

2018

## The Search for an Egalitarian First Amendment

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### Recommended Citation

Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, COLUMBIA LAW REVIEW, Vol. 118, P. 1953, 2018 (2018).

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## INTRODUCTION

### THE SEARCH FOR AN EGALITARIAN FIRST AMENDMENT

*Jeremy K. Kessler\* & David E. Pozen\*\**

*Over the past decade, the Roberts Court has handed down a series of rulings that demonstrate the degree to which the First Amendment can be used to thwart economic and social welfare regulation—generating widespread accusations that the Court has created a “new Lochner.” This introduction to the Columbia Law Review’s Symposium on Free Expression in an Age of Inequality takes up three questions raised by these developments: Why has First Amendment law become such a prominent site for struggles over socioeconomic inequality? Does the First Amendment tradition contain egalitarian elements that could be recovered? And what might a more egalitarian First Amendment look like today?*

*After describing the phenomenon of First Amendment Lochnerism, we trace its origins to the collapse of the early twentieth-century “progressive” model of civil libertarianism, which offered a relatively statist, collectivist, and labor-oriented vision of civil liberties law. The recent eruption of First Amendment Lochnerism is also bound up with transformations in the economic and regulatory environment associated with the advent of “informational capitalism” and the “information state.” First Amendment Lochnerism may reflect contemporary judicial politics, but it has deep roots.*

*To figure out how to respond to the egalitarian anxieties besetting the First Amendment, it is natural to consult normative theories of free speech. Yet on account of their depoliticization and abstraction, the canonical theories prove indeterminate when confronted by these anxieties. Instead, it is a series of midlevel conceptual and jurisprudential moves that most often do the work of resisting First Amendment Lochnerism. This grammar of free speech egalitarianism, we suggest,*

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\*\* Professor of Law, Columbia Law School. For instructive comments on an earlier draft, we thank Enrique Armijo, Vince Blasi, Jessica Bulman-Pozen, Jameel Jaffer, Lina Khan, Ramya Krishnan, Henry Monaghan, Jed Purdy, Fred Schauer, Ganesh Sitaraman, Nelson Tebbe, Laura Weinrib, and Tim Wu. For their assistance with this Essay and their stewardship of the Symposium, we are especially grateful to Joseph Catalanotto, Eve Levin, Sam Matthews, Kelsey Ruescher, Jeff Stein, and Tomi Williams.

*enables the creative elaboration of a few basic motifs concerning the scope and severity of judicial enforcement, the identification and reconciliation of competing speech interests, and the quality and accessibility of the overall expressive system. If First Amendment Lochnerism is to be countered in any concerted fashion, the roadmap for reform will be found within this grammar; where it gives out, a new language may become necessary.*

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#### INTRODUCTION: THE EGALITARIAN ANXIETY

The specter of inequality haunts the American legal imagination. For an ideologically diverse range of scholars, policymakers, and activists, growing inequality names both the deep cause and the dangerous effect of a set of overlapping conflicts—economic, racial, cultural, constitutional—that threaten the stability of contemporary U.S. society. Of course, the problem of inequality is nothing new. The nation’s constitutive ideals of economic independence and democratic self-rule have long achieved realization through practices of mastery: in particular, through the power wielded by white male property owners over the nonwhite, the nonmale, and the poor.<sup>1</sup>

Given the role that material disparities have played in American political development, it is no surprise that the legal meaning of equality has proved especially contentious, or that this meaning has changed dramatically over time. Likewise, the relative priority of equality within the inventory of American constitutional values has tended to ebb and

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1. See generally Laura Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (2009); Aziz Rana, *The Two Faces of American Freedom* (2010).

flow. In the 1860s and 1960s, for instance, the dominance of equality talk heralded the collapse of preexisting racial and (in the 1960s) sexual settlements, as well as the transformation of federalism, the separation of powers, and a host of individual constitutional rights. Today, equality talk is once again at the center of the legal conversation, challenging foundational assumptions about how numerous fields of law are organized and studied and about the social functions they are meant to serve. Why?

One proximate cause is the financial crisis of 2008 and the economic disruption that followed in its wake. Congress's and the executive branch's "seemingly plutocratic response to the crisis" inspired "angry attacks by protesters on both left and right,"<sup>2</sup> from Occupy Wall Street to the Tea Party. The Supreme Court's 2010 decision in *Citizens United v. FEC*,<sup>3</sup> striking down statutory limits on corporate electioneering, compounded these concerns. By 2014, Americans had become alarmed enough to make a bestseller of economist Thomas Piketty's 700-page empirical study of capitalism and inequality, *Capital in the Twenty-First Century*.<sup>4</sup> Two years later, the antiplutocratic politics of the early 2010s found a still broader outlet in the 2016 presidential election. For a decade now, the "anxiety that the 'Great Recession' . . . defines a new economic normal,"<sup>5</sup> in which the wealthiest individuals take an ever larger piece of an ever shrinking pie, has shaped American public culture.

The conditions and aftermath of President Donald Trump's ascendancy make clear that the resurgence of antiplutocratic politics was about far more than elite mismanagement of the macroeconomy.<sup>6</sup> On the campaign trail, Trump framed his critique of postcrisis financial regulation as part of a larger and darker narrative of Wall Street capture

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2. David Singh Grewal, *The Laws of Capitalism*, 128 Harv. L. Rev. 626, 626 (2014) [hereinafter Grewal, *Laws of Capitalism*].

3. 558 U.S. 310 (2010). We discuss *Citizens United* infra section III.B.

4. Thomas Piketty, *Capital in the Twenty-First Century* (Arthur Goldhammer trans., 2014); see also David Singh Grewal & Jedediah Purdy, *Inequality Rediscovered*, 18 *Theoretical Inquiries L.* 61, 61 (2017) [hereinafter Grewal & Purdy, *Inequality Rediscovered*] ("Thomas Piketty's *Capital in the Twenty-First Century* . . . at once produced and symbolized a new public awareness of economic inequality.").

5. Grewal, *Laws of Capitalism*, supra note 2, at 626.

6. For a well-sourced, if contested, history of the financial crisis's management by U.S. officials, see generally Ron Suskind, *Confidence Men: Wall Street, Washington, and the Education of a President* (2011). For a more comprehensive analysis of the relationship between U.S. politics and international political economy during the crisis years, see generally Adam Tooze, *Crashed: How a Decade of Financial Crises Changed the World* (2018).

and American decline.<sup>7</sup> “Pikettymania”<sup>8</sup> revolved around the stark neo-Marxist claim that “capitalism automatically generates arbitrary and unsustainable inequalities that radically undermine the meritocratic values on which democratic societies are based.”<sup>9</sup> And from Black Lives Matter to No More Deaths to #MeToo to Medicare for All to transgender liberation to the Fight for Fifteen to the Dreamers to the Campaign to End the New Jim Crow, a wave of social movements have mobilized to reveal and redress the myriad structures of oppression confronting particular groups. It is out of this decade of struggle that what we call the “egalitarian anxiety” has emerged. This anxiety joins the unexpected traumas of national economic failure and widening economic insecurity to the all-too-predictable persistence of racial, ethnic, and gender subordination.

New evidence on the extent of American inequality comes out constantly. In 1978, the wealthiest 0.1% of American households held 7% of the nation’s wealth.<sup>10</sup> By 2012, that number had more than tripled.<sup>11</sup> Today, the richest 160,000 or so families in the United States possess as much wealth as the 144 million poorest families combined.<sup>12</sup> Between the top 0.1% and the bottom 90%, there stands what the *Atlantic* recently dubbed “The New American Aristocracy”: “a well-behaved, flannel-suited crowd of lawyers, doctors, dentists, mid-level investment bankers, M.B.A.s with opaque job titles, and assorted other professionals.”<sup>13</sup> These aristocrats-by-degree account for the majority of American wealth, more than the top 0.1% and the bottom 90% put together.<sup>14</sup> And while the institutions and communities that rear the new aristocracy often define themselves in terms of merit and cultural pluralism, the class they are reproducing is in fact a bastion of white power. “African Americans represent 1.9 percent of the top 10th of households in wealth; Hispanics, 2.4 percent; and all other minorities, including Asian and multiracial individuals, 8.8 percent—even

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7. See Rebecca Berg, *Trump’s Wall Street Picks Clash with Populist Campaign*, RealClearPolitics (Dec. 1, 2016), [http://www.realclearpolitics.com/articles/2016/12/01/trumps\\_wall\\_street\\_picks\\_clash\\_with\\_populist\\_campaign\\_132473.html](http://www.realclearpolitics.com/articles/2016/12/01/trumps_wall_street_picks_clash_with_populist_campaign_132473.html) [https://perma.cc/FFF8-7C97]; Adam Thorp, *As Warren Says, Trump Is No Fan of Post-Crisis Wall Street Regulations*, Politifact (July 5, 2016), <http://www.politifact.com/truth-o-meter/statements/2016/jul/05/elizabeth-warren/warren-says-trump-no-fan-post-crisis-wall-street-r> [https://perma.cc/A594-SKEG].

8. Alan S. Blinder, ‘Pikettymania’ and Inequality in the U.S., *Wall St. J.* (June 22, 2014), <http://www.wsj.com/articles/alan-blinder-pikettymania-and-inequality-in-the-us-1403477052> (on file with the *Columbia Law Review*).

9. Piketty, *supra* note 4, at 1.

10. Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 *Q.J. Econ.* 519, 520 (2016).

11. *Id.*

12. *Id.* at 520–21, 551–52.

13. Matthew Stewart, *The 9.9 Percent Is the New American Aristocracy*, *Atlantic* (June 2018), <http://www.theatlantic.com/magazine/archive/2018/06/the-birth-of-a-new-american-aristocracy/559130> [https://perma.cc/D3FV-Y9GB].

14. *Id.*

though those groups together account for 35 percent of the total population.<sup>15</sup> The median net worth of a white family in the United States is \$134,000, versus \$11,000 for the median black family.<sup>16</sup> In Boston, home to the greatest density of higher education institutions in the country,<sup>17</sup> the median net worth of a nonimmigrant black household is \$8.<sup>18</sup>

There is a certain irony to this profusion of data on inequality, in that it is mainly manufactured and read by the new aristocracy itself. Yet this privileged group has ample reason to worry as well. Competition within the 9.9% is fierce, and only the highest ranks can comfortably absorb the rising costs of education, healthcare, housing, and environmental security that intraclass competition helps to produce.<sup>19</sup> Meanwhile, every elite has something to fear from the social breakdown that such costs may precipitate when populations simply cannot pay, or are forced to pay in more gruesome currencies.

Accordingly, a solidarity of fear—however partial or impermanent—has taken hold. It is under these conditions that the egalitarian anxiety becomes an almost inescapable motivation for conscious and conscientious legal thought. To dub our moment *the* age of inequality would require the fabrication of too many golden ages to count. But it is indeed an age of profound positional and distributional anxiety, an age when enduring, escalating, and intersectional forms of inequality have become a central object of legal study and reform.

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In less than ten years, the egalitarian anxiety has made inroads across the legal academy. One of the most dramatic manifestations is the economic turn in constitutional theory and history, as the Great Recession stirred a number of scholars to diagnose these fields' persistent neglect of considerations of economic justice,<sup>20</sup> and to begin to rectify that neglect. Today,

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15. *Id.*

16. Dedrick Asante-Muhammad et al., Inst. for Policy Studies & Prosperity Now, *The Road to Zero Wealth: How the Racial Wealth Divide Is Hollowing Out America's Middle Class* 6 (2017), [http://ips-dc.org/wp-content/uploads/2017/09/The-Road-to-Zero-Wealth\\_FINAL.pdf](http://ips-dc.org/wp-content/uploads/2017/09/The-Road-to-Zero-Wealth_FINAL.pdf) [<https://perma.cc/YKH6-794L>].

17. Denis M. McSweeney & Walter J. Marshall, *The Prominence of Boston Area Colleges and Universities*, *Monthly Lab. Rev.*, June 2009, at 64, 67.

18. Ana Patricia Muñoz et al., Fed. Reserve Bank of Bos., *The Color of Wealth in Boston* 20 tbl.9 (2016), <http://www.bostonfed.org/-/media/Documents/color-of-wealth/color-of-wealth.pdf> [<https://perma.cc/C5Q2-JLR5>].

19. See, e.g., Steven Brill, *Tailspin: The People and Forces Behind America's Fifty-Year Fall—and Those Fighting to Reverse It* 17–46 (2018); Daniel Markovits, *Yale Law School Commencement Address: A New Aristocracy* (May 2015), <http://lawyale.edu/system/files/area/departments/studentaffairs/document/markovitscommencementrev.pdf> [<https://perma.cc/HCY3-64V6>].

20. See Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 *Cornell L. Rev.* 1445, 1466–94 (2016).

the relationship between constitutional law and economic inequality—or “constitutional political economy” more broadly<sup>21</sup>—represents one of the most generative subjects of constitutional scholarship, supplanting to some extent the legal-liberal preoccupation with describing and defending variants of living constitutionalism.<sup>22</sup> While the economic turn in constitutional scholarship is particularly stark, considerations of social and material inequality have also galvanized research in fields more accustomed to thinking about the economic side of power. These include administrative law,<sup>23</sup> antidiscrimination law,<sup>24</sup> antitrust law,<sup>25</sup> banking law,<sup>26</sup> consumer law,<sup>27</sup> corporate law,<sup>28</sup> criminal law,<sup>29</sup> employment law,<sup>30</sup> environmental law,<sup>31</sup> family law,<sup>32</sup>

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21. See Joseph Fishkin & William E. Forbath, *Wealth, Commonwealth, and the Constitution of Opportunity*, in *Wealth: NOMOS LVIII* 45, 46 (Jack Knight & Melissa Schwartzberg eds., 2017) (emphasis omitted); Jeremy K. Kessler, *The Political Economy of “Constitutional Political Economy,”* 94 *Tex. L. Rev.* 1527 *passim* (2016) [hereinafter Kessler, *Political Economy*].

22. In the past four years alone, important works on constitutional political economy have proliferated. E.g., Christine Desan, *Making Money: Coin, Currency, and the Coming of Capitalism* (2014); Risa Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s* (2016); Sophia Z. Lee, *The Workplace Constitution: From the New Deal to the New Right* (2015); Reuel Schiller, *Forging Rivals: Race, Class, Law, and the Collapse of Postwar Liberalism* (2015); Ganesh Sitaraman, *The Crisis of the Middle-Class Constitution: Why Economic Inequality Threatens Our Republic* (2017); Karen M. Tani, *States of Dependency: Welfare, Rights, and American Governance, 1935–1972* (2016); Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 *U. Pa. J. Const. L.* 419 (2015); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 *B.U. L. Rev.* 669 (2014); Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 *Calif. L. Rev.* 323 (2016); Symposium, *The Constitution and Economic Equality*, 94 *Tex. L. Rev.* 1287 (2016); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 *Law & Contemp. Probs.*, no. 4, 2014, at 195 [hereinafter Purdy, *Neoliberal Constitutionalism*].

23. E.g., K. Sabeel Rahman, *Democracy Against Domination* (2016); David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 *U. Pa. L. Rev.* 1097 (2017).

24. E.g., Cary Franklin, *The New Class Blindness*, 128 *Yale L.J.* 2 (2018).

25. E.g., Lina Khan, Note, *Amazon’s Antitrust Paradox*, 126 *Yale L.J.* 710 (2017).

26. E.g., Mehrsa Baradaran, *How the Other Half Banks: Exclusion, Exploitation, and the Threat to Democracy* (2015).

27. E.g., Anne Fleming, *City of Debtors: A Century of Fringe Finance* (2018).

28. E.g., *Corporations and American Democracy* (Naomi R. Lamoreaux & William J. Novak eds., 2017).

29. E.g., Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (rev. ed. 2012); James Forman Jr., *Locking Up Our Own: Crime and Punishment in Black America* (2018).

30. E.g., Deborah Dinner, *Beyond “Best Practices”: Employment-Discrimination Law in the Neoliberal Era*, 92 *Ind. L.J.* 1059 (2017); Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 *Harv. L. & Pol’y Rev.* 479 (2016).

31. E.g., Jedediah Purdy, *After Nature: A Politics for the Anthropocene* 45–50 (2015).

32. E.g., Katherine Franke, *Wedlocked: The Perils of Marriage Equality* (2015); Emily J. Stolzenberg, *The New Family Freedom*, 59 *B.C. L. Rev.* 1983 (2018).

human rights law,<sup>33</sup> intellectual property law,<sup>34</sup> labor law,<sup>35</sup> and law and technology.<sup>36</sup>

And then there is the First Amendment. Following the 2008 financial crisis, the Roberts Court handed down a series of rulings that demonstrated the degree to which the First Amendment can be used to thwart economic and social welfare regulation—generating widespread accusations that the Court had created a “new *Lochner*.”<sup>37</sup> The freedoms of speech, association, and religion have long been touted as the last nonviolent weapons by which the downtrodden can contest their subordination.<sup>38</sup> But in cases such as *Citizens United*,<sup>39</sup> *Sorrell v. IMS Health Inc.*,<sup>40</sup> *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*,<sup>41</sup> *McCutcheon v. FEC*,<sup>42</sup> *Harris v. Quinn*,<sup>43</sup> and *Burwell v. Hobby Lobby Stores, Inc.*<sup>44</sup> (the latter three all decided in early to mid-2014, at the height of

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33. E.g., Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (2018).

34. E.g., Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 *UCLA L. Rev.* 970 (2012).

35. E.g., Kate Andrias, *The New Labor Law*, 126 *Yale L.J.* 2 (2016).

36. E.g., Julie E. Cohen, *Between Truth and Power: The Legal Construction of Informational Capitalism* (forthcoming 2019) (on file with the *Columbia Law Review*); Frank Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information* (2015).

37. Amanda Shanor, *The New Lochner*, 2016 *Wis. L. Rev.* 133 [hereinafter Shanor, *New Lochner*]; see also Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 *Colum. L. Rev.* 1915, 1917–18 nn.5–8 (2016) [hereinafter Kessler, *Early Years*] (collecting sources published from 2011 to 2016 that suggest the First Amendment has been “hijacked” by antistatist, economically libertarian interests).

38. See, e.g., Thomas I. Emerson, *The System of Freedom of Expression* 7 (1970) (discussing the “safety valve” function of the First Amendment); Steven H. Shiffrin, *Dissent, Injustice, and the Meanings of America* 128 (1999) (arguing that dissenters ought to be put “at the center of the First Amendment tradition” and that the “dissent model” of the First Amendment “has a strong political tilt against the unjust exercise of power”).

39. *Citizens United v. FEC*, 558 U.S. 310 (2010) (striking down on First Amendment grounds federal restrictions on corporate “electioneering communications”).

40. 564 U.S. 552 (2011) (striking down on First Amendment grounds a Vermont law restricting the sale and disclosure of physicians’ prescription records).

41. 564 U.S. 721 (2011) (striking down on First Amendment grounds an Arizona law awarding “matching funds” to publicly funded candidates for state office whose privately funded opponents spend over a certain amount).

42. 134 S. Ct. 1434 (2014) (striking down on First Amendment grounds aggregate limits on federal campaign contributions).

43. 134 S. Ct. 2618 (2014) (striking down on First Amendment grounds the agency-fee provision of Illinois’s Public Labor Relations Act).

44. 134 S. Ct. 2751 (2014) (striking down under the Religious Freedom Restoration Act of 1993 (RFRA) federal regulations requiring closely held for-profit corporations to provide contraceptive coverage for their employees); see also *Beckwith Elec. Co. v. Sebelius*, 960 F. Supp. 2d 1328, 1351 (M.D. Fla. 2013) (describing RFRA as the First Amendment’s “statutory corollary”); Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 *Mich. L. Rev.* 169, 172 n.11 (2015) (“*Hobby Lobby* was decided under [RFRA] but was quasi-constitutional in its reasoning and closely allied with the Court’s free exercise jurisprudence.” (footnote omitted)).



Pikettymania), the Court seemed to transform those weapons of the weak into one more resource that wealthy interests could deploy to preserve their advantages. From this point of view, the Roberts Court not only got the relevant civil liberties law wrong; it also displayed a reactionary commitment to using that law to entrench inequality in the face of a bruising recession.

Four years later, the Roberts Court's "Lochnerian" application of civil liberties law continues unchecked,<sup>45</sup> leaving students of the First Amendment with more questions than answers. This introductory Essay to the *Columbia Law Review's* 2018 Symposium, "A First Amendment for All? Free Expression in an Age of Inequality," takes up three such questions:<sup>46</sup> Why has First Amendment law become such a prominent site for struggles over socioeconomic inequality? Do First Amendment theory and precedent contain egalitarian elements that can be recovered? And what might a more egalitarian First Amendment look like today? The latter two questions also motivate the Symposium contributions published in the pages that follow. While a flurry of recent scholarship has helped to identify and critique the emergence of a substantively inegalitarian First Amendment, the search for a constitutionally compelling alternative has only just begun. Our aim in this Essay is to take stock of how the First Amendment arrived at this juncture and to sketch a roadmap for the legal journey ahead.

