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Bartnicki as Lochner: Some Thoughts on First Amendment Lochnerism

Howard M. Wasserman
Florida International University College of Law., howard.wasserman@fiu.edu

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INTRODUCTION

"First Amendment Lochnerism" sounds like a constitutional oxymoron. On one hand is *Lochner v. New York*,[1] the reviled and discredited member of the constitutional anti-canon,[2] and its derivative, Lochnerism, "one of the worst charges that can be leveled against a doctrine or constitutional interpretation, an unequivocal normative repudiation" of what the court has done.[3] On the other hand is the most favored status of the First Amendment freedom of speech.[4] In fact, there has been increased talk in recent years of the link between the two in particular areas of law.[5] These areas include the law of consumer information,[6] campaign financing,[7] broadcast regulation,[8] and copyright.[9]

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[*]Associate Professor of Law, Florida International University College of Law.

1. Lochner v. New York, 198 U.S. 45 (1905) (striking down a state law limiting bakers to 60-hour work weeks).

2. Jack M. Balkin, *"Wrong the Day it Was Decided:"* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677, 681-682 (2006) [hereinafter Balkin, *Wrong*] (describing *Lochner* "as an established element of the anti-canon," one of the cases that must be wrong); *see also* David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 1 (2003) (arguing that *Lochner* and its era have been central to constitutional debate for the past century).

3. Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1212 (2005); *see* Balkin, *Wrong*, *supra* note 2, at 682 ("A surefire way to attack someone's views about constitutional theory was to argue that they led to *Lochner*."); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 940 (1973) (arguing that the charge of Lochnerism "alone should be enough to damn" any decision); David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003) [hereinafter Strauss, *Wrong*] (stating that *Lochner* would "win the prize . . . for the most widely reviled decision of the last hundred years").

4. *See* LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 7 (1986) ("[T]he free speech idea nonetheless remains one of our foremost *cultural* symbols." (emphasis in original)); Frederick Schauer, *First Amendment Opportunism, in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 175, 176 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) [hereinafter ETERNALLY VIGILANT] ("Different societies have different argumentative showstoppers, but in the United States it is often the First Amendment that serves this function . . . ."); David A. Strauss, *Freedom of Speech and the Common-Law Constitution, in* ETERNALLY VIGILANT, *supra*, 33, 59 [hereinafter Strauss, *Common-Law Constitution*] ("The text of the First Amendment is an important cultural reference point."); Howard M. Wasserman, *Symbolic Counter-Speech*, 12 WM. & MARY BILL RTS. J. 367, 380 (2004) (describing the principle of freedom of speech as an "icon").

5. *See, e.g.*, Stuart Minor Benjamin, *Proactive Legislation and the First Amendment*, 99 MICH. L. REV. 281, 286 (2000) (describing the need "to avoid a revival of *Lochner* through First Amendment analysis"); Richards, *supra* note 3, at 1212 (describing "striking parallels" between Lochnerism and certain First Amendment arguments).

A different approach to understanding First Amendment Lochnerism is to identify and examine one particular case or constitutional rule that creates the potential for courts to behave in the free speech context the way *Lochner*-era courts were accused of behaving in the realm of liberty of contract and economic substantive due process.[10] Jed Rubenfeld made this limited inquiry and found *United States v. O'Brien*,[11] the draft-card burning case that establishes the standard for evaluating incidental restrictions on symbolic expression and expressive conduct, to "be something like *Lochner v. New York* all over again."[12]

A potentially Lochnerian decision of more recent vintage is *Bartnicki v. Vopper*.[13] In *Bartnicki*, a divided, somewhat confused, and highly ambiguous Supreme Court struck down a provision of the federal wiretap statute[14] prohibiting the disclosure of the contents of unlawfully intercepted electronic, wire, and voice communications as applied to innocent third party disseminators.[15] *Bartnicki* is a worthy candidate for the mantle of First Amendment Lochnerism because it contains several of the distinct and disparate features and characteristics captured by that appellation.[16]

Applying the Lochnerism tag is not necessarily to condemn *Bartnicki*. As we attempt to move beyond *Lochner* as an unthinking pejorative,[17] there is no consensus as to what we mean, or what we are trying to say in shorthand, when

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6. *See* Richards, *supra* note 3, at 1212-13 ("[T]here are some fairly strong parallels between the traditional conception of *Lochner* and the First Amendment critique of data privacy legislation.").

7. *See* Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1397 (1994) (arguing that the campaign finance reform decision in *Buckley v. Valeo* "might well be seen as the modern-day analogue of the infamous and discredited [*Lochner*]").

8. *See* Spencer A. Overton, *Mistaken Identity: Unveiling the Property Characteristics of Political Money*, 53 VAND. L. REV. 1235, 1255-56 (2000) (describing "Speech Realists" who, like the Legal Realists who criticized *Lochner*, argue for increased regulation of a range of speakers, including broadcasters).

9. *See* David McGowan, *Some Realism About the Free-Speech Critique of Copyright*, 74 FORD. L. REV. 435, 448 n.58 (2005).

10. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1387 (2001) ("The proper lesson of *Lochner* instructs us that, even where it is possible to identify a jurisprudential basis for judicial decisions, if those familiar with the Court's decisions do not believe those decisions to be socially correct, the work of judges will be seen as illegitimate."); Richards, *supra* note 3, at 1215 ("Even if Lochner was not an illegitimate injection of pro-business libertarian ideology into constitutional decisionmaking by judges, it was widely condemned as such.").

11. 391 U.S. 367 (1968).

12. Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 771 (2001) (comparing United States v. O'Brien, 391 U.S. 367 (1968) with *Lochner*).

13. 532 U.S. 519 (2001).

14. 18 U.S.C. § 2511 (2000).

15. *Bartnicki*, 532 U.S. at 518, 525; *see also* Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1100 (2002) (arguing that *Bartnicki* must be deciphered).

16. *See infra* Parts I, II.

17. *See* Richards, *supra* note 3, at 1213 (describing it as "rhetorically effective to accuse the critics of Lochnerism and move on").

we speak of *Lochner* and its various derivative verbs, nouns, and adjectives.[18] Recent scholarship suggests that the longstanding critiques of *Lochner*—that courts improperly substituted their own views, biases, and preferences as to the social and economic good for that of the legislature;[19] read their personal laissez-faire business views into the Constitution;[20] second-guessed the wisdom and efficacy of legislative policy choices;[21] and aimed inappropriately rigorous judicial scrutiny at ordinary economic regulation[22] —do not uniformly or singularly reflect or explain what was going on in *Lochner* or why it is so despised.[23]

Instead, recent efforts to reaccredit *Lochner* (timed, coincidentally, to the target's centenary) reflect a reinforcement of aggressive rights-based judicial review.[24] That would include, of course, First Amendment review. To call a decision such as *Bartnicki*—in which the First Amendment claim prevailed when congressional legislation failed elevated judicial scrutiny[25]—Lochnerian is to suggest a structural or procedural problem with broad enforcement of individual free speech rights.[26] The pejorative nature of the term ultimately serves to obscure meaningful substantive constitutional dialogue about the meaning of the freedom of speech and how that freedom should be balanced against competing constitutional, political, and social values.[27]

I will proceed in three steps. First, I examine what, precisely, we mean by the pejorative tag "*Lochner,*" "Lochnerism," or "Lochnerian," focusing on five prominent characteristics or features of that concept and considering how each

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18. Similarly there is no consensus on which form of the term "*Lochner*" is proper. One may speak of "Lochnerism." One may speak of "Lochnerian" or "Lochneresque" judging, decision-making, or results. One also may speak of attempts to "Lochnerize" the law. I will use all of these terms somewhat interchangeably.

19. *See, e.g.*, Friedman, *supra* note 10, at 1385.

20. *See, e.g.*, Richards, *supra* note 3, at 1212.

21. *See, e.g.*, Rubenfeld, *supra* note 12, at 771.

22. *See, e.g.*, Richards, *supra* note 3, at 1213.

23. *See* Strauss, *Wrong*, *supra* note 3, at 374 (arguing that many explanations have been provided for the wrongness of *Lochner*, but concluding that no single criticism is universally accepted).

24. *See* Friedman, *supra* note 10, at 1400.

25. *See Bartnicki*, 532 U.S. at 535 (concluding that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern"); *but see* Smolla, *supra* note 15, at 1150 (suggesting that *Bartnicki* could turn out to be a backhanded victory for privacy, and thus a backhanded defeat for speech).

26. Friedman, *supra* note 10, at 1401-02 (describing arguments for stronger liberal jurisprudence in the face of charges of Lochnerism); *see* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 205 (1993) (arguing that *Lochner* has been used "as a weapon in conservatives' struggle against the modern Court's use of fundamental rights as a trump on government power"); Richards, *supra* note 3, at 1213 (describing the Lochnerism underlying First Amendment arguments against certain laws regulating privacy in consumer and personal data).

27. *See* Richards, *supra* note 3, at 1220 (arguing that Lochnerizing the First Amendment would require "[e]very regulation that could be classified as restricting 'speech' . . . [to] be brought within the scope of First Amendment heightened review").

translates (or does not translate) into the First Amendment realm.[28] Second, I examine *Bartnicki* and the Lochneresque characteristics it possesses.[29] To the extent we continue to apply the *Lochner* label in the First Amendment conversation, *Bartnicki* remains a good illustration of the phenomenon. Third, I examine one example of how *Bartnicki* has been applied, or not applied, by a lower court so as to avoid Lochnerian results in a case involving government regulations protecting personal privacy in consumer credit data and information.[30]

I. *LOCHNER* AND THE FIRST AMENDMENT

The definitional problem is that we do not know what we mean when we speak of "Lochnerism," "Lochnerian analysis," or "Lochneresque results."[31] Obviously, it derives from the Supreme Court's 1905 decision striking down a state law limiting bakers to 60-hour work weeks.[32] More broadly, Lochnerism refers to the decisions of the constitutional era in which challenges to state and federal economic regulations were evaluated against broad judicial protection for freedom of contract under Fourteenth and Fifth Amendment substantive due process.[33] Plainly, at least in common legal discourse, Lochnerism is a pejorative.[34] As Bruce Ackerman said, "modern judges are more disturbed by the charge of Lochnering than the charge of ignoring the intentions of the Federalists and Republicans who wrote the formal text."[35]

But that tells us nothing about the content of the attack reflected in the use of the term, a content on which there is no consensus.[36] *Lochner* is, to paraphrase

28. *See infra* Part I.

29. *See infra* Part II.A-B.

30. *See infra* Part II.C. *See also* Trans Union Corp. v. FTC, 245 F.3d 809, 813 (D.C. Cir. 2001) [hereinafter *Trans Union II*]; Trans Union Corp. v. FTC, 267 F.3d 1138, 1140 (D.C. Cir. 2001) [hereinafter *Trans Union III*]; Richards, *supra* note 3, at 1213 ("To the extent that the First Amendment critique [of data privacy regulations] is similar to the traditional view of Lochner, then, its elevation of an economic right to first-order constitutional magnitude seems similarly dubious.");

31. *See supra* notes 18-23 and accompanying text.

32. Lochner v. New York, 198 U.S. 45, 52, 64 (1905).

33. *See* Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. Rev. 881, 881 (2005); Strauss, *Wrong*, *supra* note 3, at 373-74.

34. *See* Richards, *supra* note 3, at 1213; Balkin, *Wrong*, *supra* note 2 at 682 ("A sure fire way to attack someone's views about constitutional theory was to argue that they led to *Lochner*."); Ely, *supra* note 3 at 939-40 (arguing that the fact that a decision is grounded in the same philosophy as *Lochner* "alone should be enough to damn it").

35. 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 269 (1998); *see also* Bernstein, supra note 2, at 1 n.2 ("Even today, Supreme Court Justices across the political spectrum use *Lochner* as a negative touchstone with which they verbally bludgeon their colleagues.").

36. *See* Strauss, *Wrong*, *supra* note 3, at 374 ("The striking thing about the disapproval of *Lochner*, though, is that there is no consensus on why it is wrong.").

Justice Scalia, "a word of many, too many, meanings."[37] Or it is a word of no meanings, akin, as Daniel Farber suggested in his oral remarks at the symposium, to "judicial activism."[38]

We can isolate five non-exhaustive, non-mutually-exclusive features that are most prominent and prevalent in the *Lochner* literature.[39] These features determine how *Lochner* translates into the First Amendment and when and if the First Amendment has, in fact, been Lochnerized.

A. *Enforcing non-textual rights*

Lochnerism could entail an objection to judicial super-protection and enforcement of unenumerated or nontextual rights to strike down popularly enacted legislation.[40] This was the heart of John Hart Ely's critique of *Roe v. Wade*,[41] and indirectly of *Lochner*, from which *Roe* directly descended.[42] Both cases were grounded on non-textual substantive due process (whether property- or liberty-based), judicially manufactured out of whole cloth and "not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure."[43] The Court in both *Lochner* and *Roe* accorded "unusual protection to those 'rights' that somehow *seem* most pressing, regardless of whether the Constitution suggests any special solicitude for them."[44] The non-textual critique is particularly salient in the wake of Footnote Four of *United States v. Carolene Products Co.*, which suggested the propriety of more rigorous judicial review "when legislation appears on its face

37. *Cf.* Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 90 (1998) (Scalia, J.) (describing jurisdiction as "a word of many, too many, meanings") (quoting United States v. Vanness, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)).

38. *See* Richard A. Posner, *Forward: A Political Court*, 119 HARV. L. REV. 31, 54 n.74 (2005) ("[T]he term . . . has become a portmanteau term of abuse for a decision that the abuser does not like . . .").

39. *See infra* Part I.A-E.

40. *See* Bernstein, *supra* note 2, at 35 ("Critics argued that allowing courts to protect unspecified rights under the Due Process Clause amounted to judicial usurpation."); Strauss, *Wrong*, *supra* note 3, at 378-79 (describing the argument "that the Court erred in *Lochner* not by enforcing constitutional rights, but by enforcing a right not found in the Constitution").

