
FAINT-HEARTED FIRST AMENDMENT LOCHNERISM

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ABSTRACT

Free speech scholars have charged the Roberts Court with “First Amendment Lochnerism”: At the urging of powerful interests, the Court is following an antiregulatory agenda and forgetting the lessons of the now-discredited Lochner v. New York decision, by using the Constitution’s protection of speech to strike down a host of socioeconomic regulations. Opposing justices have joined the charge, accusing their colleagues of “reawakening Lochner’s pre-New Deal threat of substituting judicial for democratic decision-making” in domains long thought to be free from constitutional scrutiny.

Comparing modern free speech doctrine to Lochner, however, is problematic. It ignores the motivating concerns of Justice Holmes’s Lochner dissent, which were procedural rather than ideological. It elides the Speech Clause’s failure to categorize among kinds of speech, ignores that the line between commercial and noncommercial speech is too difficult to define for that distinction to serve as a level-of-scrutiny-setting rule, and denies that First Amendment theory cannot definitively justify lesser protection of commercial speech.

This Article is the first to chart a middle path between an anti-Lochnerist First Amendment and a libertarian one. It proposes an approach it calls faint-hearted First Amendment Lochnerism—suspicion of any speech regulation, regardless of the identity of the speaker or of the nature of the expression—while still affirming the government’s ability to regulate economic activity and harmful speech. In analyzing the constitutionality of information-forcing government regulation, faint-hearted First Amendment Lochnerism looks to common-law, private law, and rights-based limitations in tort and contract law to decide whether such regulations should be permissible. The Article then applies this methodology to the Court’s NIFLA v. Becerra decision, which drew charges of

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Lochnerism from its detractors, and shows how a foregrounding of relevant private law in First Amendment cases can preserve both (1) the preference for private ordering that is part of the Constitution's design and (2) the government's power to intervene in the traditional social and economic regulatory domains that those leveling the Lochnerism charge fear are most at risk.

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INTRODUCTION

The First Amendment scholarly community has tried and convicted the Roberts Court. The charge is “First Amendment Lochnerism”: the claim that the Court’s conservative majority, at the urging of commercial and other powerful interests and following its own antiregulatory agenda, has turned the constitutional protection for free speech into a tool with which to blow holes in the regulatory state.¹ The evidence proffered in support are the results in cases such as *Citizens United v. FEC*² and *Sorrell v. IMS Health Inc.*,³ which demonstrate that the Court is engaged in a private, power-entrenching “corporate takeover” of the First Amendment.⁴ And the category of crime is guilt by association, the associate being the Court’s 1905 *Lochner v. New York*⁵ decision. In *Lochner*, the Supreme Court found a right to liberty of contract in the Fourteenth Amendment’s Due Process Clause and then used that right to strike down a host of labor and economic regulations.⁶ The present-day Court’s liberal Justices—most forcefully Justices Breyer and Kagan—have joined in the chorus, accusing their Republican-appointed colleagues of “reawaken[ing] *Lochner*’s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue,”⁷ and “weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.”⁸

Unlike many association fallacies, the First Amendment Lochnerism charge contains some grains of truth. If one believes that there is a principled distinction between high-value and low-value speech—that the First Amendment should be more offended by some government interferences with speech than by others—then a reviewing court should not analyze a legislature’s viewpoint-based discrimination against a certain brand of political speech in the same way it would a government agency’s product labeling requirement. However, such distinctions conflict with First Amendment doctrine’s default commitment to

¹ See Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1917 (2016).

² 558 U.S. 310 (2010).

³ 564 U.S. 552 (2011).

⁴ John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 263-65 (2015).

⁵ 198 U.S. 45 (1905).

⁶ *Id.* at 63-64.

⁷ *Sorrell*, 564 U.S. at 603 (Breyer, J., dissenting); see also, e.g., *id.* at 591-92 (citing *Lochner*, 198 U.S. at 75-76 (Holmes, J., dissenting)) (“[T]he Court’s vision of its reviewing task threatens to return us to a happily bygone era when judges scrutinized legislation for its interference with economic liberty.”).

⁸ *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting); see generally Adam Liptak, *How Free Speech Was Weaponized by Conservatives*, N.Y. TIMES, July 1, 2018, at A1 (discussing argument that Court has recently used First Amendment to advance conservative agenda).

neutrality—a commitment expressly embraced by the modern Court. And the Amendment itself makes no such distinctions, leading some scholars to claim that those who advocate for gradations and categorization in speech protection doctrine are applying their own values as to the relative importance of certain categories of speech, not any values that the Speech Clause recognizes. The text of the First Amendment, in other words, is expressly anti-hierarchical on the question of speech's value.

This Article is the first attempt to chart a middle path. Assuming that a comparison to *Lochner* can do any analytical work, this Article argues that it is possible to be a faint-hearted First Amendment Lochnerist, presumptively suspicious of *any* regulation of speech—regardless of the identity or intent of the speaker, the nature of the speech, or the justifications the government asserts for the offending regulation—while still affirming the government's ability to regulate in the social and economic domains to protect the public. As an interpretive theory, faint-hearted First Amendment Lochnerism looks to common-law private rights-based limitations on harmful conduct in tort and contract law to answer the question of whether a particular speech abridgement should be permissible. Then this Article applies its theory to cases involving government-compelled disclosures of information—arguing that courts should hew closely to existing private law, information-forcing doctrines of fraud, misrepresentation, informed consent, and breach of warranty when deciding whether to permit the compulsion at issue. As in other areas of First Amendment law, asking whether the government's regulation protects a listener-based interest or offends a speaker-based interest analogous to similar interests recognized by private rights can help to define the boundaries of what the Amendment should consider permissible.

Critics of this methodology will note that on its face, it does nothing to remedy socioeconomic inequality or otherwise level the playing field between more and less powerful speakers. But a formal commitment to the common law does not disable the First Amendment from serving an egalitarian function. Private law doctrines such as strict liability and unconscionability equalize power imbalances and cut against the harshness of formalized neutrality in civil cases. These doctrines can perform a similar function in the service of an anti-subordinating First Amendment. This Article's analytical framework—which uses existing private rights of action to set the boundary of what constitutes constitutionally permissible state conduct—better equips the First Amendment's Speech Clause to work against preexisting inequalities among types of speakers rather than entrenching them. It also helps First Amendment doctrine more precisely account for the kinds of harms caused by speech and silence.

This Article proceeds as follows. Part I takes the current charge of First Amendment Lochnerism head-on, arguing that though the claim often takes the form of a procedural complaint, it is an ideological one. In *Lochner* itself, Justice Oliver Wendell Holmes's famous dissent was motivated not simply by concerns about the Court's adoption of a particular economic theory but also by judicial activism in the area of unenumerated rights—a concern not as present in the First

Amendment context.⁹ The charges of First Amendment Lochnerism, this Part argues, are motivated by (1) what its proponents characterize as a normative misbelief as to what constitutes “speech” and who constitutes a “speaker” for First Amendment purposes and (2) concern over the consequences of those misbeliefs for government intervention in areas not traditionally considered expressive in nature.

Because the debate over First Amendment Lochnerism is, at its heart, an argument about what the First Amendment *should* mean and is thus incapable of ever reaching a satisfying resolution, Part II proposes a methodological solution that takes no normative position. As a general rule, the First Amendment should not stand in the way of any compelled disclosure or other government information forcing when the government’s justifications are firmly based in private law doctrines of contract and tort. If a speaker could be held liable under a preexisting private law doctrine for failing to disclose or for misrepresenting a given fact, there should be no First Amendment impediment to the government’s compulsion of that same fact. Part II applies the proposed rule in several areas involving government-compelled disclosures and prohibitions on misleading speech. It also focuses closely on one of the Court’s recent decisions that elicited claims of First Amendment Lochnerism by its opponents, the October 2017 Term’s *NIFLA v. Becerra*.¹⁰ Part II then demonstrates that under a close reading of the relevant underlying private law—namely the common law of negligence-based informed consent—the First Amendment should not stand in the way of California’s requirements that certain clinics post information regarding the availability of government-assisted abortion services in that state.

Part III then shows how this methodology is Lochnerist, or at least a version of Lochnerism that is “faint-hearted” in the same way Justice Scalia described “faint-hearted originalism” three decades ago: the methodology avoids precedential upheaval but is appropriately skeptical of government interferences with individual rights.¹¹ Faint-hearted First Amendment Lochnerism also manifests a preference for private ordering,¹² with an important qualification—namely private ordering as limited by private rights of legal action. At the same time, the methodology preserves space for government interventions in those areas of traditional social and economic regulation that are of greatest concern

⁹ See *Lochner*, 198 U.S. at 74-76 (Holmes, J., dissenting).

¹⁰ 138 S. Ct. 2361 (2018).

¹¹ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

¹² See Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1455 (2015) (describing modern courts’ interpretations of First Amendment and Religious Freedom Restoration Act as replicating “the ideal of private ordering . . . that [was] at the heart of *Lochner*”).

to those leveling the First Amendment Lochnerism charge: fraud, consumer protection, and securities regulation.¹³

As Parts II and III show, faint-hearted First Amendment Lochnerism's interpretive approach works best when the interests that the government seeks to protect via information forcing are most analogous to the private interests protected by the relevant common law. Part IV explores how this decisional model might interact with other areas that implicate freedom of expression, such as laws limiting speech. It also asks whether hewing closely to private law in these areas would be as successful as in those areas related to compelled disclosure law discussed in Part II. This Part discusses the proposed approach's possible applications in those areas where speech torts, such as privacy and defamation, have long been constitutionalized; there, the speech-protective refinements to tort law made by state courts, including those compelled by the First Amendment, would be part of the relevant private common law. And then there are cases in which the claimed government speech abridgements have no close private conduct analogue, such as restrictions on political spending. Private law has less to say about these cases; the question becomes whether the common law's silence should cut in favor of the speaker or the government.

Finally, Part V calls for hope. To paraphrase Chief Justice John Marshall, we must never forget that it is a First Amendment we are expounding and that the First Amendment was intended, above all, to protect speakers from the State.¹⁴ A First Amendment tied to formal neutrality can still serve the substantive anti-subordinating goals that have been a core part of its history. A more formal commitment to private law, where doctrines and burdens of proof are often allocated in a way that corrects power imbalances in addressing civil liability, can assist it in doing so.

I. PROBLEMATIZING FIRST AMENDMENT LOCHNERISM

The match between *Lochner* itself and the First Amendment jurisprudence of the current Court is not as perfect as those making the Lochnerism charge claim. The Lochnerist charge rests on a distortion of Justice Holmes's dissent in *Lochner* itself and on a disregard for the Constitution's enumerated protection of the freedom of speech.

¹³ *NIFLA*, 138 S. Ct. at 2380 (Breyer, J., dissenting) (explaining how majority's view of First Amendment, "if taken literally, could radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk").

¹⁴ See, e.g., FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 86 (1984) ("Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, . . . and a somewhat deeper distrust of governmental power in a more general sense.").

A. *Holmes, Lochner, and Constitutional Methodology*

In *Lochner*, the Supreme Court held that a New York law limiting the number of hours that bakers could work in a day or a week violated the right to liberty of contract protected by the Fourteenth Amendment's Due Process Clause.¹⁵ In dissent, Justice Holmes questioned the existence of such a right; accused the majority of deciding the case "upon an economic theory which a large part of the country does not entertain"; and argued that "a constitution is not intended to embody a particular economic theory," nor does it "enact Mr. Herbert Spencer's Social Statics."¹⁶

For more than a hundred years, Holmes's dissent has been a source of inspiration for those leveling ideologically based charges against majorities ruling in favor of the economically powerful. Scholars have long argued that the "conventional narrative" fueling the "orthodox contemporary view" of *Lochner*, which itself "builds on implications from Justice Holmes's critique of the *Lochner* decision," is concerned with "judges committed to laissez-faire economics and to the protection of wealthy interests aggressively and lawlessly substitut[ing] their personal policy preferences for that of a more Progressive legislature that sought to protect workers from overreaching employers and unhealthy working conditions."¹⁷

Roscoe Pound's contemporaneous critique of the right to liberty of contract was similarly aimed at an ideologically specific set of sins. He charged courts that "force upon legislation an academic theory of equality" as among bargaining employers and employees "in the face of practical conditions of inequality" as engaging in a "fallacy."¹⁸ Pound attributed the rise of the liberty-of-contract right in judicial opinions to, among other things, "[t]he currency in juristic thought of an individualist conception of justice, which exaggerates the importance of property and of contract, exaggerates private right at the expense of public right, and is hostile to legislation, taking a minimum of law-making to be the ideal."¹⁹

This version of the *Lochner* critique—individualist-oriented; class-ignorant, if not willfully class-blind; and *laissez-faire*-dedicated—is the indictment around which current charges of First Amendment Lochnerism have coalesced. But Holmes's actual motivating concerns in *Lochner* itself were not about a specific ideology at all. Holmes was just as suspicious of judicial extrapolations

¹⁵ *Lochner v. New York*, 198 U.S. 45, 53-54 (1905).

¹⁶ *Id.* at 75 (Holmes, J., dissenting); see generally HERBERT SPENCER, SOCIAL STATICS (John Chapman ed., 1852).

¹⁷ Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 537 (2015) (citing Gary D. Rowe, *Lochner Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221, 222 (1999) (book review)).

¹⁸ Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454 (1909).

¹⁹ *Id.* at 457.

of social and civic constitutional rights from the liberty component of the Due Process Clause as he was of economic ones.

This alternative reading of the *Lochner* dissent is consistent with Holmes's larger concerns about judicial review at the time. The motivating apprehension underlying Holmes's theory of the judicial role, as expressed in his other opinions written during the *Lochner* era, was judges "overstep[ping] their authority when invalidating legislation upon constitutional grounds."²⁰ Two years before *Lochner*, in *Giles v. Harris*,²¹ Holmes wrote that the remedy for Alabama's disenfranchisement of Black people had to be granted "by the legislative and political department of the government of the United States," not through a federal court's interpretation of the Constitution.²² In his infamous opinion in *Buck v. Bell*,²³ which upheld Virginia's statute permitting compulsory sterilization of institutionalized "mental defectives" in order to promote "the health of the individual patient and the welfare of society,"²⁴ he argued that liberty-based claims were the "usual last resort of constitutional arguments."²⁵ Holmes elaborated on this point several years later in 1921's *Truax v. Corrigan*,²⁶ in which an employer successfully argued that an Arizona statute violated equal protection by exempting labor-related protests from common law tort claims for libel and interference with property.²⁷ There, in dissent, Holmes wrote, "[t]here is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires."²⁸

Buck and *Truax* are illustrative cases—especially when set against *Lochner*—for demonstrating that Holmes's concerns about judicial review were politically agnostic. He rejected the progressivism-informed equal protection position argued by the petitioners in *Buck*, that the liberty of the mentally ill to procreate should be treated on equal footing to that of the nondisabled. But he accepted the state law protections for union-related activity from generally applicable tort and property law that were at issue in *Truax*. Progressively and libertarian-inclined judges equally offended his positivist view of constitutional interpretation.

Despite this, however—and consistent with the ideology-based critique of *Lochner* and the liberty of contract driven by Pound and others—Holmes was

²⁰ H.L. POHLMAN, *JUSTICE OLIVER WENDELL HOLMES & UTILITARIAN JURISPRUDENCE* 80-81 (1984).

²¹ 189 U.S. 475 (1903).

²² *Id.* at 488.

²³ 274 U.S. 200 (1927).

²⁴ Virginia Sterilization Act of 1924, ch. 394, 1924 Va. Acts 569 (repealed 1974).

²⁵ *Buck*, 274 U.S. at 208.

²⁶ 257 U.S. 312 (1921).

²⁷ *Id.* at 334.

²⁸ *Id.* at 344 (Holmes, J., dissenting).

canonized by Progressives during the *Lochner* era because his tolerance for legislative experimentation intended to remedy economic and social imbalances in society. The *New York Times* reported that Holmes was “known through the world for his liberal and philosophic interpretation of the law . . . in cases involving property rights and personal rights.”²⁹ Upon his death, the paper called Holmes the “[c]hief [l]iberal of [the] [s]upreme [b]ench for 29 [y]ears”³⁰—an odd encomium for a justice who referred to Carrie Buck as an “imbecile[]” and “manifestly unfit” to fulfill her wish to procreate.³¹ And though Progressives celebrated Holmes as their champion on the bench, in his extrajudicial writings Holmes was deeply suspicious of moral rights as a source for constitutional interpretation.³² And in his personal views he was committed to classical economics and “supremely indifferent to social welfare schemes of any sort.”³³ Thus, Holmes was not anti-*laissez faire* in any meaningful way. Rather, he believed that Supreme Court Justices should be agnostic with respect to economic theory. Holmes saw the enemy of self-government not as libertarian-bending judges *per se*, but as judges creating unenumerated rights to impose their own ideological predispositions—whether progressive or classical liberal—to uphold or strike down class legislation depending upon their views of the classes affected.

Beyond Holmes, the debate in the Supreme Court about *Lochner*, as well as the transition from the post-*Lochner* era of across-the-board rational basis review to a more interventionist role for the Court around civil liberties, also reflected Holmes’s procedural concerns, not arguments for or against any

²⁹ *Holmes as Jurist Won World Fame*, N.Y. TIMES, Jan. 13, 1932, at 3; see also G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51, 64 (1971).

