THE LIMITS OF LOCHNERISM

Lucien Ferguson*

The Lochnerism thesis is among the most influential constitutional theories to emerge in recent years. It argues that the judiciary increasingly protects private business from public regulation by enshrining and expanding liberty of contract rights under the First Amendment. Using *303 Creative LLC v. Elenis* as a case study, this Essay explores the limits of Lochnerism as a theoretical framework. It argues that, while productively illuminating the judiciary's attack on the administrative state and democratic processes, the theory may also displace concerns over the concrete harms experienced by vulnerable communities. To bring these harms back into view, this Essay suggests a theoretical reorientation: a shift in perspective from concerns over regulation to a more traditional point of focus—the distribution of property rights.

INTRODUCTION

The Lochnerism thesis is among the most influential constitutional theories to emerge in recent years.[1] Its proponents tell us that the First Amendment has been "Lochnerized" and that we are living in the era of a "new *Lochner*."[2] What they mean,

* Drinan Visiting Assistant Professor of Law, Boston College Law School, ferguslu@bc.edu. Many thanks to Rebecca Aviel; Joe Dunman; Jacob Eisler; Emmanuel Hiram Arnaud; Saurabh Vishnubhakat; Andrew Koppelman; Jeta Mulaj; Brian Slocum; Nicholas Almendares; Paul Gowder; Meg Penrose; James Oleske; Charquia Wright; and the editors of the *William & Mary Bill of Rights Journal*.

[1] *See generally* Thomas H. Jackson & John C. Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L. CONTEMP. PROBS. 195 (2014); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133 (2016); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016); Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L.L. REV. 323 (2016); Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179 (2018); Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1241 (2020); Kenji Yoshino, *Rights of First Refusal*, 137 HARV. L. REV. 244 (2023).

[2] *See* Kapczynski, *supra* note 1, at 179–80; Shanor, *supra* note 1. Justice Elena Kagan famously stressed this point in her claim that "by weaponizing the First Amendment," the Court was "unleash[ing] judges . . . to intervene in economic and regulatory policy," and thus "prevent[ing] the American people, acting through their state and local officials, from making important choices about workplace governance." Janus v. AFSCME, Council 31, 585 U.S. 878, 954–55 (2018) (Kagan, J., dissenting).

more specifically, is that the judiciary has increasingly insulated private business from public and democratic regulation by enshrining liberty of contract rights under the First Amendment.[3]

In terms of explanatory prowess, there is much in this thesis to laud. It shows that the denigrated and generally "anticanonical"[4] character of *Lochner v. New York*[5] now does little to limit the expansion of contract liberties;[6] it elucidates certain evolutions in the political economy of the First Amendment[7] and the burgeoning nature of the Supreme Court's commercial speech doctrine;[8] and, most importantly perhaps, it illuminates the judiciary's sustained, decades-long attack on the administrative state and other mechanisms of democratic regulation.[9]

Like any theoretical construct, however, the Lochnerism thesis has its limits. It reveals but it also conceals. As such, legal scholars and practitioners should be as familiar with its perils as they are with its powers. Using *303 Creative LLC v. Elenis* as a case study, this Essay sketches the limits of Lochnerism by shedding light where it casts a shadow.[10] It argues that Lochnerism may elide the concrete harms to vulnerable communities occurring in the process of First Amendment Lochnerization.[11] The bases of this oversight, it suggests, include focus on macro-level institutional battles, perils to modern American democracy, and the dangers of economic deregulation.[12] While valuable in their own right, these points of emphasis also tend to gloss over the *micro*-level suffering of individuals that occurs when these battles redistribute property.[13]

303 Creative LLC uniquely exhibits the extent to which these harms may be obscured by judicial process.[14] There, petitioner and website designer Lorie Smith

---

[3] *See generally supra* note 1 (showing the connection between the First Amendment jurisprudence and commercial speech).

[4] *See generally* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011) (describing the anticanon as the set of cases that all legitimate constitutional decisions must repudiate).

[5] *See generally* 198 U.S. 45 (1905).

[6] *See generally supra* note 1 (showing how the First Amendment has been used to strike down economic regulations partly on contract grounds).

[7] *See, e.g.*, Genevieve Lakier, *Imagining an Antisubordination First Amendment*, 118 COLUM. L. REV. 2117, 2118–19 (2019) (explaining theories of First Amendment change).

[8] *See, e.g.*, Jackson & Jeffries, *supra* note 1, at 30–31 ("[T]he Supreme Court has reconstituted the values of *Lochner v. New York* as components of freedom of speech.").

