The First Amendment's Real *Lochner* Problem

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One of the most common criticisms of contemporary free speech law is that it is too Lochnerian. What critics usually mean by this is that First Amendment doctrine, by extending significant constitutional protection to advertising and other kinds of commercially oriented speech, makes the same mistake as the Supreme Court made in Lochner v New York *and other late nineteenth- and early twentieth-century Due Process Clause cases: namely, it grants judges too much power to second-guess the economic policy decisions of democratically elected legislatures.*

This Article challenges that argument—not to reject the idea that contemporary free speech law resurrects Lochner*, but instead to reconceive what that means. It argues that contemporary free speech law is not* Lochner*-like in failing to defer to the legislature's economic policy decisions. Instead, it repeats the errors of the* Lochner *Court by relying upon an almost wholly negative notion of freedom of speech and by assuming that the only relevant constitutional interest at stake in free speech cases is the autonomy interest of the speaker. The result is a body of law that, not just in its commercial and corporate speech cases, but in many other cases as well, replicates* Lochner*-era due process jurisprudence in both its doctrinal structure and its political economic effects.*

What this means is that the First Amendment's Lochner *problem will not be solved—as the conventional critiques suggest—by simply denying commercial and corporate speech constitutional protection or by weakening the strength of the protection the First Amendment provides to speech of this kind. It will only be solved by reconceiving freedom of speech as a positive rather than a negative right and one that guarantees, to listeners as well as speakers, the right to participate in a public*

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sphere that is diverse along both racial and class lines. Rethinking the First Amendment in this manner, this Article argues, will raise many difficult questions and make what are currently easy free speech cases much harder to resolve. But there is ultimately no other way to vindicate the democratic values the First Amendment is intended to protect.

INTRODUCTION

The ghost of *Lochner v New York*[1] haunts contemporary free speech law. Over the past four decades, numerous scholars and jurists have argued that the Supreme Court's expansive free speech jurisprudence "threatens to revive the long-lost world of *Lochner*";[2] that it "reconstitute[s] the values of *Lochner v. New York* as components of freedom of speech";[3] and that it "return[s] [constitutional law] to the bygone [*Lochner*] era."[4] What critics usually mean when they argue that contemporary free speech law revives *Lochner* is that, by extending constitutional protection to commercial advertising, to corporate speech, and to other kinds of profit-oriented expression—or by extending too much protection to speech of this sort—contemporary free speech law repeats

1 198 US 45 (1905).

2 Robert Post and Amanda Shanor, *Adam Smith's First Amendment*, 128 Harv L Rev F 165, 182 (2015).

3 Thomas H. Jackson and John Calvin Jeffries Jr, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va L Rev 1, 30–31 (1979) (citation omitted).

4 *Sorrell v IMS Health Inc*, 564 US 552, 591 (2011) (Breyer dissenting).

the error the Court made in its 1905 decision in *Lochner*: it grants judges too much power to second-guess the economic policy decisions of democratically elected legislatures. Like freedom of contract doctrine in the *Lochner* era, free speech law authorizes, on this view, "an illegitimate intrusion by the courts into a realm properly reserved to the political branches of government."[5]

One can well understand why critics would want to analogize contemporary free speech law to *Lochner*-era freedom of contract jurisprudence. There are, after all, notable similarities in how the two bodies of law have been mobilized, as well as the interests they have been used to advance. Just as in the late nineteenth- and early twentieth-centuries, when businesses invoked their constitutional due process rights to protect economic interests they could not protect via the ordinary political process, today businesses invoke their First Amendment rights to do the same.[6] And just as in the late nineteenth- and early twentieth-centuries, when the success of businesses in making due process claims limited the government's ability to regulate the market, the remarkable success that businesses have recently enjoyed as litigants in First Amendment cases limits the government's ability to regulate both the economic and political markets in order to promote welfarist aims. Claims of First Amendment Lochnerism capture, indisputably, close and interesting parallels in the role of courts and constitutional adjudication between what some have called the First and Second Gilded Ages.[7]

Yet, notwithstanding these historical parallels, there is reason to be skeptical of claims that the Court has revived *Lochner* by extending too much constitutional protection to commercial and corporate speech. Critics argue that rigorous scrutiny of speech of this kind protects only economic liberty—the kind of liberty protected by the *Lochner* Court—and does little to protect the political or personal liberty that the First Amendment values, but this simply isn't true. Although complicated arguments can be made about whether protecting commercial advertising or the nonadvertising speech of corporations does anything to advance individual expressive freedom, there is no question that, when addressed to a public audience, speech of this kind can and does help

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5 Cass R. Sunstein, Lochner*'s Legacy*, 87 Colum L Rev 873, 874 (1987).

6 John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 Const Commen 223, 246–48 (2015).

7 See, for example, Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 NYU L Rev 1, 25–26 (2004).

to shape political attitudes and beliefs. This means that, when courts closely scrutinize the government's justifications in commercial and corporate speech cases, they do not simply protect economic liberty; they also protect democratic interests that have long been of central First Amendment concern.

This Article thus contests the claim that contemporary free speech law resurrects *Lochner* by extending too much protection to commercially oriented speech. It does so, however, not to challenge the idea that First Amendment doctrine enacts a species of Lochnerism, but to recast it. It argues that First Amendment scholars are not wrong when they assert that contemporary free speech law repeats the errors of the *Lochner* Court; they are simply wrong in what they identify as the error that is being repeated.

Contemporary free speech law, this Article argues, is not *Lochner*-like because it fails to show sufficient deference to the legislature's economic policy decisions. This is not its problem. To the contrary: in many contexts, contemporary free speech law defers *too much* to the economic policy decisions of the political branches to adequately vindicate the democratic and self-expressive interests that the First Amendment is supposed to protect. This is true, for example, of the law governing rights of access to private property.[8] One might make a similar argument about copyright law and the many other areas of law where free speech interests take a backseat to property interests.[9]

Contemporary free speech law is instead *Lochner*-like in how it conceives of the liberty it protects. Although today *Lochner* is remembered most often through the prism of Justice Oliver Wendell Holmes Jr's famous dissent, which argued that the problem with the majority opinion was that it showed insufficient deference to the New York legislature's determination that a maximum-hours law was wise economic policy,[10] at the time many critics considered the *Lochner* Court's most serious error to have nothing to do with judicial-deference rules. The problem with the majority opinion in *Lochner*, these critics argued, was not its

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8 See notes 275–80 and accompanying text.

9 For arguments that copyright law inadequately protects free speech values, see generally Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 NYU L Rev 354 (1999); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 Vand L Rev 1 (1987).

10 *Lochner*, 198 US at 74–76 (Holmes dissenting).

failure to defer but instead its failure to recognize that, under conditions of pronounced economic inequality, the freedom of workers could be enhanced, not undermined, by legislative restrictions on what terms and conditions they could contract for. It was its embrace of "an academic theory of equality in the face of practical conditions of inequality," they claimed, that led the *Lochner* Court to reach the wrong conclusion.[11]

A similar criticism can be made about the contemporary First Amendment. Just as it once did in its freedom of contract cases, in recent decades the Supreme Court has embraced a highly academic conception of freedom of speech—one that largely fails (and in some contexts, adamantly refuses) to consider the economic and social forces that as a practical matter shape the exercise of First Amendment rights. The result has been the creation of a body of law that, like *Lochner*-era substantive due process, insists that most legislative efforts to protect the expressive freedom of the less powerful by limiting the expressive freedom of the more powerful are constitutionally impermissible. It is this feature of contemporary First Amendment doctrine, this Article argues, that makes it *Lochner*-like. More to the point—it is this feature of contemporary First Amendment doctrine that has made it, like *Lochner*-era freedom of contract doctrine, a powerful sword for reinforcing the power of the propertied and a shield against government efforts at redistribution.

If scholars wish to critique the doctrine for its Lochnerian tendencies, it is this they should critique. By instead focusing on the decision to extend constitutional protection to commercial and corporate speech, critics avoid having to tackle the hard questions raised by the *Lochner* analogy: namely, what a First Amendment jurisprudence organized around a less academic conception of expressive freedom would look like. They also unduly limit the scope of their critique by suggesting that the First Amendment's *Lochner* problems are either confined to the commercial and corporate speech cases, or extend only to other cases involving commercially oriented speech. If we understand the true lesson of *Lochner* to be that constitutional rights cannot effectively be enforced without taking account of the economic, political, and social conditions that impact their exercise—as indeed, we should—then the First Amendment's *Lochner* problems cannot be so easily contained.

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[11] Roscoe Pound, *Liberty of Contract*, 18 Yale L J 454, 454 (1909).

This Article thus reconceives the *Lochner* analogy in an effort to think more creatively about how to solve it. The argument proceeds in four parts. Part I describes how the analogy to *Lochner* has been used to criticize both the Burger Court's decision to apply heightened scrutiny to laws regulating commercial advertising and corporate speech, as well as the increasingly strict scrutiny the Court has applied in such cases in recent years.

Part II explains why the claim that the Court's commercial and corporate speech cases resurrect *Lochner* by extending protection to speech that lacks constitutional value is wrong. Even if we leave aside the complex question of whether and to what extent the First Amendment protects individual expressive autonomy, protection of commercial advertising and at least some kinds of corporate speech can be justified by the First Amendment's core interest in preserving a robust and diverse marketplace of ideas. This means that the extension of constitutional protection to commercial advertising and to corporate speech does not represent, as critics allege, a break from the principles that guided First Amendment jurisprudence up until the 1970s. Instead, it represents the logical extension of those principles.

Part III argues that the real source of the similarities between contemporary free speech law and *Lochner*-era freedom of contract jurisprudence is that both construe the constitutional right they vindicate as a strong but limited negative autonomy right: as a right that guarantees freedom from intentional government interference with an individual's autonomy, but one that provides almost no protection whatsoever against private interference and constraint.[12] It was this feature of *Lochner*-era jurisprudence that produced a body of law that was insensitive to

[12] By "negative right," I mean a right that guarantees negative liberty—that is, freedom from interference by others. See Isaiah Berlin, *Two Concepts of Liberty* 6–7 (Oxford 1958). When I use the term "positive right," I mean a right that guarantees positive liberty, which we might define broadly as "not freedom from, but freedom to." Id at 16–19. See also Steven J. Heyman, *Positive and Negative Liberty*, 68 Chi Kent L Rev 81, 81 (1992) ("In broad terms, negative liberty means freedom *from*—from interference, coercion, or restraint—while positive liberty means freedom *to*, or self-determination—freedom to act or to be as one wills.") (emphasis in original). The distinction between positive and negative freedom has been the subject of considerable criticism. Theorists have argued that it is incoherent to speak of negative freedom because the mere absence of government coercion cannot, on its own, guarantee individual freedom, given the numerous other sources of constraint that exist. See, for example, T.H. Green, *Lectures on the Principles of Political Obligation and Other Writings* 200–01 (Cambridge 1986) (Paul Harris and John Morrow,

questions of economic inequality and hostile, as a result, to worker-protective economic regulation like the bakery law struck down in *Lochner*. And it is because courts today rely upon a similarly strong but similarly limited conception of the right to freedom of speech that they interpret the First Amendment to protect the right of property owners to control the expressive uses to which their property gets put, but to provide very little protection to listeners, or to those who lack property that they can use to participate in public debate. The strongly anti-redistributive cast of contemporary free speech law is not, in other words, primarily a consequence of how broadly the First Amendment applies. It is instead the consequence of what courts today understand freedom of speech to mean and to require.

As Part III also shows, however, courts have not always conceived of freedom of speech in as limited a fashion as they do today. During both the New Deal and Warren Court eras, the Court employed a more capacious view of freedom of speech: one that understood it as a positive, not a negative, right. Indeed, the Court conceived the First Amendment to guarantee individuals perhaps the most important positive right they could possess in a democratic society: namely, the right to participate in the formation of democratic public opinion, and in the democratic political process more broadly. The New Deal and Warren Courts did not always do a terribly good job enforcing this positive right, but they understood that this is what freedom of speech had to mean if the First Amendment was to play its "historic" role as a guardian of American democracy.[13] It was only in the 1970s that a majority of the Court began to interpret freedom of speech as the conservative minority on the New Deal Court had once argued it should be interpreted: as a negative right—that is, as a right that guarantees noninterference from the state but little more. This shift in the Court's understanding of freedom of speech produced

eds). This may be true. It nevertheless remains the case that the idea—that what constitutional rights guarantee is freedom from government coercion and little more—has played a tremendously important role in American constitutional jurisprudence and practice. When I use the terms positive and negative rights, I use them therefore to describe competing conceptions of the nature of constitutional rights and freedoms, *not* to make claims about the possibility of a purely negative freedom.

[13] See *Thornhill v Alabama*, 310 US 88, 102–03 (1940) ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period" and to make "effective and intelligent use of the processes of popular government to shape the destiny of modern [ ] society.").

a body of law that was remarkably reminiscent, in both doctrinal structure and political economic effects, to *Lochner*-era due process jurisprudence. Critics are therefore correct when they trace the Lochnerization of the First Amendment to changes in free speech doctrine instituted by the Burger Court. They are simply incorrect in what they identify as the nature of that change.[14]

Part IV concludes by sketching out the normative implications of this history. As it demonstrates, the debate over the nature of the First Amendment's *Lochner* problem is not an academic one by any means. Different views of the First Amendment's *Lochner* problem lead to different conclusions about how it should be fixed. If the problem is that the First Amendment has gotten too big or too strong, the obvious solution is to narrow its scope and weaken the strength of its protections. But if the problem is instead the almost entirely negative conception of freedom of speech that underpins contemporary First Amendment jurisprudence, then the solution cannot be to simply limit the class of cases in which the First Amendment protection applies or to weaken the protections afforded to advertising and other kinds of commercial speech. The solution must be to reimagine freedom of speech as a *positive* right, and as a right that consequently protects individuals against both public and private power. This is, obviously, no easy task to accomplish. But it is the only satisfactory solution to the ills that beset contemporary free speech law.

I. *LOCHNER* AND THE FIRST AMENDMENT

There are few opinions in Supreme Court history that are more widely disliked than the Court's 1905 decision in *Lochner*. Indeed, to claim that an opinion is like *Lochner*, or that it performs the same move as the *Lochner* Court (in contemporary

[14] In arguing that the *Lochner*-like features of contemporary free speech are a product of how courts understand the right to freedom of speech, not how they conceive its boundaries, this Article echoes the argument that Professor Cass Sunstein made in his wonderful 1987 article, Lochner*'s Legacy*. Like Sunstein's article, this Article argues against the interpretation of the *Lochner* Court's errors that Justice Holmes articulated in his famous dissent. See Sunstein, 87 Colum L Rev at 905–06 (cited in note 5). Like Sunstein's article, it suggests instead that the problem with the *Lochner* Court—and with contemporary free speech law—is the similar conception of constitutional liberty that both employ. See id at 882–83. Unlike Sunstein's article, however, it does not assume that the Lochnerian features of contemporary constitutional law are a permanent, even inevitable feature of the constitutional landscape. See id at 903. This Article would not have been possible without Sunstein's pathbreaking earlier work.

lingo, that it "Lochnerizes"), is usually one of the most damning things one can say about it.[15] This is because *Lochner* is one of a handful of cases that make up the anticanon of constitutional law. Anticanonical decisions, like *Lochner*, *Dred Scott v Sandford*,[16] and *Plessy v Ferguson*,[17] "map out the land mines of the American constitutional order, and thereby help to constitute that order."[18] They instruct courts on what not to do when interpreting the Constitution.

To call an opinion or rule of decision Lochnerian is thus to accuse it of committing a fundamental jurisprudential error. What fundamental jurisprudential error that a court accused of Lochnerism is supposed to have made is not always self-evident, however. This is because *Lochner* has been accused of multiple sins, each of which can serve as the basis for the analogy.[19]

In *Lochner*, a 5–4 majority of the Court held that a New York law that prohibited workers in bakeries from working more than sixty hours a week violated the freedom of contract guaranteed by the Due Process Clause of the Fourteenth Amendment because it interfered with the ability of employers and employees to determine for themselves the terms of their contractual relationships.[20] In concluding as much, the majority acknowledged that the government could limit freedom of contract in order to promote "the safety, health, morals, and general welfare of the public," but dismissed the possibility that the New York law advanced any of these goals.[21] "[T]he trade of [the] baker," Justice Rufus Peckham wrote in his majority opinion, "is not an unhealthy one to that degree which would authorize the legislature to interfere with the . . . right of free contract."[22] Nor, the Court held, do tired workers pose a sufficient threat to public safety to justify the law on those

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15 See David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U Chi L Rev 373, 373–74 (2003) ("*Lochner v New York* would probably win the prize, if there were one, for the most widely reviled decision of the last hundred years."); Bruce Ackerman, *We the People: Foundations* 40 (Belknap 1991) ("For a modern judge, one of the worst insults is that she is reenacting the sin originally committed by the pre–New Deal Court in cases like *Lochner v. New York*.").

16 60 US 393 (1857).

17 163 US 537 (1896).

18 Jamal Greene, *The Anticanon*, 125 Harv L Rev 379, 380–81 (2011).

19 Strauss, 70 U Chi L Rev at 374 (cited in note 15) ("The striking thing about the disapproval of *Lochner* . . . is that there is no consensus on why it is wrong.").

20 198 US at 57–60.

21 Id at 53, 57.

22 Id at 59.

grounds.[23] The majority also dismissed the possibility that the law was necessary to protect workers against exploitation. Bakers, Justice Peckham noted, were "as a class . . . equal in intelligence and capacity to men in other trades or manual occupations." They were therefore entitled "to assert their rights . . . without the protecting arm of the State interfering with their independence of judgment and of action" by limiting the number of hours they could agree to work.[24]

In its unequivocal rejection of the possibility that the New York labor law could be justified on health or safety grounds, or as a means of protecting workers against exploitation, the decision powerfully demonstrates the early twentieth-century Court's hostility toward what Justice Peckham described in his opinion as the increasing and "meddlesome . . . interference on the part of the legislatures of the several states with the ordinary trades and occupations of the people."[25] It reflects, in other words, the unease that at least some members of the federal judiciary felt toward the efforts by Progressive reformers to regulate the increasingly industrialized economy much more intensively than it had previously been regulated, in an effort to protect workers against the new physical and economic harms they faced at work.

The doctrinal distinctions that Justice Peckham's opinion relied upon, however, and the conception of state power that it advanced were not new. Instead, they had deep roots in American constitutional law. As Professor Howard Gillman notes:

> [T]he essential elements of the *Lochner* Court's approach to the bakery law—the emphasis on market liberty, the belief that market liberty could be interfered with if legislation promoted a valid public purpose, and the suggestion that valid public-purpose legislation was distinct from laws that merely

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[23] *Lochner*, 198 US at 62:

> In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman. The connection, if any exists, is too shadowy and thin to build any argument for the interference of the legislature.

[24] Id at 57.

[25] Id at 61, 63.

> promoted the interests of some classes at the expense of others—were long-standing features of nineteenth-century police powers jurisprudence.[26]

Lochner was not, in other words, a doctrinally innovative decision.[27] It simply applied what were at the time well-established legal principles to a new factual situation, albeit in a way that was undoubtedly sympathetic to business interests.[28]

The decision was nevertheless widely criticized, both at the time and in the years to follow. Critics refused to believe that the Constitution prevented the government from protecting workers rendered newly vulnerable by the increasing concentration of wealth and power in the early twentieth-century economy.[29] And yet *Lochner* suggested that not only was the New York law unconstitutional, but so too was any labor law that could not be justified by the special characteristics of the class of laborers it protected, or the unusual dangerousness of the industry in which they labored.[30]

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[26] Howard Gillman, *The Constitution Besieged: The Rise and Demise of* Lochner *Era Police Powers Jurisprudence* 20 (Duke 1993). Nor did the decision break new ground in recognizing the right to contract as one of the personal rights guaranteed by the Due Process Clause of the Fourteenth Amendment. This honor belongs to *Allgeyer v Louisiana*, 165 US 578 (1897), which the Court handed down eight years before *Lochner*. See Thomas B. Colby and Peter J. Smith, *The Return of* Lochner, 100 Cornell L Rev 527, 534 (2015).

[27] Prior to *Lochner*, the Court had not ruled on the constitutionality of the maximum-hour laws that were springing up throughout the country, and the Court's instruction on the topic was eagerly anticipated. Gillman, *The Constitution Besieged* at 125–26 (cited in note 26). In this respect, *Lochner* was an important decision. But it was not a decision that generated significant *doctrinal* change. Id at 147–48 (noting that the dissents "triggered a minor adjustment in the way the Court went about elaborating the long-standing distinction between valid public-purpose legislation and invalid class legislation" in that afterward "the Court became more willing to attend to 'expert' social science data [regarding] the existence of unhealthful or unsafe working conditions," but that "while this adjustment led the judiciary to accept some innovative forms of social legislation, it did not lead judges to abandon their allegiance to [Lochnerian police-powers] jurisprudence").

[28] Owen M. Fiss, *History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888–1910* 163 (Macmillan 1993) ("[In striking down the New York law, Justice] Peckham did not . . . 'find' liberty of contract in the interstices of the Fourteenth Amendment. He instead was trying to preserve the then fairly well recognized limits on the police power as a form of constitutive authority."). See also Greene, 125 Harv L Rev at 384 (cited in note 18) (noting that one characteristic of anticanonical decisions like *Lochner* is that "traditional modes of legal analysis arguably support the[ir] results" and that "these cases are, in some formalistic sense, correct").

[29] See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 NYU L Rev 1383, 1402–28 (2001).

[30] In recent years, defenders of the *Lochner* Court, most notably Professor David Bernstein, have argued that the bakery law it invalidated was not "a meager but

Critics therefore provided various, sometimes conflicting, arguments for why *Lochner* was wrong. Some argued that the decision was wrong because it erroneously interpreted the Due Process Clause to protect a kind of freedom (freedom of contract) that had very shallow roots in the common law.[31] In subsequent decades, this turned into the now more familiar claim that the *Lochner* Court erred by reading into the Constitution an unenumerated right.[32] Others argued that the decision was wrong because it failed to take sufficient account of the economic realities of the modern workplace, and more specifically, the inequality in bargaining power that employers and employees possessed in the early twentieth-century economy.[33]

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hard-fought legislative victory" for "overworked, exploited bakery workers" but instead a mechanism the powerful New York bakers' union employed "to drive small bakeshops that employed recent immigrants out of the industry." David E. Bernstein, *Rehabilitating* Lochner*: Defending Individual Rights Against Progressive Reform* 23 (Chicago 2011). Anti-immigrant and anticompetitive sentiments may certainly have played a role in generating support for the law. There is no question, however, that the bakery law struck down in *Lochner* was part of a broader struggle by unions across the country and in all sectors of industry to limit working hours and guarantee better conditions for labor. See Howard Schweber, Lochner v. New York *and the Challenge of Legal Historiography*, 39 L & Soc Inq 242, 258–59 (2014) (citation omitted):

> The call for limitations on working hours was neither novel nor radical in 1905. Bakers in New York had gone on strike in 1881 demanding a twelve-hour day. New York passed eight-hour-day laws in 1867, 1870, and 1886, the last of which finally contained enforcement mechanisms. Nationally, a call for a law limiting the working day to eight hours was central to the creation of the first national labor organizations in the 1860s and remained a critical organizing issue for labor well into the 1930s.

The decision in *Lochner* came to be reviled, therefore, not so much because its critics necessarily believed that the law it struck down was so valuable but because of what it intimated about the fate of the union struggle in general. See William E. Forbath, *Law and the Shaping of the American Labor Movement* 42 n 28, 52–53 (Harvard 1991). And in this respect, critics of the decision were correct to be concerned. As Professor William Forbath has chronicled in detail, during this period, employers routinely used the tool of constitutional litigation to strike down worker-protective wage and hour legislation on due process grounds. Id at 37–97.

[31] Friedman, 76 NYU L Rev at 1413–14 (cited in note 29) (noting that critics "regularly referred to the supposed liberty of contract" recognized by the *Lochner* Court "as 'new' or 'novel'" and criticized the Court for recognizing a right "without historical precedent").

[32] See, for example, *West Coast Hotel Co v Parrish*, 300 US 379, 391 (1937) ("What is this freedom? The Constitution does not speak of freedom of contract."); Strauss, 70 U Chi L Rev at 378–81 (cited in note 15).

[33] Colby and Smith, 100 Cornell L Rev at 537–38 (cited in note 26):

Others, meanwhile, argued that the decision was wrong because it showed insufficient deference to the New York legislature's view that the bakery law was wise economic policy. This was the argument that Justice Holmes made in his now-famous dissent.[34] Because the Constitution is "made for people of fundamentally differing views," Justice Holmes asserted, judges should respect "the right of a majority to embody their opinions in law" and overturn statutes only if "a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[35] The majority therefore erred, Justice Holmes argued, when it struck down the New York law because it did not violate (at least on his view) fundamental principles of American law as reasonable men would understand them.[36]

In subsequent years, critics seized on all of these accounts of the *Lochner* Court's errors as the basis for charges of Lochnerism. Critics argued that decisions in which the Court recognized a due process right to contraception and abortion replicated the *Lochner* Court's sins by reading unenumerated rights into the Constitution.[37] In other cases, critics argued that judges resurrected *Lochner* by failing to adequately take account of economic realities, such as the inequality in bargaining power that characterized the relationship between employers and employees.[38]

When it came to the free speech cases, however, what critics usually meant when they accused the Court of Lochnerism was not that it illegitimately sought to vindicate unenumerated rights, employed overly vague rules of decision, or failed to take

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> To many observers [in the early twentieth century], the Court was either unconscionably oblivious or viciously hostile to the realities of the sweatshop-era workplace and to the underlying premise of the entire labor movement: that inequalities in bargaining power between management and labor can, in the absence of regulation, lead to egregious exploitation of the working class.

34 *Lochner*, 198 US at 74–76 (Holmes dissenting).

35 Id at 75–76.

36 Id at 76. In insisting that courts should only invalidate democratically enacted laws when they were patently unreasonable, Justice Holmes echoed the argument made by Professor James Bradley Thayer in his important 1893 article, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv L Rev 129 (1893).

37 See John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L J 920, 939 (1973).

38 See, for example, *Korte v Sebelius*, 735 F3d 654, 720–22 (7th Cir 2013) (Rovner dissenting) ("One flaw of the *Lochner* jurisprudence is that while the Court purported to protect the constitutional rights of workers as well as employers, it blinded itself to the reality that employees frequently did not possess bargaining power enabling them to pursue and protect their own liberty interests.").

adequate account of economic inequality. What they meant instead was that the Court failed to show adequate deference to the policy judgments of democratically elected legislatures.

