

Lochner lives on

Lochner presumption of equal power lives in labor law and undermines constitutional, statutory, and common law workplace protections

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Summary: Samuel Bagenstos, University of Michigan In the early 20th century (the “Lochner era”), courts invalidated numerous labor and employment laws for violating a supposed constitutional “freedom of contract.” [togglable text="expand abstract"] The Lochner-era decisions rested on a key premise—that workers and employers were equally free to enter into bargains, or not enter into bargains, with each other. Most lawyers think that the courts killed off Lochner during the New Deal. But Lochner’s principles have persisted—not in constitutional law, but in the law of labor and employment. Key foundational doctrines of labor and employment law continue to rest on the premise of equal bargaining power. And the Roberts Court has increasingly relied on the same premise in a series of anti-worker opinions. That premise has significant, concrete, and insidious consequences. Like the old Lochner, it operates to deprive workers of the rights they won in political battles. This paper demonstrates that Lochner never truly died. It just shape-shifted.[/togglable]

During the first three decades of the 20th century, the rise of progressive labor legislation triggered a powerful reaction from the courts. Judges held that various labor laws—notably those providing for minimum wages or maximum hours and those prohibiting employers from banning union membership—violated a supposed constitutional guarantee of “freedom of contract.”

Lawyers call this era of jurisprudence the “*Lochner* era” after *Lochner v. New York*,¹ the 1905 case in which the Supreme Court of the United States struck down a state law that barred bakers from working more than 60 hours a week. For lawyers, *Lochner* has become shorthand for a period in which judges invalidated labor laws based on their view that those laws prevented employers and workers from striking the best deal they could with each other.

The *Lochner*-era cases were based on an abstract, formalist understanding of bargaining between employers and workers. The idea, which judges often made explicit, was that absent labor legislation employers and workers were each equally free to enter into, or refuse to enter into, contracts with each other. That is, the courts presumed that employers and employees had equal power in the labor market. Protective labor laws disrupted that natural baseline of contractual freedom by barring both sides of the transaction from entering into bargains that they would otherwise prefer to make.

By the time of the New Deal, however, it had become widely accepted that this premise of formal equality between workers and employers was unrealistic. A new wave of labor legislation—exemplified at the federal level by the National Labor Relations Act (NLRA), enacted in 1935, and the Fair Labor Standards Act (FLSA), enacted in 1938—rested explicitly on the contrary premise that workers suffered from a lack of bargaining power vis-à-vis their employers. Laws guaranteeing the right to organize, as well as laws providing minimum employment terms, could rectify this imbalance and ensure that workers received their fair share of the surplus arising from their employment. With the Supreme Court’s “switch in time” in 1937, in which a majority pivoted to support New Deal labor legislation purportedly to forestall a court-packing scheme, the courts began to reject *Lochner* and uphold these new labor laws.

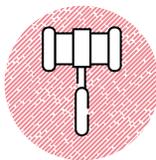
For many years now, law students have been taught that *Lochner* died in the New Deal. Centrists and progressives regard the *Lochner* era as a time when conservative judges

SECTIONS

1. The old *Lochner* • 3
2. The (apparent) death of *Lochner* in the New Deal • 5
3. *Lochner*, undead • 9
4. Conclusion • 22

Endnotes • 22

References • 24



Unequal Power

Part of the **Unequal Power** project, an EPI initiative to reestablish the understanding in law, politics, economics, and philosophy, that equal bargaining power between workers and employers does not exist. Recognizing this inherent workplace inequality will bolster freedom, economic fairness, workplace protections and democracy.

overreached—taking it on themselves to block democratic efforts to improve the condition of workers. Perhaps more surprisingly, many modern conservatives have criticized *Lochner* in similar terms—though they have done so in support of an argument that the courts are making the same overreaching error as *Lochner* when they protect women’s reproductive rights or the rights of Americans based on sexual orientation. Some libertarian conservatives have sought to revive *Lochner’s* doctrine of constitutional freedom of contract, but their position remains a minority one.

This picture, though, focuses on the rarefied precincts of constitutional law. When we look at the doctrine of labor and employment law, we find something very different. As courts apply the worker protections adopted in the New Deal and later, they continue to be driven by *Lochner*-ist premises. They continue to disregard the imbalance of bargaining power between (many) employers and (many) workers. And as a result, they have adopted and applied a number of doctrines that have severely undercut the protections that legislatures have sought to give workers. The misguided assumption of equal power undermines constitutional, statutory, and common law protections in the workplace.

Chief among the labor doctrines to which courts apply the *Lochner*-ist premise of equal bargaining power are:

- **Employment at will.** As a formal matter, the employment-at-will doctrine authorizes both employers and employees to terminate the relationship at any time, and the Supreme Court expressly relied on this supposed equality when it gave constitutional significance to at-will employment in its *Lochner*-era decisions. Since then, legislatures have made inroads on the rule with workplace protections like the NLRA, antidiscrimination laws, and whistleblower statutes, but the resilience of the doctrine has undermined their enforcement. Courts continue to treat employment at will as the baseline rule while they treat the modern statutes as mere exceptions—exceptions that they feel a need to read narrowly to avoid threatening what they understand as the core of the doctrine.
- **A worker’s status as an “employee.”** Employers have the power to drain workplace protections from their workforce simply by categorizing workers as independent contractors rather than as employees and writing those categorizations into contractual documents. In the handful of cases in which courts review those employer actions, their decisions often rest on a *Lochner*-ist premise of free contract among equals.
- **Forced arbitration.** Courts tend to regard arbitration requirements purely as a matter of contract: Workers must *agree* to arbitration if they are to lose their right to pursue their claims in court. But workplace arbitration agreements are typically offered as a take-it-or-leave-it condition of employment.
- **Right-to-work laws.** Twenty-seven states have adopted right-to-work laws through the legislative process, but in 2018 the U.S. Supreme Court imposed a right-to-work regime on government employees across the nation. The court said that collective bargaining was a form of speech, and that requiring workers to pay a fee to unions to subsidize that speech violated the worker’s First Amendment rights.

The judicial trend toward ignoring imbalances of bargaining power has accelerated in recent years, with the Supreme Court under Chief Justice John Roberts issuing a series of anti-worker decisions. The timing is ironic, because these judicial developments have occurred while evidence of weak worker bargaining power is accumulating. Working people's wages have stagnated, labor's share of national income has dropped, and inequality has risen. Economists are increasingly recognizing these trends, but the law has doubled down on the *Lochner*-ist premise that workers and their employers approach their bargaining on an equal footing.

