

THIS ISN'T *LOCHNER*, IT'S THE FIRST AMENDMENT: REORIENTING THE RIGHT TO CONTRACT AND COMMERCIAL SPEECH

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ABSTRACT—The commercial speech doctrine has long weathered accusations that it is simply an attempt to reinvigorate the laissez-faire protections provided by *Lochner v. New York*. The modern interpretation of *Lochner* is generally condemnatory, arguing that its “right to contract” is a symbol of the Supreme Court’s unprincipled decision to impose its own economic preferences upon the nation. Even though *Lochnerism* itself has been dead for nearly 100 years, some scholars believe that the First Amendment’s commercial speech doctrine is on its way to replicating the defenses provided by the right to contract. The argument goes that because speech pervades essentially all human conduct, including market transactions, the constitutional protection of free speech could serve to invalidate any attempts at regulating the commercial sphere, just like the right to contract did. But these scholars miss a crucial point: unlike the right to contract, the First Amendment’s ambit is necessarily restricted to pure speech. Accordingly, the commercial speech doctrine simply lacks the tools to serve the same role as the right to contract. In truth, *Lochner* is only a boogeyman when it comes to commercial speech; although there are certainly important discussions to be had about commercial speech, they must be centered on First Amendment principles, not the ominous ghost of *Lochnerism*. This Note seeks to draw that line once and for all.

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INTRODUCTION

Advertisements pervade the modern world. Few forums, from mobile games,¹ to rivers in bustling cities,² to NBA stars’ jerseys,³ have been left untouched by commercial speakers’ efforts to sell more products and services. The First Amendment addresses these forms of speech through what is known as the commercial speech doctrine. Broadly viewed by the Supreme Court as “expression advocating purchase,”⁴ commercial speech has seen an explosion in its constitutional pedigree over the past fifty years: during that time it has gone from no coverage,⁵ to limited coverage,⁶ to ostensibly complete coverage under the First Amendment.⁷ Supporters of the

¹ See Ivan Guzenko, *It’s Interactive, It’s Engaging, It’s AI-Powered: Mobile Advertising 2019, Are You There Yet?*, CLICKZ (Mar. 28, 2019), <https://www.clickz.com/mobile-advertising-2019/228189> [<https://perma.cc/BJ92-XPZH>].

² Colby Hamilton, *Floating ‘Eyesores’ Are Illegal Advertisements, City Suit Claims*, N.Y. L.J. (Mar. 27, 2019, 3:19 PM), <https://www.law.com/newyorklawjournal/2019/03/27/floating-eyesores-are-illegal-advertisements-city-suit-claims> [<https://perma.cc/MK7N-TWJM>].

³ Luke Adams, *Thunder Become Final NBA Team to Secure Jersey Sponsor*, YARDBARKER (Mar. 15, 2019), https://www.yardbarker.com/nba/articles/thunder_become_final_nba_team_to_secure_jersey_sponsor/s1_14822_28646324 [<https://perma.cc/GH2B-RM9F>].

⁴ Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. Rev. 67, 73–76 (2007) (citing *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 366–68 (2002)).

⁵ *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), *overruled by* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

⁶ *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

⁷ See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011).

commercial speech doctrine have long championed the importance of providing the public with information that might affect their decision-making in the commercial world.⁸ Thus, to them, the recent expansions of the commercial speech doctrine are consistent with the values inherent in the First Amendment.⁹

But that doctrine is under fire. Its critics—Supreme Court Justices and contemporary scholars alike—believe that as soon as the First Amendment wholly protects commercial speech, economic legislation as the country knows it will crumble.¹⁰ Indeed, so profound are their concerns that they bring out one of legal scholarship's most potent weapons: the infamous case of *Lochner v. New York*.¹¹ *Lochner*, decided in 1905, is widely criticized today.¹² The case grew out of a desire in the early twentieth century to promote laissez-faire economics; however, nothing in the Constitution explicitly says the market must be free of governmental interference.¹³ During the so-called *Lochner* Era, the Court thus turned toward the Due Process Clause, ultimately concluding that its provision guaranteeing “liberty” implicitly includes the right—the liberty—to contract.¹⁴ This constitutional theory was dubbed “economic substantive due process,” and it allowed the Court to strike down a substantial number of regulations aimed at reining in the free market.¹⁵

Since the late 1930s, however, the Court has recognized that economic substantive due process results in a blatant usurpation of the legislature's law-making role.¹⁶ In truth, the doctrine ignores the clear procedural drive of the Due Process Clause since it invalidates any and all laws relating to contractual relationships, even if they were passed in accordance with proper

⁸ See, e.g., Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 630 (1982) (“[I]nformation and opinion about competing commercial products and services undoubtedly aid the individual in making countless life-affecting decisions, and therefore can be seen as fostering . . . the self-realization value.”).

⁹ See *id.*

¹⁰ See, e.g., *Sorrell*, 564 U.S. at 591–92 (Breyer, J., dissenting); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165 (2015); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133.

¹¹ 198 U.S. 45 (1905).

¹² See *infra* note 77 and accompanying text.

¹³ *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937).

¹⁴ See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

¹⁵ See *infra* Section I.A.

¹⁶ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2615–16 (2015) (Roberts, J., dissenting) (describing *Lochner* as a “discredited decision[]” that symbolizes “the unprincipled tradition of judicial policymaking”).

procedure.¹⁷ As a result, economic substantive due process improperly aggrandizes the Court's interpretation of "liberty"; once the Court abandons its procedural cabining, it can freely create substantive constitutional rights where none existed before.¹⁸ That self-empowerment by the Court undermines the countermajoritarian role imposed by the Constitution's deliberate separation of powers: the judiciary is designed to check the legislature, not replace the legislature.¹⁹ Nowadays, *Lochner* generally serves as a scholarly shorthand to condemn cases where the Court goes too far in imposing its own ideology upon the nation.²⁰

Even after the demise of economic substantive due process, *Lochner* found a new role to play in First Amendment jurisprudence. Namely, the ghost of Lochnerism has lingered in the Court's consideration of commercial speech from the start—the fact that *Lochner* is so universally derided has proved irresistible for Justices seeking to condemn the expanding protections for commercial speech on similar grounds.²¹ Those Justices argue that the Court's commercial speech doctrine has warped the First Amendment to permit the Court's freewheeling imposition of its preferred economic policies, just as Lochnerism did.²² And because the label of "*Lochner*" sparks such a visceral reaction, these comparisons have taken hold in the corresponding scholarship as well.²³

Indeed, the specter of *Lochner* has come to dominate scholarship that seeks to limit the First Amendment's protection of commercial speech. Some scholars today contend that the Court's First Amendment jurisprudence may

¹⁷ See *infra* Section I.B. Note that this criticism does not necessarily extend to personal substantive due process cases, such as *Roe v. Wade*, 410 U.S. 113 (1973), which arguably have a claim to constitutionality through the Equal Protection Clause. See, e.g., Eileen McDonagh, *The Next Step After Roe: Using Fundamental Rights, Equal Protection Analysis to Nullify Restrictive State-Level Abortion Legislation*, 56 EMORY L.J. 1173, 1174 (2007) ("[T]he answer to the question of how to strengthen reproductive rights is to add constitutional guarantees under the Equal Protection Clause . . .").

¹⁸ *Ferguson v. Skrupa*, 372 U.S. 726, 731–32 (1963) (recognizing the faults inherent in the doctrine of substantive due process).

¹⁹ See *infra* Section I.B.

²⁰ David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1, 2 (2003) ("Almost one hundred years after the Supreme Court decided the case, *Lochner* and its progeny remain the touchstone of judicial error. Avoiding *Lochner's* mistake is the 'central obsession' of modern constitutional law.").

²¹ See, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 591–92 (2011) (Breyer, J., dissenting) ("History shows that the power [to invalidate economic regulations] was much abused and resulted in the constitutionalization of economic theories preferred by individual jurists."); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 784 (1976) (Rehnquist, J., dissenting) ("[T]here 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.").

²² See *Sorrell*, 564 U.S. at 591–92 (Breyer, J., dissenting); *Va. State Bd. of Pharmacy*, 425 U.S. at 784 (Rehnquist, J., dissenting); see also *infra* Section II.A.

²³ See *infra* Section II.B.

soon wholly replicate the expansive commercial protections provided by *Lochner's* right to contract.²⁴ The argument goes that, because speech is so pervasive in the commercial context, the First Amendment is on the path to preventing most, if not all, attempts at regulating commercial transactions.²⁵ That is, these scholars fear that the Court's interpretation of "free speech" may soon safeguard any and all forms of speech from regulation—including speech integral to commercial relationships.²⁶ This new definition would include, for example, speech that occurs during the exchange of goods or the formation of an employment contract.²⁷ As such, these scholars posit that *Lochnerism* is at risk of being reborn under a new, broad characterization of the First Amendment.²⁸

That intense focus on the dangers of *Lochnerizing* speech, however, overlooks how the doctrines differ in at least one essential element: the right to contract protects freedom of conduct—what people may do—whereas the First Amendment protects freedom of speech—what people may say.²⁹ As these principles translate to the commercial context, the right to contract protects the ability to *participate* in an economic transaction, and the First Amendment protects the ability to *propose* an economic transaction. That distinction is not a small one; it implicates entirely different regulatory concerns and approaches.³⁰ More specifically, economic substantive due process is confined to the realm of contractual relationships,³¹ but the First Amendment proscribes regulations that target purely persuasive expression.³² The commercial speech doctrine therefore cannot prevent regulation of a transaction, just the communicative language leading up to it. To the extent speech occurs in the transaction itself, that speech is not purely communicative and receives no First Amendment protection.³³ Accordingly,

²⁴ See *infra* Section II.B (discussing the recent work of Professors Robert Post and Amanda Shanor).

²⁵ Shanor, *supra* note 10, at 182 (describing the "radical deregulatory potential" of First Amendment *Lochnerism*).

²⁶ See, e.g., *id.*

²⁷ See *infra* Section II.B.

²⁸ Shanor, *supra* note 10, at 186 ("[The 'new' *Lochner*] largely relies on the notion that the First Amendment protects speech as such and the autonomy of all speakers regardless of context.>").

²⁹ See *infra* Section III.B.

³⁰ See *infra* notes 202–203 and accompanying text.

³¹ *Coppage v. Kansas*, 236 U.S. 1, 18–19 (1914) (explaining that the right of contract serves to protect peoples' ability to freely operate and enter into contractual relationships within the marketplace), *overruled in part by Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941).

³² *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (describing the need to grant people access to the information provided by commercial speech so they can improve their knowledge of the commercial sphere).

³³ See *infra* Section III.B.

the First Amendment's inherent limitations mean it will never serve as a genuine replacement for *Lochnerism*.

The reality, then, is that *Lochner's* role in the commercial speech doctrine is one of fearmongering. Although comparisons between the two may have initially been premised on overlapping concerns of judicial interference in the marketplace, recent developments in the scholarship³⁴ reflect the fact that *Lochner* should not have been injected into the First Amendment conversation to begin with. At a certain point, it is simply too tempting for opponents of the commercial speech doctrine to point to *Lochnerism* as an omen of things to come.³⁵ But those arguments are inherently misleading: just because *Lochner* is recognized as a mistake today does not mean the commercial speech doctrine is equally misguided.

That is not to say the commercial speech doctrine is not worth discussing at all. Indeed, there are rational debates to be had about how expansively the First Amendment should protect commercial speech³⁶ and the associated regulatory implications³⁷—these are important questions that will prove instrumental in shaping the future of advertising in America, and this Note does not attempt to resolve the dispute one way or another. But such issues concern commercial speech, not conduct, and must be examined under the appropriate, First Amendment lens. Only that lens allows scholars to draw accurate lines between valued and unvalued forms of expression; an analytical approach focused on *Lochnerism* instead leads to confusion and halts productive conversation in its tracks.³⁸ In other words, the question is not whether the development of the commercial speech doctrine happens to remind scholars of economic substantive due process but whether it comports with the First Amendment's values of protecting pure speech. Accordingly, this Note argues that the shadow of *Lochner* must finally be extracted from the commercial speech doctrine.

Part I provides an overview of the *Lochner* Era, tracking the short-lived history of economic substantive due process. It then discusses the

³⁴ See *infra* Section II.B.

