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REDISCOVERING LIBERTY OF CONTRACT: THE UNNOTICED ECONOMIC RIGHT CONTAINED IN THE FREEDOM OF SPEECH

*Steven C. Begakis**

"Dictum Meum Pactum."[1]

"'I have spoken, and I will bring it to pass;
I have purposed, and I will do it.'"[2]

The liberty of contract formation is a form of speech, and thus it is a right guaranteed by the First Amendment of the U.S. Constitution. This Article examines how the First Amendment secures the liberty of contract formation and analyzes how that liberty is supported by the U.S. Supreme Court's commercial speech jurisprudence and by both originalist and traditionalist theories of Constitutional interpretation.

* Law Clerk to the Honorable Margaret A. Ryan, U.S. Court of Appeals for the Armed Forces. J.D., University of Notre Dame Law School. B.A., Political Science and Economics, University of California, Santa Barbara. To my father, Prodromos Begakis, who taught me the value of economic freedom to the forgotten man, and to my Lord and Savior, Jesus Christ, who pleads the Father's eternal promises to me before the highest heavenly court.

1. "My Word is My Bond"—motto of the London Stock Exchange.
2. *Isaiah* 46:11.

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I. INTRODUCTION

The Free Speech Clause of the First Amendment protects—and therefore, the U.S. Supreme Court should recognize and enforce—the liberty to form a contract, balanced against the right of the states under their historic police powers and the U.S. Congress under its enumerated legislative powers to prohibit and punish the formation of contracts[3] that are contrary to a sufficiently important public policy.[4] Constitutional text establishes the right, the Court's "commercial speech" precedent foreshadows its recognition,[5] and originalist and traditionalist theories justify its judicial protection.[6]

At first glance this claim may seem far-fetched. To a certain extent it is. No court has ever recognized such a right in the First Amendment, and no scholar has ever proposed its recognition.[7] Yet my proposal sounds strange, and is strange, because we live in a strange world of modern constitutional theory. After *West Coast Hotel Co. v. Parrish*,[8] and especially after *Williamson v. Lee Optical of Oklahoma, Inc.*,[9] it has become a veritable article of faith to modern theorists that *Lochner v. New York*[10] was totally, irredeemably wrong.[11] Because we moderns start with the baseline assumption that "liberty of contract" *cannot* be in the Constitution, our natural inclination is to think that the Free Speech Clause could not possibly protect a liberty of contract formation. But this inclination is in tension with certain historical and constitutional facts.

Consider the following: The freedom to form a contract that is not contrary to the health, safety, and morals of the community is one of

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3. Because I argue that the First Amendment protects the negative liberty to form a contract free from restraint, and not the positive liberty to demand that the government enforce a contract already formed, this liberty would be balanced against the right of the government *only* to prohibit or punish contract formation, *not* its power to deem a contract already formed as unenforceable. This right is only the right to speak a contract into existence.

4. I use the term "sufficiently important" advisedly, not to stake a claim for a particular level of judicial scrutiny, but only to acknowledge that in any balancing of rights against government interests, a valid interest must be put forward and justified by the government.

5. *See infra* Part I.

6. *See infra* Part II.

7. *See, e.g.*, Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 564–79 (2015) (cataloguing legal thinkers who advocate a return to federal constitutional protection for liberty of contract through either the Due Process Clause, the Privileges or Immunities Clause, or the Ninth Amendment).

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

9. 348 U.S. 483 (1955).

10. 198 U.S. 45 (1905).

11. *See* Colby & Smith, *supra* note 7, at 527–30.

the most ancient liberties of the English-speaking world.[12] But the U.S. Constitution, the supreme charter of English freedom, currently provides zero protection against arbitrary abridgements of this freedom.[13] Isn't *that* strange?

There are, of course, oddities to the Constitution, as there are to any human law. The Constitution did not spring fully formed from the head of Zeus. It is the product of historically contingent prejudices and political compromises of imperfect people. So it is odd, for example, that the Constitution would not abolish slavery, when slavery was manifestly contrary to the warp and woof of the Constitution—not to mention the Declaration of Independence. But there was a reason for the wrinkle in the tapestry: without compromises on the issue of slavery, the Constitution would not have been ratified.[14]

As a general matter, the Constitution is a fulsome and coherent document, designed to anticipate government overreaches and provide tools for the resolution of unforeseen national challenges. While drafted in part to solve the crisis of the Articles of Confederation, it was also intended to be a document for the ages, the result of careful reflection upon the whole experience of English and Western civilization.[15] A glaring omission of a central article of the common law—the liberty of contract formation—should raise eyebrows.

Common law contract rights long predate the freedom of the press, a freedom that the Framers believed was a natural right.[16] Moreover, they were part and parcel of the Englishman's ancient property rights that were explicitly protected in the Due Process and Takings Clauses of the Fifth Amendment.[17] This is an odd constitutional disjunction: property is explicitly protected, but there is apparently no similar protection for contracting, which is an essential

12. *See generally, e.g.*, A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT (1975) (discussing the medieval origins of assumpsit actions).

13. *See Lee Optical*, 348 U.S. at 487–89 (articulating an imperviously deferential rational basis standard of review for economic regulations). *But see* St. Joseph Abbey v. Castille, 712 F.3d 215, 221–23 (5th Cir. 2013) (securing a minimal level of substantive due process review for economic regulation).

14. *See generally, e.g.*, LYNNE CHENEY, JAMES MADISON: A LIFE RECONSIDERED (2014) (detailing the precarious politics of the Philadelphia Convention).

15. *See generally* THE FEDERALIST NO. 51, at 281 (James Madison) ("But what is government itself, but the greatest of all reflections on human nature?").

16. Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 910–13 (1993).

17. U.S. CONST. amend. V.

means of alienating—and thus exercising autonomous control over—one's property.[18] Given this disjunction, one might be tempted to find the liberty of contract implicit in the Due Process Clause, either as a "liberty" or "property" interest protected from arbitrary deprivation.[19] However, the Court has ruled this out,[20] so the mismatch between protection for property, but not contracting, remains.

More puzzling still, the Framers explicitly prohibited states from impairing contracts already formed.[21] And this prohibition was absolute[22]—not a mere minimum prohibition on arbitrariness. Why would the Framers include a specific prohibition against contract impairment, but not a right to contract formation? The first answer is logical: the sovereign has an unquestioned interest in setting the rules of contracting, but far less of an interest in vitiating a lawful contract already formed, which carries not only the weight of legality, but the moral obligation of execution that justifies the legal enforcement of contracts in the first place.[23] There is also a historical explanation:

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18. *See* Peter Benson, *The Unity of Contract Law*, *in* THE THEORY OF CONTRACT LAW: NEW ESSAYS 132 (Peter Benson ed., 2001) ("If we must suppose that contract formation consists in a transfer of entitlement from one party to the other—as is necessary if the expectation principle is to function as a principle of compensation—the foregoing analysis of a transfer of ownership in the case of an executed conveyance of property should also apply to contract. Reflecting the logic of a transfer of ownership, it must be possible to understand contract as constituted by two mutually related acts of alienation and appropriation which are at once temporally successive and yet absolutely co-present.").

19. *See* Lochner v. New York, 198 U.S. 45, 52 (1905); *see also* James Madison, *Property*, *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 478–80 (J.B. Lippincott & Co., 1865), https://play.google.com/books/reader?id=DzVEAQAAMAAJ&pg=GBS.PA478 ("In its larger and juster meaning, ['property'] embraces everything to which a man may attach a value and have a right . . . [In that enlarged sense,] a man has a property in his opinions and the free communication of them . . . . He has property very dear to him in the safety and liberty of his person. He has an equal property in a free use of his faculties, and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may equally be said to have a property in his rights.").

20. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).

21. U.S. CONST. art. I, § 10, cl. 1.

22. *See, e.g.*, McCracken v. Hayward, 43 U.S. 608, 613–14 (1844) ("If the defendant had made such an agreement as to authorize a sale of his property . . . it would have conferred a right on the plaintiff, which the Constitution made inviolable; and it can make no difference whether such right is conferred by the terms or law of the contract. Any subsequent law which denies, obstructs, or impairs this right, by superadding a condition . . . affects the obligation of the contract . . . [for] the prevention of such sale is the denial of a right."). *But see* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434–35 (1934) (announcing a police power exception to the Contracts Clause).

23. *See* Norman v. Baltimore & Ohio R.R. Co., 294 U.S. 240, 316 (1935) (McReynolds, J., dissenting) ("Just men regard repudiation and spoliation of citizens by their sovereign with abhorrence; but we are asked to affirm that the Constitution has granted power to accomplish both. No definite delegation of such a power exists; and we cannot believe the farseeing framers, who labored with hope of establishing justice and securing the blessings of liberty, intended that the

state legislatures under the Articles of Confederation had impaired contracts to cancel debts during economic crisis, leading to crippling increases in interest rates.[24] The Framers learned through experience that there was a political temptation to impair contracts during crisis, resulting in predictable economic harm, so they enacted a federal prohibition on the practice.[25] The Framers had no comparable experience with state legislatures arbitrarily regulating contract formation.

