, WASH. POST (Aug. 20, 2019, 4:10 PM), https://www.washingtonpost.com/opinions/even-the-business-moguls-know-its-time-to-reform-capitalism/2019/08/20/95c4de74-c388-11e9-9986-1f3e4397be4_story.html [https://perma.cc/VJ5V-LXKC].


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\[^{35}\] The Washington Legal Foundation (WLF) is one such group. See About WLF, WASH. LEGAL FOUND. https://www.wlf.org/about-washington-legal-foundation [https://perma.cc/H4L8-478M] (“Our mission is to defend American free enterprise by litigating, educating, and advocating for a free market, a limited and accountable government, business civil liberties, and the rule of law.”) (last visited Jan. 18, 2022). WLF has been instrumental in enlarging free speech protection against U.S. Food and Drug Administration (FDA) regulation, including laying the groundwork for *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012).

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like most groups founded in shared values, do not hold single-note anti-state beliefs. They aim for a value-rich restructuring of social arrangements that in fact depend on certain forms of state action and legal choices. The full-scale adoption of autonomy-based speech rights, for example, would undermine a host of abortion regulations and protections for people of faith.

The Article then addresses the normative implications of the ascendant view of liberty. It argues that emergent view must be rejected if U.S. constitutional law is to retain the rights-as-trumps model that emerged in the twentieth century and advance any values other than free-market libertarianism. This is because many dimensions of liberty—including many of those most valued by the American people, such as the freedom to participate in democracy and to be treated equally and with dignity—are freedoms defined not only by autonomy from the state but also by social structures and relationships that are created and maintained by law, state action, and social interdependence.

The central contribution of the Article builds off the fact that the U.S. constitutional system is one of open-textured rights, the meanings of which are sensitive to litigant and movement advocacy and norm change, as a deep literature in democratic constitutionalism has traced. The tendency to define constitutional liberties as simple autonomy rights from state action, I argue, may be a persistent, if contingent, feature of our current form of capitalist democracy in which constitutional law is sensitive to litigant and social movement advocacy. This is because liberty defined as a right against state action asymmetrically favors the status quo distribution of resources, power, and status; it allows for context-independent vetoes of legal choices that alter or redistribute existing entitlements. On a political scale, the way in

which economic clout entrenches and is entrenched by political power has been well documented in the political science literature. As this Article illustrates, constitutional rights are susceptible to similar dynamics. This is both because those with more material resources and social status have more access and ability to shape the contours of rights, but also because they are seen by courts as within the community possessing such rights.

The trend toward autonomy rights is not, I argue, a feature of rights, rights-rhetoric, judicial review, or the logic of capitalism, as critics have argued. The system-tilt toward status-quo entrenching autonomy rights is instead the product of contingent, if persistent, institutional, psychological, and cultural arrangements. The same sensitivity of the U.S. constitutional system to social forces, moreover, makes the trend toward status-quo-entrenching rights one that a sufficiently mobilized populace advancing an alternative vision of liberty can overcome.

This perspective also offers a distinct contribution to the democratic constitutionalism literature: the moments that that scholarship has principally focused on, including the constitutional changes advanced by the civil rights movement, the women’s rights movement, and the New Deal, should be viewed as exceptions to the general trend of the U.S. system. In those exceptional moments, largescale movements organized to create and legally embed thick visions of constitutional freedom in relation to substantive power dynamics, rather than simple

38. Zeynep Tufekci makes a similar argument with regard to social movements and those in power in her powerful book on protest in a networked world. ZEYNEP TUFKCI, TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST 250 (2017) (“Confusion and doubt do not have the same effects on those in power as on the movements that challenge power; there is a fundamental asymmetry. Social movements, by their nature, attempt change and call for action, but doubt leads to inaction that perpetuates the status quo. The paralysis and disempowerment of doubt leads to the loss of credibility, spread of confusion, inaction and withdrawal from the issue by ordinary people, depriving movements of energy.”).

39. See, e.g., infra note 299 (collecting political science literature); Jacob S. Hacker & Paul Pierson, Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States, 38 POL. & SOCY 152, 154 (2010).

40. This Article builds upon Marc Galanter’s seminal account of why the “haves” come out ahead in the American legal system. See Marc Galanter, Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, 9 LAW & SOCY REV. 95 (1974).
autonomy. The general trend, by contrast, including in later equal protection law, are rights that entrench status quo distributions of power and resources, rather than efforts to alter or them.

We are now entering a period of extreme concentration of both wealth and thin autonomy rights, in a moment of extreme inequality and polarization. The question is whether a significant enough movement can or will coalesce to make this moment the exception, rather than the prevailing rule.

The Article is structured as follows. Part 0 briefly describes the emergence of the New Deal compromise, and the evolution of bifurcated constitutional review as a structural limit on rights as trumps. Part II elaborates the decades-long struggle to erode the compromise’s central analytical distinction between political and economic action, by incorporating an understanding of liberty as simple autonomy into public law. Part III considers the emergent individual liberty shift in U.S. constitutional law and the principal justifications for this autonomy movement. Part IV explores the significant normative and institutional drawbacks and distributional implications of this recent trend. Part V suggests that the dynamic between abstract autonomy and other dimensions of liberty evident in the current constitutional moment is a contingent but persistent feature of democratic constitutionalism in an unequal society with a common law constitutional system such as ours.

I. THE INVENTION OF THE NEW DEAL COMPROMISE

In the decades prior to the New Deal, spanning the late 1800s and early 1900s, individual constitutional rights arguments, such as Lochner’s paradigmatic liberty of contract, were often rooted in classical economics.41 The fundamental commitment of the Supreme Court at the

41. See, e.g., PHILLIPS-FEIN, supra note 20. As Victoria Nourse has argued, the rights the Lochner era protected were not the robust rights-as-trumps that are commonplace today. See, e.g., Victoria F. Nourse, A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights, 97 CALIF. L. REV. 193.
turn of the twentieth century was to a particular vision of liberty that required private, economic ordering to be unencumbered by governmental regulation.

As Roscoe Pound explained: “The idea that unlimited freedom of making promises was a natural right . . . . began as a doctrine of political economy, as a phase of Adam Smith’s doctrine which we commonly call laissez faire.”

Owen Fiss has aptly described the implication of this view:

[Even without a state, people can achieve a measure of happiness through the pursuit of self-interest and the formation of exchange relationships. As a result, the market, growing from the social realm, is treated as the basic ordering mechanism of society and the state as a derivative or supplemental institution. The state is an artificial creation, not part of the social order nor responsible for it. The state is an instrument, created to serve certain discrete ends that exist prior to and independent of it. Its duty is to facilitate exchange in the social realm by protecting property rights, among others, and to bring to an end those activities—for example, outbursts of violence or fraud—that prevent individuals from engaging in exchange or otherwise fully realizing their own ends.

As the abridged story line goes, in 1937 the Supreme Court took a historic turn away from its constitutional defense of that vision of twentieth-century laissez faire capitalism. In *West Coast Hotel*, in response to growing political forces calling for greater intervention in economic life to respond to the crises of the Great Depression, the Court downgraded constitutional protection for economic liberties and disavowed its previous protection of the freedom of

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contract.\textsuperscript{45} It is commonplace to recognize that, with that turn, the Court capitulated to the advance of the New Deal state.

A year later, in \textit{Carolene Products}, the Court elevated political rights to more stringent review.\textsuperscript{46} Stringent judicial review is legitimate, \textit{Carolene} reasoned, when legislation is not the product of a functioning political system.\textsuperscript{47} The judiciary therefore properly intervenes to protect the functioning of the political system. As explained in \textit{Carolene}'s now famous footnote four:

\begin{quote}

There may be narrower scope for operation of the presumption of constitutionality when [(1)] legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments\textsuperscript{48} . . . [(2)] legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . . [or (3)] prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.\textsuperscript{49}
\end{quote}

\textit{Carolene} attempted to craft, from the ashes of the \textit{Lochner} Court, a basis for individual rights and stringent judicial review grounded in democracy. In so doing, it moved away from the liberal, natural rights strand of early twentieth century constitutional history.\textsuperscript{50}

\begin{footnotes}


\item [47] \textit{Carolene Products}, 304 U.S. at 152 n.4.

\item [48] While \textit{Carolene} ostensibly envisioned stringent judicial review for legislation infringing rights protected by the first ten Amendments, it created the economic/political distinction within the Fifth, and that distinction has since been imported into other analytically and textually open-ended Amendments, including the First, as elaborated below.

\item [49] \textit{Carolene Products}, 304 U.S. at 152 n.4.

\item [50] \textit{See generally} Jon D. Michaels, \textit{To Promote the General Welfare: The Republican Imperative to Enhance Citizenship Welfare Rights}, 111 YALE L.J. 1457 (2002) (arguing that welfare rights are anathema to the Lochean, natural rights tradition and elaborating the need for a civic republican justification for them).

\end{footnotes}
Ever since, it has been black letter law that economic affairs are subject to laxer rational basis review, while political (or fundamental) rights—the subject of footnote four—are reviewed with more stringent scrutiny. That simple analytic distinction served as the basis of the New Deal compromise.

In rejecting *Lochner*, the Court ensured that the people, through political participation, were superior to economic power. As Franklin Delano Roosevelt expounded in a speech before the 1936 Democratic National Convention in Philadelphia:

> For too many of us the political equality we once had won was meaningless in the face of economic inequality. A small group had concentrated into their own hands an almost complete control over other people’s property, other people’s money, other people’s labor—other people’s lives. For too many of us life was no longer free; liberty no longer real; men could no longer follow the pursuit of happiness.

> Against economic tyranny such as this, the American citizen could appeal only to the organized power of Government. The collapse of 1929 showed up the despotism for what it was. The election of 1932 was the people’s mandate to end it. Under that mandate it is being ended.\(^52\)

A key goal of New Deal administration, as William Novak describes, was to privilege democracy over the agglomerations of wealth and political power that were viewed as plutocratic threats to meaningful liberty.\(^53\) It was thus a view of democracy and a claim to


\(^{53}\) William J. Novak, *The Progressive Idea of Democratic Administration*, 167 U. Pa. L. Rev. 1823, 1841 (2019) (“‘Our resplendent plutocracy,’ was Walter Weyl’s moniker for the corrupt and aristocratic alliance of ‘political “bosses”’ and ‘railroad “kings”’ and Senate “oligarchies”—the new agglomerations of corporate wealth and political power that produced a dangerous new mixture of the age-old threat of private interest trumping public democracy . . . , from this ‘degradation of democratic dogma,’ emerged the task of the times ‘[t]o curb the ambitions of plutocracy and preserve the democratic bequest for the common benefit

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justice based in a power analysis of contingent institutional arrangements. The New Deal state was grounded in the view that the political branches—namely, Congress and the administrative state—were better suited to advance the people’s interests against consolidated wealth and power than markets and the federal courts.

The New Deal compromise thus rejected the laissez faire premise that the economic sphere was a prepolitical ordering system that produced public good through the input of raw self-interest. It embraced, instead, a vision of liberty in which the people acquired greater freedom through democratic control of economic power. It aimed to advance a thick understanding of democratic participation and broad-based power. On that promise of democratic ordering, Carolene imposed certain limits—more stringent protections of certain fundamental noneconomic liberties—in order to ward off the threats of fascism and authoritarianism that the geopolitical developments leading up to World War II had brought into stark relief. Thus the New Deal compromise was born.

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54. My point is as normative as it is historical—though it is consistent with important work excavating the roots of the New Deal compromise. See, e.g., Novak, supra note 53; Laura Weinrib, Against Intolerance: The Red Scare Roots of Legal Liberalism, 18 J. GILDED AGE & PROGRESSIVE ERA 7 (2019). Cf. Laura M. Weinrib, Civil Liberties Outside the Courts, 2014 SUP. CT. REV. 297 (2014) (recovering the fluid and capacious meaning of ‘civil liberties’ during the New Deal era); John W. Wertheimer, A ‘Switch in Time’ Beyond the Nine: Historical Memory and the Constitutional Revolution of the 1930s, in 53 STUDIES IN LAW, POLITICS, AND SOCIETY 3 (Austin Sarat ed., 2010).

55. For an incisive critique of the notion that economic and noneconomic liberties can be separated, see Louis Michael Seidman, The Dale Problem: Property and Speech Under the Regulatory State, 75 U. CHI. L. REV. 1541 (2008).

Since its 1937 origins, the meaning of that compromise has evolved, most prominently during the rights revolution of the 1960s. The Civil Rights era Court, like the New Deal Court before it, sought to advance the constitutional value of broad-based democracy and freedom—simply against the backdrop of institutions and power dynamics that had changed. Against the backdrop it crafted doctrine that reflected the importance of social power and participation as well. Constitutional protections of noneconomic rights were expanded beyond the four corners of *Carolene’s* original footnote\(^57\) to include additional types of people—including women, people of color, and, increasingly, LGBT people. These protections were also extended to a greater range of civic institutions, such as schools and market spaces. The Civil Rights era’s refashioned compromise included, for example, the ability of racial minorities and women to participate more fully in social life, including through the integration of schools and public accommodations through a combination of constitutional protection and constitutional acquiescence to antidiscrimination laws.\(^58\) In the First Amendment context, this distinction was expanded to ideas and associations beyond the explicitly political—such as controversial art and associations related to social and economic power, including civil rights era litigation and boycotts.\(^59\) At its most fundamental, the rights revolution advanced the same constitutional value of broad democratic participation and power against changed institutions and power dynamics by updating the scope of constitutional liberty—and democratic will formation—to include what the Supreme Court

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57. *Cf.* Ackerman, *supra* note 46 (arguing that a key flaw of *Carolene* was its failure to reach such groups).


has called the basic “transactions and endeavors that constitute ordinary civic life in a free society.”

For decades there was broad consensus that the New Deal compromise was a relatively fixed feature of our constitutional order. Lochner has been frequently heralded by conservatives and progressives alike as part of the anticannon, or used simply as pejorative shorthand for judicial activism. Chief Justice Roberts, for instance, in his dissent in Obergefell accused the majority of Lochnerism in its recognition of marriage equality. Lochner is, as David Strauss has described, “one of the great anti-precedents of the twentieth century.” The rejection of Lochner, Bruce Ackerman has written, was the “great turning point” that “defines the legal meaning of modernity . . . in which an activist, regulatory state is finally accepted as an unchallengeable constitutional reality.” Few constitutional premises are more accepted or often noted than that Lochner is anathema to modern constitutional law. This consensus has long influenced judicial decisions and run deeper to the sorts of claims that

61. See Ackerman, supra note 8, at 40–41.
65. Strauss, supra note 62, at 373.
66. Ackerman, supra note 8, at 40. The soundness of the tiers of scrutiny—and the economic/political rights distinction on which it rests—is less often explicitly remarked upon. It, too, however, is a meme “so deeply embedded that it is often stated without further proof or elaboration and resists counterargument.” Greene, Substantive Due Process, supra note 62, at 256.
lawyers think to bring when faced with a problem in the world.\textsuperscript{67} But, as described below, that consensus is now illusory.

II. THE ASCENDANCY OF LIBERTY AS SIMPLE AUTONOMY

The New Deal order is in decline. Its emergent alternative, a version of the Constitution in Exile, is ascendant. This Part presents a brief, synthetic history of contemporary changes in constitutional doctrine. It describes the Constitution’s deregulatory turn across several doctrinal domains,\textsuperscript{68} as broad-based constitutional autonomy claims have gained increasing acceptance by judges,\textsuperscript{69} litigators,\textsuperscript{70} and scholars.\textsuperscript{71}

The aim of this Part is two-fold. First, it demonstrates the ascendancy of a version of the Constitution in Exile across a variety of constitutional domains that, taken together, evince a certain vision of constitutional liberty. Specifically, I trace the growing acceptance in the courts

\textsuperscript{67} See generally Amanda Shanor, First Amendment Coverage, 93 N.Y.U. L. REV. 318 (2018) [hereinafter Shanor, First Amendment Coverage] (describing the sociological dynamics of First Amendment coverage and what sorts of claims are understood to be “speech” claims in legal culture); Shanor, supra note 20 (elaborating the expansion of what is considered ‘speech’ for First Amendment purposes in the context of commercial speech); Amanda Shanor, Business Licensing and Constitutional Liberty, 126 YALE L.J. 314 (2016) [hereinafter Shanor, Business Licensing] (noting the importance of legal culture in making due process claims on or off the wall); Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 HARV. L. REV. 1765 (2004) (articulating the concept of constitutional salience and the role of legal culture in whether a claim is perceived as a constitutional one at all).

\textsuperscript{68} The focus of this Article is primarily on First Amendment rights, due process, nondelegation, takings, and interpretive doctrines. I have chosen that framework because of the importance of those domains to the New Deal compromise and its emergent alternative, and due to the degree of the recent transformations under those doctrines. But similar questions could be asked about other constitutional domains and potentially their differences, including under the Commerce Clause, see, for example, Nat’l Fed’n Indep. Bus. v. Sebelius, 567 U.S. 519 (2012), and of course the well-recognized shift in equal protection jurisprudence from an antisubordination to an anticlassification approach.


\textsuperscript{71} See Metzger, supra note 1, at 31–33; see also infra note 96 (collecting citations in the First Amendment context).
and U.S. legal culture of broad-based stringent constitutional review of all manner of regulation, including by way of a leveling of political and economic rights through the erosion of the New Deal distinction. These shifts remake the rights revolution of the Civil Rights era (and its strengthening of individual rights) to undo the original aim of the New Deal compromise: bringing economic power to democratic heel in furtherance of broad-based freedom and power.

Importantly, the understanding of individual liberty this movement advances, and which is increasingly reflected in caselaw, is a simple autonomy right against state action. Advocates seek to enact broad-based, context-independent autonomy rights. In so doing, they reject the New Deal’s division of political and economic rights; they likewise reject any normative theory distinguishing between forms of liberties, any domain-based distinctions, and theories of why a given freedom is, or should be, constitutionally valuable. Put differently, the Constitution, on this view, has no normative account of liberty other than simple, anti-state autonomy. As discussed in Part III, this constitutional vision may be informed, at least loosely, by Hayekian and other libertarian theories\(^\text{72}\) and classical economic ideas. It is also a view that in its negative simplicity insulates itself from claims of justice, normative tradeoffs, and power analyses.

Second, this Part contrasts the New Deal settlement, and the functional work that distinction has historically done, with the emergent model. It aims to show that the New Deal’s analytical distinction operated as a sort of liberty-as-resource management device, used by courts and legal actors to sort protected liberties from unprotected ones. In so doing, the New Deal settlement advanced a plural vision of constitutional liberty, grounded in a historically contingent analysis of power and institutional arrangements. I argue that the

\(^{72}\) For fuller description of Hayekian and other prominent libertarian theories see infra Part III.
emergent model fails to serve this crucial structural role. Instead, it rejects line drawing in favor of pervasive individual autonomy—that is, a world of rights everywhere.