³⁵ See Elliot Zaret, *Commercial Speech and the Evolution of the First Amendment*, 30 WASH. LAW. 24, 31 (2015) (quoting Richard Samp's concerns that these First Amendment discussions will not be "toned down" so long as people against that doctrine argue that their opponents are "trying to resurrect *Lochner*").

³⁶ Compare Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000) (arguing that commercial speech does not deserve full First Amendment recognition), with Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303 (2009) (arguing that, ironically, Professor Post commits the same sins of the *Lochner* Era by refusing to extend full First Amendment coverage to commercial speech).

³⁷ See Shanor, *supra* note 10, at 171.

³⁸ See *infra* Part III.

constitutional inadequacy of that doctrine and how the Court nonetheless used it to go beyond its strict counter-majoritarian role. Part II turns to the commercial speech doctrine to examine the role *Lochner* has played in its development over the years, both in the jurisprudential and scholarly sense. Part III explores the distinction between speech and conduct in the First Amendment context before explaining how that nuance makes Lochnerism fundamentally different from the commercial speech doctrine. Part IV concludes by explaining the dangers of the tendency to insert *Lochner* into First Amendment matters, showing why the two doctrines must be separated.

I. WHAT *LOCHNER* REPRESENTS TODAY

Today, mere mention of the name *Lochner* tends to sound alarm bells. That case largely set the stage for the right to contract, which the Court used to impose its own ideology upon the nation throughout the early 1900s. Such an overstep threatens to undermine the entire purpose of the Constitution's separation of powers, making *Lochner* and its progeny forceful fodder for criticism. This Part first examines economic substantive due process, as characterized by *Lochner*, including both its justification and the criticism the decision received at the time. It then describes the inherent flaws of the right to contract—namely, the inappropriately expansive powers it affords the judiciary.

A. *The Lochner Era*

Economic substantive due process is generally characterized as the invocation of the Due Process Clause's guarantee of "liberty"³⁹ to safeguard the right to contract.⁴⁰ This doctrine had a relatively brief but fiery lifespan during a period known as the *Lochner* Era. The *Lochner* Era is best measured back to the 1890s, when the right to contract was initially recognized.⁴¹ The 1897 case of *Allgeyer v. Louisiana*, in fact, was the first case where the Court explicitly relied on the right to contract in reaching its holding.⁴²

³⁹ The Due Process Clause dictates that no person shall not be deprived of "life, liberty, or property, without due process of law." U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

⁴⁰ See, e.g., Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265, 270.

⁴¹ *Lawton v. Steele*, 152 U.S. 133, 137 (1894) ("The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."). *Lawton* was the first case to hint at a right to contract inherent in the Fourteenth Amendment, but it only did so in passing. Just one year later, *Frisbie v. United States* expounded upon that foundation, using the phrase "liberty of contract" when discussing the limits of peoples' inalienable rights. 157 U.S. 160, 165 (1895).

⁴² 165 U.S. 578, 589 (1897). At issue in *Allgeyer* was a Louisiana statute restricting the capacity of its citizens to contract with out-of-state insurers. *Id.* at 583–84. The statute had been implicated because a New York insurance company's policy was illegal under Louisiana law, see *id.*, and a unanimous Court

Nonetheless, the *Allgeyer* Court concluded that the right to contract was not absolute but could be regulated through a state's police power when one of the state's genuine interests was implicated.⁴³

But *Lochner v. New York*⁴⁴ was quick to undermine *Allgeyer*'s caveat limiting the right to contract, thereby making itself the poster child for economic substantive due process. The *Lochner* Court faced a New York regulation that prohibited bakers from working more than sixty hours per week.⁴⁵ Justice Peckham, writing for the majority, stressed the importance of the right to contract: the state's asserted legislative authority must be "reasonable and appropriate" rather than "unnecessary and arbitrary" for a regulation to overcome the Fourteenth Amendment's protection.⁴⁶ The Court was emphatic that the legislature cannot simply assert any justification it wants without challenge; rather, the judiciary must determine the legitimacy of a statute's proffered purpose, lest the Constitution be rendered powerless in its ability to restrain the state.⁴⁷

Ultimately, the *Lochner* Court concluded that New York's justifications for the exercise of its police power were insufficient to override the right to contract. The Court discounted any potential health-oriented rationales motivating the statute,⁴⁸ despite existing evidence that bakers worked in uniquely unsanitary conditions.⁴⁹ Moreover, the Court did not construe the

noted that Louisiana's regulation would have controlled the policy had it been within Louisiana's jurisdiction, *id.* But in this case, the Court held that the Louisiana legislature had overstepped its bounds by seeking to restrict a New York policy solely on the grounds that its domiciliary was one of the contracting parties. *Id.* at 592. In reaching that decision, the Court determined that a person's right to contract is inherent in the Due Process Clause's provision guaranteeing "liberty," *id.* at 589, and the Louisiana legislature violated that right in seeking to regulate a contract with which it had insufficient connections, making the statute unconstitutional, *id.* at 591–92.

⁴³ *Id.* at 591 (reasoning that the right to contract "may be regulated and sometimes prohibited" when it conflicts with the state's policies and is properly within the scope of that State's jurisdiction).

⁴⁴ 198 U.S. 45 (1905).

⁴⁵ *Id.* at 52.

⁴⁶ *Id.* at 56.

⁴⁷ *Id.* at 60 (concluding that, were state legislatures given free rein, "the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract [would be] visionary, wherever the law is sought to be justified as a valid exercise of the police power").

⁴⁸ *Id.* at 57–60 (arguing that if baking were to be considered unhealthy, then most other professions would be subject to that same classification). The state had claimed its police powers could derive from either the quality of bread being sold or the health of the bakers themselves. *Id.*

⁴⁹ See Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 538 (2015) (discussing the danger of "white lung disease" facing bakers at the time who worked excess hours) (quoting Paul Kens, *Lochner v. New York: Tradition or Change in Constitutional Law?*, 1 N.Y.U. J.L. & LIBERTY 404, 408 (2005)); see also *Lochner*, 198 U.S. at 70–71 (Harlan, J., dissenting). But see DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 26–32 (2011) (arguing that the health motivations were, at best, questionable, and New York instead may have been attempting to support larger bakeries, which had the resources to comply with the law).

bakers as a class necessitating enhanced protection from the legislature in the exercise of their economic rights.⁵⁰ And because the bakers were otherwise competent when they agreed to enter into these contracts, the Court presumed that the legislature was paternalistically meddling in what was really a consensual relationship.⁵¹

In dissent, Justice Harlan argued that the Court had overstepped its limited judicial role. Rather than objecting to the underlying notion of the right to contract,⁵² however, he dissented because he believed the Court had improperly discounted the apparently dangerous health conditions of bakeries that had ostensibly prompted New York to pass the statute in question.⁵³ Justice Harlan noted that *Allgeyer* had left room for states to regulate contracts and contended that a statute must conflict with the Constitution “beyond all question” before the Court can intervene.⁵⁴ His dissent was thus a call for curtailing, not completely dispelling, the Court’s ability to impose a laissez-faire market.

Justice Holmes’s brief dissent described a considerably more deferential approach to judicial review than Justice Harlan’s. Taking aim at the Court’s decision to constitutionally enforce a laissez-faire economy, Justice Holmes attacked the foundational baseline of economic substantive due process itself: the right to contract.⁵⁵ In his now famous line, Justice Holmes asserted that “[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”⁵⁶ According to Justice Holmes, that the New York legislature had chosen to follow a reasonable regulatory model was itself sufficient regardless of the statute’s paternalistic nature.⁵⁷ By turning to the “liberty” provision of the Fourteenth Amendment to prop up the right to contract, Justice Holmes feared that the Court had effectively neutered legislatures’ ability to enact popular opinion.⁵⁸ And although he was not willing to foreclose the prospect of substantive due process altogether, he concluded that it should only be implicated in the most extreme of

⁵⁰ *Lochner*, 198 U.S. at 57 (majority opinion) (concluding that bakers “are in no sense wards of the State” because they are “equal in intelligence and capacity to men in other trades or manual occupations” and can “assert their rights and care for themselves without the protecting arm of the State”).

⁵¹ *See id.* at 52–53.

⁵² *Id.* at 65–66 (Harlan, J., dissenting) (citing *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897)).

⁵³ *Id.* at 70–71 (discussing then-contemporary treatises and reports that alluded to the dangerous health conditions of a baking profession).

⁵⁴ *Id.* at 66–68 (citations and internal quotation marks omitted) (collecting cases).

⁵⁵ *Id.* at 75 (Holmes, J., dissenting).

⁵⁶ *Id.* In *Social Statics*, Spencer argued “in favour of an extreme form of economic and social laissez-faire.” Herbert Spencer, *ENCYCLOPEDIA BRITANNICA* (Apr. 23, 2019), <https://www.britannica.com/biography/Herbert-Spencer#ref145497> [https://perma.cc/NF4H-USWD].

⁵⁷ *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

⁵⁸ *Id.*

circumstances.⁵⁹ This approach to judicial deference became the rallying cry for those who opposed economic substantive due process.⁶⁰

Indeed, Progressives emphatically decried the dangers of the right to contract throughout the *Lochner* Era.⁶¹ By the turn of the century, “trends in economic thinking, and arguably the mood of the country, had begun to shift away from laissez faire–social Darwinism.”⁶² Instead, Progressives started turning to legislation as a means of widespread reform, largely relying on the states to improve working conditions.⁶³ But when *Lochner* constitutionalized laissez-faire principles in 1905, it effectively stalled those burgeoning efforts.⁶⁴ Subsequent cases, like *Adair v. United States*, wherein the Court struck down a statute that prohibited employers from firing an employee solely because of her union membership,⁶⁵ and *Adkins v. Children’s Hospital of D.C.*, which entailed the Court declaring unconstitutional a statute that fixed a minimum wage for women,⁶⁶ only served to propagate the perception that *Lochner* had rendered “thorough debate on important public issues . . . practically futile.”⁶⁷

Progressives were thus left little recourse as the country careened toward the Great Depression;⁶⁸ in fact, the Court was able to continue expanding upon the right to contract all the way up to the early stages of the New Deal.⁶⁹ Justice Holmes remained resolute in his dissent throughout this

⁵⁹ *Id.* (reasoning that substantive due process does not come into play “unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law”).

⁶⁰ Colby & Smith, *supra* note 49, at 541.

⁶¹ See PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* 153 (1998).

⁶² *Id.* at 149–50.

⁶³ See *id.* at 150 (“Mainstream reformers believed that the states had a duty to promote the general welfare and common good.”).

⁶⁴ *Id.* at 152 (“By adopting the doctrine of liberty of contract and the narrow definition of the police power, [the Court] said that as a matter of fundamental law, promotion of public health, safety, and morals was the only legitimate motive for economic and social reform.”).

⁶⁵ 208 U.S. 161, 175–76 (1908) (reasoning that “the employer and the employé [sic] have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract”), *overruled in part* by *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941).

⁶⁶ 261 U.S. 525, 554, 562 (1923) (arguing that women “are legally as capable of contracting for themselves as men”), *overruled in part* by *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

⁶⁷ KENS, *supra* note 61, at 152.

⁶⁸ Colby & Smith, *supra* note 49, at 539 (“[T]he recalcitrant and activist *Lochner*-era Court stood in the way of overwhelmingly popular and economically necessary Progressive legislation, perhaps contributing to or worsening the Great Depression.”).