A. The First Wave of First Amendment *Lochner* Critiques

Critics began to make arguments of this sort very soon after the Court first began to interpret the First Amendment as a powerful instrument of countermajoritarian protection during the New Deal period. As early as 1941—only ten years after the Court, for the first time in its history, struck down a state law on free speech grounds[39]—Professor Walton Hamilton and George Braden claimed in an article in the *Yale Law Journal* that the Court's free speech jurisprudence was doing what liberty of contract once did: illegitimately transferring to judges power that properly belonged to the democratically elected branches of government.[40] Similar arguments would be made repeatedly over the next seventy years, even if the specific details of the *Lochner* analogy shifted over time.

Initially, critics argued, à la Justice Holmes, that the only way the Court could prevent its First Amendment jurisprudence from playing the same undemocratic role in American political life that its Due Process Clause jurisprudence once had was by interpreting the Speech Clause very narrowly, to prohibit only the most egregious and unreasonable infringements on expressive freedom. This is what Hamilton and Braden argued: in allowing courts to strike down laws that "men not devoid of reason" could believe did not infringe upon "the traditional freedom of the individual," the Court's free speech decisions granted judges, they claimed, too much discretion to interfere with the policy decisions of the political branches.[41]

Justice Felix Frankfurter, a great fan of Justice Holmes's *Lochner* dissent, similarly argued in his dissent in *West Virginia State Board of Education v Barnette*[42] that the Court should only strike laws down on First Amendment grounds when there was

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39 *Stromberg v California*, 283 US 359, 369–70 (1931).

40 Walton H. Hamilton and George D. Braden, *The Special Competence of the Supreme Court*, 50 Yale L J 1319, 1349 (1941) ("A few years ago a bench headed by the present Chief Justice read 'liberty of contract' out of the due process clause and promptly read freedom of speech into its place.").

41 Id at 1352.

42 319 US 624 (1943).

no basis for believing that "legislators could in reason have enacted [them]."[43] Any broader conception of the scope of constitutional review, Justice Frankfurter insisted, would enable the "arbitrary exercise of [judicial] authority."[44] It would commit the same jurisprudential error as *Lochner* had, by allowing judges to override the wishes of the democratic majority whenever they desired.

Justice Frankfurter and Hamilton and Braden were not alone in construing the lesson of *Lochner* to be the danger of empowering courts to perform anything other than the most limited form of constitutional review. Other important Progressives—including such well-respected figures as Judge Learned Hand—also argued that the only kind of judicial review appropriate in a pluralist democracy like the United States was the very deferential rationality review that Justice Holmes advocated in his *Lochner* dissent.[45]

This was not the view that the New Deal Court adopted, however, when it finally broke from the police-powers jurisprudence that characterized the *Lochner* era. Although the Court turned away from *Lochner* by altering the deference rules that applied in constitutional cases, rather than by altering other features of its constitutional doctrine (as some suggested),[46] the deference regime it created did not go as far as Justice Holmes's *Lochner* dissent suggested it should. In *United States v Carolene Products Co*,[47] the Court held that in cases involving "regulatory legislation affecting ordinary commercial transactions," courts should adopt a Holmesian deference rule, or something close to it.[48] However,

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43 Id at 647 (Frankfurter dissenting).

44 Id at 648.

45 See Learned Hand, *The Bill of Rights: The Oliver Wendell Holmes Lectures, 1958* 51–52 (Harvard 3d ed 1960).

46 See, for example, Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 Harv L Rev 489, 513 (1912) (arguing that, rather than deferring to the legislature, courts should interpret the meaning of constitutional rights and duties by looking at "the social facts upon which law . . . is to be applied").

47 304 US 144 (1938).

48 Id at 152:

> [R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

when laws appeared "on [their] face" to violate an enumerated constitutional right or to "restrict[ ] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" or to affect "discrete and insular minorities," the Court suggested that courts should not simply defer to the legislative judgment so long as it could be made to seem reasonable; instead, they should apply "more exacting [ ] scrutiny" of legislative ends and means.[49] In subsequent cases, it adopted this suggestion as settled law.[50]

Rather than adopting the single, very deferential standard of review that Justice Holmes advocated for in his *Lochner* dissent, the New Deal Court fashioned a two-tiered or "bifurcated" system "of constitutional review in which judges would defer to legislative regulation of the economy but scrutinize legislative regulation of noneconomic rights, including the right to free speech."[51] It did so because a majority of its members had come to believe—just as Justice Holmes himself had—that although judicial enforcement of economic rights like the right to contract undermined the vibrant pluralist democracy the Constitution was intended to create, judicial enforcement of civil rights such as the right to freedom of speech enhanced it, by preventing the majority from being able to use its control of the government apparatus to undermine the representativeness of the political system writ large.[52]

Although the bifurcated system of review was initially quite controversial, the idea that courts should vigorously enforce free

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As Professor Jack Balkin notes, this language suggests that courts should "not strike down the legislation unless the [c]ourt cannot invent a scenario in which a rational legislature might have produced the bill before it." J.M. Balkin, *The Footnote*, 83 Nw U L Rev 275, 290 (1989).

49 *Carolene Products*, 304 US at 152–53 n 4.

50 See, for example, *Skinner v Oklahoma*, 316 US 535, 541 (1942); *American Federation of Labor v Swing*, 312 US 321, 325 (1941); *Schneider v State*, 308 US 147, 161 (1939).

51 G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 Mich L Rev 299, 309 (1996).

52 Id at 334 (noting that the Court justified granting special protection to speech rights because of "their indispensable connection to the maintenance of democratic principles"); Bruce A. Ackerman, *Beyond* Carolene Products, 98 Harv L Rev 713, 715 (1985):

> [The Court's decision in] *Carolene* promises relief from the problem of legitimacy raised whenever nine elderly lawyers invalidate the legislative decisions of a majority of our elected representatives. The *Carolene* solution is to seize the high ground of democratic theory and establish that the challenged legislation was produced by a profoundly defective process. By demonstrating that the legislative decision itself resulted from an undemocratic procedure, a *Carolene* court hopes to reverse the spin of the countermajoritarian difficulty.

speech and other civil rights but not the economic rights that were of such concern to courts during the *Lochner* era soon became widely accepted.[53] The result was that, after Justice Frankfurter retired in 1962, the argument that the Court acted illegitimately when it struck down speech regulations that were not patently unreasonable almost entirely disappeared, from both the cases and the law reviews.

B. The Second Wave of *Lochner* Criticisms

The widespread acceptance that the bifurcated system of review had achieved by the 1960s did not mean that claims of First Amendment Lochnerism entirely disappeared, however. Critics continued to compare the contemporary free speech cases to *Lochner*-era freedom of contract cases, just as Hamilton and Braden did. But the analogy they drew was a different one.

Rather than arguing that the Court repeated the errors of the *Lochner* Court when it struck down speech regulations that reasonable men might find reasonable, critics now made a more nuanced claim: namely, that the Court resurrected *Lochner* when it interpreted the First Amendment to strike down laws that did not threaten the vitality of the democratic system, or any other social good that courts were authorized to protect under the terms of what was coming to be known as the New Deal settlement.[54]

Justice Hugo Black was perhaps the first prominent jurist to make this argument. He did so in his dissenting opinion in *Tinker v Des Moines Independent Community School District*[55] in 1969.[56] The case involved a free speech challenge brought by students who were suspended from school after they wore black armbands to protest the Vietnam War.[57] The majority held that the suspensions violated the students' free speech rights because the First

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53 As Professor David Strauss notes, although, since the mid-1950s, "many justices have sat on the Court . . . with different methodological and political commitments," what has united all these justices is their "rejection of the Thayer[ian] view" of the judicial function. Strauss, 70 U Chi L Rev at 377 (cited in note 15). The result has been that "[t]he Court has not limited itself to measures that no rational person could defend; it has consistently asserted a much more prominent role for itself." Id. Nor did even the Court's conservative critics advocate a Thayerian approach. See Colby and Smith, 100 Cornell L Rev at 566 (cited in note 26).

54 See, for example, Larry D. Kramer, *The Supreme Court, 2000 Term Foreword: We the Court*, 115 Harv L Rev 4, 14 (2001).

55 393 US 503 (1969).

56 Id at 525–26 (Black dissenting).

57 Id at 504 (majority).

Amendment allowed school officials to penalize students for their on-campus speech only when it threatened to substantially disrupt school activities or intrude upon the rights of others.[58] This rule was necessary, the Court argued, to ensure that the nation's future leaders learned not only reading and writing at school but also how to engage in the "robust exchange of ideas" that played such an important role in American politics, and public life more broadly.[59]

Justice Black dissented not because he believed, like Justice Frankfurter, that heightened scrutiny was almost never appropriate in First Amendment cases. To the contrary: Justice Black made clear that he believed the First Amendment imposed significant constraints on the government's power to "regulate or censor the content of speech" in other contexts.[60] Justice Black did not believe, however, that the First Amendment imposed significant constraints on the government's power to regulate or censor speech *in school*.[61] This was because he disagreed with the majority about the political importance of student speech. "[S]tudents," Justice Black argued, are not "sent to the schools at public expense to broadcast political or any other views to educate and inform the public."[62] They are instead sent to school to learn things they do not know.[63] It should therefore, he argued, be school officials, rather than courts, that determined how much student expression was pedagogically appropriate.[64] By applying heightened

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58 Id at 511.

59 *Tinker*, 393 US at 512–14 (alteration in original and quotation marks and citation omitted):

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. . . . The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.

60 Id at 517 (Black dissenting).

61 Id at 521–22.

62 Id at 522.

63 *Tinker*, 393 US at 522 (Black dissenting):

> The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. It may be that the Nation has outworn the old-fashioned slogan that "children are to be seen not heard," but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach.

64 Id at 524.

scrutiny where it was not justified by the need to prevent government interference with the democratic political process, Justice Black warned, the Court threatened to "resurrect[ ] that old reasonableness-due process test" that "prevailed in *Lochner*."[65] It arrogated to the judicial branch power that it was not entitled to, just as the *Lochner* Court once had.[66]

Justice Black's efforts to analogize *Tinker* to *Lochner* proved unpersuasive. Although it was true that, as a historical matter, schools were not viewed as important forums for political expression but instead were conceived as places in which children were taught "good order" and respect for authority, this view had largely broken down by the 1960s.[67] Instead it had come to be widely accepted that schools should not only teach children writing and reading and math, but also the principles of democratic citizenship—including, among these, the principle of dissent.[68] The result was that no other member of the Court joined Justice Black's opinion, and, in subsequent years, few others echoed his argument about the *Lochner*-like features of the Court's student-speech doctrine.[69]

This did not mean, however, that others did not share the concern that Justice Black expressed in his *Tinker* dissent—namely, that the Warren and later Burger Courts' increasingly expansive free speech jurisprudence threatened to extend the First Amendment beyond what a democratic rationale could bear. It simply meant that it was not the Court's school-speech cases that emerged as the focus of this concern. Arguments about the Lochnerization of the First Amendment instead came to focus on the Court's commercial and corporate speech cases.

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65 Id at 519–20.

66 Id at 515 ("The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected 'officials of state supported public schools . . .' in the United States is in ultimate effect transferred to the Supreme Court.") (alteration in original).

67 For expression of the older view, see *State v Mizner*, 45 Iowa 248, 250–51 (1876) (reversing a lower court ruling barring teachers from using corporal punishment on female students over eighteen years old on the grounds that such a rule "might destroy the authority of the teacher and be utterly subversive of good order" in the school).

68 See Justin Driver, *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind* 78–79 (Pantheon 2018) (noting *Tinker*'s overwhelmingly positive public reaction).

69 Of the contemporary members of the Court, only Justice Clarence Thomas has followed Justice Black in suggesting any connection between the student-speech cases and *Lochner*. See *Morse v Frederick*, 551 US 393, 420–21 (2007) (Thomas concurring).

In *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc*[70] in 1976, a 7–1 majority of the Court held that "purely commercial advertising"—which it defined as speech that "does 'no more than propose a commercial transaction'"—was entitled to First Amendment protection, and that the state of Virginia could not therefore constitutionally prohibit pharmacies from advertising the prices of their prescription drugs.[71] The holding represented a major doctrinal shift. Three decades earlier, in *Valentine v Chrestensen*,[72] the Court had held—in a unanimous, albeit extremely brief, opinion—that the First Amendment constraints that applied when the government regulated other kinds of speech did not apply when the government regulated purely commercial advertising.[73] Over the next three decades, the Court defined the category of purely commercial advertising increasingly narrowly, but continued to assume that speech of this sort lay beyond the scope of First Amendment concern.[74]

In explicitly overturning *Valentine*, *Virginia Pharmacy* unsettled over thirty years of precedent. It also suggested that, from here on out, legislatures would possess significantly less power than they had thus far to regulate what was, by the 1970s, an important segment of the market economy. The opinion was careful to note that the Court's holding did not mean that legislatures would not be able to regulate commercial advertising *at all*. In his majority opinion, Justice Harry Blackmun made clear, for example, that legislatures would still be able to prohibit false as well as misleading advertising, and suggested that they would also be able to require advertisements to "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent [their] being deceptive."[75] He strongly suggested, however, that legislatures would no longer be able to enact what he called "paternalistic" advertising laws—laws that

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70 425 US 748 (1976).

71 Id at 755, 762, 770. Justice John Paul Stevens took no part in the case.

72 316 US 52 (1942).

73 Id at 54.

74 See, for example, *Bigelow v Virginia*, 421 US 809, 822 (1975) (concluding that the First Amendment applied to abortion ads because the ads "contained factual material of clear 'public interest'"); *New York Times Co v Sullivan*, 376 US 254, 256–57, 266 (1964) (concluding that the First Amendment applied to an ad paid for by supporters of the civil rights movement that "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern").

75 *Virginia Pharmacy*, 425 US at 771 n 24.

prohibited advertising because the legislature feared that consumers would use the information it conveyed in harmful ways.[76] The opinion also unequivocally held that legislatures would no longer be able to totally ban the advertising of lawful goods or services.[77]

The reaction was strong and immediate. Although some commentators celebrated the decision, others sharply criticized it for excessively constraining the power of the democratic legislature. Many of those who made the latter argument invoked *Lochner* to do so. In an influential law review article published three years after the decision was handed down, Professors Thomas Jackson and John Calvin Jeffries Jr argued, for example, that the decision in *Virginia Pharmacy* "reconstituted the values of *Lochner v. New York* as components of freedom of speech."[78] Professor Edwin Baker similarly argued that the extension of constitutional protection to advertising augured a return to the *Lochner* era.[79] And in a dissent he wrote four years after *Virginia Pharmacy* was handed down, Justice William Rehnquist—the only member of the Court to have dissented from the original opinion—argued that, by extending significant constitutional protection to commercial advertising, the Court

> return[ed constitutional law] 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.[80]

What these critics meant when they accused *Virginia Pharmacy* of returning constitutional law to the *Lochner* era was not that the decision literally introduced into First Amendment law the doctrinal distinctions that led the *Lochner* Court to overturn

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[76] Id at 769–70 (arguing that the First Amendment prohibits legislatures like Virginia's from "keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering" in their misguided efforts to prevent the public from misusing that information).

[77] Id at 773 ("What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative.") (citation omitted).

[78] Jackson and Jeffries, 65 Va L Rev at 30–31 (citation omitted) (cited in note 3).

[79] C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 Iowa L Rev 1, 2 n 5 (1976).

[80] *Central Hudson Gas & Electric Corp v Public Service Commission of New York*, 447 US 557, 589 (1980) (Rehnquist dissenting).

the New York bakery law. What they meant was instead the same thing that Justice Black meant when he accused the *Tinker* Court of Lochnerism: namely, that the decision illegitimately aggrandized judicial power by preventing the democratic legislature from being able to regulate even democratically unimportant speech.

Commercial advertising is democratically unimportant, they argued, because it has nothing to say about the political realm. As Jackson and Jeffries noted: "The typical newspaper advertisement or television commercial makes no comment on governmental personnel or policy. It does not marshal information relevant to political action, nor does it focus public attention on questions of political significance."[81] This meant, critics insisted, that the democratic arguments the Court had relied on for four decades at that point to justify heightened scrutiny of protected speech did not justify extending the same heightened scrutiny to commercial ads.[82]

Nor, critics argued, does constitutionalizing the regulation of commercial advertising protect any other important First Amendment interest—in particular, its interest in safeguarding from state control a sphere of individual expressive autonomy. Since the early twentieth century, the Court had recognized that the First Amendment protects not only the robust political debate necessary to ensure a healthy system of democratic government, but also the individual right "to think as you will and to speak as you think"—and that it does so both as a means of vindicating democratic principles and as an end in itself.[83]

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[81] Jackson and Jeffries, 65 Va L Rev at 15 (cited in note 3).

[82] See id (arguing that because commercial advertising concerns only "economic rather than political decisionmaking," the "structure of representative democracy yields no inference of [its] inviolability"); *Virginia Pharmacy*, 425 US at 787–88 (Rehnquist dissenting) (citation omitted):

> The Court insists that the rule it lays down is consistent even with the view that the First Amendment is "primarily an instrument to enlighten public decision making in a democracy." I had understood this view to relate to public decision making 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.

[83] *Whitney v California*, 274 US 357, 375–76 (1927) (Brandeis concurring). See also *Barnette*, 319 US at 642 (concluding that a compulsory flag-salute law was unconstitutional because it "invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control"); *Stanley v Georgia*, 394 US 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.").

Beginning in the 1960s, prominent First Amendment theorists began to argue that the First Amendment's primary purpose was to protect individual expressive freedom and that it was a mistake, as a result, to give any constitutional priority to political, or even public, speech.[84] Critics of the Court's advertising decisions were not so sure. Jackson and Jeffries, in particular, expressed significant discomfort with this view of the First Amendment, which they warned could be used to create a jurisprudence that undercut, rather than reinforced, democratic government by constraining the political branches even when doing so was not necessary to ensuring that the processes of political representation were working well.[85] They noted, for example, that a First Amendment conceived primarily as an instrument of what Professor Thomas Emerson called "individual self-fulfillment" could be used to "disallow[ ] legislative choice on grounds unrelated to the integrity of the political process" and "thus limit[ ] the power of the [ ] political system that the guarantee of freedom of speech, at least in part, is designed to nurture."[86]

Jackson and Jeffries nevertheless agreed with Emerson, Baker, and others who held this view that, even if the First Amendment's primary goal is to guarantee individual expressive freedom, *Virginia Pharmacy* would still be wrongly decided.[87] This is because, they claimed, commercial advertising simply is not a medium that individuals use to find "individual self-fulfillment" or to express themselves.[88] Instead ads exist for one purpose and one purpose only: to increase sales for the products

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84 See, for example, Martin H. Redish, *The Value of Free Speech*, 130 U Pa L Rev 591, 593–94, 604 (1982) ("[T]he constitutional guarantee of free speech ultimately serves only one true value, . . . 'individual self-realization,'" which means that its "appropriate scope . . . is much broader than [a democracy-focused theory] would have it. . . . There thus is no logical basis for distinguishing the role speech plays in the political process."); Thomas I. Emerson, *The System of Freedom of Expression* 6–7 (Random House 1970) (arguing that freedom of expression is "[f]irst, . . . essential as a means of assuring individual self-fulfillment" and also "essential to provide for participation in decision making by all members of society . . . [not only in] the political realm . . . [but also] in religion, literature, art, science, and all areas of human learning and knowledge"); Baker, 62 Iowa L Rev at 8 (cited in note 79) ("As a manifestation of the self, speech deserves protection even if it is not used to communicate with others.").

85 Jackson and Jeffries, 65 Va L Rev at 13 n 46 (cited in note 3). This meant, they argued, that the Emersonian view of the First Amendment as a safeguard of expressive freedom existed in only "ironic relationship" to the traditional view of the First Amendment as a safeguard of democratic government. Id.

86 Id.

87 Id at 14–15.

88 Id at 14.

they advertise.[89] As a result, Jackson and Jeffries argued, the only interests advanced by applying heightened scrutiny to the regulation of advertisements are the kinds of economic liberty interests the *Lochner* Court protected in its freedom of contract cases. It was this that led them to conclude that *Virginia Pharmacy* "reconstituted the values of *Lochner v. New York* as components of freedom of speech."[90]

Critics made similar arguments around the same time about another line of cases in which the Court applied heightened scrutiny to laws that regulate the nonadvertising speech of corporations, as well as corporate spending on political speech. Although prior to the 1970s the Court had frequently extended constitutional protection to media corporations and had also made clear that nonprofit corporations could possess First Amendment rights, it had never squarely ruled on whether for-profit, nonmedia corporations (or what it referred to simply as "business corporations") were protected by the Speech Clause.[91] This changed in 1978, when in *First National Bank of Boston v Bellotti*,[92] the Court held that a state law that prohibited corporations from spending money to influence the vote on popular referenda that did not "materially affect[ ] any of the[ir] property, business or assets" violated the First Amendment by restricting, without sufficient justification, the speech of business corporations.[93]

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89 Jackson and Jeffries, 65 Va L Rev at 14 (cited in note 3) ("[T]he concept of a [F]irst [A]mendment right of personal autonomy in matters of belief and expression stops short of a seller hawking his wares."); Baker, 62 Iowa L Rev at 3 (cited in note 79):

> [I]n our present historical setting, commercial speech is not a manifestation of individual freedom or choice; unlike the broad categories of protected speech, commercial speech does not represent an attempt to create or affect the world in a way which can be expected to represent anyone's private or personal wishes.

See also Emerson, *Freedom of Expression* at 311 (cited in note 84) (asserting that advertising, like "soliciting, canvassing, [and] similar conduct that is wholly 'commercial' in nature . . . fall[s] within the system of commercial enterprise and . . . outside the system of freedom of expression").

90 Jackson and Jeffries, 65 Va L Rev at 30–31 (citation omitted) (cited in note 3).

91 Pre–*Virginia Pharmacy* cases involving the First Amendment rights of media corporations include *Red Lion Broadcasting Co v Federal Communications Commission*, 395 US 367 (1969); *Sullivan*, 376 US 254; *Joseph Burstyn, Inc v Wilson*, 343 US 495 (1952); and *Grosjean v American Press Co*, 297 US 233, 244 (1936). The Court recognized the First Amendment rights of a nonprofit corporation (the NAACP) in *National Association for the Advancement of Colored People v Button*, 371 US 415, 428–29 (1963). For use of the term "business corporation," see *First National Bank of Boston v Bellotti*, 435 US 765, 767 (1978).

92 435 US 765 (1978).

93 Id at 767–68, 776.

Although the Court refused to hold that the First Amendment rights of corporate persons were identical to those of natural persons, it adamantly rejected the idea that the only corporations that possessed a constitutionally protected right to speak were media companies or advocacy organizations. "[T]he press does not have a monopoly on either the First Amendment or the ability to enlighten," Justice Lewis Powell noted for the majority.[94] "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."[95] Two years later, in *Consolidated Edison Co of New York v Public Service Commission of New York*,[96] the Court again struck down a law that regulated noncommercial corporate speech—in this case, an order by a state agency that prohibited a privately owned public utility from including inserts expressing "[its] opinions or viewpoints on controversial issues of public policy" in the billing envelopes it sent to customers each month.[97]

Critics argued that, like the advertising cases, these cases augured a "return to the *Lochner* era of economic due process" by extending protection to speech that furthered primarily economic freedom, rather than the democratic or expressive freedom the First Amendment was supposed to protect.[98] In making this argument, they acknowledged that the nonadvertising speech of corporations was not necessarily irrelevant to political decisionmaking. To the contrary: the speech at issue in *Bellotti* and *Pacific Gas & Electric Co v Public Utilities Commission of California*[99] was obviously politically relevant, and designed to be.[100] Nevertheless, critics argued, regulations of even politically

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94 Id at 782.

95 Id at 777.

96 447 US 530 (1980).

97 Id at 533.

98 C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's* The Value of Free Speech, 130 U Pa L Rev 646, 653 n 25 (1982); Note, *The Corporation and the Constitution: Economic Due Process and Corporate Speech*, 90 Yale L J 1833, 1834 (1981) ("[B]y reaffirming and extending the entitlement of corporations to constitutional rights, the Court in *Bellotti* rendered a decision strongly reminiscent of the economic due process era, one marking an important departure from post–New Deal constitutional jurisprudence to date.").

99 475 US 1 (1986).

100 The corporation that challenged the law in *Bellotti* wished to spend money to influence the vote on a ballot question about a proposed state constitutional amendment that would have permitted the legislature to introduce a graduated income tax. *Bellotti*, 435 US at 769. In *Pacific Gas*, the corporation wished to continue to include in its billing

relevant corporate speech do not pose the same threat to the vitality of democratic public debate that regulations of noncorporate speech do. This is because, even when the government totally bans corporations from speaking, the natural persons who comprise the corporation remain perfectly free to make the corporation's arguments themselves.[101] Accordingly, restrictions on corporate speech "impinge[ ] much less severely upon the availability of ideas to the general public than do restrictions upon individual speech."[102]

Nor, critics claimed, do regulations of corporate speech impede the ability of individuals to "use [ ] communication as a means of self-expression, self-realization, [or] self-fulfillment."[103] This is because, even when it does not take the form of commercial advertising, corporate speech reflects the economic imperatives of the corporate entity that pays for it, rather than the values or beliefs of the individuals who compose it.[104] As a result, the *primary* interest advanced by the constitutionalization of corporate speech is not democracy or self-expression but corporate economic liberty—and *this* is not an interest the First Amendment cares anything about.

Although the details of the arguments differed, the conclusion that critics reached about the corporate speech cases—namely, that they represented "an important departure from post–New Deal constitutional jurisprudence" and a return to a Lochnerian vision of the Constitution as a guarantor of economic liberty—was identical to the conclusion that critics reached about the advertising cases.[105] In both areas of law, critics argued that the extension of constitutional protection to commercial entities

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inserts a magazine it published that "included political editorials [and] feature stories on matters of public interest" as well as "tips on energy conservation, and straightforward information about utility services and bills." *Pacific Gas*, 475 US at 5.

101 *Bellotti*, 435 US at 807 (White dissenting) ("Even the complete curtailment of corporate communications concerning political or ideological questions not integral to day-to-day business functions would leave . . . corporate shareholders, employees, and customers, free to communicate their thoughts."); Note, 90 Yale L J at 1856 (cited in note 98) ("[A]llowing legislatures to restrict the use of corporate property would intrude upon the speech rights of no individuals. Corporate owners and managers would be as free as before to advocate their political views.").

102 *Bellotti*, 435 US at 807 (White dissenting).

103 Id at 804.

104 Baker, 130 U Pa L Rev at 653 (cited in note 98) ("[T]he market mechanism, by forcing the enterprise to make the most efficient (profit-maximizing) decisions, dictates the content of the enterprise's speech, and thus separates the decision concerning speech content from the value decisions of either the employees or the owners of the enterprise.").

