A DEMOCRATIC POLITICAL ECONOMY FOR THE FIRST AMENDMENT

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INTRODUCTION

Today, the relationship between the First Amendment and distributive justice is fraught. Judges and other constitutional actors have been interpreting freedoms of speech and religion in a manner that unwinds government programs designed to ameliorate disparities of wealth, income, and other primary goods. And the regressive impact of actions grounded in these constitutional freedoms is particularly noticeable against the

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backdrop of historic levels of economic inequality.[1] Paradoxically, these constitutional rights, which are commonly associated with democracy, are working to undermine the material conditions for a cooperative society.

Two particular developments illustrate the problem. One is the diagnosis of "First Amendment Lochnerism." That trope compares the Supreme Court's contemporary speech and religion jurisprudence to its decision-making during the *Lochner* era. The comparison has a critical valence, of course, because *Lochner* is conventionally regretted. And it has been deployed by some prominent jurists, including Justice Elena Kagan[2] and Justice Stephen Breyer.[3]

A related development is destabilization of the midcentury settlement.[4] After the Supreme Court abandoned Lochnerism and ceased invalidating New Deal programs, it established a new arrangement: economic justice would be deconstitutionalized and dejudicialized, while "social" and "political" rights would continue to be enforced using judicial review.[5] The set-

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1 *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 15, 23 (2014) (arguing that income inequality has increased since the 1970s so that in 2000–2010 it matched and even exceeded the level in 1910–1920).

2 *See* Janus v. AFSCME, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (warning that the Court had "weaponize[ed]" the First Amendment "in a way that unleashes judges . . . to intervene in economic and regulatory policy").

3 *See* Nat'l. Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2381–83 (2018) (Breyer, J., dissenting) (recognizing that the Court's approach "invites courts around the Nation to apply an unpredictable First Amendment to ordinary social and economic regulation" and citing *Lochner v. New York*, 198 U.S. 45 (1905)); *see also* Sorrell v. IMS Health Inc., 564 U.S. 552, 602–03 (2011) (Breyer, J., dissenting) ("At worst, [the majority decision] reawakens *Lochner*'s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue.").

4 This has also been referred to as the "New Deal settlement," the "liberal compromise," the "civil liberties compromise," and the "civil liberties settlement." *See, e.g.*, LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE 9 (2016) ("civil liberties compromise" and "civil liberties settlement"); Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1967 (2018) ("liberal compromise"); Larry D. Kramer, *The Supreme Court 2000 Term: Foreword: We the Court*, 115 HARV. L. REV. 5, 14 (2001) ("New Deal settlement").

5 *See, e.g.*, *Becerra*, 138 S. Ct. at 2381 (Breyer, J., dissenting) ("Historically, the Court has been wary of claims that regulation of business activity, particularly health-related activity, violates the Constitution. Ever since this Court departed from the approach it set forth in *Lochner v. New York*, ordinary economic and social legislation has been thought to raise little constitutional concern." (citations omitted)). The legal source of the settlement is generally thought to be *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). *See, e.g.*, Suzanna Sherry, *Property Is the New Privacy: The Coming Constitutional Revolution*, 128 HARV. L. REV. 1452, 1469 (2015) ("[T]he *Carolene Products* footnote created bifurcated review."). While these categories of rights—political, social,

tlement has served as a defining feature of American constitutionalism in the intervening years.

Now, however, judges have unsettled that bargain by invalidating economic regulation using freedoms of speech and religion, which are paradigmatic examples of rights that fall on the noneconomic side. Lawyers on the left have been caught flat footed because they are accustomed to operating without any articulated political economy at all.[6] For many of them, the lesson of *Lochner* is just that constitutional law is prohibited from embracing judgments on matters of economic justice. They assume that any such judgments must be subordinated to constitutional rights, including freedoms of speech and religion.[7] But what if the problem was not that the *Lochner* Court was operating with a substantive understanding of the relationship between law, politics, and the economy, but just that its understanding was undemocratic?

In this Article, I begin building an interpretation of the First Amendment that promotes the practical conditions for a vital democracy. I argue that considerations of distributive justice do properly affect interpretation of free speech and religious liberty. This is true even assuming that those provisions have priority over ordinary law, including economic regulation.

The argument is divided into two parts, following this Introduction. Part I outlines a democratic interpretation of the First Amendment that harmonizes rights protection with concern for political, social, and economic belonging. It specifies how distributive justice properly affects jurisprudence in a manner that the conventional prioritization (and judicialization) of individual rights has seemed to foreclose. Speech and religion doctrines are integrated in a coherent account, which is keyed to a conception of democracy.[8] In brief, people who are suffering from certain forms of deprivation and disadvantage will find it impossible to exercise their basic rights to participate in the project of cooperative government. Basic

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and economic—cannot be neatly maintained, practitioners commonly use them in this context.

6 *See* Jeremy K. Kessler, *The Political Economy of "Constitutional Political Economy,"* 94 TEX. L. REV. 1527, 1528–29 (2016) (noting that "constitutional political economy became something of a dead language" after the New Deal) (citing JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION (forthcoming 2020) (manuscript at 65–66)).

7 For one call to rethink the First Amendment's economic valence, see Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2163 (2018).

8 *See* NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 25–36 (2017) (describing the coherence method).

liberties are thwarted by insufficiency of primary goods, while membership status may be degraded by structural inequality of economic wherewithal. To illustrate the approach, I evaluate concrete conflicts occurring both inside courts and outside them. For example, a democratic political economy has implications for campaign finance regulation, labor law, regulation of prescription drugs, the requirement of "net neutrality" for internet service providers, and the obligation of employers to provide health insurance coverage for female contraception.[9]

Part II uses the approach to understand the current moment in constitutional law. First, it sets up a historical comparison to *Lochner* that is deliberately presentist and designed to highlight undemocratic conceptions of the relationship between First Amendment law and distributive justice. To that end, I isolate two aspects of Lochnerism, both of which are drawn from the democratic theory outlined in Part I. One aspect is that constitutional actors are using a conception of rights that could be called "anticlassificatory."[10] Doing so allows them to downplay the effects of power disparities and other social circumstances on the exercise of basic liberties, even though these interpreters often do attend to the values of free speech and how those values are served on the ground (and in this sense they have assimilated the lessons of legal realism). A second aspect is that they deem the existing distribution of primary goods to be neutral and natural, rather than politically constructed, and they use that baseline to identify government departures as burdensome or biased. Understanding Lochnerism this way opens up one critical approach to cases like *Citizens United*, *Sorrell*, and *Hobby Lobby*.[11]

Notably, this way of interpreting the First Amendment applies beyond courts. It has purchase wherever constitutional arguments occur: in legislatures, administrative agencies, nonprofit organizations, media outlets, and political mobilizations. This interpretation highlights the way the *Lochner* Court deployed a political economy that frustrated democratic principles. And it suggests that such a proclivity can be shared by legislative and executive actors. Part II therefore features current examples from outside the judiciary. And it draws not

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9 *See infra* Part I.

10 *See, e.g.*, Genevieve Lakier, Reed v. Town of Gilbert, Arizona, *and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233. The term anticlassificatory, which I owe to Genevieve Lakier, does not capture all aspects of the conception of rights that I wish to describe, but it indicates some central features. *See infra* subpart II.B.

11 *See infra* sections II.A.3–4.

only from speech law, which has dominated the literature so far,[12] but also from the law of religious freedom.[13]

Part II ends with a particular account of the breakdown of the midcentury settlement. Although this point is closely related to the diagnosis of Lochnerism, the two are distinct. While the comparison to *Lochner* is designed to identify pathologies, the observation that the settlement is being reworked has no necessary negative valence. That arrangement may have been unprincipled from the start. Understanding it from the perspective of democratic theory suggests that the problem is not that the Court has begun to operate with an account of the relationship between law, politics, and the economy—that is inevitable—but instead that it is choosing an account that undermines collective self-determination.[14] Rather than rehabilitate the settlement, then, constitutional actors might respond by improving their understanding of how First Amendment rights interact with economic justice. Questions of institutional design—e.g., how to allocate authority to interpret and enforce the Constitution among branches of government—could then be answered from that perspective.

A few caveats. Nothing here should be read to suggest that constitutional law is especially important for combatting contemporary forms of unfreedom or inequality. To the degree that First Amendment decisions are contributing to the difficulty, however, it is necessary to construct alternatives. A related caution is that courts are unlikely to lead the effort to reimagine free speech and religious liberty. Constitutional arguments are likely to have greater impact outside the judiciary.[15]

Third, I bracket the matter of whether economic rights to contract and property should be constitutionalized,[16] and I

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12 *But see* Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1455–56 (2015) (comparing Lochnerism and modern freedom of religion jurisprudence).

13 *See infra* section II.A.4 (free exercise).

14 *See infra* subpart II.B.

15 For examples, see *infra* subpart I.A, sections II.A.3–4. For a leading theory of institutional design in constitutional decision-making, see LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES 1–11 (2004).

16 *Compare* JOHN TOMASI, FREE MARKET FAIRNESS 89–92 (2012) (giving civil, political, and economic liberties the status of rights that the government can limit only for compelling reasons), *with* Alan Patten, *Are the Economic Liberties Basic?*, 26 CRITICAL REV. 362, 363 (2014) (arguing that economic liberties should not enjoy priority but defining economic liberties somewhat broadly and understanding priority in a particular way), *and with* Anna Stilz, *Is the Free Market Fair?*, 26 CRITICAL REV. 423, 423 (2014) (offering "doubts about whether 'thick' economic freedom is a condition of democratic legitimacy").

stop short of proposing socioeconomic rights to housing, education, basic income, health care, and the like.[17] Although those kinds of guarantees may well be attractive, I first want to explore the more proximate and difficult argument that distributive imperatives affect our interpretation of negative rights.

Nor should my argument be taken to suggest that the First Amendment requires a particular distribution of primary goods. Rather, legal interpretation should be guided by a democratic commitment to ensuring the conditions for cooperative governance and the exercise of individual rights. For now, I have little to say about the demands of distributive justice that are independent of those conditions.

I understand that some critical theorists have given up on rights discourse altogether. Even for them, however, the argument here should hold some interest, if only as part of a transitional strategy that negotiates longstanding features of existing constitutional discourse.[18] An ambition of this Article is to bring together the critical literature's powerful diagnosis of existing First Amendment practice with a constructive effort to imagine an alternative.

Finally, it must be accepted that a turnabout in First Amendment interpretation is not likely anytime soon, given judicial and political realities. Nevertheless, academics can productively strive to develop a constitutional vision that is fully worked out, both in case conditions change and in order to promote that change with grounded arguments. Academics occupy an institutional position outside the government, advocacy groups, and business organizations, and they therefore have a distinct opportunity to undertake that work.

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17 *Cf.* Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 671, 692–95 (2014) (advocating for a return to the "Anti-Oligarchy Constitution"); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 14 (1999) (tracing the founding history of the idea that citizens had "a *right* to sufficient property upon which to work to support themselves and their families"); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 962 (1973) (discussing Rawls's *A Theory of Justice* as it relates to "affirmative rights . . . to education, shelter, subsistence, health care, and the like").

18 *See, e.g.*, Lea Ypi, *The Politics of Reticent Socialism*, 2 CATALYST 157, 157–76 (2018), https://catalyst-journal.com/vol2/no3/the-politics-of-reticent-socialism [https://perma.cc/AG5M-GUN7] (reviewing WILLIAM A. EDMUNDSON, JOHN RAWLS: RETICENT SOCIALIST (2017)) (exploring such a transitional strategy).

I
A DEMOCRATIC POLITICAL ECONOMY FOR THE FIRST AMENDMENT

To construct an account of the relationship between First Amendment rights and distributive justice that is justified and durable, I begin with a version of constitutional democracy. My aim is to identify an interpretation of freedoms of speech and religion that coheres with existing strands of legal precedent and is capable of being supported by reasons—in other words, a reading of the law that fits together with actual constitutional practices and is justified.[19]

The ideal of democracy that is implicit in jurisprudence on freedom of speech and freedom of religion has at its root the precept that democratic government derives its legitimacy from those subject to its power.[20] People formulate their own personal convictions and political conceptions, working out reasons for their views in dialogue with others.[21] Drawing on the resulting commitments, they set collective rules, including laws concerning the coercion of individuals. In that way, they manage the tension between collective self-determination and individual self-determination.[22] Formation of democratic will around a public conception of the good happens through discourse and action in a wide variety of settings, from family life to civic organizations and national platforms.[23] A permanent feature of that discourse is disagreement, both reasonable and

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19 *See* TEBBE, *supra* note 8, at 25–36 (describing and defending a method of social coherence); RONALD DWORKIN, LAW'S EMPIRE 65–68, 255 (1986) (describing the requirements of fit and justification for legal interpretation).

20 *See* ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 4–5, 40–41, 73 (2014).

21 *Cf.* RAINER FORST, THE RIGHT TO JUSTIFICATION: ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE 2–7 (Jeffrey Flynn Trans., 2012) ("One could combine an analysis of the most important discourses about political and social justice with an investigation of the social conflicts that produce those discourses . . . ."); Purdy, *supra* note 7, at 2163 ("[T]his Essay proposes that a democratic republic must be able to achieve political will formation around a creditable idea of the common good. This goal requires a modicum of civic equality . . . .").

22 *See* Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 153 (1996). For a prominent resolution of that tension, see COREY BRETTSCHNEIDER, DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF-GOVERNMENT 12 (2007) (proposing a "value theory of democracy" designed to capture the idea that "self-government should respect each individual's status as a ruler").

23 *Cf.* Joshua Cohen & Archon Fung, Democracy and the Digital Public Sphere 6 (2019) (unpublished manuscript) (on file with author) (stipulating a "*deliberative democracy*, which means a political society in which political discussion on fundamentals of policy and politics appeals to reasons—including reasons of justice, fairness, and the common good—that are suited to cooperation among free and equal persons with deep disagreements").

unreasonable, among individuals who exercise moral powers using independent judgment.

In democracy's republican form, government agents are empowered to formulate and implement legitimate laws.[24] People monitor their agents' actions, debate their merits, and hold them accountable, both through voting and by voicing their views.[25] They entrench constraints on what their representatives can do in their name—constitutional limitations—both so representatives cannot easily interfere with the mechanisms for democratic accountability, and so basic liberties are guaranteed more generally.[26] Government officials are limited affirmatively, in the extent of their powers, and negatively, in their ability to abridge fundamental rights even when they act within the scope of their authority.

A component of constitutional democracy is its conception—or its *constituting*—of people who contribute to its political project as members who are free and equal.[27] Democracy presupposes that each person can exercise moral judgment, particularly judgment regarding personal ends and collective ends, and that each person can back up those judgments with reasons.[28] It regards the individual as an author of collective commitments and the rules that instantiate them.

But cooperative authorship cannot happen where some occupy a subordinate rank, so that their participation is devalued or discounted, nor can it happen where their exercise of fundamental freedom is unfairly discouraged or disallowed. In other

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24 *See* ROBERT POST, *Lecture I: A Short History of Representation and Discursive Democracy*, *in* REPRESENTATIVE DEMOCRACY: THE CONSTITUTIONAL THEORY OF CAMPAIGN FINANCE REFORM: THE TANNER LECTURES ON HUMAN VALUES, 208, 225, 229 (2013).

25 *See* Cohen & Fung, *supra* note 23, at 6 (stipulating a "*democratic political regime*, which means a political arrangement with regular elections, rights of participation, and the associative and expressive liberties essential to making participation informed and effective"); *cf.* Charles R. Beitz, *How Is Partisan Gerrymandering Unfair?*, 46 PHIL. & PUB. AFF. 323, 358 (2019) ("The system should afford each participant a fair opportunity to affect legislative outcomes while also ensuring the people at large that a sufficiently large swing in popular political commitment will produce a change in the profile of the representative body.").

26 *See* ROBERT POST, *Lecture II: Campaign Finance Reform and the First Amendment*, *in* REPRESENTATIVE DEMOCRACY, *supra* note 24, at 265, 268–71.

27 *See* Cohen & Fung, *supra* note 23, at 5–6 (stipulating an "ambitious conception of democracy" organized around, inter alia, the notion of a "*democratic society*, which means a society whose members are understood in the political culture as free and equal persons").

28 *Id.* at 6 (positing free and equal persons who "have a sense of justice, rightness, and reasonableness; an ability to bring these normative powers to bear on social and political issues, both in reflection and discussion; and a capacity to act on the results of such reflection and discussion").

words, democracy entails a commitment to a meaningful measure of civic efficacy and equality.[29] Contributors to the cooperative political project cannot perform their basic functions if they are disabled from shaping ideas and ideologies, in collaboration with others.[30] This is a matter of both liberty and equality. Basic liberties are rendered meaningless by fundamental forms of deprivation, whereas membership status is imperiled by disadvantage (as are certain activities that are competitive in nature, as I will explain in a moment). So the democratic account is sufficientarian in certain respects, but egalitarian in others.

Though some may associate the commitment to free and equal membership with the partisan left, actually that value has deeper and broader support in American political thought. It is intimately connected, both conceptually and historically, to the ideal of democracy itself. At the founding, for instance, James Madison explained that taxation to support churches "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority."[31] And the Supreme Court has reinforced the

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29 *See* WENDY BROWN, IN THE RUINS OF NEOLIBERALISM: THE RISE OF ANTIDEMOCRATIC POLITICS IN THE WEST 17–18, 23 (2019) ("Political equality is democracy's foundation. . . . When political equality is absent, whether from explicit political exclusions or privileges, from extreme social or economic disparities, from uneven or managed access to knowledge, or from manipulation of the electoral system, political power will inevitably be exercised by and for a part, rather than the whole."). *Cf.* T.M. SCANLON, THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY 15 (2003) (arguing for a free speech principle that is "a consequence of the view that the powers of a state are limited to those that citizens could recognize while still regarding themselves as equal, autonomous, rational agents"). *But see id.* at 97–99 (disavowing this argument in a later essay, at least as a complete account of freedom of expression).

