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## Where's the Meat? Lochner and the President's Executive Order

Catherine M.A. McCauliff

Seton Hall University, [catherine.mccauliff@shu.edu](mailto:catherine.mccauliff@shu.edu)

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Catherine M.A. McCauliff\*

## Where's the Meat? *Lochner* and the President's Executive Order

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### I. INTRODUCTION

Rarely do we get the opportunity, distasteful as it may be in this situation, to relive an older Supreme Court case in real time. Today's situation involving the meatpackers, some of whose employers are taking no precautions to protect against the pandemic virus called COVID-19, is not (yet) in the courts but comes to us in the form of a presidential executive order. These circumstances recall a compelling case from the early twentieth century in which workers similarly faced conditions dangerous to their health and well-being.

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\* A.B., Bryn Mawr College, M.A., Ph.D., University of Toronto, J.D. University of Chicago. The author wishes to thank Angela Carmella, Heather Payne, Blair Parker, Bernard Freamon, Dan Morrissey, and Brendan McCauliff.

In *Lochner v. New York*,<sup>1</sup> a majority of the Supreme Court, in an opinion by Justice Rufus Peckham,<sup>2</sup> declared New York State days and hours protections<sup>3</sup> for workers unconstitutional after rejecting the evidence the state put forward and the argument that the bakers—who worked for Joseph Lochner and other entrepreneurs in hot basements with flour dust blowing into their eyes and mouths, who had an average life span of forty-two years when other workers had an average life span of fifty years—deserved protection.<sup>4</sup> Whatever conditions

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1. *Lochner v. New York*, 198 U.S. 45 (1905). Joseph Lochner, owner of Home Bakery in upstate Utica, New York, was charged with violating the Bakeshop Act of 1895, for “violat[ing] the one hundred and tenth section of article 8, chapter 415, of the Laws of 1897, known as the labor law of the state of New York.” *Id.* at 52. The text of the statute itself was included as an appendix to the Court’s opinion:

No employ[ee] shall be required or permitted to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employ[ee] shall work.

*Id.* at 68–69 (Harlan, J., dissenting) (quoting Section 110 of Article 8, Chapter 415, of the Laws of 1895).

2. *Lochner* was decided by a 5–4 majority, with Justices White and Day concurring in Justice Harlan’s dissent and Justice Holmes dissenting separately. *Lochner*, 198 U.S. at 45.
3. The Bakeshop Act also regulated sanitary conditions in Sections 111–115. *Id.* at 71 (Harlan, J., dissenting). These provisions were not challenged. On the surface, the provisions of the Bakeshop Act appeared to have a legitimate legislative purpose. The motivation, however, may have resulted from anti-immigrant sentiment in the industry, since foreign-born bakers who were willing to work longer hours seemingly threatened American bakers. See also PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* 28–48 (1998) (detailing the case’s political background); *Supreme Court Landmark Case Lochner v. New York*, CSPAN3 (Aug. 7, 2017, 8:01 AM), [https://archive.org/details/CSPAN3\\_20170807\\_120100\\_Supreme\\_Court\\_Landmark\\_Case\\_Lochner\\_v.\\_New\\_York](https://archive.org/details/CSPAN3_20170807_120100_Supreme_Court_Landmark_Case_Lochner_v._New_York) [<https://perma.cc/X4RA-53EC>] (addressing motivations behind the Bakeshop Act and the Court’s decision in *Lochner*).

4. *Lochner*, 198 U.S. at 70–72 (Harlan, J., dissenting). Justice Harlan, in his dissent, quoted an unnamed author:

The constant inhaling of flour dust causes inflammation of the lungs and of the bronchial tubes. The eyes also suffer through this dust, which is responsible for the many cases of running eyes among the bakers. The long hours of toil to which all bakers are subjected produce rheumatism, cramps and swollen legs.

*Id.* at 70. Compare the conditions of the line bakers working among overheated furnaces described in *Lochner* to present day line butchers: a worker at Tyson’s pork plant in Perry, Iowa, carved meat from the back of hogs for eight hours a day, which locked his fingers and hand in place and also caused lower back pain as he lifted the heavy carcasses to get at the meat in the necessarily very cold-temperature freezers, dressed in winter clothes and wearing a back brace. Jacob Bunge & Jesse Newman, *Tyson Turns to Robot Butchers, Spurred by Coronavirus Outbreaks*, WALL ST. J. (July 9, 2020, 10:08 AM), <https://www.wsj.com/articles/meatpackers-covid-safety-automation-robots-coronavirus-11594303535> [<https://>

businessmen like *Lochner* wanted to impose to make sure that the bakers at the furnaces made enough bread to sell to a demanding public, New York State in 1905 was prohibited from intervening to restrict the number of hours and days the workers could be in the bake shop. The holding in *Lochner* made it safe for *Lochner* still to ask his line bakers after ten hours' work, "where's the bread?"

While the Court eventually reversed course and began to allow government regulation of the labor market with 1937's *West Coast Hotel v. Parrish*,<sup>5</sup> with contemporary workers at the slaughterhouses, simultaneously essential and expendable, we are reliving the Court's prohibition of state regulation of business designed to help workers by requiring a safe and healthy environment. On Tuesday, April 28, 2020, in Executive Order 13917,<sup>6</sup> President Trump used the Defense Production Act of 1950 (DPA)<sup>7</sup> to order Tyson and other meat producers to open their plants immediately because "the American people

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perma.cc/DUL6-Y2M8] (explaining the great hazards of the butcher's work, according to Bureau of Labor statistics which may face under reporting of injuries). Tyson initiated changes in the job, including automated split saws for the carcasses in some plants and "ergonomics." *Id.* Other slaughterhouses purchased expensive plastic partitions to place between the workers, temperature scanners, masks, gloves, and "break room lunch tables." The pay for this and some higher skilled slaughterhouse and processing jobs averages \$15.92 per hour in the industry, leading to recruitment and retention problems, due to workers' inability to pay rent and buy food on this pay. In addition, many workers are suffering from and working with various kinds of bodily injuries inflicted at the slaughterhouses, amounting to 23,500 nonfatal injuries and illnesses in the latest year for which the U.S. Government Accountability Office has statistics. *Id.* In a poultry processing plant, an anonymous worker reported that

She works in the refrigerated side of the plant, handling eviscerated carcasses. The temperature, she said, is so cold that "it's unbearable." Although she is under fifty, she said that she already has arthritis.