105 Note, 90 Yale L J at 1834 (cited in note 98).

and to commercially oriented speech constituted a judicial usurpation of legislative power similar to that enacted by the *Lochner* Court.

For a while, these arguments appeared to persuade the Court to back away from rigorously protecting commercially oriented speech. Two years after *Virginia Pharmacy* was handed down, the Court handed down another commercial advertising decision in which it asserted that commercial advertising was entitled to only "a limited measure of [constitutional] protection, commensurate with its subordinate position in the scale of First Amendment values."[106] Several years later, the Court held in *Posadas de Puerto Rico Associates v Tourism Company of Puerto Rico*[107] that, because the Puerto Rican legislature possessed the "greater power" to ban all gambling in the territory, it also possessed the "lesser power" to ban all ads about gambling in the territory, even when it did not choose to ban the gambling itself.[108] Given the tremendous power that legislatures otherwise possessed to ban the sale of certain kinds of goods since the demise of economic due process, the Court's lesser-power argument granted legislatures virtually unlimited power to ban whatever advertising they desired.[109] At the same time, the Court also significantly cut back the protection afforded corporate speakers by the First Amendment when it held, in *Austin v Michigan State Chamber of Commerce*,[110] that the special advantages that corporations possessed, by virtue of state law, justified more extensive regulation of their political spending than would otherwise be permitted.[111]

This pullback in the protection afforded commercial advertising and corporate speech did not last forever, however. Beginning in the early 1990s, the Court began to show renewed solicitude

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106 *Ohralik v Ohio State Bar Association*, 436 US 447, 456 (1978).

107 478 US 328 (1986).

108 Id at 345–46.

109 See Philip B. Kurland, Posadas de Puerto Rico v. Tourism Company*: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful"*, 1986 S Ct Rev 1, 12–13 (noting that, if "advertising of any economic activity that was not itself constitutionally protected activity, however legal that activity might be, was properly subject to government censorship . . . , then, under *Posadas*, there is no advertising that is not subject to government censorship"). "[T]he protection of commercial speech under the First Amendment," Professor Kathleen Sullivan noted ten years later, appeared "[l]eft for dead." Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 S Ct Rev 123, 123.

110 494 US 652 (1990).

111 Id at 658–59.

for the free speech rights of advertisers and for-profit corporations. In *44 Liquormart, Inc v Rhode Island*,[112] it adamantly rejected the "greater power includes the lesser power" argument from *Posadas*.[113] It also applied increasingly stringent scrutiny to the arguments the government used to justify advertising regulations, as well as laws regulating corporate speech and spending.[114]

The result was a resurgence of arguments along the lines of those that Baker, Jackson and Jeffries, and Justice Rehnquist made in the late 1970s and early 1980s. Critics both on and off the Court asserted, just as critics had decades earlier, that the new commercial and corporate speech cases signaled a return to the *Lochner* era. In 1999, Professor Daniel Greenwood argued, for example, that the "rapid expansion [of the First Amendment] into areas long thought impervious to constitutional law"—specifically, areas "of economic regulation we thought the courts had abandoned to the legislatures after the *Lochner* disaster"—had made the Speech Clause "the locus of a new Lochnerism[,]or rather, a revival of the old Lochnerism under a new doctrinal label."[115] Nine years later, Professor Tamara Piety similarly argued that the commercial and corporate speech cases reflected "a sort of latter-day Lochnerism" by extending constitutional protection to speech that furthers primarily economic rather than expressive aims.[116]

This time around, these criticisms utterly failed to persuade the Court to pull back the level of scrutiny it applied to regulations of commercial and corporate speech. If anything, the Court ratcheted up the level of protection it applied in commercial and corporate speech cases. In *Citizens United v Federal Election*

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112 517 US 484 (1996).

113 Id at 510–11.

114 See Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After* Eldred*,* 44 Liquormart*, and* Bartnicki, 40 Houston L Rev 697, 732 (2003) ("The Court concluded in the mid-1970s that commercial advertising was constitutionally protected; seemingly pulled back on that protection in the 1980s; but has been providing more and more protection since the early 1990s.") (citations omitted); Richard L. Hasen, *Election Law's Path in the Roberts Court's First Decade: A Sharp Right Turn but with Speed Bumps and Surprising Twists*, 68 Stan L Rev 1597, 1603 (2016) ("The campaign finance landscape changed dramatically with the emergence of the Roberts Court, turning a Court that usually voted in favor of campaign limits by a 5–4 vote into one usually voting against such limits by a 5–4 vote.").

115 Daniel J.H. Greenwood, *First Amendment Imperialism*, 1999 Utah L Rev 659, 659–61 (citation omitted).

116 Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 Cardozo L Rev 2583, 2586 (2008).

Commission,[117] in 2010, the Court adamantly rejected the idea that the corporate nature of the speaker should make *any* difference to the analysis in free speech cases.[118] The following year, in *Sorrell v IMS Health Inc*,[119] it applied exceedingly rigorous scrutiny to a law that regulated the sale of information to pharmaceutical marketers, and ultimately struck the law down.[120]

Decisions like these have led to continuing criticism of the Lochnerian tendencies of the contemporary commercial and corporate speech cases. Some of the critics argue—just as Justice Rehnquist and Jackson and Jeffries once argued—that, in order to prevent the First Amendment from replicating the sins of the *Lochner* Court, advertising and corporate speech should be entirely denied constitutional protection.[121] Others accept that some measure of constitutional protection for commercial and corporate speech is required, but argue that contemporary free speech law resurrects *Lochner* by failing to respect the "subordinate

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117 558 US 310 (2010).

118 Id at 340–41.

119 564 US 552 (2011).

120 Id at 557, 565–70, 580.

121 See, for example, Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 Stan L Rev 1389, 1392–93 (2017) (describing the scholarly "consensus" that "the outward creep of the First Amendment" has produced a "neo-*Lochner* moment" in free speech law); Reza R. Dibadj, *The Political Economy of Commercial Speech*, 58 SC L Rev 913, 917, 919 (2007):

> Theorists have too easily tried to elevate commercial speech to the level of political, artistic, or scientific speech at the core of the First Amendment. Commercial speech, however, is different.
>
> . . .
>
> At its core, commercial speech is about facilitating a monetary transaction, not serious political, artistic, or scientific discourse.

See also Rebecca Tushnet, *COOL Story: Country of Origin Labeling and the First Amendment*, 70 Food & Drug L J 25, 25 (2015) (arguing that in recent years "[o]bjections having little to do with free speech at their heart [have been] channeled into First Amendment challenges," and that "most commercial speech regulation" is "fundamentally economic policy"); Julie E. Cohen, *The Zombie First Amendment*, 56 Wm & Mary L Rev 1119, 1128–30 (2015) (stating that "[f]or almost two centuries, the First Amendment was considered largely irrelevant to regulation of speech advancing commercial and professional activities because such regulation was understood to be directed fundamentally at commerce rather than at discourse in the public sphere," and arguing that recent commercial speech cases err by "conflat[ing] [ ] spending and speaking" and by failing to "make[ ] meaningful distinctions among kinds of speech-related activities"); Coates, 30 Const Commen at 239 (cited in note 6) (arguing that constitutional protection for corporate speech represents a "radical break with the history and traditions of U.S. law" and is "incompatib[le] . . . with American political realities").

position" that commercially oriented speech possesses in the hierarchy of First Amendment values.[122] In all cases, however, the claim is that the recent cases extend more protection to corporate and commercial speech than it warrants, and consequently represents a "return[ ] to the bygone era of *Lochner v. New York*."[123]

These arguments have considerable rhetorical force. By invoking *Lochner*, critics are able to accuse the Court not only of reaching the wrong result in its commercial and corporate speech cases but also of employing a mode of constitutional jurisprudence that has been, in theory at least, almost universally disavowed for over seventy years. They also highlight the obvious similarities in the effects of *Lochner*-era due process and contemporary free speech law—namely, the fact that both doctrines result in meaningful limits on the legislature's ability to regulate the market.

But are they correct? Is it the case that commercial advertising and corporate speech possess, at best, a subordinate status in the First Amendment hierarchy due to the fact that they further primarily economic rather than expressive ends? Is it the case, as a result, that the extension of close-to-full constitutional protection to commercial advertising and to the noncommercial speech of business corporations represents an unjustified departure—or what some have described as a "radical break"—from the principles that guided First Amendment jurisprudence up until the 1970s?[124]

In the next Part, I argue that the answer to these questions is no—that the commercial and corporate speech cases do not represent a break, radical or otherwise, from the principles that guided First Amendment jurisprudence over the previous four decades. Instead, they can be justified by the same principles that

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[122] For examples of critics who take this position, see Amanda Shanor, *The New* Lochner, 2016 Wis L Rev 133, 146, 150 (arguing that the state may regulate commercial speech more extensively than other kinds of speech due to its "subordinate [constitutional] status and [the fact that] it is not a speaker-oriented autonomy right" but that the Supreme Court's recent advertising cases "undermin[e] the [doctrinal] features that the Court that created the [commercial speech] doctrine put in place to ensure that the First Amendment would not be the undoing of the regulatory state"); Post and Shanor, 128 Harv L Rev F at 170–73 (cited in note 2) (arguing that because commercial speech, unlike political speech, does not contribute to "public discourse," courts should protect it only to the extent necessary to protect the flow of accurate information to the public, and criticizing recent cases for not applying this rule).

[123] *Central Hudson*, 447 US at 589 (Rehnquist dissenting).

[124] Weiland, 69 Stan L Rev at 1397 (cited in note 121); Coates, 30 Const Commen at 239 (cited in note 6).

led the Court in the decades prior to *Virginia Pharmacy* to extend protection to labor picketing, movies, music, pulp magazines, and many other kinds of nondidactic, nonexplicitly political expression.

Accordingly, the Court did not violate the New Deal settlement when it extended protection to commercial and corporate speech. Nor does it violate the New Deal settlement when (as is increasingly the case) it fails to significantly distinguish the protection afforded commercial and political or artistic speech. This is not to say that there is no respect in which contemporary free speech law "resurrects *Lochner*." But it is not because courts interpret the scope of the First Amendment too expansively, to include economically valuable but constitutionally valueless speech. Instead its cause must be found elsewhere—as I explore in Part III.

II. THE PROBLEM WITH THE CONVENTIONAL CRITIQUE

To understand why the Burger Court's decision to extend constitutional protection to commercial advertising and noncommercial corporate speech—or the Court's more recent tendency to grant commercial advertising almost the same level of First Amendment protection as that afforded other kinds of speech—does not represent the departure from the principles of New Deal constitutional jurisprudence that critics allege, it is necessary to first understand what those principles are. More specifically, it is necessary to understand the limiting principles the Court has employed to ensure that its vigorous enforcement of First Amendment rights does not undermine the balance between judicial and legislative power that the New Deal settlement was intended to establish. Only once we understand how modern free speech law fits into the New Deal settlement can we understand why the extension of First Amendment protection to commercial and corporate speech does not subvert it.

Figuring this out is somewhat more difficult than one might suppose, given the important role that the First Amendment played in motivating the central innovation of the New Deal settlement—namely, the bifurcated system of review. As noted in Part I, a major reason for the Court's embrace of the two-tiered system of review was its belief that, although courts should generally defer to the wisdom of legislative decision-making—even when individual rights were at stake—First Amendment rights were "special . . . and deserved particular judicial solicitude" due

to their importance to democratic government.[125] It was primarily with the First Amendment in mind, in other words, that the New Deal Court developed the bifurcated system. It is no coincidence, in this respect, that the majority of cases cited in *Carolene Products*' famous footnote four are First Amendment cases.[126]

Despite this fact, the Court rarely referred to *Carolene Products* in its First Amendment decisions.[127] Outside of the advertising cases, it also placed little emphasis on the distinction that *Carolene Products* suggested should be the central pivot of the New Deal settlement—namely, the distinction between laws that "affect[ ] ordinary commercial transactions" and laws that affect noncommercial activity.[128]

In fact, the Court repeatedly rejected the idea that laws regulating speech that occurs in a commercial setting or advances commercial ends should be subject, for that reason, to mere rational basis scrutiny. In its 1945 decision in *Thomas v Collins*,[129] for example, the Court rigorously scrutinized—and ultimately struck down—provisions in a Texas law that governed how union organizers solicited new members, even though it acknowledged that the unions affected by the law were "engaged in business activities" and that the organizers whose speech it regulated frequently "receive[d] compensation" for their speech.[130] "The idea is not sound," Justice Wiley Rutledge insisted in his majority opinion, "that the First Amendment's safeguards are wholly inapplicable to business or economic activity."[131] Several years later, in *Joseph Burstyn, Inc v Wilson*,[132] the Court rejected the argument that movies "do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit."[133] It concluded, to the

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125 White, 95 Mich L Rev at 302 (cited in note 51).

126 Of the seventeen cases cited as support in footnote four, nine are First Amendment cases. *Carolene Products*, 304 US at 153 n 4.

127 In the twenty or so years after it was handed down, only two First Amendment decisions cited *Carolene Products* for the proposition that courts should apply stricter scrutiny when First Amendment rights were at stake than they applied when other kinds of rights were threatened. Both, interestingly enough, were picketing cases. See *Thomas v Collins*, 323 US 516, 529–30 (1945); *Thornhill v Alabama*, 310 US 88, 95–96 (1940).

128 *Carolene Products*, 304 US at 152.

129 323 US 516 (1945).

130 Id at 531. These facts, it is worth noting, led the Texas Supreme Court to conclude that rational basis scrutiny was the appropriate standard of review, and that the law was ultimately constitutional. *Ex parte Thomas*, 141 Tex 591, 596 (1943).

131 *Collins*, 323 US at 531.

132 343 US 495 (1952).

133 Id at 501.

contrary, that like books, magazines, and newspapers, movies were "a form of expression whose liberty is safeguarded by the First Amendment."[134]

The Court's willingness to extend First Amendment protection to commercially oriented speech did not mean that it was insensitive to the possibility that the First Amendment could be interpreted so expansively it could unravel the New Deal settlement. As Professor Jeremy Kessler and others have shown, members of the New Deal Court were deeply concerned that the overly aggressive enforcement of First Amendment rights might undermine the Court's newly regained legitimacy, as well as the vitality of the regulatory state.[135] The Court's response to this concern, however, was not to categorically deny protection to speech that was motivated by economic concerns, related to commercial matters, or sold in the marketplace.[136]

Some members of the Court suggested that this was how the First Amendment *should* be interpreted. Justices Stanley Reed, Robert Jackson, and Felix Frankfurter, for example, objected to a series of decisions in which the Court held that laws that imposed a fixed license tax on those who sold books and pamphlets door to door violated the freedom of speech as well as the free exercise rights of those they regulated.[137] They argued that, by extending protection to what was essentially commercial activity, these decisions threatened the delicate balance between legislative and judicial power that the Court had only very recently put in place.[138]

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[134] Id.

[135] Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 Colum L Rev 1915, 1956–76 (2016).

[136] See *Douglas v City of Jeannette*, 319 US 157, 179–81 (1943) (Jackson concurring).

[137] Id at 181–82; *Jones v City of Opelika*, 319 US 103, 117 (1943) (Reed dissenting); *Jones*, 319 US at 134 (Frankfurter dissenting).

[138] See, for example, *Jones*, 319 US at 131–32 (Reed dissenting):

> [W]e [do not] think it can be said, properly, that these sales of religious books are religious exercises. . . . And even if the distribution of religious books was a religious practice protected from regulation by the First Amendment, certainly the affixation of a price for the articles would destroy the sacred character of the transaction. The evangelist becomes also a book agent.

See also id at 133:

> The limitations of the Constitution are not maxims of social wisdom but definite controls on the legislative process. We are dealing with power, not its abuse. This late withdrawal of the power of taxation over the distribution activities of those covered by the First Amendment fixes what seems to us an unfortunate principle of tax exemption, capable of indefinite extension.

The majority of justices on the Court unequivocally rejected this argument, however. They insisted that the First Amendment not only protects the commercial sale of expressive materials but also prevents local governments from requiring those who wished to engage in this kind of activity to pay for the privilege of doing so. This was the case, Justice William O. Douglas explained in his majority opinion in *Murdock v Pennsylvania*,[139] because any other rule would give local governments the power to prevent groups they disliked from spreading their message from door to door, by making it too costly for them to do so.[140] The Court recognized, in other words, that in our highly commodified public sphere, a great deal of important expression takes the form of a commodity, and interpreted the First Amendment accordingly. It refused, as a result, to restrict constitutional protection to only noncommodified speech.

The Court instead limited the reach of the First Amendment in other ways. It insisted, for example, that courts did not need to rigorously scrutinize laws that merely incidentally restrict First Amendment rights. Hence, in *Associated Press v National Labor Relations Board*,[141] in 1937, a five-member majority of the Court adamantly rejected the argument that the First Amendment prevented Congress from enforcing the National Labor Relations Act against media companies like the Associated Press (AP).[142] "The business of the Associated Press is not immune from regulation," the Court explained, "because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws."[143] Because the Act did not in any way restrict publishers from "publish[ing] the news as [they] desire[d] it published," the Court deferred to Congress's judgment that the law was an "appropriate regulation[ ] . . . for the protection and advancement . . . [of interstate] commerce."[144]

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139 319 US 105 (1943).

140 Id at 115:

> The way of the religious dissenter has long been hard. But if the formula of this type of ordinance is approved, a new device for the suppression of religious minorities will have been found. This method of disseminating religious beliefs can be crushed and closed out by the sheer weight of the toll or tribute which is exacted town by town, village by village.

141 301 US 103 (1937).

142 Id at 130–31.

143 Id at 132.

144 Id at 129, 133.

The Court also applied deferential scrutiny to laws that directly regulated speech that, on its view, had nothing to contribute to public debate. In *Chaplinsky v New Hampshire*,[145] for example, the Court held that the First Amendment imposes no restrictions on the government's ability to punish the public use of derogatory comments, or "fighting words," because speech of this kind possesses "such slight social value" that even its total prohibition would not significantly undermine the search for truth or, presumably, any of the other goods the First Amendment safeguards.[146]

As these cases make clear, the Court reconciled vigorous protection for speech with the New Deal order not by restricting judicial activism to a noncommercial sphere, but by employing a purposive interpretation of the First Amendment's reach: by insisting, in other words, that heightened scrutiny was necessary only when "the regulation of communication affect[ed] a constitutional value specifically protected by the First Amendment."[147] The result was the creation of a free speech jurisprudence that, even as it markedly constrained legislative power in some respects, imposed few constraints on it in others.

Critics are absolutely right, therefore, when they assert that under the free speech principles articulated first by the New Deal Court, laws regulating commercial and corporate speech should be subject to heightened scrutiny only when they threaten interests that are, as Professors Jackson and Jeffries put it, "appropriate for [ ] vindication under the [F]irst [A]mendment."[148] The mere fact that they regulate speech is not a sufficient reason, on its own, to do so. Nor could it be, given how much human conduct involves expressive activity, in one form or another. As Professor Fred Schauer notes:

> "Speech" is what we use to enter into contracts, make wills, sell securities, warrant the quality of the goods we sell, fix prices, place bets, bid at auctions, enter into conspiracies, commit blackmail, threaten, give evidence at trials, and do

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[145] 315 US 568 (1942).

[146] Id at 572.

[147] Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L Rev 1, 9 (2000).

[148] Jackson and Jeffries, 65 Va L Rev at 6 (cited in note 3).

> most of the other things that occupy our days and occupy the courts.[149]

A rule that required heightened scrutiny whenever the government regulates speech, let alone expressive conduct, would effectively constitutionalize great swathes of both criminal and civil law. It would threaten the bifurcated system of review as surely as the resurrection of a freedom to contract would—and perhaps more so.

Critics are wrong, however, when they conclude from this fact that the First Amendment should be understood to impose little or no constraint on the government when it regulates commercial advertising or the speech of business corporations. This is because when the government regulates commercial advertising and at least some kinds of corporate speech, its actions do threaten free speech values. They threaten, more specifically, what the Court insisted again and again was the primary social good that the First Amendment protected: namely, the "free political discussion" necessary to ensure that "government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means."[150] As a result, we do not have to answer the difficult question of whether and to what extent individuals engage in self-expression when they write or pay for advertisements, or when they speak or pay for speech in a corporation's name.

Even if we think of the First Amendment *exclusively* as an instrument for "assur[ing] [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people," a strong argument can be made that when the government regulates purely commercial advertising or regulates at least some kinds of corporate speech, its actions can threaten First Amendment values, and therefore should be subject to heightened judicial scrutiny.[151] This is because of two other principles of modern free speech jurisprudence that critics of the commercial advertising and corporate speech cases tend to ignore.

The first is the principle that speech need not touch explicitly on politics to contribute to the free political discussion necessary to ensuring responsive democratic government. The Court made

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149 Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv L Rev 1765, 1773 (2004).

150 *De Jonge v Oregon*, 299 US 353, 365 (1937).

151 See *Roth v United States*, 354 US 476, 484 (1957).

this clear very early on when, in *Stromberg v California*[152] in 1931, it struck down a California law that made it a crime to "display[ ] a red flag . . . as a sign, symbol or emblem of opposition to organized government" because it found that the law could be used to punish those who raised the red flag to symbolize purely "peaceful and orderly opposition to government" and therefore interfered with the "free political discussion" that the First Amendment guaranteed.[153] In holding as much, the Court took for granted that speech can have political significance even when it makes no explicit political claims and is designed to appeal primarily to its audience's emotional, as opposed to cognitive, faculties—as the raising of the red flag clearly was.[154]

In later cases, the Court extended constitutional protection to much less obviously political kinds of speech because it recognized that those too could contribute, however indirectly, to political debate. In *Winters v New York*,[155] for example, the Court struck down a New York law that prohibited the distribution of what were colloquially known as "true crime magazines."[156] Like the flag raising prohibited by the California law, the magazines prohibited by the New York law made no explicit political claims. Instead, they consisted almost entirely of highly sensationalized, albeit generally true, stories of violent crime.[157] Unlike the raising of the flag, true crime magazines were not intended to advance a radical political agenda, nor were they closely associated with a particular political viewpoint. Instead, they served crassly commercial ends.[158] The Court nevertheless held that the magazines were "as much entitled to the protection of free speech as the best of literature" even though Justice Reed acknowledged in his majority opinion that the justices were unable to identify anything

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152 283 US 359 (1931).

153 Id at 361, 369.

154 Only Justice Pierce Butler, in his dissent, challenged the assumption that the raising of a red flag constituted the kind of expressive activity that was protected by the Speech Clause. Id at 376 (Butler dissenting) (questioning "whether the mere display of a flag as the emblem of a purpose, whatever its sort, is speech within the meaning of the constitutional protection of speech and press").

155 333 US 507 (1948).

156 Id at 519–20.

157 See Jean Murley, *The Rise of True Crime: Twentieth Century Murder and American Popular Culture* 19–21 (Praeger 2008).

158 The magazines did tend to advance, on their surface at least, conservative law-and-order messages. However, these messages were undermined by the sensationalism of the stories they contained. Id at 23 (noting that the true crime magazines tended to "juxtapose[ ] a sharp emphasis on law enforcement . . . with an equally strong but opposing impulse to sensationalize crime and make it more interesting to readers").

"of any possible value to society" in their contents.[159] It did so because it recognized that even if its members were not affected by the stories the magazines told, others might be. As Justice Reed noted, "Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."[160]

In other cases, the Court employed a similarly capacious view of what speech matters politically. In *Joseph Burstyn*, for example, the Court extended *Winters*'s logic to conclude that movies were also entitled to full First Amendment protection. "It cannot be doubted," Justice Tom Clark wrote for the majority, "that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression."[161] In concluding as much, the Court overruled an early twentieth-century decision which found that movies were *not* entitled to free speech protection because they were "spectacles . . . mere representations of events, of ideas and sentiments published and known."[162] "The importance of motion pictures as an organ of public opinion," it asserted, "is not lessened by the fact that they are designed to entertain as well as to inform."[163]

Meanwhile, in *Thornhill v Alabama*,[164] the Court extended protection to labor picketing—to speech that, on its face, concerned solely the private economic relationship between workers and their employer—because it recognized that pickets conveyed valuable information to the public about what was "[i]n the circumstances of [the] times" a pressing political issue: namely, labor unrest.[165] They had the capacity to affect public attitudes about political matters, in other words, even when they said nothing about politics per se.

The New Deal Court's willingness to extend First Amendment protection to overtly nonpolitical, even spectacular kinds of expression was an important reason why critics such as Professor

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159 *Winters*, 333 US at 510.
160 Id.
161 *Joseph Burstyn*, 343 US at 501.
162 *Mutual Film Corp v Industrial Commission of Ohio*, 236 US 230, 244 (1915).
163 *Joseph Burstyn*, 343 US at 501.
164 310 US 88 (1940).
165 Id at 102.

Hamilton, Braden, and Justice Frankfurter accused it of Lochnerism. Indeed, one of the two cases that Hamilton and Braden invoked to illustrate the excessive power that the Court had aggrandized to itself in its free speech jurisprudence was *Thornhill*.[166] (The other was another labor picketing case, *Milk Wagon Drivers Union of Chicago v Meadowmoor Dairies*.[167]) Justice Frankfurter, meanwhile, invoked the specter of *Lochner* not only in his dissenting opinion in *Barnette* (a symbolic speech case), but in the dissenting opinion he wrote in *Winters*. "The painful experience which resulted from confusing economic dogmas with constitutional edicts," Justice Frankfurter argued, "ought not to be repeated by finding constitutional barriers to a State's policy regarding crime, because it may run counter to our inexpert psychological assumptions or offend our presuppositions regarding incitements to crime in relation to the curtailment of utterance."[168]

Rather than evidence of an unjustified judicial intrusion into the prerogatives of the democratic legislature, however, what decisions such as *Winters*, *Joseph Burstyn*, and *Thornhill* reflect is the Court's quite sophisticated understanding of how it is that citizens in a democratic society come to form, or alter, their political beliefs. Scholars have accused the modern free speech tradition of being overly rationalist in its assumptions about how communication occurs in the mass public sphere. Professor Stanley Ingber has argued, for example, that a central assumption of the modern free speech tradition is that "people can use reason to focus on the substance of a message and to distinguish and reject the emotional and irrational appeals of its packaging."[169] In fact, what cases such as *Winters* and *Joseph Burstyn* make clear is that the Court has, for decades now, recognized that the emotional and irrational aspects of speech play an important role in shaping popular attitudes and beliefs about political, and other, matters—

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166 Hamilton and Braden, 50 Yale L J at 1352 & n 140 (cited in note 40).

167 Id at 1352 & n 141, citing *Milk Wagon Drivers Union of Chicago v Meadowmoor Dairies, Inc*, 312 US 287 (1941).

168 *Winters*, 333 US at 527 (Frankfurter dissenting).

