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Consent, Coercion, and Employment Law

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Bagenstos, Samuel R. "Consent, Coercion, and Employment Law." *Harv. C. R. -C. L. L. Rev.* 55, no. 2 (2020): 409-65.

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Consent, Coercion, and Employment Law

Samuel R. Bagenstos*

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In the last few years, the Roberts Court has handed several high-profile wins in labor and employment law cases to anti-labor and pro-employer forces. These decisions include *Epic Systems*¹ and *Lamps Plus*² (applying the Federal Arbitration Act to override collective remedies for employment

* Frank G. Millard Professor of Law, University of Michigan Law School. Thanks to Matt Bodie, Roberto Corrada, Charlotte Garden, Ryan Nelson, Jim Pope (as always), Margo Schlanger, and participants at the Fourteenth Annual Colloquium on Scholarship in Employment and Labor Law for helpful comments on this piece. I particularly appreciate the editorial assistance provided by the editors of the Harvard Civil Rights-Civil Liberties Law Review. In the interest of full disclosure, I should note that I filed *amicus* briefs in two of the cases discussed extensively in this piece, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018), and *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). The views expressed here are entirely my own.

¹ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018).

² *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019).

law violations), *Janus*³ (invalidating, on First Amendment grounds, states' requirements that their employees pay "agency fees" to unions that represent them), and *Hobby Lobby*⁴ (applying the Religious Freedom Restoration Act to override the Affordable Care Act's "contraception mandate").

Dissenting justices and academics have charged that those decisions represent a return to the rejected jurisprudence of the *Lochner* Era.⁵ In response, defenders of those decisions—on and off the Court—have disputed the *Lochnerism* charge. They have noted, in particular, that these decisions do not invalidate statutes based on a supposed constitutional right to freedom of contract; to the contrary, most of these decisions enforce federal statutes against conflicting federal or state policies.⁶

The defenders of the recent Roberts Court decisions are right to identify key distinctions between those decisions and the *Lochner*-era cases. But there is an important sense in which the critics are correct: the Roberts Court has replicated a key aspect of *Lochner*-era jurisprudence. Like the *Lochner*-era cases, the Court's recent decisions rest on a principle of employee consent that ignores many of the forces that actually impose limits on an employee's choice. As the Legal Realists of the first half of the twentieth-century showed, constraints on choice are ubiquitous. Those constraints ultimately derive from legal rules—both the specific rules that are challenged in particular cases and the background rules of property and contract that structure the distribution of wealth and bargaining power. The Realists argued that taking some of these rules for granted while overriding others on the ground that they disregard the choice of contracting parties obscures the normative basis of (and perhaps the motivation for) the Court's decision. Based on this analysis, the Realists developed a powerful critique

³ *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018).

⁴ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014).

⁵ See *Epic Sys.*, 138 S. Ct. at 1633–34 (Ginsburg, J., dissenting); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1497 (2015); Mila Sohoni, *The Trump Administration and the Law of the Lochner Era*, 107 GEO. L.J. 1323, 1383–84 (2019); see also *Janus*, 138 S. Ct. at 2501 (accusing the majority of "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy" and thereby "prevent[ing] the American people, acting through their state and local officials, from making important choices about workplace governance").

⁶ See, e.g., *Epic Sys.*, 138 S. Ct. at 1630 ("Instead of overriding Congress's policy judgments, today's decision seeks to honor them."); *id.* at 1632 ("This Court is not free to substitute its preferred economic policies for those chosen by the people's representatives. That, we had always understood, was *Lochner's* sin."); Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103, 151 (2015). The union-fee cases did invalidate state statutes, but they did so based on the First Amendment, rather than the liberty of contract. For the now-familiar arguments that many Roberts Court First Amendment cases represent a revival of *Lochnerism* under a new guise, see Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1208–09 (2015); Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1959–60 (2018); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for A New Economy*, 77 L. & CONTEMP. PROBS. 195, 197 (2015); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 136–38 (2016).

of many then-existing areas of jurisprudence, notably including the *Lochner*-era freedom-of-contract cases.

Although it has faded into the background, the Realist critique of choice and consent offers a powerful framework for understanding key current controversies in labor and employment law.⁷ In this article, I begin by examining recent Roberts Court decisions and showing that, when unpacked, they invoke at least two distinct and conflicting understandings of employee and employer choice.⁸ I then turn to the Realist critique and demonstrate that the recent decisions implicate that critique just as the *Lochner*-era freedom-of-contract decisions did.⁹ Finally, I explore the implications of the Realist analysis for several significant areas of controversy that have not yet reached the Roberts Court—including the application of labor and employment laws to the “fissured workplace” and the “gig economy,” the question of the continuing vitality of employment at will, and workers’ common law and statutory rights.¹⁰ I attempt to show that employment law doctrine has never really shed the premises of *Lochner*.

The continuing *Lochnerist* premises of labor and employment law are especially important today. Since the 1940s, labor’s share of national income has dropped substantially.¹¹ That “shift from wages [labor] to

⁷ This Legal Realist critique formed a key basis for Critical Legal Studies scholarship in the 1970s and 1980s. See, e.g., MARK G. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 103–07 (1987); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 1013–14 (1985); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1361–68 (1984); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1758–60 (1976); Karl E. Klare, *Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 17–19 (1988); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1529–30 (1983). More recently, scholars associated with the law and political economy movement have sought to revive the insights of this work. See, e.g., David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 658 (2014) (suggesting a “return to Hale-style legal realism in the analysis of public institutions and ‘private’ law”); Jamee K. Moudud, *Distributional Struggles Always Operate Under the Background Laws That Determine Property, Contracts, and Torts, in Eleven Things They Don’t Tell You About Law & Economics: An Informal Introduction to Political Economy and Law*, 37 LAW & INEQ. 97, 121 (2019) (relying on Robert Hale and other Legal Realists); K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards A Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329, 1329–31 (2016) (drawing on the insights of Legal Realism to challenge the neo-*Lochnerian* turn in politics and law). For a good recent piece applying an analysis influenced by Legal Realism to employment law, see Brishen Rogers, *Beyond Automation: The Law and Political Economy of Workplace Technological Change* 6 (Roosevelt Inst. Working Paper, 2019), https://rooseveltinstitute.org/wp-content/uploads/2019/07/RI_Beyond-Automation_Working-Paper.pdf, archived at <https://perma.cc/6YUH-WAV5>.

⁸ See *infra* text accompanying notes 23–74.

⁹ See *infra* text accompanying notes 75–200.

¹⁰ See *infra* text accompanying notes 201–359.

¹¹ See U.S. BUREAU OF LABOR STATISTICS, NONFARM BUSINESS SECTOR: LABOR SHARE (PRS85006173) (Mar. 5, 2020), <https://fred.stlouisfed.org/series/PRS85006173>, archived at <https://perma.cc/57YW-5S7N>. For an instructive discussion of the appropriate methodology for measuring the labor share of income, see Josh Bivens, *The Fed Shouldn’t Give Up on Restoring Labor’s Share of Income—And Measure it Correctly*, ECON. POL’Y INST.: WORKING ECON. BLOG (Jan. 30, 2019),

profits [capital]” has “increase[d] inequality,” but we have also experienced a substantial increase in inequality “*within* labor’s share, between compensation to high earners relative to low earners.”¹² There is good reason to believe that these trends have resulted, in large part, from imbalances in bargaining power within the economy.¹³ Ordinary workers lack significant bargaining power because they face “asymmetric vulnerability” vis-à-vis their employers: they need their employer more than their employer needs them.¹⁴ Our nation’s long decline in unionization has been associated with significant wage losses, as increasing numbers of workers lack the boost in bargaining power that comes from standing together.¹⁵ Those “high earners” who have done especially well are disproportionately the top managers “who have high bargaining power to set their own remuneration.”¹⁶ And although unemployment rates have dropped significantly since the end of the Great Recession, many of those who are employed can find only “precarious work”—low-paid work that may be temporary, lacks job security, may lack consistent scheduling, and is often not eligible for employment benefits or workplace protections.¹⁷

The legal developments I discuss in this Article directly undermine the very sources of law that seek to rectify imbalances in bargaining power.¹⁸

<https://www.epi.org/blog/the-fed-shouldnt-give-up-on-restoring-labors-share-of-income-and-measure-it-correctly/>, archived at <https://perma.cc/C2XE-6E2L>.

¹² Hiba Hafiz, *Economic Analysis of Labor Regulation*, 2017 Wis. L. Rev. 1115, 1177 (2017).

¹³ ANTHONY B. ATKINSON, *INEQUALITY: WHAT CAN BE DONE?* 147 (2015) (“To a considerable degree the market outcome is currently the result of the bargaining power of different participants.”).

¹⁴ Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 238 (2013). For a good canvass of the reasons for this imbalance in power, see James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of “Involuntary Servitude”*, 119 YALE L.J. 1474, 1554–56 (2010).

¹⁵ See JAKE ROSENFELD, PATRICK DENISE & JENNIFER LAIRD, ECON. POL’Y INST., *UNION DECLINE LOWERS WAGES OF NONUNION WORKERS* 5 (2016), <https://www.epi.org/files/pdf/112811.pdf>, archived at <https://perma.cc/LX8A-J2ML> (“Unions, especially in industries and regions where they are strong, help boost the wages of all workers by establishing pay and benefit standards that many nonunion firms adopt. But this union boost to *nonunion* pay has weakened as the share of private-sector workers in a union has fallen from 1 in 3 in the 1950s to about 1 in 20 today.”). On the boost in bargaining power afforded by unions, see ATKINSON, *supra* note 13, at 128–31; JAKE ROSENFELD, *WHAT UNIONS NO LONGER DO* 68 (2014).

¹⁶ Hafiz, *supra* note 12, at 1177.

¹⁷ Nicola Kountouris, *The Legal Determinants of Precariousness in Personal Work Relations: A European Perspective*, 34 COMP. LAB. L. & POL’Y J. 21, 23–24 (2012).

¹⁸ Duncan Kennedy argues that the notion of unequal bargaining power provides, at best, a haphazard basis for identifying the circumstances in which private law rules should aim at redistribution; he sees that notion as primarily serving an ideological function in defending the liberal contract regime. See Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 614–24 (1982). In this Article, I make no effort to resolve the empirical questions regarding the effects of minimum wage and collective bargaining laws. For my purposes, it is enough to note that the declining labor share of income suggests that workers in general are systematically less able than employers to realize the surplus the two sides receive from contracting with each other, and that there are plausible arguments that

Epic Systems made it harder to enforce the Fair Labor Standards Act (FLSA), the federal minimum wage law. It also rested on a narrow understanding of the protections for concerted employee action under the National Labor Relations Act (NLRA). *Janus* directly weakened the power of labor unions. More generally, the view of worker choice that underlies these decisions also underlies many of the prevailing tests governing which workers count as “employees”—tests that enable employers in many cases to effectively exempt themselves from the NLRA and wage and hour laws, as well as other workplace protections.¹⁹ That doctrine has directly enabled the recent growth of precarious work.²⁰

Of course, labor and employment law does not simply aim to rectify imbalances of bargaining power. It also seeks to achieve workplace equality along a variety of dimensions.²¹ The developments I discuss in this Article undermine the equality goal as well. *Epic Systems* made it more difficult for workers to bring class action challenges to workplace discrimination; *Hobby Lobby* undermined the equality interests of women workers. And the view of worker choice that underlies these decisions also bolsters the at-will rule, which has imposed both practical and doctrinal limits on the effectiveness of *all* protections for workers.²² The trends I highlight in this piece thus are important for understanding both Supreme Court doctrine and the future of employment protections in the United States.

these laws help to rectify that situation. For discussion of labor law, see sources cited *supra* note 15. For discussion of wage and hour law, see, e.g., Arindrajit Dube, *Minimum Wages and the Distribution of Family Income* (Nat’l Bureau of Econ. Research, Working Paper No. 25240, 2018), <http://www.nber.org/papers/w25240>, archived at <https://perma.cc/274Y-K55X>. Note that wage and hour laws could help rectify these bargaining-power imbalances both directly (by mandating that pay not fall below a certain rate) and indirectly (by helping to set societal expectations about what is a fair wage). See Mark G. Kelman, *Progressive Vacuums*, 48 STAN. L. REV. 975, 986 (1996); see generally ATKINSON, *supra* note 13, at 90 (“The division of the surplus—and hence the wage—is influenced by the relative bargaining power of the two parties, but there is room for other factors to enter the determination of pay, including appeal to norms of equitable payment, which may in turn be embodied in custom and practice.”).

¹⁹ See *infra* text accompanying notes 201–48.

²⁰ See, e.g., Veena B. Dubal, *The Drive to Precarity: A Political History of Work, Regulation, & Labor Advocacy in San Francisco’s Taxi & Uber Economies*, 38 BERKELEY J. EMP. & LAB. L. 73, 76 (2017).

²¹ See, e.g., Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579 (2009) (arguing that status inequality, and not inequality of bargaining power, is what justifies intervention in the employment relationship); Bagenstos, *supra* note 14 (arguing that much of employment law is justified as promoting social equality); Noah D. Zatz, *Discrimination and Labour Law: Locating the Market in Maldistribution and Subordination*, in PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW 156, 161 (Hugh Collins, Gillian Lester & Virginia Mantouvalou, eds., 2019) (“The emphasis on *unequal* bargaining power suggests that so long as we get the power right, employment bargains would be unproblematic in principle. This, however, necessarily abandons the notion that markets in human labour pose a *particular* problem above and beyond those afflicting markets in general.”).

²² See *infra* text accompanying notes 248–349.

I. CONFLICTING VISIONS OF CHOICE IN THE ROBERTS COURT'S LABOR AND EMPLOYMENT LAW JURISPRUDENCE

The Roberts Court's decisions on workplace arbitration, union agency fees, and the ACA's contraception mandate have been extremely controversial. Although I cite some of the leading critiques of these cases in the footnotes below, it is not my goal to add to or rehash that controversy. Rather, I aim to draw out a theme that appears in all of these cases—the theme of employee and employer choice. Justice Ginsburg's dissenting opinion in *Epic Systems* brought this theme to the surface of the arbitration cases,²³ but prior scholarship has failed to focus on it or to appreciate the degree to which it appears across all three sets of cases.

As I show in this part, the Court's decisions in these cases invoke very different visions of choice. In the arbitration cases, the Court treats both workers and employers as free choosers. If they each sign onto an arbitration agreement, that is a choice that both sides freely made—even if the employer drafted the agreement and imposed it on the worker as a take-it-or-leave-it condition of keeping a job.²⁴ In *Janus*, by contrast, the Court treats an agency fee as a form of compulsion—even though workers can avoid the fee, just as they can avoid an arbitration agreement they do not like, simply by seeking another job. And in *Hobby Lobby*, the Court treats the contraception mandate as coercive, even though an individual with religious scruples could have avoided its application either by (a) choosing to make money in a way that did not involve hiring employees or (b) hiring employees, but doing so without hiding behind the corporate form.

My point here is not to criticize the bottom-line holdings of any of these cases or to argue that they are inconsistent with each other. Each set of cases implicates different doctrinal questions, and one can reasonably argue that all of them are rightly decided, all are wrongly decided, or some are right and some are wrong.²⁵ My point here is the limited one of showing that ideas about employer and employee choice are central to each of these cases—and that the Court employs multiple inconsistent visions of choice.

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For 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. The Court today subordinates employee-protective labor legislation to the Arbitration Act. In so doing, the Court forgets the labor market imbalance that gave rise to the NLGA and the NLRA, and ignores the destructive consequences of diminishing the right of employees to band together in confronting an employer.

Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1633 (2018) (Ginsburg, J., dissenting) (citations and internal quotation marks omitted).

²⁴ See *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415–16 (2019); *Epic Sys.*, 138 S. Ct. at 1619, 1621.

²⁵ Cards on the table: I disagree with the holdings in each of these cases.

A. *Employers and Workers as Free Choosers: Epic Systems and Lamps Plus*

Epic Systems and *Lamps Plus* involved arbitration agreements between employers and their workers—and, in particular, whether those agreements properly deprived the workers of the option to bring claims against their employers on a class or collective basis. In *Epic Systems*, the Court had to decide whether an arbitration agreement that required workers to waive their rights to bring class or collective actions violated Section 7 of the National Labor Relations Act.²⁶ (Section 7 guarantees employees the right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.”²⁷) *Lamps Plus* called on the Court to decide whether an employment arbitration agreement permitted class arbitration when its terms were ambiguous on the question.²⁸

In each case, the Court treated the arbitration agreement as a bargain that both the workers and their employers freely chose. Justice Gorsuch’s opinion for the Court in *Epic Systems* makes that premise evident from its very first two sentences, which frame the question presented: “Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?”²⁹ As Charlotte Garden notes, “[t]he extent to which this question echoes the *Lochner*-era Court’s assumptions about individual workers’ supposed freedom of contract is breathtaking.”³⁰

But the free-choice language did not stop with the first two sentences of the majority opinion. In explaining why the Court’s prior decisions enforcing class action waivers fully applied to the cases now before it, the opinion described the workers and their employers as having *chosen* to forgo the class action device: “The parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures.”³¹ “[T]his much,” the Court said, “the Arbitration Act seems to protect pretty absolutely.”³² The Court explained, “Not only did Congress require courts to respect and enforce agreements to arbitrate; it also

²⁶ See *Epic Sys.*, 138 S. Ct. at 1619.

²⁷ 29 U.S.C. § 157 (2018).

²⁸ See *Lamps Plus*, 139 S. Ct. at 1412.

²⁹ *Epic Sys.*, 138 S. Ct. at 1619.

³⁰ Charlotte Garden, *Epic Systems v. Lewis: The Return of Freedom of Contract in Work Law?*, 2 AM. CONST. SOC’Y SUP. CT. REV. 137, 159 (2018).

³¹ *Epic Sys.*, 138 S. Ct. at 1621.