She and other workers complained that, even before the coronavirus struck, their respiratory systems had suffered from inhaling harsh antimicrobial chemicals, such as peracetic acid, that are used to protect chicken from contamination.

Jane Mayer, *How Trump Is Helping Tycoons Exploit the Pandemic*, NEW YORKER (July 13, 2020), <https://www.newyorker.com/magazine/2020/07/20/how-trump-is-helping-tycoons-exploit-the-pandemic> [https://perma.cc/NT3V-TSRP]; see also Megan Durisin, *Virus Can Travel 26 Feet at Cold Meat Plants with Stale Air*, BLOOMBERG (July 23, 2020, 2:14 PM), <https://www.bloomberg.com/news/articles/2020-07-23/virus-can-jump-26-feet-at-cold-meat-plants-filled-with-stale-air> [https://perma.cc/PZ8F-L3WY] (explaining that in a study of air in a German slaughterhouse, in cold and stale air conditions, coronavirus particles traveled more than twenty-six feet).

5. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Though *West Coast Hotel* did not expressly overturn *Lochner*, the decision is widely regarded as ending the *Lochner* era.
6. Exec. Order No. 13917, 85 Fed. Reg. 26313 (Apr. 28, 2020) (classifying the slaughterhouses as "critical [meat] infrastructure" which cannot be closed by state governments).
7. Defense Production Act of 1950, 50 U.S.C. §§ 4501–4568.

need meat.” The Order also prevented workers’ suits against their employers if they got sick from COVID-19 because of the working conditions at the slaughterhouse’s plant. The Executive Order accordingly led to the conclusion that the radical elimination of the slaughterhouses’ liability for unsafe conditions was unmistakably the point: during the week of March 16, 2020, Smithfield Foods chief executive Kenneth Sullivan sent marching orders to Nebraska Governor Pete Ricketts, complaining that Smithfield employees “work in close proximity to each other and are increasingly asking one question: ‘Why are we here?’ This is a direct result of the government continually reiterating the importance of social distancing.”<sup>8</sup> While meat is economi-

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8. Ted Genoways, *Beyond Big Meat*, NEW REPUBLIC (Aug. 4, 2020), <https://newrepublic.com/article/158679/beyond-big-meat-coronavirus-pandemic-meatpacking-monopoly> [https://perma.cc/A8D6-G3RY]. The Smithfield CEO continued:

Sullivan asked that the governor’s future communications be “carefully crafted to exclude agriculture and food industry workers.” He also insisted that “government leaders, at all levels, have to understand social distancing is a nicety that makes sense only for people with laptops.” If Ricketts didn’t specifically “call out” food production as an essential industry, he maintained, then there was a high risk that Smithfield employees would “stop showing up for work,” pushing the whole country to “the precipice of a major societal disaster.”

... Sullivan warned Governor Ricketts that temporary shutdown orders “could lead to social unrest” due to food shortages. “It will be a calamity,” he said.

*Id.*; see also Anshu Siripurapu, *What Is the Defense Production Act?*, COUNCIL ON FOREIGN REL. (Jan. 26, 2021, 7:00 AM), <https://www.cfr.org/in-brief/what-defense-production-act> [https://perma.cc/YDL6-2SSH] (“Responding to concerns [from, for example, John Tyson, head of Tysons Foods] about the supply of meat following several plant closures, Trump [in late April, 2020] used DPA authority to ensure that meat processing plants remain open [amid the pandemic] by declaring them ‘critical infrastructure.’”). Other consequences ensued:

As U.S. meat production plummeted in April following a rash of coronavirus outbreaks and closures at processing plants across the country, industry and political leaders sounded an alarm.

Factory closures were “pushing our country perilously close to the edge in terms of our meat supply,” Kenneth Sullivan, CEO of Smithfield Foods, the country’s largest pork producer, warned in a public message April 6.

Kyle Bagenstose, *As Leaders Warned of US Meat Shortages, Overseas Exports of Pork and Beef Continued*, USA TODAY (June 16, 2020, 11:25 AM), <https://www.usatoday.com/story/news/investigations/2020/06/16/meat-shortages-were-unlikely-despite-warnings-trump-meatpackers/3198259001/> [https://perma.cc/H34F-PQNK]. However, though Trump’s Executive Order linked operational meat processing plants with a functional food supply chain, “Americans were never at risk of a severe meat shortage, a *USA Today* investigation found, based on an analysis of U.S. Department of Agriculture data and interviews with meat industry analysts.” *Id.* The article points out that though domestic numbers went down, the amount of meat exported during the same timeframe more than made up for the deficit. For example, “[i]n the week ending April 23, the industry exported 98.6 million pounds of pork overseas, the second-highest total of 2020.” *Id.* Heather Payne provided special insight into characterizing the Executive Order

cally big business and the heads of the slaughterhouses are powerful, meat is not the only source of protein. Meat may be more important politically and economically than nutritionally, as the concerns set forth in the Executive Order indicate.

Furthermore, whereas in previous epidemic emergencies and until the Executive Order, the Occupational Safety and Health Administration (OSHA) health protocols remained in force, this Executive Order transformed those mandatory protective measures to hortatory only, through the power of the DPA. Shockingly, because of the health and lives of slaughterhouse workers at stake, even the factual basis for the issuance of the Executive Order is now questionable. Evidence suggests slaughterhouses' contractual commitments to China apparently caused the potential or alleged meat supply "crisis" that John Tyson complained about and that Tyson's "emergency" advertisement in the papers likely was coordinated with the Labor and Agriculture Departments as well as the President in order to inveigle enough employees, sick or well, to keep working or to return to work so the contractually promised meat could be exported to China.<sup>9</sup>

China's role here provides background for the Executive Order. Since his time as National Security Adviser between April 2018, and September 2019, John Bolton has accused the President of promising or making favorable trade contracts with China in return for China's

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as a liability escape route for the slaughterhouses, which has triggered the dismissal of lawsuits seeking a remedy for the workers' injuries. *See infra* notes 43, 104 and accompanying text.