169 Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 Duke L J 1, 35. See also Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U Ill L Rev 799, 801 (asserting that the assumption that underlies the "vast majority of First Amendment cases . . . is that audiences are capable of rationally assessing the truth, quality, and credibility of core speech"); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 Harv L Rev 1641, 1678 (1967) (critiquing the "essentially rationalist philosophy of the [F]irst [A]mendment").

that they are not just part of the package, but an intrinsic part of the message that is communicated. What these cases also make clear is the Court's refusal to allow an overly rationalistic—and perhaps also overly elitist—view of how communication occurs in the public sphere from unduly limiting the First Amendment's reach.

Certainly, the effect of decisions such as *Winters*, *Joseph Burstyn*, and *Thornhill* was to extend constitutional protection to the vast body of expression that contributed to the mid-twentieth-century mass public sphere. In this respect what these decisions also reflect is the Court's efforts during this period to craft a free speech jurisprudence that guaranteed protection not only to the elite and well-educated but to the "little people" as well.[170] They point, in other words, to the egalitarianism of the New Deal Court's free speech jurisprudence, generally—an egalitarianism that I explore in more detail in Part III.

For our part, they mean that critics of the Court's commercial and corporate speech cases have been asking the wrong question. To determine whether commercial advertising or noncommercial corporate speech possesses democratic and therefore constitutional value, the relevant question is not whether speech of this sort explicitly comments on governmental policy or marshals information that is directly relevant to policy action.

Nor, for that matter, is the relevant question whether speech of this sort expresses ideas or messages that otherwise could not be publicly expressed. In none of the cases discussed above did the Court condition constitutional protection on a showing that the ideas or messages conveyed by the movies, magazines, or music subject to regulation could not be expressed in other venues and by other means. This is because of another important principle of modern free speech jurisprudence that critics of the corporate speech cases tend to ignore: namely, that the government cannot inoculate itself against constitutional scrutiny simply by providing speakers with some other venue in which to speak. As the Court noted in *Schneider v State*[171] in 1939, and reaffirmed on many occasions later, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it

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[170] *Martin v City of Struthers*, 319 US 141, 146 (1943). The phrase "little people" is of course a patronizing one. As such, it aptly illustrates the New Deal Court's often awkward, but nevertheless valiant, efforts to surmount its own elitism.

[171] 308 US 147 (1939).

may be exercised in some other place."[172] This principle reflects the Court's recognition of the fact that speech is nonfungible: where one speaks can matter tremendously to what one conveys, and even when the government merely limits where and how speech occurs, its actions can significantly affect the formation of public opinion.[173] This is obviously as true of speech that is the product of a corporate author as it is of any other kind of speech. As a result, whether a natural person could convey the same message that a corporation wishes to communicate is utterly irrelevant to the first-order question of whether corporate speech has constitutional value.

Instead, the only question that courts need to ask to determine whether the direct regulation of commercial or corporate speech threatens free speech values, and therefore warrants heightened scrutiny, under the principles laid down by the New Deal Court, is: Is speech of this kind capable of affecting public attitudes about the important social and political issues of the day, either directly, via tactics of didactic persuasion, or indirectly, by means of the "subtle shaping of thought"?[174] When phrased as such, the answer to the question is undoubtedly yes, both with respect to the speech protected by the corporate speech cases and commercial advertising.

A. Corporate Speech

This conclusion is obvious when it comes to noncommercial corporate speech, like the speech at issue in *Bellotti* and *Consolidated Edison*. After all, in both those cases, the corporations wished to speak about what the *Thornhill* Court called "matters of public concern."[175] It is hard to think of more obviously important public questions than the merits of a graduated income

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[172] Id at 163. See also *Struthers*, 319 US at 150 (Murphy concurring); *Thornhill*, 310 US at 105–06.

[173] See Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U Chi L Rev 46, 68 (1987):

> Although rules prohibiting demonstrations in the curtilage of a jailhouse, noisy protests near a school, and leafletting on the grounds of a state fair may have little effect on the vast majority of speakers, they may have a significant effect on those speakers whose messages are tied directly to the jail, the school, or the state fair. By denying these speakers access to what are the most logical targets of their expression, such regulations deprive them of access to the most important audience and prevent them from utilizing especially dramatic and effective means of communication.

[174] *Joseph Burstyn*, 343 US at 501.

[175] *Thornhill*, 310 US at 101.

tax, or the costs and benefits of nuclear power plants.[176] Furthermore, like the movies, magazines, and labor pickets to which the Court extended protection in the cases cited above, the corporate speech in both cases addressed a general public audience. It thus presumably had as much ability to affect public attitudes and beliefs as those other kinds of speech.

This means that the Court was correct to conclude in both *Bellotti* and *Consolidated Edison* that, given the existing precedents, the appropriate standard of review was not the deferential scrutiny applied to laws that regulate "ordinary commercial" activity but the more stringent scrutiny applied when First Amendment rights are at stake. This is the case notwithstanding the fact that—in *Bellotti*, and in campaign finance cases that built on *Bellotti*, such as *Citizens United*—the government did not regulate the corporation's speech directly, by dictating what it could or could not say in its own voice, but instead regulated it indirectly, by limiting its ability to spend money on speech.[177]

Some critics have argued that this distinction matters: that even if rigorous judicial scrutiny is appropriate when the government directly regulates what corporations say, a more deferential standard of review is appropriate when the government regulates corporate spending on speech. Judge J. Skelly Wright famously argued, for example, that the spending of money on speech should be treated as conduct, rather than "pure speech," and that laws regulating such spending should be subjected to the much more deferential scrutiny applied to incidental regulations of speech, like the generally applicable business laws at issue in *Associated Press v NLRB*.[178] But, as the discussion earlier makes clear, the Court only applied deferential scrutiny in *Associated Press* because it found that doing so would not significantly impede the ability of the members of the AP to communicate what they wanted to say.[179] The same is not necessarily true of laws that restrict spending on speech. To say that one may not pay for

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[176] See *Bellotti*, 435 US at 769; *Consolidated Edison*, 447 US at 532.

[177] The statute challenged in *Bellotti* prohibited corporations from spending money to influence "the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." *Bellotti*, 435 US at 767–68. The law challenged in *Citizens United* prohibited corporations (and unions) from using general treasury funds to pay for speech that "expressly advocate[d] the election or defeat of a candidate." *Citizens United*, 558 US at 320–21.

[178] J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 Yale L J 1001, 1006 (1976).

[179] *Associated Press*, 301 US at 133.

speech is, in many contexts at least, tantamount to saying that one cannot speak. This makes the application of deferential scrutiny in corporate spending cases hard to square with the modern precedents and the principles that inform them.

The fact that the Court was operating squarely within the modern free speech tradition when it interpreted the First Amendment to require exacting scrutiny of the ballot law in *Bellotti* or the regulatory ban in *Consolidated Edison* doesn't mean, of course, that it *couldn't* have crafted an exception for the speech of business corporations. But the decision to do so would have constituted the deviation from New Deal principles, not the opposite. This is not, it is worth pointing out, because heightened scrutiny of laws that regulate corporate speech is necessary to protect the interests of the corporate speaker, who may indeed have "no soul to damn and no body to kick."[180] Heightened scrutiny is necessary to protect the right of the public to hear what the corporation has to say—as Justice Powell's opinion in *Bellotti* held quite explicitly.[181]

Scholars have both criticized and praised the commercial and corporate speech cases for shifting the focus of First Amendment jurisprudence away from what they claim was its earlier focus on the rights of the speaker and focusing instead on the rights of the audience.[182] But in fact the New Deal Court was vitally concerned with the right of the public to access speech, not just the right of the speaker to express it. In *Thornhill*, for example, the Court declared the purpose of the free speech guarantee to be to "supply the public need for information and education with respect to the

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[180] John C. Coffee Jr, *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 Mich L Rev 386, 386 (1981).

[181] *Bellotti*, 435 US at 777 ("The inherent worth of the speech in terms of its capacity for *informing the public* does not depend upon the identity of its source, whether corporation, association, union, or individual.") (emphasis added).

[182] For scholars who have made claims of this sort, see, for example, Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 Brooklyn L Rev 5, 6 (1989) (arguing that the commercial speech cases represent the shift toward "a hearer-centered free speech doctrine" and away from "the speaker-centered [F]irst [A]mendment doctrine developed during the last sixty years in the areas of religion, politics, science, and art"); Post, 48 UCLA L Rev at 14 (cited in note 147) (arguing that constitutional protection for commercial speech is justified by the right of listeners, "the need to receive information, rather than [by] the rights of speakers" and that this distinguishes it from other kinds of speech—including political, artistic, and scientific speech—that are justified by the rights of speakers to participate in "public discourse"); Shanor, 2016 Wis L Rev at 145–46 (cited in note 122) (arguing that although First Amendment protection for commercial speech has been "framed . . . as a listener-based right . . . , paradigmatic [that is, noncommercial] 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").

significant issues of the times," and insisted that unions had to be free to engage in labor pickets not so that they could advance their economic self-interest but so that members of the public could learn about the causes, and nature, of labor disputes and on that basis, make "effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society."[183] Five years later, the Court again asserted that the purpose of the First Amendment was to allow the public to access "the widest possible dissemination of information from diverse and antagonistic sources."[184]

The fact that the First Amendment has traditionally cared about the rights of the audience means that many of the questions that preoccupy scholarly discussion about the corporate speech and campaign finance cases—such as, whether corporations can speak like natural persons, or whether the spending of money is itself an expressive act—are simply beside the point, at least when it comes to the threshold question of whether heightened scrutiny applies.[185] Even if we assume that spending is not an intrinsically expressive act, and even if we assume that corporations have no constitutional value as speakers in their own right, it is nevertheless the case that the direct as well as indirect regulation of corporate speech threatens the First Amendment rights of the audience to access a "diverse and antagonistic" public sphere whose terms, and limits, are not set by the government. This doesn't mean, of course, that speech of this kind cannot be regulated. But it does mean that the same constraints that apply when the government regulates noncorporate speech should apply when it regulates speech of this kind.

B. Advertising

The same is true when the government regulates commercial advertising, although the analysis here is less straightforward, given the explicitly nonpolitical nature of the speech. But here too, once one takes the implicit, affective, and aesthetic content of commercial advertising into account, it becomes obvious that

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[183] *Thornhill*, 310 US at 102–03.

[184] *Associated Press v United States*, 326 US 1, 20 (1945).

[185] For an argument on the first point, see Charles R. O'Kelley Jr, *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After* First National Bank v. Bellotti, 67 Georgetown L J 1347, 1351 (1979). For a nuanced analysis of arguments about the expressive nature of spending money, see Deborah Hellman, *Money Talks but It Isn't Speech*, 95 Minn L Rev 953, 969–70 (2011).

even "purely" commercial ads like the ads in *Virginia Pharmacy* have the capacity to shape public attitudes about important matters of public concern in at least two ways—the first of which the Court has discussed in some detail, the second of which it has not.

1. Advertising as information.

First, even if commercial advertisements do not explicitly comment on political debates, they do provide their audience a great deal of information about "who is producing and selling what product, for what reason, and at what price."[186] In *Virginia Pharmacy*, the Court argued that information of this kind was constitutionally valuable for two reasons: first, because it helps ensure that when consumers make purchasing decisions, they are "intelligent and well informed" and thereby makes the operation of the market system more efficient;[187] second, because it enables citizens to form intelligent decisions about whether, and to what extent, the economy should be regulated.[188] The Court's first argument for why the information that commercial ads provide is constitutionally valuable is far from satisfying. Market efficiency is simply not a value the First Amendment has been understood, in its modern incarnation, to protect. To the contrary: the cases strongly suggest that under the New Deal settlement it is the legislature, not the judiciary, that has responsibility for determining how efficient the market should be.[189]

The Court's second argument for why the information that commercial advertisements communicate is constitutionally valuable is more persuasive, however. This is because, under the New Deal settlement, it *is* the responsibility of the courts to ensure that voters have the necessary authority to oversee the democratic branches' regulation of the market. Ensuring the free flow of information about who is selling what at what price obviously helps voters do so.

To see this, one need only consider the advertisements in *Virginia Pharmacy*. In that case, state law prohibited pharmacies

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186 *Virginia Pharmacy*, 425 US at 765.

187 Id.

188 Id.

189 See, for example, *Williamson v Lee Optical of Oklahoma, Inc*, 348 US 483, 487–88 (1955). See also Post, 48 UCLA L Rev at 9 (cited in note 147) ("The First Amendment does not require courts to scrutinize government actions that directly interfere with the efficiency of the market, as for example by setting prices or prohibiting products. Why then should the First Amendment be concerned with the more indirect effects of advertising regulations on market efficiency?").

from advertising by almost any means the prices of the prescription drugs they sold.[190] The result was that it was very difficult for consumers in Virginia to learn about the significant price differences that existed in different pharmacies across the state.[191] This made it difficult not only to price shop, but also to evaluate the wisdom of the Virginia legislature's decision not to regulate pharmaceutical prices. That decision was by no means politically uncontroversial. Since the late 1950s, consumer advocates had been urging state and federal lawmakers to impose price caps or take other measures to prevent the price gouging that many claimed pervaded the industry.[192] These calls for reform almost entirely failed to result in meaningful price control legislation.[193] Instead, the only way in which Virginia and many states regulated pharmaceutical prices was by banning advertising about them—a state of affairs that some attributed to the power of the pharmacy lobby.[194]

One could, consequently, interpret the Virginia law as an effort by the legislature to protect the political as well as the economic status quo by depriving citizens of the information necessary to change it. Even if this were not the case, the fact that there was significant political debate about how to regulate drug prices in the 1960s and 1970s makes it difficult to see why the ads prohibited by the Virginia law touched any less on matters of public concern than the speech punished by the antipicketing law struck down in *Thornhill*. In both cases, the legislature restricted the public dissemination of speech that, although such speech did not comment explicitly on political matters, nevertheless communicated information that was directly relevant to contemporary political debates (debates about how to regulate drug prices in the first case, and debates about how to regulate labor in the second

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190 *Virginia Pharmacy*, 425 US at 752.

191 As the Court noted, the price of the same drug could vary by as much as 650 percent. Id at 754.

192 See Colleen Chien, *Cheap Drugs at What Price to Innovation: Does the Compulsory Licensing of Pharmaceuticals Hurt Innovation?*, 18 Berkeley Tech L J 853, 867 (2003) (describing these efforts).

193 Id.

194 Dale A. Danneman, *Retail Drug Advertising Bans Are Bad Medicine for Consumers—Is There a Sherman Act Prescription?*, 15 Ariz L Rev 117, 120 (1973) (citation omitted):

> [T]he National Association of Retail Druggists has been said to be, at one time at least, the most politically powerful retail trade association in the United States. It is thus no wonder that the associations have been able to keep consumers in the dark in regard to prescription drug pricing.

case). The same reasoning that led the *Thornhill* Court to conclude that the First Amendment protects labor pickets should therefore lead to the same conclusion about commercial ads—at least commercial ads that provide information about politically controversial products, services, or industries.[195] This turns out to include a wide swathe of advertising.

Indeed, one can easily find many other examples of "purely commercial advertising"[196] that nevertheless provides politically relevant market information. Consider in this respect the gambling ads at issue in *Posadas*. In that case, a Puerto Rican casino brought a First Amendment challenge to a law that prohibited casinos that operated in the territory from advertising their services to local residents.[197] The government argued that the law was intended to prevent residents from patronizing the casinos, and to thereby prevent the social problems that would be created were Puerto Ricans to gamble in significant numbers.[198] Critics have suggested that the real motivation for the law may have been more nefarious—that, like the ban on drug-price advertising in Virginia, the advertising ban was an anticompetitive measure that worked to preserve the economic power of established industry players.[199] Whatever the law's true motivations, it is indisputable that one of its effects was to make the decision to legalize gambling in Puerto Rico less salient to voters. This was a decision that generated significant opposition, both in 1948, when it was first made, and in the decades that followed.[200] Like the Virginia

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195 This is certainly what the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) argued in the brief it filed against the advertising ban. Brief for AFL-CIO as Amicus Curiae in Support of Appellant, *Posadas de Puerto Rico v Tourism Company of Puerto Rico*, No 84-1903, *11–12 (US filed Dec 12, 1985) (available on Westlaw at 1985 WL 669449). The AFL-CIO presumably filed the brief because it recognized the logical connection between labor speech and commercial advertising and feared that restrictions on the First Amendment rights of the latter could be used to constrict the First Amendment rights of the former.

196 Id at *13.

197 *Posadas*, 478 US at 332–34. The casinos that operated in Puerto Rico were intended to serve an exclusively tourist clientele. Id at 332.

198 Id at 341.

199 David A. Strauss, *Constitutional Protection for Commercial Speech: Some Lessons from the American Experience*, 17 Can Bus L J 45, 46–47 (1990) (suggesting that "[t]he Puerto Rican ban on casino advertising [may not have] reflect[ed] a public-interested effort to discourage Puerto Ricans from gambling" but instead may have been "a way for the casinos to cartelize their industry").

200 As Professor Dennis Merrill notes, the decision to legalize gambling in Puerto Rico was initially "opposed by many Puerto Ricans" because they feared "its many unsavory

ban on drug-price advertising, the law thus helped preserve the political as well as the economic status quo.

These examples demonstrate how difficult it can be to distinguish between economically relevant and politically relevant information in a post–*Carolene Products* world—that is, in a world in which decisions about economic policy are left almost entirely up to the democratic political process. In such a world, it makes sense to conclude, as the Court did in *Virginia Pharmacy*, that any ad that communicates to its readers information about "who is producing and selling what product, for what reason, and at what price"[201] has the capacity to impact public attitudes and beliefs about what, under the New Deal settlement, is supposed to be a core matter of public concern—namely, whether and how to regulate the market.

2. Advertising as art.

What the Court has described as the "informational function" of commercial advertising[202] does not entirely explain, however, why advertising as a genre receives the constitutional protection it does. This is because, although many commercial ads communicate information about who is selling what, where, and at what price, many ads do not. A significant portion of contemporary advertising spending goes to what we might call "image" as opposed to informational advertising.[203] Image ads persuade consumers to buy the products they advertise not by providing them with information about the wonderful features of that product but instead by associating that product with positive images or ideas.[204]

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side effects, especially infiltration by organized crime, as had occurred in nearby Cuba." Dennis Merrill, *Negotiating Paradise: U.S. Tourism and Empire in Twentieth-Century Latin America* 187 (UNC 2009). In the decades after, opposition to the casinos only continued to grow. Dennis Merrill, *Negotiating Cold War Paradise: U.S. Tourism, Economic Planning, and Cultural Modernity in Twentieth-Century Puerto Rico*, 25 Diplomatic Hist 179, 197–98 (2001).

201 *Virginia Pharmacy*, 425 US at 765.

202 *Central Hudson*, 447 US at 563.

203 Mark Snyder and Kenneth G. DeBono, *Appeals to Image and Claims About Quality: Understanding the Psychology of Advertising*, 49 J Personality & Soc Psych 586, 586 (1985).

204 See id at 586–87. See also William Leiss, Stephen Kline, and Sut Jhally, *Social Communication in Advertising* 43 (Routledge 2d ed 1990) (noting that "the information model has never had much relevance for national consumer product advertising" because "[t]he explicit function of spectacular image-based . . . advertising is not so much to inform as it is to persuade").

A good example of an image ad is the Coca-Cola "Hilltop" ad from the early 1970s. In the ad, dozens of attractive young people, of different skin colors and wearing clothing from different regions of the world, sing "I'd Like to Buy the World a Coke" while holding bottles of Coca-Cola in their hands.[205] The ad was famously successful. It is credited with helping Coca-Cola reform its image as the "stodgy" soda and outperform its rival, Pepsi-Cola, in sales among young people.[206] Yet it communicated very little, if any, novel information to its audience. In 1971, it was not news to anyone that Coca-Cola was a beverage, that it was sold in glass bottles with a red and white label, or that it was brown in color. Nor did the song, or the slogan that appeared at the end of the ad ("It's the real thing. Coke.") communicate any novel market information. After all, what the ad meant by saying that Coke was the real thing was not that it was "really" Coke but that it was really good at bringing people together.[207] It is difficult to see how information of this kind—if we can call it that—had any bearing on debates about how to regulate the soda industry, assuming they existed. It is consequently difficult to justify constitutional protection for this ad, or the many similar image ads that populate magazines and television, by making an argument about the political relevance of the market information they provide. And yet nothing in any of the First Amendment cases suggests that the Hilltop ad should be treated any differently than the drug price ads in *Virginia Pharmacy*.

Although the Court has never really explained why image ads are entitled to constitutional protection, it is easy enough to understand. These ads may not provide consumers much information about existing market conditions, but they possess the capacity to shape public attitudes in another way. By putting into circulation highly curated images of "the good," they help naturalize, reaffirm—and sometimes reshape—social values.

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[205] See *Coca-Cola, 1971 - 'Hilltop'; "I'd like to buy the world a Coke"*, available at https://www.youtube.com/watch?v=1VM2eLhvsSM (visited Apr 28, 2020) (Perma archive unavailable).

[206] See Douglas B. Holt, *How Brands Become Icons: The Principles of Cultural Branding* 233–34 (Harvard Business 2004).

[207] This was made clear by the slogan of Coca-Cola's previous advertising spot, entitled Friendly Feelings, which included the slogan "Coca-Cola, it's the real thing, like friendly feelings." Jeff Chang, *Who We Be: A Cultural History of Race in Post-Civil Rights America* 61 (St. Martin's 2014).

Consider once again the Hilltop ad. The ad encouraged its viewers to drink Coca-Cola by linking the beverage to an important symbol of youth culture—the flower power movement—and to the values it promoted (optimism, peace, cosmopolitanism). By doing so, the ad helped Coca-Cola position itself as the young people's drink. But it also reshaped popular conceptions of the flower power movement, by denuding it of its harder edges—its association with antiwar activism for example—and by suggesting that all that was necessary to achieve international peace and brotherhood was shared consumption of a sugary good.[208]

Or consider another successful advertising campaign: the "You've Come a Long Way, Baby!" campaign produced by the Philip Morris Tobacco Company to sell its Virginia Slims cigarettes to women. The campaign is famous—perhaps infamous—for using the iconography of the feminist movement to sell cigarettes to a female audience.[209] But the relationship did not go only one way. By linking its cigarettes to women's empowerment, Philip Morris managed not only to make its cigarettes attractive to female consumers; it also shaped consumers' conception of what an empowered woman looked like. This is one reason why the ads were regarded with ambivalence by at least some contemporary feminists.[210] The campaign domesticated feminism by feminizing it—but it also popularized the movement by defanging it, rendering it more attractive, less threatening, and more mainstream.[211]

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[208] See Laura A. Hymson, *The Company That Taught the World to Sing: Coca-Cola, Globalization, and the Cultural Politics of Branding in the Twentieth Century* *204 (unpublished dissertation, 2011) (on file with author) ("The [H]illtop commercial . . . leveraged Coca-Cola's global reach as a promise of peace and unity to American consumers in a way that made them feel good about Coke and about being American" even while "disavow[ing] continuing racial unrest [in the United States and elsewhere] and the international fears of nuclear war and communism.").

[209] See Emily Westkaemper, *Selling Women's History: Packaging Feminism in Twentieth-Century American Popular Culture* 164 (Rutgers 2017).

[210] For example, *Ms.* magazine struggled to decide whether Virginia Slims advertisements could run in its pages, notwithstanding the magazine's editorial policy to avoid ads that objectified women. Id at 188. The magazine printed one Virginia Slims ad, and also featured a mail-in offer for a Virginia Slims promotional calendar but, after readers protested, the magazine refused to print further ads. Id. Other self-described feminists celebrated the ad campaign as evidence of women's progress, however. Id at 178–80.

[211] See Andrew Wernick, *Promotional Culture: Advertising, Ideology, and Symbolic Expression* 36 (Sage 1991):

> Virginia Slims . . . construct[ed] an ambiguous image of female-ness which encapsulated the ambivalence of those women most likely to be drawn towards a

Advertisers' ability to sell sometimes utterly prosaic commodities by linking them symbolically to otherwise unrelated ideas, institutions, or practices led the sociologist Raymond Williams to describe modern advertising as "a highly organized and professional system of magical inducements . . . functionally very similar to magical systems in simpler societies."[212] For our purposes, what it means is that even when they do not provide much verifiable information about the products they promote, ads possess constitutional value for the same reason that movies and video games do: because they not only amuse, entertain, and distract but also shape public attitudes about all kinds of matters that have nothing to do with how best to regulate the market. They do so by "creat[ing] structures of meaning" that "mould[ ] and reflect[ ] our life today."[213] Or as Professor Andrew Wernick puts it: "[T]he brand-imaging of mass produced consumer goods links them symbolically to the whole world of social values. . . . By representing such values as just part of the visual furniture, the ad naturalizes them, and to that extent reinforces their hold."[214]

We may not like the fact that commercial ads possess this power. Concern with the detrimental effect that ads can have on public attitudes is in fact an important reason why governments seek to regulate them.[215] It nevertheless means that, under New Deal principles, ads are as much entitled to constitutional protection as are the other expressive commodities (such as movies, magazines, television shows, and pop songs) that populate the contemporary public sphere and that shape public attitudes by

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gender-marked cigarette. At its heart was a compromise formula in which old (patriarchal) and new (liberal-egalitarian) conceptions of female gender identity were both given a place.

212 Raymond Williams, *Advertising: The Magic System*, in Raymond Williams, ed, *Problems in Materialism and Culture* 185 (Verso 1980).

213 Judith Williamson, *Decoding Advertisements: Ideology and Meaning in Advertising* 11–12 (Marion Boyars 1978).

214 Wernick, *Promotional Culture* at 22–23 (cited in note 211).

215 This was certainly true of the gambling ads at issue in *Posadas*. As the government explained, the reason it prohibited casino ads targeted at a domestic audience was because it feared that the ads would make gambling appear too enticing and would thereby undermine the "moral and cultural patterns" that (it claimed) organized Puerto Rican society. *Posadas*, 478 US at 341. More recent advertising regulations also seek to limit what advertisers can portray in order to mitigate the presumably detrimental cultural effects of the ads that they produce. For example, the British trade group, the Advertising Standards Authority, prohibits advertisers from depicting human bodies in a "socially irresponsible" manner—that is, in a manner that valorizes being unhealthily thin. See *Social Responsibility: Body Image* (Advertising Standards Authority, June 14, 2019), archived at https://perma.cc/776Y-4A3T.

telling their audience attractive stories about how the world is, or how it could be. This is not because the messages that ads communicate are necessarily *socially* valuable ones. We may think, to the contrary, that they are overly materialistic,[216] inevitably conservative,[217] or simply not as valuable as the messages communicated by political or artistic speech.[218] Nevertheless, cases like *Winters* and *Joseph Burstyn* make clear that courts should closely scrutinize how and why they are regulated, because to do otherwise would be to vest the government with largely unconstrained power over an important site of public meaning-making and, ultimately, politics.