[9] *See, e.g.*, Kapczynski, *supra* note 1, at 189–95 (explaining the First Amendment's weaponization against regulatory power); Shanor, *supra* note 1, at 138–76 (charting the escalating tension between First Amendment commercial speech doctrine and the modern regulatory state).

[10] *See generally* 600 U.S. 570 (2023).

[11] *See infra* Section II.A.

[12] *See infra* Section II.B.

[13] *See id.*

[14] *See, e.g.*, Hila Keren, *303 Creative v. Elenis*: What's Wrong with Preemptive Litigation of Discrimination 5 (May 16, 2023) (unpublished manuscript), https://papers.ssrn.com

brought a pre-enforcement challenge to "clarify" her right to discriminate against LGBTQ+ couples.[15] The case thus emerged and was decided in her favor prior to any discrimination on her part.[16] The absence of any injured party entailed a disturbing factual paucity: the general absence of voice and representation for the LGBTQ+ people whose interests were at stake and who, inevitably, would be harmed in the decision.[17]

An attentiveness to covert harms, thus, is arguably of special importance when interpreting a case like *303 Creative LLC*. The question raised by this recognition, however, is how best to bring such harms into view?[18] As early commentary suggests, *303 Creative LLC* slides naturally into the Lochnerism story.[19] Compounding a decades-long tradition, the decision wields the First Amendment as a deregulatory mechanism by protecting a private, for-profit business from the strictures of ordinary public accommodations law.[20] But I worry that surrendering the decision to the politics of deregulation may only further obscure its harms.

We can better bring the decision's harms into view, I argue, by shifting our theoretical purview from the problem of *deregulation* to that of *redistribution*.[21] The central concept of Lochnerism, the lens of deregulation focuses our attention on the impediments that the judiciary installs against more democratic forms of economic management. By contrast, a redistributive focus can attune us to the way that such practices "*reformulate* property rights."[22] In *303 Creative LLC*, I argue, the Court

---

/abstract=4436350 [https://perma.cc/9LSC-6P4U] ("What's concealed by [the case's] preemptive strategy is the grave harm that would inevitably ensue if courts award businesses the demanded exemptions.").

[15] *303 Creative LLC*, 600 U.S. at 580.

[16] Prior to the litigation, Smith had not held the business out as a wedding-website provider. *See id.* at 583 ("[I]f she follows through on her plans to offer wedding website services . . . .").

[17] *See generally* Keren, *supra* note 14 (describing how the courts approach leaves vulnerable groups exposed to public harms without the ability to air their concerns).

[18] One way is anti-subordination. *See* Lakier, *supra* note 7, at 2153–58.

[19] *See, e.g.*, Michael L. Smith, *Public Accommodations Laws, Free Speech Challenges, and Limiting Principles in the Wake of* 303 Creative, 84 LA. L. REV. (forthcoming 2024) (manuscript at 22–29), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4565198 [https://perma.cc/F6FD-F8AA] (suggesting that the case "fits the mold of the[ ] Lochnerism critiques.").

[20] *See 303 Creative LLC*, 600 U.S. at 600. The case is significant for the Lochnerism thesis indeed: it expands the commercial speech doctrine and wields the First Amendment against public accommodations law in a novel way. *See, e.g.*, Andrew Koppelman, *Why Gorsuch's Opinion in '303 Creative' Is So Dangerous*, AM. PROSPECT (July 12, 2023), https://prospect.org/api/content/4aa7c566-202c-11ee-b19a-12163087a831/ [https://perma.cc/HBX5-V7H6] ("[T]he Supreme Court has now declared for the first time that some for-profit businesses have a constitutional right to discriminate against anyone for any reason they like.").

[21] *See infra* Part III.

[22] I am particularly inspired, in my approach here, by the classic work of Professors Cass

redistributed property away from, on the one hand, the public and the LGBTQ+ community, and to, on the other hand, private business and the Christian right. A redistribution framework thus better captures (at least part of) the harms entailed in the Court's decision: the concrete "taking" of property from a vulnerable community.[23]

While the Lochnerism thesis also foregrounds the importance of property rights, it does so differently than the redistributive lens for which I am advocating. It tends to focus on the fact that the Court increasingly uses the First Amendment to *protect* property—especially liberty of contract—against administrative incursion. What it misses, however, is that, through the same gestures, the Court also often *reallocates* property rights. Thus, in *303 Creative LLC*, I argue, liberty of contract rights were among the specific entitlements that the Court took from the public and the LGBTQ+ community and granted to private business and the Christian right.[24]

The primary contribution of this Essay is to highlight what Lochnerism leaves out, and in this vein, it is among the first of its kind.[25] In so doing, moreover, it also sets forth some initial considerations toward an alternative, property-oriented mode of conceptualizing First Amendment harms.[26] Part I begins by briefly situating *303*

Sunstein and Joseph William Singer. *See generally* Cass Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873 (1987) (arguing that *Lochner* was originally a redistributive ruling); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1295 (1996) (interpreting the history public accommodations law from the perspective property).