⁶⁹ See KENS, *supra* note 61, at 153 (“[*Lochner*] and the Court were the bane of contemporary reformers—first of Progressives and then of the early New Dealers.”). As a result of its longevity, it is possible the *Lochner* Era resulted in approximately 200 laws being declared unconstitutional. See BENJAMIN F. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 154 (1942). *But see* Michael J. Phillips, *How Many Times Was Lochner-Era Substantive Due Process Effective?*, 48 *MERCER L. REV.*

period, citing the same concerns regarding judicial overreach that he had raised in *Lochner*.⁷⁰ But it was not until 1937, apparently in reaction to President Franklin Delano Roosevelt's court-packing plan, that the Court finally yielded to Progressives and adopted Holmes's deferential approach.⁷¹ *West Coast Hotel Co. v. Parrish*⁷² served as the vehicle for that sudden transition. When faced with a Washington State law that enacted a minimum wage for women,⁷³ the Court noted that the right to contract is not enumerated in the Constitution.⁷⁴ In stark contrast to *Lochnerian* cases, the *West Coast Hotel* Court was willing to restrain the Due Process Clause's protection of liberty, and therefore the right to contract, in favor of deferring to the legislature's policy decision.⁷⁵ Through its adoption of that newly deferential approach, the Court effectively signaled the end of the *Lochner* Era and the demise of the right to contract.⁷⁶

B. Scholarly Critiques of *Lochnerism*

Most scholars today agree that *Lochner* was incorrectly decided.⁷⁷ As Professor Martin Redish and Matthew Arnould note, the judiciary is not

1049, 1080 (1997) (asserting that the *Lochner* Era only resulted in fifty-five laws stricken due to economic substantive due process).

⁷⁰ See, e.g., *Adkins*, 261 U.S. at 568–70 (Holmes, J., dissenting) (discussing how the “right to contract” is an entirely court-created doctrine and should not be used to overcome reasonable enactments of the legislature); *Adair*, 208 U.S. at 191 (Holmes, J., dissenting) (“I confess that I think that the right to make contracts at will that has been derived from the word liberty in the [Fifth and Fourteenth] amendments has been stretched to its extreme.”). Justice Holmes was resolute even when substantive due process was briefly expanded to protect civil rights—namely, the right to teach one's children a foreign language—in *Meyer v. Nebraska*. 262 U.S. 390, 403 (1923) (Holmes, J., dissenting). But interestingly, he did not dissent in *Pierce v. Society of Sisters*, wherein the Court relied on substantive due process when it unanimously struck down a law that required children to attend public school. 268 U.S. 510 (1925).

⁷¹ See Colby & Smith, *supra* note 49, at 543.

⁷² 300 U.S. 379 (1937).

⁷³ *Id.* at 386.

⁷⁴ *Id.* at 391 (“The Constitution does not speak of freedom of contract.”).

⁷⁵ *Id.* (“Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.”). Notably, the Court did not seem to discount the principles underlying a right to contract, instead choosing to simply diminish their influence over legislative enactments.

⁷⁶ Colby & Smith, *supra* note 49, at 543 (explaining how *West Coast Hotel* “ended the *Lochner* [E]ra”).

⁷⁷ See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 224 (rev. ed. 2014) (“Condemnation of *Lochner* has become de rigeur among law professors of nearly all stripes.”); BERNSTEIN, *supra* note 49, at i (“If you want to raise eyebrows at a gathering of judges or legal scholars, try praising the Supreme Court's 1905 decision in *Lochner v. New York*.”); KENS, *supra* note 61, at 2 (“For more than eighty years [*Lochner*] has served legal scholars as a poignant example of judicial activism.”); see also *infra* Part II (describing how *Lochner* is used as a warning sign in the context of commercial speech).

meant to usurp the role of the legislative branch.⁷⁸ Redish and Arnould emphasize that legislators are democratically elected; hence, they are free to sway with the whims of the people because the people ultimately hold them responsible for their actions.⁷⁹ Conversely, members of the Court are appointed, not elected, and receive lifetime tenure, meaning they are not democratically accountable to the people.⁸⁰ In other words, the Court does not answer to the people for its decisions, and that design choice, per Redish and Arnould, is meant to ensure that its holdings remain untainted by popular opinion.⁸¹

But the Court's lack of accountability can cut both ways. Redish and Arnould contend that when the Court decides to unprincipledly thrust its own political or ideological preferences upon the nation, it abandons its countermajoritarian role and leaves the people essentially powerless in their own democracy.⁸² The Constitution is expressly designed to prevent those sorts of power grabs, but according to Redish and Arnould, the judiciary has been historically willing to ignore the clear dictate of the separation of powers.⁸³ On the other hand, Redish and Arnould recognize that the Court's role within the separation of powers framework is to check the legislature; acknowledging the Court's structural limitations does not require outright stripping it of its countermajoritarian function.⁸⁴ Thus, Redish and Arnould conclude that the Court should absolutely strike down certain legislation, but only when it can point to a guiding rationale that is firmly grounded in a clear constitutional directive.⁸⁵ Adhering to this guiding principle ensures a fair, unbiased approach, free of the individual Justices' political influence.⁸⁶

According to Redish and Arnould, then, the inexorable flaw within the doctrine of economic substantive due process is that there is no objective way to define its ethereal constitutional foundation. As the two argue, the

⁷⁸ See Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1491–92 (2012).

⁷⁹ See *id.* at 1532.

⁸⁰ Stephen L. Mikochik, *Self Restraint and Substantive Due Process*, 27 QUINNIPIAC L. REV. 817, 819–20 (2009).

⁸¹ See Redish & Arnould, *supra* note 78, at 1523.

⁸² *Id.* at 1509.

⁸³ See *id.* at 1531–32.

⁸⁴ See *id.* at 1523 (explaining that the Constitution and judiciary's purpose is to "shield[] certain rights and powers from majority encroachment or abuse").

⁸⁵ See *id.* at 1533–35 (proposing a "controlled activism" model in which the Court would have to be faithful in its interpretation of unambiguous text and both transparent and consistent when interpreting inherently ambiguous provisions).

⁸⁶ See *id.*

doctrine overlooks the Due Process Clause's obvious purpose: process.⁸⁷ Indeed, it is hard to imagine how the Constitution could have been clearer about this point, as it explicitly gives the Clause a procedural focus in the very label of “due process.”⁸⁸ Redish and Arnould therefore reason that the right to contract should not be construed as one that is absolute but rather one that can be “taken from citizens, *as long as proper procedures are followed.*”⁸⁹ In *Lochner*, those proper procedures were the ones the New York legislature provided through its weighing of the options and ultimate decision to enact a regulation that limited bakers' working hours.⁹⁰ The Court nonetheless ignored that fact and substituted its own desired politics to enshrine the right to contract.⁹¹

Indeed, the twisting of a procedural guarantee to create a newfound substantive right goes to the very heart of Redish and Arnould's concerns regarding judicial overreach.⁹² When the Court overlooks the clear procedural cabining of the Due Process Clause, its interpretation of “liberty” becomes an all-powerful forge of substantive guarantees, and the legislature has no means of reining in the Court's discretion.⁹³ The fallacy of the right to contract is thus entirely divorced from political opinion; if utilizing the Due Process Clause to create substantive rights was a proper interpretation of the text, the right to contract would have a fair claim to constitutionality. But as Redish and Arnould suggest, the *Lochner* Court had to fundamentally

⁸⁷ *Id.* at 1524.

⁸⁸ U.S. CONST. amend. XIV, § 1.

⁸⁹ Redish & Arnould, *supra* note 78, at 1524.

⁹⁰ See *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting) (explaining why the New York legislature's rationale behind enacting the regulation should not be subject to the Court's personal preferences).

⁹¹ See *id.* at 64 (majority opinion).

⁹² See Redish & Arnould, *supra* note 78, at 1524; see also KENS, *supra* note 61, at 100 (“In adopting substantive due process, the judicial branch was doing much more than protecting its own authority. It now assumed that it had the right to reign over the legislative domain of states.”). Thus, even Holmes's *Lochner* dissent did not go far enough because it left the door open for a form of substantive due process when a right is deemed “fundamental.” See *supra* note 59 and accompanying text. Although the question of whether a right is “fundamental” appears to be tackling the difficult issue of *identifying* protectable rights, see *Adkins v. Children's Hospital of the D.C.*, 261 U.S. 525, 568 (1923) (Holmes, J., dissenting) (identifying the “vague contours” of the Due Process Clause), it overlooks the simple fact that no matter how rights are identified, the procedural barrier of the Due Process Clause prevents their substantive application.

⁹³ Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1799–80 (2012) (describing how the utilization of substantive due process improperly “create[s] an inalienable liberty of undefined terms, beyond the reach of a duly elected legislature”). It should be noted, though, that the Equal Protection Clause can serve as an independent textual hook for many civil rights that are currently protected by substantive due process. See, e.g., McDonagh, *supra* note 17, at 1174 (discussing how the Equal Protection Clause can protect woman's reproductive rights).

subvert the Due Process Clause's prima facie procedural purpose to justify superimposing its own political ideology upon the nation.⁹⁴

Still, some contemporary scholars are now seeking to revitalize *Lochnerism*.⁹⁵ The most prevalent argument, advanced by Professor Randy Barnett, is that *Lochner* was simply a recognition that the Constitution must be read to protect natural rights⁹⁶ regardless of whether they are explicitly enumerated, including the right to contract.⁹⁷ Professor Barnett contends that the Due Process Clause is simply standing in for the Fourteenth Amendment's Privileges or Immunities Clause,⁹⁸ meaning concerns over "procedure"⁹⁹ should not proscribe the application of economic substantive due process.¹⁰⁰ Alternatively, he posits that the Ninth Amendment¹⁰¹ protects the right to contract, among other natural rights.¹⁰² In either case, Professor Barnett supports *Lochner* because, even if the Court found a right to contract

⁹⁴ Redish & Arnould, *supra* note 78, at 1524 ("[T]he concept of 'procedural process' is redundant—just as the concept of 'substantive process' is oxymoronic.").

⁹⁵ Colby & Smith, *supra* note 49, at 592–600 (discussing how "new originalism" has shifted gears to embrace the doctrine of substantive due process, thereby opening the door to a return of *Lochner*).

⁹⁶ Professor Barnett acknowledges that originalist sources would not be enough to clarify every one of the numerous natural rights safeguarded in his vision of the Constitution. BARNETT, *supra* note 77, at 261 ("[T]he original meaning of the rights retained by the people cannot be confined to the specific liberties identified by originalist materials."). Accordingly, he claims that an impartial judiciary must be trusted to pick the rights worthy of protection. *Id.* at 269. Such an approach, however, begs the question of how to go about ensuring the Court is acting principledly in its selection of deserving rights.

⁹⁷ *Id.* at 262 (arguing that natural rights merit a "presumption of constitutionality," meaning the legislature has the burden of justifying any law that seeks to curtail one of those rights). The *Lochner* Era Court took a similar approach to finding rights within the "liberty" provision. *Cf.* *Twining v. New Jersey*, 211 U.S. 78, 99 (1908) ("If this is [a violation of due process], it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law."), *overruled in part by* *Malloy v. Hogan*, 378 U.S. 1 (1964).

⁹⁸ U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."). The Privileges or Immunities Clause was largely neutered by the *Slaughter-House Cases*, 83 U.S. 36, 74 (1873).

⁹⁹ *See supra* notes 87–94 and accompanying text.

¹⁰⁰ BARNETT, *supra* note 77, at 208. Notably, at this point, it is probably too late to go back on the substantive due process doctrine in favor of the more constitutionally appropriate vehicle. *See generally* Jeffrey D. Jackson, *Be Careful What You Wish For: Why McDonald v. City of Chicago's Rejection of the Privileges or Immunities Clause May Not Be Such a Bad Thing for Rights*, 115 PENN. ST. L. REV. 561 (2011) (discussing how substantive due process has taken up the mantle of the Privileges or Immunities Clause ever since the *Slaughter-House Cases*). *But see* *Timbs v. Indiana*, 139 S. Ct. 682, 691 (2019) (Gorsuch, J., concurring) (reasoning that the Privileges or Immunities Clause should be used to incorporate the Eighth Amendment, not the Due Process Clause); *id.* (Thomas, J., concurring) (same).

