
RECENT BOOK

REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM. By David E. Bernstein. Chicago, Ill.: University of Chicago Press. 2011. Pp. viii, 194. \$34.99.

In *Lochner v. New York*,¹ the Supreme Court held that a law limiting bakers' weekly work hours to sixty was an unconstitutional violation of the liberty of contract, which was implicit in the Fourteenth Amendment's Due Process Clause.² Since the case was decided in 1905, *Lochner* has become "likely the most disreputable case in modern constitutional discourse" and "shorthand for all manner of constitutional evils" (p. 1). In *Rehabilitating Lochner*, Professor David E. Bernstein provides a convincing historical account of *Lochner* that challenges many of the negative narratives that have caused *Lochner* to become a quintessential anticanonical case.³ By doing so, this book suggests a useful lesson: *Lochner*phobia, which has significantly influenced the development of substantive due process rights in the past, should not shape the discourse over those rights in the future.

Lochner has been commonly described as a case in which the Court "capitulat[ed] to big business" to overturn social justice legislation;⁴ protected an invented, unenumerated right that was not rooted in precedent or constitutional text; and supplanted legislative judgment in favor of judicial judgment.⁵ Along these lines, scholars complain that *Lochner*-era courts "employed a rigid formalism that neglected social realities," "imposed laissez-faire conservative values," and "overstepped their appropriate roles as judges."⁶

Rehabilitating Lochner provides a convincing counternarrative. Bernstein disputes the traditional assessments of both *Lochner*'s underpinnings and its impact, finding the former much more justifiable and the latter much more commendable than they are typically consi-

¹ 198 U.S. 45 (1905).

² *Id.* at 64.

³ *Rehabilitating Lochner* also offers an account of how the negative narrative may have developed, which is beyond the scope of this piece. The book traces the narrative to Progressives, whose "commitment to activist government to promote their vision of the common good, and a concomitant impatience, at best, with competing claims of individual right," shaped their view of *Lochner* (p. 44).

⁴ Morton J. Horowitz, *The Supreme Court, 1992 Term — Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 77 (1993).

⁵ James E. Fleming, *Fidelity, Basic Liberties, and the Specter of Lochner*, 41 WM. & MARY L. REV. 147, 150, 173–74 (1999); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 418–19 (2011).

⁶ Jack M. Balkin, "Wrong the Day It Was Decided": *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 686 (2005).

dered to be. Bernstein then considers how these misconceptions have reverberated through present-day constitutional doctrine.

Rehabilitating Lochner begins by disputing four aspects of the conventional wisdom regarding *Lochner*'s underpinnings. Bernstein first addresses the basis of the liberty of contract. He then discusses three issues regarding the narrative about *Lochner* itself: the valence of each interest at stake, the positions of the Justices, and the response from the public.

Bernstein argues that the substantive due process and liberty-of-contract doctrines were rooted in American principles and traditions that had developed long before *Lochner*. While *Lochner*'s critics assert that liberty of contract "sprang ex nihilo out of the Supreme Court justices' minds in the 1890s with the intent to favor the interests of big business and suppress the working class" (p. 8), Bernstein points out that, by 1857, multiple state constitutional decisions had relied on the Due Process Clause to prevent legislatures from unjustly meddling with property rights (pp. 9–10). Furthermore, in *Hurtado v. California*,⁷ "the Supreme Court tied the concept of due process of law to the common law tradition of recognizing inherent limits on government authority" (p. 13).⁸ Finally, lower court judges relied on the dissents in the *Slaughterhouse Cases*⁹ to argue "that there is a constitutional right to pursue a lawful calling free from unreasonable government interference" (p. 17). This right eventually transformed into a more general constitutional right of "liberty of contract" based on ideas of contractual freedom that were rooted in "American constitutional consciousness from the beginning of the republic" (p. 18) and the contract-law principle of "liberty of contract" that had become common by the 1870s (pp. 18–19).