30 Nor would a robust democracy treat its members as full persons if it denied them other basic liberties that are not themselves narrowly political or strictly necessary for self-government. In this short piece, I cannot say more about fundamental rights—such as those of intimacy, reproduction, family formation, artistic exercise, travel and mobility, integrity of the person, etc.—and how they are related to a conception of democracy.

31 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* JAMES MADISON: WRITINGS 33 (Jack N. Rakove ed., 1999). The Virginia bill to which Madison was objecting exempted only certain denominations from the tax. *Id.* at 31–32. Rousseau also described the basic status of members of a democracy as equal citizenship. *See* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 16 (1762) (Jonathan Bennet ed., 2017), https://www.earlymoderntexts.com/assets/pdfs/rousseau1762.pdf [https://perma.cc/FTD4-4PBC] ("From whatever direction we approach our principle, we always reach the same conclusion: the social compact creates an equality among the citizens so that they all commit themselves to observe the same conditions and should all have the same rights."); *see also* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 132 (Erin Kelly ed., 2001) (describing "Rousseau's solution" to inequality, which is "followed (with

constitutional commitment to free and equal membership in the political community.[32] That principle is evenhanded in the sense that it protects all individuals against coercion and caste, including those who are illiberal or antiliberal. So the ideal of political membership has the potential to unify partly because it accepts the fact of disagreement itself, including disagreement on the most fundamental questions of personal morality and political justice.

First Amendment guarantees can be understood as important to democracy, of course. Expressive freedom is paradigmatic because it protects people's ability to deliberate over personal ethics and collective justice, to inform each other about their government, and to critique their representatives' actions.[33] This is not to say that free speech serves democratic political values alone. Other aspects, such as liberty of artistic expression or scientific pronouncement, are basic in the sense that no just society would deny their fundamental status. Yet freedom of political speech has a distinct role because of its centrality to democratic processes and principles.

Freedom of conscience, for its part, allows members of the democracy to deliberate independently, and not just about pri-

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modifications) in justice as fairness: namely, the fundamental status in political society is to be equal citizenship, a status all have as free and equal persons"). Note, however, that a contractarian conception of legitimacy is not necessary to the account I am giving. Nor is a limitation of rights to only those who are present in the country as full citizens rather than legal permanent residents, visa holders, or even documented immigrants. I bracket the matter of these limitations and I use the general term "membership" rather than the more specific concept of "citizenship."

32 *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565, 616 (2014) (Kagan, J., dissenting) (describing a "norm of religious equality—the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian"); Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 542–43 (1993) ("The Free Exercise Clause protects religious observers against unequal treatment, and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." (citation, quotation marks, and alteration omitted)); Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring) ("The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community.").

33 *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948) ("The principle of the freedom of speech springs from the necessities of the program of self-government."); Post, *supra* note 22, at 153–54 ("First Amendment jurisprudence conceptualizes public discourse as a site for the forging of an independent public opinion to which democratic legitimacy demands that the state remain perennially responsive."). Here I include "informal politics," where people are focused not just on electoral dynamics as such, but also on altering or preserving broader social attitudes. *See* SCANLON, *supra* note 29, at 108.

vate salvation. Free exercise, together with freedom of thought and opinion, safeguards people when they debate and decide on matters of personal ethics and collective justice. Undue restriction would interrupt democratic feedback just as harmfully as censorship of speech, although in a distinct way. Citizens must be able to formulate their worldviews and shape their own wills, if they are to be authors of government action, and if they are to understand themselves as such.[34] And for many, a critical perspective on public matters draws from a complete moral conception.[35]

Nonestablishment likewise disallows the state from endorsing or denouncing beliefs in a manner that would hamper citizens' deliberative powers or render them members of a subordinate status or caste. Not all government endorsements have these effects—officials can and do regularly take positions that do not demote, however much they offend, for example when they condemn smoking or promote artistic excellence. And of course, many government institutions are organized hierarchically without risking systemic subordination, such as the military, educational institutions, and administrative agencies. But when a jurisdiction endorses a particular theology, it alters its legal relationship with individuals, differentiating them on the basis of a fraught social characteristic.[36] Moreover, it renders nonadherents legally disfavored at the moment of government expression, independent of any subjective feelings they might have.[37] Again, people cannot fairly participate

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34 *Cf.* Vincent Blasi & Seana V. Shiffrin, *The Story of* West Virginia Board of Education v. Barnette*: The Pledge of Allegiance and the Freedom of Thought*, *in* CONSTITUTIONAL LAW STORIES 433–34 (Michael Dorf ed., 2d ed. 2009) (noting the "First Amendment interest in the speaker's freedom of thought and freedom of conscience"); Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 854 (2005) (conceptualizing speakers as rational agents).

35 With regard to religious freedom too, I cannot discuss aspects of the right that are independent of democratic processes. *Cf. infra* note 75 (putting aside similar matters concerning freedom of speech).

36 *C.f.* Town of Greece v. Galloway, 572 U.S. 565, 633 (2014) (Kagan, J., dissenting) (arguing that being an "equal citizen" entails the ability to "go before the government not as Christians or Muslims or Jews (or what have you), but just as Americans"); CÉCILE LABORDE, LIBERALISM'S RELIGION 140–41 (2017) (discussing criteria for the "minimal separation" of church and state); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 126–28 (2007) (arguing that public religious endorsements "signify who is 'in' and 'out' of competing large-scale social and ideological structures, and assign powerful and pervasive judgments of identity and stature to the status of being in or out").

37 *See* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1548 (2000) (asserting that "[c]itizens acting together through the State are already regarding nonadherents as outsiders when they endorse religion. This collective action in itself constitutes

in a democracy when their ideas or identities are categorically discounted or subordinated. Stratifying citizens interferes with self-determination in a fundamental manner.

Having described these basic principles, albeit quickly and incompletely, it is possible to ask how democratic constitutionalism might respond to the current moment. In particular, what is the most attractive alternative to an anticlassificatory conception of rights and to the naturalization of the existing allocations of political, social, and economic power?

Democracy of the sort I have just described entails the political efficacy and equality of its members, and *that* requires social and economic parity of a certain kind and degree. You could call this social democracy[38] or radical democracy.[39] Regardless of the label, the conviction is that people cannot meaningfully cooperate in the collective formation of ideas and interests if they are so deprived of primary goods that they are burdened in their basic activities or debased in their status.[40] And a government will find its democratic legitimacy impaired

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a change in the citizenship status of nonadherents, whether or not citizens individually believe such a change is justified."); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 10 (2000) (noting that the Equal Protection Clause's prohibition on the government "adopt[ing] policies that express a message of unequal worth . . . operates without regard to whether the state action causes concrete harm to identifiable people").

38 *See* Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 650 (2019).

39 Cohen & Fung, *supra* note 23, at 3.

40 As I use it, the term "primary goods" includes not just economic resources but also social regard and basic liberties. *See* RAWLS, *supra* note 31, at 57–59. Although I use the language of primary goods, it is also possible to describe the relationship between constitutional rights and material conditions in terms of capabilities. According to the capabilities approach, distributive justice is best described as fairness in capabilities, or the opportunities people have to achieve essential functionings. *See* Ingrid Robeyns, *The Capability Approach*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY 8 (Edward N. Zalta, ed. 2016), https://plato.stanford.edu/archives/win2016/entries/capability-approach/ [https://perma.cc/N55Y-5YX7] ("Capabilities are a person's real freedoms or opportunities to achieve functionings. . . . According to the capability approach, 'functionings' and 'capabilities' are the best metric for most kinds of interpersonal evaluations."). Because people differ in their ability to convert income and other all-purpose means into real opportunities, or capabilities, there are important conceptual differences between the two approaches. *See id.* at 11, 33–36. Yet those differences do not materially alter my analysis of the relationship between the democratic interpretation of rights to speech and religion and material deprivation. After all, thinking about the material and social conditions that are necessary for basic liberties to be meaningful in practice is not radically different from thinking about the real opportunities that people have to realize valuable ends. *See id.* at 18 ("For Sen, capabilities as freedoms refer to the *presence* of valuable options or alternatives, in the sense of opportunities that do not exist only formally or legally but are also effectively available to the agent."). For foundational texts on the capabilities approach, see, e.g., AMARTYA SEN, INEQUALITY REEXAMINED

if its members are prohibited from freely participating as full members in the political community.

None of this means that democracies cannot tolerate inequality of primary goods, nor does it mean that they cannot order commercial interactions through markets. But it does suggest strongly that any deployment of market mechanisms must be compatible with collective governance by individuals who are free and equal—that is, to put the point simply and powerfully, "democracy would have to come first."[41] Revising the relationship between cooperative self-determination and commercial markets is one necessary element of any new understanding of the First Amendment.[42]

How does this account of democracy and distributive justice relate to rights—to their conceptualization and construction? Accepting for a moment the attractiveness of the relationship between cooperative government and economic belonging that I have briefly described, what would it mean for constitutional interpretation?[43]

Lawyers on the left might dismiss its relevance on the ground that distributive justice must remain unconnected to constitutional discourse. They may hold this objection, at least in part, because they accept the midcentury settlement—they assume that distributional fairness is solely a matter of statutory and regulatory argument, not constitutional law and not adjudication by unelected members of the Supreme Court. The lesson of *Lochner*, for them, is that constitutional actors are prohibited from operating with any theory of political economy at all.

A related objection might hold that considerations of distributive justice must yield to the imperatives of individual rights. On this view, the priority of freedoms of speech and

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(1992); MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000).

41 Purdy, *supra* note 7, at 2171.

42 *See id.* at 2163; *see also* Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2118–19 (2018) (noting the "significant shift" in the First Amendment's political economy over the last four decades so that "the winners in First Amendment cases are much more likely to be corporations and other economically and politically powerful actors").

43 Some have identified the need for this kind of effort. *See, e.g.*, Kessler & Pozen, *supra* note 4, at 1953, 1960 ("Does the First Amendment tradition contain egalitarian elements that could be recovered? And what might a more egalitarian First Amendment look like today?"). And others have begun building up a democratic conception of speech law. *See, e.g.*, Lakier, *supra* note 42, at 2120 (arguing for a First Amendment that "functions better to protect the expressive freedom of the powerless").

religion over ordinary policy commitments, including the commitment to economic fairness, is constitutive of the very concept of a right. For example, officials could not seek to enforce a system of progressive taxation by censoring criticism of that policy, nor could they discriminate in a military draft for efficiency reasons.[44] The priority of basic liberties is more powerful than simple judicial deference because it applies wherever constitutional discourse occurs, including in legislatures and administrative agencies.

In what follows, I will assume that basic liberties do have priority over matters of ordinary policymaking, including distributive interests.[45] Also, I will remain agnostic on whether economic rights, such as property and contract guarantees, have constitutional status.[46] For both historical and conceptual reasons, I am inclined to think that core economic entitlements actually are basic, though they may be limited and qualified like other rights, but I will not pursue that inclination here. Finally, I put aside the conviction, familiar from international human rights instruments and some domestic constitutions, that socioeconomic needs must be constitutionalized, so that citizens are guaranteed affirmative government provision of housing, health care, education, secure retirement, etc.[47] Instead, I assume the narrower, negative conception of basic rights.[48] Under these suppositions, what import could concern over resource inequality have for interpretation of the First Amendment?

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44 *See* JOHN RAWLS, POLITICAL LIBERALISM 295 (1993); RAWLS, *supra* note 31, at 47.

45 I can even assume that rights have *lexical* priority over other policy interests.

46 *Compare* TOMASI, *supra* note 16, at 91–92 (giving civil, political, and economic liberties the status of rights that the government can limit only for compelling reasons), *with* Patten, *supra* note 16, at 363 (arguing against the notion that "important economic liberties ought to be regarded as 'basic' and given special priority over other liberal concerns, including those of economic justice"), *and with* Stilz, *supra* note 16, at 423 (expressing doubt "about whether 'thick' economic freedom is a condition of democratic legitimacy").

47 *See, e.g.*, S. AFR. CONST. § 26(1) (1996) ("Everyone has a right to have access to adequate housing."); *id.* § 27(1) ("Everyone has the right to have access to health care services, including reproductive health care; sufficient food and water; and social security, including, if they are unable to support themselves and their dependants [sic], appropriate social assistance."); *id.* at § 29(1) ("Everyone has the right to a basic education . . . .").

48 *Cf.* Samuel Moyn, *Human Rights Are Not Enough*, THE NATION (Mar. 16, 2018), https://www.thenation.com/article/human-rights-are-not-enough/ [https://perma.cc/4T7J-WN8V] (arguing that the human rights concept cannot guarantee distributional justice, but must be supplemented).

My contention is that the priority objection does not defeat an interpretation of the First Amendment informed by democratic political economy; the imperatives of distributive justice do bear on constitutional interpretation in important respects. Start by recalling the basic truth that no right is absolute: every right is subject to specification as to its *scope*, the boundaries within which it applies, and as to its *strength*, the degree to which a government interest can overbalance the right even within those boundaries.[49] That much is commonly recognized among lawyers. If it is also acknowledged that moral considerations play some role in legal interpretation,[50] then it becomes possible to argue that considerations of distributive equality can impact determinations of the First Amendment's scope and strength. Such considerations can influence the *interpretation* of constitutional guarantees, for instance by including the ways in which domination distorts the actual exercise of rights under nonideal conditions.

That the U.S. government has failed to secure the conditions for full and equal democratic participation by everyone is a familiar view, of course, and not only among Marxists. To take only the most prominent example, Rawls came to believe that disparities of primary goods stood in need of justification, that the institutions of welfare-state capitalism could not bear the burden of that justification, and that either "democratic socialism" or "property-owning democracy" was necessary to implement a defensible political economy.[51] Since he wrote

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49 *Cf.* Leslie Kendrick, *Free Speech as a Special Right*, 45 PHIL. & PUB. AFF. 87, 90, 91, 93 (2017); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1205 (2015) [hereinafter *First Amendment*] ("Some speech has long been thought to be outside the scope of the First Amendment . . . . In addition, for those activities within the scope of the First Amendment, some receive a high degree of protection, and some receive a lower degree."); *see also* Alan Patten, *The Normative Logic of Religious Liberty*, 25 J. POL. PHIL. 129, 147 (2017) (drawing a similar distinction between specifying the contours of the principle of "fair opportunity for self-determination" and determining whether some other value outweighs that principle).

50 *See* DWORKIN, *supra* note 19, at 47, 52, 65–68, 96–98.

51 RAWLS, *supra* note 31, at 135–40; *see also* EDMUNDSON, *supra* note 18, at 9 ("[H]aving dismissed welfare-state capitalism, command-economy socialism, and laissez-faire capitalism, 'this leaves . . . property-owning democracy and liberal socialism: their ideal descriptions include arrangements designed to satisfy the two principles of justice.'" (quoting RAWLS, *supra* note 31, at 138)); PROPERTY-OWNING DEMOCRACY: RAWLS AND BEYOND (Martin O'Neill & Thad Williamson eds., 2012) (assessing and expanding upon Rawls's conception of property-owning democracy).

those words, the relationship between democracy and capitalism has become even more imbalanced.[52]

By one estimate that is rough but seemingly reasonable, more than thirty-two percent of American families do not earn a living wage (meaning they cannot cover basic needs), and by another estimate, forty-three percent of households cannot afford a monthly budget that includes food, child care, health care, transportation, and a cell phone.[53] Economic hardship, and the distributive disparity that accompanies it, could well worsen in the coming years.[54]

Here, I will assume without argument that existing inequalities in primary goods cannot be justified, and that government efforts to counteract them are morally significant. My concern is whether any such judgments can matter to interpretation of the First Amendment, and my argument is that constitutional actors ought to consider them by using the general interpretive approach I have just described, as well as in three more specific ways.[55]

First, rights are exercised by particular parties against the background of fair conditions.[56] A feature of that arrangement is the *social division of responsibility*, according to which government has an obligation to provide a just social framework, including the assignment of rights and duties, but then individuals are accountable for their choices within that frame-

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52 *See* Martin O'Neill, *Philosophy and Public Policy After Piketty*, 25 J. POL. PHIL. 343 (2017).

53 Glenn Kessler, *Ocasio-Cortez's Misfired Facts on Living Wage and Minimum Wage*, WASH. POST (Jan. 24, 2019, 3:00 AM), https://www.washingtonpost.com/politics/2019/01/24/ocasio-cortezs-misfired-facts-living-wage-minimum-wage/?noredirect=on [https://perma.cc/Y2BW-SSRJ] (putting the share of Americans that do not earn a living wage at between 32% and 38%); *see also* Editorial, *Two Cheers for a Lackluster Economy*, N.Y. TIMES (July 2, 2019), https://www.nytimes.com/2019/07/02/opinion/us-economy-recover-weak.html [https://perma.cc/3BYQ-TGR2] (arguing that gains from economic growth have not been distributed evenly, and in particular that neither wage increases nor gains from capital have helped less affluent families); Institute for Policy Studies, *Facts: Income Inequality in the United States*, INEQUALITY.ORG, https://inequality.org/facts/income-inequality/ [https://perma.cc/8R5R-J6V7] (last visited Sept. 20, 2019) (concluding that 43.5% of the U.S. population are either low-income or poor, while the top 1% have nearly doubled their share of national income over the examined period); Institute for Policy Studies, *Facts: Wealth Inequality in the United States*, INEQUALITY.ORG, https://inequality.org/facts/wealth-inequality/ [https://perma.cc/PDQ5-2LU8] (last visited Sept. 20, 2019) (describing how the richest Americans have accumulated wealth over the last three decades, while the poorest Americans have "negative wealth").