41. 410 U.S. 113 (1973).

42. *See* Ely, *supra* note 3, at 940 (suggesting that "*Lochner* and *Roe* are twins . . . [but] not identical").

43. *Id.* at 935-36.

44. *Id.* at 939 (emphasis in original); *see also* Bernstein, *supra* note 2, at 56 ("For better or for worse, Griswold [v. Connecticut, 381 U.S. 479 (1965)] and *Roe*'s protection of the unenumerated right to privacy raises many of the same issues as *Lochner*'s protection of the unenumerated right to liberty of contract."); Rebecca L. Brown, *The Fragmented Liberty Clause*, 41 WM. & MARY L. REV. 65, 90 (1999) (arguing that the Court's mistake in substantive due process cases was its decision to "fragment" liberty between personal and economic activity).

to be within a specific prohibition of the Constitution, such those of the first ten Amendments."[45]

Application of this feature of *Lochner* to the First Amendment is not readily apparent. After all, there is an obvious textual commitment to the freedom of speech.[46] For Ely, *Roe* was unique among Warren Court efforts to enforce ideals of liberty, because other areas, including free speech, concerned rights based in the text.[47]

But what we understand as First Amendment law is tied to the sparse (only 45 words) text and to the Framers only in the barest fashion.[48] Rather, First Amendment doctrine and vigorous protection for the freedom of speech developed in the evolutionary style of judicial common law lawmaking.[49] Courts devised rules based on prior precedents (including, and especially, the early dissents of Justices Holmes and Brandeis).[50] The Court establishes doctrine and rules taking into express account concerns for policy, political morality, and whether particular speech rules are sensible and produce fair results; rules are not based on the text, the Framers, or the experiences of the founding generation.[51] In other words, First Amendment doctrine is the product of constitutionalized (thus super-protected) common law judicial lawmaking that trumps popular legislative enactments.[52]

Courts devised the specific content of free expression much as they developed the specific content of the liberty of contract economic due process

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45. 304 U.S. 144, 153 n.4 (1938); *see also* Bernstein, *supra* note 2, at 52 (arguing that by incorporating most of the rights enumerated in the Bill of Rights, the Court was able to continue enforcement of fundamental rights against the states).

46. *See* U.S. CONST. amend. I.

47. *See* Ely, *supra* note 3, at 943 (distinguishing *Roe* from other Warren Court decisions because "by and large, it attempted to defend its decisions in terms of inferences from values the Constitution marks as special" (emphasis omitted)).

48. Strauss, *Common-Law Constitution*, *supra* note 4, at 36 ("Neither the text nor the original understandings provide much support for the principles of free expression that we today take for granted."); *see also id.* at 40 ("[I]t is not obvious what constitutes 'the freedom of speech.'").

49. *See* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1405 (1986) ("The principle is rooted in the text of the Constitution itself, but it has been the decisions of the Supreme Court over the last half century or so that have, in my view, nurtured that principle, given it much of its present shape, and accounts for much of its energy and sweep.").

50. Strauss, *Common-Law Constitution*, *supra* note 4, at 47; *see, e.g.*, Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring); Gitlow v. New York, 268 U.S. 652 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting).

51. Strauss, *Common-Law Constitution*, *supra* note 4, at 44-45; *id.* at 47 ("[T]he text has been incidental and the law has developed through precedent."); *see also* Lee C. Bollinger & Geoffrey R. Stone, *Dialogue*, *in* ETERNALLY VIGILANT, *supra* note 4, at 1, 1 ("Hundreds of judicial decisions—minutely studied, analyzed, and criticized—now constitute a highly intricate body of principles, doctrines, exceptions, and rationales.").

52. This contrasts with ordinary common law, which yields to superseding legislation, so long as the legislature states its intent to override common law. *See* Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 769 (2004) (describing the "fairly obvious fact that the common law can be overridden by legislation," because "the common law reflects a de facto legislative policy to leave certain fields of the law unplowed by legislation").

rights at issue in *Lochner*.[53] The fact that the First Amendment contains a textual commitment to the freedom of speech perhaps explains our acceptance of this review, distinguishing it from *Roe* and *Lochner*,[54] but it does not necessarily explain the meaning of the judicially enforced freedom of speech.

B. Lochner *and the Institution of Judicial Review*

The Lochnerian pejorative could challenge the entire institution of individual-rights-based constitutional judicial review and judicial invalidation of legislation duly enacted by the popularly elected branches.[55] The problem with *Lochner*, this argument goes, was not constitutional review using non-textual rights; the problem was constitutional review.[56]

Lochner, and the conventional distaste for *Lochner*, exemplifies the so-called "counter-majoritarian difficulty," the problem of reconciling constitutional review by unelected judges with democracy and democratic lawmaking.[57] Critics harped, before and after *Lochner*, on judicial interference with the popular will and failure to defer to majoritarian and legislative findings and judgments.[58] Lochnerian review was not law, but politics, they argued, because judges should defer to legislative determinations when these determinations are within reasonable range.[59] Indeed, 1905 marked the beginning of one of the most vocal periods of criticism "regarding the inconsistency of judicial review with respect to democratic principles."[60]

Recent efforts to rehabilitate *Lochner* spring from a desire to separate doctrinal distaste for economic substantive due process from the structural need for aggressive rights-based judicial review and more aggressive policing of individual rights against infringing legislation.[61] *Lochner* and the decisions of its

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53. *See* Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 264, 266-67 (1992) (describing pre-New Deal development of substantive due process and arguing that our current understanding of the First Amendment developed in a similar manner).

54. *See supra* notes 40-47 and accompanying text.

55. *See* Strauss, *Wrong*, *supra* note 3, at 376 ("The project of identifying and elaborating constitutional rights, and systematically applying them against legislative interference, was, one might have thought, precisely what courts should not do.").

56. *See id.* (arguing that "one lesson of the *Lochner* era was that judicial review is unacceptable unless it is confined to exceptional cases of government irrationality or malfeasance").

57. *See* Friedman, *supra* note 10, at 1390; *id.* at 1402 ("What we have, then, is a fight about legal legitimacy and its supposed consequences for judicial review.").

58. *See id.* at 1436-37.

59. *See id.* at 1454; *see also* Brown, *supra* note 44, at 81 (arguing that the government's reasoning may be legitimately criticized on economic grounds; however, government explanations typically are sufficient to justify limitations on liberty).

60. Friedman, *supra* note 10, at 1393.

61. *Id.* at 1400; *see* GILLMAN, *supra* note 26, at 205 (criticizing the use of *Lochner* as weapon "against the modern Court's use of fundamental rights as a trump on government power"); Gary D. Rowe, Lochner *Revisionism Revisited*, 24 L. & SOC. INQUIRY 221, 242 (1999) ("By freeing us from excessive worries about the legitimacy of judicial review, revisionism promises to direct our

era reached incorrect conclusions, the argument goes, but those decisions were the products of a structurally and procedurally proper and well-established exercise of the judicial role in protecting individual rights against popular legislation.[62]

Of course, constitutional judicial review has more than survived *Lochner*, thus hostility to such review cannot be the heart of Lochnerism.[63] More importantly, there has been the least structural controversy (as opposed to substantive disagreement with particular decisions) over judicial review in the First Amendment context: "Virtually everyone agrees that the courts should be heavily involved in reviewing impediments to free speech . . . ."[64] Commentators and critics rarely, if ever, question or challenge the structural legitimacy of courts invalidating legislation on First Amendment grounds.[65] This is so even as to decisions striking down wildly popular regulations of unpopular expression.[66]

This peculiar tolerance for First Amendment constitutionalism makes sense on Ely's theory of judicial review, under which free expression must be "strenuously" protected against majoritarian interference precisely "because [free speech] is critical to the functioning of an open and effective democratic society."[67] First Amendment doctrine historically rests on "unrelenting" distrust

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attention to more fruitful and creative jurisprudential endeavors."); *see also* Strauss, *Wrong*, *supra* note 3, at 378 ("[T]he willingness and ability of courts to take an aggressive role in enforcing constitutional rights has become an entrenched aspect of the legal culture . . . .").

62. *See* OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, 19 (1993) ("*Lochner* stands for both a distinctive body of constitutional doctrine and a distinctive conception of judicial role: One could reject one facet of *Lochner* and accept the other."); Brown, *supra* note 44, at 83-84 (arguing that the departure from *Lochner* was not a departure from recognizing the existence of economic due process, but a departure in applying the liberty principle in the face of government conceptions of the common good); Ely, *supra* note 3, at 941 (arguing that *Lochner* could be understood as asking the right question—whether the legislative action plausibly furthered a permissible governmental goal—but misapplying the question and reaching the wrong conclusion); Friedman, *supra* note 10, at 1401 ("[S]cholars argue that while the specific *Lochner*-era holdings themselves were wrong . . . the tradition of upholding rights against popular legislation was an established one.").

63. *See* Strauss, *Wrong*, *supra* note 3, at 376-77 (calling rigorous constitutional review one of the "signal developments" in the last fifty years of constitutional law); *id.* at 378 (arguing that "several decades of consensus in favor of much greater activism" means that arguments against *Lochner* cannot rest on skepticism of the legitimacy and efficacy of judicial review).

64. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105 (1980); *id.* at 116 ("'[S]trict review' is always appropriate where free expression is in issue.").

65. *See* Strauss, *Wrong*, *supra* note 3, at 377 (arguing that "no Justice—and seemingly hardly anyone outside of academia—suggests that it is improper for the courts" to exercise rigorous First Amendment review).

66. *See, e.g.*, Neal Devins, *The Majoritarian Rehnquist Court?*, 67 LAW & CONTEMP. PROBLEMS 63, 66-67 (2004) (arguing that the Communications Decency Act of 1996, 47 U.S.C. § 223 (2000), which sought to regulate internet pornography, was politically popular and on a popularly important issue, yet the decision striking the law down did not upset the public).

67. ELY, *supra* note 64, at 105; *see* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256-57 ("[T]here are many forms of thought and expression within the range of human communications from which the voter derives [ ] knowledge . . . These [

of popular government and its ability and willingness to inhibit public debate in service of its majoritarian interests.[68] We accept that it falls to the insulated courts to act as "special guardians of freedom of expression,"[69] protecting public discussion from self-interested, self-protecting, and untrustworthy, popular and governmental majorities.[70]

C. *Substituting Judicial for Legislative Judgment*

Lochnerism is most commonly associated with the criticism that courts have, in the guise of constitutional analysis, inappropriately substituted their own views for the views of the legislature as to the merit, wisdom, efficacy, and worthiness of public policy.[71] Thus did Justice Black attempt to bury *Lochner* in *Ferguson v. Skrupa*[72] by insisting that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."[73] Courts would no longer "sit as a 'superlegislature to weigh the wisdom of legislation.'"[74]

Rubenfeld emphasized this feature in criticizing the Lochnerian tendencies of *United States v. O'Brien*.[75] *O'Brien* involved the prosecution under a federal statute prohibiting the intentional destruction of Selective Service registration

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] must suffer no abridgement . . . ."); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1092-93 (2000) [hereinafter Volokh, *Information Privacy*] (arguing for protection of speech on "daily life matters," the speech related to the "real, everyday experience of ordinary people," that deserves protection from government limitation).

68. Marvin Ammori, *Another Worthy Tradition: How the Free Speech Curriculum Ignores Electronic Media and Distorts Free Speech Doctrine*, 70 MO. L. REV. 59, 64-65 (2005).

69. Strauss, *Wrong*, *supra* note 3, at 377.

70. *See* AKHIL REED AMAR, THE BILL OF RIGHTS 242 (1998) ("[W]hen the central mission of free speech shifted to protection of currently unpopular ideas from a current majority, an Article III officer with life tenure, sheltered from current political winds and sensitive to the long-term value of free speech, enjoyed certain advantages . . ."); ELY, *supra* note 64, at 106 ("Courts must police inhibitions on expression and other political activity because we cannot trust elected officials to do so: ins have a way of wanting to make sure the outs stay out."); Fiss, *supra* note 49, at 1420 (agreeing that judges act as the ultimate guardians of First Amendment values because of their independence of the forces dominating contemporary social structure).

71. *See* Balkin, *Wrong*, *supra* note 2, at 686 (describing the *Lochner* narrative of courts "repeatedly overstep[ing] their appropriate roles as judges by reading their own political values into the Constitution and second guessing the work of democratically elected legislatures and democratically accountable executive officials"); Friedman, *supra* note 10, at 1385 (describing *Lochner* as "symbolic of an era during which courts inappropriately substituted their views as to proper social policy for those of representative assemblies"); *id.* ("Courts that appear to be substituting their own view of desirable social policy for that of elected officials often are said to Lochnerize."); Rubenfeld, *supra* note 12, at 775 (condemning the "*Lochner*-like exercise in constitutional review of a law's policy merits").

72. 372 U.S. 726 (1963).

73. *Id.* at 730.

74. *Id.* at 731.

75. 391 U.S. 367 (1969); *see* Rubenfeld, *supra* note 12, at 771.

certificates of an individual who burned his card as a form of political protest.[76] The Supreme Court adopted a four-prong test for evaluating challenges such as this one to laws of general applicability regulating conduct that could, in some circumstances, be expressive or symbolic.[77] The second prong of the *O'Brien* test requires the court to determine whether the law at issue furthers an important or substantial governmental interest.[78]

The problem, according to Rubenfeld, is that this prong leaves room for a court to decide, in a form of "judicial superlegislative review," whether a conduct regulation (a law that does not target speech) in fact furthers the stated government interest.[79] He uses the example of an individual ticketed for speeding who argues that he exceeded the speed limit for expressive purposes—to protest and call attention to the stupidity of the new fifty five mile per hour limit.[80] The fact that the driver sought to present a particularized message through his conduct places his case squarely within *O'Brien*, requiring a "full-blown judicial determination" of whether the lower speed limit does (as the government argued in enacting the law) increase fuel efficiency and highway safety.[81] This inquiry has the effect of "constitutionalizing a policy question of purely legislative dimensions."[82] If the court agrees with the driver that the lower speed limit does not achieve its intended goals, the speed limit will be found unconstitutional simply because it is bad or ineffective in achieving its policy objectives—precisely what *Lochner* is thought to be about.[83]

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76. *O'Brien*, 391 U.S. at 369-70.