This paper traces the story of the seeming rejection, but actual resiliency, of *Lochner* in labor law. It begins with a discussion of the old *Lochner*-ism. Unlike treatments that focus on constitutional law, this paper highlights *Lochner*'s premise of equal bargaining between employers and workers. It then turns to a discussion of the rejection of *Lochner*-ism beginning in the 1930s. In the wake of the Great Depression, legislative and judicial actors picked up on academic criticism of *Lochner* and embraced the notion that the law needed to step in to rectify the imbalance of bargaining power in the employment relationship. Finally, the paper demonstrates that labor and employment law has never really shed *Lochner*'s premise. Consequently the assumption of equal bargaining between employers and workers in employment law continues to have a pervasive and insidious impact on workers.

The old *Lochner*

One of the key provisions of the New York Bakeshop Act of 1895, which, as the name suggests, regulated the operation of bakeries, prohibited any bakery employee from being "required" or "permitted" to work more than 10 hours a day or 60 hours a week. In an opinion by Justice Rufus Peckham, the U.S. Supreme Court, in *Lochner v. New York*, held that the law violated the 14th Amendment's due process clause.

Beginning with the very first paragraph of his opinion, Justice Peckham emphasized that the New York law blocked employers and workers from entering into agreements they believed to be mutually beneficial. "The employe may desire to earn the extra money, which would arise from his working more than the prescribed time," Justice Peckham said, "but this statute forbids the employer from permitting the employe to earn it." And that, he said, "necessarily interferes with the right of contract between the employer and employes."²

As the court's language suggests, the justices who joined the *Lochner* opinion did not regard their decision as protecting employers at the expense of workers. Rather, they understood themselves as protecting the rights of *both* employers *and* workers to enter into the contracts they preferred. Laws like the New York statute, Justice Peckham wrote, "are mere meddlesome interferences with the rights of the individual," because they "limit[...] the hours in which grown and intelligent men may labor to earn their living."³ And he saw no reason to believe "that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with

their independence of judgment and of action.” “They are,” he said, “in no sense wards of the State.”⁴

For a sense of what the court meant by “wards of the state,” one might look to its decision three years later in *Mueller v. Oregon*.⁵ There, the court upheld an Oregon maximum hours law that was limited to women workers. Its opinion explained that “woman has always been dependent upon man,” and that female workers deserve the protection of the state because “there is that in her disposition and habits of life which will operate against a full assertion of” her rights.⁶

But the *Lochner* principle was not limited to maximum hours laws (which, as in *Mueller*, the court sometimes upheld); the court applied the same principle to invalidate laws prescribing a minimum wage. In the 1923 case of *Adkins v. Children’s Hospital*,⁷ Justice George Sutherland’s opinion for the court described a minimum wage law as “simply and exclusively a price-fixing law,” one that “forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee.”⁸ So applied, the *Lochner* principle stood as a powerful barrier to legislative efforts to set minimum labor standards.

The court applied the same principle to undermine legislatures’ efforts to protect workers’ rights to form and join unions. In the years surrounding the turn of the 20th century, employers often required their workers, as a condition of employment, to sign “yellow-dog contracts,” which prohibited workers from joining a union. As the populist and progressive movements obtained a measure of political power, Congress and state legislatures passed laws to ban yellow-dog contracts, but the courts, applying the principles of *Lochner*, held those laws unconstitutional.

The first key case was *Adair v. United States*,⁹ decided three years after *Lochner*. There, the court invalidated a federal law, adopted in 1898, that prohibited yellow-dog contracts in interstate railroad employment. Justice John Marshall Harlan (who had dissented in *Lochner*) wrote the opinion for the court, and his analysis rested explicitly on what he understood to be the equality of position between employers and workers: “The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it.” Just as a worker had the right to “quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization,” an employer must have the right “to discharge [a worker] because of his being a member of a labor organization.” “In all such particulars,” Justice Harlan said, “the employer and the employe have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.”¹⁰

The U.S. Supreme Court further explained its reasoning in its 1915 decision in *Coppage v. Kansas*,¹¹ which invalidated a state law barring yellow-dog contracts. In an opinion by

Justice Mahlon Pitney, the court quoted extensively from the “equality of right” discussion in *Adair*. In its decision upholding the state law, the Kansas Supreme Court had sought to sidestep *Adair* by arguing that employers and workers did not in fact enter into their contracts on an equal plane. The state court said that “employees, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making contracts of purchase thereof.”¹²

But the U.S. Supreme Court rejected that analysis. Justice Pitney refused to consider the *actual* bargaining power of workers vis-à-vis employers. Instead, he insisted that the courts must consider only the *formal* equality of rights between the two parties, lest the entire capitalist system collapse: “since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.”¹³

The (apparent) death of *Lochner* in the New Deal

The *Lochner*-era courts stood in the way of an engaged popular movement. Their decisions rested on an abstract and formal understanding of equality between workers and employers—an understanding that seemed inconsistent with the lived experience of most workers. Not surprisingly, the courts soon faced a backlash. The reaction came at three levels. The first was intellectual, as academics affiliated with the ascendant school of Legal Realism detailed the analytic weaknesses of the courts’ abstract and formal understanding of equality. The second level was political, as the Great Depression and the New Deal led to the adoption of new statutes that directly challenged the *Lochner* regime. And the third level was judicial, as the courts came to endorse progressive understandings of the inequality of bargaining power between workers and their employers.

The intellectual reaction to the courts began with an observation that seemed self-evident: Whatever judges might say about the *formal, legal* equality between the parties, in reality workers in the industrial capitalism of the time had much less bargaining power than their employers. Most individual workers needed a job more than their employers needed any particular worker. As a result, employers could impose terms of employment that individual workers would lack any effective ability to resist. And if employers could require, as a take-it-or-leave-it condition of being hired, that workers not join a labor union, then the workers could never come together in a way that balanced out the employer’s power.

For the *Lochner*-era courts to say that they were protecting the freedom of workers was thus perverse. The courts were simply ensuring that employers could continue to pit workers against each other and degrade their bargaining power.

A group of legal and economic scholars, known as Legal Realists, bolstered this intuitive argument with an analytic one. These scholars challenged the entire premise of the

Lochner cases—that in a state of nature parties are free to contract, and that government intervention merely reduces those natural liberties. Because property and contract rights themselves derive from state action to create and enforce them, these scholars argued that *Lochner*'s premise was incoherent. Laws providing for a minimum wage, maximum hours, and a ban on yellow-dog contracts helped to rectify the coercive power that employers—backed by the law of property—imposed on workers. They did not introduce new coercion into the system.