54 PIKETTY, *supra* note 1, at 195–96.

55 This is not an exclusive list—there may be others.

56 *See* RAWLS, *supra* note 31, at 51–55 & n.16 (explaining background justice, a term not used in Rawls's *Theory of Justice*).

work.[57] This is not a matter of interest balancing—the social division of responsibility defines the scope of immunities and the force of obligations in any particular dispute.

So for example, an individual's claim based on the right of personal property (treated as fundamental for the moment) cannot defeat that person's duty to comply with taxation, even though taxation compels the loss of property as a matter of ordinary policymaking.[58] Or consider Alan Patten's example of *Hobby Lobby*: the company had a responsibility to support the ACA structure, in which adequate health care would be provided by private employers.[59] Exempting the business, as the Court did, allowed it to shirk its obligations.[60] Kent Greenawalt has a similar analysis: the *Hobby Lobby* majority used doctrinal reasoning that ignored the government's efforts to create a just distribution of primary goods.[61] To the degree

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57 *See* Patten, *supra* note 49, at 141; *cf.* SCANLON, *supra* note 29, at 22 (exploring the close relationship between distributive justice and freedom of expression). For a similar conception of responsibility in the capabilities framework, see Robeyns, *supra* note 40, at 20 (drawing on "the importance given to personal responsibility in contemporary political philosophy" and noting that "[i]f one believes that one should strive for equality of capability, then each person should have the same real opportunity (capability), but once that is in place, each individual should be held responsible for his or her own choices").

58 *See* Murdock v. Pennsylvania, 319 U.S. 105, 135 (1943) (Frankfurter, J., dissenting) ("It cannot be said that the petitioners are constitutionally exempt from taxation merely because they may be engaged in religious activities or because such activities may constitute an exercise of a constitutional right. It will hardly be contended, for example, that a tax upon the income of a clergyman would violate the Bill of Rights, even though the tax is ultimately borne by the members of his church. A clergyman, no less than a judge, is a citizen. And not only in time of war would neither willingly enjoy immunity from the obligations of citizenship. It is only fair that he also who preaches the word of God should share in the costs of the benefits provided by government to him as well as to the other members of the community. And so no one would suggest that a clergyman who uses an automobile or the telephone in connection with his work thereby gains a constitutional exemption from taxes levied upon the use of automobiles or upon telephone calls. Equally alien is it to our constitutional system to suggest that the Constitution of the United States exempts church-held lands from state taxation. Plainly, a tax measure is not invalid under the federal Constitution merely because it falls upon persons engaged in activities of a religious nature.").

59 *See* Patten, *supra* note 49, at 151.

60 A notable feature of this view is that the government's eventual accommodation unfairly relieved Hobby Lobby of that obligation, even though third-party employees eventually were covered by government regulation. *Id.* at 151–52; *see also* Alan Patten, *Religious Exemptions and Fairness*, *in* RELIGION IN LIBERAL POLITICAL PHILOSOPHY 204, 205 (Cécile Laborde & Aurélia Bardon eds., 2017) (setting forth a "fairness-based rationale for [religious] exemptions"). Patten also gives the example of progressive taxation—such a policy leaves wealthy religious people with fewer resources to pursue their faiths, but it is justified by the reasonable claims of less advantaged people to a fair share of resources. *Id.* at 205.

61 Kent Greenawalt, Hobby Lobby*: Its Flawed Interpretive Techniques and Standards of Application*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 125, 140–41,

that my argument differs from Rawls's suggestion that arrangements like the agency fee rule, which are designed to guarantee the fair equality of opportunity, must always yield to the basic liberties,[62] my contention here is a disagreement and a departure.

Second, rights are meaningless if citizens are suffering basic forms of deprivation.[63] Below a *social minimum*, people will enjoy freedoms in principle that are worthless in practice.[64] And no one should be so destitute that they are unable to exercise basic liberties, or that they are relegated to a subordinate caste. A related danger concerns stability and reciprocity: that people feel alienated from society's values[65] and they cannot understand themselves to have authorized the inequality they face.[66] Government's obligation to provide the conditions for reciprocity and stability appropriately informs the interpretation of rights that otherwise could prevent it from ensuring those conditions. Think here of subsistence income, essential health care, basic education, public financing of elections, housing, and a fair equality of opportunity for dignified work.[67] Such goods, which normally are the subject of ordi-

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145–46 (Micah Schwartzman et al. eds., 2016) (comparing the contraception mandate to a tax policy that would not admit a religious exemption).

62 *Cf.* RAWLS, *supra* note 31, at 42.

63 Rousseau conceives of the social minimum in a contractarian way; he argues that excessive inequality would make it impossible for citizens to freely assent to the polity. ROUSSEAU, *supra* note 31, § 11, at 26–27 (1762); *see also* RAWLS, *supra* note 31, at 47–48, 127–30 (arguing that the "the difference principle requires a minimum that, together with the whole family of social policies, maximizes the life-prospects of the least advantaged over time"). The "social minimum" constitutes a "constitutional essential." *Id.* at 47–48, 162 ("What should be a constitutional essential is an assurance of a social minimum covering at least the basic human needs . . . ."). *See also* RAWLS, *The Basic Liberties and Their Priority*, *in* POLITICAL LIBERALISM, *supra* note 44, at 297 ("[T]his priority [of liberty] is not required under all conditions. For our purposes here, however I assume that it is required under what I shall call 'reasonably favorable conditions,' that is, under social circumstances which, provided the political will exists, permit the effective establishment and the full exercise of these liberties. These conditions are determined by a society's culture, its traditions and acquired skills in running institutions, and its level of economic advance (which need not be especially high), and no doubt by other things as well.").

64 Cohen & Fung, *supra* note 23, at 12–13 ("Equal standing in public reasoning requires favorable social background conditions, including some limits on socio-economic inequality and the dependencies associated with it."); *cf.* TOMASI, *supra* note 16, at 91–92 (arguing that governments should be allowed to provide a social minimum, though not required to do so, and that their efforts should be subject to strict judicial scrutiny).

65 RAWLS, *supra* note 31, at 128; RAWLS, *supra* note 44, at lvi–lvii, 228–29.

66 Purdy, *supra* note 7, at 2177.

67 *Cf.* PHILIPPE VAN PARIJS & YANNICK VANDERBORGHT, BASIC INCOME: A RADICAL PROPOSAL FOR A FREE SOCIETY AND A SANE ECONOMY 21–23 (2017) (arguing for an

nary policymaking that must yield to basic liberties when they conflict, take on elevated importance when they provide the minimal material conditions for the exercise of the same basic liberties by other people.

Interests in programs that guarantee a social minimum then have parity with interests in basic liberties, in a sense, and conflicts between them must be handled in the same way as all disputes involving rights on both sides: solutions must be found that fit together in a coherent scheme, taking guidance from past judgments that have withstood reflection and from principles that fairly abstract from those judgments.[68] This is a matter not of the scope of rights but of their strength—and so addressing it may require interest balancing, again guided by precedents and principles, and it may also require some deference to legislatures or administrative agencies.

Last, basic liberties that are competitive in nature must have *fair value*, not weighted by economic or social power. Political rights have this competitive character insofar as they preserve the ability of citizens to influence elections and other democratic outcomes.[69] And of course freedom of speech is a paradigmatic political right.[70] If some voices have greater impact than others, because of disparate resources or cultural

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unconditional basic income); Tom Parr, Automation, Unemployment, and Taxation 16 (2019) (unpublished manuscript) (on file with author) (pressing "a distinctive pro-employment argument for basic income that is sometimes overlooked," namely that basic income increases workers' bargaining power as against employers).

68 *See* TEBBE, *supra* note 8, at 25–36 (describing this method).

69 RAWLS, *supra* note 31, at 46. Rawls believes that ensuring the fair value of political liberties is a constitutional essential that enjoys priority over the second principle of justice. *Id.*; *see also* SCANLON, *supra* note 29, at 22 (arguing that governments have an obligation "to insure that means of expression are readily available through which individuals and small groups can make their views on political issues known" and to insure that the means of political expression are not dominated by any one group).

70 *Cf.* Joshua Cohen, *Freedom of Expression*, 22 PHIL. & PUB. AFF. 207, 215 (1993) ("A system of stringent protections of expressive liberties must assure fair opportunities for expression: that is, the value of expressive liberties must not be determined by a citizen's economic or social position."); Cohen & Fung, *supra* note 23, at 10 (arguing for a value called "expression" which "adds substance [to the speech right] by requiring fair opportunities to participate in public discussion by communicating views on matters of common concern to audiences beyond friends and personal acquaintances. Expression requires a fair opportunity—dependent on motivation and ability, not on command of resources—to reach an audience given reasonable efforts, not as a right to have others listen or for your views to be taken seriously."). On the one hand, Cohen seems to advocate for a "fair opportunity" to engage in expression, but on the other hand, he sometimes argues that everyone should have "good and *equal* chances" to engage in public discourse. Cohen & Fung, *supra* note 23, at 11 (emphasis added).

domination, then democratic processes cease to work well for everyone. And that means people cannot effectively safeguard their other interests against state incursion. According to this vision, all citizens have a fair chance to inform themselves about the working of government, they are able to discuss and debate what they learn with others, they enjoy the latitude to formulate their own views and offer reasons to support them, and they have realistic prospects of conveying those convictions to each other and to government.

This too ought to be a matter of balancing the First Amendment against government interests, as it is under current law.[71] But recognition is due to the importance of achieving political parity, which goes well beyond the simple interest in avoiding the appearance of corruption. And here too, according to the best understanding, there are interests of comparable weight on both sides—the interest in protecting political speech and the interest in guaranteeing the fair value of political liberties—and therefore conflicts over campaign finance reform cannot be resolved simply by reference to the priority of rights over other kinds of concerns, but must be managed through a search for solutions that cohere with precedents that have withstood scrutiny over time and with principles that fairly abstract from those judgments. The implication is not only that regulations protecting fair value ought to be upheld, but also that regulations impairing fair value ought to be suspect. General laws that disproportionately burden people who lack the resources to broadcast their messages ought to be presumptively invalid under this approach.[72]

Tentatively, we may want to extend the concern over fair value to nonpolitical basic liberties, which otherwise are in danger of becoming merely formal. Rawls thought that doing so would be superfluous because the second principle of justice (which governs distribution) would assure the practical worth of other basic liberties.[73] But under nonideal circumstances, it may be necessary to counter the influence of distributive disparity and material deprivation by altering the interpretation of rights themselves. Rawls also worried that ensuring the fair value of other liberties would be socially divisive—and here he gave the example of enabling religious believ-

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71 *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010) (applying a balancing test, using the standard of strict scrutiny, to campaign finance legislation).

72 *See* Cohen, *supra* note 70, at 216.

73 RAWLS, *supra* note 31, at 151; RAWLS, *Reply to Habermas*, *in* POLITICAL LIBERALISM, *supra* note 44, at 329.

ers to go on expensive pilgrimages by giving them social resources.[74] But the social division of responsibility, described above, addresses that concern. And if we understand the goal to be fair value, rather than equal value, then the divisiveness objection loses some force and we can begin to imagine extending the guarantee of fair value beyond the political liberties.

Regardless of these specifics, my main conclusion is that distributional concerns properly affect the interpretation of rights to speech and conscience. This approach is substantive—it connects interpretation of the First Amendment to a conception of democracy and to distributional requirements that support the ability of participants to cooperate in a project of political authorship. None of this means simply shrinking the scope of First Amendment protections across the board or diluting their strength. Contrary to the view of many on the left that the First Amendment should simply be weakened, there are today important areas where freedoms of speech and religion are badly *underprotected*.[75] Instead, this substantive conception of the First Amendment is capable of distinguishing between protections that help and hinder democratic agency.

Notice how the approach reworks the midcentury settlement. First, constitutional rights retain their priority over ordinary policymaking, but they are shaped by economic concerns in multiple ways, both as to their scope and their strength. Constitutional interpreters cannot avoid the need to operate with a democratic conception of political economy—they cannot ignore the material conditions for democratic belonging but instead they must sensitize themselves to the complex interactions between distributive justice and basic liberties.

Second, a democratic conception of the First Amendment separates questions of constitutional morality, such as the priority of basic liberties, from the institutional question of how to allocate power between courts and the elected branches of gov-

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74 RAWLS, *supra* note 31, at 151; *see also* Patten, *supra* note 49, at 139–40 (giving a similar example involving "contemplative pilgrims" who are impecunious but committed to taking an annual pilgrimage to a distant site).

75 Examples of doctrines that arguably underprotect freedom of speech, on this democratic conception, include rules limiting the speech rights of public employees, cases holding that time, place, and manner restrictions leave adequate alternate opportunities for expression, and decisions justifying viewpoint discrimination as government speech. For examples of situations where an egalitarian approach would result in greater protection for speech, see STEVEN H. SHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT? 116 (2016); Kessler & Pozen, *supra* note 4, at 1990–92.

ernment.[76] Those two issues were conflated by the midcentury settlement and now must be distinguished. While institutional differences among the branches of government may well entail differences in their capacities to resolve questions of inequality, they do not demand a categorical ban on economic judgments by constitutional actors, nor should they require an outright prohibition on constitutional interpretation by legislators or administrative officials.

Finally, and most generally, a democratic conception of the First Amendment consolidates these several concerns in a coherent understanding of political membership and its necessary background conditions. Commitments to constitutional rights and distributive fairness both support a conception of society in which people cooperate to govern themselves. Strictly separating constitutional interpretation from resource fairness, and judicial power from executive and legislative authority, has failed—it has produced the kind of anticlassificatory conception of rights in the service of market expansion that we are seeing today. An alternative requires a robust understanding of democratic political economy.

A. Free Speech Examples

How would the interpretation of freedoms of speech and religion I have described, with their sensitivity to resource deprivation, alter the analysis and outcomes of actual constitutional conflicts? The examples in this section concern economic regulation, with speech and religion cases taken in turn. Dividing up illustrations in this way is not fully possible, of course, because the issues are cross-cutting, but it is possible to some degree. Throughout, I include legislative and administrative examples alongside judicial decisions.

In *Citizens United v. FEC*, the Court invalidated a campaign finance law that disallowed corporations from expressly advocating for or against particular candidates, or broadcasting "electioneering communications," within thirty days of a primary or sixty days of a general election.[77] Justice Anthony Kennedy, writing for five justices, applied the legal rule that government may not burden political speech unless it can

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76 Rawls often conflated two distinctions: the conceptual difference between constitutional and statutory interests and the institutional distinction between the judiciary and the legislature. *See, e.g.*, RAWLS, *supra* note 31, at 48 (assessing developmental phases of constitutional and statutory law in terms of legislative and judicial institutional roles); *id.* at 162 (suggesting that constitutional norms are worrisome when courts alone are not able to enforce them).

77 Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 337 (2010).

show that its regulation was narrowly tailored to a compelling state interest.[78] He concluded that Congress had impermissibly intervened in political discourse:

> By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.[79]

Justice Kennedy's principle was not unprecedented. In an earlier campaign finance decision, *Buckley v. Valeo*, the Burger Court had adopted an understanding of expressive neutrality according to which "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[80]

At first, that principle may appear to promote the conception of democracy that I sketched above. It suggests that government cannot classify speakers in public discourse without compromising their ability to form their ideas and interests, independent of influence from the very officials they seek to hold accountable. Interference with that process counts as a burden on private speech and as a violation of government neutrality. In passages making points like these, Justice Kennedy is attempting to articulate free speech values that drive the presumption against discrimination on the basis of content and speaker identity.

Yet the campaign finance rule invalidated in *Citizens United* deprived corporations of the ability to establish respect for their voices only in an abstract sense. Even if that characterization could have been maintained as to this particular entity—a nonprofit corporation broadcasting "Hillary: The Movie"—it did not realistically fit the broader class of business and incorporated nonprofits. At the very least, Congress might reasonably have concluded that allowing corporate electioneering during the final moments of an election would do more to pollute the expressive environment than disallowing it would.[81] A court that wished to find this judgment unreasona-

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78 *Id.* at 340.

79 *Id.* at 340–41.

80 Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam).

81 *Cf.* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 388 ("[F]or the legal realists, individual economic transactions had to be judged in their larger context, not only in terms

ble would have to assert a political economy that sharply defined private interactions and insulated them from public concerns. As I will explain in greater detail in Part II, Justice Kennedy asserts in *Citizens United* a conception of speech neutrality by the government that looks to the categories that the statute deploys to find unfairness. To view the speech right in that way is to disregard the broader political and economic context, in which legislation that uses speech categories may promote rather than impede the fair value of political liberties—the realistic ability of all citizens to participate in the political process that, in turn, is responsible for regulating the economic inequalities that produce political unfairness in the first place.[82]

Moreover, and connected, Justice Kennedy's conception of government discrimination relies on a naturalized conception of economic markets and their relationship to electoral markets. Only in a world in which economic influence on politics is produced by prepolitical interactions among private parties could it be found that campaign finance laws "distort" political relationships by constraining the power and influence of corporate actors.[83] Justice Kennedy is not exactly engaged in mechanical jurisprudence here—instead, he is operating with a particular account of the purposes driving the Speech Clause, an account grounded in a conception of how economic actors properly amass power in the private sphere and how they then deploy that power in electoral competition.[84]

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of their effects on the power of the parties, but also in terms of their cumulative effects on third parties and, indeed, upon the nation as a whole.").