¹⁰¹ U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

¹⁰² BARNETT, *supra* note 77, at 244. Justice Goldberg took this approach in his concurrence to *Griswold v. Connecticut*, 381 U.S. 479, 491–92 (1965) (Goldberg, J., concurring), but it has never been adopted by a majority on the Court.

in the improper constitutional vehicle, the right to contract, along with other natural rights, nevertheless exists within permissible constitutional confines.¹⁰³

But Justice Black persuasively refuted both proffered sources of natural rights during his time on the Court. First, in *Duncan v. Louisiana*, he suggested that the Privileges or Immunities Clause should incorporate only the explicitly enumerated provisions in the Bill of Rights and not any unenumerated, natural rights.¹⁰⁴ He noted that reading the Fourteenth Amendment as enforcing atextual rights, like the right to contract, would wholly undermine the Constitution's efforts to limit judicial discretion; there would be no principled methodology of identifying which rights are protected and which are not.¹⁰⁵ And second, dissenting in *Griswold v. Connecticut*, Justice Black contended that the Ninth Amendment does not decree that natural rights are automatically constitutionally protected but only that state laws protecting them are not necessarily unconstitutional.¹⁰⁶ In that sense, Justice Black read the Amendment as an anti-preemption provision: the rights enumerated in the Bill of Rights are not the only rights that can be protected by the legislature.¹⁰⁷ Indeed, he noted that if the Ninth Amendment constitutionally enforced unenumerated rights, it would give the unaccountable judiciary untethered discretion over picking and choosing the liberties it wanted to protect.¹⁰⁸

Thus, according to Justice Black, to point to the Privileges or Immunities Clause or Ninth Amendment as justifying *Lochnerism* is to run into the same problems inherent in economic substantive due process. Any

¹⁰³ See BARNETT, *supra* note 77, at 216–17 (dismissing Justice Holmes's *Lochner* dissent as “unfair”).

¹⁰⁴ 391 U.S. 145, 166 (1968) (Black, J. concurring) (“[The text of the Privileges or Immunities Clause] seem[s] to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States.”).

¹⁰⁵ See *id.* at 168 (“It is impossible for me to believe that such unconfined power is given to judges in our Constitution that is a written one in order to limit governmental power.”). Although Justice Black made that argument in the context of the Due Process Clause, it applies just as easily to the Privileges or Immunities Clause. See, e.g., J. Harvie Wilkinson III, *The Fourteenth Amendment Privileges or Immunities Clause*, 12 HARV. J. L. & PUB. POL'Y 43, 52 (1989) (warning that reading the Privileges or Immunities Clause to include unenumerated rights “holds special hazards for judges who are mindful that their proper task is not to write their personal views of appropriate public policy into the Constitution”); cf. Kurt T. Lash, *Federalism and the Original Fourteenth Amendment*, 42 HARV. J. L. & PUB. POL'Y 69, 78–79 (2019) (referencing Frederick Douglass's belief that the Privileges or Immunities Clause had to be restricted to enumerated rights to avoid creating a “despotic” central government).

¹⁰⁶ 381 U.S. at 519–20 (Black, J., dissenting).

¹⁰⁷ See *id.*

¹⁰⁸ *Id.* at 520–21 (“The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts.”).

of these approaches supplies a blank check to the judiciary, allowing it to freely constitutionalize its preferred policies in a wholesale abandonment of its limited checking role.¹⁰⁹ Contemporary scholars have widely recognized this fallacy embedded in a theory of natural rights. Accordingly, *Lochner* today has been relegated to serving as a condemnable symbol of judicial overreach.¹¹⁰ In no realm is *Lochner*'s symbolism more weaponized than that of commercial speech.

II. THE COMMERCIAL SPEECH DOCTRINE AND ITS TIES TO LOCHNERISM

The shadow of *Lochner* has long plagued the commercial speech doctrine. Indeed, the Court has never been able to extend even partial constitutional status to commercial speech without dissenting Justices and scholars alike arguing that it was attempting to surreptitiously reinvigorate economic substantive due process. These comparisons have only increased in intensity as the Court has continued to expand the First Amendment's coverage of commercial speech. This Part explores the Court's evolving treatment of commercial speech and how some Justices—namely, Justice Rehnquist and Justice Breyer—have referenced *Lochner* in protest. It then examines how scholars have used the specter of Lochnerism in their attempts to push back against the expansion of the commercial speech doctrine.

A. Constructing the Commercial Speech Doctrine

The Court has generally construed commercial speech as “expression advocating purchase.”¹¹¹ Like *Lochner* itself, this doctrine experienced a tumultuous history in terms of constitutional coverage;¹¹² it was not until *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* in 1976 that the Court brought commercial speech into the constitutional fold.¹¹³ In that case, the law at issue was a Virginia regulation that punished physicians who advertised the price of prescription-only drugs.¹¹⁴ In analyzing the value of those advertisements, the Court for the first time

¹⁰⁹ See *supra* notes 104–108 and accompanying text; see also *supra* notes 78–86 and accompanying text.

¹¹⁰ *Supra* note 77 and accompanying text (highlighting the near-universal condemnation of Lochnerism).

¹¹¹ Redish, *supra* note 4, at 75.

¹¹² See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (“We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.”), *overruled by* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1956–76 (2016) (discussing how the tax peddling cases in the 1940s foreshadowed the constitutionalization of commercial speech).

¹¹³ 425 U.S. 748 (1976).

¹¹⁴ *Id.* at 752.

considered the listeners'—that is, the public's—interest in hearing commercial speech.¹¹⁵ It asserted that many people would benefit more from hearing the prices of drugs than they would from hearing other forms of speech that are afforded full constitutional protection, such as political speech.¹¹⁶ The Court further observed that advertisements are necessary to facilitating people's frequent decision-making in the massive, complex commercial world¹¹⁷ and helping people decide how that commercial world should be regulated.¹¹⁸ The Court was thus resolute that the Constitution would no longer permit legislatures to “keep[] the public in ignorance.”¹¹⁹ Instead, the First Amendment would serve to “open the channels of communication” to the people by providing at least some protection for commercial speech.¹²⁰

In dissent, Justice Rehnquist argued that the First Amendment should not be deployed as a tool with which the Court can control how legislatures approach economic regulations.¹²¹ He asserted that the First Amendment is concerned with collective choices made by society as a whole, not an individual's personal decisions on what to purchase; thus, he would not have applied the First Amendment to commercial speech in the first place.¹²² So in an echo of Justice Holmes's *Lochner* dissent, Justice Rehnquist contended that the Court had contorted the First Amendment to protect commercial speech in an impermissible instance of judicial overreach.¹²³ Indeed, Justice Rehnquist went so far as to reference Justice Holmes's famous line from *Lochner*, stating, “[T]here is certainly nothing in the United States

¹¹⁵ *Id.* at 756–57 (“If there is a right to advertise, there is a reciprocal right to receive the advertising.”).

¹¹⁶ *Id.* at 763 (stating that a person's interest in hearing this commercial information “may be as keen, if not keener by far, than his interest in the day's most urgent political debate”).

¹¹⁷ *Id.* at 765. Unsurprisingly, this need was considered particularly acute if that person was in specific need of the medicine in question. *Id.* at 763–64.

¹¹⁸ *Id.* at 765 (“[E]ven if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking [sic] in a democracy, we could not say that the free flow of information does not serve that goal.”).

¹¹⁹ *Id.* at 770.

¹²⁰ *Id.* That protection, however, was limited to truthful commercial speech—false commercial speech remained wholly uncovered. *Id.* at 771–72 & n.24 (“The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.”). In his concurring opinion, Justice Stewart emphasized this point, contending that advertisers have unique insight into and economic incentive regarding their product, thereby bolstering commercial speech's durability. *Id.* at 777 (Stewart, J., concurring). Moreover, he argued that because commercial speech itself does not contribute to “ideological expression,” but instead merely concerns selling a product, it deserves lower levels of constitutional protection. *Id.* at 780–81.

¹²¹ *Id.* at 788–89 (Rehnquist, J., dissenting).

¹²² *Id.* at 787.

¹²³ *Id.* at 783–84.

Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith.”¹²⁴ Similarly, when the Court laid out a test resembling intermediate scrutiny for commercial speech a few years later, Justice Rehnquist reiterated that the Court had reinvigorated the right to contract’s capacity to freely strike down economic regulations, lamenting that “[t]he Court in [its decision] returns to the bygone era of *Lochner v. New York*.”¹²⁵

Despite Justice Rehnquist’s outcries, the commercial speech doctrine has continued expanding to this day. Perhaps no contemporary case in this arena is more divisive than *Sorrell v. IMS Health Inc.*, a 2011 case wherein the Court struck down a Vermont law that, among other things, prohibited pharmacies from selling prescriber information to pharmaceutical manufacturers for marketing purposes.¹²⁶ The Court did not decide one way or the other whether the sale of data itself was protected speech;¹²⁷ however, it found that the law posed more than an incidental burden on speech,¹²⁸ pointing to pharmaceutical manufacturers’ marketing efforts that had traditionally relied on access to the now-unavailable prescription information.¹²⁹ With the First Amendment thus implicated, the Court classified the Vermont statute as a form of content-based discrimination since it only impacted marketing—that is, commercial—uses of the data.¹³⁰ Moreover, it concluded that the law was also an instance of speaker-based discrimination in that it only sought to regulate commercial entities; other speakers were wholly unaffected.¹³¹

According to the Court, the statute was akin to a “law prohibiting trade magazines [and only trade magazines] from purchasing or using ink.”¹³² Although the purchase of ink clearly is not speech, it is an integral element of trade magazines’ ability to speak—just like the sale of prescription information is crucial to pharmaceutical companies’ speech. Such

¹²⁴ *Id.* at 784; *cf. supra* note 56 and accompanying text.

¹²⁵ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting).

¹²⁶ 564 U.S. 552, 563 (2011).

¹²⁷ *Id.* at 571 (“[T]his case can be resolved even assuming, as the State argues, that prescriber-identifying information is a mere commodity [as opposed to speech].”).

¹²⁸ *Id.* at 567.

¹²⁹ *Id.* at 558 (“Detailers, who represent [pharmaceutical] manufacturers, then use the reports [based on prescriber-identifying information] to refine their marketing tactics and increase sales.”).

¹³⁰ *Id.* at 564 (“The statute thus disfavors marketing, that is, speech with a particular content.”)

¹³¹ *Id.* (“More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers.”). The Court further held that the statute’s practical application amounted to viewpoint discrimination because it was specifically regulating against commercial speakers’ profit-making incentives. *Id.* at 565 (“Vermont’s law ‘goes even beyond mere content discrimination, to actual viewpoint discrimination.’”) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992)).

¹³² *Id.* at 571.

discriminatory laws had long been presumptively unconstitutional in the noncommercial context,¹³³ but this was the first time the Court extended that same protection to commercial speech.¹³⁴ Ultimately, the Court reasoned that content- or speaker-based discriminatory regulations affecting commercial speech merit a higher level of scrutiny.¹³⁵

Justice Breyer's dissent in *Sorrell* picked up the *Lochner* torch where Justice Rehnquist had left it. In addition to maintaining intermediate scrutiny for regulations impacting commercial speech,¹³⁶ Justice Breyer would have construed the Vermont law as only having a minimal impact on speech, thereby avoiding the First Amendment altogether.¹³⁷ He thus warned that the Court's holding would severely constrain legislatures' ability to enact economic regulations.¹³⁸ Indeed, he believed the decision expanded the First Amendment such that it reopened the *Lochnerian* door to constitutionalizing a laissez-faire marketplace that aligned with the Court's personal preferences.¹³⁹ And this was not a one-off comparison for Justice Breyer;¹⁴⁰

¹³³ See, e.g., *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991).

¹³⁴ Richard Samp, *Sorrell v. IMS Health: Protecting Free Speech or Resurrecting Lochner?*, 2010 CATO SUP. CT. REV. 129, 133–34 (2011).

¹³⁵ *Sorrell*, 564 U.S. at 565 (“Act 80 is designed to impose a specific, content-based burden on protected expression. It follows that heightened judicial scrutiny is warranted.”). Notably, the Court never had to clarify exactly how strict this new scrutiny should be as it also found that the regulation failed to meet the intermediary scrutiny required by *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). *Sorrell*, 564 U.S. at 571–79. Still, the Court later suggested that by “heightened scrutiny,” it meant strict scrutiny. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). In so reasoning, the Court has effectively granted full First Amendment protection to truthful commercial speech. Martin H. Redish & Kyle Voils, *False Commercial Speech and the First Amendment: Understanding the Implications of the Equivalency Principle*, 25 WM. & MARY BILL RTS. J. 765, 776 (2017). False commercial speech, however, remains unprotected. *Id.* at 767.

¹³⁶ *Sorrell*, 564 U.S. at 582 (Breyer, J., dissenting) (referring to the test established in *Central Hudson*).

