

THE NEW *LOCHNER*

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Commercial interests are increasingly laying claim, often successfully, to First Amendment protections. Once the mainstay of political liberty, the First Amendment has emerged as a powerful deregulatory engine—and one with great implications for modern governance. This Article identifies that development as a growing constitutional conflict between the First Amendment and the modern administrative state and analyzes its origins and implications.

The Article traces two opposing trends that have led to that constitutional conflict. A business-led social movement has mobilized to embed libertarian-leaning understandings of the First Amendment in constitutional jurisprudence. At the same time, administrative regimes have moved away from command-and-control regulation towards lighter-touch forms of governance that appear more speech-regulating.

The stakes of this conflict are high. Because nearly all human action operates through communication or expression, the First Amendment possesses near total deregulatory potential. For that reason, I argue that the First Amendment operates as the fullest boundary line of constitutional state action.

I identify the unique features of this modern form of constitutional deregulation—which I call the new *Lochner*—by interrogating the parallel drawn by a growing number of scholars and judges between recent First Amendment jurisprudence and *Lochner v. New York*'s liberty of contract.

The Article explores linkages between theories of the First Amendment and administrative law, and it analyzes the implications of the First Amendment's deregulatory turn for understandings of democratic legitimacy, choice, and constitutional change. I argue that the new *Lochner* must be rejected because advocates of its deregulatory vision are forwarding a concept of liberty that has no limiting principle and, if taken to its analytical conclusion, would render self-government impossible.

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Introduction	134
I. The Origins of the New <i>Lochner</i>	138
A. The Arc and Architecture of the Commercial Speech Doctrine	140
1. The Origin & Evolution of Commercial Speech Protection.....	140
2. A Changing Legal Culture & a Business-Led Social Movement	155
B. The Rise of the Information State	164
II. Speech Protection as the Boundary Line of State Action	177
III. Echoes of <i>Lochner</i>	183
IV. Democracy, Choice & Constitutional Change	192
Conclusion.....	206

INTRODUCTION

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

1. See, e.g., *Friedrichs v. Cal. Teachers Ass'n*, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *cert granted*, 135 S. Ct. 2933 (2015) (mem.); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (First Amendment inflected statutory claims under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2012)); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014); John C. Coates IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223 (2015) (demonstrating that businesses are increasingly displacing individuals as the beneficiaries of First Amendment protection).

2. See, e.g., *Sorrell*, 131 S. Ct. 2653; *Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (en banc); *Edwards*, 755 F.3d 996; *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015); *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1403 (2015); *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294 (1st Cir. 2005); *Nordyke v. Santa Clara Cnty.*, 110 F.3d 707 (9th Cir. 1997).

conflict between the First Amendment and the modern administrative state and analyzes its origins and implications.

The Article pinpoints two opposing trends that have led to the growing constitutional conflict between the First Amendment and the regulatory state. First, a largely business-led social movement has mobilized to embed libertarian-leaning understandings of the First Amendment in constitutional jurisprudence. At the same time, federal and state administrative regimes have moved towards lighter-touch, often information-based, forms of governance, either in place of or in addition to command-and-control regulation. What makes the tools of modern governance—such as mandated disclosures—lighter-touch, however, makes them appear more speech-regulating than earlier conduct regulations, thereby rendering them more susceptible to First Amendment challenge. Together, these trends have brought the First Amendment into greater conflict with the modern administrative state.

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

The academic literature is only just beginning to address this burgeoning constitutional and inter-branch conflict.³ But a growing number of scholars, commentators, and judges have likened aspects of recent First Amendment jurisprudence to *Lochner v. New York*'s⁴ anticanonical liberty of contract.⁵ This Article analyzes that parallel as a

3. See, e.g., Coates, *supra* note 1; Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165 (2015); Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867 (2015); Christine Jolls, *Debiasing Through Law and the First Amendment*, 67 STAN. L. REV. 1411 (2015).

4. 198 U.S. 45 (1905).

5. See, e.g., *Sorrell*, 131 S. Ct. at 2685 (Breyer, J., dissenting); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 589–91 (1980) (Rehnquist, J., dissenting); Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodation Law*, 66 STAN. L. REV. 1205, 1233 (2014); Jack M. Balkin, *Cultural Democracy and the First Amendment*, NW. U. L. REV. (forthcoming 2016); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism* (unpublished manuscript on file with the author); Tamara R. Piety, *Citizens United and the Threat to the Regulatory State*, 109 MICH. L. REV. FIRST IMPRESSIONS 16 (2014); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195 (2014); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015); Nelson Tebbe, Richard Schragger &

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

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

Micah Schwartzman, *When Do Religion Accommodations Burden Others?* (unpublished manuscript on file with the author); Nina Totenberg, *Rare Unanimity in Supreme Court Term, with Plenty of Fireworks*, NPR (July 7, 2014, 3:10 PM), <http://www.npr.org/2014/07/06/329235293/rare-unanimity-in-supreme-court-term-with-plenty-of-fireworks> (“‘It’s the new *Lochner*,’ laments Yale Law School’s Akhil Amar.”); Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, NEW REPUBLIC (June 2, 2013), <http://www.newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation>. *But see* Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103, 147–51 (2015) (arguing that religious accommodation is not tantamount to *Lochnerism*). For an early seminal discussion see Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

6. See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).

This examination shows that advocates of the new *Lochner* are forwarding a formal concept of liberty that has no apparent limiting principle. They contend that all speech is speech and equally subject to stringent constitutional scrutiny. Given the pervasiveness of speech and expression, taken to its logical conclusion, this contention would render democratic self-government impossible. Contextualizing the new *Lochner* in this historical and conceptual framework, I argue that this new form of formal liberty must be rejected.

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

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

Part III analyzes the ways in which the First Amendment’s recent libertarian turn resonates with—and diverges from—*Lochner* itself. Courts’ growing protection of commercial speech threatens to revive a sort of *Lochnerian* constitutional economic deregulation embedded not in substantive due process but the First Amendment. The similarities between the current trend in commercial speech doctrine and *Lochner* itself are pronounced. Both pit business freedom to choose against government structuring or facilitation of choice. Both privilege the negative over the positive state. And both render courts, not the political branches, the arbiters of our economic life. But, while this modern form of constitutional deregulation resonates with *Lochner*, the two differ in significant aspects. Commercial speech protection possesses broader deregulatory capacity and whereas *Lochner* relied on

the apparent naturalness of the common law's distribution of entitlements, the new *Lochner* takes as its baseline the naturalness of what constitutes 'speech.' By embedding economic rights in the more textually grounded, if capacious, First Amendment, the new *Lochner* allows *Lochner* itself to remain in the anticanon.

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

I. THE ORIGINS OF THE NEW *LOCHNER*

Perhaps the most dynamic area of First Amendment law today is the commercial speech doctrine. That doctrine is not coincidentally also the key site of dispute in the constitutional contest between the First Amendment and the modern regulatory state.⁷ The D.C. Circuit recently sat en banc to consider the constitutionality, under the First Amendment, of a country-of-origin label that the U.S. Department of Agriculture requires be placed on certain meat products sold in the United States.⁸ The majority of circuits have reviewed similar First Amendment challenges to what would once have been understood as routine economic regulation subject to rational basis review under black letter constitutional law—in diverse areas from nutritional and tobacco labeling to regulations regarding prescription drugs, credit cards, insurance, and business licensing.⁹ As John Coates has empirically

7. Commercial challenges under the doctrine for expressive conduct and incidental burdens are a related and overlapping site of conflict also addressed in this Part. See *infra* note 75.

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

9. See, e.g., *CTIA—The Wireless Ass'n v. City of Berkeley*, No. C-15-2529 EMC, 2015 WL 5569072 (N.D. Cal. Sept. 21, 2015), *appeal docketed*, No. 16-15141 (9th Cir. Feb. 1, 2016); *Grocery Mfrs. Ass'n v. Sorrell*, 102 F. Supp. 3d 583 (D. Vt. 2015), *appeal docketed*, No. 15-1504 (2d Cir. May 6, 2015); *Expressions Hair Design v. Schneiderman*, 808 F.3d 118 (2d Cir. 2015); *Dana's R.R. Supply v. Att'y Gen. of Fla.*, 807 F.3d 1235 (11th Cir. 2015); *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389 (9th Cir. 2015); *Nat'l Assoc. of Mfrs. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015); *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258 (2d Cir. 2014); *Edwards v. District*

demonstrated, free speech challenges by commercial entities have proliferated markedly since the mid-1970s, and businesses have increasingly displaced individual litigants as the beneficiaries of First Amendment rights.¹⁰

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

of Columbia, 755 F.3d 996 (D.C. Cir. 2014); *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014); *Liberty Coins, LLC v. Goodman*, 748 F.3d 682 (6th Cir. 2014); *Educ. Media Co. at Va. Tech, Inc. v. Insley*, 731 F.3d 291 (4th Cir. 2013); *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013); *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808 (9th Cir. 2013); *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012); *CTIA—The Wireless Ass'n v. City & Cnty. of S.F.*, 494 F. App'x 752 (9th Cir. 2012); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012), *overruled in part by Am. Meat Inst.*, 760 F.3d 18; *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403 (D.C. Cir. 2012); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628 (6th Cir. 2010); *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2d Cir. 2009); *Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294 (1st Cir. 2005); *United States v. Wenger*, 427 F.3d 840 (10th Cir. 2005); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001); *Nordyke v. Santa Clara Cnty.*, 110 F.3d 707 (9th Cir. 1997); *Valley Broad. Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997); *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996); *Cal-Almond, Inc. v. USDA*, 14 F.3d 429 (9th Cir. 1993). Such cases are even more prevalent at the district and state court levels. *See, e.g., Am. Beverage Ass'n v. City & Cnty. of S.F.*, No. 3:15-cv-03425 (N.D. Cal. filed July 24, 2015); *Duguid v. Facebook, Inc.*, No. 3:15-cv-985 (N.D. Cal. filed Mar. 3, 2015); *PSEG Long Island LLC v. Town of N. Hempstead*, No. 15-cv-0222, 2016 WL 423635 (E.D.N.Y. Feb. 3, 2016); *Mass. Ass'n of Private Career Sch. v. Healey*, No. 14-13706-FDS, 2016 WL 308776 (D. Mass. Jan. 25, 2016); *Amarei v. City of Chi.*, No. 13-C-2805, 2015 WL 7251940 (N.D. Ill. Nov. 17, 2015); *S.F. Apartment Ass'n v. City & Cnty. of S.F.*, No. 15-cv-01545-PJH, 2015 WL 6747489 (N.D. Cal. Nov. 5, 2015); *Poughkeepsie Supermarket Corp. v. Cnty. of Dutchess*, No. 14-CV-1702 (CS), 2015 WL 6128800 (S.D.N.Y. Oct. 15, 2015); *Amarin Pharma, Inc. v. FDA*, No. 15 Civ. 3588(PAE), 2015 WL 4720039 (S.D.N.Y. Aug. 7, 2015); *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 110 F. Supp. 3d 176 (D.D.C. 2015); *Nat'l Rest. Ass'n v. New York City Dep't of Health & Mental Hygiene*, No. 654024/2015 Dkt. No. 105 (N.Y. Sup. Ct., Feb. 24, 2016).

10. Coates, *supra* note 1.

A. The Arc and Architecture of the Commercial Speech Doctrine

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

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

1. THE ORIGIN & EVOLUTION OF COMMERCIAL SPEECH PROTECTION

Despite its recent importance, the commercial speech doctrine is quite young. In 1942, the Supreme Court explicitly placed commercial speech beyond constitutional protection. While the Court had addressed a small handful of proto-commercial speech cases in the late nineteenth century and early twentieth century, its first serious treatment of the issue was in *Valentine v. Chrestensen*,¹¹ a case involving advertising for a submarine exhibition.¹²

11. 316 U.S. 52 (1942).

12. *Id.* at 52–53; *see also, e.g., Packer Corp. v. Utah*, 285 U.S. 105, 107 (1932) (ban on cigarette advertising); *St. Louis Poster Adver. Co. v. City of St. Louis*, 249 U.S. 269, 273 (1919) (regulations of billboard sizes); *Thomas Cusack Co. v. City of Chi.*, 242 U.S. 526, 527–28 (1917) (same); *Fifth Ave. Coach Co. v. City of N.Y.*, 221 U.S. 467, 476–77 (1911) (prohibition on advertising on the outside of stagecoaches); *Halter v. Nebraska*, 205 U.S. 34, 38 (1907) (ban on use of American

Chrestensen wanted to advertise his submarine exhibit in New York City to drum up business. The City code forbade the distribution of business advertising materials, however, and after being found in violation of the ordinance, he sued.¹³ The Supreme Court upheld the City's restriction in a terse opinion released less than two weeks after argument, saying it was "clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."¹⁴ Instead, "[w]hether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment."¹⁵ *Chrestensen's* cursory holding explicitly placed commercial speech beyond the Constitution's ambit—essentially categorizing it as wholly unprotected expression, like fighting words or obscenity,¹⁶ or perhaps understanding the "promot[ion] or pursu[it] of a gainful occupation in the streets" as a type of commercial conduct.¹⁷

Chrestensen occurred in the initial wave of the Court's turn away from *Lochner*, as Judge Alex Kozinski and Stuart Banner have observed.¹⁸ The case came to the Court in 1942—a mere five years after *West Coast Hotel v. Parrish*,¹⁹ in which Justice Roberts's famous "switch in time" brought the *Lochner* era to a close.²⁰ The case was likewise decided only four years after the Court, in *United States v. Carolene Products Co.*,²¹ announced that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless" it fails to "rest[] upon some rational basis."²²

flag on a beer label); *In re Rapier*, 143 U.S. 110, 112 (1892) (ban on distribution of lottery materials by mail); *Ex Parte Jackson*, 96 U.S. 727, 736 (1877) (same); Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 757–58, 763–69 (1993); Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2182–83 (2015).

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

14. *Id.* at 54.

15. *Id.*; see also *Breard v. Alexandria*, 341 U.S. 622, 644–45 (1951) (upholding a prohibition on door-to-door solicitation of magazine subscriptions on similar grounds).

16. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 268–69 (1981).

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

18. Kozinski & Banner, *supra* note 12, at 761–63.

19. 300 U.S. 379 (1937).

20. *Id.* at 400.

21. 304 U.S. 144 (1938).

22. *Id.* at 152.

Chrestensen's challenge to the City's restriction was in fact not brought as a First Amendment claim but as a substantive due process challenge.²³ And it was Justice Roberts himself who penned *Chrestensen's* cursory rejection of that claim. The Court's initial exclusion of commercial speech from constitutional protection, then, was a part of the Court's revolutionary turn away from *Lochner*.

Commercial speech jurisprudence changed course in the 1960s, as one facet of a progressively led rights revolution.²⁴ In a watershed decision in 1976, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,²⁵ the Court squarely addressed the continuing validity of *Chrestensen* and "whether there is a First Amendment exception for 'commercial speech.'"²⁶ The Court struck down a Virginia law barring pharmacists from advertising the prices of drugs. It overruled *Chrestensen*, thereby creating the modern commercial speech doctrine.²⁷

The Court's animating rationale is striking. It reasoned that a "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate" and "society also may have a strong interest in the free flow of commercial information."²⁸ The constitutional protection of commercial speech, then, is due to its value to its *audience*, not its *speaker*. As *Virginia Board of Pharmacy* teaches,

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

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

24. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256–57 (1964); *Bigelow v. Virginia*, 421 U.S. 809, 812 (1975). Both cases arguably foreshadow *Virginia Board of Pharmacy*, as did the dissents of Justices Stewart, Douglas, and Blackmun in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 397–404 (1973) (Douglas, Stewart & Blackmun, JJ., dissenting).