82 Notably, Rawls compared *Buckley* with *Lochner* in his essay *The Basic Liberties and Their Priority* which dates from 1982. RAWLS, *The Basic Liberties and Their Priority*, *in* POLITICAL LIBERALISM, *supra* note 44, at 362–63 ("The First Amendment no more enjoins a system of representation according to influence effectively exerted in free political rivalry between unequals than the Fourteenth Amendment enjoins a system of liberty of contract and free competition between unequals in the economy, as the Court thought in the Lochner era. . . . The danger of *Buckley* is that it risks repeating the mistake of the Lochner era, this time in the political sphere where . . . the mistake could be much more grievous.").

83 *See* Balkin, *supra* note 81, at 381–82 ("[T]he legal realists argued that one could not disregard the effect of economic status on the exercise of economic rights, and that neither the existing distribution of economic power nor the effect of that distribution on economic bargains were pre-political. But the same thing might be said of the right of freedom of speech in two senses: First, the right of political participation is no less affected by differences in economic power than is the right of economic participation. There is nothing natural, or (in modern post-*Lochner* terms) nothing fair, about the results of a process in which some have vastly more political clout because of vastly more economic clout. This is the critique of *Buckley v. Valeo*.").

84 Purdy notices that the Court is operating out of fear of political entrenchment, against which Purdy offers a fear of economic entrenchment. Purdy, *supra*

An alternative would empower Congress to pursue the equal value of political freedom for all participants. It would recognize the tendency of wealth and other forms of economic capital to translate into political capital in American electoral practice.[85] It would understand the implication that there are interests in basic political liberties on both sides in cases like *Citizens United*.[86] And it would appreciate that the scope and strength of the First Amendment can and must be understood in terms of a robust conception of democracy that recognizes the actually existing connection between corporate power and political influence—the electioneering equivalent of unequal bargaining power. Processes of democratic selection, and enforcement of the speech rights that structure them, only generate just results if economic influence does not systematically affect electioneering and the responsiveness of those subsequently elected.[87] Whether these insights also impose on government the constitutional *obligation* to rectify structural imbalances in electoral influence is a matter I set to one side in this project, given my focus on negative rights rather than positive governmental duties. Whatever the answer to that question, a democratic conception of the relationship between rights and the distribution of primary goods ought to authorize

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note 7, at 2169–73. That interpretation is compatible with my reading that the Court is operating against the backdrop of an assumption about the smooth functioning of political markets.

85 Purdy, *supra* note 7, at 2171–74 (providing empirical evidence for the proposition that "[w]ealth and class stratification tend constantly to undermine the equality of citizens (which is always artificial and legally constituted), giving certain classes (the wealthy, professionals, investors) the capacity to set political agendas and control important decisions"); *see also* MICHAEL WALZER, SPHERES OF JUSTICE 11 (1983) ("[I]n a capitalist society, capital is dominant and readily converted into prestige and power."); *id.* at 315 ("The dominance of capital outside the market makes capitalism unjust.").

86 RAWLS, *The Basic Liberties and Their Priority*, *in* POLITICAL LIBERALISM, *supra* note 44, at 362 ("[T]he aim of achieving a fair scheme of representation can justify limits on and regulations of political speech in elections, provided that these limits and regulations satisfy the three conditions mentioned earlier [:no content discrimination, no unequal or undue burdens on political groups, and rational tailoring. *Id.* at 357–58]. For how else is the full and effective voice of all citizens to be maintained? Since it is a matter of one basic liberty against another, the liberties protected by the First Amendment may have to be adjusted in the light of other constitutional requirements, in this case the requirement of the fair value of the political liberties."); *cf.* Patten, *supra* note 60, at 213 (addressing balancing among competing considerations of self-determination).

87 RAWLS, *The Basic Liberties and Their Priority*, *in* POLITICAL LIBERALISM, *supra* note 44, at 362 ("In both [*Buckley* and *Lochner*] the results of the free play of the electoral process and of economic competition are acceptable only if the necessary conditions of background justice are fulfilled.").

policymakers to realize the practical conditions for effective political participation by everyone in the polity.

If *Citizens United* concerned mainly the equal value of political liberties, *Janus* implicated the social division of responsibility.[88] That case concerned a requirement that workers in an unionized workplace who declined to be members of the union nevertheless would be required to contribute an "agency fee" equivalent to a certain percentage of union dues. Otherwise, the government's thinking went, all workers would be incentivized to become nonmembers because they would still benefit from the union's collective bargaining without bearing any of the associated costs. Even those who were sympathetic to the union's mission and would otherwise be happy to be members would face financial pressure to surrender their union membership. This was referred to as the free rider problem.

In an opinion by Justice Samuel Alito, the Court invalidated an agency fee arrangement in a public-sector workplace on the theory that nonmembers were being coerced into supporting speech they opposed (viz., collective bargaining by the union). Justice Alito reasoned in part that "a significant impingement on First Amendment rights occurs when public employees are required to provide financial support for a union that takes many positions during collective bargaining that have powerful political and civic consequences" and he held that the labor law provision failed the "exacting scrutiny" used in commercial speech cases, without deciding whether the even more demanding standard of strict scrutiny should be applied.[89]

How should the Court have reasoned? It might seem strange that speech was thought to be involved at all, since only money was at issue, or that a payment compelled by the government counted as "endorse[ment]" of the negotiating activities of the union.[90] Yet an even deeper problem troubles the majority opinion and suggests an alternative outcome. Labor laws that impose agency fee requirements help to structure background justice—they are part of the framework that allocates duties among people living in a political community. Like taxes, these government-imposed fees specify the social division of responsibility. Also like taxes, they do not properly admit First Amendment exceptions, but instead they help to

88 Janus v. AFSCME, 138 S. Ct. 2448, 2460–66 (2018).

89 *Id.* at 2464–65 (internal quotation marks omitted).

90 *Id.* at 2464.

establish the framework of responsibilities within which those rights are exercised.[91]

Recall that citizens cannot rightfully complain when their taxes are used to fund government speech with which they disagree.[92] And because the agency fee was comparable to an excise tax, *Janus* involved a situation where a citizen sought to evade his social responsibility by citing a rights objection to the framework of fair background conditions, rather than forthrightly bearing responsibility for his actions. Mark Janus, the complaining employee, successfully avoided doing his share to support background justice, including a framework for the fair distribution of primary goods. This is a matter of the scope of the speech right, rather than its strength, recall—it is not a question of interest balancing.

Outside the courts, a democratic political economy has equally important implications for free speech interpretation. For example, the Trump Administration has rolled back regulations requiring "net neutrality"—that is, rules prohibiting internet service providers from discriminating among types of data they provide to users, such as by favoring their own content by providing it at higher speeds.[93] Trump administrators have defended the repeal as restoring the free market for digital communications.[94] Market neutrality is consistent with an argument that the repeal of net neutrality is required in order to protect the free speech rights of internet service providers, who are seen to be analogous to newspapers for these purposes. And in fact, Justice Brett Kavanaugh made this argument in a dissent he wrote while serving on the D.C. Circuit.[95] Arguments like these ally the First Amendment with market ordering, and they assimilate regulations like net neutrality rules

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91 *See* Steve Shiffrin, *Public Unions and Political Power*, RELIGIOUS LEFT LAW (June 30, 2018), https://www.religiousleftlaw.com/2018/06/public-unions-and-political-power.html [https://perma.cc/3QVE-P2EL].

92 *See, e.g.*, *id.* (comparing the agency fee in *Janus* to an excise tax and noting that "[c]itizens commonly are taxed to support ideologies to which they are opposed").

93 The repeal regulation is Restoring Internet Freedom, 83 Fed. Reg. 7852-01 (Feb. 22, 2018) (codified at 47 C.F.R. pts. 1, 8, 20).

94 Announcing the repeal of net neutrality, FCC chairman Ajit Pai commented that "[t]he internet is the greatest free-market innovation in history," and that "[i]t is time for us to restore internet freedom." Michelle Castillo & Todd Haselton, *The FCC Has Reversed a 2015 Rule That Could Change How You Access and Pay for Internet Service*, CNBC (Dec. 14, 2017), https://www.cnbc.com/2017/12/14/fcc-reverses-open-internet-order-governing-net-neutrality.html [https://perma.cc/6XXE-VAWC].

95 *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 428–29 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

with impermissible government efforts to redistribute speech opportunities against the principle of *Buckley*.[96]

A democratic approach would treat such regulations as mechanisms that establish fair background conditions and provide a framework for interaction without implicating the speech interests of internet intermediaries. Like "must carry" provisions that required cable television companies to devote a portion of their channels to local broadcasters, net neutrality requirements address potential technological bottlenecks and the outsized power that would be exercised by the companies who control them. The regulations respond by structuring the speech environment to allow for greater opportunities by disfavored speakers as well as greater access by the listening public.[97] While cable may be a natural monopoly, unlike the internet, it is also true that internet service providers can create restriction points that function much the same way—and in fact, many internet service providers are themselves cable companies.[98] Net neutrality requirements allocate duties in a specific manner in order to ensure the framework conditions within which individuals and entities may exercise their expressive freedoms.

B. Free Exercise Examples

For an example of how an alternative political economy could change thinking about religious liberty, consider *Burwell v. Hobby Lobby Stores, Inc.*[99] There, the Court exempted a business corporation from the "contraception mandate," which had been implemented by the department of Health and Human Services (HHS) acting under authority provided by the Affordable Care Act (ACA).[100] The contraception mandate required most employers who provided health insurance to include coverage for female contraception without cost sharing.

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96 Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.").

97 Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 196–98 (1997) (upholding must carry provisions and noting Congress's concern that cable operators were concentrating market power in ways that allowed them to exclude local stations). The Court also noted that the must carry provisions ensured that local stations continued to receive sufficient revenue, so that viewers without cable would continue to have access to rich programming. *Id.* at 208, 221. That consideration also relates to the background structure of the speech environment.

98 *See* Rob Frieden, *Assessing the Merits of Network Neutrality Obligations at Low, Medium and High Network Layers*, 115 PENN ST. L. REV. 49, 69 (2010).

99 573 U.S. 682 (2014). I also discuss the decision *infra* section II.A.4.

100 *See Hobby Lobby*, 573 U.S. at 696–704.

Hobby Lobby argued that it had a right to an exemption from the contraception requirement because its objection was grounded in religious beliefs and therefore protected under the Religious Freedom Restoration Act (RFRA), and the Court agreed. Consequently, coverage for female contraception was denied to the company's roughly thirteen thousand employees and their dependents.[101] They went without coverage from the time of the decision (and quite possibly earlier, because lower courts had already blocked the government from enforcing the contraception mandate) until HHS implemented a workaround about a year later.[102]

An alternative account would have understood the contraception mandate as part of the background allocation of social duties, and therefore not a candidate for a religious exemption. In this way, the contraception mandate was analogous to a tax, and the conclusion that it did not admit religious exemptions drew power from the widespread and considered view that taxation does not admit religious exemptions.[103]

Now, Hobby Lobby claimed it did not have a choice and therefore that it really was substantially burdened in its religious practice. It could not avoid the contraception mandate by ceasing to provide health insurance to its employees because it viewed providing that employment benefit as itself religiously obligated.[104] Moreover, the company would have faced a monetary penalty under the ACA for failing to provide health insur-

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101 The Court assumed that employees would not be harmed, predicting (correctly) that the Obama administration would extend to business corporations the same accommodation that it had crafted for nonprofit employers. *Id.* at 729–33. Under that accommodation, health insurers (or administrators of self-insured plans) were required to provide the coverage without additional cost. But nothing in the Court's opinion *required* the administration to take that action. And in fact, employees were harmed: they went without coverage for at least a year, between the date of the Court's mandate and when the administration promulgated the new regulation. In fact, employees probably were deprived for longer, since companies were relieved of the obligation by lower courts well before the Supreme Court handed down its decision. Courts have found that the harm from even temporary loss of contraception coverage may be irreparable. *See, e.g.*, Univ. of Notre Dame v. Burwell, 786 F.3d 606, 607–08 (7th Cir. 2015); Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 259–62 (D.C. Cir. 2014).

102 *See* Kimberly Leonard, *After Hobby Lobby, a Way to Cover Birth Control*, U.S. NEWS & WORLD REPORT (July 10, 2015, 5:35 PM), https://www.usnews.com/news/articles/2015/07/10/after-hobby-lobby-ruling-hhs-announces-birth-control-workaround [https://perma.cc/MP6M-89KP].

103 For similar comparisons between the contraception mandate and taxation, see Patten, *supra* note 49, at 151–52; Patten, *supra* note 60, at 204; Greenawalt, *supra* note 61, at 140–41, 145–46.

104 *Hobby Lobby*, 573 U.S. at 721 (noting that Hobby Lobby has "religious reasons for providing health-insurance coverage for [its] employees").

ance, and it might have suffered a competitive disadvantage in the labor market.[105] Yet those responses were not dispositive. Again, Congress enacted its health policy as part of its effort to provide fair background conditions, and religious actors had to bear the costs of their choices within that framework. On that account, the scope of religious freedom should not have been taken to include an exemption from government efforts to guarantee the basic material conditions for social and political cooperation.

When Congress enacted the ACA and required all employers that provide health insurance to include coverage for "preventative care," its ultimate objective was to extend health insurance to all Americans.[106] That is, Congress recognized that many citizens receive coverage through their employers, and it endeavored to build a national system around that reality. That policy could be interpreted as an effort to discharge the government's obligation to provide the minimal conditions necessary for participation in the life of the polity, the society, and the economy—including the meaningful exercise of individual rights.[107] Specifically, the contraception mandate worked to ensure that women (including not just employees but dependents) could realistically exercise reproductive freedom and enjoy practical equality of opportunity in the workforce. So even if employers' constitutional interests were implicated by the mandate, they were overbalanced by compelling concerns.

A democratic political economy has implications for free exercise interpretation by lawmakers and regulators as well. For example, the Trump administration has exempted employers who oppose the contraception mandate on moral or religious grounds, regardless of whether they are nonprofits or

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105 *Id.* at 722 ("[I]t is predictable that the companies would face a competitive disadvantage in retaining and attracting skilled workers.").

106 *See, e.g.*, 156 CONG. REC. H1827 (daily ed. Mar. 21, 2010) (statement of Rep. Welch) ("[B]y voting 'yes' to move us so that we have a health care system in this country where every American is covered and we all help pay."); *Id.* at H1851 (statement of Rep. Slaughter) ("You either believe in insurance reform, which will give a decent chance for health care for every American, or you simply believe in insurance companies."); Remarks on Signing the Patient Protection and Affordable Care Act, 2010 DAILY COMP. PRES. DOC. 1 (Mar. 23, 2010) ("And we have now just enshrined, as soon as I sign this bill, the core principle that everybody should have some basic security when it comes to their health care.").

107 RAWLS, *supra* note 44, at lix (listing "[b]asic health care assured all citizens" as one of the "essential prerequisites for a basic structure" within which the public-reason ideal "may protect the basic liberties and prevent social and economic inequalities from being excessive").

businesses.[108] The administration justifies those exemptions as necessary to support the right to freedom of conscience.[109] Unlike the Obama regulation that had already exempted religious nonprofits, however, these new regulations do not provide employees with alternate coverage—they deny coverage altogether on the theory that employees are not harmed when they lose a government benefit, relative to the world of private ordering. Even by the Trump administration's own estimates, up to "126,400 women of childbearing age" will lose health insurance for contraception.[110]

By contrast, a democratic interpretation would foreground the government's effort to provide comprehensive health insurance coverage on fair terms. When exempting religious actors entails significant harm to other private citizens—here, employees—that implicates their own religious freedom interests.[111] This is the principle against third-party harms that I have defended elsewhere.[112] Here, however, my point is just that the ACA and its implementing regulations structure the conditions against which individual rights are exercised, and they work to ensure that constitutional guarantees are not merely technical but meaningful in practice.

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108 The exemption for nonreligious moral reasons only applies to for-profit entities with no publicly traded ownership interests (as well as all nonprofits). *See* Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838, 47,861 (Oct. 13, 2017) (to be codified at 45 C.F.R. pt. 147). Conversely, the religious exemption applies to all employers. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,563, 57,559 (Nov. 15, 2018) (to be codified at 45 C.F.R. pt. 147).

109 83 Fed. Reg. at 57,544–45 (concluding that the religious exemption is required by RFRA); *cf. id.* at 57,541, 57,597 (claiming legal authority to exempt those "with sincerely held views of conscience on the sensitive subject of contraceptive coverage").

110 *Id.* at 57,551 n.26.

111 *See* Pennsylvania v. Trump, 930 F.3d 543, 570–74 (3rd Cir. 2019) (enjoining the rules under the APA and holding that they are not required by RFRA and because "the Religious Exemption . . . would impose an undue burden on nonbeneficiaries—the female employees who will lose coverage for contraceptive care") (citing Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) (an Establishment Clause case)); California v. Dept. of Health and Human Servs., 351 F. Supp. 3rd 1267, 1295–96 (N.D. Cal. 2019) (holding that the regulations' failure to protect third parties raise serious questions about their constitutionality under the Establishment Clause).