Maybe the Framers saw the liberty of contract as so basic, so fundamental, that they simply assumed that no American government, state or federal, would ever think or dare to abridge it. But that is implausible. First, the more basic the right, the more anxious the Framers were to protect it. The rights to due process,[26] trial by jury,[27] security in one's person and effects,[28] privacy from military quartering,[29] keep and bear arms,[30] petition the government,[31] speak,[32] and practice religion[33]—these rights and others, some considered by the Framers to be pre-political and fundamental to a free society,[34] were explicitly protected. The Framers even prohibited *ex post facto* legislation,[35] a principle that was considered so basic to legislating that including it in the Constitution was deemed by some to be an affront to the legislature's intelligence.[36] The Framers were a paranoid bunch

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expected government should have authority to annihilate its own obligations and destroy the very rights which they were endeavoring to protect. Not only is there no permission for such actions; they are inhibited. And no plenitude of words can conform them to our charter.").

24. *Blaisdell*, 290 U.S. at 453–65 (Sutherland, J., dissenting) (describing the historical backdrop of the framing of the Contracts Clause).

25. *Id.*

26. U.S. CONST. amend. V.

27. *Id.* amend. VI.

28. *Id.* amend. IV.

29. *Id.* amend. III.

30. *Id.* amend. II.

31. *Id.* amend. I.

32. *Id.*

33. *Id.*

34. *See* Diarmuid F. O'Scannlain, *The Natural Law in the American Tradition*, 79 FORDHAM L. REV. 1513, 1517 (2011).

35. U.S. CONST. art. I, § 9, cl. 3. (prohibiting both *ex post facto* laws and bills of attainder).

36. *See* O'Scannlain, *supra* note 34, at 1518 ("The principle was so obvious, and so widely known, that some Framers thought it was unnecessary, and almost embarrassing, to declare it in the Constitution as though it were news. James Wilson, for one, feared that placing an ex post facto ban in the Constitution would 'proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so.' Thus, we see that the Ex Post Facto Clause merely codified a principle which eighteenth century lawyers grew up believing was a fundamental command of the natural law." (citations omitted)).

with a limitless imagination of government tyranny.

Generally speaking, Congress could only constitutionally abridge the formation of a contract through its power to regulate commerce among the several states—a limited power.[37] Moreover, contract law was a traditional domain of the state governments reserved to the states under the Tenth Amendment.[38] A guarantee of contract freedom against the federal government would therefore be theoretically unnecessary, even under the most frightful government abuses imagined by the Framers. As noted above, however, the Framers provided specific protection for property rights[39]—a state law matter that, like contracting, could only be plausibly abridged through the commerce power.

And so, we are left with an oddity, a gap, in the Constitution. We would have expected the Framers to protect contract freedom, but they apparently did not. At this point, there is a powerful temptation to shrug the proverbial shoulder and move on. After all, the judicial and scholarly rejection of *Lochner* is nearly total,[40] and therefore the burden on those who would defend anything like a doctrine of contract freedom is immense.

But this supposed gap—no protection, at all, of contract formation—only makes sense in our modern milieu. More specifically, it only makes sense in light of the epochal political drama of the New Deal—the assault on free enterprise by the Progressives and the judicial transformation of the Constitution designed to accommodate it. Popular modern theoretical approaches, such as originalism and traditionalism, cannot explain why the First Amendment does not, or should not, protect contract formation. Only the sacralization of the New Deal and its political monuments explains our constitutional paradox.

Part I of this Article demonstrates through text and precedent that contract formation is in fact a form of speech protected by the First Amendment. Part II considers the prudence of recognizing a First Amendment liberty of contract formation by applying two modern constitutional theories: originalism and traditionalism. Part III

37. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 64–65 (1824). *But see* Wickard v. Filburn, 317 U.S. 111, 118–25 (1942) (recognizing a virtually limitless scope of Congressional authority to legislate under the Commerce Clause).

38. *See* U.S. CONST. amend. X.

39. *Id.* amend. V.

40. *See supra* text accompanying note 11.

analyzes whether the Court would be perceived as more legitimate if it utilized the Due Process Clause, Privileges or Immunities Clause, or the Ninth Amendment as an alternative textual vehicle to protect the liberty of contract formation.

II. LEGAL ARGUMENTS FOR PROTECTING CONTRACT FORMATION

The First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech."[41] The First Amendment presumptively protects all speech; speech is only unprotected if it is part of an identified category of speech that is traditionally subject to censorship and punishment.[42] Moreover, speech only receives a lower level of protection if the regulation is not content-based,[43] or if there are compelling reasons for treating that speech as uniquely suspect.[44] This section will examine whether contract formation is speech protected by the First Amendment.

A. Argument from Text: Contract Formation Is Speech

The formation of a contract has three basic elements: offer, acceptance, and consideration.[45] An offer and an acceptance are either words or expressive actions that contain objective manifestations of a promise.[46] Put another way, a promise is speech, and a contract is simply two mutual promises spoken with consideration.[47] Contract formation is, from top to bottom, speech.

Moreover, mutual promises do not require a governmental

41. U.S. CONST. amend. I.

42. *See* United States v. Stevens, 559 U.S. 460, 468–72 (2010).

43. *See* United States v. O'Brien, 391 U.S. 367, 376–77 (1968).

44. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562–64 (1980) (granting less protection to commercial speech).

45. RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (AM. LAW INST. 1981). ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."); *id.* § 22(1) ("The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties.").

46. *Id.* § 24 ("An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."); *id.* § 50(1) ("Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.").

47. *Id.* § 2(1)–(3) ("A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made. The person manifesting the intention is the promisor. The person to whom the manifestation is addressed is the promisee."); *id.* § 18 ("Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance.").

imprimatur to be *contracts* objectively—only to be *enforceable* contracts.[48] Courts interpret the law of contracts to determine whether the contracts that individuals have already formed are legally enforceable. The state does not confer on individuals the capacity to make contracts in the first place. Nor does a contract exist in suspended animation until, at long last, a duly appointed judge in final judgment so orders that it come to be. For example, an exchange of promises to pay compensation in exchange for murder is a contract, but it is an unenforceable and punishable contract.[49] If a judge declares that a contract is void *ab initio*, this does not change the fact that certain people exchanged promises—indeed, the only way a judge can decide that a contract is void at all is by analyzing the content and circumstances surrounding speech that really occurred. A court cannot, by *ipse dixit*, transform speech into not-speech simply because the contract formed by that speech is contrary to public policy.

This simple observation—that contract formation is speech and therefore protected by the First Amendment—has not yet been recognized.[50] Why is uncertain. Perhaps the oversight is due to the *Lochner* era's use of the Due Process Clause as the exclusive textual hook for the liberty of contract.[51] Moreover, the First Amendment had not yet been incorporated.[52] Progressives who opposed *Lochner*, but who did not want to abandon judicial review of all individual liberties, rhetorically contrasted Due Process liberty of contract (not protected by the Constitution) to First Amendment political speech (protected by the Constitution).[53] After the New Deal, a majority coalition of

48. *See id.* § 1 ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."). For its part, the Supreme Court has never adopted a purely positivist understanding of the nature of contracts. *See* Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 100 (1938) (refusing to defer to Indiana's contract law in determining whether an Indiana law, retroactively declaring that a public contract was never a contract, impaired that contract under the Contracts Clause).

49. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 45, at § 178 ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.").

50. *See supra* text accompanying note 7.

51. *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525, 545 (1923).

52. Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporating the Free Speech Clause well after the recognition of the liberty of contract in Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897)).

53. *See* Colby & Smith, *supra* note 7, at 548 ("During the *Lochner* era, while they had been railing against aggressive judicial protection of economic rights, Justices Holmes and Brandeis had simultaneously argued in *favor* of aggressive judicial protection of the freedom of speech. Relying primarily on the marketplace-of-ideas metaphor, Holmes insisted that it is 'the theory of our

conservative and liberal thinkers joined the New Deal chorus that courts should not stand in judgment over popular economic regulations.[54] While there is a strong intuitive appeal for finding a liberty of contract in the First Amendment's text, there has not yet been occasion for doing so. As Martin Krygier observed, "unearth[ing] hitherto unknown truths about law" is frequently accomplished by re-examining what is "already familiar . . . so familiar as to escape notice altogether."[55]

Contracts are mutual promises supported by consideration.[56] Promises are speech.[57] As speech, contract-forming promises are—or rather, ought to be—presumptively protected by the First Amendment.[58] This syllogism is simple and logical. To be sure, contract formation is a very specific and peculiar type of speech. Not just any speech can be described as a contract, and fewer contracts still will rise to the level of enforceability. But nothing in the text of the First Amendment itself indicates that the "freedom of speech" does not encompass this unique speech, as it encompasses most other unique forms of speech.

B. Argument from Precedent: Contract Formation Is Commercial Speech

The text of the First Amendment can only get us so far, because the Supreme Court has held that some speech is not protected by the Constitution.[59] For example, incitement, defamation, and fraud, are all unprotected speech.[60] The freedom of speech has never been absolute. In the past, the Court declared that certain categories of speech are unprotected because they are valueless.[61] Moving away from this *ad hoc* value-balancing, the Court now says that speech is presumptively protected unless there is a historical practice of denying that speech

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Constitution' that free speech should be aggressively protected, whereas liberty of contract should not. Brandeis, by contrast, had relied on the unique centrality of free speech to a well-functioning political process. The Framers, he insisted, believed '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.'").

54. *See supra* text accompanying note 11.

55. Martin Krygier, *Law as Tradition*, 5 L. & PHIL. 237, 238 (1986).

56. *See supra* text accompanying notes 45–47.