25. 425 U.S. 748 (1976).

26. *Id.* at 760.

27. See *id.* at 758, 770.

28. *Id.* at 763–64.

intelligent opinions as to how that system ought to be regulated or altered.²⁹

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

The commercial speech doctrine was forged as a tool of consumer protection to secure the value of commercial speech to society, not to ensure the autonomy interests of commercial speakers.³³ It is noteworthy that commercial speech was drawn within the First Amendment's ambit at a moment when the consumer protection movement was arguably at its peak.³⁴ While the early 1900s and 1930s had seen considerable consumer mobilization, in the 1960s and 1970s that movement gained renewed prominence. President Kennedy delivered a Consumer Message to Congress in the spring of 1962 that included a Consumer Bill of Rights that emphasized, among other things, the right to be informed and the right to choose.³⁵ In the mid-1960s, President Johnson created a new position of the Special Assistant for Consumer Affairs and urged the passage of over a dozen

29. *Id.* at 765 (citations omitted).

30. *Id.* at 770.

31. *Id.*

32. *Id.*

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

34. See Robert O. Herrmann & Robert N. Mayer, *U.S. Consumer Movement: History and Dynamics*, in *ENCYCLOPEDIA OF THE CONSUMER MOVEMENT* 584, 584-602 (Stephen Brobeck ed., Robert N. Mayer & Robert O. Herrmann assoc. eds., 1997) [hereinafter *Consumer Movement History*].

35. President John F. Kennedy, Special Message to the Congress on Protecting Consumer Interest (Mar. 15, 1962), <http://www.presidency.ucsb.edu/ws/?pid=9108>; President John F. Kennedy, Papers Regarding the Special Message to Congress on Protecting Consumer Interest (Mar. 15, 1962), <http://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-037-028.aspx>; *Consumer Movement History*, *supra* note 34, at 589-90.

consumer protection laws, from truth in lending to food and drug inspection.³⁶ In 1968, a nationwide network of consumer organizations, the Consumer Federation of America, was created, and state and local consumer groups proliferated.³⁷ Ralph Nader founded Public Citizen in 1971—one of several such organizations that he established around the same time, including the Center for Study of Responsive Law and the Public Interest Research Group (PIRG)—as part of that growing consumer advocacy movement.³⁸

The Public Citizen Litigation Group, co-founded by Nader and Alan Morrison in 1972, litigated *Virginia Board of Pharmacy* itself.³⁹ As David Vladeck, a litigator who joined the Litigation Group in the mid-1970s and now Georgetown Law professor describes, the goal of that litigation was to dislodge guild practices that hurt consumers by stifling competition.⁴⁰ Because a small pharmacy had unsuccessfully challenged anti-competitive state laws on due process and equal protection grounds⁴¹ and state action defenses were developing to block antitrust challenges,⁴² the First Amendment was the only viable option. The Court's rejection of the due process challenge to anti-competitive state pharmacy laws explicitly grounded itself in the turn from *Lochner*; in some sense it was *Lochner* itself that prompted the consumer movement to resort to the First Amendment.⁴³ And consumer

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

37. *Overview*, CONSUMER FED'N AM., <http://www.consumerfed.org/about-cfa/overview> (last visited Jan. 30, 2016).

38. *See Consumer Movement History*, *supra* note 34, at 591, 593–94; *About Us*, PUB. CITIZEN, <http://www.citizen.org/Page.aspx?pid=2306> (last visited Jan. 30, 2016); *see also* STEPHEN BROBECK, *THE MODERN CONSUMER MOVEMENT* 75 (1990); Louise G. Trubek, *Public Interest Law Practice*, in *ENCYCLOPEDIA OF THE CONSUMER MOVEMENT*, *supra* note 34, at 465, 465–67.

39. *See* Brief for Appellees at 39, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1975) (No. 74-895) (Alan B. Morrison and Girardeau A. Spann on the brief); *Accomplishments*, PUB. CITIZEN, <http://www.citizen.org/Page.aspx?pid=2313> (last visited Jan. 30, 2016); Alan B. Morrison, GW L., <http://www.law.gwu.edu/Faculty/profile.aspx?id=16070> (last visited Jan. 30, 2016).

40. E-mails between David C. Vladeck and author (Sept. 10, 2015) (on file with the author); *see also* David C. Vladeck, *Lessons From a Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1069 n.89 (2004).

41. *N.D. State Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156 (1973).

42. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558 (1984).

43. *Snyder's Drug Stores*, 414 U.S. at 164–67 (“We refuse to sit as a ‘superlegislature to weigh the wisdom of legislation,’ and we emphatically refuse to go back to the time when courts used the Due Process Clause ‘to strike down state laws,

protection, not the free speech rights of purveyors, was the operating logic of the early commercial speech cases.

The doctrinal revolution in commercial speech came over the strenuous opposition of the Court's conservatives.⁴⁴ Justice Rehnquist penned a fiery dissent in *Virginia Board of Pharmacy*, criticizing the majority for "elevat[ing] commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas."⁴⁵ He quipped that he had understood the First Amendment to "relate to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo."⁴⁶

One need not disagree with the majority's view that consumers and society have a strong interest in the free flow of information, Justice Rehnquist maintained, to believe that that question should presumptively be left to the political branches:⁴⁷

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

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

regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. . . . [R]elief, if any be needed, lies not with us but with the body constituted to pass laws for the State" (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963)).

44. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 781-90 (1976) (Rehnquist, J., dissenting).

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

46. *Id.* at 787 (Rehnquist, J., dissenting).

47. *Id.* at 783-84 (Rehnquist, J., dissenting).

48. *Id.* (Rehnquist, J., dissenting) (citations omitted).

49. *Id.* at 785 (Rehnquist, J., dissenting).

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

First, and most fundamentally, the Court framed the protection of commercial speech as a listener-based right. The Court has repeatedly affirmed the principle that “[t]he First Amendment’s concern for commercial speech is based on the informational function of advertising,” not the autonomy of the commercial speaker, including in its leading commercial speech case, *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁵⁰ By contrast, paradigmatic First Amendment speech is generally protected not because of the value of the speech to its audience but due to the right of the *speaker* to speak. One of the most important values animating the free speech clause is the protection of political speech because of its importance to democratic self-determination.⁵¹ When speakers participate in public discourse, paradigmatic First Amendment doctrine protects not only their liberty to speak but also the manner in which they choose to do so.⁵² Hence, paradigmatic First Amendment doctrine protects the speech of citizens as an autonomy right.

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

Commercial speech regulation is by its nature content-based. Such regulations definitionally target *commercial* speech and normally certain

50. 447 U.S. 557, 563 (1980); *see also, e.g., Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977).

51. *See, e.g., Stromberg v. California*, 283 U.S. 359, 369 (1931).

52. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Cohen v. California*, 403 U.S. 15 (1971); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

53. *Bd. of Trs. v. Fox*, 492 U.S. 469, 477 (1989) (alteration in original) (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978)).

54. *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980).

forms of commercial expression (for example, by prohibiting fraud or mandating financial or product-related disclosures). Until recently, the political branches could generally conclude that some forms of commercial speech were regulatable *precisely because* of their message (or their failure to disclose a particular message) without increasing constitutional scrutiny.⁵⁵ By contrast, in non-commercial political speech cases, content discrimination has long prompted the most exacting review.⁵⁶ Whereas the government has traditionally had authority to outright ban false or misleading commercial speech without triggering the First Amendment at all,⁵⁷ paradigmatic First Amendment speech may be protected even if it is deliberately false.⁵⁸

Third, the Court created a sharp asymmetry between regulations that restrict commercial speech and those that compel it. Bans on commercial speech receive a type of intermediate scrutiny under *Central Hudson*,⁵⁹ whereas compelled commercial speech must meet something more akin to rational basis review under *Zauderer v. Office of Disciplinary Counsel*.⁶⁰ *Zauderer* held that the commercial interest in refusing to provide government mandated factual information was

55. See *id.* at 564 n.6. But see *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664, 2667 (2011) (stating that “[t]he First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys” and that “[c]ommercial speech is no exception” (internal quotation marks omitted)).

56. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

57. *Central Hudson*, 447 U.S. 557.

58. See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

59. 447 U.S. at 566. *Central Hudson* articulated the following four-part analysis:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id.

60. 471 U.S. 626, 651 (1985) (“Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant’s constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. . . . [W]e hold that an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest” (citation omitted)).

“minimal” and requires only that disclosures be reasonably related to the state’s interest and not be unjustified or unduly burdensome.⁶¹

This sharp asymmetry in the level of scrutiny makes sense because the constitutional value in commercial speech is that it can provide information to the public so that the public may make more intelligent decisions. Restrictions on commercial speech are thus necessarily more constitutionally suspect than mandated disclosures. Ordinary First Amendment jurisprudence, by contrast, incorporates the principle that “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”⁶²

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

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

I had thought by now it had become well established that a State has broad discretion in imposing economic regulations. As this Court stated in *Nebbia v. New York*: “[T]here can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects. . . .”⁶³

61. *Id.*

62. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)); see also *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988).

63. *Central Hudson*, 447 U.S. at 589 (Rehnquist, J., dissenting); see also, e.g., *Shapero v. Ky. State Bar Ass’n*, 486 U.S. 466, 483 (1988) (O’Connor, J., with whom Rehnquist, C.J., and Scalia, J., joined, dissenting).

By the mid-1990s, however, the valance of commercial speech shifted, and the Court's conservatives were animated less by the federalism and democratic deference concerns of Justice Rehnquist. They instead began to embrace the First Amendment as a deregulatory tool.⁶⁴

Justice Thomas has authored a number of separate opinions in recent years calling for commercial speech to be treated on par with political speech.⁶⁵ He has argued that there is no "philosophical or

64. See, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (Justice Kennedy, joined by Chief Justice Roberts and Justices Scalia, Thomas, Alito, and Sotomayor, comprising the majority, with Justice Breyer, joined by Justices Ginsburg and Kagan, in dissent); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002) (Justice O'Connor, joined by Justices Scalia, Kennedy, Souter, and Thomas, comprising the majority, with Justice Breyer, joined by Chief Justice Rehnquist and Justices Stevens and Ginsburg, in dissent); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas forming a majority to invalidate regulations governing certain outdoor advertising of smokeless tobacco and cigars and the same group, also joined by Justice Souter, to void regulations prohibiting certain indoor point-of-sale advertising of those products); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (Justice Kennedy, joined by Chief Justice Rehnquist and Justices Stevens, Scalia, Souter, and Thomas forming a majority, with Justices Stevens and Thomas also concurring, to invalidate compelled subsidization of mushroom advertising over the dissent of Justice Breyer joined by Justices O'Connor and Ginsburg); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (Justice Thomas joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, Souter, Ginsburg, and Breyer, with Justice Stevens concurring, invalidating a federal law prohibiting beer labels from displaying alcohol content); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (Justice Stevens, joined by Justices Blackmun, O'Connor, Scalia, Kennedy, and Souter invalidating a commercial handbill law over the dissent of Chief Justice Rehnquist, in which Justices White and Thomas joined).

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

65. *Lorillard Tobacco*, 533 U.S. at 572–90 (Thomas, J., concurring in part and concurring in judgment); *id.* at 575 ("I continue to believe that when the

historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial’ speech”⁶⁶ and expressed doubts about “whether it is even possible to draw a coherent distinction between commercial and noncommercial speech.”⁶⁷ Animating his concerns is a particular vision of free consumer choice. He has stated that he does not believe that “the only explanations that the Court has ever advanced for treating ‘commercial’ speech differently from other speech can justify restricting ‘commercial’ speech in order to keep information from legal purchasers so as to thwart what would otherwise be their choices in the marketplace.”⁶⁸ Justices Thomas, Kennedy, and Scalia have additionally questioned whether the commercial speech doctrine’s core precedents should be retained.⁶⁹ This gradual shift in the Court’s conservatives’ approach to commercial speech arguably echoes larger developments in the dominant forces of the Republican Party from an

government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as ‘commercial.’”); *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 518–28 (1996) (Thomas, J., concurring in part and concurring in judgment); *id.* at 518 (“In cases such as this, in which the government’s asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in *Central Hudson* . . . should not be applied, in my view. Rather, such an ‘interest’ is *per se* illegitimate and can no more justify regulation of ‘commercial’ speech than it can justify regulation of ‘noncommercial’ speech.”).

66. *44 Liquormart*, 517 U.S. at 522 (Thomas, J., concurring in part and concurring in judgment).

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

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

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

emphasis on judicial deference to one focusing on economic libertarianism following the Reagan Revolution.⁷⁰

The Supreme Court's most recent commercial speech case goes the furthest in chipping away the initial architecture of the commercial speech doctrine and in undermining the features that the Court that created the doctrine put in place to ensure that the First Amendment would not be the undoing of the regulatory state. In *Sorrell v. IMS Health Inc.*,⁷¹ the Court addressed a challenge to a state law restricting the sale, disclosure, and use of pharmacy data revealing prescribing practices of doctors without their consent. Justice Kennedy, writing for the Court, gestured toward the notion that commercial speech is protected due to the autonomy interest of commercial speakers, not due to the value of commercial information to the public.⁷² *Sorrell*, moreover, suggested that content discrimination regarding commercial speech restrictions raises constitutional concern.⁷³ While declining to decide if *Central Hudson's* intermediate scrutiny or some stricter form of review applied, it noted that “[i]n the ordinary case, it is all but dispositive to conclude that a law is content-based.”⁷⁴ But, of course, the very category of commercial speech is a content-based category.

The emergent revolution in commercial speech jurisprudence is not confined to the Supreme Court. First Amendment challenges to economic regulations are proliferating across the country.⁷⁵ Commercial

70. See generally Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527 (2015).

71. 131 S. Ct. 2653 (2011).

72. See, e.g., *id.* at 2663 (“The law on its face burdens disfavored speech by disfavored speakers.”); *id.* at 2672 (“The State has burdened a form of protected expression that it found too persuasive. At the same time, the State has left unburdened those speakers whose messages are in accord with its own views. This the State cannot do.”); see also Tamara R. Piety, “A Necessary Cost of Freedom”? *The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1 (2012).

73. 131 S. Ct. at 2664 (“The First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys. . . . Commercial speech is no exception.” (internal quotation marks omitted)); see also *infra* notes 191–194 and related text (discussing arguments that the change in the definition of content discrimination adopted in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), eliminated any distinction between commercial and noncommercial speech).

74. *Id.* at 2667.

75. The vast majority of these are formally analyzed under the commercial speech doctrine, while a small handful are litigated under the test announced in *United States v. O'Brien*, 391 U.S. 367 (1968), for expressive conduct and incidental burdens. Both sets of cases are in functional respects of the same cloth. Compare, e.g., *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014), with *R.J. Reynolds Tobacco*

plaintiffs have mounted cases against economic regulations ranging from the more quotidian—such as tour guide licensing, required country-of-origin labels on meat products, and a prohibition on the sale of guns at a county fair—to laws implicating weightier matters such as public health and foreign affairs—including the Food and Drug Administration’s graphic cigarette warnings, the Food, Drug, and Cosmetic Act’s ban on the off-label promotion of drugs, and the Securities and Exchange Commission’s required reporting of whether a company’s products contain minerals sourced from the armed conflict in the Democratic Republic of Congo.⁷⁶

Faced with these cases, some circuits have implied or assumed that the First Amendment grants commercial speakers an autonomy right. Two D.C. Circuit opinions authored by Judge Brown are exemplars: *Edwards v. District of Columbia*,⁷⁷ a case in which the court invalidated the District of Columbia’s business licensing scheme for tour guides as violating the First Amendment, and *R.J. Reynolds Tobacco Co. v. FDA*,⁷⁸ in which a panel held the FDA’s graphic cigarette warning labels unconstitutional, but which has since been abrogated in part by the en banc court. *R.J. Reynolds*, for instance, relied on paradigmatic speech cases in articulating the rule in a commercial speech case. Citing cases such as *West Virginia State Board of Education v. Barnette*,⁷⁹ which addressed whether students could be forced to salute the flag and recite the Pledge of Allegiance, the court transformed commercial speech protections into a speaker-based right.⁸⁰

Several circuits have likewise questioned whether the government has a freer hand to discriminate with regard to content in the context of

Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012). Both sub-doctrines analyze regulations of commercial speech under a type of First Amendment intermediate scrutiny that was, in origin, imported from Equal Protection doctrine. *Compare Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980), with *O’Brien*, 391 U.S. at 377. This perhaps explains in part the bleed between the two formally distinct sub-doctrines. *See also* Post & Shanor, *supra* note 3 (analyzing overlap).