³² *Id.*

specifically directed them to respect and enforce the parties' chosen arbitration procedures."³³

In dissent, Justice Ginsburg questioned whether the arbitration agreements, with their accompanying class action waivers, were "genuinely bilateral."³⁴ Two of the employers before the Court had imposed the agreements by emailing them to incumbent employees.³⁵ In each instance, the email provided that "employees' continued employment would indicate their assent to the agreement's terms."³⁶ Justice Ginsburg argued that the NLRA and the Norris-LaGuardia Act rested on the premise that workers do not have true freedom of contract if they are forced to make individual deals with their employers: "For 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."³⁷ Justice Ginsburg concluded that collective litigation was a protected form of "concerted activit[y] . . . for . . . mutual aid or protection" under Section 7 of the NLRA.³⁸ And she concluded that an arbitration agreement requiring a worker to waive the right to engage in that activity violated Section 7. "The law could hardly be otherwise: Employees' rights to band together to meet their employers' superior strength would be worth precious little if employers could condition employment on workers signing away those rights."³⁹

The *Epic Systems* majority apparently saw no need to respond directly to Justice Ginsburg's argument that the class action waivers were not an exercise of free employee choice. The majority followed precedent, which had held that (a) the Federal Arbitration Act (FAA) makes arbitration agreements enforceable in the employment context;⁴⁰ and (b) the FAA preempts *state law* rules that prohibit class action waivers.⁴¹ And the majority concluded that joining together to pursue a claim in court is not the sort of "concerted activit[y]" the NLRA protects.⁴² But the prior cases on which the Court relied rested on the premise that the arbitral agreement reflects a choice the parties made.⁴³ Indeed, the *Epic Systems* Court specifically described the

³³ *Id.*

³⁴ *Id.* at 1636 n.2 (Ginsburg, J., dissenting).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 1633.

³⁸ 29 U.S.C. § 157 (2018).

³⁹ *Epic Sys.*, 138 S. Ct. at 1641 (Ginsburg, J., dissenting).

⁴⁰ See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

⁴¹ See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011).

⁴² See *Epic Sys.*, 138 S. Ct. at 1625–26. Every piece of the majority's argument is highly contestable, to say the least. For apt criticism of that argument, see Garden, *supra* note 30.

⁴³ See *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013); *Concepcion*, 563 U.S. at 351. See generally Michael Selmi, *Supreme Court Term 2017-18: The Umpires Play Ball*, 22 EMP. RTS. & EMP. POL'Y J. 195, 217–18 (2018) ("The Supreme Court fell in love with arbitration agreements in the 1980s when courts started to view such agreements as a way to reduce clogged federal dockets, and treating the agreements as voluntary has played an essential role in its jurisprudence.").

“essential insight” of those prior cases as follows: “courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties’ consent.”⁴⁴

Where the Court’s premise of free worker choice lay in the background of *Epic Systems*, it was central to the reasoning in *Lamps Plus*. The lower courts had held that, where an arbitration agreement was ambiguous regarding whether it authorized class arbitration, the parties could proceed on a class basis.⁴⁵ Those courts applied the general principle of *contra proferentem* to interpret the ambiguity against the employer, who had drafted the contract.⁴⁶ But the Supreme Court reversed.⁴⁷

The Court recognized (albeit grumpily) that *contra proferentem* was a general state law contract principle, one not targeted at arbitration.⁴⁸ It nevertheless held that applying that principle to permit class arbitration would “‘stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives’ of the FAA.”⁴⁹

In particular, the Court held, applying *contra proferentem* would undermine “a ‘rule[] of fundamental importance’ under the FAA, namely, that arbitration ‘is a matter of consent, not coercion.’”⁵⁰ The Court explained that “[t]he first principle that underscores all of our arbitration decisions’ is that ‘[a]rbitration is strictly a matter of consent.’”⁵¹ It continued:

Consent is essential under the FAA because arbitrators wield only the authority they are given. That is, they derive their “powers from the parties’ agreement to forgo the legal process and submit their disputes to private dispute resolution.” Parties may generally shape such agreements to their liking by specifying with whom they will arbitrate, the issues subject to arbitration, the rules by which they will arbitrate, and the arbitrators who will resolve their disputes. Whatever they settle on, the task for courts and arbitrators at bottom remains the same: “to give effect to the intent of the parties.”⁵²

Because class arbitration is different than ordinary arbitration, the Court found it doubtful that parties entering into an arbitration agreement would have intended to permit class proceedings absent some provision in the agreement making that clear.⁵³ And the Court concluded that using the prin-

⁴⁴ *Epic Sys.*, 138 S. Ct. at 1623.

⁴⁵ See *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1413 (2019).

⁴⁶ See *id.*

⁴⁷ See *id.* at 1419.

⁴⁸ *Id.* at 1417.

⁴⁹ *Id.* at 1415 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011)).

⁵⁰ *Id.* (quoting *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 681 (2010)).

⁵¹ *Lamps Plus*, 139 S. Ct. at 1415 (quoting *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299 (2010)).

⁵² *Id.* at 1416 (citations omitted).

⁵³ See *id.*

principle of *contra proferentem* to fill the gap would be inconsistent with the principle of consent. That principle, the Court determined, does not seek to identify the intent of the parties; rather, it “provides a default rule based on public policy considerations.”⁵⁴ Applying *contra proferentem* thus committed a basic sin under the Court’s arbitration cases: it “[rel]ie[d] on state contract principles to ‘reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties’ consent.’”⁵⁵

Dissenting in *Lamps Plus*, Justice Ginsburg once again criticized the majority’s premise that workers are in a position to exercise free choice over the terms of arbitration agreements. She described the Court as having “treacherously . . . strayed from the principle that ‘arbitration is a matter of consent, not coercion.’”⁵⁶ Emphasizing again the “‘Hobson’s choice’ employees face: ‘accept arbitration on their employer’s terms or give up their jobs,’” Justice Ginsburg described the Court’s invocation of the principle of consent as “iron[ic].”⁵⁷ As in *Epic Systems*, the majority offered no substantive response to her argument about unequal bargaining power.⁵⁸ That employees had agreed to arbitration, as a take-it-or-leave-it condition of keeping their jobs, was sufficient “consent” to justify depriving them of the power to pursue their grievances on a class basis.⁵⁹

Both *Epic Systems* and *Lamps Plus*, then, rested crucially on the premise that the workers and employers had freely chosen the arbitration agreements at issue. That was so even though the Court recognized that the employer had drafted the arbitration agreements in each case and imposed them on workers as a condition of continued employment. Apparently, because the workers could refuse the offer and look for work elsewhere, their acceptance of the employers’ terms constituted adequate “consent.”

That, of course, is the same understanding of worker choice that the Court articulated during its *Lochner*-era cases. For example, in *Coppage v. Kansas*, which invalidated a state law prohibiting yellow-dog contracts, the Court explained that the offer of such a contract left the worker “free to exercise a voluntary choice.”⁶⁰ The Court said that the worker, faced with an employer’s offer of employment on the condition that he never join a union, “is free to decline the employment on those terms, just as the em-

⁵⁴ *Id.* at 1417.

⁵⁵ *Id.* at 1418 (quoting *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018)).

⁵⁶ *Id.* at 1420 (Ginsburg, J., dissenting) (quoting *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 681 (2010)).

⁵⁷ *Lamps Plus*, 139 S. Ct. at 1421.

⁵⁸ The majority noted that *contra proferentem* finds its justification in “equitable considerations about the parties’ relative bargaining strength,” *id.* at 1417 (majority opinion), but its opinion said nothing about the bargaining power of the parties in the case before it.

⁵⁹ *Id.* at 1416–17.

⁶⁰ *Coppage v. Kansas*, 236 U.S. 1, 9 (1915). For an argument that workplace arbitration agreements are this generation’s yellow-dog contracts, see generally Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

ployer may decline to offer employment on any other; for ‘It takes two to make a bargain.’”⁶¹

B. Workers as Constrained: Janus

In *Epic Systems* and *Lamps Plus*, the Roberts Court determined that a term imposed as a condition of continued employment nonetheless reflected workers’ choice because they always have the option to seek employment elsewhere. But the Roberts Court has not consistently taken that approach to worker consent. In *Janus v. AFSCME*, the Court treated employees as having no choice to resist paying agency fees to the union that represented them, even though they—just like the workers in the arbitration cases—could have avoided the fees simply by finding work elsewhere.

As in *Epic Systems*, the first two lines of the Court’s opinion in *Janus* highlight the centrality of choice and compulsion to the decision:

Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.⁶²

Later, when explaining the First Amendment principles that formed the foundation for its conclusion, the Court highlighted the harms that occur “[w]hen speech is compelled” and individuals are thus “coerced into betraying their convictions.”⁶³ The Court concluded that “[c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns.”⁶⁴

What does it mean to say that the workers in *Janus* were “forced,” “compelled,” or “coerced” to subsidize a union? It means simply that those workers had to choose between paying the agency fee and finding another job. But the union could easily respond that “no one is compelled to accept

⁶¹ *Coppage*, 236 U.S. at 21. The leading modern exponent of this view is Richard Epstein. See, e.g., Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 *YALE L.J.* 1357, 1371–72 (1983).

⁶² *Janus v. AFSCME Council 31*, 138 S. Ct. 2448, 2459–60 (2018). The opening passages of the opinions leading up to *Janus*, also written by Justice Alito, similarly emphasized the Court’s premise that the collection of agency fees constituted the compulsion of workers. *Harris v. Quinn*, 573 U.S. 616, 620 (2014) (“This case presents the question whether the First Amendment permits a State to compel personal care providers to subsidize speech on matters of public concern by a union that they do not wish to join or support.”); *Knox v. SEIU Local 1000*, 567 U.S. 298, 302 (2012) (“In this case, we decide whether the First Amendment allows a public-sector union to require objecting nonmembers to pay a special fee for the purpose of financing the union’s political and ideological activities.”).

⁶³ *Janus*, 138 S. Ct. at 2464.

⁶⁴ *Id.*

a job from an employer who has agreed to an agency-shop arrangement.”⁶⁵ The workers in *Epic Systems* and *Lamps Plus* faced the same structural choice—accept employment terms they might not want or find another job. Yet the Court in those cases concluded that the workers “chose,” “agreed to,” or “consented to” the arbitration clauses that banned class actions.

In *Janus*, the Court framed the relevant situation narrowly: it took the employment relationship for granted and noted that, in the context of that relationship, the employer had imposed an employment term that workers could not avoid. In *Epic Systems* and *Lamps Plus*, the Court framed the situation more broadly: if workers did not like a term the employer sought to impose, they could avoid it by eschewing an employment relationship with that employer.⁶⁶

C. *Employers as Constrained: Hobby Lobby*

In the arbitration cases, the Roberts Court has treated workers’ choices as free, even if they were made under threat of the denial of a job. In *Janus*, by contrast, the Court stated that the threat of job denial “compelled” and “coerced” workers to accept a condition of employment. And the Court applied a *Janus*-like approach to coercion once again in *Burwell v. Hobby Lobby*—though this time it was employers, rather than employees, whom it found to be coerced.

The question in *Hobby Lobby* was whether the Affordable Care Act’s “contraceptive mandate” violated the Religious Freedom Restoration Act (RFRA).⁶⁷ The plaintiffs were closely held for-profit corporations owned by people who had religious objections to paying for contraceptives that block the implantation of fertilized ova.⁶⁸ The government argued that the plaintiffs had no rights under RFRA, having chosen to operate as for-profit corporations to obtain limited liability and the other benefits that the state provides to such corporations.⁶⁹ For RFRA to apply to the operation of their business,

⁶⁵ See Louis Michael Seidman, *The Dale Problem: Property and Speech Under the Regulatory State*, 75 U. CHI. L. REV. 1541, 1589 (2008); see Tabatha Abu El-Haj, *Public Unions Under First Amendment Fire*, 95 WASH. U. L. REV. 1291, 1305 (2018) (“The bottom line is that in choosing to work for the government in a unionized setting, petitioners have already chosen association over non-association, *as employees*.”); Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 829 (2012) (“[I]f employees can choose to leave, or not to accept, a job covered by a union security agreement and instead work in the non-union sector (or in a union job in one of the twenty-three states where such clauses are illegal), the meaning of the claim that employees are ‘compelled’ to pay dues to the union is not self-evident.”).

⁶⁶ On the importance, and manipulability, of such framing choices in legal doctrine, see generally Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311 (2002); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 600–16 (1981). On the particular connection between framing choices and determinations of consent, see Kelman, *supra*, at 614–16.

⁶⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 692 (2014).

⁶⁸ See *id.* at 700–03.

⁶⁹ See *id.* at 709–13.

the government contended, the owners should have operated as a sole proprietorship rather than shielding themselves behind the separate legal personhood of a corporation.⁷⁰ The Court, however, rejected that argument.⁷¹ It noted that the government's position "would put these merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations."⁷² The Court concluded that Congress, in enacting RFRA, would not have wanted to impose such a burden.⁷³

Of course, the contraception mandate would not have applied to the owners at all if they had not first made a choice to make their money by operating a business that involved hiring employees. Just as the workers in the arbitration cases and *Janus* could have avoided the impositions they challenged simply by finding work elsewhere, the business owners in *Hobby Lobby* could have avoided the imposition *they* challenged by seeking other ways of making a living. But the Court did not even consider whether *that* choice rendered the contraception mandate voluntary—and, indeed, the government did not even make that argument.

The Court's holding is understandable, if contestable, on its own terms.⁷⁴ But the crucial point for my purposes is the Court's treatment of choice and coercion. The only reason there was a question whether the contraception mandate and RFRA applied to the employers in *Hobby Lobby* is that they made choices—a choice to earn their money by employing others, and a further choice to shield themselves behind the corporate form in doing so. Yet the Court did not treat those choices as being free ones. To the contrary, because of the burden the employers would have had to assume if they were to avoid the mandate, the Court concluded that the mandate was coercive.⁷⁵

II. THE ROBERTS COURT'S LABOR AND EMPLOYMENT DECISIONS AND THE LEGAL REALIST CRITIQUE OF CHOICE AND CONSENT

In Part I, I showed that the Roberts Court's labor and employment law decisions rest on different and conflicting understandings of free choice. Sometimes, as in the arbitration cases, the Court envisions employers and workers as operating free from constraint—even when employers impose

⁷⁰ See *id.*

⁷¹ See *id.* at 691.

⁷² *Id.* at 706.

⁷³ See *Hobby Lobby*, 573 U.S. at 706–09.

⁷⁴ While *Hobby Lobby* was pending, but anticipating its holding, I suggested that the Court's decision would open the door to constitutional challenges to many applications of civil rights laws. See Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1238–40 (2014).

⁷⁵ See *Hobby Lobby*, 573 U.S. at 726 (contrasting the contraception mandate with the facts in cases where plaintiffs could not "identify any coercion directed at the practice or exercise of their religious beliefs" (internal quotation marks omitted)).

take-it-or-leave-it terms on workers as a condition of keeping their jobs. Other times, as in *Janus* and *Hobby Lobby*, the Court envisions employers and workers as coerced or compelled—even when they could avoid the impositions they challenge simply by seeking other work or remuneration.

But what does this have to do with *Lochner*? In this part, I draw the connection. *Lochner*-era labor and employment cases, like the Roberts Court's recent cases, rested on contestable understandings of worker choice and consent. As I showed above, the understanding of worker choice reflected in the recent arbitration cases is exactly the same as the one that underlay the *Lochner*-era cases invalidating bans on yellow-dog contracts.⁷⁶ Yet today, as in the *Lochner* era, the Court typically takes its understanding of choice for granted. As a result, it neither surfaces nor defends the contestable normative basis for that understanding, nor does it explain why it employs different understandings of worker choice in different cases.

In the first half of the twentieth-century, various Legal Realist scholars responded to *Lochner*-era jurisprudence by highlighting the same dynamics. I begin this part by describing their critique.⁷⁷ I then apply that critique to the Court's recent cases.

A. *The Legal Realist Critique*

The core of the Legal Realist critique of choice and consent is simply stated: constraints on choice are everywhere. Those constraints arise in significant part as the result of legal rules that assign entitlements and structure existing distributions. To talk about choice or consent as the driving principle of a legal regime is therefore to hide the way the law constructs the distribution of wealth and sets the context for bargaining—and to hide the considerations that actually underlie decisions to enforce or override particular choices.

⁷⁶ See *supra* text accompanying notes 59–60.

⁷⁷ In offering this description, I make no effort to describe what arguments or scholars were “central” to Legal Realism, or what the “true” take-away of Legal Realism was. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 169–92 (1992); *cf.*, e.g., Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 470 n.6 (1988) (criticizing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927–1960* (1986) for focusing too heavily on the work of Jerome Frank, whom Singer calls “a peripheral figure in legal realism,” as compared to “central figures” such as “Morris and Felix Cohen, Robert Hale, Walter Wheeler Cook, Leon Green, and Karl Llewellyn”); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 272 n.24, 26 (1997) (arguing that critical legal scholars have incorrectly treated Robert Hale and Morris Cohen as key figures in Legal Realism). Whether or not that sort of inquiry is coherent, it is not especially useful for my purposes—which are merely to highlight certain analytical and critical tools, developed by some scholars in the early part of the Twentieth Century, that shed light on current disputes in labor and employment law. Nor do I attempt, like Hanoch Dagan, to make any broad-scale reconstruction of Realist ideas, though I do share with Dagan the goal of “drawing out from the realist texts a vision of law that is currently relevant—indeed, valuable”—rather than engaging in an exercise of intellectual history. Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 609 (2007).

The crucial figures in developing this critique were Robert Hale and Morris Cohen, and the employment relationship was a key area of focus for them. Hale, for example, 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).”⁷⁸ 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.”⁷⁹ 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).⁸⁰ Hale thus concluded that any contract for hire reflects the balance between the coercive power deployed on either side.⁸¹ “[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.”⁸²

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. “Hale showed that government regulations do not, as a conceptual matter, interject coercion into our world but rather (re-)distribute the coercion that unavoidably inheres in any system

⁷⁸ Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 472 (1923).

⁷⁹ *Id.* at 473; see also Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 627 (1943) (“The employer’s power to induce people to work for him depends largely on the fact that the law previously restricts the liberty of these people to consume, while he has the power, through the payment of wages, to release them to some extent from these restrictions.”).

⁸⁰ Hale notes, for example, that the law may deprive workers of this coercive power to the extent that it makes some strikes (collective refusals to work) illegal. See Hale, *supra* note 79, at 607.