¹³⁷ *Id.* at 585–88 (“Vermont’s statute neither forbids nor requires anyone to say anything, to engage in any form of symbolic speech, or to endorse any particular view, whether ideological or related to the sale of a product.”). *But see supra* notes 127–129 and accompanying text (discussing the Court’s construal of the law as having a significant burden on speech).

¹³⁸ *Sorrell*, 564 U.S. at 585–88 (Breyer, J., dissenting) (arguing that the Court has traditionally, and properly, showed great deference to the legislature in this regard); see also *id.* at 588–91 (explaining that economic legislation often necessarily makes distinctions based on the expression’s content or the speaker’s identity).

¹³⁹ *Id.* at 591–92 (“History shows that the power [to intervene in economic regulations] was much abused and resulted in the constitutionalization of economic theories preferred by individual jurists.”). In reply to this challenge in particular, the Court quipped, “The Constitution does not enact Mr. Herbert Spencer’s Social Statics. It does enact the First Amendment.” *Id.* at 567 (majority opinion) (quotation marks omitted) (quoting *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)).

¹⁴⁰ *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2381 (2018) (Breyer, J., dissenting) (contending that the Court was continuing to deviate from its post-*Lochner* path of leaving economic regulation in the hands of the legislature).

his ongoing references to *Lochner* elucidate the crucial role the case plays in the Court's debate concerning the constitutional merits of commercial speech.

B. Scholarly Invocations of Lochner

Scholars, too, have sensed *Lochner* lurking in the shadows of commercial speech. Indeed, as far back as 1979, scholars had begun comparing the two doctrines, contending that the then-recently decided *Virginia State Board* effectively “renovat[ed]” *Lochner*ism under the auspices of the First Amendment.¹⁴¹ And scholars have only become more insistent in advancing these arguments today, with various pieces rallying against expanding protections for commercial speech by citing the widely discredited *Lochner* Era.¹⁴²

Most notably, Professors Robert Post and Amanda Shanor worry that the commercial speech doctrine threatens to become just as potent as *Lochner*'s economic substantive due process.¹⁴³ They fear that because speech is inherent in every communication, including those that are commercial, the First Amendment could potentially stretch to cover economic transactions themselves.¹⁴⁴ The argument goes that the First Amendment's protection of speech, taken to its extreme, could also cover the speech involved in buying and exchanging goods, creating terms of employment, and the like.¹⁴⁵ In other words, if certain conduct is at all manifested through speech, it could be exempted from regulation under the First Amendment's guarantee of “free speech.” By this logic, any law

¹⁴¹ Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 30–32 (1979). The authors concluded that the commercial speech doctrine was not raising more widespread concern due to the generally high regard afforded to the First Amendment. *Id.* at 32.

¹⁴² See, e.g., Daniel J.H. Greenwood, *First Amendment Imperialism*, 1999 UTAH L. REV. 659, 666 (“*Lochner*, then, has returned. Once again, our Court is trying to solve the problems of our joint economic life by interpreting the principles of liberal abstention.”); Rebecca Tushnet, *COOL Story: Country of Origin Labeling and the First Amendment*, 70 FOOD & DRUG L.J. 25, 26 (2005) (“[T]he First Amendment has become the new *Lochner*, used by profit-seeking actors to interfere with the regulatory state in a way that substantive due process no longer allows.”); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1472 (2017) (“[T]he doctrinal expansion of the neo-*Lochner* movement undermines the areas of law that are newly covered and—because of the libertarian tradition that developed to justify the speech doctrine's outward movement—risks undermining the theoretical foundation of the First Amendment itself.”).

¹⁴³ Post & Shanor, *supra* note 10, at 167 (“It is no exaggeration to observe that the First Amendment has become a powerful engine of constitutional deregulation. The echoes of *Lochner* are palpable.”).

¹⁴⁴ *Id.* at 166.

¹⁴⁵ See *id.* at 166–67.

seeking to regulate economic transactions could soon face challenges from the First Amendment.¹⁴⁶

According to Professors Post and Shanor, the commercial speech doctrine was originally designed to prevent this outcome. The Court in *Virginia State Board* only granted commercial speech constitutional protection so far as it benefited listeners, not speakers,¹⁴⁷ and Professors Post and Shanor contend that this caveat reflects the Court's decision to allow more expansive regulation in the commercial sphere.¹⁴⁸ But they go on to suggest that courts in recent years have focused more on the interests of speakers than those of listeners, in the process eroding the doctrine's original limitations.¹⁴⁹ As a result, Professors Post and Shanor conclude that the First Amendment is well on its way to replacing *Lochnerism's* immense control of regulations in the commercial sphere.¹⁵⁰

Professor Shanor builds upon that line of argumentation in her aptly titled article, *The New Lochner*.¹⁵¹ There, she reiterates that, in its fullest form, the First Amendment has "total deregulatory potential" because speech is involved in nearly all aspects of human life.¹⁵² The commercial sphere is no exception.¹⁵³ Indeed, were a theory of "speech as such," accepted, meaning any and all speech falls within the First Amendment's coverage,¹⁵⁴ Professor Shanor contends that the pervasiveness of speech in economic transactions would prevent essentially all attempts at regulating the commercial sphere.¹⁵⁵ And she believes the modern approach to commercial

¹⁴⁶ See *id.*

¹⁴⁷ See *supra* notes 115–120 and accompanying text.

¹⁴⁸ Post & Shanor, *supra* note 10, at 169–70 (“[The] [c]ommercial speech doctrine was invented with the clear understanding that the state would be freer to regulate in the domain of commercial speech than it was ‘in the realm of noncommercial expression.’”) (quoting *Ohralik v. Ohio State Bar Ass’n.*, 436 U.S. 447, 456 (1978)).

¹⁴⁹ *Id.* at 170–73.

¹⁵⁰ *Id.* at 182 (reasoning that the expanded First Amendment doctrine “threatens to revive the long-lost world of *Lochner* and destroy the very democratic governance the First Amendment is designed to protect”).

¹⁵¹ Shanor, *supra* note 10.

¹⁵² *Id.* at 135. Even the 9/11 attacks, according to Professor Shanor, entail expressive elements that could be construed as falling within the realm of protected speech were the principle taken to its most extreme conclusion. *Id.* at 176–77.

¹⁵³ *Id.* at 181 (“[A]ny sale or contract involves the communicative elements of offer and acceptance.”).

¹⁵⁴ *Id.* at 186–88.

¹⁵⁵ See *id.* at 182 (“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.”). In line with Professor Shanor’s “speech as such” contention, some scholars suggest that the right to contract itself should be included within the First Amendment’s coverage because contracts are made up of language that could be construed as “free speech.” See, e.g., Steven C. Begakis, *Rediscovering Liberty of Contract: The Unnoticed Economic Right Contained in the Freedom of Speech*,

regulation—one focused on regulations that seek to rein in certain conduct through means other than outright banning it—is especially susceptible to such First Amendment challenges.¹⁵⁶ This “new *Lochner*,” then, supposedly threatens to steadfastly shield the autonomy of commercial speakers¹⁵⁷ as the right to contract had done before.¹⁵⁸

Professor Shanor, in fact, suggests that the First Amendment could pose an even greater threat to economic regulation than *Lochner* did. Although she acknowledges that the two doctrines are not perfectly identical,¹⁵⁹ Professor Shanor argues that these discrepancies might actually make the First Amendment a more powerful tool for the Court to exploit. For instance, she notes that, in comparison to the Due Process Clause, free speech is the more widely accepted¹⁶⁰ and valued¹⁶¹ doctrine, which would make it easier for people to support invalidating economic regulations on First Amendment grounds. Ultimately, Professor Shanor goes so far as to argue that “[c]ommercial speech protection possesses *broader* deregulatory capacity [than economic substantive due process]”—an unmistakable warning to those who have condemned *Lochner* over the years.¹⁶² By taking the notion of a deregulatory First Amendment to its extreme, Professor Shanor has propagated the historical trend of reframing the commercial speech doctrine in *Lochnerian* terms. That trend, though, misrepresents the true scope of the First Amendment.

III. PURGING *LOCHNER* FROM THE FIRST AMENDMENT

Deploying *Lochner* in the commercial speech context is misleading and unhelpful. Arguments that an expanded commercial speech doctrine will serve to curtail legislatures are correct in so far as they recognize that any expansion of rights would naturally result in more regulations being struck down when those new rights are impinged. Yet recklessly invoking the

50 LOY. L.A. L. REV. 57, 90 (2017) (“[T]he liberty to form a contract is secured by the text of the First Amendment, is implicit in the U.S. Supreme Court’s commercial speech jurisprudence, is justified by reference to originalist and traditionalist theory, and finds the most appropriate textual vehicle in the First Amendment.”).

¹⁵⁶ Shanor, *supra* note 10, at 171 (“[T]he modern state regulates in ways that appear, or are more prone to appear, speech-regulating than earlier forms of administration.”).

¹⁵⁷ *See id.* at 143.

¹⁵⁸ *See supra* Section I.A.

¹⁵⁹ Shanor, *supra* note 10, at 182 (explaining that the expanding commercial speech doctrine “is a story of constitutional conflict that has been told, *if slightly differently*, once before,” in the context of economic substantive due process (emphasis added)).

¹⁶⁰ *Id.* at 184 (recognizing the First Amendment’s “textual hook”).

¹⁶¹ *Id.* at 186 (arguing that the protection of free speech is “more broadly attractive [than *Lochner*], particularly to more ‘progressive’ jurists”); *see also id.* at 189–90.

¹⁶² *Id.* at 137 (emphasis added).

Lochner label to describe these concerns only results in unproductive fearmongering.¹⁶³ In reality, the commercial speech doctrine would be better served were *Lochner* removed from the discussion altogether: the two doctrines have entirely different scopes and thus implicate entirely different types of regulations. This Part begins by discussing the First Amendment's means of distinguishing between purely persuasive expression, which fits under "free speech," and conduct that goes beyond that limitation. It then applies these First Amendment principles to the commercial sphere to explain how concerns over the commercial speech doctrine are separate from those regarding *Lochnerism's* economic substantive due process.

A. *The First Amendment's Limited Scope*

The First Amendment draws a line between purely communicative speech and conduct that goes beyond those limits.¹⁶⁴ Indeed, when speech is intertwined with conduct, it is deemed a "speech act" that is not entitled to First Amendment coverage.¹⁶⁵ For instance, words communicated in the act of firing someone do not constitute "free speech" since the firing itself entails the conduct-oriented effect of abrogating a contractual relationship.¹⁶⁶ Although such a rule may make intuitive sense here—of course the First Amendment should not extend to cover the legal implications of firing someone—the underlying rationale illuminates the true scope of "pure speech."

Professor Thomas Emerson proposes, and the Court's doctrine largely seems to agree,¹⁶⁷ that First Amendment speech should include all expression that has no more than an indirect impact on the legal or physical world, a standard reflective of the First Amendment's principal function of facilitating communication.¹⁶⁸ Expression that is motivated only by

¹⁶³ See *infra* Part IV.

¹⁶⁴ See, e.g., THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 17–18 (1970).

¹⁶⁵ Shanor, *supra* note 10, at 194 n.250 (citing Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 13–14).

¹⁶⁶ *Id.*

¹⁶⁷ See *infra* notes 176–192 and accompanying text. One notable exception to this principle is conspiracy, where states are often too lax in determining when an "action" has taken place that transforms pure speech from into the act of preparing to commit the conspired crime; as it stands, conspirators can often be punished for merely agreeing to commit a crime without taking any action directly in furtherance of the crime. Martin H. Redish & Michael J.T. Downey, *Criminal Conspiracy as Free Expression*, 76 ALB. L. REV. 697, 716 (2012–2013).