112 *See, e.g.*, TEBBE, *supra* note 8, at 49–70 (advocating for a concept of religious freedom that avoids harm to others, and criticizing *Hobby Lobby* as violating that principle); Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 106 KY. L.J. 781, 809 (2019) (arguing that excessive religious freedom exceptions violate a third party's right to be free from having religious beliefs imposed on them).

So a democratic approach to the political economy of the First Amendment produces real conceptual and practical yield. It reorients the relationship between distributive justice and rights interpretation, making economic considerations relevant to the interpretation of freedoms of speech and religion both generally and in (at least) three specific ways. Without unsettling the priority of basic liberties over ordinary policy concerns, including distributive justice, and without constitutionalizing either economic rights or socioeconomic entitlements, this democratic political economy makes distributive concerns relevant to the interpretation of First Amendment rights.

A First Amendment jurisprudence grounded in democratic justice also has implications for the coming crisis in constitutional law. I argue in the next Part that it generates a distinctive understanding of two literatures in particular: First Amendment Lochnerism and the breakdown of the midcentury settlement. At root, these developments are best understood as reflecting a different—undemocratic—conception of the relationship between politics, law, and the economy. Their primary flaw is not judicial activism, nor deregulation itself, but instead the inappropriate extension of the model of private consumer markets to public domains such as campaign finance, health regulation, labor law, civil rights, and more.

II
A TURNING POINT IN CONSTITUTIONAL LAW

If the democratic conception of the First Amendment described above seems abstract or irrelevant, then it might help to recognize that it has immediate implications for a turning point in constitutional law that has been reached today. Two related critiques characterize this moment. One is First Amendment Lochnerism, a term that is designed to reveal pathologies in the contemporary moment by comparing it to the *Lochner* era. The approach I sketched in Part I gives content to the critical comparison; it motivates an understanding of *Lochner* that highlights undemocratic features of the jurisprudence today. For me, the comparison isolates neither institutional imbalance (too much power for courts) nor simple deregulation (too much interference with social and economic policy), but instead a combination of anticlassification and market naturalization. Setting up the historical analogy that way has implications—for example, it allows us to see Lochnerism not only in court decisions but also in legislation and regu-

lation. And, constructed this way, it spotlights contemporary understandings of the relationships between law, politics, and the economy.

Another literature, closely related to the first, diagnoses the breakdown of the midcentury settlement. After the New Deal, the Supreme Court decided that it would leave economic matters to ordinary policymaking while continuing to enforce social and political rights. Today, however, the Court has altered that agreement—it has begun invalidating economic judgments using freedoms of speech and religion, which are noneconomic rights. This second line of argument is of course closely related to the first, but unlike the critique of Lochnerism, it does not necessarily carry a negative connotation. Quite possibly, the midcentury settlement was unstable and unprincipled from the start. Understanding its breakdown from the perspective of political economy suggests that the problem is not that the Court is operating with a substantive account of distributive justice—that seems inevitable—but instead that it is operating with one that is regressive in its effects.

In this Part, I unpack these two arguments, showing how a democratic account understands them differently from the way they have been depicted by some judges and scholars. Throughout, I offer examples not just from judicial decisions but also from constitutional actions in other branches of government.

A. The *Lochner* Trope

First Amendment Lochnerism is a critical term that compares current constitutional interpretation to decisions by the Supreme Court from around 1897[113] until 1937.[114] In order to

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113 Allgeyer v. Louisiana, 165 U.S. 578, 592–93 (1897) (invalidating a state statute using liberty of contract, a substantive due process right).

114 West Coast Hotel Co. v. Parrish, 300 U.S. 379, 392, 399 (1937) (holding that liberty of contract was not violated by state minimum wage legislation).

Regarding free speech Lochnerism, see Frederick Schauer, *First Amendment Opportunism*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 175, 178–79 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (examining "First Amendment Opportunism" in areas of regulation such as commercial speech and campaign financing); Balkin, *supra* note 81, at 383–84 (revealing how free speech has shifted from supporting liberal ideas to benefiting conservative interests); Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1232–40 (2014) (describing how recent interpretations of the First Amendment threaten public accommodation laws); Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 CORNELL L. REV. 527, 529–33 (2015) (analyzing how Lochnerism has evolved both in liberal and conservative ideologies); Daniel J.H. Greenwood, *First Amendment Imperialism (A Response to Michael Walzer's Leary Lecture)*, 1999 UTAH L. REV. 659, 659 (describing how the

understand and assess its force, I first describe the aspects of Lochnerism that are isolated by the democratic theory above and then I ask whether they shape First Amendment discourse today.

First Amendment has become "a bar to governmental action" and imposes *Lochner*-like economic regulations); Walton H. Hamilton & George D. Braden, *The Special Competence of the Supreme Court*, 50 YALE L.J. 1319, 1349 (1941) ("A few years ago a bench headed by the present Chief Justice read 'liberty of contract' out of the due process clause and promptly read freedom of speech into its place."); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 30–31 (1979) (criticizing the Court's use of the First Amendment to veto economic legislation as a "denial of the whole democratic system"); Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179, 181–82 (2018) (noting the dangers of "Lochnerizing" the First Amendment); Kendrick, *First Amendment*, *supra* note 49, at 1207 (noting how businesses are using the First Amendment for deregulation, similar to their use of liberty-based claims in the *Lochner* era); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1917 (2016) (tracing "anxieties about such 'First Amendment Lochnerism' date back to the federal judiciary's initial turn to robust protection of free exercise and free expression in the 1930s and 1940s"); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 167, 181–82 (2015) (warning that recent commercial speech decisions threaten to revive *Lochner* and destroy democratic governance); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 198–203 (2014) (describing how the Supreme Court embraced a neoliberal interpretation of the First Amendment); K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329, 1334 (2016) (arguing that the Roberts Court's approach to *Lochner* is based on an underlying faith in the free-market system); Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935, 942, 951, 957 (1993) [hereinafter *Political Incidence*] (noting that "there may be a closer affinity between free speech libertarianism and economic libertarianism or libertarianism simpliciter than has traditionally been supposed"); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133 (assessing the origins of the "new *Lochner*" and calling for limits on commercial speech protections); Rebecca Tushnet, *COOL Story: Country of Origin Labeling and the First Amendment*, 70 FOOD & DRUG L. J. 25, 26 (2015) (noting how the First Amendment has replaced substantive due process as "the new *Lochner*"); Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, THE NEW REPUBLIC (June 3, 2013) https://newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation [https://perma.cc/M9GE-6NF9] (recounting the history of the First Amendment as a tool for economic deregulation).

Regarding free exercise Lochnerism, see Korte v. Sebelius, 735 F.3d 654, 693 (7th Cir. 2013) (Rovner, J., dissenting) (opposing a decision to exempt religious employers from the contraception mandate and warning against subjecting "a potentially wide range of statutory protections to strict scrutiny, one of the most demanding standards known in our legal system . . . [in a manner that is] reminiscent of the *Lochner* era"); Sepper, *supra* note 12, at 1456–58 (diagnosing "Free Exercise Lochnerism").

1. *The (First) Gilded Age*

In *Lochner v. New York*[115] the Supreme Court invalidated a state statute that limited working hours for bakers.[116] The decision came to symbolize a period when the Supreme Court stood in the way of government efforts to address the economic suffering and injustice experienced by many during the Gilded Age and the Great Depression. Not all New Deal initiatives were invalidated, but several statutes that were central to President Roosevelt's program to address the economic crisis were struck down, along with many state regulations.[117] On the conventional view, unelected judges were opposing economic reform not only because they genuinely believed the Constitution to be offended, but also because they preferred laissez-faire economic policy to progressive regulation.[118] Only after the Court reversed course in 1937 was President Roosevelt's New Deal program implemented without judicial obstruction, on this accepted account. Lochernism therefore has a normative valence: it is never a first-order term of self-identification, but always a second-order expression of disapproval.[119]

Lochnerism's features are contested. Many lawyers associate it with judicial activism, understood simply as a willingness to strike down democratically enacted statutes and the regulations that implement them. But for my purposes, the aspects that are most useful for isolating and illuminating aspects of our own era are an anticlassifcatory conception of rights combined with a tendency to naturalize private market distributions. Of course, other features coexisted with these two during the first third of the twentieth century, and these two

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115 198 U.S. 45, 61 (1905).

116 The trope carries weight across the political spectrum. Consider Chief Justice John Roberts's *Obergefell* dissent, where he accuses the majority of Lochnerism many times. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2612, 2615–16, 2618–20 (2015) (Roberts, C.J., dissenting).

117 *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935) (invalidating the National Industrial Recovery Act of 1933); Carter v. Carter Coal Co., 298 U.S. 238, 310–11 (1936) (invalidating the Bituminous Coal Conservation Act).

118 *See, e.g.*, *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) (arguing that a judge's agreement or disagreement with economic policy should have no impact on their legal opinion).

119 There are exceptions. *See, e.g.*, DAVID E. BERNSTEIN, REHABILITATING *Lochner* (2011) (arguing that *Lochner* was rightly decided and that "modern constitutional jurisprudence owes at least as much to the limited-government ideas of *Lochner* proponents as to the more expansive vision of its Progressive opponents"); Randy E. Barnett, *After All These Years,* Lochner *Was Not Crazy—It Was Good*, 16 GEO. J.L. & PUB. POL'Y 437, 442 (2018) (arguing that *Lochner* was a "reasonable and good decision").

could be found in other constitutional periods (and the periodization itself should be problematized). But the point here is not to determine what Lochnerism "really" was, but instead to reveal aspects of our own era. And for that, it is most productive to focus on these two aspects.

Judges that typified the *Lochner* era, on my account, interpreted liberty and equality to prohibit government categorization on the basis of the protected activity or status.[120] They were not simple formalists, as that term is conventionally understood, because they appreciated that legal rules were driven by constitutional values and they cared about facts on the ground.[121] But they believed constitutional values were best served by focusing on government categorization as such rather than how it might have served rights interests in a more realistic, practical, or systematic manner. Realists therefore criticized the Justices for pretending that legal rules could determine outcomes to conflicts concerning economic arrangements, apart from the substance of how the purposes driving those rules were served in a more systemic sense.[122] And they pointed out that protecting against classifications under conditions of unfreedom and inequality would produce failures of substantive liberty and substantive equality.[123]

So in *Lochner* itself, the Court found that a New York law restricting the hours of bakers implicated liberty of contract simply by prohibiting an employer and an employee from agreeing to longer work hours.[124] By its very terms, the statute interfered with the ability of individuals to strike bargains regarding employment. Finding no state "police power" because New York could prove no valid concern for the "safety, health,

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120 Balkin, *supra* note 81, at 388–89; *id.* at 397 (identifying "the formal liberty of speech" as "freedom from content-based censorship").

121 *See, e.g.*, Rick Hills, *The Healthcare Decision and the Revival of the Taxing Power: The Costs and Benefits of Formalism in Federalism*, PRAWFSBLAWG (JUNE 28, 2012), https://prawfsblawg.blogs.com/prawfsblawg/2012/06/the-healthcare-decision-and-the-costs-and-benefits-of-formalism-in-federalism.html [https://perma.cc/K8EJ-8MNY] ("The essence of formalism in legal interpretation is paying no attention to the purpose embodied in the text one is interpreting." (quoting Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 562 (1996)).

122 *See* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605 (1908) ("Law is not scientific for the sake of science. Being scientific as a means toward an end, it must be judged by the results it achieves, not by the niceties of its internal structure.").

123 *See* Balkin, *supra* note 81, at 396–97.

124 Lochner v. New York, 198 U.S. 45, 53 (1905) ("The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer.").

[or] morals" of longer work hours for bakers, the Court invalidated the law.[125] On the more substantial question of whether bakers were *really* free to strike bargains with employers, the Court said only that there was no evidence that the deal before them was "involuntary."[126] But it deemed irrelevant the question of whether the power distribution between employer and employee in this industry made bargaining imbalanced in practice.[127] In cases like these, the Court engaged in analysis that looked first and foremost to see whether the government had targeted a protected activity, like freedom of contract.[128] It dismissed as unreasonable the argument that the same liberty might have been promoted, rather than prohibited, by the economic regulation at issue.[129] Viewed as a "labor law, pure and simple," the state statute was simply unreasonable—there could be no real debate over whether it did more rather than less to protect the substantive freedom of employees to negotiate contracts.[130]

A second, related characteristic of Lochnerism—again, for my presentist purposes—was naturalization of the market and

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125 *Id.*

126 *Id.* at 52.

127 *See id.* at 76 (Holmes, J., dissenting) ("Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work."); *id.* at 69 (Harlan, J., dissenting) ("It may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength.").

128 *Cf.* Alfred L. Brophy, *Did Formalism Never Exist?*, 92 TEX. L. REV. 383, 391–92 (2013) (reviewing BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2010)) (characterizing the view "that realists characterized judges as formalists because they were adherents of individualism, embraced the doctrine of freedom of contract, and were reluctant to depart from precedent" as "accepted wisdom among legal historians").

129 *Lochner*, 198 U.S. at 57 ("There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state . . . .").

130 *Id.* A similar conception affected cases concerning federalism. For example, the *Lochner* Court devised doctrines for the Commerce Clause and then applied them to strike down federal statutes that presented no realistic risk to federalism. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 277 (1918) (invalidating a federal regulation of child labor that was overwhelmingly supported by states but that the states could not have enacted themselves because of high coordination costs). Although the Court recognized that the overriding purpose of the commerce provision was to limit the ability of Congress to interfere with state regulatory power over local economic matters, actually the Court's invalidation *frustrated* the ability of the states to enact meaningful limits on child labor, a goal they needed federal assistance to achieve.

the common-law entitlements that structured it, so that private ordering could provide a baseline for construing government violations of liberty and neutrality. According to this understanding, commonly associated with Cass Sunstein, the Justices believed that doctrines of property, contract, and tort provided fair rules for private transactions between willing parties, and that government departures from market distributions could be constituted as violations of individual liberty or state neutrality.[131] In other words, judges' assumption of a market baseline allowed them to register economic regulations as violations of neutrality or restrictions on liberty. Government redistribution, in particular, raised the concern that the state was unjustly taking resources from one private citizen and giving them to another in violation of property and contract rights. Implicit in this way of thinking was an acceptance of the status quo distribution of wealth and income.[132] Ruled out was recognition of the historical and political construction of common law rules in the pursuit of particular policy ends, with particular contemporary effects on the relative power of market actors.

In *Lochner*, for example, the majority dismissed the possibility that New York could justify its statute as a "labor law, pure and simple." Implicit though it was, the objection seemed to be that a labor law would simply be redistributing economic power from one private actor to another. In the parlance of the time, a "labor law, pure and simple" could not be justified as an exercise of the police power because it did not serve a public purpose, but instead simply promoted the private interests of

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131 *See, e.g.*, 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 365–66, 489 n.41 (2000) ("Within this *Lochnerian* vision, . . . [i]t was only the state that could provide unconstitutional 'subsidies' when it enacted 'class legislation' that picked the pockets of one group merely to enhance the welfare of another."); Sepper, *supra* note 12, at 1460 ("[T]his [Article] defines Lochnerism to mean strict scrutiny of economic regulation supported by an ideal of private ordering and a resistance to redistribution from that private order."); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874–75 (1987) ("Whether there was a departure from the requirement of neutrality, in short, depended on whether the government had altered the common law distribution of entitlements."); Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, U. CHI. L. REV. (forthcoming 2020) (manuscript at 37), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3374370 [https://perma.cc/5B6R-PJBF] ("[W]e can attribute the failure of *Lochner* era courts to adequately account for the 'realities of modern life' almost entirely to the strong public/private distinction they relied upon to delimit the scope of constitutional rights.").

132 Sunstein, *supra* note 131, at 882 ("[T]he Court took as natural and inviolate a system that was legally constructed and took the status quo as the foundation from which to measure neutrality.").

one actor over another in an economic contest.[133] Interference with private ordering thus *constituted* a violation of liberty of contact. In this way, the market ideal drove the identification of burdens on the liberty of contract and unfairness among economic classes. Eliminated by this reasoning was the recognition that New York had been involved in shaping economic policy all along, through its construction of the common law inter alia, and that hours and wages legislation therefore could not so easily be construed as burdensome or biased.

What this comparison highlights about Lochnerism is not primarily that the Justices deregulated. Nor is it that unelected judges frustrated legislative representatives. Nor is it that they deployed a right—freedom of contract—that was not enumerated in the Constitution. Rather than any of these, the comparison brings out that the *Lochner* Court promoted a political economy that frustrated, not furthered, a conception of democracy that prioritized economic belonging alongside social and economic membership.[134] That difficulty was substantive—a matter of political and constitutional morality—rather than only institutional.

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133 *Lochner*, 198 U.S. at 57 ("Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act.").

134 Marc O. DeGirolami has criticized Elizabeth Sepper's account of Lochnerism. He writes:

> The disparaging comments by Sepper and others who take a similarly critical line about *Lochner* are perplexing. They evince a deep misunderstanding of what the *Lochner* era was all about. Substantive due process in the style of *Lochner* was meant to ensure that the government was properly pursuing the public good, rather than invidiously or arbitrarily depriving individuals of their liberty. . . . The claims of scholars like Sepper and others who invoke *Lochner* as a legal hobgoblin are actually very similar in structure to the arguments of the *Lochner* period. *They* are today's Lochnerizers, though they bring very different substantive visions of the common good to their work than did judges of the *Lochner* era. Indeed, it is they who insist on the demotion of First Amendment rights to interests that should be balanced in accordance with the public good against other interests they may think are more valuable. They have simply substituted a different baseline of political commitments for *Lochner's*, while taking on board all of the solicitude and formalism for their baseline that *Lochner* did for its own very different one.