⁸¹ Hale, *supra* note 78, at 474; see also *id.* at 477 (“[T]he income of each person in the community depends on the relative strength of his power of coercion, offensive and defensive.”); Hale, *supra* note 79, at 612 (“[A]ll money is paid, and all contracts are made, to avert some kinds of threats.”).

⁸² Robert L. Hale, *Law Making by Unofficial Minorities*, 20 COLUM. L. REV. 451, 452 (1920); see also John P. Dawson, *Economic Duress: An Essay in Perspective*, 45 MICH. L. REV. 253, 266 (1947) (stating, in a piece inspired by Hale’s work, that “‘freedom of the ‘market’ was essentially a freedom of individuals and groups to coerce one another, with the power to coerce reinforced by agencies of the state itself”).

of private property.”⁸³ The only real question is which forms of coercion, in which circumstances, the law should support. And answering *that* question requires resort to some concept beyond “coercion”—whether “actual power of free initiative,”⁸⁴ “sound reasons of economic policy,”⁸⁵ or something else.⁸⁶

Cohen made a similar point: “[I]n enforcing contracts,” he said, “the government does not merely allow two individuals to do what they have found pleasant in their eyes.”⁸⁷ Because enforcement “puts the machinery of the law in the service of one party against the other,” the issues of *when* and *how* the law should enforce contracts “are important questions of public policy.”⁸⁸ Like Hale, Cohen argued that, because of background economic and social conditions, formal freedom of contract did not necessarily reflect a truly free choice—“though men may be legally free to make whatever contract they please, they are not actually or economically free.”⁸⁹ Some contracts result from one party “exploiting” the “dire need of their neighbors to make the latter agree to almost anything.”⁹⁰ As with Hale, Cohen found the source of this private coercive power in property law. Because the law of property empowers me to exclude “my neighbor” from things that may be “necessary to [his] life,” it “confers on me a power, limited but real, to make him do what I want.”⁹¹

Canvassing an array of different situations in which the law deems parties to have entered into contracts even though “there is no negotiation, bar-

⁸³ Ian Ayres, *Discrediting the Free Market*, 66 U. CHI. L. REV. 273, 275 (1999); see Hale, *supra* note 78, at 478 (“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.”); see generally BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 212 (1998) (“What proponents championed as laissez[-]faire turned out on closer inspection to be merely a different form of public meddling with so-called private affairs.”); Justin Desautels-Stein, *The Market as a Legal Concept*, 60 BUFF. L. REV. 387, 466–67 (2012) (“In the real world, the actual function of laissez-faire was shot through with coercive restrictions on individual freedom, restrictions ‘out of conformity with any formula of “equal opportunity,” or of “preserving the equal rights of others.”’ In any modern society, such restrictions were unavoidable, and the only question was when and how to coerce whom, and where to direct the distribution of income and resources.”) (footnote omitted) (quoting Hale, *supra* note 78, at 470).

⁸⁴ Hale, *supra* note 78, at 478.

⁸⁵ Hale, *supra* note 79, at 628.

⁸⁶ Barbara Fried argues that Hale filled this in with a social-democratic form of Lockean appropriation theory. See FRIED, *supra* note 83, at 110–11. Neil Duxbury argues that Hale “simply believed that, by identifying the true nature of economic compulsion, and by realising that it in fact exists where normally one sees a relationship of *prima facie* economic freedom, legislators and judges may be able to take steps to reduce the accumulation of private governing power in the hands of an economically privileged few.” Neil Duxbury, *Robert Hale and the Economy of Legal Force*, 53 MOD. L. REV. 421, 442 (1990).

⁸⁷ Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 562 (1933).

⁸⁸ *Id.*

⁸⁹ *Id.* at 563.

⁹⁰ *Id.*

⁹¹ Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927).

gain, or genuinely voluntary agreement,” Cohen argued that voluntary choice cannot be the sole basis for enforcing contracts.⁹² He gave special attention to employment contracts, particularly in industrial enterprises. “The working-man has no real power to negotiate or confer with the corporation as to the terms under which he will agree to work,” Cohen argued.⁹³ Explicitly rejecting the notion of freedom of contract applied in *Lochner* and *Coppage*, Cohen contended that “the element of consent on the part of the employee may be a minor one in the relation of employment—a relation much more aptly and realistically described by the old law as that between master and servant.”⁹⁴

As did Hale, Cohen emphasized the power that common-law rules of property and contract enable private parties to exercise over other private parties—a power he referred to as “sovereignty.”⁹⁵ And because the rules governing when to enforce agreements necessarily involve the state’s decision about how to deploy *its* sovereign power, the resolution to that question must necessarily be a political one. “If, then, the law of contract confers sovereignty on one party over another (by putting the state’s forces at the disposal of the former), the question naturally arises: For what purposes and under what circumstances shall that power be conferred?”⁹⁶

The negative liberty of contract cannot provide a coherent basis for answering that question. Rather, Cohen argued, the state should take “care that the power of the state be not used for unconscionable purposes, such as helping those who exploit the dire need or weaknesses of their fellows.”⁹⁷ Enforcing every bargain “would logically lead not to a maximum of individual liberty but to contracts of slavery, into which, experience shows, men will ‘voluntarily’ enter under economic pressure . . . a pressure that is largely conditioned by the laws of property.”⁹⁸ Limiting the types of bargains the state will enforce thus may be “necessary to assure real freedom.”⁹⁹

⁹² Cohen, *supra* note 87, at 568–71.

⁹³ *Id.* at 569; *see also* Cohen, *supra* note 91, at 12 (“[N]ot only is there actually little freedom to bargain on the part of the steel worker or miner who needs a job, but in some cases the medieval subject had as much power to bargain when he accepted the sovereignty of his lord. Today I do not directly serve my landlord if I wish to live in the city with a roof over my head, but I must work for others to pay him rent with which he obtains the personal services of others. The money needed for purchasing things must for the vast majority be acquired by hard labor and disagreeable service to those to whom the law has accorded dominion over the things necessary for subsistence.”).

⁹⁴ Cohen, *supra* note 87, at 569.

⁹⁵ *See id.* at 586 (“The law of contract, then, through judges, sheriffs, or marshals puts the sovereign power of the state at the disposal of one party to be exercised over the other party. It thus grants a limited sovereignty to the former.”); Cohen, *supra* note 91, at 12; *see also* Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 217 (1937).

⁹⁶ Cohen, *supra* note 87, at 587; *see also* Cohen, *supra* note 91, at 14 (“[I]t is necessary to apply to the law of property all those considerations of social ethics and enlightened public policy which ought to be brought to the discussion of any just form of government.”).

⁹⁷ Cohen, *supra* note 87, at 587.

⁹⁸ *Id.*

⁹⁹ *Id.*

Although Cohen's and Hale's interventions were analytic in form, they explicitly served a political and jurisprudential agenda of undermining *Lochner*-era understandings of freedom of contract.¹⁰⁰ As Jedediah Purdy explains referring to Hale in particular—but in an analysis that applies to both men—their work “showed the implausibility of simply blessing as ‘voluntary’ a labor contract resulting from the encounter of the worker’s very small coercive power (the threat of withholding labor) with the very great coercive power of the employer (the threat of withholding employment).”¹⁰¹ Joseph Singer puts the same point slightly differently: “Property law thus limits freedom of contract, since some people have more freedom of contract—ability to obtain what they want on terms agreeable to them—than others.”¹⁰²

Coppage, which invalidated a state law banning yellow-dog contracts,¹⁰³ was the key *Lochner*-era case. Justice Pitney's opinion for the Court recognized that the state may “properly exert its police power to prevent coercion on the part of employers towards employees, or *vice versa*.”¹⁰⁴ And he also recognized that Kansas had described the employer's action—demanding that workers agree, as a condition of continued employment, not to join a union—as coercive.¹⁰⁵ In particular, Justice Pitney noted the view, expressed by the Kansas Supreme Court, 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.”¹⁰⁶ He agreed that “wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances.”¹⁰⁷ Each party thus will be “inevitably more or less influenced by the question whether he has much property, or little, or none.”¹⁰⁸

But, Justice Pitney concluded, this sort of pressure or influence cannot count as coercion “in truth,”¹⁰⁹ lest the entire system of property and contract unravel. He found it “self-evident that, unless all things are held in

¹⁰⁰ See Warren J. Samuels, *The Economy as a System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261, 273 (1973) (showing that Hale offered *Coercion and Distribution* in direct response to *Coppage*); Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form"*, 100 COLUM. L. REV. 94, 124 (2000) (arguing that “a major practical conclusion that was made to follow from” analyses like those of Hale and Cohen “was that the U.S. Supreme Court should not strike down progressive legislation on the grounds that it interfered with a right of free contract guaranteed by the 14th Amendment”).

¹⁰¹ Jedediah Purdy, *People as Resources: Recruitment and Reciprocity in the Freedom-Promoting Approach to Property*, 56 DUKE L.J. 1047, 1097 (2007).

¹⁰² Singer, *supra* note 77, at 490.

¹⁰³ See *Coppage v. Kansas*, 236 U.S. 1, 26 (1915).

¹⁰⁴ *Id.* at 15.

¹⁰⁵ *Id.* at 8.

¹⁰⁶ *Id.* at 17 (internal quotations omitted).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Coppage*, 236 U.S. at 16.

common, some persons must have more property than others.”¹¹⁰ He thus reasoned that “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.”¹¹¹

Coppage’s narrow understanding of coercion thus rested on a proto-Nozickian understanding that any distribution that results from free exchange is just.¹¹² Precisely because that distribution is just, Justice Pitney argued, it cannot be deemed to undermine the freedom of the transactions that follow.¹¹³ “Unless a private party had violated the market ground rules of competency, fraud, and duress,” Pitney thus “viewed coercion as residing exclusively in affirmative state action.”¹¹⁴

Hale and Cohen’s analysis fatally undermined Pitney’s argument, because it demonstrated that “the ‘inequalities of fortune’ by which individuals are ‘inevitably more or less influenced’ are the result of state power.”¹¹⁵ It is the state, through rules of property and contract law, that gives market actors the power to coerce each other. Thus, the effort to say that limitations imposed by state law represent coercion “in truth,” while limitations imposed by private parties do not, necessarily unravels. All of these limitations rest on state law in the end.¹¹⁶ Just “because courts can do nothing to revise the underlying pattern of market relationships,” 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.”¹¹⁷

To say that coercion is everywhere, of course, doesn’t mean that existing arrangements are improper, illegitimate, or unjustified. Hale emphasized that “to call an act coercive is not by any means to condemn it.”¹¹⁸ Similarly, Cohen wrote that “the recognition of private property as a form of sovereignty is not in itself an argument against it.”¹¹⁹ As Fried puts it, “[n]othing logically followed” from the Legal Realist critique, “beyond the all-important conclusion . . . that most legal questions were questions of

¹¹⁰ *Id.* at 17.

¹¹¹ *Id.*

¹¹² See Epstein, *supra* note 61, at 1408. For Nozick’s classic “Wilt Chamberlain” example of free exchange leading to (justifiable) inequality, see ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 160–64 (1974).

¹¹³ Although this is not a logically necessary implication of his theory that distributions resulting from free exchange are just, it is notable that in his work on coercion Nozick, too, “recognizes neither social or structural coercion, nor the possibility that coercion might be the unconscious byproduct of human action primarily directed at other ends, nor the possibility that one might ‘coerce’ by exploiting limitations on the freedom of others not of one’s own making.” Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1449 (1989) (footnote omitted).

¹¹⁴ Gary Peller, *Privilege*, 104 GEO. L.J. 883, 897 (2016).

¹¹⁵ *Id.* at 890 (footnotes omitted; quoting *Coppage v. Kansas*, 236 U.S. 1, 17 (1915)).

¹¹⁶ See *id.* at 897.

¹¹⁷ Hale, *supra* note 79, at 625.

¹¹⁸ Hale, *supra* note 78, at 471.

¹¹⁹ Cohen, *supra* note 91, at 14.

policy for the legislatures, not matters of constitutional rights for the courts.”¹²⁰ But the “skeptical, deconstructive analysis” of Hale and Cohen’s critique “offered little guidance” in deciding how to answer those questions.¹²¹

The point of Hale and Cohen’s interventions, however, was not to resolve the questions of what forms the government’s actions to structure and regulate the market should take. Those are questions that “can be answered only by reference to moral and policy considerations.”¹²² Rather, the point was to demonstrate that concepts like coercion, consent, private property, and free contract cannot resolve them. Acting as if these concepts can resolve cases merely hides the moral and policy judgments that are being made offstage.¹²³ These, notably, include judgments about which inequalities are “so severe, and the resulting bargains so unfair, that they represent illegitimate impositions of power” and thus should not be understood as “free bargains.”¹²⁴

When it interred the *Lochner* Era and began upholding New Deal legislation, the Supreme Court relied on arguments that resonated with the Legal Realist critique of freedom of contract. Hale himself played a significant role in developing one key New Deal statute—the National Labor Relations Act. In the Senate hearings on the bill, he “voiced quintessential realist arguments about the pervasiveness of relations of power and coercion in the labor market, which were echoed throughout [Senator] Wagner’s own rhetorical appeals for the Act’s passage.”¹²⁵ Upholding the statute in *NLRB v. Jones & Laughlin Steel Corp.*,¹²⁶ Chief Justice Hughes’ opinion for the Court embraced those arguments. Hughes explained 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,” 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,” and

¹²⁰ FRIED, *supra* note 83, at 210.

¹²¹ *Id.*

¹²² Singer, *supra* note 77, at 491; see Robert W. Gordon, *Using History in Teaching Contracts: The Case of Britton v. Turner*, 26 U. HAW. L. REV. 423, 432–33 (2004) (“There may be valid reasons for distinguishing the different kinds of threats, but as Hale and Dawson memorably pointed out, the reasons cannot be that the parties under threats of force or breach of pre-existing contracts are coerced and the workers under threat of firing/not hiring are free. All are making a rational choice of the less disagreeable alternative. The reasons some threats are held improper and others permitted must be moral, economic and political reasons independent of the degree of coercion.”).

¹²³ For the classic general statement of the point, by Morris Cohen’s son, see generally Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

¹²⁴ Singer, *supra* note 77, at 490.

¹²⁵ Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1409 n.124 (1993).

¹²⁶ 301 U.S. 1 (1937).

that joining together was therefore “essential to give laborers opportunity to deal on an equality with their employer.”¹²⁷

Upholding a minimum wage for women in *West Coast Hotel Company v. Parrish*,¹²⁸ Chief Justice Hughes similarly emphasized the measure’s role 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.”¹²⁹ And just as Hale and Cohen dissolved the boundaries between public and private, Hughes highlighted the way the seemingly private conduct of employers in paying starvation wages imposed a burden on the public fisc: “What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met.”¹³⁰ In a Haleian analytic move, Hughes said that allowing employers to pay their workers low wages would thus be “a subsidy for unconscionable employers.”¹³¹

B. *The Critique Applied to the Roberts Court*

With the Legal Realist critique in mind, it is easy to see how the recent Roberts Court decisions replicate the *Lochner* Era. It is not that the Roberts Court has invalidated labor and employment statutes on substantive due process grounds.¹³² Instead, the Roberts Court has replicated the *Lochner* Era by relying on an undefended—and often unarticulated—notion of free contract in the employment context. The Court’s notion of free contract persistently fails to take account of the ways in which workers’ choices are constrained by the circumstances surrounding the employment relationship. Concomitantly, it persistently fails to take account of the way that unionization and regulation can rectify bargaining power imbalances and help pro-

¹²⁷ *Id.* at 33.

¹²⁸ 300 U.S. 379 (1937).

¹²⁹ *Id.* at 399.

¹³⁰ *Id.*

¹³¹ *Id.* See generally Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 *IND. L.J.* 783, 818 (2003) (“In effect, the Court portrayed the minimum wage law as *reducing* rather than *creating* moral hazard, reasoning that the law internalized costs that employers had wrongly spread to society.”); Cass R. Sunstein, *Lochner’s Legacy*, 87 *COLUM. L. REV.* 873, 880–81 (1987) (“The Court’s claim is that the failure to impose a minimum wage is not nonintervention at all but simply another form of action—a decision to rely on traditional market mechanisms, within the common law framework, as the basis for regulation.”).

¹³² *Janus*, of course, has overtones of *that* sort of *Lochnerism*, as do Roberts Court decisions protecting the First Amendment rights of businesses. See *supra* note 5. In my own work, I have argued that these developments represent a strategic effort to reframe libertarian claims from the property-and-contract frame, which “was politically vulnerable in a post-*Lochner* world,” to a First Amendment frame, which was “more politically congenial.” Bagenstos, *supra* note 74, at 1233. The Court’s holding that the Affordable Care Act’s individual mandate exceeded congressional power under the Commerce Clause can be understood as another example of strategic reframing of *Lochnerism*. See generally Jamal Greene, *What the New Deal Settled*, 15 *U. PA. J. CONST. L.* 265 (2012).

vide workers with “real freedom”¹³³ or the “actual power of free initiative.”¹³⁴

1. *The Arbitration Cases*

The point is most obvious in *Lamps Plus*. In rejecting class arbitration, the Court relied on what it called the “first principle” of arbitration jurisprudence, “that arbitration is a matter of consent, not coercion.”¹³⁵ But the very question at issue was precisely *what* the employer and employee had consented to. The employer’s contract was ambiguous regarding whether it would permit arbitration on a class basis. In determining what the parties consented to, the employee argued, the courts should apply the general, pre-existing principle of *contra proferentem*.¹³⁶ It is a perfectly reasonable interpretation of the concept of consent to say that a party consents to contractual terms supplied by well-understood background principles of law.¹³⁷

Rejecting that argument, Chief Justice Roberts’s opinion for the Court argued that the *contra proferentem* doctrine does not promote consent because it is not designed to identify the linguistic meaning of a term: “Unlike contract rules that help to interpret the meaning of a term, and thereby uncover the intent of the parties, *contra proferentem* is by definition triggered only after a court determines that it *cannot* discern the intent of the parties.”¹³⁸ Rather than seeking to determine what the parties consented to, Roberts argued, that doctrine is “based on public policy factors, primarily equitable considerations about the parties’ relative bargaining strength.”¹³⁹

There are several flaws in Chief Justice Roberts’s analysis. First, whatever the *reason* for the *contra proferentem* doctrine, it is a background principle of long standing.¹⁴⁰ Roberts never explained why the employer in *Lamps Plus*—a large corporation that acted with the aid of counsel—should not be understood as having consented to the application of that doctrine when it drafted its arbitration contract. As Justice Kagan noted in her dis-

¹³³ Cohen, *supra* note 87, at 587.