³⁰ *Justice Holmes Succumbs to Pneumonia at Age 93*, N.Y. TIMES, March 6, 1935, at 1.

³¹ *Buck v. Bell*, 274 U.S. 200, 207 (1927). Holmes’s reputation as a Progressive was complicated, even though he eventually came around to a First Amendment position that was protective of political dissent. Much of Holmes’s reputation as a civil libertarian is attributable to his role as “the founder of a modern libertarian tradition of First Amendment analysis.” G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CALIF. L. REV. 391, 412 (1992). Holmes’s awakening, however, was a 180-degree turn from his initial view, which was that “free speech ‘stands no differently than freedom from vaccination.’” DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 99 (2011) (quoting DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 293 (1997) (discussing Holmes’s 1918 conversation with Judge Learned Hand about tolerance and free speech)).

³² See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897) (“[N]othing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law.”).

³³ White, *supra* note 29, at 58. Indeed, many of these tributes mistook Holmes’s procedural commitments for his substantive views. See, e.g., Charles E. Carpenter, *Oliver Wendell Holmes, Jurist*, 8 OR. L. REV. 269, 270 (1929) (“[N]o judge who has sat upon the bench has ever been more progressive in his attitude.”).

particular ideological predisposition. One example of the shift was the votes of Justices Black and Douglas, advocates of Holmesian judicial restraint, who joined the majority opinion in *Minersville School District v. Gobitis*,³⁴ but then felt compelled to explain their changes of heart via a separate concurring opinion in *West Virginia State Board of Education v. Barnette*,³⁵ which held the opposite of *Gobitis* just three years later.³⁶ Like the *Lochner* decision itself, this swing back toward an individual rights justification for judicial intervention also proved Holmes's point: the very danger of *Lochnerizing* is that it could be used instrumentally to bend the Constitution toward either liberal *or* conservative ends. By Holmes's lights, the judicial acolytes of Ronald Dworkin's *Freedom's Law* and of Herbert Spencer's *Social Statics* would be at equal fault.³⁷

In sum, Holmes's project, both in *Lochner* itself and in his thinking more generally, was not driven simply by the fact that the Court was adopting a particular economic theory but also that it was using that theory to read into the Constitution a right that was not there—which exacerbated his concerns about the antidemocratic implications of that methodology.³⁸ The political direction of the majority's theory was not his concern; it was the work that the theory was doing in the interpretation of constitutional law. Holmes's juristic commitment was to procedure, and, in the absence of clear constitutional commands, he believed that democratic outcomes should be viewed as authoritative. So, to call conservative Justices' decisions "Lochnerist" in a rhetorical attempt to characterize them as ideologically predisposed toward conservative results, as the *Lochnerism* chargers currently do, is to miss Holmes's larger and more fundamental point about constitutional law.

B. *Specific Enumeration as a Basis for Distinguishing Lochner*

It is no reach to conclude that Holmes's positivism and his enumerationism went hand in hand because, to him, both demonstrated the same commitment. As Professor Jane Schacter wrote:

³⁴ 310 U.S. 586, 598-600 (1940) (holding that state could legislatively force schoolchildren to salute American flag), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

³⁵ 319 U.S. 624 (1943).

³⁶ *Id.* at 643 (Black & Douglas, JJ., concurring).

³⁷ Dworkin believed that the moral right to "equal concern" underlying the Fourteenth Amendment called for judicial invalidation of laws that, for example, segregated public schools based on race. RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 7-10 (1996). *See generally* SPENCER, *supra* note 16 (using natural law theory to predict reduced role for government with societal advancement).

³⁸ *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 418-21 (2011) (stating that some critiques of *Lochner* are "not that the Court improperly second-guessed legislative judgments, but that it did so in the name of invented rights").

[T]he most familiar and important [value that drives an interpretative norm favoring enumeration] flows from ideas about democracy. The majoritarian would say that we should insist upon enumeration because it leaves more decisions to the political process and fewer to the courts. The crude calculation is that the more textual specificity that is required before a court can find a right, the more democracy the polity gets.³⁹

The role that *Lochner* might properly play in this larger unenumerated rights debate is unsettled. Professor Jamal Greene argues that a strict anti-*Lochner*ist position based exclusively on procedural objections to unenumerated rights would toss out lots of other babies with the proverbial substantive due process and equal protection bathwater.⁴⁰ Though Holmes would be fine with this result, Greene maintains that it should make Progressives wary.⁴¹ One issue, however, is clear. Attacking First Amendment decisions as anti-*Lochner*ist is problematic in one straightforward way that the attackers' many proponents have failed to recognize: the specifically enumerated protection—or to use Schacter's term, the "textual specificity"⁴²—justifying the right to freedom of speech.

To be sure, the Supreme Court has consistently held that the First Amendment contains some unenumerated derivative rights that protect more than just expressive acts in the conventional sense. Professor Jed Rubenfeld points to the right to expressive association recognized in cases like *Boy Scouts of America v. Dale*⁴³ as one example.⁴⁴ Similarly, several Supreme Court Justices and scholars have argued that the unenumerated right to vote "derives from the right of association that is at the core of the First Amendment."⁴⁵ And to criticize the right found in *Lochner* as unenumerated is only partly correct because the majority derived the liberty-of-contract right from a textual protection of liberty more generally. But despite these caveats, the First Amendment's core coverage of "speech"—the "communication of ideas, information, and artistic sentiment

³⁹ Jane S. Schacter, *Unenumerated Democracy: Lessons from the Right to Vote*, 9 U. PA. J. CONST. L. 457, 471 (2007) (footnotes omitted). Schacter's article is actually a critique of this position. *See id.* at 471-72.

⁴⁰ *See* Greene, *supra* note 38, at 420-21.

⁴¹ *Id.* (explaining that *Griswold v. Connecticut*, 381 U.S. 479 (1965), which relied on substantive due process to establish right of privacy, "makes clear that *Lochner*'s anticonstitutionality cannot be rooted in its reliance on substantive due process or in its recognition of rights that are absent from the constitutional text").

⁴² Schacter, *supra* note 39, at 471.

⁴³ 530 U.S. 640, 644 (2000) (holding that application of New Jersey public accommodations law protecting against discrimination based on sexual orientation would violate Boy Scouts organization's First Amendment right of expressive association).

⁴⁴ *See* Jed Rubenfeld, *The New Unwritten Constitution*, 51 DUKE L.J. 289, 295-98 (2001).

⁴⁵ *Storer v. Brown*, 415 U.S. 724, 756 (1974) (Brennan, J., dissenting); *see also* Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CALIF. L. REV. 1209, 1255-60 (2003).

through means that are either linguistic, pictorial, or traditionally artistic”⁴⁶—justifies greater judicial intervention into legislative and executive exercises of authority in the communicative domain than the free-ranging extrapolation of rights from text that the Court drew upon in *Lochner*.

As a first principle of constitutional law, rights listed in the Constitution are “obviously appropriate for judicial enforcement.”⁴⁷ And judicial enforceability of rights takes enumeration into account when deciding on an appropriate standard of review to apply to the challenged legislation in question.⁴⁸ Enumeration also plays a role in the larger constitutional system of rights and of powers beyond justifying robust judicial review. Professor Jud Campbell notes that Framers considered the importance of enumeration as far back as their debates over whether to include a bill of rights in the Constitution at all. For example, James Madison argued that enumeration would serve as a check on legislative and executive power in norm-setting terms outside the specific context of judicial duty insofar as expressed individual rights would “establish the public opinion in . . . favor” of such rights and “tend to prevent the exercise of undue power” that might infringe them.⁴⁹ In other words, elected officials, acting in good faith, would respect enumeration of individual rights as inherent limits on their authority to act.

The point here is not to fetishize textual enumeration.⁵⁰ Nor is it to engage in First Amendment preferentialism for its own sake. Rather, it is to wedge some

⁴⁶ SCHAUER, *supra* note 14, at 91. Schauer’s definition of “speech” does not expressly address symbolic speech, but he intends his use of the term “communication” to include both (1) “those symbols that serve as virtually exact linguistic equivalents” and (2) those symbols that intend to communicate a message “through the use of a commonly understood symbolic convention” for which “there is no exact linguistic analogue, but there is a message that could have been expressed in words.” *Id.* at 96-97.

⁴⁷ John V. Orth, *The Enumeration of Rights: “Let Me Count the Ways,”* 9 U. PA. J. CONST. L. 281, 288 (2006).

⁴⁸ See *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008) (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)) (noting that rational basis review and its presumption of constitutionality “could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right” such as freedom of speech).

⁴⁹ Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 GEO. J.L. & PUB. POL’Y 569, 583 (2017) (quoting James Madison, Amendments to the Constitution [8 June] 1789, in 12 THE PAPERS OF JAMES MADISON 196, 203-04 (Charles F. Hobson & Robert A. Rutland eds., 1979)).

⁵⁰ Indeed, several of the authors in the works cited immediately above are dubious of a rigid hierarchical conception of enumerated versus unenumerated rights or of the premise that enumerated rights should be presumptively favored as a matter of constitutional method. See, e.g., *id.* at 584-85 (disputing “conventional view[that] Madison was explicitly endorsing the judicial enforceability of all enumerated rights while implicitly denying the constitutional status of all unenumerated rights”); Orth, *supra* note 47, at 288-89 (“The resolution of difficult [constitutional] questions . . . is not aided by the use of non-constitutional concepts

needed space inside the *Lochner* analogy between current First Amendment doctrine and its comparator. Those charging the current Court with First Amendment *Lochnerism* claim that the enumerated term “speech” in the Amendment is being used to expand the types of activity that the term includes and then to protect that activity—now redefined as expressive—against government interventions in much the same way that the term “liberty” in the Due Process Clause was used by the *Lochner* Court to create and enforce an unenumerated right to liberty of contract. The point of the *Lochner* analogy is to argue that these two moves, in both intent and effect, use judicial review to cause similarly antidemocratic results in social and economic areas that are traditionally found to be well within the general police power.

But, even assuming an economic/non-economic sorting line in the exercise of “selecting [which] rights [are] entitled to special protection”⁵¹ is valid, the speech and liberty moves described immediately above are not equivalent.⁵² Though both terms are enumerated in the Constitution, current doctrine properly recognizes that the term “speech” provides more of a textual basis than the term “liberty” to trigger an *automatically* heightened standard of review for any communicative act.

Speech is an individual’s particular expressive act; liberty describes an individual’s general state of being. Other than freedom from arbitrary government incarceration, any right emanating from the liberty component of the Due Process Clause is necessarily implied. This includes not only the liberty to freely negotiate employment contracts qua *Lochner* but also the liberty to choose one’s life partner,⁵³ to use contraceptives,⁵⁴ to decide upon schooling for one’s children,⁵⁵ or what one might more generally call the “liberty to X.”⁵⁶ The doctrinal work is to assess whether the right that comes after the “liberty to” language in this Article’s formulation is fundamental—whether or not it is justified for a reviewing court to infer that the lesser included “liberty to X” at issue is within the larger liberty right protected by the Amendment. Consistent

like . . . ‘unenumerated rights.’”); Schacter, *supra* note 39, at 457 (suggesting that there are “sharp limitations of enumeration as a guiding concept in constitutional law” and that enumeration as the norm has “significant uncertainties”).

⁵¹ John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 939 n.109 (1973).

⁵² See G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 301 (1996); see also Rebecca L. Brown, *The Fragmented Liberty Clause*, 41 WM. & MARY L. REV. 65, 66 (1999) (comparing strict scrutiny, used for challenges to “laws curtailing personal liberties,” and rational basis review, used for those “impinging upon economic liberties”).

⁵³ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

⁵⁴ See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

⁵⁵ See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925).

⁵⁶ Or more precisely, as Professor Joseph Blocher describes them, liberty to choose “to or not to do X.” Joseph Blocher, *Rights To and Not To*, 100 CALIF. L. REV. 761, 800 (2012).

with that approach, the first part of the doctrinal inquiry in determining what rights come within the textual grant to liberty is the debate over the proper framing of the right at issue, and how much of a justification the government needs to infringe upon the conduct the individual would otherwise choose to engage in absent the infringement.⁵⁷

By contrast, to determine whether a particular act is expressive, and thus within the definition of the First Amendment's enumerated speech, is a first-order constitutional question because if there is one overlaying division across all of First Amendment doctrine, it is the distinction between speech and conduct.⁵⁸ It is not persuasive to argue that expression with a primarily commercial purpose is more like conduct than speech. Thus, the speech-versus-conduct distinction serves the same role as the fundamental-rights inquiry in due process and equal protection law—it decides the threshold issue of whether the relevant Amendment covers the conduct at issue. Not all exercises of liberty involve a fundamental right, but every speech act, regardless of its intent, content, or the societal domain in which it takes place, involves speech.

Given this distinction, substantive due process is a more appropriate battlefield upon which charges of *Lochner*ism should be cast than is free speech. Indeed, during oral argument for *Griswold v. Connecticut*,⁵⁹ the modern font of individual liberty-based substantive due process, the Justices expressed the same concerns about a return to *Lochner* as those being made today. Thomas Emerson, who argued the case, distinguished *Lochner* on the ground that it involved economic activity, not the “individual rights and liberties” at issue in *Griswold*.⁶⁰ But an economic-speech-versus-expressive-speech dichotomy is not a proper basis upon which to level *Lochner*ist accusations concerning the First

⁵⁷ See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (assessing whether adulterous father's right to parenthood is within Due Process Clause by first framing right at “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified”).

⁵⁸ See Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 80 n.141 (1987).

⁵⁹ 381 U.S. 479 (1965).

⁶⁰ Oral Argument at 18:22, *Griswold*, 381 U.S. 479 (No. 496), <https://www.oyez.org/cases/1964/496> [<https://perma.cc/S5Q3-NRKY>]. Emerson was the most prominent First Amendment scholar of his time and, consistent with his argument in *Griswold*, he believed that the distinction between economic and individual rights was as clear in the speech context as in the liberty context. See THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 105 n.46 (1966) (“Communications in connection with commercial transactions generally relate to a separate sector of social activity involving the system of property rights rather than free expression.”). And Emerson made this argument even though one of the cases he cited in his colloquy with the Court—*Meyer v. Nebraska*, 262 U.S. 390 (1923)—expressly situated the right that it recognized within a liberty clause that also included the liberty to contract. See *Id.* at 399 (citing, inter alia, *Lochner v. New York*, 198 U.S. 45 (1905)).

Amendment. It is an overstatement to claim, as Professor Neil Richards does, that any equivalency between economic and civic-related speech will unwind “the basic and essential division between civil and economic rights at the core of modern constitutionalism.”⁶¹ Economically motivated speech and politically motivated speech are not apposite in the same way as economic and noneconomic conduct are. All speech, whether economic, artistic, or political, is communicative.

C. *Prescriptive Debates in Descriptive Clothing*

The current Lochnerist critique of recent First Amendment jurisprudence, then, is not the procedural one that was raised by Holmes in *Lochner* itself—rather, it is a normative one. It maintains that the Court is interpreting speech and speakers too broadly so as to include those that should be beyond the First Amendment’s coverage or protection. And the Justices who do so are influenced, if not driven, by political and economic ideology. So, the real motivating concern for the claim of First Amendment Lochnerism is not a prescriptive debate about the proper role of judges. Rather, it is alarm about the perceived collapse of two kinds of libertarianism in First Amendment cases: expressive and economic.⁶²

This conclusion is evident in the critiques themselves. For example, Professor Jedediah Purdy characterizes First Amendment Lochnerism as “assimilat[ing] to a single constitutional status two kinds of activity that have traditionally received very different levels of protection: classic political speech on the one hand and market activities such as spending, marketing, and data-mining on the other.”⁶³ Purdy views this assimilation by the current Court as sharing an “ideological coherence” with the *Lochner* era.⁶⁴ Other accusers use similarly instrumental language in their own critiques; Professor Amanda Shanor’s evidence of Lochnerism in current First Amendment doctrine is its “pit[ting of] business freedom against the government’s ability to structure or facilitate citizen choice,” and its “privileg[ing] the negative over the positive state.”⁶⁵ But,

⁶¹ Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1152 (2005).

⁶² Cf. Daniel A. Farber, *Access and Exclusion Rights in Electronic Media: Complex Rules for a Complex World*, 33 N. KY. L. REV. 459, 462-65 (2006) (discussing economic versus expressive libertarianism in context of media regulation).

⁶³ Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 197-98 (2014) (“[T]he *Lochner* era provides a hindsight view . . . of what constitutional jurisprudence can look like when it adopts a moralized view of economic life that protects individual autonomy in market transactions.”).

⁶⁴ *Id.* at 206.

⁶⁵ Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 182; see also Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165, 167 (2015)

as noted above, ideological commitment was not *Lochner*'s original sin, at least according to its most trenchant critic. Additionally, those making the Lochnerist charge argue that economic and noneconomic expression *should* be treated differently for First Amendment purposes, but it is hard to find a principled and predictable basis upon which to do so.