Marc O. DeGirolami, *The Sickness unto Death of the First Amendment*, 42 HARV. J. L. & PUB. POL'Y 751, 792–93 (2019). DeGirolami appears to believe that the error of the *Lochner* Court was to operate with a substantive theory of any type. I am offering a substantive political economy for the First Amendment, though one grounded in a more attractive and appropriate understanding of democracy than the earlier Court's.

A corollary of this revision is that Lochnerism can affect legislatures and administrative agencies as well as courts, which dominate the conventional account. Officials in any of these institutions can interpret and implement the prohibition of classifications on the basis of speech or religion, and any of them can conclude that citizens have been impermissibly benefitted or burdened by reference to private ordering structured by common law entitlements. If the difficulty is not simply that courts have used the power of judicial review to frustrate democratic will, but that they have constitutionalized the existing distribution of resources and the common law rules that maintain them, then the problem can extend to official institutions beyond courts.[135]

One important objection is that the Sunstein view of Lochnerism is too narrow. The real difficulty with the earlier Court, on this objection, was its willingness to use rights guarantees to override government efforts to preserve economic fairness, health, and safety.[136] That willingness extended to judges commonly identified as liberal and it persisted well after 1937. Judicial enforcement of civil liberties cannot easily be distinguished from judicial enforcement of economic liberties, because both can dovetail with private commercial interests and both can interfere with public regulation, and it is *this* confusion that actually drives First Amendment Lochnerism.[137] Defeating Lochnerism, on this view, means weakening judicial review generally, or at least concerning civil rights claims that overlap with economic interests, and instead empowering political institutions to handle such issues.[138]

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135 For examples, see *infra* subpart I.A, sections II.A.3–4.

136 *See* Kessler, *supra* note 114, at 1920–22; *id.* at 2001 (arguing that cases granting religious exemptions from government conditions on "new property" programs "stand for the same proposition that animates the peddling-tax cases, the commercial speech cases, and the cases that so trouble liberal scholars today" and that this "proposition is that civil libertarian interests—even when inextricable from private economic interests—should override governmental interests in health, safety, and fiscal integrity").

137 *Id.*

138 *Id.* at 2001–02 ("As this Article has shown, the doctrinal blurring of civil and economic libertarianism that drives First Amendment Lochnerism has been, more often than not, the work of politically liberal judges and activists. Accordingly, one of the easiest and most useful tactics that judges and legal scholars who oppose First Amendment Lochnerism might adopt is simply a *refusal* to endorse civil libertarian doctrines that risk further erosion of the autonomy and legitimacy of political regulation of the economy. Thereafter, to the extent that critics of First Amendment Lochnerism seek to vindicate such political control, their focus may eventually have to shift from reforming the courts to building more respected and more powerful political institutions. The peddling-tax dissenters and the legal-realist scholars who first warned of the Lochnerian tenden-

This account identifies critical dangers and makes a real contribution to the literature on Lochnerism. But in its strongest form, not yet found in the literature but conceivable as a position, it criticizes judicial enforcement of civil liberties without acknowledging that constitutional argument is prevalent in legislatures and executive agencies as well as in courts. So even if judges are taken out of the picture, the question of First Amendment interpretation will remain (as illustrated by the nonjudicial examples in this Article). And this strong version of the objection dismisses too quickly the possibility that First Amendment rights can be interpreted in a manner that is consistent with democratic understandings of society, the polity, and the economy. It suggests that judicial enforcement of civil liberties *intrinsically* tends toward economic libertarianism, and it is silent on whether that is true in other branches.

It is fair and productive to push critics of Lochnerism to develop a theory that can distinguish between problematic and unproblematic enforcement of First Amendment in cases where they affect distributive justice—and providing that kind of interpretation is one objective of this Article. Articulating an attractive account of the relationship between First Amendment rights and distributive justice therefore has critical bite, because it can help to isolate deleterious aspects of rights interpretation, both before and after 1937.

Take *Murdock v. Pennsylvania*, which is a central example for the objection.[139] For me, the difficulty with Justice Douglas's decision for the Court was not simply that it used the First Amendment to protect Jehovah's Witnesses from a license tax that applied to their activity of proselytizing door-to-door and selling religious literature. Actually, Justice Douglas was careful to consider the economic impact of the decision.[140] His challenge, writing in 1943 shortly after the switch in time, was to figure out what it would mean to appreciate the real material

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cies of judicial civil libertarianism got at least this much right: One task for which judicial review, no matter how 'liberal,' is especially ill-suited is enhancing political control of the economy." (footnote omitted)).

139 319 U.S. 105 (1943).

140 Lakier also defends this era of speech cases against Frankfurter's charge of Lochnerism: "Rather than evidence of an unjustified judicial intrusion onto the prerogatives of the democratic legislature, however, what decisions such as *Winters* and *Burstyn* and *Thornhill* reflect is the Court's quite sophisticated understanding of how it is that citizens in a democratic society come to form, or alter, their political beliefs." Lakier, *supra* note 131, at 23–24.

conditions under which the Witnesses were trying to practice their faith.[141]

If there was a problem with the decision, it was that the Court misconstrued the relationship between individual rights and distributive justice—and specifically the social division of responsibility, including the duty to bear the burdens of taxation.[142] As Justice Felix Frankfurter argued in dissent, speakers and religious practitioners are not properly relieved of the burdens of citizenship simply because taxation makes their protected activities more expensive.[143] And the license tax did only that—it did not actually prohibit them from practicing their faith.[144] A better rationale for the outcome would have been that this particular license tax was targeting the Witnesses, and that practitioners of majority faiths would face no comparable tax on core observances.

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141 *See, e.g.*, *Murdock*, 319 U.S. at 111 ("Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way."); *id.* at 112 ("Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy.").

142 I say "if there was a problem" because *Murdock* was a difficult case. Both sides were concerned with the practical impact of the tax on the ability of the Witnesses to exercise basic liberties—they both rejected the anticlassificatory conception of rights, and they differed only on the outcome of a substantive interpretation. Although Justice Frankfurter was right that the majority never found that the Witnesses were substantially burdened in their ability to practice their faith, *see id.* at 135 (Frankfurter, J., dissenting), the Court's concern surely was that the tax would or could have precisely that effect, and that its burdens would fall disproportionately on a minority faith with unorthodox practices, *see id.* at 112.

143 In an important passage, Justice Frankfurter described and defended the social division of responsibility:

> It cannot be said that the petitioners are constitutionally exempt from taxation merely because they may be engaged in religious activities or because such activities may constitute an exercise of a constitutional right. It will hardly be contended, for example, that a tax upon the income of a clergyman would violate the Bill of Rights, even though the tax is ultimately borne by the members of his church. A clergyman, no less than a judge, is a citizen. And not only in time of war would neither willingly enjoy immunity from the obligations of citizenship. It is only fair that he also who preaches the word of God should share in the costs of the benefits provided by government to him as well as to the other members of the community. . . . Plainly, a tax measure is not invalid under the federal Constitution merely because it falls upon persons engaged in activities of a religious nature.

Id. at 135 (1943) (Frankfurter, J., dissenting).

144 *Id.* at 134 ("No claim is made that the effect of these taxes, either separately or cumulatively, has been or is likely to be to restrict the petitioners' religious propaganda activities in any degree.").

So again, it is possible to assimilate the lesson that everyone must bear the burdens of citizenship, including by paying taxes, without concluding that constitutional review should be broadly abandoned by courts in such cases, or that parallel forms of constitutional argument must be avoided by actors in the political branches of government. Making the right kind of comparison to *Lochner* requires a democratic political economy that specifies the relationship between rights enforcement and distributive justice, so that application of the First Amendment can be critiqued not just when it serves narrowly libertarian ends but whenever it undermines free and equal democratic membership.

To test whether my approach is up to that task, it may be helpful to compare the jurisprudence of Gilded Age to today's First Amendment law along the lines that I have been suggesting.

2. *The Second Gilded Age*

What understanding can we gain by setting contemporary decisions alongside the Court's jurisprudence leading up to 1937? An obvious difference is that officials today are featuring the First Amendment rather than liberty of contract or the Commerce Clause.[145] This shift matters not so much for measuring deregulation, which can result regardless, but for noticing destabilization of the midcentury settlement, discussed below in subpart II.B.

Another difference is that officials are protecting not laissez-faire economics, classical liberalism, or simple libertarianism but a political economy that we might call neoliberal. While that term carries several meanings, I take it to designate active government facilitation of market ordering not only in the economy as such, but also in areas of politics and civil society (to the degree these domains can meaningfully be distinguished).[146] And in neoliberalism, the emphasis is not only

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145 *See supra* note 114; *see also* Gillian Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 28 (2017) ("In recent years, the Roberts Court has expanded First Amendment protections in ways that pose challenges to major regulatory schemes.").

146 *See* BROWN, *supra* note 29, at 17–18 ("Neoliberalism is most commonly associated with a bundle of policies privatizing public ownership and services, radically reducing the social state, leashing labor, deregulating capital, and producing a tax-and-tariff-friendly climate to direct foreign investors."); *id.* at 19–20 (describing Foucault's understanding, first, that neoliberalism extended beyond economics as such, so that "market principles become governing principles applied by and to the state, but also circulating through institutions and entities across society—schools, workplaces, clinics, etc." and, second, that neoliberalism

on labor and employment, which preoccupied laissez-faire proponents, but also on the ideal of free consumer choice.[147] That paradigm is then exported to other forms of social interaction that could possibly be characterized as consumption—such as education, civic association, and even voting.[148]

Finally, Lochnerism's current incarnation is less consequential than the original, at least so far. The *Lochner* Court struck down major pieces of federal legislation, such as the National Industrial Recovery Act of 1933.[149] Today the phenomenon has yet to reach that level, despite cases like *Citizens United* or *Janus*. Whether its scope will turn out to be comparable remains to be seen, but it is far from unthinkable.

Despite such differences between the two eras, the comparison has critical purchase along the two dimensions I identify. It illuminates how the Court leverages a rule against categorization on the basis of basic liberty or protected forms of equality, rather than prioritizing the practicalities of how these guarantees are affected by government policies.[150] And it spotlights the tendency to naturalize market ordering, as structured by legal entitlements, rather than understanding that ordering to be the product of democratic choices that are inherently revisable.[151] Neither of these features is present in every decision, and others matter too. But together they reveal characteristics of the current moment in speech and religion law—fundamentally, they help to diagnose a relationship between law and the economy that fails democratic principles. Consider a few examples.

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understands the state itself to be actively involved in constituting and supporting markets in an arrangement where "governing itself" is "reformatted to serve markets"); WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION 17 (2015); David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 5, 13–14 (2014) ("[T]he intensity of governance in a technologically and economically hyper-complex world makes it inescapably clear that neoliberalism can never be a 'hands-off' antiregulatory doctrine as classical liberalism purported to be.").

147 *See* Purdy, *supra* note 114, at 200–01.

148 Grewal & Purdy, *supra* note 146, at 13.

149 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935).

150 *See* Lakier, *supra* note 131, at 58 ("[L]ike *Lochner* Era due process jurisprudence, contemporary free speech law relies on what Pound called an 'academic theory of equality' and I have called elsewhere a formal equality norm.").

151 *See id.* at 36 (arguing that what is "genuinely Lochnerian" about contemporary speech law is "the rigid public/private distinction that courts rely upon when determining what constraints the First Amendment imposes on government actors once it applies").

3. *Free Speech*

On the speech side, the leading example is *Citizens United*. When I criticized that case above, I emphasized its anticlassificationism and market naturalization.[152] But such dynamics are not limited to landmark decisions by the federal high Court. Consider here a more obscure case, *National Association of Manufacturers v. National Labor Relations Board*, which has been offered as an example of First Amendment Lochnerism by Leslie Kendrick.[153]

A labor regulation known as the Notice Posting Rule required employers to notify workers of certain protections they enjoyed under the National Labor Relations Act (NLRA).[154] Its purpose was straightforward. Under preexisting rules, the NLRB did not have the power to enforce the NLRA itself and therefore it needed workers to understand their statutory entitlements so they could initiate necessary claims against employers.[155] Yet the D.C. Circuit struck down the Notice Posting Rule, reasoning that it abridged businesses' right to be free from "compelled speech."[156] Though the court grounded its holding in a provision of the NLRA that protected "[t]he expressing of any views" so long as the expression "contains no threat of reprisal or force or promise of benefit," its reasoning drew on First Amendment concepts and precedents.[157]

Kendrick rightly offers *National Association of Manufacturers* as an example of how the scope of the Speech Clause has expanded.[158] In addition, the decision resonates with the aspects of Lochnerism that I track. Quite clearly, the court measured the businesses' burden against the backdrop of a baseline of imagined government nonintervention, instead of against the reality of pervasive regulation of labor relations,

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152 *See supra* subpart I.A.

153 717 F.3d 947 (D.C. Cir. 2013), *overruled by* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 22–23 (D.C. Cir. 2014) (en banc); *see* Kendrick, *First Amendment*, *supra* note 49, at 1206–09.

154 Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006 (Aug. 30, 2011); 29 C.F.R. § 104.202(a) (2014).

155 *Nat'l Ass'n of Mfrs.*, 717 F.3d at 951.

156 *Id.* at 957–59.

157 *See id.* at 954–55 (noting that the NLRA provision "§ 8(c) merely implements the First Amendment") (internal quotation marks omitted); *id.* at 955 n.8 (explaining that the court need not decide whether § 8(c) is narrower or broader than the First Amendment).

158 *See* Kendrick, *First Amendment*, *supra* note 49, at 1204 ("A court could, in short, easily distinguish the Notice Posting Rule from [compelled speech in precedents, but] the D.C. Circuit did not. It is this fact that makes *National Association of Manufacturers* so indicative of current trends in First Amendment law.").

including expression by employers and employees.[159] That is another way of understanding the court's decision to treat the notices as compelled speech—as a problematic conclusion that any expression was coerced, when measured against a background of extensive government allocation of expressive burdens and benefits in the labor context.

Moreover, the court understood the rule against compelled speech to protect against a technical disclosure requirement. It therefore invalidated the Notice Posting Rule without crediting the contention that the rule actually *promoted* freedom of speech by structuring an expressive environment in which workers had the information they needed to make decisions about whether and how to exercise their rights under the NLRA.[160] Notably, the Act also required disclosure of information that would work to the advantage of employers.[161] Overall, then, the Notice Posting Rule could be deemed presumptively unconstitutional only in isolation and without considering the overall effects of labor law on the workplace speech environment. And the ruling undermined the movement for a social minimum that would allow workers to meaningfully participate as speakers and listeners, more generally.

In the 2018 decision *Janus v. AFSCME*, the Supreme Court again used the compelled speech doctrine to invalidate a labor safeguard, this time the "agency fee" requirement for public employees in unionized workplaces.[162] Recall that workers who declined to join the union nevertheless were required to pay union dues, on the theory that allowing them to opt out would create free-rider problems—it would incentivize employees to benefit from collective bargaining without incurring any cost.[163] Yet the Court invalidated the agency fee rule, reasoning that it compelled workers to support speech they may oppose.

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159 An earlier decision had recognized that employers' right to silence was "sharply constrained in the labor context," where employers and employees are pervasively regulated. *Nat'l Ass'n of Mfrs.*, 717 F.3d at 959 (quoting UAW-Lab. Emp. & Training Corp. v. Chao, 325 F.3d 360, 365 (D.C. Cir. 2003)); *see also* 29 U.S.C. § 158(b)(7) (1959) (a provision of the original National Labor Relations Act that prohibits labor picketing in many circumstances).

160 *See* Kendrick, *First Amendment*, *supra* note 49, at 1204–06 (arguing that the decision "says something about" the current state of First Amendment law).

161 *See, e.g.*, *Nat'l Ass'n of Mfrs.*, 717 F.3d at 958 (describing an executive order that required "government contractors to post notices at their workplaces informing employees of their rights not to be forced to join a union or to pay union dues for non-representational activities").

162 138 S. Ct. 2448, 2460 (2018).

163 *See supra* subpart I.A for a more detailed description of the facts.

Writing for the majority, Justice Alito identified a burden on workers' freedom of expression by comparison to unregulated contracting between employers and employees, rather than by comparison to the existing world of pervasive labor regulation designed to equalize bargaining power and thereby promote substantively free negotiations between management and labor.[164] And he treated the agency fee as a "subsidy" of union speech,[165] rather than a measure that disallows workers from enjoying the benefits of collective bargaining while externalizing the costs, creating serious collective action problems.[166] Setting the *Janus* decision next to Lochnerism from the first part of the twentieth century helpfully highlights the difficulties with these moves. To invalidate agency fee requirement, moreover, the *Janus* Court had to overturn a forty-year-old precedent.[167]

Consider finally *Sorrell v. IMS Health Inc.*, where the Supreme Court invalidated a Vermont statute that aimed to limit pharmaceutical companies from using certain forms of "data mining."[168] Before the law was enacted, data mining firms purchased prescription records from pharmacies and analyzed them to identify the practices of individual doctors; drug companies then acquired these reports and used them to target their marketing to specific doctors who were more likely to prescribe name-brand drugs.[169] Vermont was concerned about the privacy of patients and their doctors, who were being individually identified by pharmaceutical marketers.[170] It also worried about the impact of the practice on economic distribu-

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164 *See, e.g.*, Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 141-191 (1947) (noting that Federal labor laws serve "to protect the rights of individual employees in their relations with labor organizations").