Bernstein next sets out to turn the traditional account of *Lochner* on its head by demonstrating that central assumptions about the case may not, in fact, have been true: the case may not have been about "overworked, exploited bakery workers"; decided by a Court that "refused to acquiesce to . . . progress and social justice, . . . instead protect[ing] the interests of large corporations"; decided by a sharply divided Court that relied on "abstract notions of rights divorced from

⁷ 110 U.S. 516 (1884).

⁸ Bernstein shows that, between the early-nineteenth-century state court cases and *Hurtado*, the use of due process to regulate legislative substance evolved through cases such as *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), in which the majority and dissenting Justices agreed that "the Due Process Clause protected substantive property rights" (p. 10), and *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655 (1875), in which the Court acknowledged that "there are limitations on [government] power which grow out of the essential nature of all free governments" (p. 11) (alteration in original) (quoting *Loan Ass'n*, 87 U.S. at 663) (internal quotation marks omitted).

⁹ 83 U.S. (16 Wall.) 36, 83 (1873) (Field, J., dissenting); *id.* at 111 (Bradley, J., dissenting); *id.* at 124 (Swayne, J., dissenting).

social context”; or received with universal criticism by the public (p. 23). Instead, *Rehabilitating Lochner* posits that the bakers’ union designed the hours legislation at issue in *Lochner* in an effort to drive both small and nonunion bakeshops out of business; as a result, the Court was not in fact seeking to protect large corporations (p. 23). In addition, Bernstein argues that eight Justices agreed, based on prior legal developments, that the Due Process Clause protects liberty of contract (p. 35). Further, *Rehabilitating Lochner* suggests that while Progressives and labor unions immediately condemned *Lochner*, law review articles and newspaper editorials immediately praised the decision (pp. 38–39).

Rehabilitating Lochner also challenges the negative narrative that has developed regarding *Lochner*’s impact on subsequent jurisprudence. Bernstein rebuts the conventional wisdom that liberty of contract had to be sacrificed subsequently to protect civil liberties because the two were mutually exclusive (p. 107). In the 1920s, due process jurisprudence expanded beyond property rights and liberty of contract to include educational liberty (pp. 93–95)¹⁰ and freedom of expression (pp. 99–102).¹¹ At that time, due process decisions did not distinguish between “civil liberties” and “economic liberties” but instead treated them as parallel rights that could be simultaneously supported (pp. 90, 101, 107). Eventually, protections for these two sets of liberties were decoupled (p. 101). Thereafter, protection for freedom of expression and other civil liberties was able to expand as “the scope of the liberty of contract doctrine began to shrink” (p. 102).¹² But this decoupling did not occur because conflict between the liberties forced a choice (p. 107).

According to Bernstein, not only did protection of liberty of contract *not* necessarily come at the expense of protection of other civil liberties, but liberty-of-contract principles were also used to “expand[] constitutional protections for the rights of African Americans and women and [to justify protections] for civil liberties” (p. 55). Turning to the workplace, Bernstein explains how *Lochner*-type thinking about

¹⁰ See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (invalidating a law prohibiting schools from teaching pre-high school classes in a foreign language based on a “right of the individual . . . to engage in any of the common occupations of life” and to “acquire useful knowledge”); see also *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (reasserting parents’ right to direct the education of their children). The *Meyer* Court’s assertion of broad liberty rights was supported by citations to liberty of contract and due process decisions, including *Lochner*. *Meyer*, 262 U.S. at 399.

¹¹ See, e.g., *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

¹² One way that liberty-of-contract protection shrank was through the Court’s expansion of the “affected with a public interest” exception to liberty of contract “to the point where just about any regulation of prices passed muster under the Due Process Clause” (p. 103). Despite the decline of liberty of contract, the Court continued to use the Due Process Clause to protect individual liberties such as freedom of speech (pp. 104–06).

liberty of contract enhanced women's rights by encouraging the argument that women "are entitled to the same rights under the Constitution to make contracts with reference to their labor as are secured thereby to men. . . . Her right to choice of vocations cannot be said to be denied or abridged on account of sex" (p. 57).¹³