As far back as 1983, Professor Steven Shiffrin argued that commentators “support[ing] the view that commercial speech should be outside the scope of the first amendment . . . have not taken full account of the range of activity that has traditionally been thought of as commercial speech.”⁶⁶ The modern move from an agrarian to an industrial to an information-based economy has made the distinction between economic and expressive activity even more difficult for critics to draw. Professors Jeremy Kessler and David Pozen link the First Amendment's crossing over into economic regulation not simply to the rise of the Roberts Court but also to a much broader societal shift: the emergence of communication and exchange of data as the preeminent organizing principle for the modern Western economy.⁶⁷ Capitalism's informationalization has swept the First Amendment along with it, creating doctrinal momentum toward what Professors Jane and Derek Bambauer call “information libertarianism”—a theoretical default that calls for judicial skepticism concerning any government intervention into areas involving data and informational exchange, regardless of the societal domains in which those exchanges take place.⁶⁸

Nor is First Amendment theory of much assistance. For decades, scholars have sought to use First Amendment marketplace, self-realization, democratic, and autonomy-related values to justify differential treatment for purely expressive and economic-related speech. But those same values have been offered in support of arguments that commercial speech deserves full constitutional protection. The Court's point in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*⁶⁹—that prospective customers' interest in pricing information “may be as keen, if not keener by far, than his interest in the day's most urgent political debate”⁷⁰—is as straightforward of a

(“It is no exaggeration to observe that the First Amendment has become a powerful engine of constitutional deregulation. The echoes of *Lochner* are palpable.”).

⁶⁶ Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1224 (1983).

⁶⁷ See Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1971-72 (2018); see also Purdy, *supra* note 63, at 202 (“[A]n economy built on consumption and information makes the First Amendment a natural vehicle to constitutionalize transactions at the core of the market.”).

⁶⁸ Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. 335, 340-41 (2017) (“The First Amendment has not drastically expanded its meaning; rather, modern society has come to the nuisance.”).

⁶⁹ 425 U.S. 748 (1976).

⁷⁰ *Id.* at 763.

listener-based, anti-state-information-denying,⁷¹ marketplace-of-ideas-affirming argument as the Court has ever put forth.⁷²

While the Court's *Virginia Board* opinion was strongly pro-listener autonomy, speaker-based autonomy and self-fulfillment interests also support equivalent protection for speech uttered with economic motives. As Professor Martin Redish argued forty years ago, "protecting the dissemination of advertising about currently available low-cost housing" would have far greater utility for the self-fulfillment and autonomy of both the prospective landlord and the tenant than "protecting dissemination of information to the public concerning political debate over proposed governmental housing projects."⁷³

Nor do the democratic values that the First Amendment protects inherently support lesser protection for speech uttered for personal economic gain. One answer to the question of "how commercial speech serves the constitutional value of democracy"⁷⁴ is that booksellers and lobbyists seek to both inform the public and get paid for doing so. Thus, the democracy-based rationale for the First Amendment does not cleanly cut in favor of reduced protection for commercial speech. Consequently, a speaker's economic motivation for speaking—even accepting, for the moment, the logical fallacy that speakers have singular motives rather than mixed ones—should not disqualify that speaker's expression from First Amendment protection or be dispositive as to the amount of protection that speech should receive.⁷⁵ Commercial speech enables individuals, often via the use of the corporate form and even through communication that "does 'no more than propose a commercial transaction,'"⁷⁶

⁷¹ See Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 583 (2004) (defining judicial skepticism of "information-denying" government actions as core commitment of First Amendment).

⁷² See *Va. State Bd. of Pharmacy*, 425 U.S. at 748-49; see also Burt Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOK. L. REV. 437, 448 (1980) ("[T]he respect for rational political decision-making which underlies the Meiklejohn approach to political speech seems equally applicable to speech which is necessary to rationalize economic choices."); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 14 (2000) (describing how Supreme Court's "development of commercial speech doctrine" through statements about consumers' interest in price information "closely tracks Meiklejohn's analysis" concerning self-governance).

⁷³ Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 443 (1971).

⁷⁴ Robert C. Post, *Viewpoint Discrimination and Commercial Speech*, 41 LOY. L.A. L. REV. 169, 175 (2007).

⁷⁵ See Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053, 1081 (2016) ("[T]here is no clear distinction between people 'seeking to advance their commercial interests' and 'participating in the public life of the nation.'" (quoting Post, *supra* note 72, at 12)).

⁷⁶ *Va. State Bd. of Pharmacy*, 425 U.S. at 762 (quoting *Pittsburg Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 375 (1973)).

to “achieve their personal economic or social goals.”⁷⁷ The ability to do so is an essential predicate to both private self-governance and to collective self-governance.⁷⁸ In addition, the Supreme Court has consistently held that the collective self-governance process underlying the democracy-enhancing view of the First Amendment does not operate only with respect to speech concerning political issues.⁷⁹ More recently, failing to prove a clear winning argument under any single prevailing First Amendment theory, scholars’ next step has been to draw distinctions *within* the First Amendment theories themselves as another way to justify striating levels of constitutional protections for certain kinds of speech. To take one recent example, scholars have begun distinguishing between “thin” and “thick” self-autonomy and categorizing commercial speech as an example of the former.⁸⁰

These efforts strain for the same reason the First Amendment *Lochner* analogy strains: the intuitive and analytical difference between speech uttered for a predominantly economic reason versus a predominantly noneconomic reason is not nearly as large as the difference between economic and noneconomic liberty more generally. In the former dyad, the speech at issue in both cases is expressive. To use Professor Frederick Schauer’s classic distinction between coverage and protection, *Lochner* and the liberty of contract line were coverage cases, meaning they asked whether the Constitution should apply at all.⁸¹ The First Amendment *Lochnerist* critique, however, as well as the argument about commercial speech more generally, is largely a debate about protection—the degree to which the Constitution, which indisputably applies, should limit the government’s ability to restrict the conduct in question.⁸²

Finally, attempts to find a doctrinal basis to distinguish between economic activity and expressive activity have also been unsuccessful. In *United States v. United Foods, Inc.*,⁸³ the Court held that a law requiring all mushroom producers

⁷⁷ MARTIN H. REDISH, CATO INSTITUTE POLICY ANALYSIS NO. 813: COMMERCIAL SPEECH AND THE VALUES OF FREE EXPRESSION 7 (2017), <https://pdfs.semanticscholar.org/761c/031a93338ffd0b0ed78b19beb0750fdf53a8.pdf> [<https://perma.cc/5G8R-N6VJ>].

⁷⁸ *See id.* at 8.

⁷⁹ *See, e.g.,* *Winters v. New York*, 333 U.S. 507, 510 (1948) (“What is one man’s amusement, teaches another’s doctrine. Though we can see nothing of any possible value to society in [banned] magazines, they are as much entitled to the protection of free speech as the best of literature.”).

⁸⁰ *See* Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1396-97 (2017). For Weiland’s analysis, commercial speech is of a piece with other speech by “corporations and other nonnatural legal persons.” *Id.*

⁸¹ *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1767-69 (2004).

⁸² *See id.*

⁸³ 533 U.S. 405 (2001).

to pay assessments into a fund designated for generic promotional mushroom advertising violated the First Amendment rights of those who wanted to portray their brands of mushrooms as better than those grown by other producers.⁸⁴ In his dissent, Justice Breyer accused the Court's majority of "introduc[ing] into First Amendment law an unreasoned legal principle that may well pose an obstacle to the development of beneficial forms of economic regulation."⁸⁵ Breyer began with the premise, echoed seventeen years later by Justice Kagan in her dissent in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*,⁸⁶ that "[n]early every human action that the law affects, and virtually all governmental activity, involves speech."⁸⁷ The majority's error in *United Foods*, Breyer claimed, was failing to "distinguish[] among contexts in which speech activity might arise, applying special speech-protective rules and presumptions in some of those areas, but not in others"⁸⁸—for example, a failure to define those areas in which a claimed expressive liberty should give way to a reasonable regulatory objective.

Breyer's underlying premise, however—the claim that skepticism of government regulation should apply to the speech of some speakers but not others—is difficult to defend.⁸⁹ In his *United Foods* dissent, Breyer offered three justifications to support his conclusion that the mushroom advertising regulation in question involved "a 'species of economic regulation,' which does not 'warrant special First Amendment scrutiny.'"⁹⁰ He argued that these justifications could be applied to both the regulation at issue there as well as in future cases. None of his justifications, however, individually or collectively, provide a sound basis by which to distinguish economic from expressive regulation.

Breyer's first justification was that the program in question did not "significantly interfere with protected speech interests" because it "d[id] not compel speech itself" but rather "compel[led] the payment of money."⁹¹ However, this claim fails to distinguish the "peddling-tax" cases from the early 1940s, in which the Court found that several generally applicable taxes and licensure requirements violated the First Amendment rights of Jehovah's

⁸⁴ *Id.* at 408, 416.

⁸⁵ *Id.* at 419 (Breyer, J., dissenting).

⁸⁶ 138 S. Ct. 2448 (2018).

⁸⁷ *United Foods*, 533 U.S. at 424 (Breyer, J., dissenting); *see also Janus*, 138 S. Ct. at 2502 (Kagan, J., dissenting) ("[A]lmost all economic and regulatory policy affects or touches speech.").

⁸⁸ *United Foods*, 533 U.S. at 424 (Breyer, J., dissenting).

⁸⁹ *See Kessler*, *supra* note 1, at 1925.

⁹⁰ *United Foods*, 533 U.S. at 425 (Breyer, J., dissenting) (citation omitted) (quoting *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 474, 477 (1997)).

⁹¹ *Id.*

Witnesses who sold and distributed books and pamphlets door to door.⁹² The Court has consistently found that some government compulsions of money, particularly those that put the money toward another private party's message with which the compelled party might disagree, implicate the Speech Clause.

Breyer's second justification—that the program “further[ed], rather than hinder[ed], the basic First Amendment ‘commercial speech’ objective” of providing consumers truthful information about products and services⁹³—proves too much. Any regulation compelling subsidies for speech or even direct speech itself adds to the amount of information available to listeners, customers, or other speakers. As discussed in greater detail in Part II below, the presence or absence of an information-providing objective cannot be a basis for categorizing a regulation as aimed at economic (and thus presumptively permissible) or expressive (and thus presumptively impermissible) activity.⁹⁴ All forced disclosures, even facially viewpoint discriminatory disclosures, increase the amount of available information so long as they do not also foreclose counter-speech.

Finally, and in contrast, Breyer's third justification for distinguishing economic from expressive regulation—that there was “no special risk of other forms of speech-related harm” because the program presented “no risk of significant harm to an individual's conscience”⁹⁵—proves too little. By referring to individual consciences, Breyer distinguished the type of compelled subsidies present in *United Foods* from the compelled speech found unconstitutional in canonical First Amendment cases like *Barnette* and *Wooley v. Maynard*.⁹⁶ However, the Court has often found speech compulsions that caused no harm to an individual's conscience unconstitutional, such as the Florida right-of-reply statute at issue in *Miami Herald Publishing Co. v. Tornillo*.⁹⁷ And the converse is also true: Speech compulsions in the noncommercial context often *directly* implicate an individual's conscience—for example, a witness compelled to testify before a grand jury when her conscience would otherwise demand her silence.⁹⁸ Yet, so long as the compulsions meet standards of relevancy and do

⁹² See *Murdock v. Pennsylvania*, 319 U.S. 105, 116-117 (1943); *Jones v. Opelika*, 316 U.S. 584, 599-600 (1942), *vacated*, 319 U.S. 103, 104 (1943); see also Kessler, *supra* note 1, at 1972-80 (discussing contemporary critiques of the peddling-tax cases as blurring the line between economic activity and civil liberties).

⁹³ *United Foods*, 533 U.S. at 426-27 (Breyer, J., dissenting).

⁹⁴ See *infra* Section II.A.1.

⁹⁵ *United Foods*, 533 U.S. at 427 (Breyer, J., dissenting).

⁹⁶ 430 U.S. 705 (1977) (holding that state may not compel citizens to display state motto on license plate).

⁹⁷ 418 U.S. 241, 256 (1974) (holding right-of-reply statute presented First Amendment concerns despite fact that it did not prevent newspapers from saying anything they wished).

⁹⁸ *Branzburg v. Hayes*, 408 U.S. 665, 702-05 (1972).

not meaningfully infringe on associational rights,⁹⁹ they are barely thought to trigger First Amendment protections, if at all.¹⁰⁰ In other words, the presence or absence of a speech compulsion's harm to individual conscience does not address whether the speech affected by that compulsion is economic or expressive, or whether First Amendment scrutiny of the regulation's compulsion should be heightened or not.

The very first commercial speech case that the Supreme Court ever decided as such, 1942's *Valentine v. Chrestensen*,¹⁰¹ determined the illegality of a flyer that advertised, on one side, Chrestensen's submarine that he had docked at New York City's East River and opened to public tours for an admission charge. The other side of the flyer, however, included a protest of the City's refusal of his permit for docking the submarine at his preferred location of Battery Park's Pier A on the Hudson.¹⁰² The flyer alleged that the City's Dock Commissioner's denial of the permit was capricious and discriminatory treatment; importantly, the fact that Chrestensen's protest involved his commercial interest certainly did not mean his conscience was unaffected by New York's criminalization of his flyer.¹⁰³

It certainly is so that the First Amendment's primary concern with respect to compelled speech is harm to individual conscience. As such, *Barnette* and *Wooley* occupy the extreme end of the expressive side of the expressive-versus-economic scale. But harm to an individual's conscience is by no means a necessary condition for the First Amendment to recognize a compulsion-based claim.

The First Amendment Lochnerism argument is about what the law should be—in particular what should be considered “speech” for purposes of the First Amendment—and what justifications should be used to arrive at those conclusions. It is an ideological debate dressed as a methodological one. And like all other ideological debates, there is no shared understanding upon which agreement can be built.¹⁰⁴

⁹⁹ See, e.g., *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 555-58 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958).

¹⁰⁰ See Robert Post, *Compelled Subsidization of Speech: Johanns v Livestock Marketing Association*, 2005 SUP. CT. REV. 195, 216 (“First Amendment concerns are not automatically aroused when persons are forced to speak in ways that they find objectionable.”).

¹⁰¹ 316 U.S. 52 (1942).

¹⁰² *Id.* at 53. For additional facts, see *Chrestensen v. Valentine*, 122 F.2d 511, 511-12 (2d Cir. 1941), *aff'd*, 316 U.S. 52 (1942).

¹⁰³ *Valentine*, 316 U.S. at 55.

¹⁰⁴ See Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 2-3 (1998) (“[C]onstitutional theory has no power to command agreement from people not already predisposed to accept the theorist's policy prescriptions.”).

So, to try to move beyond this ideological debate, this Article proposes a methodological solution based on a premise that both expressive-only and expressive-economic libertarians should be able to agree: a foregrounding of private law in the resolution of First Amendment questions.

II. PRIVATE RIGHTS AS BOUNDARY SETTERS FOR THE FIRST AMENDMENT RIGHTS OF COMPELLED SPEAKERS

The First Amendment should not stand in the way of government compulsions of speech where a failure to disclose that same information would be a basis for private law liability. This Part defends that principle and then discusses ways in which constitutional courts can better use private law to inform their decision-making in compelled disclosure cases.

Generally, the proper interrelationship between private law and constitutionally protected expression is not a novel issue. The question of how and whether the First Amendment can or should *foreclose* civil liability for speech-related harms is one of the most discussed aspects of free speech law.¹⁰⁵ Scholars have perennially explored the tensions caused when “common law duties imposed under assault, negligence, alienation of affections, interference with prospective economic advantage, and even trespass to chattels torts . . . incidentally impact speech.”¹⁰⁶ Commentators have also argued that contract-based torts, such as intentional interference with contract, could be better reconciled with commercial speech doctrine.¹⁰⁷ But the more precise notion considered here—namely, how constitutional courts should assess government conduct that would constitute a breach of a legal duty if committed by a private individual and how private duties could set the bounds of a relevant constitutional right—has not been as well explored. Professors William Baude and James Stern recently argued that background positive law, such as property, torts, and other generally applicable statutory provisions should inform Fourth

¹⁰⁵ See, e.g., ROBERT M. O’NEIL, *THE FIRST AMENDMENT AND CIVIL LIABILITY* 3-4 (2001) (“The law that defines the scope of potential liability for expressive activity turns out to be remarkably thin and surprisingly unhelpful on most . . . questions.”); Elaine W. Shoben, *Uncommon Law and the Bill of Rights: The Woes of Constitutionalizing State Common-Law Torts*, 1992 U. ILL. L. REV. 173, 179 (“Once the Court finds that the Constitution constrains the ability of states to allow civil tort awards in some area, further clarification and elaboration will be necessary . . . if the Court substitutes its own standard to replace that of the common law . . .”); Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1652 (2009) (“There are, however, many instances where the Supreme Court applies virtually no First Amendment scrutiny when civil liability implicates speech.”).

¹⁰⁶ Timothy Zick, “Duty-Defining Power” and the First Amendment’s Civil Domain, 109 COLUM. L. REV. SIDEBAR 116, 120 (2009).

¹⁰⁷ See, e.g., David A. Anderson, *Torts, Speech, and Contracts*, 75 TEX. L. REV. 1499, 1533-37 (1997).

Amendment protections.¹⁰⁸ This proposal garnered attention in the context of the third-party-doctrine issues raised by the Supreme Court's recent cell-site location data case.¹⁰⁹ And in its regulatory takings jurisprudence, the Supreme Court has attached constitutional significance to the symmetry between government power and private liability in that the State's ability to regulate a private landowner's land without compensation is limited by those "restrictions that background principles of the State's law of property and nuisance already place upon land ownership."¹¹⁰ However, the role of private law has not been considered in the context of establishing boundaries around the right to free speech.