A. Speech

First, the free speech clause has emerged as a robust engine of deregulation. Plaintiffs across the country are increasingly marshaling the right of free speech in contexts that a generation ago would not have prompted a lawyer or court to identify any First Amendment concern. It is now well recognized that something Lochneresque is afoot in the First Amendment.\(^\text{73}\) Regulatory regimes in disparate domains from health care to foreign affairs, and antidiscrimination law to securities regulation, are under constitutional threat.\(^\text{74}\) As Floyd Abrams, a prominent First Amendment Supreme Court advocate, observed: more so than perhaps at any other moment in history, the basic purposes of the First Amendment are now in play.\(^\text{75}\)

At the crux of that play is the erosion of the economic/political rights distinction—that is, the basic \textit{Carolene} distinction—that the Court embedded midcentury in free speech jurisprudence. Following the New Deal, the Supreme Court adopted the economic/political distinction within the doctrinal architecture of the freedom of speech (as well as the freedom of association). It explicitly distinguished between the levels of, and bases for, the protection

\[\text{Supreme Court case citations are added here for context.}\]

\[\text{Further reading and sources are added for completeness.}\]
of political speech, on the one hand, and economic activity and commercial speech, on the other. This distinction served as a check on the potential of the freedom of speech, an otherwise analytically unbounded right, to undo the New Deal settlement.

When the Court first extended First Amendment protection to commercial speech, for example, it explicitly afforded it less stringent review than speech about and in the context of public discourse. The Court stressed that “commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,” and is subject to “modes of regulation that might be impermissible in the realm of noncommercial expression.” Similarly, the Court arguably extended an even lesser level of constitutional protection to workplace speech, altogether excluding speech regulated by Title VII—including workplace speech bearing on pressing public questions of the status of women and racial and religious minorities—from First Amendment scrutiny. By contrast, speech in

76. For a discussion of the analytically unbounded nature of the freedom of speech, see Shanor, supra note 20. Freedom of association is similarly without a clear analytical limiting principle. Nearly everything humans do involves other humans or the absence of a relationship with another human (just as it does language and expression), and so the regulation of much of life could in theory be conceived of as a regulation on association. This is true not just of the obvious examples, such as antidiscrimination laws, but also, for example, regulations of business incorporation, the payment of taxes, antitrust law, or conspiracy. This is especially the case if we interpret the ‘expressive’ aspect of ‘expressive association’ broadly.


79. See Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (failing to mention First Amendment issue); Brief for Respondent at 31–33, Forklift, 510 U.S. 17 (No. 92-1168) (arguing that Petitioner’s interpretation of Title VII would violate the First Amendment); Reply Brief of Petitioner at 10–11, Forklift, 510 U.S. 17 (No. 92-1168) (arguing that the facts of the case did not implicate First Amendment concerns); see also Richard H. Fallon, Jr., Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn’t Bark, 1994 SUP. CT. REv. 1, 13 (1994) (“[T]he Supreme Court’s failure to notice a First Amendment question would signal its unanimous view that there was no question to be noticed—a judgment that the prohibited category was so clearly unrelated to the First Amendment’s purposes that it should not be dignified with an explanation as to why it constituted an ‘exception.’”); Shanor, First Amendment Coverage, supra note 67, at 350 (noting that Forklift’s failure to address the speech question amounted to the conclusion that Title VII’s regulation of harassing workplace speech is beyond First Amendment coverage).
public discourse about political, religious, and artistic matters receives the most stringent review.\textsuperscript{80}

It is underappreciated that the First Amendment iteration of the political/economic distinction reflects the larger New Deal compromise. That very same political/commercial speech divide is the focal point of recent antiregulatory advocacy and litigation. First Amendment challenges to economic regulation have proliferated across the circuits over the last three decades—everything from cigarette warnings labels, to credit card swipe fee laws, to the U.S. Food and Drug Administration’s (FDA’s) drug regulatory power, to antidiscrimination laws.\textsuperscript{81} In the 2017–18 term alone, the Supreme Court issued two decisions in the context of claims that challenged the distinction between commercial and noncommercial speech: \textit{National Institute of Family and Life Advocates v. Becerra}\textsuperscript{82} and \textit{Masterpiece Cakeshop v. Colorado Civil Rights Commission}.\textsuperscript{83} Those cases followed on the heels of several others—such as \textit{Reed v. Town of Gilbert},\textsuperscript{84} \textit{Sorrell v. IMS Health Inc.},\textsuperscript{85} and \textit{Expressions Hair Design v. Schneiderman}\textsuperscript{86}—each of which chipped away at the New Deal architecture previously embedded in First Amendment doctrine.\textsuperscript{87}

\begin{itemize}
\item \textsuperscript{80}See, e.g., \textit{W. Va. State Bd. of Educ. v. Barnette}, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).
\item \textsuperscript{81}For a fuller history of the commercial speech doctrine and its erosion, see Shanor, supra note 20; Alex Kozinski & Stuart Banner, \textit{The Anti-History and Pre-History of Commercial Speech}, 71 TEX. L. REV. 747 (1993); Post, supra note 30; infra note 96 (collecting citations).
\item \textsuperscript{82}138 S. Ct. 2361 (2018).
\item \textsuperscript{83}138 S. Ct. 1719 (2018).
\item \textsuperscript{84}576 U.S. 155 (2015).
\item \textsuperscript{85}564 U.S. 552 (2011).
\item \textsuperscript{86}137 S. Ct. 1144 (2017).
\item \textsuperscript{87}It is worth noting that prior to the deaths of Justices Scalia and Ginsburg, there appeared to be three votes on the Supreme Court to revisit more squarely and openly the propriety of any commercial/noncommercial speech distinction. These included Justices Thomas, Kennedy, and Scalia. See, e.g., 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part and concurring in judgment).
\end{itemize}
Reed is arguably the most noteworthy of these decisions. It announced a new content discrimination rule, and one with potentially far reaching consequences. The majority held that speech is content-based, and subject to heightened review, if a regulation “applies to particular speech because of the topic discussed or the idea or message expressed.” Read literally, Reed leveled the field not just between commercial and political speech—but between political speech and all categories of speech that the Court has previously either excluded from constitutional protection altogether (such as commercial fraud and child pornography) or to which it has extended lesser protection (such as commercial speech). This is because all of these are categories defined by the topics they address: commercial speech is so categorized because of its commercial topic, child pornography by its pornographic topic, and so forth. Whether and to what extent Reed should be read so expansively is one of the key First Amendment ground games today.


89. Id. at 251 (quoting Reed, 576 U.S. at 163).


In short, the New Deal distinction adopted within the architecture of free speech doctrine is being challenged across the circuits—and one of the newest members of the Supreme Court, Justice Kavanaugh, has previously issued opinions in broad agreement with First Amendment deregulation.92

Of importance here, this change in speech caselaw is occurring through courts’ increasing willingness to adopt an understanding of liberty that means only a simple autonomy right against state action. I and several scholars have traced this trend. As I have described,93 the vision of liberty adopted by recent speech cases is relatively untheorized, but it is grounded in the notion that all speech is speech and thus all speech should receive equally stringent review. Morgan Weiland identifies this vision of liberty as “thin autonomy” in the libertarian tradition,94 and Genevieve Lakier describes it as an anticlassificatory approach.95 We, and a growing chorus, have pointed out that this emerging view of First Amendment freedom reflects a turn away from thicker understandings of liberty and normative justifications for speech protection as articulated in many theories of the First Amendment, by classic First Amendment thinkers, and in earlier caselaw.96 As both a doctrinal and a cultural matter, part


95. Lakier, supra note 88, at 236.

of how this is happening is that Smithian-inflected conceptions of people and markets—if ones boiled down to simple autonomy—are being embedded into First Amendment caselaw.¹⁷

¹⁷ Robert Post and I have previously noted this trend. See Post & Shanor, supra note 7. For prominent examples in the caselaw, see, for example, Sorrell v. IMS Health Inc., 564 U.S. 552, 577–79 (2011), which found unconstitutional a state law that prohibited pharmacies from selling, absent a doctor’s consent, data they collected about that doctor’s prescribing practices for use in marketing. In so doing, the Court explained that the physicians, whom it described as “consumers,” id. at 577, would only be able to “perceive their own best interests,” id. at 578 (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976)), if use of their prescribing data was unimpeded in the market. The court stressed that “[a] consumer’s concern for the free flow of commercial speech,” or in this case commercial data, “often may be far keener than his concern for urgent political dialogue,” opining “[t]hat reality has great relevance in the fields of medicine and public health, where information can save lives,” id. at 566 (internal quotation marks omitted). See also Edwards v. District of Columbia, 755 F.3d 996, 1007 (D.C. Cir. 2014), which concluded that the market was sufficient to turn “the coal of self-interest” into “a gem-like consumer experience,” thereby rendering a municipal business licensing regime superfluous. In so holding, the court pointed to the “seemingly straightforward” case of a “celebrated economist and philosopher” Adam Smith, who had long ago “captured the essence of this timeless principle: ‘It is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard to their own interest’” Id. (quoting Adam Smith, Wealth of Nations, at 408). Adam Smith’s influence on the First Amendment arguably runs to the Supreme Court’s initial extension of First Amendment protection to commercial speech in Virginia State Board of Pharmacy, in which the majority explained that the constitutional value of commercial speech lies in its informational value to consumers:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it
B. Association

Second, the New Deal compromise and its internal First Amendment instantiation are under sharp attack in the freedom of association context. Decades ago, as it did in its speech jurisprudence, the Supreme Court adopted a version of the New Deal compromise within its association jurisprudence. 98

In a leading case, Roberts v. United States Jaycees, 99 the Court addressed the conflict between a state’s efforts to eliminate gender discrimination and the associational rights of members of the Jaycees—which was founded as the Junior Chamber of Commerce—to exclude women as full voting members from the organization. 100 Justice O’Connor’s partial concurrence made the distinction crystal clear. She stressed the “dichotomy between rights of commercial association and rights of expressive association,” 101 and their “radically different constitutional protections,” 102 explaining that “an association engaged exclusively in protected expression

is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.

Va. State Bd. of Pharmacy, 425 U.S. at 765 (citations omitted).

This view was decried at the time by Chief Justice Rehnquist as reflecting the views of Adam Smith.

Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 589–92 (1980) (Rehnquist, J., dissenting) (“The view apparently derives from the Court’s frequent reference to the ‘marketplace of ideas,’ which was deemed analogous to the commercial market in which a laissez-faire policy would lead to optimum economic decisionmaking under the guidance of the ‘invisible hand.’” (citing ADAM SMITH, WEALTH OF NATIONS (1776)); Va. State Bd. of Pharmacy, 425 U.S. at 783–84 (Rehnquist, J., dissenting) (citations omitted) (“The Court speaks of the importance in a ‘predominantly free enterprise economy’ of intelligent and well-informed decisions as to allocation of resources. While there is again much to be said for the Court’s observation as a matter of desirable public policy, there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession.”).


100. Id. at 629–31; see also Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537, 548–49 (1987) (finding that the California civil rights act did not violate the association rights of Rotary Clubs by requiring them to admit women). Interestingly, only a few years later, the Court declined to even address the conflict between an employer’s right to free speech and the state’s interest in eliminating gender discrimination in the Title VII context, see supra note 79.

101. Roberts, 468 U.S. at 634 (O’Connor, J., concurring in part and concurring in the judgment).
enjoys First Amendment protection of both the content of its message and the choice of its members,” while there is “only minimal constitutional protection of the freedom of commercial association.”\(^{103}\) And she tied that distinction in free association doctrine to the same one made in free speech jurisprudence.\(^{104}\)

On that basis, she flatly stated that “[t]he Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State. A shopkeeper has no constitutional right to deal only with persons of one sex.”\(^{105}\) It is worth noting that the free speech challenge articulated in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* and its follow on cases could be understood as an associational challenge to the New Deal distinction made in *Jaycees* and other right of association cases and similar earlier challenges under the Due Process Clause.\(^{106}\) Each of these precedents rejected the right to refuse to interact with a person in economic life, regardless of constitutional clause.\(^{107}\)

\(^{102}\) *Id.* at 638.

\(^{103}\) *Id.* at 633–34.

\(^{104}\) *Id.* at 635.

\(^{105}\) *Id.* at 634. On that basis, the Court rejected the more recent associational challenge to Title VII brought by male partners of King & Spalding on the grounds that the First Amendment protected them against compelled association with female partners, *Hisbon v. King & Spalding*, 467 U.S. 69, 78 (1984), saying “[i]nvividious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.” *Id.* (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)).


The Court similarly drew the political/economic distinction when it addressed the constitutionality of union agency shop agreements in *Abood v. Detroit Board of Education*. Under *Abood*, all employees represented by a union, including nonmembers, must pay a fee for representation as a condition of employment. The Court concluded that while nonmembers constitutionally could be compelled to pay service charges for the economic benefits of union representation—such as collective bargaining, contract administration, and grievance adjustment—they could not be made to pay mandatory dues that were spent on the union’s political activities. By contrast, the freedom to associate (or decline to associate) in both intimate and sociopolitical life is robustly protected.

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109. *Id.* at 238–39; *see also* Int’l Ass’n of Machinists v. Street, 367 U.S. 740, 773–75 (1961) (reaffirming the constitutionality of union shop agreements for the purposes of collective bargaining but finding that union spending on political activities was beyond the scope of the statutory grant); *Ry. Emps.’ Dep’t v. Hanson*, 351 U.S. 225, 238 (1956) (holding that union shop agreements between interstate railroads and their unions were a valid exercise of congressional commerce power and did not violate the First or Fifth Amendments). *Cf.* *Ry. Mail Ass’n v. Corsi*, 326 U.S. 88, 95–96 (1945) (finding legislation prohibiting exclusion of workers from a union based on race, color, or creed not a violation of substantive due process).

In *Janus v. AF-CMEF*, the Court struck a fatal blow to the First Amendment’s internal New Deal compromise in the context of public sector union fees. *Janus* overruled *Abood*’s basic distinction on the grounds that collective bargaining over workplace issues is “inherently ‘political’” and so agency fees cannot be constitutionally compelled even for such quotidian economic tasks as workplace grievances. Justice Kagan, in strenuous dissent, criticized the *Lochnerian* nature of the Court’s opinion, and tied the speech holdings in *NIFLA* and *Sorrell* to the association holding in *Janus*:

[T]he majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy. Today is not the first time the Court has wielded the First Amendment in such an aggressive way. . . . And it threatens not to be the last. Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority’s road runs long. And at every stop are black-robed rulers overriding citizens’ choices. The First Amendment was meant for better things.

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In addition to speech and association, the New Deal compromise was embedded in the Court’s boycott jurisprudence under the “inseparable” rights of “speech, assembly, association, and petition,” NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911 (1982), now at issue in cases challenging anti-BDS laws that require government contractors to certify that they will not engage in boycotts of Israel. See, e.g., Ark. Times L.P. v. Waldrip, 988 F.3d 453 (8th Cir. 2021), vacated & rej’d en banc granted June 10, 2021; Jordahl v. Brnovich, 789 F. App’x 589 (9th Cir. 2020) (BDS refers to the Boycott, Divestment, Sanctions movement, which is organizing boycotts of Israel over its policy toward Palestine. I joined amicus briefs of First Amendment scholars in support of challengers to anti-BDS laws in both cases.).

In the boycott context, too, the Court has distinguished between stringently protected political boycotts aimed at social and political change, *Claiborne Hardware*, 458 U.S. at 889–92, 911, 914, but refused to extend constitutional protection to economically-motivated boycotts and secondary boycotts by labor unions (in keeping with *Abood*) on the grounds that they “differ[ed] in a decisive respect.” *Superior Ct. Trial Lawyers*, 493 U.S. at 426; *Int'l Longshoremen’s Ass’n v. Allied Int'l*, Inc., 456 U.S. 212, 226–27 (1982). That is, the boycotts were different because they fell on the other side of the New Deal compromise. These decisions followed *Claiborne Hardware*’s earlier recognition of “the strong governmental interest in certain forms of economic regulation,” and its holding that that “[g]overnmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances,” including when businesses “‘associate’ to suppress competition,” or engage in “unfair trade practices,” and its recognition that government can prohibit “[s]econdary boycotts and picketing by labor unions” and boycotts designed “to secure aims that are themselves prohibited by a valid state law.” *Claiborne Hardware*, 458 U.S. at 912, 912 n.47, 915 n.49 (citations omitted).

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To summarize: Midcentury, the First Amendment rights of both speech and association incorporated the New Deal’s analytical distinction, which differentiated between speech in political and economic life. That doctrinal distinction reflected a view of democracy and claims of justice regarding not only political but also civic and economic participation for the American people. It also reflected a contingent view of institutional arrangements that viewed economic and social egalitarianism as best advanced by the political branches. That view of constitutional liberty is now being eclipsed by a thinner vision of anti-state autonomy.

C. Due Process

Third, there is growing support for the revival of constitutional protections for economic rights under *Lochner*’s original hook: the Due Process Clause. The suggestion has emerged that due process protection of economic rights should be revived—and invigorated with more stringent bite than its early twentieth century instantiation. This shift has manifested in a tranche of challenges to a range of largely small scale regulatory programs. Advocates’ aim is


114. In *Lochner*, the Supreme Court struck down a state maximum hours law that is now standard labor law fare. The Court struck down the law under a type of stringent due process protection protecting the freedom of contract, which reigned for the decades before the court abandoned it in *West Coast Hotel*. *Lochner v. New York*, 198 U.S. 45, 64 (1905).

to do away with the rational basis test, in favor of more generalized stringent review of economic regulation. Former D.C. Circuit Judge Janice Rogers Brown opined in a case regarding milk regulation, for example: ‘‘[G]overnment is a broker in pillage, and every election is a sort of advance auction sale of stolen goods.’ . . . Rational basis review means property is at the mercy of the pillagers. The constitutional guarantee of liberty deserves more respect—a lot more.’’

Challenges to business licensing laws are at the forefront of this trend. For instance, the Sixth Circuit accepted a plaintiffs’ argument that a licensing scheme for funeral directors violated both due process and equal protection. Other substantive due process challenges to business licensing regimes have involved tour guides, dentists, hair braiders, and food truck operators, among others.


118. For differing views on this trend, see David E. Bernstein, The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?, 126 YALE L.J. 287 (2016) (noting hopefully the prospect of more rigorous constitutional review of restrictions on pursing lawful occupations); Clark Neily, Beating Rubber-Stamp Into Gavels: A Fresh Look at Occupational Freedom, 126 YALE L.J. 304 (2016) (arguing that occupational licensing is subject to abuse but that caselaw appears on the verge of changing to provide occupational choice more protection); Shanor, Business Licensing, supra note 67 (situating debates over the constitutional treatment of business licensing in larger historical context).