For example, Robert Hale, professor of law and economics at Columbia University, argued that all employment contracts are the result of coercion backed by law. Thanks to the law of property, individuals cannot simply take from others the food, shelter, or income they need to survive—nor can they take land, machinery, or other means of making a living. These legal entitlements thus coerce those individuals into accepting contracts of employment. “If the non-owner works for anyone,” Hale argued, “it is for the purpose of warding off the threat of at least one owner of money to withhold that money from him (with the help of the law)” (Hale 1923, 472). Because “the law which forbids [a non-owner] to produce with any of the existing equipment, and the law which forbids him to eat any of the existing food, will be lifted *only* in case he works for an employer,” it is “the law of property which coerces people to work for factory owners” (Hale 1923, 473).

Of course, workers have coercive power, too, in the form of their legal right to withhold their labor from their employer—at least to the extent that the law gives them that right. (Recall that for many years courts prohibited workers from joining together to collectively withhold their labor from employers.) Hale thus concluded that any contract for hire reflects the balance between the coercive power deployed on either side—coercive power that is backed by, and to a large extent created by, law (Hale 1923, 474, 477). “[I]n a sense each party to the contract, by the threat to call on the government to enforce his power over the liberty of the other, *imposes* the terms of the contract on the other” (Hale 1920, 452).

For Hale, then, to talk about “freedom of contract” in the sense of freedom from coercion was nonsensical. *All* contracts reflect the balance of coercion between the contracting parties. And because that coercion finds its source in state power in the form of law, it is equally nonsensical to treat existing contracts and distributions as a neutral baseline against which any new government intervention is coercive. As Hale said, “To take this control by law from the owner of the plant and to vest it in public officials or in a guild or in a union organization elected by the workers would neither add to nor subtract from the constraint which is exercised with the aid of the government. It would merely transfer the constraining power to a different set of persons” (Hale 1923, 478). The only real question is which forms of coercion, in which circumstances, the law should support. And that is a policy question, not one that can be answered by reference to abstract rights.

Justice Pitney's *Coppage* opinion had argued that the law must take for granted the “inequalities that are but the normal and inevitable result of” the exercise of property and contract rights. But the Legal Realists showed that these inequalities weren't inevitable—and that they in fact resulted from the state's own actions. When the law intervened to rectify those inequalities, it was not introducing coercion into a natural realm

of freedom; it was rectifying the imbalance of coercion that its own rules of property and contract had created. Just “because courts can do nothing to revise the underlying pattern of market relationships,” Hale argued, it did not follow that “courts should, in the name of liberty and equality, thwart [legislative] attempts to equalize the economic liberty of the weak” (Hale 1943, 625).

The intellectual work of the Legal Realists, along with institutional economists like John Commons, fed the political work of progressive legislators during the Franklin Roosevelt administration. A key pillar of the New Deal was the National Labor Relations Act of 1935, which guaranteed workers the right to engage in collective action for mutual aid and protection. During the congressional debates over the bill, supporters explained that its provisions were necessary to rectify the imbalance in bargaining power between workers and employers.

The NLRA’s principal sponsor, Senator Robert Wagner, made this point explicit in a speech he gave shortly after introducing the bill. He argued that the NLRA was a key step toward industrial peace and cooperation between workers and employers. And he made clear that rectifying the imbalance between the parties was essential to that end: “The primary requirement for cooperation is that employers and employees should possess equality of bargaining power. The only way to accomplish this is by securing for employees the full right to act collectively through representatives of their own choosing.”¹⁴ In part, of course, Wagner’s speech was political rhetoric. The idea of ensuring absolute equality of bargaining power in every instance seems quixotic in light of the many factors that might give a particular party an edge in a particular negotiation. But Wagner was clear that in the typical case workers were at a significant disadvantage in bargaining, and that the surest way to cooperation and industrial peace was to mitigate that disadvantage by empowering workers to join together.

In response to the claim that legal protections of worker collective action violated the freedom of contract, Wagner endorsed the Realist position that rectifying the imbalance in bargaining power was in fact essential to ensure true freedom of contract:

“ The law has long refused to recognize contracts secured through physical compulsion or duress. The actualities of present-day life impel us to recognize economic duress as well. We are forced to recognize the futility of pretending that there is equality of freedom when a single workman, with only his job

between his family and ruin, sits down to draw a contract of employment with a representative of a tremendous organization having thousands of workers at its call.¹⁵

As a result, he said, “the right to bargain collectively” was “a veritable charter of freedom of contract; without it there would be slavery by contract.”¹⁶

Three years after it adopted the NLRA, the New Deal Congress adopted the Fair Labor Standards Act, which prohibited child labor and guaranteed covered workers a minimum wage and overtime.

Not surprisingly, these New Deal laws faced challenges in the courts. But in two crucial cases in 1937, the Supreme Court upheld progressive labor legislation and seemed to inter *Lochner*.

In *NLRB v. Jones & Laughlin Steel Corporation*,¹⁷ the court upheld the NLRA against a constitutional challenge. In his opinion for the court, Chief Justice Charles Evans Hughes explicitly embraced the arguments of Hale and Wagner, explaining that “a single employee was helpless in dealing with an employer,” that “he was dependent ordinarily on his daily wage for the maintenance of himself and family,” and that “if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment.”¹⁸ As a result, the right of workers to join together in labor unions was “essential to give laborers opportunity to deal on an equality with their employer.”¹⁹

In the other key 1937 case, *West Coast Hotel Company v. Parrish*,²⁰ the court upheld a state minimum wage law that applied only to women. Again writing the opinion for the court, Hughes emphasized the role of a minimum wage in preventing the “exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage.” Hughes also highlighted the way the seemingly private conduct of employers in paying starvation wages imposed a burden on the public purse: “[w]hat these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met.” Allowing employers to pay their workers low wages, he said, would thus be “a subsidy for unconscionable employers.”²¹

West Coast Hotel was decided before Congress adopted the FLSA, but four years later the court extended the precedent specifically to uphold the act. In *United States v. Darby* (1941),²² Justice Harlan Fiske Stone’s opinion for the court said that since *West Coast Hotel* it was “no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process.” And he concluded that the FLSA was “not objectionable because applied alike to both men

and women.”²³

Lochner, undead

After *Jones & Laughlin*, *West Coast Hotel*, and *Darby*, it seemed that *Lochner* was dead. The courts had rejected the notion that laws regulating employment terms violated a constitutional right to freedom of contract, and the courts had seemed to embrace the Legal Realist point that regulation could actually enhance contractual freedom by rectifying imbalances in bargaining power.