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45. See, e.g., *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (holding that requiring nonmembers of public sector unions to pay fees toward collective bargaining violates the First Amendment); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (striking down on First Amendment grounds a California law requiring pro-life pregnancy centers to provide certain factual information to patients); *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (concluding that a New York law prohibiting merchants from imposing a surcharge on credit card purchases is a "speech regulation" and remanding to the court of appeals to determine whether the law violates the First Amendment); see also *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting) (lamenting that, "not [for] the first time," the Roberts Court was "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy"); Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. Times (June 30, 2018), <http://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html> (on file with the *Columbia Law Review*) (describing *Janus* and *Becerra* as "the latest in a stunning run of victories for a conservative agenda that has increasingly been built on the foundation of free speech"). There is little cause to believe that the replacement of Justice Anthony Kennedy with Justice Brett Kavanaugh will derail this trend. See Ken White, *You'll Hate This Post on Brett Kavanaugh and Free Speech*, Popehat (July 10, 2018), <http://www.popehat.com/2018/07/10/youll-hate-this-post-on-brett-kavanaugh-and-free-speech> [<https://perma.cc/4YVK-ECBT>] (reviewing Kavanaugh's appellate opinions and concluding that "[p]eople who buy into the 'conservatives are weaponizing the First Amendment' narrative will see him as a strong [weaponizer], in that he has applied the First Amendment to [invalidate] campaign finance laws, telecommunications regulation, and other aspects of the regulatory state").

46. In keeping with the Symposium's theme, we focus on free expression and largely bracket First Amendment jurisprudence relating to the freedoms of religion, press, assembly, and petition.

## I. THE LONG ROAD TO THE ROBERTS COURT

Judicial enforcement of First Amendment rights was once thought to be among the greenest pastures in the land of legal liberalism—the ideology that came to dominate the American legal academy in the 1960s and that sought to defend both the postwar welfare state and its reform by the Warren Court.<sup>47</sup> Yet as explained above, a growing number of legal liberals have begun to view this pasture as a battlefield on which the most powerful socioeconomic actors occupy the highest ground.<sup>48</sup> Scholars who share this anxious assessment disagree about the extent to which First Amendment inegalitarianism should be attributed to long-term trends in American political economy and civil liberties law or, instead, to a relatively recent doctrinal and ideological rupture with the past.<sup>49</sup> Those scholars who believe such a rupture has taken place, meanwhile, differ as to its timing. Cases decided by the Roberts Court, the Rehnquist Court, the Burger Court, and even the Stone Court have been singled out as the inflection point when First Amendment doctrine took its inegalitarian turn.<sup>50</sup> Beneath these debates about causation and chronology, however, lies a set of core propositions affirmed by nearly all participants: first, that there exists an inegalitarian tendency within First Amendment jurisprudence; second, that this tendency has become ever more pronounced during the Roberts Court era;<sup>51</sup> and third, that First

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47. See generally Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (1991); Laura Kalman, *The Strange Career of Legal Liberalism* (1996); Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (1995).

48. See *supra* note 37 and accompanying text.

49. Compare, e.g., Kessler, *Early Years*, *supra* note 37, at 1922 (arguing that “contemporary critics of First Amendment Lochnerism have overstated the phenomenon’s novelty and understated the economically libertarian tendencies that may be intrinsic to judicial enforcement of civil liberties”), with Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, *New Republic* (June 3, 2013), <http://newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation> [<https://perma.cc/CMM6-UPJY>] [hereinafter Wu, *Right to Evade*] (arguing that the “co-opting of the First Amendment” has been enabled by “a new generation of conservative judges, who have repudiated the judicial restraint their forebears prized”).

50. Potential candidates include *Citizens United v. FEC*, 558 U.S. 310 (2010); *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 (1980); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam); *Lathrop v. Donohue*, 367 U.S. 820 (1961); *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740 (1961); and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). For further discussion of this chronology, see Kessler, *Early Years*, *supra* note 37, at 1917–22, 1992–2002.

51. See, e.g., Elizabeth Sepper, *Free Exercise Lochnerism*, 115 *Colum. L. Rev.* 1453, 1455–57 (2015); Laura Weinrib, *The Right to Work and the Right to Strike*, 2017 *U. Chi. Legal F.* 513, 533–35; Jedediah Purdy, *The Roberts Court v. America*, *Democracy* (Winter 2012), <http://democracyjournal.org/magazine/23/the-roberts-court-v-america> [<https://perma.cc/GK6U-5LGM>]; Wu, *Right to Evade*, *supra* note 49; Joseph Fishkin & William E. Forbath, *Constitutional Political Economy When the Court Is to the Right of the Country*, *Balkinization* (June 28, 2018), <http://balkin.blogspot.com/2018/06/constitutional-political->

Amendment inequality is particularly potent in the economic realm.

A. *First Amendment Lochnerism*

It is thanks to this third proposition that egalitarian anxieties about the First Amendment have come to be spelled out in the language of “Lochnerism.” By invoking the Supreme Court’s 1905 ruling in *Lochner v. New York*,<sup>52</sup> legal theorists and practitioners suggest that today’s First Amendment jurisprudence serves a function similar to the early twentieth century’s Fourteenth Amendment jurisprudence.<sup>53</sup> In both cases, the argument goes, we see the federal courts using a select set of individual rights to protect the privileges of the economically powerful and to resist legislative and executive efforts to advance the interests of the economically marginal. Lochnerism provides a particularly vivid trope, or heuristic, with which to criticize judicial decisions that entrench economic inequality.<sup>54</sup>

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economy-when.html [https://perma.cc/H85Q-D6J8]; cf. Lee Epstein et al., 6+ Decades of Freedom of Expression in the U.S. Supreme Court 9 (2018), <http://epstein.wustl.edu/research/FreedomOfExpression.pdf> [https://perma.cc/MS3C-WZ5A] (finding empirically that “[e]ven as the Roberts Court has decided a smaller number of expression cases than its predecessors, it has accepted significantly more petitions in which the government (or some other body) suppressed *conservative* expression”).

52. 198 U.S. 45 (1905). Invocations of Lochnerism generally connote not just the *Lochner* ruling but a series of Fourteenth Amendment cases decided during the first Gilded Age, including *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908); and *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

53. For judicial uses of the *Lochner* analogy, see, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 591–92, 602–03 (2011) (Breyer, J., dissenting); *Korte v. Sebelius*, 735 F.3d 654, 693 (7th Cir. 2013) (Rovner, J., dissenting). For scholarly uses and defenses of the analogy, see, e.g., Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 *Harv. C.R.-C.L. L. Rev.* 323, 323–26 (2016) [hereinafter Garden, *Deregulatory First Amendment*]; Sepper, *supra* note 51, at 1459–507; Shanor, *New Lochner*, *supra* note 37, at 183–92; Purdy, *Neoliberal Constitutionalism*, *supra* note 22, at 196–203. As Professor Leslie Kendrick describes the contemporary constitutional landscape:

[L]itigants claim immunity from laws regulating commercial conditions such as employee safety and benefits; the location and organization of businesses; the composition and labeling of foodstuffs, drugs, and commercial products; and the treatment of customers. These claims mirror *Lochner*-era claims in their structure: they posit a constitutional right, held by business interests (be they sole proprietors or corporate entities), which immunizes them from government regulation, often regulation that relies upon state interests in public health, safety, and welfare.

The difference today is that the First Amendment is so often the designated vehicle for these antiregulatory impulses.

Leslie Kendrick, *First Amendment Expansionism*, 56 *Wm. & Mary L. Rev.* 1199, 1207–09 (2015) [hereinafter Kendrick, *Expansionism*] (footnotes omitted).

54. *Lochner* comparisons have long served as a rhetorical strategy for anathematizing disfavored judicial decisions. See Jamal Greene, *The Anticanon*, 125 *Harv. L. Rev.* 379,

While shaped by the historical analogy to a previous Gilded Age, the discourse of First Amendment Lochnerism does not focus exclusively on the economy. An aggressive, libertarian First Amendment, it is increasingly recognized, has the potential to crowd out egalitarian norms across the social field, propagating inequalities of sex, gender, race, and religion along with inequalities of fiscal and cultural capital. Proponents of the *Lochner* analogy thus invoke or allude to it when criticizing a wide range of deregulatory First Amendment decisions. For example, the use of civil libertarian arguments to undermine antidiscrimination law has been identified by several scholars as a particularly worrisome form of modern-day Lochnerism.<sup>55</sup>

Nonetheless, the problem of economic power remains central to the discourse, a testament to the trauma of the Great Recession as well as to the growing popularity of the view that economic inequality intersects with and reinforces other forms of inequality. From the black–white wealth gap and residential segregation to the special burdens that socially conservative employers impose on their female employees’ access to reproductive health care, debates over economic inequality have become seemingly inextricable from debates over racial and sexual inequality. The use of the First Amendment to affirm or advance any combination of these inequalities is liable to earn the Lochnerian epithet among today’s legal liberals.

Some may find this epithet to be excessive. It is probably a stretch to claim that First Amendment law plays as direct a role in entrenching economic inequality today as substantive due process and equal protection law did in the *Lochner* era. On the other hand, there is a good deal of evidence that our conventional picture of the *Lochner* era is itself overdrawn: that the federal judiciary at the turn of the twentieth century was actually quite accommodating of new regulatory schemes aimed at ameliorating economic distress, upholding the vast majority of such schemes as valid uses of the states’ police powers or the federal government’s Commerce Clause authority.<sup>56</sup> This Essay is not the place to

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417–22 (2011). In many instances, the implied critique is simply that judges have overstepped their proper role, substituting their personal policy preferences for those of democratic majorities. Within the scholarly discourse of First Amendment Lochnerism, however, the comparison tends to be more substantive, criticizing not only imperious judges but also the programmatic use of individual rights to achieve deregulatory outcomes that favor well-capitalized parties. See Kessler, *Early Years*, supra note 37, at 1917–25, 1992–2004. The use of the term “Lochnerism” more or less as an antonym of “egalitarianism” elides any number of historical and conceptual complexities, see sources cited infra note 56, but it remains a central feature of this discourse.

55. See, e.g., Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 *Stan. L. Rev.* 1205 (2014); Sepper, supra note 51; Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 *Harv. L. & Pol’y Rev.* 25 (2015).

56. See generally David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform* (2011); Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (1998); Howard Gillman, *The*

hash out this historical dispute. Suffice it to say here that perception goes a long way in the law. The egalitarian critiques that currently swirl around cases like *Citizens United*, *Hobby Lobby*, and *Janus* may one day be taught together with—and enjoy the same cachet as—the classic legal-realist and progressive critiques leveled against cases like *Allgeyer*, *Adair*, and *Lochner*.

Whatever the future may bring, it is instructive to ask where the language of First Amendment *Lochnerism* comes from. Why have free expression and free exercise cases come to be linked with these long-buried due process and equal protection cases? Why is First Amendment doctrine increasingly seen as our “*Lochner*,” our symbol of law’s complicity in plutocracy?

#### B. *The Rise and Fall of Progressive Civil Libertarianism*

The answer to these questions becomes slightly less mysterious in light of recent revisionist scholarship on early twentieth-century civil liberties law. According to the revisionists, the “traditional” model of civil liberties law as the judicial enforcement of individuals’ noneconomic rights against state interference was itself a rightward departure from the progressive civil libertarianism of the initial decades of the twentieth century. Prior to World War II, revisionists maintain, the progressive lawyers, administrators, and activists who first championed federal protection of civil libertarian rights did so in the hope of building a more economically just, culturally pluralistic society.<sup>57</sup> Such a society would be typified by a strong labor movement; by a powerful but porous

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Constitution Besieged: The Rise and Demise of *Lochner* Era Police Powers Jurisprudence (1993); Claudio J. Katz, Protective Labor Legislation in the Courts: Substantive Due Process and Fairness in the Progressive Era, 31 *Law & Hist. Rev.* 275 (2013).

57. Significant works of revisionism include Megan Ming Francis, *Civil Rights and the Making of the Modern American State* (2014); Risa L. Goluboff, *The Lost Promise of Civil Rights* (2007) [hereinafter Goluboff, *Lost Promise*]; Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (2004); Sam Lebovic, *Free Speech and Unfree News: The Paradox of Press Freedom in America* (2016); Victor Pickard, *America’s Battle for Media Democracy: The Triumph of Corporate Libertarianism and the Future of Media Reform* (2014); Laura Weinrib, *The Taming of Free Speech: America’s Civil Liberties Compromise* (2016) [hereinafter Weinrib, *Taming of Free Speech*]; John Fabian Witt, *Patriots and Cosmopolitans: Hidden Histories of American Law* (2007); William E. Forbath, *Politics, State-Building, and the Courts, 1870–1920*, in 2 *The Cambridge History of Law in America* 643 (Michael Grossberg & Christopher Tomlins eds., 2008); Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 *Colum. L. Rev.* 1083 (2014) [hereinafter Kessler, *Administrative Origins*]; Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 *Va. L. Rev.* 1 (2000); Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 *Yale L.J.* 314 (2012); Laura M. Weinrib, *Civil Liberties Outside the Courts*, 2014 *Sup. Ct. Rev.* 297 [hereinafter Weinrib, *Outside the Courts*]; Emily Zackin, *Popular Constitutionalism’s Hard when You’re Not Very Popular: Why the ACLU Turned to the Courts*, 42 *Law & Soc’y Rev.* 367 (2008); and Carrie DeCell, Note, *Deweyan Democracy and the Administrative State*, 125 *Harv. L. Rev.* 580 (2011).

administrative state, continually solicitous of and transformed by public participation; and by the privileging of collective welfare over individual interest. Federal courts—the inveterate guardians of private property and persecutors of organized labor—had little role to play in this vision. Instead, its proponents focused their energies on administrative and legislative enforcement of civil liberties, especially the liberties of workers, political dissenters, and vulnerable minorities.<sup>58</sup> Free expression and federal regulation were seen as complementary tools in the struggle for socioeconomic equality. This vision achieved its fullest embodiment in the design, staffing, and early operation of New Deal agencies such as the National Labor Relations Board (NLRB), the Federal Communications Commission (FCC), and the Civil Liberties Unit of the Department of Justice (DOJ).<sup>59</sup>

By portraying early twentieth-century civil libertarianism as a relatively statist, collectivist, and labor-oriented project, revisionist scholarship helps to clarify the institutional and ideological roots of today's First Amendment Lochnerism. For if the revisionist story is correct, then before the First Amendment could be Lochnerized, it had to be judicialized, individualized, and shorn of its prolabor bias. According to the revisionists, this is exactly what began to happen in the mid-to-late 1930s, as a coalition of conservative lawyers and businessmen took aim at those aspects of the administrative state most indebted to the progressive civil libertarian cause, such as the NLRB.<sup>60</sup> In a conscious

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58. Not all of those legal and political activists who considered themselves both “progressive” and “civil libertarian” would have agreed with every aspect of this summary account. In particular, the more radical proponents of sexual freedom and labor self-management tended to be less trusting of the administrative state as a vehicle of reform; they also occasionally scored victories in the courts. See, e.g., Laura M. Weinrib, *The Sex Side of Civil Liberties: United States v. Dennett and the Changing Face of Free Speech*, 30 *Law & Hist. Rev.* 325, 326–27 (2012) (describing litigation campaigns against the regulation of birth control and “obscene” speech); see also Weinrib, *Outside the Courts*, *supra* note 57, at 312–15 (noting that “Communists and other radicals who opposed [the National Labor Relations Act] framed their objections as civil liberties concerns” and that this framing influenced the lobbying of the American Civil Liberties Union (ACLU)). The presence of this dissenting bloc within the progressive civil libertarian coalition highlights the popularity and success that the more statist and court-skeptic fractions enjoyed during the 1930s.

59. See, e.g., Jerold S. Auerbach, *Labor and Liberty: The La Follette Committee and the New Deal* 8–11, 51–73 (1966) (discussing the NLRB's ideology); Susan L. Brinson, *The Red Scare, Politics, and the Federal Communications Commission, 1941–1960*, at 5–59 (2004) (discussing the FCC's progressive origins and the influence of “New Deal liberalism” on early FCC policies); Goluboff, *Lost Promise*, *supra* note 57, at 111–24 (discussing the formation and leadership of the Civil Liberties Unit); see also Weinrib, *Outside the Courts*, *supra* note 57, at 304 (explaining that “New Deal reformers who called for active intervention in the economy also . . . advocated adjustments in the marketplace of ideas to correct distortions stemming from inequality of access or relative power” and generally “sought to implement that vision in spite of, rather than through, the courts”).

60. See generally Weinrib, *Taming of Free Speech*, *supra* note 57, at 226–310; Kessler, *Early Years*, *supra* note 37, at 1925–36; Gillian E. Metzger, *The Supreme Court, 2016*

attempt to wrest the civil libertarian banner from the New Deal's progressive wing, this coalition argued that the administrative state, both at the national and local level, had become a threat to free expression and association, imposing ideological conformity on everyone from street preachers to corporate lobbyists.<sup>61</sup> The obvious, if hyperbolic, parallels were Nazi Germany and Soviet Russia.<sup>62</sup> To check such "administrative absolutism," the new civil libertarians called for the reassertion of judicial power—in particular, for vigorous judicial protection of every individual's rights to free expression and procedural due process, without regard to his or her relative economic power or substantive political goals.<sup>63</sup>

Despite the anti-New Deal origins of the new civil libertarianism, several factors in the late 1930s conspired to make it attractive to a growing number of moderate lawyers and politicians as well. Particularly troubling to these on-and-off New Dealers was President Franklin Roosevelt's 1937 campaign for judicial reorganization and executive consolidation, a campaign fatefully launched just as the American economy slipped back into recession and the New Deal's left flank championed an unpopular strike wave in the automobile industry.<sup>64</sup> Such domestic upheaval looked even more ominous in light of the brutal programs of fascist and communist social reform then sweeping Europe.<sup>65</sup> To curtail the more "totalitarian" tendencies of administrative governance while affirming the basic legitimacy of the New Deal, the mainstream legal community engineered a sort of Solomonic compromise, in which civil libertarian rights to free expression, political participation, religious liberty, and procedural due process were both hailed as a shield against bureaucratic domination *and* sharply distinguished from rights to economic liberty.<sup>66</sup> The former, noneconomic rights were to be guarded jealously by the federal judiciary. The latter, economic rights were to be

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Term—Foreword: 1930s Redux: The Administrative State Under Siege, 131 *Harv. L. Rev.* 1, 52–62 (2017).

61. See Weinrib, *Taming of Free Speech*, *supra* note 57, at 271.

62. See Daniel R. Ernst, *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940*, at 125–27, 137 (2014); see also Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 *Harv. L. Rev.* 718, 750 n.137 (2016) [hereinafter Kessler, *Administrative Legitimacy*] (collecting sources on the deployment of this analogy).

63. E.g., Report of the Special Committee on Administrative Law, 63 *Ann. Rep. A.B.A.* 331, 343–68 (1938).

64. See Barry D. Karl, *The Uneasy State: The United States from 1915 to 1945*, at 139, 154–58 (1983); Richard Polenberg, *Reorganizing Roosevelt's Government: The Controversy over Executive Reorganization, 1936–1939*, at 55–78 (1966).

65. See Joanna L. Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal* 18 (2012); Karl, *supra* note 64, at 168; Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* 173–82 (2013).

66. See generally Richard A. Primus, *The American Language of Rights* 177–233 (1999); Kessler, *Administrative Legitimacy*, *supra* note 62, at 757–73; Weinrib, *Outside the Courts*, *supra* note 57, at 348–60.

entrusted largely to Congress and the President, who would calibrate and recalibrate them in the interests of national prosperity and security.