120. See, e.g., Young v. Ricketts, 825 F.3d 487 (8th Cir. 2016) (First and Fourteenth Amendment challenge to state real estate licensing law); Hettinga, 677 F.3d 471 (equal protection and due process challenge to milk regulations); Complaint for Declaratory and Injunctive Relief, Vogt v. Ferrell, No. 2:16-cv-04492 (S.D. W. Va. May 19, 2016) (Fourteenth Amendment and Commerce Clause challenge to licensing of moving services); Cornwell v. Hamilton, 80 F. Supp. 2d 1101 (S.D. Cal. 1999) (substantive due process and equal protection challenge to cosmetology licensing scheme); Patel v. Tex. Dep’t of Licensing & Regul., 469 S.W.3d 69 (Tex. 2015) (substantive due process challenge to regulation of commercial eyebrow threaders). See also Economic Liberty Cases, INST. FOR JUST., [https://ij.org/pillar/economic-liberty/?post_type=case [https://perma.cc/CW5D-NJGX] (last visited Dec. 10, 2020) (collecting due process and First Amendment cases).
But business licensing regimes are not the only area that has witnessed a boom in this type of claim. Top appellate firms have begun to bring economic substantive due process claims in other contexts as well, often pairing them with First Amendment claims. For example, when the Department of Justice demanded that Apple unlock the iPhone of a mass shooter who launched a 2015 attack in San Bernardino, California, Apple mounted both free speech and substantive due process claims in opposition. It argued that the government’s motion to compel Apple to give it access to the phone threatened “Apple’s substantive due process right to be free from ‘arbitrary deprivation of [its] liberty by government.’” Taxicab companies have likewise challenged the regulation of their services and of rideshare companies like Uber and Lyft on substantive due process and equal protection grounds.

Although pure substantive due process claims have, thus far, gained less traction than First Amendment deregulatory claims, there are indications that courts may be increasingly open to this type of challenge. In a series of decisions, for example, the Supreme Court has recognized a substantive due process right against punitive damages awards it deems grossly excessive.

121. Apple Inc.’s Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search, & Opposition to Government’s Motion to Compel Assistance, at 32-34, In re Search of an Apple iPhone, No. CM 16-10 (SP) (C.D. Cal. Feb. 25, 2016).

122. Id. at 34 (arguing that granting motion would violate Apple’s substantive due process right “by conscripting a private party with an extraordinarily attenuated connection to the crime to do the government’s bidding in a way that is statutorily unauthorized, highly burdensome, and contrary to the party’s core principles”).

123. See Ill. Transp. Trade Ass’n v. Chicago, 839 F.3d 594 (7th Cir. 2016); Joe Sanfelippo Cabs, Inc. v. Milwaukee, 46 F. Supp. 3d 888 (E.D. Wisc. 2014), aff’d on other grounds, 839 F.3d 613 (7th Cir. 2016).

124. In State Farm v. Campbell, the Court concluded that an award of $145 million in punitive damages was excessive in violation of substantive due process, explaining that “[t]o the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.” State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003).

Likewise, in Exxon v. Baker, the Court held that a jury award of $5 billion dollars for a massive oil tanker spill in Alaska must be reduced to $507.5 million, an amount equal to the compensatory damages awarded, finding that “given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio . . . is a fair upper limit.” Exxon Shipping Co. v. Baker, 554 U.S. 471, 513 (2008).

Similarly, in Philip Morris USA v. Williams, the Court rejected another jury award, this time ostensibly on procedural due process grounds. Philip Morris USA v. Williams, 549 U.S. 346 (2007). A jury had found
Highlighting the broader shift in U.S. legal culture, opponents of the Affordable Care Act, too, initially argued that the individual mandate violated their substantive due process rights in addition to the Commerce Clause challenge the Court would later accept.\(^{125}\) Although both contentions faced broad criticism precisely because of the nearly unquestioned consensus in (nonlibertarian) U.S. legal circles about the scope of Congress’s power post–New Deal,\(^ {126}\) it ultimately proved critical to what Josh Blackman has called the “popular constitutionalist movement” that shifted arguments in favor of revived economic rights protections “from ‘off the wall’ to ‘on the wall.’”\(^ {127}\)

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These arguments drew largely on Randy Barnett’s perceptive interpretation of Justice Kennedy’s theory of liberty, which he drew from the Justice’s opinion in Lawrence v. Texas. Randy E. Barnett, Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas, 2002–2003 CATO SUP. CT. REV. 21, 35 (2003) (“Lawrence is potentially revolutionary not only because it abandons a right to privacy in favor of liberty, but for another closely related reason: In the majority’s opinion, there is not even the pretense of a ‘fundamental right’ rebutting the ‘presumption of constitutionality’… . In other words, with liberty as the baseline, the majority places the onus on the government to justify its statutory restriction.”).

\(^{126}\) See, e.g., Jamal Greene, What the New Deal Settled, 15 U. PA. J. CONST. L. 265, 266 (2012) (stating that the Commerce Clause argument “bordered on frivolous” under existing precedent and exploring why the litigation followed that path, not substantive due process, even though the substantive due process contention “had, and still has, no ‘all-fours’ doctrinal obstacles”).


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That Williams’s death was caused by smoking induced by Philip Morris’s advertising and awarded compensatory damages of $821,000 along with $79.5 million in punitive damages. Id. at 350. The Court rejected the punitive damages award on the grounds that “state courts cannot authorize procedures that create an unreasonable and unnecessary risk” that a jury, “in taking account of harm caused others under the rubric of reprehensibility, [will] also seek[] to punish the defendant for having caused injury to others.” Id. at 357. Justice Thomas, in dissent, stressed that “[i]t matters not that the Court styles today’s holding as ‘procedural’ because the ‘procedural’ rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages.” Id. at 361 (Thomas, J., dissenting).
D. Takings

Most recently, the Court accepted a sweeping understanding of the Takings Clause in Cedar Point Nursery v. Hassid.\(^\text{128}\) In that case, agricultural employers challenged a California regulation that provided limited but periodic access to their property for union organizers to speak with agricultural employees.\(^\text{129}\) The growers argued that the regulation requiring that they provide periodic access to their property was an uncompensated taking in violation of the Fifth and Fourteenth Amendments. The Court eschewed the notion that granting such access was a regulatory taking that merely reduced the value but did not physically take the property. It instead concluded that the state requirement “appropriates a right to invade the growers’ property and therefore constitutes a *per se* physical taking,” “[a]nd when the government physically takes an interest in property, it must pay for the right to do so.”\(^\text{130}\) In so holding, the Court expanded the scope of property interests deemed *per se* takings requiring government compensation.

We will have to wait and see whether *Cedar Point*'s holding is bound to the context of regulations providing access to labor organizers (a non-governmental third party), or if the holding will be extended more broadly to require the government to pay property owners for governmental (say, nuclear waste or occupational health and safety) inspectors or more generally expand the category of *per se* takings requiring compensation. For our purposes, the important point is that the Court has embraced an increasingly broad vision of robust autonomy interests under a range of constitutional doctrines.

\(^{128}\) 141 S. Ct. 2063 (2021).

\(^{129}\) Id.

\(^{130}\) Id. at 2072, 2075.
E. Nondelegation and Interpretive Doctrines

Finally, a range of interpretive doctrines that sit at the intersection of constitutional and administrative law are being pushed in a more stringently anti-state direction. Grounded in separation of powers concerns, these doctrines help define the scope of permissible legislative versus executive power. They have also long facilitated the New Deal compromise by extending more regulatory power to the state as a general matter, and in social and economic domains in particular. By mediating the extent of procedural hurdles to lawmaking, these doctrines contribute to the expansion or contraction of regulatory power and, advocates of the emergent vision of liberty argue, thereby the sphere of individual freedom. Justice Gorsuch, for example, has argued that separation of powers doctrines such as the nondelegation doctrine limit the government’s “power to enact laws restricting the people’s liberty” by “mak[ing] lawmaking difficult.”

Consider the nondelegation doctrine, which to date has had only one good year: 1935. In only *Schechter Poultry* and *Panama Refining* did the Court identify statutes that it found beyond nondelegation bounds. Ever since, under the intelligible principle standard, the Court has embraced a flexible standard that permits broad delegation and so greater latitude for agency action.


134. *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (nondelegation only requires Congress to lay down “an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform”); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (finding the intelligible principle standard is satisfied if a statute “clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority”); *Yakus* v. United States, 321 U.S. 414, 426 (1944) (“Only if we could say that there is an absence of standards for the guidance of the act,”).
The Court articulated an institutional and democracy-based justification for this approach, much like its justifications for adopting the New Deal compromise and the distinction’s rights revolution update. Addressing its refusal to narrow the scope of permissible delegation to agencies, the Court explained that, “[t]he judicial approval accorded these ‘broad’ standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems.”\textsuperscript{135} This position is necessary, the Court further explained, because “[t]he legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation.”\textsuperscript{136} That institutional assessment arguably carries even more force today in 2022, when Congress is closely divided and sharply polarized.\textsuperscript{137}

Likewise, in the context of \textit{Chevron v. National Resources Defense Council} and other agency deference cases—which, like the nondelegation doctrine, make lawmaking more or less difficult by requiring more or less lawmaking be done directly by Congress rather than federal agencies—the Court has articulated a democracy-based justification for deference to the political branches:

> While agencies are not directly accountable to the people, the Chief Executive is . . . . [F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between

\textsuperscript{135} Am. Power \& Light Co., 329 U.S. at 105.

\textsuperscript{136} Id.; see also Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940) (the Constitution thus does not require “depriv[ing] the agency of that flexibility and dispatch which are its salient virtues.”).

competing views of the public interest are not judicial ones: “Our Constitution vests such responsibilities in the political branches.”

A lenient nondelegation doctrine and strong deference doctrines have been foundational pieces of the post–New Deal order on which the modern administrative state is built. But the Court’s longstanding positions on both may be changing.

In 2019, for instance, eight members of the Supreme Court considered whether to revive the nondelegation doctrine to strike down a conviction under rules promulgated under the Sex Offender Registration and Notification Act. The case was heard before either Justice Kavanaugh or Justice Barrett was seated, leaving only eight members of the Court to consider it.

Although a majority upheld the Act, with Justice Kagan writing for four members of the Court in support of the midcentury approach to nondelegation, Justice Alito joined only in the judgement. He made his more general disagreement with the New Deal model clear, saying: “If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.”

In a searing dissent, Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, took direct aim at the New Deal model. The dissent eschewed the midcentury nondelegation doctrine for permitting an excess of lawmaking and emphasized that the most dangerous power of the federal government is the power to enact laws restricting the people’s

139. See Gundy v. United States, 139 S. Ct. 2116 (2019).
140. Id. at 2131 (Alito, J., concurring in judgment).
141. Justice Gorsuch issued a similarly fiery dissent from rehearing that same question en banc when he was on the Tenth Circuit, and in that context, too, called for a more robust nondelegation standard. United States v. Nichols, 784 F.3d 666, 672 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of reh’g en banc).
liberty.\textsuperscript{142} It warned that permitting the New Deal nondelegation approach to stand would turn the executive branch “into a vortex of authority that was constitutionally reserved for the people’s representatives in order to protect their liberties.”\textsuperscript{143} And, the dissent explicitly predicted that a future, fully-seated Court will embrace a more stringent nondelegation doctrine.\textsuperscript{144}

With the addition of Justice Kavanaugh to the Court, there appear to be five votes to revive the nondelegation doctrine with significant bite.\textsuperscript{145} In a statement accompanying the Court’s orders in November 2019, Justice Kavanaugh wrote that Justice Gorsuch’s “scholarly analysis of the Constitution’s nondelegation doctrine in his \textit{Gundy} dissent may warrant further consideration in future cases.”\textsuperscript{146} Although Justice Barrett’s views on nondelegation are less clear, even without her vote, a majority of the Court appear to be interested in revisiting the

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142. \textit{Gundy}, 139 S. Ct. at 2134 (Gorsuch, J., dissenting).
143. \textit{Id.} at 2142.
144. The dissent begins:

The Constitution promises that only the people’s elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. . . . Today, a plurality of an eight-member Court endorses this extraconstitutional arrangement but resolves nothing. . . . Justice Alito supplies the fifth vote for today’s judgment and he does not join either the plurality’s constitutional or statutory analysis, indicating instead that he remains willing, in a future case with a full Court, to revisit these matters. Respectfully, I would not wait.

\textit{Id.} at 2131.
145. This prompted Nicholas Bagley to ask in a recent op-ed if the Supreme Court suggested that it was prepared to agree that most of government is unconstitutional. Nicholas Bagley, Opinion, \textit{Most of Government Is Unconstitutional}, N.Y. TIMES (June 21, 2019), https://www.nytimes.com/2019/06/21/opinion/sunday/gundy-united-states.html [https://perma.cc/SB6B-LKA3]. Lisa Heinzerling, has taken a different view, observing that “[t]he proposed approach [of the conservative justices] is nothing other than a gerrymander: it precisely trims and shapes Congress’s domain to ensure victory for a conservative vision of regulatory policy that has been a source of political contestation for decades.” Lisa Heinzerling, \textit{Nondelegation on Steroids}, 29 N.Y.U. ENV'T L.J. 379, 382 (2021).
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doctrine—and any number of administrative actions may tee up an opportunity for the Court to do so.¹⁴⁷

Longstanding deference doctrines are also under reconsideration. A plurality on the Supreme Court, even prior to Justice Barrett’s confirmation, appeared to support the steep curtailment, if outright not overruling, of both *Chevron* and *Auer* deference,¹⁴⁸ with Justices Gorsuch and Kavanaugh in apparent relative and vigorous agreement based on their prior writings and comments.¹⁴⁹

In *Kisor v. Wilkie*, the Court granted cert to consider “whether [the Court should] overrule *Auer* and (its predecessor) *Seminole Rock*.⁵¹⁰ A plurality of the Court (this time including the progressives and Chief Roberts, who joined only in part) nominally upheld *Auer*, if a more stringent contextualized version of it—indeed, one that may look, as the Chief suggested in a separate writing, a whole lot like the dissent’s robust version of *Skidmore* review.⁵¹ Justice Gorsuch, joined in part by Justices Thomas, Alito, and Kavanaugh, wrote separately in support

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¹⁴⁷. Recent examples that, before the election of Joe Biden, could have presented this question include President Trump’s invocation of the Trade Expansion Act as authority to impose tariffs on imported steel, see Am. Inst. for Int’l Steel, Inc. v. United States, 806 Fed. App’x 982 (Fed. Cir. 2020) (rejecting nondelegation challenge), cert. denied 141 S. Ct. 133 (June 22, 2020) (mem.), and his invocation of the National Emergencies Act as authority to build “The Wall,” see, e.g., Michael C. Dorf, *National Emergencies: The Big Picture*, DORF ON L. (Jan. 11, 2019), http://www.dorfonlaw.org/2019/01/national-emergencies-big-picture.html [https://perma.cc/Q977-33QE] (arguing this may be an unconstitutional delegation).


¹⁵¹. *Id.* at 2408, 2414–18; *see also id.* at 2424–25 (Roberts, C.J., concurring in part).
of overruling *Auer* outright in favor of a more stringent version of *Skidmore* review, under which it appears that a court would not be compelled to adopt an agency’s view at any point.\textsuperscript{152}

Of note, in the Chief’s separate opinion, he emphasized that *Kisor* has no bearing on *Chevron*—reaffirming that it, too, remains ready to be revisited.\textsuperscript{153} And as Jessica Bulman-Pozen has noted, “Even while applying *Chevron*, [the Court] has read statutes aggressively to reject agency interpretations, including at step two, and it has applied the major-question exception in a manner that destabilizes the very premise of deference.”\textsuperscript{154}

To summarize: in the context of interpretive doctrines that mediate the separation of powers, the newly arranged Court appears inclined to make lawmaking more difficult, and so practically constrict the scope of the state, they contend, in favor of individual liberty.

F. An Assessment of Liberty as Simple Autonomy

The prior Subparts traced the emergent vision of constitutional liberty and the way that it is being advanced across multiple constitutional domains and interpretive doctrines. This Subpart synthesizes the characteristics and foundational assumptions of this concept of liberty as thin autonomy, many of which make it normatively and institutionally unattractive.

First, the animating idea of this growing body of law defines liberty as freedom from government and law.\textsuperscript{155} Put differently, it advances the view that the Constitution has no

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\textsuperscript{152} Id. at 2425–49 (Gorsuch, J., dissenting). See also *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (establishing the doctrine of *Skidmore* deference).

\textsuperscript{153} Id. at 2425 (Roberts, C.J., concurring in part). For a thoughtful post elaborating the possible difference of the plurality and dissent—and why the Chief may have joined the decision so as not to appear to be “a partisan institution bent on overruling *Roe*” and may do something similar regarding *Chevron*, see Thomas Merrill, *Symposium: Shadow Boxing With the Administrative State*, SCOTUSBLOG [June 27, 2019, 7:00 AM], https://www.scotusblog.com/2019/06/symposium-shadow-boxing-with-the-administrative-state [https://perma.cc/DZS6-3692].

normative account of liberty other than simple, anti-state autonomy.\textsuperscript{156} It reflects an emergent constitutional vision that applies stringent judicial review regardless of domain, and irrespective of context (or potential constitutional value). And it rejects the New Deal’s division of constitutional protections into political and economic domains in favor of pervasive individual liberties—that is, a world of rights everywhere.