57. *Id.*

58. *See supra* text accompanying notes 41–44.

59. United States v. Stevens, 559 U.S. 460, 468–69 (2010).

60. *Id.*

61. *Id.* at 470.

any protection all.[62] There is no such historical practice with contract formation—Anglo-American courts have honored and enforced most commercial promises time out of mind. Practically speaking, the basic common law right to form a contract has been the rule, and abridgement of this right the exception.[63] Therefore, contract formation should be presumptively protected as a matter of precedent.

This initial conclusion is vindicated by the Supreme Court's "commercial speech" precedent. In its commercial speech decisions, the Court has repeatedly recognized an inseparable relationship between speech and economic activity by striking down regulations that restrict commercial advertisements.[64] To be sure, the Court has awarded commercial speech a lower level of judicial scrutiny, and it is generally wary of striking down economic regulations, even those burdening speech.[65] These cases, however, indicate that the First Amendment does not merely protect political speech—it also protects economic speech, such as the right to extend an offer and acceptance on reasonable terms that do not offend the common good.[66]

1. A New Deal for Advertising: *Valentine* and Commercial Speech

In 1942, the U.S. Supreme Court, in the landmark case of *Valentine v. Chrestensen*,[67] stripped away all constitutional protection

62. *Id.* at 468, 472 ("[T]he First Amendment has 'permitted restrictions upon the content of speech in a few limited' . . . 'historic and traditional categories long familiar to the bar' . . . The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.").

63. *Cf.* Adkins v. Children's Hosp., 261 U.S. 525, 546 (1923) ("There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception . . .").

64. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

65. *See id.* at 562–63 ("Nevertheless, our decisions have recognized 'the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.' The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." (citations omitted)).

66. *Cf.* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1975) ("Our question is whether speech which does 'no more than propose a commercial transaction,' is so removed from any 'exposition of ideas,' and from '"truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,"' that it lacks all protection. Our answer is that it is not.").

67. 316 U.S. 52 (1942).

for economic speech.[68] The Court has subsequently walked back its position in *Valentine* and granted greater protection to economic speech.[69] The Court has found it increasingly difficult, if not untenable, to distinguish between economic and non-economic speech.[70] If the Court is correct that the First Amendment protects both economic and political speech, this fulsome reading of the Free Speech Clause all but dictates recognizing a First Amendment liberty of contract formation.

In *Valentine*, the owner of a navy submarine, Christensen, moored the ship at a state pier on the East River of New York City and distributed handbills advertising a showcase exhibit of the vessel.[71] Christensen was charged under the city sanitary code, which prohibited the distribution of commercial advertisements on the pier and permitted only handbills devoted to "information or public protest."[72] In an extraordinarily brief opinion, the Court held—without any legal reasoning and without citing to a single authority—first, that states may not unduly burden the communication of information and opinion on a public street, and second, that "the Constitution imposes no such restraint on government as respects purely commercial advertising."[73] The Court thus created out of thin air the interpretive distinction between political speech and economic speech.

Aside from the total lack of historical, precedential, or textual basis for its distinction between economic and non-economic speech, the *Valentine* Court offered no logical justification, either. While it noted that the state possessed a valid police power interest in the prevention of handbill clutter on the roads,[74] it did not explain why this valid interest, rather than limiting the scope of commercial speech

68. *Id.* at 54.

69. *See Va. State Bd. of Pharmacy*, 425 U.S. at 758–59, 762 (overruling *Valentine*).

70. *Id.* at 765 ("So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision-making in a democracy, we could not say that the free flow of information does not serve that goal." (citations omitted)); *see* Sorrell v. IMS Health Inc., 564 U.S. 552, 576 (2011) (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

71. *Valentine*, 316 U.S. at 52–53.

72. *Id.* at 53.

73. *Id.* at 54.

74. *Id.* at 54–55.

freedom, instead entirely divested commercial speech of all constitutional protection. The Court's opinion was an imposition of judicial will apart from even a pretext of legal interpretation.[75]

The timing of *Valentine* may offer a clue as to the Court's reasoning. *Valentine* was decided in 1942, five years after the Court's dramatic reversal of key *Lochner*-era precedents. With the Court's definitive rejection of the liberty of contract in *West Coast Hotel* in recent view, the decision in *Valentine* begins to make more sense. While Christensen did not plead a liberty to form contracts to exhibit his submarine—only a liberty to spread information about the submarine exhibition—had the Court held in his favor, they would have reignited pre-New Deal review of state economic policy. You can imagine the Justices thinking, "We won this war already," and dashing off an unreasoned reversal. Indeed, the opinion was even written by Justice Owen Roberts, the key vote who secured a majority in *West Coast Hotel*. The historical context of the political struggle over *Lochner* sheds light on an otherwise mysterious opinion. But the true motivation of the unanimous Court, led by Justice Roberts, is unknown.

2. *Valentine* Reversed: The Right to "Propos[e] a Commercial Transaction"

A quarter century later, the Court revisited the commercial speech doctrine in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* [hereinafter *Virginia Pharmacy*].[76] In *Virginia Pharmacy*, consumers of prescription drugs sued the state board that prohibited licensed pharmacists from "publish[ing], advertis[ing] or promot[ing], directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription."[77] The Court began by overruling *Valentine*, which "had been tempered, by later decisions of this Court, to the point that First Amendment interests in the free flow of price information could be

75. Only later did the Court attempt to offer a *post hoc* rationalization for its distinction. *See Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24 ("There are commonsense differences between speech that does 'no more than propose a commercial transaction,' and other varieties." (citation omitted)).

76. *Id.* at 748.

77. *Id.* at 750.

found to outweigh the countervailing interests of the State."[78]

The district court, in reaching its conclusion, did not rely entirely on *Valentine*; it also cited *Lee Optical*[79]—a Due Process case—in which the Court upheld a restriction on the advertisement of prices for eyeglass frames.[80] *Lee Optical* is notorious for its articulation of a *pro forma* rational basis review that instructs courts to uphold virtually any economic regulation from a substantive due process challenge.[81] The Supreme Court in *Virginia Pharmacy* distinguished the case from *Lee Optical* on the facts, noting that the "same dangers of abuse and deception" are not present "when the advertised commodity [is] prescribed by a physician for his individual patient and [is] dispensed by a licensed pharmacist."[82] This distinction makes sense, but the similarity between *Virginia Pharmacy*, a First Amendment case, and *Lee Optical*, a Due Process case, was striking—enough to catch the attention of the district court.[83] The Supreme Court ultimately held that the First Amendment protected the right of the pharmacists to spread pricing and other commercial information,[84] even if the Due Process Clause did not.

Unconvinced by the Court's treatment of *Lee Optical*, Justice Rehnquist vigorously dissented. He argued that the holding of *Lee Optical* was dispositive, notwithstanding the fact that *Lee Optical* was only a Due Process case.[85] To Justice Rehnquist, the Court's rejection of *Lochner*-style economic liberty arguments in the Due Process context was a rejection of them in *every* context, the First Amendment included.

Justice Rehnquist went further, arguing that while the First Amendment protects speech that may have "remote possible effects of noxious ideologies," it does not prohibit the regulation of "direct,

78. *Id.* at 755.

79. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955).

80. *Va. State Bd. of Pharmacy*, 425 U.S. at 755–56.

81. *See Lee Optical*, 348 U.S. at 487–89 ("The Oklahoma law may exact a needless, wasteful requirement in many cases . . . . It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."); *see also* Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 111–12 (Tex. 2015) (Willett, J., concurring) ("Indeed, federal-style scrutiny is quite unscrutinizing, with many burdens acing the rational-basis test while flunking the straight-face test . . . . All this explains why critics charge the test is less 'rational basis' than 'rationalize a basis.'").

82. *Va. State Bd. of Pharmacy*, 425 U.S. at 756.

83. *See id.* at 755–56.

84. *Id.* at 762.

85. *See id.* at 783–85.

active conduct."[86] In other words, there is a constitutional distinction between speech and conduct[87]—dialogue and discourse on ideas, and verbal economic activity.[88] In this view, the First Amendment is designed to protect "public decision-making as to political, social, and other public issues," not "the decision of a particular individual as to whether to purchase one or another kind of shampoo."[89] Deliberation in the halls of Congress is constitutional speech, but bargaining on the streets of the bazaar is not.

To justify the old *Valentine* rule, Justice Rehnquist insisted that, even though many people "regard the choice of shampoo as just as important as who may be elected to local, state, or national political office," that does not "automatically bring information about competing shampoos within the protection of the First Amendment."[90] This is true enough—First Amendment protection does not turn on whether hearers consider speech important or unimportant[91]—but it is also a *non sequitur*. The First Amendment presumptively protects all speech, even the most frivolous[92]—such as "a 'merchant' who goes

86. *Id.* at 789 (quoting Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 399 (1950)).

87. *Cf.* Brandenburg v. Ohio, 395 U.S. 444, 456 (1969) ("The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.").