C. Implications

The preceding discussion suggests that it is not the *Virginia Pharmacy* Court's conclusion that advertising is entitled to First Amendment protection that is difficult to reconcile with the principles that undergird modern free speech law.[219] Nor is it the assertion in *Bellotti* that corporate speech that touches on matters of public concern is "at the heart of the First Amendment[ ]" that is difficult to do so.[220] Instead, it is the Court's rather offhand assertion in *Valentine* in 1942 that the First Amendment "imposes no [ ] restraint on government as respects purely commercial advertising" that is difficult to reconcile with the rest of the New Deal precedents.[221]

In fact, a strong argument could be made that the decision in *Valentine* is not the cornerstone of the New Deal settlement that scholars such as Professors Jackson and Jeffries have suggested it is. Rather, *Valentine* reflects the much narrower and more rationalistic view of the democratic public sphere that characterized the pre–New Deal case law, and that led courts to deny constitutional protection not only to commercial advertising but to plays and movies as well.[222] It is certainly the case that the distinction

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[216] See Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 Case W Res L Rev 411, 467–68 (1992).

[217] See Wernick, *Promotional Culture* at 42–43 (cited in note 211).

[218] See Eberle, 42 Case W Res L Rev at 458 (cited in note 216).

[219] See *Virginia Pharmacy*, 425 US at 762.

[220] See *Bellotti*, 435 US at 776.

[221] *Valentine*, 316 US at 54.

[222] See, for example, *Mutual Film Corp*, 236 US at 244–45 (denying constitutional protection to movies on the ground that they are mere "spectacles" rather than "part of the press of the country or [ ] organs of public opinion"). See also John Wertheimer, Mutual

the *Valentine* Court drew—between speech that "communicat[es] information and disseminat[es] opinion" and "commercial advertising"—was not a novel invention but a feature of the case law that was at that point many decades old.[223]

This suggests that in overruling *Valentine*, the Court did not break with the principles of the modern free speech tradition. It merely ensured that they applied more consistently.[224]

This does not mean, of course, that those principles are correct. One might think, just as Hamilton and Braden or Justice Frankfurter thought, that the New Deal Court interpreted the First Amendment more expansively than democratic principles can justify when it invalidated regulations of speech that were not patently unreasonable—and that, for that reason, decisions such as *Winters*, *Joseph Burstyn*, and *Virginia Pharmacy* were wrongly decided (even perhaps Lochnerian).

If one believes, however, in the premise of the modern constitutional system—namely, that courts can and should play an active role in defending the institutions of democratic government against what Justice Louis Brandeis called "the occasional tyrannies of [ ] majorities"[225]—then it proves extremely difficult to explain why courts should rigorously scrutinize the laws regulating movies and magazines or, for that matter, political speech, but not laws regulating commercial advertising. The fact that they are a product of commercial motives obviously impacts what commercial advertisements say and how they say it, but it also means that ads penetrate where more self-consciously political or artistic genres of expression may not.[226]

Film *Reviewed: The Movies, Censorship, and Free Speech in Progressive America*, 37 Am J Legal Hist 158, 161–70 (1993) (discussing the lack of constitutional protection for plays as well as movies).

[223] *Valentine*, 316 US at 54. For earlier cases that relied on this distinction, see *Coughlin v Sullivan*, 126 A 177, 177 (NJ 1924); *People v Johnson*, 191 NYS 750, 751 (Gen Sess 1921); *Pavesich v New England Life Insurance Co*, 50 SE 68, 80 (Ga 1905).

[224] It was not the only decision in which the Court did so. *Virginia Pharmacy* can be understood as only one in a series of decisions that the Court handed down over the course of the 1950s, 1960s, and 1970s in which it revised its earlier, unduly narrow, judgment of what kinds of speech contribute to the "unfettered interchange of ideas" that the First Amendment protects. See, for example, *Roth v United States*, 354 US 476, 484, 487–89 (1957) (extending constitutional protection to sexually explicit but not prurient speech); *New York Times Co v Sullivan*, 376 US 254, 288, 292 (1964) (extending protection to negligent defamatory falsehoods about public officials); *Cohen v California*, 403 US 15, 21 (1971) (extending protection to profanity).

[225] *Whitney v California*, 274 US 357, 376 (1927) (Brandeis concurring).

[226] See Williams, *Advertising: The Magic System* at 184–85 (cited in note 212):

The result is that laws that restrict the dissemination of commercial advertisements, or limit what they can say, may pose as great a threat to the vitality of the democratic public sphere as movie censorship laws or other repressive speech regulations.[227] Consider in this respect a law (enacted, say, in 1953) that, in order to preserve "social order," banned the public circulation of any commercial ad that included images of white and black people interacting in an intimate manner. Surely we would all recognize such a law as political, in its aims and effects, even if the speech it regulated was purely commercial? And surely we would all recognize that one of the effects of such a law would be to burden civil rights activists who wished to use commercial advertising to subvert prevailing segregationist social norms?[228]

This suggests that the New Deal Court was correct when it insisted that, if the First Amendment is to protect the "unfettered interchange of ideas for the bringing about of political and social

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> Advertising is . . . in a sense, the official art of modern capitalist society: it is what "we" put up in "our" streets and use to fill up to half of "our" newspapers and magazines: and it commands the services of perhaps the largest organized body of writers and artists, with their attendant managers and advisers, in the whole society.

[227] This point should not be overstated. The commercial motives of advertisers tend to make them rather conservative in their messaging, as many have noted. Hence, laws that restrict the content of commercial ads will be less likely to prevent truly novel or heterodox ideas from entering the public sphere than laws that restrict the content of art-house movies or plays. On the other hand, the fact that ads are such a pervasive feature of the modern public sphere means that they may possess more power than other genres of expression to normalize contested ideas and beliefs. This explains why both individuals and groups seeking to promote particular, contested social values tend to pay a great deal of attention to the content of commercial ads. They obviously recognize the political power of the genre. See, for example, *Devour Succumbs to Tasteless Advertising* (American Family Association, Sept 12, 2016), archived at https://www.perma.cc/V96V-8N8U; Tovia Smith, *Backlash Erupts After Gillette Launches a New #MeToo-Inspired Ad Campaign* (NPR, Jan 17, 2019), archived at https://perma.cc/Y6GL-2EFX.

[228] Civil rights activists indeed tried to do just that. To give only one example: in 1963, members of the Congress for Racial Equality (CORE) attempted to get the Coca-Cola Company to include images of white and black people sharing a Coke in its advertisements. Hymson, *Coca-Cola* at *231 (cited in note 208). The attempt was only partially successful. Coca-Cola's president, Paul Austin, agreed to include integrated images in Coca-Cola ads that ran in *Ebony* magazine but refused to do so in magazines that appealed to a primarily white audience because he feared backlash from Coke's southern white consumers. Id at *231–32. To appease CORE, Austin proposed running ads in these magazines that included images of both white and black people drinking Coke, but not at the same table. Id. The incident nevertheless suggests that the CORE activists recognized that Coca-Cola advertising represented an important site for the representation—and perhaps reconfiguration—of ideas of race, equality, and community.

changes desired by the people,"[229] it must apply not only to expressly political speech but also to crassly commercial speech, like the true crime magazines in *Winters*, not despite but in some respects *because* of its power to entertain, distract, and seduce. The Court simply erred in how broadly it understood this principle to apply.

Some have argued that even if this is true—even if the First Amendment should be interpreted to extend some protection to commercial advertising and to other kinds of commercially oriented speech—commercial speech nevertheless is entitled to only a lesser degree of protection than other kinds of speech because of its commercial orientation. Professors Robert Post and Amanda Shanor recently argued, for example, that the same rules that apply in political and artistic speech cases should not apply in cases involving commercial advertising because advertisers, when they speak, "are not participating in democratic self-determination [but] are instead transacting business in the marketplace."[230] Others have argued that lesser protection for commercial advertising is necessary to ensure that the government can effectively regulate the marketplace. Justice Rehnquist made this argument in his dissent in *Central Hudson Gas & Electric Corp v Public Service Commission of New York*,[231] and numerous First Amendment scholars have made similar arguments in recent years to criticize the strength of the protection courts today provide to commercial advertising and advertisers.[232]

It is far from obvious, however, why the commercial orientation of commercial ads—or for that matter, corporate expression—should fundamentally alter the constitutional calculus in

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[229] *Roth*, 354 US at 484.

[230] Post and Shanor, 128 Harv L Rev F at 171–72 (cited in note 2).

[231] 447 US 557 (1980).

[232] See, for example, id at 595–99 (Rehnquist dissenting); Shanor, 2016 Wis L Rev at 146, 150 (cited in note 122) (arguing that the state may regulate commercial speech more extensively than other kinds of speech due to its "subordinate [constitutional] status and [the fact that] it is not a speaker-oriented autonomy right" but that the Supreme Court's recent advertising cases "undermin[e] the [doctrinal] features that the Court that created the [commercial speech] doctrine put in place to ensure that the First Amendment would not be the undoing of the regulatory state"); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L & Contemp Probs 195, 203 (Issue 4, 2014) (arguing that the recent commercial and corporate speech cases represent "the Court's march away from a principle that it accepted with the New Deal: [b]uying and selling enjoy no special constitutional status, and legislatures can regulate markets and businesses to make life more equitable, safe, or healthful").

free speech cases. For one thing, it simply is not true that advertisers are the only constitutionally protected speakers who speak in order to "transact[ ] business in the marketplace" rather than to "participat[e] in democratic self-determination." The same is obviously true of video game manufacturers, Hollywood producers, and true crime magazine publishers. Indeed, the pervasiveness of these kinds of business motives among those who engage in public expression is a predictable consequence of the fact that the "free trade in ideas"[233] that the First Amendment protects tends (like most important activities in our capitalist society) to be organized around market principles and to involve the buying and selling of goods. As a result, most of the politically or culturally important speech that circulates in public either takes a commodified form or occurs on a commodified platform.

Accordingly, if all those who engaged in speech in order to make money rather than to contribute to the formation of democratic public opinion were denied protection, *except* when they communicated "accurate information to the public"—as Post and Shanor argue should be the rule for advertising[234]—the result would be a tremendously narrower and weaker First Amendment. After all, as the previous discussion makes clear, a tremendous amount of important political expression can take place via speech that neither communicates accurate factual information nor is intended to contribute to democratic political debates.

Even leaving aside the problematic effects that a principled application of such a rule would have on the efficacy of the First Amendment as a safeguard of the democratic public sphere, it is not at all clear why it should matter, constitutionally, whether a speaker engages in public speech in order to contribute to the democratic process of self-government or in order to make hard cash. What the modern First Amendment protects is not, after all, simply the right of citizens to self-consciously participate in processes of democratic self-representation. What it protects and, as I suggested earlier, *has always protected*, is the right of the public to access "the widest possible dissemination of information from diverse and antagonistic sources."[235] Unless speech that is motivated by profit has nothing to contribute to public debate—and

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[233] *Abrams v United States*, 250 US 616, 630 (1919) (Holmes dissenting).

[234] Post and Shanor, 128 Harv L Rev F at 173, 177 (cited in note 2) ("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.").

[235] *Associated Press*, 326 US at 20.

this is, as I have shown, obviously not the case—the degree of protection that speech receives cannot rest on the purity of the speaker's motives.

Nor is there any reason to think that advertising and corporate speech need to be considered second-class or "subordinate" kinds of protected speech to enable the government to regulate the market effectively. Advertising is a profit-oriented genre of expression, certainly, but so too are the movie business, the television business, the book industry, and virtually all the other mediums of mass communication that the First Amendment today protects. And yet the fact that these kinds of speech are considered fully protected does not mean, and has never meant, that the government cannot regulate the conditions of their production, the terms on which they are sold, and in limited respects, their content, in order "to make life more equitable, safe, or healthful."[236]

This is not to say that the vigorous protection that courts have in recent years extended to commercial advertising and to other kinds of commercially oriented speech has not made it harder for the government to regulate the market. It certainly has. It has, for example, made it much more difficult for legislatures to shape consumer behavior by using what Justice Blackmun described in *Virginia Pharmacy* as "highly paternalistic" speech regulations.[237] This can pose a significant obstacle to legislatures that want to reduce teen smoking by limiting cigarette advertising.[238]

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[236] Purdy, 77 L & Contemp Probs at 203 (cited in note 232).

[237] *Virginia Pharmacy*, 425 US at 770.

[238] Notwithstanding Justice Blackmun's absolutist language, courts have *not* found the antipaternalism principle to totally foreclose laws of this sort. See, for example, *Discount Tobacco City & Lottery, Inc v United States*, 674 F3d 509, 518 (6th Cir 2012) (upholding significant portions of the Family Smoking Prevention and Tobacco Control Act against a constitutional challenge); *National Association of Tobacco Outlets, Inc v City of Providence*, 731 F3d 71, 74 (1st Cir 2013) (upholding city ordinances designed to limit the marketing and sale of cigarettes to minors against a First Amendment challenge). Even the Court has held that, when it comes to cigarette advertising, "[t]he State's interest in preventing underage tobacco use is [not only] substantial . . . [but] compelling." *Lorillard Tobacco Co v Reilly*, 533 US 525, 564 (2001). Nevertheless, the First Amendment antipaternalism principle clearly has made it considerably more difficult for the government to engage in this kind of market regulation. See, for example, id at 534–35, 564 (striking down a state ban on cigarette advertising within one thousand feet of a school or playground because it unduly interfered with the ability of "tobacco retailers and manufacturers . . . [to] convey[ ] truthful information about their products to adults, and [the ability of] adults . . . [to] receiv[e] truthful information about tobacco products").

The constraint that the commercial advertising cases impose on the government's ability to shape consumer behavior by limiting what ads say and how they say it is not, however, different in kind from the constraint that the movie and magazine and newspaper cases impose on legislative power. The same principle that makes it difficult for legislatures to restrict cigarette advertising also makes it difficult for the government to restrict images of smoking in movies, even when it believes, with good evidence, that images of smoking in movies help glamorize the consumption of a very dangerous and addictive product, and even when cigarette companies, fueled by the pursuit of profit, spend considerable sums of money playing those images in the movies.[239] It is a mistake to conceive of the first law as economic regulation and the second as something else. In both cases, the modern free speech tradition intrudes upon the government's power to shape consumer behavior; in both cases, it does so for democratic ends. There is no reason to think that the trade-off the First Amendment requires is *worse* in the first case than in the second, even if it may have to be made more frequently, given the sheer volume of commercial ads.

This does not mean that courts need to apply precisely the same rules in cases involving free speech challenges to commercial ads, or corporate speech, as they apply in cases involving free speech challenges to other kinds of protected speech. There are, as I explore in more detail in the next Part, specific features of commercial advertising that justify the somewhat different rules courts have traditionally applied in commercial speech cases, and continue to apply today. For the most part, however, these distinctive features of advertising regulation have nothing to do with the fact that advertising is motivated by commercial aims.

Nor should the preceding discussion be interpreted to mean that the trade-offs that the contemporary commercial advertising and corporate speech cases make between the relevant regulatory and democratic interests are in all cases good ones. There is good reason to believe, as I show in the next Part, that many of the trade-offs the recent cases make are bad: that the contemporary commercial and corporate speech jurisprudence tends to overvalue the interest of speaker autonomy and undervalue the

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[239] It may be the case that the cigarette companies no longer do this, but at one point the companies spent large sums of money paying movie studios to depict smoking in their films. See Simon Chapman and Ronald M. Davis, *Smoking in Movies: Is It a Problem?*, 6 Tobacco Control 269, 269 (1997).

interests promoted by government regulation. Critics are correct, in other words, to be concerned about the powerful deregulatory effects of recent commercial and corporate speech decisions like *Citizens United* and *Sorrell*.

What the preceding discussion does mean, however, is that these (very serious) problems with contemporary free speech law cannot be blamed on what Morgan Weiland calls the "outward creep" of the First Amendment—namely, its expansion to include commercially oriented speech like advertising, and to protect commercial speakers like corporations.[240] Nor can they be blamed on courts' more recent tendency to treat commercial advertising and corporate speech as equal in value to other, less obviously commercial, kinds of speech. Nor, for that matter, are they an inevitable consequence of the intrinsically libertarian tendencies of the modern free speech tradition, as some have recently suggested.[241]

Instead, as the next Part demonstrates, the economically deregulatory tendencies of contemporary free speech law are the product of changes in how the Court—and consequently, lower courts—have come to understand the free speech right over the past four decades. These changes in the judicial conception of what it means to possess freedom of speech have been profound—their impact has, as I show, extended far beyond just the advertising and corporate speech cases. Nevertheless, it is these changes in what courts understand freedom of speech to mean, rather than in their understanding of how broadly it applies, that best explains what is wrong with the holdings in *Citizens United* and *Sorrell*.

By focusing on the extension of First Amendment protection to advertising and corporate speech, scholars miss the far more consequential, and in fact, far more radical, changes that have taken place in free speech jurisprudence over the past forty years—changes that have reshaped, and continue to reshape

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[240] Weiland, 69 Stan L Rev at 1423 (cited in note 121).

[241] See Kessler, 116 Colum L Rev at 1922, 1925 (cited in note 135) (arguing that "economically libertarian tendencies [ ] may be intrinsic to judicial enforcement of civil liberties, regardless of the politics of individual judges," and arguing as a result that reformers should "break with a legal tradition long insensitive to the deleterious impact of judicial civil libertarianism on political regulation of the economy"); Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 Colum L Rev 2219, 2232–33 (2018) (arguing that "First Amendment theory rests on libertarian assumptions at war with progressivism" and that "the holding of *Citizens United* was also more or less inevitable").

many areas of free speech law besides the commercial and corporate speech cases. To see why, it is necessary to revisit one more time the early twentieth-century debates about *Lochner*'s ills, and what it means to enforce constitutional rights in a society characterized then as now by significant inequality.

III. AN ALTERNATIVE GENEALOGY

As I noted in Part I, in the first few decades of the twentieth century, critics provided many different explanations for why *Lochner*, and the other decisions in which the Supreme Court invalidated labor laws on freedom of contract grounds, got it wrong. One of the explanations they provided was the Thayerian argument that Justice Holmes made in his *Lochner* dissent. But another, in fact far more common, explanation for why the freedom of contract cases were incorrectly decided was that they relied upon an unrealistic and out-of-date conception of the modern industrial workplace, and the circumstances under which labor contracts were actually forged.

Scholars, including such respected figures as Professors Roscoe Pound and Robert Eugene Cushman, criticized the courts for producing a jurisprudence that failed to take adequate "cognizance . . . of the realities of modern life."[242] They argued that the overly "mechanical and legalistic" approach that courts took when deciding Fourteenth Amendment cases prevented them from "effective[ly] [ ] investigat[ing] or consider[ing] [ ] the situations of fact behind or bearing upon the statutes" they analyzed, and led them to rely upon a nostalgic, and incorrect, view of contracting—one which was ignorant of, or willfully blind to, the very significant economic pressures that prevented workers from making meaningful choices about where and under what conditions to contract.[243] Ultimately, it was courts' inability to grasp the economic and social reality of the modern workplace, these critics argued, that produced "rules and decisions which, tested by their practical operation, defeat[ed] liberty" rather than enhanced it.[244]

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[242] Robert Eugene Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment*, 20 Mich L Rev 737, 750–51 (1922). See also Pound, 18 Yale L J at 454–55 (cited in note 11); Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 Harv L Rev 943, 960 (1927); Henry Wolf Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 Harv L Rev 6, 7–8 (1924); Louis D. Brandeis, *The Living Law*, 10 Ill L Rev 461, 463, 467 (1916).

[243] Bernstein, *Rehabilitating* Lochner at 44–45 (cited in note 30).

[244] Roscoe Pound, *Mechanical Jurisprudence*, 8 Colum L Rev 605, 616 (1908).

Critics provided a number of explanations for why courts paid such insufficient attention to the economic conditions under which workers exercised their freedom of contract. They blamed it on the class biases of judges,[245] the inadequacies of legal education (which, Pound argued, focused too much on philosophical argument and too little on the sociological analysis of law),[246] and the very formalistic character of legal reasoning at the time.[247]

In fact, we can attribute the failure of *Lochner*-era courts to adequately account for the "realities of modern life" almost entirely to the strong public/private distinction they relied upon to delimit the scope of constitutional rights. As Professor Joseph William Singer and others have demonstrated, a foundational assumption of constitutional doctrine during this period was that there were two spheres of activity that could be strictly separated—a "private sphere of individual contractual freedom [and] the public sphere of government regulation"—and that the Constitution protected individual liberty only against the latter.[248]

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[245] See Cushman, 20 Mich L Rev at 748 (cited in note 242); Eaton S. Drone, *The Power of the Supreme Court*, 8 Forum 653, 657 (1890) ("Consciously or unconsciously, honestly or otherwise, judges on the supreme bench have been controlled or influenced by their political beliefs, by partisan bias, by public sentiment . . . , [and by] the theories of the party with which they have acted or may sympathize.").

[246] Pound, 18 Yale L J at 457 (cited in note 11). See also Brandeis, 10 Ill L Rev at 470 (cited in note 242):

> [J]udge[s] came to the bench unequipped with the necessary knowledge of economic and social science, and [their] judgment suffered likewise through lack of equipment in the lawyers who presented the cases to [them]. . . . It is not surprising that under such conditions the laws as administered failed to meet contemporary economic and social demands.

[247] See Pound, 18 Yale L J at 457 (cited in note 11) (identifying as a source of the problems with the freedom of contract cases the dominance of a "mechanical jurisprudence . . . in which deduction from conceptions has produced a cloud of rules that obscures the principles from which they were drawn, in which conceptions are developed logically at the expense of practical results and in which the artificiality characteristic of legal reasoning is exaggerated"); Biklé, 38 Harv L Rev at 12 (cited in note 242) ("It seems clear that a substantial part of the criticism which [the Court's due process cases] aroused was due to the Court's undertaking to decide for the country the controlling questions of fact on the basis of *a priori* reasoning.").

[248] Joseph William Singer, *Legal Realism Now*, 76 Cal L Rev 465, 478 (1988). See also Gary Peller, *The Metaphysics of American Law*, 73 Cal L Rev 1151, 1196–1204 (1985) (citation omitted):

> The representational practice of the liberty of contract era assumed that the social world was divisible into "public" and "private" spheres of action, implicitly corresponding to the "presence" or "absence" of the individual's free will. When conduct was "purely" private, an expression of the autonomous free will of the affected parties, there was no basis for the imposition of legislative power.

What this meant in practice was that courts construed the Constitution to protect individuals against constraints on their liberty that were the intended result of government regulation of the private sphere, but refused to construe the Constitution to protect individuals against constraints on their liberty that were the product of private decision-making—even private decision-making that was enforced by means of the legal mechanisms of tort, contract, and property law.[249] To the contrary: courts insisted that what the Constitution guaranteed *was* the freedom of private individuals to decide the terms of their relationships with one another and to enforce those decisions, if necessary, by using the courts.[250] Hence, they interpreted the Constitution to allow the government to intrude upon this realm of private ordering only when doing so was necessary to advance a limited number of important purposes—most of which had to do with protecting the system of private ordering itself or safeguarding the welfare of the community as a whole.[251]

The sharp divide that courts drew in this period between the public and the private realms helps explain their strong antipathy toward "class legislation"—to legislation, that is, that restricts a constitutionally protected liberty or property right of some private citizens in order to protect the constitutionally protected liberty or property of others.[252] After all, if what the Constitution guarantees is a private sphere in which individuals can negotiate their relationships for themselves, efforts by the government to reorder the terms of those relationships are obviously illegitimate, at least so long as those subject to the regulation are

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[249] See Peller, 73 Cal L Rev at 1202 (cited in note 248):

> Private law generally was conceived as the realm where the judiciary carried out the prior intentions of social actors. . . . In private law, the judiciary was conceived as a neutral mediator for the enforcement of individual intent, just as in constitutional law legislative power was limited to the neutral public interest.

[250] See Singer, 76 Cal L Rev at 479 (cited in note 248) ("Freedom of contract meant that the parties were free to make or not make contracts, and that when they made contracts the courts would enforce the terms to which the parties had agreed.").

[251] See Sunstein, 87 Colum L Rev at 877 (cited in note 5) (noting that an "especially distinctive" feature of the *Lochner* Court's approach was its "sharp limitation of the category of permissible government ends" and insistence that "[e]fforts to redistribute resources and paternalistic measures were both constitutionally out of bounds"); Gillman, *Constitution Besieged* at 97–98 (cited in note 26) (describing the requirement that government intervention into the public sphere should benefit the public as a whole); Singer, 76 Cal L Rev at 479 (cited in note 248) (noting that contracts could not be enforced if "there was a defect in free will, such as fraud, duress, or incapacity").

[252] Peller, 73 Cal L Rev at 1198 (cited in note 248).

autonomous actors, capable of exercising their constitutional rights on their own behalf.[253]

Courts' assumption during this period that what the Constitution guarantees is a private sphere of freedom from government control—and one organized, in large part, via the mechanisms of the private market—also helps explain why, notwithstanding the cries of formalism, courts were willing to pay attention to *certain* kinds of facts—for example, to the extraordinary physical dangers that workers in specific industries faced—but refused, for the most part, to integrate into their constitutional analysis any consideration of the economic and social facts that realist critics wanted them to.[254] A constitutional doctrine that allows the government to limit freedom of contract when necessary to protect workers against particularly hazardous working conditions does not appear to pose an existential threat to the independence of the private market. But a constitutional doctrine that allows the government to limit freedom of contract whenever necessary to correct for inequalities in economic and social power *does*—at least if one assumes, as the Court clearly assumed, that inequality of this kind is a natural and inevitable result of a market system.[255] Hence, although courts on occasion acknowledged the economic constraints that workers in concentrated industries faced when making decisions about when and how to sell their labor, for the most part they left out of their analysis any consideration of how economic inequalities affected freedom of contract, or any

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[253] As Cushman noted, courts allowed legislatures to protect persons who were "infants, lunatics, wards, or [ ] under some other definite legal disability" against private exploitation and abuse. Cushman, 20 Mich L Rev at 748 (cited in note 242). But it did not allow the legislature to do the same with respect to workers, like the bakers in *Lochner*, who possessed ordinary "intelligence and capacity." *Lochner*, 198 US at 57.