¹³⁴ Hale, *supra* note 78, at 478.

¹³⁵ *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019) (internal quotations omitted).

¹³⁶ *See id.* at 1417.

¹³⁷ *See, e.g.*, Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 866 (1992) (“[W]hen the transaction costs of discovering and contracting around the default rules are sufficiently low, a party’s consent to be legally bound coupled with silence on the issue in question may well constitute consent to the imposition of the particular default rule that is in existence in the relevant legal system.”); David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1820 (1991) (“[O]nce the parties know that the law will supply the term, they take that into account when calculating the benefits of drafting an express term.”).

¹³⁸ *Lamps Plus*, 139 S. Ct. at 1417.

¹³⁹ *Id.* It is not clear that Roberts was right about this.

¹⁴⁰ *See id.* (acknowledging that “the rule enjoys a place in every hornbook and treatise on contracts”); Tal Kastner & Ethan J. Leib, *Contract Creep*, 107 GEO. L.J. 1277, 1298 (2019) (“*Contra proferentem* is an admittedly old principle of contract construction that may have already been in the domain of ‘general contract law’ since Roman times.”).

sent, “Lamps Plus, knowing about the anti-drafter rule, still chose *not* to include a term prohibiting class arbitration.”¹⁴¹

Second, Chief Justice Roberts’s critique of the application of *contra proferentem* could be applied just as well—if not even more strongly—to his own analysis. There was no term in the *Lamps Plus* arbitration agreement that forbade class proceedings.¹⁴² Indeed, although the language of the agreement did not definitively resolve the issue one way or the other, Justice Kagan made a strong case that the language was most plausibly read to permit both individual and class arbitration.¹⁴³ If the employer did not consent to an arbitration agreement that permitted class proceedings, the employee certainly did not consent to an agreement that banned class proceedings. The “first principle” that “arbitration is strictly a matter of consent,”¹⁴⁴ is simply not sufficient to tell us whether to allow class arbitration here.

The majority’s decision to read the contract to bar class arbitration rested, not on an effort to identify the intent of the parties, but on the Court’s own policy of removing obstacles to individual arbitration. Relying on the Court’s prior cases that had enforced arbitration contracts that expressly banned class proceedings, Chief Justice Roberts emphasized that class arbitration “sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”¹⁴⁵ That policy has nothing more to do with consent than does the policy of *contra proferentem*.

To be sure, Chief Justice Roberts attempted to connect the Court’s policy concern to (actual or hypothetical) consent. Given the differences between individual and class arbitration, he argued, the mere fact that a person consented to individual arbitration does not suggest that the person consented or would have consented to class arbitration. Contractual ambiguity, he concluded, “does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to ‘sacrifice[] the principal advantage of arbitration.’”¹⁴⁶

But this analysis of consent focuses entirely on the employer’s perspective. Perhaps an employer would not have agreed to an ambiguous arbitration agreement if it understood that the ambiguity would be read to permit class proceedings. From the employee’s perspective, however, things look different. In the abstract, it seems just as plausible that workers would not have agreed to a complex arbitration agreement unless they understood that ambiguities in that agreement would be interpreted against the drafter. That, after all, is one of the justifications scholars have offered for the *contra*

¹⁴¹ *Lamps Plus*, 139 S. Ct. at 1434 (Kagan, J., dissenting).

¹⁴² *See id.* at 1428–29 (Kagan, J., dissenting).

¹⁴³ *See id.*

¹⁴⁴ *Id.* at 1415 (majority opinion) (internal quotation marks and brackets omitted).

¹⁴⁵ *Id.* at 1416 (internal quotation marks omitted; quoting *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 348 (2011)).

¹⁴⁶ *Id.* (quoting *Concepcion*, 563 U.S. at 348).

proferentem rule. Eric Posner, for example, suggests that the *contra proferentem* rule promotes consent:

The drafter has an advantage: she can sneak in favorable language. But as a consequence, the drafter may have trouble persuading the nondrafter to consent to a contract. A natural solution to this problem is to agree that ambiguities will be construed against the drafter.¹⁴⁷

When one considers Posner's analysis and the employee's perspective, it is evident that the principle of consent does not resolve the issue in *Lamps Plus*. Perhaps the employer wouldn't have agreed to the contract if it thought ambiguities would be resolved in favor of class arbitration, but then perhaps the employee wouldn't have agreed to the contract if it thought ambiguities would be resolved in favor of the drafting party.¹⁴⁸

At this point, one might object that my analysis is unrealistic: *Of course* the employee would still have agreed to the contract if it had explicitly forbidden class arbitration, because the contract would have been offered as a take-it-or-leave-it condition of employment.¹⁴⁹ Individual workers lack the power to resist the imposition of terms like these.¹⁵⁰ Indeed, they are unlikely to read the fine print of arbitration contracts—or even necessarily know that they have agreed to them—in any event.¹⁵¹

¹⁴⁷ Eric A. Posner, *There Are No Penalty Default Rules in Contract Law*, 33 FLA. ST. U. L. REV. 563, 580 (2006).

¹⁴⁸ Randy Barnett argues that terms in form contracts that were “radically unexpected” by one of the parties are not part of what they objectively consented to. Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 639–40 (2002). We can put the debate in *Lamps Plus* into Barnett's terms: Chief Justice Roberts argues that reading a general arbitration agreement to permit class arbitration would be radically unexpected by the employer; the dissent argues that reading an ambiguity in the arbitration agreement in favor of the employer would be radically unexpected by the worker. Barnett's understanding of consent offers arguments to both sides and cannot resolve the dispute between them.

¹⁴⁹ See Rachel Amow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637, 639 (2007) (noting that employment arbitration agreements are typically “boilerplate documents, unilaterally drafted by the employer and presented as a condition of employment, often subsequent to the start of work”); see also Lisa J. Bernt, *Tailoring A Consent Inquiry to Fit Individual Employment Contracts*, 63 SYRACUSE L. REV. 31, 31–32 (2012) (“The setting for individual employment contracts is often one where the employee is ignorant about his legal rights, lacks information, and is rushed into a take-it-or-you-don't-work agreement. The provisions are sometimes tucked into what appears to be a pile of routine paperwork.”).

¹⁵⁰ See *supra* note 14.

¹⁵¹ See *Varela v. Lamps Plus, Inc.*, No. CV 16-577-DMG (KSX), 2016 WL 9110161, at *1 (C.D. Cal. July 7, 2016) (“On Varela's first day of work, he signed multiple documents, including an arbitration agreement, as a condition of his employment with Lamps Plus. Varela contends that he does not remember signing this document or having its contents explained to him, but does not contest the fact that he signed it.”), *aff'd*, 701 F. App'x 670 (9th Cir. 2017), *rev'd*, 139 S. Ct. 1407 (2019) (citations omitted); Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived in the Workplace*, 35 BERKELEY J. EMP. & LAB. L. 5, 8 (2014) (“Employees often have no knowledge that they are subject to forced arbitration provisions, which can be buried in boilerplate language or the fine print of job applications, employment contracts, and employment handbooks. Forced arbitration provisions also have been tucked into com-

But that point undermines the Court's entire employment arbitration jurisprudence—not just *Lamps Plus*, but also *Epic Systems* and even the modern origin point of that jurisprudence, *Circuit City Stores, Inc. v. Adams*.¹⁵² If the “first principle that underscores all of our arbitration decisions is that arbitration is strictly a matter of consent,”¹⁵³ then it seems difficult to justify binding workers to arbitration agreements that they have no meaningful ability to resist.¹⁵⁴ The justification must come from some external policy consideration.¹⁵⁵

But the lesson of *Hale* and *Cohen* is that, when we talk about consent to contract, some external policy consideration is *always* doing the work. Constraints on choice are everywhere, and they are structured and backed by legal rules. When we say that a choice to contract is a free one, we are saying that the balance of coercion on either side is consistent with principles of policy and morality, and that it does not permit either side to exercise its “economic power” in a way that is “illegitimate.”¹⁵⁶

When the Court in *Lamps Plus* displaced the doctrine of *contra proferentem*, it was making a choice. It was determining that the policy of clearing away obstacles to individualized arbitration was more powerful than the policies that *contra proferentem* promotes. Although it offered the principle of consent as its justification, that principle did not, analytically, compel a decision in favor of the employer. Indeed, as I have shown, there is a strong argument that the Court's decision undermines, rather than reinforces, worker consent.

Similarly, when the Court in *Epic Systems* determined that agreements with individual employees barring class arbitration were enforceable, it was making a choice. It was determining that the policy in favor of clearing away obstacles to individual arbitration was more powerful than the policies supporting collective action by workers. As in *Lamps Plus*, the parties' supposed consent played a key role in the Court's reasoning. But, as in *Lamps Plus*, the principle of consent could not resolve the issue. An essential pre-

pany-wide emails, job offers, and in computerized applications on websites and workplace kiosks.”) (footnotes omitted); see generally Omri Ben-Shahar, *The Myth of the “Opportunity to Read” in Contract Law*, 5 EUR. REV. CONT. L. 1 (2009).

¹⁵² 532 U.S. 105 (2001) (holding that the Federal Arbitration Act applies to all contracts of employment except for those involving transportation workers).

¹⁵³ *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019) (internal quotation marks and alterations omitted).

¹⁵⁴ Indeed, as Magaret Radin argued forcefully, the notion of consent provides a weak basis for justifying the enforcement of boilerplate contracts in general. See MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 82–96 (2013). Given the constraints facing individual workers, Radin's argument can be applied even more powerfully in the employment context.

¹⁵⁵ Cf., Nathan B. Oman, *Reconsidering Contractual Consent Why We Shouldn't Worry Too Much About Boilerplate and Other Puzzles*, 83 BROOK. L. REV. 215, 216 (2017) (recognizing that consent-based theories cannot easily justify enforcement of boilerplate contracts but arguing that the utility of such contracts in solving problems of social coordination provides a sufficient justification).

¹⁵⁶ Singer, *supra* note 77, at 491.

mise of the National Labor Relations Act and the Norris-LaGuardia Act—the two statutes on which the employees relied—is that workers acting alone lack sufficient bargaining power to enter into truly free agreements with their employers.¹⁵⁷ Recall Chief Justice Hughes’s explanation of the reasons Congress protected workers’ rights to engage in concerted activities: “[A] single employee was helpless in dealing with an employer” because “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.”¹⁵⁸

As in *Lamps Plus*, then, both sides in *Epic Systems* could make an argument based on the principle of consent. The employers could argue that they could not be bound to engage in class arbitration when they had not consented to proceeding on a class basis, and the workers could argue that they could not be bound by an agreement to individual arbitration that their employers imposed on them individually as a condition of employment. By resolving the case in favor of the employers’ rather than the workers’ perspective, the Court made a choice. It chose to give more weight to the policy favoring arbitration than to the policy favoring collective action as a means of rectifying bargaining-power imbalances.¹⁵⁹

¹⁵⁷ See, e.g., 29 U.S.C. § 151 (2018) (stating that the NLRA responded to “[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association”); *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 835 (1984) (“[I]n enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment.”). Justice Ginsburg made this point squarely in her dissent. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1633, 1633–34 (2018) (Ginsburg, J., dissenting).

¹⁵⁸ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

¹⁵⁹ In his *Epic Systems* opinion, Justice Gorsuch argued that the workers’ unequal-bargaining-power argument was foreclosed by the Court’s earlier employment arbitration decisions, notably *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); see *Epic Sys.*, 138 S. Ct. at 1630–31 (arguing that “the dissent’s real complaint lies with the mountain of precedent” the Court had created under the Federal Arbitration Act). In understanding the options open to the Court in *Epic Systems*, Justice Gorsuch makes a fair point. The dissenters in *Circuit City* argued that Congress had exempted employment arbitration from the Federal Arbitration Act, precisely because of concern with “the potential disparity in bargaining power between individual employees and large employers.” *Circuit City*, 532 U.S. at 132 (Stevens, J., dissenting); see also *id.* at 138–39, 139 n.3 (Souter, J., dissenting) (noting congressional “concern that arbitration could prove expensive or unfavorable to employees, many of whom lack the bargaining power to resist an arbitration clause if their prospective employers insist on one”). But Justice Ginsburg offered the reasonable response that the Court’s decision marked a significant step beyond that prior precedent. See *Epic Sys.*, 138 S. Ct. at 1645 (Ginsburg, J., dissenting). In any event, my point is that the Court’s employment-arbitration jurisprudence represents a judicial policy choice. Whether the Court first made that choice in *Epic Systems*, in *Circuit City*, or in some case in between, my point is the same.

2. Janus

As I showed in Part I, there is a significant tension between *Janus* and the Roberts Court's employment arbitration cases. In *Janus*, the Court found that workers were coerced into paying agency fees even though they could have avoided those fees simply by seeking another job. In *Epic Systems* and *Lamps Plus*, by contrast, the Court found that workers had freely consented to waive their rights to pursue class proceedings even though those waivers were the price of keeping their jobs. When we view these cases through the lens of the Legal Realist critique, however, we can see that there is a deep similarity between them. In particular, just as in the arbitration cases, the invocation of coercion in *Janus* hides the policy choices the Court is making—choices that disfavor the policy of enabling workers to join together to assert their interests and disregard the way that such collective action can expand the scope of choices actually available to workers.

As a historical and doctrinal matter, it is easy enough to see why the *Janus* Court did not hold that workers had consented to the agency fee by accepting jobs in a unionized workplace. *Janus* was a First Amendment case. "In modern times it has become insufficient to assert that, because an employee has no constitutional right to a government paycheck, his employment is a mere privilege whose various conditions are beyond the First Amendment's purview."¹⁶⁰

But that raises the question why the Court did not apply the *Janus* understanding of free choice to its employment arbitration cases. If we understand conditions on employment as coercive despite the worker's option of

¹⁶⁰ Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 WM. & MARY L. REV. 1985, 2005 (2012). The early twentieth-century law of public employee speech gave crucial weight to the worker's freedom to seek a job elsewhere—as captured in Justice Holmes's famous statement that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. City of New Bedford*, 29 N.E. 517, 517 (Mass. 1892). However, the Supreme Court turned strongly against Holmes's aphorism during the McCarthy era. See *Connick v. Myers*, 461 U.S. 138, 144 (1983) (collecting cases). For the classic argument that the force of Holmes's aphorism had been eroded—and that Holmes's approach should be rejected entirely—see William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1442 (1968). One can, of course, agree that Holmes was wrong but also reject the holding in *Janus*. If a job condition that requires the payment of an agency fee is not analogous to a job condition that prevents "talk[ing] politics," *McAuliffe*, 29 N.E. at 517, then there is no contradiction. See, e.g., Kate Andrias, *Janus's Two Faces*, 2018 SUP. CT. REV. 21, 34 (2018) ("[T]he Court never offered a satisfying explanation for why requiring workers to subsidize a union (or requiring citizens to subsidize another representative organization) constitutes a violation of the First Amendment."); William Baude & Eugene Volokh, *The Supreme Court, 2017 Term—Comment: Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 171 (2018) ("The better view, we think, is that requiring people only to pay money, whether to private organizations or to the government, is not a First Amendment problem at all."); El-Haj, *supra* note 65, at 1306 ("Fair-share service fees do not impinge any employee's 'constitutional right to talk politics' by forcing a choice between employment and exercising rights protected by the freedom of speech or association.") (footnotes omitted).

exit, how can the acceptance of an arbitration agreement, imposed as a condition of employment, be treated as consent?

Perhaps the answer is simply the public-private distinction. The constitutional guarantee of free speech, which is the legal protection that was formally at issue in *Janus*, applies only to government actors.¹⁶¹ That doctrinal rule reflects the premise that government actions come backed with greater power to coerce than do private actions.¹⁶² So perhaps the reason the Court more readily found coercion in *Janus* than in its arbitration cases is that, in fact, conditions of government employment place more pressure on workers than do conditions of private employment.

The analysis of Hale and Cohen should lead us to be skeptical of such a claim. As they showed, there is no clean public-private distinction to be found here.¹⁶³ Government coercion lies behind the hiring and firing decisions of private employers. Practically speaking, workers in the public sector are likely to have as much ability to walk away from objectionable contract terms as do workers in the private sector.¹⁶⁴ In both sectors, most workers face “asymmetric vulnerability”—they need their job more than their employer needs them.¹⁶⁵ Because conditions of public employment are not likely to be more coercive than conditions of private employment, the difference between *Janus* and the arbitration cases is most plausibly understood as reflecting a difference in policy judgments about the *kind* of condition at issue in each case: The Court simply places a higher value on the process of arbitration than on the financing of collective bargaining representatives.

But from the perspective of “real freedom”¹⁶⁶ or the “actual power of free initiative,”¹⁶⁷ that policy judgment is perverse. As we have seen, the premise of the Wagner Act is that workers lack meaningful freedom of choice unless they can band together to bargain collectively.¹⁶⁸ Agency fees

¹⁶¹ With some exceptions, statutory and common-law rules generally do not protect political speech against private employers. See Bagenstos, *supra* note 14, at 257.

¹⁶² See generally Van Alstyne, *supra* note 160, at 1460–62.

¹⁶³ See Singer, *supra* note 77, at 477–95 (showing how the Legal Realists undermined the public-private distinction); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1351–52 (1982) (same).

¹⁶⁴ See Kermit Roosevelt III, *Not As Bad As You Think: Why Garcetti v. Ceballos Makes Sense*, 14 U. PA. J. CONST. L. 631, 639–40 (2012) (arguing that government employers have no greater coercive power over their employees than do private employers). For an argument that private employers have substantial coercive power, see ALEXANDER HERTEL-FERNANDEZ, *POLITICS AT WORK: HOW COMPANIES TURN THEIR WORKERS INTO LOBBYISTS* ch. 5 (2018).

¹⁶⁵ See *supra* note 14 and accompanying text. There might, of course, be other reasons to distinguish government and nongovernment workplaces. See, e.g., Pauline T. Kim, *Market Norms and Constitutional Values in the Government Workplace*, 94 N.C. L. REV. 601, 639 (2016).