Most First Amendment scholars have at some point considered how and when the First Amendment defines the reach of civil liability. This Article is the first to examine the opposite: how civil liability can define the reach of the First Amendment.

A. *Private Common Law Foregrounding in Compelled Speech Cases*

Faint-hearted First Amendment Lochnerism permits the government to compel commercial speech disclosures consistent with the First Amendment as derived from the existence and continued vitality of private common law doctrines such as fraudulent misrepresentation by omission, fraud in the inducement, and breach of express warranty. Instead of citing these doctrines as *justifications* for less rigorous First Amendment review in the commercial speech context, this Article calls for a formal application of the rules and principles associated with those doctrines in *deciding* First Amendment cases.

The first question to address is why courts should use private common-law baselines in constitutional cases over the current approach: setting levels of scrutiny. As this Section explains below, in discussing specific applications of the rule, a private common law foregrounding better harmonizes First Amendment doctrine with the harm-based limitations on speech and silence that private law has long recognized and accepted. Indeed, courts regularly refer to these same limitations when discussing the presence or absence of First Amendment coverage in constitutional cases. When considering scope-of-coverage questions, courts invoke private law in First Amendment cases as a matter of course. *NIFLA*, for example, begins from the premise that the private law doctrine of informed consent permits government regulation of any speech

¹⁰⁸ William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1859-60 (2016).

¹⁰⁹ See *Carpenter v. United States*, 138 S. Ct. 2206, 2222-23 (2018).

¹¹⁰ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029-30 (1992) (holding that application of law or regulation affecting landowner's property must "do no more than duplicate the result that could have been achieved in the courts . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise").

that would fall within that doctrine.¹¹¹ Lower courts have adopted a similar methodology.¹¹² This Part reconstructs the role that private common law currently plays in resolving First Amendment coverage questions, and provides a decisional model courts can use to (1) better locate and define the private common law relevant to a speech claim and (2) decide whether the First Amendment covers the speech or speaker in question. In so doing, it also calls on constitutional courts to do more to recognize the historical pedigree of the legal interests that private common law protects—a pedigree that current First Amendment doctrine, by and large, does not.

The areas in which the First Amendment steps aside to permit or constrain private liability are well established. The methodology proposed by this Article uses these private liability principles, as well as their general acceptance, to find more common ground with respect to the Amendment's boundaries.

1. Common-Law Fraud, Materiality, and Private Law Liability in Compelled Disclosure Cases

The first such cross-cutting private law principle is a materiality standard. Private law fraud and warranty doctrines have been subject to a materiality standard for hundreds of years, and materiality has been imported into the statutory requirements and limitations for fraud-based causes of action. For example, Federal Rule of Civil Procedure 9(b) and its state-level analogues require a party to “state with particularity the circumstances constituting fraud or mistake.”¹¹³ More specifically, a plaintiff charging fraud is “required to plead a factual basis that would make it reasonable to determine that a statement was materially false or misleading.”¹¹⁴ So a plaintiff claiming that a statement was fraudulent must plead

- (1) a specific false representation of material fact; (2) knowledge by the person who made it of its falsity; (3) ignorance of its falsity by the person

¹¹¹ See *NIFLA v. Becerra*, 138 S. Ct. 2361, 2673-74 (2018). For a full discussion of the case, see *infra* Section II.B.

¹¹² See, e.g., *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 430-35 (6th Cir. 2019) (analyzing First Amendment challenge to statute compelling doctors performing abortion procedures to play fetal heartbeats and describe ultrasound images to patients seeking abortion procedures under Kentucky's informed consent law).

¹¹³ FED. R. CIV. P. 9(b); see also, e.g., N.Y. C.P.L.R. 3016(b) (McKinney 2019) (“Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.”); UTAH R. CIV. P. 9(c) (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”).

¹¹⁴ *Bowers v. Allied Inv. Corp.*, 822 F. Supp. 835, 837 (D. Me. 1993) (citing *Greenstone v. Cambex Corp.*, 975 F.2d 22, 25 (1st Cir. 1992)).

to whom it was made; (4) the intention that it should be acted upon; and (5) that the plaintiff acted upon it to his [or her] damage¹¹⁵

—in other words, the “time, place [and content]” of the fraud and what was gained therefrom.¹¹⁶

For purposes of the methodology proposed here, once the materiality requirements for showing common-law fraud along with fraud’s other prima facie elements are established as background law, the next step is to demonstrate how these principles would be used in the state action context. The First Amendment cabins any government effort to compel a disclosure in the same way that the common law cabins private fraud claims. That is, the government must show that any information that it seeks to compel is material to the parties that the disclosure is intended to protect. And if the government can do so, the disclosure it compels is not subject to First Amendment challenge. In other words, the government can force the disclosure of any fact which could provide a basis for private law liability against the party being compelled if that fact had *not* been disclosed by that party.

This approach has administrability-related benefits. Its application would be more precise than the malleable narrow tailoring inquiry that is used throughout First Amendment law. The narrow tailoring inquiry’s indeterminacy, particularly with respect to commercial speech cases, leads to inconsistent results.¹¹⁷ And this approach makes more intuitive sense. If failure to disclose certain information can subject a manufacturer, marketer, or seller to private law liability, then the First Amendment is not a defense to that liability. Not even the most maximalist free speech libertarian would argue that a drug manufacturer has a First Amendment right to be free from tort liability for its defective label if the representations in that label are relied upon to a user’s detriment. The First Amendment cannot be asserted as an affirmative defense in the private civil liability context against fraud, misrepresentation, and warranty claims; correspondingly, it should also be prohibited as an affirmative defense against the government for forcing disclosure of the same information that would be the basis for private liability. The relevant legal boundary is the same for both the private civil action and the government authority exerted in support of the interest that the private civil action protects.

This approach does not prevent the government from acting *ex ante* to protect the public from nondisclosure-related harms. Despite heightened scrutiny of *ex*

¹¹⁵ *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 270 (3d Cir. 2006) (alteration in original) (quoting *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 284 (3d Cir. 1992)).

¹¹⁶ *Official Publ’ns, Inc. v. Kable News Co.*, 775 F. Supp. 631, 636-37 (S.D.N.Y. 1991) (quoting *FED. R. CIV. P.* 9(b)).

¹¹⁷ *See, e.g., Caroline Mala Corbin, Compelled Disclosures*, 65 ALA. L. REV. 1277, 1283 (2014) (arguing that rules concerning commercial versus noncommercial speech “provide limited guidance” because “they are not applied consistently,” and “[s]peech designated as commercial or political is often really a mixture of the two”).

ante regulation of speech, the First Amendment has never barred government action aimed at prospective harms and undertaken with preventive intent. Neither has the common law. Allowing only private suits for breach of warranty *ex post*, for example, is a remedy that “comes too late, after the damage is already done, and may never come at all for those consumers who need it most.”¹¹⁸ Regulation is thus appropriate in the interest of consumer protection.¹¹⁹ Reliance interests are important here as well—both for speakers and the government seeking to compel speech. As is the case with private law, history and tradition play a role in setting the bounds of disclosures the government may compel consistent with the First Amendment. For example, in the D.C. Circuit’s *American Meat Institute v. U.S. Department of Agriculture*,¹²⁰ then-Judge Kavanaugh argued that consumer-protection labeling requirements that have been applied for decades should be presumed constitutional.¹²¹ Similarly, though with insufficient elaboration, the Supreme Court in *NIFLA* noted that its decision finding the compelled disclosure at issue was unconstitutional did not “question the legality of health and safety warnings long considered permissible.”¹²²

The flip side of this analysis, of course, is that in the absence of possible private law liability for failure to disclose or for otherwise misrepresenting the relevant information, a government attempt to compel disclosure of that information will be subjected to constitutional scrutiny. The government is barred from compelling disclosure of immaterial facts or other information, the absence of which would not form the basis for fraud or misrepresentation.

This rule applies even if the facts the government seeks to compel disclosure of are true. For example, the Trump administration announced a plan to require that drug companies include list price information in their direct-to-consumer television advertising to incentivize manufacturers to lower prices.¹²³ Drug

¹¹⁸ Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 391 (1979).

¹¹⁹ See Rebecca Tushnet, *It Depends on What the Meaning of “False” Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227, 250 (2007).

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

¹²¹ See *id.* at 31-32 (Kavanaugh, J., concurring). The Founders would likely have agreed with Justice Kavanaugh’s point. See Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 291-92 (2017) (explaining that common law as originally construed mapped onto obligations individuals assumed under natural law’s social contract).

¹²² *NIFLA v. Becerra*, 138 S. Ct. 2361, 2376 (2018).

¹²³ See Regulation to Require Drug Pricing Transparency, 83 Fed. Reg. 52,789, 52,790, 52,793 (proposed Oct. 18, 2018) (defining list price as the “Wholesale Acquisition Cost” of the applicable “drug or biological product”); U.S. DEP’T OF HEALTH AND HUMAN SERVS., AMERICAN PATIENTS FIRST: THE TRUMP ADMINISTRATION BLUEPRINT TO LOWER DRUG PRICES AND REDUCE OUT-OF-POCKET COSTS 23-28 (2018) [hereinafter AMERICAN PATIENTS FIRST]; Alex M. Azar II, Sec’y, U.S. Dept. of Health & Human Servs., Remarks on Drug Pricing Blueprint (May 14, 2018), <https://www.hhs.gov/about/leadership/secretary/speeches/2018->

manufacturers and broadcasters have declared their intent to challenge any such regulation on First Amendment grounds.¹²⁴ Under this Article's analysis, the primary question is whether the list price of a drug (as opposed to the price the consumer actually pays, which would be based on the co-pay rules of the consumer's health insurance) would be material information to a consumer such that the government could compel disclosure of that same information. The answer to that question is likely no. As the Department of Health and Human Services ("HHS") admitted in its own proposal, "[g]overnment programs, commercial insurers, and individual consumers pay for drugs differently."¹²⁵ And though out-of-pocket prices and list prices for drugs are certainly related, the reasonable consumer is not likely to consider a price that they do not pay material to whether they would purchase that product when a doctor prescribes it. Accordingly, the First Amendment precludes HHS's attempt to compel disclosures of these nonmaterial facts.

2. Common-Law Products Liability as a Boundary Setter for Compelled Labeling

Products liability is another source of private law that can be usefully operationalized in commercial speech cases. Since 1906, the federal government has imposed duties of disclosure and accuracy on drug manufacturers by, among other things, penalizing "misbranding" of drug labels.¹²⁶ Later, manufacturers were obliged to prove that their drugs worked for the specific purposes for which they were being advertised.¹²⁷ Though the statutory scheme around mandatory drug labeling consists mostly of legislative responses to specific public health scandals—for example, Upton Sinclair's publication of *The Jungle*, the elixir sulfanilamide mass poisoning tragedy, and the thalidomide crisis¹²⁸—the applicable duties of care are rooted in those imposed by the post-privity common law of products liability. Specifically, the duty to anticipate a product's intended user group, to warn those foreseeable users of foreseeable risks of harm associated with a product's use and predictable misuses, and to provide warnings and instructions commensurate with those risks are all rooted in the common

speeches/remarks-on-drug-pricing-blueprint.html [https://perma.cc/V4A6-5MK8]. This rule was subsequently codified at 42 C.F.R. §§ 403.1200-04 (2020).

¹²⁴ See Robert Pear, *Drug Prices on TV? Stay Tuned. Sticker Shock May Be Coming*, N.Y. TIMES, Mar. 24, 2019, at A17.

¹²⁵ AMERICAN PATIENTS FIRST, *supra* note 123, at 32-33.

¹²⁶ See Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179, 184 (2018) (citing Pure Food and Drug Act of 1906, Pub. L. No. 59-384, 34 Stat. 768, 769-71 (repealed 1938)).

¹²⁷ See *id.* at 186 (first citing Food, Drug, and Cosmetic Act, 21 U.S.C. § 321 (g)(1) (2018); and then citing 21 C.F.R. § 201.128 (2018)).

¹²⁸ See *id.* at 184-86.

law of products liability.¹²⁹ Under the decision-making model proposed by this Article, government information-forcing that is commensurate with these duties presents no First Amendment issue.

Additionally, unlike First Amendment claims under current doctrine, the private liability system for inadequate labeling and advertising takes market asymmetries of information into account. In either negligence or strict liability, the duty owed in an inadequate labeling claim is based on what the labeling manufacturer knew or should have known with respect to a given risk or danger posed by the product.¹³⁰ The flip side of that duty, however, is that harm to a user caused by an openly and obviously dangerous product cannot be a basis for liability to that user.¹³¹ For that reason, the correction of asymmetrical information concerning product dangers is embedded in the private law remedy where the remedy is only available with respect to information that the manufacturer knew or should have known and that the user did not or could not have known.¹³² The same is true with respect to government-compelled disclosures for products offered to the public.¹³³ Governments can step in to impose disclosure requirements wherever ex post failures to disclose or false disclosures can give rise to private liability because private liability alone is often not effective enough to incentivize manufacturers to provide adequate warnings.¹³⁴ Accordingly, the applicable rule is that when the government-

¹²⁹ See generally KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11*, at 141-48 (2008).

¹³⁰ See RESTATEMENT (SECOND) OF TORTS §§ 291, 310-11, 402A-B (AM. LAW INST. 1965) (describing fraudulent and negligent misrepresentations and strict products liability); see also RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 9 (AM. LAW INST. 1998) (“One engaged in the business of selling or otherwise distributing products who, in connection with the sale of a product, makes a fraudulent, negligent, or innocent misrepresentation of a material fact concerning the product is subject to liability for harm to persons or property caused by the misrepresentation.”).

¹³¹ See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2, cmt. j (AM. LAW INST. 1998). A similar common-law rule applies to fraud claims: an affirmative defense to a claim of fraud is the plaintiff’s prior knowledge of the material fact that is the basis for the claim. See RESTATEMENT (SECOND) OF TORTS § 537 (AM. LAW INST. 1977). In both the fraud and the products examples, knowledge of the fact at issue by the harmed party cuts against the default asymmetry-of-information justifications for the private right of action.

¹³² See RESTATEMENT (THIRD) OF PRODS. LIAB. § 2, cmt. j (AM. LAW INST. 1998).

¹³³ See Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 664 (1977) (explaining that there are “many areas where key information necessary for consumers to make a sensible choice between rival brands, or to decide whether to buy the product at all, is absent”); see also *id.* at 670 (“In typical buyer-seller transactions, it will be rare that buyers will be able efficiently to collect relevant information about the large number of products they seek or to take effective precautions against injuries sustained as a result of misplaced reliance on erroneous information.”).

¹³⁴ See *id.* at 667-68.

imposed duty to disclose is equivalent to the duty imposed by private law, the First Amendment does not stand in the way.

This is true not just with respect to the content of compelled disclosures but also to their form. As noted, analyzing the adequacy of a warning under private products liability considers the nature of a warning's expression—its intensity and understandability in relation to the danger the product presents to the product's expected user group. So, the greater the risk presented by a product, the greater the government's leeway with respect to the form of the compelled disclosure. The measure of product risk informs what courts have considered the question of whether a particular disclosure's form is "unduly burdensome."¹³⁵

For example, the Ninth Circuit recently held that, under *Zauderer v. Office of Disciplinary Counsel*, San Francisco's compelled disclosure about the health risks of soft drinks and other sugar-sweetened beverages was unduly burdensome.¹³⁶ The form of the disclosure required that San Francisco's prescribed message occupy twenty percent of the surface area of any billboard or other display advertising such drinks.¹³⁷ The city's own evidence that the disclosure would improve consumers' understanding of the beverages' health harms, however, was based on a disclosure that used ten percent of the relevant advertisements' available space.¹³⁸ This is analogous to a finding under the law of products liability that the intensity of the disclosure's form was too great given the risk of harm presented by the product. The extent of the risk that the product presents defines the extent of the disclosure's burden.

Consumer protection laws, informed as they are by the common law of civil liability to consumers for false advertising and including judicial analysis of those laws' obligations on manufacturers are relevant as well.¹³⁹ In *Davidson v. Kimberly-Clark Corp.*,¹⁴⁰ a consumer sued a manufacturer for violating California's false advertising law by claiming its wipes were flushable when they did not in fact degrade completely.¹⁴¹ The plaintiff-consumer in such a claim must plead with sufficient particularity the statement alleged to have been false, and the role of the reviewing court is to determine whether that standard has been met. In determining that the plaintiff-consumer met her burden of pleading that the manufacturer's statement was fraudulent, the Ninth Circuit held that the plaintiff's determination of what the term "flushable" would mean to the ordinary consumer, as well as her allegation of why the manufacturer's

¹³⁵ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

¹³⁶ *Am. Beverage Ass'n v. City & Cty. of S.F.*, 916 F.3d 749, 756-57 (9th Cir. 2019) (en banc).

¹³⁷ *Id.* at 754.

¹³⁸ *Id.* at 757.

¹³⁹ Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 5 (2005).

¹⁴⁰ 889 F.3d 956 (9th Cir. 2018).