165 *Janus*, 138 S. Ct. at 2464.

166 *Id.* at 2490 (Kagan, J., dissenting) (arguing that the agency fee avoids "a collective action problem of nightmarish proportions"). Justice Kagan explained the free rider problem this way:

> Without a fair-share agreement, the class of union non-members spirals upward. Employees (including those who love the union) realize that they can get the same benefits even if they let their memberships expire. And as more and more stop paying dues, those left must take up the financial slack (and anyway, begin to feel like suckers)—so they too quit the union. And when the vicious cycle finally ends, chances are that the union will lack the resources to effectively perform the responsibilities of an exclusive representative—or, in the worst case, to perform them at all.

Id. at 2491 (citations omitted).

167 Namely, *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 222 (1977).

168 Sorrell v. IMS Health Inc., 564 U.S. 552, 565 (2011); *see also* Purdy, *supra* note 114, at 199 (offering *Sorrell* as an example of neoliberal constitutionalism).

169 *Sorrell*, 564 U.S. at 558.

170 *See id.* at 572.

tion because the corporations were using digital technology to further amplify their bargaining power, so that citizens would have restricted access to generic drugs, which generally deliver comparable benefits at lower cost.[171] So Vermont enacted a law that prohibited pharmacies from selling records that identified individual physicians to pharmaceutical companies without the physicians' consent, and it prohibited the use of data that identified individual physicians for marketing purposes.[172]

Nevertheless, the Court invalidated the law, reasoning that it discriminated on the basis of content and speaker identity without being closely tailored to an important government interest.[173] After all, Justice Kennedy reasoned for the majority, the state prohibited the distribution of identifying data (absent the physician's consent) to pharmaceutical marketers but not to the government itself or public health researchers. That distinction made the law presumptively unconstitutional.[174] And the state's interest in protecting patients with unequal bargaining power was insufficient, because it was actually *Vermont's* law that would skew the market—against pharmaceutical companies and toward generic drug manufacturers and

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171 The Court described the legislature's findings this way:

> Vermont found, for example, that the "goals of marketing programs are often in conflict with the goals of the state" and that the "marketplace for ideas on medicine safety and effectiveness is frequently one-sided in that brand-name companies invest in expensive pharmaceutical marketing campaigns to doctors." Detailing [i.e., the practice of marketing directly to doctors in person], in the legislature's view, caused doctors to make decisions based on 'incomplete and biased information." Because they "are unable to take the time to research the quickly changing pharmaceutical market," Vermont doctors "rely on information provided by pharmaceutical representatives." The legislature further found that detailing increases the cost of health care and health insurance; encourages hasty and excessive reliance on brand-name drugs, before the profession has observed their effectiveness as compared with older and less expensive generic alternatives; and fosters disruptive and repeated marketing visits tantamount to harassment.

Id. at 560–61 (citations omitted). *But see id.* at 560 (explaining that generic drug manufacturers also market directly to physicians in a practice called "counterdetailing," and asserting that "[t]he counterdetailer's recommended substitute may be an older, less expensive drug and not a bioequivalent of the brand-name drug the physician might otherwise prescribe"). *See also id.* at 594 (Breyer, J., dissenting) ("The record before us . . . contains no evidentiary basis for the conclusion that any such individualized counterdetailing is widespread, or exists at all, in Vermont.").

172 *Id.* at 558–59 (quoting the central provision of the Vermont statute).

173 *Id.* at 565.

174 *Id.* at 564–65.

public health agencies.[175] In reasoning this way, Justice Kennedy even attempted to head off the charge of Lochnerism.[176]

Yet setting *Sorrell* alongside the *Lochner* decisions is revealing, in certain ways. First, it highlights that the "market" for information about the prescription practices of doctors did not exist in nature but was constructed by the government. Federal and state regulators required pharmacies to collect the information at issue.[177] So whether the flow of information was considered "free" depended on whether the comparison was to a world without only Vermont's statute or also without the government mandate to collect prescription information. In other words, the Court's identification of a speech restriction followed from its choice of baselines. And its choice of baselines was connected to its assessment of how government and corporate power interacted with First Amendment values.[178] As it happened, the Court's interpretation was controversial. Questioning the government's ability to manage information that was itself created by regulatory action was anomalous, Justice Breyer pointed out in dissent.[179] Justice Kennedy relied on a contested judgment about the neutrality of market distributions and their independence from government policymaking when he concluded that the Vermont statute had skewed the free exchange of identifying prescription records.

Relatedly, the *Sorrell* Court's analysis depended on a particular conception of the right.[180] Saying that pharmaceutical

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175 *See* Purdy, *supra* note 114, at 200–01 (comparing the *Sorrell* decision to *Va. State Bd. Pharmacy v. Va. State Consumer Council*, 425 U.S. 748 (1976)).

176 *Sorrell*, 564 U.S. at 567 ("Vermont's law does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers. The Constitution 'does not enact Mr. Herbert Spencer's Social Statics.' It does enact the First Amendment." (citations omitted) (quoting Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting))).

177 *Id.* at 558 (citing 21 U.S.C. § 353(b) (2018); 04-030-230 VT. CODE R. §§ 9.1, 9.2 (LexisNexis 2020) (Vermont Board of Pharmacy Administrative Rules)).

178 Justice Kennedy did address the argument that the information had been created by a regulatory mandate, but he took this argument to meant that the data was "governmental information." *Id.* at 567–68. That interpretation allowed him to respond simply that the information was in government hands. Justice Kennedy did not address the deeper point.

179 Until *Sorrell*, the Court had "*never* found that the *First Amendment* prohibits the government from restricting the use of information gathered pursuant to a regulatory mandate—whether the information rests in government files or has remained in the hands of the private firms that gathered it." *Id.* at 588 (Breyer J., dissenting). Nor had it "*ever* previously applied any form of 'heightened' scrutiny in any even roughly similar case." *Id.* (citations omitted).

180 This second point anticipates and responds to an objection to the first. Someone could say that the constructed nature of the information market does not matter because content discrimination is constitutionally problematic even where the information is created by regulation. So had the Court acknowledged

companies would be disadvantaged by Vermont's rule, as Justice Kennedy did, depended on a definition of disadvantage that looked only to the text of the statute. Or, probing just a bit deeper, the Court might have been worried that the statute was the product of lobbying by manufacturers of generic drugs. Justice Kennedy seemed to suggest that generic drug manufacturers had their own direct marketing operations that would be unfairly advantaged by Vermont's ban on the sale or use of information capable of identifying individual doctors who were more likely to prescribe branded pharmaceuticals.[181]

Vermont, however, had made a substantive determination that ordinary patients would be disadvantaged by data mining practices that allowed large corporate pharmaceutical companies to target individual doctors who had shown a proclivity to prescribe expensive drugs.[182] Vermont's determination, in other words, was that the practical effect of free speech neutrality, as demanded by the Court, would actually be non-neutral—it would result in a skewed information environment that would systematically disadvantage ordinary citizens who were depending on their doctors for expert advice.[183] In overriding that determination, the Supreme Court constitutionalized a particular, and particularly contested, political economy.

On this reading, the central problem with *Sorrell* was not simply that the Court deregulated, striking down a law that was intended to counteract one aspect of growing distributive injustice. Nor was it that Justice Kennedy used the power of judicial review to frustrate a democratically enacted law because it conflicted with a rights provision. Nor was it necessarily that the Court protected commercial speech by a corporation. Nor was it only that the Court expanded the scope of speech protection to include data mining.

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that point, it might still have found that Vermont's discrimination on the basis of speaker and content was a presumptive problem, because skewing speech is constitutionally suspicious even if the speech is promoted by a government program. My second point, about anticlassification, is not vulnerable to that objection.

181 *See Sorrell*, 564 U.S. at 560 (describing the detailing operations of generic manufacturers, who also used state-supplied information identifying individual physicians).

182 *See id.* at 560–61 (describing the legislative findings).

183 *Cf.* Schauer, *Political Incidence*, *supra* note 114, at 957 (arguing that "there may be reason to believe that those who are politically or socially disadvantaged would urge this broader protection [of free speech] with caution, and that those who are politically or socially advantaged would welcome this greater protection with some enthusiasm").

My comparison to *Lochner* highlights two other dangers: naturalization of a certain conception of the market, so that government intervention is deemed burdensome or biased, and transformation of the right, so that a presumptive speech violation is identified from the fact that Vermont regulated categories of speaker and speech, instead of by looking at whether the statute would promote the free flow of information to everyone, given the existing power dynamics among corporations, governments, and citizens. Vermont's claim was precisely that *the statute* would guarantee that full information would get to those who needed it most—doctors and patients—and not judicial enforcement of free speech doctrinal categories. Seeing this analogy opens up lines of critique that otherwise might remain obscured by decisions like *Sorrell*, which actually do use sophisticated discussions of free speech doctrines and the values that drive them to deliver conclusions that appear to have assimilated the lessons of American legal realism. And it illuminates, once again, how such decisions actually work to undermine the basic material conditions for the free and equal exercise of speech rights by everyone in the political community.

Outside of courts, powerful statutes feature similar speech rationales, such as Section 230 of the Communications Decency Act.[184] That provision exempts internet intermediaries from defamation and other civil liability for speech by individual users. Courts have interpreted Section 230 broadly, holding that it immunizes internet platforms even if they have been notified that a user has posted harmful content and take no action.[185] And there is little doubt that Congress enacted Section 230 in order to enforce free speech values. Lawmakers feared that without the measure intermediaries would be swamped with notices of harmful material posted by other users and, unable to filter these requests because of the high volumes and attendant costs, companies would err on the side of caution and simply remove content—thereby impoverishing the information marketplace that the internet promised to become.[186] Congress reasoned that the "Internet and other inter-

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184 47 U.S.C. § 230(c)(1) (1996) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

185 The leading decision is *Zeran v. AOL, Inc.*, 129 F.3d 327, 331–32 (4th Cir. 1997).

186 *See id.* at 331 ("Congress' purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. . . . The specter of tort liability in an area of such prolific speech would have an obvious chilling

active computer services have flourished, to the benefit of all Americans, with a minimum of government regulation" and that it was therefore crucial "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[187]

Quite evidently, Section 230 was driven by an ideal of private initiative, and by a corresponding understanding of the application of even longstanding tort doctrines as distorting and debilitating.[188] Foreclosed was any real consideration of how such a legal regime might distort the speech environment more broadly, especially by dampening the expression of those harmed by tortious online speech by other users.

Now, simply comparing today's decisions on freedom of expression with the *Lochner* Court's jurisprudence on due process and the Commerce Clause is not sufficient to show that cases like *National Association of Manufacturers*, *Janus*, or *Sorrell* were wrongly decided. Comparison can only open up lines of critique, because decisions like these are supported by their own constitutional visions. But a fully convincing argument can be grounded in an alternative vision such as the one I offer in Part I, based on a conception of democracy that includes a commitment to economic belonging.

To see this even more clearly, consider how similar dynamics are characterizing religious freedom actions. They can be equally consequential for distributive justice, though they have received less attention for their impact on the deprivation and distribution of resources.

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effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect." (citations omitted)).

187 47 U.S.C. § 230(a)(4), (b)(2); *see also* MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION 181 (2019) ("The protections of Section 230 are, in the view of the courts and the public, coextensive with free speech.").

188 FRANKS, *supra* note 187, at 165 ("Contrary to [John Perry Barlow, the founder of EFF's] startling claim that cyberspace 'is an act of nature,' the U.S. government in particular was essential to the creation of the Internet."); *id.* at 187 ("As noted above, this 'free market' fundamentalism ignores that there is no such thing as an unregulated market and that the government plays an essential role in establishing and protecting all freedoms.").

4. *Free Exercise*

With regard to religious liberty, the most consequential recent example is *Burwell v. Hobby Lobby Stores, Inc.*[189] Throughout its opinion, the Court assumed a market baseline for measuring harm to the company and its employees. It held that the company was substantially burdened by the contraception mandate, implicitly comparing the regulation to a world in which the business could decide whether to provide health insurance to its employees without government interference. But in fact, that decision had already been constructed by law. As Elizabeth Sepper points out, the federal government had long provided tax subsidies to businesses that compensated employees partly with health insurance rather than wages.[190] By requiring employers to provide adequate preventative care, including contraception, Congress and HHS were ensuring that the coverage met certain minimum standards. They were conditioning a government benefit, or more simply, they were deciding how to distribute public resources.[191] Viewed in that light, rather than against the backdrop of a

189 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014). For the facts of the case, see *supra* subpart I.B.

190 Sepper, *supra* note 12, at 1485, 1498; *see also* Tax Policy Center Briefing Book, *How Does the Tax Exclusion for Employer-Sponsored Health Insurance Work?*, TAX POLICY CTR., https://www.taxpolicycenter.org/briefing-book/how-does-tax-exclusion-employer-sponsored-health-insurance-work [https://perma.cc/PD5G-6BA4] (last visited Sept. 9, 2019) (explaining the tax exemption for employer-sponsored health insurance). Although it could be contested whether the exclusion of health insurance premiums counts as a "subsidy," the Treasury Department does include it in its annual analysis of "tax expenditures"—and in fact it ranks the exclusion as the single largest tax expenditure of all in its 2020 analysis. *See* U.S. DEPARTMENT OF THE TREASURY, TAX EXPENDITURES 33 (2018), https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2020.pdf [https://perma.cc/DY2M-RNSW].

To be sure, the greatest benefit from the tax exclusion for health insurance premiums goes to employees, rather than employers. Still, employers do see a benefit from the exclusion of their share of health insurance premiums from payroll tax and other taxation, relative to a world in which they compensated employees an equivalent amount through ordinary salary. In short, the tax exemption allows employers to offer a more attractive compensation package (i.e., one that includes employer-provided coverage) at a lower cost. Therefore, it seems fair to say that employers are incentivized by tax laws to provide a portion of compensation through health insurance premiums rather than salary.

191 Hobby Lobby could have declined to provide coverage altogether, subject to an assessment. *See* Marty Lederman, *Hobby Lobby Part III—There Is No "Employer Mandate,"* BALKINIZATION (Dec. 16, 2013, 9:36 AM), https://balkin.blogspot.com/2013/12/hobby-lobby-part-iiitheres-no-employer.html [https://perma.cc/FE5G-UYR5] (explaining "federal law does not impose a legal duty on large employers to offer their employees access to a health insurance plan, or to subsidize such a plan" and paying assessment "would almost certainly be far *less* costly than continuing to offer health insurance").

prepolitical world of private ordering, the Court's decision did not simply relieve the company from a government burden—it allowed Hobby Lobby to retain a government subsidy without having to comply with its conditions.[192] Yet the Court treated those circumstances as irrelevant to whether the company's religious exercise was "free."

Now, recognizing that fact might not have changed the outcome—the Court might have concluded that HHS's new condition on the tax subsidy, the contraception mandate, burdened religious freedom. Nevertheless, the style of the reasoning reified the public/private divide in a recognizable manner. But more profoundly, I am arguing that comparing contemporary jurisprudence to *Lochner* depends on a substantive normative evaluation, and that the idea of the social division of responsibility, outlined in my earlier treatment of *Hobby Lobby*, grounds that evaluation.[193]

Market naturalization also affected the Court's assessment of the impact on employees. In a footnote, the Court questioned whether the employees had been harmed at all.[194] Arguably, Hobby Lobby's workers had just been returned to the position they were in before Obamacare was enacted—they had lost a discretionary benefit, not suffered a harm, relative to what private ordering would have provided. In the footnote, Justice Alito reasoned for the majority that the workers, who were "third parties" to the dispute between the company and the government, had not been harmed because virtually any regulation could be "fram[ed] . . . as benefiting a third party."[195] If the constitutional rule was that accommodations could not be granted where they entailed serious harm to identifiable third parties, allowing the government to characterize its programs as harming third parties would mean that any religious exemption could be defeated, "rendering RFRA meaningless."[196] By understanding harm this way, the Court assumed an objective yardstick for managing labor relations. Only the contractual agreements between Hobby Lobby and its employees could be used to reliably identify government benefits and

192 Sepper, *supra* note 12, at 1485. After the decision, Hobby Lobby and companies like it could retain the tax advantage without providing the contraception coverage—giving them an advantage over nonreligious competitors.

193 *See supra* subpart I.B.

194 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 729 n.37 (2014).

195 *Id.*

196 *Id.*

burdens.[197] Comparing this reasoning to the logic of *Lochner* reveals a political economy that characterizes government regulations as intrusions into the autonomous realm of contracting between employers and employees.

Of course, some features separate *Hobby Lobby* from *Lochner* itself. For one thing, religious liberty accommodations do not invalidate entire regulations—they carve out exemptions.[198] So the contraception mandate survived the Court's decision in *Hobby Lobby*, except as applied to companies with religious objections.[199] For another, it could be argued that the *Hobby Lobby* Court intended to simply protect religious liberty, rather than seeking to smuggle in a policy preference for free markets, as the *Lochner* Court is commonly thought to have done.[200] Even granting those differences, however, similarities connect the two cases, including the Court's use of market ordering to identify burdens.[201] And *Hobby Lobby*'s deregulatory effect, though inessential to my understanding of Lochnerism, is unmistakable.