¹⁶⁶ Cohen, *supra* note 85, at 587.

¹⁶⁷ Hale, *supra* note 78, at 478.

¹⁶⁸ See *supra* text accompanying notes 124–26.

are plausibly necessary to ensure that workers can do so.¹⁶⁹ Without an agency-fee arrangement, individual workers have an incentive to free-ride; they will benefit from whatever bargain their union reaches, but they can avoid paying their fair share to support the union in its efforts. But the behavior that is individually rational for a given worker will, engaged in collectively, severely hamper the ability of a union to amplify the workers' bargaining power.¹⁷⁰ The agency fee solves this collective action problem by ensuring that all workers who benefit from a union's activities pay for their fair share of those activities. As a result, although the agency fee is imposed on workers as a condition of employment, its overall effects may be to increase workers' range of choices on net by making it possible for the workers to band together effectively.¹⁷¹

Indeed, rather than seeing the agency fee as having been *imposed* on workers, it makes at least as much sense to understand the exaction of that fee as an *exercise* of worker choice. Strictly speaking, it was not the state that imposed the agency fee requirement in *Janus*. The fee emerged as the outcome of a negotiation—a negotiation between the state and the union that government employees had elected to represent their interests.¹⁷² Indeed, it was the union who sought the agency fee requirement. A majority of the workers in the bargaining unit chose to be represented by the union. To make that choice effective, they needed to collect a fair-share fee from those other workers who would benefit from the representation.¹⁷³

The Roberts Court took precisely this view of worker choice in *14 Penn Plaza v. Pyett*,¹⁷⁴ one of its arbitration cases. There, the Court held that a

¹⁶⁹ See Brishen Rogers, *Three Concepts of Workplace Freedom of Association*, 37 BERKELEY J. EMP. & LAB. L. 177, 216 (2016).

¹⁷⁰ See MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* 76–91 (1965).

¹⁷¹ See Andrias, *supra* note 160, at 45–48; Cynthia Estlund, *The “Constitution of Opportunity” in Politics and in the Courts*, 94 TEX. L. REV. 1447, 1462–63 (2016); Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 216–17 (2015) [hereinafter “Estlund, *Constitutional Anomaly*”]; Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU*, LOCAL 1000, 98 CORNELL L. REV. 1023, 1075–77 (2013). Robert Hale himself made essentially that same argument when he testified in favor of the National Labor Relations Act. He argued that if a worker “belongs to a union in a closed shop industry, it is perfectly true he has no freedom to work without being a member of the union, but he has a little more freedom through the brotherhood of his union against the restraint imposed upon him by the employer.” *To Create a National Labor Board: Hearings Before the Senate Comm. on Educ. & Labor*, 73d Cong., 2d Sess. 51 (1934).

¹⁷² As Luke Norris shows, the labor activists who pushed for the NLRA “argued that worker self-government was not only consonant with the nation’s ethos but also was necessary for workers to become the kinds of economically un-dominated people that citizenship in the republic demanded. When workers formed in a union to deliberate on their shared goals and ends, they engaged in a democratic act and expression of freedom in everyday life.” Luke Norris, *Constitutional Economics*, 28 YALE J.L. & HUMAN. 1, 15 (2016).

¹⁷³ While *Janus* was pending, Benjamin Sachs argued that agency fees are best understood not as being paid by individual workers to the union but instead as being paid by the state to the union. See Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 HARV. L. REV. 1046, 1046 (2018). One’s acceptance of that argument likely correlates with one’s acceptance of the Legal Realist premises that the Court ignored in *Janus*.

¹⁷⁴ 556 U.S. 247, 257 (2009).

union's decision to accept an arbitration agreement can bind individual workers whom the union represents.¹⁷⁵ Because the union must be elected by a majority of the bargaining unit—and has a duty to fairly represent everyone in the unit—the Court said that it is proper to treat the union as the voice of the workers that makes choices in their name.¹⁷⁶ That is true even if not all individual employees would agree with those choices. But although the agency fee requirement in *Janus* resulted from collective bargaining, the Court treated that requirement as one imposed upon—rather than chosen by—the workers.

My point is not that the view of worker choice reflected in *14 Penn Plaza* is right and the one reflected in *Janus* is wrong. Rather, the point is that the principle of worker choice cannot resolve either case. That principle cannot tell us whether the *Janus* Court should have sided with the minority of objecting workers (as it ultimately did) instead of with the majority of workers who had chosen union representation (as the *14 Penn Plaza* Court had). As Hale and Cohen's analysis helps us see, there was simply no avoiding coercion of some employees in *Janus*: Either the workers who chose to band together would coerce the objectors into paying their fair share, or the workers who refused to pay their fair share would coerce the union supporters into having no effective collective representation. Just as in *Lamps Plus* and *Epic Systems*, the Court chose the view of worker choice that gave short shrift to the policy of collective action as a means of checking employer power.¹⁷⁷

3. Hobby Lobby

In *Hobby Lobby*, the Court treated the employers as having been coerced by the ACA's contraception mandate.¹⁷⁸ But Hale and Cohen's analysis severely complicates the question of coercion, because it requires us to consider the full set of ways in which the government empowers the employers, as well as the ways in which it limits their freedom. Unlike in the arbitration cases and *Janus*, the *Hobby Lobby* Court did at least hint at the complexity of the coercion question. But it gave the matter short shrift.

Were the employers coerced? As Elizabeth Sepper points out, “[t]he federal government has long provided significant tax benefits to employers for compensating employees with health benefits in the place of wages.”¹⁷⁹

¹⁷⁵ See *id.*

¹⁷⁶ See *id.* at 270–72.

¹⁷⁷ My argument here is similar to that of Brishen Rogers, who argues that the Court's recent union-fee jurisprudence reflects a choice of a “neoliberal” versus a “civil libertarian” or “social democratic” understanding of worker freedom of association. See Rogers, *supra* note 169, at 182.

¹⁷⁸ See *supra* text accompanying notes 67–73.

¹⁷⁹ Sepper, *supra* note 5, at 1485. For a similar argument, see Nomi Maya Stolzenberg, *It's About Money: The Fundamental Contradiction of Hobby Lobby*, 88 S. CAL. L. REV. 727, 739–41 (2015).

The ACA's contraception mandate can be understood as simply stating a condition on an employer's receipt of those tax benefits: If the employer wants the federal subsidy for providing health care to its employees, it must "cover a minimum set of health benefits including contraception and other preventive care."¹⁸⁰ As I noted above, one could also see the contraception mandate as a condition on employers' decision to take the corporate form—a decision that offers very substantial benefits to the employer.¹⁸¹

And what about coercion of the workers? As we have seen, Hale and Cohen were particularly attentive to the ways in which the law of property gives employers coercive power over their workers.¹⁸² And the contraception mandate can be seen as a response to just that sort of coercion.¹⁸³ Absent the mandate, employers could impose employment terms that provided health insurance but did not cover contraception. As Frederick Gedicks points out, the effect of that imposition is likely to be quite substantial:

It is well documented that failure to cover approved contraceptives in an employer health plan imposes significant out-of-pocket costs on employees, who then have to pay for the excluded contraceptives with after-tax wages instead of having them fully covered by insurance that they pay for only in part and with pre-tax wages.¹⁸⁴

Doctrinally, the Court was forced to address the effect of the mandate on workers, because the government sought to defend the mandate's burden on religious practice as the least restrictive means of serving the compelling interest of ensuring access to contraception.¹⁸⁵ The Court "assume[d] that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA."¹⁸⁶ But it held that the mandate was not the least restrictive means of achieving that interest, because the government could serve it just as well by either paying for

¹⁸⁰ Sepper, *supra* note 5, at 1485; *cf.* Robert L. Hale, *Rate Making and the Revision of the Property Concept*, 22 COLUM. L. REV. 209, 214 (1922) ("Ownership is an indirect method whereby the government coerces some to yield an income to the owners. When the law turns around and curtails the incomes of property owners, it is in substance curtailing the salaries of public officials or pensioners.").

¹⁸¹ See *supra* text accompanying notes 68–70; *cf.* Daniel A. Crane, *Lochnerian Antitrust*, 1 NYU J.L. & LIBERTY 496, 511 (2005) ("Even in the *Lochner* era, the liberty of contract and of property did not entail a right to invoke the privileges of the corporate form and then insist on the right to be left alone by the government to expand the corporation to a monopolistic size.").

¹⁸² See *supra* text accompanying notes 77–98.

¹⁸³ See Caroline Mala Corbin, *Corporate Religious Liberty*, 30 CONST. COMMENT. 277, 302–03 (2015) ("[W]hile some dissatisfied employees may be able to find a comparable full-time position without difficulty, the assumption that employees are always able to choose employers whose values match their own relies on a *Lochner*-era view of employment opportunities.").

¹⁸⁴ Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J.L. & GENDER 153, 170 (2015).

¹⁸⁵ See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 727 (2014).

¹⁸⁶ *Id.* at 728.

contraception itself or requiring the objecting employer's insurance issuer or third-party administrator to pay.¹⁸⁷ The Court thus concluded that the effect on workers of excusing objecting employers from the mandate "would be precisely zero."¹⁸⁸

There are good reasons to doubt that conclusion. Gedicks makes a powerful argument that *neither* of the Court's proposed alternative policies is ever likely to come into force, given political and economic realities.¹⁸⁹ Absent such an alternative, workers "would be forced to pay the costs of Hobby Lobby's observance of its anti-contraception beliefs, beliefs that employees may not themselves hold or observe."¹⁹⁰

So the degree of coercion the mandate imposed on employers was plausibly less than the Court suggested. As well, the degree of coercion employers imposed on their workers *absent* the mandate was plausibly greater than the Court suggested. Does that mean that the Court was wrong to suggest that the mandate coerced objecting employers? Not necessarily. Recall a key lesson of the Hale/Cohen analysis: The party on each side of a transaction typically has some state-backed power to coerce its counterparty. To say that a law is impermissibly coercive is, therefore, to elevate the importance of some of the law's coercive effects over others. And that is a determination that turns on moral or policy considerations external to the concept of coercion.¹⁹¹

The *Hobby Lobby* Court touched on this question in a somewhat elliptical footnote. Although it recognized that the effects of a challenged regulation on third parties "will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest," the Court refused to "giv[e] the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals."¹⁹² The Court explained that:

¹⁸⁷ See *id.* at 728–31.

¹⁸⁸ *Id.* at 693.

¹⁸⁹ Gedicks, *supra* note 184, at 162–63 (footnote omitted).

¹⁹⁰ *Id.* at 174; see also Sepper, *supra* note 5, at 1507 (noting that "[a]s a practical matter, [*Hobby Lobby*] detrimentally affected employees" and that "more than a year later, employees of Hobby Lobby and other companies that have received religious exemptions lacked contraceptive coverage").

¹⁹¹ For an application of the Hale/Cohen analysis to *Hobby Lobby*, see Nelson Tebbe, Micah Schwartzman & Richard Schragger, *When Do Religious Accommodations Burden Others?*, in *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY* 328, 340 (Susanna Mancini & Michel Rosenfeld eds., 2017) (footnote omitted):

In sum, burdens on third parties can be identified neither by assuming a naturalized state of nonintervention by the government, nor by assuming that government programs always set the proper point of reference for measuring burdens. Instead of either of these methods, we should measure burdens by referring to the substantive public commitments—including constitutional values—implicated in a particular case. That is the lesson applied by the realists during the progressive era, and that is the most nuanced and powerful approach today.

¹⁹² *Hobby Lobby*, 573 U.S. at 730 n.37.

it could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties.¹⁹³

One way of reading that footnote is as demanding that courts balance a regulation's burden to an employer's religious exercise against the unique benefits that the regulation provides to workers.¹⁹⁴ If the burden imposed is small enough, or the benefit to workers is great enough, then the regulation will survive RFRA scrutiny. Seen in that way, *Hobby Lobby* footnote 37 is consistent with the *Hale/Cohen* analysis.¹⁹⁵

But there is another way of reading the footnote. The Court's language could be read to treat the pre-regulatory world as the baseline against which to measure redistribution: the mandate is a "burden" imposed on employers to require them to "confer a benefit on other individuals."¹⁹⁶ As Sepper argues, this language suggests that the Court understands regulation as "redistributing gains from a private order built on consent."¹⁹⁷ Gedicks and his coauthor Rebecca Van Tassell go further and argue that the *Hobby Lobby* footnote means that an interest in religious accommodation will often override third-party interests in cases involving "social welfare and other laws that regulate the claimant's behavior for the benefit of others."¹⁹⁸

Gedicks and Van Tassell's interpretation is certainly not the only reading of the footnote, and in my view is probably not the best one. The footnote expressly recognizes that the effects of a religious objection on third parties are relevant to the analysis of whether to honor that objection under RFRA.¹⁹⁹ And it seems to say that the law will not honor the objection if the government interest in avoiding those third-party effects is compelling and cannot "be achieved through alternative means."²⁰⁰

Still, when one combines the Court's language (which seems to treat the unregulated market as the baseline) with the Court's holding (which seems to

¹⁹³ *Id.*

¹⁹⁴ "Unique" benefits in the sense that the challenged regulation is necessary to provide them.

¹⁹⁵ See Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights As Trumps?*, 132 HARV. L. REV. 28, 46 (2018) (reading the *Hobby Lobby* opinion, particularly in conjunction with Justice Kennedy's pivotal concurrence, as applying this sort of balancing analysis).

¹⁹⁶ *Hobby Lobby*, 573 U.S. at 730 n.37.

¹⁹⁷ Sepper, *supra* note 5, at 1498–99, 1505–06 ("Like the lower courts, [the *Hobby Lobby* Court] perceived a return to the pre-ACA status quo as neutral toward employees (simply withholding benefits), whereas regulation burdened employers (imposing an obligation 'to confer a benefit').").

¹⁹⁸ Frederick Mark Gedicks & Rebecca G. Van Tassell, *Of Burdens and Baselines: Hobby Lobby's Puzzling Footnote 37*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY 323, 331 (Micah Schwartzman, Chad Flanders & Zöe Robinson eds., 2015).

¹⁹⁹ See *Hobby Lobby*, 573 U.S. at 730 n.37.

²⁰⁰ See *id.*

give too little weight to the actual burden workers will face absent the contraception mandate), the reasons for Gedicks and Van Tassell's concern become apparent. As in the arbitration cases and *Janus*, the Court has once again undervalued the importance of regulation in protecting workers against state-backed coercion by their employers.

III. BROADER IMPLICATIONS: THE *LOCHNERIST* PREMISES THAT STILL UNDERLIE EMPLOYMENT LAW

Those Roberts Court cases are not an anomaly. More than eighty years after the supposed rejection of *Lochner* in *Jones & Laughlin* and *West Coast Hotel*, central doctrines of employment law rest on *Lochnerist* premises. Leading scholar Steve Willborn had it right when he said that “[c]onsent is everywhere in employment law.”²⁰¹ But courts too often refuse to engage with the coercive aspects of the employment relationship, and they often give too little weight to the role of the law in checking employers' coercive power. The Legal Realist analytical tools developed by Hale and Cohen offer a powerful lens for critiquing those doctrines.

I first discuss courts' determination of who is an “employee” and who is an “employer.”²⁰² “Employee” status is the ticket for entry to the protections afforded by virtually all labor and employment laws, and those protections generally apply only against an entity that has the status of an individual's “employer.” The continuing *Lochnerist* premises of the law lead courts to interpret these terms too narrowly. The result is to undermine efforts to rectify imbalances in bargaining power and efforts to protect workers' other interests. I then turn to the at-will rule. I show that it, too, rests on *Lochnerist* premises.²⁰³ These premises, and the influence of the at-will doctrine itself, undermine constitutional, statutory, and common law protections in the workplace.²⁰⁴

²⁰¹ Steven L. Willborn, *Consenting Employees: Workplace Privacy and the Role of Consent*, 66 LA. L. REV. 975, 992 (2006).

²⁰² See *infra* text accompanying notes 205–47.

²⁰³ See *infra* text accompanying notes 253–359.

²⁰⁴ My work builds on that of other scholars, who have highlighted the continuing *Lochnerist* premises of particular labor law doctrines. See, e.g., Richard Blum, *Labor Picketing, the Right to Protest, and the Neoliberal First Amendment*, 42 N.Y.U. REV. L. & SOC. CHANGE 595 (2019); Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305 (1994); Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356 (1995); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004); see also Kate Andrias, *The Fortification of Inequality: Constitutional Doctrine and the Political Economy*, 93 IND. L.J. 5, 15 (2018) (detailing ways in which the Supreme Court has “reinforc[ed] inegalitarian distributions of power” in its labor cases); Estlund, *Constitutional Anomaly*, *supra* note 171, at 225–28 (2015) (critiquing the notion of coercion that underlies the Taft-Hartley Act's prohibitions on certain labor picketing); see generally JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); Moshe Zvi Marvit, *On the Greatest Property Transfer That Wasn't: How the National Labor Relations Act Chose Employee Rights and the Supreme Court Chose*

A. *The “Employee”-“Employer” Relationship*

The trigger for most labor and employment protections under state and federal law is a determination that a worker is an “employee” rather than an “independent contractor.”²⁰⁵ And those protections tend to attach only to the firm or firms that are “employers” of a particular worker; businesses up the supply chain do not generally have employment law responsibilities.²⁰⁶ Through the years, the employee/contractor line—along with the related question of which firms are “employers” of a given employee—has been a significant point of controversy in labor and employment law. This controversy has recently focused on the status of workers in the so-called “gig economy,” such as Uber or Lyft drivers.²⁰⁷ But these issues have arisen across all sectors of work.²⁰⁸

The stakes of determining who is an employee and who is an employer are monumental. If workers are deemed to be independent contractors, they will not receive the protections of the vast body of labor and employment protections adopted in the Progressive, New Deal, and Civil Rights Eras. And if the firm that is deemed to be the employer cannot pay a judgment, those protections will prove hollow even if they formally apply.