9. By mid-April, COVID-19 resulted in a substantial number of slaughterhouse employees' absence from work. Genoways, *supra* note 8 ("[I]n the third week of April . . . Tyson confirmed more than 1,000 cases of Covid-19 among its packinghouse workers in Waterloo, Iowa, and the JBS plant in Worthington, Minnesota, simultaneously confirmed nearly 800 cases, forcing both to close down for two weeks . . ."); see Michael Corkery & David Yaffe-Bellany, *As Meat Plants Stayed Open To Feed Americans, Exports to China Surged*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2020/06/16/business/meat-industry-china-pork.html> [<https://perma.cc/N2VD-68Q9>]. The Centers for Disease Control (CDC) and OSHA released a statement indicating that the "United States would weigh in on the side of companies who were facing litigation for reported workplace exposures to the coronavirus, as long as the companies were following the standards that the C.D.C. and OSHA had issued for meat processing facilities." Ana Swanson & David Yaffe-Bellany, *Trump Declares Meat Supply 'Critical,' Aiming To Reopen Plants*, N.Y. TIMES (Apr. 28, 2020), <https://www.nytimes.com/2020/04/28/business/economy/coronavirus-trump-meat-food-supply.html?action=click&module=relatedLinks&pgtype=article> [<https://perma.cc/2SWX-YX6W>]; see also Mayer, *supra* note 4 (quoting non-profit advocacy leader Tony Corbo about how he believed the media largely missed a big aspect of the COVID-19 story:

Trump and his contributors "were crying about shortages, and yet we're still exporting meat. The shortage was phony. . . . Everyone is looking at the shiny object—the pandemic. . . . Meanwhile, the government is deregulating *everything*. It's unreal."

help in getting the President re-elected. According to Bolton, on June 29, 2019, in Osaka, Japan, the President asked President Xi Jinping of the People's Republic of China to help with his re-election campaign ("Make sure I win.") by buying more American soybeans and wheat from needy American farmers, who would then vote to re-elect Trump. Trump and Xi decided to work together to improve trade relations over the next six years, a timeframe that meant the President also needed Xi's help with his re-election so he would be in a position to extend his second term beyond four years, in order to work with Xi.<sup>10</sup> We can now interpret the help for the four major slaughterhouses in the Executive Order as a partial fulfillment of China's need for food and, in particular, for meat after the decimation of its pig population by African swine flu in 2018, in exchange for Xi's efforts in support of the President's reelection. In short, the President likely saw the Order keeping slaughterhouses open during the pandemic as a reelection strategy.<sup>11</sup>

Beyond Trump's reelection plans, U.S.-China relations also inform the purported domestic meat shortage justifying the Executive Order. Exports of meat to China continued to increase after the Executive Order was signed on April 28, and though the Order pointed to shortages in the domestic meat supply, referring to workers' sick leave as the cause of the meat shortage, it made no reference to exports.<sup>12</sup>

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10. John Bolton, *The Scandal of Trump's China Policy*, WALL ST. J. (June 17, 2020, 2:46 PM), <https://www.wsj.com/articles/john-bolton-the-scandal-of-trumps-china-policy-11592419564> [https://perma.cc/BYC4-9MQV] ("The president pleaded with Chinese leader Xi Jinping for domestic political help."). Despite these efforts, the relationship between the two countries is in tatters. Steven Lee Myers & Paul Mozur, *Caught in 'Ideological Spiral,' U.S. and China Drift Toward Cold War*, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/07/14/world/asia/cold-war-china-us.html?action=click&module=relatedLinks&pgtype=article> [https://perma.cc/LRQ9-VZED] (explaining that the Administration "challenged China's claims in the South China Sea, setting the stage for sharper confrontation . . . . And President Trump said . . . he had signed into law a bill to punish Chinese officials for the new security law that curbs the rights of Hong Kong residents"). The *Wall Street Journal* ran an editorial, giving a supportive assessment of Smithfield executive Kenneth Sullivan's "unapologetic response." Editorial, *Senators Get a Meaty Education*, WALL ST. J. (July 28, 2020, 7:22 PM), <https://www.wsj.com/articles/senators-get-a-meaty-education-11595978578> [https://perma.cc/AZH9-GCDF]. (explaining that "running a business isn't as easy as being a Senator," and averring that "[n]early all corporate leaders are doing their best to protect workers while continuing to serve customers").
  11. The fact that one of the four big slaughterhouses is owned by a Chinese company may further bolster this interpretation. For more on the Chinese ownership of Smithfield Farms, see *infra* notes 90–91 and accompanying text.
  12. In May of 2020, "meat exports . . . of poultry increased 28 percent from a year earlier, according to Panjiva, the supply-chain research unit of S&P Global Market Intelligence. And pork exports to China rose 590 percent from a year earlier, reaching their highest level since at least 2009." Michael Corkery, *Warren and Booker Press Meatpackers on Exports to China*, N.Y. TIMES (June 23, 2020) [here-

The workers' illnesses acted as a camouflage for the exportation activity, tracked by the Agriculture Department with a month's lag; as section one of the Executive Order emphasized, "outbreaks of COVID-19 among workers at some processing facilities have led to the reduction in some of those facilities' production capacity."<sup>13</sup> Using the workers' illnesses to hide the increased efforts to export more to China brought the attention of senators with various oversight functions.<sup>14</sup> For example, the four major slaughterhouses' pattern of behavior led senators to ask owners whether they were living up to "commitments to the workers who produce your pork and beef, the communities in which you operate and the nation's consumers [who] rely on your products to feed their families."<sup>15</sup>

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inafter Corkery, *Warren and Booker*], <https://www.nytimes.com/2020/06/23/business/warren-booker-china-meat.html?searchResultPosition=1> [https://perma.cc/9ADJ-ALY4]. Partially in response to questions from Senators Warren and Booker and partially in response to employees' suits, Smithfield Foods, which has hidden the number of its employees who have contracted COVID-19, offered a response from CEO Kenneth Sullivan. In it, Sullivan complained that Smithfield had been held to "unfair and impractical standards regarding masks and social distancing measures." Michael Corkery, *Smithfield Foods Defends Its Pandemic Response: 'Think This Has Been Easy?'*, N.Y. TIMES (July 29, 2020, 5:50 PM) [hereinafter Corkery, *Smithfield*], <https://www.nytimes.com/live/2020/07/24/business/stock-market-updates-coronavirus> [https://perma.cc/JTL4-9KMP]; see also Editorial, *supra* note 10 (emphasizing the pressure Senators Warren and Booker placed on the four prominent meat processors in America). In April 2020, Sullivan warned that COVID-19 threatened the American meat supply on one hand, but exported record amounts of pork to China on the other hand (along with his cohort of CEOs), leading to the possibility that there might not have been a shortage at all but a deflection due to the unusually large foreign exports, of pork in particular. Furthermore, in an early August full-page advertisement in the Sunday *New York Times*, Sullivan claimed that Smithfield is "in the business of making good food . . . responsibly." Smithfield, *Good Food. Responsibly*, N.Y. TIMES, Aug. 2, 2020, at A17. The advertisement also ran in the next day's *Wall Street Journal*.