¹⁴¹ *Id.* at 961.

statement was false, were both adequate.¹⁴² Using that private law as a guide, in compelling a disclosure of warning information under the methodology proposed here, the government similarly has to show with an analogous degree of particularity the truth of the statement it seeks to compel of the product manufacturer and the materiality of the statement to the products' prospective consumers. If it has done so, then the manufacturer has no First Amendment claim with respect to the compulsion. And the government's power to order a manufacturer to cease false advertising as part of the remedy for a consumer protection claim is simply the flip side of its power to compel statements that are true and material to prospective users.¹⁴³ The Speech Clause is no bar in either case.

The compelled soft drink notice discussed above is also relevant to a false-fact analysis. In addition to being unduly burdensome with respect to form, San Francisco sought to compel soft drink manufacturers to make a statement that was inaccurate, or at least imprecise; it warned that "[d]rinking beverages with added sugar(s) contributes to . . . diabetes" when there was a scientific correlation between consuming sugar-sweetened beverages and type 2 or adult-onset diabetes, but not type 1 (i.e., juvenile-onset diabetes).¹⁴⁴ Here, a product manufacturer could argue that a failure to warn concerning a connection between type 2 diabetes and sugar-sweetened drinks could subject it to private law liability, but the broader diabetes-to-sweetened-drinks connection was factually inaccurate; therefore, compelling the broader disclosure that included the false information about the product violates the manufacturer's First Amendment rights. A disclosure that compels both true and false information is by definition overinclusive and therefore presumptively unconstitutional.

An operational question concerning this approach would be *how* the government would, in the context of a particular compelled disclosure, define the extent of the duty imposed by the relevant private law. Through the Administrative Procedure Act and its state law analogues' notice-and-comment processes, regulators already engage in similar inquiries.¹⁴⁵ With respect to soft

¹⁴² *Id.* at 964-65. Commentators have argued, however, that statutory consumer protection has extended well beyond these historical common-law requirements. *See infra* notes 174-78 and accompanying text.

¹⁴³ *Id.* at 960-61 ("California law also permits [a harmed] consumer to seek a court order requiring the manufacturer of the [falsely advertised] product to halt its false advertising.").

¹⁴⁴ *See* *Am. Beverage Ass'n v. City & Cty. of S.F.*, 916 F.3d 749, 765-66 (Christen, J., concurring in part and concurring in judgment).

¹⁴⁵ *See* Kathleen M. Sullivan, *Cheap Sprints, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123, 153 & n.114 ("A vast regulatory apparatus in both the federal government and the states has developed to control not only knowingly false statements of fact, but also potentially misleading or deceptive speech."). Courts often engage in similar inquiries as well. *Cf., e.g.,* Tushnet, *supra* note 119, at 234 (discussing how courts determine whether a "substantial percentage" of customers share manufacturer's interpretation of challenged term for false advertising claims under Lanham Act).

drink advertising, San Francisco sought to demonstrate how its proposed disclosure would serve the interests of alerting prospective customers of the health- or safety-related harms associated with the advertised product before passing its law.¹⁴⁶ In reviewing the Food and Drug Administration's proposed graphical warnings for cigarette packaging and advertising, the D.C. Circuit stated that the agency's burden was to show that, "absent disclosure, consumers would likely be deceived by the Companies' [existing] packaging in the future."¹⁴⁷ That is, the agency has to demonstrate that in the absence of the disclosure that it sought to compel, cigarette consumers would not be properly warned of the risks of harm associated with the relevant product. Embedded in this burden are all of the adequacy standards used by private law discussed above: what information would be material to prospective users of this particular product, who is in the product's intended user group, and what risks of harm are associated with the product's foreseeable uses. If lay juries can determine liability after the fact by assessing whether a warning is adequate, it should be little trouble for the government to use administrative and legislative factfinding procedures to determine what adequateness requires prior to imposing a disclosure.¹⁴⁸

3. Rescuing *Zauderer* From the Marketplace Metaphor

The proposal set out here is as much a call for a return to first principles as it is a turn toward a new interpretive methodology. Many compelled disclosure cases already recognize the background role of positive law in First Amendment doctrine, albeit glancingly. For example, as noted above, *Zauderer* imposed a reasonableness standard for government-compelled disclosures of noncontroversial factual information. The Court's arguments for such a lenient standard of review incorporate the justifications for common-law protections in consumer deception-based torts and breach of warranty; the Court spoke of "disclosure requirements [as] reasonably related to the State's interest in preventing deception of consumers."¹⁴⁹

To be sure, this language, which spoke to the public policy-related benefits of certain information-forcing, and which has been repeated in commercial speech compelled disclosure cases and *Zauderer*-related scholarship, is consistent with

¹⁴⁶ *Am. Beverage Ass'n*, 916 F.3d at 757.

¹⁴⁷ *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012), *overruled* by *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

¹⁴⁸ This is the same showing that the Court deemed was necessary for a state to show that it can regulate the uses of a private landowner's property without just compensation. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992) (holding states "must identify background principles of nuisance and property law that prohibit the uses [the affected landowner] now intends").

¹⁴⁹ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *see also* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502 (1996).

the marketplace-of-ideas justification for the First Amendment.¹⁵⁰ And, post-*Zauderer*, this is the way the language has been interpreted—compelled commercial disclosures add to the marketplace whereas speech restrictions generally take away from the marketplace—as a way to justify greater government compulsion.¹⁵¹ It is fair to question, however, whether this formulation is doing meaningful analytical work. *Any* compelled factual disclosure adds to the marketplace of ideas. That does not mean, however, that *all* compelled disclosures, even of commercial factual information, present no First Amendment concerns. In the same vein, lower courts’ interpretations of *Zauderer*’s “uncontroversial” requirement have been, to say the least, problematic.¹⁵² So the more precise question is, what *kinds* of factual information are important enough that government should be deemed to have the power to force disclosure of them?

The private law of fraud, misrepresentation, and warranty provides the answers to that question: information (1) that is material enough that consumers or other counterparties to the speaker would rely upon it in deciding to use the manufacturer’s product and (2) that the prospective user could not readily observe or know on their own. Ex ante information forcing by the government, done with the intent to avoid the harms and protect the interests that private law already recognizes, should present no First Amendment issue. But to come to that conclusion, the link between the interests that the private law protects and the constitutional question of permissibility must be made clearer. Using the concept of a marketplace of ideas to place limitations on the context of compelled disclosures of commercial information only begs the questions of *which* marketplace and *whose* ideas are protected. Arguments over materiality

¹⁵⁰ Similar theories have been advanced in commercial speech compelled disclosure cases and *Zauderer*-related scholarship. *See, e.g.*, Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 550-51 (2012) (“Compelled speech requirements merely enhance the information that is being circulated, thus contributing to and improving the marketplace of ideas by providing citizens with more information than would otherwise be available.”).

¹⁵¹ *See id.* at 560-61 (arguing that *Zauderer* should be read, consistent with its marketplace of ideas rationale, to permit compelled disclosures beyond consumer deception); *see also* Nat’l Elec. Mfrs. Ass’n v. Sorrell, 272 F.3d 104, 114-16 (2d Cir. 2001) (holding that First Amendment is satisfied where rational connection exists between disclosure requirement and government means employed).

¹⁵² *See* CTIA-The Wireless Ass’n v. City of Berkeley, 158 F. Supp. 3d 897, 904-05 (N.D. Cal. 2016) (“A ‘controversy’ cannot be created any time there is a disagreement between the parties because *Zauderer* would never apply . . .”), *vacated and remanded*, 138 S. Ct. 2708 (2018); Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L.J. 1351, 1385-86 (2019) (“[W]hen parties present conflicting information about a disclosure in litigation, the disclosure becomes controversial [and subject to heightened, *Zauderer*, review]. . . . [L]itigation itself becomes a process to transform a disclosure into a contested public issue.”).

and reliance, however, are the “bread and butter of the legal profession,” tasks much more in line with the roles of judges, lawyers, and regulators than theorizing over markets and truth.¹⁵³

In sum, the “protection of consumers against advertising fraud should not be a broad, theoretical effort to achieve Truth, but rather a practical enterprise to ensure the existence of reliable data which in turn will facilitate an efficient and reliable competitive market process.”¹⁵⁴ Rescuing *Zauderer*’s justification from its lofty association with the grand First Amendment theory of the marketplace of ideas and returning it to a private law, consumer-focused grounding solidifies compelled disclosure doctrine. The harms caused by the kinds of market failures discussed by the Court in *Zauderer* are the same kinds of harms that common-law fraud was intended to prevent. To speak in broader terms than that is to invite imprecision into the analysis of compelled disclosures. It is also an invitation to engage in the kind of *Lochnerism* that Justice Holmes warned of.

B. NIFLA v. Becerra’s *Incomplete Invocation of the Law of Informed Consent*

The first step in applying the methodology proposed in this Article is judicial consideration of the body of private common law that most closely applies to the First Amendment question at issue. Section II.A discussed fraud-related torts and warranty-based claims in contract. However, other sources of private law can be relevant to assess the constitutionality of information-forcing efforts by the government. Applying this methodology to a recent case where the Court was accused of reaching a *Lochnerist* result,¹⁵⁵ *NIFLA*, demonstrates how a foregrounding of the law of informed consent can provide greater clarity concerning the kinds of medically relevant information the government may properly compel, as well as its justifications for doing so. But determining how private law should inform the compelled disclosure question requires a more rigorous analysis of informed consent law than the one the Court applied.

1. Negligence Versus Battery in Informed Consent Law

California’s Freedom, Accountability, Comprehensive Care, and Transparency (“FACT”) Act¹⁵⁶ required “crisis pregnancy centers,” which were pro-life counseling facilities licensed by the state as family planning or pregnancy-related service providers, to inform their clients via a government-drafted notice posted onsite about the availability of state-assisted abortion-related services.¹⁵⁷ Unlicensed centers that provided family planning counseling

¹⁵³ Baude & Stern, *supra* note 108, at 1852.

¹⁵⁴ Pitofsky, *supra* note 133, at 671.

¹⁵⁵ See *NIFLA v. Becerra*, 138 S. Ct. 2361, 2381 (2018) (Breyer, J., dissenting).

¹⁵⁶ CAL. HEALTH & SAFETY CODE §§ 123470-73 (West 2018).

¹⁵⁷ *NIFLA*, 138 S. Ct. at 2368-69.

had to inform clients of their non-licensure.¹⁵⁸ In *NIFLA*, the Court held that the FACT Act's requirements likely violated the centers' First Amendment rights.¹⁵⁹ In deciding that the First Amendment barred the FACT Act from compelling the centers to speak about abortion, Justice Thomas, writing for the majority, began by rejecting the law of informed consent's relevance to the compulsion at issue.¹⁶⁰ Thomas argued that informed consent justifies compelling a disclosure only when the disclosure at issue is related to the professional's own services or conduct; here, by contrast, California's disclosure "d[id] not facilitate informed consent to a medical procedure" or "a procedure at all" by requiring the clinics to provide the notice.¹⁶¹ Covered facilities were compelled to post the notice "regardless of whether a medical procedure is ever sought, offered, or performed."¹⁶² Accordingly, because *NIFLA*'s clinics did not perform abortions, the private law of informed consent could not support California's compulsion of speech.¹⁶³

By focusing exclusively on whether the party being compelled to speak was itself the one performing a medical procedure, Thomas's conceptualization of the legal theory underlying the law of informed consent is synonymous with that of Justice Cardozo in 1914's *Schloendorff v. Society of New York Hospital*¹⁶⁴: a theory of battery. Cardozo's linking of informed consent and battery influenced decades of informed consent law. Indeed, Thomas even cited *Schloendorff* for this proposition and, invoking informed consent's common-law pedigree, described the principle as "firmly entrenched in American tort law."¹⁶⁵

Justice Thomas's opinion is an attempt to use private law to define the point at which a First Amendment claim begins. By framing a medical procedure provided in the absence of informed consent as an offensive or harmful touching protected by the tort of battery, Thomas and the *NIFLA* majority reached a straightforward conclusion with respect to the limits of informed consent law to the First Amendment question at hand. Because the clinicians subject to the compelled speech requirement do not deliver babies or perform abortions, informed consent law was not relevant to the clinicians' First Amendment claim concerning compelled abortion-related speech. Where the party that the state is

¹⁵⁸ *Id.* at 2369-70.

¹⁵⁹ *Id.* at 2378.

¹⁶⁰ *Id.* at 2373-74.

¹⁶¹ *Id.* at 2373.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ 105 N.E. 92, 93 (N.Y. 1914).

¹⁶⁵ *NIFLA*, 138 S. Ct. at 2373 (quoting *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990)); see also RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT 123-25 (1986) (noting Cardozo's *Schoendorff* opinion "drew considerable attention to the proposition that patients have the right to protect the inviolability of their persons by choosing how they will be treated medically, and that interference with this right may constitute unauthorized bodily invasion—a battery").

forcing to provide information is not performing a medical procedure, there is no possibility for a nonconsensual touching. A medical professional's withholding of information concerning a procedure available from a third party, in other words, cannot meet the harmful or offensive touching requirement for a claim of battery against the withholding professional. And if there is no potential battery claim against the professional for failing to disclose information about the procedure that is the object of the disclosure, then the law of informed consent is irrelevant to the speech being compelled. Thus, the government could not point to common law informed consent to vitiate NIFLA's First Amendment claim against the compulsion at issue. Instead, their case proceeds to judicial selection and to application of the relevant level of constitutional scrutiny to apply to the compulsion.

But with respect to the underlying positive law that should inform the question of whether the First Amendment applies, the Court's analysis in *NIFLA* was misplaced. Modern common law, including in California where the case was litigated, finds that most informed consent claims are supported by the legal theory of negligence, not battery.¹⁶⁶ Not every informed consent case involves a plaintiff who consented to undergo a medical procedure without having received information that would have been material to their consent from the professional who performed the procedure. Far from it. Modern informed consent doctrine also protects what some courts call a right to "informed refusal"—where the patient *foregoes* a test, treatment, or other procedure, many of which are provided by third parties to the conversation between medical professional and patient. In such a case, the plaintiff-patient argues that if the professional had reasonably informed them as to the consequences of their refusal, they would

¹⁶⁶ See *Cobbs v. Grant*, 502 P.2d 1, 8-9 (Cal. 1972) (in bank), in which the California Supreme Court held, after surveying the law on whether the failure to provide informed consent constitutes a battery or negligence, that

the trend appears to be towards categorizing failure to obtain informed consent as negligence. . . . [That trend] reflects an appreciation of the several significant consequences of favoring negligence over a battery theory. . . . The battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented. When the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present. However, when the patient consents to certain treatment and the doctor performs that treatment but an undisclosed inherent complication with a low probability occurs, no intentional deviation from the consent given appears; rather, the doctor in obtaining consent may have failed to meet his due care duty to disclose pertinent information. In that situation the action should be pleaded in negligence.

See also *Arato v. Avedon*, 858 P.2d 598, 604 (Cal. 1993) (in bank) (“[*Grant* is t]he fount of the doctrine of informed consent in California . . . [and] significantly broaden[ed] the scope and character of the physician's duty of disclosure . . . and anchored much of the doctrine of informed consent in a theory of negligence liability . . .”).

not have foregone the procedure.¹⁶⁷ For example, assume a pregnant woman has flu-like symptoms and goes to a medical clinic. A clinical professional does not give the woman a vaccination or even discuss the option of receiving one, despite health alerts concerning a flu pandemic in the area that is particularly fatal for pregnant women. The woman and her unborn child die from the flu, and the woman's husband sues the clinic on their behalf for lack of informed consent. The battery analogy does not hold because there is no inoculation and, therefore, no unlawful touching. But under the actual private law of informed consent, a claim would unquestionably exist. The modern common law of informed consent reaches a failure to treat claim even though the legal theory of battery does not.¹⁶⁸

Indeed, the law of informed consent is even broader than that. The hypothetical clinic above is the one deciding not to provide the flu shot that is the basis of the informed consent claim. But the extent of the duty to provide informed consent is drawn by those risks involving any medically relevant interventions, including risks associated with foregoing those interventions that other medical professionals would provide. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁶⁹ the Court held that the part of the Pennsylvania law at issue which required that information provided to a patient seeking an abortion include information about adoption agencies or other abortion alternatives, did not violate doctors' First Amendment rights because that information was part of providing informed consent to such a patient.¹⁷⁰ The law at issue compelled speech of abortion-performing doctors and hospitals about third-party adoption agencies. So, the *NIFLA* limitation on informed

¹⁶⁷ See, e.g., *Truman v. Thomas*, 611 P.2d 902, 906 (Cal. 1980) (in bank) (rejecting argument that informed consent's "duty to disclose applies only where the patient consents to the recommended procedure" and noting that the duty recognized in *Cobbs v. Grant* was based on patients "meaningfully exercis[ing] their right to make decisions about their own bodies"[, and] . . . the need for disclosure is not lessened because patients reject a recommended procedure"); *Moore v. Preventive Med. Med. Grp., Inc.*, 223 Cal. Rptr. 859, 863-64 (Ct. App. 1986) (concluding duty internist owed was "to disclose . . . all material information which would enable [the patient] to make an informed decision whether to see the [internist-referred] specialist or not"); see also *Townsend v. Turk*, 266 Cal. Rptr. 821, 824 (Ct. App. 1990) (describing doctrine recognized in *Truman* and *Moore* as "informed refusal"); California Civil Jury Instructions (CACI) No. 534 (2017), <https://www.justia.com/trials-litigation/docs/caci/500/534/> [<https://perma.cc/SBN7-2RJS>]; California Civil Jury Instructions (CACI) No. 535 (2017), <https://www.justia.com/trials-litigation/docs/caci/500/535/> [<https://perma.cc/7MMZ-5GBV>].