These shifts are not limited to court decisions, but have been felt more broadly in U.S. legal culture. Even a decade ago, economic regulations from warning labels to antidiscrimination laws, and U.S. Securities and Exchange Commission (SEC) to FDA regulations, were not the grist of constitutional challenges that they are today.\textsuperscript{157} Prominent law firms now maintain large and successful constitutional deregulatory practices.\textsuperscript{158} More of economic life is becoming seen as constitutionally relevant, and more of its regulation is being constitutionally challenged.\textsuperscript{159} The redefinition of constitutional freedom as thin autonomy is shifting the range of economic and social activities thought salient to the constitution and worthy of constitutional challenge, pushing us toward a world in which constitutional rights are plausibly seen everywhere.

\begin{itemize}
\item \textsuperscript{155} See, e.g., \textit{Gundy}, 139 S. Ct. at 2133–34 (Gorsuch, J., dissenting) (contrasting lawmaking with liberty).
\item \textsuperscript{156} That is, the Constitution should protect liberty in a context-independent way and does not differ in the reasons why it values or protects different types of liberties (say, political speech versus commercial speech). For a contrasting view in the First Amendment context, see, for example, Post & Shanor, \textit{supra} note 7; Post, \textit{supra} note 30.
\item \textsuperscript{157} Shanor, \textit{supra} note 20.
\item \textsuperscript{159} Shanor, \textit{First Amendment Coverage}, \textit{supra} note 67; Kendrick, \textit{supra} note 96.
\end{itemize}
But why, we might ask, given the diversity of views of freedom, should a thin vision of liberty be the only one constitutionally recognized? The Constitution has long been understood as guarding our democracy and made for people of fundamentally differing views.\textsuperscript{160} Why should this understanding of liberty be adopted if it is inconsistent with the lived understanding of freedom held by many Americans? Consider the diversity of even the most prominent public views of freedom: President Franklin Delano Roosevelt’s freedom from want and freedom from fear,\textsuperscript{161} the freedom to participate in public economic life championed by the Congress that passed the Civil Rights Act of 1875 (many of them framers of the Reconstruction Amendments), and the freedoms enabled by a livable wage, affordable healthcare, or a society not riven by racial inequality. How could the Constitution require the political branches to adopt a single understanding of liberty, even if, after democratic deliberation, the people reject it?

The emergent view is, moreover, incoherent insofar as it purports to protect against government interference but in fact attends only to a small subset of the role of law in social life. The model focuses on interference from the state at time one (say, when a government regulates my business) but obscures the role that law plays in constructing and maintaining private power and entitlements, or lack thereof, in prior moments (say, through tax laws, subsidies, policing, funding of infrastructure, or the regulation of property and contract to name a few).

\textsuperscript{160} Cf. \textit{Lochner v. New York}, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting) (“[A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of \textit{laissez faire}. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”).

Framed in this way, the emergent concept of liberty ignores the role of law in maintaining even the thin vision of freedom it advances—let alone the role of legal choices in constituting and maintaining other forms of freedom. Significantly, the emergent concept of liberty obscures the role of legal choices in creating structural inequality. This form of thin autonomy asymmetrically favors the status quo and its distribution of power and resources, and disfavors attempts to alter or redistribute them.

Second, the emergent model views liberty as an unlimited, nonrivalrous resource. It admits no normative tradeoffs, only legitimate liberty claims and non-liberty interests. This feature, in part, explains its appeal as a public relations strategy or soundbite appeal: Who could be against freedom? Who wouldn't want more freedom if there are no tradeoffs?

The Conclusion elaborates why the assumption of no normative tradeoffs is false. But a critical part of defining other forms and visions of liberty as non-liberty interests is to delegitimize, ignore, and eclipse them. It permits no other framework for understanding liberty, and its interrelationship with justice, equality, or power. This approach fosters a legal culture in which liberty as thin autonomy does not have to normatively defend itself. It is instead presented as a neutral, apolitical, even natural definition: the one and only meaning of liberty.162 Scholars of law and political economy have prominently argued that certain features of contemporary law, which they term the “Twentieth Century Synthesis,” “encase[] ‘the market’ from claims of justice and conceal[] it from analyses of power.”163 My point here is

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162. See, e.g., Robert W. Gordon, New Developments in Legal Theory, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281, 287–88 (David Kairys, ed. 1982) (“Law, like religion and television images, is one of these clusters of belief . . . that convince people that all the many hierarchical relations in which they live and work are natural and necessary. . . . Such system building has the effect of making the social world as it is come to seem natural and inevitable.”).

related: the emergent constitutional model not only wraps markets in neutrality—but also the concept of liberty itself.

Finally, the ascendant model assumes that the Constitution should maximally protect liberty claims thus defined. As a practical matter, a stringent nondelegation doctrine will mean less congressionally-made law and a far smaller space for federal executive action. Constricted deference doctrines will further hem-in executive action. And, constitutional claims brought under the First Amendment, Due Process Clause, and Takings Clause have the potential to drastically curtail not only federal, but also state and local law. Given the pervasive nature of speech and the potentially expansive reach of due process arguments, the expansion of strict scrutiny in these contexts is fundamentally altering the permissible scope of government action at all levels. By eroding the New Deal distinction, without providing an alternative limiting principle, the movement for autonomy-centered liberty is steering us toward a world of rights everywhere and state nowhere. Without a principled limit, the emergent understanding of liberty renders the Constitution the enemy of democracy and social and economic change. Taken to its logical conclusion, liberty so defined would render democratic self-government impossible.\footnote{164}

In short, the emergent model ignores the way that law pervasively interferes by creating and maintaining distributions of entitlements. But liberty from law is incoherent. We must instead decide what forms of liberty are valuable, based on a normative theory much thicker than freedom from law. The ascendant view of liberty fails to do this. It instead shields itself from critique through an appealing soundbite that misleadingly argues for (nonrivalrous)

\footnote{164. I have previously made a similar argument about this ascendant vision of liberty under the First Amendment. Shanor, supra note 20, at 136–38, 182.}
liberty for all. The emergent constitutional vision pits the Constitution against representative democracy.

III. THE CRITICS OF THE NEW DEAL ORDER

The trends described above demand a twenty-first century reassessment of the New Deal model's emergent alternative. This Part analyzes the leading arguments against the New Deal order and its perceived excesses, and, more importantly, in support of its emergent alternative—one from economics, one from originalism, and the third from libertarian philosophy. The first two of these are advanced by legal theorists and in courts. The third, from philosophy, is in many ways more principled if not one explicitly advanced in constitutional theory. Instead, the emergent model appears to adopt in some ways a highly diluted form of Hayekian (or libertarian capitalist) theory—or perhaps more accurately, to be advanced by a movement that is culturally informed by, and sometimes gestures at, these ideas.

A. The Argument from Economics

As Richard Posner describes, classical law and economics, building off of Smithian insights, “explores[s] the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions—what we shall call his ‘self-interest.’”165 It is premised on the view that humans will maximize their utility, and so broader social welfare, through voluntary transactions. Work in law and economics advocated, to great success, that those principles should be embedded in law.166 The trajectory of contemporary constitutional law traced above reflects the incorporation of those views in public constitutional law.

165. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 3 (8th ed. 2011); see also Richard A. Posner, Utilitarianism, Economics, and Legal Theory, 8 J. LEGAL STUD. 103 (1979). Posner, too, has asserted that “[t]he legal arguments for giving greater protection to personal than to economic liberties are superficial.” POSNER, supra, at 882.

166. See, e.g., Khan, supra note 28 (describing the significant effects of law and economics on antitrust law).
The law and economics critique of the New Deal compromise is both straightforward and analytically powerful, drawing as it does on the decades-long intellectual wave of the law and economics movement. It is, like Dworkin’s approach to law, founded in substantive normative commitments—specifically, the commitments and assumptions of classical economics. It takes Smithian conceptions of the public value of individual self-interested action as the basic metric for constitutional interpretation and application.

Richard Epstein explains the core critique of the New Deal compromise from this perspective:

As a matter of first principle I do take the position that a unified conceptual framework should apply to what are called economic and personal liberties, even if it were possible to articulate some hard-edged separation between them. The analytical origin of this position is that voluntary contracting, whether for the transfer of goods and services or the formation of long-term associations, works as well in the one domain as in the other. In each case, there are gains from trade among the parties that the law should seek to preserve.

On this view, all government action beyond facilitating and preserving voluntary trades (and protecting private property) are presumptive drags on social utility and so should be presumptively unconstitutional. As Epstein explains: “All proposals that deviate from the basic common law protections of life, liberty, and property should reach the legislature under a presumption of error.”

For this reason, with only limited exceptions, all state action beyond these voluntary-trade maximizing activities should be subject to stringent judicial constitutional review. Because


169. EPSTEIN, supra note 2, at 98.

170. Epstein would permit laws that facilitate voluntary transactions and protect private property—that is market facilitating coercion—including laws “countering force, fraud, and monopoly.” Id. at 55.
the “classical liberal position gives narrow weight to purported justifications both as to the
ends the state chooses and the means it uses to achieve them,” Epstein argues, “there are
virtually no cases, except perhaps on some narrow national security questions, where rational
basis sets the right standard of review.”

Put differently, the New Deal bifurcation of judicial review should be rejected in favor of stringent review (and presumptively invalidation) of all forms of regulation. The purpose of the Constitution, on this view, is generally to “keep public hands off voluntary transactions in labor, capital, goods, or services.”

Consider one recent example that highlights the role of such Smithian concepts in contemporary constitutional concerns. In *Masterpiece Cakeshop v. Colorado Civil Right Commission*—a First Amendment challenge that, if successful on the merits, would have threatened public accommodations and potentially a host of other laws—a group of law and economics scholars filed an amicus brief in support of the plaintiff in that case, a baker who refused to sell wedding cakes to same-sex couples in contravention of state public accommodations law. The bakery argued that these laws “seriously undermine[] the workings of market mechanisms” because they coerce businesses to sell goods and services to customers to whom the business would rather decline service for any reason (including on the basis of race, sex, religion, or sexual orientation). On this view, exemptions from antidiscrimination laws are welfare promoting because “social welfare is diminished by the resulting poor match of provider skill with consumer preferences.” This perspective—that economic efficiency

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171. *Id.* at 310–11.
172. *Id.* at 42.
and social welfare are enhanced by removing governmental restraints on discriminatory business practices—might be applicable to antidiscrimination and all other manner of laws.\textsuperscript{176}

Within the academic literature, the principal response to neoclassical law and economic arguments has been behavioralism. Decades of behavioral research have revealed the assumptions of neoclassical economics often to be incorrect.\textsuperscript{177} Humans do not act in consistently rational, welfare-maximizing ways, and, as Jim Crow era discrimination perhaps suggests, unregulated markets cannot always be depended on to produce social welfare-maximizing outcomes.\textsuperscript{178} We might contest the importation of neoclassical principles into constitutional law on similar behavioral grounds.

Bracketing the empirical question of whether people act in consistently rational, wealth-maximizing ways, however, the critique of the New Deal compromise from economics—and the social welfare argument for embedding Smithian economic concepts in the Constitution more generally—faces a steep challenge on its own terms. As discussed in Part IV, rational nondiscrimination principle might be justified in the context of white monopoly, it is difficult to justify when segregationist forces do not hold sway).

\textsuperscript{176} Evan Bernick of the Institute for Justice, which litigates many economic substantive due process cases, has argued that the problem with the Supreme Court’s protection of the right of privacy in \textit{Griswold v. Connecticut} was that the unenumerated rights revolution did not go far enough: “the Court must insist that the government may \textit{never} restrict people’s peaceful exercise of their liberty without an honest, reasoned justification” because there should be “no such thing as a second-class right, any more than a second-class citizen.” Bernick, \textit{supra} note 116. These views, while in many ways a radical affront to the earlier hegemony of the legal process school, share its aspiration to neutral principles, see, e.g., Herbert Wechsler, \textit{Toward Neutral Principles of Constitutional Law}, 73 HARV. L. REV. 1 (1959)—if ones grounded in the ostensible “neutrality” of market ordering.


\textsuperscript{178} For this reason, a group of behavioral social science and economics scholars, including Nobel laureate Daniel Kahneman, filed a responsive amicus brief in \textit{Masterpiece Cakeshop}, rejecting the neoclassical proposition that “anti-discrimination laws should be held to be unnecessary and the market should have the opportunity to ‘self-correct’” as a “nakedly normative position” ungrounded in accepted scientific principles. Brief of Amici Curiae Scholars of Behavioral Science and Economics in Support of Respondents at 13, \textit{Masterpiece Cakeshop}, 138 S. Ct. 1719 (No. 16-111).
self-interest, even if stipulated, may lead not to optimal social welfare outcomes, but instead to significant societal harms.

B. The Argument from Originalism

The critique of the New Deal compromise that has garnered the most support in academic, popular, and judicial corners relies on history for its normative force. Proponents argue that the framers embraced a natural rights-based, laissez faire understanding of economic liberty—and related stringent judicial review on constitutional grounds—and sought to reflect that conception in the Constitution. They further claim that the post–New Deal regulatory state is inconsistent with that vision of liberty and the stringent judicial review of infringements on liberty that it demands. Scholars and others who advance this contention are often labeled defenders of the Constitution in Exile—invoking the notion that we should return to a Constitution of the past, that is, the real Constitution, which has been forced into exile by the unlawful and unconstitutional New Deal.

Most vociferously, Philip Hamburger contends that administrative law is lawless and tyrannous at its root. He argues that the administrative state combines legislation and adjudication into a form of absolute power akin to the royal prerogative of seventeenth century England. On Hamburger’s view:

180. See Epstein, supra note 168; EPSTEIN, supra note 2.
182. HAMBURGER, supra note 4; see also, e.g., Gary Lawson, The Rise and Rise of the Administrative State, 107 HARV. L. REV. 1231, 1231 & n.1 (1994) (“The post–New Deal administrative state is unconstitutional,” meaning “at variance with the Constitution’s original public meaning.”).
Administrative agencies, crouched around the President’s throne, enjoy extralegal or supralegal power; the Environmental Protection Agency, with its administrative rule making and combined legislative, executive, and judicial functions, is a modern Star Chamber; *Chevron* is a craven form of judicially licensed executive tyranny, a descendant of the Bloody Assizes. The administrative state stands outside, and above, the law.  

“Constitutional law,” he contends, “developed precisely to bar this sort of consolidated extra- and *supra* legal power.”

Randy Barnett more judiciously argues that the framers subscribed to a capacious understanding of natural rights, which should inform constitutional interpretation. He contends that “[t]he founding generation universally believed that enactments should not violate the inherent or ‘natural’ rights of those to whom they are directed,” meaning “rights persons have independent of those they are granted by government and by which the justice or propriety of governmental commands are to be judged.”

Because the Constitution, including prominently through privileges and immunities and the Ninth Amendment, retained all rights in the people, Barnett asserts that judges should stringently impose a “presumption of liberty” against state action. Under this rubric, government must prohibit the wrongful “infringement of rights by private parties” and may regulate actions that “create a substantial risk of violating the rights of others” but all other


184. HAMBURGER, *supra* note 4, at 494 (emphasis added).


186. Id. at 53–68; see also, e.g., id. at 258 (“In his unrelated state, man has a natural right to his property, to his character, to liberty and to safety... In these general relations, his rights are, to be free from injury, and to receive the fulfillment of the engagements, which are made to him; his duties are, to do no injury, and to fulfill the engagements, which he has made.... These are the pillars of justice.” (quoting James Wilson, *Of the Natural Rights of Individuals*, in *THE WORKS OF JAMES WILSON* 307, 308 (J.D. Andrews, ed. 1896)). Robust views of natural rights were not limited to the founding era, Barnett asserts, but also to during the enactment of the Fourteenth Amendment. See id. at 65 (quoting CONG. GLOBE, 39th Cong., 1st Sess., 474 (1866)).

187. Id. at 255–72.
governmental actions “are improper and unconstitutional.” To identify which rights are “rightful” versus “wrongful,” Barnett contends, we should refer to the common law:

Distinguishing rightful from wrongful behavior is exactly what common law courts have been doing for centuries (with occasional assistance from legislatures). The freedom to act within the boundaries provided by one’s common law or “civil” rights may be viewed as a central background presumption of the Constitution—a presumption reflected in both the Ninth Amendment and the Privileges or Immunities Clause. There is no constitutional privilege to commit a tort or breach of contract; but so long as one is acting rightfully, one should presumptively be immune from government interference.

Under these principles, the state must enforce common law tort and property rules, but the modern administrative state should be ruled, in the main, unconstitutional through a leveling up of constitutional scrutiny.

The weakness of the originalist arguments, as historians including Sophia Lee lucidly explain, is that they rely on unjustified assumptions about the history of judicial review in the nineteenth century. The nineteenth century was not the period of de novo constitutional review that originalist critics of the New Deal compromise assume. Historical scholarship instead suggests that administrative agencies in the nineteenth century often were both the first and final word on the Constitution’s meaning. The critique of the New Deal from

188. Id. at 335.
189. Id. at 263.
190. Id. at 264–65 (“So emerges the great outline of an institutional allocation of responsibility in discerning and protecting the background natural rights of all persons: State common law processes determine the rights that each citizen enjoys against others, whereas state and federal judges are authorized to protect citizens from having their ‘civil’ rights infringed by state and federal governments.”).
191. Lee, supra note 5; see also Metzger, supra note 1.
history may thus be a call not to bend the arc of history backward—but to return to an imaginary past.¹⁹³

But leaving aside the stringency of constitutional review in the nineteenth century, whatever the framers’ views of natural rights, they emphatically did not believe that economic liberty was protected by the First Amendment freedoms now used to effectuate it in the courts. Perhaps for this reason, to my knowledge, no prominent scholar has defended recent First Amendment deregulatory decisions—including, for example, *Janus v. AFSCME¹⁹⁴*—on originalist grounds.

Indeed, the prominence and widely agreed upon value of stringent First Amendment review poses a more fundamental challenge to many originalist methodologies. The Sedition Act of 1798, passed just seven years after the ratification of First Amendment, made it a federal crime to “write, print, utter or publish... any false, scandalous and malicious writing... against the government of the United States,” and punished violations with up to two years imprisonment and fines up to $2000 (over $40,000 in 2022 dollars).¹⁹⁵ Under its terms, journalists and other government critics were convicted and imprisoned—but the Act was never held unconstitutional by any federal court.¹⁹⁶ Blackstone, too, appeared to confine

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the freedom of the press to a prohibition on prior restraints, not against post-publication punishments.\footnote{William Blackstone, Commentaries on the Laws of England *152–53 (William Carey Jones ed., 1916) (“The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. . . . But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty.”).}

Such concepts are anathema to contemporary First Amendment principles—\footnote{See, e.g., N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).} but under doctrines and ideas that were not developed until the twentieth century. Despite their current prominence, First Amendment protections are of relatively recent advent. Not until the early twentieth century did the Supreme Court provide any protection for the freedom of speech.\footnote{Robert Post, Reconciling Theory and Doctrine in First Amendment Jurisprudence, 88 Calif. L. Rev. 2353, 2356 (2000) (“Although First Amendment law did not spring into existence \textit{ex nihilo} in the year 1919, First Amendment jurisprudence as we now know it springs from a series of profoundly influential opinions by Oliver Wendell Holmes in the spring and fall of that year.”).}

And as I have elaborated elsewhere, protection for commercial, as opposed to political, speech is of even more recent origin; commercial speech was not deemed “speech” for constitutional purposes until 1976.\footnote{Shanor, \textit{supra} note 20, at 140–55. The history of business licensing is similar. The notion of the corporation, for example, was understood from its inception in England as a delegation of governmental power, and corporate charter was of course a license. See Adam Winkler, \textit{We the Corporations: How American Businesses Won Their Civil Rights} (2018); Coates, \textit{supra} note 96; Mary Sarah Bilder, \textit{The Corporate Origins of Judicial Review}, 116 Yale L.J. 502 (2006); Janet McLean, \textit{The Transnational Corporation in History: Lessons for Today?}, 79 Ind. L.J. 363 (2004). As John Coates explains, “the conception of business corporations as fully \textit{private}, equivalent to individuals in operation, is a late development—emerging well after the adoption of the U.S. Constitution, the Bill of Rights, and even the Civil War Amendments.” Coates, \textit{supra} note 96, at 232.}

This history places originalist critics of the New Deal compromise in a potentially awkward position: the deregulatory outcome produced by the emergent model including through First Amendment trends may be (at least somewhat) closer to what they believe the founders intended on a metaconstitutional level—that is, closer to a form of laissez faire, natural-rights based constitutionalism. However, a (if not the) key method of reaching that
outcome is contrary to the very methodology from which they derive their normative force. The living constitutionalist means by which the emergent model is being constructed, in other words, confounds the principle originalist critique of the New Deal compromise.