[254] See, for example, *Holden v Hardy*, 169 US 366, 393–98 (1898) (examining in some detail the peculiar dangers faced by laborers in underground mines and upholding a maximum-hours statute for them); *Muller v Oregon*, 208 US 412, 421–23 (1908) (examining in some detail the effects of extended labor on women's "physical structure and the performance of maternal functions" and upholding a maximum-hours law, and concluding that a maximum-hours law that applied only to female laborers was constitutionally permissible because it was "not imposed solely for [the] benefit [of the workers] but also largely for the benefit of all").

[255] As the Court declared in *Coppage v Kansas*, 236 US 1 (1915), "[I]t is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights." Id at 17.

of the other freedoms that the Fourteenth Amendment guaranteed.[256] Doing so was simply too threatening to the doctrinal status quo.

Rather than an oversight, or the consequence of an inadequate legal education, we can thus understand the economically insensitive character of constitutional law during the *Lochner* era as the predictable result of a jurisprudence that insisted on construing constitutional rights as largely negative autonomy rights—as rights that entitled the individual to freedom from governmental regulation, but not rights that entitled the individual to anything more positive (such as a meaningful choice about where and how to contract).

The result was, nevertheless, a body of law that appeared increasingly out of touch with the modern world—one that insisted on treating as a sphere of freedom what appeared to many exactly the opposite. It was the sharp divide between legal doctrine and social reality that ultimately produced the crisis of legitimacy that resulted in the New Deal revolution. As Professor Barry Friedman notes, it was "because the *Lochner*-era judges engaged in formalist legal reasoning, without attention to the felt necessities of the time, that they earned the contempt of their contemporaries."[257]

This helps explain why, when the New Deal Court finally broke with *Lochner*-era jurisprudence, it did so by rejecting the sharp distinction between the public and private realms on which it had previously relied. The Court made as much clear in its landmark decision in *West Coast Hotel Co v Parrish*,[258] in 1937, when it declared that the liberty protected by the Due Process Clause

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[256] In *Holden*, for example, the Court acknowledged that workers in mines and their employers "do not stand upon an equality, and that their interests are, to a certain extent, conflicting" and concluded that "[i]n such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority." *Holden*, 169 US at 397. It made clear, however, that this inequality justified legislative intervention only when the work the laborers performed was particularly hazardous. Id at 396:

> While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the processes of refining or smelting.

[257] Friedman, 76 NYU L Rev at 1388 (cited in note 29).

[258] 300 US 379 (1937).

was a "liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people" and made clear that one of these evils which menaced the welfare of the people was the evil created by the private "exploitation of a class of workers who are in an unequal position with respect to bargaining power."[259] In *National Labor Relations Board v Jones & Laughlin Steel Corp*,[260] the Court similarly insisted that the right of employees to collectively organize had to be recognized as a "fundamental right" given the unequal bargaining power that existed between employer and employee.[261]

Professor Edward Corwin, in an article published in *The New Republic* just a few months later, argued that these decisions were revolutionary because they recognized something that earlier decisions had not: namely, that "'liberty' is . . . something that may be infringed by other forces as well as by those of government; indeed, something that may require the positive intervention of government against those other forces."[262] The Court's recognition of this fact, Corwin argued, "mark[ed] a development of profound significance in our constitutional history."[263]

In fact, the Court's recognition that private action could result in a denial of constitutional rights would prove less revolutionary than Corwin may have anticipated—at least when it came to its freedom of contract cases—due to the fact that, a few years after *West Coast Hotel* was handed down, the Court effectively deconstitutionalized the entire area of law. The significant deference the Court gave the legislature when it came to decisions that implicated freedom of contract rendered its understanding of what that freedom meant largely irrelevant to the disposition of cases, or to the operation of governmental power writ large.[264]

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[259] Id at 391, 399.

[260] 301 US 1 (1937).

[261] Id at 33.

[262] Edward S. Corwin, *The Court Sees a New Light* (The New Republic, Aug 4, 1937), archived at https://perma.cc/2YH3-F73N.

[263] Id.

[264] As Professor Jack Balkin notes, "*West Coast Hotel* could have been seen as the clarion call for a new doctrine of substantive economic justice, where economic rights were based not upon parameters derived from the common law but from evolving notions of economic fairness." Balkin, 83 Nw U L Rev at 295 (cited in note 48). Instead, it became merely a pit stop on the way to *Carolene Products*. See id at 296.

In other areas of law, however—for example, its First Amendment cases—the Court continued to play an active role in enforcing constitutional limits on state action. It was in this context, then, that the New Deal Court's "revolutionary" approach to the interpretation of constitutional liberties—and more specifically, its sensitivity to the threat that private economic power posed to constitutionally protected liberty—made itself felt.

A. The Public and Private Divide in the New Deal Cases

Consider in this respect the Court's 1945 decision in *Associated Press v United States*.[265] The case involved a First Amendment challenge to a district court opinion that found that the Associated Press violated the Sherman Antitrust Act when it enacted bylaws that prevented its member newspapers from selling news to nonmember newspapers and allowed member newspapers to block competitors from membership.[266] The district court enjoined the AP from enforcing these bylaws and the AP appealed.[267] It argued that the injunction violated the First Amendment rights of both it and its members by requiring them to accept into the association, and to share news with, newspapers in whose pages they did not want their articles to appear.[268] The government, for its part, argued that this restriction on the freedom of AP newspapers was justified by the government's "vital" interest in ensuring "the dissemination of news from as many different sources, and with as many different facets and colors as is possible."[269]

The case thus posed essentially the same question as that posed in *Lochner*: Could the government restrict the constitutionally protected freedom of powerful private actors (bakery owners, members of the AP) in order to protect the constitutionally protected freedom of less powerful others (bakers, those excluded from membership in the AP, the reading public)? But if in

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[265] 326 US 1 (1945).

[266] Id at 4, 19.

[267] See *United States v Associated Press*, 52 F Supp 362, 375 (SDNY 1943).

[268] Reply Brief for Tribune Company and Robert Rutherford McCormick, *Associated Press v United States*, Nos 57, 58, 59, *19 (US filed Nov 13, 1944) (available on Westlaw at 1944 WL 42540) (arguing that if the Sherman Act is enforced as the lower court dictated, "AP must admit to membership and therefore 'utter' its news dispatches to every applicant newspaper" and that "no 'clear and present danger' justifies such a compulsive decree").

[269] Brief for the United States, *Associated Press v United States*, Nos 57, 58, 59, *91 (US filed Nov 1944) (available on Westlaw at 1944 WL 42539).

Lochner, the Court answered this question with a resounding no, in *Associated Press* the Court reached the opposite conclusion. It upheld the district court's injunction because it recognized that even if there was no difference in the "intelligence and capacity" of those included and those excluded from the organization, their economic circumstances were not the same. Because it was extremely difficult for nonmember newspapers to, as the Court put it, "g[et] along without AP news," members of the AP possessed the economic if not the legal power to make it much more difficult for competitor newspapers to exercise their freedom of press.[270] This meant, the Court concluded, that it was constitutionally permissible for the government to limit the AP's ability to exclude newspapers from its organization and to prevent the sharing of members' news.[271] "It would be strange indeed," Justice Black wrote in his majority opinion, "if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom."[272] He went on:

> The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.[273]

As this passage makes clear, the *Associated Press* Court recognized what the *Lochner* Court had not: namely, that private economic power could limit the exercise of constitutional rights just as government coercion could, and that government intervention into the private sphere could consequently protect, not merely threaten, constitutional liberty. As a result, in this and

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[270] *Associated Press*, 326 US at 17–18.
[271] Id at 21–22.
[272] Id at 20.
[273] Id.

other decisions, it refused to invalidate laws like the Sherman Antitrust Act that limited the freedom of media producers but did so in order to promote a more "diverse and antagonistic" public sphere.[274] To the contrary: it interpreted those laws as not only constitutionally permissible but as means by which the legislature in its own right furthered First Amendment values.

Nor did the Court limit itself to affirming the constitutionality of legislative interventions of this sort into the private sphere. In contexts where either the legislative or executive branches did not do enough to safeguard diverse and inclusive participation in public debate, the Court did so itself, by interpreting the First Amendment to require positive rights of access to important public spaces. In what would come to be known as its public forum cases, for example, the Court rejected the *Lochner*-era rule that categorically denied constitutional protection to speakers who were excluded from publicly owned land.[275] It held instead that, when it comes to parks, streets, and sidewalks, the government not only has to grant speakers rights of access to those spaces, but also had to bear the costs of their speech—including the security costs that offensive or otherwise unpopular speakers could create.[276] In *Marsh v Alabama*,[277] the Court extended essentially the same rule to private property owners who sought to exclude speakers from privately owned streets, parks, and sidewalks.[278]

In these and other cases, the New Deal Court effectively rejected the idea that what the First Amendment guarantees is no

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[274] For other examples of the government's intervention into the private sphere on similar grounds, see *National Broadcasting Co v United States*, 319 US 190, 216–19 (1943); *Associated Press*, 301 US at 123–24.

[275] See *Davis v Massachusetts*, 167 US 43, 47–48 (1897). This rule reflected the more general view that prevailed during this period that when the government acted within the system of private ordering, rather than regulating the terms on which it occurred—when it exercised, in other words, the same powers as property owner or employer that private individuals possessed—no constitutional constraints applied. (In such cases, courts regarded the government action as part of the "private," rather than public sphere of activity, and immune as a result from constitutional scrutiny.) As Justice Holmes put it in his majority opinion in *Ellis v United States*, 206 US 246 (1907), "The Government purely as contractor, in the absence of special laws, may stand like a private person." Id at 256. See also *Davis*, 167 US at 47 ("For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.").

[276] See *Terminiello v City of Chicago*, 337 US 1, 4 (1949); *Schneider*, 308 US at 163; *Hague v Committee for Industrial Organization*, 307 US 496, 515–16 (1939); *Lovell v City of Griffin*, 303 US 444, 450 (1938).

[277] 326 US 501 (1946).

[278] Id at 507–08.

more and no less than a sphere of negative liberty. It insisted instead that the First Amendment granted individuals something more positive: namely, some right to access, either as speaker or as listener, the "uncensored" "channels of communication" that citizens needed in order to effectively exercise their democratic role.[279] It insisted, furthermore, that the constitutional interest in facilitating this kind of positive liberty trumped the right of both public *and* private property owners to control the uses to which their property was put.[280]

The result was a body of law that did not, as Hamilton and Braden suggested in their 1941 article, simply replicate in new form *Lochner*-era due process jurisprudence. Both bodies of constitutional law, it is true, vested judges with considerable power to strike down democratically enacted laws and had, as a result, a considerable deregulatory effect. Nevertheless, their deregulatory effects were quite different. If in the earlier period, the Court had interpreted the Due Process Clause as a limit on the government's ability to *alter* the existing balance of economic and political power by restricting the freedom of the powerful and the propertied, now the Court interpreted the First Amendment as a limit on the government's ability to *shore up* the existing balance of power by, among other things, enforcing the traditional right of property owners to exclude, when doing so made it significantly more difficult for some to participate in public debate. Put differently, if *Lochner* due process jurisprudence rendered many kinds of redistribution constitutionally impermissible, the New Deal Court's free speech jurisprudence rendered certain kinds of redistribution constitutionally obligatory—or at least, constitutionally permissible.

There were limits to how much the Court was willing to constrain either government or private power in order to promote a

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[279] Id.

[280] See id at 509:

> In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute.

See also *Hague*, 307 US at 515 ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

more diverse and more inclusive public sphere. For one thing, neither in *Associated Press* nor in any other decision did the Court hold that the legislature was constitutionally *required* to ensure that powerful speakers did not use their economic muscle to shut others up, even if this is the conclusion that the logic of the opinion might suggest. The Court also did not interpret the First Amendment to require all property owners to grant access to their property for those who wanted to speak on matters of public concern. It merely required rights of access to sufficiently important public places.[281] The Court also allowed the government, in some cases at least, to make rules for the regulation of the public sphere that imposed a disparate burden on the ability of those with few economic resources to make their voices publicly heard. In *Kovacs v Cooper*,[282] for example, a bitterly divided Court upheld a law that banned the public use of "loud and raucous" loudspeakers attached to cars,[283] even though, as Justice Black pointed out in his impassioned dissent, the law made it considerably harder for "people who have ideas that they wish to disseminate but who do not have enough money to own or control publishing plants, newspapers, radios, [or] moving picture[s]" to do so.[284] The Court concluded that, because the law served important government aims and because it left open alternative means for those it affected to communicate their message, it was constitutionally permissible.[285]

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[281] Professor Mike Seidman has argued that the Court ultimately turned away from what he calls "*Marsh*-style reasoning" because the logic of the decision was impossible to reconcile with the New Deal settlement. Louis Michael Seidman, *The* Dale *Problem: Property and Speech Under the Regulatory State*, 75 U Chi L Rev 1541, 1549, 1550–51 (2008) (citation omitted):

> Taken to the limits of its logic, *Marsh* constitutionalizes virtually all of public policy. Every decision concerning the allocation of property rights has implications for the total amount of speech society produces. Hence, all such decisions become constitutionally mandatory and, therefore, outside the sphere open to political control. . . . Of course, this outcome was unacceptable. The liberals on the Court attempted to avoid it by deconstitutionalizing "neutral" background property law entitlements.

But in fact, Justice Black's opinion in *Marsh* made quite clear that judicial override of legislative property allocations was required only in a limited number of cases. *Marsh*, 326 US at 506. Nothing in *Marsh* therefore requires, or even hints at the possibility, that property law might be thoroughly constitutionalized, and therefore placed outside the sphere open to political control.

[282] 336 US 77 (1949).

[283] Id at 89 (Reed) (plurality).

[284] Id at 102 (Black dissenting).

[285] Id at 89 (Reed) (plurality).

The Court did not assume, in other words, that the First Amendment guaranteed speakers and listeners absolute equality of opportunity to speak. The Court did assume, however, that the First Amendment guaranteed speakers and listeners a meaningful opportunity to both speak and listen in important public places—and that this meant that, in some contexts, the rights of both public and private property owners had to give way to the rights of speech.[286] Because it interpreted freedom of speech to mean more than a formal or "abstract" right the speaker held against the state, it also paid close attention to the economic and social, as well as legal, forces that limited the exercise of expressive freedom and crafted doctrinal rules that attempted to ensure that the socially and economically powerless, as well as the socially and economically powerful, had a meaningful opportunity to speak.[287]

B. The Burger Court's Shift

The Court continued to employ this, what we might call "realist," conception of freedom of speech throughout the 1950s and 1960s. Indeed, a hallmark of the Warren Court's free speech jurisprudence was its sensitivity to the threat that economic, social, and political inequality posed to the "uninhibited, robust, and wide-open" public debate that it now understood the First Amendment to safeguard.[288] This explains, among other things, the

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[286] Even the *Kovacs* plurality took for granted that, were the disparate impact sufficiently grave, the First Amendment would prevent the government from being able to restrict speech, no matter how legitimate its aim. *Kovacs*, 336 US at 88–89.

[287] See, for example, *Terminiello*, 337 US at 3–35 (striking down the breach-of-peace conviction of a speaker who refused to stop speaking after his speech drew a hostile, and increasingly violent, reaction from its audience because to do otherwise would be to allow the "standardization of ideas" not only by "legislatures [and] courts" but also by "dominant political or community groups"); *Murdock v Pennsylvania*, 319 US 105, 112 (1943) (striking down a license tax that applied to sellers of expressive materials out of concern that it would impose too onerous a burden on "those who do not have a full purse" and would prevent "the needy" from being able to engage in religious evangelism).

[288] *New York Times Co v Sullivan*, 376 US 254, 270 (1964). See also John E. Nowak, *Foreword: Evaluating the Work of the New Libertarian Supreme Court*, 7 Hastings Const L Q 263, 276, 280 (1980):

> The Warren Court's constitutional rulings . . . [reflected the principle that] government institutions should neither approve nor tolerate the existence of private interests which seek to produce unfairness and inequality beyond the principles of the social compact.
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> . . .

Court's insistence in *New York Times Co v Sullivan*[289] that the First Amendment protects speakers against not only criminal statutes or regulatory ordinances but also against civil suits brought by private parties, and the economic sanctions that result.[290] It also explains the Court's vigorous enforcement of the rule against hecklers' vetoes in cases involving civil rights protestors.[291] And it explains the decision in *Tinker* to extend constitutional protection to student speech.[292]

Beginning in the early 1970s, however, there was a marked shift in the Court's First Amendment jurisprudence away from the equality-promoting, context-sensitive approach that had characterized its free speech decisions, more or less, from the 1930s through the late 1960s. The Burger Court, despite the fears of some critics, proved itself to be a sometimes-aggressive defender of First Amendment freedoms.[293] But it interpreted those freedoms quite differently than had the New Deal and Warren Courts. Rather than interpreting the First Amendment as a guarantee of expressive freedom that depended on—but nevertheless sometimes required deviation from—the ordinary rules of property and contract, the Court now increasingly interpreted the First Amendment as a grant of almost total freedom to the property owner to dictate the expressive uses to which his or her property would be put. The result was a free speech jurisprudence that

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> The Court's most famous and innovative [free speech] decisions promoted [the idea] that the social compact must promote equality and must allow for free speech on social issues.

289 376 US 254 (1964).

290 Id at 277–78 ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.") (citation omitted).

291 See, for example, *Gregory v City of Chicago*, 394 US 111, 112–13 (1969); *Edwards v South Carolina*, 372 US 229, 237 (1963).

292 *Tinker*, 393 US at 508–09. Like the earlier opinion in *Terminiello*, the decision in *Tinker* represents the Court's efforts to ensure that government actors, even when well-meaning, do not act in a manner that makes government institutions an instrument of the censorial desires of the majority. Id at 508 ("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression . . . [because a]ny variation from the majority's opinion may inspire fear."), citing *Terminiello*, 337 US 1.

293 See Martin H. Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 Nw U L Rev 1031, 1031 (1983) ("Perhaps in th[e] area [of freedom of speech] more than any other, the Burger Court has evinced a relatively protectionist and libertarian attitude, which, though assuredly not applied with unwavering consistency, occasionally even surpassed the protectionist zeal of the Warren Court.") (citation omitted).

was much more "mechanical" and "abstract" in the Poundian sense of the terms.

Perhaps the most striking evidence of the Court's new understanding of what the First Amendment guarantee of freedom of speech prohibits or requires was its 1974 decision in *Miami Herald Publishing Co v Tornillo*.[294] The case involved a First Amendment challenge to a Florida law that required newspapers that criticized the character of political candidates to offer those candidates space in their newspaper to reply.[295] Five years earlier, in *Red Lion Broadcasting Co v Federal Communications Commission*,[296] the Court had upheld FCC regulations that imposed a similar right of reply requirement on radio broadcasters.[297] *Red Lion* was a controversial decision because it allowed the government to compel media companies to transmit speech "which their 'reason' tells them should not be published" notwithstanding Justice Black's suggestion in *Associated Press v United States* that the First Amendment did not permit this kind of compulsion.[298] The *Red Lion* Court upheld the regulations, however, for reasons very much in keeping with *Associated Press*—namely, because it found that they "enhance[d] rather than abridge[d] the freedoms of speech and press protected by the First Amendment" by ensuring that a diversity of viewpoints was heard on the radio notwithstanding the concentration of control over the industry in relatively few hands.[299] In this respect, it represented a continuation of principles the Court had relied upon for over thirty years.

It was quite significant, then, when the *Tornillo* Court did not so much overrule *Red Lion* as reject its entire analytic approach.[300] It struck down the Florida right of reply law in *Tornillo*,

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294 418 US 241 (1974).

295 Id at 244.

296 395 US 367 (1969).

297 Id at 386–401.

298 *Associated Press*, 326 US at 20 & n 18.

299 *Red Lion*, 395 US at 375, 391 (concluding that "the First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use").

300 The *Tornillo* opinion did not mention *Red Lion* at all. This allowed the Court to employ a markedly different approach to the constitutional questions raised by right of reply laws than that employed in *Red Lion*. But it also meant that the opinion was not subsequently understood to have overruled *Red Lion*; instead it merely cabined its reach to radio and television broadcasting. See *Federal Communications Commission v Pacifica Foundation*, 438 US 726, 748 (1978). The Court's understanding of the decision did change, however, considerably. In later decisions, the Court asserted that the reason broadcast

even though it recognized that the newspaper industry was plagued by many of the same problems of concentrated power as the radio industry.[301] In his majority opinion, Chief Justice Warren Burger noted, for example, that because the newspaper business (like the radio industry) was highly concentrated, "the power to inform the American people and shape public opinion" was "place[d] in few hands."[302] Chief Justice Burger noted also that the problem of concentration could not be easily corrected by the ordinary processes of market competition, given the steep barriers to entry that existed in the newspaper industry, in Florida as elsewhere.[303] Chief Justice Burger nevertheless insisted that the First Amendment sharply limited the government's ability to do anything about these problems. "A responsible press is an undoubtedly desirable goal," he wrote, "but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[304]

The opinion suggested in fact that any law that limited the freedom of newspaper editors to decide the size and content of the newspapers they edited—no matter how small a limitation it imposed—would "fail[ ] to clear the barriers of the First Amendment" because of its intrusion on editorial freedom.[305] This would be the case "[e]ven if a newspaper would face no additional costs to comply with a compulsory access law," Chief Justice Burger wrote, "and would not be forced to forgo publication of news or opinion by the inclusion of a reply."[306] This is because, he explained, "[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising."[307] It is instead the product of "editorial control and judgment."[308] "It has yet to be demonstrated," he added, "how governmental regulation of this

media could be heavily regulated was not so much the power that broadcasters enjoyed due to their control of a scarce expressive resource, but the unique pervasiveness of the broadcast media in private homes and its accessibility to children. See id at 748–49. A concern with the economic power that broadcasters possessed, and its effect on the interests that the First Amendment protects, disappeared entirely from the analysis in this, as in almost all other areas of free speech law.

301 *Tornillo*, 418 US at 248–49.

302 Id at 250.

303 Id at 251.

304 Id at 256.

305 *Tornillo*, 418 US at 258.

306 Id.

307 Id.

308 Id.

crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."[309]

In an article published the year after *Tornillo* was handed down, Professor Kenneth Karst argued that the breadth of the language in Chief Justice Burger's opinion reflected the Court's desire to not only resolve the case, but also "make a more general doctrinal statement."[310] If so, that doctrinal statement may have been that, notwithstanding the many cases in which the Court had said the opposite, the First Amendment did not in fact guarantee "the widest possible dissemination of information from diverse and antagonistic sources" but instead guaranteed something quite different: namely, a zone of individual liberty, free from state control. Certainly the opinion's explicit and quite extended rejection of the idea that courts should take account of facts such as market concentration or media diversity when assessing the constitutionality of newspaper right of reply laws strongly suggested that, in this context at least, the Court believed that the First Amendment interest in protecting the expressive autonomy of newspaper editors trumped the First Amendment interest in ensuring that members of the public had access to a wide range of views and information.

In portions of his opinion, Chief Justice Burger suggested that it was by protecting the expressive autonomy of newspaper editors that the First Amendment ensured, in the long-term, a diverse, vibrant, and antagonistic public debate.[311] The opinion made clear, however, that even if it didn't, the government would still be constitutionally prohibited from interfering with the autonomy of newspaper editors—that the negative right of the speaker to be free of government interference prevailed over the positive right of the public to access a meaningfully diverse public debate.[312] And in fact, in other decisions it handed down around the same time, the Court employed a similarly property-protective and anti-redistributive approach to the interpretation of First Amendment rights, even when doing so could not plausibly be said to advance free speech values.

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[309] *Tornillo*, 418 US at 258.

[310] Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U Chi L Rev 20, 50 (1975).

[311] *Tornillo*, 418 US at 257 (arguing that "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate'"), quoting *Sullivan*, 376 US at 279.

[312] *Tornillo*, 418 US at 258.

This was true, for example, of the Court's shopping mall decisions. In *Amalgamated Food Employees Union Local 590 v Logan Valley Plaza, Inc*,[313] in 1968, the Court held that a state court could not constitutionally enjoin members of a union from picketing a store located in a privately owned shopping mall because the mall, like the company town in *Marsh*, performed an important public function—in an era of suburbanization, it provided an important site for public expression, as well as commerce.[314] This meant, the Court concluded, that the First Amendment prevented mall owners from using state property laws to exclude objectionable speakers from the property when that speech was not incompatible with the ordinary uses of the mall.[315] In holding as much, the Court did not articulate a new doctrinal principle but merely extended the logic of *Marsh* to apply to the new social realities of late twentieth-century America.

Despite this fact, four years after *Logan Valley* was handed down, the Court sharply limited its reach when it held in *Lloyd Corp v Tanner*[316] that speakers did not have a First Amendment right to access privately owned shopping malls when their speech did not relate to the businesses that used the mall.[317] Four years after that, in *Hudgens v National Labor Relations Board*,[318] the Court went one step further and overruled *Logan Valley*.[319] In neither decision did the Court argue that there was anything wrong with *Logan Valley*'s analysis of the sociological importance of malls to late twentieth-century American public life. Instead, the Court rejected the idea that this social fact should matter to the constitutional analysis. The only facts that mattered, the Court asserted, were facts pertaining to the nature of the invitation the mall owner issued when he opened his mall up to public use. If the owner issued an "open-ended invitation to the public to use [his mall] for any and all purposes," the Court held, then the mall could be considered "dedicate[ed] . . . to public use [so] as to entitle [speakers] to exercise therein . . . First Amendment rights."[320] But if not, the First Amendment did not grant speakers a right of access to these private spaces. To hold otherwise, the Court insisted,

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313 391 US 308 (1968).
314 Id at 318, 324–25.
315 Id at 324–25.
316 407 US 551 (1972).
317 Id at 564, 570.
318 424 US 507 (1976).
319 Id at 518.
320 *Lloyd Corp*, 407 US at 565, 570.

would be to engage in "an unwarranted infringement of property rights."[321]

Just as it had in *Tornillo*, the Court held in these cases too that the autonomy rights of property owners trumped the First Amendment rights of those who sought access to their property to speak on matters of public concern. The result was to render almost completely irrelevant to the analysis any consideration of the effect of the protestors' exclusion from the mall on their ability to effectively communicate and, more broadly, to deconstitutionalize the law of private property. It allowed "the formalities of title [to] put an end to analysis," as Justice Thurgood Marshall put it in his dissent in *Hudgens*.[322] It resuscitated, in other words, the much more formal distinction between the public and private spheres that *Lochner*-era courts had relied upon.

The Court employed a similarly formalist approach in cases involving rights of access to government-owned property. Just as it had during the *Lochner* era, the Court analogized the rights that the government enjoyed as property owner to the rights that a private person enjoyed as property owner, and concluded that this meant that speakers had virtually no rights of access to government property that didn't happen to take the form of a park, street, or sidewalk.[323] The Court reaffirmed, in other words, the priority of property rights over speech rights, even when the property owner happened to be the government and the property happened to be a publicly important space like a military base—or in later cases, a library, a state fair, or an airport terminal.[324]

The Court continued to assert that First Amendment rights of access trumped property rights when it came to publicly owned streets, parks, and sidewalks.[325] Even in those spaces, however,

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[321] Id at 567.