[23] *See generally* Sunstein, *supra* note 22, at 884 (discussing *Lochner* and its progeny as "takings" cases). *But cf.* Singer, *supra* note 22, at 1301, 1301 n.42 (highlighting that takings arguments were traditionally used by opponents of public accommodations laws); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261–62 (1964) (offering the canonical position that a typical public accommodations law is not a Fifth Amendment taking).

[24] The redistributive framework offered here also differs from another dominant framework used by contemporary constitutional scholars to theorize First Amendment harms: the anti-subordination theory. *See, e.g.*, Lakier, *supra* note 7, at 2121–24, 2159 (building on critical race theory to advance an anti-subordination understanding of the First Amendment). The anti-subordination theory focuses on equality of voice and dignity more than it does the distribution of property rights. *See* Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 11 (1977) ("The principle's main targets are distinctions of caste, not class.").

[25] Consider, for instance, that even critics of the Lochnerism critique like Lakier tend to confine themselves to its basic framework. *See, e.g.*, Lakier, *supra* note 1, at 1244 ("First Amendment scholars are not wrong when they assert that contemporary free speech law repeats the errors of the Lochner Court; they are simply wrong in what they identify as the error that is being repeated.").

[26] These considerations build on the work of Singer, who stressed the importance of a redistributive lens, but did not apply those considerations to First Amendment law. *See generally* Brief of Public Accommodations Law Scholars as Amici Curiae Supporting Respondents, 303 Creative LLC v. Elenis 600 U.S. 570 (2023) (No. 21-476) (arguing in favor of respondents, but co-authors Singer and Professor James Oleske do not apply Singer's redistribution analysis).

Creative LLC in relation to the Lochnerism framework. Part II then explains why the Lochnerism critique fails to grasp the case's proprietary harms. Part III shows how a redistributive, property-oriented lens helps us reconceptualize the case's implications. The Conclusion emphasizes these implications in terms of the evolution of America's caste system.

I. *303 CREATIVE LLC*'S LOCHNERISM

Proponents of the Lochnerism thesis describe it both as the return of "*Lochner* era" and as the emergence of a "new *Lochner*": a new era of judicial constitutionalism.[27] They hold that the Court's neo-Lochnerism entails a return to its early twentieth-century defense of liberty of contract principles under the First Amendment rather than the Fourteenth Amendment's Due Process Clause.[28] In particular, they note, the Court has developed a commercial speech doctrine that allows it to secure contract liberty as a limit to and weapon against more democratic modes of economic regulation.[29] *303 Creative LLC* builds on these trends in at least two ways: first, it expands the category of commercial speech itself; second, it strengthens commercial speech protections.[30]

Though the *303 Creative LLC* Court relied on a line of First Amendment expressive association cases to justify its decision, it ultimately expanded the category of commercial speech to encompass wedding websites produced by single-owner, for-profit businesses.[31] For decades, already, the Court had recognized protected commercial speech as an exceedingly broad category.[32] *303 Creative LLC* reasserted

---

[27] *See, e.g.*, Shanor, *supra* note 1, at 183–92; Shanor, *supra* note 1, at 182 ("Both [Lochners] pit business freedom against the government's ability to structure or facilitate citizen choice. Both privilege the negative over the positive state. And both render courts, not the political branches, the key arbiters of our economic life.").

[28] *See* Jackson & Jeffries, *supra* note 1, at 30 ("[E]conomic due process is resurrected, clothed in the ill-fitting garb of the first amendment, and sent forth to battle the kind of special interest legislation that the Court has tolerated for more than forty years.").

[29] Shanor, *supra* note 1, at 138–73 (narrating the rise and evolution of the commercial speech doctrine between the mid-1970s and early-2010s).