¹⁶⁸ See FADEN & BEAUCHAMP *supra* note 165, at 138-39 ("In many instances, no treatment is an alternative to the procedure proposed. Thus, the risks of doing nothing are very likely to fall within the scope of the physician's duty to disclose information about any proffered procedure. . . . This point is . . . incompatible with the battery theory of liability . . .").

¹⁶⁹ 505 U.S. 833 (1992).

¹⁷⁰ *Id.* at 884-87.

consent to those procedures associated with the speaker's *own* services or conduct is a misplaced foregrounding of the relevant private law.

Returning to the facts of *NIFLA* and properly applying the law of negligence-based informed consent to the First Amendment claim at issue, one can easily imagine a licensed clinic worker owing a duty to inform a pregnant woman about an available medical abortion option as a way of avoiding foreseeable risks of harm associated with childbirth—especially where the clinician determines that risk factors are present.¹⁷¹ Duties in modern informed consent law extend to any material medical fact that a reasonable patient would want to know before deciding whether or not to undergo a given procedure or other course of treatment.¹⁷² If a woman entering a California clinic had known that the termination of her pregnancy was an option in that state and later develops a severe complication attributable to taking the child to term, that woman could have a viable common-law informed consent claim against any medical professional who counseled her and failed to inform her about the termination option that would have avoided or minimized the health complication—not just, as the *NIFLA* Court claimed, against the doctor that delivered her child. That is, the clinicians compelled to speak under the California law at issue in *NIFLA* would be prospective defendants, even though those clinicians did not perform abortions themselves.¹⁷³

¹⁷¹ This is especially so since studies have shown medical abortion to be generally much safer than childbirth. See Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 *OBSTETRICS & GYNECOLOGY* 215, 215 (2012) (comparing pregnancy mortality rate of 8.8 deaths per 100,000 births to abortion mortality rate of 0.6 deaths for 100,000 abortions). When the basis for compelling disclosure is justified by the common law of informed consent, constitutionally permissible disclosures concerning the availability of abortion would be those that are health-related. Cf. *Acuna v. Turkish*, 930 A.2d 416, 418, 423-24 (N.J. 2007) (rejecting patient's argument that informed consent compelled gynecologist's pre-abortion disclosure of fact that aborted embryo "was an existing human being," on ground that disclosure did not consist of "medical facts," but rather "moral, theological, and highly personal judgment").

¹⁷² See *Cobbs v. Grant*, 502 P.2d 1, 12-18 (Cal. 1972) (in bank) (citing *Canterbury v. Spence*, 464 F.2d 772, 768 (D.C. Cir. 1972)) (rejecting measure of duty in informed consent based on "the custom of physicians practicing in the [relevant] community" and stating "the test for determining whether a potential peril must be divulged is its materiality to the patient's decision"); see also *Harbeson v. Parke Davis, Inc.*, 746 F.2d 517, 522 (9th Cir. 1984). ("[W]hen a reasonable person in the patient's position probably would attach significance to this specific risk in deciding on treatment, the risk is material and must be disclosed." (citation and quotation marks omitted) (quoting *Smith v. Shannon*, 666 P.2d 351, 355 (Wa. 1983) (en banc)).

¹⁷³ The staffs of the licensed crisis pregnancy center that challenged the FACT Act included gynecologists, obstetricians, radiologists, and nurses. The unlicensed centers employed several nurses and contracted with a licensed medical provider for sonogram referrals. *NIFLA v. Harris*, 839 F.3d 823, 831 (9th Cir. 2016), *rev'd and remanded sub nom. NIFLA v. Becerra*, 138 S. Ct. 2361 (2018).

Though Justice Thomas is right to argue that the particular notice required under California law spoke only to the availability of state-funded or subsidized abortions for eligible women, the modern law of informed consent could support private law liability for a California medical professional's failure to discuss an abortion option in the specific context of pregnancy counseling. The First Amendment should not be read to bar California ability to compel disclosure of the same information for which there would be private liability under the law of informed consent for a failure to disclose.

2. Choice of Private Law Puzzles in Constitutional Cases

Foregrounding private law in resolving constitutional questions will often raise choice of law issues. When a state or local law compels speech, as was the case in *NIFLA*, the choice of law issue is straightforward. Both the speech compulsion at issue and the parties affected are in California, and thus, as indicated by the analysis above, courts should look to the common law of that state in order to define the reach of the First Amendment. However, federal government compulsions of speech require courts to decide which private law to foreground. This part of the methodology could potentially raise inconsistent conclusions with respect to defining the relevant duty owed.

As an initial matter, the inconsistency concern should not be overstated. Manufacturers and other parties who are forced to disclose information are subjected to private law standards by different jurisdictions all of the time. Each state has its own consumer protection law, and some are broader than others. These jurisdictional differences also reflect differences in federal analogues in the form of the Federal Trade Commission Act and the Federal Trade Commission's implementing regulations, "in their definitions of unlawful conduct, the remedies they afford, and their provision of private rights of action."¹⁷⁴ These differences, however, go mostly toward the questions of who can bring a claim,¹⁷⁵ how those claims must be pled,¹⁷⁶ or what remedies those individual or class litigants and their attorneys might get if they win.¹⁷⁷ And to

¹⁷⁴ Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 521 n.107 (2019) (citing, inter alia, Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 165-67 (2011)).

¹⁷⁵ See Michael S. Greve, *Consumer Law, Class Actions, and the Common Law*, 7 CHAP. L. REV. 155, 171-73 (2004) (stating common law tort and contract claims "circumscribe classes of plaintiffs and causes of actions" in way that statutory consumer protection rights of action do not because "a legislature that enacts a consumer protection statute wants to do more than to codify pre-existing law").

¹⁷⁶ See, e.g., Schwartz & Silverman, *supra* note 139, at 40.

¹⁷⁷ See, e.g., Greve, *supra* note 175, at 175 (describing how states "provided added incentives for private litigation" to their consumer protection statutes, "typically in the form of attorneys' fees and treble damages for certain violations").

the extent that state-level consumer protection statutes “circumvent traditional, rational requirements of the common law . . . fraud and negligent misrepresentation claims, such as [actual and reasonable] reliance, intent, injury, and damages,” courts should be free to read those requirements back into consumer protection law when establishing the private law principles that are applied in analyzing a particular speech compulsion.¹⁷⁸ As discussed above, fraud is a product of state common law, but that law has achieved vertical uniformity across the states, at least with respect to its essential elements. Differences across states that might be highly relevant in other contexts, such as the proper role of class actions, do not factor into the decisional model’s application to First Amendment questions.

Another operational complication arises from the fact that the common law is not static but “by definition, evolves and develops over time.”¹⁷⁹ If the common law imported for use as a boundary setter is not set in place, then First Amendment protections will evolve as state law changes. But some dynamism imported via the common law would actually have clarifying effects on coverage doctrine. Section II.B.1 demonstrates how the law of informed consent evolved to include more potential claims than those relating to battery and how that evolution changes the boundaries for related First Amendment claims. As argued above, courts hearing constitutional claims are already using common law baselines to decide coverage questions; common law’s inherent dynamism has not impeded courts from invoking the common law to this point. Rejecting wholesale any baseline shifting by common-law courts by which First Amendment claims are judged would “freeze the common law as it has been constructed by the courts” and “allow no room for change in response to changes in circumstance.”¹⁸⁰ This is true with respect to private law itself or to the constitutional baseline. Constitutional law changes over time; a common law that establishes the reach of constitutional law should be able to change as well.¹⁸¹

¹⁷⁸ Schwartz & Silverman, *supra* note 139, at 3. In other words, even if a state’s particular statutory consumer protection statute did not require a showing of reliance, intent, or injury-in-fact for private actions, the government would have to show a likelihood of all of those common law-based elements in adopting a compelled disclosure. *Cf. id.* at 49-66 (arguing that courts can and should require common-law prima facie fraud elements like injury, reliance, fault, and causation when assessing claims private actions brought under state consumer protection acts).

¹⁷⁹ Hamdan v. Rumsfeld, 548 U.S. 557, 691 (2006) (Thomas, J., dissenting).

¹⁸⁰ PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 93 (1980) (Marshall, J., concurring).

¹⁸¹ See David A. Strauss, *On the Origin of Rules (with Apologies to Darwin): A Comment on Antonin Scalia’s The Rule of Law as a Law of Rules*, 75 U. CHI. L. REV. 997, 1008 (2008) (describing how even originalist constitutional rules “are routinely the product of evolution,” and they “continue to evolve after they have been elaborated” in their applications in subsequent cases).

Too much capacity for evolution, however, may invite manipulation. Under the methodology proposed here, states might engineer changes to their boundary-setting common law to reach private parties' desired results in potential constitutional challenges. For example, a state could statutorily define common-law fraud in the securities disclosures context as narrowly as possible so as to attract corporations seeking the lowest possible disclosure burden; once state-level fraud is narrowly defined, any required disclosure that did not fall into that category would then be susceptible to constitutional challenge.¹⁸² Conversely, a state could expand its common law to reduce the First Amendment's force against that law, such as by defining common-law defamation more widely to increase the amount of speech it could then subject to criminal punishment.¹⁸³ Or, more generally, a state could legislatively overturn a judicial decision with which it disagrees, thereby changing the common law that led to the overturned decision—and by extension moving the boundary that common law would set in First Amendment cases.¹⁸⁴

But a generalized fear of shifting common-law baselines cannot justify rejecting the methodology proposed here. First, and as demonstrated above, most state-law variations in the common law do not modify the essential elements of private law claims. But to minimize the substantive variation that does exist and to preclude manipulation concerns, in identifying common-law boundaries, this Article's methodology adopts an interpretive norm that favors "pure" common law—that is, legal rules that judges simultaneously create and apply in concrete cases arising "in those areas that have always been the province of the courts"¹⁸⁵ over (1) changes to that law made via statute or (2) the interstitial common law that involves judicial interpretations of statutes and of the legal products of other lawmaking bodies.¹⁸⁶ Doing so would add a level of stability to the common law's potential for dynamism. In drawing rules of decision in constitutional cases, common law's dynamism is also a lesser evil; the indeterminacy of the existing scrutiny-based approach makes current

¹⁸² For examples of similar conduct, see generally Michal Barzuza & David C. Smith, *What Happens in Nevada? Self-Selecting into Lax Law*, 27 *REV. FIN. STUD.* 3593 (2014) (describing how Nevada markets itself as having developed low-liability legal regime to attract out-of-state incorporations).

¹⁸³ Thank you to Sarah Haan and Joseph Blocher respectively for offering these hypotheticals.

¹⁸⁴ See Neil Kinkopf, *The Progressive Dilemma*, 75 *NOTRE DAME L. REV.* 1493, 1531 (2000) (book review) ("If the political branches of the relevant jurisdiction disapprove of a given rule of common law, they can repudiate or revise it by ordinary legislation.").

¹⁸⁵ Frederick Schauer, *Is the Common Law Law?*, 77 *CALIF. L. REV.* 455, 457 (1989) (book review).

¹⁸⁶ This exercise would require courts to distinguish between statutory *codifications* of existing common law and statutes intended to *diverge* from existing common law.

doctrine more malleable than a common-law baseline methodology would be, even taking into account the common law's capacity for change.

And finally, some shifts in the common law would benefit the First Amendment. As discussed in Section IV.B.2 below, in applying the methodology, constitutional courts would be cognizant of those areas where common-law baselines have taken speech-protective developments into account.

3. Properly Rejecting "Professional Speech" Doctrine

Though a proper foregrounding of the relevant private law in analyzing the First Amendment claim leads to a different result than the Court reached in *NIFLA*, it produces a narrower basis for that decision than the Ninth Circuit found below, which the *NIFLA* Court majority was right to reject. The Ninth Circuit held that regulations of professional speech are subject to intermediate First Amendment scrutiny when the speech being regulated is, among other things, a form of treatment such as medical advice or therapy.¹⁸⁷ Following its own precedent and aligning with rulings by some other federal courts of appeals,¹⁸⁸ the Ninth Circuit upheld the FACT Act's notices because the regulated speech was part of the clinics' "professional practice of offering family-planning services," was spoken to the affected clinics' clients, occurred "within the clinics' walls," and was provided "in the context of medical treatment, counseling, or advertising."¹⁸⁹ The Court differentiated this kind of "professional speech" from "public dialogue, [where] First Amendment protection is at its greatest."¹⁹⁰ The court's test for professional speech was purpose-based: if the speech being affected "is to advance the welfare of the clients, rather than contribute to public debate," then the speech-affecting regulation was subject to only intermediate scrutiny.¹⁹¹

On appeal to the Supreme Court, Justice Thomas was correct to reject professional speech as a category of speech more amenable to regulation. As he wrote, "the professional-speech doctrine would cover a wide array of individuals"—not just doctors and lawyers, but potentially "nurses, physical therapists, truck drivers, bartenders, barbers, and many others."¹⁹² Thomas also

¹⁸⁷ *NIFLA v. Harris*, 839 F.3d 823, 839 (9th Cir. 2016), *rev'd and remanded sub nom. NIFLA v. Becerra*, 138 S. Ct. 2361 (2018).

¹⁸⁸ *Id.* at 840 (first citing *Pickup v. Brown*, 740 F.3d 1208, 1227-28 (9th Cir. 2014); then citing *King v. Governor of N.J.*, 767 F.3d 216, 231 (3d Cir. 2014); and then citing *Stuart v. Camnitz*, 774 F.3d 238, 247-49 (4th Cir. 2014)).

¹⁸⁹ *Id.* at 839-40.

¹⁹⁰ *Id.* at 839 (quoting *Pickup*, 740 F.3d at 1227).

¹⁹¹ *Id.* (quoting *Pickup*, 740 F.3d at 1228).

¹⁹² *NIFLA v. Becerra*, 138 S. Ct. 2361, 2375 (2018) (citing Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 68 (2016)); *see also* Timothy Zick, *Professional Rights Speech*, 47 ARIZ. ST. L.J. 1289, 1315 (2015). For a contrary

noted that when the licensing state decides what kinds of professions to license and thus where a professional speech-specific doctrine is recognized, the state is also deciding the level of First Amendment scrutiny to apply to certain professions.¹⁹³ Though “[l]icensing requirements for law and medicine in the United States likely date back to the founding period,”¹⁹⁴ state occupational licensing has exploded in recent years, which expands the possible professions to which a professional speech doctrine would apply.¹⁹⁵ And the “within the walls,” “public dialogue” distinction that the Ninth Circuit drew in deciding the level of protection to apply oversimplifies the interaction between professionals and their clients and the nature of the discussion as part of that interaction. As Professor Timothy Zick argues that, even during one-on-one interactions, “professionals and clients are engaged in a form of constitutional discourse,” particularly when the speech taking place “in professional offices relates directly or indirectly to the character or exercise of constitutional and legal rights.”¹⁹⁶ This would certainly be so of the crisis pregnancy centers in *NIFLA*, at least with respect to abortion generally.

Another reason the *NIFLA* Court was correct to reject the Ninth Circuit’s reasoning—and one closely related to the approach proposed in this Article—is that the compulsions capable of government obligation under the professional-speech doctrine are potentially much broader than the duties imposed by the private common law of informed consent. Many other states have passed laws compelling doctors who perform abortion procedures to provide information to patients seeking abortion procedures. Though couched by these states as statutory refinements to the common-law duty imposed by informed consent, several of these laws—which require doctors to tell women that abortions

view, see generally Nick Robinson, *The Multiple Justifications of Occupational Licensing*, 93 WASH. L. REV. 1903, 1926-32, 1950-53 (2018).

¹⁹³ See *NIFLA*, 138 S. Ct. at 2375.

¹⁹⁴ Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1279 (2016) (citing Douglas A. Wallace, *Occupational Licensing and Certification: Remedies for Denial*, 14 WM. & MARY L. REV. 46, 46 n.1 (1972)); see also Robert Kry, *The “Watchman for Truth”*: *Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885, 888 (2000).

¹⁹⁵ See, e.g., Maury Gittleman, Mark A. Klee & Morris M. Kleiner, *Analyzing the Labor Market Outcomes of Occupational Licensing*, 57 INDUS. REL. 57, 67 (2018) (showing that twenty-eight percent of survey respondents obtained license or certification for employment); Ryan Nunn, *Occupational Licensing and American Workers*, BROOKINGS INST. (June 21, 2016), <https://www.brookings.edu/research/occupational-licensing-and-the-american-worker/> [https://perma.cc/7P3J-TDY6]; U.S. BUREAU OF LAB. STATS., CERTIFICATION AND LICENSING STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION 16 YEARS AND OVER BY EMPLOYMENT STATUS, 2019 ANNUAL AVERAGES 1 (2019) <https://www.bls.gov/cps/cpsaat49.pdf> [https://perma.cc/RF6E-LU78] (seventeen percent of U.S. civilian non-institutional population and twenty-four percent of full-time labor force sixteen years and over held certification or license).