We might further ask whether the common law, as it has evolved since the founding, can truly be squared with the views of natural rights that New Deal critics ascribe to the founders. Or, more practically, whether critics intend to retain a common law (meaning, judicially updated) system of regulation, or instead a wholesale return to judicially evolved doctrines of the eighteenth and nineteenth centuries.

To provide one example familiar to first year torts students, early consumer law embodied the principle of caveat emptor: buyer beware. This made sense in a pre-industrial economy, against an economic backdrop in which most people produced their own food and clothes or purchased them from known, trusted sources.201 From the mid-1800s through early 1900s, products liability was limited to those in privity of contract.202 Only individuals who had bought a product directly from the manufacturer could sue for injuries caused by a faulty product. But as supply chains grew, more of economic life became between strangers, and negligence of faraway manufacturers proved difficult to discover. Not only privity but ordinary negligence standards appeared less and less reasonable. Modern courts therefore dropped the privity requirement and now strict liability is the norm for product defects.

If originalist critics mean a truly evolving common law, like that reflected in products liability law, the presumption of liberty may have less bite than it might appear. The presumption may, instead, suggest a different institutional design choice wherein judges, not


legislatures or regulators, bear more of the weight of responding to evolving social and economic challenges. For example, it may mean more emphasis on Boeing’s potential tort liability for 737 MAX 8 crashes, instead of Federal Aviation Administration (FAA) regulation. We might reasonably question the legitimacy of such an outsized role for the judicial branch.

We might likewise ask whether it is feasible or desirable for federal constitutional law to vary state-by-state, as tying constitutional meaning to state common law rules would require. Should the First Amendment’s protections be different in Alabama than California (let alone every other state) simply because each state takes a different private-law approach?

On a deeper register, we might question whether it is at all desirable (or realistic) to try to fit modern social and economic life, and its global informational capitalism, into the institutional framework of nineteenth-century mercantilism.\(^{203}\) As Robert Gordon forcefully contends:

> The vogue in our own age for the revival of the classical system can only arise from an astonishing misapprehension of its actual consequences. And the program to return to the legal-social status quo ante of the 1890s—a society riven by violent class conflict[,] mass unemployment, industrial injury and poverty-stricken old age, unspeakable levels of urban and rural squalor, corporate domination of politics and systemic racial oppression—is a truly nightmarish prospect to anyone who knows anything at all about it.\(^{204}\)

Regardless, insofar as the critical argument from history would prescribe the unconstitutionality of all state action beyond market-facilitating rules of property, contract, and tort law, the arguments from history and economics may amount to much the same result.

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203. See generally Shanor, supra note 20 (questioning the practicality of running so many constitutional claims through the courts). Mark Tushnet has persuasively argued that due to the pervasiveness of speech and expression, were all speech to fall within the scope of the First Amendment, this would cause a ‘too much work’ problem. Mark Tushnet, The Coverage/Protection Distinction in the Law of Freedom of Speech—An Essay on Meta-Doctrine in Constitutional Law, 25 WM. & MARY BILL RTS. J. 1073 (2017); see also Mark Tushnet, Art and the First Amendment, 35 COLUM. J.L. & ARTS 169 (2012).

Or, as Trevor Morrison has observed, Barnett’s originalist theory of constitutional interpretation would “enact Richard Posner’s *Economic Analysis of Law.*”

C. The Argument from Philosophy

The third, and most analytically powerful, justification of antiregulatory constitutional trends can be constructed from the work of libertarian philosophers. These philosophic theories range from the classical libertarian approach, perhaps best articulated by Friedrich Hayek, to more full-throated libertarian theories, which I will call, following Robert Nozick, libertarian capitalist philosophy, such as that of Nozick himself. Although the courts and academic literature have not explicitly adopted these approaches, the arc of libertarian philosophy has left clear fingerprints on both the economic and originalist arguments described above and deeply shaped broader legal culture.

At its core, libertarian philosophy asserts that freedom, correctly understood, is the highest good for the individual and, for many theorists, for society as well. For example, Hayek’s view of freedom is “that condition of men in which coercion of some by others is reduced as much as possible in society.” Coercion, in this context, means “such control of the environment or circumstances of a person by another that, in order to avoid greater evil, he is forced to act not according to a coherent plan of his own but to serve


206. *The Libertarian Reader* vii (Tibor R. Machan ed., 1982) (“Libertarians agree that liberty should be prized above all other political values”); *Jan Narveson, The Libertarian Idea* 175 (2001) (“[T]he idea of libertarianism is to maximize individual freedom.”).

the ends of another.” On that view, liberty is a negative freedom (the freedom from) in which
the individual is as free as possible from the interference of others.

Within Hayekian theory, value should be determined by the market, because the market
induces the right type of behaviors and produces beneficial inequality. It capitalizes on
inequality by demonstrating which choices cause which outcomes and garnering better elites
for society, as forces coalesce to create great opportunity for some. The government’s role,
Hayek argues, is to enable markets to perform their assertedly beneficial role in demonstrating
the positive social value of freedom to the course of social evolution.

Within Hayek’s formulation, the rule of law is evolutionary: it is a reverence for tradition
and recognition of the ways of governing society that have produced positive results in the
past. It is the emergence of spontaneous order from individual free action and based in
recognizing the positive results of freedom, so defined, that are produced through social
evolution. Hayek’s work is also ostensibly grounded in epistemic modesty: No person or
government, he argues, can have sufficient knowledge to advance social justice through
central, rational ordering (rather than spontaneous order).

Hayek, and the broader Scottish and English schools upon which he built, has long been
associated with the concept of laissez faire. But both Hayek and Smith were consequentialists:
They argued that a laissez faire system would generate more desirable outcomes than a more

209. See generally Isaiah Berlin, Two Concepts of Liberty: An Inaugural Lecture Delivered Before the University
211. Id.
212. Id. at 95–100.
213. HAYEK, LAW, LEGISLATION & LIBERTY, supra note 3, at 153–76; id. at 167 (“[A]ll progress must be based
    on tradition.”).
heavily regulated economy as a matter of fact.\textsuperscript{214} As Michael Teitelman has argued, “[t]his was both a powerful and a vulnerable argument: powerful, because it rests on the productive virtues of the market, and vulnerable, because the case against state intervention gives way when the actual behavior of market systems turns out to be less acceptable than predicted.”\textsuperscript{215} Accordingly for Hayek, like Smith before him, free markets “did not mean rejection of government’s redistributive powers and acceptance of the ‘night-watchman state.’”\textsuperscript{216} Hayek, for example, supported social security and a minimum basic income in order to shore up social stability\textsuperscript{217} and recognized that “[w]e owe our freedom to restraints of freedom.”\textsuperscript{218}

By contrast, libertarian theorist Robert Nozick took a non-consequentialist view. He famously argued that “[i]ndividuals have rights, and there are things no person or group may do to them (without violating their rights).”\textsuperscript{219} He put forth an entitlement theory of justice (contra John Rawls’ theory of justice as fairness) under which “a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; [and] any more extensive state will violate persons’ rights not to be forced to do certain things, and is unjustified.”\textsuperscript{220} Under Nozick’s property-based view of rights, there are two legitimate ways to acquire holdings: mixing one’s labor with something no one else

\begin{itemize}
\item \textsuperscript{214} See Michael Teitelman, \textit{Book Review}, \textit{77 Colum. L. Rev.} 495, 497 (1977) (reviewing \textsc{Robert Nozick, Anarchy, State, and Utopia} (1974)).
\item \textsuperscript{217} See, e.g., \textsc{Hayek, The Constitution of Liberty, supra note 3}, at 54–56, 285–305.
\item \textsuperscript{218} \textsc{Hayek, Law, Legislation \& Liberty, supra note 3}, at 163; \textit{id.} (“For,’ Locke wrote, ‘who could be free when every other man’s humour might domineer over him?’” (citing \textsc{John Locke, Second Treatise of Government}, sec. 57)).
\item \textsuperscript{219} \textsc{Robert Nozick, Anarchy, State, and Utopia} xix (2013).
\item \textsuperscript{220} \textit{Id.}
\end{itemize}
possesses and transfer (including exchange, gift, and inheritance). To Nozick, “No one is entitled to a holding except by (repeated) applications of 1 and 2.”

The upshot of Nozick’s entitlement theory and the minimal state that he argues follows from it is that the state may not alter market-based allocations, regardless of the consequential outcomes. That is because for Nozick, contrary to Hayek, property ownership and free transfer can never be infringed for the sake of other social values. Nozick sees these individual rights as inviolable—so much so that he would support a right to sell yourself into indentured servitude. This is because to Nozick, rights “are boundaries around each innocent person that may not be crossed, even to prevent greater evils.” Under his view, state action to prevent climate change or curb poverty would be defined as rights violating, and being free to breathe cleaner air or not starve are not recognized as forms of liberty.

It is clear why adoption of constitutional liberty defined as a simple right against state action may be attractive from a Hayekian or, even more definitively, a Nozickian perspective. Negative rights against state action, save state action to protect property and contract,

221. Id. at 151.

222. Id.

223. See Thomas Nagel, Libertarianism Without Foundations, 85 YALE L.J. 136, 141 (1975) (reviewing ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974)) ("[Nozick] denies that any of the rights he detects may be overridden merely to do good or prevent evil."); Thomas Nagel, Foreword, in NOZICK, supra note 219, at xi, xiii ("[Nozick’s] libertarianism rests on three claims: (1) the strict moral priority of a set of individual rights to freedom of action and association that limit what may be done to anyone by any other person or group, (2) the denial that there are any independent moral principles applying to collective or political institutions that cannot be derived from the natural rights of their individual members, and (3) the denial that there is a moral reason to mitigate social and economic inequality."); Freeman, supra note 216, at 127 ("It is a fundamental libertarian precept that people ought to have nearly unrestricted liberty to accumulate, control, and transfer rights in things (property), whatever the consequences or constraints may be for other people.").

224. NOZICK, supra note 219207, at 58 ("My nonpaternalistic position holds that someone may choose (or permit another) to do to himself anything, unless he has acquired an obligation to some third party not to do or allow it.").

225. Nagel, Foreword, supra note 223, at xiii. Nozick imagines individual rights as a “line (or hyperplane) [that] circumscribes an area in moral space around an individual” and actions that “transgress the boundary or encroach upon the circumscribed area” violate those rights. Id. at 57. Cf. ROBERT NOZICK, THE EXAMINED LIFE: PHILOSOPHICAL MEDITATIONS 286–87 (1989) ("The libertarian position I once propounded now seems to me seriously inadequate, in part because it did not fully knit the humane considerations and joint cooperative activities it left room for more closely into its fabric.").
advances a vision of freedom consonant with libertarian philosophy. Such rights protect status quo distributions of property and other forms of power against redistribution—that is the moral definition of proper state action as defined by Nozick. Indeed, for Nozick, the patterns of holdings that free markets create “are always just—whatever they turn out to be.”

The trouble with a libertarian approach, from a constitutional perspective, is several-fold. First, and most importantly, libertarian theory defines only certain freedoms as things of moral value. That approach is inconsistent with democracy and pluralism, insofar as the People are empowered to choose values—including nonmarket values and understandings of freedom that are more capacious, positive, or otherwise inconsistent with libertarian understandings. For example, the freedom not to be denied service for your race is not freedom on most libertarian accounts; only the choice of who to sell to (or whom to patronize) is. But freedom from discrimination is a type of freedom of great value to countless Americans, as the struggles against Jim Crow segregation (including discrimination by wholly private business decisions) and Congressional support for the Civil Rights Act of 1875 bring into stark relief. Why should society attend, value, and concern itself only with the cramped form of liberty with which libertarian theory is concerned?

Second, and relatedly, we might respond with Robert Hale’s classic insight that coercion is thoroughgoing in any society, setting background constraints on the universe of available choices from which one can “freely” choose. The definition of coercion as interference

226. See Teitelman, supra note 214, at 504; id. at 505 (“To approve a set of procedures in the absence of any information about the outcomes they generate is to assign an infinite value to those procedures: no matter how bad the outcome, the procedures are preferable to any others.”). Cf. Brian Barry, Books in Review: Anarchy, State and Utopia, 1975 POL. THEORY 331 (reviewing ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974)) (“Justice for Nozick, as for Thrasymachus, is the interest of the stronger.”).

227. See, e.g., Teitelman, supra note 214, at 502 (“By Nozick’s light, renting to and hiring only white people or refusing to offer better dwellings and jobs to members of racial minorities does not violate anybody’s rights, but state prohibition of racial discrimination does . . . .”).

228. Hale, supra note 52; see also FRIED, supra note 52.
with private choices blinds itself to the way in which countless forms of coercion create and shape the status quo ante.

Liberties related to property provide a simple example. As legal realist theorists such as Hale articulated so powerfully during the First Gilded Age, both property and markets in which to ‘freely’ trade one’s property are themselves constituted and preserved by legal coercion. You need a police force to protect your house (or valuable data set) from the autonomy of those who would by force (or hacking) free you of it. You also need the protections of contract law and the laws that constitute and sustain market institutions to provide you the freedom to transfer that property. Cass Sunstein’s famous contention that Lochnerism protected common law distributions, as a sort of invisible baseline, against political alteration\(^{229}\) restates that insight. The common law is itself a form of regulatory system that constitutes and maintains forms of possession, private power, and liberty.

Or consider freedoms related to equality and inclusion. The lived experience of equality is informed not only by the right to be free from government discrimination—but by interactions with employers, colleagues, teachers, and others that convey (or fail to convey) equal worth. As prominent sociologist Erving Goffman explained, each “individual must rely on others to complete the picture of him of which he himself is allowed to paint only certain parts.”\(^{230}\) The freedoms experienced in a world in which you are treated equally (or their absence, in a world in which you are not) are built upon legislatively enacted entitlements against private discrimination, as well as the minimum wage, family leave, and tax and labor

\(^{229}\) Sunstein, *supra* note 43.

policies, the history of legal maintenance of slavery, settler colonialism, sexism, and religious
discrimination as well as legal responses to them, to name a minute subset.231

Consider the history of the Reconstruction Amendments—the Thirteenth, Fourteenth,
and Fifteenth Amendments, which were adopted following the Civil War. Those
Amendments in many ways failed to accomplish the revolutionary “new birth of freedom”232
that the Radical Republicans who framed them had hoped. Many of the same lawmakers who
enacted the Fourteenth Amendment233 voted to pass the Civil Rights Act of 1875 under that
Amendment’s enforcement power,234 only to have the Supreme Court in _The Civil Rights
Cases_235 deal a blow to Congress’s powers under it. The Court held that the Fourteenth
Amendment did not empower Congress to prohibit discrimination by private entities, as the
Civil Rights Act of 1875 did.236 In so holding, the Court left formerly enslaved people to the
hands of entrenched private discrimination and laid the groundwork for Jim Crow rather than
the guarantee of greater freedoms for Black Americans that many abolitionist and Radical
Republicans had sought. As I hope is apparent, the Jim Crow South was lacking in countless
forms of liberty for Black people—despite (if not in part because of) the Supreme Court’s

231. _See generally, e.g_, Cheryl I. Harris, _Whiteness as Property_, 106 HARV. L. REV. 1707 (1993).


233. Section 1 of the Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are
citizens of the United States and of the state wherein they reside. No state shall make or enforce
any law which shall abridge the privileges or immunities of citizens of the United States; nor shall
any state deprive any person of life, liberty, or property, without due process of law; nor deny to
any person within its jurisdiction the equal protection of the laws.

_U.S. CONST._ amend. XIV, § 1.

234. Section 5 of the Fourteenth Amendment provides: “Congress shall have power to enforce, by appropriate
legislation, the provisions of this article.” _Id._ § 5.

235. 109 U.S. 3 (1883).

236. The 1875 Act prohibited this by prohibiting discrimination by public accommodations including inns,
public transportation, and theaters on the basis of race, color, or previous condition of servitude. _Civil
limiting of constitutional claims to, and congressional action regarding, those against state
governments. They were deprived of many forms of freedom that the Congress of 1875, and
many Americans before and since, understood to be constitutional liberties.

We thus cannot define coercion against a neutral baseline. We must instead decide what
forms of coercion are beneficial, based on a normative theory much thicker than coercion of
private choice or autonomy from state action. 237

Finally, the libertarian capitalist approach fails on its own market-based terms because
externalities, transaction costs, and rent seeking may undermine market-based freedoms,
particularly in the long run. Libertarian theory, at least in its most robust form such as Nozick’s
type, fails to provide a good response to these challenges, including the problem of
pollution. On the libertarian capitalist view, any problems not caused by coercion of certain
individual freedoms are simply not morally cognizable. 238 Libertarian capitalism, taken literally,
defines away commons problems and externalities (and, for that matter, other potential
problems of a libertarian capitalist world, such as social unrest arising out of inequality). 239 As
Amartya Sen argues “what if the collectivity of what are taken to be ‘just institutions’ [in

237. Cf. NOZICK, supra note 219, at 27 (“If some redistribution is legitimate in order to protection everyone,
why is redistribution not legitimate for other attractive and desirable purposes as well?”).