Exploring *Lochner's* impact on segregation cases, *Rehabilitating Lochner* argues that the *Lochner* line of cases was not "philosophically at odds with racial equality" (p. 88) or based on ideological premises similar to those invoked in *Plessy v. Ferguson*,¹⁴ as is commonly asserted (p. 73). Instead, Bernstein's discussion of *Buchanan v. Warley*¹⁵ and *Bolling v. Sharpe*¹⁶ reveals that, had it not been for the NAACP's "hesitan[ce] to rely on 'conservative' constitutional doctrines like liberty of contract" in their arguments before the Court (p. 85), the Court could have used *Lochner's* due process and liberty-of-contract arguments instead of the Equal Protection Clause to expand the rights of African Americans (pp. 85, 87).¹⁷ For example, Chief Justice Warren's draft opinion in *Bolling* relied heavily on citations of liberty-of-contract-era due process cases to argue that the right to pursue an education was a fundamental liberty upon which the government could not impose arbitrary restrictions (p. 87). However, these citations were absent from the final opinion (p. 87). The resulting opinion is "so watered down and cryptic" that it has been subsequently characterized as an equal protection ruling when in fact *Bolling* was a "substantive due process' opinion with roots in several liberty of contract era cases" (p. 88).

Finally, *Rehabilitating Lochner* turns to *Lochner's* impact on modern constitutional law. Specifically, Bernstein focuses on *Lochner's* reemergence in 1965, when the Court, for the first time since the mid-1930s, relied on the Due Process Clause to protect unenumerated rights in *Griswold v. Connecticut*¹⁸ (p. 113). In invalidating a law that prohibited doctors from prescribing contraceptives, Justice Douglas "relied in part on *Meyer* and *Pierce*," two cases from the *Lochner* line of cases, "for the proposition that the Due Process Clause protects a

¹³ Bernstein quotes *Ritchie v. People*, 40 N.E. 454, 458 (Ill. 1895). Alterations are in the original, and internal quotation marks have been omitted. Amid public outrage and changing economic conditions due to the Depression, the Court eventually changed positions, "narrowed liberty of contract's scope," and upheld a "protective labor law[]" in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (pp. 70–71).

¹⁴ 163 U.S. 537 (1896).

¹⁵ 245 U.S. 60 (1917).

¹⁶ 347 U.S. 497 (1954).

¹⁷ As an example, *Rehabilitating Lochner* points to a Georgia Supreme Court case that used liberty of contract to invalidate a law that made it illegal for black barbers to cut white children's hair (p. 85).

¹⁸ 381 U.S. 479 (1965).

right to privacy” (p. 115). Justice Douglas denied that he was relying on *Lochner*,¹⁹ instead treating *Meyer* and *Pierce* as First Amendment cases and pointing to “penumbras, formed by emanations.”²⁰ But in fact, “all the justices in the *Griswold* majority relied on . . . the *Lochner* line of cases” (p. 116). Then, in *Roe v. Wade*,²¹ the Court, again careful not to rely on *Lochner*, held that there was a right to terminate a pregnancy “founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action.”²² In light of these cases, “conservative jurists [became] hostile to ‘substantive due process’ as represented by *Lochner*” and equated *Roe* with *Lochner* (p. 120). In response, liberal scholars created a variety of rationales to explain why their due process precedents were not “*Lochnerizing*” or at least why the part of *Lochner* that endorsed using the Due Process Clause to protect unenumerated rights was not incorrect (pp. 120–22). The book ends with a summary of its conclusions, including that the liberty-of-contract decisions were “far more deferential to regulatory legislation” than the traditional narrative suggests (p. 126); that they were “likely a net positive from the standpoint of their practical effects”; and that they established the principle “that the police power is not infinitely elastic” (p. 127).

A fear of having one’s arguments or analysis be equated with *Lochner* has had a negative impact on the development of modern substantive due process rights, such as the constitutional right to privacy. *Rehabilitating Lochner* demonstrates the danger of allowing a single case that is subject to many interpretations — including the interpretation promoted here by Bernstein — to direct the development of such significant legal areas. Supporters of modern substantive due process decisions should no longer let *Lochnerphobia* distort their arguments, and opponents of modern substantive due process decisions should no longer rely on *Lochnerphobia* as a primary attack. This is an important lesson that will hopefully resonate with courts and scholars as they consider what is likely to be the next frontier in privacy law — information privacy.