13. Exec. Order No. 13917, *supra* note 6, at 1.

14. "These actions raise questions about the circumstances of the President's executive order, your honesty with the American public about the reasons for higher food prices, and your commitment to providing a safe, affordable, and abundant food supply for the nation." Letter from Elizabeth Warren, U.S. Senator, and Cory A. Booker, U.S. Senator, to Noel W. White, Chief Exec. Officer, Tyson Foods, Inc., Andre Nogueira, President & Chief Exec. Officer, JBS USA, David W. MacLennan, Chief Exec. Officer, Cargill & Kenneth M. Sullivan, President & Chief Exec. Officer, Smithfield Foods (June 22, 2020), <https://www.warren.senate.gov/imo/media/doc/2020.06.22%20Letter%20to%20meatpackers%20investigating%20manipulation%20of%20COVID-19%20crisis.pdf> [https://perma.cc/RF5E-VKM8].

15. Corkery, *Warren and Booker*, *supra* note 12; see also David Benoit, *Move over, Shareholders: Top CEOs Say Companies Have Obligations to Society*, WALL ST. J. (Aug. 19, 2019, 6:55 PM), <https://www.wsj.com/articles/business-roundtable-steps-back-from-milton-friedman-theory-11566205200> [https://perma.cc/NU7B-5XEL] (explaining that the "Business Roundtable urges firms to take into account employees, customers and community" but provides no enforcement or commitment); Business Roundtable, *Statement on the Purpose of a Corporation*,



Congress had hoped that the President would address the COVID-19 pandemic-related public health crisis using the DPA.<sup>16</sup> At that point in 2020,<sup>17</sup> the ideal use of an Executive Order based on the DPA would have been protection of important epidemiological practices (testing, tracing, and supplies like masks and gowns) rather than economic trade in meat for export.<sup>18</sup> Epidemiologists, virologists, and scientists generally would have prioritized: 1) widespread testing for more than the symptomatic (twenty percent of those infected do not have symptoms), 2) tracing contacts of the infected, and 3) assuring individual protection with the provision of personal protective equipment (PPE) (including masks, testing kits, supplies, and as much other protective covering as necessary for the situation) for people who

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BUS. ROUNDTABLE (Aug. 19, 2019), <http://brt.org/OurCommitment> [<https://perma.cc/6EUR-QDKU>] (officially reflecting the new attitude). *But see* Nell Minnow, *Six Reasons We Don't Trust the New "Stakeholder" Promise from the Business Roundtable*, HARV. L. SCH. F. CORP. GOVERNANCE (Sep. 2, 2019), <https://corpgov.law.harvard.edu/2019/09/02/six-reasons-we-dont-trust-the-new-stakeholder-promise-from-the-business-roundtable/> [<https://perma.cc/4F4D-3HH9>] (expressing skepticism regarding the purpose of the "stakeholder" promise from the Business Roundtable).

16. *See* Li Zhou, *How Congress Could Force Trump To Use the Defense Production Act*, VOX (Mar. 25, 2020, 1:30 PM), <https://www.vox.com/2020/3/25/21191600/congress-defense-production-act-trump> [<https://perma.cc/KC6P-A64L>] ("Democrats have introduced multiple bills that would require Trump to fully use his powers under the [DPA] . . ."); *see also* Peter Sullivan, *Trump Rejects Calls To Directly Use Defense Production Act*, HILL (Mar. 22, 2020, 7:16 PM), <https://thehill.com/policy/healthcare/488938-trump-rejects-calls-to-directly-use-defense-production-act> [<https://perma.cc/PY4Z-YQ5Y>] ("President Trump on Sunday rejected calls from governors, hospitals and others to direct companies to ramp up production of critical supplies for the coronavirus fight through the use of the Defense Production Act.").
17. *See* Talal Ansari et al., *Texas Governor Rolls Back Reopening at U.S. Coronavirus Cases Hit Record*, WALL ST. J. (June 26, 2020, 9:01 PM), <https://www.wsj.com/articles/coronavirus-latest-news-06-26-2020-11593159630?page=1> [<https://perma.cc/L58H-5GGW>] (reporting that COVID-19 cases outstripped "a peak not seen since the worst day in April"); Sheryl Gay Stolberg & Noah Weiland, *Fauci, Citing "Disturbing Surge," Tells Congress the Virus Is Not Under Control*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/23/us/politics/fauci-congress-coronavirus.html?searchResultPosition=1> [<https://perma.cc/NQ4L-G7X3>] (emphasizing the importance of testing and tracing in controlling the dangerous spread of COVID-19).
18. "The COVID-19 outbreak and these necessary mitigation measures have taken a dramatic toll on the United States economy and critical infrastructure," as well as a reduction in some of the slaughterhouses' production. Exec. Order No. 13917, *supra* note 6, at 1. The four largest meat processing companies, Tyson Foods, Cargill, JBS, and Smithfield Farms "had been building up [their] processing and packing capacity and raising more pigs" in the period leading up to their call on the President to "force" the slaughterhouses to remain open or re-open to supply protein to Americans, despite the absence of many employees due to COVID-19. Corkery, *Warren and Booker*, *supra* note 12.

come within six feet of each other.<sup>19</sup> Right behind these essential workers come the members of the public themselves. Under the DPA, the President could address that difficulty by working to make PPE widely available for use in any facility in accordance with its particular needs and could spur production and maintenance of necessary supplies to alleviate scarcity as well as competition among the states for scarce resources.

Until this Executive Order, it was difficult to know whether or when the President had invoked the DPA at all. Various senators and representatives had urged the President to ensure the manufacture of PPE for health care workers and ventilators for patients.

There's a drastic wartime tool at President Trump's disposal to force U.S. manufacturers to make this medical equipment, but Trump has been reluctant to enforce the Defense Production Act. He has been so inconsistent in his public statements on it that it's hard to tell whether it's in use even when his own FEMA director says it is.<sup>20</sup>

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19. These front lines include assembly lines, public agencies like transportation and post offices, or other more obvious locations such as prisons, immigration camps, and nursing homes as well as medical settings, such as out-of-hospital acute care and transport, intensive care units, and emergency rooms.