¹⁶⁸ See EMERSON, *supra* note 164, at 18 (explaining that speech with expression as its "dominant element" should be protected under the First Amendment); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (discussing how the First Amendment serves "to open the channels of communication rather than to close them"); see also C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 998 (1978) ("The key aspect distinguishing

persuasive efforts, then, is the sort of “free speech” valued by the First Amendment.¹⁶⁹ In line with Emerson’s model, purely persuasive expression only has a legal or physical consequence if the third-party intermediary—the person targeted by the expression—is persuaded to directly bring about that consequence herself.¹⁷⁰ Simply sharing one’s ideas, in other words, does not shape the tangible world unless other people are actually convinced. So even when a speaker effectively persuades others to engage in illegal conduct, she is protected because her expression can be extricated from whatever effect ultimately results.¹⁷¹

But when expression is part and parcel of conduct that goes beyond persuasion and directly affects the physical world, it is not afforded First Amendment armor. For instance, whereas someone asking her friend to give her money would qualify as pure speech, pointing a gun at her friend’s head and asking for money would fall outside the First Amendment’s scope.¹⁷² In the second scenario, the speaker serves as an agent in the action, meaning she crosses the line between speech and conduct.¹⁷³ Her expression, although still technically speech, has evolved into an effort to forcefully coerce another through a physical threat, which does not comport with the First Amendment’s limited scope of sharing ideas in an effort to convince others.¹⁷⁴ So the determinant factor in considering First Amendment coverage is whether the expression is self-executing such that it directly causes a tangible shift in the physical or legal realm.¹⁷⁵ If so, the expression is not protected by the First Amendment and is subject to regulation.

harms caused by protected speech acts from most other methods of causing harms is that speech harms occur only to the extent people ‘mentally’ adopt perceptions or attitudes.” (emphasis added)). It should be noted that this construal of “free speech” can entail both verbal and nonverbal expression. *See infra* notes 181–186 and accompanying text.

¹⁶⁹ *See* EMERSON, *supra* note 164, at 18; David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 342 (1991) (noting that the “persuasion principle” serves to limit the scope of governmental regulation).

¹⁷⁰ *See* EMERSON, *supra* note 164, at 404–05.

¹⁷¹ *Id.* at 405 (noting that, if the conduct is illegal, “the community must satisfy itself with punishment of the one who [acted],” not the one who only “communicated with him about it.”); *see also infra* note 187 and accompanying text (discussing the Court’s rule that incitement of unlawful conduct can be considered unprotected speech if it is directly proximate to the unlawful conduct itself).

¹⁷² *Cf.* Martin H. Redish & Matthew Fisher, *Terrorizing Advocacy and the First Amendment: Free Expression and the Fallacy of Mutual Exclusivity*, 86 FORDHAM L. REV. 565, 574 (2017) (making a similar comparison using a mugger demanding that the victim give him her money).

¹⁷³ EMERSON, *supra* note 164, at 404.

¹⁷⁴ Baker, *supra* note 168, at 998 (“The reasons why speech is protected do not apply if the speaker coerces the other or physically interferes with the other’s rights.”).

¹⁷⁵ *See* Strauss, *supra* note 169, at 343 (explaining the line the government must draw between efforts to persuade and efforts to solely injure through expression); *see also* Baker, *supra* note 168, at 997–98; Comment, *Coercion, Blackmail, and the Limits of Protected Speech*, 131 U. PA. L. REV. 1469, 1471 (1983).

The Court enforces this distinction in the context of symbolic political speech. For example, *United States v. O'Brien* concerned a law that prohibited the destruction of draft cards, which had been implicated when O'Brien burned his own card in protest of the Vietnam War.¹⁷⁶ In determining how to apply the First Amendment, the Court considered whether the regulation targeted purely persuasive expression or expression intertwined with a tangible, and therefore regulable, action.¹⁷⁷ Here, the Court concluded that the regulation served to ensure the smooth functioning of the Selective Service System.¹⁷⁸ O'Brien's expression thus went beyond persuasive purposes; instead, it directly impacted his legal relationship with the Selective Service.¹⁷⁹ Accordingly, the Court held that the First Amendment did not afford him protection.¹⁸⁰

Conversely, the Court in *Texas v. Johnson*¹⁸¹ found no such element of intertwined conduct. There, the Court examined a flag-burning statute that Johnson had violated when he burned a United States flag during a political rally.¹⁸² The Court concluded that, despite Johnson's lack of spoken words, the regulation targeted Johnson's "speech" precisely because of its persuasive nature and nothing more.¹⁸³ The Court dismissed fears that the expression may have been offensive or might have convinced witnesses that national unity has been undermined as insufficient reasons to bypass the First Amendment.¹⁸⁴ Those rationales, in fact, justified invoking the free speech doctrine in the first place—otherwise new, societally challenging ideas

¹⁷⁶ 391 U.S. 367, 369–70 (1968). The Court conceded that the act certainly had some expressive value but was still unwilling to extend it First Amendment protection on those grounds alone. *Id.* at 376.

¹⁷⁷ *Id.* at 377 (listing amongst the requirements for a permissible regulation that it be "unrelated to the suppression of free expression" and, in the event of an "incidental" First Amendment impact, that it be "no greater than is essential to the furtherance of [the government's] interest").

¹⁷⁸ *Id.* at 378–80 (determining that the maintenance of draft cards is essential to the operation of the Selective Service).

¹⁷⁹ *Id.* at 382 ("When O'Brien deliberately rendered unavailable his registration certificate, he wilfully [sic] frustrated this governmental interest [of effectively running the Selective Service]. For this noncommunicative impact of his conduct, and for nothing else, he was convicted.")

¹⁸⁰ *Id.* at 386. Emerson notably disagrees with the Court's conclusion about the purpose of the law in *O'Brien*. EMERSON, *supra* note 164, at 84–87 (arguing that a different legislative scheme already contemplated the unexpressive element of O'Brien's conduct—hindering the draft process—meaning this set of legislation must have specifically targeted the expression inherent in burning draft cards). Still, to the extent *O'Brien*'s test can be extricated from its particular fact pattern, it provides helpful guidance for drawing the line between speech and conduct. *See infra* notes 181–186 and accompanying text.

¹⁸¹ 491 U.S. 397 (1989).

¹⁸² *Id.* at 399–400.

¹⁸³ *Id.* at 407.

¹⁸⁴ *Id.* at 407–10.

would be too easily stifled by majoritarian forces.¹⁸⁵ So because there was no indication that burning a flag itself has a direct impact on any legal structures, the Court classified Johnson's expression as pure speech and protected it under the First Amendment.¹⁸⁶

The Court runs into a similar issue when it comes to people who openly advocate for the commission of a crime: should the speaker be suppressed for fear she will manage to convince others to follow through with her suggestion, or is her expression protected by the First Amendment? In resolving that conundrum, the Court in *Brandenburg v. Ohio* crafted an "imminent lawless action" test, wherein expression can only be suppressed if it is likely to immediately bring about the relevant unlawful activity.¹⁸⁷ The First Amendment thus does not protect expression that is made in "imminent" preparation of a crime, whereas even the most radical expression that is minimally tangential to a crime falls within the First Amendment's ambit.¹⁸⁸ That small but crucial distinction allows the Court to appropriately parse through statements that act as mere propositions to engage in illegal conduct—persuasive expression that merits constitutional protection—and expression that is tightly woven into the illegal conduct itself, thereby losing its "pure speech" qualities.¹⁸⁹

Accordingly, under *Brandenburg*, turning to a fellow revolutionary at the precipice of a violent governmental overthrow and shouting that they shoot someone would constitute an unprotected form of conduct, given its proximity to the unlawful act.¹⁹⁰ But on the other hand, passing out pamphlets

¹⁸⁵ *Id.* at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *id.* at 415 ("[N]othing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it").

¹⁸⁶ *Id.* at 420 (reasoning that in upholding Johnson's right to free speech, the Court was conveying the true meaning of the American flag).

¹⁸⁷ 395 U.S. 444, 447 (1969) (explaining that the First Amendment only applies against advocacy for unlawful activity if the speech "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"). *But see* EMERSON, *supra* note 164, at 75 (arguing that "incitement" is inherent in all speech, meaning that the *Brandenburg* standard is too broad). *Brandenburg* involved a member of the Ku Klux Klan convicted under an Ohio law for his speech at a rally. 395 U.S. at 445–47. The Court ultimately held that the Ohio law was too broad to pass muster under the First Amendment. *Id.* at 449 ("[W]e are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action.").

¹⁸⁸ Redish & Fisher, *supra* note 172, at 572.

¹⁸⁹ *See id.* at 572–73.

¹⁹⁰ *See* *Whitney v. California*, 274 U.S. 357, 376–77 (1927) (Brandeis and Holmes, J.J., concurring) (laying the groundwork for the *Brandenburg* test by reasoning that the First Amendment can only be eschewed when "immediate serious violence [is] to expected" and, along those lines, noting "[o]nly an emergency can justify repression"), *overruled in part by Brandenburg*, 395 U.S. 444.

that do nothing more than propose gruesome societal upheaval would receive all the benefits associated with the First Amendment. Simply spreading ideas is not inexorably intertwined with the execution of those ideas; the speaker is expressing herself, not engaging in any tangible conduct aimed at directly shaping the world around her.¹⁹¹ And although some may argue that the legislature's ability to regulate unlawful conduct necessarily implies its ability to also regulate speech associated with that conduct, such a stance is an oversimplification of the First Amendment. The government has more capacity to regulate what people actually do than how they think and express themselves.¹⁹²

The ultimate demarcation between speech and conduct, then, lies in the purpose of the expression. If the speaker means to persuade another to action, only indirectly changing the physical or legal world, the expression is pure speech, which implicates the First Amendment. But if the speaker aims to directly impact those realms—meaning the expression itself affects the physical or legal world—an element of conduct is invoked, and the First Amendment does not apply.¹⁹³ Therefore, the key to a speaker obtaining protection under the First Amendment is that her only intention be to persuade another to action; once she engages in expression that directly effectuates some other purpose, First Amendment coverage is no longer available.

B. Identifying Pure Speech in the Commercial Sphere

The necessity of differentiating between speech and conduct under the First Amendment makes the invocation of *Lochner* misleading in the context of the commercial speech doctrine. In line with the First Amendment's focus on pure speech, the protections for commercial speech must extend to solely

¹⁹¹ Cf. *Hess v. Indiana*, 414 U.S. 105, 106–08 (1973) (holding that saying “[w]e’ll take the fucking street later” in response to police presence at a political rally is protected speech because it is “nothing more than advocacy of illegal action at some indefinite future time”).

¹⁹² Strauss, *supra* note 169, at 342 (concluding that the First Amendment prevents the government from regulating speech simply due to the fear that it will prove to be too influential). This same principle is reflected in *Virginia State Board's* rationale that the legislature cannot deny people access to commercial speech out of paternalistic concerns over the speech's persuasive effect. *Supra* notes 115–120 and accompanying text.

¹⁹³ It is for that reason that Professor David Strauss argues to exclude workplace harassment from First Amendment coverage: because such expression is not aimed at convincing an intermediary but is instead spoken in insular contexts with the primary intent to directly harm the victim, it does not merit “free speech” status. Strauss, *supra* note 169, at 343; cf. Redish & Fisher, *supra* note 172, at 574 (“Simply put, a true threat is a coercive act, not speech. The First Amendment does not protect every use of words. It protects the right of the speaker to voluntarily express herself in order to persuade a willing listener to adopt a certain belief or take a certain action.”). On the other hand, “defamation or speech that induces a hostile audience reaction” falls more in line with Professor Strauss's persuasion principle since it is ostensibly aimed at convincing members of the crowd. Strauss, *supra* note 169, at 343.

persuasive efforts¹⁹⁴—as in, efforts to convince others to enter into economic engagements, most notably through advertisements.¹⁹⁵ Alternatively, the right to contract directly affects the legal realm since contracts create binding, legal obligations between parties. In other words, whereas commercial speech is aimed at convincing potential consumers to act on their own behalf, contracts serve as transactions in and of themselves; contracts are the objects, not the means, of persuasion. Thus, the two doctrines implicate entirely different portions of the overarching marketplace.