The history of the substantive due process privacy doctrine demonstrates the negative impact *Lochnerphobia* may have on future substantive due process decisions.²³ *Lochnerphobia* influenced the priva-

¹⁹ *Id.* at 481–82 (“Overtones of some arguments suggest that *Lochner v. New York* should be our guide. But we decline that invitation We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.” (citations omitted)).

²⁰ *Id.* at 484.

²¹ 410 U.S. 113 (1973).

²² *Id.* at 153.

²³ Since a part of the plurality in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), attributed to Justice O’Connor, provided a way to distinguish *Roe* from

cy line of cases in two significant ways. First, in order to avoid comparisons to *Lochner*-era cases, the Court sometimes obscured the underlying logic driving its conclusions, resulting in a series of decisions that were neither as clear nor as honest as they could have been.²⁴ For example, in *Griswold*, Justice Douglas “denied . . . that he was relying on a *Lochner*-like understanding of the Due Process Clause” (p. 115) and instead relied on the First, Third, Fourth, Fifth, and Ninth Amendments.²⁵ However, “all of the justices in the *Griswold* majority relied on *Meyer* and *Pierce*, which in turn were firmly in the *Lochner* line of cases” (p. 116).²⁶ The result was a fragmented decision that “obscur[ed] the constitutional derivation of the right of privacy.”²⁷ *Roe* provides a second example. “[T]he Court’s opinion, like the multiple opinions in *Griswold*, tends to obscure rather than elucidate the analytical bases of the decision,”²⁸ thereby making the decision vulnerable to attack by those who did not recognize *Griswold* as a substantive due process decision or did not think that *Griswold*’s application of substantive due process was proper.²⁹

Second, as set forth in *Rehabilitating Lochner*, a narrative equating *Roe* to *Lochner*³⁰ quickly developed (p. 120), and cries of “*Lochner*-

Lochner, Justices Souter and Kennedy have succumbed less to *Lochner*phobia. See David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1523 (2005). But *Lochner*phobia has by no means been eradicated, and *Lochner* is still commonly used as an epithet. See Rebecca L. Brown, *The Art of Reading Lochner*, 1 N.Y.U. J.L. & LIBERTY 570, 586 (2005) (discussing “the continued — even accelerating — use of the *Lochner* epithet as an utterly under-theorized criticism of constitutional interpretations”). The majority opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), provides an example of Justice Kennedy’s willingness to openly cite *Meyer* and *Pierce* as “broad statements of the substantive reach of liberty under the Due Process Clause.” *Id.* at 564. Justice Scalia’s dissent in *Lawrence* provides an example of how *Lochner* is still used as an attack. *Id.* at 592 (Scalia, J., dissenting) (stating that the law at issue constrains liberty, but so do laws prohibiting “working more than 60 hours per week in a bakery,” clearly referring to *Lochner*).

²⁴ See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 300–01 (2009); Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner*, 61 WASH. L. REV. 293, 307–08 (1986).

²⁵ *Griswold*, 381 U.S. at 484.

²⁶ See, e.g., *id.* at 515–16 (Black, J., dissenting).

²⁷ Garfield, *supra* note 24, at 307; see also David E. Bernstein, Essay, *Bolling, Equal Protection, Due Process, and Lochnerphobia*, 93 GEO. L.J. 1253, 1283–84 (2005) (stating that the *Griswold* opinion was “distorted by the Justices’ *Lochner*phobia”); Brown, *supra* note 23, at 580 (discussing how *Griswold* led to the “fragmentation of the Liberty Clause” into rights that are fundamental and rights that are ordinary, which was “not an auspicious beginning for the protection of individual liberty, which has been struggling ever since”); Garfield, *supra* note 24, at 308 (“The ghost of *Lochner* . . . made many courts and commentators wary of placing the constitutional roots of the right of privacy where they clearly belong, in the due process clause of the fourteenth amendment.”).