77. *Id.* at 377:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

This is essentially the same test for content-neutral regulations, laws that directly regulate speech (as opposed to conduct that may, or may not, be expressive), but apply regardless of the content or message. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298, 299 n.8 (1984) (stating the constitutional test for content-neutral restriction is "little, if any, different" from the test for regulations of expressive conduct); Rubenfeld, *supra* note 12, at 785; Smolla, *supra* note 15, at 1125 (calling *O'Brien* the "close cousin" of the intermediate scrutiny standard for content-neutral regulations); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 653 (1991) ("[T]he Court has collapsed the [time, place, and manner] and symbolic speech doctrines into a single, rather weak, standard.").

78. *O'Brien*, 391 U.S. at 377.

79. Rubenfeld, *supra* note 12, at 771.

80. *Id.* Rubenfeld further develops the hypothetical by adding the fact that the speeder/speaker's car bears a sign reading "If you see me driving at 65, it means I'm protesting the 55-mile-per-hour speed limit." *Id.* at 774.

81. *Id.* at 771, 775.

82. *Id.* at 771.

83. *Id.* at 775.

This feature of *Lochner* does not get us very far analytically because it really depends on one's biased perspective whether a court in a given case applied good-faith legal analysis or superimposed its own judgments on the legislature.[84] Ultimately, it breaks out into a broader critique of all balancing in constitutional analysis.[85] Many *Lochner*-era decisions were derided simply as judicial re-balancing of interests, a re-measuring of the legislature's conclusion that a particular regulation of business served the public or common good.[86] Congress already had struck the balance among competing interests in drafting the law; the Court should not re-do that balance.[87] Moreover, *Lochner*-era critics saw judicial balancing as arbitrary, random, unpredictable, and ultimately political, with results varying widely among cases.[88]

But such balancing is uniquely prevalent under the First Amendment. Indeed, it seems unavoidable unless the language of the First Amendment—"Congress shall make no law"—is taken as an absolute bar to the regulation of all that could be expressive.[89] Such absolutism is precisely where Rubenfeld hopes to go.[90] He argues for a new "purposivist" approach to free speech: the First Amendment is, per se, violated when the immediate purpose of a law is to target speech or to punish someone for speaking; it is, per se, not violated if the government's purpose was to target something other than speech or if the person was not punished for speaking.[91] Under this approach, there would be no balancing of interests, means, or ends.[92]

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84. *See* Ely, *supra* note 3, at 940 ("All the 'superimposition of the Court's own value choices' talk is, of course, the characterization of others and not the language of *Lochner* or its progeny.").

85. *See* Rubenfeld, *supra* note 12, at 786 (arguing that balancing's inquiry into "how well a law furthers important governmental interests becomes nothing more than superlegislative judicial review of the law's policy merits").

86. *Compare* Bernstein, *supra* note 2, at 12-13 (discussing conclusions that legislation that merely shifted resources could not be regarded as beneficial to the public) *and* Brown, *supra* note 44, at 82 (arguing that the move from *Lochner* reflected "changes in the understanding of what constituted a valid public purpose of government") *with* Cushman, *supra* note 33, at 899 (discussing cases striking down business regulations because the business was not affected with the public interest, thus its regulation could not be in service of the public good).

87. *See supra* notes 71-74 and accompanying text.

88. *See* Friedman, *supra* note 10, at 1406.

89. *See* OWEN M. FISS, THE IRONY OF FREE SPEECH 5 (1996) [hereinafter FISS, IRONY] (arguing that the Supreme Court has not interpreted the First Amendment as a bar to all state regulation; instead, the Court has interpreted the First Amendment as a mandate to reign in the state's authority by balancing the value of the speech with the state's advanced interest in regulating); MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 54 (1984) ("[A]ny general rule of first amendment interpretation that chooses not to afford absolute protection to speech because of competing social concerns is, in reality, a form of balancing."); *but see* Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 553 (1962) (interviewing Justice Black, who described his view of the First Amendment as "'no law' means no law").

90. *See* Rubenfeld, *supra* note 12, at 776.

91. *See id.* Rubenfeld distinguishes purpose from motive and focuses only on the former. *Id.* at 793-94. Purposivism looks to the immediate action of the law and whether it targets speech;

Unless the Court adopts the absolutist interpretation, there must be consideration and balancing of the means and ends employed by government and the tailoring between the two where speech is involved—whether a given law is necessary to serve an interest and whether that interest is, on balance, sufficiently important to justify the disfavored legislative act of restricting speech.[93] The charge of First Amendment Lochnerism perhaps derives because the balance so often tilts in favor of protecting expression and against the asserted legislative interests.[94] But the alternative is for courts to analyze the threat posed by the particular speech at issue—an approach that places courts in the similarly questionable position of judging the value or worth of particular expression.[95] That focus would not guard effectively against courts getting swept up in the concerns that motivated the legislators to act to restrain particular speech in the first instance.[96]

D. *Misallocating Rigorous Judicial Scrutiny*

Lochnerian courts allegedly aim (or misaim) rigorous judicial scrutiny at the wrong targets.[97] *Lochner*-era courts reviewed ordinary social, economic, and commercial regulation that should not have warranted heightened (if any) constitutional review, ultimately removing much economic regulation from the legislative purview.[98] The defeat of *Lochner* in 1937 through the Supreme Court's famous "Switch in Time"[99] reflected a new constitutional understanding:

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motive or further purpose (what the legislature ultimately hopes to achieve as a matter of public policy beyond simply regulating speech) is irrelevant. *See id.*

92. *See id.* at 779 ("A purposivist view of the First Amendment does not involve *balancing*. It is absolute." (emphasis in original)).

93. ELY, *supra* note 64, at 105-06; *see also* Rubenfeld, *supra* note 12, at 786 (arguing that narrow-tailoring requirements may be useful as a way to uncover impermissible motive).

94. *See* REDISH, *supra* note 89, at 55 (arguing for balancing with a "thumb on the scales" in favor of free speech); Schauer, *supra* note 4, at 192 ("[T]he fact that the First Amendment is the authority of choice . . . says a great deal about the way in which the First Amendment functions in American society . . . ."); Wasserman, *supra* note 4, at 382 ("Freedom of speech frequently trumps other societal and constitutional values . . . .").

95. *See* FCC v. Pacific Found., Inc., 438 U.S. 726, 761 (1978) (Powell, J., concurring in part and concurring in the judgment) ("I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection."); Rubenfeld, *supra* note 12, at 823 ("The freedom of speech, as we actually know it and have it in this country, is irreconcilable with high-value/low-value thinking."); *id.* at 824 (arguing that the First Amendment forbids governmental actors from declaring an opinion to be of low value).

96. ELY, *supra* note 64, at 107.

97. *See* Balkin, *Wrong*, supra note 2, at 686.

98. *Id.*; Richards, *supra* note 3, at 1213 (arguing that *Lochner*'s theory "seek[s] to place certain forms of economic regulation beyond the power of legislatures to enact"); *see also* Rubenfeld, *supra* note 12, at 778 (arguing that individuals should have no First Amendment claims when they violate ordinary prohibitory laws).

99. *See* 2 ACKERMAN, *supra* note 35, at 262, 290-91 (describing the "switch in time" by two centrist justices to endorse the New Deal by upholding legislation, as "the result of the law working

legislatures should have power in particular regulatory areas and reviewing courts would accord greater deference to political branches and less rigorous review where economic, commercial, and business matters were concerned.[100] As the *Carolene Products* Court said in the text just before Footnote Four:

> the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[101]

On this view, the problem with *Lochner* was the application of rigorous judicial scrutiny to, and potential invalidation of, such economic legislation, even if most in fact survived review.[102] Similarly, Rubenfeld recognizes that courts do not use *O'Brien* to engage in the feared superlegislative review of the wisdom and merits of speed limits or other generally applicable conduct laws absent some indication "of an improper speech-suppressing purpose."[103] For Rubenfeld, however, that simply drives the point that a "profound rethinking" of First Amendment law and a move away from balancing is doctrinally necessary.[104]

The concept of according more or less constitutional scrutiny to particular categories of laws finds its First Amendment analogue in the content distinction, the differential treatment of content-based and content-neutral laws that is a cornerstone of modern free speech doctrine.[105] Content-based regulations restrict speech because of the substance, message, ideas, subject matter, or

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itself pure"); Schauer, *supra* note 4, at 178 ("Halfway through the New Deal the Supreme Court changed its mind (or at least its tune), and things have never been the same.").

100. *See* 2 ACKERMAN, *supra* note 35, at 401 ("When the New Deal Court repudiated *Lochner* after 1937, it was repudiating market freedom as an ultimate constitutional value, and declaring that, henceforth, economic regulation would be treated as a utilitarian question of social engineering."); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 389 (1990) [hereinafter Balkin, *Realism*] ("[I]t was thought that issues of economic freedom should be left to legislatures and administrative agencies, who could study these matters in their larger social context and determine the allocation of rights and duties that best served the public interest."); Schauer, *supra* note 4, at 178 ("[T]he Court . . . has continued to uphold most forms of social and economic regulation against libertarian objections, concluding that with respect to such matters it was the place neither of the comparatively unchangeable Constitution nor of the unelected federal courts to interfere . . . .").

101. *Carolene Prods.*, 304 U.S. at 152.

102. *See* Brown, *supra* note 44, at 86-87 (arguing that far more legislation was upheld in the face of economic due process challenge than was struck down); *but see* Friedman, *supra* note 10, at 1449 (arguing that the "small absolute number of overrulings looked like a sea change to observers living at the time").

103. Rubenfeld, *supra* note 12, at 787.

104. *Id.* ("[W]hen the purposivism instinct in First Amendment law is taken seriously—a profound rethinking of a number of First Amendment issues becomes possible.").

105. *See* Bollinger & Stone, *supra* note 51, at 19; Williams, *supra* note 77, at 617 (describing the "growing focus on content discrimination as the central concern of the first amendment").

speakers involved, or because of the effect of the expression on the audience.[106] Content-neutral laws apply to all speech, regardless of subject matter, speaker, or point of view, and are justified or explained without regard to the substance of the speech regulated.[107] Content-based regulations can be further divided between those that discriminate based on viewpoint—regulating one particular point of view on a subject while leaving other viewpoints on that subject unregulated—and on content or the subject matter of speech—regulating the overall topic, subject, or issue discussed or the category of speakers involved.[108] The First Amendment also could be implicated by neutral laws of general applicability, laws that do not regulate speech in any sense, instead targeting conduct or other behavior that may involve language or that may be performed for expressive purposes.[109]

The continuum of content connection leads to a continuum of constitutional scrutiny. Viewpoint-discriminatory laws are virtually per se unconstitutional.[110] Content-based laws are subject to highly rigorous (and rarely satisfied) strict or exacting scrutiny, requiring that the law be the least restrictive means to serve a compelling government interest.[111] Content-neutral laws are subject to

106. *See* Bollinger & Stone, *supra* note 51, at 19 ("A content-based regulation restricts speech because of its message . . ."); Smolla, *supra* note 15, at 1123 (arguing that law appears content-based when the regulation "must at least to some degree reflect something in the nature of a content-based judgment about the speech"); Williams, *supra* note 77, at 622-23 ("[A] regulation will qualify as content discriminatory only if the government purpose served by the regulation is related to the content of the speech."); *see also, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 811-12 (2000); Forsythe County v. Nationalist Movement, 505 U.S. 123, 134 (1992); Simon & Schuster, Inc. v. Members of State Crime Victims Bd., 502 U.S. 105, 116 (1991); Boos v. Barry, 485 U.S. 312, 321 (1988).

107. *See* Bollinger & Stone, *supra* note 51, at 19; Strauss, *Common-Law Constitution*, *supra* note 4, at 38 (describing regulations directed at speech but not based on the content of the speech regulated); *see also, e.g.*, Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994) [hereinafter *Turner I*] ("[L]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral."); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293)) (stating that laws are content-neutral when "justified without reference to the content of the regulated speech"); *id.* at 791 (stating the issue as "whether the government has adopted a regulation of speech because of disagreement with the message it conveys").

108. *See* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (calling viewpoint discrimination "an egregious form of content discrimination"); Smolla, *supra* note 15, at 1121 ("Viewpoint discrimination, at its worst, involves deliberate suppression of particular views . . ."); Williams, *supra* note 77, at 655 (calling viewpoint discrimination "the most biased end of the continuum . . . where the government singles out and disadvantages one view on a subject while leaving other points of view untouched"); *see also* Smolla, *supra* note 15, at 1122 ("While all laws that discriminate on the basis of viewpoint automatically discriminate on the basis of content, not all laws that discriminate on the basis of content go so far as to single out disfavored viewpoints.").

109. *See* Rubenfeld, *supra* note 12, at 770-71; Smolla, *supra* note 15, at 1119-20; Strauss, *Common-Law Constitution*, *supra* note 4, at 38.

110. *See* Smolla, *supra* note 15, at 1122.