Today, we associate this redistribution of individual rights and institutional responsibilities with Footnote Four of *Carolene Products*.<sup>67</sup> And that footnote is indeed a gnomic testament to the “liberal compromise”<sup>68</sup> (as Professor Laura Weinrib has labeled it) that, in 1938, was gradually displacing progressive civil libertarianism. The work of the most moderate Republicans on the Supreme Court, Justice Harlan Fiske Stone and Chief Justice Charles Evans Hughes, the footnote represented their effort to negotiate the extremes of irresponsible conservative antistatism and irresponsible progressive collectivism.<sup>69</sup>

It may seem odd to think of the advent of bifurcated review as the first step toward First Amendment Lochnerism. *Carolene Products*' hallowed distinction between civil liberty and economic liberty is precisely what First Amendment Lochnerism is said to erode.<sup>70</sup> Yet the liberal compromise of the late 1930s and early 1940s established many of the conditions, or preconditions, that would later enable First Amendment Lochnerism to thrive. It rescued the courts from decades of left-wing critique, recasting them as classless custodians of universal values. By the same token, it elevated the judiciary above the administrative state as the ultimate bulwark of republican self-government. The once reactionary framing of the administrative state as an intrinsic threat to personal freedom and private ordering—rather than the only institution capable of securing a competitive economy and fair society—was more or less accepted across the legal profession. Finally, the liberal compromise “neutralized” the theory and practice of civil libertarianism, transforming a field that had been identified, above all, with workers' rights to organize, picket, and strike<sup>71</sup> into a set of formal limitations on what democracy could demand of any individual or group. As the liberal compromise became the new orthodoxy, admitting considerations of economic power into free speech analysis began to feel more like pollution than pragmatism to the champions of bifurcated review.

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67. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

68. See generally Laura M. Weinrib, *The Liberal Compromise: Civil Liberties, Labor, and the Limits of State Power, 1917–1940* (May 1, 2011) [hereinafter Weinrib, *Liberal Compromise*] (unpublished Ph.D. dissertation, Princeton University), [http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1005&context=other\\_publications](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1005&context=other_publications) (on file with the *Columbia Law Review*). This felicitous term captures the political *defeats* that produced midcentury “liberalism.”

69. Kessler, *Early Years*, supra note 37, at 1925–56.

70. See, e.g., Suzanna Sherry, *Property Is the New Privacy: The Coming Constitutional Revolution*, 128 *Harv. L. Rev.* 1452, 1471–72 (2015) (discussing the ways in which legal liberals contrast bifurcated review with Lochnerism).

71. Weinrib, *Outside the Courts*, supra note 57, at 297.



The empowerment of the federal courts, the suspicion of administrative governance, and the insistence on formal neutrality in the enforcement of civil libertarian rights all smoothed the way for the co-optation of the First Amendment by the economically powerful. If the liberal compromise did not *more quickly* devolve into First Amendment Lochnerism, historical contingencies account for much of the delay. For instance, the political composition of the midcentury judiciary, dominated by a decade's worth of Roosevelt appointees, limited extensions of the First Amendment in obviously inegalitarian directions.<sup>72</sup> At the same time, a relatively bipartisan embrace of the logic of Cold War kept the most rabid critics of public spending and regulation on the constitutional margins. Antistatism, whether right wing or left wing, was difficult to square with the fiscal and institutional demands of "competing" with the Soviet Union for global hegemony.<sup>73</sup> Just as these factors slowed the drift toward First Amendment Lochnerism, they also help explain the real attractions of the liberal compromise. In a period of rapid economic growth and declining economic inequality,<sup>74</sup> that compromise offered left-leaning lawyers a principled basis for resisting racially discriminatory state and

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72. See Rayman L. Solomon, *The Politics of Appointment and the Federal Courts' Role in Regulating America: U.S. Courts of Appeals Judgeships from T.R. to F.D.R.*, 9 *Am. B. Found. Res. J.* 285, 323–27, 341–43 (1984) (describing the unprecedented role that judicial ideology and policy considerations played in President Roosevelt's Article III nominations following the Senate's rejection of wholesale judicial reorganization in July 1937). More than two-thirds of Roosevelt's Article III appointments—130 out of 193 total, including all nine Supreme Court appointments—occurred during the post-court-packing phase of his presidency. See *Biographical Directory of Federal Article III Judges, 1789–Present*, Fed. Judicial Ctr., <http://www.fjc.gov/history/judges> [<https://perma.cc/5GWS-LMFM>] (last visited Sept. 11, 2018). Nor did New Deal policy preferences cease to influence the bench after Roosevelt's death. Between Harry Truman's elevation to the presidency in 1945 and the election of Richard Nixon in 1968, pro-New Deal Democrats (Truman, John F. Kennedy, and Lyndon B. Johnson) appointed 443 Article III judges, while the sole Republican President during those years (Dwight D. Eisenhower) appointed 182. *Id.* It was during this period that presidential ideology displaced the traditional politics of party patronage as the dominant influence on the judicial appointment process. See David Alistair Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees 1–19* (1999) (describing this new pattern of ideological influence); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *Va. L. Rev.* 1045, 1064–80 (2001) (identifying presidential selection of federal judges on an ideological basis as the chief vehicle of "partisan entrenchment" in post-New Deal constitutional law).

73. See Aaron L. Friedberg, *In the Shadow of the Garrison State: America's Anti-Statism and Its Cold War Grand Strategy 69–75* (2000) (discussing the "stable strategic synthesis" that emerged from ideological tensions between anticommunism and antistatism in the wake of World War II); Julian E. Zelizer, *Arsenal of Democracy: The Politics of National Security—From World War II to the War on Terrorism 4–8* (2010) (elaborating on the partisan political aspects of this dynamic).

74. See David Singh Grewal, *Closing Remarks: Law and Inequality After the Crisis*, 35 *Yale L. & Pol'y Rev.* 337, 338–39 (2016) (discussing the "exceptional period" of widely shared growth from roughly 1945 to 1975 and listing the "superlatives" by which it is known in various countries).

local laws while moderating two of the most threatening aspects of Cold War political culture: the repression of dissenting voices in the name of national security and the rollback of the welfare state in the name of the free market. The conditions of moderation, however, began to erode in the 1970s, as the New Deal generation dwindled, the postwar economic boom petered out, and inflation made deregulation and austerity increasingly bipartisan commitments.<sup>75</sup> Those commitments, moreover, would no longer be checked to the same degree by arguments from national security, as failure in Vietnam precipitated a leaner and less visible national security state.<sup>76</sup> All three branches of government shifted rightward.<sup>77</sup>

While this shift was underway, the Burger Court's commercial speech,<sup>78</sup> campaign finance,<sup>79</sup> and religious funding<sup>80</sup> decisions elicited a brief flurry of scholarship warning of—or celebrating—the erosion of the distinction between civil and economic liberty.<sup>81</sup> It was at this moment that anxieties about “Lochnerization” of the First Amendment first surfaced in the law reviews.<sup>82</sup> Cases in which “individuals or groups commonly thought of as ‘conservative’ took up the First Amendment cudgels against regulatory forces supported by individuals or groups commonly thought to be ‘liberals’” began to multiply in the late 1970s and 1980s, both in the economic realm and beyond.<sup>83</sup> Yet when all was said and done, the Burger Court's transformative First Amendment jurisprudence did surprisingly little to dislodge scholarly support for the

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75. See *id.* at 339 (“Starting in the 1970s and 1980s—and continuing through to today—inequality reasserted itself, with increasing vigor . . .”); see also Judith Stein, *Pivotal Decade: How the United States Traded Factories for Finance in the Seventies*, at ix–xxii (2010) (describing both parties' rejection of midcentury political economy).

76. See Zelizer, *supra* note 73, at 234–36 (describing the politics of this change in grand strategy).

77. See Michael J. Graetz & Linda Greenhouse, *The Burger Court and the Rise of the Judicial Right 1–10* (2016) (describing the rightward shift in the courts); Laura Kalman, *Right Star Rising: A New Politics*, at xviii–xxi, 353–66 (2010) (describing the rightward shift in the political branches).

78. E.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

79. E.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*).

80. E.g., *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985); *United States v. Lee*, 455 U.S. 252 (1982); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Waltz v. Tax Comm'n*, 397 U.S. 664 (1970).

81. See, e.g., J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 *Duke L.J.* 375, 384 [hereinafter Balkin, *Some Realism*]; Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 *Va. L. Rev.* 1, 30–33 (1979); Mark Tushnet, *An Essay on Rights*, 62 *Tex. L. Rev.* 1363, 1387–88 (1984).

82. See, e.g., Jackson & Jeffries, *supra* note 81, at 30–31; Cass R. Sunstein, *Lochner's Legacy*, 87 *Colum. L. Rev.* 873, 883–84 (1987).

83. Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 *U. Colo. L. Rev.* 935, 941 (1993).

liberal compromise. During the Rehnquist Court years, from 1986 to 2005, the legal academy generally continued to treat the distinction between civil and economic liberty as sacrosanct, a precious fragment of the crumbling New Deal constitutional order, and spoke rarely about the dangers of First Amendment Lochnerism.<sup>84</sup> Such faith would be sorely tested by the Great Recession.

## II. INFORMATIONAL CAPITALISM, THE INFORMATION STATE, AND THE FIRST AMENDMENT—INDUSTRIAL COMPLEX

If Lochnerian currents were always swirling just beneath the surface of postwar First Amendment law, over the past decade they have flooded the legal landscape. The timing of this flood may seem strange from a strategic perspective. With Americans facing high unemployment, collapsing wages, and mounting household debt in the late 2000s, considerations of institutional legitimacy presumably counseled against bold judicial experiments in deregulation. The contemporaneous “rediscovery”<sup>85</sup> of economic inequality by the mass media and mainstream policy-makers cast these experiments in an especially harsh light. One does not need to read Piketty, however, to guess that equating corporations’ rights to spend money, sell data, and trim benefits with citizens’ First Amendment rights might prove controversial in a world of bank bailouts and mortgage foreclosures. Why did the Court choose such an unpropitious moment to take a wrecking ball to the already-unstable boundary between freedom of expression and freedom from economic regulation?

One answer might be that it was only shortly before the financial crisis that the Court gained the necessary votes to do so. Justice Sandra Day O’Connor and Chief Justice William Rehnquist had long resisted the expansive approach to defining and protecting commercial speech favored by their successors, Justice Samuel Alito and Chief Justice John Roberts.<sup>86</sup> When O’Connor retired in late 2005, the original vision of the liberal compromise went out the door with her. By the end of the George

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84. But cf., e.g., Daniel J.H. Greenwood, *First Amendment Imperialism*, 1999 *Utah L. Rev.* 659, 661 (“The First Amendment . . . has become the locus of a new Lochnerism—or rather, a revival of the old Lochnerism under a new doctrinal label.”); Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 *Harv. L. Rev.* 30, 109–16 (1993) (critiquing the “Lochnerization of the First Amendment” since the end of the Warren Court). A 2006 symposium in the *Northern Kentucky Law Review* brought sustained attention to “First Amendment Lochnerism” for the first time in years. See generally Symposium, *First Amendment Lochnerism? Emerging Constitutional Limitations on Government Regulation of Non-Speech Economic Activity*, 33 *N. Ky. L. Rev.* 365 (2006).

85. See generally Grewal & Purdy, *Inequality Rediscovered*, *supra* note 4.

86. See, e.g., Steven G. Calabresi, *The Libertarian-Lite Constitutional Order and the Rehnquist Court*, 93 *Geo. L.J.* 1023, 1049 (2005) (observing that in commercial speech cases in which the Rehnquist Court engaged in “Lochner-izing under the guise of the First Amendment,” the “more pro-government view [was] taken by Justices Rehnquist, O’Connor and Breyer”).

W. Bush Administration, the conservative legal movement had finally produced a Supreme Court majority sufficiently committed to First Amendment Lochnerism—or sufficiently indifferent to its inegalitarian effects—to risk popular backlash in the midst of a recession.

However plausible this electoral explanation may be, fixating on judicial personalities risks obscuring deeper connections between the political economic structure of the First Amendment disputes the Roberts Court has confronted and the deregulatory doctrines it has crafted. Recent scholarship on the political economy of our digital age suggests several factors that may have helped to catalyze First Amendment Lochnerism in the present period.<sup>87</sup>

To begin with, transformations in the capitalist system have imbued more and more economic activity with communicative content. The Roberts Court's tenure has coincided with an “ongoing shift from an industrial mode of development to an informational one,”<sup>88</sup> a shift that has radically reconfigured the processes, products, and personnel through which capital is accumulated and commodities are created and exchanged.<sup>89</sup> Synthesizing the insights of economists, political scientists, social theorists, and technologists, legal scholar Julie Cohen highlights two “fundamental transformations” bound up with our relatively recent passage from a predominantly industrial to a predominantly informational economy:

First is a movement away from an economy oriented principally toward manufacturing and related activities toward one oriented principally toward the production, accumulation and processing of information. In an information economy, the mass model of production that emerged in the industrial era is itself increasingly redirected toward development of intellectual and informational goods and services, production and distribution of consumer information technologies, and ownership of service-delivery enterprises. Second is a transformation in the conduct of even traditional industrial activity. In an information economy, information technology assumes an increasingly prominent role in

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87. As with all bodies of scholarship touched on in this Essay, we cannot remotely do justice here to the breadth or depth of this literature. Prominent book-length examples include Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (2006); Jodi Dean, *Democracy and Other Neoliberal Fantasies: Communicative Capitalism and Left Politics* (2009); Jack Goldsmith & Tim Wu, *Who Controls the Internet? Illusions of a Borderless World* (2006); Bernard E. Harcourt, *Exposed: Desire and Disobedience in the Digital Age* (2015); Pasquale, *supra* note 36; Nick Srnicek, *Platform Capitalism* (2017); and Tim Wu, *The Attention Merchants: The Epic Scramble to Get Inside Our Heads* (2016).

88. Julie E. Cohen, *The Regulatory State in the Information Age*, 17 *Theoretical Inquiries L.* 369, 370 (2016) [hereinafter Cohen, *Regulatory State*].

89. See generally 1 Manuel Castells, *The Rise of the Network Society: The Information Age: Economy, Society, and Culture* (2d ed. 2000); Dan Schiller, *How to Think About Information* (2007).

the control of industrial production and in the management of all kinds of enterprises.<sup>90</sup>

Following sociologist Manuel Castells,<sup>91</sup> Cohen identifies these developments with the rise of “informational capitalism.”<sup>92</sup> Two years into the financial crisis, political theorist Jodi Dean arrived at a similar diagnosis, warning of the rise of “communicative capitalism.”<sup>93</sup> Whatever one calls it, this emergent mode of capitalist organization is not restricted to those “new” sectors of the economy focused on the creation and exchange of data. Rather, the creation and exchange of data suffuse the manufacturing and service sectors as well.<sup>94</sup> There, the relative speed and accuracy of communication among managers, producers, and consumers become keys to maximizing return and minimizing risk.

These developments make it increasingly difficult to separate economic activity from expressive activity—and thus to maintain the distinction at the heart of the liberal compromise. A great deal of economic activity has long had some sort of communicative dimension. But as the locus of profit-making migrates from the production, accumulation, and processing of material goods to the production, accumulation, and processing of information (usually in digital form), the creation and circulation of information, as such, assumes a far more prominent role in the economy while the metaphor of information assumes a far more prominent role in the culture. Doing business in the twenty-first century means dealing with data, and because “data is expressed in alphanumeric symbols, it certainly looks a lot more like traditional speech” than, say, making steel or plowing a field.<sup>95</sup> In turn, the standard justification for affording First Amendment protection to commercial speech—that it serves the interests of listeners in making

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90. Cohen, *Regulatory State*, supra note 88, at 371 (footnote omitted).

91. See I Castells, supra note 89, at 18–21 (defining “informational capitalism”).

92. Cohen, *Regulatory State*, supra note 88, at 370–71, 414.

93. See generally Dean, supra note 87. As with other social theorists grounded in historical materialism, Castells, Cohen, and Dean do not assume a sharp break between one “mode of production” and another (whether from feudalism to capitalism, or industrial capitalism to informational capitalism). See, e.g., Cohen, *Regulatory State*, supra note 88, at 371 (noting that “the relationship between industrialism and informationalism is not sequential, but rather cumulative, and the emergence of informationalism as a mode of economic development is powerfully shaped by its articulation within capitalist modes of production”). The term “informational” or “communicative” capitalism is best understood as marking a change in the activities and technologies *most essential* to profit-making in a given social formation dominated by the capitalist mode of production. Cf. Perry Anderson, *Arguments Within English Marxism* 59–77 (1980) (discussing how a single, historically delimited social formation may exhibit variety both within and across modes of production).

94. See, e.g., Louis Columbus, *Ten Ways Big Data Is Revolutionizing Manufacturing*, *Forbes* (Nov. 28, 2014), <http://www.forbes.com/sites/louiscolumnbus/2014/11/28/ten-ways-big-data-is-revolutionizing-manufacturing> [<https://perma.cc/9Z7X-HPRH>].

95. Jane Bambauer, *Is Data Speech?*, 66 *Stan. L. Rev.* 57, 59 (2014).

informed decisions—expands to include the interests of commercial actors in imparting, or withholding, valuable information.<sup>96</sup>

An additional feature of informational capitalism extends the potential reach of First Amendment Lochnerism: the dominant role played by private owners of the platforms through which information circulates online and within which ever more data is commodified and mined for economic value. Even though they control the infrastructure of digital communication and function as the “new governors” of the digital public sphere, companies like Facebook and Google are generally assumed to not be bound by the First Amendment because they are not state actors.<sup>97</sup> Instead of empowering users to challenge their policies, the First Amendment empowers the companies themselves to challenge statutes and regulations intended to promote antidiscrimination norms or users’ speech and privacy, among other values.<sup>98</sup> First Amendment law not only fails to check the internet’s new governors and the inequalities that pervade their platforms<sup>99</sup> but also stands in the way of legislative and administrative correctives.

The *old* governors, meanwhile, face an additional set of civil libertarian obstacles as the “neoliberal” turn in public administration has gradually substituted the management of information for the policing of conduct. Neoliberalism, as the term is used here, refers to an ideology

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96. See, e.g., *id.* at 87 (arguing based on a “right to create knowledge” that “direct regulations of data should draw [First Amendment] scrutiny”); see also Heather Whitney, Knight First Amendment Inst., Search Engines, Social Media, and the Editorial Analogy 3–7 (2018), [http://knightcolumbia.org/sites/default/files/content/Heather\\_Whitney\\_Search\\_Engines\\_Editorial\\_Analogy.pdf](http://knightcolumbia.org/sites/default/files/content/Heather_Whitney_Search_Engines_Editorial_Analogy.pdf) [<https://perma.cc/6J36-AGCX>] (describing the largely successful efforts of technology companies to analogize the decisions they make about their platforms to the editorial judgments made by publishers, for purposes of claiming First Amendment protection); Jack M. Balkin, Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society, 79 N.Y.U. L. Rev. 1, 19 (2004) [hereinafter Balkin, Digital Speech] (“[B]usinesses argue [that] regulation of the distribution network is a regulation of the freedom of speech of the network owner, because the network owner ‘speaks’ through its decisions about which content to favor and disfavor.”).

97. See Kate Klonick, The New Governors: The People, Rules, and Processes Governing Online Speech, 131 Harv. L. Rev. 1598, 1610–11, 1658–59 (2018).

98. See, e.g., Jack Balkin, The Political Economy of Freedom of Speech in the Second Gilded Age, Law & Pol. Econ. (July 4, 2018), <http://lpeblog.org/2018/07/04/the-political-economy-of-freedom-of-speech-in-the-second-gilded-age> [<https://perma.cc/B9KQ-MR8D>] (“The First Amendment . . . may be a potential obstacle to laws that would try to regulate the owners of private infrastructure to protect freedom of speech and privacy. One example would be first amendment attacks on network neutrality. A second would be first amendment defenses against privacy regulations . . .”).

99. See, e.g., Olivier Sylvain, Knight First Amendment Inst., Discriminatory Designs on User Data 3, 8–16 (2018), [http://knightcolumbia.org/sites/default/files/content/Sylvain\\_Emerging\\_Threats.pdf](http://knightcolumbia.org/sites/default/files/content/Sylvain_Emerging_Threats.pdf) [<https://perma.cc/VU5V-WBRC>] (describing numerous ways in which “online engagement [is] more difficult for children, women, racial minorities, and other predictable targets of harassment and discriminatory expressive conduct”).

and mode of governance that favors “the imperatives of market economies . . . deployed to further capital accumulation” over “nonmarket values grounded in the requirements of democratic legitimacy.”<sup>100</sup> The neoliberal preference is not necessarily for “free markets” in any strict sense, but for a regulatory environment that prioritizes “familiar protections of property and contract” along with “a favorable return on investment and managerial authority.”<sup>101</sup> In our digital age, the facilitation of these preferences has fallen to the “information state,” the set of national (or international) bureaucracies that oversee the operations of informational capitalism.<sup>102</sup> Within these bureaucracies, “mandates or bans on conduct”—such as traditional labor laws, wage and price controls, or licensing regimes—are apt to be rejected as overly market-disruptive and replaced whenever possible with “lighter-touch” forms of governance . . . such as disclosure requirements” and other regulatory techniques that further the production and circulation of commercially salient information.<sup>103</sup> As Professor Amanda Shanor has detailed, one effect of this trend is to make today’s regulations “more prone to appear speech-regulating” and, hence, more vulnerable to First Amendment challenge.<sup>104</sup> Whereas banning or taxing most commercial practices (for instance, the use of “conflict minerals”) is unlikely to raise any First Amendment issues under existing law, requiring firms to publish information pertaining to these practices (for instance, through

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100. David Singh Grewal & Jedediah Purdy, Introduction: Law and Neoliberalism, 77 *Law & Contemp. Probs.*, no. 4, 2014, at 1, 2–3.