[30] *See, e.g.*, Yoshino, *supra* note 1, at 266; Jacob Eisler, *Discrimination, Private Liberty, and Public Accommodations Law*, 12 TEX. A&M L. REV. (forthcoming 2024) (explaining that "neo-Lochnerist critiques identify the consequences of protecting discrimination as expressive, they do not explain the logic of the decision").

[31] 303 Creative LLC v. Elenis, 600 U.S. 570, 624 (2023) (Sotomayor, J., dissenting) (explaining that "303 Creative LLC is a limited liability company that sells graphic and website designs for profit" and that "Lorie Smith is the company's founder and sole member-owner."). Among the precedent most important for the majority were *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 559–61 (1995) (supporting the exclusion of an LGBTQ+ organization from an Irish St. Patrick's Day parade) and *Boy Scouts of America v. Dale*, 530 U.S. 640, 643–44 (2000) (allowing the Boy Scouts to exclude a gay scoutmaster).

[32] *See infra* note 37.

the category's breadth, in part by electing *not* to proffer anything like limiting principle that might cabin its expansive nature.[33]

Arguably, *303 Creative LLC* also augmented commercial speech's security under the First Amendment. Over the remonstrations of Justice Sonia Sotomayor's dissent, for example, the majority patently rejected the view that the profit motive inhering in petitioner Smith's conduct might be reason to diminish its protection under the First Amendment.[34] Doing so enabled them to claim that commercial website designers—be they individuals or corporations—should be just as protected as "speechwriter[s]" and "visual artist[s]" looking to turn a profit.[35]

The Court also elected not to settle the extent to which commercial speech should be protected under the First Amendment moving forward.[36] For example, it decided not to apply a previous line of cases indicating that speaker- and content-based restrictions on commercial speech should receive heightened scrutiny, and opted instead to dispense with its First Amendment analysis through a set of analogical fact patterns.[37] Yet *303 Creative LLC* clearly suggests that commercial speech is so stringently protected that it supersedes the government's "'compelling interest' in eliminating discrimination in places of public accommodation."[38] Such assertions do not clarify the level of scrutiny that commercial speech restrictions should receive, but they do suggest that the latter should be treated as more sacred to the Constitution than basic antidiscrimination principles.

---

[33] Keren, *supra* note 14, at 4, 18 ("[E]fforts to limit the free speech claim against the enforcement of nondiscrimination laws were made during the hearing, but, as this Article shows, they generated no limiting principle."). Early in the litigation, the State of Colorado stipulated to the facts that: "All of the graphic and website design services Ms. Smith provides are expressive," and that her "wedding websites . . . express [her] and 303 Creative's message" by "celebrating and promoting her view of marriage." *303 Creative LLC*, 600 U.S. at 582. As such, the Court did not need to promulgate a standard specifying the bounds of expressive commerce as a protected category, a task their decision presumably delegates to the lower courts.

[34] *Compare id.* at 634 (Sotomayor, J., dissenting) (distinguishing *Hurley* and *Dale* as pertaining to "private, nonprofit expressive associations"), *with id.* at 600 (majority opinion) (holding that "the First Amendment extends to all persons engaged in expressive conduct, including those who seek profit.").

[35] *Id.* at 2316, 2320.

[36] *See, e.g.*, Christopher R. Green, *Speech, Complicity, Scarcity, and Public Accommodation*, 2023 CATO SUP. CT. REV. 93, 95 (analyzing the implications of the Court's decision to forego the application of tiered-scrutiny analysis).

[37] *See, e.g.*, Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) (holding that the First Amendment applies to commercial speech restrictions because "the free flow of commercial information is indispensable."); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–63, 566 (1980) (holding that courts should apply intermediate scrutiny to laws restricting commercial speech); Sorrell v. IMS Health Inc., 564 U.S. 552, 563, 571 (2011) (suggesting that strict scrutiny may be warranted when laws regulating commercial speech are "content- and speaker-based.").

[38] 600 U.S. at 573 (holding that, nonetheless, "no public accommodations law is immune from the demands of the Constitution.").

These features of the decision highlight *303 Creative LLC*'s vast deregulatory implications. *Inter alia*, public accommodations laws like the Colorado Anti-Discrimination Act are strategies for regulating the economy.[39] Indeed, since the Civil Rights Act of 1964, public accommodations laws have been recognized as legitimate and basically unremarkable applications of the police powers that States retain under the Tenth Amendment and the government's powers under the Commerce Clause.[40] They regulate the economy by ensuring that all vendors who hold themselves open to the public provide goods and services fully and equally to all consumers alike.[41] Until *303 Creative LLC*, the Court had regarded these laws as legitimate commercial regulations.[42] By contrast, it now seems that any contract formed by a for-profit business may be treated as protected speech.[43] *303 Creative LLC* is thus a deregulatory decision because it further diminishes the domain of economic intervention permitted to the political branches at all levels of government. It builds on a line of cases that, since the mid-1970s, attack the regulatory authority of democratically elected bodies.