76. *See* cases cited *supra* notes 8–9.

77. 755 F.3d 996 (D.C. Cir. 2014).

78. 696 F.3d 1205 (D.C. Cir. 2012), *overruled in part by Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

79. 319 U.S. 624 (1943).

80. *R.J. Reynolds*, 696 F.3d at 1211 (“The general rule ‘that the speaker has the right to tailor the speech[] applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.’ . . . This holds true whether individuals . . . or corporations . . . are being compelled to speak.” (citations omitted)).

commercial speech. In *United States v. Caronia*,⁸¹ the Second Circuit held unconstitutional the use of speech as evidence of criminal misbranding under the Federal Food, Drug, and Cosmetic Act, after noting that laws that impose content-based restrictions on commercial speech are subject to heightened review.⁸²

And while the Supreme Court recently affirmed the asymmetry of constitutional protection that applies to regulations that compel rather than restrict commercial speech in *Milavetz, Gallop & Milavetz, P.A. v. United States*,⁸³ some circuit court decisions have not been so clear. Sitting en banc, the D.C. Circuit in *American Meat Institute v. United States Department of Agriculture*,⁸⁴ in addressing the constitutionality of required country-of-origin labeling for certain meat products, described *Zauderer* as an “an application of *Central Hudson*, where several of *Central Hudson*’s elements have already been established,” arguably blurring the line between the two tests.⁸⁵ The Tenth Circuit in *United States v. Wenger*⁸⁶ followed a similar approach.⁸⁷ And two Justices, Ginsburg and Thomas, have indicated a desire to revisit the continuing validity of *Zauderer*, which created that distinction.⁸⁸

* * *

Two points should become evident from this brief history: courts across the country are increasingly faced with First Amendment challenges to economic regulation and, at the same time, are inconsistent in adhering to the only constitutional rationale the Supreme

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

82. *Id.* at 163–64.

83. 559 U.S. 229 (2010).

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

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

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

87. *Id.* at 849 (“*Zauderer*, therefore, eases the burden of meeting the *Central Hudson* test. In assessing disclosure requirements, *Zauderer* presumes that the government’s interest in preventing consumer deception is substantial, and that where a regulation requires disclosure only of factual and uncontroversial information and is not unduly burdensome, it is narrowly tailored.”).

88. *Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080 (2002) (mem.) (Thomas, J., joined by Ginsburg, J., dissenting from denial of certiorari).

Court has articulated for the protection of commercial speech. That rationale was that such speech is protected due to the interest the listening public has in receiving commercial information, from which a number of doctrinal features flow, including less concern about content discrimination and compelled speech. The Court has not to date, however, articulated a new or additional rationale to justify the constitutional protection of commercial speech or explained how commercial speaker autonomy, or even quasi-autonomy, can be squared with the modern regulatory state with its pervasive disclosure requirements and restrictions on false and misleading commercial speech. And what effect the passing of Justice Scalia will have on these trends is an open question—if one already subject to media speculation.⁸⁹

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

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

89. Adam Liptak, *Supreme Court Nominee Could Reshape American Life*, N.Y. TIMES (Feb. 18, 2016), <http://www.nytimes.com/2016/02/19/us/politics/scalias-death-offers-best-chance-in-a-generation-to-reshape-supreme-court.html> (“Appointing a replacement for Justice Scalia could be just as consequential [as the replacement of Justice Marshall by Justice Thomas]. . . . First Amendment arguments in cases on campaign finance, public unions and commercial speech would meet a more skeptical reception.”).

90. *Sorrel v. IMS Health Inc.*, 131 S. Ct. 2653, 2685 (2011) (Breyer, J., dissenting) (citations omitted) (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting)).

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

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

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

The origins of that mobilization are often attributed to Justice Lewis Powell. Two months before ascending to the bench in 1971 and while a private attorney in Virginia, the future Justice penned a memo to his neighbor and the Chairman of the Education Committee of the U.S. Chamber of Commerce, Eugene Sydnor, outlining a strategy for business-friendly advocacy.⁹² “No thoughtful person can question that the American economic system is under broad attack,”⁹³ Powell began his analysis. “[T]he time has come – indeed, it is long overdue – for the wisdom, ingenuity and resources of American business to be marshaled against those who would destroy it.”⁹⁴

The Powell Memo outlined a strategy for the business community to ensure the “survival of what we call the free enterprise system.”⁹⁵ As for individual corporations, Powell recommended an increased emphasis on public relations and governmental affairs. “But independent and uncoordinated activity by individual corporations, as important as it is, will not be sufficient,” he contended.⁹⁶ Instead, coordinated action by the National Chamber of Commerce and other industrial and commercial groups was needed. “Strength lies in

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

92. Confidential Memorandum from Lewis F. Powell, Jr. to U.S. Chamber of Commerce (Aug. 23, 1971) [hereinafter Powell Memorandum], <http://law2.wlu.edu/powellarchives/page.asp?pageid=1251>.

93. *Id.* at 1.

94. *Id.* at 9.

95. *Id.* at 10.

96. *Id.* at 11.

organization, in careful long-range planning and implementation, in consistency of action over an indefinite period of years, in the scale of financing available only through joint effort, and in the political power available only through united action and national organizations.”⁹⁷ The Powell Memo includes dozens of concrete organizing suggestions, including building more intellectual support at major universities, monitoring and responding to media attacks on free enterprise, and a full throated public media campaign ranging from public lectures and academic journals to paid advertisements. But in the final analysis, Powell concluded, the payoff for business “is what government does.”⁹⁸

[O]ne should not postpone more direct political action, while awaiting the gradual change in public opinion to be effected through education and information. Business must learn the lesson, long ago learned by Labor and self-interest groups. This is the lesson that political power is necessary; that such power must be assiduously cultivated; and that when necessary, it must be used aggressively and with determination – without embarrassment and without the reluctance which has been so characteristic of American business.⁹⁹

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

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

97. *Id.*

98. *Id.* at 24.

99. *Id.* at 25–26.

100. *Id.* at 26.

101. *Id.* at 32.

102. *Id.*

103. *Id.*

While no mention of the Powell Memo was made during the Justice's confirmation hearings, a copy was leaked to the press by a member of the Chamber's staff after Powell was seated. The leaked memo prompted significant press coverage¹⁰⁴ as well as requests for copies of the memo from individual businessmen and local and state chambers of commerce. In a representative request, a southern regional manager for Uniroyal Chemical wrote that he felt "a national movement is needed at all levels to make people become more aware and to GET INVOLVED."¹⁰⁵ According to a letter Eugene Sydnor sent to Justice Powell in 1972, this attention prompted the Chamber to reprint and distribute the Powell Memo "on a very wide scale throughout the country"¹⁰⁶ and build a public relations and organizational campaign around it.¹⁰⁷ As Sydnor described:

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

104. See, e.g., Jack Anderson, *FBI Missed Blueprint by Powell*, WASH. POST, Sept. 29, 1972, at C27; Jack Anderson, *Powell's Lesson to Business Aired*, WASH. POST, Sept. 28, 1972, at F7; Fred P. Graham, *Powell Proposed Business Defense*, N.Y. TIMES, Sept. 29, 1972, at 31; William H. Jones, *Powell Advises Business on Politics*, WASH. POST, Nov. 12, 1973, at D15.

105. Letter from A.B. Rogerson, S. Reg'l Manager of Uniroyal Chem. to Eugene Sydnor, Jr., President, S. Dep't Stores of Uniroyal Chem., copying Justice Lewis F. Powell (Oct. 25, 1972); see also Letter from Oliver M. Mendell, Reg'l Vice President at Chem. Bank to Justice Lewis F. Powell (Oct. 30, 1972); Letter from Arthur J. Brandt, Jr. to Justice Lewis F. Powell, Jr. (Oct. 26, 1972).

106. Letter from Eugene B. Sydnor to Justice Lewis F. Powell, Jr. (Oct. 3, 1972); see also Letter from Lewis Powell, Jr. to Eugene B. Sydnor, Jr. (Oct. 6, 1972). Justice Powell generally declined to discuss the memorandum. See, e.g., Letter from Justice Lewis F. Powell, Jr. to John Nelson Washburn (Nov. 21, 1972).

107. This included a series of radio broadcasts. See *Free Enterprise #1* (Warm/Viewpoint radio broadcast Jan. 12–13, 1973); *Free Enterprise #2* (Warm/Viewpoint radio broadcast Jan. 16–17, 1973); *Free Enterprise #3* (Warm/Viewpoint radio broadcast Jan. 20–21, 1973); *Free Enterprise #4* (Warm/Viewpoint radio broadcast Jan. 24–25, 1973).

108. Letter from Eugene B. Sydnor, Jr. to Justice Lewis F. Powell, Jr. 1 (Nov. 22, 1972); see also Letter from W.B. Lamberth, President, Lambert Corp., to Justice Lewis F. Powell, Jr. (May 2, 1973) ("A group of us from the Young Presidents'

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

But Justice Powell and the Chamber of Commerce form only part of the story. As historians, political scientists, and sociologists have observed, starting in the 1970s and 1980s, “[b]usiness organized across a broad front to seek a reorientation of American politics.”¹¹² That included the efforts of the Business Roundtable, which became a

Organization have taken it upon ourselves to implement the recommendations contained in your excellent 1971 Memorandum to the U.S. Chamber of Commerce, ‘Attack on American Free Enterprise System.’ Last month in Dallas we met with heads of various foundations, The U.S. Chamber of Commerce, and several college presidents. Since then we’ve been in touch with a number of other groups (Council of Better Business Bureaus, Conference Board, U.S. Chamber, Mr. John Harper’s business group, etc.) to take a further ‘inventory.’ . . . Our effort is an international one, and we are making progress. Thank you for being the inspiration to this action, Justice Powell.”). Justice Powell forwarded this correspondence to Eugene Sydnor, Letter from Justice Lewis F. Powell to Eugene B. Sydnor, Jr. (May 8, 1973), and sent an uncharacteristic response, Letter from Justice Lewis F. Powell to William B. Lambert, President, Lambert Corp., (May 8, 1973) (“I write to thank you for your gracious letter . . . I hardly need say that, for many years, I have thought that responsible business leaders paid too little attention to public affairs and to the tides of change which are running strongly in this country.”).

109. JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 119 (2010).

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

111. See, e.g., Biskupic et al., *supra* note 110; *Cases: First Amendment*, INST. FOR JUST., <http://ij.org/cases/firstamendment> (last visited Jan. 30, 2016); *Criminalization of Free Enterprise – Business Civil Liberties Program*, WASH. LEGAL FOUND., <http://www.wlf.org/litigating/projects.asp?id=1> (last visited Jan. 30, 2016); *Free Speech Cases*, U.S. CHAMBERS LITIG. CENTER, <http://www.chamberlitigation.com/cases/issue/free-speech> (last visited Jan. 30, 2016).

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

premier business lobbying organization.¹¹³ Many of the businessmen and organizations involved in this movement “believed their main problems came not from international competition or labor but from government and a democratic political system.”¹¹⁴ Their concern was with the expansion of the regulatory state, and, as Thomas Edsall has written, for the first time in the “1970s, business refined its ability to act as a class, submerging competitive instincts in favor of joint, cooperative action.”¹¹⁵ The growing rise in deregulatory First Amendment cases is one product of that concerted cooperative action.

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

[T]he central presentation, which set the tone of subsequent discussion, viewed the commercial speech issue to be merely one example of the ill effects of governmental regulation in general; the speaker concluded with a plea that regulation in all marketplaces be put on an equal footing, with the

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

114. HIMMELSTEIN, *supra* note 112, at 135–38.

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

116. *Fifty Years of Affirming the Ideal of Individual Liberty*, LIBERTY FUND, <http://www.libertyfund.org/anniversary.html> (last visited Jan. 30, 2016).

117. R. H. COASE, *ADVERTISING AND FREE SPEECH* 1 (1977).

presumption being that regulation is unjustified. This defense of commercial speech was quickly viewed by those attending the conference to be based on a desire to return to a *Lochner* type of protection of property rights.¹¹⁸

At another Liberty Fund conference in 1979 on the “Modern Rights Theory,” a central focus was re-grounding constitutional property rights.¹¹⁹

During the same period, Bernard Siegan—the prominent libertarian theorist whose unsuccessful nomination to the Ninth Circuit was described by the *New York Times* as “one of the most bitterly disputed judicial nominations of the Reagan era”¹²⁰—penned a number of influential libertarian works and was well-known for his ardent attack on footnote four of *Carolene Products* and his assertion that courts should abandon the rational basis test in favor of a return to the standard of review articulated in *Lochner v. New York*.¹²¹

As described by Edwin Meese III, President Reagan’s Attorney General, the broader “freedom-based public interest law movement,” of which the Liberty Fund was a part, was forged in the 1970s in response to the success of predominantly left-leaning impact litigation by groups such as the American Civil Liberties Union and the NAACP Legal Defense Fund.¹²² On the account of Lee Edwards, the Heritage Foundation’s historian of the conservative movement, this “freedom-based public interest law movement was born in the early 1970s in reaction to several accelerating trends in America” including not only “an expanding liberal public interest law coalition” but also

118. See Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 4 n.22 (1976).

119. The proceedings of the conference were published by the *Georgia Law Review*. See Antony Flew, *Perspectives on Rights: What is a Right?*, 13 GA. L. REV. 1117, 1117 (1979); see also Roger Pilon, *The Cato Institute’s Center for Constitutional Studies*, in BRINGING JUSTICE TO THE PEOPLE: THE STORY OF THE FREEDOM-BASED PUBLIC INTEREST LAW MOVEMENT 134, 135 (Lee Edwards ed., 2004) [hereinafter BRINGING JUSTICE TO THE PEOPLE].

120. Margalit Fox, *Bernard Siegan, 81, Legal Scholar and Reagan Nominee, Dies*, N.Y. TIMES (Apr. 1, 2006), <http://www.nytimes.com/2006/04/01/us/01siegan.html>.

121. See, e.g., BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 113–14, 203 (1980).

122. Edwin Meese III, *Foreword* to BRINGING JUSTICE TO THE PEOPLE, *supra* note 119, at i–ii.

“an intrusive regulatory government.”¹²³ This cadre of lawyers, political operatives, and activists had a range of objectives and interests—a key fulcrum of which was economic liberty and property rights.¹²⁴

One wing of this movement was the National Center for the Public Interest, which was founded in 1975 as a network of freedom-based public interest organizations around the country, including the Atlantic Legal Foundation, the Mountain States Legal Foundation, the Southeastern Legal Foundation, and what would become the Landmark Legal Foundation.¹²⁵ After establishing this network in the mid-1970s, the National Legal Center relocated to Washington, D.C. and began a campaign promoting “individual rights, free enterprise, private property, [and] limited government.”¹²⁶ It focused on the interests and concerns of corporate general counsel and business lawyers, and as its president of over two decades explained, its primary audience was “the private sector—business, industry, and agriculture.”¹²⁷

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

123. Lee Edwards, *The First Thirty Years*, in BRINGING JUSTICE TO THE PEOPLE, *supra* note 119, at 1, 1.

124. *Id.* at 20–22.