101. *Id.* at 3. The fusion of Cohen’s two “fundamental transformations”—the predominance of information as both (1) a commodity and medium of exchange and (2) a means of managing production and exchange—is most fully achieved in the financial services sector. There, securitization enables the reduction of almost any perceived inefficiency to another piece of saleable information. Scholars from across the academy have identified this primacy of financial services, underwritten by the ease of securitization in the digital marketplace, as a key feature of neoliberalism. See, e.g., David M. Kotz, *Financialization and Neoliberalism*, in *Relations of Global Power: Neoliberal Order and Disorder* 1, 1 (Gary Teeple & Stephen McBride eds., 2011) (“A common view is that the rise of neoliberalism is explained by the growing role and power of finance in the political economy of capitalism.”); Marc Lavoie, *Financialization, Neo-Liberalism, and Securitization*, 35 *J. Post Keynesian Econ.* 215, 215, 225–31 (2012) (discussing the “generalization of securitization” and its role in neoliberal economic theory and the 2008 financial crisis).

102. Shanor, *New Lochner*, supra note 37, at 163; cf. Philip Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century* 85–90 (2008) (describing the ongoing transition from twentieth-century industrial “nation states” to contemporary informational “market states”).

103. Shanor, *New Lochner*, supra note 37, at 137, 165; see also David E. Pozen, *Transparency’s Ideological Drift*, 128 *Yale L.J.* 100, 123–59 (2018) [hereinafter Pozen, *Ideological Drift*] (discussing, in connection with neoliberalism, the turn toward transparency requirements and away from “substantive” regulation in the United States over the past several decades).

104. Shanor, *New Lochner*, supra note 37, at 164, 171.

regular reports on their mineral sourcing) may give rise to claims of unconstitutionally compelled speech.<sup>105</sup>

At the same time that it makes economic regulation more susceptible to First Amendment scrutiny, the turn toward “lighter-touch” governance saps such regulation of much of its redistributive potential. From the standpoint of individuals lacking in market expertise or capital endowments, these new forms of governance can be perverse. Not only do they fail to produce the levelling effects of traditional regulatory mechanisms aimed at labor–capital parity, but disclosure mandates and the like also often end up “hurting the people [they] purport[] to help” by lulling consumers into complacency, insulating compliant companies from antifraud liability, and undercutting political will for more substantive policy measures.<sup>106</sup> In other words, the same “informational” focus that exposes neoliberal governance to civil libertarian challenges from regulated parties also tends to set internal limits on the equality-enhancing capacities of the administrative state.

Just beyond the formal boundaries of the informational state and the informational marketplace lies a final set of institutions that contributes to contemporary Lochnerism: nonprofit, nongovernmental organizations dedicated to First Amendment advocacy. As the First Amendment’s deregulatory potential has become more evident, the economic surplus enjoyed by wealthy firms and executives has increasingly fed back into such organizations. Dissenting Supreme Court Justices<sup>107</sup> and mainstream media outlets<sup>108</sup> called attention this past Term to the “weaponization” of the First Amendment by a well-funded network of advocacy groups, such as the Alliance Defending Freedom, the Becket Fund for Religious Liberty, the Institute for Justice (IJ), the Liberty Justice Center, and the National Right to Work Legal Defense Foundation (NRWLDLDF). The efforts of these groups follow in the mold of, and build upon, the highly effective campaign to advance commercial speech rights that business

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105. See, e.g., *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359, 370–73 (D.C. Cir. 2014) (partially invalidating under the First Amendment a 2012 Securities and Exchange Commission rule requiring firms using conflict minerals to disclose their origin); see also Garden, *Deregulatory First Amendment*, supra note 53, at 339–51 (explaining that claims of “compelled speech” have become a key tool for proponents of a deregulatory, antilabor First Amendment).

106. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 *U. Pa. L. Rev.* 647, 651 (2011); see also Pozen, *Ideological Drift*, supra note 103, at 135–41 (elaborating on these points).

107. See *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2501–02 (2018) (Kagan, J., dissenting).

108. See, e.g., Liptak, supra note 45; Dahlia Lithwick et al., *Kneecapping Unions and Weaponizing the First Amendment*, *Slate* (July 2, 2018), <http://slate.com/news-and-politics/2018/07/janus-becerra-masterpiece-cakeshop-the-supreme-court-terms-big-cases.html> [<https://perma.cc/HRY6-KLLJ>].



interests have been leading since the 1970s.<sup>109</sup> Over the past two decades, nonprofits dedicated to religious freedom have joined the fray, sometimes supported by the same donors who fund commercial speech advocacy as well as parallel campaigns against legal protections for organized labor.<sup>110</sup>

Within the broader conservative legal movement that has arisen since the 1970s,<sup>111</sup> there now exists, then, something of a *First Amendment–industrial complex*. Mapping the contours of this complex is well beyond the scope of this Essay. The basic point, for present purposes, is that arguments for a deregulatory First Amendment are now promoted not only (or even primarily) by for-profit companies seeking to minimize their own labor costs or regulatory burdens, but also by a growing set of nominally depoliticized nonprofits with varying degrees of connection to the business community.

In this regard, a critic of First Amendment Lochnerism may have cause to worry about the establishment, within the past year alone, of numerous First Amendment clinics and centers at law schools around the country.<sup>112</sup> Organized as public interest law firms or as 501(c)(3) “public

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109. See Garden, *Deregulatory First Amendment*, *supra* note 53, at 325–31; Shanor, *New Lochner*, *supra* note 37, at 155–63. The 1970s commercial speech campaign itself built upon the midcentury efforts of wealthy conservative activists, such as Cecil B. DeMille, who helped to create a network of nongovernmental organizations committed to the legal expansion of economic, religious, and expressive freedom. See generally Brinson, *supra* note 59, at 61–140; Kevin M. Kruse, *One Nation Under God: How Corporate America Invented Christian America* 27–34, 127–61 (2015); Lee, *supra* note 22, at 56–78, 115–32; Pickard, *supra* note 57, at 75–96.

110. The Koch brothers, for instance, have supported the Becket Fund for Religious Liberty, IJ, and NRWLDF, among many other groups active in the First Amendment area. See Jane Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* 178 (2016) (IJ); Jay Riestenberg & Mary Bottari, *Who Is Behind the National Right to Work Committee and Its Anti-Union Crusade?*, *Huffington Post* (Aug. 5, 2014), [http://www.huffingtonpost.com/mary-bottari/who-is-behind-the-nationa\\_b\\_5451743.html](http://www.huffingtonpost.com/mary-bottari/who-is-behind-the-nationa_b_5451743.html) [<https://perma.cc/6MK5-25TQ>] (NRWLDF); Amelia Thomson-DeVeaux, *The Spirit and the Law: How the Becket Fund Became the Leading Advocate for Corporations’ Religious Rights*, *Am. Prospect* (June 18, 2014), <http://prospect.org/article/little-known-force-behind-hobby-lobby-contraception-case> [<https://perma.cc/LQN3-5MAK>] (Becket Fund).

111. See generally Jefferson Decker, *The Other Rights Revolution: Conservative Lawyers and the Remaking of American Government* (2016); Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (2008); Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 *Colum. L. Rev.* 915, 951–59 (2018). Recent scholarship on the history of right-to-work laws, corporate religious liberty, and federal communications regulation suggests that some of the foundations of the conservative legal movement and its First Amendment–industrial complex began to be laid several decades earlier. See *supra* note 109.

112. See, e.g., Ronald K.L. Collins, *First Amendment Clinic Coming to Vanderbilt Law*, *Concurring Opinions* (Jan. 12, 2018), <http://concurringopinions.com/archives/2018/01/fan-173-2-first-amendment-news-first-amendment-clinic-coming-to-vanderbilt-law-full-time-director-sought.html> [<https://perma.cc/Z98X-TTSH>]; Cornell Law School Announces Launch of New First Amendment Clinic, *Cornell Law Sch.* (Dec. 7, 2017), <http://www.lawschool.cornell.edu/spotlights/first-amendment-clinic.cfm> [<https://perma.cc/S79W-8258>]; Powell to

charities,” these centers and clinics will not engage in electioneering or do any substantial amount of legislative advocacy.<sup>113</sup> Instead, they can be expected to do what such nonprofits usually do: bring lawsuits seeking access to government records or seeking to strike down government policies under the Constitution. Even if some of these centers and clinics are staffed by liberals who aim to defend the downtrodden,<sup>114</sup> the proliferation of First Amendment–focused organizations risks further exacerbation of “First Amendment expansionism”<sup>115</sup> and further degradation of the state’s ability to regulate, to better or worse effect, on behalf of the public interest.<sup>116</sup>

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Against this historical and institutional backdrop, any robust response to First Amendment Lochnerism must grapple with the many ways in which the First Amendment tends to entrench socioeconomic inequality. We have called attention to a set of economic, political, technological, and legal developments that, over the past half century, have combined to make First Amendment litigation and ideology a field of struggle that overwhelmingly favors the interests of large employers and well-educated professionals in the private sector (as well as the upper echelons of the national security bureaucracy in the public sector, a topic we lack the space to address<sup>117</sup>). Not only does the contemporary First

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Lead New First Amendment Clinic at Duke Law, Duke Law News (Feb. 7, 2018), <http://law.duke.edu/news/powell-lead-new-first-amendment-clinic-duke-law> [<https://perma.cc/V3B2-6NHJ>]; Karen Sung, ASU Law Establishes First Amendment Clinic with Gift from Stanton Foundation, Ariz. State Univ. (Dec. 13, 2017), <http://campus.asu.edu/content/asu-law-establishes-first-amendment-clinic-gift-stanton-foundation> [<https://perma.cc/RXD4-8R9W>]. One of us (Pozen) served this past year as the inaugural visiting scholar at Columbia University’s Knight First Amendment Institute, which was established in 2016.

113. The Knight First Amendment Institute, for instance, is organized under section 501(c)(3) of the Internal Revenue Code. See Press Release, Knight Found., ACLU’s Jameel Jaffer to Direct Knight First Amendment Institute at Columbia University (June 29, 2016), <http://www.knightfoundation.org/press/releases/aclus-jameel-jaffer-direct-knight-first-amendment> [<https://perma.cc/Y5W4-P5PJ>]. Accordingly, it may not “participate . . . or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office” or devote a “substantial part of [its] activities” to “attempting[] to influence legislation.” I.R.C. § 501(c)(3) (2012).

114. See, e.g., G.S. Hans Joins Vanderbilt’s Law Faculty as an Assistant Clinical Professor of Law, Vanderbilt Law Sch. (Aug. 15, 2018), <http://law.vanderbilt.edu/news/gautam-hans> [<https://perma.cc/CR5Q-WW7F>] (quoting the incoming director of Vanderbilt’s new First Amendment clinic as expressing a “particular[] interest[] in representing vulnerable populations who may need help in asserting their speech and assembly rights”).

115. Kendrick, *Expansionism*, *supra* note 53, at 1200, 1210–19.

116. Cf. *infra* section IV.A (elaborating further on the risk that “maximalist” First Amendment arguments advanced for progressive purposes will ultimately fuel First Amendment Lochnerism).

117. See, e.g., Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech to Protect Its Own Expression*, 59 *Duke L.J.* 1, 2 (2009)

Amendment landscape give the high ground to those already rich in financial and cultural capital, but it also places numerous obstacles in the path of wage laborers and undercapitalized social groups—groups whose free expression and association might otherwise serve as tools of collective self-protection and advancement.

As this grim appraisal makes clear, the search for an egalitarian First Amendment is well and truly a search: an inquiry, both practical and theoretical, into the very possibility of a First Amendment jurisprudence that would advance the expressive and associational interests of the socioeconomically disadvantaged.

### III. THE INADEQUACY OF FIRST AMENDMENT THEORY

How might this inquiry proceed? A natural place to begin the search for a more socioeconomically egalitarian First Amendment—a First Amendment that alleviates, or at least does less to aggravate, the “egalitarian anxiety” sketched in this Essay’s introduction—is with normative theories of free speech.<sup>118</sup> The Free Speech Clause itself is notoriously unhelpful. Neither its text<sup>119</sup> nor its drafting history<sup>120</sup> sheds much light on contemporary controversies. In the absence of interpretive input from such sources, judges and scholars have produced a vast body of writing that seeks to justify, critique, and shape First Amendment doctrine in light of foundational principles and aspirations—above all, the pursuit of

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(explaining that courts assessing public employees’ First Amendment claims “increasingly permit government to control its employees’ expression at work, characterizing this speech as the government’s own,” and “also increasingly consider government workers to be speaking as employees even when away from work”); David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 *Harv. L. Rev.* 512, 515 (2013) (explaining that under existing First Amendment doctrine “the government has expansive legal authority to prosecute employees who leak” national security information to the media).

118. Again, this Essay, like the Symposium of which it is a part, focuses on questions of free expression to the neglect of other aspects of First Amendment law. See *supra* note 46.

119. The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. Yet hardly anyone reads the Amendment to apply only to Congress, and since the early twentieth century “principles of free expression have taken hold in a way that has become detached from—and may never have been all that securely connected to—the words of the First Amendment.” David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 *Harv. L. Rev.* 1, 34 (2015).

120. See, e.g., Daniel A. Farber, *The First Amendment* 9 (4th ed. 2014) (“Unfortunately, the incomplete materials concerning the legislative history of the Amendment shed little light about just what was meant by freedom of speech and of the press.”); Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 *Const. Comment.* 43, 53 (2007) (stating that “most scholars agree” that “the original meaning of the First Amendment . . . is—at best—indeterminate or unhelpful”); cf. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1, 22 (1971) (“The framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject.”).

truth, the promotion of individual autonomy, and the facilitation of democratic self-government.<sup>121</sup> The canonical theories of free speech, one might assume, should help us get some purchase on the egalitarian anxiety, whether by suggesting ways in which the inegalitarian aspects of First Amendment law might be challenged and alternative doctrines developed, or by supplying reasons why this body of law's subordination of substantive equality interests to negative liberty interests is defensible or maybe even unavoidable.

A. *Truth, Autonomy, Democracy . . . and Equality?*

In point of fact, however, the leading theories of the First Amendment prove indecisive when confronted by the egalitarian anxiety. Democratic theorizing about free speech may seem at first glance to offer the most hospitable terrain for egalitarian projects and autonomy theorizing the least, insofar as the former prioritizes communal goods while the latter prioritizes individualistic ideals. And indeed, First Amendment theorists who emphasize democratic deliberation and decisionmaking have been more likely, on balance, to take socioeconomic inequalities into account. Yet none of the leading theories of free speech has been able to generate clear or consistent guidance about how such inequalities ought to bear on constitutional analysis, for several reasons.

First, truth-seeking, autonomy-promoting, and democracy-facilitating accounts of free speech (as well as related accounts that focus on tolerance, dissent, and so on) tend to be formulated in highly abstract and depoliticized terms. This allows them to apply to a wide range of situations and to appeal to a wide range of groups—no one is “against” truth, self-actualization, or self-government—but also to be invoked by very different jurists in support of very different outcomes.<sup>122</sup> Alexander Meiklejohn's democratic theory of free speech, for example, has been “embraced all along the political spectrum, from Robert Bork to William Brennan,”<sup>123</sup> and deployed to defend both exceptionally narrow conceptions of First

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121. See, e.g., Timothy Zick, *First Amendment Cosmopolitanism, Skepticism, and Democracy*, 76 *Ohio St. L.J.* 705, 714 (2015) (describing these as “the principal American First Amendment free speech theories or justifications”); see also Yotam Barkai, Note, *The Child Paradox in First Amendment Doctrine*, 87 *N.Y.U. L. Rev.* 1414, 1429 n.90 (2012) (“Because the text is inherently unhelpful and the original understanding of free speech has limited utility, judges and scholars have generally referred to these three theories [advancing truth, facilitating democratic self-government, and promoting autonomy, self-fulfillment, and self-realization] in analyzing First Amendment problems.”).

122. Cf. Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 *U. Chi. L. Rev.* 1819, 1826–41 (2016) (explaining why “depoliticized” legal theories are especially susceptible to co-optation and reformulation over time).

123. Owen M. Fiss, *The Irony of Free Speech 2* (1996).

Amendment review<sup>124</sup> and expansive proposals for the redistribution of speech rights.<sup>125</sup> Moreover, it is now widely appreciated that the pursuit of truth, the promotion of individual autonomy, and the facilitation of democratic self-government are best understood as partial and overlapping—rather than comprehensive or mutually exclusive—theories of free speech,<sup>126</sup> which creates additional play in the normative joints.

Second, the indeterminacy of abstract First Amendment theories is compounded by empirical uncertainty about the real-world effects of different speech arrangements. All the leading theories assume a certain causal relationship between speech rules and social outcomes. They posit that expressive practices, when structured appropriately, can generate more knowledge, better debate, greater self-realization, or the like. For the most part, however, these claims are not grounded in any well-worked-out social theory, and good evidence of the validity of the assumed causal relationships is sparse to nonexistent. Although it has long been asserted, for instance, that an “open marketplace of ideas” is more likely to distinguish truth from falsity than a regime based on epistemic paternalism, in which authorities categorize ideas as true or false, the existing empirical research offers little support for this assertion.<sup>127</sup> Empirical results on the impact of various antitrust and media regulations on the diversity of ideas “have been similarly mixed.”<sup>128</sup> The relevant

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124. See, e.g., Bork, *supra* note 120, at 20 (arguing on “democratic” grounds that First Amendment “protection should be accorded only to speech that is explicitly political” and not to “any other form of expression”).

125. See, e.g., Owen M. Fiss, *Free Speech and Social Structure*, 71 *Iowa L. Rev.* 1405, 1415 (1986) [hereinafter Fiss, *Social Structure*] (arguing that a “commitment to rich public debate will allow[] and sometimes even require the state” to adopt policies that “make certain all views are heard,” however “repressive” such policies “might at first seem”).

126. See Farber, *supra* note 120, at 8–10; Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 *Nw. U. L. Rev.* 1212, 1283 (1983); Lawrence B. Solum, *The Value of Dissent*, 85 *Cornell L. Rev.* 859, 859–60 (2000).

127. See Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 *N.Y.U. L. Rev.* 1160, 1163 (2015) (“[A] considerable amount of existing empirical research . . . tends . . . to justify skepticism about the causal efficacy of establishing an open marketplace of ideas in identifying true propositions and rejecting false ones.”); cf. Frederick Schauer, *Facts and the First Amendment*, 57 *UCLA L. Rev.* 897, 910–11 (2010) (“[T]he persistence of the belief that a good remedy for false speech is more speech, or that truth will prevail in the long run, may itself be an example of the resistance of false factual propositions to argument and counterexample.”). As Vincent Blasi has explained, Justice Oliver Wendell Holmes, in introducing the market metaphor, did not intend to endorse the pursuit of truth as the overriding aim of free speech or neutral proceduralism as a model of regulation. See Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 *Sup. Ct. Rev.* 1, 39–40 (“[O]ne must appreciate how far [Holmes] was from a modern procedural liberal concerned more about the right than the good . . . . The cultural/intellectual/political combat facilitated by free speech is, in Holmes’s vision, messy, unpredictable, often nasty, and impossible to domesticate.”).

128. Ho & Schauer, *supra* note 127, at 1165 n.16.

dependent variables (truth, democratic discourse, personal autonomy) are hard to specify and to measure, and they may be influenced by countless factors apart from formal speech rules. When it comes to the central prescriptive dilemma raised by the egalitarian anxiety—the degree to which its alleviation requires government planning—the leading theories of free speech therefore have less to offer than one might expect.