20. Amber Phillips, *What Is the Defense Production Act and Why Is Trump So Resistant to Using It To Help Hospitals?*, WASH. POST (Mar. 24, 2020, 10:56 AM), <https://www.washingtonpost.com/politics/2020/03/19/defense-production-act-trump-coronavirus/> [https://perma.cc/TUE5-E3J8]. Phillips describes the confusion:

Around the same time Tuesday morning as his FEMA chief spoke to CNN, Trump tweeted the [DPA] is "in full force," but that the federal government is not forcing manufacturers such as automakers to start making medical equipment. His reasoning: Private companies are doing this on their own. But there's confusion even among the Trump administration whether this is happening. CNN reports that White House officials were caught off guard by FEMA's announcement that the act was being used to make test kits.

*Id.* Note that the CDC and OSHA did not issue any regulations on which the workers could rely, so the slaughterhouses were protected from workers' suits, but in return, the slaughterhouses did not have to clean the plants or enforce any practices associated with social distancing to protect workers. Taylor Telford, *OSHA Releases Guidance To Keep Meatpacking Workers Safe Amid Surging Cases, Food Supply Fears*, WASH. POST (Apr. 27, 2020, 2:13 PM), <https://www.washingtonpost.com/business/2020/04/27/osha-releases-guidance-keep-meatpacking-workers-safe-amid-surging-cases-food-supply-fears/> [https://perma.cc/F8LG-B7P8]. Furthermore, the unions were keenly aware that help failed to materialize: "a union representing plant workers accused the administration of failing to develop meaningful safety requirements that would have helped contain the disruptions." Jennifer Jacobs & Lydia Mulvany, *Trump Orders Meat Plants To Stay Open in Move Unions Slam*, BLOOMBERG (Apr. 28, 2020, 11:18 AM), <https://www.bloomberg.com/news/articles/2020-04-28/trump-says-he-s-issuing-order-for-tyson-s-unique-liability> [https://perma.cc/UWP3-BC7H]. "We only wish that this administration cared as much about the lives of working people as it does about meat, pork and poultry products," said Stuart Appelbaum, President of the Retail, Wholesale and Department Store Union. *Statement from RWDSU President Stuart Appelbaum on Trump Invoking the Defense Production*

For projects like medical equipment, the President hesitated to use the DPA; it may be that corporations and other constituents did not wish to be involved in an inflexible program with little room for negotiation, but the President invoked federalism and was generally reluctant to force action by corporations.<sup>21</sup>

It proved to be a very different situation when the meatpackers sought the President's help to keep open or re-open plants closed for workers' illness. On Sunday, April 26, 2020, Tyson Foods chairman John Tyson wrote in a blog post that "[t]he food supply chain is breaking."<sup>22</sup> Even as the chairman professed, "I am grateful for our team

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*Act Mandating Poultry and Meat Processors Remain Open*, RETAIL WHOLESALE & DEP'T STORE UNION (Apr. 28, 2020), [https://www.rwdsu.info/statement\\_from\\_rwdsu\\_president\\_stuart\\_appelbaum\\_on\\_trump\\_evoking\\_the\\_defense\\_act\\_mandating\\_poultry\\_and\\_meat\\_processors\\_remain\\_open](https://www.rwdsu.info/statement_from_rwdsu_president_stuart_appelbaum_on_trump_evoking_the_defense_act_mandating_poultry_and_meat_processors_remain_open) [https://perma.cc/5AQW-BM2W].

21. "If Trump did invoke the Defense Production Act to have U.S. companies make health-care equipment, it would be one of the most dramatic uses of the act in decades. Trump apparently isn't ready to go down in the history books that way yet." Phillips, *supra* note 20. The virus spread exponentially in the days after the Executive Order went into effect. This aspect of the pandemic's path in the United States would require a separate article to do justice to the claim of federalism and the factual twists and turns arising from the President's non-use of DPA for health and safety purposes (which, in turn, affects the economic condition of the country). On April 27, the Trump-Pence website listed the President and his Administration's actions. Trump-Pence 2020, *Timeline: The Trump Administration's Decisive Actions To Combat the Corona Virus*, TRUMP PENCE (April 27, 2020), <https://www.donaldjtrump.com/media/timeline-the-trump-administrations-decisive-actions-to-combat-the-coronavirus/>. These actions are listed, among others not included, for March 27, 2020:

[1] President Trump signed The Coronavirus Aid, Relief, and Economic Security (CARES) Act into law. [2] President Trump signed a Defense Production Act memorandum ordering General Motors (GM) to accept, perform, and prioritize federal contractors for ventilators [sic]. [3] President Trump signed an executive order allowing the military to activate members of the Selected Reserve and Ready Reserve to active duty to assist with the Federal response to the coronavirus. [4] President Trump appointed Office of Trade and Manufacturing policy director Peter Navarro [who said on television that he has 63,000 doses of hydroxychloroquine, which could be used for prevention] to serve as the Defense Production Act Policy Coordinator. [5] FEMA Administrator Pete Gaynor spoke to the director of each of the state's [sic] emergency operations about the state-led, federally-supported coronavirus response effort.

*Id.* (numbering added).

22. John Tyson, *Feeding the Nation and Keeping Our Team Members Healthy*, TYSON FOODS: THE FEED BLOG (Apr. 26, 2020) [hereinafter *Feeding the Nation*], <https://thefeed.blog/2020/04/26/feeding-the-nation-and-keeping-our-employees-healthy/> [https://perma.cc/VM6E-TF53]; see also Jen Skerritt, *How Giant Tyson Foods Helped Create the Meat Shortage It Now Warns Against*, L.A. TIMES (Apr. 29, 2020, 11:00 AM), <https://www.latimes.com/business/story/2020-04-29/meat-shortage-tyson> (explaining that Tyson began a process of consolidation by purchasing a competitor every year from 2001 through 2019 and that therefore Tyson Foods, Cargill, JBS and Smithfield Foods Inc. "have such a stranglehold on

members, but most of all I care about their health and safety,” he warned:

In small communities around the country where we employ over 100,000 hard-working men and women, we’re *being forced to shutter our doors*. This means one thing – *the food supply chain is vulnerable*. As pork, beef and chicken plants are being forced to close, even for short periods of time, millions of pounds of meat will disappear from the supply chain. As a result, there will be limited supply of our products available in grocery stores until we are able to reopen our facilities that are currently closed.<sup>23</sup>

This was a cry, or shout out, for help from the President, however pre-arranged this cry may prove to be.