125. Lee Edwards, *The National Legal Center for The Public Interest*, in BRINGING JUSTICE TO THE PEOPLE, *supra* note 119, at 90, 90–91; *see also* Ann Southworth, *Conservative Lawyers and the Contest Over the Meaning of “Public Interest Law,”* 52 UCLA L. REV. 1223, 1242–43 (2005).

126. Edwards, *supra* note 125, at 91.

127. *Id.* (quoting Ernest Hueter). The group later merged in 2007 with the American Enterprise Institute Legal Center for the Public Interest. *See AEI and National Legal Center for the Public Interest Establish New Research Center on Legal and Constitutional Issues*, AM. ENTERPRISE INST. (Sept. 4, 2007, 12:00 AM), <http://www.aei.org/press/aei-and-national-legal-center-for-the-public-interest-establish-new-research-center-on-legal-and-constitutional-issues/>.

afford its own legal representation.”¹²⁸ Among other factors, such criticism led many foundations to withdraw support from conservative public interest organizations focusing on deregulatory work for some time—leaving economic liberty litigation, including in its First Amendment instantiations, largely in the hands of private industry itself.¹²⁹ But by the mid-1980s, some conservative public interest organizations supported an economic-rights driven approach to the First Amendment based on conservative ideals, not simply the defense of particular interests. The Center for Applied Jurisprudence, for instance, assembled task forces of lawyers and intellectuals on economic liberty, property rights, and the First Amendment—the latter devoted in part to expanding commercial speech protections.¹³⁰

This history is reflected in the makeup of the present-day leaders of the commercial speech movement. They are, in the main, individual commercial plaintiffs and public interest organizations that grew out of the freedom-based conservative public interest movement’s genesis in the 1970s. Businesses and private industry groups, often represented by some of the most prominent Supreme Court and appellate advocates, including Theodore Olson, Floyd Abrams, and Noel Francisco, have brought the majority of recent cases.¹³¹ Others have been litigated by

128. Southworth, *supra* note 125, at 1252 (quoting Michael Horowitz, *The Public Interest Law Movement: An Analysis with Special Reference to the Role and Practices of Conservative Public Interest Law Firms 2* (1980) (unpublished manuscript)); *see also* STEVEN M. TELES, *THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 67–73* (2008).

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

130. TELES, *supra* note 128, at 82–84.

131. *See, e.g., Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (business & industry group represented by private law firms); *CTIA–The Wireless Ass’n v. City of Berkeley*, No. C-15-2529 EMC, 2015 WL 5569072 (N.D. Cal. Sept. 21, 2015), *appeal docketed*, No. 16-15141 (9th Cir. Feb. 1, 2016) (industry association represented by private law firms); *Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583 (D. Vt. 2015), *appeal docketed*, No. 15-1504 (2d Cir. May 6, 2015) (same); *Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (en banc) (same); *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014) (same); *CTIA–The Wireless Ass’n v. City & Cnty. of S.F.*, 494 F. App’x 752 (9th Cir. 2012) (same); *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628 (6th Cir. 2010) (same); *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (same); *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294 (1st Cir. 2005) (same); *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001) (same); *Int’l*

public interest organizations such as the Institute for Justice.¹³² The Chamber of Commerce has filed amicus briefs in many of these cases, as have a number of conservative public interest organizations such as the Washington Legal Foundation, the Cato Institute, the Institute for Justice, and the Pacific Legal Foundation, along with various private industry associations.¹³³

What emerges from this history is not a simple account of political capture by economic elites, but instead a complex picture of increasingly well-organized business actors and conservative movement lawyers acting in a multifaceted approach over decades to influence the meaning and constitutional salience of free speech protections. To be sure, that success was not immediate. And while it originated in no small part with Justice Powell—whose tenure on the Supreme Court saw the creation of the commercial speech doctrine¹³⁴ and many of its

Dairy Foods Ass'n v. Amestoy, 92 F.3d 67 (2d Cir. 1996) (same); *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258 (2d Cir. 2014) (businesses represented by private law firms); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012) (same); *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403 (D.C. Cir. 2012) (same); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012) (same).

132. See, e.g., *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014); *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1403 (2015).

133. See, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (amici including the Chamber of Commerce of the United States of America, Washington Legal Foundation, National Association of Manufacturers, Pacific Legal Foundation, and Cato Institute); *Grocery Mfrs. Ass'n v. Sorrell*, 102 F. Supp. 3d 583 (D. Vt. 2015), *appeal docketed*, No. 15-1504 (2d Cir. May 6, 2015) (amici including the Chamber of Commerce and Washington Legal Foundation); *Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (amici including the Chamber of Commerce, Business Roundtable, National Association of Manufacturers, and Grocery Manufacturers Association); *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014) (amici including the Cato Institute); *Liberty Coins, LLC v. Goodman*, 748 F.3d 682 (6th Cir. 2014) (amici including Institute for Justice and Pacific Legal Foundation); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012) (amici including the Chamber of Commerce and Washington Legal Foundation); *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403 (D.C. Cir. 2012) (amici including the Cato Institute and Pacific Legal Foundation); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012) (amici including the Washington Legal Foundation); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294 (1st Cir. 2005) (amici including the Chamber of Commerce, Business Roundtable, and American Health Insurance Plans, Inc.); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001) (amici including the National Association of Manufacturers and Electronic Industries Alliance).

134. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

central precedents,¹³⁵ as well as the greatest increase in business-brought First Amendment claims heard by the Supreme Court¹³⁶—Powell was in many ways an intermediate figure, working in the more recent shadow of the Supreme Court’s turn away from economic substantive due process and at the beginning of a movement that only decades later would come to ascendancy.

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

B. The Rise of the Information State

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

In this section, I make three claims. First, the very features that make modern regulatory tools ‘lighter-touch’ render them more prone to appear speech-regulating than the traditional regulatory levers of mandates and bans on conduct. Second, by leveraging human behavioral patterns such as biases and heuristics, information regulation may raise a disquiet about paternalism that resonates with, if also differs from, one traditional First Amendment concern: paternalism of thought. Third, together, these trends in administrative law, features of

135. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980) (Powell opinion); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

136. See Coates, *supra* note 1, at 251 fig.2; see also, e.g., *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (Powell opinion extending First Amendment protection to corporate expression of views on issues of public importance).

contemporary regulation, and economic trends have placed the modern regulatory state in greater potential tension with the First Amendment.

* * *

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

While information regulation is far from new—from the securities disclosures enacted in the 1930s¹³⁷ to the 1960s truth-in-lending mandates¹³⁸—it has recently taken on new forms and priority that place the regulatory state in greater conflict with the First Amendment. Although a full history of this administrative revolution is beyond the scope of this Article, this section draws a sketch of this trend and identifies several of the factors that have given rise to it.

As Justice Kagan has observed, policy control over the federal administrative state has become increasingly consolidated in the President and his staff since the Reagan Administration.¹³⁹ The turn to lighter-touch federal administration forms one facet of that trend. In the early to mid-1980s, President Reagan issued two executive orders, Executive Orders 12,291¹⁴⁰ and 12,498,¹⁴¹ that among other things formalized the role of the White House's Office of Management and Budget in reviewing federal regulations and established a number of guiding principles that agencies are directed to follow when developing regulations, including the use of cost-benefit analysis. In 1993,

137. Securities Act of 1933, 15 U.S.C. §§ 77a–77e (2012).

138. Truth in Lending Act of 1968, 15 U.S.C. §§ 1601–1604 (2012).

139. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277–81 (2001).

140. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

141. Exec. Order No. 12,498, 3 C.F.R. 323 (1986).

President Clinton replaced President Reagan's twin executive orders with Executive Order 12,866, which has since served as the cornerstone to federal administrative policy. This Order retained the foundations of centralized review adopted by President Reagan, but expressly required agencies to identify and assess alternatives to command-and-control regulation.¹⁴²

President Obama extended and further clarified these principles in Executive Order 13,563, which requires every agency to "identify and assess available alternatives to direct regulation, including . . . providing information upon which choices can be made by the public" and "[w]here relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, . . . identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public," including "warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible."¹⁴³ The President's more recent Executive Order, *Using Behavioral Science to Better Serve the American People*, elaborates the directive to use behavioral science to implement policy, including prominently through providing information to facilitate citizen choice.¹⁴⁴

Information regulation has proliferated at the federal level in recent decades. Much of the response to the financial crisis has taken the form of mandated disclosures, as has the regulation of consumer protection, campaign finance, and public health.¹⁴⁵ From your cell phone bill to your food packaging to your retirement plan, the signs of information regulation are nearly inescapable. The FDA's graphic cigarette warning labels are a striking example. Neither Congress nor the FDA banned the sale or possession of cigarettes or smoking—instead, at the direction of Congress, the FDA issued a rule requiring cigarette manufacturers to

142. Exec. Order No. 12,866, 3 C.F.R. 638 (1994) ("Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.").

143. Exec. Order No. 13,563, 3 C.F.R. 215 (2012).

144. *Exec. Order — Using Behavioral Science Insights to Better Serve the American People*, WHITE HOUSE (Sept. 15, 2015), <https://www.whitehouse.gov/the-press-office/2015/09/15/executive-order-using-behavioral-science-insights-better-serve-american>; see also Cass R. Sunstein, *Making Government Logical*, N.Y. TIMES, Sept. 20, 2015, at SR9.

145. See generally OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* (2014).

label their products with one of nine graphic warning labels and a phone number for a hotline offering help to quit smoking.¹⁴⁶

States and municipalities, too, have robustly embraced information regulation. Almost fifty states, along with the District of Columbia, Guam, Puerto Rico, and the Virgin Islands, require companies to disclose to customers security breaches involving their personally identifiable information,¹⁴⁷ New York has mandated that nutritional information be displayed in many restaurants,¹⁴⁸ and the cities of San Francisco and Berkeley have both required cell phone retailers to provide disclosures about the radiofrequency radiation that cell phones

146. See 15 U.S.C. § 1333(d) (2012); Required Warnings for Cigarette Packages and Advertisements, 21 C.F.R. § 1141 (2015).

147. ALASKA STAT. § 45.48.010 (2015); ARIZ. REV. STAT. ANN. § 44-7501 (2015); ARK. CODE ANN. §§ 4-110-101 to -108 (2015); CAL. CIV. CODE §§ 1798.29, .82 (2016); COLO. REV. STAT. § 6-1-716 (2015); CONN. GEN. STAT. § 36a-701b (2015); DEL. CODE tit. 6, § 12B-102 (2016); D.C. CODE §§ 28-3851 to -3852 (2016); FLA. STAT. §§ 282.0041, 282.318(2)(i), 501.171 (2015); GA. CODE ANN. §§ 10-1-910 to -912, 46-5-214 (2015); HAW. REV. STAT. § 487N-1 to -4 (2015); IDAHO CODE ANN. §§ 28-51-104 to -107 (2015); 815 ILL. COMP. STAT. §§ 530/1 to /25 (2015); IND. CODE §§ 4-1-11, 24-4.9-3 (2015); IOWA CODE §§ 715C.1-.2 (2016); KAN. STAT. ANN. §§ 50-7a01 to -7a02 (2015); KY. REV. STAT. §§ 61.931-.934, 365.732 (2015); LA. REV. ANN. STAT. §§ 40:1173.1-.6, 51:3071-.:3074 (2015); ME. REV. STAT. tit. 10, §§ 1347-1349 (2015); MD. CODE, COM. LAW §§ 14-3501 to -3504 (2015); MD. CODE, STATE GOV'T §§ 10-1301 to -1308 (2015); MASS. GEN. LAWS ch. 93H, §§ 93H:1-.4 (2015); MICH. COMP. LAWS §§ 445.63, .72 (2016); MINN. STAT. §§ 325E.61, .64 (2015); MISS. CODE ANN. § 75-24-29 (2015); MO. REV. STAT. § 407.1500 (2015); MONT. CODE ANN. §§ 30-14-1701 to -1704 (2015); NEB. REV. STAT. §§ 87-801 to -807 (2015); NEV. REV. STAT. §§ 242.183, 603A.010-.220 (2015); N.H. REV. STAT. ANN. §§ 359-C:19 to C:21 (2015); N.J. STAT. ANN. §§ 56:8-161 to -163 (West 2012); N.Y. GEN. BUS. LAW § 899-aa (McKinney 2015); N.Y. STATE TECH. LAW 208 (McKinney 2015); N.C. GEN. STAT. §§ 75-61, -65 (2014); N.D. CENT. CODE §§ 51-30-01 to -02 (2015); OHIO REV. CODE ANN. §§ 1347.12, 1349.19-.192 (West 2015); OKLA. STAT. tit. 24, §§ 161-166 (2015); *id.* tit. 74, § 3113.1; OR. REV. STAT. §§ 646A.600-.604 (2014); 73 PA. CONS. STAT. ANN. §§ 2301, 2303 (West 2015); R.I. GEN. LAWS §§ 11-49.3-1 to .3-6 (2016); S.C. CODE ANN. § 39-1-90 (2015); TENN. CODE ANN. § 47-18-2107 (2016); TEX. BUS. & COM. CODE ANN. §§ 521.002, .053 (West 2015); TEX. EDUC. CODE ANN. § 37.007(b)(5) (West 2015); UTAH CODE ANN. §§ 13-44-101 to -202 (LexisNexis 2015); VT. STAT. ANN. tit. 9, §§ 2430, 2435 (2015); VA. CODE ANN. §§ 18.2-186.6, 32.1-127.1:05 (2015); WASH. REV. CODE §§ 19.255.010, 42.56.590 (2014); W. VA. CODE §§ 46A-2A-101 to -102 (2015); WIS. STAT. § 134.98 (2013-14); WYO. STAT. ANN. §§ 40-12-501 to -502 (2015); 9 GUAM CODE ANN. §§ 48.10-.30 (2015); P.R. LAWS ANN. tit. 10, §§ 4051-4052 (2013); V.I. CODE ANN. tit. 14, § 2208 (2015).

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

emit.¹⁴⁹ Berkeley has additionally proposed mandated disclosures on gas pumps regarding the contribution of fossil fuels to climate change.¹⁵⁰

The animating logic of lighter-touch regulations such as these is one of disaggregated democracy fueled through individual, often citizen consumer, action. Information regulation seeks to regulate more lightly—meaning to enhance the public’s power of choice by eschewing the sometimes costly, inefficient, and heavy-handed burden of direct regulation of behavior.¹⁵¹ Instead of consolidating decision-making about substantive policy decisions as fully in the administrator or legislator, lighter-touch regulation disaggregates choice, if incompletely, in the public and those who would otherwise be directly regulated. To what degree should smoking or fossil fuel consumption be reduced, with their attendant budgetary, health, foreign affairs, and environmental effects? The choice is left in large part to the aggregate of citizen consumers. Lighter-touch regulation aims to affirm individual choice, and in so doing it embraces a disaggregated path to democratic legitimacy. And, whether or not lighter-touch regulation is in fact as choice-affirming as announced, and whether choice necessarily enhances welfare, the affirmation and appearance of choice has contributed to the political popularity of lighter-touch regulation.¹⁵²

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

150. See, e.g., *Berkeley Approves Plan for Global Warming Labels on Gas Pumps*, CBS S.F. (Nov. 19, 2014, 1:10 PM), <http://sanfrancisco.cbslocal.com/2014/11/19/berkeley-approves-plan-for-global-warming-labels-on-gas-pumps-climate-change/>; Libby Rainey, *Global Warming Labels Coming to Berkeley, S.F. Gas Pumps?*, SF GATE, (Nov. 17, 2014, 6:55 PM), <http://www.sfgate.com/bayarea/article/Global-warning-labels-coming-to-Berkeley-S-F-5899496.php>.