Finally, truth-seeking, autonomy-promoting, and democracy-facilitating theories of free speech are ambiguously positioned vis-à-vis the egalitarian anxiety because while none of these theories foregrounds “equality” as a desideratum, none rejects it either. For example, the preeminent autonomy advocate Professor Martin Redish is happy to concede that equality is “an important element of free speech theory,” as “[t]he equality principle has a long and venerable tradition in First Amendment theory and doctrine.”<sup>129</sup> The equality principle that Redish has in mind, however, is a version of viewpoint neutrality: the proposition that “[a]ll viewpoints must have an equal opportunity to compete in the intellectual marketplace, free from selective governmental regulation.”<sup>130</sup> Explicitly rejected are other versions of an equality principle, more in tune with the concerns of this Symposium, that might entail “increasing the pre-speech resources of the economically inferior speakers or limiting the economically superior speakers’ ability to employ their resources for expressive purposes.”<sup>131</sup> As Redish’s discussion reflects, equality claims are made by free speech theorists of all stripes and on both sides of the same questions. Accordingly, debates over whether and how free speech law should respond to present inequalities are prone to take place *within* an already capacious, ill-defined, and internally riven egalitarian tradition of First Amendment theorizing.

#### B. *The Example of Campaign Finance Regulation*

Perhaps no area better illustrates the inadequacy of high-level First Amendment theory for negotiating the egalitarian anxiety than campaign finance law. Cases such as *Citizens United v. FEC*<sup>132</sup> and *McCutcheon v. FEC*<sup>133</sup> have been at the heart of the emerging critique of First Amendment Lochnerism. They raise the question whether the Free Speech Clause permits a legislature to limit the election-related spending of corporations,

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129. Martin H. Redish & Howard M. Wasserman, What’s Good for General Motors: Corporate Speech and the Theory of Free Expression, 66 *Geo. Wash. L. Rev.* 235, 282 (1998). A generation earlier, Professor Kenneth Karst argued influentially that the “principle of equal liberty of expression underlies” each of the three major theories of the First Amendment. Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 *U. Chi. L. Rev.* 20, 23 (1975).

130. Redish & Wasserman, *supra* note 129, at 283.

131. *Id.*

132. 558 U.S. 310 (2010).

133. 134 S. Ct. 1434 (2014).

unions, or wealthy individuals in the service of antiplutocratic goals. To help answer this question in the face of mixed precedent and negligible Founding-era evidence, the Justices have adverted to each of the three major normative theories of the First Amendment.

Writing for the Court in *Citizens United*, Justice Anthony Kennedy contended that the restrictions on corporate “electioneering communications” imposed by the Bipartisan Campaign Reform Act of 2002<sup>134</sup> (BCRA) were simultaneously undermining the pursuit of truth, individual autonomy, and democratic deliberation, as corporate speech contributes importantly to all of these values. According to Kennedy, such restrictions “interfere[] with the ‘open marketplace’ of ideas protected by the First Amendment”;<sup>135</sup> impair “the freedom to think for ourselves”;<sup>136</sup> “deprive[] the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice”;<sup>137</sup> and distort “an essential mechanism of democracy” and “enlightened self-government.”<sup>138</sup> Various amici on the side of *Citizens United* appealed similarly to truth, autonomy, and democracy.<sup>139</sup> Justice Kennedy further contended that the design of BCRA reflected an impermissible government preference for certain categories of speakers (natural persons) over others (corporations and unions).<sup>140</sup> As Professor Genevieve Lakier observes in her essay for this Symposium, the majority opinion aggressively claimed the mantle of egalitarianism.<sup>141</sup> It just adopted a highly formalistic, anticlassificationist conception of expressive equality,

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134. Pub. L. No. 107-155, § 203, 116 Stat. 81, 91 (codified as amended at 2 U.S.C. § 441b (2012)).

135. *Citizens United*, 558 U.S. at 354 (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)).

136. *Id.* at 356.

137. *Id.* at 340–41.

138. *Id.* at 339; see also *id.* at 360 (asserting that any appearance of special political “influence or access” for corporate speakers “will not cause the electorate to lose faith in our democracy”).

139. See, e.g., Brief Amicus Curiae of Pacific Legal Foundation in Support of Appellant on Supplemental Question at 11–17, *Citizens United*, 558 U.S. 310 (No. 08-205), 2009 WL 2349017 (citing “the pursuit of truth,” “responsive democratic government,” and the “values of self-realization, personal and cultural development, autonomy, and autonomous decision-making” as reasons to strike down limitations on corporate electioneering).

140. See, e.g., *Citizens United*, 558 U.S. at 341 (“We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.”); cf. Joel M. Gora, *The First Amendment . . . United*, 27 Ga. St. U. L. Rev. 935, 940 (2011) (describing the *Citizens United* Court as taking “steps to dismantle the First Amendment ‘caste system’ whereby whether someone or some group could speak depended on who or what they were”).

141. See Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 Colum. L. Rev. 2117, 2130–31 (2018).

similar to Redish's notion of equality as freedom from "selective governmental regulation."<sup>142</sup>

Justice John Paul Stevens's dissenting opinion in *Citizens United*, meanwhile, argued just as vigorously that BCRA's restrictions on corporate electioneering *enhanced* the pursuit of truth, individual autonomy, and democratic deliberation. These restrictions, in Stevens's telling, did not impinge upon anyone's autonomy or self-expression, and on the contrary they reduced the risk that a "corporation's electoral message" would "conflict with the[] personal convictions" of the individuals associated with the corporation.<sup>143</sup> At the same time, these restrictions reduced the risk that corporations would "distort public debate" and stymie the search for truth by "cow[ing]" politicians "into silence," "drowning out . . . noncorporate voices," and "dimish[ing] citizens' willingness and capacity to participate in the democratic process."<sup>144</sup> These arguments, too, were familiar from the First Amendment literature. Nearly three decades earlier, Judge Skelly Wright sought to show that "all of the leading first amendment rationales may be comfortably reconciled with campaign spending reforms," because regulation that limits spending by wealthy interests "enhances the self-expression of individual citizens who lack wealth," preserves "the truth-producing capacity of the marketplace of ideas," and "prevent[s] mutilation of . . . communal thought processes."<sup>145</sup> Like Judge Wright before him, Justice Stevens connected these claims to a substantive and, in Lakier's terms, antisubordinating vision of expressive and political equality.<sup>146</sup>

Both the majority and the dissent in *Citizens United* thus plausibly invoked each and every one of the three major First Amendment theories, as well as the value of equality itself, in support of their dueling positions. The result is a vivid demonstration of how the abstraction and depoliticization, lack of empirical grounding, and underspecified embrace of equality that characterize these theories sap them of the power to sharpen, let alone resolve, the most controversial questions at the intersection of free speech and political economy. Grand theorizing about truth, autonomy, and democracy fails to supply meaningful direction to those seeking a more egalitarian First Amendment. Instead,

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142. Redish & Wasserman, *supra* note 129, at 283.

143. *Citizens United*, 558 U.S. at 467 (Stevens, J., concurring in part and dissenting in part) (emphasis omitted).

144. *Id.* at 469–72.

145. J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 *Colum. L. Rev.* 609, 636–39 (1982).

146. Lakier, *supra* note 141, at 2123–27. Justice Stevens did not defend this equality value by name, relying instead on the language of "anticorruption" and "antidistortion" from the Court's earlier opinions. See *Citizens United*, 558 U.S. at 447–75 (Stevens, J., concurring in part and dissenting in part); cf. Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 *Ga. St. U. L. Rev.* 989, 992–1000 (2011) (noting doctrinal and case-specific reasons Justice Stevens may not have felt "comfortable embracing the political equality rationale fully" and explicitly in his dissent).



those who wish to reverse or offset First Amendment Lochnerism tend to pursue a set of midlevel conceptual and jurisprudential moves suggested by the contemporary legal landscape. We turn next to these moves and the grammar of free speech egalitarianism they have created.

#### IV. FIRST AMENDMENT EGALITARIANISM: A CRITICAL ROADMAP

To appreciate more fully the institutional, ideological, and doctrinal challenges that egalitarian reformers face today, it is helpful to imagine the mirror image of First Amendment Lochnerism—that is, the mirror image of judicial enforcement of negative rights against state action in an ostensibly neutral, yet materially inequalitarian, manner. The mirror image of such a regime would look something like early twentieth-century progressive civil libertarianism, updated for the information age. As discussed in section I.B, progressive civil libertarians turned to administrative agencies and sympathetic legislators, rather than courts, to protect workers, political dissenters, and vulnerable minorities from the dominance of private employers, bigoted local governments, and conservative blocs within the national government. Motivating this project was not an apolitical belief in formal equality or fair play but a partisan commitment to the creation of a more inclusive, economically just society. Newly created agencies such as the NLRB, the FCC, and the Civil Liberties Unit of DOJ saw it as an important part of their mission to redistribute expressive and associational rights to undercapitalized groups.

The regulatory approach taken by these New Deal institutions now seems “off the wall,”<sup>147</sup> and not merely because of recent First Amendment Lochnerism. When the liberal compromise displaced progressive civil libertarianism in the second half of the twentieth century,<sup>148</sup> it ruled out precisely the kind of civil libertarian activities in which agencies like the NLRB used to engage. Between its founding in 1935 and 1940, NLRB administrators openly favored the organizing efforts of those unions they thought most politically progressive and ethnically diverse (and most supportive of the New Deal); they scrutinized the speech and assembly of employees opposed to unionization for interference with the goals of federal labor law; and they vigorously investigated and sanctioned employers who expressed anti-union views or issued misleading descriptions of labor law.<sup>149</sup> Such employer speech, the NLRB reasoned, was not

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147. See Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, Atlantic (June 4, 2012), <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040> [https://perma.cc/T449-4S97] (“Off-the-wall arguments are those most well-trained lawyers think are clearly wrong . . .”).

148. See *supra* section I.B.

149. See Weinrib, *Liberal Compromise*, *supra* note 68, at 468–96 (describing the NLRB’s activities in this period and the cleavage its suppression of employer speech produced within the nongovernmental civil libertarian community); see also Peter H.

speech at all within the meaning of the First Amendment.<sup>150</sup> Rather, interpreted in the context of the power that employers wield over employees' wages and work conditions, the expression of opposition to unionization by owners and managers constituted a form of coercion.<sup>151</sup> The NLRB's suppression of employer speech in the name of the civil liberties of workers went so far as to lead the Board to subpoena local newspaper editors to determine whether their publication of anti-union—or anti-NLRB—statements had been sought by employers engaged in nearby labor disputes.<sup>152</sup>

Through the lens of the liberal compromise, the early NLRB's insistent rejection of neutrality when it came to the regulation of expression and association looks shocking, as do the sheer scope and zeal of its investigations into anti-union speech, both inside and outside the workplace. Government viewpoint (and, to a lesser extent, content) neutrality is a "bedrock principle" of modern First Amendment law.<sup>153</sup> The partisan provision of expressive and associational rights by the political branches to make up for disparities in socioeconomic power among private parties *inverts* the contemporary paradigm: judicial enforcement of such rights against state interference, above all when that interference seems motivated by a preference for certain classes of speakers or ideas.

While each feature of this paradigm has been the target of egalitarian critique or qualification, very few commentators have called for its wholesale abandonment. Especially now, in the midst of the Trump presidency, elements of the liberal compromise such as judicial supremacy, content and viewpoint neutrality, and the state action doctrine strike many on the left as salutary limits on the degree to which ascendant political movements can dominate civil society. Unfortunately for egalitarians, these elements also stand in the way of building a progressive civil libertarian state. Such a state would curtail judicial review, reject the ideal of formal neutrality when it comes to the regulation of certain categories of expression and association, and

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Irons, *The New Deal Lawyers* 226–71 (1982) (providing a detailed account of the NLRB's early administrative practices); Kessler, *Administrative Legitimacy*, *supra* note 62, at 751–54 (discussing political and legal critiques of the NLRB's progressive civil libertarianism in the late 1930s).

150. See Joseph K. Pokempner, *Employer Free Speech Under the National Labor Relations Act*, 25 *Md. L. Rev.* 111, 112–13 (1965); Kate E. Andrias, Note, *A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections*, 112 *Yale L.J.* 2415, 2422–24 (2003) [hereinafter Andrias, *Robust Public Debate*].

151. See, e.g., 3 *NLRB Ann. Rep.* 59–62, 125 (1938); 2 *NLRB Ann. Rep.* 65–66 (1937); 1 *NLRB Ann. Rep.* 73–74 (1936).

152. See Weinrib, *Liberal Compromise*, *supra* note 68, at 441–45.

153. Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 *B.C. L. Rev.* 695, 695 (2011); see also, e.g., *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

impose speech-redistributive obligations on particularly powerful private entities. To the extent that these modes of governance are seen by mainstream legal and political actors as incompatible with a free democratic society, the strongest historical alternative to First Amendment Lochnerism—progressive civil libertarianism—will remain off the wall and off the table.

As a result, today's progressives generally struggle to achieve a more egalitarian First Amendment within the doctrinal and rhetorical boundaries of the liberal compromise. In this Part, we outline the basic motifs—the transsubstantive themes, tropes, and fault lines—of First Amendment egalitarian argument. Drawing on both the Symposium essays and outside writings, we identify three such motifs that recur again and again in the literature. Together, these motifs constitute something like a grammar of First Amendment egalitarianism.<sup>154</sup> We make no claim to comprehensiveness or taxonomic rigor. There may in fact be two basic motifs, or ten. The grammar will undoubtedly change over time in response to the success or failure of particular ideas; it will also likely feature a host of overlaps and other internal ambiguities, the resolution of which may prove unnecessary, impossible, or, alternatively, transformative.<sup>155</sup> The goal of this Part is not to arbitrate among competing camps but to clarify the structure of contemporary First Amendment debate and to give some sense of the argumentative resources—and the limitations of the resources—available to critics of First Amendment Lochnerism.

#### A. *Minimalism Versus Maximalism*

Before they can arrive at any particular reform proposal, the threshold question that confronts, and divides, critics of First Amendment Lochnerism is how powerful they want the judicially enforced First Amendment to be. This question itself has several dimensions. Reformers might seek to expand or contract the scope of the First Amendment's "coverage," or the amount of communicative activity that is subject to First Amendment scrutiny.<sup>156</sup> For any given category of

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154. For this metaphorical usage of "grammar," see Grammar, Merriam-Webster, <http://www.merriam-webster.com/dictionary/grammar> [<https://perma.cc/9BVJ-D7EN>] (last visited July 21, 2018) (defining "grammar" as, inter alia, "the principles or rules of an art, science, or technique," as in "a *grammar* of the theater"). For the canonical discussion of this usage, see Kenneth Burke, *A Grammar of Motives*, at xix (Univ. of Cal. Press 1969) (1945) (defining a grammar as the "formal interrelationships [that] prevail" among a given set of "terms . . . by reason of their role as attributes of a common ground or substance"); id. at 441 (defining a grammar as "an attitude embodied in a method").

155. See Burke, *supra* note 154, at xix (emphasizing the need "to study and clarify the *resources* of ambiguity" within a grammar, as "it is in the areas of ambiguity that transformations take place; in fact, without such areas, transformation would be impossible").

156. See Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. Rev. 318, 325 (2018) ("Coverage is a sociological concept: It is not the theoretical or philosophical scope of the right of free speech, but what litigants and courts in a given historical moment view as within, or plausibly within, the scope of that right."); see also Frederick Schauer, *The*

covered speech, they might seek to invigorate or enervate this scrutiny and the First Amendment “protection” that the category receives.<sup>157</sup> And whatever their views on coverage and protection, reformers might seek to allocate more or less of this enforcement work to the courts. The overarching issue is whether and to what extent the project of creating a more socially and economically egalitarian public sphere should be pursued within or outside judicial enforcement of the First Amendment.

As free speech law has drifted rightward in recent years, many progressives have become less concerned to get First Amendment doctrine just right than to get it out of the way. No fewer than four contributions to this Symposium appeal to such *First Amendment minimalism*. After critiquing the neoliberal assumptions that animate the Roberts Court’s free speech rulings, Professor Jedediah Purdy calls for a “jurisprudence of permission” that would enable legislatures to pursue social democratic aims without running afoul of the First Amendment.<sup>158</sup> Professor Jack Balkin warns against applying the First Amendment to social media platforms, and he urges courts to reject free speech challenges brought by these platforms to “technical, regulatory, and administrative” measures that would enhance end users’ “practical freedom,” such as net neutrality rules and media concentration limits.<sup>159</sup> Both Professor Leslie Kendrick and Professor Louis Michael Seidman suggest that First Amendment law is not simply ill equipped to drive progressive change, but incapable of doing so.<sup>160</sup> For all these authors, judicial enforcement of First Amendment rights will not lead to a more egalitarian state or society; the best that can be hoped for is to contain the damage.

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Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 *Harv. L. Rev.* 1765, 1769–807 (2004) [hereinafter Schauer, Boundaries] (exploring possible political, cultural, and economic determinants of First Amendment coverage).

157. The distinction between First Amendment coverage and protection is Professor Frederick Schauer’s. See Mark Tushnet, *The Coverage/Protection Distinction in the Law of Freedom of Speech—An Essay on Meta-Doctrine in Constitutional Law*, 25 *Wm. & Mary Bill Rts. J.* 1073, 1075 & n.13 (2017) (discussing the origins of the distinction). For a particularly recent and concise restatement, see Frederick Schauer, *Response, Out of Range: On Patently Uncovered Speech*, 128 *Harv. L. Rev. Forum* 346, 347–48 (2015), [http://harvardlawreview.org/wp-content/uploads/2015/06/vol128\\_Schauer.pdf](http://harvardlawreview.org/wp-content/uploads/2015/06/vol128_Schauer.pdf) [<https://perma.cc/3MNZ-HSAP>].

158. Jedediah Purdy, *Beyond the Bosses’ Constitution: The First Amendment and Class Entrenchment*, 118 *Colum. L. Rev.* 2161, 2175–81 (2018); cf. Tim Wu, *Knight First Amendment Inst., Is the First Amendment Obsolete?* 19 (2017) [hereinafter Wu, *Obsolete*], <http://knightcolumbia.org/sites/default/files/content/Emerging%20Threats%20Tim%20Wu%20Is%20the%20First%20Amendment%20Obsolete.pdf> [<https://perma.cc/YWN6-FSYJ>] (“[T]he project of realizing a healthier speech environment may depend more on what the First Amendment permits, rather than what it prevents or requires.”).

159. Jack M. Balkin, *Free Speech Is a Triangle*, 118 *Colum. L. Rev.* 2011, 2032–33 (2018) [hereinafter Balkin, *Triangle*].

160. See generally Leslie Kendrick, *Another First Amendment*, 118 *Colum. L. Rev.* 2095 (2018); Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 *Colum. L. Rev.* 2219 (2018).

The slow but steady growth in judicial coverage and protection of commercial speech, computer algorithms, and campaign spending<sup>161</sup> would seem to support the view that even when First Amendment norms are crafted with the most egalitarian of intentions,<sup>162</sup> they tend to reproduce or intensify the inequalities inherent in a legal system wedded to the production, exchange, and accumulation of commodities.<sup>163</sup> Minimalist responses, accordingly, aim to limit the scope of First Amendment coverage (as with the argument that algorithms should not be considered “speech”<sup>164</sup>), to limit the degree of First Amendment protection (as with the argument that regulations of commercial speech should be subject to less demanding scrutiny<sup>165</sup>), or to avoid legal moves that could inadvertently invigorate the First Amendment in the future.<sup>166</sup> With the First Amendment thus chastened, legislators and administrators could pursue a broader set of egalitarian projects. Of course, this gain in freedom to regulate would

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161. See Kendrick, *Expansionism*, supra note 53, at 1200 (discussing “First Amendment expansionism, where the First Amendment’s territory pushes outward to encompass ever more areas of law”); Frederick Schauer, *First Amendment Opportunism*, in *Eternally Vigilant: Free Speech in the Modern Era* 174, 176 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (discussing “First Amendment opportunism,” whereby free speech doctrine and rhetoric are asked to serve ends external to “the purposes the First Amendment was designed to serve”).

162. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976) (justifying the extension of First Amendment coverage to include commercial advertising on the ground that a pharmacy’s generic drug ads would help “the poor, the sick, and particularly the aged” procure medicines at the lowest price).

163. For the commodity-form theory of law, see generally Evgeny B. Pashukanis, *Law and Marxism: A General Theory* (Barbara Einhorn trans., Ink Links Ltd. 1989) (1924). For a perceptive summary of Pashukanis’s thought, see China Miéville, *The Commodity-Form Theory of International Law*, in *International Law on the Left: Re-examining Marxist Legacies* 92, 105–20 (Susan Marks ed., 2008).

164. See, e.g., Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 *UCLA L. Rev.* 1149, 1169 (2005) (“I believe that most privacy regulation that interrupts information flows in the context of an express or implied commercial relationship is neither ‘speech’ within the current meaning of the First Amendment, nor should it be viewed as such.” (footnotes omitted)); Tim Wu, *Free Speech for Computers?*, *N.Y. Times* (June 19, 2012), <http://www.nytimes.com/2012/06/20/opinion/free-speech-for-computers.html> (on file with the *Columbia Law Review*) (“[A]s a general rule, nonhuman or automated choices should not be granted the full protection of the First Amendment, and often should not be considered ‘speech’ at all.”).