In the area of constitutional law, *Lochner* did really die. Libertarian conservatives have repeatedly attempted to bring it back, but the courts have largely stuck to the settlement of 1937 and refused to use the 14th Amendment’s due process clause to enforce a supposed constitutional right to freedom of contract. That is, by and large, true of both conservative and liberal judges. The libertarians have had more success in sneaking *Lochner*-ist principles into the law through other constitutional provisions—notably the First Amendment. That is a troubling development, but so far the return of *Lochner*-ism in constitutional law has been limited.

But when we turn our focus to the doctrine of labor and employment law—doctrine that generally purports to apply the common law and statutes, rather than the Constitution—we find that *Lochner* never really left. Central aspects of labor and employment law continue to rest on the premise that workers and employers have equal bargaining power. And that premise has significant, concrete, and insidious consequences. Like the old *Lochner*, it operates to deprive workers of the rights they won in political battles.

The resilient employment-at-will rule

Employment at will, the concept under which an employer is free to “terminate an employee for a good reason, a bad reason, or no reason at all” (Bagenstos 2013, 244–245), stands as the baseline rule nearly everywhere in the United States. The alternative to at-will, adopted in this country only in Montana and to some extent in Puerto Rico, permits employers to fire their workers only if they have good cause. Most union contracts contain similar provisions limiting firing to cases of just cause. But employment at will is the norm in nonunion positions, which are the overwhelming majority of jobs in the private sector.

Legislatures have made inroads on the at-will rule by enacting modern workplace protections like the NLRA, antidiscrimination laws, and whistleblower statutes. But, as shown below, the resilience of the at-will doctrine has undermined the enforcement of these statutory protections. Courts continue to treat employment at will as the baseline rule while they treat the modern statutes as mere exceptions—exceptions that they feel a need to read narrowly to avoid threatening what they understand as the core of the doctrine.

Scholars have long seen continued adherence to employment at will as an example of undead *Lochner*-ism (see, e.g., Blades 1967). Key *Lochner*-era cases like *Adair* and *Coppage* explicitly defended the regime of at-will employment, and, more important, the doctrine rests on the *Lochner*-ist premise that workers and employers have equal bargaining power. Judges and scholars have repeatedly defended the doctrine as reflecting the choices of workers, while dismissing any claim that workers lack the ability to bargain for something better.

The *Lochner*-ist premises of employment at will

Defenders of employment at will highlight the bilateral nature of the doctrine, at least as it appears on the books: As a formal matter, the doctrine authorizes both employers and employees to terminate the relationship at any time.

The Supreme Court expressly relied on this supposed equality when it gave constitutional significance to at-will employment in its *Lochner*-era decisions. In *Adair*, Justice Harlan wrote that “the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee.”²⁴ He went on to say that “the employer and the employe have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.”²⁵ And he declared, “it cannot be...that an employer is under any legal obligation, against his will, to retain an employe in his personal service any more than an employe can be compelled, against his will, to remain in the personal service of another.”²⁶ Modern defenders of the rule like New York University Law Professor Richard Epstein have similarly pointed to its evenhanded nature (Epstein 1984, 954–955).

These arguments draw their rhetorical force by equating the position of employers who want to fire their employees with the position of workers who seek freedom from being forced to continue to work for their current employers. But the positions of the two groups are not comparable. If workers are bound to particular employers, they live in a situation of feudalism or slavery—with ramifications that limit the freedoms they can enjoy throughout their lives. The 13th Amendment reflects a fundamental national commitment that individuals may not be bound to their employment in that way. Although the baseline right of a worker to quit at will is deeply rooted, there is no similar justification for giving bosses the right to fire at will. Employers who must retain an unwanted employee will perhaps absorb some economic costs—which may be regarded as one of many costs of doing business imposed by government regulations adopted for the public good—but they will not experience any broader restriction on their freedom throughout life. And it’s not like the alternative to employment at will is unqualified life tenure for workers. The alternative is instead barring employers from firing a worker without just cause—a rule that takes full account of the legitimate interests of business.

More to the point, as the Legal Realists showed, in many industrial contexts the formal equality of the at-will rule does not match workers’ reality. And the same is true in our increasingly post-industrial era. To treat the employer’s ability to terminate an employee as equivalent to the worker’s ability to walk away is to disregard that reality. Workers typically

cannot simply leave their jobs. Because our nation ties so many important benefits—notably health care and retirement security—to the particular workplace, many employees will find themselves unable to exit even an undesirable work situation. And where taking a new position requires a move to a different city, workers will understandably be unwilling to break important ties to family and community.

Despite the at-will rule’s formal equality, observers have recognized that in most cases it is the employer, rather than the employee, who has the real power to decide whether to terminate the relationship. That was what the New Deal Congress concluded when it enacted the NLRA and the FLSA, and it has been a basic premise of virtually all of the worker protections legislatures have enacted since. The at-will doctrine rests on a denial of that reality.

Defenders argue that the at-will doctrine nonetheless implements the choices of workers because it is merely a default rule. Employees and employers are free to negotiate contracts that give the workers more job security, but in the overwhelming majority of cases they do not do so—a fact that leads defenders to conclude that workers prefer to be fireable at the will of their employer.

As numerous scholars have shown, however, there are many reasons to doubt that workers actually make a free choice to be fireable at will (Bodie 2017, 233–238). Surveys demonstrate that many at-will employees believe the law protects them against arbitrary termination—a fact that suggests they did not actually choose to forgo such a protection (Freeman and Rogers 1999, 146–148; Estlund 2002, 9). Workers might fail, simply due to inertia, to think to change the default term of the contract they are offered (Korobkin and Ulen 2000, 1113). Or they might be afraid to ask for greater job tenure because their employer will think of them as less-capable workers (Kamiat 1996). And, of course, workers may simply have no realistic option to say no to at-will employment; their particular position may be the only sort of job on offer to them. By assuming that workers choose to be denied employment security, the at-will baseline disregards these limitations on their ability to exercise a truly free choice.

The *Lochner*-ist effects of employment at will on worker protections

Employment at will is objectionable in itself. It reinforces status hierarchies in the workplace by requiring workers to accept all manner of indignities on pain of losing their jobs. Three scholars memorably described the effects of the at-will doctrine this way:

“ On pain of being fired, workers in most parts of the United States can be commanded to pee or forbidden to pee. They can be watched on camera by their

boss while they pee. They can be forbidden to wear what they want, say what they want (and at what decibel), and associate with whom they want. They can be punished for doing or not doing any of these things....They can be fired for donating a kidney to their boss (fired by the same boss, that is), refusing to have their person and effects searched, calling the boss a “cheapskate” in a personal letter, and more. (Bertram, Robin, and Gourevitch 2012)

But the problems go beyond that: The persistence of the at-will baseline has the effect of undermining other common law and statutory protections for workers. The at-will doctrine thus is not just *Lochner*-ist in its premises. It is *Lochner*-ist in its effects, because it allows a background principle of free contract and managerial prerogative to take precedence over democratically adopted regulations of the work relationship.