That crucial distinction effectively undermines any assertions that the commercial speech doctrine will ever become a new version of the right to contract. The First Amendment is focused on allowing people to convince others to undertake certain actions or beliefs by keeping the channels of communication free from governmental interference.¹⁹⁶ But there is no such persuasive communication occurring at the time of contract formation since, by that point, the listener has *already* been convinced to enter into an economic transaction. And conversely, a listener is not forced to directly alter her legal status by simply reading an advertisement. A commercial speaker therefore only has an indirect impact on legal relationships; no legal shift occurs until the listeners take action on their own behalves. Accordingly, so long as the First Amendment's protection requires that a speaker is persuading her listener and nothing more, an expanded commercial speech doctrine is simply not equipped to reinvigorate *Lochnerism*.¹⁹⁷

As a result of their unique foundational bases, each doctrine has a distinct impact on the legislature's ability to enact laws regarding the marketplace. The right to contract, in fact, conflicts with direct mandates from the legislature,¹⁹⁸ which are regulatory methodologies the First Amendment would never touch.¹⁹⁹ That is, if Congress wants to restrain a particular economic transaction, the First Amendment leaves open the opportunity to ban that conduct altogether: the commercial speech doctrine

¹⁹⁴ See *supra* Section III.A.

¹⁹⁵ *Supra* note 4 and accompanying text.

¹⁹⁶ *Supra* notes 164–175 and accompanying text.

¹⁹⁷ To the extent commercial speakers are protected against discrimination under the First Amendment, that doctrine still only affects discriminatory laws, whereas the right to contract affected every law—discriminatory or not—that interfered with a contractual relationship. See *infra* notes 213–221 and accompanying text.

¹⁹⁸ See, e.g., *Lochner v. New York*, 198 U.S. 45, 52 (1905) (describing New York's law as “an absolute prohibition upon the employer, permitting, under any circumstances, more than ten hours work to be done in his establishment”).

¹⁹⁹ Shanor, *supra* note 10, at 198 (“Where constitutional barriers prevent such ‘lighter-touch’ regulation [referring to regulations that tend to be more speech-oriented], mandates may be the most feasible regulatory response.”).

is not concerned with economic transactions themselves but rather the ability to propose them to listeners.²⁰⁰ Throughout the *Lochner* Era, however, the fate of direct mandates was entirely subject to the Court's discretion; the right to contract prevented the legislature from outright prohibiting certain provisions in an economic relationship.²⁰¹ In line with the imminent lawless action test, then, the First Amendment protects the ability to advocate for an economic transaction, even if the transaction itself is illegal. On the other hand, the *Lochner* line of cases would protect the transaction, but not any related advocacy for the transaction—the right to contract only acts once there is a tangible contract in place.

In that sense, the First Amendment might be construed as having even more impactful regulatory implications than *Lochnerism* ever did.²⁰² Without a free speech protection, regulations could restrict the information available in the public sphere, thereby surreptitiously influencing people's perceptions and insulating companies' activities from public scrutiny. But in a world without the right to contract, information continues to flow freely, so the people can still accurately decide how they want to regulate certain economic transactions through the political branches. Each doctrine's respective focus is thus molded accordingly: whereas the *Lochner* Era's concerns pertained to the legislature preventing people from acting a certain way, the First Amendment is concerned with the legislature preventing people from talking and thinking in a certain way.²⁰³ Consequently, economic substantive due

²⁰⁰ *Sorrell* emphasizes this point by stating that a regulation must have more than an “incidental” impact on speech before the First Amendment intervenes. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

²⁰¹ *See, e.g.*, *Adair v. United States*, 208 U.S. 161 (1908) (striking down a direct mandate against contracts that prohibited employees from joining unions), *overruled in part by Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941).

²⁰² *Cf. supra* note 192 and accompanying text (discussing why the legislature's greater ability to regulate unlawful conduct does not include the lesser ability to regulate speech associated with that conduct in regard to the imminent lawless action test). Justice Black in particular recognized the importance of facilitating the free communication of ideas through the First Amendment, writing that its protections hold a “preferred place” in democratic societies. *Dennis v. United States*, 341 U.S. 494, 581 (1951) (Black, J., dissenting).

²⁰³ *See supra* note 192 and accompanying text; *see also supra* notes 115–120 and accompanying text (discussing *Virginia State Board's* rationale for extending constitutional protection to commercial speech); *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 502–03 (1996) (discussing how regulations of truthful commercial speech “hinder customer choice” and also “impede debate over central issues of public policy”); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 579 (1980) (Blackmun, J., concurring in the judgment) (“If a governmental unit believes that use or overuse of air conditioning is a serious problem, it must attack that problem directly, by prohibiting air conditioning or regulating thermostat levels. . . . [It] may *not* promote energy conservation ‘by keeping the public in ignorance.’” (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976))).

process is necessarily aimed at restricting a class of regulations entirely separate from the First Amendment.

For instance, the Court in *Lochner* could not have reached the same holding had it relied on the First Amendment instead of the right to contract. The law there mandated a maximum number of working hours for New York bakers, which voided the contractual relationship the plaintiff had established with his own employees.²⁰⁴ That contract entailed no attempts at persuading a listener to action; rather, it self-executed so as to form a legal relationship between employer and employee. Any law regulating such a contract is beyond the reach of the First Amendment because, despite speech's literal presence in the contract itself,²⁰⁵ the language therein is being utilized to directly impact the parties' legal duties. In fact, the Court pointed to that tangible effect in justifying its deployment of the right to contract to strike down the regulation.²⁰⁶

Similarly, in *Coppage v. Kansas*, a case emblematic of the *Lochner* Era, the Court struck down a regulation that prohibited employers from implementing contracts with explicit restrictions on their employees' capacity to join a union.²⁰⁷ Again, the regulated expression there—the original contract—went beyond pure speech by creating binding, legal obligations between the parties. That conduct-oriented purpose, however, did not preclude the application of the right to contract. Indeed, the Court only intervened with the Due Process Clause because the regulated transaction was intrinsically, and in the Court's view, unfairly, conduct-oriented.²⁰⁸ The right to contract thus served as a means to reach regulations that would otherwise be untouched by the enumerated provisions in the Bill of Rights, including the First Amendment's promise of free speech; because the Constitution had not provided a right through which the Court could

²⁰⁴ *Lochner v. New York*, 198 U.S. 45, 52 (1905) (discussing how, under the New York law, *Lochner* had “wrongfully and unlawfully required and permitted an employé working for him to work more than sixty hours in one week”).

²⁰⁵ See *supra* note 155 and accompanying text.

²⁰⁶ See *Lochner*, 198 U.S. at 53 (“The right to *purchase* or to *sell* labor is part of the liberty protected by [the Fourteenth Amendment].” (emphasis added)).

²⁰⁷ 236 U.S. 1, 16 (1914), *overruled in part by* *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941) (“The Act . . . is intended to deprive employers of a part of their liberty of contract, to the corresponding advantage of the employed and the upbuilding of the labor organizations.”).

²⁰⁸ See *id.* at 18–19 (“[I]n our opinion, the Fourteenth Amendment debars the States from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare.”).

enforce its preferred policies, the Court had to invent a new right altogether.²⁰⁹

Commercial speech cases, too, serve to distinguish between Lochnerism and the First Amendment: were the right to contract the Court's only tool in those fact patterns, it would have been unable to overturn regulations that restrict pure speech. In *Virginia State Board*, the Court considered a regulation that punished physicians who advertised the price of prescription-only drugs.²¹⁰ Unlike the Lochnerian cases, the expression here was purely persuasive in that it did not directly affect the physical or legal world but instead focused on convincing third-party consumers to do so for themselves. There was, after all, no contract or other direct action involved unless and until the expression proved successful in persuading the listeners to purchase the advertising physician's products.²¹¹ The right to contract would therefore provide no foothold to justify safeguarding the regulated speech. Instead, the Court considered this persuasive expression to be exactly the sort valued under the First Amendment and accordingly invoked the protection of free speech in striking down the law.²¹²

Even *Sorrell v. IMS Health*, often cited as an egregious contemporary expansion of commercial speech,²¹³ does not implicate the same concerns as Lochnerism. *Sorrell* struck down a regulation that prohibited pharmacies from selling individual doctors' prescription information for marketing purposes.²¹⁴ At first blush, such a law may appear to be conduct-regulating in that it outright proscribed a transaction—the sale of data—thus suggesting

²⁰⁹ See *supra* notes 104–108 and accompanying text (discussing the limitations of natural rights theories).

²¹⁰ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 752 (1976).

²¹¹ See *id.* at 762 (discussing “the transaction that is *proposed* in the commercial advertisement” (emphasis added)).

²¹² *Id.* at 770 (stating that, although Virginia can regulate the pharmaceutical industries through more direct means, the First Amendment prohibits it from “do[ing] so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering”). 44 *Liquormart v. Rhode Island* provides a further illustration of a commercial speech case that could not be replicated through the right to contract. 517 U.S. 484 (1996). The law at issue in that case was a regulation that significantly limited the capacity of liquor companies to advertise the prices of their products. *Id.* at 489–90. Such a law does not target any contract or other form of direct impact on legal statuses; rather, the regulated speech was aimed solely at convincing consumers to purchase the speakers' products. See *id.* And because that formulation does not comport with the tangible effects covered by the right to contract, the Court invoked the First Amendment to protect people's access to purely persuasive expression, commercial or not, citing the fact that regulations of truthful commercial speech “hinder customer choice” and “impede debate over central issues of public policy.” *Id.* at 502–03, 508. Indeed, the regulation at hand reflected the specific paternalism concerns inherent in the First Amendment, not the right to contract—namely those regarding the government's efforts to insulate its genuine public policy from the people. *Id.*

²¹³ See *supra* notes 136–139 (discussing Justice Breyer's dissenting opinion in *Sorrell*).

²¹⁴ *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011).

it would be better analyzed under the right to contract than the First Amendment.²¹⁵ But in reality, the *Sorrell* decision had nothing to do with the distinction between speech and conduct. Rather, it was predicated on an entirely distinct concept under the First Amendment: the protection against discrimination.²¹⁶ Crucially, the law at issue in *Sorrell* only targeted the use of prescription data in companies' marketing efforts without at all burdening noncommercial speakers' use of that same data.²¹⁷ Such a regulation is akin to, for example, a law allowing Republicans to purchase paper for their informational pamphlets but preventing Democrats from doing so.²¹⁸

Accordingly, the *Sorrell* law exemplified speaker-based discrimination in that it targeted only certain speakers—those seeking to sell prescription drugs—based on nothing more than the speakers' commercial identity, and *that* defect is what led the *Sorrell* Court to its holding.²¹⁹ In other words, the decision had nothing to do with an expanded definition of speech in the commercial context.²²⁰ Comparisons to *Lochner*, therefore, are unfounded because economic substantive due process could undermine any regulation affecting contractual relationships, irrespective of whether the regulations discriminated against a specific group.²²¹ Indeed, the only change that could truly revitalize *Lochnerism* under the First Amendment is stretching the definition of commercial speech so it includes non-persuasive conduct. *Sorrell* did nothing of the sort.

Ultimately, then, economic substantive due process and the commercial speech doctrine target wholly distinct regulatory approaches that do not

²¹⁵ *But see id.* at 570 (contesting Vermont's argument that its law was conduct-regulating because "the creation and dissemination of information are speech within the meaning of the First Amendment").

²¹⁶ *See* Agatha M. Cole, *Internet Advertising after Sorrell v. IMS Health: A Discussion on Data Privacy & the First Amendment*, 30 *CARDOZO ARTS & ENT. L.J.* 283, 303 (2012) (discussing the Court's holding in the context of discriminatory principles).

²¹⁷ *See supra* notes 130–131 and accompanying text. Indeed, the Court suggested that, had the law been applied more expansively to all speakers, it is possible the First Amendment would not have been implicated in the first place. *See Sorrell*, 564 U.S. at 571 (noting that the case turned on the content-discriminatory effects of the law, regardless of whether the sale of information qualified as "speech").

²¹⁸ *Cf. id.* ("So long as they do not engage in marketing, many speakers can obtain and use the information. But detailers cannot. Vermont's statute could be compared with a law prohibiting trade magazines from purchasing or using ink.").

²¹⁹ *Id.* at 564.

²²⁰ Although the sale of prescription information was not necessarily speech itself, the Court concluded that to restrict that sale would be to pose more than an incidental burden on speech, which is enough to subject the law to the First Amendment. *Id.* at 567. In this case, the burdened speech was the eventual marketing toward certain doctors that was based, in large part, on the company's access to prescriber information. *See id.* at 558.