Free exercise Lochnerism is not confined to courts, for legislatures and administrative agencies have used similar logic to grant religious exemptions from general laws that regulate the economy in pursuit of fairness for workers and consumers. Recall for example the executive branch's rules that exempt nonprofit religious organizations from the contraception mandate, this time without contemplating any alternative coverage

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197 The *Hobby Lobby* Court reflects neoliberalism, rather than libertarianism, insofar as it acknowledged that the government would have a continuing role in supporting markets. *See* Sepper, *supra* note 12, at 1502 ("[W]hereas the *Lochner* Court treated the baseline as the market defined by the common law of contract, property, and tort, [the *Hobby Lobby*] Court treated the baseline as the market supplemented by some undefined set of statutory requirements.").

198 *See* Thomas C. Berg, *Religious Accommodations and the Welfare State*, 38 HARV. J.L. & GENDER 103, 148 (2015) ("[R]eligious accommodation does not interfere nearly as greatly with regulation as *Lochner* did.").

199 Because the Court contemplated a government solution that still regulated market actors—insurance providers and administrators—Sepper concludes that *Hobby Lobby* stopped short of full-blown Lochnerism. *See* Sepper, *supra* note 12, at 1497.

200 *Cf.* Berg, *supra* note 198, at 150 ("[R]eligious accommodation does not treat market logic like this as natural, pre-political, or unqualified. Instead it makes use of this logic, in a limited way, to serve the purpose of accommodation: making reasonable room for people of fundamentally differing views to follow their identities in cases of conflict.").

201 Note that anticlassification is absent from *Hobby Lobby* insofar as the Court is applying RFRA, which provides protection against incidental burdens on religion. But arguably it is present insofar as the Court ignores the burden that its decision places on the religious freedom of dissenting employees and their dependents.

for female employees and female dependents.[202] There, the administration explicitly argued that workers nevertheless were not harmed because they were simply deprived of a government benefit—they were simply returned to the position they were in before the ACA was enacted.[203] As to them, the government has merely refrained from acting.

Beyond rulemaking, the Attorney General has issued twenty "principles of religious liberty" that guide administrative agencies in executing federal law. For example, principle 11 holds that the right to religious freedom extends to all manner of corporations and business associations, principle 4 argues that the right applies to economic arrangements between employers and employees, and principle 15 establishes that exemptions are not "categorically" unavailable when they "deprive a third party of a benefit."[204] While these principles may not *require* Lochnerism in agency administration, they are consistent with that approach, and they deregulate religious actors across a wide range of distributive programs. The administration has not left enforcement to chance—it has also

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202 *See* Pennsylvania v. Trump, 930 F.3d 543, 573–74 (3rd Cir. 2019) (citing Cutter v. Wilkinson, 544 U.S. 709 (2005), an Establishment Clause case, and enjoining the rules under the APA and holding that they are not required by RFRA because "the Religious Exemption . . . would impose an undue burden on nonbeneficiaries—the female employees who will lose coverage for contraceptive care").

203 The Trump regulations concerning moral objections explain:

> If some third parties do not receive contraceptive coverage from private parties whom the government chooses not to coerce, that result exists in the absence of governmental action—it is not a result the government has imposed. Calling that result a governmental burden rests on an incorrect presumption: That the government has an obligation to force private parties to benefit those third parties, and that the third parties have a right to those benefits. . . . [T]he government has simply restored a zone of freedom where it once existed. There is no statutory or constitutional obstacle to the government doing so, and the doctrine of third party burdens should not be interpreted to impose such an obstacle.

Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592, 57,606 (Nov. 15, 2018). The exemption for religious employers is Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018). For a similar argument, see Brief of *Amici Curiae* Constitutional Law Scholars Supporting Intervenor-Defendant-Appellant and Reversal at 14, Pennsylvania v. Trump, 930 F.3d 543 (3d Cir. 2019) (No. 19-1189) 2019 WL 913448, at *14 ("Because the Establishment Clause is not implicated in the absence of state action, it is incoherent to suggest the Clause protects 'regulatory baselines' when a religious claimant seeks to restore the pre-regulation status quo.") (quoting and responding to Schwartzman, Tebbe & Schragger, *supra* note 112, at 896) (footnotes omitted).

204 Federal Law Protections for Religious Liberty, 82 Fed. Reg. 49,668, 49670 (Oct. 26, 2017).

created a Religious Liberty Task Force to oversee the guidelines' implementation,[205] as well as a similar entity within HHS.[206]

For a final example, consider the decision by the Department of Health and Human Services (HHS) to grant a waiver from the nondiscrimination requirements of the federal foster care program.[207] South Carolina requested the exemption from the federal funding condition because one of its child placement agencies, Miracle Hill Ministries, had refused to place children with families that did not share the agency's evangelical Protestant faith.[208] It also refused to hire employees from other denominations. Miracle Hill, which operates the state's largest placement operation for children who have no special needs, therefore would not serve Catholic and Jewish parents who wished to foster children.[209] Because that policy violated the federal government's antidiscrimination condition on its funding program, South Carolina sought an accommodation for Miracle Hill and all other agencies that excluded people of faiths other than their own.

HHS granted the waiver.[210] In its decision, the agency concluded that Miracle Hill had a religious freedom right to an

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205 Memorandum from the Office of the U.S. Att'y Gen. on the Religious Liberty Task Force (July 30, 2018), https://www.justice.gov/opa/speech/file/1083876/download [https://perma.cc/J3JK-6VXJ].

206 Press Release, Office for Civil Rights, HHS Announces New Conscience and Religious Freedom Division (Jan. 18, 2018), https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html [https://perma.cc/J88G-R8Y3].

207 Letter from Steven Wagner, Principal Deputy Assistant Secretary, Administration for Children and Families, to Governor Henry McMaster (Jan. 23, 2019), https://governor.sc.gov/sites/default/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf [https://perma.cc/GZ6U-7B7Q]. The HHS nondiscrimination requirement can be found at Statutory and National Policy Requirements, 45 C.F.R. § 75.300(c) (2019).

208 Meg Kinnard, *In Lawsuit, a Catholic Mother from Simpsonville Alleges Discrimination by Miracle Hill*, GREENVILLE NEWS (Feb. 15, 2019, 1:16PM), https://www.greenvilleonline.com/story/news/2019/02/15/greenville-miracle-hills-ministries-foster-agency-lawsuit/2881913002/ [https://perma.cc/Q2KV-Y35S] (quoting a spokesperson for the agency as saying "our mentoring program which, like our foster program, requires that volunteers in positions of spiritual influence share the organization's Protestant, Christian faith").

209 Carol Kuruvilla, *Federally Funded Evangelical Foster Agency Still Won't Accept Jewish or Queer Volunteers*, HUFFPOST (July 12, 2019, 6:55 PM), https://www.huffpost.com/entry/miracle-hill-ministries-christians_n_5d28ddbfe4b0bd7d1e1c0f6b [https://perma.cc/K2BE-53CJ]. Miracle Hill subsequently has changed its policies to allow Catholics and other conservative Christians to accept foster placements, but it still excludes others. *Id.*

210 Letter from Steven Wagner, *supra* note 207, at 3 (reasoning that "Miracle Hill's sincere religious exercise would be substantially burdened by application of the religious nondiscrimination requirement of § 75.300(c), and that subjecting

exemption under RFRA. It reasoned that Miracle Hill would be substantially burdened by the nondiscrimination requirement, which was not narrowly tailored to a compelling interest. It compared the provision to other antidiscrimination rules, it found that the provision was not found in statutes applicable to the program, and it observed that the statute's failure to provide a religious exemption was unlike Title VII and the Fair Housing Act, both of which provide limited religious exemptions.

An alternative interpretation would have appreciated that HHS's nondiscrimination requirement was a condition on public funding—and therefore unlikely to constitute a substantial burden on religion, except insofar as the funding program could somehow be considered part of the baseline for determining burdens on religion.[211] The federal government was deciding which kinds of child placement agencies it wished to fund, and its nondiscrimination requirement was germane to that policy in obvious ways: like most other civil rights provisions, it was designed to promote fair equality of economic opportunity as well as equal membership in society. This was especially evident because the equality requirement applied to employment as well as to provision of services.

In sum, the Court's political economy informs not only its speech cases, which have been the focus of the literature so far, but also its religion decisions. And a similar approach is at work in legislation, administrative rulemaking, and executive enforcement.

An objection to this account might be that the heightened conflict between the First Amendment and socioeconomic regulation is due not to any change in constitutional argument but to expansion of government programs. According to this concern, Hobby Lobby came into conflict with the regulatory state only after the advent of Obamacare and implementation of the contraception mandate. Adoption agencies ran up against antidiscrimination law only after its scope was widened to cover LGBT+ citizens. Pharmaceutical companies brought a speech challenge when Vermont started regulating their use of data mining. On this account, rights to freedom of speech and religion underwent no transformation—rather, they withstood government encroachment.

Miracle Hill to that requirement . . . is not the least restrictive means of advancing a compelling government interest on the part of HHS").

211 Nor could a nondiscrimination requirement readily be understood as discriminatory, since it applied to religious and nonreligious groups alike.

In some contexts, this objection is difficult to sustain. *Janus*, for instance, struck down a longstanding labor law, a result that required overturning an established precedent.[212] And the campaign finance provision that was overturned in *Citizens United* was three decades old.[213] But in other contexts, it has greater force. Hobby Lobby did appear to have been put in a difficult position by an expansion in health care protections. Is government assertiveness what changed, rather than constitutional logic?

Bracket the fact that Hobby Lobby appeared to have provided contraception coverage voluntarily, before Obamacare—that appears to have been inadvertent.[214] A deeper answer is that the Court's reasoning did not seriously consider the complexity of interaction between government policies and religious choices when it concluded that the company had been burdened by one particular provision, the contraception mandate. Nor did it condition its holding on avoiding harm to employees; instead, the majority questioned whether they had been harmed at all, relative to an imagined market structured solely by nongovernmental choices.[215] It assumed that the company was burdened by a regulatory departure from private ordering and it characterized the government's program as an unusual intervention in the market that might not be supported by a compelling interest.

Similarly, in *Sorrell*, the Court assumed that drug companies had been burdened by the state's restriction on targeted marketing. It ignored distortions in the speech environment that might be introduced by data mining, which makes it possible for marketers to advantage brand drugs over cheaper generics. It is this shift in jurisprudential logic that seems significant, even if regulation has actually become more pervasive and more expansive.

Another objection is that religious freedom decisions have a textual basis, whether it is the Free Exercise Clause or RFRA,

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212 Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222–23 (1977) (upholding a union-shop arrangement insofar as it compels employees to pay the portion of union fees that supports collective bargaining).

213 The provision struck down in Citizens United dated back to the 1970s, though it had been amended several times. Pub. L. No. 94-283, § 321, 90 Stat. 486, 491–92 (1976) (codified at 2 U.S.C. § 441b).

214 Katie Sanders, *Did Hobby Lobby Once Provide the Birth Control Coverage It Sued the Obama Administration Over?*, PUNDITFACT (July 1, 2014, 1:02 PM), https://www.politifact.com/punditfact/statements/2014/jul/01/sally-kohn/did-hobby-lobby-once-provide-birth-control-coverag/ [https://perma.cc/GN22-XFYH].

215 Burwell v. Hobby Lobby Stores, Inc., 537 U.S. 682, 729 n.37 (2014).

unlike the decision in *Lochner*, which applied a liberty of contract that was a matter of substantive due process.[216] But the aspects of Lochnerism that I am isolating here, because of their diagnostic power today, have nothing to do with textualism—they have characterized legal doctrine concerning written and unwritten constitutional rights alike.

B. Pressure on the Midcentury Settlement

Connected to First Amendment Lochnerism is a second development, namely breakdown of the midcentury settlement. By the terms of this arrangement, as conventionally understood by lawyers, the Court managed the crisis of judicial review after 1937 by ceding economic matters to legislative and executive actors, and by retaining enforcement power over social and political rights.[217] Ambiguously but perceptibly, the arrangement was both legal, insofar as economic interests were deconstitutionalized, and also institutional, insofar as they were given over to elected officials, with only limited possibilities of judicial review. Whether the arrangement was principled or pragmatic was and remains a point of contention.[218] For my purposes, it is sufficient to recall the shared perception among lawyers that a midcentury arrangement existed, and that it represented a core feature of liberal democracy after the New Deal.[219]

Especially in the wake of Piketty's *Capital*, it is apparent that this legal agreement was part of a more general—and unusual—historical moment of relatively widespread prosperity.[220] Although the postwar period saw its own conflicts (think of the

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216 Berg, *supra* note 198, at 148–49 (distinguishing *Lochner* because of its atextualism).

217 *See* Grewal & Purdy, *supra* note 146, at 12.

218 Ely famously argued that judicial review was limited to "representation reinforcement," meaning fixing defects in the democratic process itself. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 101–04 (1980). But due process protection for reproductive freedom challenged that account, strengthening the argument that midcentury constitutionalism represented a modus vivendi.

219 Grewal and Purdy, for example, describe "a constitutional settlement in which the Supreme Court largely left the federal government to define its own powers to regulate interstate commerce and the states to exercise economic regulation without significant due-process constraints." Grewal & Purdy, *supra* note 146, at 12. They add that "[c]onstitutional interpretation turned to the noneconomic dimensions of personal liberty and equality, while in 'private-law' areas such as property, scholars and judges alike largely adopted the legal-realist view that economic rights are political creations that give shape to economic life, not boundaries on political intrusion into the private economy." *Id.*

220 *Id.* at 12–13; PIKETTY, *supra* note 1, at 12–13.

civil rights struggle and the resulting reconstruction of constitutional law), it seemed to feature reduced tension between economic freedom and democratic demands. And the constitutional settlement participated in that broader shift, though in complicated ways.

Liberals sidelined democratic concern for economic fairness, at least as a matter of constitutional law, during this period.[221] They focused on matters of racial and gender equality, personal liberty, and political liberties. And this was not only a matter of institutional selection. In legislatures as well as in courts, they avoided the language of rights on economic questions, leaving property and contract to ordinary policymaking. This was consistent with a recognition that economic relations were pervasively constructed by government policy, and that evaluating market fairness was largely a matter of legislative judgment rather than a question of constitutional rights.

Today, however, that arrangement is under pressure, and First Amendment jurisprudence is central to that intensification. With decisions like the ones described above, courts have altered the implicit agreement—they have begun to police economic policy for constitutionality in a manner that they would not have previously. Probably the best account of this shift is not simply that the Justices are failing to defer to lawmakers on economic questions, but instead that government officials in *various* institutions are using First Amendment rights, which are thought to fall on the noneconomic side of the bifurcation, to obstruct government measures designed to produce a more egalitarian distribution of primary goods. Again, thinking about the settlement in terms of such categories (political, social, economic) is not entirely accurate, even though it is accepted among lawyers. More helpful would be to say that constitutional actors are deploying rights discourse to support a political economy that imagines a strictly circumscribed role for democratic governance in the prepolitical private economy. Refigured that way, critique of the breakdown of the settlement is closely connected to the critique of Lochnerism.

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221 There were, of course, exceptions. Think of arguments for legal recognition of a right to "new property," grounded in welfare-state entitlements, during the 1960s and 1970s. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 785–86 (1964). But these arguments were shut down in the mid-seventies, when the Court reinforced the midcentury settlement by ruling out constitutional arguments by indigent people. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44 (1973).

Pressure on the midcentury settlement has also been associated with a more general crisis of economic conditions.[222] On this view, breakdown of bifurcated constitutionalism accompanies an increasingly unequal distribution of material and political power. Just as the midcentury settlement coincided with a moment of shared prosperity, relative to historical patterns, so too its disintegration accompanies the return of a marked disparity of primary goods, as well as the privatization and commodification of basic social functions. It is no accident, on this account, that the governmental decisions illustrating this trend concern matters such as labor law, health care, campaign finance, education, and regulation of the digital economy.

How is this unsettlement of two-tiered constitutionalism related to democratic belonging? Most obviously, it challenges the exclusive focus on social and political rights, the notion that they can be neatly separated from economic policy, and the supposition that questions of distributive justice can and must be deconstitutionalized and dejudicialized. In this respect, First Amendment developments are only part of a wider challenge for democratic egalitarians, namely to reinvent the conception of political economy in response to the contemporary crisis of cultural and commercial stratification. They cannot simply return to the midcentury settlement, which separated distributive justice from expressive and religious freedom in a manner that proved to be unstable.[223] What is needed is a democracy that ensures belonging for all members of the polity, whatever their social or economic location.

CONCLUSION

Today, First Amendment jurisprudence is weakening democratic belonging for millions of people. To adequately respond, constitutional law and political theory need a conception of democracy that coheres with a substantive reimagination of the Constitution's speech and religion provisions. That conception is necessary and possible. It would apply not only to speech law, but also to religious freedom doctrine, and it would concern not just social and political issues, but the pressing imperatives of distributive justice in an age of worsening ine-

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222 Grewal & Purdy, *supra* note 146, at 11 ("What accounts for the return of [Lochnerist] arguments within neoliberalism and the perspective they crystallize—in other words, what accounts for the arrival of the 'neo-'? Much of the answer, we believe, lies in the revival of concrete, material conflicts over the distribution of resources and power, particularly in the advanced industrial countries.").

223 Kessler & Pozen, *supra* note 4, at 1967 (citing Weinrib, *supra* note 4, at 297).

quality. Now is the time to develop an approach to these fundamental questions that can work for everyone.