Speech and privacy protections

The *Lochner*-ist effects of at-will employment can be seen first in the way the doctrine has led courts to limit their protection of worker speech and privacy under the common law. Over the last two decades, employers' efforts to control workers' off-the-job speech and to intrude on workers' otherwise private spaces and choices have been a frequent subject of controversy and litigation. Employers have disciplined workers for expressing opinions on controversial political issues—even if the workers have done so off the job and without in any way drawing the employer's name into the matter. In one notable case in 2002, Goodwill Industries fired a sewing-machine operator because he was a member of the Socialist Workers Party. More prosaic cases involve workers who were discharged because they took positions in local political debates that conflicted with those of the companies they worked for—even when their jobs had nothing to do with those issues (Bagenstos 2013, 255–256). Employers have also discharged workers for violating company policies regarding off-work dating, using tobacco, or even volunteering at the

worker's chosen charity (Finkin 2018).

Although workers have sought to challenge these employer practices, the at-will baseline has made judges wary of embracing their arguments. Protecting workers' speech or privacy, after all, would impose limits on the reasons why an employer could terminate the employment relationship—limits that would stand in tension with the background principle that the relationship can be terminated for any reason or no reason at all.

With vanishingly rare exceptions, courts have refused to grant workers the right to challenge employer retaliation for political speech.²⁷ And they have often explained that they were doing so precisely to limit intrusions on employment at will. Thus, when the Illinois Supreme Court declined to protect worker speech, the court declared that “[t]he common law doctrine that an employer may discharge an employee-at-will for any reason or for no reason is still the law in Illinois, except for when the discharge violates a clearly mandated public policy.”²⁸ And when the New Mexico Supreme Court reached the same conclusion, it emphasized “that retaliatory discharge is a narrow exception to the rule of employment at will” and that the courts “have refused to expand its application.”²⁹

Courts have done a somewhat better job of protecting privacy in the workplace—particularly where an employer has sought to force workers to undergo drug testing or intrusive searches of their bodies or personal property. But courts still frequently reject privacy claims on the ground that workers have consented to any intrusion.

The problem is that the concept of “consent” can empower employers to vitiate privacy rights entirely. If the employer says that giving up a privacy interest is a condition of the job, how should we treat a worker's decision to accept that job? Does the acceptance constitute consent to what would otherwise be a privacy invasion? Note that the same question can arise for an at-will employee if the employer imposes the condition at some point after hire. Because the employer can end the relationship at any time, the law generally treats the new condition as the equivalent of the employer firing the worker and then offering to rehire on new terms—a practice that would shock most observers without legal training (and probably many with legal training).

At least once the condition is made clear, the worker's acceptance of (continued) employment on that condition does constitute a form of consent, in the sense that the worker considered it the best of available options. But the worker's decision is made in a coercive context. Unfortunately, however, courts too often focus on the concept of consent and too rarely attend to the imbalance of bargaining power between employers and employees. Sometimes, a court's analysis is obviously reminiscent of the *Lochner* era. In an infamous Texas case, for example, the court held that a worker could be fired for refusing to submit to urinalysis.³⁰ The employee argued that, because she needed her job to live, “any ‘consent’ she may give, in submitting to urinalysis, will be illusory and not real.”³¹ The court rejected the argument on the ground that “[t]here cannot be one law of contracts for the rich and another for the poor.”³² Indeed, the judges said that they could not “imagine a theory more at war with the basic assumptions held by society and its law.”³³

The echoes of Justice Pitney in *Coppage* are evident there. But even those courts that do

not so explicitly endorse *Lochner*-ist premises still give significant weight to (compromised) worker consent. Many courts conclude that a worker cannot demonstrate a violation of the right to privacy unless the employer's actions invaded a reasonable expectation of privacy. If an employer notifies workers that they cannot expect certain spaces or actions to be private—or requires workers to sign a waiver of any right to privacy—courts will often say that the worker's consent demonstrates the lack of any such reasonable expectation (Summers 2001, 472–473).

Statutory workplace protections

The cases involving worker speech and privacy are generally common law decisions. They involve judge-made doctrines, so one might think it legitimate that judges read those doctrines narrowly to preserve the at-will presumption. But judges have done something very similar with statutory protections of workers. By reading those protections narrowly to preserve at-will employment, they have undermined the victories workers won in Congress and state legislatures.

Statutes protecting workers against discrimination, or against retaliation for complaining about violations of law, should override common law rules like the at-will presumption. *Federal* statutes—where many of the crucial worker protections are found—should certainly override *state* common law rules. But judges have aggressively defended the baseline of employment at will against encroachment from those statutes. As a result, workers have in many cases found it impossible to challenge intentional race or sex discrimination, retaliation for their union activity, and other violations of the law.

Some of the reasons are practical. As New York University Law Professor Cynthia Estlund demonstrated years ago, if employers are free to discharge workers for good reasons, bad reasons, or no reason at all, they can easily hide the bad motive that violates anti-discrimination, anti-union, or anti-retaliation laws. “When liability depends on proof of a particular bad reason for discharge, ‘no reason’ or even a demonstrably false or fabricated reason is good enough for the employer to escape liability” (Estlund 1996, 1671). The at-will doctrine therefore substantially weakens many of the most significant workplace protections enacted by legislatures.

The courts have exacerbated these practical problems by adopting rules that blunt the force of statutory workplace protections in order to preserve employment at will. Their actions have been particularly notable in discrimination cases. Because employers can easily hide discriminatory motives, courts have developed intricate procedures for proving those motives circumstantially. One of these procedures, called the *McDonnell Douglas* approach after the 1973 Supreme Court case adopting it,³⁴ contains three steps. First, the worker must present evidence that he or she was qualified for the job at issue. At that point, the inquiry moves to the second stage, where the employer has to present evidence that there was a legitimate, nondiscriminatory reason for firing or refusing to hire the worker. If the employer can do so, the court moves to the third stage, where the worker has the opportunity to show that the employer's supposed legitimate reason was in fact a pretext. This three-part scheme rests on a common-sense inference: If the worker was qualified for the job, and the employer gives a reason for an adverse action that is proven

false, it's fair to infer that the real reason for the action was discrimination.

In the nearly five decades since the *McDonnell Douglas* case, the court has made it very difficult for workers to prevail under its three-step approach. And it has done so precisely because the justices were worried about the anti-discrimination laws encroaching on employers' prerogative to discharge workers for whatever (nondiscriminatory) reason they wish.