238. I am particularly grateful for Sasha Volokh’s input on this point.

239. Interestingly, Nozick cannot stomach a right to pollute that the rest of his theory would entail and so, rather
inconsistently, advocates for a right to pollute only when “benefits are greater than costs,” bringing his
thinking in line with many economic libertarians. NOZICK, supra note 219, at 79–81. By contrast, as Jane
Mayer put it, “The Kochs vehemently opposed the government taking any action on climate change that
would hurt their fossil fuel profits.” JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE

It is important to recognize that there is a great diversity of libertarian thought generally and on this
front. Some radical libertarians, for example, hold a strong norm against nonaggression which might in
fact prohibit pollution, even if it is the product of productive economic activity. See, e.g., MURRAY N.
ROTHBARD, FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO 319 (1973) (“All such emanations which
injure person or property constitute aggression against the private property of the victims. Air pollution,
after all, is just as much aggression as committing arson against another’s property or injuring him
physically. Air pollution that injures others is aggression pure and simple. The major function of
government—of courts and police—is to stop aggression; instead, the government has failed in this task
and has failed grievously to exercise its defense function against air pollution.”). This radical form of
libertarianism is not, however, the one that has influenced the ascendant constitutional vision of liberty.
Nozick’s view] generates terrible results for the people in that society [without actually violating their . . . libertarian rights? 240] To this question, Novick shrugs. Indeed, “The point of the gambit of constructing a purely procedural conception” of entitlement justice “is to render the defense of the market invulnerable to such considerations.” 241

By contrast, as a consequentialist, Hayek accepts the need for the state to protect certain social values, even if he centrally privileges property-based freedom. He defends the provision of a minimum basic income, for example, to avoid social discontent:

The assurance of a certain minimum income for everyone, or a sort of floor below which nobody need fall even when he is unable to provide for himself, appears not only to be a wholly legitimate protection against a risk common to all, but a necessary part of the Great Society . . . . A system which aims at tempting large numbers to leave the relative security which the membership in the small group has given [in favor of a highly mobile open society] would probably soon produce great discontent and violent reaction when those who have first enjoyed its benefits find themselves without help . . . . 242

In addition, Hayek recognizes the need to deal with market externalities by way of state action. In The Road to Serfdom, for example, he explains:

There are . . . undoubted fields where no legal arrangements can create the main condition on which the usefulness of the system of competition and private property depends: namely, that the owner benefits from all the useful services rendered by his property and suffers for all the damages caused to others by its use. . . . Nor can certain harmful effects of deforestation, of some methods of farming, or of the smoke and noise of factories be confined to the owner of the property in question or to those who are willing to submit to the damage for an agreed compensation. In such instances we must find some substitute for the regulation by the price mechanism. 243


241. See Teitelman, supra note 214, at 507.

242. HAYEK, LAW, LEGISLATION AND LIBERTY, supra note 3, at 55; see also HAYEK, THE CONSTITUTION OF LIBERTY, supra note 3, at 285–305 (analyzing and justifying social security).

One could imagine that Hayek might oppose modern constitutional trends that reflect the emergent view of constitutional liberty to the extent that they generate social instability or are used to rent seek. Which is to say, while the contemporary movement for anti-state autonomy appears informed by Hayekian (or Smithian) understandings of freedom, this movement does not apply libertarian theory in a nuanced or thoroughgoing way. At most, the version of liberty advocated in and by courts—that freedom from government is good—is a blunt, highly diluted understanding of libertarian theories.

Modern constitutional trends might instead appear more consistent with, and perhaps informed by, the most single-mindedly libertarian capitalist approaches. But it is hard to imagine, practically, that either the advocates of the emergent model or the courts would in fact countenance the thoroughgoing adoption of libertarian capitalism into constitutional law—such as the rejection of drug safety laws, publicly funded schools and roads, police, social security, minimal welfare, or a host of other basic state services and institutions.

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This Subpart has analyzed the principal arguments—from economics, originalism, and libertarian philosophy—that support the ascendant vision of constitutional liberty and broad-based and stringent judicial review. In robust intellectual form they differ in significant respects, and if adopted in constitutional law would have divergent doctrinal implications and encompass different limiting principles.

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244. This inference is also buttressed by his support for certain market facilitating rules. Interestingly, Hayek’s support for policies from compulsory education to taxation to military service demonstrates that he assumed social understandings of duty and empathy that are inconsistent with modern forms of libertarianism and its vision of rights. See, also e.g., HAYEK, supra note 243, at 110–11 (“Democracy is essentially a means, a utilitarian device for safeguarding internal peace and individual freedom. As such it is by no means infallible or certain. . . . Democratic control may prevent power from becoming arbitrary, but it does not do so by its mere existence.”). Cf. Coates, supra note 96, at 271–75 (arguing that modern First Amendment claims are rent-seeking).
Principled scholars from a libertarian economic perspective might, for example, agree that government appropriately acts to encourage the internalization of the cost of externalities and respond to transaction costs. And originalist intellectuals might, with sufficient historical proof, agree that judicial review was not pervasively stringent at the founding (or that agencies were the first and often last form for constitutional interpretation) or that the views of the framers themselves contained limiting principles in law or norms, making some liberty claims less appropriate for strict constitutional review today. But even if such constraints are intellectually conceivable, as of yet, they are largely unarticulated if not expressly disavowed within mainstream discussion of constitutional liberty.

Aside from an analytically untenable rights-everywhere model, neither courts nor legal academics or advocates have staked out an alternative to the New Deal’s central distinction. Still, in nothing short of an emergent constitutional revolution, we appear headed toward that vision of constitutional ordering.

IV. THE TRAGEDY OF DEMOCRATIC CONSTITUTIONALISM

Fifty years ago, Garrett Hardin published an influential article in Science that has had a lasting impact on private and administrative law. In environmental and administrative law, torts and property, the Tragedy of the Commons has become shorthand for the destruction that can result when self-interested individuals use common resources. In contexts involving shared resources, Hardin argued, people pursuing self-interest are not led “to promote . . . the public interest” as Adam Smith predicted; instead, they create collective ruin.

245. See, e.g., Richard A. Posner, Some Uses and Abuses of Economics in Law, 46 U. CHI. L. REV. 281, 305 (1979) (“One of the main purposes of law, from an economic standpoint, is the control of externalities.”).

246. Hardin, supra note 31, at 1244 (citing ADAM SMITH, THE WEALTH OF NATIONS 423 (Modern Library, 1934) (1776)).
To illustrate this point, Hardin asks us to imagine a pasture “open to all.”247 Acting in their own self-interest, each herdsman will try to keep as many cattle in the common field as possible. Such an arrangement may be satisfactory as long as conditions keep the numbers of men and cattle below the carrying capacity of the land. But the day will come when “the inherent logic of the commons remorselessly generates tragedy.”248 As each herdsman seeks to maximize his personal gain, he will be motivated to add more and more animals to the commons. This is because he receives a direct benefit from his own cattle but only shares a portion of the costs of overgrazing:

Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.249

We might respond to this inevitability, Hardin says, by selling the commons off as private property or regulating who can enter the public commons—on the basis of who can pay the most,250 by merit, by lottery, or on a first-come, first-served basis administered by queues.251 But choose we must, or face the ruination of the commons.

Hardin's insights have since been formalized as a form of prisoner's dilemma. In the paradigmatic example, two criminals are arrested and held in separate cells, unable to communicate. Police have evidence only of a minor infraction on both but offer each prisoner

247. Id.
248. Id.
250. Cf. MICHAEL J. SANDEL, WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS (2012) (arguing that the United States has become a market society, in which market values have crowded out non-market values, and in which you can pay for nearly anything).
251. Hardin, supra note 31, at 1245.
a deal to betray the other on a larger crime. If A betrays B, she will be set free and B will get ten years in prison (or the reverse). If each prisoner betrays the other, they will each spend five years in prison. But if they both remain silent they will each receive a year. This game has fascinated scholars because each person selecting the best individual strategy will not produce the best collective result. The “betray” strategy dominates to the prisoners’ joint loss.

The prisoner’s dilemma, like the *Tragedy of the Commons*, suggests that individually rational strategies may lead to perverse collective results:

The paradox that individually rational strategies lead to collectively irrational outcomes seems to challenge a fundamental faith that rational human beings can achieve rational results. . . . “Thus, they bear directly on fundamental issues in ethics and political philosophy and threaten the foundations of the social sciences. It is the scope of these consequences that explains why these paradoxes have drawn so much attention and why they command a central place in philosophical discussion.”

These paradoxes are central to many social science debates because of the prominence of Smithian notions across the social sciences. Although Hardin was responding to the individualistic turn in demography, similar movements toward self-interested individualism—incorporating Smithian assumptions about people and institutions—have pervaded a wide range of fields. Economics is perhaps the archetypal example. Over the decades of the influence of the law and economics movement, private and administrative law took up core principles of neoclassical economic concepts. The current incorporation of neoclassical economic principles into constitutional law can be seen as a culmination of this movement.

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252. This dilemma is commonly represented in this 2 x 2 structure:

<table>
<thead>
<tr>
<th></th>
<th>A Cooperate</th>
<th>A Don’t Cooperate</th>
</tr>
</thead>
<tbody>
<tr>
<td>B Cooperate</td>
<td>1, 1</td>
<td>10, 0</td>
</tr>
<tr>
<td>B Don’t Cooperate</td>
<td>10, 0</td>
<td>5, 5</td>
</tr>
</tbody>
</table>

Commons analysis draws from the analytical toolbox of thinkers who advance the argument from economics.

A. Liberty as Commons

While the tragedy of the commons has long been important to the development of private and administrative law, its paradox has been largely unexplored in U.S. constitutional law.254

Before I delve into the implications of the tragedy of the commons for the emergent model of constitutional liberty, a few caveats are in order. First, and most importantly, my hope is not to draw a tight analogy between Hardin’s *Tragedy of the Commons* and constitutional liberties. Nor do I argue that constitutional liberty should be defined in the efficiency-based way that commons analysis advances255—indeed quite to the contrary. Nor do I do mean to assert that humans should be understood to be rational welfare maximizers, as commons analysis assumes, or that commons of either constitutional or real property dimensions inevitably fall into tragedy.256 A key critique of the emergent model is that it offers a single,

254. In a recent article, Brigham Daniels and Blake Hudson explore the Constitution as a commons and seek “to rectify the scholarly neglect of how the commons relates to the Constitution.” Brigham Daniels & Blake Hudson, *Our Constitutional Commons*, 49 GA. L. REV. 995, 1005 (2015). Daniels and Hudson theorize a cycle between conflicts over rivalrous constitutional meanings and nonrivalrous constitutional goods (including liberties and allocation of governmental powers). *Id.* at 1002–03. They conclude, contrary to the analysis presented here, that constitutional liberties are not themselves rivalrous, but competing meanings of constitutional law are. *See id.* at 1000–03.

Carol Rose has also prominently connected constitutional law and commons analysis. *See* Carol M. Rose, *Commons and Cognition*, 19 THEORETICAL INQUIRIES L. 587, 614–15 (2018) (discussing aspects of the ratification debates in the U.S. Constitution in analyzing features of largescale commons problems). And of course, there is nothing new about the notion that liberties are potentially rivalrous, as Zechariah Chafee’s famous quote and discussion, *see infra* note 258 and accompanying text, among others, makes clear.

255. John Coates essentially makes this assertion in his powerful paper arguing that First Amendment claims by business are a form of rent-seeking that undermine capitalism. *See* Coates, *supra* note 96.

256. If we were to take the endeavor more literally, we might instead consider constitutional liberty claims in the current moment more as an anti-commons, given the range of types of claims under a variety of doctrines that lock out potentially socially productive action from government. *See* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition From Marx to Markets*, 111 HARV. L. REV. 621 (1998). As I have argued, it is important to consider the bundle of simple liberty claims across doctrines, as an anti-commons analogy would encourage. *See id.*

It is also important to note that Hardin was a wildly unappealing figure: “a racist, eugenicist, nativist and Islamophobe,” who is “listed by the Southern Poverty Law Center as a known white nationalist” and who “helped inspire the anti-immigrant hatred spilling across America today.” Matto Mildenberger, *The Tragedy of the Tragedy of the Commons*, Sci. Am. (April 23, 2019),
market-based, and hollow understanding of liberty that is inconsistent with the lived experience of many Americans and with richer visions of constitutional freedom. Both presently and historically, richer visions of constitutional liberty have often been informed by context-bound claims of justice and analyses of both power and institutional design. There is no reason that efficiency-based logic should define liberty; let alone that the Constitution should impose it on the political branches if the People vote to reject it. Indeed, my point is that while our constitutional system may contingently tend to define liberty in such a thin way—due to the sensitivity of constitutional law to social and economic movements and that thin liberty rights asymmetrically favor status quo distributions of entitlements and power in an unequal world—a sufficiently mobilized people both can and has repeatedly overcome that tendency in favor of thicker visions of constitutional freedom.

My hope is to use a commons form of analysis—drawn from the toolbox of one of the principle justifications of the ascendant model, classical law and economics—to better understand the implications of the emergent constitutional revolution, including on the own terms of one of its principle justifications. Considering freedoms in this way sheds helpful light on a number of persistent constitutional dynamics, and brings into focus several of the normatively unappealing features of the ascendant constitutional model—and the hopeful possibility of its rejection.

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For a host of reasons, advocates of the emergent constitutional model have been able to ignore the larger implications and normative tradeoffs of their arguments. One of the attractive features of the emergent constitutional model is its apparent expansion of individual


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liberty, particularly in the domain of free speech.\footnote{257} The deep assumption of this view is that liberty is an unlimited nonrivalrous resource, such that freedom for me means more freedom for everyone. This is perhaps the central appeal of liberty everywhere arguments.

But constitutional liberty can be productively analogized to a common resource. Liberty, like grazing space, is both largely communal—defined by social relationships and the actions of others—and often rivalrous. Like Zechariah Chafee’s often quoted “Your right to swing your arms ends just where the other man’s nose begins”\footnote{258}—my fullest liberties (to swing my arm) may be rivalrous with yours (to be free of nose punches).\footnote{259} As Hardin points out, the prohibition on robbery may appear as a limit on individual liberty—but through it we collectively gain freedom from theft, from the fear of robbery, and the reduction in robbery the prohibition effects provides broad opportunity to use the saved resources to pursue many other forms of life we find enhance our practical freedoms (such as vocation or an education).

This insight has old roots. The logic of the commons with regard to political power was captured in Thomas Hobbes’s vision of a life that is “solitary, poor, nasty, brutish, and short.”\footnote{260} That is, a world in which the physically powerful dominate through brute force.\footnote{261}

\footnote{257. For this and a range of other reasons, as I and others have noted, First Amendment expansionism enjoys robust cross-ideological support. See Schauer, \textit{supra} note 96; Shanor, \textit{supra} note 20; Kendrick, \textit{supra} note 96.}

\footnote{258. Zechariah Chafee, Jr., \textit{Freedom of Speech in War Time}, 32 HARV. L. REV. 932, 957 (1919).}


\footnote{261. \textit{See also} \textit{JOHN LOCKE, SECOND TREASISE ON GOVERNMENT} sec. 57 (Jonathan Bennett ed., 2008) (1689), https://www.scribd.com/document/89756316/John-Locke-Second-Treatise-of-Government [https://perma.cc/2F4T-YXYH] (“[H]owever much people may get this wrong, what law is for is not to abolish or restrain freedom but to preserve and enlarge it; for in all the states of created beings who are capable of laws, where there is no law there is no freedom. Liberty is freedom from restraint and violence by others; and this can’t be had where there is no law. This freedom is not—as some say it is—a freedom for every man to do whatever he wants to do (for who could be free if every other man’s whims might dominate him?) . . . .”).}
The communal and often rivalrous nature of freedoms is true not only of abstract power dynamics but of constitutional ones. In the contemporary context, my First Amendment liberty to, say, refuse you service in my restaurant is rivalrous with your freedom to be served. My right to market my pharmaceutical off label (meaning, outside the FDA’s current approval process) is rivalrous with your freedom to avoid life-threatening side effects. My right to be free of the individual healthcare mandate may be rivalrous with yours to receive lifesaving therapy. My free speech right to say racist or anti-Trump slurs may be rivalrous with your freedom to avoid those slurs—or to feel welcome where they are said. My freedom to sell my explosive Ford Pinto may be contrary to your freedom to avoid explosion. And my liberty to spew pollution when making my products may be rivalrous with yours (and your children’s) to avoid the effects of climate change.

At four sheets in the original text, the U.S. Constitution is not only the oldest continuously operating federal constitution, but also one of the shortest. It contains numerous provisions that are both textually and analytically open-ended enough to encompass most, if not all, human and state activity. I have previously stated this insight in reverse form in relationship to the Speech Clause: “Because nearly all human action operates through communication or expression, the First Amendment possesses near total deregulatory potential.” Much the same could be said of the Due Process, Equal Protection, Takings, and Privileges and Immunities Clauses, to say nothing of the Ninth Amendment or separation of powers principles.

Privileges and immunities and rights reserved within the Ninth Amendment could be read to include all manner of activities, including, as Barnett memorably describes, “the right

262. Shanor, supra note 20, at 133.
to wear a hat, to get up when one pleases and go to bed when one thinks proper, to scratch one’s nose when it itches (and even when it doesn’t), to eat steak when one has a taste for it, or take a sip of Diet Mountain Dew when one is thirsty." Or, for that matter, the right not to serve you in my store, to spew pollution, or to pay workers below minimum wage.

The literature and public discussion of First Amendment expansionism and broader anti-administrativism have not sufficiently surfaced the tradeoffs of the emergent model’s expansion of autonomy. Incisive criticisms have linked First Amendment Lochnerism with tradeoffs of democracy. But there are significant liberty tradeoffs, as well.

It may be difficult to see, for example, that a world of rights everywhere could easily mean more exploding Ford Pintos; more dirty water and dangerous snake oil drugs; faster environmental degradation and climate change; rampant workplace injury and rapacious consumer-facing business practices; a society not only riven by even greater class divisions and corporate and elite domination of economic and political life—but one in which all of us are less free. If we truly mean liberty everywhere, that liberty may not stop at your nose.

Productively comparing our constitutional system to a commons depends on the notion that certain people or groups of people are sometimes, if not always, roughly rational and utility-maximizing—or at least self-interested. One might rightly question the strength of this assumption, as I do. As discussed above, significant research in behavioral economics and behavioral law and economics have undermined strong-form assumptions of rationality. Nonetheless, we might stipulate a weak and historically contingent rationality assumption for two reasons. First, this assumption takes arguments in favor of the emergent constitutional model on their own terms. Many advocates of the simple autonomy model of constitutional


264. See Post & Shanor supra note 7; Shanor, supra note 20; Purdy, supra note 28; Kapczynski, supra note 28.
law embrace robust rationality assumptions. My hope is that my work productively engages with theirs, and highlights an overlooked risk of maximal thin liberty regimes, even if one ascribes to tenants of classical economics.