111. *See Playboy Entm't*, 529 U.S. at 813; *Rosenberger*, 515 U.S. at 828; *Simon & Schuster*, 502 U.S. at 116; *see also* Smolla, *supra* note 15, at 1122 (describing strict scrutiny as "highly

intermediate scrutiny, a less demanding and "more open-ended 'balancing'" test[112] that weighs a law's restrictiveness against the government's important or substantial justifications for the law and overwhelmingly strikes the balance in favor of constitutionality.[113] The difference in the forms of scrutiny, and thus the likely result of the balancing, turns on the degree of exactingness that the court demands in the fit between the law and the legislative goal.[114]

This difference in scrutiny is justified on the theory that the more content (or viewpoint) plays a role in the application of or justification for a law, the more the law looks like governmental censorship or governmental manipulation of public debate, thus the greater the harm to free-speech values.[115] In Smolla's words, "[i]t is not that content-based regulation of speech is inherently despotic, but that it inherently lends itself to despotism."[116] The great threat to free-speech values is governmental manipulation or control of debate by controlling messages or points of view or the anticipated effects if the audience hears and is persuaded by some expression.[117]

And the difference functions quite sharply in practice, perhaps (silently) to preempt charges of First Amendment Lochnerism. Few, if any, content-based laws survive the "acid baths" of strict scrutiny.[118] Nearly all content-neutral regulations survive less-rigorous intermediate review.[119]

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demanding, but not absolute"); Strauss, *Common-Law Constitution*, *supra* note 4, at 38 (arguing that content-based regulations are presumptively unconstitutional).

112. Bollinger & Stone, *supra* note 51, at 20.

113. *See id.*; Smolla, *supra* note 15, at 1125; *see also Turner I*, 512 U.S. at 662 (citing O'Brien, 391 U.S. at 377); *Ward*, 491 U.S. at 798-800 (requiring that the law be narrowly tailored, although not necessarily the least restrictive means, to serve a significant government interest while leaving open ample alternative channels of communication).

114. *See* Rubenfeld, *supra* note 12, at 785.

115. *See* Smolla, *supra* note 15, at 1121-22 (describing viewpoint discrimination as "tantamount to thought control"); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 198-99 (1983) (arguing that the community though process is distorted and manipulated when government eliminates particular ideas, viewpoints, or information from the public debate); *see also Simon & Schuster*, 502 U.S. at 116 (stating that "the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace"); *but see* REDISH, *supra* note 89, at 104 (arguing that content-neutral regulations diminish the value of free speech and questioning the differential standards of review).

116. Smolla, *supra* note 15, at 1122; *see* City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring) ("[C]ontent-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate.").

117. *See* Stone, *supra* note 115, at 198-99; David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 355 (1991) (arguing that the First Amendment prohibits government from attempting to control the audience's mental processes by deliberately denying them information in order to induce certain behavior).

118. Smolla, *supra* note 15, at 1122; *see* REDISH, *supra* note 89, at 118-19; Heidi Kitrosser, *From Marshall McLuhan to Anthropomorphic Cows: Communicative Manner and the First Amendment*, 96 NW. U. L. REV. 1339, 1393 (2002); Stone, *supra* note 115, at 196. Ironically, the exception is in those areas of First Amendment law that commentators fear may or have become Lochnerized. *See, e.g.*, McConnell v. FEC, 540 U.S. 93 (2003) (upholding, as against strict

E. Lochner *as Political Symbol: "Nine Old Men" and "Switch in Time"*

Finally, *Lochner* is a political and ideological morality play. It is the narrative of the Nine Old Men and the Switch in Time.[120] It is the collision between old-guard judges enforcing their outmoded world views as matters of constitutional law and elected officials putting into play popular new progressive ideas then in social ascension, with the latter eventually prevailing.[121] Lochnerian judges imposed their anti-Progressive biases—pro-business, anti-labor, libertarian, laissez-faire economics—to strike down, as unconstitutional, popular attempts to change, and ultimately level, the social and economic playing field.[122] Lochnerism is the last judicial stand of the old constitutional order against new legislative initiatives.[123] *Lochner* was the old, rigid, formalist regime that had to be slain in order for the progressive, flexible, pragmatic ideals of the New Deal to spread and take hold.[124] The New Deal's turn from *Lochner* reflected eventual judicial recognition of changed social and economic conditions that altered the understanding of the common good, the role of government in ensuring the public good, and when constitutional liberty must yield to the common good.[125]

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scrutiny, limitations on campaign contributions and expenditures); Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1989) (same as to restrictions on corporate expenditures).

119. *See* REDISH, *supra* note 89, at 99 (describing the Court's "ambivalence" towards content-neutral restrictions); Kitrosser, *supra* note 118, at 1393 (describing criticism that courts give a "veritable 'pass' to regulations deemed content-neutral"); *see also, e.g.*, Turner Broadcasting Sys., Inc. v. FCC, 520 U.S. 180, 189-90 (1997) [hereinafter *Turner II*]; *Ward*, 491 U.S. at 796; *see infra* note 201-209 and accompanying text.

120. *See* 2 ACKERMAN, *supra* note 35, at 290-91 (describing the "switch in time" by two centrist justices to endorse the New Deal); Bernstein, *supra* note 2, at 4 (describing view of "the heroic Franklin Roosevelt [standing] up to the Nine Old Men" of the Supreme Court in securing the New Deal).

121. *See* Balkin, *Wrong*, *supra* note 2, at 685 ("Following the struggle over the New Deal and the ascendancy of the Roosevelt Court, *Lochner* symbolized the constitutional regime that had just been overthrown."); *see also* Bernstein, *supra* note 2, at 4 ("This morality tale bore only a modest relation to reality. However, it suited the political needs of the Progressive and New Deal era controversialists who initially wove it.").

122. *See* 2 ACKERMAN, *supra* note 35, at 257 ("*Lochner* became the symbol of a repudiated era of laissez-faire jurisprudence."); Bernstein, *supra* note 2, at 2 (outlining the view that "*Lochner* era Supreme Court Justices, influenced by pernicious Social Darwinist ideology, sought to impose their laissez-faire views on the American polity."); Cushman, *supra* note 33, at 983 (describing this as the "narrow" view of *Lochner*); Friedman, *supra* note 10, at 1452 (discussing the perception of *Lochner*-era judges motivated by class bias); Richards, *supra* note 3, at 1212; Schauer, *supra* note 4, at 178 (arguing that the Court "[c]ast[] aside the view that the Constitution adopted a libertarian or laissez-faire view of economics").

123. *See* Balkin, *Wrong*, *supra* note 2, at 686.

124. *Id.*; *see* 2 ACKERMAN, *supra* note 35, at 401 ("When the New Deal Court repudiated *Lochner* after 1937, it was repudiating market freedom as an ultimate constitutional value . . . .").

125. *See* Brown, *supra* note 44, at 83-84 ("By [1937], the suffering of workers and the changes in the economic and social order had persuaded many that liberty was not protected adequately without regulation . . ."); *id.* at 87 (arguing that government sometimes convinced *Lochner*-era judges that some restriction on economic liberty was in the common good); Strauss, *Wrong*, *supra*

The *Lochner*-as-politics critique further entails what Jack Balkin calls "ideological drift" in constitutional principle, through which radical and progressive constitutional ideas gain acceptance, ultimately become orthodoxy, then are adopted (or co-opted, depending on one's point of view) by the other side of the ideological constitutional divide as arguments for preserving the status quo.[126] The constitutional laissez-faire economic arguments that were the bane of New Deal Democrats and *Lochner*-era Progressives originated as antebellum liberal arguments against the provision of government benefits (such as the advantages of the newly created corporate form) to monied interests; the arguments only later were picked up by big business as a way of fending off government regulation, while the progressive left committed itself to redistributive social and economic regulation.[127]

Ironically, the death of *Lochner* helped create this feature of First Amendment Lochnerism. Faced with the loss of viable libertarian economic arguments against government regulation, business and conservative interests turned to the First Amendment and to the historically libertarian free speech tradition of the left.[128] That, in turn, cast the First Amendment ideologically adrift. The political left now holds dear and supports the counter values the legislature often asserts to justify some restrictions on speech—equality, democracy, personal privacy—as uniquely compelling values that at times should outweigh free speech.[129] Moreover, the political left's substantive commitment to redistributive economics is incompatible with broad libertarian protection for conservative-leaning contrary expression by large, monied corporate and business interests.[130]

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note 3, at 386 (arguing that the problem was the *Lochner* Court's failure to recognize that other concerns could outweigh liberty of contract).

126. Balkin, *Realism*, *supra* note 100, at 383.

127. *Id.* at 383-84.

128. *See id.* at 384 ("Business interests and other conservative groups are finding that arguments for property rights and the status quo can more and more easily be rephrased in the language of the first amendment by using the very same absolutist forms of argument offered by the left in previous generations."); Schauer, *supra* note 4, at 178 ("Facing the increasing constitutional (or at least doctrinal) weakness of arguments from economic libertarianism, economic libertarians turned their attention to the First Amendment.").

129. *See* FISS, IRONY, *supra* note 89, at 9-10; *id.* at 83 ("The autonomy protected by the First Amendment and rightly enjoyed by individuals and the press is not an end in itself, . . . but is rather a means to further the democratic values underlying the Bill of Rights."); Balkin, *Realism*, *supra* note 100, at 423 (describing conflicts between egalitarianism and the requirement of governmental content-neutrality in regulating speech).

130. *See* Martin H. Redish and Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 291 (1998) ("But it is probably accurate often enough to treat corporate speech as the rough equivalent of something approaching more politically conservative free market advocacy. If such is the case, however, then attempts to exclude corporate speech from the First Amendment's scope are similarly likely to represent the rough equivalent of burdening only one substantive political-economic position.").

We find ourselves in the First Amendment equivalent of 1936.[131] Both constitutional conflicts arise out of similar social contexts: New Deal legislation and recent speech-restrictive legislation (such as the wiretap law at issue in *Bartnicki*) both are born "of the economic and social dislocations caused by rapid technological change."[132] Popular government seeks to deal with these upheavals through legislation and the courts are forced to fit this legislation into existing doctrinal frameworks.[133] *Lochner*-era courts continued to broadly protect economic liberty from government regulation, not yet embracing the "irony" urged from the left that the failure of government to act in the economic sphere was harmful to the public good.[134] Similarly, the Court today (call them the "Eight Middle-Aged-to-Old Men and One Older Woman") continues to apply broad First Amendment principles created in an earlier era to strike down government regulation, not yet embracing the paradox suggested by many that the state can be "a friend of speech" and can, through regulation of speech, enhance democracy and democratic ideals.[135]

With few exceptions, free speech principles do not yet yield in court to other liberal values that popular government may seek to protect through limits on expression—much as freedom of contract did not yield prior to 1937. Neil Richards argues that to invalidate laws protecting privacy in consumer credit data and information would mark a descent into First Amendment Lochnerism.[136] According to Richards, *Lochner* and the First Amendment arguments against information-privacy rules share an unnecessary (and unwanted) "libertarian gloss upon the Constitution," placing economic regulation beyond the reach of the ordinary legislative process in a way favored by business interests.[137]

Broad protection for free speech may be perceived as the old constitutional order, judicially enforced and resistant to calls for greater protection of privacy and personal dignity as a different, worthy legal value that popular branches of government may proactively protect.[138] And we see a political valence similar to

131. *See infra* notes 132-142 and accompanying text.

132. Richards, *supra* note 3, at 1213.

133. *See* Friedman, *supra* note 10, at 1397 (discussing arguments that *Lochner*-era decisions were grounded in and faithful to existing doctrine).

134. *See* Brown, *supra* note 44, at 83-84.

135. FISS, IRONY, *supra* note 89, at 83; *see also* Cass R. Sunstein, *The Future of Free Speech*, *in* ETERNALLY VIGILANT, *supra* note 4, 285, 304 (arguing that a belief in the democratic foundations of the free speech principle means that some government regulation of speech is not problematic if it is a reasonable effort to promote democratic goals).

136. *See* Richards, *supra* note 3, at 1212-13 ("[T]here are some fairly strong parallels between the traditional conception of Lochner and the First Amendment critique of data privacy legislation.").

137. *Id.* at 1213; *id.* at 1215 ("[T]he modern normative commitment against placing social and economic problems beyond the reach of democratic regulatory politics would still counsel against taking the First Amendment critique at face value.").

138. *See* Susan E. Gindin, *Lost and Found in Cyberspace: Informational Privacy in the Age of the Internet*, 34 SAN DIEGO L. REV. 1153, 1155 (1997) (calling on government to "guarantee

the period before *Lochner*'s demise, with the left seeking to limit the dominant, libertarian constitutional value in the face of these countervailing interests.[139] Initial calls for restrictions on speech as a way to protect and preserve other values, such as equality, individual dignity, and individual self-worth, came from the left.[140] This old regime rests on an assumption that government may not decide what speech is unfair, excessive, intolerable, or in bad taste and that granting government that power necessarily creates the potential for abuse.[141] The new constitutional order hopes government can and will legislate in favor of privacy and other interests, even at the risk of creating new, but justified, free speech restrictions.[142]

II. *LOCHNER* AND *BARTNICKI*

A. Bartnicki *Considered*

In 1968, as part of the Omnibus Crime Control and Safe Streets Act, Congress sought to prohibit and punish particular private conduct: wiretapping and intercepting wire and voice (expanded in 1986 to include electronic) communications.[143] The statute prohibited the willful interception of communications,[144] the use of devices designed to intercept communications,[145] the use of the contents of illegally intercepted communications,[146] and the intentional disclosure of the contents of a communication knowing or having reason to know the information was obtained through an unlawful interception.[147] The law was enforceable through a private civil action for

individuals the right to control . . . their personal information"); Smolla, *supra* note 15, at 1150 ("Upholding a restriction on privacy contraband, however, merely permits the government to come to the aid of a speaker . . . who does not wish to have his views involuntarily exposed from having those views forcibly stolen and disseminated.").

139. Balkin, *Realism*, *supra* note 100, at 376 ("The left in the United States used to be solidly united around the overriding importance of protecting speech from governmental interference . . . It's not that way anymore.").