88. The Court has held that speech integral to criminal conduct is unprotected. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949); *see* United States v. Stevens, 559 U.S. 460, 468–69 (2010) (affirming the continuing validity of *Giboney*). In *Giboney*, union members conspired to drive a non-union company out of business, violating a state law that prohibited economic combinations in restraint of trade. 336 U.S. at 491–92. The unions claimed that their conspiracy was protected speech. *Id.* at 494. To be sure, it *was* speech, but it was also conduct that was disfavored at common law and arguably *malum in se*. *See id.* at 495–97 (holding that prohibiting restraints on trade is one of the "traditional powers of states" and an unquestionably constitutional government interest). Therefore, *Giboney* does not hold, *a la* Justice Rehnquist in *Virginia Pharmacy*, that speech is protected while conduct is not. The distinction between speech and conduct is too permeable, since every act of speaking, from mere persuasion to incitement to imminent lawless action, is a speech-*act*—conduct, by definition. *Giboney*, rather, respects the historic police powers of the state to punish criminal acts without any First Amendment impediment, even if that conduct takes the form of a verbal utterance. Every law that burdens speech is in some sense regulating conduct. Indeed, if *Giboney* held that all regulations of speech that could be characterized as conduct were immune from First Amendment scrutiny, the First Amendment would be nonjusticiable.

89. *Va. State Bd. of Pharmacy*, 425 U.S. at 787.

90. *Id.*

91. *See* United States v. Stevens, 559 U.S. 460, 468–72 (2010).

92. *See, e.g.*, Cohen v. California, 403 U.S. 15, 16, 26 (1970) (holding that a jacket with the words "Fuck the Draft" is protected speech); Winters v. New York, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting) ("Wholly neutral futilities, of course, come under the protection of free speech as fully as do Keats' poems or Donne's sermons."); *see also* United States v. Alvarez, 132 S. Ct. 2537, 2551 (2012) ("[O]ne of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace.").

from door to door 'selling pots.'"[93]

Justice Rehnquist saw the intimate connection between advertising pots and selling them (i.e., forming a contract).[94] Advertising and contracting are closely related activities.[95] By protecting commercial advertisements, the Court handicapped the states, limiting their previously unconstrained economic regulatory powers granted to them by *Lee Optical*.

The Court in *Virginia Pharmacy* only announced an intermediate level of scrutiny, maintaining the distinction between political and economic speech.[96] In a fascinating and prescient line, the Court based this differing treatment on "'commonsense' differences between *speech that . . . propos[es] a commercial transaction*, and other varieties" of speech.[97] Since "speech proposing a commercial transaction" could describe *both* advertisement *and* contract formation, the Court was only a hairsbreadth away from recognizing a liberty of contract formation. Without expressly using the term "liberty of contract," the Court all but held that the First Amendment protects contract-forming promises.

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[98] the Court reaffirmed *Virginia Pharmacy*.[99] Justice Rehnquist dissented again—this time directly citing *Lochner*.[100] As in his *Virginia Pharmacy* dissent, Justice Rehnquist emphasized the connection between protecting commercial speech and protecting the

93. *Va. State Bd. of Pharmacy*, 425 U.S. at 788.

94. *See id.* at 783, 788 ("[T]he Court necessarily adopts a rule which cannot be limited merely to dissemination of price alone . . . . [T]he protections of that Amendment do not apply to a '"merchant" who goes from door to door "selling pots."').

95. *See* Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1175–76 (2012) ("It was long ago suggested that there is good reason to treat commercial speech (at least narrow commercial speech) as simply part of the transaction, but not as speech, or at least not as speech covered by the First Amendment. The notion that the regulated commercial speech is simply part of the commercial transaction . . . [is] broadly based on the nature of all commercial speech, whose essential (and generally only) function is to enable or assist effectuation of the secondary process." (citations omitted)); Samuel R. Olken, *The Business of Expression: Economic Liberty, Political Factions and the Forgotten First Amendment Legacy of Justice George Sutherland*, 10 WM. & MARY BILL RTS. J. 249, 255 (2002) ("[Justice] Sutherland implicitly perceived [a] connection between the rights of business (essentially ones of property) and those of expression, and so he imbued his analysis of the First Amendment with his understanding of economic substantive due process and equal protection.").

96. *Va. State Bd. of Pharmacy*, 425 U.S. at 770–73.

97. *Id.* at 771 n.24 (citation omitted) (emphasis added).

98. 447 U.S. 557 (1980).

99. *Id.* at 561–64.

100. *Id.* at 589.

liberty of contract.[101] But Justice Rehnquist took his criticism further, attacking the idea that the First Amendment protects a "marketplace of ideas."[102] While he conceded that "an important objective of the First Amendment is to foster the free flow of information"—including commercial information—nevertheless, just as the invisible hand of the market will not always lead to "optimum economic decisions in the commercial market," in the same way, "the marketplace of ideas is [not] free from market imperfections."[103] For the same reason that a state has to be free to regulate (even arbitrarily) the perceived imperfections of the market,[104] so the state must have unrestrained power to regulate commercial speech in the marketplace of ideas.[105]

3. *Virginia Pharmacy* Extended: The Right to Communicate by Contract

Recently, the Supreme Court reexamined the commercial speech doctrine in *Sorell v. IMS Health Inc*.[106] In that case, Vermont prohibited the "sale, disclosure, and use" of pharmacy records that reveal prescribing practices of individual doctors.[107] This information empowered pharmaceutical manufacturers to more effectively market their product, a process called "detailing."[108] However, the Vermont legislature regulated this practice out of a fear that it would help large, branded pharmaceutical companies who could afford to engage in detailing, leading to under-prescription of cheaper, generic pharmaceuticals.[109]

The Court held that prohibiting the "*sale*, disclosure, and use"[110] of records for detailing was an unconstitutional "content- and speaker-based restriction[]" on free speech.[111] The Court explained:

> The statute . . . disfavors marketing, that is, speech with a

101. *See id.*
102. *Id.* at 592.
103. *Id.*
104. *See supra* note 80 and accompanying text.
105. *Cf.* Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265, 294 n.161 (1987) ("[C]ontemporary proponents of economic substantive due process often argue that the 'marketplace of ideas' rationale for free speech also helps justify the free economic market and the rights underlying it.").
106. 564 U.S. 552 (2011).
107. *Id.* at 557.
108. *Id.* at 552.
109. *Id.* at 560–61, 564–65.
110. *Id.* at 557 (emphasis added).
111. *Id.* at 563.

> particular content. More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers. As a result of these content- and speaker-based rules, detailers cannot *obtain* prescriber-identifying information, even though the information may be *purchased* or acquired *by other speakers* with diverse purposes and viewpoints.[112]

Critically, the law did not merely regulate *disclosure* of information (advertising)—it also regulated the *sale and purchase* of information (contracting). The Court thus recognized both advertisement and contract as manners of speaking covered by the First Amendment.[113]

The law in *Sorrell* failed First Amendment scrutiny because it prohibited sales and purchases in the market to stop the free flow of commercial information and to pick winners and losers in the marketplace.[114] Because the regulation was aimed at preventing certain information—"prescriber-identifying information" owned by pharmaceutical companies—from entering the market, it was content-based.[115] Because the regulation sought to strangle the "sale" (i.e., communication) of this information in order to privilege one manufacturer in the marketplace (i.e., one speaker) over another, it was speaker-based.[116] Therefore, because the regulation (1) prohibited the formation of contracts that communicate information, and (2) prohibited the formation of contracts in order to privilege one market participant communicating information over another, it was an abridgement of free speech.

Using this reasoning, the regulation in *Sorrell* may be directly analogized to a price control. Price controls prohibit the formation of

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112. *Id.* at 564 (emphasis added).

113. Opponents of commercial speech protections have recognized this shift. *See* Seth E. Mermin & Samantha K. Graff, *The First Amendment and Public Health, at Odds*, 39 AM. J.L. & MED. 298, 303–04 (2013) ("A key strategy of industry advocates has been to try to take business practices that were never considered expressive and to re-characterize them as protected speech . . . . If companies increasingly consider everything that they do to be marketing (and they do), and the courts increasingly consider marketing to be protected speech, then the portion of business activity that government is able to regulate will be significantly diminished—and the revived *laissez-faire* dream of the *Lochner* era will, to a significant extent, have been realized." (citation omitted)). *But see* Richard Samp, Sorrell v. IMS Health*: Protecting Free Speech or Resurrecting* Lochner*?*, 2011 CATO. SUP. CT. REV. 129, 144 (2011) (identifying the constitutional speech, not as the contract transferring the commercial information, but as the subsequent advertisement of that commercial information that would have been broadcasted but for the regulatory burden preventing acquisition of the commercial information).

114. *Sorrell*, 564 U.S. at 563–64.