Additionally, recent social science research suggests that both elites and groups exhibit higher rates of rationality and self-interestedness than individuals and less-affluent Americans. As Raymond Fisman, Pamela Jakiela, Shachar Kariv, and Daniel Markovits demonstrated in *Science*, for example, highly elite law students—a class likely to assume positions of power and influence in American politics and society—exhibited sharply more selfish and efficiency-focused preferences than the U.S. public or intermediate elites. Such elites and groups (particularly corporations) are and have been critical to the recent turn away from the New Deal compromise, as work in history, political science, and law has amply demonstrated. The very people and groups research has shown are likely to be more self-interested are at the forefront of constitutional litigation and advocacy contributing to the Constitution’s recent individual liberty turn. A deep political science literature, moreover, describes the way in which organized elite interests have, over the last fifty years, influenced distributional laws to their economic advantage.

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265. *See, e.g.*, EPSTEIN, supra note 2.

266. *See infra* note 299 and accompanying text (collecting political science research).


My point is not that elites are necessarily self-interested (or any more so than others), or that they inevitably will embed principles that benefit them in law. My argument is rather that as a contingent matter of culture and psychology, over the last fifty years they have done so in significant ways not only with regard to large scale laws that affect distributional outcomes, but in the context of the meaning and scope of constitutional liberties as well.

Prominent responses to Hardin have argued that informal norms and governance strategies may operate as sufficient property management regimes—and so formal legal rules are not necessary to avoid a tragedy of the commons. Elinor Ostrom, for example, illuminated the ways in which diverse societies manage common resources—often wholly independent of law—in ways that avoid ecosystem collapse.270 Robert Ellickson has likewise found that communities such as Shasta County’s ranchers effectively resolve property disputes without law.271 Ostrom, Ellickson, and others have shown that norms, informal agreements, trust and reciprocity, and other extralegal mechanisms of governance can and regularly do prevent Hardin-style resource tragedies. And, as Yochai Benkler and others have made clear, commons in information can and do produce significant knowledge and innovation—and greater freedom—rather than tragedy, principally because of the nonrivalrous nature of information.272

270. See generally Ostrom, supra note 253.
272. As Benkler explains:

Whether one or the other of the two systems [property and markets or commons], used exclusively, will provide “greater freedom” in some aggregate sense is not a priori determinable. . . In the context of information, knowledge, and culture, because of the nonrivalry of information and its characteristic as input as well as output of the production process, the commons provides substantially greater security of context than it does when material resources, like parks or roadways, are at stake. Moreover, peer production and the networked information economy provide an increasingly robust source of new information inputs. . . As to information, then, we can say with a high degree of confidence that a more expansive commons improves individual autonomy, while enclosure of the public domain undermines it.
Might nonlegal mechanisms of governance or legal-cultural norms moderate a constitutional tragedy? There is ample reason to believe they have and could. At various points in American history, including the founding, cultural norms and beliefs regarding the normative basis for rights appear to have functioned as sorts of implicit limiting principles for rights claims.

Vincent Blasi, for example, has thoughtfully explored the way in which ideas of civic duty informed the framers and other influential intellectuals’ beliefs about the content of free speech. Through nuanced intellectual history, Blasi demonstrates that free speech to thinkers including James Madison, John Milton, John Stuart Mill, and Louis Brandeis did not mean a thin or empty autonomy right against the state. The right of free speech was not content or context-less—to the contrary, it was understood as a liberty in furtherance of meaningful public-facing duties. As Blasi explains:

Milton, Madison, Mill, and Brandeis rely heavily on various notions of individual duty to justify robust protection for certain speech—political duty in the case of Madison and Brandeis, moral and intellectual duty in the case of Mill, religious as well as civic duty in the case of Milton. But all four derive and

YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOMS 145–46 (2006); Yochai Benkler, Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment, 11 HARV. J. L. & TECH. 287, 359 (1998) (“Spectrum is not a thing, like a pasture, that can be eliminated by overgrazing or needs constant upkeep. To be precise, if one wishes to treat spectrum as a resource, one must recognize that it is a perfectly renewable resource that is an input into the value sought to be maximized—the capacity of users to send and receive communications.”). Cf. Kevin Werbach, Supercommons: Toward a Unified Theory of Wireless Communication, 82 TEX. L. REV. 863 (2004) (reconceptualizing spectrum policy around wireless equipment rights and the supercommons model).

273. Blasi, supra note 96.

274. Blasi explains that “the types of individual character Milton, Mill, and Brandeis associate with free speech . . . are presented as ideals precisely because, in their view, the collective well-being of society depends so much on the nurturing of such traits.” Id. at 24. Brandeis, for example, explained:

Those who won our independence believed . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . Brandeis viewed the freedom of speech as generated in significant part by duties. Rights and goods that others think of as protecting individual choice or personal space—privacy, economic security, entrepreneurial opportunity, leisure time—Brandeis prioritized for their contribution to the discharge of the duties of citizenship. For him freedom was serious business.

Id. at 18.
elaborate the duties that inform their understandings of the freedom of speech not by asking how those duties implement or respect the autonomy of the bearers and beneficiaries of the duties. Rather, they justify the duties predominantly with reference to the interests of audiences and indirectly the society at large.\footnote{275. \textit{Id.} at 22–23.}

That ideas of collective duty—rather than simple autonomy—animated early understandings of free speech perhaps sheds light on the fact that First Amendment claims were rarely litigated until the early twentieth century. Norms and beliefs about the reasons for and purposes of rights, this suggests, may themselves act as forms of limiting principles.

Even the iconic economic liberties of the \textit{Lochner} era were considerably cabined by then-prevailing understandings of the power of the police state as well as of less trump-like rights, which were arguably closer to modern European proportionality, than to our modern conception of constitutional rights.\footnote{276. \textit{See, e.g.}, Nourse, supra note 41, at 752; Greene, supra note 37 (arguing that constitutional rights have become too trump-like and in favor of proportionality).} In addition, corporations were generally extended property but not liberty rights during the \textit{Lochner} era, creating an additional norm-based limit.\footnote{277. In a case not entirely unlike \textit{Masterpiece Cakeshop}, for example, a public accommodations law was upheld against a corporate constitutional challenge on the grounds that:

\begin{quote}
[A] corporation cannot be deemed a citizen within the meaning of [the Privileges and Immunities Clause]. . . . The same observation may be made as to the contention that the statute deprives the defendant of its liberty without due process of law; for the liberty guaranteed by the [Fourteenth] Amendment against deprivation without due process of law is the liberty of natural, not artificial, persons.
\end{quote}

W. Turf Ass’n v. Greenberg, 204 U.S. 359, 363 (1907); \textit{see} Messenger v. State, 41 N.W. 638, 639 (Neb. 1889) (“A barber, by opening a shop, and putting out his sign, thereby invites every orderly and well-behaved person who may desire his services to enter his shop during business hours. The statute will not permit him to say to one: ‘You are a slave, or a son of a slave; therefore I will not shave you.’”); Norwood v. Harrison, 413 U.S. 455, 469–70 (1973) (“[A]lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.”); R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992) (“Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.”); Runyon v. McCrary, 427 U.S. 160, 175–76 (1976); Roberts v. U.S. Jaycees, 468 U.S. 609, 612 (1984); Hishon v. King & Spalding, 467 U.S. 69, 78 (1984); Bob Jones Univ. v. United States, 461 U.S. 574, 602–04 (1983).}
Often, implicit views about what constitutes speech (selling a cake? limits on credit card swipe fees?) also inform what is litigated under the First Amendment in our current moment. Nonetheless, the practical scope of the freedom of speech remains malleable to the point of threatening rule of law issues. But on a broader scale, as of yet, norms (and courts and litigants) have not identified, let alone settled on, an alternative normative theory or limiting principle in the wake of the decline of the New Deal compromise—and prominent critics of it openly forswear one. To the extent that additional nonlegal governance or norm-based limits exist, so far they appear to privilege market-facilitating limits (take, for example, the fact that contracts are generally not subject to First Amendment challenge), again asymmetrically favoring ex ante distributions of entitlements. This prompts us to wonder, again, why should market-based notions of liberty prevail in constitutional law, let alone be imposed by the Constitution on the political branches when the People adopt a different view of freedom?

More sharply, a skeptical reader might reasonably ask: Even if we might analogize constitutional freedoms to real property ones, was Hardin’s theory of tragedy even correct on its own terms?

Such a question is apt: Ostrom (among others) has demonstrated that Hardin’s model does not hold in a host of contexts. In the real world, as Ostrom, Ellickson, and others have detailed, communities often effectively manage commons resources so as to avoid tragedy without resort to either of Hardin’s proposed solutions, prominently including division into private property or management by government.

278. Shanor, First Amendment Coverage, supra note 67, at 358.

279. Ostrom was not the first to suggest the idea that Hardin’s model does not hold in many contexts. See Carol M. Rose, Thinking About the Commons, 14 INT’L J. COMMONS 557, 558–59 (2020) (discussing the earlier work of Scott Gordon, Mancur Olsen, and Harold Demsetz).
I certainly do not intend to suggest that tragedy is inevitable or that extralegal governance mechanisms or norms could not likewise avert a tragedy with respect to constitutional liberty. They very much could. But, in the current moment, they do not appear to be doing so. To the degree that extralegal structures and norms appear to be providing some limits on the emerging view of liberty, they privilege market-facilitating limits, which again asymmetrically favor ex ante distributions of entitlements and work to entrench structural inequality.

As Carol Rose’s recent work has illuminated, moreover, there are several forms of commons that vary in their tendency to the sort of tragedy Hardin identified.\textsuperscript{280}

Largescale commons situations, such as climate change, are those most likely to pose Hardin-type commons problems. That is because participants are more likely to be either ignorant of the existence of a commons issue or indifferent to it. “It is noticeable how frequently commons problems are simply unknown to those who create them,” Rose explains.\textsuperscript{281} “Some of this ignorance has to do with the size of the common pool resource, and the relatively minute character of the damage that any individual actor perpetrates.”\textsuperscript{282} Other participants do know there is a problem but do not care—either because they believe their skill will help them evade the consequences of tragedy or because there are too many participants, and too big a collective action problem, to even bother trying to do anything about it.\textsuperscript{283} Large scale commons are also different from others, and more susceptible to tragedy, because of the heterogeneity of participants.\textsuperscript{284} This is not to say that large scale

\textsuperscript{280} See Rose, supra note 254; Rose, supra note 279. In fact, as Rose describes, Hardin’s paradigmatic commons and Ellickson’s rancher communities are best suited to avoid tragedy because of their ability to identify and manage the potential for it through social norms and informal coordination. See Rose, supra note 254, at 597–604, 613–14.

\textsuperscript{281} Rose, supra note 254, at 606.

\textsuperscript{282} Id.

\textsuperscript{283} Id. at 605.

\textsuperscript{284} Id. at 607–08.
commons cannot be managed by nonlegal governance structures, perhaps with nested enterprises as Ostrom’s eighth design principle describes. Rose’s point is that it is more difficult to avoid commons problems with large scale commons.

The American constitutional system arguably bears hallmarks of a largescale commons of that sort: it faces a largescale collective action problem with radically diverse participants, the vast majority of whom are ignorant of the potential of rights-based tragedy or unsure if anything can be done about the problem in any event. In structure, then, the U.S. constitutional system may face similar collective action challenges that climate change poses—and may tend to produce tragedy, absent a significant national movement.

B. The Necessity of a Limiting Principle

Against this backdrop, the New Deal compromise—which protects some rights as fundamental liberties and others as amenable to democratic control—can be seen as one possible resource management strategy of sorts for constitutional liberties. In this way, it served a crucial structural role in our constitutional system that has been used by courts and legal actors to sort protected liberties from unprotected ones, perhaps as conceptions of duty did at the founding.

That constitutional norm mediated—if certainly imperfectly—between anti-state and thicker notions of liberty over the course of the last century. For example, the compromise produced a distinction that permitted legislation that promotes minority access to market and

285. OSTROM, supra note 253, at 90 (articulating a design principle for [common pool resources] that are parts of larger systems: “8. Nested enterprises: Appropriation, provision, monitoring, enforcement, conflict resolution, and governance activities are organized in multiple layers of nested enterprises”).

286. One which may, in fact, share some of the characteristics of the nested enterprises that Ostrom argues can create long-enduring common pool resources on a large scale. Id.

287. And, more specifically, one point between the poles of managerial or authoritarian state and laissez faire or market-dominated approaches.
employment spaces that are open to all, while protecting religious and private spaces for private choice. Although it permitted governmental acquiescence to poverty, the compromise arguably resisted constitutionally-based rent-seeking and upper-bound inequality though its context-bound distinction. And it prevailed over the *trente glorieuses*—the era of greatest prosperity and lowest levels of economic inequality in American history. Those thirty years were not only economically prosperous, but they also produced a period of relatively greater (if still wildly incomplete) social equality through the changes facilitated by racial and gender justice movements.

The New Deal compromise is certainly not the only metaconstitutional choice we could, or should, make—and my point here is not to defend the line drawn it drew. Rather, I want to consider the work the compromise did as a system of liberty-as-resource management. For almost a century, it served the dual purpose of fending off fascism on one hand and Hardin-like tragedy on the other. Other concepts of constitutional freedom, tied to contemporary distributions of power, institutional arrangements, and concepts of justice, could serve this purpose today—and further richer and currently meaningful views of liberty. But conceiving of liberty as pervasive freedom from the state everywhere, which trumps other values, cannot successfully do so.


289. *Cf.* Coates, *supra* note 96 (arguing that the First Amendment is now used by businesses as a form of rent seeking); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987) (critiquing the compromise and arguing that the Constitution should protect the poor); Frank I. Michelman, *The Supreme Court, 1968 Term: Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (arguing that the Fourteenth Amendment should protect the poor).


291. We might also embrace proportionality, rather than domain-specified or values-defined rights-as-trumps, as a different method of line drawing, *see generally* Greene, *supra* note 37 (critiquing rights as trumps)—though for reasons detailed below, that approach appears institutionally less plausible.
My point is that we must choose a concept of liberty other than pervasive freedom from the state everywhere if we are to have a republic.292 Pervasive autonomy would, as Justice Scalia put it, make every person “a law unto himself.”293 If we are to retain the rights-as-trumps model that resulted from the rights revolution, U.S. constitutional law requires some limiting principle. That is, it requires an understanding of liberty that is richer and more nuanced than a boundless right against state action.

C. The Political Economy of the Constitutional Commons

In contemporary constitutional law, organized interests and litigants with means are shaping public policies that mediate distributional outcomes. In this way, deregulatory constitutionalism shares deep and overlooked continuities with winner-take-all politics.294 As antiregulatory constitutional claims have gained momentum, elite interests have indeed been in a period of ascendancy. This transformation is occurring at a moment in which the United States faces the most extreme levels of economic inequality it has seen since the Great Depression.295

Political scientists Jacob Hacker and Paul Pierson have coined the term winner-take-all politics to explain the role that politics has played in creating our present economic reality.296

292. It is noteworthy that even the most prominent academic theorists supporting the emergent model tacitly admit the need for significant state coercion—even in a “free market” society or one defined by a “presumption of liberty”—in the form of property rights, criminal law, and other market-facilitating protections. See generally BARNETT, supra note 4 (arguing in favor of a presumption of liberty but with state enforced common law rules of property, contract, and tort). But this approach only tees up the very problem of the commons to which Hardin points: a world in which certain property protections exist (say, for cattle) but other resources are common and open to all (the pasture, or by analogy, constitutionally protected liberties).


294. See generally HACKER & PIERSON, supra note 269 (demonstrating the outsized influence of organized, elite interests in American politics and how resulting policy has aided the rich and fueled economic inequality).

295. See supra note 21 and accompanying text; see also supra note 22 and accompanying text.

296. See HACKER & PIERSON, supra note 269.
They have prominently argued that “organized interests” play a key role in “shaping large-scale public policies that mediate distributional outcomes.” Specifically, Hacker and Pierson demonstrate that political organization by business interests and those they term the “superrich” have influenced policymaking and produced greater economy inequality. Their conclusion is reinforced by reams of political science research demonstrating the overwhelming influence of elite opinion and business interests on policymaking by the political branches.

Contemporary constitutional trends are cut from the same institutional and sociological cloth. Just as some individuals and groups are more able to influence politics than others, some are relatively more able to influence public policy through constitutional litigation.


298. Id. at 185.


300. See Shanor, supra note 20, at 154–63.

301. Some communities are more or less able or likely to access the social and institutional mechanisms that influence the shape of economic policy by way of constitutional litigation, just as they are more or less likely able to influence politics. As social scientists have pointed out, the unorganized and non-elite are less able to obtain political power. Hacker & Pierson, supra note 269; Kathleen Bawn, Martin Cohen, David Karol, Seth Masket, Hans Noel & John Zaller, A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics, 10 PERSPS. ON POL. 571, 591 (2012). Marc Galanter has made a related point. Marc Galanter, Why the “Flawes” Come out Ahead: Speculations on the Limits of Legal Change, 9 LAW & SOC’Y REV. 95 (1974). Whether or to what extent current constitutional trends contribute to economic inequality is a question in need of empirical research.
Although a liberty-everywhere principle may appear equally available to everyone, an all-purpose deregulatory hammer is only useful to those who can lift it. Expanding constitutional liberties allow the affluent to double down their gains in the courts, further entrenching socioeconomic stratification, and turning the Constitution into a tool of a winner-take-all economy. The contemporary push for simple autonomy rights against state action allows those who can invoke rights to define the rules by which they operate.

Contemporary constitutional trends form an important, if overlooked, instance of larger trends toward the privatization of public decisionmaking. Federal courts and civil procedure scholars have analyzed another aspect of this broader trend with regard to arbitration and access to courts. Maria Glover, for example, has persuasively asserted that the Supreme Court’s recent arbitration jurisprudence allows, “[t]hrough private arbitration contracts, private parties [to] effectively rewrite substantive law by rendering a host of legal claims mere nullities,” thereby eroding public law.

That elites and business interests (and indeed, groups more generally) demonstrate more rational preferences also at least partially, if contingently, rebuts a behaviorist critique of a constitutional tragedy of the commons. See Gary Bornstein & Ilan Yaniv, Individual and Group Behavior in the Ultimatum Game: Are Groups More “Rational” Players?, 1 EXPERIMENTAL ECON. 101 (1998); Gary Bornstein, Tamar Kugler & Anthony Ziegelmeier, Individual and Group Decisions in the Centipede Game: Are Groups More “Rational” Players?, 40 J. EXPERIMENTAL SOC. PSYCH. 599 (2004); Taya R. Cohen, Brian C. Gunia, Sun Young Kim-Jun & J. Keith Murnighan, Do Groups Lie More Than Individuals? Honesty and Deception as a Function of Strategic Self-Interest, 45 J. EXPERIMENTAL SOC. PSYCH. 1321 (2009); see also Fisman, Jakiela, Kariv & Markovits, supra note 267; Page, Bartels & Seawright, supra note 299. To be clear, again, my point is to use commons analysis as a loose metaphor to elucidate the independent problems of the emergent constitutional model.