140. *See* FISS, IRONY, *supra* note 89, at 10 (arguing that "many liberals find it difficult to choose freedom of speech over the countervalues being threatened," when the state "exercises . . . power on behalf of another of liberalism's defining goals—equality").

141. *See* Volokh, *Information Privacy*, *supra* note 67, at 1116; *see also* Ammori, *supra* note 68, at 64-65 (arguing that different speech traditions apply to different circumstances, divided by the prevalence of an "unrelenting government distrust"); Smolla, *supra* note 15, at 1122 ("It is not that content-based regulation of speech is inherently despotic, but that it inherently lends itself to despotism . . .").

142. *See* Volokh, *Information Privacy*, *supra* note 67, at 1106.

143. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 211 (1968), *as amended by* Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986); *see also Bartnicki*, 532 U.S. at 523-24; Smolla, *supra* note 15, at 1100-01.

144. 18 U.S.C. § 2511(1)(a) (2000).

145. *Id.* § 2511(1)(b).

146. *Id.* § 2511(1)(d).

147. *Id.* § 2511(1)(c).

equitable relief, actual, statutory, and punitive damages, and attorneys' fees.[148] Congress' explicit purpose was to protect personal privacy in burgeoning wire and electronic communications against surreptitious eavesdropping.[149] The law reflects an effort by Congress to get ahead of technology in protecting personal, business, and other privacy interests against unwanted intrusion.[150] As Rodney Smolla argues:

> Congress clearly understood that new communications technologies would often supplement, if not largely supplant, many traditional forms of communication . . . forms of communication that historically promised a reasonably strong degree of privacy protection. Congress plainly thought it was important to attempt to secure some rough measure of equivalent privacy for these new modes of communication, and for new forms that would undoubtedly develop in the future, given our modern culture's ever-accelerating arc of invention.[151]

Throughout 1992 and 1993, a high-profile and highly contentious labor dispute raged between the Pennsylvania State Education Association and the school board governing Wyoming Valley West High School in north-central Pennsylvania.[152] In May 1993, Anthony Kane, a teacher in the district and the president of the local union, had a telephone conversation with Gloria Bartnicki, the union's chief negotiator; Kane spoke on his land line while Bartnicki spoke from her cellular phone.[153] The conversation about the labor dispute, the school board, and the current status of negotiations was, in Smolla's words, "candid, and included some blunt down-and-dirty characterizations of their opponents in the labor controversy, at times getting personal."[154] The conversation eventually turned to the school board's media-reported bargaining position of refusing any pay increase greater than three percent, of which Kane said "If they're not gonna

148. *Id.* § 2520(a), (b).

149. *See e.g.*, S. REP. NO. 90-1097, at 66 (1968), as *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153 (describing statutory purpose as "protecting the privacy" of wire and oral communication); *id.* at 67 ("Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage."); *Oversight on Communications Privacy: Before the Subcomm. on Patents, Copyrights, and Trademarks, Senate Committee on the Judiciary*, 98th Cong. 1-2 (1984) (statement of Sen. Leahy) (discussing the impact of new electronic communications "on our lives and our sense of privacy").

150. Smolla, *supra* note 15, at 1102-03 ("There is indeed a whole lot a scannin' goin' [sic] on. People surreptitiously intercept, record, and disclose the usual suspects for the usual reasons, in the perpetual parade of human perfidy.").

151. Smolla, *supra* note 15, at 1102-03 (footnotes omitted).

152. *Bartnicki*, 532 U.S. at 518.

153. *Id.*; Smolla, *supra* note 15, at 1112.

154. Smolla, *supra* note 15, at 1112.

move for three percent, we're gonna have to go to their, their homes . . . To blow off their front porches, we'll have to do some work on some of those guys."[155]

The telephone call was intercepted by an unknown individual and recorded onto a cassette tape.[156] The tape was passed anonymously to Jack Yocum, president of a local taxpayers' organization that had actively supported the board and opposed the union's positions in the dispute.[157] Yocum passed the tape to Frederick Vopper, who hosted a radio talk show under the pseudonym "Fred Williams," who repeatedly played the tape on the air.[158] Other media outlets, some of which had received anonymous copies of the tape, then similarly published the contents of the cassette.[159]

Bartnicki and Kane sued Vopper and Yocum for actual, statutory, and punitive damages and attorney's fees under the disclosure provision of the federal wiretap law and a separate state law.[160] Vopper and Yocum argued that the First Amendment precluded their liability under these circumstances[161] and six justices, led by Justice Stevens, agreed.[162] Justice Stevens held that the case was controlled by the principle of *Smith v. Daily Mail Publishing Co.*[163] that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order."[164] The basic elements of that test were satisfied: neither Yocum, Vopper, nor any other media member played a role in the initial unlawful interception of the Kane-Bartnicki call; all obtained the information lawfully; and the subject matter of the conversation—the labor dispute and negotiations and everything surrounding that—was a matter of public concern.[165]

Justice Stevens reaffirmed the Court's ongoing refusal to declare categorically whether publication of truthful information ever could be punished.[166] Nevertheless, he soundly rejected the government's asserted interests in stopping interception and in protecting the personal privacy of those engaged in these conversations.[167] While recognizing that the latter interest was

155. *Bartnicki*, 532 U.S. at 518-19; Smolla, *supra* note 15, at 1113; *see also id.* at 1144 (arguing that "[i]t was *The Sopranos* talk of blowing off porches and 'do[ing] some work on some of these guys' (or 'dese guys')" that influenced several justices in the case).

156. *Bartnicki*, 532 U.S. at 519.

157. *Id.*

158. *Id.*; Smolla, *supra* note 15, at 1113 n.54.

159. *Bartnicki*, 532 U.S. at 518-19; Smolla, *supra* note 15, at 1113.

160. *Bartnicki*, 532 U.S. at 519-20 n.3.

161. *Id.* at 520.

162. *Id.* at 516.

163. 443 U.S. 97 (1979).

164. *Bartnicki*, 532 U.S. at 527-28 (quoting *Daily Mail*, 443 U.S. at 103).

165. *Bartnicki*, 532 U.S. at 525; Smolla, *supra* note 15, at 1116-17; *but see id.* at 1150 (criticizing the "sweeping version" of public concern used by Justice Stevens).

166. *Bartnicki*, 532 U.S. at 529 (quoting Florida Star v. B.J.F., 491 U.S. 524, 532-33 (1989)); Richards, *supra* note 3, at 1199.

167. *Bartnicki*, 532 U.S. at 529-34.

strong, Stevens stated that those "concerns gave way when balanced against the interest in publishing matters of public importance," the sort of truthful information at the core of First Amendment protection.[168]

Justices Breyer and O'Connor nominally joined Justice Stevens' opinion, creating an apparent majority.[169] But Justice Breyer wrote a concurring opinion that, in tone and language, was narrower and appeared to take a distinct path to the conclusion that the expression *in the instant case* was protected, a path that leaves expression less thoroughly protected in the face of privacy concerns.[170] Justice Breyer emphasized the "special circumstances" inhering in publication of intercepted information "involv[ing] a matter of unusual public concern," in this case, a genuine true threat of physical harm to person and property.[171] He concluded that Bartnicki and Kane "had little or no *legitimate* interest in maintaining the privacy" of such threats.[172] Moreover as limited public figures for purposes of the labor dispute, Bartnicki and Kane had forfeited some of their interests in privacy.[173] Justice Breyer took pains to agree with Justice Stevens that § 2511(1)(c) is unconstitutional only as applied to the facts, refusing to extend the ruling beyond present circumstances.[174]

B. *A Lochnerian Spin on* Bartnicki

Bartnicki is Lochner in one sense of the word: the Court reviewed and invalidated federal legislation on constitutional grounds.[175] If one sees Lochnerism in all individual rights-based judicial review, *Bartnicki* obviously fits the mold – as does every other major First Amendment case. *Bartnicki* also reflects, in the First Amendment realm, several of the other, more nuanced elements frequently associated with the purported evils of Lochnerism.[176] If we are going to speak of First Amendment Lochnerism, *Bartnicki* remains a good illustration of the purported problems.

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168. *See id.* at 532-34.
169. *Id.* at 535.
170. *See* Smolla, *supra* note 15, at 1113 (discussing narrower scope of Breyer's concurring opinion).
171. *See Bartnicki*, 532 U.S. at 535-36 (Breyer, J., concurring); Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After* Eldred, 44 Liquormart, *and* Bartnicki, 40 HOUS. L. REV. 697, 743 (2003) [hereinafter Volokh, *Intellectual Property*]; *see also* Smolla, *supra* note 15, at 1144 (arguing that Breyer "seemed offended by the conversation," treating it as an authentic discussion of the need to engage in violence, rather than a hyperbolic discussion of anger at the school board's negotiating intransigence).
172. *Bartnicki*, 532 U.S. at 539 (Breyer, J., concurring) (emphasis in original).
173. *See id.* (Breyer, J., concurring).
174. *Id.* at 541 (Breyer, J., concurring).
175. *See supra* Part I.B.
176. *See supra* Parts I.C-E.

1. Rigorous review of inappropriate targets

Bartnicki aimed rigorous (and ultimately disqualifying) First Amendment review at what appears to be the type of law that ordinarily should not receive such close scrutiny. "Appears" is the operative word, of course, because the type of law at issue and level of review are the most confused aspects of the main opinion.

Justice Stevens initially described § 2511(1)(c) as a "content-neutral law of general applicability."[177] This description fuses two distinct types of laws—laws of general applicability that do not regulate speech but instead regulate conduct,[178] and laws that regulate pure speech without regard to the content of the speech regulated.[179] This confused description points to the Court's uncertainty in characterizing the disclosure provision.[180] On one hand, § 2511(1)(c) was not a stand-alone restriction, but a supplement to the broader prohibition on interception, the latter obviously a law of general applicability regulating not speech but conduct.[181] Alternatively, an argument could be made that Congress' decision to prohibit dissemination of intercepted communications was grounded in discomfort with the substance or content of what would be revealed in a private conversation, a somewhat-content-based judgment underlying the law.[182]

The third, and best, description of § 2511(1)(c) is a content-neutral regulation of expression.[183] The law was "fairly characterized as a regulation of pure speech," since it prohibits the publication of information, but one that applied regardless of the substance or content of the conversation disclosed and was justified by a government interest in protecting the privacy interests of those in the conversation without reference to their content.[184] The prohibition turned on the source of the communication, on the fact that the conversation had been

177. *Bartnicki*, 532 U.S. at 526.

178. Smolla, *supra* note 15, at 1119-20; Strauss, *Common-Law Constitution*, *supra* note 4, at 38.

179. Smolla, *supra* note 15, at 1123; Strauss, *Common-Law Constitution*, *supra* note 4, at 38; *supra* notes 105-109 and accompanying text.

180. *See Bartnicki*, 532 U.S. at 526-27 (finding that § 2511(1)(c) "is fairly characterized as a regulation of pure speech" after concluding that § 2511(1)(c) is a "content-neutral law of general applicability").

181. *See* 18 U.S.C. § 2511(1); *infra* notes 210-227 and accompanying text.

182. *See* Smolla, *supra* note 15, at 1123 ("[T]he widespread repugnance in our society for trafficking in such privacy contraband is at least to some degree bound up in repugnance for the open airing of the content of what was intercepted."); *see also Bartnicki*, 532 U.S. at 527 n.11 ("[W]hat gave rise to statutory liability in this suit was the information communicated on the tapes.") (citing Boehner v. McDermott, 191 F.3d 463, 484 (D.C. Cir. 1999) (Sentelle, J., dissenting)).

183. *See* Smolla, *supra* note 15, at 1123.

184. *Bartnicki*, 532 U.S. at 526-27; Smolla, *supra* note 15, at 1122.

intercepted and recorded unlawfully, rather than the conversation's subject matter.[185]

Such a content-neutral regulation of pure speech ordinarily should be subject to intermediate scrutiny.[186] Justice Breyer's concurring opinion insisted that intermediate scrutiny was necessary and that strict scrutiny was inappropriate.[187] Chief Justice Rehnquist similarly emphasized in dissent that intermediate scrutiny was appropriate.[188] One thus could conclude, as Smolla does after reconstructing the majority opinion in light of the concurring and dissenting opinions, that a majority of five Justices (the two concurring justices and the three dissenters) did agree that the law was subject to intermediate review (even if they disagreed how to apply that scrutiny).[189]

But Justice Stevens himself never identified the standard of review he was applying.[190] Justice Breyer, who purported to join Justice Stevens's opinion, never disavowed that failure.[191] And the dissent's point of departure is its view that the majority had, *sub silentio*, subjected the law to the strict scrutiny not normally appropriate for such a law.[192]

Bartnicki took its Lochnerian turn when Justice Stevens avoided content scrutiny and the standards of review altogether.[193] In doing so, he invoked a freestanding doctrinal line distinct from ordinary content analysis.[194] But his application of *Daily Mail* nevertheless is unique.

Bartnicki is the first, and thus far only, time that *Daily Mail* had been applied to a content-neutral regulation; prior cases had applied the principle to laws that obviously targeted particular expressive content.[195] *Daily Mail*

185. *Bartnicki*, 532 U.S. at 526; Smolla, *supra* note 15, at 1122-23.

186. *See* Smolla, *supra* note 15, at 1123 (arguing that intermediate scrutiny exists for a law such as § 2511(1)(c), which is not sufficiently content-based to warrant strict scrutiny but sufficiently impacts speech such that rational-basis review is inappropriate).

187. *Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring); Smolla, *supra* note 15, at 1118.

188. *Bartnicki*, 532 U.S. at 545 (Rehnquist, C.J., dissenting).