165. See, e.g., Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 *Cardozo L. Rev.* 2583, 2584 (2008) (critiquing the trend “to offer broader protection to commercial speech and corporate speakers than has been extended in the past”); Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 *Harv. L. Rev. Forum* 165, 174 (2015), [http://harvardlawreview.org/wp-content/uploads/2015/03/vol128\\_PostShanor2.pdf](http://harvardlawreview.org/wp-content/uploads/2015/03/vol128_PostShanor2.pdf) [<https://perma.cc/3ZJQ-JA55>] (criticizing contemporary courts for reviewing regulations of commercial speech in an “aimlessly intrusive” manner).

166. See, e.g., Kate Andrias, *Building Labor’s Constitution*, 94 *Tex. L. Rev.* 1591, 1593–95 (2016) [hereinafter Andrias, *Labor’s Constitution*] (describing and defending “the choice of worker movements *not* to lay claim to the Constitution” and noting labor lawyers’ fear that “even when workers direct their constitutional claims to elected officials, courts often end up reviewing—and rejecting—their validity”).

likely come at the expense of some valuable expression. For progressive minimalists, however, that tradeoff might well seem worth it, especially to the extent that judicial enforcement of the First Amendment fails to protect truly transformative or transgressive speech, as opposed to speech that poses little threat to legal elites or the socioeconomic status quo.<sup>167</sup>

This tradeoff will seem especially worthwhile in periods when the legislative and executive branches are led by progressives. The United States is, to put it mildly, not in such a period right now. Yet First Amendment minimalism need not entail a belief that the legislative and executive branches, simply as a matter of constitutional structure, are more likely than courts to produce egalitarian outcomes under all social conditions. Progressive civil libertarians in the first half of the twentieth century not only sought to free the political branches from the negative constraint of judicial supervision; they also sought to impose on the political branches both new institutional forms and a specific ideological mission—oriented around values such as democratic pluralism and individual self-determination—through the operation of a mass political party committed to that mission and capable of sustaining institutional innovation.<sup>168</sup> Similarly, nothing prevents contemporary First Amendment minimalists from seeking to coordinate their civil libertarian vision with the practical pursuit of political power.

Despite the appeals of minimalism, achieving any significant rollback of First Amendment doctrine looks like an uphill battle given the rise of informational capitalism in the marketplace, the First Amendment–industrial complex in civil society, and First Amendment Lochnerism in the courts.<sup>169</sup> Whether out of conviction or in capitulation, many contemporary

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167. As Professor Michael Klarman has observed:

A cynical, though nonetheless apparently accurate, interpretation of the Court's free speech jurisprudence is that political dissidents become entitled to significant constitutional protection only when they cease to pose a serious threat to the status quo—that is, communists and Ku Kluxers in the second half of the 1960s, but not, respectively, in the 1950s or 1920s. Further, according to this interpretation, the Court protects the expression rights of pesky but nonthreatening dissidents (Jehovah's Witnesses) and of mainstream speakers (labor union picketers in 1940 but not 1920). Precious little corroboration of the Court's countermajoritarian heroics appears in the free speech context.

Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 Va. L. Rev. 1, 14–15 (1996) (footnote omitted); cf. Andrias, *Labor's Constitution*, supra note 166, at 1609–11 (observing, with reference to First Amendment doctrine, that “the history of court antagonism toward workers is particularly long and storied”).

168. On the relationship between New Deal administration and the mass party, see Kessler, *Administrative Legitimacy*, supra note 62, at 731–34. On the relationship between progressive civil libertarianism and democracy, see Kessler, *Administrative Origins*, supra note 57, at 1084–92.

169. See supra Part II; see also Schauer, *Boundaries*, supra note 156, at 1789–90 (discussing “the First Amendment's *magnetism*,” its “rhetorical power and argumentative authority,” in contemporary U.S. political culture); Frederick Schauer, *The Politics and Incentives of First*

progressives have offered more *maximalist* arguments that seek to extend First Amendment coverage to, or enhance First Amendment protection of, equality-promoting expressive and associational activities that are slighted by existing doctrine. In this spirit, Professor Bertrall Ross argues in his contribution to this Symposium that courts should not only embrace First Amendment claims against partisan gerrymandering—claims that have been rapidly gaining traction, especially on the left<sup>170</sup>—but also do so in a manner that prioritizes the associational interests of “political outsiders.”<sup>171</sup> Going more against the grain of current case law, Professor Catherine Fisk argues in her Symposium essay for substantially greater First Amendment protection for labor picketing and boycotts.<sup>172</sup>

Not represented in this Symposium are a host of other maximalist arguments put forward in recent years that seek to enhance social or economic equality in parts of the expressive landscape. Examples include proposals for recognizing or strengthening First Amendment rights:

- to register to vote and to cast a ballot;<sup>173</sup>
- to access government information and facilities (a “right to know”);<sup>174</sup>

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Amendment Coverage, 56 Wm. & Mary L. Rev. 1613, 1614–17 (2015) (cataloguing “accelerating attempt[s]” in recent years “to widen the scope of First Amendment coverage”).

170. This development itself reflects a remarkable expansion of First Amendment (and contraction of equal protection) advocacy. Cf. Richard Pildes, What Is the First Amendment Theory of Partisan Gerrymandering?, Election Law Blog (Mar. 25, 2018), <http://electionlawblog.org/?p=98319> [<https://perma.cc/J9XF-4D7Y>] (noting that until very recently, “references to the First Amendment ha[d] sometimes been thrown in” to equal protection challenges to partisan gerrymandering “but never developed in a full way”). For the most recent judicial statement of support, authored by Justice Elena Kagan and joined by all three of her liberal colleagues, see *Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring) (“[P]artisan gerrymanders may infringe the First Amendment rights of association held by parties, other political organizations, and their members.”).

171. Bertrall Ross, Partisan Gerrymandering, the First Amendment, and the Political Outsider, 118 Colum. L. Rev. 2187, 2190–94 (2018).

172. Catherine L. Fisk, A Progressive Labor Vision of the First Amendment: Past as Prologue, 118 Colum. L. Rev. 2057, 2076–91 (2018); see also Andrias, Labor’s Constitution, *supra* note 166, at 1600 & n.46 (collecting recent sources arguing that the Court should “interpret the First Amendment’s speech and assembly clauses to give employees greater rights in organizing campaigns, boycotts, and strikes”).

173. See, e.g., Armand Derfner & J. Gerald Hebert, Voting Is Speech, 34 Yale L. & Pol’y Rev. 471, 472 (2016) (“This Essay . . . proposes that we find a source of constitutional protection for voting in the First Amendment.”); Janai S. Nelson, The First Amendment, Equal Protection, and Felon Disenfranchisement: A New Viewpoint, 65 Fla. L. Rev. 111, 115–16, 141–59 (2013) (advancing a “First Amendment Equal Protection” framework for strengthening the right to vote and challenging felon disenfranchisement laws); cf. *Citizens United v. FEC*, 558 U.S. 310, 424–25 (2010) (Stevens, J., concurring in part and dissenting in part) (“Under the majority’s view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech.”).

174. See, e.g., Heidi Kitrosser, Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State, 39 Harv. C.R.-C.L. L. Rev. 95,

- to record the police and other officials performing public duties (a “right to record”),<sup>175</sup> as well as private parties engaged in matters of public concern;<sup>176</sup>
- to exercise expressive and religious liberties outside the borders of the United States;<sup>177</sup>
- to feed homeless people;<sup>178</sup>
- to engage in panhandling;<sup>179</sup>
- to access, use, reproduce, and exchange copyrighted or otherwise privately owned information;<sup>180</sup>

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130–34 (2004) (arguing for First Amendment access rights to administrative proceedings); Barry Sullivan, FOIA and the First Amendment: Representative Democracy and the People’s Elusive “Right to Know,” 72 Md. L. Rev. 1, 20 (2012) (criticizing courts’ “failure to acknowledge that the First Amendment ‘right to know’ is a foundational value of our form of government . . . and the key to interpreting [the Freedom of Information Act]”); see also Sonja R. West, Awakening the Press Clause, 58 UCLA L. Rev. 1025, 1031 (2011) (urging an “interpretation of the Press Clause . . . that would allow journalists additional and unique protections, primarily with respect to newsgathering”). Outside the context of criminal trials, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), efforts to convince courts to recognize a First Amendment right of access have thus far been “overwhelmingly unsuccessful,” Frederick Schauer, Positive Rights, Negative Rights, and the Right to Know, *in* *Troubling Transparency: The History and Future of Freedom of Information* 34, 37–38 (David E. Pozen & Michael Schudson eds., 2018).

175. See Howard M. Wasserman, Police Misconduct, Video Recording, and Procedural Barriers to Rights Enforcement, 96 N.C. L. Rev. 1313, 1337–41 (2018) (reviewing “scholarly arguments in support of the First Amendment right to record”). At this writing, a half-dozen federal appellate courts recognize some version of a First Amendment right to record public officials. See *id.* at 1336.

176. See, e.g., Justin Marceau & Alan K. Chen, Free Speech and Democracy in the Video Age, 116 Colum. L. Rev. 991, 1026–62 (2016) (arguing that the First Amendment should be read to confer a limited privilege to engage in nonconsensual audiovisual recording on private property when the matters recorded are of public concern).

177. See, e.g., Timothy Zick, The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation, 52 B.C. L. Rev. 941, 1020 (2011) (criticizing “First Amendment parochialism” and advocating a “cosmopolitan” approach that would make First Amendment rights “generally portable with regard to citizens, and at least partially portable with regard to aliens”).

178. See, e.g., *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, No. 16-16808, 2018 WL 4000057, at \*1 (11th Cir. Aug. 22, 2018) (holding that a nonprofit organization’s “outdoor food sharing” with homeless individuals “is expressive conduct protected by the First Amendment”).

179. See, e.g., Ronald K.L. Collins, ACLU Targets Panhandling Laws Across the Nation, *Concurring Opinions* (Aug. 29, 2018), <http://concurringopinions.com/archives/2018/08/fan-199-7-first-amendment-news-aclu-targets-panhandling-laws-across-the-nation.html> [<https://perma.cc/L9WA-RM84>] (collecting sources on the ACLU’s “all out assault on panhandling laws”).

180. See, e.g., Yochai Benkler, Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain, 74 NYU. L. Rev. 354, 412–46 (1999) (arguing that laws that lead to “enclosure” of the public domain, such as the anticircumvention provision of the Digital Millennium Copyright Act, raise severe First Amendment concerns); Jed Rubenfeld, The Freedom of Imagination: Copyright’s Constitutionality, 112 Yale L.J. 1, 5 (2002) (arguing that the “freedom of imagination” guaranteed by the First



- to speak and associate about lawful subjects with organizations designated as terroristic;<sup>181</sup>
- for journalists to withhold confidential information from or about their sources;<sup>182</sup>
- for executive branch employees to “leak” classified information suggesting government error or abuse;<sup>183</sup>
- to assemble peaceably in public spaces;<sup>184</sup> and
- to be free from state surveillance.<sup>185</sup>

This is by no means a complete list. If they were to succeed (or succeed to a greater extent than they already have) in the courts, these sorts of arguments would not dispel the specter of First Amendment Lochnerism; past trends suggest that the First Amendment’s deregulatory potential would only grow. But the political valence of First Amendment case law might begin to tack back toward the left.

Conscious of such tradeoffs, progressive maximalists generally advance arguments for careful, and highly selective, expansion of the First Amendment’s reach. The risk of libertarian co-optation and ideological drift hangs over these efforts.<sup>186</sup> If a present inequality could

Amendment “calls into question the enormous and growing set of prohibitions imposed by modern copyright law on so-called ‘derivative’ works”).

181. See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 41 (2010) (Breyer, J., dissenting) (arguing that the First Amendment forbids the application of a federal statute criminalizing the provision of “material support” to designated foreign terrorist organizations to “coordinated teaching and advocacy furthering the designated organizations’ lawful political objectives”).

182. See, e.g., Jeffrey S. Nestler, Comment, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist’s Privilege*, 154 U. Pa. L. Rev. 201, 203 (2005) (“[J]ournalists should have a privilege, grounded in the common law and derived from the First Amendment, to refuse to answer subpoenas issued by judicial authorities.”).

183. See, e.g., Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. Nat’l Security L. & Pol’y 409, 411 (2013) (“This article argues that, contrary to the conventional wisdom, leakers merit robust First Amendment protections against prosecution.”).

184. See, e.g., Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. Rev. 543, 586–89 (2009) (critiquing the turn toward requiring prior permission for such assemblies and arguing “that the right of assembly should not be collapsed into the right of free expression”); John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. Rev. 2, 8 (2017) (arguing that courts and scholars have “erroneously” limited the right of assembly “to purposes of petitioning the government” and ignored First Amendment “principles meant to constrain discretionary enforcement by public authorities”).

185. See, e.g., Alex Abdo, *Why Rely on the Fourth Amendment to Do the Work of the First?*, 127 Yale L.J. Forum 444, 455 (2017), [http://www.yalelawjournal.org/pdf/Abdo\\_5czbvbj9.pdf](http://www.yalelawjournal.org/pdf/Abdo_5czbvbj9.pdf) [<https://perma.cc/65EU-E7S5>] (suggesting that “[c]ourts could simply apply the First Amendment . . . to surveillance that substantially burdens free speech and dissent”); Neil M. Richards, *Intellectual Privacy*, 87 Tex. L. Rev. 387, 431–34 (2008) (arguing that government surveillance of confidential communications jeopardizes the First Amendment value of “intellectual privacy”).

186. Rather than seek to carve out certain categories of speech from First Amendment coverage or protection, as a minimalist might do, some of today’s progressive maximalists

actually be rectified through maximalist litigation, however, the normative cost of allowing it to persist may seem too steep.

The arguments just reviewed generally take as a given the existing state action doctrine, pursuant to which the First Amendment, like other provisions of the Bill of Rights and the Fourteenth Amendment, applies almost exclusively to government actors.<sup>187</sup> As nongovernmental entities such as Facebook and Google have come to dominate the online expressive environment, some have proposed the further maximalist move of directly applying the First Amendment to these companies (or, more modestly, to certain uses of their digital platforms by government officials).<sup>188</sup> The resurrection and expansion of *Marsh v. Alabama*,<sup>189</sup> a 1946 case in which the Court treated a “company town” as a state actor for First Amendment purposes, is an *idée fixe* of this literature.<sup>190</sup> Yet while these proposals are often motivated by a concern about the amount of power that a small number of technology firms wield, it is far from clear that their adoption would serve egalitarian ends. As Balkin explains, to hold Facebook, Google, and their ilk to the same First Amendment standards to which we hold public regulators “would quickly make these spaces far less valuable to end users, if not wholly ungovernable,” and would significantly impair the firms’ ability to tamp down on hate speech, harassment, and other forms of antisocial

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appear to seek heightened judicial solicitude for the expressive conduct of poor or otherwise disempowered speakers. The history of First Amendment Lochnerism suggests the difficulty of convincing courts to recognize any such *carve-in* and then stabilizing it across judicial appointments and political economic change. Even if this could be achieved, however, the result may be hard to reconcile with the principles of content and viewpoint neutrality, at least as those principles have been articulated in modern doctrine. See *supra* notes 147–153 and accompanying text; *infra* notes 213–217 and accompanying text. The strategic question facing these progressive maximalists is therefore not just whether they can avoid co-optation and drift, but whether arguments of this sort can be pursued to any substantial extent within the terms of the liberal compromise—or whether their success depends, instead, on a reorientation of First Amendment law toward the pursuit of substantively egalitarian governance.

187. See Klonick, *supra* note 97, at 1609–13 (summarizing First Amendment state action doctrine).

188. See generally Whitney, *supra* note 96, at 24–28 (reviewing recent lawsuits raising such claims and concluding that “the once off-the-wall theory that these companies should count as state actors for First Amendment purposes is starting to look a bit more on the table”).

189. 326 U.S. 501 (1946).

190. See, e.g., Jonathan Peters, The “Sovereigns of Cyberspace” and State Action: The First Amendment’s Application—or Lack Thereof—to Third-Party Platforms, 32 *Berkeley Tech. L.J.* 989, 1025 (2017) (using “*Marsh* as a foundation” for “a state action theory suitable for the digital world”); Daniel Rudofsky, Note, Modern State Action Doctrine in the Age of Big Data, 71 *N.Y.U. Ann. Surv. Am. L.* 741, 777 (2017) (“Facebook is the town in *Marsh v. Alabama*. Only it appears to be a virtual town, and Facebook has essentially created a government over that virtual town. A strong case could be made that Facebook should be considered a state actor . . .”).

expression that disproportionately target women and racial minorities.<sup>191</sup> First Amendment doctrine would have to be made much more internally proregulatory before its direct application to these platforms could become a net plus for egalitarians.

B. *Speech on Both Sides*

First Amendment minimalist and maximalist arguments confine themselves to the traditional image of Anglo-American public law adjudication, pitting private right against public authority in a politically independent court of law.<sup>192</sup> Their underlying premise is that egalitarian ends can be achieved by recalibrating the distribution of constitutional authority between a private party's expressive interests and the state's legitimate public interests—interests ranging from social welfare to national security to antidiscrimination. In any given case, minimalist arguments tend to value the state's public interests more highly than the private party's expressive interests, and accordingly call for narrower First Amendment coverage or weaker First Amendment protection of the latter. Conversely, maximalist arguments tend to value certain expressive interests more highly than the state's public interests, and accordingly call for broader First Amendment coverage or stronger First Amendment protection of the former.

A second genre of egalitarian argument complicates this framework by introducing a set of interests that neither the private litigant nor the state necessarily represents. These interests are the expressive interests of third parties. Whereas minimalist and maximalist arguments focus on the degree to which the First Amendment should shield a particular party's expressive activity from state interference, arguments involving *speech on both sides* focus on the degree to which one party's expressive activity compromises the ability of other private parties to exercise their own First Amendment rights.

The generic speech-on-both-sides argument begins by identifying expressive interests distinct from, and downstream of, the expressive interests asserted by Speaker X in a First Amendment challenge to state regulation. The next two steps of the argument are to claim, first, that in the absence of appropriate regulation, the expression of X threatens the expressive interests of Speakers Y and Z, for example by "chilling" or "drowning out" the speech of Y and Z; and next, that these threatened interests are themselves entitled to some degree of First Amendment solicitude. The final step of the speech-on-both-sides argument is to contend that, when adjudicating X's constitutional claim, courts should

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191. Balkin, Triangle, *supra* note 159, at 2026.

192. See generally Peter L. Lindseth, Reconciling with the Past: John Willis and the Question of Judicial Review in Inter-War and Post-War England, 55 U. Toronto L.J. 657, 663–76 (2005) (describing the origins and persistence of this traditional image in English public law).

take into account the threat that X's expression poses to the expressive interests of Y and Z. This might lead a court to *devalue* speech by X that tends to silence Y and Z—to accord X's speech less First Amendment protection than it might otherwise enjoy.<sup>193</sup> Alternatively, judicial consideration of the immanent conflict between the expressive freedom of X and the expressive freedoms of Y and Z might lead a court to *accord greater weight* to the state's public interests in regulating X. Those public interests would now include preservation of the First Amendment rights of Y and Z.<sup>194</sup>

Whatever the precise form that it takes, the egalitarian goal of the speech-on-both-sides approach is to promote the positive liberty of those disempowered speakers who find it difficult to vindicate their expressive interests as First Amendment plaintiffs. Such speakers may suffer legally not only from a comparative lack of financial or cultural capital, but also from the adversarial, state-versus-society character of public law litigation. Judicial enforcement of the First Amendment focuses on private parties with grievances against the state for interfering with (rather than for failing to enable) their expression.<sup>195</sup> Speech-on-both-sides arguments seek to ameliorate this structural bias by opening the courthouse windows, so that the struggle for expressive freedom within society can be heard in the midst of adjudications formally framed as struggles between regulated speakers and their regulators.

Described in this way, speech-on-both-sides arguments have an impressive, if controversial, pedigree within contemporary First Amendment

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193. When the speech-on-both-sides argument takes this form, it can also be described as a minimalist move insofar as it entails decreasing First Amendment coverage or protection for a particular kind of speech.