²⁸ Garfield, *supra* note 24, at 313.

²⁹ *Id.* at 316.

³⁰ See generally John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973). See also *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting)

izing” became an easy and powerful attack for privacy’s opponents.³¹ While throwing around “*Lochner*” may seem to be an easy way to convey the set of criticisms that have become associated with the case, using the case as a shorthand does not make it clear what the opponents’ primary concerns are, how those concerns manifest themselves in the case, or what the substantive arguments against the constitutional claim may be.³² The focus in the scholarship and in Court opinions on trying to equate the privacy line of cases to *Lochner* has diverted attention away from more substantive discussions and stunted the constitutional discourse regarding the right to privacy.³³

The next frontier of privacy law may be information privacy. Information privacy has attracted increased attention as the advent of the Information Age and development of technology have resulted in an increase in the collection of personal data.³⁴ In 1977, the Supreme Court hinted at a role for the Constitution in protecting information privacy in *Whalen v. Roe*.³⁵ While the Court declined to determine whether the Constitution protects information privacy and instead reached a decision on other grounds,³⁶ the Court implied that there may be a protected privacy interest “in avoiding disclosure of personal matters” and in “independence in making certain kinds of important decisions.”³⁷ Subsequently, many circuit courts have interpreted the

(“[T]he result [the majority] reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in [*Lochner*].”).

³¹ *Lochner* has in fact remained an easy and reliable “symbol of one’s jurisprudential opponents’ perceived faults” in all sorts of cases (p. 122). While, in the privacy line of cases, conservatives invoked *Lochner* to criticize liberal decisions, throughout history both liberals and conservatives have taken advantage of *Lochner*phobia to attack decisions they thought were substantively unjust. For example, Justice Stevens used *Lochner* to criticize the Court’s ruling that property regulations unconstitutionally violated the Takings Clause in *Dolan v. City of Tigard*, 512 U.S. 374, 406 n.9 (1994) (Stevens, J., dissenting). See also *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2675 (2011) (Breyer, J., dissenting) (stating that the Court’s opinion “would risk [a] . . . retur[n] to the bygone era of *Lochner*” (second alteration in original) (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 589 (Rehnquist, J., dissenting) (internal quotation mark omitted))).

³² See Greene, *supra* note 5, at 418 (noting that for such an unpopular opinion, *Lochner* does not generate much agreement as to why it was actually wrong); David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 374 (2003) (same); see also Fleming, *supra* note 5, at 173 (explaining that to say someone is “*Lochnerizing*” is “to charge someone with doing whatever it was that the Supreme Court did in *Lochner* that was so horrible,” without any uniform understanding of what that actually means).

³³ See Brown, *supra* note 23, at 580–81 (noting that certain privacy rights “ha[ve] been struggling . . . to find an appropriate textual home and theoretical foundation”).

³⁴ See Francis S. Chlapowski, Note, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. REV. 133, 133–34 (1991).

³⁵ 429 U.S. 589 (1977).

³⁶ *Id.* at 598, 605–06.

³⁷ *Id.* at 599–600. The possibility of a right to information privacy was also hinted at in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), but information privacy was not independently addressed in that decision, which instead focused on President Nixon’s Fourth

Court as holding that a constitutional right to information privacy exists.³⁸

However, the Court has never explicitly recognized such a right, and in 2011, presented with the opportunity to determine whether the Constitution protected a right to information privacy in *NASA v. Nelson*,³⁹ it decided the case without clearly determining whether such a right exists.⁴⁰ In his opinion concurring in the judgment, Justice Scalia predicted that the majority's decision would perpetuate an uncertainty regarding the Constitution that would result in confusion amongst the lower courts and increase the number of information privacy lawsuits.⁴¹ Therefore, it is likely that the question of whether there is a constitutionally protected right to information privacy is likely to be the subject of future consideration by courts and legal scholars.