The President answered Tyson (and oversaw careful negotiations with the four largest meat processing plants, the descendants of the slaughterhouses)<sup>24</sup> to ask what they wanted done to avert the meat “supply crisis,” thus replicating *Lochner’s* effect on worker health and safety in the twenty-first century.<sup>25</sup> Tyson and his fellow entrepre-

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output that it leaves the supply chain with few remedies when even just a handful of plants are down.”). Tyson’s website mentions in its biography of John Tyson that:

In 2014, Tyson Foods acquired The Hillshire Brands Company, a leading producer of branded, prepared foods. The combination of Tyson and Hillshire created a single company with more than \$40 billion in annual sales and a portfolio of recognized brands, such as *Tyson®*, *Jimmy Dean®*, *Hillshire Farm®*, *Sara Lee®*, *Ball Park®*, *Wright®*, *Aidells®* and *State Fair®*.

*John Tyson: Chairman of the Board*, TYSON FOODS, <https://www.tysonfoods.com/who-we-are/our-people/leadership/john-tyson> [<https://perma.cc/5YKA-DX3V>] (last visited July 13, 2021).

23. *Feeding the Nation*, *supra* note 22 (emphasis added). John Tyson’s complaint to the President is echoed in critics’ comments. “In some cases, local health authorities have ordered plants to close, or companies have agreed to take such steps after pressure from state officials. Some shuttered plants have already started to reopen.” Swanson & Yaffe-Bellany, *supra* note 9. The possible coordination between Tyson’s advertisement and the decision to issue the Executive Order does not appear to be the subject of investigation. Gregory Meyer, *John Tyson Laments Breakdown of Meat System His Family Pioneered*, FIN. TIMES (May 1, 2020), <https://www.ft.com/content/82c2f5fa-1070-4388-853b-a2ed430fbf04> [<https://perma.cc/L8V4-GWAM>] (providing context for the company’s full-page ad, which investigative reporter Christopher Leonard described as an “extraordinarily rare, if not unprecedented” move for Tyson—“to so blatantly advertise that the system is falling apart was breathtaking”).
24. Jennifer Jacobs and Lydia Mulvany explain:
- The White House has been discussing the order with meatpacking executives to determine what they need to operate safely and stay open, in order to prevent shortages, an administration official said. White House General Counsel Pat Cipollone worked with private companies to design a federal mandate to keep the plants open and to provide them additional virus testing capacity as well as protective gear.
- Jacobs & Mulvany, *supra* note 20.
25. *Id.* (“Trump signaled the executive action at the White House on Tuesday, saying he planned to sign an order aimed at Tyson’s liability, which had become ‘a road block’ for the company. He didn’t elaborate.”).

neurs said they were afraid of being sued by workers who got sick or by the families of workers who contracted COVID-19 and died.<sup>26</sup> The President did not call the unions because they wanted social distancing with plastic barriers, masks, testing for the virus, checks of workers' temperatures before entering the plant, bunk beds near the plants (to keep workers from infecting their parents and children by going home after the shift), staggering shifts and start times, adequate paid sick leave, and deep cleaning for the plants themselves.<sup>27</sup>

One of the unions, the United Food and Commercial Workers International Union (UFCW), responded to the Executive Order by asking the government to “put the safety of our country’s meatpacking workers first” because “the food supply cannot be secure without healthy workers.”<sup>28</sup> The UFCW, representing both retail grocery workers and line butchers in slaughterhouses, also took out an advertisement on Sunday, the 26th of April, in the campaign leading up to the President’s signing of Executive Order 13917.<sup>29</sup> UFCW took an educational stance toward the public, emphasizing smart shopping—which involves wearing a mask or face covering, keeping socially distant by six feet from other customers and workers, and disposing of masks and gloves safely—so that customers and workers together could make retail grocery stores safe for all. The advertisement emphasized both the vulnerability of the grocery store employees on the

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26. See Swanson & Yaffe-Bellany, *supra* note 9. The Labor Department and OSHA coordinated with the President to assure the slaughterhouses that the agencies would pre-empt states’ orders for many businesses to close: “No part of the joint meat processing guidance should be construed to indicate that state and local authorities may direct a meat and poultry processing facility to close, to remain closed or to operate in accordance with procedures other than those provided for in this guidance,” they explained. *Id.* Again, the guidance was deliberately vague so as to exempt the slaughterhouses from incurring liability at the hands of its sick employees or the estates of its dead employees.

27. Rhian Hunt, *Workers, Unions Push Back Against Trump’s Executive Order To Keep Meatpackers Open*, MOTLEY FOOL (Apr. 29, 2020, 1:06 PM), <https://www.fool.com/investing/2020/04/29/workers-unions-push-back-against-trumps-executive.aspx> [<https://perma.cc/3QNS-M9XC>] (quoting a statement released by the UFCW). In return, Trump and his donors pushed back against unions, including the UFCW. Mayer, *supra* note 4 (explaining the de-unionization campaign at Mountaire, a chicken processing company owned by Ronnie Cameron, a three-million-dollar donor to President Trump’s 2016 campaign, and noting that the “White House had appointed Cameron to an advisory board on the pandemic’s economic impact. The executive order commanded meat-processing facilities to ‘continue operations uninterrupted to the extent possible.’”) *Id.*

28. Hunt, *supra* note 27 (the UFCW sought “full paid sick leave, federal monitoring of facilities, daily testing, and measures to ‘compel all meatpacking companies to provide the highest level of protective equipment through access to the federal stockpile of PPE’”).