115. *Id.*

116. *Id.*

a contract because of the prices they communicate. Prices are *signals* by the speaking party (the promisor), communicating to the listening party (the promisee) the amount of value that the speaking party places on the scarce resource that is the subject of the transaction.[117] This pricing conversation, culminating in a final agreement on a contract price, disseminates this information (private perceptions of relative value) into the market at large.[118] Therefore, *all* price controls—forbidding contracts at certain prices—target commercial information. Not every contract is designed to *alienate* information that is held as intellectual property—as in *Sorrell*—but every contract has a simultaneous function of alienating property and communicating price information to market participants.[119]

A price control, then, is a content-based regulation of speech. Price controls smother the frank conversation that naturally characterizes the bazaar. Ordinarily the formation of a contract involves a debate between two people, each of them insisting that their own perception of supply and demand ought to determine the value of the property being exchanged. In conducting this debate, contracting parties will point to prices that have been communicated by other similar contracts and argue that those prices reflect the true and accurate price of a fair bargain. Price controls silence this exchange of commercial information, inserting a government censor into the commercial dialogue to ensure that individuals only communicate

117. *See generally, e.g.*, F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 526 (1945) ("Fundamentally, in a system where the knowledge of the relevant facts is dispersed among many people, prices can act to coordinate the separate actions of different people . . . The whole acts as one market, not because any of its members survey the whole field, but because their limited individual fields of vision sufficiently overlap so that through many intermediaries *the relevant information is communicated to all*. The mere fact that there is one price for any commodity—or rather that local prices are connected in a manner determined by the cost of transport, etc.—brings about the solution which . . . might have been arrived at *by one single mind possessing all the information which is in fact dispersed among all the people involved in the process*." (emphasis added)); *see also supra* text accompanying note 70 (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1975) ("So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions . . . . To this end, the free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system . . . ." (citations omitted))).

118. *See* F.A. Hayek, supra note 117.

119. Some members of the Court have attempted to imbue this distinction with constitutional significance. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 499 (1996) (plurality opinion) ("[T]he State retains less regulatory authority when its commercial speech restrictions strike at 'the substance of the information communicated' rather than the 'commercial aspect of [it]—with offerors communicating offers to offerees.'").

government-approved pricing information.

Moreover, price controls are designed to favor one speaker in the market over another. Minimum wages, for example, are designed to coerce employers to communicate a price at the minimum wage or above, even though the employer privately believes that the minimum price overvalues the offered labor. Minimum wages are also designed to coerce low-skilled laborers—those who would otherwise want to work at low wages—into demanding at least the minimum wage for their labor, even though they privately agree with the employer that the minimum wage overvalues their work.

Minimum wages pick winning and losing speakers in the marketplace. They censor the economic speech of employers who need low-skill labor, privileging wealthy employers who can survive without low-skill labor. They also censor low-skilled laborers who would voluntarily contract their labor at an agreed price, privileging higher-skilled workers who can offer more value for the same wage. Minimum wages, like all price controls, silence speech because the government disfavors the pricing information communicated and the speakers communicating it.[120]

Though *Sorrell* did not inaugurate a free-standing First Amendment liberty of contract formation, its reasoning makes price control legislation at least suspect, if not presumptively unconstitutional.[121] In a curious line, the Court modified Justice

120. Commercial promises have two functions: (1) pledging a conditional alienation of property, and (2) communicating price information. Price controls target the more obviously communicative aspect of contract formation. However, a pledge is no less "speech" than a price signal, even though it does not serve a primarily informational function. Indeed, it is impossible to fully distinguish regulations that target the underlying substance of a contract (the alienated property) from regulations that target the information communicated by contract terms (the price), since a speaker cannot contract at $5 rather than $10 without alienating the underlying property at the agreed-upon price. The "content" of a contract is not just the price; it is the whole property that is the subject of the contractual conversation. For further discussion of the mysterious relationship between commercial information and property, see generally GEORGE GILDER, KNOWLEDGE AND POWER: THE INFORMATION THEORY OF CAPITALISM AND HOW IT IS REVOLUTIONIZING OUR WORLD (2013) (contending that material wealth finds its genesis and substance in the creation of new information).

However, that does not mean that every aspect of contract law should be reviewed under heightened scrutiny. There are many content-neutral default rules of contract that set the terms of contracting without regard for the underlying content of the transaction. These rules incidentally burden speech, but they do not target speech in a discriminatory way. *Cf.* United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (applying intermediate scrutiny for content-neutral regulations that incidentally burden speech); *see also* Emp't Div. v. Smith, 494 U.S. 872, 879 (1990) (rejecting heightened scrutiny for neutral, generally applicable laws that incidentally burden free exercise of religion).

121. *But see* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV.

Holmes' *Lochner* dissent, saying, "The Constitution 'does not enact Mr. Herbert Spencer's Social Statics.' It does enact the First Amendment."[122] In other words, the Constitution's Due Process Clause may not protect contracting for the sale of information, but the First Amendment clearly protects economic speech, whether in the form of advertisement or sale. This way of thinking blazes a trail for explicitly recognizing and protecting the right to form a contract.[123]

Dissenting in *Sorrell*, Justice Breyer carried the torch of Justice Rehnquist's *Virginia Pharmacy* and *Central Hudson* dissents, arguing that the Court, in striking down a regulation prohibiting the sale of information, was voiding "ordinary commercial or regulatory legislation that affects speech in less direct ways."[124] Refusing to acknowledge that the sale of detailer information was constitutionally cognizable speech, Justice Breyer argued that using the First Amendment to protect sales contracts would resurrect *Lochner* review of economic regulation.[125] Justice Breyer saw that the First Amendment could be used to perform an end-run around *West Coast Hotel* and *Lee Optical*.[126] He saw what Justice Roberts and the *Valentine* Court saw in 1942.

III. THEORETICAL JUSTIFICATIONS FOR PROTECTING CONTRACT FORMATION

There is a strong case from text and precedent that the First Amendment protects a liberty of contract formation. Even if this right is protected by the Constitution, however, that does not necessarily mean that the U.S. Supreme Court should review legislation infringing it. Recognizing a First Amendment contract freedom would not

1, 11 (2000) (arguing that the Court protects commercial speech because it "is highly relevant to the formation of democratic public opinion," empowering citizens to "organize politically to advocate within public discourse for government price controls"); Henry N. Butler & Larry E. Ribstein, *Corporate Governance Speech and the First Amendment*, 43 U. KAN. L. REV. 163, 183 (1994) ("[E]ven if the Court is unwilling to second-guess legislative decisions regarding economic activity, it is willing to ensure that the political process leading to those decisions is robust and well-informed . . . . Thus, protecting speech on constitutional grounds differs from employing constitutional arguments to protect the underlying economic activity.").

122. Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011) (citation omitted).

123. *But see* Samp, *supra* note 113, at 148 ("Nonetheless, by relying on 'burdens' imposed on the speech of drug manufacturers, rather than on the direct and substantial regulation of IMS Health's efforts to disseminate physician-identifying information, the majority left itself open to criticism that its First Amendment standards are too open-ended.").

124. *Sorrell*, 564 U.S. at 584.

125. *Id.* at 591–92, 602–03.

126. *See id.* at 584–85.

reverse the reasoning of *West Coast Hotel*, but it could reverse the outcome, restoring judicial review of economic regulations that abridge contract formation. This would herald a sea change in constitutional law. Because of the stakes involved in this potentially dramatic re-engagement of the Court, we must turn to constitutional theory for aid in answering a second-order question of judicial prudence.

A. Originalist Justification: Need for Liberal Construction

As an ostensibly neutral theory of constitutional interpretation, originalism provides a powerful normative justification for any proposed constitutional doctrine.[127] Originalism is a "family of views that cluster around two central ideas, the fixation thesis and the contribution thesis."[128] The fixation thesis is the idea that "original meaning was *fixed*, or determined, at the time each provision of the Constitution was framed and ratified."[129] All originalists agree on this point, making it the "core idea" of originalism.[130] The contribution thesis is the idea that "the original meaning of the Constitution should make a substantial contribution to the content of constitutional doctrine."[131]

Originalists disagree about *how much* of a contribution this original meaning should make.[132] Some originalists believe that "each and every rule of constitutional law must be identical to the original meaning of some provision of the Constitution."[133] Other originalists hold that constitutional doctrines should be allowed to supplement vague provisions, provided they do not "contradict the original meaning."[134] Still others allow for circumstances where original meaning is trumped by other considerations, such as the role of precedent and *stare decisis*, even though "original meaning should

127. *Cf.* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 35 (1971) ("The Supreme Court's constitutional role appears to be justified only if the Court applies principles that are neutrally derived, defined and applied.").

128. Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM 35–36 (Grant Huscroft & Bradley W. Miller eds., 2011).

129. *Id.* at 33.

130. *Id.*

131. *Id.* at 35.

132. *See id.* at 34–35.

133. *Id.* at 34.

134. *Id.*

govern in cases of first impression."[135]

The perceived virtue of originalism is that it constrains judges with a historical method of interpretation[136]—a virtue that is particularly important here, given that any recognition of a First Amendment contract freedom would invariably provoke charges that the judiciary has willfully super-imposed a laissez-faire economic theory on the Constitution and the nation.

There are two forms of originalist theory: original intentions originalism ("Old Originalism") and original public meaning originalism ("New Originalism"). Old Originalism holds that judges who interpret constitutional provisions ought to be constrained by the intentions of the Framers.[137] New Originalism considers, instead, what the Framers and the ratifying public would have understood the words to mean at the time.[138] New Originalism recognizes a distinction between "interpretation" and "construction"—judges *interpret* a text to determine whether it provides a specific rule or an open ended principle, and if the text mandates the application of a broad principle, judges *construct* doctrines to give the most faithful effect to that principle.[139]

The originalist inquiry into the First Amendment begins, unfortunately, with a poverty of historical evidence. According to

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135. *Id.*

136. *See* Bork, *supra* note 127, at 17 ("There appear to be two proper methods of deriving rights from the Constitution. The first is to take from the document rather specific values that text or history show the framers actually to have intended and which are capable of being translated into principled rules . . . . The second method derives rights from governmental processes established by the Constitution.").

137. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 603 (2004) ("[O]riginalists often did speak in terms of attempting 'to understand the Constitution according to the intention of those who conceived it,' even though they might simultaneously renounce the view that interpreters should attempt to open up the heads of the founders and 'look inside for the truest account of their brain states at the moment that the texts were created.' Perhaps more precisely, this form of originalism can be said to be concerned with the 'scope beliefs' and 'counterfactual scope beliefs' of the founders regarding 'the specific legal *implications or effects* of (correctly interpreted) constitutional provisions.'" (citations omitted)).

138. *Id.* at 609–10 ("[T]he new originalism is focused less on the concrete intentions of individual drafters of constitutional text than on the public meaning of the text that was adopted . . . . This is not to say the history of the drafting process is irrelevant—it may provide important clues as to how the text was understood at the time and the meaningful choices that particular textual language embodied—but it is not uniquely important to the recovery of the original meaning of the Constitution.").

139. *Id.* at 611 ("The point of [new] originalist inquiry is not to ask Madison what he would do if he were a justice on the Supreme Court hearing the case at issue. The point is to determine what principle Madison and his contemporaries adopted, and then to figure out whether and how that principle applies to the current case.").

Judge Alex Kozinski and Stuart Banner, "The Framers' commentary on freedom of speech focuses entirely on the importance of free speech to self-government."[140] James Madison, for example, "valued the freedom of speech solely as necessary to protect the right of citizens to criticize government officials."[141] The controversy over the Alien and Sedition Acts "reinforced the focus [of the First Amendment] on political speech," as Madison "stressed the importance of the freedoms of speech and the press in assuring that the electorate receives a continuous flow of accurate information about political candidates."[142] A myopic historical inquiry leads to a surprising conclusion: "the people involved with the drafting or ratifying of the first amendment" were only concerned with "politically oriented speech."[143] While it is true that "[t]he Framers and their contemporaries would have encountered commercial speech in a number of [] contexts," this fact does not tell us whether they specifically intended to protect commercial speech.[144]

Perhaps the lack of historical evidence means that the First Amendment does not protect commercial speech at all. But Kozinski and Banner maintain that this argument "proves too much."[145] After all, "[t]he Framers never expressed an interest in protecting literature either," but nobody questions the fact that literature is "speech."[146] Nor did the Framers ever distinguish between content-based and content-neutral restrictions on speech, but this distinction is fundamental to First Amendment law.

Because there simply is not enough historical evidence to support an intentions-based originalist approach to the First Amendment—or, for that matter, any strict originalist approach that requires maximal recourse to history—originalists have "fairly unanimously" stopped

140. Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 632 (1990) ("Thomas Jefferson wrote: 'The people are the only censors of their governors: and even their errors will tend to keep these to the true principles of their institution . . . . The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.'" (citation omitted)).

141. *Id.*

142. *Id.*

143. *Id.*

144. *See id.* at 632–33.

145. *Id.* at 633.

146. *Id.*

trying.[147] Robert Bork, originalist *par excellence*, conceded, "The framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject."[148] Bork—to the agreement of scholars—concluded, "The first amendment, like the rest of the Bill of Rights, appears to have been a hastily drafted document upon which little thought was expended."[149]

Would James Madison have thought (or did he think) that contract formation is "speech"? We may never know. Fortunately, New Originalism has a solution. New Originalism asks, instead, "What principle did James Madison enact by using the word 'speech'"?[150] The word "speech" meant then, as it does today, any intelligible utterance.[151] This broad word enacts a broad principle: the right to utter in any manner (speaking, writing, or acting expressively), for whatever purpose (political or commercial), and in whatever context (private or public). Having derived this broad principle of "speech," New Originalism commands judges to construct doctrines that give proper effect to it.

Whether applying Old or New Originalism, both methodologies appear resigned to an expansive interpretation of the Free Speech Clause. This interpretation can accommodate the judicial construction of a liberty of contract formation, offering a prudential basis for recognizing the right.

B. Traditionalist Justification: Need for Deeply Rooted Liberty

A theory of constitutional traditionalism offers an even more compelling case for recognizing and protecting a First Amendment liberty of contract formation.[152] "Traditionalism" is an approach to

147. *Id.*

148. *Id.*

149. *Id.*

150. *Compare* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 795–98 (2011) (holding that there was a historical practice at the time of the founding of tolerating violent entertainment), *with id.* at 816–21 (Alito, J., concurring) (arguing that changes in technology make the media of interactive video games meaningfully different from the forms of media that were intentionally protected by the Framers—and therefore less worthy of protection).

151. *See* Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE 813–14 (10th ed. 1792) ("To SPEAK . . . . 1. To utter articulate sounds; or express thoughts by words . . . . 4. To exhibit . . . . SPEAKER . . . . 2. One that speaks in any particular manner . . . . SPEECH . . . . 2. Language; words considered as expressing thoughts . . . . 4. Any thing spoken.").

152. What I call a "theory" of traditionalism is more of a philosophical *disposition* of judicial respect for history and practice. *See generally, e.g.*, Michael W. McConnell, *The Right to Die and*

constitutional law that takes our legal practices and precedent as given, and only elevates something to the status of constitutional law if it is both foundational and fundamental to our legal order. The traditionalist approach is best exemplified by Chief Justice Rehnquist's decision in *Washington v. Glucksberg*.[153]

The *Glucksberg* approach to recognizing new constitutional rights follows two steps. First, the Court carefully defines the proposed constitutional right, searching for a narrow level of generality.[154] In *Glucksberg*, for example, defendants sought a declaration from the Court of a constitutional right to assisted suicide.[155] Rather than broadly describing it as "the right to die," the Court described it as "[the] right to commit suicide which itself includes a right to assistance in doing so," a narrower right that more closely fit the relief sought by the parties in that particular case.[156] After carefully describing the right, the Court considers whether *that* right is "deeply rooted in this Nation's history and tradition," and is "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [it was] sacrificed."[157] This ensures that any newly recognized constitutional right is rooted in our national experience and rises to a certain level of normative importance. The *Glucksberg* approach, while framed in the context of substantive due process, represents a wise, objective approach to individual rights jurisprudence in general, focusing on experience and practical needs rather than ideology. If a right "passes" the *Glucksberg* test, the Court has less reason to fear stifling democratic debate on contested issues,[158] inflicting unintended, socially-disruptive consequences,[159] or imposing its policy preferences on the nation.[160]

Applying the traditionalist approach to the First Amendment

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the Jurisprudence of Tradition, 1997 UTAH L. REV. 665 (1997) (praising the historical reasoning of *Washington v. Glucksberg* as a prudent traditionalist approach to judging).

153. Washington v. Glucksberg, 521 U.S. 702 (1997).

154. *Id.* at 720.

155. *Id.* at 722.

156. *Id.* at 723.

157. *Id.* at 721.

158. *Id.*

159. *See id.* at 732–33 ("[T]he State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia. The Court of Appeals struck down Washington's assisted-suicide ban only 'as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors.' Washington insists, however, that the impact of the court's decision will not and cannot be so limited.").

160. *Id.* at 720.

liberty of contract formation, the Court would begin by seeking a careful description of the newly proposed right. The right must not be an abstract or ambiguous concept—"economic liberty," "the right to make a living," or even "the liberty of contract." It must be a very specific freedom: the right to speak a promise, which itself includes the right to strike a bargain through an exchange of promises. Describing the right in this way achieves the same low level of generality as the right described by the Court in *Glucksberg*.[161]

The right to form a contract is also "deeply rooted in this Nation's history and tradition."[162] The common law of contracts, protecting and enforcing mutual promises supported by consideration, is ancient.[163] While every state regulates contract formation, state law generally favors enforceability.[164] The right to form a contract, while never treated as absolute, has been recognized as fundamental and protected as sacred in American and English society time out of mind.

It is harder to say whether this right is "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [it was] sacrificed."[165] This is a philosophical inquiry designed to test the normative importance of the right. The right of contract formation is undeniably important to a free society, because contracting is the primary way in which private property is voluntarily alienated. Freedom to contract ensures that resources can be efficiently distributed to others who have a need for it, that distribution is positive-sum for all parties in privity and Pareto optimal for society, and that individual incentives are aligned toward alienation rather than accumulation and concomitant decay.

Contracting is not the only method of economic distribution, nor should it be. Market failures can incentivize contracts with negative externalities, and positive-sum contracts, while achieving efficient allocations, may nevertheless leave some members of the community in a state of destitution. In these situations, alienation by gratuitous donation, regulation that internalizes negative externalities, and even coerced transfer payments may achieve important and alternative

161. Here, it is the right to speak a promise, which itself includes the right to strike a bargain through an exchange of promises. In *Glucksberg*, it was "[the] right to commit suicide which itself includes a right to assistance in doing so." *Id.* at 723.

162. *Id.* at 720.

163. *See supra* text accompanying note 12.

164. *See supra* text accompanying note 63.

165. *Glucksberg*, 521 U.S. at 721.

values that are exogenous to the world of contracting. Nevertheless, contract formation is vital to the maintenance and growth of free communities and nations. In this sense, it is "implicit in the concept of ordered liberty."[166]

But contracting is more than dollar signs and distribution networks. It is a uniquely human activity that is essential to human flourishing.[167] When people contract, they shape the world around them, accomplishing *by a word* a normative transformation of their environment. As soon as A says to B, "I will give you my bicycle for your skateboard," A has altered the nature of the bicycle. It was once *theirs*. No longer—A has now clouded his title to the bicycle by creating the contingency of a possible acceptance. If B accepts, the bicycle's title transfers, permanently.