151. See, e.g., Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211 (2003); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

152. See, e.g., Ryan Bubba & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1595–96, 1604 (2014). For a

The general trend of administrative regimes towards information regulation has been spurred by a number of forces in addition to this political appeal. Most recently, the use of lighter-touch regulatory tools by federal agencies, including altering defaults and mandating disclosures, has been encouraged by behavioral law and economics scholarship and one of its pioneers, Cass Sunstein, President Obama's head of OMB's Office of Information and Regulatory Affairs from 2009 to 2012.¹⁵³ Behavioral law and economics research has identified tools, such as defaults, disclosures, and salience effects, that regulators can use to markedly alter behaviors without conduct rules.¹⁵⁴

The turn towards lighter-touch regulation was likewise encouraged by many of the same business advocates now litigating against the constitutionality of lighter-touch regulatory regimes. The New Deal response to the Great Depression in programs from the Agricultural Adjustment Act to the Social Security Act, and the Rural Electrification Administration to the Tennessee Valley Authority greatly expanded the reach and function of the American regulatory state. The Great Society programs passed during the 1960s and 70s—including framework statutes such as the Civil Rights Act, the Occupational Safety and Health Act, the Clean Air Act, and the Environmental Policy Act—further broadened its reach. And just as business organized in the courts to respond to this regulatory expansion beginning in the 1970s, it mobilized against regulation by the political branches, spurring lighter-touch regimes in the process.¹⁵⁵

The history of tobacco regulation is illustrative. While Congress has mandated health warnings on cigarettes since 1966, it did not authorize the FDA to directly regulate tobacco products until 2009.¹⁵⁶

thoughtful explication of the challenges presented to efforts to regulate for rationality, see Alan Schwartz, *Regulating for Rationality*, 67 STAN. L. REV. 1373 (2015).

153. See CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 100–26 (2013); see also, e.g., Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

154. See, e.g., RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 230–48 (2008); Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349 (2011). Behavioral law and economics research, too, has underscored that because individual decision-making is marked by a range of heuristics and biases, information disclosure may influence public behavior in ways that are more or less choice affirming. See, e.g., Bubb & Pildes, *supra* note 152, at 1595–96, 1604.

155. See generally, e.g., ALYSSA KATZ, THE INFLUENCE MACHINE: THE U.S. CHAMBER OF COMMERCE AND THE CORPORATE CAPTURE OF AMERICAN LIFE (2015).

156. See Federal Cigarette Labeling and Advertising Act of 1966, 15 U.S.C. §§ 1331–1340 (2012); Family Smoking Prevention and Tobacco Control Act of 2009,

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

A concomitant growth of a range of contemporary concerns—from big-data privacy to supply chains that span borders—has further prompted the use of information regulation by contemporary administrators and legislators. The regulation at the center of the D.C. Circuit’s recent *National Association of Manufacturers v. SEC*¹⁵⁹ decision provides an apt example. Encouraged by staff at the State Department, Congress in Dodd-Frank directed the Securities and Exchange Commission to require firms to disclose whether minerals used in their products were sourced from the area of the armed conflict in the Democratic Republic of Congo or nearby states.¹⁶⁰ The SEC in

Pub. L. No. 111-31, 123 Stat. 1786 (2009) (codified as amended at 21 U.S.C. § 387a (2012)); see also K Michael Cummings, *Programs and Policies to Discourage the Use of Tobacco Products*, 21 ONCOGENE 7349, 7349–52 (2002) (providing a brief history of tobacco regulation).

157. *Compare FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (successful industry challenge to FDA exertion of authority over the regulation of tobacco products), and Janet Hook, *Senate Approves FDA Regulation of Tobacco*, L.A. TIMES (June 12, 2009), <http://articles.latimes.com/2009/jun/12/nation/na-tobacco12> (“Most tobacco companies bitterly opposed” the 2009 bill authorizing FDA regulation), and Michael Givel, *FDA Legislation*, 16 TOBACCO CONTROL 217, 217 (2007) (discussing Philip Morris’s lobbying effort to “stop[] a future FDA regulation regulating tobacco as a drug and drug delivery device”), with Irvin Molotsky, *Firmer Warnings on Cigarettes Called Likely*, N.Y. TIMES (May 22, 1984), <http://www.nytimes.com/1984/05/22/us/firmer-warnings-on-cigarettes-called-likely.html> (discussing a warning label compromise in which the tobacco industry won multiple concessions and stating that “[a] spokesman for Senator Helms confirmed that he had reached such an agreement [on the labels] with Senator Hatch but that it was contingent on Mr. Helms’s being notified formally by the tobacco lobbying group, the Tobacco Institute, that it had indeed agreed to the compromise”). The 2009 Act indeed prohibits the FDA from reducing nicotine in products to zero or banning classes of tobacco products altogether. 21 U.S.C. § 387g(d)(3) (2012).

158. See *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012).

159. 800 F.3d 518 (D.C. Cir. 2015).

160. See 15 U.S.C. § 78m(p)(1)(A) (2012).

turn required firms to file conflict minerals reports describing their supply chain sources and to disclose if any minerals used had “not been found to be ‘DRC conflict free.’”¹⁶¹ The aim of the regulation was two-fold. First, the required disclosure might deter firms from sourcing minerals from the DRC or neighboring regions because of the negative publicity (and potential stock-price decline) they might face. Second, the disclosures might influence shareholder and consumer choices in a way that would indirectly influence corporate mineral-sourcing behavior. These first- and second-order aims were only means, however, to accomplish the higher order policy goal of influencing the conflict in the DRC by drying up sources of revenue to fighters there, so as to advance American foreign affairs and humanitarian goals in East Africa. Direct military intervention by the United States or sanctions (such as outright forbidding firms from sourcing from the conflict in the DRC) or legal or military order imposed by the DRC or neighboring countries were not feasible or politically attractive. Information regulation, then, was an indirect means to accomplish similar foreign policy goals.

The tools of lighter-touch regulation may be the policy options of choice, if not necessity, in regulatory arenas where direct mandates are not possible—either because they are beyond the power of the government or outside of its knowledge. Many economic foreign policy issues, including foreign labor, industrial, and banking practices, share this characteristic. Information disclosure may be one of the only tools the state has to gain knowledge about data practices that may in turn raise privacy, disparate impact, cyber security, or other concerns that the state might later target with substantive regulation. We might view similarly the efforts of some states—in the face of the unconstitutionality of outright banning abortion—to attempt to discourage it by way of mandated ultrasounds or required disclosures by abortion-providing doctors.¹⁶²

Whatever its causes, the modern state regulates in ways that appear, or are more prone to appear, speech-regulating than earlier forms of administration. This is because much modern regulation operates through systemic human behaviors, incentives, and market pressures created by altering the information landscape (or choice

161. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,274, 56,320, 56,322 (Sept. 12, 2012).

162. See, e.g., *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014); *Planned Parenthood of Minn. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc).

architecture) relevant to the targeted behavior, instead of simply mandating or banning that behavior. Rather than banning cigarettes or sodas, for instance, the state might require a warning or the disclosure of nutrition information. Instead of banning the prescription of drugs for off-label purposes, it might prohibit their off-label marketing. Or in the absence of a ban on the sourcing of conflict minerals, it might require disclosure of supply chain information to investors. A warning or disclosure, or a ban on certain methods of advertising or information dissemination, appears more speech-regulating than a ban on sales or purchasing practices. The very feature that makes modern forms of regulation ‘lighter-touch’ is what brings it in greater potential conflict with the First Amendment.

At the same time as lighter-touch regulation has emerged as more apparently speech regulating, the objects of modern regulation themselves increasingly appear speech-like. This change is due, at least in part, to the shift from an industrial towards an information-based economy. Manufacturing jobs have disappeared in favor of industries that involve data and run on information. This has meant that many of the targets of regulation now involve greater components of information, communication, and indicia of knowledge creation or its potentiality.¹⁶³ These trends have caused the objects of modern regulation to more often appear speech-like and data and information-laden than in moments, and economies, past. And the larger importance of informational goods and services to our political economy has both trained regulatory attention on information-based activities and raised the economic stakes for those regulated.¹⁶⁴ As Julie Cohen has observed, “contests over the substance of regulatory

163. See, e.g., Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. (forthcoming 2016) (manuscript at 3), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2714072 (noting that “[i]n an information economy, information technology assumes an increasingly prominent role in the control of industrial production and the management of all kinds of enterprises”); Jack M. Balkin, *Republicanism and the Constitution of Opportunity*, U. Tex. L. Rev. (forthcoming 2016) (“[The First Amendment] eventually has become the most powerful and anti-regulatory tool in the information age, especially in a world in which information and information goods are central to markets.”); see also Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 66 (2014).

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

mandates and the shape of regulatory institutions are most usefully understood as moves within a larger struggle to chart a new direction for the regulatory state in the era of informational capitalism.”¹⁶⁵ It is against those economic changes and that political economy that regulation—and resistance to it—is undertaken.

Lighter-touch regulation may moreover raise a type of paternalism concern that strikes closer to the core of the First Amendment’s animating rationales than do mandates or bans on conduct. More flexible regulation, such as defaults or disclosure requirements that provide information to the public, is often heralded as choice affirming.¹⁶⁶ I may choose to opt-out of a default or alter a decision based upon a required disclosure, and in that sense modern regulation may enhance consumer choice. But defaults are often quite sticky—indeed, their effectiveness may depend on this stickiness—and warnings or disclosures, while often ignored, may cause salience or framing effects that systematically affect citizen and consumer behavior, some through unconscious or non-rational means.¹⁶⁷

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

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

166. See, e.g., Sunstein, *supra* note 154, at 1349.

167. See, e.g., Bubb & Pildes, *supra* note 152, at 1625–26.

168. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976); VINCENT BLASI, THE CLASSIC ARGUMENTS FOR FREE SPEECH 60–61 (unpublished manuscript on file with the author); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 212–14 (1983).

unease about freedom of thought and paternalism of the mind that resonate with anxieties long at the center of the First Amendment's focus, and in so doing draw the modern regulatory state in greater possible conflict with the First Amendment.

The contemporary state regulates in ways that may generally appear more speech-regulating and operate by way of less overt rules, but modern regulation is made up of a rich tapestry of methodologies—and not all are likely to pose equal First Amendment concern. We might think of this diversity of tools and approaches in five stylized categories, ordered roughly in their likelihood of conflict with the First Amendment:

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

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

169. Examples include the limitations on the sale or distribution of marketing data at issue in *Sorrell*, 131 S. Ct. 2653; the ban on material support, including expert advice, to designated terrorist organizations litigated in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010); the tobacco product placement restrictions in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); and the bans on drug price, electrical services, beer alcohol content, and casino advertising at issue in *Virginia State Board of Pharmacy*, 425 U.S. 748 (1976), *Central Hudson*, 447 U.S. 557 (1980), *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), and *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), respectively.

170. See, e.g., *Sorrell*, 131 S. Ct. at 2664; *Central Hudson*, 447 U.S. at 566.

of the government's interest and less restrictive alternatives. And while the regulations enumerated above all involve the regulation of 'speech' in any colloquial sense, the courts have not found First Amendment concern, or even speech, in a number of them.¹⁷¹

Speech Compulsions. Disclosure requirements are one of the most prevalent, if debated, modern regulatory tools.¹⁷² From graphic tobacco warnings to mandated nutritional information disclosures, miles per gallon, and energy efficiency ratings to country-of-origin labeling and financial disclosures to drug warnings—mandated disclosures are pervasive. Because they typically involve words or pictures, disclosure requirements are often easily understood to raise First Amendment concern. Mandated commercial disclosures face laxer constitutional review and may be a less restrictive alternative to limitations on speech.¹⁷³ At the same time, many types of commercial speech compulsions, such as mandated tax filings, are not often viewed as 'speech' or challenged on free speech grounds.

Incentives and Conditions. Another common lighter-touch regulatory tool involves the use of incentives and conditions on governmental licenses or grants.¹⁷⁴ Reflecting the "view that government may not do indirectly what it may not do directly," the doctrine of unconstitutional conditions may invalidate regulatory incentives and conditions if they require a beneficiary to surrender a constitutional right.¹⁷⁵ The important point for our purposes is that the constitutionality of a condition rises or falls on the existence and recognition of an underlying constitutional right. For example, as Kathleen Sullivan has observed, "conditioning federal education funding on private recipients' cessation of race or sex discrimination surely pressures the recipients' private associational choices, but unless forbidding private race or sex discrimination would violate the first amendment, conditions tending to produce the same result are not

171. See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993) (Title VII); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (antitrust laws); Schauer, *supra* note 6, at 1765–67.

172. See, e.g., BEN-SHAHAR & SCHNEIDER, *supra* note 145, at 6.

173. See, e.g., *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 650–53 & n.14 (1985); *Central Hudson*, 447 U.S. at 565–66.

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

175. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

unconstitutional.”¹⁷⁶ Some incentives and conditions may be more likely to conflict with the First Amendment than others. Some, like the federal requirement at issue in *Agency for International Development v. Alliance for Open Society International, Inc.*,¹⁷⁷ which conditioned federal funding on organizations’ adoption of an express policy opposing prostitution and sex trafficking, are more likely to invite First Amendment challenge.¹⁷⁸ But many incentives and conditions are unlikely to appear to impinge on speech at all. Benefits that are contingent on actions that appear more conduct-like, such as the condition of federal funding on a state desegregating its public schools,¹⁷⁹ are doubtful to raise First Amendment concern.

Defaults & Choice Architecture. Robust social science evidence demonstrates that defaults, or starting points, such as automatic enrollment in a retirement savings plan, can affect behavioral outcomes.¹⁸⁰ Defaults are one of the strongest policy levers in the broader toolbox of choice architecture.¹⁸¹ Like incentives and conditions, many defaults and alterations to choice architecture are less likely to conflict with First Amendment principles. But insofar as a required default calls on a commercial entity to use language—say, to effectuate automatic enrollment in a retirement savings plan—a colorable First Amendment challenge might exist. Defaults and other regulation based on systematic patterns in decision-making may also raise a paternalism concern that resonates with First Amendment principles.

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

176. *Id.* at 1427.

177. 133 S. Ct. 2321 (2013).

178. *Id.* at 2324–25.

179. *See, e.g.*, Elizabeth Cascio et al., *Paying for Progress: Conditional Grants and the Desegregation of Southern Schools*, 125 Q.J. ECON. 445, 445–48 (2010).

180. *See, e.g.*, Sunstein, *supra* note 154, at 1350.

181. *See* Jolls et al., *supra* note 153, at 1535–37; Sunstein, *supra* note 154, at 1353–55. *But see, e.g.*, Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155, 1157–59 (2013).

targeted behavior or those who engage in it, even conduct rules may be susceptible to First Amendment challenge.

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

II. SPEECH PROTECTION AS THE BOUNDARY LINE OF STATE ACTION

The stakes of this burgeoning constitutional conflict are high due to a simple but often overlooked fact: because nearly all human action—and so state regulation—operates through communication, the First Amendment possesses near total deregulatory potential. For this reason, the scope of First Amendment protection uniquely tracks the boundary of the constitutionally permissible administrative state. This section elaborates those contentions and paints the stakes of the growing conflict between the First Amendment and the administrative state.