189. Smolla, *supra* note 15, at 1119. *Compare Bartnicki*, 532 U.S. at 541 (Breyer, J., concurring) ("I consequently agree with the Court's holding that the statutes as applied here violate the Constitution, but I would not extend that holding beyond these present circumstances.") *with id.* at 551 (Rehnquist, C.J., dissenting) ("The same logic applies here and demonstrates that the incidental restriction on alleged First Amendment freedoms is no greater than essential to further the interest of protecting the privacy of individual communications.").

190. *See* Smolla, *supra* note 15, at 1118 ("Astonishingly, at no point in Justice Stevens's opinion does the Court come right out and say what standard of review or doctrinal test it is applying to the laws before it.").

191. *See Bartnicki*, 532 U.S. at 535 (Breyer, J., concurring).

192. *See id.* at 544 (Rehnquist, C.J., dissenting).

193. *See id.* at 527-29.

194. *See* Smolla, *supra* note 15, at 1121.

195. *See, e.g.*, *Florida Star*, 491 U.S. at 526 (challenging statute prohibiting publication of names of victims of sex offenses); *Daily Mail*, 443 U.S. at 98 (challenging statute prohibiting publication of juveniles charged as offenders); *see also Bartnicki*, 532 U.S. at 545 (Rehnquist, C.J., dissenting) ("Each of the laws at issue in the *Daily Mail* cases regulated the content or subject matter of speech."); Smolla, *supra* note 15, at 1129.

dictates that government can punish publication only to serve an interest of the "highest order," seemingly synonymous with the "compelling interest" required as part of strict scrutiny.[196] And, although the Court continues to refuse to say categorically that truthful publication never can be punished,[197] it has yet to find any government interest of a sufficiently high order to justify punishing the publication of truthful, lawfully obtained information on a matter of public concern.[198] *Daily Mail* analysis smacks of strict scrutiny, demanding the tightest fit between the law and the sought-after interest in order to be the least restrictive means for serving that interest.[199] In *Florida Star*, for example, both Justice Marshall's majority and Justice Scalia's concurring opinions made much of the underinclusiveness of the regulation at issue (in terms of the expression it left unregulated), which called into question whether the law could be the least-restrictive means to serve those interests.[200]

Daily Mail (and thus *Bartnicki*) marks a theoretical break from the content distinction, perhaps explaining the apparent use of strict-scrutiny-like review of a non-content-based law. A central criticism of the content distinction is that content-neutral regulations severely impair free-speech interests by reducing the sum total of information and opinion that gets disseminated, spoken, and heard in public discourse.[201] Whatever value one believes free expression serves and whatever rationale one adopts for protecting expression, it is undermined as much by content-neutral regulations that (even if evenhandedly and equally applied to all speech) reduce the total quantity of available public expression.[202]

Daily Mail and its progeny rest on a similar impulse that a greater quantum of speech is better for First Amendment purposes. Just as Martin Redish would apply the same heightened scrutiny to content-neutral as content-based laws,[203]

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196. *See* Smolla, *supra* note 15, at 1118-19; *see also Bartnicki*, 532 U.S. at 527-28 (quoting *Daily Mail*, 443 U.S. at 103); *Florida Star*, 491 U.S. at 541 (requiring the prohibition to be "narrowly tailored to a state interest of the highest order"); *Daily Mail*, 443 U.S. at 101-02 (stating that imposing penal sanctions for publishing truthful information "requires the highest form of state interest to sustain its validity").

197. *See Bartnicki*, 532 U.S. at 529.

198. *See, e.g., Florida Star*, 491 U.S. at 532; *Daily Mail*, 443 U.S. at 104.

199. *See Daily Mail*, 443 U.S. at 101-02.

200. *See Florida Star*, 491 U.S. at 540 ("[T]he facial underinclusiveness . . . raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests . . ."); *id.* at 542 (Scalia, J., concurring in part and concurring in the judgment) (arguing that a law cannot be regarded as serving an interest of the highest order "when it leaves appreciable damage to that supposedly vital interest unprohibited").

201. *See* REDISH, *supra* note 89, at 102; Williams, *supra* note 77, at 664.

202. *See* REDISH, *supra* note 89, at 103; *see also Clark*, 468 U.S. at 313-14 (Marshall, J., dissenting) ("The consistent imposition of silence upon all may fulfill the dictates of an even handed content-neutrality. But it offends our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.") (quoting New York Times Co. v. Sullivan, 376 U.S. 264, 270 (1964)).

203. *See* REDISH, *supra* note 89, at 117 (arguing that courts should subject all restrictions on expression to the "same critical scrutiny traditionally reserved for regulations drawn in terms of content").

Daily Mail imposes strict scrutiny to strike down (thus far) any effort, content-based or (after *Bartnicki*) content-neutral, that limits the sum total of truthful speech on matters of public concern that will be disseminated. *Daily Mail* seeks to stop not government skewing of debate by limiting some subjects or viewpoints (the ordinary justification for heightened scrutiny of content-based laws)[204], but government keeping of truthful information out of the public debate, regardless of its substance and source.

To the extent that Justice Stevens could be seen as applying intermediate scrutiny to this content-neutral law, as Justice Breyer unquestionably did in agreeing that § 2511(1)(c) was unconstitutional, the case remains unique simply because the Court invalidated the law, an exceedingly rare result under intermediate review.[205] Justices Stevens and Breyer both found the government's interest in protecting the personal privacy of telephone conversationalists to be important, but outweighed in the balance, whether generally (Stevens) or on the particular facts and speech at hand (Breyer).[206] But intermediate-scrutiny balancing almost never tips against laws that regulate without regard to content.[207] The majority and concurrence obviously demanded more of Congress than courts ordinarily do and found governmental justifications lacking.

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204. *See supra* notes 110-117 and accompanying text.

205. Since the establishment of the modern content distinction during Burger Court, the Supreme Court has applied intermediate scrutiny to strike down content-neutral statutes in only two cases. *See Watchtower Bible* and Tract Soc'y v. Village of Stratton, 536 U.S. 150, 164-69 (2002) (striking down village ordinance requiring permits for door-to-door advocacy); *Gilleo*, 512 U.S. at 54-58 (striking down ordinance prohibiting display of signs on residential property). And both can be seen as involving unusual content-neutral laws. The permit requirement in *Watchtower* swept up a large amount of speech in its net, requiring a permit before one could speak to her neighbors, "a dramatic departure from our national heritage." *Watchtower Bible*, 536 U.S. at 166. The problem with the ordinance in *Gilleo* was that the communicative medium of one's own home was unique, affecting the particular and distinct message actually presented, to cut-off that medium was to cut-off that unique message. *Gilleo*, 512 U.S. at 56-57; *see also* Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 638-39 (2006) (describing regulations on place as "content-correlated" where the regulation of place affects or alters the message). The Court also has struck down portions of two content-neutral injunctions, applying more than intermediate scrutiny (because these were injunctions not statutes) but less than strict scrutiny (because they were content neutral). *See* Madsen v. Women's Health Center, Inc., 512 U.S. 753, 764-66 (1994); *id.* at 757 (holding that some provisions of the injunction satisfy the First Amendment, but not others); *see also* Schenck v. Pro-Choice Network, 519 U.S. 357, 361 (1997) (same); *cf. Madsen*, 512 U.S. at 791 (Scalia, J., concurring in the judgment in part and dissenting in part) (deriding the standard as "intermediate-intermediate scrutiny" and complaining that the "difference between it and intermediate scrutiny (which the Court acknowledges is inappropriate for injunctive restrictions on speech) is frankly too subtle for me to describe").

206. *See Bartnicki*, 532 U.S. at 534 ("[P]rivacy concerns give way when balanced against the interest in publishing matters of public importance."); *id.* at 539 (Breyer, J., concurring) ("[T]he speakers had little or no *legitimate* interests in maintaining the privacy of the particular conversation." (emphasis in original)); Smolla, *supra* note 15, at 1145-46.

207. *See supra* notes 110-119, 205 and accompanying text.

Interestingly, this might be the rare case in which a law would fail intermediate scrutiny anyway. Section 2511(1)(c) worked an absolute ban on the disclosure of the lawfully obtained contents of communications of public concern; the law left open no alternative channels of communication for the innocent recipient and no alternative means to publish this important information.[208] True intermediate scrutiny here would have looked much like the intermediate scrutiny applied in *Gilleo*: the law entirely cut off a unique mode of communication that carried with it a distinct message, leaving no meaningful alternative communicative outlet, a fatal defect even if the law did not regulate based on content.[209]

2. Second-guessing Congress

The *Bartnicki* Court also disregarded legislative context in performing its constitutional analysis.[210] Section 2511(1)(c) was not a stand-alone speech restriction and cannot fairly be described as an effort to silence debate or censor information.[211] Congress did not seem immediately concerned with prohibiting the disclosure of the information that might be contained in electronic and wire communications; rather, this provision supplemented the broader statutory prohibition on the interception of electronic, wire, and voice communication.[212]

The anti-disclosure provision was intended to operate on a "drying-up-the-market" theory.[213] Congress believed that eliminating any legal downstream outlet for intercepted communications would eliminate the incentive for upstream interception in the first instance.[214] A perpetrator with a political, personal, or business axe to grind would be less likely to intercept a communication if there were no legal way that the conversation could be disclosed to the press and thus no legal way to publicly embarrass her adversary; conversely, knowing that an unconnected downstream stranger could publish (widely) with impunity, she may be more willing to intercept and pass the conversation along anonymously by dropping a tape on the media's doorstep.[215]

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208. *See Ward*, 491 U.S. at 791; *see supra* notes 105-114 and accompanying text. I thank Eugene Volokh for pointing this out.

209. *See Gilleo*, 512 U.S. at 56-57 (holding that there was no substitute for the "important medium of speech that [the city had] closed off").

210. *See Bartnicki*, 532 U.S. at 526-27.

211. *See* Smolla, *supra* note 15, at 1175 ("Nor are laws that seek to deter trafficking in the contraband of antisocial acts laws passed out of the sinister censorial motives that offend the core of the First Amendment.").

212. *See* 18 U.S.C. § 2511(1)(a) (2000).

213. *See* Smolla, *supra* note 15, at 1132 ("[L]egislatures routinely make the judgment that it is as important to dry up the market for contraband as it is to attack its initial creation.").

214. *See Bartnicki*, 532 U.S. at 529; Smolla, *supra* note 15, at 1140 ("[T]he presence of a liability-free media ready to publicize the intercept material in the happy comfort of legal immunity may well create an incentive for invasion, and penalizing disclosure may well . . . work effectively to dry up, if not entirely dry out, that high-visibility submarket.").

215. *See* Smolla, *supra* note 15, at 1139-40.

Justice Stevens would have none of it and in rejecting Congress's justification he directly questioned its policy judgments.[216] He insisted that "[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it."[217] If more deterrence becomes necessary, Congress should impose higher penalties on the unlawful conduct itself.[218]

The Court did acknowledge an exception for the rare case in which direct enforcement was too difficult and downstream regulation actually would supplement direct enforcement and effectively deter upstream conduct.[219] But Congress had not attempted to justify § 2511(1)(c) as a response to the difficulties of enforcing the interception provisions.[220] Worse, the Court cited Congress's failure to provide empirical evidence to support the drying-the-market theory, that is, to show that disincentivizing downstream disclosure would reduce upstream interception.[221] The latter insistence seems unfair; given the number of scanners out there and the small amount of information that gets widely published, it is unlikely that Congress could gather such empirical support.[222]

The dissent explicitly charged Lochnerism in response, accusing the majority of failing to give sufficient deference to Congress's reasonable legislative judgments as to the necessity and effectiveness of the law.[223] The drying-up-the-market theory was well-established and, as a matter of common sense, perfectly logical.[224] The majority's rejection of the theory thus "rests upon nothing more than the bald substitution of its own prognostications in place of the reasoned judgment of . . . the United States Congress."[225] Indeed, Smolla

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216. *See id.* at 1140 ("The Court seemed to have a fundamental difficulty with the drying up argument . . .").

217. *Bartnicki*, 532 U.S. at 529; *see also* Smolla, *supra* note 15, at 1140 (arguing that the drying up argument "ran afoul of what the Court appeared to regard as the baseline norm: that as law exists to deter transgression, it should punish actual transgressors").

218. *Bartnicki*, 532 U.S. at 529.

219. *Id.* at 530; *see* Smolla, *supra* note 15, at 1133 ("One might simply seek to determine whether the exclusion of further dissemination is in fact likely to dry up the market and thereby deter illegal interceptions."); *id.* at 1140 ("[T]he Court reasoned that the drying up rationale would be defensible only if one could make a case that for some reason it is especially difficult to find and punish interceptors . . .").

220. *Bartnicki*, 532 U.S. at 530.

221. *Id.* at 530-31 n.17; *id.* at 531 ("[T]here is no basis for assuming that imposing sanctions upon [defendants] will deter the unidentified scanner from continuing to engage in surreptitious interceptions.").

222. *See* Smolla, *supra* note 15, at 1139; *see also* Volokh, *Intellectual Property*, *supra* note 171, at 743 (questioning Justice Stevens's assumption that the ban on dissemination would provide little additional deterrent value).

223. *See Bartnicki*, 532 U.S. at 550 (Rehnquist, C.J., dissenting).

224. *Id.* at 550-51 (Rehnquist, C.J., dissenting) ("Were there no prohibition on disclosure, an unlawful eavesdropper who wanted to disclose the conversation could anonymously launder the interception through a third party and thereby avoid detection.").