Promises are tools, possessed only by humans, by which people leave a dint in the reality they inhabit. This impression, however, is made with modesty, vulnerability, and honesty. Person A does not *throw* his bicycle at B or *take* B's skateboard. Person A begins by offering an exchange—accepting, before any response by B is given, the possibility of rejection—and places his integrity as a person on the line by announcing ahead of time his commitment to honor his word. Contracting is a uniquely virtuous and communitarian expression of individual autonomy. If this basic right, this profound social activity, were ever extinguished, it would be said of that "society" that "neither liberty nor justice . . . exist."[168]

A traditionalist approach to constitutional theory therefore justifies recognizing a First Amendment liberty of contract formation. This is highly significant, because judicial review of economic regulations—particularly price controls—is typically viewed as the epitome of unrestrained judicial activism.[169] But traditionalist theory pierces through the New Deal rhetoric and demonstrates that recognizing this economic freedom is in fact a modest step of

166. *Id.*

167. *See* FREDERICK DOUGLASS, THE LIFE AND TIMES OF FREDERICK DOUGLASS 259 (1882) ("I was not long in accomplishing the job, when the dear lady put into my hand *two silver half-dollars*. To understand the emotion which swelled my heart as I clasped this money, realizing that I had no master who could take it from me—*that it was mine—that my hands were my own*, and could earn more of the precious coin—one must have been in some sense himself a slave . . . . I was not only a freeman but a free-working man, and no master Hugh stood ready at the end of the week to seize my hard earnings.").

168. *Glucksberg*, 521 U.S. at 721.

169. *See supra* text accompanying note 11.

constitutional interpretation.

IV. ALTERNATIVE TEXTUAL VEHICLES FOR PROTECTING CONTRACT FORMATION

A First Amendment liberty of contract formation is guaranteed by the First Amendment text and implied by the U.S. Supreme Court's commercial speech precedent. Two families of modern constitutional theory—originalism and traditionalism—justify judicial review of legislative infringements. But notwithstanding its textual, precedential, and theoretical justifications, some may charge that the First Amendment is primarily about political liberty and is therefore a poor textual vehicle for recognizing a right that is purely commercial in nature.[170] To address this criticism, this section analyzes whether recognizing a right of contract formation under another constitutional clause would be perceived as more legitimate.

A. Due Process and the Problem of Judicial Activism

The Fifth Amendment provides, "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."[171] This clause is rooted in Magna Carta's guarantee of "the law of the land," and the Supreme Court has periodically interpreted it to provide a minimum level of constitutional protection against arbitrary restrictions of unenumerated rights.[172] Under the theory of substantive due process, legislation that deprives individuals of life, liberty, or property without rational justification cannot be described as "law," even if it is passed in accordance with all constitutional procedure.[173]

Recognizing a liberty of contract formation through the Due Process Clause would not provide any comparative advantages to the

170. Reza R. Dibadj, *The Political Economy of Commercial Speech*, 58 S.C. L. REV. 913, 924 (2007) ("Regardless of where one stands on the regulatory debate, however, '[o]ne needn't hold any particular hierarchy of values to think that the free speech clause is one of the oddest places the framers could have chosen to constrain governmental abridgement of economic liberty.'" (citation omitted)).

171. U.S. CONST. amend V.

172. *Glucksberg*, 521 U.S. at 757 (Souter, J., concurring).

173. *See*, Randy E. Barnett, *Foreword: Why Popular Sovereignty Requires the Due Process of Law to Challenge "Irrational or Arbitrary" Statutes*, 14 GEO. J.L. & PUB. POL'Y (forthcoming 2016) (manuscript at 13) http://ssrn.com/abstract=2765131. ("[L]ike [Justice] Chase [in *Calder v. Bull*], [Justice] Marshall [in *M'Culloch v. Maryland*] identifies a law 'for the accomplishment of objects not entrusted to the government' as 'an act' that is 'not the law of the land,' or simply *not law*.").

First Amendment. First, after the Court in *Obergefell v. Hodges*[174] overruled *Glucksberg*, there is now no longer any neutral, principled limit on substantive due process.[175] Recognizing a liberty of contract formation under the Due Process Clause would first require articulating an overarching, intelligible principle of review.[176] Second, because the word "liberty" in the Constitution is very broad, judges applying the liberty of contract formation may, at a later date, decide to interpret the liberty at a higher level of generality. This judicial expansion could transform the liberty of contract *formation* into a free-wheeling judicial review of all economic regulations[177]—the very kind of judicial activism that the Court condemned in *Lee Optical*.[178] Third, there is simply no appetite on the Supreme Court for returning to *Lochner*.[179]

B. Privileges or Immunities and the Problem of Comprehensibility

The Fourteenth Amendment provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[180] The Supreme Court in the *Slaughter-House Cases*[181] held that this clause protects a small batch of unenumerated rights.[182] However, recent scholarship has found that the original drafters of the amendment intended for the clause to secure

174. 135 S. Ct. 2584 (2015).

175. *Id.* at 2602.

176. *See generally* Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL'Y 283 (2012) (defending the logic and coherence of substantive due process review without relying on *Glucksberg*).

177. The right to contract formation would have a narrower scope than *Lochner*. *Cf.* Albert P. Mauro, Jr., *Commercial Speech After* Posadas *and* Fox: *A Rational Basis Wolf in Intermediate Sheep's Clothing*, 66 TUL. L. REV. 1931, 1955 (1992) (observing that the right to economic speech is narrower than the right to work); *see also* Sean P. Costello, *Strange Brew: The State of Commercial Speech Jurisprudence Before and After* 44 Liquormart, Inc. v. Rhode Island, 47 CASE W. RES. L. REV. 681, 744–45 (1997) ("This is not a return to *Lochner*. Unlike substantive due process, it [commercial speech] facilitates rather than frustrates majority will . . . facilitating the communication *process* and ultimately promoting self-government.").

178. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.").

179. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting) (invoking *Lochner* as a byword for illicit judicial engagement).

180. U.S. CONST amend. XIV § 1, cl. 2.

181. 83 U.S. 36 (1872).

182. *See id.* at 78. *But see* Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 123 n.327 (2000) ("Virtually no serious modern scholar—left, right, or center—thinks this a plausible reading of the Amendment.").

against the states the rights enumerated in the Bill of Rights, as well as other fundamental, unenumerated rights.[183]

The liberty to contract was fundamental to the Framers of the Fourteenth Amendment, making the Privileges or Immunities Clause a prime alternative text for recognizing a liberty of contract formation.[184] But reversing the *Slaughter-House Cases* and reinvigorating the Privileges or Immunities Clause would replicate some of the same problems generated by substantive due process. First, there would be a problem of placing principled limits on judicial activism. Even if the Court held that the clause protects only those liberties considered fundamental at the time of ratification—thereby constraining the Court with the objective, neutral standard of history—it is hard to see the Court stopping at a liberty of contract *formation*. *Lochner* could be reborn in its entirety.

There is another problem with the Clause—one that is not theoretical, but "pragmatic." To be blunt, nobody knows what the phrase "privileges or immunities" means anymore. This was a legal term of art that has since been evacuated from the American vocabulary. If the Supreme Court suddenly restarts judicial review of legislative limits on contract formation—striking down minimum wage laws, for example—there will surely be a public outcry. It will be difficult for judges, lawyers, and outside observers to explain to the public why this long-lost clause of the Constitution has suddenly

183. *See, e.g.*, Amar, *supra* note 182, at 123 ("[T]he Privileges or Immunities Clause suggests a method for finding fundamental rights that is less Court-centered, and admirably so. The Fourteenth Amendment does not exhaustively list all the privileges and immunities of American citizenship, but it presupposes that such fundamental rights are catalogued elsewhere in documents that the American people have broadly ratified, formally or informally. In the eyes of those who drafted and ratified the Fourteenth Amendment, the federal Bill of Rights was one of these catalogues, a compilation of fundamental rights that the Amendment would henceforth guarantee ('incorporate') against [sic] states. But the Bill of Rights was not the only epistemic source of guidance . . . . [T]he Privileges or Immunities Clause would invite the Court to canvass nonjudicial legal sources . . . as critical sources of epistemic guidance."). *But see* McDonald v. City of Chicago, 561 U.S. 742, 834 (2010) (Thomas, J., concurring) (expressing doubt that the Privileges or Immunities Clause protects unenumerated rights).

184. *See Slaughter-House Cases*, 83 U.S. at 91 (Field, J., dissenting) ("[T]he act of Congress known as the Civil Rights Act . . . was framed and adopted upon a construction of the thirteenth amendment, giving to its language a similar breadth . . . . Its first section declares that all persons . . . 'of every race and color, without regard to any previous condition of slavery, or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right in every State and Territory in the United States, *to make and enforce contracts*, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as enjoyed by white citizens.'" (emphasis added)).

returned from the legal grave to invalidate popular economic regulations. Simply reciting, "Contract formation was a privilege or immunity of citizenship at the time of the Fourteenth Amendment's ratification," probably will not cut it in the court of public opinion.