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

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

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

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

A few recent cases clarify the potential reach of the new *Lochner*. The Supreme Court’s 2011 decision in *Sorrell* is illustrative. In that case, Vermont data miners and an association of pharmaceutical manufacturers challenged a state law restricting the sale, disclosure, and use of pharmacy data revealing prescribing practices of doctors without their consent.¹⁸⁵ The Court concluded that there is a “strong argument” that such information is speech for First Amendment purposes but held the law unconstitutional even if the data was treated as a “mere commodity.”¹⁸⁶ “Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs.”¹⁸⁷ But if information is speech (or even simply a commodity whose regulation alters others’ speech), it is not clear what the First Amendment does not cover or protect with

182. Frederick Schauer, *First Amendment Opportunism*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 174, 176, 192 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

183. *Id.* at 191.

184. *Id.* at 193.

185. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2660 (2011).

186. *Id.* at 2667.

187. *Id.*

Sorrell's level of scrutiny. Certainly, a business license or tax filing could be considered a regulation of information. Insider trading restrictions, too, regulate when certain information can be disclosed. The Federal Rules of Evidence prescribe what sorts of information may be admitted at trial or required to be disclosed in discovery. Countless examples of the regulation of "information" spring to mind.

Sorrell moreover held that content-based restrictions that burden speech are subject to "heightened" scrutiny, adding that "[c]ommercial speech is no exception."¹⁸⁸ The Court emphasized that "[i]n the ordinary case it is all but dispositive to conclude that a law is content-based."¹⁸⁹ But could this really be so? If such a principle was extended, it would invalidate all mandated commercial disclosures. By definition, all mandatory disclosures require some defined class to say something rather than something else. Were this contention accepted, every mandated disclosure would be subject to searching constitutional review. This would "all but dispositive[ly]" render unconstitutional all warning labels, securities disclosure statements, even the mandatory filing of tax returns. Bans on false and misleading commercial speech are likewise patently content-based. Taken literally, *Sorrell* suggests that the First Amendment impedes the government from banning outright fraud because fraud is banned precisely because it is based on *false* representations, a content-based restriction.¹⁹⁰ This would render much of the work of the Securities and Exchange Commission and Federal Trade Commission unconstitutional.

The Supreme Court's recent decision in *Reed v. Town of Gilbert*¹⁹¹ expanded the definition of content discrimination in ways that commercial speech advocates likewise contend renders all commercial speech subject to strict scrutiny. The Court announced that a government regulation of speech is content-based, and so presumptively unconstitutional, if it "applies to particular speech because of the topic discussed or the idea or message expressed . . . regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."¹⁹²

Commercial speech advocates have since argued that because commercial speech regulation necessarily targets speech because of the

188. *Id.* at 2664.

189. *Id.* at 2667.

190. *See infra* note 246 and accompanying text.

191. 135 S. Ct. 2218 (2015).

192. *Id.* at 2227–28.

topic discussed, namely its commercial content, *Reed* requires strict scrutiny of all commercial speech.¹⁹³ On this view, *Reed sub silentio* overruled decades of commercial speech precedent, including landmark commercial speech cases such as *Central Hudson* and *Zauderer*. While it strains credulity, in the words of the late Justice Scalia,¹⁹⁴ to suggest that the Supreme Court hid such an elephant in the mouse hole of a relatively obscure case about an Arizona sign ordinance, *Reed*, like *Sorrell*, signals growing tension between various First Amendment sub-doctrines. And were *Reed* applied universally as advocates urge, the commercial speech doctrine—along with other topic-based sub-doctrines such as those that currently permit the greater regulation of child pornography, obscenity, fraud, perjury, price-fixing, conspiracy, or solicitation—would be rendered obsolete, thereby rendering large swaths of the administrative state presumptively unconstitutional.

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

193. See, e.g., Transcript of Proceedings Held on 8/20/15 at 14, *CTIA—The Wireless Ass’n v. City of Berkeley*, 2015 U.S. Dist. LEXIS 126071 (N.D. Cal. Sep. 21, 2015) (No. 50) (The Court: “[I]t seems to me that [under your argument] every disclosure case would—is content and viewpoint—contains viewpoint and distinctions and discrimination. It can’t be the law that every disclosure requirement is suddenly subject to strict scrutiny . . . because it has a built-in—I mean, the line between commercial speech and noncommercial speech is itself [a] content-driven distinction.” Mr. Theodore Olson: “We submit under the Supreme Court’s most recent ruling, *Reed vs. Town of Gilbert* . . . that requires the application of strict scrutiny.”).

194. See *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 468 (2001).

195. 748 F.3d 682 (6th Cir. 2014).

196. *Id.* at 686 (quoting OHIO REV. CODE ANN. § 4728.02 (West 2014)).

Coins had a strong likelihood of success on the merits because it concluded that “holding [oneself] out” as a precious metals dealer was a form of speech subject to intermediate scrutiny.¹⁹⁷

The D.C. Circuit, too, recently invalidated a business licensing scheme for tour guides under the First Amendment on the basis that tour guides speak for a living, leading the court to conclude that requiring a tour guide to first obtain a business license impermissibly burdened speech.¹⁹⁸ Nearly any business licensing scheme or regulation might be swept within this logic. How do we know that a pharmacist or an accountant, for instance, is a pharmacist or an accountant—and so subject to a given type of regulation? Because they engage in activities related to pharmacy or accountancy and hold themselves out with words as such. Because most, if not all, commercial services operate at least in part through the use of words, all business licensing schemes are in principle susceptible to First Amendment challenge.¹⁹⁹

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

In *Nordyke v. Santa Clara County*,²⁰⁰ the Ninth Circuit addressed a challenge to an addendum that the County added to its lease with the Santa Clara Fairgrounds Management Corporation. That addendum banned gun shows on fairground premises by prohibiting “any person from selling, offering for sale, supplying, delivering, or giving possession or control of firearms or ammunition to any other person at

197. *Liberty Coins, LLC v. Goodman*, 977 F. Supp. 2d 783, 792–94 (S.D. Ohio 2012).

198. *Edwards v. District of Columbia*, 755 F.3d 996, 1002 (D.C. Cir. 2014).

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

200. 110 F.3d 707 (9th Cir. 1997).

a gun show at the fairgrounds.”²⁰¹ The Ninth Circuit struck down that ban as violative of the First Amendment on the basis that prohibiting the offer of firearms or ammunition for sale was a regulation of commercial speech. But of course any sale or contract involves the communicative elements of offer and acceptance. And if banning sales—under the logic that they involve the communicative elements of offer and acceptance—triggers First Amendment review, little if any commercial activity falls outside of the First Amendment’s ambit.

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

At a deep level, any conduct could be expressive depending on the actor and audience of the “conduct.” The plaintiffs in *Spirit Airlines, Inc. v. United States Department of Transportation*²⁰² made a not dissimilar argument. They contended that the First Amendment shielded them from including government taxes within the most prominent sale price they advertised on the basis that they had a right to inform the public of the tax burden imposed on air travel.²⁰³ Hate crimes legislation faced a similar First Amendment challenge.²⁰⁴ Alternately, regulation of “conduct” could be understood as a form of government expression or “opinion,” triggering a different variety of First Amendment concern.²⁰⁵ But of course the decision to impose any sort of regulation—either a disclosure or a mandate—reflects some sort of government sentiment that the regulation is needed or the behavior it seeks to alter is harmful, dangerous, or the like.

201. *Id.* at 708–09.

202. 687 F.3d 403 (D.C. Cir. 2012).

203. *Id.* at 411–12.

204. *See Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

205. Compare, e.g., *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), with *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005), and *United States v. United Foods, Inc.*, 533 U.S. 405 (2001).

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

III. ECHOES OF *LOCHNER*

In a certain sense, protection for commercial speech is quite new, and the libertarian turn in commercial speech doctrine of even more uniquely modern coinage. In another, however, this is a story of constitutional conflict that has been told, if slightly differently, once before. A number of scholars, commentators, and more than one Supreme Court Justice have suggested that courts’ growing protection for commercial speech threatens to revive a new form of *Lochnerian* constitutional economic deregulation.²⁰⁶ This Part analyzes that contention to illuminate the ways in which this contemporary form of constitutional deregulation is uniquely modern.

The similarities between the new commercial speech doctrine and *Lochner* itself are pronounced. Both pit business freedom against the government’s ability to structure or facilitate citizen choice. Both privilege the negative over the positive state. And both render courts, not the political branches, the key arbiters of our economic life.²⁰⁷

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

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

Following *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), for instance, the courts of appeals diverged on whether that case requires the judiciary to defer to a claimant’s assertion that a law or policy substantially burdens its religious exercise under RFRA. Compare *Sharpe Holdings, Inc. v. U.S. Dep’t of Health &*

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

The application of the First Amendment right of association in recent labor union agency fees share cases also exhibits some *Lochnerian* qualities, if defined as advancing economic libertarianism. See, e.g., *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Friedrichs v. Cal. Teachers Ass’n*, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *cert. granted*, 135 S. Ct. 2933 (2015) (mem.). As do libertarian association claims in the context of public accommodations, as Samuel Bagenstos has aptly argued. See Bagenstos, *supra* note 5. Indeed, one provocative question is why speech claims, not association claims, have been more often invoked for contemporary deregulatory purposes, despite the similar elasticity of the right of association.

Perhaps most importantly, the developments I discuss is a piece of the larger phenomenon of neoliberal constitutionalism along with campaign finance cases such as *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Citizens United v. FEC*, 558 U.S. 310 (2010), which Jedediah Purdy has so thoughtfully explored. See Purdy, *supra* note 5; Jedediah Purdy, *That We Are Underlings: The Real Problems in Disciplining Political Spending and the First Amendment*, 30 CONST. COMMENT. 391 (2015); Jedediah Purdy, *The Roberts Court v. America: How the Roberts Supreme Court Is Using the First Amendment to Craft a Radical, Free-Market Jurisprudence*, 23 DEMOCRACY: J. IDEAS 46 (2012); Jedediah Purdy, *Wealth and Democracy* 13–14 (Duke Law Sch. Publ. Law & Legal Theory Series, Paper No. 2015-38, May 13, 2015), available at <http://ssrn.com/abstract=2641121>.

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

But, while this modern form of constitutional deregulation resonates with *Lochner*, it differs in significant aspects. First, commercial speech protection possesses broader deregulatory capacity. While all contracts operate through speech, not all speech is a contract. All commercial communication—the filing of a tax form, a required warning or nutritional label, any sale or advertisement, a malpractice suit, or a business licensing scheme—might plausibly come within the First Amendment’s ambit. One might have thought that the First Amendment would be a more limited restriction on state power than the *Lochner* era’s substantive due process because of its textual hook. Free speech is an enumerated right, while liberty of contract is not. As the last section demonstrated, however, the textually grounded “freedom of speech” is potentially profoundly capacious, outstripping even liberty of contract’s deregulatory potential—and permitting judges to engage in “*Lochner*’s error of converting personal preferences into constitutional mandates.”²⁰⁸

Second, the new *Lochner* is, in a more nuanced way, more robust because the notion of right it defends is stronger than that which prevailed during the *Lochner* era. As Victoria Nourse has captured, the understanding of rights and police power predominant at the time of *Lochner* in the early 1900s was not the rights-as-trumps understanding of individual rights versus state action familiar to modern constitutional law.²⁰⁹ Substantive due process, while far from a weak tool of deregulation, was not used to strike down the number of laws that some imagine.²¹⁰ Commercial speech advocates, and supporters of a libertarian First Amendment more generally, have been only partially successful in realizing the First Amendment’s deregulatory potential. But because the contemporary form of right the First Amendment now

extent that I do not explore here, also bear a relationship to the administrative state that is analytically different than religious accommodation claims.

208. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2618 (Roberts, C.J., dissenting).

209. Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 753 (2009) (“Today, no constitutionalist would mistake rational basis for strict scrutiny, but this is precisely what we do when we assume that *Lochner*-era courts adopted a strong, trumping view of fundamental rights.”).

210. Compare Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 885–86 (1987), and GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 724 (4th ed. 2001) (“the Court invalidated approximately 200 economic regulations”), with Nourse, *supra* note 209, at 796–97.

protects is closer to the concept of right-as-trump,²¹¹ contemporary First Amendment litigation has the potential to be a heavier deregulatory hammer than was the right to contract.

Third, while *Lochner* epitomized early-twentieth century attempts to prevent the expansion of the regulatory state, the current contest reflects efforts to whittle it down in size. The *Lochner* era involved litigation aimed to impede the creep of the public sphere into new domains of previously private ordering, such as early minimum wage and maximum hour legislation. The new *Lochner*, by contrast, occurs against the backdrop of an already robust regulatory state that is near ubiquitous in its involvement in economic affairs—from the regulation of vehicle emissions to trans fats to debt collection practices. In this way, the new *Lochner* takes an offensive rather than defensive posture and is distinctively neo-liberal.²¹² It seeks to reconfigure regulation to permit and support different forms of economic ordering—instead of attempting to prevent the state from entering theretofore private domains in the first instance. This distinction is mirrored in the types of rules typically challenged by each form of constitutionalism: largely legislative mandates during the *Lochner* era, in contrast to administrative (often lighter-touch) regulation today—though these are rough, not necessary, categories.²¹³ In this way, *Lochner* typified a conflict between courts and legislatures, while the current contest largely opposes courts and agencies.

Fourth, the animating concepts of the two moments of conflict between the regulatory state and the Constitution differ. *Lochnerian* substantive due process was not monolithic in its underlying justification or consistent in its application. It further passed through

211. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, at xi (1977); Nourse, *supra* note 209, at 752–53. For histories demonstrating that the First Amendment was not always the robust trump it is today, see Lakier, *supra* note 12, at 2168, and Kozinski & Banner, *supra* note 12, at 749, 761.

212. See generally David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 *LAW & CONTEMP. PROBS.* 1, 9 (2014).

213. Compare, e.g., *Lochner v. New York*, 198 U.S. 45, 46 (1905) (challenging a New York statute setting maximum working hours for bakers), and *Adkins v. Children's Hosp. of D.C.*, 261 U.S. 525, 539 (1923) (challenging a federal statute setting minimum wages for women and children in the District of Columbia), with *Am. Meat Inst. v. USDA*, 760 F.3d 18, 20 (D.C. Cir. 2014) (challenging Department of Agriculture mandated country-of-origin disclosures), and *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1208 (D.C. Cir. 2012) (challenge to FDA rule requiring graphic tobacco warning labels). But see, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659 (2011) (challenging a Vermont statute).

rough stages as it bridged the common law and modern eras. The late nineteenth century through approximately 1912, in which *Lochner* itself as well as *Adair v. United States*²¹⁴ and *Allgeyer v. Louisiana*²¹⁵ were decided, witnessed a more radical libertarian form. The period until the early 1920s observed a more moderate form of liberty of contract, which permitted the state police power greater inroads into economic ordering.²¹⁶ And the early 1920s through 1937 saw a more robust version of liberty in which the four horsemen—Justices McReynolds, Butler, Sutherland, and Van Devanter—faced off against the burgeoning New Deal state.²¹⁷ In the main, though its configurations differed, the *Lochner* era equated constitutional liberty with the free hand of the market and was bolstered by an intellectual movement espousing the theories of Adam Smith.²¹⁸

Just as the late nineteenth and early twentieth century witnessed several moments of *Lochnerism*, we can begin to identify phases of the new *Lochner* and its animating bases. At present, the new *Lochner* resonates with Smithian ideology, and indeed some opinions have drawn explicit connections between the deregulatory use of the First Amendment and Smithian philosophy.²¹⁹ The animating justification of the movement to protect commercial speech—or at least its litigation strategy—however, is not so richly theorized. It largely relies on the notion that the First Amendment protects speech as such and the autonomy of all speakers regardless of context.²²⁰

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

214. 208 U.S. 161 (1908).