29. Press Release, #ShopSmart Campaign Urges Shoppers To Help Keep America’s Grocery Workers Safe & Grocery Stores Open, UFCW (Apr. 26, 2020), <https://www.ufcw.org/press-releases/ssad/> [<https://perma.cc/UQN7-KNP6>].

front line of COVID-19 transmission and their desire to obtain the public's cooperation in exercising social distance and wearing masks to protect everyone—especially as these workers, like the line workers in the slaughterhouses, had little leverage or say in decisions regarding measures likely to protect them.<sup>30</sup>

The real crisis may be that the Tyson Foods and slaughterhouse operators wanted to (and did) open plants without protections for workers,<sup>31</sup> much as *Lochner* was willing to risk the health and safety of his workers because he remained unsatisfied with his profits when workers spent only ten hours a day, six days a week at the hot furnaces with flour dust blowing into their eyes and into their lungs.<sup>32</sup> In deciding *Lochner*, the Court declined to credit or even consider the information New York State submitted from the hearings on the Bakeshop Bill because the Court considered it irrelevant to the question of the extent of state police power authority. The Court reasoned that the states should protect the lives of its residents, but they are prohibited from interfering with the individual's right to freely contract.<sup>33</sup> Similarly, both the President and the slaughterhouse operators downplayed the concern for health in favor of the desire to get back to business and make money,<sup>34</sup> and thus Trump's Executive Or-

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30. *Id.*; see Swanson & Yaffe-Bellany, *supra* note 9 (“Companies have been criticized for moving too slowly to supply workers with masks and other protective gear in the middle of the outbreak. In many plants, workers cut and debone meat in tight conditions, share meals in crowded cafeterias and walk the same narrow hallways, making social distancing practically impossible.”).

31. Jacobs & Mulvany, *supra* note 20. Jacobs and Mulvany illuminate additional political influencers whose interests the President took into account in crafting a sharp, harsh implementation of the DPA:

Trump acted one day after Iowa's two U.S. senators and its governor urged the administration to invoke the DPA to keep meatpackers open and reopen closed facilities “as soon as it is possible to do so safely.” Iowa produces one-third of the nation's pork supply, according to the state officials. The officials also asked for federal assistance in euthanizing pigs and reimbursing hog farmers for their losses due to closures of processing facilities.

*Id.*

32. In 1910, OSHA developed regulations to address the dangerous particulate matter in flour. OSHA, *1910.263 - Bakery Equipment*, U.S. DEP'T STATE, <https://www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.263> [https://perma.cc/4GK6-Z3GY] (last visited Feb. 19, 2020).

33. *Lochner v. New York*, 198 U.S. 45, 57–58 (1905); see also *infra* notes 126–139 and accompanying text (juxtaposing different views on the tiers of scrutiny as applied to the exercise of police powers in *Lochner*).

34. Many workers face wage and hours problems, lack of sick pay, and most pressingly, health and safety challenges in their crowded assembly lines—on-going problems that likely should have been addressed before the pandemic escalated health and safety concerns. After *Lochner*, legislative bodies could enact protective measures benefiting workers:

Minimum wage laws, as well as other limits on the employment relationship, might be a way of dealing with markets in which employers have

der ran counter to state and local use of police power to protect the health and safety of the public, “set[ting] the stage for a showdown between America’s meat giants, who[ ] [were] pressing to reopen plants . . . and local officials and labor unions who[ ] called for closures . . . to prevent the virus from spreading.”<sup>35</sup>

Not only did President Trump refuse to protect the health and safety of workers—in some instances, running counter to state statutes not very different from the New York law at issue in *Lochner*—but the Executive Order also declared that individuals who did not show up for work were not be eligible for unemployment insurance. In response, “[u]nions fired back, saying the White House was jeopardizing lives and prioritizing cold cuts over workers’ health.”<sup>36</sup> However, under the DPA, classifying meat processing as critical infrastructure enabled the President to take drastic measures overriding state and local COVID-19 regulations, state health and safety laws, and state unemployment laws.<sup>37</sup>

The Executive Order is every bit as strong as the holding in *Lochner* against the bakery workers. This help from the Executive Order for the employers, a stick over the backs of poor and low-paid workers, is the federal government tying the workers to their employers’ slaughterhouses to help the plants move meat products abroad and at home to make money, whatever the physical health and economic status of the workers. Does this Order look like the result in *Lochner*, perhaps with additional barbs?

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monopoly power; the laws have the same effect as a labor union, reducing competition among employees so that a bilateral monopoly is created, with distributive effects that benefit the employees.

David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 384 (2003).

35. Jennifer Jacobs, *Trump To Order U.S. Meat Plants To Stay Open Amid Supply Fears*, TIME (Apr. 28, 2020, 2:07 PM), <https://time.com/5828682/trump-meat-processing-plants-open-coronavirus/> [https://perma.cc/G9SM-GZ5U]; see also Jacobs & Mulvany, *supra* note 20 (“The president himself has long agitated for Americans to return to work and restore a U.S. economy crippled by social distancing measures.”).
36. *Trump Orders Meat Processing Plants To Remain Open*, POST-J. (Apr. 29, 2020), <https://www.post-journal.com/news/covid-19-coverage/2020/04/trump-orders-meat-processing-plants-to-remain-open/> [https://perma.cc/X7YP-5HL6].
37. Exec. Order No. 13917, *supra* note 6, at 1. Shortly before the Executive Order was published, the CDC and OSHA issued interim guidance for meatpacking employers and employees, including “recommended actions employers can take to reduce the risk of exposure to the coronavirus.” Press Release, U.S. Dept. Labor, U.S. Department of Labor’s OSHA and CDC Issue Interim Guidance To Protect Workers in Meatpacking and Processing Industries (Apr. 26, 2020), <https://www.osha.gov/news/newsreleases/national/04262020> [https://perma.cc/Q6A5-AU3W]. The executive order states that the Secretary of Agriculture is to “take all appropriate action under [the DPA] to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA.” Exec. Order No. 13917, *supra* note 6, at 1.

Chief Justice John Roberts recently had occasion to explain the police powers of the states in the context of COVID-19.<sup>38</sup> In *South Bay United Pentecostal Church v. Newsom*, congregants who disagreed with temporary closure or restrictions on the size of the congregation during Sunday services argued that the state had no power to restrict the free exercise of religion for any reason, including prevention of the spread of a life-threatening infectious disease. In concurring with the majority's refusal to enjoin the state from restricting Sunday services, Chief Justice Roberts wrote, "I adhere to the view that the 'Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the states,'" quoting *Jacobson v. Massachusetts*, a case decided two months earlier than *Lochner*.<sup>39</sup> *Jacobson*, which has not been overturned, upheld the state's police power to require vaccination during an outbreak of smallpox in the city of Cambridge precisely because the compulsory vaccination stopped the spread of communicable diseases and the effects of refusal were not felt only by those wishing not to accept the vaccine.<sup>40</sup>