When courts resolve these questions, however, they often rest on a *Lochnerian* premise of free contract. 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 applied in Fair Labor Standards Act and other cases. 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 offer reasons for hope, however. In particular, employment law reformers have successfully pressed several states to adopt the “ABC test,” which 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.”²⁰⁹ The “right to control” is not a natural or inherent right. It

Property Rights, 38 S.U. L. REV. 79 (2010). Unlike that work, I focus on the two most fundamental doctrines of labor and employment law—the employer/employee question and the at-will rule—and I show how their continued *Lochnerist* premises undermine the goals of labor and employment law in general.

²⁰⁵ See, e.g., TIMOTHY P. GLYNN, CHARLES A. SULLIVAN & RACHEL S. ARNOW-RICHMAN, *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS* 5–6 (4th ed. 2019).

²⁰⁶ See, e.g., DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 183–213 (2014).

²⁰⁷ See, e.g., Richard A. Bales & Christian Patrick Woo, *The Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors?*, 68 MERCER L. REV. 461 (2017).

²⁰⁸ See generally WEIL, *supra* note 206.

²⁰⁹ *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992). See also WEIL, *supra* note 206 (showing that the control test also applies to determining who is an employer).

is one that finds its source in the contractual arrangement between the parties and it is also a right that is highly manipulable. David Weil's work demonstrates that lead firms often allocate key aspects of control to poorly capitalized intermediaries who will be the ones on the hook as "employers."²¹⁰ And Julia Tomassetti has shown that 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.²¹¹ As a result, they can evade the obligations of labor and employment law without making any real change in their operations.²¹² They can demand that workers accept these evasive contract terms, and many workers will lack effective power to say no.²¹³

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 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."²¹⁴

²¹⁰ See WEIL, *supra* note 206.

²¹¹ See Julia Tomassetti, *From Hierarchies to Markets: Fedex Drivers and the Work Contract as Institutional Marker*, 19 LEWIS & CLARK L. REV. 1083, 1137 (2015) [hereinafter "Tomassetti, *From Hierarchies*"]; Julia Tomassetti, *The Contracting/Producing Ambiguity and the Collapse of the Means/Ends Distinction in Employment*, 66 S.C. L. REV. 315, 315 (2014) [hereinafter "Tomassetti, *Contracting/Producing*"].

²¹² See Martin H. Malin, *Protecting Platform Workers in the Gig Economy: Look to the FTC*, 51 IND. L. REV. 377, 382 (2018) ("The common law right to control test is malleable. In the current round of litigation, some platform workers may win their battles to be classified as employees. But, in the end, the platforms will undoubtedly win the war.") (footnote omitted).

²¹³ Although many workers who receive the "independent contractor" label have significant bargaining power, a very large fraction of workers who receive that label are likely to lack any meaningful power to negotiate the terms of their hire. See, e.g., Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1684 (2016) (noting that "some low-skilled employees such as janitors and restaurant servers who once indisputably enjoyed employee status now work for businesses that designate them as independent contractors"); *id.* at 1686 (noting that "one-third of on-demand workers say either that they cannot find traditional employment or that they earn forty percent or more of their income by working in the gig economy"); Martha T. McCluskey, *Are We Economic Engines Too? Precarity, Productivity and Gender*, 49 U. TOL. L. REV. 631, 639, 644 (2018) (discussing lack of bargaining power for workers in contingent jobs and the gig economy); Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 279 (2006) (stating that "nearly thirty-two percent, or 3.3 million individuals" listed as independent contractors, "are in construction, agriculture, manufacturing, and transportation" and are likely to "have little independence or autonomy and depend upon another business for their livelihood").

²¹⁴ Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 A.B.A. J. LAB. & EMP. L. 279, 289 (2011).

One might think that the “economic realities” test applied in Fair Labor Standards Act cases could solve this problem.²¹⁵ That test is supposed to be a less formalistic, more capacious test of employment, one designed to prevent businesses from evading their labor law obligations.²¹⁶ But “[i]n practice, the economic realities test does not operate much differently from the control test.”²¹⁷ Often, courts applying the “economic realities” test continue to focus on questions of control, but rather than looking simply to the letter of any formal contract between the parties, they 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.²¹⁸ But that analysis, too, is contractual—it simply looks as much to the tacit terms of the parties’ agreement as to the express ones.²¹⁹ A court is likely to start with the express terms in any event.²²⁰ But however the court identifies that agreement, the crucial point is

²¹⁵ See, e.g., *Goldberg v. Whitaker House Co-op.* 366 U.S. 28, 33 (1961) (stating that “the ‘economic reality’ rather than ‘technical concepts’ is to be the test of employment”).

²¹⁶ See, e.g., Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 113 (1984) (arguing that the “flexibility” of the economic realities test “avoid[s] the rigidity of the common law test and to accommodate the present range of employment relationships and the new patterns that may evolve in the future”).

²¹⁷ Jooho Lee, *The Entrepreneurial Responsibilities Test*, 92 TUL. L. REV. 777, 795 (2018); see, e.g., RESTATEMENT OF EMP. LAW § 1.01 reporter’s note to cmts. d-e (AM. LAW INST. 2019) (“Decisions interpreting the meaning of the term ‘employee’ under the federal antidiscrimination laws illustrate the lack of any sharp distinction between the common-law test, at least as formulated in *Reid* and *Darden*, and a multifactor economic-realities test.”); Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 314 (2001) (“There was, however, no clear dividing line between the common law control test and the modern economic realities test. Both have control and domination as their central concern; the former purporting to focus on control over the worker’s performance of services for the employer as a matter of contractual right, and the latter purporting to look at an employer’s sources of power that give it true, if not contractually specified, control.”); *id.* at 338 (describing overlap between the Supreme Court’s current description of the “control” test and its past understanding of the “economic realities” test); Zatz, *supra* note 214, at 282 (arguing that the “control” and “economic realities” tests are both “vague” and that “they overlap sufficiently” that “they can easily produce the same results”).

²¹⁸ See, e.g., Lee, *supra* note 217, at 796 (arguing that “most courts” applying the economic realities test “continue to look to the element of managerial control as an important—and often the first—factor to be considered”).

²¹⁹ The institutional economist John Commons—a contemporary and fellow-traveler of Legal Realists like Hale and Cohen—argued that the at-will rule means that the employment relationship is “not a contract,” but is instead “a continuing implied *renewal* of contracts at every minute and every hour, based on the continuance of what is deemed, on the employer’s side, to be satisfactory service, and, on the laborer’s side, what is deemed to be satisfactory conditions and compensation.” JOHN R. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 285 (1924). For an excellent application of Commons’ argument to the who-is-an-employee problem, see Julia Tomassetti, *Contracting/Producing*, *supra* note 211, at 349–62.

²²⁰ Consider the approach taken by the Restatement of Employment Law:

The underlying economic realities of the employment relationship, rather than any designation or characterization of the relationship in an agreement or employer policy statement, determine whether a particular individual is an employee. Thus, even an agreement stating that a service provider is an “independent contractor” would

this: to the extent that the “economic realities” test focuses entirely on control *within* the parties’ contractual relationship, and does not look to the effective freedom the workers had to decide to enter into that relationship, it continues to replicate the yellow-dog contract problem.

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.”²²¹ But, as Keith Cunningham-Parmeter shows, these courts often dramatically overstate the worker’s exit options. These courts conclude 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.²²² This vision of worker as freely choosing entrepreneur, divorced from the realities of bargaining power, is precisely the one Justice Pitney indulged in *Coppage*.

Veena Dubal demonstrates that “the cultural and political veneration of the ‘entrepreneur’ as the ideal citizen-worker has greatly influenced doctrinal analysis of who constitutes a worker for the purposes of employment protections.”²²³ The influence is most apparent in the D.C. Circuit’s well-known decision in *FedEx Home Delivery v. NLRB*.²²⁴ There, the court held that FedEx delivery drivers were independent contractors rather than employees.²²⁵ The court explained that “an important animating principle” in

not be controlling. But at the same time, the terms of a contract between a service provider and a recipient of the services may help determine the extent of the principal’s control over how the services are to be provided and whether the service provider is free to operate as an independent businessperson.

RESTATEMENT OF EMP. LAW § 1.01, cmt. g (AM. LAW INST. 2019).

²²¹ Cunningham-Parmeter, *supra* note 213, at 1698. For example, in *Thibault v. Bellsouth Telecomms., Inc.*, 612 F.3d 843 (5th Cir. 2010), the court concluded that a splicer was not an employee, in significant part because he “did not work exclusively for the defendants. He had his own business selling picnic tables, storage buildings, and customized golf carts, in his home state of Delaware.” *Id.* at 846.

²²² Cunningham-Parmeter, *supra* note 213, at 1698–99.

²²³ Veena B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 65, 81 (2017).

²²⁴ 563 F.3d 492 (D.C. Cir. 2009). The Restatement of Employment Law also prominently features the worker-as-entrepreneur concept. See RESTATEMENT OF EMP. LAW § 1.01 (AM. LAW INST. 2019), (“An individual renders services as an independent businessperson and not as an employee when the individual in his or her own interest exercises entrepreneurial control over important business decisions, including whether to hire and where to assign assistants, whether to purchase and where to deploy equipment, and whether and when to provide service to other customers.”). On the differences between the *FedEx* and Restatement versions of the entrepreneurial test, see Matthew T. Bodie, *Participation As A Theory of Employment*, 89 NOTRE DAME L. REV. 661, 689–90 (2013) (“[W]hile both the D.C. Circuit and the Restatement focus on entrepreneurialism, the court’s ‘entrepreneurial opportunities’ test focuses on whether employees have a legal right to pursue economic gain outside of the relationship. The Restatement’s test, on the other hand, looks at the degree of entrepreneurial control exercised by the parties within the relationship.”).

²²⁵ See *FedEx Home Delivery*, 563 F.3d at 495.

resolving ambiguous questions regarding whether a worker is an employee “is whether the position presents the opportunities and risks inherent in entrepreneurialism”—that is, “whether the putative independent contractors have significant entrepreneurial opportunity for gain or loss.”²²⁶

By emphasizing the drivers’ “*potential* entrepreneurial opportunity,” rather than “realized entrepreneurial opportunity or practice,” the *FedEx Home Delivery* court “implicitly placed value on the ‘freedom’ of the worker to entrepreneurialize himself while subverting his right to act collectively.”²²⁷ For example, where FedEx imposed new terms on its drivers—including new route assignments, changes in required hours, and changes in rates of pay—the court treated the company’s action as simply starting a new negotiation with the workers, not as controlling their work.²²⁸

FedEx structured its contracts in a way that shifted many of the enterprise’s economic *risks* to the drivers, while reserving to itself many of the attendant economic *opportunities*. That a worker would agree to such a lopsided arrangement might be taken as evidence of a significant imbalance of bargaining power.²²⁹ But the *FedEx* court did not even discuss that imbalance. If anything, as Tomassetti shows, the court’s reasoning seemed paradoxically to “transform some of the same vulnerabilities that place the drivers within the policy concerns of minimum-wage and collective-bargaining law into evidence of their autonomy.”²³⁰ The court’s approach thus “adds insult to injury” by “validat[ing] th[e company’s] shifting of risks and further weaken[ing] the already disadvantaged workers by refusing to apply protective employment standards to them.”²³¹

Dubal describes the *FedEx Home Delivery* decision as “reflect[ing] a particular idealization of the ‘entrepreneur’ and the cultural and political philosophies of neoliberalism, typified by the idea that workers should be liberated by the free market and unencumbered by the state’s protections.”²³² What she sees as neoliberalism could just as easily be seen as *Lochnerism*.²³³ *FedEx Home Delivery* rests on the vision of workers as freely choosing the arrangements under which they work, and it disregards the constraints on

²²⁶ *Id.* at 503 (internal quotation marks omitted).

²²⁷ Dubal, *supra* note 223, at 94–95.

²²⁸ See, e.g., Tomassetti, *supra* note 211, at 1116–17 (“While it might appear that FedEx was controlling the work in determining delivery areas, the parties were really just reopening negotiations.”).

²²⁹ One might object to such an arrangement on substantive grounds as well. See Lee, *supra* note 217, at 832–33 (“If entrepreneurs are able to expose their employees to the risks associated with market participation while retaining the opportunity to profit from their enterprise, they wrong not only their employees but the rest of society by contributing to the misallocation of resources.”).

²³⁰ Tomassetti, *supra* note 211, at 1094.

²³¹ Guy Davidov, *Who Is A Worker?*, 34 *INDUS. L.J.* 57, 67–68 (2005).

²³² Dubal, *supra* note 223, at 70.

²³³ See David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 *LAW & CONTEMP. PROBS.* 1, 10–11 (2014) (arguing that neoliberalism is in many respects a modern-day form of *Lochnerism*).

worker choice that led to the enactment of laws like the National Labor Relations Act—the very statute the court purported to apply. The case is thus fairly understood as a modern-day heir to Justice Pitney’s opinion 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,²³⁴ is the California Supreme Court’s 2018 decision in *Dynamex Operations West v. Superior Court*²³⁵—a decision the California legislature recently codified in significant part.²³⁶ *Dynamex*, like *FedEx Home Delivery*, involved the claims of delivery drivers.²³⁷ But unlike the *FedEx Home Delivery* court, the *Dynamex* court concluded that the drivers were employees.²³⁸ And unlike the *FedEx Home Delivery* court, the *Dynamex* court directly connected its “employee” definition to the law’s employer-checking goals.

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.”²³⁹ The court noted that regulatory agencies had estimated that misclassification costs “millions of workers of the labor law protections to which they are entitled.”²⁴⁰ 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*.”²⁴¹ But it held 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.²⁴²

The *Dynamex* court fleshed out that general definition in two ways, both of which were designed to lead to broader application of wage-and-hour protections. First, the court placed the burden squarely on the hiring party to show that a worker was an independent contractor and not an employee.²⁴³ Second, the court adopted the “ABC test” that worker advocates

²³⁴ See generally Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 55 (2015).

²³⁵ 416 P.3d 1 (Cal. 2018).

²³⁶ See CAL. LABOR CODE § 2750.3 (West 2019).

²³⁷ See *Dynamex*, 416 P.3d at 5.

²³⁸ See *id.* at 41.

²³⁹ *Id.* at 5.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 7.

²⁴² *Id.*

²⁴³ See *Dynamex*, 416 P.3d at 35.

have recently favored.²⁴⁴ That test requires the hiring party to show 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.²⁴⁵

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.²⁴⁶

When the *Dynamex* court adopted the ABC test, it did so expressly to impose a counterweight to employers' bargaining power. For example, 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:

Treating all workers whose services are provided within the usual course of the hiring entity's business as employees is important to ensure that those workers who need and want the fundamental protections afforded by the wage order do not lose those protections. If the wage order's obligations could be avoided for workers who provide services in a role comparable to employees but who are willing to forgo the wage order's protections, other workers who provide similar services and are intended to be protected under the suffer or permit to work standard would frequently find themselves displaced by those willing to decline such coverage.²⁴⁷

Under a contrary rule, the court explained, "employers might be able to use superior bargaining power to coerce employees . . . to waive their pro-

²⁴⁴ *Id.* For the New Jersey Supreme Court's adoption of the ABC test, which was particularly influential to the *Dynamex* court, see *Hargrove v. Sleepy's*, 106 A.3d 449, 463 (N.J. 2015). For a general discussion of recent efforts by reformers to adopt the ABC test, see Deknatel & Hoff-Downing, *supra* note 234, at 64–78; see also WEIL, *supra* note 206, at 204–05 (recommending adoption of the ABC test to ensure that workers are protected in the "fissured workplace").

²⁴⁵ *Dynamex*, 416 P.3d at 35. The (B) requirement has some overlap with Matt Bodie's proposal that workers who are part of the hiring party's single process of joint production should be treated as employees. See Bodie, *supra* note 224, at 705–06.

²⁴⁶ See John A. Pearce II & Jonathan P. Silva, *The Future of Independent Contractors and Their Status as Non-Employees: Moving on from A Common Law Standard*, 14 HASTINGS BUS. L.J. 1, 28 (2018) (arguing that "the ABC Test eliminates the most easily manipulated factors" of the control test).

²⁴⁷ *Dynamex*, 416 P.3d at 37.

tections.”²⁴⁸ 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.²⁴⁹

There is, of course, room for employers and courts to manipulate the ABC test. Two pressure points are apparent: the definition of the “usual course of the hiring entity’s business,” and the determination of what constitutes an “independently established trade.” There is some indication that employers are already seeking to press the ambiguities in these terms. Naomi Sunshine, for example, points out that “some companies require drivers to set up business entities themselves so as to create the appearance that the company is contracting with small businesses, not individuals.”²⁵⁰ Moreover, after the California Legislature codified the ABC test, Uber and Lyft announced their position that their drivers still did not satisfy the definition of “employee,” because, on the companies’ view, driving was not part of the “usual course” of their business.²⁵¹ So far, however, courts applying the ABC test have largely—though not entirely—held firm against efforts to narrow the “employee” category.²⁵² The *Dynamex* approach thus offers a promising tool to overcome the legacy of *Lochner* in the who-is-an-employee debate.

B. *Employment-at-Will—And Its Domination Over Workplace Protections*

Employment-at-will stands as the baseline rule nearly everywhere in the United States.²⁵³ Under that rule, an employer is free to “terminate an employee for a good reason, a bad reason, or no reason at all.”²⁵⁴ Scholars have long seen continued adherence to employment-at-will as an example of

²⁴⁸ *Id.* (quoting *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 302 (1985)).

²⁴⁹ *Hargrove*, 106 A.3d at 464.

²⁵⁰ Naomi B. Sunshine, *Employees As Price-Takers*, 22 LEWIS & CLARK L. REV. 105, 152–53 (2018).

²⁵¹ *See, e.g.*, Shirin Ghaffary, *Uber’s Baffling Claim That Its Drivers Aren’t Core To Its Business, Explained*, VOX (Sept. 16, 2019), <https://www.vox.com/recode/2019/9/16/20868916/uber-ab5-argument-legal-experts-california>, archived at <https://perma.cc/J4DW-8ECS>.

²⁵² *See* Deknatel & Hoff-Downing, *supra* note 234, at 97–101.

²⁵³ *See, e.g.*, RESTATEMENT OF EMP. LAW § 2.01, Reporter’s Note to cmt. a (“The at-will default rule is presently recognized in 49 states and the District of Columbia.”). For a suggestion that courts vary in their adherence to the at-will rule, *see* Scott A. Moss, *Where There’s at-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment at Will*, 67 U. PITT. L. REV. 295, 300 (2005).