215. 165 U.S. 578 (1897).

216. See, e.g., *Bunting v. Oregon*, 243 U.S. 426, 433–34 (1917) (upholding a law limiting the work day to ten hours and imposing certain overtime pay requirements).

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

218. See *Am. Fed’n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 543 (1949) (Frankfurter, J., concurring).

219. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2656–57 (2011); *Edwards v. District of Columbia*, 755 F.3d 996, 1007 (2014).

220. See *infra* notes 236–237 and accompanying text.

libertarian First Amendment with its mid-century use to protect the free speech of social and political dissidents.²²¹ The speech-as-such theory may be a savvy litigation strategy or attractive type of judicial rationale because of its ability to bridge multiple substantive justifications and understandings of the animating values of the First Amendment.

The less-visible ideology of the new *Lochner* points to the fifth of its features: its naturalization of speech. *Lochner*-era governance relied on the naturalization of a certain division of public and private spheres and, as Cass Sunstein has argued, the existing distribution of wealth and entitlements under the common law baseline as something that was viewed as pre-politically “there.”²²² This naturalization supported the exclusion of the state from private choices in economic ordering. The new *Lochner*, by contrast, relies on the apparent natural existence of ‘speech’ without its social, cultural, or economic context. These logics are similar. Just as there is no naturally operative market without state intervention in domains from property law to policing,²²³ there is no ‘speech’ for constitutional purposes or meaning without social and cultural context.²²⁴

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

221. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 398, 404–05 (1989); *Cohen v. California*, 403 U.S. 15, 19 (1971).

222. See Sunstein, *supra* note 210, at 884–85. For a critique of Sunstein’s history and analysis, see David E. Bernstein, *Lochner’s Legacy’s Legacy*, 82 TEX. L. REV. 1 (2003).

223. See, e.g., Amy Kapczynski, *Intellectual Property’s Leviathan*, 77 LAW & CONTEMP. PROBS. 131, 134–35 (2014); Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 674–75 (1979).

224. See, e.g., Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1249, 1273 (1995).

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

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

Sixth, the new *Lochner* allows *Lochner* itself to remain anticanonical while permitting its largely discredited economic rights to be repackaged in the First Amendment. This is critical because noteworthy conservative jurists, including Chief Justice Roberts, have denounced *Lochner*’s approach as “discredited” and “unprincipled” and as improperly enshrining the “naked policy preferences” of the Justices into the Constitution.²²⁶ Chief Justice Roberts’s dissent to the Supreme Court’s recent recognition of gay marriage in *Obergefell* was devoted

225. See Grewal & Purdy, *supra* note 212, at 6.

226. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2616, 2621 (2015) (Roberts, C.J., dissenting); see also, e.g., *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 355 (2007) (Thomas, J., concurring) (noting that “[i]n *Lochner* the Court located a ‘right of free contract’ in a constitutional provision that says nothing of the sort” and describing “the ‘right’ [*Lochner*] vindicated” as “illegitimate”); *Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 690–91 (1999) (Scalia, J., writing for the Court) (“We had always thought that the *distinctive* feature of *Lochner*, . . . was that it sought to impose a particular economic philosophy upon the Constitution.”).

almost exclusively to a comparison of the majority's decision to *Lochner's* approach.²²⁷ It argued that the majority's extension of due process protection to gay marriage "had nothing to do" with the Constitution, just as *Lochner's* protection of economic rights had not.²²⁸ The power of this dissent lies in the continuing anticanonical status of *Lochner* itself. To be sure, a growing number of commentators, scholars, and judges have recently advocated the revival of substantive due process protection for economic rights, including most prominently Richard Epstein and George Will.²²⁹ But the new *Lochner* permits commercial speech advocates to sidestep this high-stakes debate. They may take for granted the discredited nature of *Lochner* and its "freewheeling" elevation of judges' "own policy judgments to the status of constitutionally protected 'liberty.'"²³⁰ And they may assume that the bifurcation of economic and personal rights adopted in *Carolene Products*²³¹ remains black letter constitutional law as it has since the late 1930s, while encouraging the practical punch of economic liberties to be swung by the First Amendment's 'personal' right. That

227. *Obergefell*, 135 S. Ct. at 2611–26 (Roberts, C.J., dissenting).

228. *Id.* at 2626.

229. RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* 305 (2014) (arguing for the revitalization of the protection of economic rights, against the wealth transfers caused by market regulation, and for "all individual interests, whether they are classified as economic, expressive, or intimate" to be treated the same); George F. Will, *The 110 Year-Old Case that Still Inspires Supreme Court Debates*, WASH. POST (July 10, 2015), https://www.washingtonpost.com/opinions/110-years-and-still-going-strong/2015/07/10/f30bfe10-2662-11e5-aae2-6c4f59b050aa_story.html (arguing that "the United States urgently needs many judicial decisions as wise as *Lochner*" and that "[t]he next Republican president should ask this of potential court nominees: Do you agree that *Lochner* correctly reflected the U.S. natural rights tradition and the Ninth and 14th amendments' affirmation of unenumerated rights?"); see also *Hettinga v. United States*, 677 F.3d 471, 480–83 (D.C. Cir. 2012) (Brown, J., concurring) ("[G]overnment is a broker in pillage, and every election is a sort of advance auction sale of stolen goods.' . . . Rational basis review means property is at the mercy of the pillagers. The constitutional guarantee of liberty deserves more respect—a lot more." (quoting H.L. MENCKEN, *ON POLITICS: A CARNIVAL OF BUNCOMBE* 331 (1996))); Colby & Smith, *supra* note 70, at 602 (describing changes in conservative legal philosophy that have led next-generation originalists to "stand poised to move conservative legal thought about economic rights forward: by taking it back a hundred years"); Suzanna Sherry, *Property is the New Privacy: The Coming Constitutional Revolution*, 128 HARV. L. REV. 1452, 1452–53 (2015) (noting the lack of progressive scholarly response to the conservative movement "to ensure that economic rights receive the same level of judicial protection as non-economic or personal rights, and thus to make it much more difficult for the government to regulate economic activity").

230. *Obergefell*, 135 S. Ct. at 2617, 2621 (Roberts, C.J., dissenting).

231. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

the First Amendment is an enumerated right—if a capaciously open ended one—unlike *Lochner*'s liberty of contract, further renders it more attractive to textualists concerned with judicial discretion unmoored from text.²³² Though as discussed above, because speech and expression are pervasive, this textual grounding provides little practical limitation.

The new *Lochner* is, seventh, at least currently facilitated by the cross-ideological coalition that has supported robust First Amendment freedoms following the Vietnam War. This coalition ranges from organizations such as the American Civil Liberties Union and Cato Institute to the U.S. Chamber of Commerce.²³³ The use of the First Amendment as a deregulatory tool brings together progressive-leaning organizations and judges that associate its freedoms with protections of political dissidents along with more conservative judges and organizations that find it resonant with libertarian values or religious protection. An open question of the new *Lochner* is whether its strong deregulatory effects, particularly in light of progressive opposition to *Citizens United v. FEC*²³⁴ and high levels of economic inequality, will strain this coalition to breaking. At some point, the coalition that currently supports the deregulatory use of the First Amendment may not defend its fullest potential reach. The new *Lochner*'s logical elasticity may be its undoing.

Finally, the practical controversies and doctrinal bases that gave rise to each form of *Lochnerism* reflect their different historical moments. I argued in Part II that the First Amendment presently

232. Cf. Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715, 715 (2010) (arguing that liberty claims are stronger than privacy claims in a text-centric constitutional culture, due to liberty's textual anchor).

233. See, e.g., *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012); JONATHAN W. EMORD, CONTRIVED DISTINCTIONS: THE DOCTRINE OF COMMERCIAL SPEECH IN FIRST AMENDMENT JURISPRUDENCE (1991), <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa161.pdf>; *Free Speech*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/issues/free-speech> (last visited Jan. 22, 2016) ("Since the 1920s, the ACLU has been involved in virtually all of the landmark speech cases to reach the U.S. Supreme Court."); *Free Speech & Business*, U.S. CHAMBER COM., <https://www.uschamber.com/event/free-speech-business> (last visited Jan. 22, 2016); *supra* notes 38–43 and accompanying text (discussing the role of the Public Citizen Litigation Group in the Supreme Court's protection of commercial speech in *Virginia Board of Pharmacy*); see also Linda Greenhouse, *The Free Speech Puzzle*, N.Y. TIMES (Aug. 22, 2012, 9:00 PM), <http://opinionator.blogs.nytimes.com/2012/08/22/the-free-speech-puzzle/>; Wu, *supra* note 5. This current cross-ideological support further helps to explain the First Amendment opportunism Schauer identifies. See Schauer, *supra* note 182.

234. 558 U.S. 310 (2010).

operates as a distinctively full boundary to state power, due to speech's pervasiveness and trends in constitutional interpretation since the 1920s. But conceptions of liberty always partially bound the state's power in constitutional democracies to greater or lesser degrees.²³⁵ The site of dispute between the state and those conceptions of liberty are historically bound. A core social and political concern of the *Lochner* era was the rise of the administrative state and the shifting of the line between private and public ordering. Liberty of contract and conflicts over where it set the boundary on police power embodied this dispute. Today's most debated issues are distinctive to the information age: questions of choice, voice, opportunity, access, and economic efficiency and inequality. It is perhaps not surprising that the First Amendment, which rose to prominence in tandem with the expansion of the regulatory state, has evolved into its most potent limit and the ground of today's liberty disputes.

IV. DEMOCRACY, CHOICE & CONSTITUTIONAL CHANGE

The current movement for robust commercial speech rights is premised on the notion that all speech is speech and so entitled to equal constitutional protection. In the words of one advocate on the heels of the Supreme Court's decision in *Sorrell*, "A free society would be better served by striving to achieve First Amendment parity among forms of speech that are occasionally treated differently through artificial, illogical, and increasingly unenforceable distinctions. Thankfully, the Supreme Court appears to be heading in that direction by acknowledging that speech is speech."²³⁶ Floyd Abrams, the

235. Due process could, in theory, operate as a quite full boundary to permissible state power, especially if embraced in both robust substantive and procedural forms. But it has not historically demonstrated the deregulatory potential that the First Amendment has of late.

236. Adam Thierer, *Victory for Commercial Free Speech at the Supreme Court*, FORBES (June 26, 2011, 12:37 PM), <http://www.forbes.com/sites/adamthierer/2011/06/26/victory-for-commercial-free-speech-at-the-supreme-court/>; see also, e.g., Plaintiff's Motion for Preliminary Injunction at 9 n.1, *CTIA—The Wireless Ass'n v. City of Berkeley*, 2015 U.S. Dist. LEXIS 126071 (N.D. Cal. Sept. 21, 2015) (No. 15-cv-2529) ("[T]he same constitutional protection should apply to commercial speech as to any other category of protected speech."); Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 192–93 (2015) (arguing that "occupational speech should be treated just like any other content-defined category of speech" and subject to strict scrutiny); *Backgrounder*, INST. FOR JUST., <http://ij.org/issues/first-amendment/backgrounder/> (last visited Jan. 22, 2016) ("[The Institute for Justice] rejects interpretations of the First Amendment that would give

preeminent First Amendment advocate, captured the concept perhaps most compellingly: “Liberty is [l]iberty. . . . [and] the First Amendment is about liberty.”²³⁷ Due to the pervasiveness of speech and expression, that contention, however attractive, has no principled limit. Because of that pervasiveness, the logical conclusion of the notion that ‘speech is speech’ and liberty, liberty is a radical reconfiguration of governmental power.

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

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

The approach of commercial speech advocates would subject innumerable laws to strict scrutiny—including those that require

some categories of speech favored protection over other categories.”). *See generally* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1347–48 (2005) (“When the law restricts speech because of what the speech communicates—because the speech causes harms by persuading, informing, or offending—we shouldn’t deny that the law is a speech restriction, and requires some serious justification. Such justifications may at times be available. . . . But courts and scholars ought to develop these rules with the recognition that the rules are indeed speech restrictions—not by asserting that the rules merely restrict ‘conduct.’”); Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 372–73 (1979); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 431 (1971). *Cf.* Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1216 (1983).

237. Floyd Abrams, Remarks at Temple University (Mar. 16, 2015) (transcript available at Ronald K.L. Collins, *Guest Contributor—Floyd Abrams, “Liberty is Liberty,”* CONCURRING OPINIONS (Mar. 18, 2015), <http://concurringopinions.com/archives/2015/03/guest-contributor-floyd-abrams-liberty-is-liberty.html>).

238. *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005).

nutritional labels,²³⁹ disclosure of information related to securities,²⁴⁰ Truth in Lending Act disclosures,²⁴¹ disclosures in prescription drug advertisements,²⁴² warnings for pregnant women on alcoholic beverages,²⁴³ airplane safety information,²⁴⁴ and required exit signs.²⁴⁵ Not only that, but a ‘speech is speech’ theory would subject deliberately *false* commercial statements—that is, outright fraud—to ‘fatal in fact’ review on the basis that the distinction between false and true statements is content discrimination.²⁴⁶ It would constitutionalize ordinary contract law and the filing of tax returns.

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

Will the judiciary accept that the First Amendment demands full deregulation or even that all ‘speech’ must receive searching constitutional scrutiny? It is too soon to tell. But despite the First Amendment’s deregulatory *potential*, it is highly unlikely. The First Amendment will instead stand ready to be mobilized against particularly controversial regulations. To understand why this is likely the case, it is helpful to recognize that while the First Amendment has always had the potential to be invoked nearly everywhere, it has not historically always appeared. The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”²⁴⁷ But, as demonstrated above, were the First Amendment to extend to all ‘speech’ or ‘expression’ as such, nearly the entire regulatory state and criminal law would come under constitutional scrutiny—a situation that

239. 21 U.S.C. § 343(q) (2012).

240. 15 U.S.C. § 781(a) (2012).

241. 15 U.S.C. §§ 1601(a), 1604 (2012).

242. 21 C.F.R. § 202.1 (2015).

243. 27 U.S.C. § 215(a) (2012).

244. 14 C.F.R. § 135.117 (2015).

245. 29 C.F.R. § 1910.37 (2015).

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

247. U.S. CONST. amend. I.

even the most casual observer knows is not currently the case. The First Amendment has never before protected expression in its totality.²⁴⁸

As a number of scholars have pointed out, much is excluded from the *coverage* of the First Amendment—meaning what sort of speech acts it protects at all—either in categories that First Amendment doctrine expressly excludes or that courts (and litigants) implicitly exclude as self-evidently not covered.²⁴⁹ Many acts that we colloquially call ‘speech’ are not protected by the First Amendment. Indeed, in many cases involving speech, the First Amendment does not even come into play. If your doctor incorrectly recommended cutting off your leg, and you subsequently sued her for malpractice, she would almost certainly not point to the First Amendment as a defense, even though her recommendation was nothing other than speech in any normal sense. It is not that she would invoke the First Amendment and lose—the First Amendment would likely not appear at all. Likewise, if your employer fired you, saying he did so because you were African American, he would not have a First Amendment defense, even though his statement was in every sense ‘speech.’²⁵⁰ These are a few of the boundaries of First Amendment coverage, and those boundaries change across time. Motion pictures, for instance, were expressly excluded from the First Amendment’s coverage in 1915,²⁵¹ but later covered in 1952.²⁵² Similarly, as discussed above, commercial speech was

248. See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992) (no coverage for fighting words); *New York v. Ferber*, 458 U.S. 747, 763–64 (1982) (no coverage for child pornography); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (no coverage for violations of antitrust laws or speech integral to a crime).