225. *Id.* at 552 (Rehnquist, C.J., dissenting).

argues that Justice Stevens' biggest mistake was that he "barely scratched the surface" in analyzing the drying-up-the-market theory and the enforcement difficulties that the disclosure provision was designed, and reasonably could be expected, to ease.[226] In Lochnerian terms, the majority concluded that Congress had made an unwise, unjustified policy choice, one that therefore is unconstitutional.[227]

3. Old-World Constitutional Values and Ideological Drift

The overall prohibition on the interception of electronic, wire, and oral communications represents a congressional effort to protect personal privacy.[228] It was in part a regulation of the economic marketplace: some of the electronic eavesdropping that Congress sought to halt arose in the context of corporate spying and industrial espionage.[229] In striking down such a law, Neil Richards argues, the Court's analysis risks "the creep of First Amendment analysis into the economic rights and commercial context," in disregard of "the basic and essential division between civil and economic rights at the core of modern constitutionalism."[230]

One could view *Bartnicki* as a case in which constitutional rights were pitted directly against one another, to be balanced by the court.[231] Alternatively, and more accurately, the balance is between a constitutional interest in freedom from government-imposed restrictions on expression and a statutorily created privacy right in certain communications as against other private actors that functions as a substantial or compelling government interest in support of the law.[232] However we define those interests, the Court did balance, passing judgment (ultimately negative) on the propriety of the accommodation that Congress struck in the anti-disclosure provision, insisting that "privacy concerns give way when balanced against the interest in publishing matters of public importance."[233]

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226. *See* Smolla, *supra* note 15, at 1140; *id.* at 1139 ("On a nonquantitative level, however, there is something to the 'drying up' argument, something tied to the creeping tabloidization of modern American mass culture.").

227. *See supra* Part I.C.

228. *See Bartnicki*, 532 U.S. at 526; *supra* notes 143-151.

229. *See Bartnicki*, 532 U.S. at 530 n.16 (citing legislative history).

230. Richards, *supra* note 3, at 1152.

231. *See Bartnicki*, 532 U.S. at 533 ("[I]t seems to us that there are important interests to be considered on *both* sides of the constitutional calculus." (emphasis in original)); *id.* at 536 (Breyer, J., concurring) (describing this as case in which "important competing constitutional interests are implicated"); Smolla, *supra* note 15, at 1150 ("From the broadest perspective, *Bartnicki* accepted the premise that the conflict posed between speech and privacy is a conflict between two rights of constitutional stature.").

232. *See* Volokh, *Information Privacy*, *supra* note 67, at 1107 ("[T]he speech vs. privacy . . . tensions are not tensions between constitutional rights on both sides. The Constitution presumptively prohibits government restrictions on speech and perhaps some government revelation of personal information, but it says nothing about interference with speech or revelation of personal information by nongovernmental speakers.").

233. *See Bartnicki*, 532 U.S. at 534.

What has changed of late—and what arguably puts the *Bartnicki* majority in the position of retrograde Lochnerian guardian of the old constitutional order—is how it struck that balance compared to recent solicitude for privacy interests in the face of free speech claims.[234] Smolla suggests there was "a lameness to the assertion by Justice Stevens that anytime an otherwise private conversation implicates matters of public concerns, freedom of speech must trump the right to privacy."[235] The outcome places the *Bartnicki* Court at odds with recent commentary urging the Court to adjust free speech in the name of protecting personal privacy as a countervailing civil right.[236] Certainly Justice Breyer was far more receptive to the plaintiffs' claims of privacy in their communications.[237] He rejected the disclosure provision as applied only after characterizing the plaintiffs as public figures and the subject of the conversation at issue as a genuine true threat of violence against persons and property (blowing off porches and doing work on those guys), rather than a hyperbolic discussion of a high-profile policy dispute, in which they had no legitimate expectation of privacy.[238] A different conversation might have yielded a different balance of speech and privacy from Justice Breyer and a different outcome.[239]

The outcome of the speech/privacy balance in *Bartnicki* also contrasts strikingly with the balance that Justice Stevens himself struck for the Court in *Hill v. Colorado*.[240] *Hill* involved a challenge to a state law regulating sidewalk protests outside and around health clinics; the law prohibited speakers from approaching within eight feet of non-consenting clinic patrons "for the purpose of . . . engaging in oral protest, education, or counseling." [241] Writing for the Court, Justice Stevens held that the law was a content-neutral regulation of the time, place, and manner of speech outside clinics that was justified without

234. *See infra* notes 235-45 and accompanying text.

235. Smolla, *supra* note 15, at 1145; *see also* Strauss, *Wrong*, *supra* note 3, at 386 ("[J]udicial review requires courts to recognize the complexity of the issues they confront . . .").

236. *See* Volokh, *Information Privacy*, *supra* note 67, at 1106 ("Speech that reveals personal information about others, the argument goes, violates their basic human rights, strips them of their dignity, causes serious emotional distress, interferes with their relations with family, friends, acquaintances, and business associates, and puts them at risk of crime."); *see also* Gindin, *supra* note 138, at 1222 ("The United States needs a comprehensive federal policy guaranteeing individuals the right to control the collection and distribution of their personal information."); Richards, *supra* note 3, at 1151 (arguing that "the relationship between privacy and the First Amendment is complex, but . . . not irreconcilable").

237. *See Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring).

238. *Id.* at 539-40 (Breyer, J., concurring); *see also* Smolla, *supra* note 15, at 1144 ("Justices Breyer and O'Connor seemed offended by the conversation between Gloria Bartnicki and Anthony Kane, treating it not as angry 'union-talk' but as actual authentic discussion of the need to engage in violence against persons and property.").

239. *See* Smolla, *supra* note 15, at 1144 ("Had Bartnicki and Kane been merely expressing their anger at the school board for its negotiating positions, Justices Breyer and O'Connor might not have gone alone with Justice[] Stevens . . . .").

240. 530 U.S. 703 (2000).

241. *Id.* at 707 n.1. The law banned such activities at all health care facilities, but was aimed primarily at protests around reproductive health clinics. *Id.* at 715.

reference to the viewpoint or content of any particular expression that may occur there and that survived intermediate scrutiny.[242]

Importantly, he accepted the governmental interest in protecting unwilling listeners (women entering the clinics) from being assaulted by unwanted face-to-face speech outside the clinic, a privacy-based right to be let alone that outweighed protesters' countervailing free speech rights.[243] Perhaps a woman having to walk a gauntlet of potentially hostile anti-abortion protesters is more vulnerable in her privacy and mental well-being than Bartnicki and Kane and their talk of "getting 'dose' guys," making legal protection from the speech of others more essential.[244] Alternatively, Justice Scalia explains *Hill* solely in terms of First Amendment ideological drift, another example of the left's abandonment of free speech in order to protect other rights—here the right to reproductive freedom undeterred by up-close, face-to-face protesters.[245]

The anti-wiretap law in *Bartnicki* fits the mold of a speech/privacy balance struck amid a First Amendment drifting rightward ideologically.[246] Political progressivism would seem to favor protecting personal privacy from the probing (electronically enhanced) ears of those with personal, commercial, legal, and political axes to grind.[247] The political left also may appreciate that the anti-

242. *Id.* at 719-20 (explaining why statute is content-neutral); *id.* at 725-26 (explaining why content-neutral statute survives intermediate scrutiny).

243. *Id.* at 716-17 ("The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader 'right to be let alone' that one of our wisest Justices characterized as 'the most comprehensive of rights and the right most valued by civilized men.'" (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting))); *id.* at 716 ("The recognizable privacy interest in avoiding unwanted communication varies widely in different settings."); *see also id.* at 738 (Souter, J., concurring) ("[T]he reason for the [statute's] restriction on approaches goes to the approaches, not to the content of the speech of those approaching. What is prohibited is a close encounter when the person addressed does not want to get close."); Kitrosser, *supra* note 118, at 1368 ("The Court also emphasized the importance of the state interest in allowing individuals to shield themselves from overly intrusive communications, especially in situations where such intrusiveness could be traumatic, such as prior to entering a hospital or clinic as a patient.").

244. *See Hill*, 530 U.S. at 715 (describing "a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests"); Kitrosser, *supra* note 118, at 1339 (describing the range of expression that might confront a woman seeking to enter a clinic); *id.* at 1404-05 (describing the meaning of Court findings that patients entering clinics are in vulnerable states and subject to protection from disturbing face-to-face messages).

245. *Hill*, 530 U.S. at 741 (Scalia, J., dissenting) ("What is before us, after all, is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the 'ad hoc nullification machine' that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice." (quoting *Madsen*, 512 U.S. at 785 (Scalia, J., concurring in judgment in part and dissenting in part))); *id.* at 764 (Scalia, J., dissenting) (describing *Hill* as "not an isolated distortion of our traditional constitutional principles, but [] one of many aggressively pro-abortion novelties announced by the Court in recent years").

246. *See supra* notes 126-142 and accompanying text.

247. *See* Smolla, *supra* note 15, at 1104-05 (describing areas in which electronic snooping on others' privacy occurs); *see also* Boehner v. McDermott, 441 F.3d 1010, 1012-13 (D.C. Cir. 2006)

disclosure provision enhances private speech, furthering the "more speech" values of the First Amendment; by ensuring that one's expression remains private if the speaker chooses to keep it private and only becomes public if she makes it public, the law removes a deterrent that might cause individuals to refrain from speaking.[248] Similarly, recent proposals for rules protecting privacy in personal and consumer information—from the goods one buys, to one's hobbies, reading preferences, or pet ownership[249]—sound in efforts to protect consumers from the objectionable practices of large business and commercial interests, akin to much New Deal legislation.[250] Such protections, not grounded in an attempt to censor a speaker from speaking her mind in a public arena, it is argued, are more acceptable in a free-speech regime.[251]

It remains to be seen whether the speech/privacy collision produces a First Amendment "constitutional moment" akin to 1937.[252] As Eugene Volokh argues, "[p]rivacy is a popular word, and government attempts to 'protect our privacy' are easy to endorse."[253] *Bartnicki* on its face does not reflect or implement such a moment.[254] But Smolla argues that the case could become a "backhanded victory" for privacy as against speech, given the ambiguities in Justice Stevens's opinion and the narrower approach in Justice Breyer's concurrence that might have gone the other way on different facts.[255] Smolla

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(discussing a § 2511(1)(c) action arising from an intercepted call involving one member of Congress disclosed to the press by another member of Congress).

248. *See Bartnicki*, 532 U.S. at 537 (Breyer, J., concurring).

249. *See* Richards, supra note 3, at 1157-58; Paul M. Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 IOWA L. REV. 553, 554 (1995); Volokh, *Information Privacy*, *supra* note 67, at 1117.

250. *See* Richards, *supra* note 3, at 1158 ("In addition to being intrusive and deeply unsettling to many people, the multibillion dollar profiling industry provides the lifeblood of data on which the direct marketing industry survives.").

251. *See* Smolla, *supra* note 15, at 1150.

252. *See* 2 ACKERMAN, *supra* note 35, at 346 ("Constitutional moments must come to an end. The People must be allowed to move on to other things with a sense that all of their passionate political argument and activity hasn't been in vain . . .").

253. Volokh, *Information Privacy*, *supra* note 67, at 1050.

254. *See supra* Part II.B.1.

255. Smolla, *supra* note 15, at 1149-50; *id.* at 1144 (discussing possibility that, on different facts, Justices Breyer and O'Connor might have joined the dissent). There is scholarly debate as to how to read both the Stevens and Breyer opinions. Nominally, Justice Stevens wrote for a majority of six (including Justices Breyer and O'Connor) and Justice Breyer's was a concurring opinion. But Justice Breyer took such a different, narrower analytical approach that Justice Stevens's opinion may be better understood as a four-justice plurality and Justice Breyer's opinion as one concurring in the judgment and providing the final two votes for the result, but not the reasoning. *See* Smolla, *supra* note 15, at 1113-14; *see also* Sonja West, *Concurring in Part and Concurring in the Confusion*, 104 MICH. L. REV. ___, ___ (2006) (manuscript at 4-5) (criticizing the confusion created in lower courts by Supreme Court concurring opinions, using Justice Breyer's *Bartnicki* opinion as an example of the uncertainty). As a practical matter, Justice Breyer's approach—more receptive to privacy rationales and privacy-protecting legislation and less absolutist about free-speech protection—may become the controlling opinion in the lower courts. *See* Smolla, *supra* note 15, at 1116. *Bartnicki* may repeat the history of *Branzburg v. Hayes*, 408 U.S. 665 (1972), where Justice Powell nominally joined the majority opinion categorically rejecting a constitutional

suggests that *Bartnicki* "does not shut the door on the prohibition of privacy contraband" and at the very least leaves the constitutional issues "largely in play."[256] It remains to be seen whether we reach a different tipping point in the doctrinal balance between speech and privacy.

C. Bartnicki*'s potential application and non-application*

If Bruce Ackerman is correct that judges fear the Lochnerism charge above all else,[257] then it should not be surprising that, five years later, *Bartnicki*'s impact has been virtually non-existent. Lower courts have limited the decision's effect by narrowly construing and applying it, perhaps fearing the dreaded charge of Lochnerism.[258] Statutes and other government acts do not fall in the face of *Bartnicki* analysis because *Bartnicki*'s basic constitutional rule—government may not punish the dissemination of truthful, lawfully obtained information on a matter of public concern—is held to be inapplicable to the case at hand.[259] This allows courts to avoid even the limited, open-ended, right-against-right balancing that Justice Breyer endorsed and that could go either way depending on the facts.[260]

Consider, for example, the D.C. Circuit's non-use of *Bartnicki* as applied to the Fair Credit Reporting Act (FCRA), a consumer protection statute imposing various obligations and restrictions on consumer reporting agencies designed to protect the privacy and accuracy of consumers' credit information.[261] The statute creates broad privacy rights in consumer credit reports, broadly defined as the communication of information "bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living."[262] The law is one of several legal efforts, actual and proposed, to protect privacy in, and prohibit inappropriate uses of, consumers' personal, economic, and financial information by business interests.[263]

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reporter-source privilege, then wrote a concurring opinion suggesting that such a privilege could exist on a balancing approach, an opinion then adopted by many lower courts to recognize a qualified constitutional privilege. Smolla, *supra* note 15, at 1114-16; *id.* at 1116 ("If to live by the concurrence is to die by the concurrence, the press's victory in *Bartnicki* could over time prove as pyrrhic as its defeat in *Branzburg*.").