II. THE LIMITS OF LOCHNERISM

Notwithstanding its evident explanatory power, however, the Lochnerism theory does not provide a total picture of *303 Creative LLC*'s implications. There are two collectives in particular that directly bear the case's costs: the public and the LGBTQ+ community. The fact that understanding the case's Lochnerist dimensions does not require an explicit analysis of these harms is implicit, already, in the foregoing analysis.[44] The purpose of this Part, accordingly, is to bring these harms better into view and, at the same time, explain further why they may escape the vista of the Lochnerism critique.

A. The Costs of 303 Creative LLC

303 Creative LLC imposes multiple forms of harms upon multiple cross-sections of the American population.[45] In this Part, I give special consideration to its

---

[39] *Id.* at 606–07 (Sotomayor, J., dissenting) (explaining that public accommodations laws have "two core purposes:" to ensure "*equal access* to publicly available goods and services" and to establish "*equal dignity* in the common market.").

[40] *See generally* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[41] *See, e.g.*, *303 Creative LLC*, 600 U.S. at 606–09 (Sotomayor, J., dissenting).

[42] *See, e.g.*, *Sorrell*, 564 U.S. at 567 (holding that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.").

[43] Shanor, *supra* note 1, at 185 ("While all contracts operate through speech, not all speech is a contract.").

[44] *See supra* Part I.

[45] 600 U.S. at 638–40 (Sotomayor, J., dissenting) (explaining how, following *303 Creative LLC*, "A stationer could refuse to sell a birth announcement for a disabled couple

proprietary harms.[46] This aspect of the case becomes evident when it is situated in the post-Reconstruction history of public accommodations laws in the United States.[47] As the Jim Crow regime emerged, the legal system increasingly issued private businesses a right—indeed, often a *requirement*—to exclude on the basis of race.[48]

In granting public accommodations editorial discretion over their clientele, these laws simultaneously destroyed the public's "easement of access" to private businesses, a right they had enjoyed for generations.[49] Arguably, a fundamental right underlying this entitlement was the public's liberty to contract in the marketplace.[50] Jim Crow, in other words, destroyed a particular dimensionality of public property.[51]

303 Creative LLC, I suggest, involves an analogous form of harm. Prior to the decision, the public retained a broad right, under federal, state, and local public accommodations laws, to contract with all for-profit businesses, regardless of the protected-class status of the particular, contract-seeking individual.[52] But following *303 Creative LLC*, this right has been stricken, and in its place the Court has erected a vast, new right to exclude.[53]

---

because she opposes their having a child. A large retail store could reserve its family portrait services for 'traditional' families. And so on.").

[46] In part, the purpose of this Essay's proprietary focus is to highlight a dimension of First Amendment harms that also tends to escape the increasingly popular anti-subordination theory. *See, e.g.*, Lakier, *supra* note 7, at 2127 (reimagining the First Amendment "as a tool for protecting the expressive freedom of those at the bottom of the economic and social hierarchies," not as an instrument that takes or redistributes property).

[47] *See, e.g.*, Singer, *supra* note 22, at 1295 (providing an overview of this history).

[48] *Id.*; Christopher W. Schmidt, *Defending the Right to Discriminate: The Libertarian Challenge to the Civil Rights Movement*, *in* SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 417, 422 (Sally E. Hadden & Patricia Hagler Minter eds., 2013) (explaining that a judicially enforceable "right to discriminate" would have also implied a "right *not* to discriminate," thus allowing private businesses resist racial segregation).

[49] Singer, *supra* note 22, at 1295; *see* Schmidt, *supra* note 48, at 422. Scholars debate the extent to which this right was a general feature of eighteenth- and nineteenth-century British and American common law. *Compare* Singer, *supra* note 22, *with* Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156 (1904), *and* Green, *supra* note 36.

[50] *See, e.g.*, Singer, *supra* note 22, at 1485.

[51] For an account of tensions between the central principles of *Lochner* and Jim Crow, see generally Singer, *supra* note 22. For an analysis of their symbiosis, see, for example, Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 VILL. L. REV. 767, 775 (1988) (arguing that *Lochner*, like *Plessy*, "protected existing property and political arrangements, while ignoring the disadvantages to the powerless caught in those relationships: the exploited whites [in *Lochner*] and the segregated blacks [in *Plessy*].").

