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FIRST AMENDMENT LOCHNERISM? EMERGING
CONSTITUTIONAL LIMITATIONS ON GOVERNMENT
REGULATION OF NON-SPEECH ECONOMIC ACTIVITY

*Symposium Introduction by Kenneth D. Katkin**

The subject of today's Symposium is "First Amendment Lochnerism?: Emerging Constitutional Limitations on Government Regulation of Non-Speech Economic Activity." In these opening remarks, I will attempt to describe what that obscure title is intended to convey, and also to tell you a little more about today's program.

The term "Lochnerism" refers generally to a now-discredited judicial doctrine often associated with the Supreme Court's 1905 opinion in *Lochner v. New York*.¹ In *Lochner*, the Supreme Court held unconstitutional a New York law that prohibited bakers from working more than ten hours in a day.² In striking down this law, the *Lochner* court stated that minimum wage and maximum hour laws tended to interfere arbitrarily with the "liberty of contract" that, according to the Court, inhered in the Fourteenth Amendment's Due Process Clause.³ Following *Lochner*, many courts in the early twentieth century applied the judge-made constitutional doctrine of "liberty of contract" to strike down numerous attempts by state and local governments to regulate business and economic affairs.⁴

Dissenting in *Lochner*, Justice Oliver Wendell Holmes rejected the Court's contention that the Fourteenth Amendment protects any "liberty of contract."⁵ Justice Holmes argued:

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1. 198 U.S. 45 (1905), *overruled by* *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963).

2. *Id.* at 64.

3. *See id.* at 56-57.

4. *See, e.g.,* *Morehead v. New York ex rel. Tiplado*, 298 U.S. 587 (1936) (striking down state minimum wage law for women and child laborers), *overruled by* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *see also* *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (striking down D.C. minimum wage law for women and child laborers), *overruled by* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *see also* *Coppage v. Kansas*, 236 U.S. 1 (1915) (striking down state law that prohibited employers from firing employees for joining labor unions), *overruled by* *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *see also* *Adair v. United States*, 208 U.S. 161 (1908) (striking down federal law that prohibited railroad companies from firing employees for joining labor unions), *overruled by* *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

5. *See Lochner*, 198 U.S. at 75-76 (Holmes, J. dissenting).

But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.⁶

In 1937, largely in response to the Court's propensity to strike down progressive economic legislation as unconstitutional, President Franklin Roosevelt threatened to increase the number of Justices on the Supreme Court from 9 to 15.⁷ Within months of this threat, the *Lochner* era came to an end. In the 1937 case of *West Coast Hotel v Parrish*,⁸ the Court belatedly embraced Justice Holmes's view, and announced that it would no longer rely on the Fourteenth Amendment to interfere with legislative efforts to regulate business and economic affairs.⁹ The Court's former "liberty of contract" doctrine, now commonly referred to as "*Lochnerism*," remains substantially discredited today.

During the same decade that the Court turned away from *Lochnerism*, however, it began for the first time to embrace a role in protecting the "freedom of speech" guaranteed in the First Amendment. In *Palko v. Connecticut*,¹⁰ also decided in 1937, Justice Benjamin Cardozo sought to explain why active judicial protection of "freedom of speech" was different from *Lochnerism*. Justice Cardozo wrote:

We reach a different plane of social and moral values when we pass to the privileges and immunities [of which] . . . neither liberty nor justice would exist if they were sacrificed. This is true, for illustration, of freedom of thought and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal.¹¹

In elevating protection of freedom of speech to this "higher plane," the Court drew heavily from a line of dissenting opinions in earlier free speech cases authored by Justices Holmes and Brandeis. In his concurring opinion in the

6. *Id.*

7. President Franklin Roosevelt, Message to Congress (Feb. 5, 1937). *See also* S. Rep. No. 75-711 (1937) (Adverse Report of the Senate Judiciary Committee on Reorganization of the Federal Judiciary). For a history of President Roosevelt's court-packing plan, *see generally* WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 82-162 (1995) and MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937* (2002).

8. 300 U.S. 379 (1937).

9. *Id.* at 406-407.

10. 302 U.S. 319 (1937).

11. *Id.* at 326-27.

1927 case of *Whitney v. California*,¹² for example, Justice Brandeis had identified a number of reasons—both historical and political—why government censorship of speech should be anathema in the United States. Justice Brandeis argued:

Those who won our independence valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.¹³

Contemporary constitutional scholars have drawn upon—and extrapolated from—Justice Brandeis’s *Whitney* concurrence to identify the reasons why free speech should be strongly protected. Judicial protection of the right of individuals to speak their minds without suffering reprisals from the government is often characterized as a necessary incident of democracy.¹⁴ Freedom of speech gives rise to a “marketplace of ideas,” in which citizens are exposed to the widest possible range of information and opinion, and are thereby best equipped to sift good information from bad, and to discover truth.¹⁵ This process of discovery equips citizens with both the information and the habits of mind

12. 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring).