[322] *Hudgens*, 424 US at 538–39 (Marshall dissenting).

[323] See *Greer v Spock*, 424 US 828, 836–37 (1976) (concluding that because "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated," speakers have a constitutional right of access to government property only when the government "abandon[s] any claim of special interest in regulating" speech on that property); *Jones v North Carolina Prisoners' Labor Union, Inc*, 433 US 119, 133–35 (1977).

[324] See *Greer*, 424 US at 839–40 (upholding a military base policy of prohibiting partisan political speech); *Heffron v International Society for Krishna Consciousness, Inc*, 452 US 640, 642, 655 (1981) (concluding that a state fair could limit speech access to a designated part of the fairgrounds); *International Society for Krishna Consciousness, Inc v Lee*, 505 US 672, 685 (1992) (holding that an airport terminal could prohibit First Amendment access).

[325] *Perry Education Association v Perry Local Educators' Association*, 460 US 37, 44–45 (1983).

the Burger Court construed the scope of speakers' First Amendment rights more narrowly than the Warren Court had. In particular, the Court failed to enforce the requirement that, when the government regulates speech in the public forum, it must leave open ample alternative channels for those disparately affected by its regulation to advance their views.[326] When analyzing the constitutionality of time, place, or manner laws, the Court focused almost entirely on the question of whether the law furthered a constitutionally legitimate purpose and paid virtually no heed to the effect that the law might have on the expressive freedom of those who had ideas they wished to disseminate but no money to pay for speech.[327]

The result of the Court's much more negative, and much more abstract, approach to the delimitation of free speech rights was a body of law that was much more similar, both in its doctrinal structure and in its distributive effects, to *Lochner*-era due process jurisprudence than was previously true. Not only did the Burger Court's almost entirely negative view of the free speech guarantee lead it to ignore the social and economic facts that Pound and other realists criticized the *Lochner* Court for ignoring, it also led the Court to conclude, just as the *Lochner* Court had before it, that the government could not interfere with the operations of the private market in order to achieve redistributive aims.

Specifically, in *Buckley v Valeo*[328] in 1976, the Court rejected the idea that the government could constitutionally restrict spending on election-related speech in an effort to prevent the very wealthy from using their money to buy access to politicians, thereby preventing those without as much money from having a meaningful opportunity to do the same.[329] The idea that campaign

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[326] See Geoffrey R. Stone, *The Burger Court and the Political Process: Whose First Amendment?*, 10 Harv J L & Pub Pol 21, 23 (1987) ("The [Burger] Court has, in truth, paid only lip-service to the 'alternative means' inquiry.").

[327] The Court held as much explicitly in *Ward v Rock Against Racism*, 491 US 781, 791 (1989) ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.").

[328] 424 US 1 (1976).

[329] Id at 48–49, 143. The government had argued that a federal law that prohibited individuals from spending more than $1,000 annually on campaign-related speech was necessary to "lessen the disproportionate advantage, the distorting effect, of wealthy special interest groups, and to increase opportunities for meaningful participation by ordinary citizens, as voters, supporters and candidates." Brief for the Attorney General and the

finance regulation was necessary in order to prevent the very wealthy from monopolizing the market in political influence was, by the time *Buckley* came along, a very well-established justification for restrictions on corporate spending on campaign-related speech, and one the Court had previously relied on to uphold a campaign finance law of this sort against a First Amendment challenge.[330] In *Buckley*, however, the Court declared, in a per curiam opinion, that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[331] And then, in a somewhat ironic twist, it added, "The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion."[332]

Professor Cass Sunstein has argued that the opinion in *Buckley* should be regarded as "a direct heir to *Lochner*."[333] This is certainly true. By rejecting the possibility that a law that sought to limit the freedom of the more powerful in order to promote the interests of the less powerful could ever further a constitutionally valid public purpose, the Court effectively imported into modern free speech law the prohibition against class legislation that played such an important role in *Lochner*-era due process jurisprudence, and in *Lochner* itself.[334]

Buckley does not demonstrate, however, as Sunstein suggests, the existence of an unbroken jurisprudential tradition. It does not show that *Lochner* has, as he put it, never "been entirely overruled."[335] *Buckley* instead demonstrates the important, if rather underappreciated, shift in free speech doctrine that took place in the early 1970s that made it much more Lochnerian than it had previously been. After all, only seven years earlier, the

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Federal Election Commission, *Buckley v Valeo*, Nos 75-436, 75-437, *23 (US filed Oct 21, 1975) (available on Westlaw at 1975 WL 171459).

330 See *United States v International Union United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO)*, 352 US 567, 568, 589–91 (1957).

331 *Buckley*, 424 US at 48–49.

332 Id at 49.

333 Sunstein, 87 Colum L Rev at 884 (cited in note 5).

334 See Gillman, *Constitution Besieged* at 128–29 (cited in note 27) ("[Although] Peckham's majority opinion [in *Lochner*] . . . does not explicitly rely on the language of unequal, partial, or class legislation," it ultimately concluded that the New York law was impermissible because its object was "'simply to regulate the hours of labor between the master and his employees,' and [thereby] . . . use [ ] government power to favor certain groups at the expense of others."), quoting *Lochner*, 198 US at 64.

335 Sunstein, 87 Colum L Rev at 918 (cited in note 5).

Warren Court had held quite unequivocally that the First Amendment *did* permit the government to restrict the speech of some in order to enhance the speech of others when it upheld the FCC right of reply regulations in *Red Lion*. The gulf between the view of the First Amendment articulated in *Red Lion* and in *Buckley* is significant, and startling.

Critics are not wrong, then, when they trace the Lochnerian tendencies of contemporary free speech jurisprudence to changes that the Burger Court made to the existing body of First Amendment law. They are simply wrong in what they identify as the pivotal decisions. It was not the decisions in *Virginia Pharmacy* and *Bellotti* that made free speech law skeptical of government power, and deferential to private interests, in many of the same ways that the *Lochner*-era due process cases were. It was instead all the *other* decisions in which the Court construed the guarantee of freedom of speech to protect, but to do little more than protect, the expressive autonomy of property owners that did so.

In fact, the commercial speech cases represented an important *exception* to the Burger Court's general tendency to prioritize the autonomy interests of the property owner/speaker above all other interests and concerns. This is because, in those cases and very few others, the Court continued to allow the government to limit what speakers could use their property to say, when doing so promoted what Justice John Paul Stevens described in 1996 as a "fair bargaining process."[336] Although the Court justified the different rules it applied in commercial speech cases by pointing to what it claimed were inherent or "commonsense" differences between commercial and noncommercial speech, in fact, none of the differences the Court identified stand up to critical scrutiny.[337] Instead, one can understand the different rules the Court applied

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[336] *44 Liquormart*, 517 US at 501. Another set of cases in which the Court continued to take seriously the threat of private power involved, ironically enough, campaign finance regulation. See notes 328–32 and accompanying text.

[337] Specifically, the Court argued that because "[t]he truth of commercial speech . . . may be more easily verifiable by its disseminator than . . . news reporting or political commentary" and "there is little likelihood of its being chilled by proper regulation," a "different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." *Virginia Pharmacy*, 425 US at 771 n 24. The Court provided no evidence to substantiate its assertions about the "commonsense differences" between commercial speech and other kinds, and there is good reason to be skeptical of them. Id at 771 n 24. As Professor Martin Redish has pointed out, many statements in political discourse are as easily verifiable as statements in commercial speech and many statements in commercial speech are hard to verify. Redish, 130 U Pa L Rev at 633 (cited

in commercial speech cases to reflect its recognition of the marked power imbalance that tends to characterize the relationship between the seller and the buyer of commercial goods and services, due to the fact that the seller knows things about the product that the buyer cannot know.[338]

Certainly many of the Court's commercial speech cases evince a keen sensitivity to the possibility that commercial sellers might exploit, manipulate, or deceive their audience, and a willingness to allow the government to take action to prevent them from doing so.[339] In this line of cases, then, and very few others, the Court continued to act as if "'liberty' is . . . something that may be infringed by other forces as well as by those of government," and that may "indeed . . . require the positive intervention of government against those other forces."[340] The result was a body of law that was much less threatening to the regulatory state than other areas of Burger Court jurisprudence, and much less "abstract" in the Poundian sense.

Today, of course, the commercial speech cases represent less marked an exception to the rest of free speech jurisprudence. It remains the case even today, however, that the government can sanction commercial speech when it is false or misleading and can impose disclosure requirements on commercial speakers that it absolutely cannot impose on other kinds of speakers.[341] Nevertheless, the increasingly strict scrutiny the Court has applied in its

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in note 84). Meanwhile, the commercial motives of advertisers may make them not more resistant to regulation but less. Id ("The possibility of regulation [might] not deter [commercial manufacturers] entirely from advertising, but it might deter [them] from making certain controversial claims for [their] product[s].").

338 See *Virginia Pharmacy*, 425 US at 771 n 24 (noting that the commercial "advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else").

339 See, for example, *Friedman v Rogers*, 440 US 1, 15–16 (1979) (upholding law regulating the use of optometrical trade names because "[r]ather than stifling commercial speech, [the law] ensures that information regarding optometrical services will be communicated more fully and accurately to consumers than it had been in the past when optometrists were allowed to convey the information through unstated and ambiguous associations with a trade name"); *Bates v State Bar of Arizona*, 433 US 350, 383–84 (1977) ("[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising."); *Ohralik v Ohio State Bar Association*, 436 US 447, 462 (1978) (upholding a ban on certain kinds of in-person solicitation as a constitutionally permissible means of protecting consumers against "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct'").

340 Corwin, *The Court Sees a New Light* (cited in note 262).

341 See Post, 48 UCLA L Rev at 26–28, 34–36 (cited in note 147).

commercial speech cases has obviously had a pronounced deregulatory effect.

This does not mean that it is currently any less of a mistake than it was in 1976 to argue that modern free speech law resurrects *Lochner* by extending protection—or too much protection—to commercial speech and speakers. This is not only because it is difficult, for all the reasons I suggested earlier, to see why commercial and corporate speech should receive any *less* protection than movies, true crime magazines, or the many other overtly nonpolitical genres of mass entertainment that the First Amendment fully protects. It is also a mistake because it misconceives the nature of the problem.

The threat that the commercial and corporate speech cases pose to the government's ability to "regulate markets . . . to make life more equitable, safe, [and] healthful" is not a consequence of the fact that they involve commercially oriented speech.[342] The threat they pose to the government's ability to regulate markets is a consequence of the Court's increasing tendency, in these cases as in others, to construe the First Amendment as a grant to speakers of almost-absolute freedom to use the expressive resources that they happen to possess or control for whatever purposes they desire.

C. Current Examples

Consider in this respect *Citizens United*, perhaps the most infamous of all the Roberts Court's free speech cases. In that case, the Court invalidated a provision in the federal Bipartisan Campaign Reform Act[343] (BCRA) that "prohibit[ed] corporations and unions from using their general treasury funds to" spend money on speech that advocated for or against candidates in federal elections.[344] The plaintiff was a nonprofit corporation that had wanted to use money to distribute a ninety-minute documentary about then–presidential candidate Hillary Clinton in the run-up to the 2008 election but feared that if it did so it would violate the law.[345] Given that what was at stake was the ability of the corporation to publicly disseminate speech that clearly touched on pressing public matters, it is hard to quarrel with the majority's conclusion

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342 Purdy, 77 L & Contemp Probs at 203 (cited in note 232).

343 Pub L No 107-155, 116 Stat 81 (2002), codified at 52 USC § 10101 et seq.

344 *Citizens United*, 558 US at 318–20, 365.

345 Id at 319–21.

that serious scrutiny of Congress's means and aims was called for.[346] Nor was this feature of the decision in any way new. By the time *Citizens United* was handed down, the Court had recognized corporate speech rights—and applied rigorous scrutiny—in dozens of corporate speech cases.[347]

What was significant about the decision was instead its assertion that the government could not justify a law like the one at issue in the case as a means of ensuring to the not-so-wealthy a meaningful opportunity to influence the views of elected politicians. Although *Buckley* had rejected the idea that the government could restrict the campaign spending of some in order to increase opportunities for participation in the political process by others, in subsequent decisions, the Court had allowed the government to justify both corporate and noncorporate campaign finance restrictions on very similar grounds.[348] It had retreated, that is, from the strong anti-redistributive position it articulated in *Buckley* because it recognized that government regulation of the political marketplace could further, not just threaten, the democratic values that the First Amendment protected.

In *Citizens United*, however, the Court returned to the position it first announced in *Buckley* in 1976 and reaffirmed that, under the First Amendment, the government has no legitimate "interest 'in equalizing the relative ability of individuals and groups to influence the outcome of elections.'"[349] Notwithstanding considerable evidence that infusions of large amounts of money distort political incentives and policy positions, and thereby undermine the representativeness of the system writ large, the Court insisted that the government could only regulate the campaign spending when necessary to prevent the direct trading of

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[346] Id at 340.

[347] Id at 342, citing, among others, *Bellotti*, 435 US at 778; *Tornillo*, 418 US 241; *Sullivan*, 376 US 254; *Joseph Burstyn*, 343 US 495.

[348] See, for example, *Nixon v Shrink Missouri Government PAC*, 528 US 377, 382, 389 (2000) (upholding a law that limited individual campaign contributions as necessary to protect against "the broader threat [of] politicians too compliant with the wishes of large contributors"); *Austin*, 494 US at 655 (upholding a law limiting corporate spending on elections as necessary to prevent "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas"). As Professor Richard Hasen noted, in these cases, the Court moved very close to the "equality rationale" that *Buckley* rejected. Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S Cal L Rev 885, 894 (2005).

[349] *Citizens United*, 558 US at 350, quoting *Buckley*, 424 US at 48.

money for political favors, and the appearance of quid pro quo corruption of this sort.[350] Ultimately, it was the decision's narrowing of the permissible purposes the government could rely upon to justify campaign finance laws that made it a significant, and significantly deregulatory, change from prior law—not the fact that the law it struck down happened to regulate the speech of corporations.[351]

Citizens United does not demonstrate, in other words, the "corporate takeover of the First Amendment."[352] Indeed, the decision's most pronounced effect has been on campaign finance regulations that do not only apply to corporations.[353] It demonstrates the Court's increasing tendency to construe the First Amendment as a shield that private market actors can wield against government regulation, rather than (as it once did) as a mechanism for safeguarding free speech values against the threat posed to them by *both* private and government power. What it also demonstrates is the Court's intense hostility toward what *Lochner*-era courts would have called class legislation.

A similar story can be told about the decision in *Sorrell*. In that case, the Court showed strong disfavor to a law that made speaker-based distinctions. Specifically, it struck down a Vermont law that prohibited pharmacies from selling information about physician prescribing practices—information that federal law required them to collect—to pharmaceutical marketers without the physician's consent.[354] The Court construed the fact that Vermont prohibited pharmacies from selling physician prescribing data to pharmaceutical marketers but did not prohibit the sale of data to other groups, such as public health researchers, to mean that the law was viewpoint discriminatory, and therefore presumptively unconstitutional.[355] In fact, there was a good reason why the legislature may have prohibited only the sale of data to pharmaceutical marketers and not to other groups, a reason

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350 Id at 359–60. For a discussion of the evidence of what he calls "misalignment" in voters' and politicians' preferences, see Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 Va L Rev 1425, 1426–28, 1430 (2015).

351 See Sunstein, 87 Colum L Rev at 877 (cited in note 5) (noting that an "especially distinctive" feature of the *Lochner* Court's approach was its "sharp limitation of the category of permissible government ends" through its insistence that "[e]fforts to redistribute resources and paternalistic measures were both constitutionally out of bounds").

352 Coates, 30 Const Commen at 239 (cited in note 6).

353 Michael S. Kang, *The End of Campaign Finance Law*, 98 Va L Rev 1, 20–21 (2012).

354 *Sorrell*, 564 US at 557–58.

355 Id at 564–65, 571.

that had nothing to do with animus against the marketers' viewpoint: namely, marketers were the only ones who threatened the privacy interests that the law aimed to protect, by using the data to target, even harass, doctors who did not prescribe their products with sufficient frequency.[356] In his majority opinion, Justice Anthony Kennedy rejected this justification for the law. "It is doubtful," he wrote, "that concern for 'a few' physicians who may have 'felt coerced and harassed' by pharmaceutical marketers can sustain a broad content-based rule like" the Vermont law.[357] "Many are those who must endure speech they do not like," he added, "but that is a necessary cost of freedom."[358]

The decision thus confirmed what *Citizens United* had suggested: namely, that the Court would look from now on with great skepticism on laws that made speaker-based distinctions, even when there were good, noncensorial reasons why the legislature may have wanted to treat some speakers differently than others. The result was to make it very difficult for the government to protect some members of the community against speech-related harms caused by others. In previous decades, the Court had upheld laws that allowed private individuals to choose whether or not to receive speech that threatened their privacy—and it had done so even when the speech in question was high-value, not "purely commercial," expression.[359] The Court now insisted that Vermont could not do so even when the harm to the speaker's autonomy was quite minor and the privacy harms the government

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356 Id at 575. See also Piety, 29 Cardozo L Rev at 2610–11 (cited in note 116) (discussing the evidence of harassing sales practices).

357 *Sorrell*, 564 US at 575.

358 Id.

359 The best example of this is the Court's 1970 decision in *Rowan v United States Post Office Department*, 397 US 728 (1970), which upheld a federal law that required commercial and noncommercial advertisers to remove from their mailing lists any homeowners who did not want to receive their materials because they believed they were "erotically arousing or sexually provocative." Id at 729–30, 737. The Court held that the law did not violate the First Amendment because "[n]othing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit" and "the citizen cannot be put to the burden of determining on repeated occasions whether the offending mailer has altered its material so as to make it acceptable . . . [or] risk that offensive material come into the hands of his children before it can be stopped." Id at 737–38. It therefore concluded that it was permissible for "Congress [to] erect[ ] a wall—or more accurately permit[ ] a citizen to erect a wall—that no advertiser may penetrate without his acquiescence." Id at 738. The Vermont law obviously did much the same, even if it operated to protect the privacy of the medical office, not the home.

acted to prevent were quite serious.[360] This is what is most remarkable about *Sorrell*, and it has nothing, ultimately, to do with the fact that it involved commercial speech.

To argue, as Justice Stephen Breyer did in his dissent, that the decision resurrected *Lochner* by "substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue" thus misses what was doctrinally innovative about it.[361] In earlier cases—cases involving for example, the taxation of newspaper ink—the Court had recognized, sensibly enough, that when the government intentionally makes it harder for speakers to acquire the expressive resources they need to engage in speech, the First Amendment is implicated no less than when the government intentionally restricts their speech.[362] In applying more than rational basis scrutiny to a law that was quite explicitly intended to affect commercial speech, the *Sorrell* Court merely followed this precedent.[363]

Where the decision broke new ground was in refusing to allow Vermont to prevent marketers from using information available to them on the private market to tailor their speech, even when that information posed a significant threat to doctor privacy, and even when the restrictions the law imposed could be overridden by physician consent, and even when the information that the pharmacies wished to sell existed solely as a consequence of government coercion.[364] Doctors did not, in other words, consent to the collection of their data. They had no choice about it. Nevertheless, although the government created the commodity that

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[360] Marketers, after all, remained free under the law to say whatever they liked to doctors during their marketing pitches. They were merely restricted in the range of information they could draw on to tailor their presentation.

[361] *Sorrell*, 564 US at 603 (Breyer dissenting).

[362] See *Minneapolis Star & Tribune Co v Minnesota Commissioner of Revenue*, 460 US 575, 582 (1983) (holding that when the government "single[s] out the press for special treatment" by imposing a special tax on the ink and paper required to print newspapers, the "tax . . . cannot stand unless the burden is necessary to achieve an overriding governmental interest").

[363] That the law was intended to limit marketing speech was evident from its text, which prohibited "[p]harmaceutical manufacturers and pharmaceutical marketers . . . [from] us[ing] prescriber-identifiable information for marketing or promoting a prescription drug unless the prescriber consents." *Sorrell*, 564 US at 558–59.

[364] As Justice Breyer noted in his dissent, until *Sorrell*, the Court had "*never* found that the *First Amendment* prohibits the government from restricting the use of information gathered pursuant to a regulatory mandate—whether the information rests in government files or has remained in the hands of the private firms that gathered it." Id at 588 (Breyer dissenting) (emphasis in original). Nor had it "*ever* previously applied any form of 'heightened' scrutiny in any even roughly similar case." Id (emphasis in original).

marketers sought to access, the decision in *Sorrell* imposed very significant constraints on its ability to subsequently regulate the commodity's circulation. In this respect, the decision demonstrates the same conceptual error as *Lochner*-era due process jurisprudence: like the earlier due process decisions, it obscures from view the ways in which government coercion *constructs* the market that constitutional doctrine then immunizes from subsequent regulation.[365] It construes as a site of individual freedom what is in fact an arena of significant constraint.

To think of *Sorrell* merely as a case in which the Court failed to show sufficient deference to the economic policy decisions of the legislature thus obscures what is generally Lochnerian about it: namely, its insistence that what the constitutional guarantees of liberty mean, ultimately, is that the legislature may not impose even a minor constraint on the freedom of powerful individuals in order to protect the freedom of weaker and more vulnerable others, even when the legislature helped create the unequal power relationships at issue in the case. It also obscures the important similarities between the decision and the many other decisions in which the Court relied on a similarly rigid distinction between the public and private spheres to strike down laws that could never be described as ordinary economic regulation.

Consider in this respect the decision in *California Democratic Party v Jones*,[366] which struck down a California ballot initiative that permitted any voter registered in the state to vote in the party primary election of her choice, regardless of her official party affiliation.[367] In that case too, the Court held that the government could not interfere with the ability of powerful private speakers (namely, the leaders of the major political parties) to control the use of an important expressive resource (namely, the primary process) in an effort to protect the interests of third parties—in this case, the voters of California—without unconstitutionally infringing the First Amendment rights of the powerful.[368]

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[365] See Sunstein, 87 Colum L Rev at 874 (cited in note 5) ("Market ordering under the common law was understood to be a part of nature rather than a legal construct, and it formed the baseline from which to measure the constitutionally critical lines that distinguished [state] action from inaction and neutrality from impermissible partisanship.").

[366] 530 US 567 (2000).

[367] Id at 570, 586.

[368] Id at 574–75. See also Gillian E. Metzger, *Privatization as Delegation*, 103 Colum L Rev 1367, 1476 n 376 (2003) ("[Even] while acknowledging that California's use of a primary election system constituted a delegation of public power to private associations,

This was the case, the Court held, notwithstanding the very important role that the primary process played in the constitution of governmental authority itself, and notwithstanding its extensive regulation by the state.[369]

Or consider *Boy Scouts of America v Dale*.[370] In that case, the Boy Scouts argued that its First Amendment rights of expressive association would be violated if it were forced to comply with New Jersey's public accommodation law by reinstating a scoutmaster who it fired because he was gay.[371] The Court agreed. It held that because enforcement of the public accommodations law against the Boy Scouts would limit the organization's ability to propagate, in whatever way it desired, a message of moral cleanliness that did not include homosexuality, the law violated the First Amendment.[372] In holding as much, the Court again paid no attention to the other expressive interests at stake in the dispute—including perhaps most importantly the expressive interests of the scoutmaster, James Dale, who lost his position not because of his sexual orientation but because of his willingness to publicly speak about his sexual orientation. As Professor Mike Seidman notes, Dale may very well have been "making a political point when he insisted on Boy Scout membership" and his performance as scoutmaster may have "forcefully communicated opposition to [the]

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the Court held that California's blanket primary system violated the First Amendment associational rights of political parties because" of "private autonomy concerns.").

369 *Jones*, 530 US at 572–74, 581–82 (rejecting the idea that "party affairs are public affairs, free of First Amendment protections," and concluding that when the state "forces [parties] to adulterate their candidate-selection process . . . by opening it up to persons wholly unaffiliated with the party," strict scrutiny applies). As Professor Samuel Issacharoff notes, it was in its insistence that, because political parties are private entities, they enjoy a strong First Amendment claim to institutional autonomy, that the decision departed from, and is difficult to reconcile with, prior decisions that recognized a much less rigid distinction between the public and private spheres. Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 Colum L Rev 274, 278–79 (2001):

> A review of the caselaw prior to *Jones* reveals that, as a purely doctrinal matter, the claim of the major political parties to formal institutional autonomy from state regulation is at best a weak rights claim. . . . The reason that the rights claim of the political parties is weak—and here it may be useful to focus on the major political parties—is not simply that no such positive claims had heretofore been recognized in the caselaw. Rather, the ability to make a full-throated demand for autonomy from state regulation is compromised by the fact that the present party system is so fundamentally the product of a heavily regulated electoral arena.

370 530 US 640 (2000).

371 Id at 646.

372 Id at 650, 655, 659.

negative stereotypes about male homosexuals."[373] Nevertheless, the Court spent not a word of its opinion discussing the impact that nonenforcement of the New Jersey law might have on Dale's free speech rights or, for that matter, on the associational rights of boys who signed up for the Boy Scouts without necessarily knowing its policy positions.[374] It did so because it assumed that the only thing that the First Amendment protected was the negative right of the Boy Scouts to speak, *not* the positive right of men like Dale to participate in the public realm that the state public accommodations law had delimited.

In all these cases, and many more, the Court interpreted the guarantee of freedom of speech, just as *Lochner*-era courts once interpreted the guarantee of due process, as a guarantee of private freedom *from* government regulation, rather than as a guarantee of anything more positive.[375] The result is that today, the First Amendment makes it difficult in many areas of law for the government to protect members of the political community against speech-related harms that are the product of private action, while doing nothing to ensure that "[f]reedom of speech . . . [is] available to all, not merely to those who can pay their own way."[376]

It is in this respect that contemporary free speech law "resurrects *Lochner*." What this means is that to solve the First Amendment's *Lochner* problem, it will not be sufficient to do what Chief Justice Rehnquist and, more recently, Justice Breyer have

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[373] Seidman, 75 U Chi L Rev at 1548–49 (cited in note 281).

[374] As Justice Stevens noted in dissent, there was very little evidence that the Boy Scouts did anything to inform its members of its views on homosexuality—in fact, to the contrary. *Dale*, 530 US at 672 (Stevens dissenting) (noting that the policy on homosexuality was "never publicly expressed" and that the Boy Scouts' "*public* posture—to the world and to the Scouts themselves—remained . . . one of tolerance") (emphasis in original).