[52] *See generally* C. MALLORY & B. SEARS, EVIDENCE OF DISCRIMINATION IN PUBLIC ACCOMMODATIONS BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY (2016), https://williamsinstitute.law.ucla.edu/publications/lgbt-public-accomm-discrimination/ [https://perma.cc/G5VU-ZXKA] (providing an overview of these laws and information about the rate at which they are violated).

[53] *See, e.g.*, Koppelman, *supra* note 20 (arguing that *303 Creative LLC* "declare[s] for the

303 Creative LLC also resembles the Jim Crow system because it simultaneously imposes this harm upon the public *and* upon at least one of the vulnerable communities of which it is comprised. The case degrades the LGBTQ+ community's liberty of contract rights just as the Jim Crow Court had done to the African American population a century prior.[54] As the dissent in *303 Creative LLC* emphasizes, the decision entails that "same-sex couples" no longer have a right to "the full and equal enjoyment of" marriage "services."[55] Marriage rights, of course, are contract rights.[56] But in a broader sense, the LGBTQ+ community has been deprived of its right to contract with for-profit businesses, both for marriage services and for services of other kinds.[57]

To note, the taking of this particular proprietary right is not the only kind of harm involved in the case. If anything, as the dissent emphasizes, the case's foremost harms may be dignitary in nature,[58] a fact that may lead scholars to reach for other theories as they seek to understand and contextualize the decision and its practical implications.[59] If so, however, it becomes all the more important to emphasize its additional, proprietary harms. These are harms that the Lochnerism critique, like theories that foreground dignitary harms, may have difficulty capturing.

---

first time that some for-profit businesses have a constitutional right to discriminate against anyone for any reason they like."); *see also* 303 Creative LLC v. Elenis, 600 U.S. 570, 640 (2023) (Sotomayor, J., dissenting) (emphasizing that "a dollar in the hands of one person" no longer "will purchase the same thing as a dollar in the hands of another." (quoting Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968))).

[54] *See, e.g.*, Singer, *supra* note 22, at 1295.

[55] 600 U.S. at 637.

[56] Richard A. Epstein, *Caste and the Civil Rights Laws: From Jim Crow to Same-Sex Marriages*, 92 MICH. L. REV. 2456, 2474–75 (1994) (describing the expansion of contract liberties as one of the purposes of civil rights laws authorizing interracial and same-sex marriages).

[57] *See, e.g.*, *303 Creative LLC*, 600 U.S. at 638–40 (Sotomayor, J., dissenting).

[58] *Id.* at 637.

> By issuing this new license to discriminate in a case brought by a company that seeks to deny same-sex couples the full and equal enjoyment of its services, the immediate, symbolic effect of the decision is to mark gays and lesbians for second-class status. In this way, the decision itself inflicts a kind of stigmatic harm, on top of any harm caused by denials of service. The opinion of the Court is, quite literally, a notice that reads: "Some services may be denied to same-sex couples."

Id. Moreover, as the decision undermines LGBTQ+ protections under public accommodations laws, the decision also inflicts secondary, dignitary harms. *Id.* at 606–07 (emphasizing that public accommodations laws are about ensuring "equal access" and "equal dignity" to all persons). Each act of discrimination now authorized under this decision will present these kinds of harms, both inflicting psychic trauma and degrading the reputation of LGBTQ+ people, both as individuals and as a community.

[59] *See, e.g.*, Lakier, *supra* note 7.

B. Lochnerism's Loopholes

Indeed, proprietary redistributive harms may slip, like sand, through the fingers of the Lochnerism theory. This may occur, in part, because of the theory's scale: its tendency to focus on the historically evolving nature of major institutional conflicts.[60] Here, however, I want to focus on a different potential reason for such slippage: that the Lochnerism theory overwhelmingly focuses on the threat of economic deregulation to American democracy.[61] Debates over the extent to which democratically controlled institutions should determine economic relations are, likewise, fundamentally about questions of property. However, they tend to focus on the extent to which property should be *regulated*, not the shape that its *distribution* should take.

Consider that libertarians, as Professor Samuel Bagenstos has emphasized, have long resented public accommodations laws as instances in which the government reaches beyond its legitimate authority.[62] Specifically, they argue that these laws weaken private property rights in favor of anti-discrimination principles.[63] Faced with such arguments, proponents of the Lochnerism theory may tend simply to flip the script, arguing that democratic control should take precedent over private property.[64] That is, they may well agree with a basic premise of the libertarian position: that the crucial question is *how much* property rights should be protected.