In its 1978 decision in *Furnco Construction Corporation v. Waters*,³⁵ the court dramatically lowered the employer's burden at the second stage of the *McDonnell Douglas* inquiry. *McDonnell Douglas* had said that the employer must show a legitimate, nondiscriminatory reason. In *Furnco*, the court held that *any* nondiscriminatory reason would do, even if it was one that was objectively unreasonable.³⁶ As a matter of factual inference, if an employer's explanation for an adverse action is unreasonable, that would be a legitimate basis for an observer to conclude that the explanation was false—and that the real reason was a forbidden one like discrimination. But the court feared that inquiring into the reasonableness of the decision would intrude on the employer's prerogative to be unreasonable—a prerogative protected by the common law at-will doctrine.

Fifteen years after *Furnco*, the Supreme Court took a similar step in the employer's favor, this time at the third stage of the *McDonnell Douglas* process. In its 1993 decision in *St. Mary's Honor Center v. Hicks*,³⁷ the court held that workers were not necessarily entitled to prevail simply by showing that the legitimate nondiscriminatory reason proffered by the employer was pretext; they must also show that the reason was a pretext *for discrimination*.³⁸ As in *Furnco*, the court's decision rested on the at-will rule. The court disclaimed any "authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, *that the employer has unlawfully discriminated*."³⁹ But the very question at issue in the case was whether a showing of pretext was sufficient to require a factfinder to determine that the employer had unlawfully discriminated—and a reasonable observer would surely think that if the employer had a chance to offer a nondiscriminatory reason for its actions, and that reason was proven false, the real reason was likely to be discrimination.

As University of Nevada, Las Vegas Law Professor Ann McGinley shows, *St. Mary's* is but one example of a common thread in employment discrimination cases. Judges deciding those cases "often rely on the employment at will doctrine to defeat the plaintiff's case" by concluding, "[i]n essence," that the employer has a "license to be mean" (McGinley 1996, 1459). Even if plaintiffs can prove that their discharges were "wrongful[...]" in some generic sense, or even were based on "animus" against them, judges refuse to infer that the reason was discrimination based on protected-class status (McGinley 1996, 1459–1460). Just like *Lochner*, decisions like these allow the judge-made at-will doctrine to trump democratic efforts to protect workers' rights. A formalist assumption of equal power begets at-will, and at-will begets the systematic undermining of democratically determined worker protections.

Excluding workers from legal protection: Who is an ‘employee’?

Courts have found another way to undermine the workplace protections democratically adopted by Congress and the state legislatures. These protections—including the National Labor Relations Act, the Fair Labor Standards Act, the federal antidiscrimination laws, and their state equivalents—generally apply only to workers who have the legal status of “employee” rather than “independent contractor.” Employers thus have the power to drain protections from their workforce simply by categorizing workers as independent contractors rather than employees and writing those categorizations into contractual documents. And in the handful of cases in which courts review those employer actions, their decisions often rest on a *Lochner*-ian premise of free contract among equals.

Courts have tended to use one of two tests for determining whether a worker is an employee and whether a firm is an employer: the common law “control” test and the “economic realities” test (which was first applied in FLSA cases but has expanded to other areas of employment law). In the past several years an approach that focuses on entrepreneurial opportunities has also become popular. Under any of these approaches, a court will start with the terms of the contract between the worker and the hiring party. Some recent developments in the law offer reasons for hope, however. In particular, employment law reformers have successfully pressed several states to adopt what has become known as the “ABC test”—most notably in a key 2018 California Supreme Court decision.⁴⁰ This rising legal doctrine may help avoid the *Lochner* problem.

Under the classic common law control test, a court looks to “the hiring party’s right to control the manner and means by which the product is accomplished.”⁴¹ The “right to control” does not come from nature; it comes from the contractual arrangement between the parties. And scholars have shown that it is highly manipulable. Lead firms can practice “fissuring,” allocating key aspects of control to poorly capitalized intermediaries who will be the ones on the hook as employers—thus protecting the large enterprise in charge from liability (Weil 2014). And sophisticated firms can readily characterize workers’ actions as the “ends” for which the parties have contracted rather than as the “means” of performing the contract (Tomassetti 2015; 2014). As a result, employers can evade the obligations of labor and employment law without making any real change in their operations. They can demand that workers accept these evasive contract terms, and many workers will lack effective power to say no.

But because the common law control test focuses on what sorts of control the hiring party has once the work relationship begins, without giving attention to the background conditions under which the parties enter into and set the terms of the relationship in the first place, it will treat all of these terms as freely chosen by the worker. As UCLA Law Professor Noah Zatz points out, the definition of employment thus replicates the problems with yellow-dog contracts: “The same employer power that necessitates labor law cannot be allowed to circumvent labor law...by forcing employees to agree to verbal characterizations of themselves as nonemployees ineligible to unionize and then giving force to those agreements” (Zatz 2011, 289).

Progressive legislators and judges tried to solve this problem by adopting a different approach for determining who is an employee in cases brought under the Fair Labor Standards Act. The FLSA seeks to prevent circumvention of its requirements by defining the word “employ” broadly to include “to suffer or permit to work.”⁴² Courts tried to implement that broad purpose by adopting what they called the economic realities test. That approach was designed to be just what its name suggests—a test that focuses not on the formal terms of the employment contract but on what is actually going on between the parties. In practice, however, things have not worked out that way.

Courts applying the economic realities test still generally focus on questions of control (Goldstein, Linder, Norton, and Ruckelshaus 1999). But rather than simply examining the letter of any formal contract between the parties, the courts look to the relationship demonstrated by their entire course of dealing. If the hiring party “really” has control over the means and manner of performance, the court will find an employment relationship even if the written contract does not expressly provide for such control (Lee 2018, 796). But that analysis, too, is contractual—it simply looks as much to the tacit terms of the parties’ agreement as to the express ones. And, crucially, the economic realities test often focuses entirely on control *within* the parties’ contractual relationship. It thus does not look to the effective freedom the workers had to decide to enter into that relationship.

Sometimes courts applying the economic realities test *do* look beyond the relationship between the worker and the hiring party. If “workers are genuine entrepreneurs,” these courts say, “then they do not depend economically on any single firm for work and thus do not require the FLSA’s protection” (Cunningham-Parmeter 2016, 1698). But these courts often dramatically overstate the worker’s exit options. These courts conclude, for example, that workers who operate small side businesses “lack[...] ‘economic dependence’ on a single company”—even if their side businesses are so small that they cannot realistically walk away from their main line of work (Cunningham-Parmeter 2016, 1698–1699). This vision of a worker as a freely choosing entrepreneur, divorced from the realities of bargaining power, is precisely the one Justice Pitney indulged in *Coppage*.