¹⁹⁶ Zick, *supra* note 192, at 1319.

increase the risk of breast cancer, infertility, and suicide, or to describe fetal ultrasound images—are disclosures that go “beyond the bounds of what would be required under common law.”¹⁹⁷ Treating these compelled disclosures as professional-speech regulations opens a host of indeterminate constitutional issues, including not just whether these compulsions are part of “public dialogue” or “medical treatment” but also whether *Zauderer* or *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*¹⁹⁸ standards can or should apply as well.¹⁹⁹ Indeed, if one applies the Ninth Circuit’s *NIFLA* professional speech test to these nonmedical compulsions, it is an open question as to whether some, if not all, would survive First Amendment scrutiny.

Hewing closely to the private law of informed consent, however, focuses on the asymmetrical nature of the relationship between the medical professional and the patient. It asks whether the information the professional is being compelled to speak is factually accurate, medically relevant, and material to the patient’s decisional self-autonomy with respect to the medical issue being discussed.²⁰⁰ The disclosures compelled by private law are defined by a medical custom standard of care, not a policy preference with respect to abortion or other controversial topics.²⁰¹ Limitations on the disclosure-related duties that are part of common-law informed consent prevent states from smuggling in their own ideological messages under their power to regulate the speech of licensed professionals. Once the compulsion at issue is deemed outside of what the duty of informed consent would require, full First Amendment scrutiny should apply.

Finally, a state’s consequence for violating its own professional speech-based law is often banishment from the profession. For example, the Eleventh Circuit declared unconstitutional Florida’s recent Firearms Owners’ Privacy Act, which sought to bar medical professionals from “asking [patients] questions concerning the ownership of a firearm or ammunition”; any professional who was found to have done so was subject to, among other punishments, permanent license revocation.²⁰² When the state has the power to revoke an occupational license for a speech-related reason and the grounds for revocation are subject to

¹⁹⁷ Nadia N. Sawicki, *Informed Consent as Compelled Professional Speech: Fictions, Facts, and Open Questions*, 50 J.L. & POL’Y 11, 11-12 & nn.2-5 (2016) (citing various state statutes requiring information be given to abortion-seeking patients); see also Caroline Mala Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. 1175, 1178 (2014) (noting state statutes which mandate counseling laws such as undergoing ultrasounds).

¹⁹⁸ 447 U.S. 557 (1980).

¹⁹⁹ See, e.g., *United States v. Wenger*, 427 F.3d 840, 849-51 (10th Cir. 2005); see also Zick, *supra* note 192, at 1323.

²⁰⁰ See Sawicki, *supra* note 197, at 20 (discussing how physicians’ rights to freedom of speech are “more closely tied to the patient’s right to accurate medical information than to traditional justifications offered in defense of the right to freedom of speech”).

²⁰¹ See Corbin, *supra* note 117, at 1331 nn. 354-362 (noting that disclosures compelled from abortion physicians in many states are based on model laws drafted by pro-life organizations).

²⁰² *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1303 (11th Cir. 2017) (en banc).

a lesser standard of constitutional review, the government grants itself the speech-hostile—and, as discussed in Part III below, profoundly anti-Lochnerist—power to ban individuals from the occupations of their choice based on what they say.

III. PRIVATE RIGHTS BOUNDARY SETTING AS FAINT-HEARTED LOCHNERISM

The results reached when properly foregrounding private law in answering First Amendment questions are Lochnerist in the sense that the primary legal rights and obligations that bind individuals are those agreed to via private bargain and exchange. They also manifest a default wariness of government interventions in areas involving speech that attempt to engineer relationships between private actors—a principle embedded in the First Amendment itself. But these Lochnerist results are faint-hearted in the same sense that Justice Scalia called himself a faint-hearted originalist. They lead to less precedential upheaval than the brave-and-bold, rights-inventing form of Lochnerism because courts deciding constitutional issues are more deferential to longstanding private law.

A. *Lochner as a Natural Rights-Based Decision*

As Professor David Bernstein shows in his seminal review of *Lochner* in historical perspective, *Lochner* and the Supreme Court's other liberty of contract cases were born out of natural rights theory, and the source of that right was as influenced by the private law of contract as by the public law of personal liberty.²⁰³ Locating a right to freely contract in the Due Process Clause was a “confirmation” of a preexisting right “‘embedded’ in the Anglo-American tradition”²⁰⁴; occupational liberty and the lesser-included right to negotiate the terms and conditions of employment, as well as the “more general constitutional right to ‘liberty of contract’” which followed, were together “a bedrock part of American constitutional consciousness from the beginning of the republic.”²⁰⁵

The methodology of using private rights for boundary-setting in First Amendment cases shares this view of rights, with an important qualification: a properly nuanced view of the intellectual history of natural rights concludes that natural rights are not, and indeed never were, trumps.²⁰⁶ Since the Founding Era, the rights to speak, to write, and to publish have been believed to exist

²⁰³ BERNSTEIN, *supra* note 31, at 17-19.

²⁰⁴ *Id.* at 17 (quoting Stephen A. Siegel, *Lochner Era Jurisprudence in the American Constitutional Tradition*, 70 N.C. L. REV. 1, 83 (1991)).

²⁰⁵ *Id.* at 18.

²⁰⁶ Cf. Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 30 (2018) (describing two “competing frames” for adjudicating conflicts over rights, one where cases challenging “rights infringement arise as the consequences of governing poorly” and the other where cases “arise as the costs of governing well”).

independent of the “existence of a government.”²⁰⁷ However, as Professor Jud Campbell shows, those rights were always thought to have been “regulable” via the common law.²⁰⁸ Most relevant for present purposes, historical recognition of a right as natural did not preclude the Founders from believing, for example, that the freedom of speech prevented the common law from imposing restrictions on speech “designed to mislead or harm.”²⁰⁹ Private law foregrounding of the type set out in this Article is thus consistent with recognition of natural rights and with *Lochner*.²¹⁰ Private common law has always been a legitimate boundary setter for natural rights, even as applied to the natural right of the freedom of speech.

B. *Informed Consent and Lochner as Bedfellows*

Specific applications of private law to constitutional questions reveal additional symmetries with *Lochner*'s underlying premises. For example, the close reading of the private common law of informed consent as it relates to the *NIFLA* case set out in Section II.B is *Lochnerist* in several important respects.

The *Lochner* decision itself manifested a threading together of three distinct normative preferences, all of which apply to the values underpinning the law of informed consent: *individual autonomy*, which the law should privilege and protect; *economic efficiency* in the macro sense, or the idea that only transactions resulting from informed choices can result in a net increase of societal welfare; and *anti-statism* in the form of favoring private ordering over public law intrusions.²¹¹ The anti-statism default underlying the law of informed consent is a conceptually mild one because the interest in receiving material information with respect to possible medical treatments is one that the state recognizes and protects by permitting a private common-law right of action. But informed consent's respect for these three values—which are also influential in defining the protections of other areas of common law, such as fraud and misrepresentation—are consistent with the *Lochner* Court's protections for “the rights of individuals” to make decisions “upon such terms as they may think best.”²¹²

²⁰⁷ Campbell, *supra* note 121, at 252-53.

²⁰⁸ *See id.* at 276.

²⁰⁹ *Id.* at 260.

²¹⁰ *See id.* at 291-92 (“[At the Founding,] [t]he common law was probative, in part, because it helped define the natural-law boundaries of natural rights. . . . [N]atural law itself provided little guidance about how to resolve difficult legal questions. Instead, lawyers and judges used a system of customary legal rules known as the common law. . . . [And] customary positive law helped reveal the proper scope of natural liberty.”).

²¹¹ *See* David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 383-84 (2003); *see also* Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 901 (1994).

²¹² *Lochner v. New York*, 198 U.S. 45, 61 (1905).

C. *Faint-Hearted Lochnerism's Deference to Private Common Law*

Finally, although the private law foregrounding version of Lochnerism shares many of the values of the original version, including a more formal relation between “regulatory power” and “the redress of harms recognized at common law,”²¹³ it departs in one important respect: precedential stability. A judicial system where federal courts addressing constitutional questions rely more on private law is a safer system for that private law.

As discussed in Section I.A, “Lochnerphobia”²¹⁴ today is very different from what it was at the time of the *Lochner* decision itself. Holmes’s general proceduralist concerns have given way to a specific ideological critique. This shift has occurred primarily because many of those making the ideological critique are unwilling to accept all that a proceduralist critique of *Lochner* would portend. As Professor David Strauss argues, “for anyone who generally accepts the role that the Supreme Court plays today, the argument that *Lochner* is wrong cannot draw—as it did during the New Deal—on a general skepticism about the legitimacy and efficacy of judicial review.”²¹⁵ For better or worse, the legal academy and the Supreme Court no longer practice across-the-board Frankfurterian “judicial abstinence,” specifically when it comes to the First Amendment.²¹⁶

In a world where no judges fear their own power, doctrinal rules that favor the common law are its only hope against constitutional law. A doctrine that compelled courts to be more solicitous of longstanding private common law in constitutional cases would embed respect for that law in constitutional decision-making more generally. And the primary limits on social and economic interactions would be set not by the Constitution, but by private rights of action—another faintly Lochnerist result.

IV. THE LIMITS OF PRIVATE COMMON LAW

As argued in Part II, the common law doctrines of fraud, misrepresentation, informed consent, and warranty are useful in examining issues regarding compelled commercial speech because much of the doctrine of compelled speech was built on the same private interests that the common law claims are intended to protect. However, when the theory of faint-hearted First Amendment Lochnerism is expanded to other areas of First Amendment concern, it is not

²¹³ Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 877 (1987).

²¹⁴ “Lochnerphobia” is David Bernstein’s term. David Bernstein, *Justice Breyer, Lochner-phobe*, WASH. POST: VOLOKH CONSPIRACY (Jan. 12, 2017, 8:09 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/12/justice-breyer-lochner-phobe/?utm_term=.84e163aa82b7.

²¹⁵ Strauss, *supra* note 211, at 378.

²¹⁶ *See id.* at 379; Mark Tushnet, *Introduction: Reflections on the First Amendment and the Information Economy*, 127 HARV. L. REV. 2234, 2237-39 (2014) (implying that First Amendment scholars are more solicitous of aggressive judicial review than those working in other areas of constitutional law).

difficult to imagine those scenarios in which private law analogues are either inapposite or inappropriate for use in analyzing government interferences with speech. These scenarios can be roughly sorted into two categories: those cases in which foregrounding private law would grant governments significantly greater leeway in interference with speech, and those in which no private law analogue applies to the government regulation of speech at issue.

Additionally, there are also those areas in which the First Amendment has already asserted significant influence over private law, namely privacy and defamation. In those areas, the methodology proposed in this Article gives legitimate cause for concern. Assume a government attempts to justify its suppression of speech by arguing that the speech at issue could be the basis for liability under the private common law of privacy or defamation and thus is regulable without offending the First Amendment. Would foregrounding private law as a part of First Amendment analysis, as proposed in this Article, de-constitutionalize the common law in those areas—and thus drastically expand the government’s power to bar speech?

A. *Property-Based Common-Law Rights and the First Amendment*

Though courts already invoke tort- and contract-related principles to a great extent in speech-related cases, other areas of private law are less consistent matches with the values and justifications underlying the First Amendment. This is most immediately apparent with respect to the common law of property.

As noted in Section II.A, takings jurisprudence, which “has traditionally been guided by the understandings of our citizens regarding the content of, and the State’s power over, the ‘bundle of rights’ that they acquire when they obtain title to property,” uses common-law property principles as a boundary setter for government power.²¹⁷ Using property law to address First Amendment questions, however, leads to inconsistent results. When analyzing government interference with a speaker’s use of her *own* property, the common-law right to exclusive possession does well. For example, in *Linmark Associates, Inc. v. Township of Willingboro*,²¹⁸ the Supreme Court held that it was impermissible under the First Amendment for a town’s ordinance to bar property owners from posting “Sold” or “For Sale” signs on their property.²¹⁹ The Court held that the ordinance failed to survive intermediate scrutiny analysis for restrictions on commercial speech established in *Virginia Board*.²²⁰ Nowhere in its opinion, however, did the Court place any decisional weight on the fact that the owners/petitioners wanted to place the “Sold” and “For Sale” signs on their own property. Under the methodology this Article proposes, which foregrounds private rights, the right of exclusive possession and the legal interests protected

²¹⁷ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

²¹⁸ 431 U.S. 85 (1977).

²¹⁹ *Id.* at 97.

²²⁰ *Id.* at 92-97.

by the torts of trespass and nuisance affirms the landowner's First Amendment right to place such a sign in her yard.²²¹

Foregrounding property rights is helpful in First Amendment cases involving government restrictions on the use of data as well. In *Sorrell*, Vermont sought to place restrictions on pharmacies' dissemination of prescription-related information they collected pursuant to prescribing drugs if that data was to be used by pharmaceutical manufacturers and their marketers for marketing purposes.²²² Because the restriction applied only to pharmaceutical representatives who used the data to market their companies' drugs to prescribing doctors, the Court found that it constituted speaker-based discrimination.²²³ The Court also held, confusingly, that the restriction on the data's use did not survive the intermediate scrutiny standard for commercial speech—a standard that does not take the speaker's identity into account.²²⁴ As in *Linmark*, a property law-based foregrounding provides a more straightforward conclusion with respect to the First Amendment issue: the data at issue belonged to the pharmacies, and restrictions on the use of that data would offend the common-law right to free alienability of that property.²²⁵ There could be circumstances under which a third party might have significant privacy-related interests in data that is in the possession of another party, and thus, a narrowly tailored restriction on the free alienability of that data might be appropriate on that ground.²²⁶ But the default, common-law-informed First

²²¹ Background principles of common-law doctrines of property and conversion also do analytical work in the Court's First Amendment cases involving union agency fees; the Court's conclusion that the union's use of those fees is limited by the First Amendment rights of the fee-paying workers is driven by a "traditional understanding . . . of fees as employee property paid by workers to unions." Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 HARV. L. REV. 1046, 1047 n.9, 1069-70 (2018) ("If we treat fees as employee money or property . . . then the questions of compelled speech and association arise.").

²²² *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 558-60 (2011).

²²³ *Id.* at 563-64; see also Ashutosh Bhagwat, *Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 857-58 (2012).

²²⁴ *Sorrell*, 564 U.S. at 572.

²²⁵ See *id.* at 569 (finding information restricted by Vermont statute "is in the hands of pharmacies and other private entities"). The Court's suspicion of the statute on the ground that it barred the use of prescribing data for marketing purposes but not other purposes could be relevant to the alienability analysis as well. Cf. John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 93-94 (1996) (stating that a "[r]estriction[] on information-producing property" that is "underinclusive in that it is not generally applied to other uses of the property that have similar effects . . . would violate a property-based understanding of the First Amendment").

²²⁶ See Bhagwat, *supra* note 223, at 871-72; see also Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 112-13 (2014) (arguing that government protections of individual interests in seclusion and confidentiality of certain relationships could survive First Amendment review). By contrast, the information that the Vermont statute at issue in *Sorrell* restricted

Amendment rule proposed by this Article could still apply with respect to *Sorrell*: A private party could not restrict the pharmacies' use of their prescribing data, including its conveyance, and thus the government could not either.

So, in both *Linmark* and *Sorrell*, private law principles of common-law property lead to the same speech-affirming result as intermediate scrutiny commercial speech doctrine in a much more straightforward manner. The government cannot interfere with speech on one's property in the same way that a private individual could not.

However, foregrounding private law in government speech restrictions on *its own* property leads to a very different result. The entire point of public forum doctrine is to *restrict* the government's rights to exclusive possession by the private property owner when citizens use government property for speech. "[T]he First Amendment 'has no part to play' in the general application of trespass law to protestors, because private landowners may, unlike the government, exclude speakers from their property for any reason, including their disagreement with the content of the speaker's message."²²⁷ Absent a reconceptualization of the public forum doctrine that took seriously the "First Amendment easement" basis for protecting private speech on public property, treating the common-law rights of exclusive possession of government landowners as coextensive with those of private landowners would permit far too much interference with speech.²²⁸

B. *Constitutionalized Common Law*

Based on the discussion above, one might be drawn to the distinction between compelled disclosures and speech restrictions in deciding the proper role of common law in First Amendment questions. Private common law should play a much greater role in disclosure-based cases, especially since a common-law decisional model that looked too far back into the past for the relevant private law could potentially result in the deconstitutionalization of the communicative torts. But a closer look at those cases, along with a flexible approach to the decisional model that would treat the constitutionalization of private law claims *as part of the common law* relating to those claims, allays that admittedly serious concern. With this point in mind, even under the decision model proposed in this Article that foregrounds the common law, governments would be unable to suppress speech for privacy or reputational reasons to any greater degree than they can now.

concerned what drugs doctors were prescribing, not the identities of those individuals to whom drugs were being prescribed. *Sorrell*, 564 U.S. at 558-59.

²²⁷ Richards, *supra* note 61, at 1186-87 (quoting *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976)).

²²⁸ See Stone, *supra* note 58, at 93.