This distinguishes the neoliberal model from Cass Sunstein’s description of the Lochner-era concept of freedom, which reflected common law baseline distributions. See Sunstein, supra note 43.

J. Maria Glover, Disappearing Claims and the Erosion of Substantive Law, 124 YALE L.J. 3052, 3052 (2015); see also generally Rory Van Loo, The Corporation as Courthouse, 33 YALE J. ON REGUL. 547 (2016) (discussing role of commercial dispute resolution processes for consumer law).
cumulative effect of the rise of arbitration clauses, the absence of mass arbitration, the diffusion of disputes to private adjudicators, and arbitration’s closed processes together create an unconstitutional system.\textsuperscript{305} Administrative and constitutional law scholars, too, have addressed the privatization of public functions from schools and prisons to military and national security powers.\textsuperscript{306} Current constitutional liberty trends thus form part of more far reaching shifts.

In the First Amendment context, John Coates has traced the rates of business versus individual First Amendment cases over time, and empirically demonstrated that the beneficiaries of First Amendment rights are increasingly businesses, not individuals.\textsuperscript{307} Arguing that commercial litigation has become a form of rent seeking, he asserts that this trend threatens to corrupt American capitalism: the “corporate takeover of the First Amendment” threatens “an extended era of economic malaise . . . that one might call (with only some exaggeration) the ‘risk of Russia.’”\textsuperscript{308}

But these trends may do more than threaten capitalism and efficiency-based notions of liberty. As I have argued, they also threaten our lived experiences of a range of thicker forms


The election law literature has likewise addressed the privatization of public functions. Heather Gerken and Alex Tausanovitch, for example, have argued that both lobbying and campaign finance are privatizations of important public functions, namely the funding of campaigns and the gathering of information necessary to legislate. Gerken & Tausanovitch, supra note 299.

\textsuperscript{307} Id. at 265. \textit{Cf.} Richard L. Hasen, \textit{Lobbying, Rent-Seeking, and the Constitution}, 64 STAN. L. REV. 191 (2012) (proposing a new state interest in promoting national economic welfare that would support lobbying regulation because lobbyists facilitate rent seeking).

\textsuperscript{308} Id. at 265.
of freedom. The political economy of contemporary constitutional trends illuminates the high stakes of these shifts. The ascendant notion of liberty remakes the strengthening of individual rights that occurred in the rights revolution to stymie New Deal efforts to rein in economic power in furtherance of thicker forms of freedom and human flourishing. These trends also suggest a deeper concern: our Constitution now protects forms of autonomy rights that harm larger and more capacious liberties that could frame more just worlds.

Interestingly, the concept of liberty the emergent model advances may divide the coalition of libertarian and social movement conservatives that has pushed it to ascendancy. First Amendment litigation around reproductive rights brings this tension into stark relief. The Supreme Court recently struck down a California law that required crisis pregnancy centers to disclose information about whether licensed medical professionals were on site and other services that the state offered (including abortion). But were it the case that pregnancy-related service providers could refuse all mandated disclosures under the First Amendment, abortion providers could equally refuse the pro-life advocated disclosure of ultrasounds, heartbeats, and alleged mental health risks of abortion now mandated in states like Texas. This and similar tensions may threaten the coalition that has heretofore advanced First Amendment deregulation—and, in so doing, force the Court to face whether it really is ready to accept a vision of constitutional liberty that amounts only to a simple autonomy right against the state, and nothing more.

309. My colleagues Amy Sepinwall and Eric Orts have argued that we have a common interest in collective goods, including democratic government, and that commodification (and over-application of market values) can threaten those collective goods. Eric W. Orts & Amy J. Sepinwall, Collective Goods and the Court: A Theory of Constitutional Commodification, 97 WASH. U. L. REV. 637 (2020).


312. We might also question whether advocates of the emergent model even want the thoroughgoing acceptance of their arguments. The arguments of sophisticated counsel in cases such as Masterpiece Cakeshop and Fulton
V. A CONTINGENT IF PERSISTENT FEATURE OF DEMOCRATIC CONSTITUTIONALISM

In this Part, I argue that the U.S. constitutional system—as an unequal capitalist democracy whose open textured Constitution is susceptible to litigant influence—tends persistently, if contingently, toward understanding constitutional liberty as thin autonomy. The Constitution’s same openness to social and intellectual movements, however, also ensures that with sufficient mobilization other visions of freedom can gain constitutional traction.

In a system with open ended constitutional clauses subject to varying interpretations (and interpretive methodologies), an amendment process that is practically insurmountable, and a relatively politically-sensitive judiciary, significant incentives exist for litigants to try to advance constitutional liberty claims in which they believe or from which they would benefit. Scholars of democratic constitutionalism have traced how, as a practical matter, U.S. constitutional law realizes these efforts. Detailing the influence of social movements, this work has captured how groups of people, from the civil rights and women’s rights movements to the National Rifle Association and business-led movements, have significantly altered constitutional meaning.

\[v. City of Philadelphia\] suggest that they do not want (or at least think the Court would allow) autonomy to go that far. Transcript of Oral Argument at 38:21–40:14, 42:2–49:2, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123) (the federal government’s lawyer attempting to dodge the question of whether their proposed rule would extend to a faith group seeking to deny foster care services on racial grounds and positing that race discrimination might be different but declining to explain why); Brief for the United States as Amicus Curiae Supporting Petitioners at 32, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n, 138 S. Ct. 1719 (2018) (No. 16-111) (arguing that the Constitution extends a general right to choose one’s customers, but that laws targeting race discrimination “may survive heightened First Amendment scrutiny”).

Metaconstitutional rules such as the New Deal compromise delineate what sort of claims are tractable, in both courts and legal culture, and what laws are subject to greater or less stringent review. The practical dynamics of constitutional change in the United States suggests that such rules, and the lines they draw, are open to litigant and social movement influence. This dynamic is arguably the story of the creation of the New Deal compromise itself, which was crafted in the context of significant social and political mobilization (and, of course, President Roosevelt’s threat to pack the courts).  

It is also the story of the doctrinal evolution of the New Deal compromise detailed in this Article, and of the dynamics traced in the broader literatures on First Amendment Lochnerism and administrative constitutionalism on which it builds.

The New Deal compromise and its ongoing revision illuminate the key importance not only of social movements, but also of unwritten constitutional norms. Although the New Deal distinction is found nowhere in the text of the Constitution, it has arguably been the most important ordering force in U.S. constitutional law for the last century. And it operates not simply through the courts, but through the forms of constitutional claims that ordinarily socialized lawyers and judges find plausible in the first instance.

This evolution evinces a clear shift toward maximal, thin individual liberty rights. This tendency may be a persistent, if contingent, feature of a common law constitutional system in

314. This dynamic may in some contexts advance important democratic or other normatively justified goals, such as the increased participation of minorities in social and political life. It may also facilitate social cohesion, as Douglas NeJaime and Reva Siegel have argued with respect to claims of conscience. NeJaime & Siegel, supra note 313, at 2542–52.

315. As such, the New Deal distinction may share some similarities to social norms-based property management regimes—or perhaps more precisely, regimes in which social norms and formal rules evolve together. See generally ELICKSON, supra note 271 (describing the role of norms in property disputes); OSTROM, supra note 253, at 90 (describing design principles, including principle number eight which addresses large scale commons).
a capitalist democracy such as the United States. Our system may, under contemporary conditions, tend toward the sorts of context-independent autonomy rights that are the hallmark of our current jurisprudential moment.

This is for several reasons. First, common law systems like that of the United States are relatively open to litigant and social movement influence, as a rich literature on the role of social movements in law and comparing the American system to others amply demonstrates.

This feature makes litigants’ arguments and ideas, and broader norm change, relatively important to constitutional meaning. Relatedly, the U.S. Constitution contains open-textured constitutional language, such as the Speech Clause, such that an interpretation of the Constitution as protecting individual liberty without limiting principle, or something very close to that, is conceivable.

Second, common law systems like that of the United States are by design adversarial. They reward zealous advocacy. Adversarial systems encourage categorical and extreme implications-focused arguments, rather than nuanced or proportional constitutional argumentation and judicial logic.

Any lawyer worth half her salt will not argue that her

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316. On this front, it is worth noting that common law systems have recently followed a divergent path with regard to economic inequality. See Share of Total Income Going to the Top 1% Since 1900, Our World in Data, https://ourworldindata.org/uploads/2018/07/Top-Incomes.png [https://perma.cc/3CQ8-CGKA] (last visited Feb. 5, 2022).

317. See supra text accompanying note 313 and note 299; see also, e.g., ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001); Robert A. Kagan, Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry, 19 LAW & SOC. INQUIRY 1, 1 (1994) ("Cross-national case studies repeatedly indicate that compared to other economically advanced democracies, American methods of policy implementation and dispute resolution are more adversarial and legalistic, shaped by costly court action or the prospect of it. As a mode of governance, ‘adversarial legalism’ enhances responsiveness to the justice claims of groups and individuals; but it also entails substantial costs, which often frustrate aspirations for justice and social welfare.").

318. See, e.g., Kagan, supra note 317, at 5 ("Even when compared to the British ‘adversarial system’ from which it descended, American methods of adjudication are far more party-influenced, less hierarchically controlled, and consequently less predictable.").

319. See, e.g., Greene, supra note 37 (criticizing such extreme-implications-type arguments). In particular, Greene criticizes the arguments made by litigants and Justices on all sides in Masterpiece Cakeshop.

320. Often these are slippery-slope arguments in the form of if-this-logic-is-extended-to-its-conclusion, a catastrophe will occur.
opponent’s position has some merit and should receive a partial win. She will argue that her opponent’s position is wholly without merit and will lead to a slippery slope of catastrophic proportions—and so she should entirely prevail. In an adversarial precedential system this is to be expected. In other words, our system may tend away from European-style proportionality, no matter how abstractly attractive it may be. The midcentury model of rights-as-trumps bounded by limiting principles arguably makes sense within this institutional design: it creates a relatively bright line rule for judicial and zealous litigant ordering. This model prevailed for nearly a century. But in an adversarial system any line such as this—where on one side a litigant receives stringent review and generally prevails, and on the other he gets relaxed review and generally loses—will face hydraulic pressure.

Third, wealth disparity and other forms of inequality may fuel bids to expand constitutional liberty against democratic control. Adversarial common law systems reward lawyering, as well as those who can afford to bring claims. Because of this, intellectual and economic elites (both parties and their counsel) have steep advantages in litigation. At the same time, as the political science literature has chronicled, elites exert disproportionate influence in political life, including judicial appointments. This means that inequality can entrench itself through political influence, as well as in the courts. Economist Thomas

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322. See supra text accompanying note 299; Hacker & Pierson, supra note 269; Hacker & Pierson, supra note 39; O’Harrow Jr. & Boburg, supra note 19; Teles, supra note 19 (describing the rise of the conservative legal movement and its influence, including on judicial appointments).

Piketty has argued that capitalism, too, leads to growing inequality, such that any change in that trajectory must stem from politics—or, as David Grewal has described, from alterations in the laws governing capitalism. If this is the case, which many have questioned, capitalism may tend to exacerbate a tragedy of democratic constitutionalism.

This is not to argue that courts will in fact extend autonomy rights everywhere. No serious Supreme Court watcher believes that this, or likely any other plausible Court, would do anything close. Consider, too, national security, immigration, criminal justice, or reproductive rights domains where individual autonomy has certainly not prevailed. But the contention that autonomy rights have not been adopted in some context does not negate that they have expanded, and gained increasing robustness, in others. Indeed, the fact of disparate adoption of autonomy rights confirms my central argument: the contemporary pattern and form of rights reinforces existing distributions and inequalities of power, material resources, and status. We might understand differences in this regard as reflecting who is within the political community and eligible to full autonomy rights—perhaps not unlike the difference between the Court’s Lochner-era acceptance of a minimum wage law for women on paternalism.

324. Piketty supra note 21.
325. See Rognlie, supra note 23; Summers, supra note 23; Hamilton, supra note 23.
326. This insight adds new dimension to the models of justice and authority elaborated by Mirjan Damaška. Damaška links constellations of procedures and orientations toward state authority into a holistic typology grounded in comparative sociology. Mirjan R. Damaška, The Faces of Justice and State Authority: A Comparative Approach to the Legal Process (1986). He identifies two axes along which institutional forms of justice and authority can be organized: hierarchical/coordinate (meaning the relative weight of centralized expertise versus generalist, distributed authority) and activist/reactive governance (meaning the disposition toward managing society through policy implementation versus toward providing a framework for social interaction, focused on conflict-solving). Id. at 9–12. The constitutional trends outlined in Part II and related literatures suggest that that relatively more coordinate-reactive systems like ours may trend, in law and legal culture, toward maximalist thin liberty. See also, e.g., Kagan, supra note 317; Kagan, supra note 317 (collecting citations on the role of social movements in U.S. constitutional law).
grounds prior to the adoption of the Nineteenth Amendment and their holding a similar law unconstitutional as violating the equal autonomy rights of women and their employers after its passage.328

If the insight of this Article—that the U.S. system has tended toward a thin, anti-state definition of liberty—is correct, we might rightly question whether that outcome is inexorable in our system. In an unequal democracy with a common law constitutional system such as that of the United States, is the current movement toward a thin liberty that foils the advancement of thicker visions of freedom—in Hardin’s words—simply the “remorseless working of things”?329

Critics have argued that inegalitarian effects of rights are a feature of rights or rights-rhetoric,330 judicial review,331 or the logic of capitalism.332 Other than Marxist theorists wed to teleological historiography, however, these critiques generally recognize their contingent nature.333 The most forceful of these is the argument of Critical Legal Theorists that rights, under twentieth-century cultural and institutional contexts, are anti-progressive, and that rights rhetoric diverts progressive energy from more fruitful, political change.334 I depart from the Critical Legal Studies account in part because last thirty years have amply demonstrated that


330. Tushnet, An Essay on Rights, supra note 96, at 1363–64; see also Balkin, supra note 96; Coates, supra note 96; Purdy, supra note 26; Kapczynski, supra note 26; Seidman, supra note 96.

331. Tushnet, supra note 96, at 1364.

332. KARL MARX, CAPITAL (1867).


334. Mark Tushnet has argued that “[t]he concept of rights falsely converts into an empty abstraction (reifies) real experiences that we ought to value for their own sake” and that “[t]he use of rights in contemporary discourse impedes advances by progressive social forces.” Tushnet, An Essay on Rights, supra note 96, at 1364.
electoral politics is no less susceptible than courts to forces encouraging law to reflect elite interests—making the tradeoff between rights and politics even more indeterminate and contingent.

Just as Ostrom’s work has undermined Hardin’s claim that tragedy is “inexorable,” there is no reason that thin autonomy need prevail as the prominent vision of constitutional liberty in the United States. The system-tilt toward status-quo entrenching autonomy rights is instead the product of contingent, if persistent, institutional, psychological, and cultural arrangements: elites psychologically inclined toward and organized to change law to their self-benefit, a history of negative rights, a winner-take-all adversarial legal system, deep racial and wealth gaps that make affluent interests dominant in constitutional litigation and discourse, and a culture strongly informed by market ordering that affirms self-interest as a preeminent value.

The same sensitivity of the U.S. constitutional system to social forces, however, makes the trend toward status-quo-entrenching rights one that a sufficiently mobilized populace advancing an alternative vision of liberty can overcome. While thin liberties that entrench inequality have been the norm of the last fifty years in the United States, if not far longer, there are exceptions that suggest that sufficiently mobilized people can overcome that result at least for meaningful periods. The Lochner era and the period that followed is itself an example: At the extreme, the Lochner era approach can be seen as an institutional structure that stringently warded off threats of state power, while ushering in an era dominated by private, rent-seeking forces. After several decades of expanding economic rights in furtherance of that

335. See supra note 299 (collecting evidence in political science literature).

336. See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896) (announcing ‘separate but equal’ doctrine); The Civil Rights Cases, 109 U.S. 3 (1883) (holding that the Fourteenth Amendment did not authorize Congress to address private discrimination); Pace v. Alabama, 106 U.S. 583, 585 (1883) (upholding anti-miscegenation law as applying “equally” to Blacks and whites); Dred Scott v. Sandford, 60 U.S. 393 (1857) (holding that no Black person, whether free or enslaved, was a citizen within the meaning of Article III of the Constitution).
structure, the Court changed course. The New Deal era instead allowed significant governmental intervention, while limiting the encroachment of private (economic) interests on collective concerns. Other shifts in constitutional doctrine—including the Civil Rights era’s constitutional acquiescence to antidiscrimination principles in the foundational civic institutions of education and economic life, the influence that women’s rights movement had upon the meaning of the Fourteenth Amendment,\(^{337}\) and perhaps even the earlier Reconstruction period’s exorcising some (if so much less than all) racist notions of property embedded in constitutional law and on which the system of slavery and early development of American capitalism depended—may likewise evidence not only entrenchment of status quo distributions of power, wealth, and status, but also the possibility of partially successful responses to that entrenchment.

This perspective offers a distinct contribution to the democratic constitutionalism literature: the moments that that scholarship has principally focused on, including the constitutional changes advanced by the New Deal, the women’s rights movement, and the civil rights movement, should be viewed as the exceptions to the general trend within the U.S. system. They are moments in which largescale social and intellectual movements coalesced across entrenched structural inequalities to and asymmetries of power. These movements created new visions of constitutional freedom in relation to substantive power dynamics, rather than abstract autonomy. In short, the contingent indeterminateness of rights in a system sensitive to social forces has the capacity to tend not only toward thin autonomy, but also richer visions of freedom.\(^ {338}\)

\(^{337}\) See Siegel, *Constitutional Culture*, supra note 313.

CONCLUSION

In nothing short of a revolution, the New Deal compromise, long a fundamental feature of U.S. constitutional law, is collapsing in favor of a world of thin autonomy rights everywhere. This ascendant constitutional vision must be rejected if the Constitution is to advance any values or understandings of liberty more capacious than market fundamentalism. What is more, if the rights-as-trumps model adopted is maintained, the ascendant constitutional vision pits the Constitution against democracy.

The political economy that has produced this ascendant concept of liberty sheds light on deeper dynamics within democratic constitutionalism in our current and unequal society. These dynamics demonstrate both the tendency of the U.S. constitutional system over the last fifty years toward thin autonomy claims that entrench existing forms of inequality, and the possibility that this tendency can be overcome by a sufficiently mobilized populace.

We are in the midst of a period of great concentration of both wealth and power in a moment of extreme polarization. The open question is whether this moment will prompt a movement powerful enough to advance a richer conception of constitutional liberty than autonomy alone.