13. *Id.* at 375-76 (Brandeis, J., concurring).

14. For the classic exposition of this view, see generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948). For a modern exposition, see generally CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993).

15. See e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting) (“[T]he best test of truth is the power of [a] thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of our Constitution.”). The notion that freedom of speech promotes the discovery of truth is the core of John Stuart Mill’s defense of freedom of speech in *On Liberty*. See generally JOHN STUART MILL, *ON LIBERTY* (Penguin Books 1975) (1859).

necessary to participate in the political life of the community. Even the continued expression of facts and ideas that society has deemed false has been said to serve the public interest, by promoting reexamination of conventional wisdom, which can have the effect of revitalizing the truth.¹⁶

Freedom of speech also contributes to social stability by allowing disgruntled persons to vent their anger verbally, rather than through violent action, and by allowing others to identify and keep tabs on such persons.¹⁷ In addition, a robust and uncensored press can serve as a watchdog on the government, playing an important role in both exposing and deterring abuses of governmental authority.¹⁸

In addition to its structural role in facilitating the exercise of popular sovereignty in our democracy, judicial protection of freedom of speech also protects individual liberty. The United States prides itself on being a “free country.” The right of every person “to think as she will and to speak as she thinks” has been characterized as the very essence of freedom.¹⁹ To the individual, the freedom of speech can provide an outlet for emotion as well as an opportunity to develop one’s personality, one’s mental and moral faculties, and one’s ideas.²⁰ In contrast, government censorship can infringe on the dignity and autonomy of the individual. Censorship that is triggered by governmental disagreement with the ideas being expressed also can undermine the principle of equality under law.²¹

Citing all of these reasons, the Supreme Court since the 1930s has erected a highly speech-protective framework for deciding First Amendment cases. Under current constitutional doctrine, the government is not permitted to regulate the content of most speech except in minor ways that are narrowly tailored to

16. See, e.g., KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 16 (1989) (attributing to John Stuart Mill the proposition that “[e]ven if an idea is wholly false, its challenge to received understanding promotes reexamination which vitalizes truth”).

17. See *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring). The Court endorses the view that: [O]rder cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

Id.

18. See, e.g., Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. B. Found. Res. J. 521 (1977).

19. *Whitney*, 274 U.S. at 375-76 (Brandeis, J., concurring).

20. See, e.g., MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 20-30 (1984); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964, 966 (1978).

21. See, e.g., KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 33 (1989) (noting that “the idea that the government should treat people with dignity and equality” provides a secondary justification for free speech).

achieve a compelling government interest.²² Indeed, even when enforcing general laws that do not directly regulate the content of speech, the government must refrain from incidentally burdening speech or expressive activity, unless imposing such burdens substantially relates to the achievement of an important government interest.²³ Employing these “heightened scrutiny” standards of review, United State courts have rendered the United States one of the most speech-protective societies in the world.

Even while doing so, however, the Supreme Court has largely adhered to Justice Cardozo’s venerable distinction between judicial imposition of particular economic theories (which remains impermissible) versus judicial protection of indispensable human freedoms (which remains indispensable). Based on that distinction—and with a few exceptions—the Court for the past seven decades has largely deferred to governmental efforts to regulate business and economic affairs—particularly through redistributive programs—even while erecting increasingly strong judicial protections against legislation that abridges the freedom of speech.

Since the dawn of the 21st century, however, the Supreme Court and some lower courts have arguably begun to apply stringent First Amendment “free speech” standards when reviewing the constitutionality of a variety of government efforts to regulate business or economic activities—often in cases in which the regulations at issue do not appear directly to implicate traditional First Amendment concerns about government censorship. For example, in 2002, on First Amendment grounds, the Supreme Court struck down a longstanding provision of the Food, Drug, and Cosmetic Act that prohibited manufacturers from marketing drugs for uses that had not been proven safe and effective.²⁴ In 2003, at the behest of some of the nation’s leading legal scholars, the Court considered whether the First Amendment bars Congress from extending the duration of copyrights in existing works, before those works lapse into the public domain.²⁵ Professors Farber and Ku today will tell you about that case.²⁶ In 2001, also on First Amendment grounds, the Court struck down important provisions of a federal statute that sought to protect users of mobile telephones from having the contents of their conversations intercepted, recorded, and

22. See, e.g., *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000) (“If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”) (citing *Reno v. ACLU*, 521 U.S. 844, 874 (1997)).

23. See, e.g., *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189 (1997) (“A content neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”).

24. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002).

25. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

26. Daniel A. Farber, *Access and Exclusion Rights in Electronic Media: Complex Rules for a Complex World*, -- N. Ky. L. Rev. -- (2006); Raymond Shih Ray Ku, *Copyright Lochnerism* -- N. Ky. L. Rev. -- (2006).

distributed by nose neighbors.²⁷ Professor Wasserman will analyze that decision.²⁸

In addition, over the past few years, several federal circuit courts have considered whether the First Amendment prohibits the government from regulating the number of broadcast stations or cable TV systems a single corporation can own, both nationwide and in a particular local market.²⁹ As Professor Candeub will tell you,³⁰ the decisions to date on these issues have been split.³¹ At least one federal district court, perhaps encouraged by a law review article written by Professor Ku,³² has also held that the First Amendment protects cable system operators against being required to offer a choice of Internet service providers to their residential cable modem customers.³³ Professor Farber will discuss this decision, as part of a deeper analysis of the interaction between the First Amendment and the rights of access and exclusion in electronic media.³⁴ Today, technological innovation continues to cause convergence of the various existing networks that formerly were used to separately deliver telephone service, electricity, cable television service, and the Internet. As policymakers seek to replace outdated category-driven regulatory regimes with a new paradigm of regulatory "net neutrality," First Amendment concerns will doubtless influence the shape of this new paradigm. Ms. Barbara

27. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

28. Howard M. Wasserman, *Bartnicki As Lochner: Some Thoughts on First Amendment Lochnerism*, -- N. Ky. L. Rev. -- (2006).

29. *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1045-47 (D.C. Cir. 2002), *modified*, 293 F.3d 537 (D.C. Cir. 2002) (broadcast system ownership); *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126 (2001), *cert. denied*, 534 U.S. 1054 (2001) (cable system ownership).

30. Adam Candeub, *The First Amendment and Measuring Media Diversity: Constitutional Principles and Regulatory Challengers* -- N. Ky. L. Rev. -- (2006).

31. *See Time Warner Entm't Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001). The court struck down as unconstitutional the FCC's implementation of a federal statute that prohibited any single cable television system operator from serving more than 36% of the cable subscribers in the United States. *Id.* 1130-36. *But see Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002). In contrast, the same court held that the FCC did *not* violate the First Amendment when it reaffirmed a longstanding rule prohibiting a single entity from owning enough broadcast television stations to reach more than 35% of U.S. television households. *Id.* at 1045-47. Even while concluding that the FCC's national broadcast television station ownership cap was not unconstitutional, however, the *Fox Television Stations* court found the cap to be arbitrary and capricious, and thus contrary to law under the Administrative Procedure Act and the Telecommunications Act of 1996. *Id.* at 1047.

32. *See Raymond Shih Ray Ku, Open Internet Access and Freedom of Speech: A First Amendment Catch-22*, 75 Tul. L. Rev. 87 (2000).

33. *See Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000); *but see AT & T Corp. v. City of Portland*, 43 F.Supp.2d 1146, 1154 (D. Or. 1999) (rejecting same First Amendment argument), *rev'd in other respects*, 216 F.3d 871 (9th Cir. 2000).

34. Daniel A. Farber, *Access and Exclusion Rights in Electronic Media: Complex Rules for a Complex World*, -- N. Ky. L. Rev. -- (2006).

Cherry of the FCC's Office of Strategic Planning & Policy Analysis will discuss the specifics of some of these First Amendment concerns.³⁵

Arguably, perhaps, governmental efforts to regulate business arrangements—and even to redistribute wealth within—the communications, information, and technology industries *should* logically be subject to First Amendment scrutiny, because such regulation ultimately can affect the content of information provided to the public via facilities controlled by those industries. If so, then the prophylactic extension of First Amendment doctrine into these new areas may be a salutary development, the emergence of which is timely or even overdue.

Alternatively, however, the government actions at issue in these modern cases that I have described might be seen as standard efforts to protect consumers by regulating big business, in ways that do not implicate core First Amendment concerns about censorship of dissent or the establishment of “official truths.” If so, then to paraphrase Justice Holmes, perhaps it is fair to ask whether the Courts have begun to construe the First Amendment as if it embodies one or more “particular economic theories, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*.”³⁶ Such a development, if it is occurring, might fairly be called “First Amendment Lochnerism.”

With these remarks, I have attempted to paint in broad strokes a picture of what the phrase “First Amendment Lochnerism” might mean. In today's exciting program, our five very distinguished speakers will paint in some detail various aspects the broad strokes I have set forth. In particular, in the various papers that you will hear today, our panelists will identify and analyze various specific controversies in which First Amendment arguments have been or might be raised to challenge regulation of business activities in the communications and information industries. From the different panelists, you will hear a variety of different perspectives concerning both the magnitude and desirability of this trend. These speakers include some of the nation's leading experts on the intersection of the First Amendment with information technology, and it is an honor for the Chase College of Law that each of them has agreed to appear here today.

35. Barbara A. Cherry, *Misusing Network Neutrality to Eliminate Common Carriage Threatens Free Speech and the Postal System*, -- N. Ky. L. Rev. -- (2006).

36. *See Lochner*, 198 U.S. at 75-76 (Holmes, J. dissenting).