[375] Recent cases that similarly construe the First Amendment in a strongly negative and "abstract" manner include *Janus v American Federation of State, County, and Municipal Employees, Council 31*, 138 S Ct 2448, 2486 (2018) (holding unconstitutional on free speech grounds laws that require workers represented by labor unions to pay those unions monthly dues); *National Institute of Family and Life Advocates v Becerra*, 138 S Ct 2361, 2368, 2378 (2018) (striking down a state law that required crisis pregnancy clinics to provide potential customers with information about the availability of free or low-cost medical services, including abortion); and, as I have elsewhere written about, *Manhattan Community Access Corp v Halleck*, 139 S Ct 1921, 1934 (2019). See Genevieve Lakier, Manhattan Community Access Corp. v. Halleck*: Property Wins Out over Speech on the Supposedly Free-Speech Court*, 3 ACS S Ct Rev 125, 161–63 (2019), archived at https://perma.cc/GA5J-4SGP. This is obviously just a representative sample and doesn't touch on what is transpiring in the lower courts.

[376] *Murdock*, 319 US at 111.

suggested courts should do to avoid repeating the errors of the past—namely, deny constitutional protection to commercial speech and corporate speakers, or limit how broadly it applies. Limiting the scope of constitutional protection in that way will only blunt the anti-redistributive force of contemporary doctrine to some degree, while leaving commercial speakers and audiences defenseless against repressive, status-quo-promoting legislation of the kind I discussed in the previous Part. Moreover, it will do nothing to ensure that those without economic resources will have anything like a meaningful opportunity to participate in democratic public discourse.

To avoid repeating the errors of the *Lochner* Court, what is needed is not a change to the rules that determine when heightened scrutiny applies but a change to the rules that govern heightened scrutiny. What is needed is to resuscitate the more positive, and more economically sensitive, conception of constitutional liberty that the New Deal and later the Warren Courts employed in their free speech cases. In the next and final Part, I briefly sketch out what this would look like more concretely.

IV. IMPLICATIONS

As the previous Part suggests, contemporary free speech law is not *Lochner*-like merely because, like early twentieth-century freedom of contract jurisprudence, it imposes significant, albeit limited, constraints on the legislature's ability to engage in economic regulation.[377] It is *Lochner*-like in many other ways as well.

Three similarities between contemporary free speech law and *Lochner*-era freedom of contract doctrine are particularly important to highlight. The first is the tendency of both bodies of law to construe the guarantee of liberty (be it a substantive due process liberty, or the right to free speech) in almost purely negative terms, as a right the individual possesses against the state, rather than as a guarantee of something positive (a minimally fair bargaining process, say, or a reasonable opportunity to be heard).

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[377] For an example of how limited the constraints the First Amendment imposes on the legislature's ability to make economic policy can be when those rules shore up the rights of property owners, one need only look at contemporary copyright law. See generally Benkler, 74 NYU L Rev 354 (cited in note 9). When decrying the economically deregulatory tendencies of contemporary free speech law, it is important not to forget the extent to which contemporary free speech law—like *Lochner*-era freedom of contract doctrine—naturalizes existing market relations and the laws that create them, and thereby helps immunize those laws from constitutional challenge.

This feature of *Lochner*-era due process jurisprudence was well recognized at the time. Professor Pound argued, for example, that one of the factors that led courts to employ, in freedom of contract cases, a "legal conception of the relation of employer and employee [that was] so at variance with the common knowledge of mankind" was their "hostil[ity] to legislation," and tendency to "tak[e] a minimum of law-making to be the ideal."[378] It is also a feature of constitutional doctrine that the New Deal Court quite self-consciously rejected.[379] But it is a view of constitutional liberty that the Court has quite unequivocally embraced in its free speech cases over the past four decades—and not only in *Tornillo*, where this negative-rights-only conception of the First Amendment was perhaps most explicitly laid out. The view is also present in the many other cases the Court has handed down since then in which it has interpreted the First Amendment to mean that the government may only limit the ability of the speaker to dictate the expressive uses to which his property shall be put when it can show a truly compelling purpose and very narrowly tailored means.

A second similarity between the two bodies of law is the tendency of both to define the sphere of negative liberty that the constitution protects by reference to existing property rights. This was obviously true of *Lochner*-era freedom of contract cases.[380] But it is also true, although less obviously so, of contemporary free speech law, as the previous Part illustrates. The result is a

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[378] Pound, 18 Yale L J at 454, 457 (cited in note 11).

[379] In his influential opinion in *Barnette*, for example, Justice Jackson declared it to be the difficult but important task of the Court to "translat[e] the majestic generalities of the Bill of Rights, conceived" when the reigning "philosophy [was] that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints," into rules that could work in a society "in which the laissez-faire concept . . . has withered at least as to economic affairs, and social advancements are increasingly sought through . . . expanded and strengthened governmental controls." 319 US at 639–40. See also notes 275–87 and accompanying text.

[380] *Allgeyer v Louisiana*, 165 US 578, 589 (1897), defining the liberty guaranteed by the Due Process Clause to include

> not only the right of the citizen to be free from the mere physical restraint of his person . . . but the . . . right of the citizen . . . to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

Later decisions, recognizing a due process right to control the upbringing of one's children, can also be understood in property terms. See generally Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 Wm & Mary L Rev 995 (1992).

body of law that is in some respects highly skeptical of state power (when it intrudes upon the expressive autonomy of another) and in other ways highly deferential to it (when it exercises its own power as employer or property owner).[381]

Finally, like *Lochner*-era due process jurisprudence, contemporary free speech law relies on what Pound called an "academic theory of equality" and what I have called elsewhere a "formal equality rule."[382] Just as it did in its *Lochner*-era due process cases, the contemporary Court assumes that implicit in the guarantee of expressive freedom is a guarantee of equal treatment—and specifically, a guarantee that the government will treat all speakers identically, regardless of the economic or social factors that distinguish them. It is its commitment to formal equality that helps explain the *Lochner* Court's palpable hostility to laws that aimed to protect workers against employers, and that also explains the palpable distaste the Court showed to redistributive campaign finance regulation in *Buckley* and *Citizens United*.[383]

These three features of contemporary free speech jurisprudence do a great deal to explain why it is that the First Amendment has today become, as Professor Rebecca Tushnet put it, "the new *Lochner*, used by profit-seeking actors to interfere with the regulatory state in a way that substantive due process no longer allows."[384] They also explain why the First Amendment provides relatively little protection to other groups—government whistleblowers, for example, or political protestors.[385] But they are not

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[381] Compare *Citizens United*, 558 US at 340 ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints."), with *Garcetti v Ceballos*, 547 US 410, 421 (2006) (denying First Amendment protection against employer discipline to any speech made by public employees "pursuant to their official duties").

[382] Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 Colum L Rev 2117, 2131 (2018).

[383] See Sunstein, 87 Colum L Rev at 884 (cited in note 5) ("*Buckley*, like *Lochner*, grew out of an understanding that for constitutional purposes, the existing distribution of wealth must be taken as simply 'there,' and that efforts to change that distribution are impermissible.").

[384] Tushnet, 70 Food & Drug L J at 26 (cited in note 121).

[385] See Timothy Zick, *Speech and Spatial Tactics*, 84 Tex L Rev 581, 585 (2006) (noting the aggressive use in recent years of facially neutral time, place, or manner laws to "control [ ] just the sort of speech the First Amendment ought to protect. . . . Geometric precision is being utilized to marginalize dissent, to capture and confine it"); Ronald J. Krotoszynski Jr, *Whistleblowing Speech and the First Amendment*, 93 Ind L J 267, 292 (2018) ("The Supreme Court [ ] has not provided robust protection for government employees who engage in whistleblowing activities.").

immutable. Nor, as the previous Part indicates, are they hardwired into the modern speech tradition.

For over four decades—from the early 1930s until the early 1970s—the Court interpreted the First Amendment, specifically the Speech and Press Clauses, as an affirmative guarantee, not just a prohibition, against certain kinds of state action. In case after case, it insisted that what the First Amendment provided individuals was not simply, and not even primarily, a sphere of personal liberty in which the state may not intrude, but a particular kind of *social* institution—namely, the democratic public sphere and, more broadly, the democratic system of government. Indeed, on very few occasions did the Court construe the First Amendment to protect speech that did not play an important role in the formation of democratic public opinion in order to vindicate individual expressive autonomy. (I can think, in fact, of only one occasion on which it did so—the 1969 decision in *Stanley v Georgia*.[386]) Instead, it made clear that the "core value" the First Amendment protected was the individual right to meaningfully participate, either as speaker or as listener, in a "free and unhindered debate on matters of public importance."[387]

It was because it guaranteed individuals this incredibly important positive right—a right that was "the matrix, the indispensable condition, of nearly every other form of freedom"—that the New Deal, and later Warren, Courts argued that the vigorous judicial enforcement of First Amendment rights was appropriate, even in a post-*Lochner* age.[388] The crucial role that the First Amendment played in facilitating and protecting democratic self-government is also what led the Court to conclude, in *Marsh* and in other cases, that First Amendment rights enjoyed a "preferred position" compared to other kinds of rights, such as property.[389] And it explains the Court's insistence that First Amendment doctrine pay attention to how economic and social forces, not just legal rules, shape the exercise of expressive freedom. After all, if the First Amendment protects not just individual liberty but the vitality of the democratic public sphere, it obviously matters

[386] 394 US 557, 564, 568 (1969) (holding that the government may not punish the possession of unprotected obscenity in the home because doing so intrudes too far on "the privacy of a person's own home").

[387] *Pickering v Board of Education*, 391 US 563, 573 (1968).

[388] See *Palko v Connecticut*, 302 US 319, 327 (1937).

[389] *Marsh*, 326 US at 509.

whether the economic and social conditions that enable it to flourish do or do not exist. This is why, in many different cases, the Court assumed that whether state action violates the First Amendment depends not only on the purposes that motivate it, or the form it takes; what also matters are its effects on the robustness and vitality of public debate.[390]

To ensure that the First Amendment does in fact continue to perform the important, representation-reinforcing function it is supposed to perform in the post-*Lochner* constitutional order—and that it does not prevent the government from regulating the market, and other spheres of "private" life, when doing so does not pose a threat to democratic values—it is this, more positive, less property-based, and less formalist view of freedom of speech that we would need to recapture. Doing so would not require a radical break with the modern free speech tradition. To the contrary, what the preceding Part suggests is that a more positive, less formalist approach in free speech cases would be much *more* in keeping with the modern free speech tradition, at least as the New Deal Court understood it, than the contemporary Court's much more laissez-faire approach. It would, however, require significant change to a good number of contemporary doctrinal rules.

Taking seriously the possibility that "'liberty' is . . . something that may be infringed by other forces as well as by those of government,"[391] would require, among other things, rejecting the idea that under the First Amendment the government "may [never] restrict the speech of some . . . in order to enhance the relative voice of others."[392] This is because, in cases where private speakers possess monopoly or oligopoly control over important sites of public expression—the radio waves, say, or the newspapers—the formal equality rule that these cases announced will make it very difficult for the government to do what the New Deal Court thought it was incumbent on the legislature as well as the courts to do: namely, safeguard the vitality of public debate from private, as well as government, repression. If one recognizes that privately owned property provides an important site for the operation of the democratic public sphere, it makes no sense to interpret the First Amendment as a constraint on the censorial impulses of state actors but to *require* legislators to give free rein to

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390 See notes 222–24 and accompanying text.

391 Corwin, *The Court Sees a New Light* (cited in note 262).

392 *Buckley*, 424 US at 48–49.

the censorial impulses of private actors. Similarly, if one presumes that the "core" First Amendment value is a political system in which all members of the community have a meaningful opportunity to have their say, it is difficult to see why the legislature acts impermissibly when it imposes limits on campaign spending in an effort to ensure that both the wealthy and the poor have a meaningful opportunity to influence the positions that politicians adopt.

This is not to say that the government should have free rein to restrict the speech of powerful private actors. Recognizing the threat that the exercise of *private* power can pose to free speech values does not require ignoring the threat that *government* power can pose to those same values. The question in all cases should be: Does the regulation of private speech enhance the diversity and vitality of public debate, and the health of the system writ large, by preventing the monopolization of an important expressive resource? Or does it do the opposite, by requiring private actors to promote a government-favored point of view or by otherwise retarding, rather than enhancing, political debate among private citizens? This is, more or less, the question that guided the Court's analysis in the early- and mid-twentieth-century media-concentration cases.[393] But it is a question that the contemporary Court's rigid embrace of a formal equality rule takes completely off the table.

Embracing a more positive, more materialist conception of freedom of speech would also require courts to take more seriously than they currently do the idea that First Amendment rights enjoy a privileged position when compared to property rights. This proposition follows directly from the organizing principle of the New Deal settlement—namely, that economic rights need not be safeguarded against the will of democratic majorities, but civil rights, such as the right to freedom of speech, do. It is nonetheless a view of the relationship between property and free speech rights that the current doctrine almost entirely rejects—the result being to produce a jurisprudence that is much more effective in protecting the speech of some than others.

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[393] See, for example, *Red Lion*, 395 US at 392–93 (noting that if evidence emerges that the FCC right of reply regulations have "the net effect of reducing rather than enhancing the volume and quality of coverage" the Court will revisit their "constitutional implications").

Finally, a more positive conception of freedom of speech would require courts to take much more seriously than they currently do the constitutional and subconstitutional interests of listeners and third parties. The Court's embrace of a largely negative view of freedom of speech—its assumption that what the First Amendment protects, and all that it protects, is the right of the speaker to be free of intentional government efforts to limit what she can and cannot say—has prevented it from having to deal with, or even recognize, the often rather significant rights conflicts that exist in First Amendment cases. *Dale* is by no means unique in this regard. All of the cases discussed in the previous Part can be reframed as cases in which the speaker's exercise of his or her expressive freedom burdened—or directly precluded—other people's exercise of their expressive freedom, or infringed upon some important right or interest (for example, the doctors' right to privacy in *Sorrell*). In none of them, however, did the Court spend any time considering the difficult question of how to weigh the competing interests. Instead, it presumed that the only interest of any constitutional significance was that of the speaker. It is this single-minded focus on the rights of the speaker that helps explain a great deal of what is wrong with contemporary free speech law.

The result of these changes to free speech doctrine would be a body of law that would be much better than the contemporary regime in reconciling the vigorous judicial enforcement of First Amendment rights with an active regulatory state. This is because it would permit the government to restrict the expressive freedom of market participants—in some cases, significantly—when doing so does not meaningfully hamper their ability to participate in public discourse and meanwhile advances the kinds of substantial government purposes the First Amendment has traditionally required to justify the regulation of public speech.[394] It would, for example, almost certainly lead to the conclusion that the data privacy law struck down in *Sorrell* is constitutionally unproblematic. This is because that law did not impose anything but the most minimal burden on the marketers' ability to publicly communicate their point of view, or to otherwise shape public attitudes about the pharmaceuticals they marketed. Nor did it threaten, in any way, the right the Court worried about in

[394] See *Schneider*, 308 US at 161.

Stanley—namely, the individual "right to be let alone."[395] If anything, this was the interest that Vermont was trying to *protect*. Meanwhile, the law promoted important interests—chief among these being the doctor's interest in preserving the privacy of her prescribing practices, and the patient's interest in a doctor-patient relationship that is as unconstrained as possible.[396]

A view of the First Amendment that conceived it primarily as a safeguard of a robust, diverse, and inclusive public sphere would also likely lead to the conclusion that the law struck down in *Citizens United* was constitutionally permissible, although the question is a somewhat closer one. Although the law obviously made it more difficult for corporations to engage in protected political speech in the days leading up to a federal election, the burden it imposed on their speech was not terribly onerous. This is because, under the BCRA, corporations remained entirely free to use the money in separate corporate-funded political action committees (PACs) to pay for whatever speech they liked, right up until an election.[397] This suggests that the primary effect of the provision that the Court struck down was not to "muffle[ ] the voices that best represent the most significant segments of the economy"—as Justice Kennedy asserted in his majority opinion—but to channel corporate spending to the more heavily regulated and more transparent PACs.[398] Although it is true that, because only certain persons could contribute money to corporate PACs, their coffers might be more limited than the corporations' general treasury funds, when one considers the many benefits associated with a more transparent campaign finance system, as well as the constitutionally protected interests of the voters to participate in a democratic political system in which they enjoy a meaningful opportunity to be heard, these restrictions on the expressive autonomy of corporate speakers seem easy to justify. Meanwhile, there is no reason to think that the law the Court struck down posed any threat to individual privacy interests, or to any other core feature of individual autonomy. It certainly posed no threat to the individual right to be let alone.

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395 *Stanley*, 394 US at 564, quoting *Olmstead v United States*, 277 US 438, 478 (1928) (Brandeis dissenting).

396 Brief for Petitioners, *Sorrell v IMS Health Inc*, No 10-779, *46–47 (US filed Feb 22, 2011) (available on Westlaw at 2011 WL 661712).

397 *Citizens United*, 558 US at 393–94 (Stevens concurring in part and dissenting in part).

398 See id at 354.

At the same time, a First Amendment conceived primarily as a safeguard of democratic government, rather than private autonomy, would not give the government a blank check to regulate speech however it desired. It should be, for example, as difficult to justify paternalistic speech regulations under this less Lochnerian conception of the First Amendment as it is under the contemporary, speaker-autonomy-focused approach. This is because when the government deliberately denies information to people for the purpose of influencing their behavior, it not only violates their autonomy but takes from them a fundamental prerogative of democratic citizenship: namely, the power to decide, both for oneself and for the political community, what the appropriate ends to pursue and values to vindicate are.[399] This explains why a strong prohibition against paternalism has been a core feature of the modern free speech tradition since the early twentieth century.[400] And what it means is that the Court was correct in striking down the ban on pharmaceutical price advertising in *Virginia Pharmacy*, and incorrect when it upheld Puerto Rico's deeply paternalistic ban on casino advertising in *Posadas*.

Laws that discriminate against particular kinds of speakers *for no good reason* also pose an obvious problem to a First Amendment conceived primarily as a vehicle for guaranteeing the diversity and vitality of public debate. This is why the decision in *Citizens United* is less clearly incorrect, when assessed under this alternative view of the First Amendment, than the decision in *Sorrell*. After all, Vermont had very good reasons to think that pharmaceutical marketers, and only pharmaceutical marketers, threatened the privacy harms that it sought to prevent when it enacted the law that the Court struck down. It is far less obvious that Congress had good reasons to single out corporations for special treatment when it enacted the BCRA. As Justice Kennedy noted in his majority opinion, wealthy individuals possess the same power as wealthy corporations to use their money to buy political influence.[401] And in fact, wealthy individuals spend a

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[399] See David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colum L Rev 334, 356 (1991) ("When the government violates the persuasion principle, it has determined that people will, to a degree, pursue its—the government's—objectives, instead of their own.").

[400] See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev 189, 212–13 (1983).

[401] *Citizens United*, 558 US at 356.

great deal more on elections than wealthy corporations.[402] This raises serious doubts that "there [was] an appropriate governmental interest suitably furthered by the differential treatment" that BCRA applied.[403] Of course, Congress may have had other reasons to treat corporations differently under the BCRA than natural persons. It may have wanted to protect the rights of shareholders, for example, by limiting the extent to which corporate directors could use corporate moneys for political ends with which they disagreed. Or it might have believed, understandably enough given *Buckley*, that it could not impose restrictions on natural persons similar to those that it imposed on corporations.

The point here is simply that a more positive, less rigidly speaker-autonomy-focused conception of the First Amendment would not mean an abdication of courts' responsibility to safeguard the independence of the democratic public sphere. What it would do is enable a more nuanced reconciliation between free speech values and regulatory power than current doctrine allows. It would permit the government to regulate all kinds of market actors (not just commercial speakers) when doing so was necessary to protect consumers against misleading, deceptive, coercive, or harassing behavior. But it would not allow the government to regulate commercial speech, or for that matter, any constitutionally valuable expression, in order to shape the views and behaviors of members of the public, except when it had a genuinely compelling need to do so.[404]

The result would be a jurisprudence that would not need to demarcate a particular category of low-value speech to protect consumers from the kinds of harms that the commercial speech precedents, until recently at least, have allowed the government to guard against. Such harms, after all, have nothing to do with the intrinsic value of the speech; instead, they are the product of the power inequality that the seller of a commercial good possesses, by virtue of his or her greater knowledge about the good that he or she sells. There is consequently no obvious reason why the government should be able to protect members of the public

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402 Stephanopoulos, 101 Va L Rev at 1426 (cited in note 350) ("Almost all [2012 campaign] funding came from individual donors, not corporations or unions.").

403 *Police Department of the City of Chicago v Mosley*, 408 US 92, 95 (1972).

404 The Court has suggested, for example, that paternalistic speech regulation might be justified by a need to prevent consumption of highly addictive goods like cigarettes, so long as those regulations are sufficiently narrowly tailored. *Lorillard Tobacco Co v Reilly*, 533 US 525, 564 (2001).

against these kinds of harms *only* when it comes to commercial advertising and other kinds of commercial speech.[405] The result would be a more consistent, and coherent, body of free speech law: one that does not need to cabin the scope of its protections by relying upon an unduly formalistic distinction between commercial and noncommercial speech.

More generally, what a more positive conception of the First Amendment would produce is a body of law that is more sensitive to the multiple interests implicated in free speech disputes than contemporary First Amendment jurisprudence, and one that would do what courts almost entirely fail to do today: namely, take seriously the constitutional interests of those who do not happen to own the expressive resource the government is regulating. It simply cannot be that only property owners possess free speech rights—and yet this is essentially the result that current doctrine produces, at least in those areas of free speech law where the New Deal and Warren Courts' precedents no longer hold sway.

Precisely for this reason, however, a First Amendment that took seriously the threat to free speech interests posed by both government and private power would also make the constitutional analysis in a good number of cases a lot harder than it is today. Consider for example *Dale*. Viewed through a negative autonomy lens, the case is an easy one. If property owners possess an almost unlimited right to decide the expressive uses to which their property shall be put, the conclusion that New Jersey violated the First Amendment rights of the Boy Scouts when it forced the organization to use its property to send a message of tolerance and equality that it did not want to send is a very easy one to reach. If we did not assume as much, however, and instead presumed that the constitutionality of enforcing the public accommodations law against the Boy Scouts depends on whether doing so promotes or threatens the "uninhibited, robust, and wide-open" public debate on public matters that the First Amendment protects, then the analysis becomes enormously more complicated. Then, courts would have to weigh the harm that would be created

[405] Indeed, I have previously argued that the decision in *Riley v National Federation of the Blind of North Carolina, Inc*, 487 US 781 (1988), is wrong precisely because it fails to protect listeners in a similarly power-imbalanced relationship with noncommercial speakers. See Genevieve Lakier, *Not Such a Fixed Star After All:* West Virginia State Board of Education v. Barnette*, and the Changing Meaning of the First Amendment Right Not to Speak*, 13 FIU L Rev 741, 763 (2019).

were the public accommodations law enforced against the harm were it not to be. And to figure that out, courts would have to think carefully not only about the threat that enforcing the public accommodations law posed to the expressive freedom of the Boy Scouts; they would also have to think about the alternative avenues that Dale possessed to speak.

This analysis need not be open ended. In other areas of law—for example, in its libel cases—the Court has crafted relatively clear-cut rules that are nevertheless responsive to the multiple and competing interests implicated by the regulation of defamatory speech. One can read the special rules that courts apply in advertising cases as achieving similar ends, as I suggested earlier.

Courts can, in other words, do a better job than they currently do of reconciling the multiple, often conflicting, interests at stake in First Amendment cases without having to perform, in every case, a totality-of-the-circumstances analysis or engage in what the Court has at times described derisively as "ad hoc balancing." Nevertheless, the Supreme Court will, at least, have to engage in balancing of some kind, when fashioning the rules that apply in different regulatory contexts, and courts of all kinds will have to pay more attention to social and economic context than they currently do when applying these rules.

We might worry that judges will not be able to adequately perform the more complicated doctrinal analysis I am calling for, or that the result of their doing so will be a body of law that fails to sufficiently protect the independence of the public sphere against repressive governmental regulation.[406] The problem is that there is no good alternative. This is because, in a society characterized by tremendous inequality in economic and social power, simply pushing the reconciliation of competing rights to the subconstitutional arena of private law means creating a First Amendment jurisprudence that cannot possibly vindicate the freedoms it serves.

In this sense, the difficulty of the analysis that a less laissez-faire view of freedom of speech would produce might not be a drawback, but a virtue of the approach. This is because the task

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[406] For an argument along these lines see Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum L Rev 449, 471 (1985) (arguing that one tool courts can use to protect free speech values in periods of heightened repression is to avoid "[c]omplicated, subtle, imaginative legal arguments" and instead "speak . . . in confident tones that do not invite critical reflection and doubt regarding the importance of free speech").

of crafting a set of doctrinal rules that can preserve free speech against repression from both public and private actors without effectively constitutionalizing the entire legal domain *is* a difficult task, and one that courts and scholars should recognize as such. Current doctrine obscures the difficult questions posed when the government restricts the freedom of some in order to protect the freedom of others by making the analysis unduly formalistic—or to use Pound's terminology, "abstract." As a result, it fails to effectively vindicate free speech values by focusing to its detriment on only a subset of the interests at stake when the government regulates speech.

What this means is that the First Amendment's *Lochner* problem isn't just a problem for the regulatory state; it is a problem for the First Amendment itself.

CONCLUSION

Over one hundred years after it was handed down, *Lochner* continues to haunt American constitutional jurisprudence. This is in part a product of the fact that agreement over what went wrong in *Lochner* is so incompletely theorized. As Professor Jamal Greene has noted, the fact that "there is disagreement, even irreconcilable disagreement as to why" they were wrong makes anticanonical decisions like *Lochner* useful weapons in legal argument because they "enable[ ] multiple sides . . . to use the anticanon as a rhetorical trump."[407] But it is also a product, as this Article has shown, of the Court's tendency to repeat the mistakes of its past.

Recent concern about the Lochnerian tendencies of contemporary free speech law is not merely rhetorical. There are significant and important similarities between *Lochner*-era due process jurisprudence and contemporary free speech law—albeit, not the similarities that most contemporary critics point to. These similarities are important to understand not only the First Amendment's past but also its present and future.

This is because another lesson *Lochner* teaches is that there may be political limits to how anti-redistributive constitutional doctrine can become. If the strongly anti-redistributive tendencies of contemporary free speech progress unabated, a political reckoning may arrive sooner rather than later. If that occurs, it will be important to remember that the First Amendment was not always wedded to a laissez-faire conception of constitutional liberty and

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[407] Greene, 125 Harv L Rev at 384 (cited in note 18).

that it need not always be. Recovering the past of the First Amendment may be key to preserving its meaning for future generations. This Article begins that work.