Accession to this particular premise, however, makes it difficult to bring the proprietary harms of *303 Creative LLC* into view. This is because it imagines society as maintaining a basic, formal equality of property rights and then, subsequently, debates how much protection these rights should receive. But what it overlooks is that affording more or less protection to particular rights may also involve their reallocation. In *303 Creative LLC*, thus, what appears as the strengthening of liberty of contract rights actually entails the taking of established property rights from some and the simultaneous granting of new entitlements to others: what it does, in other words, is rearrange the distribution of liberty of contract itself.[65]

Of course, some Lochnerism theorists may want to respond that their approach has other means of bringing the maldistribution of property into view. For example, they might argue that their commitment to democracy leads them to emphasize the importance of a fair distribution of economic resources.[66] To be sure, the weakening

---

[60] *See, e.g.*, *supra* note 1.

[61] *See, e.g.*, *id.*

[62] *See generally* Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205 (2014).

[63] *Id.* at 1220–28 (analyzing libertarian politician Rand Paul's desire to abolish Title II of the Civil Rights Act of 1964).

[64] *See, e.g.*, *supra* note 1.

[65] *See generally supra* Part II.

[66] *See generally* JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY (2022) (describing a project to embed redistributive ideals into constitutional law).

of democratic-regulative potentialities during the new *Lochner* era—which is *our* era—strips both the public, and thus the many vulnerable communities of which it is made up, of its power to collectively determine the rules under which it lives.[67] As a theoretical matter, however, the rise of juristocracy in the twentieth and twenty-first centuries does not necessarily compel such consequences.[68] Indeed, as John Hart Ely once pointed out, a powerful judiciary might protect democracy just as much as it might destroy it.[69]

Overall, the approach's attention to democracy entails that questions of property are likely to be litigated in terms of their utility for other values, like equality of voice. As a democratically oriented theory, Lochnerism emphasizes the way that private businesses disempower individuals, communities, and the public writ large to determine their fates by participating in the democratic process.[70] It may accept that democracy requires a certain distribution of resources. In the end, however, its purview, for the most part, is participation, not property.

III. FROM DEREGULATION TO REDISTRIBUTION

The limits of the Lochnerism critique reflect the need for a theory capable of centering redistributive harms.[71] Drawing on Singer's *No Right to Exclude*, this Part briefly sketches what a theory of this kind might look like.[72] Such a theory, I suggest, can be strikingly simple. Its basis has already been laid by the traditional critique of public accommodations laws as takings.[73] We can think of it as involving two basic steps: first, the identification of a baseline (T1) distribution; and, second, the identification a new (T2) allocation. The harm lies in the difference between T1 and T2.

A T1 distribution might be constructed by looking to history. The work of Singer—in establishing a compelling case for the existence of a relatively universal

---

[67] *See generally* WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION (2015) (describing the corrosive spread of neoliberalism and its undermining of democratic society).

[68] *See generally* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004) (commenting on the phenomenon of juristocracy and its key principles).

[69] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (explaining the immense power of the modern judiciary over democracy).

[70] Purdy, *supra* note 1, at 202 (arguing that Lochnerism "makes unequal economic power much harder for democratic lawmaking to reach.").

[71] *See supra* Part II.

[72] *See generally* Singer, *supra* note 22.

[73] *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (ruling against the plaintiffs' argument that the Civil Rights Act of 1964, which had been passed under the Commerce Clause, was a "taking" under the Due Process Clause of the Fifth Amendment because it "deprived [him] of the right to choose [his] costumers and operate [his] business as [he] wishe[d]."); U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. amend. V; *Heart of Atlanta Motel, Inc.*, 379 U.S. at 243–44.

common law entitlement to contract with public-facing businesses—is helpful in this vein.[74] It alleges evidence toward a T1 distribution that Jim Crow separate-but-equal laws unconstitutionally violated. These laws reallocated property: they took basic liberty of contract entitlements from both the public and from African American people, granting additional liberty of contract entitlements, by the same token, to businesses and the white population. The resulting T2 property distribution typified Jim Crow society, which enforced, as Singer puts it, "a business right to exclude correlative with no right of access by members of the public, unless the business fit into a narrow range of public service companies."[75]