249. See, e.g., Frederick Schauer, *Out of Range: On Patently Uncovered Speech*, 128 HARV. L. REV. F. 346 (2015); Schauer, *supra* note 6.

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

251. *Mut. Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230, 242–45 (1915).

252. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952); see also *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948).

implicitly excluded from First Amendment coverage before 1942,²⁵³ expressly excluded between 1942 and 1976, and then covered in 1976.

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

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

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

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

253. The handful of proto-commercial speech cases arguably problematize this characterization. See *supra* note 12 and related text.

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

255. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 339–40 (2010).

256. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563–66 (1980); cf. Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181 (1988) (analyzing the various levels of scrutiny for commercial speech).

257. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

258. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

standard.²⁵⁹ Some cases formally apply one level of protection while arguably reflecting another²⁶⁰—but in any case, these are issues of protection.

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

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

259. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); see also *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1212 (2012) (describing *Zauderer*’s scrutiny level as “akin to rational-basis review”); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 554 (6th Cir. 2012) (“If a commercial-speech disclosure requirement fits within the framework of *Zauderer* and its progeny, then we apply a rational-basis standard.”); *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101, 1109 (D.C. Cir. 2011) (same); *Pub. Citizen Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 227 (5th Cir. 2011) (“Applying Rational Basis Review to Disclosure Requirements”); *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 132 (2d Cir. 2009) (“In light of *Zauderer*, this Circuit thus held that rules ‘mandating that commercial actors disclose commercial information’ are subject to the rational basis test.” (quoting *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001))); *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (describing *Zauderer* as “akin to the general rational basis test governing all government regulations under the Due Process Clause”).

260. As Robert Post and I have recently argued, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), a speech and association challenge to the statute prohibiting material support for terrorism, is such a case. Post & Shanor, *supra* note 3, at 179–81 (arguing that while in *Humanitarian Law Project*, the Court formally applied a stringent level of protection, which it has later described as strict scrutiny, its level of scrutiny was anything but strict, given the level of deference the Court gave to the government’s factual conclusion about whether the speech and association in question materially supported terrorism). I was involved in the litigation of *Humanitarian Law Project* with David Cole before the Supreme Court.

as an example of that very sort of judgment, as Richard Fallon aptly concluded.²⁶¹ The Sixth Circuit's decision to apply rational basis review to Ohio's precious metal dealers licensing scheme in *Liberty Coins* could be seen as another.²⁶² These two approaches are, of course, stylized and not mutually exclusive categories.

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

The judiciary's response to increasing First Amendment challenges will, regardless, influence the resultant form of our democracy and the vision of democratic legitimacy understood to ground it. Institutionally, the degree of the First Amendment's *Lochnerian* turn will no doubt affect the character and scope of our democracy and regulation within it. Increased constitutional scrutiny will tend to transfer decisions about the proper mode and extent of economic regulation from administrators and legislatures to courts, in what Justice Scalia has trenchantly termed a "black-robed supremacy,"²⁶³ or even free speech claimants. Constitutional scrutiny and litigation will raise the cost of lighter-touch information regulation. Greater protections for commercial speech may therefore reduce the role of many of the tools of behavioral law and

261. Fallon, *supra* note 250.

262. *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 693–97 (6th Cir. 2014); see also *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014) (reviewing a licensing scheme for tour guides). It is interesting to note that the D.C. Circuit took a nearly opposite approach and concluded that licensing of tour guides requires intermediate scrutiny and that the District of Columbia's licensing scheme violated the First Amendment. *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014). The Supreme Court declined to review *Kagan* despite this circuit split, 135 S. Ct. 1403 (2015) (mem.).

263. *United States v. Windsor*, 133 S. Ct. 2675, 2698 (2013) (Scalia, J., dissenting).

economics based regulation—either producing deregulatory outcomes or, paradoxically, incentivizing mandates.

More aggressive First Amendment commercial speech protection may prove to be a deregulatory boon as its advocates hope. There is some indication that this will be the trend.²⁶⁴ Increased constitutional scrutiny may relatedly incentivize different, and perhaps less transparent, regulatory decision-making by spurring regulators to develop sturdier governmental interests and build administrative records to support them.

Litigation and judicial invalidation of economic regulations may instead, however, trigger a turn back towards mandates. Federal agencies are required by Executive Order 13,563 to “identify and assess available alternatives to direct regulation, including . . . providing information upon which choices can be made by the public” and “[w]here relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law . . . identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public,” including “warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible.”²⁶⁵

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

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

265. Exec. Order No. 13,563, 3 C.F.R. 215 (2012).

At a deeper level, the constitutional conflict between the First Amendment and the regulatory state implicates the relationship of democratic legitimacy and choice—and is entangled with the future of behavioral law and economics based policy and debates over to what extent it can or should be libertarian.²⁶⁶ To practical effect, the courts' assessment of deregulatory free speech cases affects the balance between the state's ability to affect public decision-making and enforce substantive policy goals through structuring choice and the people's ability to govern by representative governance at all.

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

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

We might debate whether *Virginia Board of Pharmacy* found constitutional value in commercial speech only insofar as it enhances

266. Bubb & Pildes, *supra* note 152.

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

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

269. PHILIP BOBBITT, TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY 191, 195 (2008); see also WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 163 (2010).

270. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

the public's ability to evaluate public policies about market affairs—or also to make well-informed choices about commercial decisions such as the choice of shampoo.²⁷¹ But the space, if any, between those two may be less great than it might first appear because modern administration enlists citizens to effectuate public policies through their market choices. Citizens in the modern administrative state are consumers not just of market goods but of public policies, and their individual (often market) choices play a role in determining collective outcomes. Modern administration's vision, then, is of partially disaggregated democracy. But it nonetheless places the *public* in a central role in collective decision-making—at once through delegated authority to governmental actors by way of elections and again through citizen participation in the space for individual choice given by modern regulators.

Second, the movement for commercial speech, by contrast, appears to view all challenged regulation as paternalist and therefore unconstitutional.²⁷² If taken to its logical conclusion, this or any speech-as-such approach has the capacity to undo the state and transfer control of market regulation from the political branches to the judiciary, if not ultimately to the hands of free speech claimants. The vision of democracy underlying the new *Lochner* is robustly counter-majoritarian and staunchly judicially—or, perhaps more accurately, privately—controlled. For, the new *Lochner* in one sense aggrandizes the judiciary against the political branches. But in another, because free speech claims can be so opportunistically invoked,²⁷³ it places considerable choice about policy invalidation in the hands of free speech challengers. This is a different vision of democracy than that envisioned by modern administration or *Virginia Board of Pharmacy*. It is not one in which citizens are armed with information so as to make intelligent choices about products or policy. It is one in which commercial actors limit regulation through targeted constitutional litigation. The class of individuals who have the ability, knowledge, and access to that sort of

271. See *id.* at 787 (Rehnquist, J., dissenting).

272. Cf. Ronald K.L. Collins, *FAN 53 (First Amendment News) Justice Sotomayor Joins in Discussion of Burt Neuborne's New Book ("Madison's Music")*, CONCURRING OPINIONS (Mar. 25, 2015), <http://concurringopinions.com/archives/2015/03/fan-53-first-amendment-news-justice-sotomayor-joins-in-discussion-of-burt-neubornes-new-book-madisons-music.html#more-96177> (Justice Sotomayor observed that Justice Kennedy's "approach to [the First Amendment], unlike some of my other colleagues, is born on a very, very, almost fanatical belief that . . . the essence of democracy is no regulation of speech.").

273. See Schauer, *supra* note 182, at 176, 192.

litigation is more limited²⁷⁴ than the set that can vote; benefit from a listener-oriented commercial speech regime so as to make more intelligent policy decisions; or respond to a mandated disclosure regarding, for example, miles per gallon or fair lending, so as to influence the effect of those regulatory schemes. The new *Lochner* thus displaces the policy preferences and the mechanisms for intelligent policy-preference development of a broader public with those of a smaller elite.

The new *Lochner* does not, however, *expressly* adopt an entirely new vision of the citizen claimant.²⁷⁵ Deregulatory First Amendment advocates embrace a vision of democracy that at first blush appears generally applicable—in fact *more* generally applicable than that adopted by *Virginia Board of Pharmacy* and modern administration. They argue that commercial speakers, not only consumer listeners, are entitled to equal First Amendment protection.²⁷⁶ The new *Lochner* asks simply to expand free choice, and the legitimate free speech claimant, from the listening public to the speaking seller. But because of the realities of who can bring constitutional claims, while this vision of democracy has the veneer of general, even populist, application, in practice it curtails public participation in determining public policies. Commercial speech advocates thus advance a version of democracy that privileges elite over public preferences, but one cloaked in a universalist liberty claim. It is noteworthy in this regard that some of the organizations that advance the most robust protections for commercial speech, such as the Institute for Justice, do so on expressly populist grounds, while being funded by a handful of the nation's wealthiest individuals.²⁷⁷

274. See Michael McCann, *Litigation and Legal Mobilization*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 522, 529 (Keith E. Whittington, R. Daniel Kelemen, & Gregory A. Caldeira eds., 2008).

275. Cf. WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION (2015) (arguing that neoliberalism is a form of rationality that embraces an understanding of the citizen as an economic actor, not a political one).

276. See, e.g., Brief For Respondent at 13, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (No. 10-779) (“No one would doubt that the First Amendment would apply fully if Vermont sought to prohibit the *other* party to the transaction—the patient—from discussing the fact of the prescription. There is no logical basis for treating the expression of the pharmacy, insurer, or the Publisher Respondents as categorically different.”); *Sorrell*, 131 S. Ct. 2653.

277. These include Charles and David Koch and the Walton Family. Compare *Quotable Quotes: ABA Journal Spotlights 50 Innovators, Mavericks and Pathfinders of the Legal Profession*, LIBERTY & L., Dec. 2009, at 15 (Institute for Justice bimonthly newsletter, quoting *ABA Journal* article on founder Chip Mellor: “Mellor’s typical

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

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

A feature of the new *Lochner* additionally contributes to our understanding of the processes and mechanisms of constitutional change. The importance of a business-led social movement in the First Amendment's recent deregulatory turn again demonstrates how social movements can alter constitutional principles absent Article V amendment. Leading scholars of democratic constitutionalism such as Reva Siegel, Robert Post, William Eskridge, Jr., and David Cole, have vitally contributed to our understanding of the role of social mobilization in the transformation of constitutional norms.²⁷⁸ The influence of a business-led social movement in the turn in commercial speech jurisprudence lends additional support for the existence of this form of constitutional change as well as power to the assertion of its importance in American constitutional law.²⁷⁹

The history detailed above demonstrates the ability of social movements to influence not only the content of substantive

client is someone who lacks the means to fight in court. . . . In a David and Goliath fight, Mellor sees himself as the equalizer.”), *with* Ctr. for Media & Democracy, *Institute for Justice*, SOURCEWATCH, http://www.sourcewatch.org/index.php/Institute_for_Justice (last visited Feb. 5, 2016) (listing the Walton Foundation as one of IJ's major funders, noting IJ's public thanks to Charles Koch for providing its initial seed funding and to David Koch for being a “generous benefactor each year of IJ's first decade,” and detailing hundreds of thousands of dollars in Koch support).

278. See, e.g., DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* (forthcoming 2016); ESKRIDGE & FEREJOHN, *supra* note 269; William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CALIF. L. REV. 1323 (2006); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

279. See, e.g., Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1984–2004 (2003).

constitutional norms, as constitutional scholars have previously documented²⁸⁰ but also their constitutional salience, the allocation of their interpretation and enforcement among the branches, and the vision of democratic legitimacy upon which those institutional arrangements depend. The new *Lochner* thus deepens our understanding of the influence of changing legal cultures not only on constitutional interpretation but also on the separation of powers and shape of American democracy and administration.

While the theorization of the pluralism effects of various forms of social mobilization on democratic constitutionalism is beyond the scope of this Article,²⁸¹ the new *Lochner* highlights the importance of organized mobilization for American constitutional law and the significance of the legal, institutional, and social conventions that encourage, shape, and channel those modes of participation.

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

Coverage and protection are also linked within the domain of commercial speech. In reformulating the rules of *protection* and

280. See sources cited *supra* notes 269, 278.

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

constitutional values underlying that protection, courts may affect what sorts of speech acts fall within the category of covered ‘commercial speech.’ If commercial speech is protected due to its informational value to the public—as has been the case since the doctrine’s inception in *Virginia Board of Pharmacy*—then only colorable claims that regulations impinge on the public’s access to commercial information should properly be subjected to constitutional review and protection. If, however, commercial speech is protected to advance the autonomy interests of commercial speakers to say (or not say) what they want, when they want to—as paradigmatic First Amendment speech is—a larger range of marketplace speech may be covered. The regulation of contracts, for instance, is generally not subject to First Amendment review. The constitutional salience of the firearm regulation in *Nordyke*, however, demonstrates that reorienting the architecture of *protection* from a listener-based to a speaker-based right may expand the boundaries of commercial speech *coverage*.²⁸² First Amendment coverage and protection, then, can affect each other and, in turn, jointly determine the boundary of permissible state action and the relative distribution of decision-making about market regulation among the branches.

A further lesson can be drawn from the comparison of the two forms of *Lochnerism*: the notion of formal liberty is persistently compelling. Claims to it have historically been wildly popular, and it has proved to be a robust frame for social mobilization and successful law reform agendas for a range of ideological valances. Formal liberty claims are a hallmark of modern social movements, including the business-led social movement that has contributed to the First Amendment’s recent libertarian turn.²⁸³ The prominent identity-based movements of the twentieth and twenty-first centuries—including the civil rights, women’s rights, and gay rights movements—have made prominent use of formal or *de jure* liberty claims. But the formal freedom claims of twentieth century identity-based movements are

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

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

structurally different from those of contemporary libertarian free speech advocates. Because of the pervasiveness of speech, the most formal speech protection is tantamount to full deregulation. Identity-based movements, by contrast, gain their more limited freedoms through *de jure* rights. Identity-based movements face the challenges of seeking less-bright line entitlements only *after* gaining formal liberties. This is the work of positive rights entrenchment in regulatory and statutory regimes.²⁸⁴

CONCLUSION

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

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

Why, Pound asked, do courts “force upon legislation an academic theory of equality in the face of practical conditions on inequality?”²⁸⁷ His answer was mechanistic jurisprudence, a type of academic formalism that rendered the liberty that freedom of contract averred to

284. See ESKRIDGE & FEREJOHN, *supra* note 269.

285. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 417–22 (2011).

286. Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454 (1909) (quoting *Adair v. United States*, 208 U.S. 161 (1908)).

287. *Id.*

protect utterly hollow.²⁸⁸ *Lochner*'s freedom of contract was rejected in part because it enacted a sort of 'formal' liberty that was at odds with the realities of social relationships. It equated the 'liberty' of the employee with that of the employer when their lived freedoms were anything but equal.

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

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

288. *Id.* at 471–72 (“Necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them.” (quoting *Vernon v. Bethell*, (1762) 28 Eng. Rep. 838 (Ch.) 839; 2 Eden, 110)).

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

290. *See, e.g.*, *Stromberg v. California*, 283 U.S. 359, 369 (1931).

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

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

* * *

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

291. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).