Some courts have sought to reverse these trends and implement a test of who is an employee that gives full weight to the importance of counteracting employer power. The most prominent example, which builds on statutory and judicial efforts in other states, is the California Supreme Court’s 2018 decision in *Dynamex Operations West v. Superior Court*.⁴³ The California legislature recently codified that decision, with some small changes, in a prominent new statute.⁴⁴

In the introductory section of its opinion, the *Dynamex* court highlighted “the potentially substantial economic incentives that a business may have in mischaracterizing some workers as independent contractors.”⁴⁵ The court noted that regulatory agencies had estimated that misclassification costs “millions of workers of the labor law protections to which they are entitled.”⁴⁶ It held that, “in light of [the] history and purpose” of California wage-and-hour regulations, the employee definition under those regulations “must be interpreted broadly to treat as ‘employees’...all workers who would ordinarily be viewed as *working in the hiring business*.”⁴⁷ But it emphasized that “the type of individual workers, like independent plumbers or electricians, who have traditionally been viewed as *genuine*

independent contractors who are working only in their own independent business,” would not be covered by that definition.⁴⁸

To avoid evasion of workplace protections, the *Dynamex* court adopted what has become known as the ABC test.⁴⁹ Under that test, workers will be treated as employees unless the business that hires them can prove all three of the following:

“**(A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (B) that the worker performs work that is outside the usual course of the hiring entity’s business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.**”⁵⁰

Under the ABC test, a lack of control is thus not enough for a conclusion that a worker is an independent contractor. Accordingly, the ways in which employers can manipulate the control and economic realities tests seem less likely to be available (Pearce and Silva 2018, 28).

When the *Dynamex* court adopted the ABC test, it did so expressly to impose a counterweight to employers’ bargaining power. The court explained that a key purpose of this test was to protect workers against being effectively forced to agree to independent-contractor arrangements that waived employment-law protections.⁵¹ Under a contrary rule, the court explained, “employers might be able to use superior bargaining power to coerce employees...to waive their protections.”⁵² When the New Jersey Supreme Court adopted the same test, it similarly explained that “the ‘ABC’ test fosters the provision of greater income security for workers, which is the express purpose of” the state wage-and-hour laws.⁵³

Of course, a necessary consequence of adopting the ABC test is to prevent some workers

from opting into contractor status, even if they might actually freely choose that status in circumstances of equal bargaining power. But that margin of overinclusion seems justified as a check against the manipulability of employment status under other tests—particularly in light of the large bargaining-power imbalance that typically exists, and the way that our laws make employee status the key to so many protections.

The *Dynamex* approach is the most promising tool yet to overcome the legacy of *Lochner* in determining who is covered by the labor and employment laws. But its reach is limited. It applies only to state law claims, and only in some states. The federal labor and employment laws do not adopt that test.

And even in states that have adopted it, businesses are seeking to evade the ABC test. After the California Legislature codified the test last year, Uber and Lyft announced their position that their drivers still did not satisfy the definition of employee because, in the companies' view, driving was not part of the "usual course" of their business (Ghaffary 2019). This aggressive approach seems unlikely to prevail, but expanding and implementing the ABC test will take a fight.

Closing the courthouse door: forced arbitration

Courts—and particularly the U.S. Supreme Court—have used another tool to deprive workers of the protections adopted by Congress and the state legislatures: They have closed the courthouse door to claims that employers have violated their legal obligations and have required instead that these claims be heard in private arbitration. But arbitration often takes place in secret, it is not meaningfully bound by legal precedent, and the arbitrators often depend on the employers—who are the most important repeat players in the process—to continue to be assigned cases to arbitrate in the future. As a result, workers tend to face a stacked deck when they are sent to arbitration (Colvin 2016).

And, in recent years, the Roberts court has made the problem worse. It has said that arbitration provisions can lawfully bar workers from engaging in class or collective actions. Because any individual worker's pay claim is likely to be too small to attract a lawyer to bring a case, class actions are often the only way that workers can effectively bring claims that they have been denied the minimum wage or overtime pay, or that they have been the victims of pay discrimination. To ensure that laws concerning wages can be effectively enforced, workers must be able to join together to bring their claims; only then will there be a sufficient amount at stake to make a case viable for an attorney.

The Supreme Court has expanded the role of arbitration in a series of cases dating back to the 1990s. But the key case was 2018's *Epic Systems v. Lewis*,⁵⁴ which held that workers could be bound to an arbitration provision that denied them the right to pursue class actions. In her dissenting opinion in *Epic Systems*, Justice Ruth Bader Ginsburg accused the majority of reviving "*Lochner*-era contractual-'liberty' decisions."⁵⁵ The majority rejected the comparison. But Justice Ginsburg's analysis was apt—not just because the court's decisions have undermined the enforcement of democratically adopted worker protections, but also because those decisions have rested on a view of

consent that ignores the imbalance of bargaining power in the workplace.

The key point is that there is no statute that *requires* workers to arbitrate their claims. Arbitration is purely a matter of contract. Workers must *agree* to arbitration if they are to lose their right to pursue their claims in court.

Workplace arbitration agreements, however, are typically offered as a take-it-or-leave-it condition of employment. Indeed, they often appear in a stack of papers that workers are required to sign on their first day on the job, in an online box that they are required to click in order to submit a job application, or somewhere in a long employee handbook. Without necessarily even knowing of the terms to which they have legally agreed, workers have no effective way of resisting.

Sometimes, the agreement appears through an even more coercive process. In *Epic Systems*, for example, the workers' supposed agreement to arbitrate occurred when the employer sent an email to incumbent employees telling them that showing up to the job the next day would constitute agreement to arbitration of workplace disputes. The idea that simply showing up at work the next day represented a "free" choice defies reality. For many reasons, workers may find it impractical to change jobs even if they freely chose their current job in the first place. They may have moved cities, purchased a home, or placed children in schools to take their current position. Or they may find that it is impossible to find a new job at the moment their employer imposes a new condition. When, as in *Epic Systems*, a term is imposed by an employer on an ongoing work relationship, and the worker's only possible protection is to quit, it is even less plausible to say that the supposed agreement resulted from a freely made bargain between equals.

The issue is particularly egregious in cases like *Epic Systems* that enforce arbitration agreements that bar workers from bringing claims collectively. The National Labor Relations Act explicitly protects the right of workers to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Class or collective litigation is a concerted activity, and it is one in which workers engage for their "mutual aid or protection." To say that an employer can insist that its workers waive their rights to pursue this sort of concerted activity as a condition of employment is to reject the basic premises that underlay the NLRA.