194. Whether or not this should be understood as a maximalist move is a tricky question. On the one hand, recognizing a strong public interest in preserving the ability of third parties to exercise their First Amendment rights does amount to greater protection of those rights. But as a matter of legal form, it is the state's authority to *restrict* speech—speech that suppresses too much other speech—that has been enhanced. Such regulation of third-party harms would seem to have a surer constitutional footing in the religious liberty context due to the interplay between the Free Exercise and Establishment Clauses, which forbid accommodations of religion that impose significant burdens on the religious liberty of others. See generally Frederick Mark Gedicks & Rebecca G. Van Tassell, RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion, 49 Harv. C.R.-C.L. L. Rev. 343, 356–71 (2014) (reviewing this constitutional argument). But cf. Micah Schwartzman, Conscience, Speech, and Money, 97 Va. L. Rev. 317, 359–71 (2011) (noting the absence of an Establishment Clause for speech but suggesting that the Supreme Court's compelled speech doctrine might provide a usable alternative).

195. See Gregory P. Magarian, Regulating Political Parties Under a “Public Rights” First Amendment, 44 Wm. & Mary L. Rev. 1939, 1943 (2003) (“The present Court, across the terrain of First Amendment doctrine, treats the freedom of expression and the attendant freedom of association as private, negative rights intended to shield individual autonomy against government regulation.”).

theory.<sup>196</sup> Speech-on-both-sides arguments have featured prominently, for instance, in egalitarian defenses of regulations of pornography on the ground that pornography silences women and suffocates antipatriarchal speech;<sup>197</sup> in egalitarian defenses of regulations of campaign spending on the ground that unlimited spending by wealthy interests impedes “the kind of open public political discussion that the First Amendment seeks to sustain”;<sup>198</sup> and in egalitarian defenses of (and proposals to expand) copyright law doctrines such as fair use on the ground that overly broad copyright protections jeopardize the free speech rights of third parties.<sup>199</sup>

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196. Speech-on-both-sides arguments are a subset of what Eugene Volokh calls the “constitutional tension” method, which asks why any given speaker’s free speech rights should necessarily trump other constitutional values, including equality interests and the free speech interests of third parties. See generally Eugene Volokh, *Freedom of Speech and the Constitutional Tension Method*, 3 U. Chi. L. Sch. Roundtable 223 (1996). According to Volokh, although a constitutional tension approach to the First Amendment “comes naturally” and can be traced “to the founding of our nation,” it has an “unfortunate” track record and is “not the approach the Supreme Court generally uses today.” *Id.* at 224–25; see also Erica Goldberg, *Competing Speech Values in an Age of Protest*, 39 *Cardozo L. Rev.* 2163, 2167–68 (2018) (concluding similarly that under current doctrine “the government generally cannot advance the desire to promote free speech values . . . as an interest in restricting a private party’s free speech rights”).

197. Major works in this genre include Andrea Dworkin, *Pornography: Men Possessing Women* (1981); Catharine A. MacKinnon, *Only Words* (1993) [hereinafter MacKinnon, *Only Words*]; Alisa L. Carse, *Pornography: An Uncivil Liberty?*, 10 *Hypatia* 155 (1995); Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 *Wake Forest L. Rev.* 345 (2014); and Rae Langton, *Speech Acts and Unspeakable Acts*, 22 *Phil. & Pub. Aff.* 293 (1993). For a succinct summary of Professor Catharine MacKinnon’s and Andrea Dworkin’s canonical speech-on-both-sides arguments, see Balkin, *Some Realism*, *supra* note 81, at 377–78. For MacKinnon’s most recent critique of First Amendment pornography doctrine, see Catharine A. MacKinnon, *The First Amendment: An Equality Reading*, in *The Free Speech Century* (Lee C. Bollinger & Geoffrey R. Stone eds., forthcoming 2018) (on file with the *Columbia Law Review*).

198. Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 47 (2005); see also, e.g., *Citizens United v. FEC*, 558 U.S. 310, 441 (2010) (Stevens, J., concurring in part and dissenting in part) (arguing that “the Constitution does, in fact, permit numerous ‘restrictions on the speech of some in order to prevent a few from drowning out the many’” (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring))); *id.* at 470 (“[W]hen corporations grab up the prime broadcasting slots on the eve of an election, they can flood the market with advocacy that bears ‘little or no correlation’ to the ideas of natural persons or to any broader notion of the public good.” (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990))); cf. Bradley A. Smith, *The John Roberts Salvage Company: After McConnell, a New Court Looks to Repair the Constitution*, 68 *Ohio St. L.J.* 891, 909 (2007) (“[I]t has long been a fundamental part of the ‘drowning out’ argument popular in [campaign finance] ‘reform’ circles that some doors of communication must of necessity be closed in order to open others.”).

199. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (describing fair use as a “free speech safeguard[]”); Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 *Cardozo L. Rev.* 1781, 1793–95 (2010) (summarizing judicial and scholarly arguments that fair-use expression should receive First Amendment protection); see also Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*,

Speech-on-both-sides arguments have also made cameos in recent scholarship defending restrictions on employers' anti-union speech as a safeguard of employee expression and association.<sup>200</sup> "Behind almost every restriction on speech," Professor Erica Goldberg observes in a new article cataloguing additional examples, "lurks a potential argument that the lack of a speech regulation may be as deleterious to free speech values as a proposed speech regulation."<sup>201</sup>

The paradigm case of speech-on-both-sides argument concerns hate speech<sup>202</sup>—speech that vilifies, denigrates, or dehumanizes individuals or groups on the basis of ascriptive characteristics "such as race, ethnicity, religion, gender, or sexual orientation."<sup>203</sup> The traditional legal term for such speech is group defamation or group libel, and these categories still animate hate speech jurisprudence across the globe. In the United States, however, hate speech regulations have fallen out of favor in response to a growing judicial consensus that they violate the First Amendment.<sup>204</sup> Existing First Amendment doctrine does permit the

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42 B.C. L. Rev. 1, 67 (2000) (using copyright law to illuminate the general First Amendment problem raised "[w]hen speech interests exist on both sides of an issue").

200. See, e.g., Charlotte Garden, Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech, 79 Fordham L. Rev. 2617, 2660 (2011) (arguing that although federal regulation of employers' speech during unionization campaigns "involves restrictions on speech," these restrictions are justified in part because they enhance "employees' First Amendment associational interests"); Andrias, Robust Public Debate, *supra* note 150, at 2432 (arguing for a reframing of "the free speech paradigm within workplace representation elections as Speech vs. Speech").

201. Goldberg, *supra* note 196, at 2165. Goldberg herself is wary of speech-on-both-sides arguments and urges "a formally neutral free speech doctrine" that discounts them, as "governmental intervention into speech is," in her view, "far more corrosive than any private interference or self-censorship." *Id.* at 2168.

202. Cf. Volokh, *supra* note 196, at 224 (suggesting that the "constitutional tension" approach to the First Amendment has been most fully theorized "with regard to the hate speech debate").

203. Craig Martin, Striking the Right Balance: Hate Speech Laws in Japan, the United States, and Canada, 45 Hastings Const. L.Q. 455, 455 (2018); see also Alexander Brown, Rethorizing Actionable Injuries in Civil Lawsuits Involving Targeted Hate Speech: Hate Speech as Degradation and Humiliation, 9 Ala. C.R. & C.L. L. Rev. 1, 2 (2018) (defining the "opaque idiom" of hate speech in terms of "vituperation (bitter and abusive language) or vilification (viciously disparaging or insulting language) that makes reference to the victim's race, ethnicity, nationality, citizenship status, religion, sexual orientation, gender identity, disability, or other protected characteristic").

204. While the Supreme Court's decision in *Beauharnais v. Illinois*, 343 U.S. 250 (1952), which upheld a state criminal law prohibiting group defamation, has never been overturned, its validity has been all but ignored for at least four decades. See, e.g., *Collin v. Smith*, 578 F.2d 1197, 1204 (7th Cir. 1978) (questioning whether *Beauharnais* "would pass constitutional muster today"), cert. denied, 439 U.S. 916 (1978). For the development of the American status quo and its position as a global outlier, see Jeremy Waldron, Dignity and Defamation: The Visibility of Hate, 123 Harv. L. Rev. 1596, 1601–02 (2010). For three foundational efforts to revive the American law of group libel and defamation with respect to racist speech, see generally Richard Delgado, Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 Harv. C.R.-C.L. L. Rev. 133 (1982); Charles

prohibition of speech used to commit a criminal or civil infraction, as long as the infraction is not itself defined in terms of the expression of a particular topic or viewpoint.<sup>205</sup> It also permits the prohibition of speech that, in a given context, is so inflammatory as to have the force and effect of otherwise sanctionable physical conduct.<sup>206</sup> But typical hate speech laws do not fit well into either of these categories: They *do* define infractions in terms of the expression of a particular message, and they self-consciously *do not* confine their sanctions to speech that causes immediate physical disruption. On the contrary, the harms that hate speech laws would most specifically redress are often those that implicate psychological, dignitary, and expressive interests.

Proponents of such laws have long argued that one of the most significant costs of hate speech is its tendency to suppress the expressive and associational activity of vilified individuals and groups.<sup>207</sup> As Professor Mari Matsuda writes: "In order to avoid receiving hate messages, victims have had to quit jobs, forgo education, leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor."<sup>208</sup> Not only can hate speech silence individuals in the short term, but both hate speech and the failure to police it can also lead to the longer-term "disassociation" of minority groups from the ostensibly democratic political community and the communicative action essential to its maintenance.<sup>209</sup> It is for this

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R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 *Duke L.J.* 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 *Mich. L. Rev.* 2320 (1989).

205. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–91 (1992) (distinguishing a narrow yet constitutionally impermissible hate speech law from those categories of speech that the government may constitutionally prohibit); see also *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (confirming the vitality of *R.A.V.*'s approach); *id.* at 2235 (Breyer, J., concurring in the judgment) (same); *id.* at 2237–38 (Kagan, J., concurring in the judgment) (same).

206. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (indicating that while the First Amendment generally protects speech that advocates violence, it allows prohibitions on advocacy that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

207. See, e.g., Martin, *supra* note 203, at 504 ("[H]ate speech . . . not only distorts the search for truth, but suppress[es] and silence[s] the voices of the members of the target minority. Members of the hated group are effectively muzzled and driven from the public arena and fora of debate . . ." (footnote omitted)); see also *id.* at 467 n.38, 502 n.174 (collecting sources making similar arguments).

208. Matsuda, *supra* note 204, at 2337; see also Brown, *supra* note 203, at 18–22 (arguing that hate speech makes it more difficult for its targets to communicate in an effective and self-controlled manner); Delgado, *supra* note 204, at 146–47 (calling attention to public schools as a key institution in which the censorious dynamics of hate speech may be particularly acute and destructive).

209. Matsuda, *supra* note 204, at 2337–38. For the canonical "communicative" account of democratic society, see 1 Jürgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society* (Thomas McCarthy trans., Beacon Press 1984) (1981). In this spirit, Professor Richard Delgado has suggested that the legal sanctioning

reason that legal philosopher Jeremy Waldron views hate speech regulation as supporting the public good of “assurance,” or “conveying to people a sense of security in the enjoyment of their most fundamental rights.”<sup>210</sup> Beyond its immediate targets, hate speech may also impose expressive and associational costs on “non-target-group members,” costs that may be of “constitutional dimension” insofar as they fracture or stultify democratic dialogue.<sup>211</sup> More recently, the power of hate speech to drive vulnerable individuals and groups from the public square seems to have been magnified by the rise of the platform economy. The anonymity afforded by digital communications technologies, together with the speed and scale at which content spreads across the internet, have combined to create an “unforgiving ecology” of online abuse for women and other historically subordinated groups.<sup>212</sup>

As the example of hate speech regulation shows, the failure of speech-on-both-sides arguments to make more headway in the courts<sup>213</sup> has not been for lack of theory or evidence that certain forms of speech can degrade various other forms of speech. That premise is not much in dispute. Rather, the failure of such arguments reflects both the substantively libertarian orientation of First Amendment doctrine and the arguments’ awkward fit with the structure of public law litigation—a structure that disinclines judges to acknowledge and balance the competing constitutional interests of private parties.<sup>214</sup> Some formulations of speech-on-both-sides arguments may also run afoul of the Court’s doctrines regarding content and viewpoint neutrality, which strongly disfavor laws that appear on their face to prefer one sort of speech over another (say, nonhateful speech over hateful speech). These doctrines, as Lakier explains in her essay for this Symposium, have come to embody a formalistic conception of “expressive equality” that “limit[s] the effectiveness of the

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of hate speech may be necessary precisely because such speech interrupts the normal functioning of democratic dialogue that might otherwise correct it. See Delgado, *supra* note 204, at 147.

210. Waldron, *supra* note 204, at 1626–30. Only thanks to the provision of such assurance, Waldron contends, can “people who might otherwise feel insecure, unwanted, or despised . . . put that insecurity out of their minds and concentrate on what matters to them in social interaction—its pleasures and opportunities.” *Id.* at 1629.

211. Matsuda, *supra* note 204, at 2338–39.

212. Sylvain, *supra* note 99, at 9; see also *id.* at 10 (discussing Professor Danielle Citron’s and Professor Mary Anne Franks’s pioneering work on this issue). As Citron explained nearly a decade ago, the internet enables “bigots” to form “anonymous online mobs” and engage in numerous communicative activities that “terrorize victims, destroy reputations, corrode privacy, and impair victims’ ability to participate in online and offline society as equals.” Danielle Keats Citron, *Cyber Civil Rights*, 89 *B.U. L. Rev.* 61, 63–64 (2009).

213. See *supra* note 196 and accompanying text.

214. For a broad comparative critique of U.S. courts’ efforts to avoid the explicit balancing of rights claims, see generally Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps*, 132 *Harv. L. Rev.* (forthcoming 2018) (on file with the *Columbia Law Review*).



First Amendment as a tool for protecting the expressive freedom of those at the bottom of the economic and social hierarchies.”<sup>215</sup> According to these doctrines, the important thing is not that everyone’s speech interests are recognized and respected; the important thing is that every person, natural and artificial, is subject to the same governmental speech rules.

Lakier herself embraces the proposition that the First Amendment contains a principle of expressive equality, but she observes, crucially, that the meaning of expressive equality may be construed in a more or less context-sensitive manner. This observation echoes the classic debate between anticlassification and antisubordination readings of the Equal Protection Clause.<sup>216</sup> Speech-on-both-sides arguments tend to be deeply concerned with the expressive environment’s egalitarian character, only they conceptualize equality in more functionalist, materialist, and dignitarian terms than is typical in First Amendment law.<sup>217</sup> From this perspective, expressive equality is not about treating all speakers the same. It is about ensuring that all speakers have a more or less equal opportunity to participate in the public sphere. Lakier’s essay can be read as a call for a kind of symmetry across the First and Fourteenth Amendments: Legal liberals who support an antisubordination approach to equal protection, she suggests, should want judges to incorporate antisubordination norms into free speech law as well. One way judges might do this is by giving closer consideration to the expressive interests of third parties when those interests are directly implicated by the First Amendment case at hand.

### C. *From Speaker to System*

Speech-on-both-sides arguments aspire to make First Amendment law more egalitarian, and less Lochnerian, by acknowledging a wider range of expressive interests. Compared to the standard method of First Amendment analysis, these arguments take a relatively broad and dynamic view as to which speakers matter and which forms of interference with their speech raise constitutional concerns—looking not only at speakers whose expression is constrained by state regulation but

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215. Lakier, *supra* note 141, at 2127.

216. See *id.* at 2121–23. For a precursor to Lakier’s proposed hybridization of free speech and equal protection, see Charles R. Lawrence III, *Cross Burning and the Sound of Silence: Anti-Subordination Theory and the First Amendment*, in *The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography* 114 (Laura J. Lederer & Richard Delgado eds., 1995) (discussing the relationship between antisubordination constructions of the Equal Protection Clause and the First Amendment). For a more general discussion of “hybrid” and “intersectional” constitutional rights, see Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 *B.U. L. Rev.* 1309 (2017).

217. See, e.g., MacKinnon, *Only Words*, *supra* note 197, at 98 (contrasting American free speech law’s “stupid theory of equality,” which is “indifferent to whether dominant or subordinated groups are hurt or helped,” with the “more substantive” Canadian approach, which is “directed toward changing unequal social relations”).

also at third parties whose expression may be liberated by such regulation. Yet once one begins to move away from the dyadic, speaker-versus-regulator focus of current doctrine, why stop there? Why limit the analysis to the claims of competing speakers, rather than ask which sorts of regulation would best serve the expressive environment as a whole? A final set of egalitarian strategies resists the lure of the vexing individual case and emphasizes instead the importance of examining the system of free expression at the macro level—attending to the perspective of listeners as well as speakers, and taking into account the informational and expressive interests of as many listeners and speakers as practicable.

The First Amendment literature in support of campaign finance regulation illustrates how easily speech-on-both-sides arguments can bleed into *systemic* arguments of this sort. As noted above, liberal jurists such as Justice Stephen Breyer, Justice Stevens, and Judge Wright have sought to sustain statutory limits on electioneering expenditures against First Amendment attack partly on the ground that such limits may “enhance[] the self-expression of individual citizens who lack wealth.”<sup>218</sup> While this argument works in part by identifying the “speech on both sides” of campaign finance laws, it does so with reference to a practically uncountable number of nonwealthy third-party speakers. Furthermore, these jurists pivot almost immediately to a broader set of claims about how expenditure limits may also enhance “the truth-producing capacity of the marketplace of ideas”<sup>219</sup> and “the integrity, competitiveness, and democratic responsiveness of the electoral process.”<sup>220</sup> If anything, the standard legal-liberal defense of the constitutionality of campaign finance regulation places greater weight on the interests of listener-voters than it does on the interests of speaker-campaigners. The fundamental concern is not that big-money spending will result in the suppression of ordinary people’s political speech (a difficult-to-prove empirical proposition). The fundamental concern is that such spending will skew political discourse, and politics itself, in antidemocratic ways.

Speech-on-both-sides arguments, it turns out, cannot easily be confined to the courthouse. Their proponents want judges to give greater weight to the expressive, informational, and dignitarian interests of third parties who may be negatively affected by a litigant’s First Amendment victory and therefore to uphold regulations designed to protect those interests. At least in principle, however, there is little reason why someone advocating this approach should not *also* want judges to give greater weight to the interests of speakers and listeners one step

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218. Wright, *supra* note 145, at 637; see also *supra* notes 143–145, 198 and accompanying text.

219. Wright, *supra* note 145, at 636.

220. *Citizens United v. FEC*, 558 U.S. 310, 472 (2010) (Stevens, J., concurring in part and dissenting in part); see also Breyer, *supra* note 198, at 47 (“Ultimately, [campaign finance laws] seek . . . to maintain the integrity of the political process—a process that itself translates political speech into governmental action.”).

further removed from any given case.<sup>221</sup> More than that, there is little reason why someone who supports judicially enforced redistribution of speech rights in the name of the First Amendment should not also want *legislative* and *executive* officials to pursue policies that advance the expressive, informational, and dignitarian interests of the polity. Compared to courts, legislatures and agencies are likely to be in a better position to advance such interests at a wholesale level.

Several strains of anti-Lochnerian First Amendment argument make just this move from speaker to system—from asking how to define and defend specific types of speech by specific types of persons to asking how to engineer a fairer, fuller, “freer” expressive environment for everyone. Some systemic arguments remain fairly far off the wall, such as those that militate for a First Amendment right to an adequate education<sup>222</sup> or to “a formal, transparent platform for individual—and, in particular, minority—voices to participate in the lawmaking process.”<sup>223</sup> Systemic arguments in favor of campaign finance regulation are comparatively mainstream. Outside of the campaign finance context, the systemic perspective has proven especially popular in the First Amendment literature on media regulation in its widest sense, what Marvin Ammori has called the “structure of American communication.”<sup>224</sup> Ammori’s

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221. Notice in this regard that speech-on-both-sides arguments implicitly acknowledge listeners’ interests. The claim that certain forms of expression on one “side” (pornography, hate speech, big-money campaign spending) are liable to undermine expression on the other “side” (speech by women, vulnerable minorities, the nonwealthy) depends upon the effects that the former is expected to have on listeners (chilling, scaring, silencing). The basic concern is that unregulated or misregulated expression at  $T_1$  will prevent listeners at  $T_2$  from becoming speakers themselves at  $T_3$ . Even if speech-on-both-sides arguments do not invoke listeners’ interests as such, they tend to assume a certain causal relationship between the experience of listening and the production of speech.

222. See, e.g., Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 *Nw. U. L. Rev.* 550, 596–602 (1992); Penelope A. Prevolos, *Rodriguez Revisited: Federalism, Meaningful Access, and the Right to Adequate Education*, 20 *Santa Clara L. Rev.* 75, 91–96 (1980); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (noting the appellees’ contention “that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote”).