²⁵⁴ Bagenstos, *supra* note 14, at 244–45; *see also* Matthew T. Bodie, *The Best Way Out Is Always Through: Changing the Employment at-Will Default Rule to Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223, 228 n.20 (noting that the “for any reason or no reason at all” language appears in literally hundreds of cases involving at-will employment).

undead *Lochnerism*.²⁵⁵ It is easy enough to draw the connection. Key *Lochner*-Era cases like *Adair v. United States* and *Coppage v. Kansas*, after all, explicitly relied on and defended the regime of at-will employment.²⁵⁶ The leading modern supporter of the doctrine, Richard Epstein,²⁵⁷ has repeatedly praised the analysis of *Coppage* in particular²⁵⁸—the very analysis at which the Legal Realists aimed their attacks.²⁵⁹

As I show in the remainder of this section, key defenses of employment-at-will have been based on the premise that the doctrine advances worker choice. Consideration of the Realist critique demonstrates that the effects of the doctrine on worker choice are ambiguous. If employment-at-will is to be defended, that defense must rest on some principle of policy or morality that goes beyond choice. The stakes are particularly high because the background doctrine of at-will employment has the effect, in both doctrine and practice, of undermining an array of workplace protections.

1. *Employment-at-Will and Worker Choice*

Defenders of employment-at-will argue that the doctrine promotes worker choice. They note that the doctrine authorizes both employers and employees to terminate the relationship at any time and thus frees workers from being contractually bound to their employers.²⁶⁰ Because employment-at-will is merely a default rule, they argue that the doctrine preserves the ability of workers to contract for greater protections if they wish. In particular, they observe that employers and employees generally do not opt out of the at-will baseline.²⁶¹ They argue that in many cases employment-at-will is more efficient than alternative termination rules.²⁶² For these reasons, defenders of the at-will baseline contend that the doctrine reflects the preferences of most workers.²⁶³

²⁵⁵ See, e.g., Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1416–19 (1967); Bodie, *supra* note 254, at 225.

²⁵⁶ See *Coppage v. Kansas*, 236 U.S. 1, 10–11 (1915); *Adair v. United States*, 208 U.S. 161, 172–76 (1908).

²⁵⁷ See Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 951–53 (1984).

²⁵⁸ See Epstein, *supra* note 61, at 1366 n.29; Richard A. Epstein, *Skepticism and Freedom: The Intellectual Foundations of Our Constitutional Order*, 6 U. PA. J. CONST. L. 657, 671–72 (2004).

²⁵⁹ Indeed, Epstein specifically argues that Hale was wrong because *Coppage* was right. See Richard A. Epstein, *The Assault That Failed: the Progressive Critique of Laissez Faire*, 97 MICH. L. REV. 1697, 1705–06 (1999).

²⁶⁰ See Epstein, *supra* note 257, at 954–55.

²⁶¹ See *id.* at 953–56; J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 898–900.

²⁶² See Epstein, *supra* note 257, at 964–66; Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 50–51 (1993).

²⁶³ See Epstein, *supra* note 257, at 951–52.

The worker-choice justification for employment-at-will finds expression in the doctrine as well. Most states have now recognized a “public policy” exception to the at-will presumption.²⁶⁴ But courts tend to limit the exception to cases in which the discharge will harm third parties beyond the employer-employee relationship.²⁶⁵ This doctrine rests on the premise of worker choice, because it refuses to intervene to protect the workers who could presumably have taken care of themselves through contract. It intervenes only when necessary to protect outsiders. The employee’s consent cannot legitimate the harm an action imposes on third parties.

Does employment-at-will really promote worker choice, though? To answer that question, we need to look not just to the formal rights workers have under the doctrine but at the coercive power created by the broader structure that surrounds the relationship between worker and employer. When one engages in that deeper analysis, one will find serious problems with the claim that the at-will doctrine promotes worker choice.

Start with the defense based on formal equality. It is true that, as a formal matter, the at-will rule is evenhanded. Both employers and employees may 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. As the Court said in *Adair v. United States*, “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.”²⁶⁶ Modern defenders of the rule have similarly pointed to its evenhanded nature.²⁶⁷

As cases like *Adair* and *Coppage* show, at-will employment was one of the central “common law baselines”²⁶⁸ against which *Lochner*-Era courts identified impermissible redistribution. And the supposed equality between employer and employee was crucial to the Court’s analysis. The *Adair* opinion, for example, explained that “the employer and the employee 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.”²⁶⁹ The Court said that “it cannot be . . . that an employer is under any legal obligation, against his will, to retain an em-

²⁶⁴ See RESTATEMENT OF EMP. LAW § 5.01, cmt. a (“A clear majority of jurisdictions recognizes such a limit when the employer discharges an employee in violation of a well-established public policy.”).

²⁶⁵ See generally Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943, 1945 (1996).

²⁶⁶ *Adair v. United States*, 208 U.S. 161, 174–75 (1908) (overruling recognized in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941)).

²⁶⁷ See Epstein, *supra* note 257, at 954–55 (defending the rule in part on these grounds).

²⁶⁸ Sunstein, *supra* note 131, at 874.

²⁶⁹ *Adair*, 208 U.S. at 175.

ployee in his personal service any more than an employee can be compelled, against his will, to remain in the personal service of another.”²⁷⁰

But as Hale and Cohen showed, to treat the employer’s ability to terminate an employee as equivalent to the worker’s ability to walk away is to disregard the overall context of their relationship. In Cohen’s words, “though men may be legally free to make whatever contract they please, they are not actually or economically free.”²⁷¹ 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.²⁷² As Elizabeth Anderson writes, “[i]t is an odd kind of countervailing power that workers supposedly have to check their bosses’ power, when they typically suffer more from imposing it than they would suffer from the worst sanction bosses can impose on them.”²⁷³ The equality defenses of the at-will doctrine thus draw the frame too narrowly by failing to consider the broader context in which the employer and employee make their termination decisions.

Those defenses also draw the frame too narrowly in another respect: They fail to consider the way that the at-will rule creates inequality between employers and employees during the course of the relationship. In his classic attack on employment-at-will, Lawrence Blades argued that the doctrine “forces the non-union employee to rely on the whim of his employer for preservation of his livelihood” and thus “tends to make him a docile follower of his employer’s every wish.”²⁷⁴ Workers who live in fear of arbitrary termination must submit to a “boss’s dominion” that “goes beyond what simply serves the productive mission of the workplace and potentially extends to any aspect of the worker’s life.”²⁷⁵ Thanks to the threat imposed by the at-will rule,

workers ‘can be commanded to pee or forbidden to pee’; can be ‘forbidden to wear what they want, say what they want (and at what decibel), and associate with whom they want’; and ‘can be fired for donating a kidney to their boss (fired by the same boss, that is), refusing to have their person or effects searched, calling the boss a ‘cheapskate’ in a personal letter, and more.’²⁷⁶

²⁷⁰ *Id.* at 175–76.

²⁷¹ Cohen, *supra* note 86, at 563.

²⁷² See, e.g., Bagenstos, *supra* note 14, at 245; Blades, *supra* note 255, at 1405; see generally Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65 (2000).

²⁷³ ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT)* 56 (2017).

²⁷⁴ Blades, *supra* note 255, at 1405.

²⁷⁵ Bagenstos, *supra* note 14, at 246.

²⁷⁶ *Id.* at 245.

Clyde Summers wrote that under the at-will doctrine “the employer has sovereignty” over its workers.²⁷⁷ That “deeply rooted conception” itself rests on assumptions about property rights: “The employer, as owner of the enterprise, is viewed as owning the job,” and that “property right gives the employer the right to impose any requirement on the employee, give any order and insist on obedience, change any term of employment, and discard the employee at any time.”²⁷⁸ It is hard to miss the echo of Hale and Cohen in Summers’s argument (even though Summers does not cite them).²⁷⁹ Cohen described the law as granting property owners a form of “sovereignty” over those with whom they deal, and he and Hale both focused on the way the law empowers some private actors to exercise coercion over others.²⁸⁰ As Cohen wrote, property law gives employers “dominion over things”—dominion that becomes “*imperium* over our fellow human beings.”²⁸¹ Even if we believe that workers make a free decision to enter into at-will employment, any analysis of whether the at-will doctrine serves worker choice must take into account the way that the doctrine limits worker choices once they are on the job.

And there are substantial reasons to doubt the conclusion that workers are making a free choice to enter into at-will employment.²⁸² Many at-will employees in fact believe that the law protects them against arbitrary termination, which suggests that they did not actually choose to forgo such a protection.²⁸³ Workers might not know about the at-will default or the op-

²⁷⁷ Summers, *supra* note 272, at 68; *see generally* Hugh Collins, *Is the Contract of Employment Illiberal?*, in PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW, *supra* note 21, at 48.

²⁷⁸ Summers, *supra* note 272, at 78 (2000); *see also* Jack M. Beermann & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 946 (1989) (“The employment-at-will doctrine rests on a particular construction of property rights as well as contract rights. It protects employers’ property rights against claims by workers that they have a right of access to employers’ property.”).

²⁷⁹ Elizabeth Anderson’s argument that employers exercise the power of “private government” is very much in the same tradition, and also resonates strongly with the arguments Hale and Cohen made in the first part of the Twentieth Century (though Anderson does not cite them). *See* ANDERSON, *supra* note 273, at 53–54, 60 (“Under the employment-at-will baseline, workers, in effect, cede *all* of their rights to their employers, except those specifically guaranteed to them by law, for the duration of the employment relationship.”). (The influence of Legal Realist ideas is especially strong in *id.* at 47–48.) The phrase “private government” is one that numerous commentators have attributed to Hale. *See e.g.*, Duxbury, *supra* note 86, at 434 (describing “Hale’s notion of private government” as “a particularly novel contribution to th[e] debate” over the public-private distinction); Hiba Hafiz, *Beyond Liberty: Toward A History and Theory of Economic Coercion*, 83 TENN. L. REV. 1071, 1100 (2016) (“Hale originated the concept of ‘private government’ to explain how the acquisition and exercise of private rights in a market economy governed resource allocation and income distribution.”); Samuels, *supra* note 100, at 266 (“Arthur S. Miller quoted Hale as an originator of the concept of ‘private government,’ a notion basic to Hale’s analysis.”) (quoting Arthur S. Miller, *Private Governments and the Constitution*, in THE CORPORATION TAKE-OVER 138–39 (Andrew Hacker ed. 1964)).

²⁸⁰ *See supra* text accompanying notes 75–94.

²⁸¹ Cohen, *supra* note 91, at 13.

²⁸² For a nice summary, *see* Bodie, *supra* note 254, at 233–38.

²⁸³ *See* RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 146–48 (1999); Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*,

portunity to contract around it. They might fail, simply due to inertia, the endowment effect, or other status quo bias, to change the default term.²⁸⁴ They might be afraid to ask for a just cause term out of a fear of signaling “that they may be ‘lemons’—that is, shirkers or boundary-testers—whose costs to the employer will be more than the wage adjustment associated with the term.”²⁸⁵ And, of course, workers may simply have no realistic option to say no to at-will employment; that may be the only sort of job on offer to them.

In any event, in most states the employment-at-will doctrine operates more powerfully than a normal default rule. Courts typically treat an employment contract as at-will unless there is “‘unequivocal’ or ‘unambiguous’ evidence” to the contrary.²⁸⁶ “Even an employer statement that the employee will be discharged only for ‘good reason’ or ‘good cause’ is insufficient when there is no agreement on what those terms encompass.”²⁸⁷ Courts are unlikely to consider “contextual evidence” regarding what the parties agreed to,²⁸⁸ nor will they consider what the employer “leads employees to reasonably believe.”²⁸⁹ Many courts will decline to accept an oral agreement to depart from the at-will default (even though most employment contracts are oral) but will instead require such a departure to be in writing.²⁹⁰ And in many cases, even “[i]f an employer expressly agrees to give up his power to discharge at will,” courts “will not enforce that promise without ‘special consideration.’”²⁹¹ That an employee works under an at-

77 N.Y.U. L. REV. 6, 9 (2002); Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 105–06 (1997); Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers’ Legal Knowledge*, U. ILL. L. REV. 447, 452 (1999); Jesse Rudy, *What They Don’t Know Won’t Hurt Them: Defending Employment-at-Will in Light of Findings That Employees Believe They Possess Just Cause Protection*, 23 BERKELEY J. EMP. & LAB. L. 307, 317–38 (2002).

²⁸⁴ See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1113 (2000) (“The fact that parties rarely contract around the ‘at will’ rule might mean that ‘at will’ employment is efficient for most parties, but it also might mean that the status quo bias swamps a preference many parties would otherwise have for a ‘just cause’ term.”); cf. Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 676–80 (2006) (noting that employers and workers rarely contract around the default rule, regardless of whether the default is a strong rule of at-will employment, a weak rule of at-will employment, or even a rule that termination should be only for cause).

²⁸⁵ Walter Kamiat, *Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting*, 144 U. PA. L. REV. 1953, 1959 (1996).

²⁸⁶ Bodie, *supra* note 254, at 229.

²⁸⁷ *Id.* (internal quotation marks omitted).

²⁸⁸ *Id.*

²⁸⁹ Summers, *supra* note 272, at 70.

²⁹⁰ See Bodie, *supra* note 254, at 230–31.

²⁹¹ Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 376 (1986).

will contract—or a contract that a court construes to be at will—thus does not suggest that the worker chose that term in any meaningful way.²⁹²

All of this suggests that the doctrine of at-will employment cannot be justified simply by reference to the concept of worker choice. The effects of that doctrine on worker choice operate in multiple dimensions at multiple times, and they push in multiple directions. The net effect is incalculable, and it is as likely to be negative as it is to be positive. As Cohen observed in *The Basis of Contract*, “the element of consent on the part of the employee” is relatively “minor,” even under current law.²⁹³

None of this means that the employment-at-will doctrine cannot be justified. What it means is that any justification for that doctrine must rest on some principle of policy or morality that goes beyond choice.²⁹⁴ Some of its defenders, for example, argue that the at-will presumption promotes efficiency within the employment relationship.²⁹⁵ Others defend the presumption on macroeconomic grounds. By making it easier for employers to fire less effective workers, they contend, at-will employment allows enterprises to be nimbler and increases their incentives to hire workers in the first place.²⁹⁶ Empirical studies finding that some of the recognized exceptions to the at-will rule are associated with an increase in unemployment provide some support for this view.²⁹⁷

Opponents of the doctrine disagree that the presumption is efficient.²⁹⁸ They argue that “if fairness at work is a benefit that workers value but employers tend to under-provide, for example because of adverse selection effects, dismissal legislation can induce an increase in labour supply and also help shift the employment exchange to a more efficient contractual equilibrium.”²⁹⁹ Even if employment-at-will reduces hiring, they argue, these effects are likely to be small in the long term, and they are likely to be balanced by positive macroeconomic effects that come from reduced job turnover, increased incentives to invest in human capital, and associated increased productivity.³⁰⁰ A recent multi-national empirical study found that

²⁹² Beermann & Singer, *supra* note 278, at 940 (arguing that if workers believe they can be fired only for cause, then “employment-at-will cannot be justified as the free contract position”).

²⁹³ Cohen, *supra* note 86, at 569.

²⁹⁴ See *supra* text accompanying notes 117–21.

²⁹⁵ See, e.g., Epstein, *supra* note 257, at 962–73.

²⁹⁶ See, e.g., Edward P. Lazear, *Job Security Provisions and Employment*, 105 Q. J. ECON 699, 699 (1990).

²⁹⁷ See, e.g., David H. Autor, John J. Donohue III & Stewart J. Schwab, *The Costs of Wrongful Discharge Laws*, 88 REV. ECON. & STATISTICS 211, 211 (2006).

²⁹⁸ See, e.g., Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1833–34 (1980).

²⁹⁹ Zoe Adams et al., *The Economic Significance of Laws Relating to Employment Protection and Different Forms of Employment: Analysis of a Panel of 117 Countries, 1990–2013*, 158 INT’L LAB. REV. 1, 3 (2019).

³⁰⁰ See *id.* at 3 (“The overriding message from the voluminous literature on the economic effects of labour laws is that the theoretical effect of firing restrictions on employment levels is ambiguous.”) (internal quotation marks omitted).

employment protection legislation is associated with both an increase in employment and an increase in workers' share of national income, providing some support for this argument.³⁰¹

Opponents also challenge at-will employment on noneconomic grounds. For example, my previous work has argued that employment-at-will undermines social equality, because it helps to create and maintain illegitimate status hierarchies.³⁰² These debate are outside the scope of this Article. The point is merely that employment-at-will must find its justification in these sorts of policy arguments, rather than in the principle of worker choice.

2. *Employment-at-Will and Its Effect on Workers' Rights More Generally*

The *Lochner* underpinnings of employment-at-will are of surpassing importance, because the persistence of the at-will baseline has the effect of undermining all manner of protections for workers—whether those protections derive from the common law, from statutes, or even from the Constitution. In this way, the spirit of *Lochner* still lives throughout employment law.

Start with 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.³⁰³ But the at-will baseline has made judges wary of recognizing common law protections against these efforts. 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.

This has been easiest to see in the context of workers' speech rights. With vanishingly rare exceptions,³⁰⁴ courts have refused to extend their "public policy" wrongful discharge doctrine to cases in which the employer

³⁰¹ *Id.* at 20. For an argument that the macroeconomic data on the effects of labor-market regulations are inconclusive, see Richard B. Freeman, *Labour Market Institutions Without Blinders: The Debate over Flexibility and Labour Market Performance*, 19 INT'L ECON. J. 129 (2005).

³⁰² See Bagenstos, *supra* note 14, at 244–47. In a similar vein, see ANDERSON, *supra* note 273.

³⁰³ See GLYNN, ET AL., *supra* note 205, at 315–461.