1. The Privacy Torts

One might argue that the private law decisional model would lead to different results in cases like *Snyder v. Phelps*²²⁹ and *Hustler Magazine, Inc. v. Falwell*,²³⁰ in which the Court held that recovery in intentional infliction of emotional distress claims is limited by the First Amendment. Would the longstanding availability of a state law intentional infliction of emotional distress claim in Maryland weaken the “matter[] of public concern” defense based on the First Amendment that led the Court to conclude Fred Phelps and his Westboro Baptist Church could not be held liable?²³¹

A yes-or-no answer to that question does not take proper account of the ways in which private common law is *itself* limited in speech-favorable ways. If a state law tort claim includes a public-interest-based “privilege to interfere” with the legal interest that a tort protects, then the tort claim would be resolved in favor of the speaker-defendant.²³² In the analogous area of public disclosure of private facts, Professor Alan Garfield has shown that “even before the First Amendment was invoked in private-facts cases, the common law recognized a First Amendment-like defense to the tort: no liability arises if the information disclosed is ‘of legitimate concern to the public.’”²³³ In other words, the common-law version of the public disclosure of private facts tort included a requirement that the matter disclosed not be newsworthy well before that element was turned by federal courts into a “constitutional requisite[].”²³⁴

It is obviously the case that state courts can—and certainly do—modify their private law in light of the speech-protective considerations that federal courts bring to bear in cases involving speech torts.²³⁵ The same is true with respect to some contract-based claims, in particular breaches of promises of confidentiality.²³⁶ As discussed below with respect to defamation,

²²⁹ 562 U.S. 443, 458-59 (2011).

²³⁰ 485 U.S. 46, 53-56 (1988).

²³¹ *Snyder*, 562 U.S. at 450-51.

²³² Anderson, *supra* note 107, at 1512.

²³³ Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 320-21 (1998) (quoting RESTATEMENT (SECOND) OF TORTS § 652D(b) (AM. LAW INST. 1977)); *see also* Spahn v. Julian Messner, Inc., 221 N.E.2d 543, 544-45 (N.Y. 1966).

²³⁴ Anderson, *supra* note 107, at 1508; *see* *Briscoe v. Reader’s Digest Ass’n*, 483 P.2d 34, 43 (Cal. 1971) (in bank), *overruled on other grounds by* *Gates v. Discovery Commc’ns, Inc.*, 101 P.3d 552 (Cal. 2004).

²³⁵ Anderson, *supra* note 107, at 1536-38.

²³⁶ *See, e.g.*, Richards, *supra* note 61, at 1201-02. Despite the general rule that there is no First Amendment defense to a breach of confidentiality claim, there might be reason to find a particular nondisclosure agreement void for public policy and thus unenforceable, depending on the content of the information that the non-breaching party seeks to protect from disclosure. *See* Garfield, *supra* note 233, at 266-68; *see also* Alison Frankel, *Trump NDAs Can’t Silence*

foregrounding private law also includes foregrounding any speech-protective values embedded in that private law, regardless of whether their provenance is courtesy of the First Amendment or common-law rules protecting speech on matters of public concern.

In sum, “[t]he common law has long recognized that the public has a proper interest in learning about many matters.”²³⁷ The First Amendment likely gets too much credit for helping courts arrive at this conclusion. But regardless of *how* private common law has come to protect speech, it would continue to do so under a decisional model that contemplates a larger role for that law.

2. Libel and Defamation

All the points immediately above are also true of the common law of defamation. Even before the landmark *New York Times Co. v. Sullivan*,²³⁸ there were several defenses to state law defamation claims based on longstanding common-law privileges, each with its own application and justification.²³⁹ As Professor Eugene Volokh argues, “constitutional constraints on speech-based civil liability have deep roots, stretching back to the Framing era.”²⁴⁰ Given the existence of these privileges, as well as the fact that “the common law operates from a deep conviction in the importance of freedom of speech,”²⁴¹ it remains an open question as to precisely how much the constitutionalization of libel law actually did to promote freedom of expression compared to what state common and statutory law²⁴² would have done alone. Other areas of First Amendment doctrine also have a pre-First Amendment common-law pedigree; for example, the law of incitement had its roots in the common law. In his analysis of Justice Holmes’s clear and present danger test, Zechariah Chafee noted that the test

Ex-White House Officials: Legal Experts, REUTERS (Mar. 19, 2018, 5:24 PM), <https://www.reuters.com/article/us-otc-nda/trump-ndas-cant-silence-ex-white-house-officials-legal-experts-idUSKBN1GV2UT> [<https://perma.cc/D2AJ-F92W>].

²³⁷ RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (AM. LAW INST. 1977).

²³⁸ 376 U.S. 254 (1964).

²³⁹ See, e.g., RESTATEMENT (SECOND) OF TORTS §§ 582-612 (AM. LAW INST. 1977) (discussing defenses to the tort of defamation); Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 785, 791 n.21 (1986). What is not in dispute, however, is that the Supreme Court’s intervention in *Sullivan* was justified on the ground that segregationists throughout the South had weaponized state libel law in the 1950s and 1960s to shut down “a hostile press”; during that period, “the press faced nearly \$300 million in potential liability from libel suits brought by public officials in the region.” ERIC B. EASTON, *NEW YORK TIMES V. SULLIVAN: DOCUMENTARY SUPPLEMENT 5* (2018).

²⁴⁰ Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition*, 96 IOWA L. REV. 249, 250 (2010); see also *McKee v. Cosby*, 139 S. Ct. 675, 679 (2019) (Thomas, J., concurring in denial of certiorari).

²⁴¹ Epstein, *supra* note 239, at 791.

²⁴² Though admittedly not the state common and statutory law of Alabama in the early 1960s.

“draws the boundary line very close to the test of incitement at common law and clearly makes the punishment of words for their bad tendency impossible.”²⁴³

Debates over *Sullivan*’s inviolability are thus immaterial for present purposes. As noted above with respect to the privacy torts, both pre-*Sullivan* and post-*Sullivan* limitations on civil liability apply to foregrounded private law. In analyzing a government suppression of speech supported by a state’s intent to protect individuals or groups from reputational harm, the private common law of defamation would necessarily include and recognize the speech-protective values embedded in that law.

C. *Where No Private Common Law Applies: Presumption of First Amendment Coverage*

Government action that infringes on speech is often “different . . . than similar conduct by private parties.”²⁴⁴ There are several government regulations of speech for which there is no private law analogue, and thus no common law to foreground for purposes of analyzing the regulation. The decisional model proposed here offers little assistance in analyzing the constitutionality of campaign finance regulation, for example; the government is the only party in the political speech system with the ability to limit the amount of money that individuals or groups can give to candidates, political action committees, and issue advertisers. When the government infringes upon a speech right and there is no possible civil liability for analogous private party conduct, in which direction should the absence cut?

The motivating concern behind the First Amendment and the rest of the Bill of Rights was that a national government “would be unconstrained by common-law principles and could infringe liberties in ways that private entities could not.”²⁴⁵ Consistent with that concern, for purposes of applying the methodology proposed here, constitutionality review can fill in the gap created by an absence of the common law. If the government is infringing on speech in a way only it can, it makes sense to apply a more rigorous constitutional standard of review. Such a presumption also harmonizes the approach with the rule discussed in Section II.A.1, namely that constitutional scrutiny would attach to any government attempts to compel disclosure of information that, if concealed or misrepresented, would not form a basis for private liability under the common law. Where no analogy to a private right intrusion can be made to a government infringement on speech, the First Amendment should be presumed to apply to that action.

In the context of the approach proposed in this Article, in every case where the government is affecting speech in ways only it can, finding First Amendment coverage causes much less havoc than it at first appears. Recall from Part II that

²⁴³ Zechariah Chafee Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 967 (1919).

²⁴⁴ Richard M. Re, *The Positive Law Floor*, 129 HARV. L. REV. F. 313, 314, 322 (2016).

²⁴⁵ Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 513 (1985).

properly focused government interventions to protect consumers from fraud, misrepresentation, or dangerous products, or to provide other information that facilitates individuals' exercise of informed self-autonomy in the case of informed consent, present no First Amendment concerns. And there are other domains in which relationships are embedded with asymmetrical information problems, such as employers and employees, where common-law analogues can help to preserve government interventions; the information-forcing provisions of federal labor and employment law are intended to protect the same interests as common-law fraud and misrepresentation.²⁴⁶

In addition, the presumption of constitutional review that would apply in the absence of an analogous private right infringement would not be inviolable. Like other presumptions, it would place the burden of rebuttal on the government, but some government interests could be deemed compelling enough to justify interferences with the mode or, in more limited cases, even the content of communication chosen by a particular speaker, such as an interest in eradicating discrimination in hiring or housing.²⁴⁷ The presumption could also be rebutted if, as is the case in current doctrine, the restriction in question is both generally applicable and primarily aimed at conduct rather than at speech. The government need not be limited to protecting only those interests that are also recognized and protected by the common law as against private parties. Often, the absence of relevant private law can demonstrate that the harm the government seeks to address is one only the government can attempt to remedy (i.e., imbalances in the market for political access). But when the government does seek to address such a harm, the prospect of judicial review for constitutionality ensures that it is acting as narrowly as possible to achieve its goal.

Those areas of traditional governmental regulation which the *Lochner*-phobes fear are at most risk—food labeling requirements, most securities disclosures, professional responsibility rules for lawyers, rules concerning doctor-patient confidentiality, and a host of other safety-based regulations—would all be safe from the presumption that the First Amendment applies because a foregrounding of the relevant private common law would foreclose any First Amendment challenges in those areas.²⁴⁸ And moving *toward* private law harm-based

²⁴⁶ See, e.g., Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31, 32-33, 37-38, 62 (2016); Richard P. Perna, *Deceitful Employers: Common Law Fraud as a Mechanism to Remedy Intentional Employer Misrepresentation in Hiring*, 41 WILLAMETTE L. REV. 233, 234 (2005).

²⁴⁷ See David E. Bernstein, *Sex Discrimination Laws Versus Civil Liberties*, 1999 U. CHI. LEGAL F. 133, 163-66.

²⁴⁸ See, e.g., *Reed v. Town of Gilbert*, 576 U.S. 155, 174-79 (2015) (Breyer, J., concurring in the judgment). Even those compelled securities disclosures which do not directly involve issuer statements in a public offering as to the marketability of a particular stock, such as those related to executive compensation or to other information included in proxy statements, would weigh materially on current or prospective investors' decisions with respect to whether to buy, sell, or hold.

principles also means a move *away* from a standard-of-review-setting regime which has shown itself malleable enough to threaten the constitutional validity of any regulation that may touch on speech.

V. PRIVATE LAW AND THE NEUTRALITY-BASED FIRST AMENDMENT

The debate about First Amendment Lochnerism is really a debate about power and the targets at which that power should be aimed. Driving the Lochnerism anxiety is a reading of the First Amendment that directs too much power toward entrenching the interests of the powerful. Those rebutting the Lochnerist charge view the First Amendment's power as always directed against the government, irrespective of the identity of speakers or their interests in communicating. Based on Roberts Court's application of current doctrine, formal neutrality is carrying the day.²⁴⁹ But a Speech Clause dedicated to formal neutrality still provides some reason for hope for the antisubordinationist project, especially when combined with a methodology in which private law plays a greater role.

Despite the academy's best efforts to develop a counter-Lochnerist First Amendment, unavoidable impediments stand in the way of the Amendment's ability to promote substantive equality. Professor Louis Seidman writes that the "doctrinal apparatus" of the First Amendment is so fundamentally built around notions of neutrality that "our free speech regime must, itself, be neutral as between [political] disputes."²⁵⁰ Seidman argues, "a progressive First Amendment necessarily violates the ground-level premises of American constitutionalism."²⁵¹ The Lochnerism critique is aimed at this view: neutrality with respect to speakers and their motivations necessarily preserves the status quo, and preserving the status quo is an entrenchment of subordination, not a means to undo it. And, as was the case in the *Lochner* era, this formal commitment to First Amendment neutrality has a specific price for the project of substantive equality. As Professor Jedediah Purdy notes, neutrality "protect[s]

²⁴⁹ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 394 (2010) (Stevens, J., dissenting) (reasoning that "basic premise" underlying majority's holding was "its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity"); Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2131 (2018) (quoting *Citizens United*, 558 U.S. at 394 (Stevens, J., dissenting) ("[T]he central value the [*Citizens United*] opinion vindicated was [formal] equality.")).

²⁵⁰ Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2244 (2018); see also David Cole, *Trust the First Amendment*, N.Y. TIMES, Aug. 2, 2018, at A25.

²⁵¹ Seidman, *supra* note 250, at 2245.

unequal bargaining power in the private economy from interference by government regulation.”²⁵²

Further, the *Lochner*-phobes are correct to argue that neutrality is itself a *Lochner*ist commitment. Professor Howard Gilman notes that *Lochner* upheld “a principle of neutrality”²⁵³ compelling skepticism of “legislation that bestowed government favors on certain groups at the expense of others.”²⁵⁴ And the background private law systems of tort and contract that this Article argues should play a greater role in First Amendment cases are, on their faces, ideologically neutral as well, though Professor Cass Sunstein warns of understanding “[m]arket ordering under the common law” and its associated baselines “to be a part of nature rather than a legal construct.”²⁵⁵ So would increasing the role of private rights of action in defining the boundaries of constitutional protection for speech double-down on formal neutrality? Would it take the First Amendment even further away from where the anti-*Lochner*ists would like it to go?

In many ways, private law has been more effective than constitutional law in ensuring legal outcomes that are substantively fair. For example, the common law of torts has deemed that strict liability is appropriate when a party’s activity creates a “risk of enormous damage” to others who are unable to protect themselves when that risk materializes and causes them harm.²⁵⁶ Similarly, common-law courts have developed nonenforceability rules around contracts of adhesion, meaning “where one party is ordinarily unable to negotiate any of the contract’s terms.”²⁵⁷ These are examples of contextually sensitive legal doctrines that cut against default rules that are formally neutral in their

²⁵² Purdy, *supra* note 63, at 206, 213; *see also* Jedediah Purdy, *Beyond the Bosses’ Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2176 (2018).

²⁵³ HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 61 (3d paperback ed. 2004).

²⁵⁴ James Y. Stern, *Choice of Law, the Constitution, and Lochner*, 94 VA. L. REV. 1509, 1554 (2008) (citing GILLMAN, *supra* note 253, at 10); *see also* WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 77-80, 199 (paperback ed. 1995) (“*Lochner* was] entirely consistent with the basic doctrine of American constitutionalism extracted in the preceding three decades of adjudication from the Fourteenth Amendment: that a statute which, without reason, distinguishes between two groups of similarly situated citizens is unreasonable, arbitrary, and therefore void.”).

²⁵⁵ Sunstein, *supra* note 213, at 874. *But see* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 235 n.47 (1992) (“[B]ackground [common law] systems are indifferent—blessedly—to the ideological uses to which their beneficiaries would put them.”).

²⁵⁶ *See* Dennis R. Honabach, *Toxic Torts—Is Strict Liability Really the “Fair and Just” Way to Compensate Victims?*, 16 U. RICH. L. REV. 305, 309 (1982) (quoting *Cities Serv. Co. v. State*, 312 So. 2d 799, 803 (Fla. Dist. Ct. App. 1975)).

²⁵⁷ Andrew Tutt, Note, *On the Invalidation of Terms in Contracts of Adhesion*, 30 YALE J. ON REG. 439, 442 (2013).

orientation. So private law has the capacity to promote substantive equality, at least with respect to making liability findings fairer in circumstances where asymmetry exists between the parties with respect to knowledge, expertise, bargaining power, or capacity for risk avoidance. Using private law in constitutional cases would, in theory, bring along some of those same sensitivities to power imbalances in resolving First Amendment questions. Private common law has demonstrated its ability to recalibrate when strict commitments to formal neutrality would lead to unjust results.

This methodology that foregrounds the private law is consistent with a preexisting doctrinal commitment to formal neutrality. It takes the private common law as it finds it—unlike an originalism-based commitment, there are no excavation attempts at historical public meaning that always can and will be contestable. This methodology cabins formal neutrality’s logical extremes, however, by tempering the claims of speakers asserting First Amendment protection against government intervention when those claims come up against public-protective actions that have been considered to be well within the police power. The default preference is to treat all speakers alike with respect to both speech compulsions and speech restrictions, except in those cases when some speakers or speech can cause harms to interests that the private law system has long recognized.

CONCLUSION

Courts have long treated private common law as *relevant* to First Amendment protection questions—the degree of constitutional protection for the infringed speech at issue.²⁵⁸ But private law, where it applies, should be dispositive in resolving coverage questions—whether or not the First Amendment should apply to the government’s speech-infringing action at all.²⁵⁹

There may be a certain irony in this approach, in particular in its advocacy for a *Lochner*-informed view of the First Amendment that operationally renders the Amendment subservient to longstanding rules of civil liability when the opposite has always been assumed to have been the case. But one of the approach’s virtues is in recognizing that the best way to get along with the First Amendment is to get over it. And the bridge for getting over it—for courts to reach a place where the freedom of expression can be understood and interpreted as a bulwark against government censorship in all its forms, while also recognizing and affirming the government’s power to minimize the harms that speech and silence can cause—is the private common law.

²⁵⁸ See, e.g., *Rushman v. City of Milwaukee*, 959 F. Supp. 1040, 1045 (1997) (reasoning that “[a]lthough the City can draft an ordinance that focuses on fraud, this ordinance censors more than fraud” and thus, violates First Amendment).

²⁵⁹ See Schauer, *supra* note 82, at 1767.