As Justice Ginsburg explained, recalling Chief Justice Hughes's opinion upholding the statute in *Jones & Laughlin*, Congress enacted the NLRA because it recognized that "[f]or workers striving to gain from their employers decent terms and conditions of employment, there is strength in numbers. A single employee, Congress understood, is disarmed in dealing with an employer."⁵⁶ By blessing employers' actions to get individual employees to waive these collective rights, the court endorsed a modern-day equivalent of the yellow-dog contracts that were the subject of the *Lochner*-era cases.

Undermining unions: constitutionalizing ‘right to work’

A final example of the persistence of *Lochner*-ism involves the rise of so-called right-to-work laws. Right-to-work laws are a reaction to one of the key features of American labor law—exclusive representation. Under the NLRA and most state labor laws, a union that has been selected by a majority of a unit’s employees serves as the exclusive representative for all employees in that unit. As the exclusive representative, the union owes a duty of fair representation to each of the employees in the unit, whether or not they are union members. Because the law requires unions to represent nonmembers, it creates a free-rider problem: Individual workers have an incentive not to join the union—and thus to avoid paying dues—so they can get the benefits of union representation without paying the costs. But if too many workers choose to free-ride, the union will not have sufficient resources to do its job.

To respond to that free-rider problem, unions prefer to collect a fee from nonmembers in the bargaining unit to defray their share of the costs of representation. This exaction is called a “fair-share fee” or “agency fee.” A right-to-work law bans unions from collecting fair-share fees from nonmembers. The Taft-Hartley Act of 1947—a statute designed to roll back some of the protections Congress granted labor unions in the NLRA—first authorized states to enact these laws.

Twenty-seven states have enacted right-to-work laws, with a notable uptick in the 2010s—including in some historic bastions of American labor. Indiana and Michigan adopted these laws in 2012, Wisconsin followed suit in 2015, West Virginia in 2016, and Kentucky in 2017. Missouri’s legislature also adopted a right-to-work law in 2017, but the state’s voters rejected it at the polls the next year.

These states have adopted right-to-work laws through the legislative process. But in its 2018 decision in *Janus v. AFSCME*,⁵⁷ the Roberts court imposed a right-to-work regime on government employees across the nation. The court said that collective bargaining was a form of speech, and that requiring workers to pay a fee to unions to subsidize that speech violated the worker’s First Amendment rights.

The First Amendment questions raised by *Janus* are interesting. Is a fair-share fee really speech? For present purposes, though, what is more important is the court’s understanding of worker compulsion. The court said that workers had no real option to refuse to pay the fee, because their employer’s union contract imposed it as a condition of employment.

Note that this is the opposite of the understanding of worker choice the court applied in *Epic Systems*, where it treated workers as freely choosing an arbitration agreement that their employer imposed on them as a condition of employment, validated by showing up for work each day. And the court’s analysis in *Janus* once again fails to appreciate the role of collective organization in overcoming the imbalance of bargaining power that workers face when dealing with their employers. If the fair-share fee is necessary to ensure that unions can overcome the free-rider problem to be viable organizations, and joining

together in a union is essential to rectify that imbalance and give workers a meaningful ability to bargain with their employers, then prohibiting such a fee in fact impedes workers' freedom of choice. *Janus*, then, is best understood as a form of undead *Lochner*-ism.

Conclusion

Although most lawyers think that the courts killed off *Lochner* during the New Deal, *Lochner*'s principles have persisted—not in constitutional law, but in the law of labor and employment. Key foundational doctrines of labor and employment law continue to rest on the premise of equal bargaining power. And the Roberts court has increasingly relied on the same premise in a series of anti-worker opinions. Taken together, these doctrines—like the old *Lochner* doctrine—seriously hamstringing the laws that Congress and the state legislatures adopted to protect workers. *Lochner* never truly died. It just shape-shifted.

Endnotes

1. 198 U.S. 45 (1905).
2. *Id.* at 52–53.
3. *Id.* at 61.
4. *Id.* at 57.
5. 208 U.S. 412 (1908).
6. *Id.* at 421–422.
7. 261 U.S. 525 (1923).
8. *Id.* at 554–555.
9. 208 U.S. 161 (1908).
10. *Id.* at 174–176.
11. 236 U.S. 1 (1915).
12. Quoted in *id.* at 17.
13. *Id.*
14. 1 Nat'l Labor Relations Bd., Legislative History of the National Labor Relations Act of 1935 at 20 (1949).
15. *Id.*
16. *Id.*
17. 301 U.S. 1 (1937).
18. *Id.* at 33.

19. *Id.*
20. 300 U.S. 379 (1937).
21. *Id.* at 399.
22. 312 U.S. 100 (1941).
23. *Id.* at 125.
24. *Adair v. United States*, 208 U.S. 161, 174–75 (1908).
25. *Id.* at 175.
26. *Id.* at 175–176.
27. Restatement of Employment Law § 5.02, Reporter’s Note to cmt. d.
28. *Barr v. Kelso-Burnett Co.*, 478 N.E.2d 1354, 1356 (Ill. 1985).
29. *Shovelin v. Cent. New Mexico Elec. Co-op., Inc.*, 850 P.2d 996, 1007 (N.M. 1993).
30. 765 S.W.2d 497 (Tex. App. 1989), *writ denied* (Dec. 13, 1989).
31. *Id.* at 502.
32. *Id.*
33. *Id.*
34. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–805 (1973).
35. 438 U.S. 567 (1978).
36. *Id.* at 577–578.
37. 509 U.S. 502 (1993).
38. *Id.* at 515–516.
39. *Id.* at 514.
40. *Dynamex Operations West v. Superior Court*, 7 416 P.3d 1 (Cal. 2018).
41. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992).
42. 29 U.S.C. § 203(g).
43. 416 P.3d 1 (Cal. 2018).
44. Cal. Labor Code § 2750.3.
45. *Dynamex*, 416 P.3d at 5.
46. *Id.*
47. *Id.* at 7.
48. *Id.*

49. *Id.*
50. *Id.* at 35.
51. *Id.* at 37.
52. *Id.* (internal quotation marks omitted).
53. *Hargrove v. Sleepy’s, LLC*, 106 A.3d 449, 464 (N.J. 2015).
54. 138 S. Ct. 1612 (2018).
55. *Id.* at 1635 (Ginsburg, J., dissenting).
56. *Id.* at 1633.
57. 138 S. Ct. 2448 (2018).

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