256. Smolla, *supra* note 15, at 1150.

257. *See* 2 ACKERMAN, *supra* note 35, at 269.

258. *See, e.g.*, *Trans Union III*, 267 F.3d at 1138.

259. *See supra* notes 163-168 and accompanying text.

260. *See supra* notes 169-174 and accompanying text.

261. *See Trans Union II*, 245 F.3d at 811-12; 15 U.S.C. § 1681 (2000); *see also* Gindin, *supra* note 138, at 1206-07 (discussing FCRA and its purpose).

262. 15 U.S.C. § 1681a (2000); *Trans Union II*, 245 F.3d at 813 (stating that this definition is not very demanding because "almost any information about consumers arguably bears on their personal characteristics or mode of living").

263. *See* Richards, *supra* note 3, at 1167-68 (describing range of statutes seeking to protect consumers from inappropriate uses of personal data by businesses); Volokh, *Information Privacy*,

The Federal Trade Commission found that Trans Union Corporation, a reporting agency, had improperly sold consumer credit reports to target marketers, an unapproved use under the statute,[264] a conclusion that the D.C. Circuit affirmed in April 2001.[265] The court then considered a First Amendment challenge to the FCRA and the FTC's determination, concluding that the speech at issue (disclosure of credit information) was not on a matter of public concern, because the information only was of interest to Trans Union and its direct-marketer customers.[266] The statute was subject only to intermediate scrutiny, which it easily survived, given the government's substantial interest in protecting the privacy of consumer information.[267]

Trans Union then moved for reconsideration in the court of appeals, in part arguing that *Bartnicki* changed the appropriate constitutional analysis.[268] The court quickly disposed of the argument, stating that *Bartnicki*, and other cases in the *Daily Mail* line, was inapplicable where the speech was not on a matter of public concern.[269] And, as the court already had found, consumer credit information is a matter of purely private business and commercial interest.[270] That basic limiting principle meant this straight-forward economic regulation was not subject to even potentially Lochnerian heightened constitutional review; nor was Congress required to put forward an interest of the highest order to justify the regulation because the highly protective constitutional rule was inapplicable.

Bartnicki was inapplicable, however, only because of a stunted view of what constitutes matters of public concern for purposes of *Daily Mail*.[271] In part, this is a holdover from the Court's earlier decision in *Dun & Bradstreet*,[272] holding that statements in a credit report about a company's bankruptcy were not matters of public concern because only of interest to the company and its customers.[273] In part this is a built-in limitation on *Bartnicki* itself, where the Court suggested

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supra note 67, at 1117 ("[M]any of the proposals to restrict communication of consumer transactional data would apply far beyond a narrow core of highly private information, and would cover all transactional information, such as the car, house, food, or clothes one buys.").

264. *Trans Union II*, 245 F. 3d at 812-13.

265. *Id.* at 815-16.

266. *Id.* at 818 (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762 (1985)); *see also Trans Union III*, 267 F.3d at 1140 (reasserting that Trans Union's speech, as per *Dun & Bradstreet*, "solely interests the speaker (Trans Union) and its 'specific business audience' (its customers)").

267. *Trans Union II*, 245 F. 3d at 818.

268. *Trans Union III*, 267 F. 3d at 1140-41.

269. *Id.*

270. *See id.* at 1141.

271. *See* Volokh, *Intellectual Property*, *supra* note 171, at 743 ("Every time the Court has decided that certain speech is not on a matter of public concern, it has erred.").

272. 472 U.S. 749 (1985).

273. *Id.* at 762; *see also* Volokh, *Intellectual Property*, *supra* note 171, at 744 (stating that it would surprise employees, creditors, and customers of the bankrupt company to learn that the bankruptcy was not a matter of public concern).

a different speech/privacy balance would prevail were "trade secrets or domestic gossip or other information of purely private concern" at issue.[274] Justice Stevens seemed to hint that consumer credit information also would not be protected because it did not satisfy the public-concern requirement.[275]

We return to Neil Richards's argument that the First Amendment critique (grounded in *Bartnicki* and *Bartnicki*'s adoption of the *Daily Mail* rule) of the sort of data-privacy laws at issue in *Trans Union* devolves into First Amendment Lochnerism.[276] By preempting the broadest reach of *Bartnicki*, the D.C. Circuit avoided the supposed *Lochner* trap, applying a more modest (and survivable) balancing test.[277] Relatedly, a court perhaps could limit *Bartnicki* only to cases involving media defendants reporting on matters of public concern, thus similarly inapplicable to disclosure of private information by a nonpress entity engaged in ordinary commercial activity.[278] Absent such limitations, Richards would argue, the more rigorous balancing of *Bartnicki* would place the court in the position of behaving like a *Lochner*-era court, with all the negatives associated with that view.[279]

But a stronger application of *Bartnicki* means courts would more vigorously protect free speech interests. The D.C. Circuit's narrow reading of *Bartnicki* thus becomes problematic. Certainly, consumer credit information is not part of the broad political debate. But that need not be the limit of the concept of public import.[280] Eugene Volokh describes personal information such as consumer credit data as speech on "daily life matters," a category of expression at least as worthy of protection, in terms of the import of its use to speaker and listener, as art and movies.[281] In fact, because such speech is "related to the real everyday life experiences of ordinary people" and dictates how we deal with others, it arguably is of greater value to individual choices and action than political editorials.[282] The consumer and credit information sold by Trans Union would be useful to direct marketers, individuals, and businesses in determining whom

274. *Bartnicki*, 532 U.S. at 533.

275. *See id.*

276. *See* Richards, *supra* note 3, at 1212-13 ("[T]here are some fairly strong parallels between the traditional conception of *Lochner* and the First Amendment critique of data privacy legislation.").

277. *See Trans Union III*, 267 F.3d at 1140-41; *Trans Union II*, 245 F3d at 818.

278. *See* Richards, *supra* note 3, at 1199.

279. *See id.* at 1213.

280. *See infra* notes 281-284 and accompanying text.

281. *See* Volokh, *Information Privacy*, *supra* note 67, at 1092-93; *see also* REDISH, *supra* note 89, at 50 ("[I]f an individual is given the opportunity to control his or her destiny . . . he or needs all possible information that might aid in making these life-affecting decisions.").

282. Volokh, *Information Privacy*, *supra* note 67, at 1092-93; *see also* REDISH, *supra* note 89, at 61 ("[I]nformation and opinion about competing commercial products and services undoubtedly aid the individual in making countless life-affecting decisions . . .").

they would like to do business and otherwise relate with, surely a matter of concern to their successful operations.[283]

In *Trans Union*, the analytical impact of this more expansive conception of public concern would have meant some level of balancing (whether Justice Stevens's weighted, strict-scrutiny-esque or Justice Breyer's more open-ended) between the government's asserted interest in protecting consumer privacy and Trans Union's interest in publishing (and its customers in receiving) truthful information unquestionably lawfully obtained. The circuit court's approach assured that this balancing never occurred.[284]

III. CONCLUSION

I close on some normative points. *Bartnicki*—specifically the broader, strict-scrutiny-sounding, highly speech-protective approach established in Justice Stevens's opinion—was correct. The asserted privacy interests did not outweigh the expressive need for publication, particularly where the conversation revealed potential political misfeasance.[285] On the other hand, lower courts have failed to apply the full scope of *Bartnicki*, as illustrated by two decisions from the D.C. Circuit. One is *Trans Union*, in which the court took a cramped view of what constitutes a matter of public concern for *Daily Mail* purposes.[286] The other, more problematic case, is *Boehner v. McDermott*,[287] where a divided court of appeals held, in a wiretap third-party disclosure case, that *Bartnicki* did not protect a third-party who knew the identity of the interceptor and knew that the communication had been intercepted unlawfully, even if the third party was uninvolved in the interception.[288] That decision essentially deprives *Bartnicki* of any bite; it should be obvious to any recipient of a recorded conversation

283. *See* Volokh, *Information Privacy*, *supra* note 67, at 1093-94. Volokh has been the leading critic of information-privacy regulations that raise First Amendment concerns, such that Richards labels the First Amendment arguments "Volokhner". Richards, *supra* note 3, at 1210.

284. *See Trans Union III*, 267 F. 3d at 1140-41.

285. *See Bartnicki*, 532 U.S. at 518-19 (involving disclosure of intercepted telephone conversation between two union leaders in midst of high-profile labor dispute); Boehner v. McDermott, 441 F.3d 1010, 1012-13 (D.C. Cir. 2006) (involving disclosure of intercepted telephone conversation among Republican members of Congress discussing how to respond to ethics probe of Republican Speaker of the House).

286. *See supra* notes 261-284 and accompanying text.

287. 441 F.3d 1010 (D.C. Cir. 2006).

288. *Id.* at 1015 ("[T]o hold that a person who knowingly receives a tape from an illegal interceptor either aids and abets the interceptor's second violation (the disclosure) , or participates in the illegal transaction would be to take the [*Bartnicki*] Court at its word."); *id.* at 1016-17 (emphasizing the difference between someone who discovers a bag containing a stolen diamond ring on the sidewalk and someone who accepts the same bag from the thief knowing the ring inside is stolen); *but see id.* at 1020 (Sentelle, J., dissenting) (arguing that *Bartnicki* does not turn on the discloser's knowledge that a communication was unlawfully intercepted, only on his actual participation in the unlawful interception).

(including Yocum and Vopper)[289] that the conversation likely had been unlawfully intercepted.

This is not to say necessarily that protecting consumer or other privacy interests ever can or never can be an interest of the highest order.[290] Nor is it to define a categorical balance between free speech and other constitutional, political, and social values. Rather, a substantive discussion of how to create constitutional doctrine that strikes the best balance among competing interests would be welcome.[291] Certainly other western liberal democratic societies that share a commitment to freedom of speech draw a quite-different balance between expression and competing values such as privacy and individual dignity.[292]

The point is that slapping the Lochnerism tag on a decision such as *Bartnicki* does not advance the discussion. *Lochner* ends debate, by definition and intention, de-legitimizing the decision on its own terms.[293] And it does so with a pejorative term whose meaning we do not know and cannot agree upon and whose assumed meaning runs a broad range.[294]

It is more beneficial to begin from the premise that the *Bartnicki* Court acted in a structurally and procedurally legitimate manner in striking down the wiretap disclosure provision or, hypothetically, in using *Bartnicki* as precedent to strike down other information-privacy rules. Perhaps, although structurally proper, the Court simply failed to understand the complexity of the issues or to recognize that it is possible to protect First Amendment rights while also accommodating

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289. *See Bartnicki*, 532 U.S. at 525 (accepting plaintiffs' assertions that defendants at a minimum had reason to know the interception was unlawful).

290. *See id.* at 529 (describing the "Court's repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment").

291. *See* FISS, IRONY, *supra* note 89, at 26 ("We should never forget the potential of the state for oppression, never, but at the same time, we must contemplate the possibility that the state will use its considerable powers to promote goals that lie at the core of a democratic society [such as] equality."); *compare* Richards, *supra* note 3, at 1222 ("[T]he First Amendment is being used as [a] screen, to infringe upon legitimate modes of government privacy regulation.") *and* Smolla, *supra* note 15, at 1175 ("[B]alanced measures are called for, and sometimes there is room in our constitutional system for a measure of balance."); *with* Volokh, *Information Privacy*, *supra* note 67, at 1051 ("We already have a code of 'fair information practices,' and it is the First Amendment . . . .") *and* Volokh, *Intellectual Property*, *supra* note 171, at 748 (arguing that the First Amendment "continues to impose important limits" on several areas of the law).

292. *See* Schauer, *supra* note 4, at 192 (discussing fact that "non-American equivalents [to the First Amendment] tend, interestingly, not to be used in the same way in other societies"); Frederick Schauer, *The Exceptional First Amendment* at 3 (unpublished manuscript on file with the author) ("[T]he American understanding of freedom of expression is substantively exceptional compared to international standards because a range of American outcomes and American resolutions of conflicts between freedom of expression and other rights and goals are starkly divergent from the outcomes and resolutions reached in most other liberal democracies.").

293. *See* Ely, *supra* note 3, at 939-40 (arguing that the charge that a decision is grounded in the philosophy of *Lochner* "alone should be enough to damn it"); Richards, *supra* note 3, at 1213 (describing the ability and temptation "to accuse the critics of Lochnerism and move on").

294. *See* Strauss, *Wrong*, *supra* note 3, at 374; *supra* Part I.

other constitutional and legislative values that may be in tension with those rights.[295] That is an issue worth considering.

But speaking in terms of *Lochner* and Lochnerism leaves no room to discuss necessary substantive First Amendment questions. It simply leaves us wondering whether, one hundred years from now, the constitutional canon and anti-canon might change again.[296] Perhaps we will have our Ackermanian constitutional moment, after which we will come to think of the freedom of speech (or at least certain applications of the freedom of speech reaching particular political outcomes) the way we now think of liberty of contract and economic substantive due process.[297] But that would not mean that *Bartnicki* was wrong and certainly would not mean it was illegitimate, only that constitutional values had changed.[298]

295. *See* Strauss, *Wrong*, *supra* note 3, at 386 (arguing that the problem with *Lochner* was not protection of freedom of contract, but the Court's failure to grasp the greater complexity of the social, political, and legal issues).

296. *See* Balkin, *Wrong*, *supra* note 2, at 692 ("Just as some conservative and libertarian scholars could see *Lochner* as less inhospitable, some liberal scholars could find *Lochner* less threatening.").

297. *See supra* notes 252-56.

298. *See* 2 ACKERMAN, *supra* note 35, at 280 ("*Lochner* is no longer good law because the American people repudiated Republican constitutional values in the 1930's, not because the Republican Court was wildly out of line with them before the Great Depression.").