This is an unprincipled reason to reject the Privileges or Immunities Clause as an alternative textual vehicle. It is not theoretical; indeed, is anti-theoretical. But the Court must be prudent. The public will understand that the First Amendment protects their right to speak a promise long before they understand that making promises is a historical "privilege or immunity." This point should not be lightly passed over, either. The Supreme Court stressed in *West Coast Hotel* that the Due Process Clause nowhere speaks about a "freedom of contract."[185] This kind of folksy observation matters to the sovereign citizenry. Of course, the Constitution will be more complex in application than its plain language might suggest, but complexity in the law is the enemy of public acceptance. And surely one of the goals of any legal system, be it common law, statutory, or constitutional, is to obtain and to proudly bear the approval of society.

C. The Ninth Amendment and the Problem of Historical Practice

The Ninth Amendment provides, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[186] The Ninth Amendment offers the weakest textual vehicle for recognizing a liberty of contract formation.

As with Due Process and Privileges or Immunities, there is the same problem of judicial activism. In interpreting the Ninth Amendment's open text, why would the Court stop at the right of contract *formation*? The Ninth Amendment also faces a dramatic precedent problem. Since its inception, the Ninth Amendment has never been interpreted by the Supreme Court to be a font of substantive rights.[187]

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185. W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) ("In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law.").

186. U.S. CONST. amend. IX.

187. *See, e.g.*, Gibson v. Matthews, 926 F.2d 532, 537 (6th Cir. 1991). *See generally* Seth Rokosky, *Denied and Disparaged: Applying the "Federalist" Ninth Amendment*, 159 U. PA. L.

Professor Randy Barnett makes a compelling historical case that the Ninth Amendment protects natural rights by creating a "presumption of liberty,"[188] and some Justices on the Supreme Court have looked to the Ninth Amendment as a possible source of unenumerated rights.[189] However, the Court has thus far treated the Ninth Amendment as an unenforceable "ink blot" in the Constitution.[190] Overcoming this weight of precedent would be extremely difficult.

For these reasons, neither the Due Process Clause, Privileges or Immunities Clause, nor the Ninth Amendment provide a superior, more legitimizing textual alternative to the First Amendment for recognizing the liberty of contract formation.[191]

V. CONCLUSION

This Article demonstrates that the liberty to form a contract is secured by the text of the First Amendment, is implicit in the U.S. Supreme Court's commercial speech jurisprudence, is justified by reference to originalist and traditionalist theory, and finds the most appropriate textual vehicle in the First Amendment. On careful reflection, the legal and theoretical case for recognizing this right is powerful. Moreover, recognizing a federal contract freedom would solve a historical and constitutional paradox—the fact that contract freedom, while fundamental to the Framers of the Constitution, currently receives no legal protection from the Court.

Despite the various and sundry arguments in favor of recognizing this constitutional liberty, no court has yet acknowledged its existence.[192] How can that be? Earlier in this Article I suggested that

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REV. 275 (2010) (detailing the various theories of the Ninth Amendment).

188. *See* Randy E. Barnett, *Restoring the Lost Constitution, Not the Constitution in Exile*, 75 FORDHAM L. REV. 669 n.3 (2006); *see also generally* Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL'Y 5 (2012) (arguing that the Due Process Clause, Privileges or Immunities Clause, and Ninth Amendment protect unenumerated economic rights).

189. *See* Griswold v. Connecticut, 381 U.S. 479, 486–87 (1965) (Goldberg, J., concurring).

190. *See* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 80 (2006) ("When Robert Bork compared the Ninth Amendment to an inkblot, he violated John Marshall's famous dictum that '[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.' Still, Bork was on to something, for until quite recently the Ninth Amendment has been the Rorschach test of constitutional theory." (citation omitted)).

191. This conclusion, however, is not meant to deny or disparage the rich and varied scholarship supporting a theory of unenumerated economic rights grounded in one or more of these clauses.

192. *See* Barnett, *supra* note 189. But the Court has come awfully close. *See supra* notes 120–

this could merely be the product of historical accident.[193] Though it is quite an accident. I suspect that more is going on—that the fear and loathing that surrounds *Lochner*, the great sin of judicial activism, has closed the legal mind to constitutional economic rights.[194]

For some, *Lochner* was not wrong merely because it found a right that the text of the Constitution did not actually secure—it was wrong because it transgressed the Progressive political agenda of the New Deal.[195] *Lochner*'s defeat in *West Coast Hotel* and *Lee Optical* was thus more than a modification of substantive due process doctrine; it was a wholesale repudiation of the very idea that judges can or should review any regulation of the marketplace, even when that regulation is patently arbitrary.[196] Under this way of thinking, even orthodox economic liberties like commercial speech are suspect because those activities are of a lower order of being.[197]

There is a real modern hostility toward economic liberty.[198] Perhaps it represents a crass pre-commitment to anti-capitalist ideology. Maybe it is a recognition, with Professor Ackerman, that the New Deal produced an extra-Article V amendment to our Constitution: an unwritten rule of construction that prohibits judges from questioning economic regulation, especially those types of regulations that emerged from the New Deal.[199] Or perhaps it is a

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193. *See supra* notes 50–55.

194. *See* Hettinga v. United States, 677 F.3d 471, 480, 483 (D.C. Cir. 2012) (Brown, J., concurring) ("America's cowboy capitalism was long ago disarmed by a democratic process increasingly dominated by powerful groups with economic interests antithetical to competitors and consumers. And the courts, from which the victims of burdensome regulation sought protection, have been negotiating the terms of surrender since the 1930s . . . . Rational basis review means property is at the mercy of the pillagers. The constitutional guarantee of liberty deserves more respect—a lot more.").

195. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 82 (1996) ("The stench of those cases [*Lochner v. New York* and *Bowers v. Hardwick*] does not lie in any jurisdictional vice or judicial overreaching. After a near century of treating *Lochner* as a whipping boy, no one has produced a sound mechanical test that it fails. The vice of bad decisions is bad argument and bad conviction . . ."); *see also* Washington v. Glucksberg, 521 U.S. 702, 761 (1997) (Souter, J., concurring) ("[W]hile the cases in the *Lochner* line routinely invoked a correct standard of constitutional arbitrariness review, they harbored the spirit of *Dred Scott* in their absolutist implementation of the standard they espoused.").

196. *See supra* note 80.

197. *See supra* note 88.

198. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (comparing the common law liberty of contract to Herbert Spencer's Social Darwinism); Obergefell v. Hodges,135 S. Ct. 2584, 2617 (2015) (Roberts, C.J., dissenting) (touting Justice Holmes' famous "Social Statics" barb from *Lochner* while equating *Lochner* with *Dred Scott*).

199. *See* 2 BRUCE A. ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 26 (1998) ("These

deeper skepticism of *Marbury v. Madison*[200] that sees judicial review as inherently problematic.[201]

In any event, the guiding star of our modern constitutional consensus is the New Deal and the jurisprudence of judicial restraint that emerged to rubber-stamp it.[202] To understand why the judiciary has not yet recognized a First Amendment liberty of contract formation, perhaps we need only look to the Court's unreasoned opinion in *Valentine*. There the triumph of New Deal judicial restraint toward economic regulation was so obvious to the Court that legal reasoning and citation to precedent was no longer necessary.[203] This is our strange world of modern constitutional theory.[204]

The legal profession would do well to contemplate an axiomatic proposition: The Constitution is not an a-philosophical document. It protects certain rights, and not others. It instantiates specific roles for government, and not others. Insofar as it protects a right of contract formation, it does—to some extent—embrace a philosophy of economic freedom. Invoking scare words ("laissez-faire") and hurling epithets ("Social Darwinism") cannot change this fact.

Judges must therefore interpret and enforce the Constitution, regardless of whether they, or certain members of the public at large, personally agree with its economic philosophy. The Justices of the Court took an oath;[205] they made a promise to the people, a contract with the nation, to faithfully interpret the First Amendment. Their word is their bond. We are entitled to the principal.

New Deal cases not only rejected leading decisions of the old regime, like *Lochner v. New York* . . . They transformed *Lochner* into a symbol of an entire constitutional order that had been thoroughly repudiated by the American people. These New Deal opinions have operated as the functional equivalent of formal constitutional amendments . . .").

200. 5 U.S. (1 Cranch) 137 (1803).

201. Some scholars have argued, for example, that privileging free speech of any kind "replicates an error of *Lochner*" by "excessively privileg[ing] one type of right . . . ." Wendy E. Parmet & Jason A. Smith, *Free Speech and Public Health: A Population-Based Approach to the First Amendment*, 39 LOY. L.A. L. REV. 363, 443 (2006). This is a damned-if-you-do, damned-if-you-don't argument—if the Court enforces unenumerated rights, it is *Lochnerizing*; if it enforces enumerated rights only, it is *Lochnerizing*. Hostility toward *Lochner* translates here into hostility toward judicial review generally.

202. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). *But see generally* Suzanna Sherry, *Selective Judicial Activism: Defending* Carolene Products (Vand. U. L. Sch. Pub. L. & Legal Theory, Working Paper No. 16–9, 2016), http://ssrn.com/abstract=2741287 (arguing that there is a "powerful case in favor of a selective judicial activism that privileges personal rights over economic rights" consistent with *Carolene Products*).

203. *See supra* Part I.B.1.

204. *See supra* text accompanying notes 7–13.

205. U.S. CONST. art. VI, cl. 3.