A redistributive analysis of *303 Creative LLC* might consider using the same T1 distribution—indeed, its universality makes it an attractive contender. But its relative antiquity might also render it vulnerable to certain criticisms. The distribution of property imposed by CADA, thus, might serve as a powerful alternative. CADA, similarly, extended a right to "full and equal enjoyment" of contract liberties to the public as an entity explicitly including LGBTQ+ individuals.[76] Against this T1 distribution, *303 Creative LLC* imposed a new T2 settlement "abolishing," yet again, what Singer once called "the general right held by the public to have access to places open to the public and replacing it with a general right of businesses to control access to their property."[77]

This kind of analysis will undoubtedly have its critics. For example, the choice of T1's and T2's here appears to be motivated by principles of a non-neutral variety.[78] It must be recalled, however, that my principal aim in this Essay is to highlight the horizons of the Lochnerism theory and to do so by bringing otherwise-obscured harms into view.[79] It is not, that is, to advance the claim—however interesting or provocative it may be—that *303 Creative LLC* or other instances of government-imposed restrictions on public accommodation laws are unconstitutional under the Fifth Amendment. Bringing to light the harm of property redistribution, as an initial matter, is sufficient for our purposes here.[80]

---

[74] *See generally* Singer, *supra* note 22. To be sure, in the early nineteenth century, many states passed "black laws" restricting free African Americans' rights of access to public accommodations; KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT: FROM THE REVOLUTION TO RECONSTRUCTION (2021). However, as Singer suggests, the existence of such laws itself points to the generally accepted distribution of property rights as well as to the fact that its application extended to all jurisdictions not covered by black laws. Singer, *supra* note 22, at 1236–37.

[75] Singer, *supra* note 22, at 1295.

[76] COLO. REV. STAT. § 24-34-601(2)(a).

[77] Singer, *supra* note 22, at 1295.

[78] *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[79] *See, e.g.*, *supra* Part II.

[80] Though, of course, if the argument advanced here also inspires further consideration of our theories of property and constitutional law, so much the better.

CONCLUSION: OUR EVOLVING CASTE SYSTEM

To conclude, I wish, briefly, to make an additional suggestion regarding the implications of this Essay's proposed theoretical reorientation. A popular contemporary narrative about the Civil Rights Act of 1964 is that it was the final nail in the coffin of a caste system that had characterized the United States for generations. By finally mandating an end to private discrimination, it has been said, the Act finally established a formal equality of rights. Thinking about *303 Creative LLC* and the history of public accommodations laws through the lens of property, however, places difficult questions to this narrative. If we accept that, today, the Constitution no longer mandates a duty on the part of public-facing businesses to serve the public,[81] we simply cannot claim to have realized formal equality or to have overcome caste.

Many readers of *303 Creative LLC* will likely agree with Justice Sotomayor who, in dissent, argued that the majority decision—like vendors who publicly advertise that they will not serve LGBTQ+ customers themselves—"sends the message that we live in a society with social castes . . . say[ing] to the child of the same-sex couple," for instance, "that their parents' relationship is not equal to others."[82] An evident evil of the decision and its effects, that is, is that they will inflict dignitary harms upon a broad range of Americans.[83]

But a caste system implicates both status *and* property.[84] As Singer stresses in *No Right to Exclude*, the "common-law right to exclude . . . was adopted" by Jim Crow courts in order to "establish a racial caste system in access to the market."[85] Caste, as we know, does not mean race;[86] it is, as Singer implies, an economic category that captures the stratification of access and opportunity in capitalist society.[87] Surely, the First Amendment is currently being weaponized as a deregulatory mechanism. Perhaps, however, the implications of *303 Creative LLC* run somewhat deeper. The case, if anything, is a warning: a declaration that, in the twenty-first century, the Supreme Court may willingly restore caste.

---

[81] *See, e.g.*, *supra* Part III.

[82] 303 Creative LLC v. Elenis, 600 U.S. 570, 637 (2023) (Sotomayor, J., dissenting).

[83] *See id.* at 638.

[84] *Cf.* Karst, *supra* note 24, at 11.

[85] Singer, *supra* note 22, at 1300, 1295, 1452, 1466, 1471, 1474 n.748, 1476.

[86] *See, e.g.*, Charisse Burden-Stelley, *Caste Does Not Explain Race*, BOS. REV. (Dec. 15, 2020), https://www.bostonreview.net/articles/caste-does-not-explain-race/ [https://perma.cc/23ES-HQHU].

[87] *See, e.g.*, Singer, *supra* note 22, at 1471.