²²¹ Still, there is no denying that the application of speaker-discriminatory principles to protect commercial speakers will impact the regulatory schema permissible under the First Amendment. *See infra* note 242 and accompanying text.

overlap beyond their economic nature. And that distinction between the doctrines should hardly be surprising—it bears emphasizing that the First Amendment and Due Process Clause are not constitutionally linked whatsoever and, consequently, have wholly unique focuses.²²² Accordingly, striking down a law that prohibits employers from firing workers due to their union membership²²³ or provides women with a minimum wage²²⁴ differs not in degree, but in kind, from rejecting regulations that restrict an employer's capacity to advertise her business²²⁵ or prevent pharmaceutical companies, and nobody else, from engaging in certain speech.²²⁶ This demarcation brings to light the problems that result from forcing *Lochnerism* into First Amendment debates.

IV. THE TROUBLING IMPLICATIONS OF EXPLOITING *LOCHNER*

Lochnerism and commercial speech are distinct doctrines, but the consistent conflation of the two²²⁷ has effectively muddled the line between them. Concededly, there is something appealing about the notion that both doctrines can be weaponized to protect economic interests; it makes for a compelling narrative and conveniently grounds the growing commercial speech doctrine in familiar terms. But *Lochner* is too potent to be so recklessly injected into discussions of First Amendment issues. *Lochnerism* today signifies an untethered, unprincipled judiciary, and scholars and Supreme Court Justices have subsequently pressed that widely condemned image²²⁸ into the fabric of the commercial speech doctrine. Regardless of the actual propriety of granting commercial speech full constitutional protection—a tricky question that continues to garner considerable

²²² See *supra* notes 202–203 and accompanying text (discussing the different paternalism concerns inherent in each doctrine).

²²³ *Coppage v. Kansas*, 236 U.S. 1, 16 (1914), *overruled in part by Phelps Dodge Corp.*, 313 U.S. 177 (1941); *Adair v. United States*, 208 U.S. 161 (1908), *overruled in part by Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941);

²²⁴ *Adkins v. Children's Hospital of D.C.*, 261 U.S. 525 (1923), *overruled in part by W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

²²⁵ *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

²²⁶ *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

²²⁷ See *supra* Part II (discussing Justices' and scholars' comparisons between the two doctrines).

²²⁸ See *supra* note 110 and accompanying text.

debate²²⁹—the recent expansions to the doctrine are not nearly as revolutionary as the parade of horrors the label of Lochnerism suggests.²³⁰

In reality, it is safe to say that deploying the First Amendment to protect commercial speech simply does not enable Lochnerian levels of judicial overreach.²³¹ Inevitably, when interpreting “free speech,” the Court will need to exercise some discretion over what types of expression the First Amendment covers; like many constitutional provisions,²³² the proper application of the First Amendment is not always perfectly clear.²³³ *Texas v. Johnson*, for instance, did not entail speech at all, just the symbolic act of burning a flag.²³⁴ Still, few would argue that the Court outright abandoned the boundaries of the First Amendment in protecting that expression: the law in *Johnson* was designed precisely to burden the persuasive, communicative component of the act of burning the flag, making it well-suited for the constitutional protection of “free speech.”²³⁵

Ostensibly, commercial speech is an even better fit under the First Amendment than the burning of a flag. Commercial speech generally entails actual speech, unaccompanied by a corresponding action, that is purely persuasive—most notably, advertisements meant to persuade others to purchase. Such an expression falls in line with other forms of speech that receive unquestioned protection, like political campaigning during an election.²³⁶ Consequently, the Court does not indisputably abandon its constitutional boundaries in construing “free speech” as wholly protecting commercial speech; that interpretation could be justified as a reasonable, and

²²⁹ *Supra* note 36 and accompanying text (comparing the approach Professor Robert Post takes in disfavoring the commercial speech doctrine to Professor Martin Redish and Abby Mollen’s argument that the First Amendment must logically include commercial speech).

²³⁰ Professor Shanor makes a similar point at the end of her Article. Shanor, *supra* note 10, at 193 (“[D]espite the First Amendment’s deregulatory *potential*, it is highly unlikely.”).

²³¹ See *supra* Section I.B (discussing the inherent flaws of economic substantive due process).

²³² See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (emphasizing that *procedural* due process is a context-oriented right whose protections turn on the “governmental and private interests” that are affected in that specific case).

²³³ Although it may be somewhat ambiguous, the “free speech” guarantee in the First Amendment provides significantly more guidance than does the “privileges or immunities” language of the Fourteenth Amendment, see *supra* notes 98–100 (discussing the Privileges or Immunities Clause as a potential alternative grounding for the right to contract); whereas the latter has limitless potential, the former is at least restricted to issues concerning expression.

²³⁴ 491 U.S. 397, 399–400 (1989).

²³⁵ See *supra* notes 181–186 and accompanying text.

²³⁶ Indeed, even Professor Robert Post, who opposes full protection of the commercial speech doctrine, would afford it some level of First Amendment value. Post, *supra* note 36, 4 (“Commercial speech differs from public discourse because *it is constitutionally valued* merely for the information it disseminates, rather than for being a valuable way of participating in democratic self-determination.” (emphasis added)).

even proper, reading of the First Amendment. The tie between commercial speech and the First Amendment is thus stronger than any connection between *Lochner's* right to contract and the Due Process Clause.²³⁷ As Justice Kennedy put it in *Sorrell*: “The Constitution does not enact Mr. Herbert Spencer’s Social Statics. It does enact the First Amendment.”²³⁸ Therefore, comparing commercial speech to *Lochnerism* is not only misguided but also unfair since the argument for constitutionalizing commercial speech is, on its face, far more sound than any argument for constitutionalizing the right to contract.²³⁹

This Note, however, does not insist that the First Amendment must necessarily cover commercial speech, only that an analysis of the issue requires a discussion of First Amendment principles rather than *Lochnerian* ones. In other words, although the commercial speech doctrine can and should continue to be critically discussed, it should not be bluntly compared to *Lochnerism* just because both doctrines involve commercial entities and relationships. Whenever the jurisprudential behemoth of *Lochnerism* steps in, any analytical nuance is lost; *Lochner* forces scholars to assess the relevance of the right to contract in the context of the First Amendment, a task akin to fitting a square peg in a round hole.²⁴⁰

Thus, in its current role, invocations of *Lochner* are nothing but a boogeyman when it comes to commercial speech. The forced comparisons between economic substantive due process and commercial speech can cause the scholarship to lose sight of the legitimate concerns surrounding the First Amendment, instead homing in on its supposed *Lochnerian* characteristics.²⁴¹ That tendency is dangerously misrepresentative of both doctrines and effectively stalls progress in the burgeoning, important field of commercial speech scholarship. And certainly, there are issues left to be resolved here.

²³⁷ See *supra* Section I.B.

²³⁸ *Sorrell v. IMS Health*, 564 U.S. 552, 567 (2011) (quotation marks and citations omitted) (quoting *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)).

²³⁹ Of course, there are many arguments regarding the constitutionality of commercial speech that are beyond the scope of this Note. For more thorough discussions of those principles, see generally Post, *supra* note 36; Redish & Mollen, *supra* note 36.

²⁴⁰ For example, that Professor Shanor goes so far as to bring up “speech as such”—the notion that any form of expression, regardless of its accompanying conduct, could feasibly be protected under the First Amendment, Shanor, *supra* note 10, at 199—shows just how far scholars have strayed from the core tenets of the First Amendment. “Speech as such” is a constitutional absurdity; the day the Court accepts such an approach is the day the right to free speech has swallowed any and all human conduct, and at that point, there will be no way to govern society, much less regulate advertising. See *id.* at 176 (“Just as most conduct operates in whole or in part through speech, most conduct can be expressive.”). This visage, frightening as it may be, would require drastic doctrinal upheavals far, far beyond the recent developments of the commercial speech doctrine.

²⁴¹ See *supra* Section II.B.

For instance, Professor Shanor raises a fair point when she contends that the Court's application of strict scrutiny to laws discriminating against commercial speakers will have broad regulatory implications.²⁴² Unlike *Lochner*, however, these are questions relating to the First Amendment, not economic substantive due process, and must be framed accordingly.

Additionally, if the commercial speech doctrine is really at risk of reviving *Lochner*, that same principle must logically pose a threat in other First Amendment domains as well.²⁴³ For instance, in the context of matrimony, asking, "Will you marry me?" is similar to proposing a commercial transaction by advertising a product, and saying "I do" parallels the ultimate purchase of that product.²⁴⁴ Although speech is technically contained in both of those statements, only the latter—"I do"—has a direct legal impact by creating binding obligations between the parties. So if First Amendment protection can extend from the proposal of a transaction to also cover the transaction itself in the commercial sphere, would it not prevent the regulation of the "speech" of agreeing to marry someone? By that logic, states would no longer be able to regulate the binding obligations created at the point of marriage.

In reality, there is no principled reason to confine concerns regarding an expanded First Amendment scope to the commercial context, which further elucidates the dangers posed by comparisons to *Lochner*. These arguments have not only created a free speech issue out of whole cloth²⁴⁵ but also illogically cabined it to the commercial sphere.²⁴⁶ Indeed, if an expanding definition of speech is really a legitimate First Amendment

²⁴² Shanor, *supra* note 10, at 178 (citing *Sorrell v. IMS Health*, 564 U.S. 552, 566–71 (2011)). Specifically, Professor Shanor worries that this new standard could serve to invalidate all mandated disclosures, like warnings on cigarettes, because such regulations technically single out commercial speech based solely on the speaker's identity. *Id.* ("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."). She also lists fraudulent and demonstrably false speech as protected under this holding since they too are regulated purely on the basis of the content of the speech. *Id.* *But cf.* Samp, *supra* note 134, at 136–39 (listing laws regarding misrepresentative speech, speech that is false or proposes criminal activities, and privacy as the types of regulations that will probably be unaffected by *Sorrell's* holding). Indeed, her point seems especially salient given that compelled disclosures are a prominent example of lighter-touch regulations, which are becoming increasingly prevalent and tend to be more speech-oriented. *See supra* note 156 and accompanying text.

²⁴³ Shanor, *supra* note 10, at 177 (acknowledging that given her speech as such approach, "almost all regulation is or could be understood to regulate speech or expression"). Indeed, Professor Shanor does not shy away from this point, noting that even events like 9/11 could theoretically be construed as falling within the broadest definition of the First Amendment. *Id.* at 176.

²⁴⁴ *See, e.g., United States v. Li*, No. CV-12-00482-PHX-DGC, 2014 WL 4220853, at *4 (D. Ariz. Aug. 26, 2014) (describing the process of making a marriage legal).

²⁴⁵ *See supra* Section III.B.

²⁴⁶ *See supra* notes 243–244 and accompanying text.

concern, it is even more imperative that the comparisons to *Lochnerism* cease so that scholarship is forced to look beyond the commercial speech doctrine to examine all areas where speech is present. Put another way, free speech is a broader issue than *Lochner*. Overlooking that fact unduly constrains important discussions about the First Amendment's role in a democratic society.

CONCLUSION

The commercial speech doctrine is not *Lochner*, no matter how persistently the two are compared. In reality, the First Amendment's well-established doctrinal lines do not stretch beyond purely persuasive, communicative expression, which effectively prevents it from ever protecting the conduct that historically implicated *Lochner's* right to contract. Bringing *Lochner* into the realm of commercial speech therefore does not provide any clarity but only obscures a relatively new and undoubtedly important issue. As such, this Note draws a line between the two doctrines. Once the scholarship recognizes that commercial speech is its own entity with its own particular concerns, discussion and debate about that doctrine can move forward in a productive way. Moreover, diverting attention away from commercial speech will refocus discussion on the ongoing attempts by certain scholars to revive *Lochner* on its own terms—that is, not through the First Amendment, but a theory of natural rights.²⁴⁷ Each doctrine thus requires the scholarship's full and focused attention, which will be impossible so long as *Lochner* continues to haunt the halls of the First Amendment.

²⁴⁷ See *supra* notes 95–103 and accompanying text (discussing Professor Barnett's theories). For a more elaborate discussion of the potential return of *Lochner* in something akin to its original form, see generally, Colby & Smith, *supra* note 49.