Rehabilitating Lochner provides a strong reason why, when considering information privacy, courts, scholars, and interested parties do not have to succumb to the pitfalls experienced in the early development of the right to privacy. Whether or not one completely believes in Bernstein's account of *Lochner*, the book raises questions about the widely accepted *Lochner* narrative and demonstrates that there is more than one rationally supported account of the case. By providing an alternative account of *Lochner*, especially one that eliminates many of the negative connotations of the case, Bernstein's book highlights the danger of allowing a single narrative regarding one line of case law, no matter how powerful, to disproportionately affect the development of doctrine: What if that narrative is simply a distorted version of the truth? If the common narrative is not the only possible characterization of *Lochner*, why should that narrative be allowed to shape constitutional discourse? If *Lochner* has come to stand for a series of evils that may or may not reflect what was going on in *Lochner* itself, what does it mean to say someone is "*Lochnerizing*"? The book therefore suggests that neither supporters nor opponents of modern substantive due process rights *should*, let alone *must*, allow "the ghost of *Lochner*" to limit their constitutional arguments.

As courts and scholars discuss whether the constitutional protection of privacy extends to information privacy, both supporters and oppo-

Amendment claim. *Id.* at 455–66; see also Russell T. Gorkin, Commentary, *The Constitutional Right to Informational Privacy: NASA v. Nelson*, 6 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 1, 6–7 (2010).

³⁸ See Gorkin, *supra* note 37, at 8 n.56 (collecting cases).

³⁹ 131 S. Ct. 746 (2011).

⁴⁰ *Id.* at 756–57 ("As was our approach in *Whalen*, we will assume for present purposes that the Government's challenged inquiries implicate a privacy interest of constitutional significance. We hold, however, that, whatever the scope of this interest, it does not prevent the Government from asking reasonable questions" (citation omitted)).

⁴¹ *Id.* at 765–69 (Scalia, J., concurring in the judgment).

nents of such protection would benefit from considering *Rehabilitating Lochner* and resisting the urge either to allow *Lochner*phobia to shape the way they argue in support of information privacy or to use *Lochner*phobia as an easy way to argue against it. As the experiences with *Griswold* and *Roe* illustrate, if supporters of information privacy try to superficially distinguish their arguments from those made in *Lochner* instead of clearly embracing and explaining a foundation in the Due Process Clause, their arguments will likely be dishonest, fragmented, confusing, and open to a whole set of avoidable critiques.⁴² Conversely, if opponents of a constitutional right to information privacy continue to use *Lochner* as a sloppy shorthand for a host of complaints, as a rally for their cause, and as a loaded epithet against their adversaries, “they are substituting empty rhetoric for meaningful constitutional argument” (p. 129), which will also result in more ambiguity in the field of substantive due process.⁴³ If courts and scholars instead recognize that there are multiple supportable accounts of *Lochner* and therefore choose not to allow the common, negative narrative to shape their analysis completely, the debate surrounding a potential right to information privacy will be substantially clearer, more robust, and more productive.

⁴² Cf. Garfield, *supra* note 24, at 353 (discussing due process, privacy, and *Lochner*phobia in the wake of *Roe* and concluding that “[w]hat is needed is a frank acknowledgement of the continuing vitality of substantive due process, coupled with a conscientious effort to enunciate a sound constitutional rationale for the substantive due process right of privacy”).

⁴³ For example, an attack that proponents of the right to information privacy are “*Lochnerizing*” could mean that the opponent believes that it is wrong to protect any unenumerated right through the Due Process Clause, that the Due Process Clause should be construed narrowly, that this is just the wrong type of substantive liberty to protect, or some combination thereof. Cf. Fleming, *supra* note 5, at 173–75. Even if an individual’s invocation of *Lochner* made his opposition to information privacy extremely clear, the discourse would be much more fruitful and coherent if the opponent explained the legal and normative bases for his concerns. Proponents could then, hopefully, directly respond to those concerns instead of being so scared of the loaded term “*Lochnerizing*” that they focus on distinguishing their approach from that used in *Lochner* or obscuring their reasoning so it looks less like *Lochner*.