223. Maggie McKinley, *Lobbying and the Petition Clause*, 68 *Stan. L. Rev.* 1131, 1131 (2016). Drawing on a range of historical and political science sources, McKinley’s innovative article suggests that the Petition Clause might be revived to challenge the current system of congressional lobbying and the preferential access this system affords to the politically powerful.

224. Marvin Ammori, *First Amendment Architecture*, 2012 *Wis. L. Rev.* 1, 10. The concept of a “structure of communication” usefully complements two other, better established concepts in twentieth-century social theory: “structure of power” and “structure of feeling.” On the former, see William F. Grover & Joseph G. Peschek, *The Unsustainable Presidency: Clinton, Bush, Obama, and Beyond 15* (2014) (“There is a structure of power—the very structure and operation of society itself—that lies beneath the distribution of governmental powers.” (quoting Woodrow Wilson, *The New*

portrayal of this structure relies heavily on physical metaphor, charting a landscape of “speech spaces” and the legal “architecture” that shapes them.<sup>225</sup> But the broader import of his doctrinal and scholarly overview is more abstract: A venerable tradition of constitutional theorists has found the First Amendment to permit or even require the state to take affirmative steps to secure the expressive and informational interests of “all Americans,”<sup>226</sup> population by population and medium by medium, from internet to television to telephone to print publishing to city streets.<sup>227</sup>

As Ammori emphasizes, his “architectural” approach builds on the work of leading First Amendment theorists of media regulation, including Professors C. Edwin Baker, Jack Balkin, Jerome Barron, Yochai Benkler, Owen Fiss, and Cass Sunstein.<sup>228</sup> All of these theorists share a commitment to affirmative government intervention across a range of media, whether through financial subsidies for the press, a “fairness doctrine” requiring broadcasters to present opposing views on a controversial issue, “must-carry” rules for cable providers,<sup>229</sup> “net neutrality” and “open access” rules for internet carriers,<sup>230</sup> or any number of other regulatory strategies aimed at creating a more democratic and egalitarian

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Freedom: A Call for the Emancipation of the Generous Energies of a People 19 (1961)); C. Wright Mills, *The Structure of Power in American Society*, 9 *Brit. J. Soc.* 29, 32–35 (1958) (describing a “structure of power” as a network of public and private institutions that determine the real experience of being governed in a given society). On the latter, see Raymond Williams, *Marxism and Literature* 131–35 (1977) (describing a “structure of feeling” as the less-than-conscious attitudes and habits that members of a given society develop in response to the formal discourses and institutions that constitute the society’s self-conscious communal life). By analogy, a structure of communication might be understood as the real experience of speaking and listening in a given polity, as determined by the interaction of the social, economic, and technological means of communication and the legal and political governance of those means. Cf. Ammori, *supra*, at 21 (describing the practices and principles that “have been core to how Americans experience their First Amendment protections” (emphasis added)). All three of these concepts of structure play important roles, whether explicitly or implicitly, in systemic First Amendment argument.

225. Ammori, *supra* note 224, *passim*.

226. *Id.* at 21.

227. Cf. Jack M. Balkin, *Media Access: A Question of Design*, 76 *Geo. Wash. L. Rev.* 933, 936 (2008) (cataloging a historical range of “speech conduits,” from “dead tree” newspapers to “wireless services”).

228. See Ammori, *supra* note 224, at 10, 18, 24 (noting these influences).

229. See, e.g., Cass R. Sunstein, *A New Deal for Speech*, 17 *Hastings Comm. & Ent. L.J.* 137, 138–40, 154–59 (1994) (suggesting each of the foregoing strategies, among others, as potential means “to promote freedom of speech” by “promot[ing] attention to public issues and diversity of view” and thereby “diminish[ing] the influence of money over the content of broadcasting”).

230. See, e.g., Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 *Pepp. L. Rev.* 427, 428–33 (2009) [hereinafter Balkin, *Future of Free Expression*] (net neutrality); Yochai Benkler, *Ending the Internet’s Trench Warfare*, *N.Y. Times* (Mar. 20, 2010), <http://www.nytimes.com/2010/03/21/opinion/21Benkler.html> (on file with the *Columbia Law Review*) (open access).

structure of communication. In this spirit, Professor Tim Wu has recently proposed “[n]ew laws or regulations requiring that major speech platforms behave as public trustees, with general duties to police fake users, remove propaganda robots, and promote a robust speech environment surrounding matters of public concern.”<sup>231</sup>

However exactly they are framed, these proposals reflect a conviction that a well-functioning “system of free speech depends not only on the mere absence of state censorship, but also on an infrastructure of free expression.”<sup>232</sup> The Constitution must not stand in the way of building this infrastructure; on the contrary, it may need to be recruited as an ally in the effort. “When the state acts to enhance the quality of public debate,” Fiss writes in a representative passage, “we should recognize its actions as consistent with the First Amendment.”<sup>233</sup> “What is more, when on occasions it fails to, we can with confidence demand that the state so act.”<sup>234</sup>

Brought together by these basic commitments, egalitarian theorists of the “system of free speech” nevertheless vary in their normative and institutional emphases. For instance, some systemic theorists seek to establish a constitutional pedigree for their policy prescriptions, insisting that the First Amendment itself demands or at least motivates their proposals. Most others, however, ground their prescriptions in the subconstitutional or extraconstitutional demands of democracy, social justice, or prudence, seeking to establish only that the First Amendment does not forbid them.<sup>235</sup> Likewise, some systemic theorists foreground the

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231. Wu, *Obsolete*, *supra* note 158, at 23. These measures are needed, in Wu’s view, to counter the rise of “troll armies,” “flooding” tactics, “fake news,” and other new or intensifying threats to the digital speech environment. *Id.* at 11–17, 23–26.

232. Balkin, *Future of Free Expression*, *supra* note 230, at 432. As Balkin elaborated this claim in an influential early effort to reimagine the systemic perspective for the internet era:

Protecting freedom of speech in the digital age means promoting a core set of values in legislation, administrative regulation, and the design of technology. What are those values? They are interactivity, broad popular participation, equality of access to information and communications technology, promotion of democratic control in technological design, and the practical ability of ordinary people to route around, glom on, and transform.

Balkin, *Digital Speech*, *supra* note 96, at 52.

233. Fiss, *Social Structure*, *supra* note 125, at 1416.

234. *Id.*; see also Owen M. Fiss, *Why the State?*, 100 *Harv. L. Rev.* 781, 783 (1987) (suggesting that state regulation of speech with the goal of “furthering free speech values . . . is consistent with, and may even be required by, the [F]irst [A]mendment”); Christopher Witteman, *Information Freedom, a Constitutional Value for the 21st Century*, 36 *Hastings Int’l & Comp. L. Rev.* 145, 245 (2013) (drawing on German constitutional jurisprudence in suggesting that the First Amendment be read to require public “access to a diversity of ideas and a fullness of information”).

235. Compare, e.g., Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 *Harv. L. Rev.* 1641, 1641 (1967) (arguing for “a twentieth century interpretation

expressive interests of marginalized speakers, whereas most others appear to prioritize the informational interests of listeners.<sup>236</sup> And some systemic theorists envision a key role for the courts in developing robust speech architectures, whereas most others downplay the judicial function and focus on the incentives, responsibilities, and authorities that do or should lead legislators and administrators to enact their preferred reforms.<sup>237</sup> In the language of this Essay,<sup>238</sup> systemic theorists of the First Amendment tend to be more minimalist than maximalist in their visions of judicial review, asking the courts largely to step aside as the political branches experiment with measures to enhance the quality, diversity, and accessibility of public debate.

As explained above, the position that the political branches, and only the political branches, should aggressively promote egalitarian First Amendment rights fell into disrepute when the liberal compromise supplanted progressive civil libertarianism in the mid-twentieth

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of the [F]irst [A]mendment which will impose an affirmative responsibility on the monopoly newspaper to act as sounding board for new ideas and old grievances”), and Fiss, *Social Structure*, supra note 125, at 1411 (“What the phrase ‘the freedom of speech’ in the [F]irst [A]mendment refers to is a social state of affairs, not the action of an individual or institution.”), with Balkin, *Future of Free Expression*, supra note 230, at 441 (“Protecting free speech values in the digital age will be less and less a problem of constitutional law . . . and more and more a problem of technology and administrative regulation.”), and Wu, *Obsolete*, supra note 158, at 19 (affirming the “basic” proposition that the First Amendment is “a negative right against coercive government action,” not “a right against the conduct of nongovernmental actors” or “a right that obliges the government to ensure a pristine speech environment”).

236. Compare, e.g., Barron, supra note 235, at 1678 (proposing “a right to be heard” that would allow more speakers to obtain access to the mass media), with C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 *Fla. L. Rev.* 839, 854 (2002) (criticizing a shift in First Amendment doctrine from treating media entities “instrumentally,” and protecting their speech choices only insofar as they “serve the interests of the audience in the receipt of uncensored and diverse content,” toward “treating media enterprises as rights bearers in their own behalf”), and Fiss, *Social Structure*, supra note 125, at 1411 (“[T]he key to fulfilling the ultimate purposes of the [F]irst [A]mendment is not [speaker] autonomy . . . . In fact, autonomy adds nothing and if need be, might have to be sacrificed, to make certain that public debate is sufficiently rich to permit true collective self-determination.”).

237. Compare, e.g., Ammori, supra note 224, at 21 (identifying five doctrinal “principles” that “reflect a substantive, value-laden concern for the availability of speech spaces for all Americans” and arguing that these principles “should be adopted explicitly by courts deciding questions concerning legislated or judicial access to speech spaces”), and Barron, supra note 235, at 1678 (urging “the courts to fashion a remedy for a right of access, at least in the most arbitrary cases, independently of legislation”), with C. Edwin Baker, *Media Structure, Ownership Policy, and the First Amendment*, 78 *S. Cal. L. Rev.* 733, 755–58 (2005) (criticizing “activist judicial review” of “media architecture” regulation and noting that “the market is merely one among many possible architectures”), and Cass R. Sunstein, *Free Speech Now*, 59 *U. Chi. L. Rev.* 255, 257 (1992) (criticizing judicial interpretations of the First Amendment that “invalidate democratic efforts to promote the principle of popular sovereignty”).

238. See supra section IV.A.

century.<sup>239</sup> Few if any of today's systemic theorists openly repudiate the resulting constitutional settlement. Even as he urges state intervention to enhance public debate, for example, Fiss is careful to clarify that "[j]udges are the ultimate guardians of constitutional values" and bear a heavy "burden of guarding against the danger of First Amendment counterproductivity."<sup>240</sup> Yet by placing so much stock in legislative and administrative action and so little stock in judicial protection of negative rights against government infringement of speech, some of the stronger versions of the move from speaker to system may have quite disruptive implications. Indeed, the very aspiration to engineer a "better" system of free expression through the political process represents a challenge to the prevailing "negative-liberty model" of the First Amendment and its premise that "the central First Amendment purpose . . . is to keep government *out* of speech."<sup>241</sup> As Professor Burt Neuborne has observed, "[c]urrent Supreme Court doctrine is relentlessly speaker-centered" and inattentive to the interests of "the hearer,"<sup>242</sup> much less to the interests of the expressive environment writ large. This state of affairs is partly attributable to the structure of First Amendment litigation and partly to the Court's "uncompromising refusal to trust government speech regulators with any significant power."<sup>243</sup>

In short, to ask judges to review free speech cases through a systemic lens, or otherwise to defer to legislative and administrative judgments about the speech system, is to imagine a very different First Amendment regime from the one we have now. Insofar as the logic of egalitarian critique pushes toward a systemic perspective, the question therefore arises whether First Amendment Lochnerism could ever truly be dispelled without a radical rethinking of existing doctrine, including the limits imposed by the liberal compromise. The move from speaker to system is the most powerful move in the contemporary grammar of egalitarian First Amendment argument; its underlying account of free speech does not merely complicate or chisel away at the deregulatory Lochnerian paradigm but supplies a comprehensive alternative. It does so, however, by putting pressure on First Amendment norms ranging from content and viewpoint neutrality to the primacy of judicial enforcement to the baseline opposition to redistribution of expressive and informational resources. In threatening to displace such norms, the pursuit of systemic egalitarianism may end up looking a good deal like a revival of progressive civil libertarianism.

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239. See *supra* notes 147–155 and accompanying text; *supra* section I.B.

240. Fiss, *Social Structure*, *supra* note 125, at 1420.

241. Ammori, *supra* note 224, at 8 (emphasis added). The negative-liberty understanding of the First Amendment, Ammori explains, comes with the "corollaries of government distrust, value-neutrality, and anti-redistribution." *Id.* at 81.

242. Burt Neuborne, *The Status of the Hearer in Mr. Madison's Neighborhood*, 25 *Wm. & Mary Bill Rts. J.* 897, 897 (2017).

243. *Id.* at 902.

## CONCLUSION: THE EGALITARIAN FIRST AMENDMENT IN EXILE?

The search for an egalitarian First Amendment has never looked harder. As this Essay has tried to show, it is not just the current composition of the Supreme Court or its most controversial free speech decisions that account for the rise of First Amendment Lochnerism—a First Amendment jurisprudence that disables redistributive regulation and exacerbates socioeconomic inequality. Beyond the recent upsurge in conservative judicial appointees, a series of more fundamental developments in American law and political economy has facilitated, and seems likely to continue to facilitate, the spread of First Amendment Lochnerism. Three in particular stand out: first, the long-term growth of numerous overlapping forms of inequality from the 1970s through the present;<sup>244</sup> second, the rise of informational capitalism in the marketplace and a First Amendment–industrial complex in civil society;<sup>245</sup> and third, the surprising degree to which the midcentury liberal compromise between progressive and reactionary understandings of the First Amendment has delegitimated efforts to redistribute expressive and informational resources while legitimating an increasingly inegalitarian socioeconomic structure.<sup>246</sup>

In terms of both knowledge and power, legal egalitarians are best equipped to interrogate and to challenge the third development: the tendency of the liberal compromise, and the presumptively benign First Amendment jurisprudence it has produced, to favor First Amendment Lochnerism. Yet legal egalitarians cannot simply renounce the liberal compromise. Or, at least, they cannot do so without committing to a practically difficult and normatively fraught renovation of American constitutionalism writ large. This is because the features of the liberal compromise that allow First Amendment Lochnerism to thrive are intrinsic to the broader constitutional settlement that emerged from the New Deal. These include the primacy of judicial enforcement of civil libertarian rights and the reconceptualization of such rights as limitations on the state’s regulatory role, irrespective of the regulated parties’ relative socioeconomic power. Although the renunciation of these features might well forestall the spread of First Amendment Lochnerism, it would also undermine the very constitutional settlement that legal egalitarians currently seek to defend from conservative attack on multiple fronts.<sup>247</sup>

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244. See *supra* notes 2–19 and accompanying text (surveying historical and economic diagnoses of contemporary American inequality).

245. See *supra* Part II.

246. See *supra* notes 37–84 and accompanying text (describing the emergence of the liberal compromise and its facilitation of inegalitarian First Amendment doctrine).

247. See generally Fishkin & Pozen, *supra* note 111, at 969–71 (discussing contemporary legal liberals’ “defensive” constitutional posture and “small-c conservative orientation toward the Constitution”).



Faced with this conundrum, this Essay has canvassed First Amendment scholarship in search of ways around it, paths that may have gone unnoticed because theorists and historians were seeking solutions to a different problem. We find that traditional First Amendment theorizing in the grand style—a style motivated by justificatory ideals such as truth, autonomy, and democracy—is too empirically thin and politically inert to be of much use in this search.<sup>248</sup> Elsewhere, however, in scholarship more focused on concrete policy matters and persistent doctrinal ambiguities, we identify two relatively coherent and consistent strategies that remain available to legal egalitarians opposed to First Amendment Lochnerism. These strategies parallel familiar dichotomies from the social sciences: voice and exit,<sup>249</sup> reform and revolution.<sup>250</sup> The first strategy (voice, reform) is to remain within the world of the liberal compromise and to test its institutional and doctrinal boundaries. Might these boundaries extend farther, or prove less fixed, than previously thought? Notwithstanding the current composition of the federal judiciary, might new territory be found along the margins where a more egalitarian speech environment could flourish? As discussed in Part IV, contemporary First Amendment scholars, including participants in this Symposium, have not only asked these questions but also developed a grammar with which to answer them—a set of midlevel doctrinal and empirical arguments that seek to justify special judicial solicitude for the expressive and informational interests of the socioeconomically disadvantaged. Such solicitude may take the form of either stronger or weaker enforcement of preexisting First Amendment principles, found scattered across the precedential landscape.

This egalitarian grammar is highly suggestive of new ways to practice and to theorize First Amendment law. In their very generativity, however, the most powerful egalitarian arguments tend to move rapidly toward the frontier, to the edge of the liberal compromise if not beyond it altogether. Here we find the other means of evading First Amendment Lochnerism that our overview of free speech theory and historiography has identified. What lies beyond the liberal compromise? We suspect that the answer will resemble the approach that the liberal compromise itself displaced: the progressive civil libertarianism of the early-to-mid-twentieth century.<sup>251</sup>

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248. See *supra* Part III.

249. See generally Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* 3–5 (1970) (identifying “exit” and “voice” as competing strategic responses available to dissatisfied members of an organization).

250. See generally Göran Therborn, *Science, Class, and Society: On the Formation of Sociology and Historical Materialism* 115–44 (Verso 1980) (1976) (describing the self-conscious emergence of the distinction between reform and revolution in the mid-nineteenth century).

251. See *supra* section IV.C (suggesting that standard liberal arguments for giving greater weight to the “speech on both sides” of free speech controversies tend to push

This exiled alternative to the liberal compromise is in some respects reminiscent of the “Constitution in Exile” of the conservative legal imagination.<sup>252</sup> Both the Constitution in Exile and progressive civil libertarianism seek to forge a new constitutional political economy—one that is more libertarian or egalitarian, respectively—by using civil libertarian argument. Both trace their origins to the far side of the New Deal settlement, a settlement that putatively committed the zealous protection of noneconomic rights to the federal judiciary while entrusting the rational management of economic rights to Congress and the executive branch. At the same time, if the conservative Constitution in Exile or progressive civil libertarianism were ever to return, each would undoubtedly look quite different from what the actual legal culture of the early twentieth century allowed. While progressive civil libertarianism does not claim an originalist pedigree, hardly anyone is a thoroughgoing originalist when it comes to free speech.<sup>253</sup> Perhaps the most striking divide between these two exiled legal regimes is that progressive civil libertarianism—even in an updated and domesticated form—does not claim at this time any significant constituency within the legal academy.

Yet as this Symposium reflects, the sheer ambition of today’s First Amendment Lochnerism may be creating an opening for equally ambitious progressive projects. For instance, mainstream legal liberals seem more willing to question the “negative-liberty model” of the First Amendment<sup>254</sup> than they have been in decades. The ACLU is reportedly debating whether to reorient its free speech practice around “standing up for the marginalized.”<sup>255</sup> Might the disruptive nature of the Roberts Court’s First Amendment jurisprudence generate a countervailing movement of real consequence? The answer to this question will depend, in part, on whether progressive civil libertarianism can be reimagined for the digital age in ways that make good on its egalitarian promise while limiting possibilities for government censorship and abuse. Those scholars and practitioners who take up this challenge will inevitably

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toward a “systemic” perspective on free speech regulation, which in turn tends to push toward progressive civil libertarianism).

252. See generally Stephen E. Sachs, *The “Constitution in Exile” as a Problem for Legal Theory*, 89 *Notre Dame L. Rev.* 2253 (2014) (describing and defending the concept of a constitution in exile). “Nowadays,” Sachs notes, “the idea that constitutional practice may have gone seriously wrong” is most often attributed to conservative “originalists—followers, allegedly, of a nefarious ‘Constitution in Exile,’ waiting in their subterranean lairs to subdue the populace and abolish the New Deal.” *Id.* at 2254.

253. See *supra* notes 119–120 and accompanying text.

254. See *supra* notes 241–243 and accompanying text.

255. Mark Joseph Stern, *Who Does the ACLU Fight For?*, *Slate* (Aug. 27, 2018), <http://slate.com/news-and-politics/2018/08/the-aclus-decision-to-defend-the-nra-is-under-attack-internally.html> [<https://perma.cc/78WS-CE5Z>]; see also *id.* (stating that the ACLU has already “moved toward incorporating what one staff attorney described as ‘power analysis’ into its free speech litigation”).

disagree on many matters of normative priority and institutional detail. But the challenge must first be seen with clear eyes. Before any meaningful progress can be made toward overcoming First Amendment Lochnerism, its critics may need to affirm a more basic theoretical and practical point, a point that we hope this Essay has helped to establish: Progressive civil libertarianism is not a contradiction in terms.