³⁰⁴ The oft-cited exception is *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 896–901 (3d Cir. 1983) (applying Pennsylvania law). But *Novosel* has not been followed by other circuits. See *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 618–20 (3d Cir. 1992); *Edmondson v. Shearer Lumber Prods.*, 75 P.3d 733, 738–39 (Idaho 2003) (“[T]he public policy adopted in *Novosel* has not been endorsed by any other court, not even the Pennsylvania state courts within the federal district of the Circuit that issued *Novosel*.”).

retaliated for the employee's political or extramural speech.³⁰⁵ That is true even though suppressing such speech has fairly obvious third-party effects by depriving the audience of information.³⁰⁶ The rationale these courts offer is that the First Amendment applies only in the case of state action, so it cannot be a source of public policy on which to base a claim for wrongful discharge against a *private* employer.³⁰⁷ As one leading case put it, "[t]he public policy that is mandated by the cited provisions is that the power of government, not private individuals, be restricted."³⁰⁸

The analysis of Hale and Cohen suggests that this rationale is too simplistic. The only reason private employers can discharge workers for their speech is because state law has empowered them to do so. Lisa Bingham describes the relationship in Haleian terms (although she does not cite Hale): "the judicially created and enforced rule excluding free speech from protection . . . puts private-sector employers in the position of being able to knowingly coerce vulnerable and economically dependent employees."³⁰⁹ Bingham argues that, as a result, the private employer's act should count as "state action" for constitutional purposes.³¹⁰ Today's Supreme Court would certainly disagree.³¹¹ But either way, Hale and Cohen's analysis shows that the state remains deeply implicated in the employer's conduct.

And, as Bingham points out, the conclusion that there is no "state action" is merely the starting point of the wrongful discharge analysis. To say that there is no "state action" is to say that the employer did not *violate* the First Amendment. But that is an analytically distinct question from the question whether the First Amendment can serve as a source of "well-established public policy"³¹² to support a claim. The courts recognized the wrongful discharge cause of action to provide a remedy for employer "abuses [of] power" that did *not* independently violate some other source of law.³¹³ If the employer's abuse already violated the law, the case would

³⁰⁵ See RESTATEMENT OF EMP. LAW § 5.02, reporter's note to cmt. d. By contrast, whistleblowing speech—in which workers bring violations of the law to the attention of public bodies—is generally protected against employer coercion. See Bagenstos, *supra* note 14, at 262.

³⁰⁶ See Joseph Thai, *The Right to Receive Foreign Speech*, 71 OKLA. L. REV. 269, 278–309 (2018) (describing First Amendment interests in the receipt of information).

³⁰⁷ See, e.g., *Borse*, 963 F.2d at 619–20; *Edmondson*, 75 P.3d at 738.

³⁰⁸ *Barr v. Kelso-Burnett Co.*, 478 N.E.2d 1354, 1357 (Ill. 1985).

³⁰⁹ Lisa B. Bingham, *Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 OHIO ST. L.J. 341, 368 (1994).

³¹⁰ See *id.* at 362–68.

³¹¹ See *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53 (1999); *Rendell-Baker v. Kohn*, 457 U.S. 830, 839–42 (1982); *Blum v. Yaretsky*, 457 U.S. 991, 1010 (1982); *Flagg Bros. v. Brooks*, 436 U.S. 149, 165–66 (1978). But I agree with Professors Seidman and Tushnet that the state action doctrine is conceptually confused, precisely because judges at some level recognize the analytic power of the Legal Realist critique at the same time that they attempt to protect a sphere of private conduct. See LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES* 70–71 (1996).

³¹² RESTATEMENT OF EMP. LAW § 5.02(f).

³¹³ Bingham, *supra* note 309, at 370.

not present any question of whether a court should extend the wrongful discharge doctrine.³¹⁴ As the rare court to have found a wrongful termination cause of action in this context said, “the concern for the rights of political expression and association” underlying the First Amendment might reflect a “public policy” of protecting “political freedoms”—one that applies regardless of “whether the threat comes from state or private bodies.”³¹⁵

Why have the courts generally refused to find “well-established public policy” against interference with workers’ speech? Despite their near-unanimity on the point—or maybe because of it—judges have tended to offer little analysis beyond ritualistically invoking the “state action” doctrine.³¹⁶ But one clear motivation does emerge from some of the decisions—the perceived imperative to limit intrusions on employment-at-will. Thus, when the Illinois Supreme Court declined to protect worker speech under its “public policy” doctrine, the court endorsed “a narrow interpretation of the retaliatory discharge tort.”³¹⁷ In the very next sentence, 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.”³¹⁸ Further, 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.”³¹⁹

Common law protections of worker privacy present a more mixed picture because courts have often (though hardly always) recognized employees’ claims in this context.³²⁰ But the at-will baseline has had significant effects here as well. As with the protection of worker speech, “any meaningful protection of employee privacy requires limitation of an employer’s power to fire at will.”³²¹ Yet courts have done a poor job of managing the

³¹⁴ *Id.* (“[I]t was precisely *because* there was no other remedy that the courts had to intervene.”).

³¹⁵ *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 900 (3d Cir. 1983).

³¹⁶ *See, e.g., Edmondson v. Shearer Lumber Prods.*, 75 P.3d 733, 738–39 (Idaho 2003) (“The prevailing view among those courts addressing the issue in the private sector is that state or federal constitutional free speech cannot, in the absence of state action, be the basis of a public policy exception in wrongful discharge claims.”); *Bushko v. Miller Brewing Co.*, 396 N.W.2d 167, 172 (Wis. 1986) (stating that including worker speech in the wrongful-termination doctrine would “eliminate any distinction between private and governmental employment”); *Johnson v. Mayo Yarns, Inc.*, 484 S.E.2d 840, 843 (N.C. Ct. App. 1997) (“We conclude that the plaintiff’s conduct carried out in private employment is not constitutionally protected activity. Therefore, plaintiff has failed to allege facts sufficient to support a claim of wrongful discharge based on his activity being protected speech and expression by our Constitution.”).

³¹⁷ *Barr v. Kelso-Burnett Co.*, 478 N.E.2d 1354, 1356 (Ill. 1985).

³¹⁸ *Id.*

³¹⁹ *Shovelin v. Cent. New Mexico Elec. Coop.*, 850 P.2d 996, 1007 (N.M. 1993).

³²⁰ *See* RESTATEMENT OF EMP. LAW § 7.07, reporter’s notes cmt. b (collecting cases); *see generally* MATTHEW W. FINKIN, *PRIVACY IN EMPLOYMENT LAW* (5th ed. 2018).

³²¹ Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 OHIO ST. L.J. 671, 676 (1996).

tension between at-will employment and workers' privacy rights—because they keep tripping over the concept of employee consent.

Consent is generally a defense to an invasion of privacy. Indeed, some would say that consent is “an integral part of what we understand privacy to be”: The right to privacy is the right to decide with whom to share one's private matters.³²² Steven Willborn goes so far as to say that “the only good being protected” in the privacy context “is the employee's ability to consent or not to consent.”³²³

How, then, should we treat a worker's decision to accept a job that the employer conditions on giving up some privacy interest? 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 new condition is the equivalent of the employer firing the worker and then offering to rehire on new terms.

As Hale and Cohen's analysis indicates, the concept of “consent” cannot answer the question whether the term is acceptable. 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—as are all such decisions. To decide whether to treat the intrusion on privacy interests as impermissible requires some concept that goes beyond “choice” or “consent.”³²⁴ The analysis might, for example, focus on the impact of the particular intrusion on personhood, autonomy, or broader equality interests, and the employer's countervailing interest justifying the intrusion.³²⁵

For example, in *Jenninvs v. Minco Technology Labs, Inc.*³²⁶ a Texas state court held that a worker could be fired for refusing to submit to urinalysis. 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.”³²⁷ The court rejected the argument on the ground that “[t]here cannot

³²² Willborn, *supra* note 201, at 975; *see also id.* at 979 (“Within the domain protected by privacy, the thing that is protected is precisely the individual's authority to consent or to withhold consent.”).

³²³ Steven L. Willborn, *Notice, Consent, and Nonconsent: Employee Privacy in the Restatement*, 100 CORNELL L. REV. 1423, 1439 (2015). I have argued against Willborn's consent-focused account of privacy. *See* Bagenstos, *supra* note 14, at 247–48.

³²⁴ *See supra* text accompanying notes 112–17. *See generally* Kim, *supra* note 321, at 719 (recognizing “the indeterminacy inherent in the notion of consent” in this context based on “the difficulty of finding a principled way to distinguish fully voluntary from coerced agreements”).

³²⁵ *See, e.g.*, Bagenstos, *supra* note 14, at 247–53 (articulating a social-equality approach to privacy protections); Kim, *supra* note 321, at 676 (arguing “that the employer has legitimate access to those areas socially designated as highly private—what I call ‘core’ privacy interests—only to the extent necessary to achieve the purposes of the employment”).

³²⁶ 765 S.W.2d 497 (Tex. App. 1989), *writ denied* (Dec. 13, 1989).

³²⁷ *Id.* at 502.

be one law of contracts for the rich and another for the poor.”³²⁸ Indeed, the judges said that they could not “imagine a theory more at war with the basic assumptions held by society and its law.”³²⁹

The echoes of Justice Pitney in *Coppage* are evident in *Jennings*. But even those courts that do not so explicitly endorse *Lochnerist* premises still give significant weight to (compromised) worker consent. The doctrine often requires a reasonable expectation of privacy, for example. 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 reasonable expectation of privacy.³³⁰

The Restatement of Employment Law comes close to solving this problem, but it troublingly continues to rely on the concept of consent. Promisingly, the Restatement provides for wrongful discharge liability for “[a]n employer who discharges an employee for refusing to consent to a wrongful employer intrusion upon a protected employee privacy interest.”³³¹ The Restatement also says in a comment that “employee consent obtained as a condition of obtaining or retaining employment is not effective consent to an employer intrusion and does not in itself provide a defense to wrongful intrusion.”³³²

The Restatement clearly recognizes the problematic nature of worker consent, but it does not solve the problem. The “in itself” language is the tell. Thus, the comment explains that “[b]y engaging in a certain type of employment” that “involve[s] reduced expectations of privacy,” and by doing so “with notice of the accompanying reduced privacy, the employee effectively consents to the reasonable requirements of the position, including intrusions in areas that would be considered private in other contexts.”³³³ It is not clear why the concept of consent is necessary there, when “reasonable requirements” should in fact do all of the work. As Professor Willborn suggests, the Restatement’s treatment of notice effectively grants employers “considerable discretion to narrow and even eliminate” worker privacy interests.³³⁴ Although the Restatement explicitly seeks to “excise[]” the concept of consent, the notice provisions enable that concept to return through the back door, because “one gets to consent only if there is a privacy interest in the first place.”³³⁵

Now consider statutory and constitutional claims. Statutes protecting workers against discrimination, or against retaliation for complaining about

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ See Clyde W. Summers, *Individualism, Collectivism and Autonomy in American Labor Law*, 5 EMP. RTS. & EMP. POL’Y J. 453, 472–73 (2001).

³³¹ RESTATEMENT OF EMP. LAW § 7.07.

³³² RESTATEMENT OF EMP. LAW § 7.06 cmt. h.

³³³ *Id.*

³³⁴ Willborn, *supra* note 323, at 1435.

³³⁵ *Id.*

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. And, of course, rules grounded in the federal Constitution should prevail over all other laws. But the baseline of employment-at-will has stiffly resisted being overcome by statutory and constitutional rules.³³⁶

Some of the reasons are practical. As Cynthia Estlund demonstrated many 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 antidiscrimination or antiretaliation laws.³³⁷ “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.”³³⁸

The at-will baseline has affected the doctrine as well. In statutory discrimination cases, the Supreme Court has worked hard to prevent its rules for proving disparate treatment from encroaching on the employers’ presumed prerogative to discharge workers arbitrarily.³³⁹

In *Furnco Construction Corporation v. Waters*,³⁴⁰ for example, the Court interpreted the second step of the *McDonnell Douglas* burden-shifting scheme³⁴¹ as imposing only a relatively limited burden on employers. Under *McDonnell Douglas*, plaintiffs first must establish a *prima facie* case by showing that they are members of a protected class, were qualified for the position they sought, and were rejected under circumstances indicative of

³³⁶ James Pope has similarly shown how the Supreme Court has repeatedly “elevate[d] the state common-law rights of employers over the federal statutory rights of workers” under the NLRA. Pope, *supra* note 204, at 519.

³³⁷ See Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1671–72 (1996).

³³⁸ *Id.* at 1671; see William E. Forbath, *The Distributive Constitution and Workers’ Rights*, 72 OHIO ST. L.J. 1115, 1143 (2011) (arguing that, to prove retaliatory firing under the National Labor Relations Act, “[i]t is the worker’s burden to show that the firing was to thwart the union campaign, but the employer can always claim that the reason for the firing was not talking to the union or organizing or attending a meeting—i.e., exercising one’s rights; instead, the motivation for the firing was ‘malingering’ or ‘insubordination’ or ‘lateness’ or literally anything else”); Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 183 (2007) (arguing that, due to the at-will doctrine, workers “frequently face an uphill battle in persuading judges that an unjust dismissal represents a significant departure from business norms and is therefore likely the result of a forbidden motive (e.g., race or labor organizing), rather than simply a privileged exercise in animosity, contrariness, or whimsy”); see also Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 46 (2000) (arguing that the at-will doctrine has undermined judicial enforcement of the Americans with Disabilities Act).

³³⁹ For a good general discussion, see generally William R. Corbett, *The “Fall” of Summers, the Rise of “Pretext Plus,” and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from McKennon and Hicks*, 30 GA. L. REV. 305 (1996); Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to “No Cause” Employment*, 81 TEX. L. REV. 1177 (2003).

³⁴⁰ 438 U.S. 567 (1978).

³⁴¹ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973).

discrimination.³⁴² At that point, the burden “shift[s] to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”³⁴³ In *Furnco*, the Court held that *any* nondiscriminatory reason would do, even if it was one that was objectively unreasonable or failed to account for the interest in promoting the hiring of a diverse workforce.³⁴⁴ The Court criticized the court of appeals for “requir[ing] businesses to adopt what it perceive[d] to be the ‘best’ hiring procedures.”³⁴⁵ It declared: “Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.”³⁴⁶ As William Corbett explains, “the *Furnco* admonition regarding judicial incompetence to second-guess employers parallels one of the theories explaining the widespread adoption of employment at will by state courts. Courts adopted the doctrine because they did not deem themselves competent to evaluate employers’ discharge decisions.”³⁴⁷

Fifteen years after *Furnco*, the Court infused an at-will mindset into the third stage of the *McDonnell Douglas* burden-shifting scheme. The third stage allows plaintiffs to prevail if they can prove that the employer’s “stated reason for [the adverse employment action] was in fact pretext,”³⁴⁸ In *St. Mary’s Honor Center v. Hicks*,³⁴⁹ the Court held that plaintiffs were not necessarily entitled to prevail simply by showing that the legitimate nondiscriminatory reason proffered by the employer was pretext; the plaintiffs must also show that the reason was a pretext *for discrimination*.³⁵⁰ As in *Furnco*, the Court’s decision rested on the at-will baseline. 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*.”³⁵¹ 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.³⁵² As Corbett argues, the Court’s statement “reveals that the Court chose not to exercise its power by requiring the fact finder to find discrimination when plaintiffs prove pretext, because the Court

³⁴² See *id.* at 802.

³⁴³ *Id.*

³⁴⁴ See *Furnco*, 438 U.S. at 577–78.

³⁴⁵ *Id.* at 578.

³⁴⁶ *Id.*

³⁴⁷ Corbett, *supra* note 339, at 334–35; see also Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on A Statutory Task*, 69 N.C. L. REV. 1, 71 (1990) (describing *Furnco*’s “disinclination to ‘restructure’ private business practices” as an example of the Court’s hewing to “common-law baselines” in interpreting Title VII).

³⁴⁸ *McDonnell Douglas*, 411 U.S. at 804.

³⁴⁹ 509 U.S. 502 (1993).

³⁵⁰ *Id.* at 515–16.

³⁵¹ *Id.* at 514.

³⁵² See *id.* at 504.

values employment at will more highly than employment discrimination law and its underlying policies.”³⁵³

As 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.”³⁵⁴ 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.³⁵⁵

Reliance on the at-will baseline has even affected the Supreme Court’s constitutional decisions. When the Court refused to apply the class-of-one equal protection doctrine to government employment, it explained that prohibiting arbitrary treatment of government employees would be “simply contrary to the concept of at-will employment.”³⁵⁶ The Court thus pointed to the common law at-will doctrine to justify exempting the employment context from the otherwise generally applicable constitutional principle against arbitrary treatment.³⁵⁷ Indeed, across a range of different rights, the Court has sought to ratchet down the constitutional protections available to public employees so that the government can exercise the prerogatives available to private employers—prerogatives that are rooted in the at-will doctrine and the conception of employer sovereignty on which it rests.³⁵⁸

These developments are troublesome. If the at-will doctrine rests on an implicit set of judicial policy judgments, that doctrine should not be permitted to “undermine decisions society has made about fundamental rights in the workplace” through statutory and constitutional law.³⁵⁹ Because they continue to give the at-will baseline dominance over democratic efforts to protect workers’ rights, they are properly understood as descendants of *Lochner*.

CONCLUSION

In this paper, I have attempted to show that our labor and employment law has never truly shed the premises of *Lochner*. The Roberts Court’s recent decisions seem on the surface to rely on conflicting understandings of worker choice, but—just like the infamous decisions of the *Lochner*-era

³⁵³ Corbett, *supra* note 339, at 352.

³⁵⁴ Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward A Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1459 (1996).

³⁵⁵ *See id.* at 1459–60.

³⁵⁶ Engquist v. Oregon Dep’t of Agr., 553 U.S. 591, 606 (2008).

³⁵⁷ *See* Village of Willowbrook v. Olech, 528 U.S. 562, 563–65 (2000) (applying general prohibition of arbitrary government action outside of the employment context).

³⁵⁸ *See* Kim, *supra* note 166.

³⁵⁹ Joseph E. Slater, *The “American Rule” That Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL’Y J. 53, 58 (2007).

Court—they are all consistent in failing to take account of the value of regulation and collective bargaining in promoting meaningful freedom for workers. It is not just the Roberts Court. Fundamental doctrines of labor and employment law continue to rest on a view of choice that does not account for the coercive situation in which workers find themselves. If we are to address today's problems of exploitation of labor, we must relearn the lessons of the Legal Realists of the early twentieth century and recognize the importance of legal interventions to rectify imbalances of bargaining power in the workplace.