Today, can a state help meat processing workers in a freezing slaughterhouse by mandating that their employer make working conditions safe for their health with PPE and social distancing? No, not without challenging the President's Executive Order of April 28, 2020, issued under the authority of the DPA. The Order was designed, as

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38. *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (Roberts, C.J., concurring) (partially granting the application for injunctive relief); Adam Liptak, *Supreme Court, in 5-4 Decision, Rejects Church's Challenge to Shutdown Order*, N.Y. TIMES (June 15, 2020), <https://www.nytimes.com/2020/05/30/us/supreme-court-churches-coronavirus.html> [<https://perma.cc/JQ5Z-P363>]. *But see* Jeremy K. Kessler & David E. Pozen, Symposium, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. (2018), <https://columbialawreview.org/content/the-search-for-an-egalitarian-first-amendment/> [<https://perma.cc/T9HG-K23P>] ("Over the past decade, the Roberts Court has handed down a series of rulings that demonstrate the degree to which the First Amendment can be used to thwart economic and social welfare regulation—generating widespread accusations that the Court has created a 'new *Lochner*.'").

39. *S. Bay*, 141 S. Ct. at 717 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)). *Jacobson* was decided on February, 20, 1905, and *Lochner* was decided on April 18, 1905.

40. The opinion for the Court (7-2) in *Jacobson* was written by Justice John Marshall Harlan (1833-1911), who dissented in *Lochner*. In *Lochner*, Justice Harlan stated that the state has police power "to prescribe regulations to promote the health, peace, morals, education, and good order of the people." *Lochner v. New York*, 198 U.S. 45, 65 (1905) (Harlan, J., dissenting) (quoting *Barbier v. Connolly*, 113 U.S. 27, 31 (1885)). Such state power

has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of the employ[ees] as to demand special precautions for their well-being and protection, or the safety of adjacent property.

*Id.* at 66 (quoting *Holden v. Hardy*, 169 U.S. 366, 391 (1898)).



*Lochner* was, to take away the state's ability to protect the health and safety of its citizens."<sup>41</sup> If unions challenged the Executive Order, would the Supreme Court revive *Lochner*, deferring to the President's support of businesses without regard for worker safety?

The concept the majority used in *Lochner*, freedom of contract, seemed a neutral phrase but nevertheless favored the entrepreneur. Similarly, the current slaughterhouse conditions may be analyzed under different constitutional theories, including the powers of the state governors and the powers of the federal government using the language of federalism. These arguments are analogous to freedom of contract and reach the same result, even if the arguments avoid the freedom of contract language embraced by the majority in *Lochner*.<sup>42</sup> The unions already had concerns about transmission of COVID-19 when the President signed the Executive Order. One union claimed that the Order is unconstitutional and, like in *South Bay*, sought an injunction or a temporary restraining order against compelling employees to work while sick or going back to work in reopened plants before the workers were given protective equipment, means to social distance, as well as the best form of testing available.<sup>43</sup> The court cited the President's Executive Order in concluding that it was bound to defer to the Department of Agriculture's power to order the workers back to work and forced to accept the employer's conditions of an un-sanitized plant, lack of testing, and crowding in the work space.

Thus, Part II of this Article assesses the government's role in protecting laborers and their working conditions. The current slaughterhouse situation prominently involves the President's Executive Order, but both Congress and labor unions had tried to protect workers and individuals generally. Congress urged the President to take different actions, such as ordering the production of N95 protective masks for

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41. See, e.g., *infra* notes 43, 61, 104, 183 and accompanying text (detailing a local union's suit and large collection of unions seeking mandamus to enforce health protections for workers in slaughterhouses).

42. *Lochner*, 198 U.S. at 53 ("The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution." (citing *Allgeyer v. Louisiana*, 165 U.S. 578 (1897))); see also Jedediah Purdy, *Lochner and Liberty: A Response to David Bernstein*, DEMOCRACY: J. IDEAS (Dec. 20, 2011, 10:15 AM), <https://democracyjournal.org/magazine/23/the-roberts-court-v-america/> [<https://perma.cc/B9WA-BPJZ>] ("Today as then, laissez-faire ideas in the larger intellectual and political culture contribute to the development of anti-regulatory lines of jurisprudence.").

43. *Rural Comty. Workers All. v. Smithfield Foods, Inc.*, 459 F. Supp. 3d 1228 (W.D. Mo. 2020). The current slaughterhouse situation prominently involves the President's Executive Order, just as *Youngstown* (the Steel Seizure Case) did during President Truman's Administration. Truman's Executive Order 10340 directed the Secretary of Commerce to take possession of and run the steel mills because the government needed steel weapons for the Korean conflict. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

hospital workers, ventilators for patients, test kits, laboratory processing of the kits, and solutions for the test kits. They did not, however, urge the President to take the action he in fact took, an action detrimental to workers and public health. Unions considered working conditions in the slaughterhouses to be dangerous to their members, as well as to other employees,<sup>44</sup> and wrote to the federal agencies that in past outbreaks, epidemics, and serious health situations, individuals have benefitted from having mandatory protections in place and by responding to special conditions.<sup>45</sup> As both Congress and the unions found, to their sorrow, they had no leverage to encourage the formerly active federal agencies to protect the health and working conditions of the workers suffering from perilous conditions.<sup>46</sup> Where possible, unions turned to the courts to protect the workers but were stymied. The courts, as though they had not read the filings, turned the workers back to OSHA, now hobbled by the Administration's earlier policies

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44. Taylor Telford & Kimberly Kindy, *As They Rushed To Maintain U.S. Meat Supply, Big Processors Saw Plants Become Covid-19 Hot Spots, Worker Illnesses Spike*, WASH. POST (Apr. 25, 2020, 3:28 PM), <https://www.washingtonpost.com/business/2020/04/25/meat-workers-safety-jbs-smithfield-tyson/> [https://perma.cc/SJZ3-JW36] (stating that “[a]t a JBS beef processing plant in Colorado, employees claimed that managers encouraged them to report for shifts even when they appeared sick, according to workers and a letter from county health officials to the company” and that “JBS confirmed that it did not receive masks for its employees until April 2 and did not mandate their use until April 13. Tyson said it wasn’t until April 15 that it started requiring that all its workers wear masks”).

45. *Id.* The investigative team reported that Tyson Foods, JBS USA, and Smithfield Foods, among other issues

failed to provide protective gear to all workers, and some employees say they were told to continue working in crowded plants even while sick.

The actions . . . continued even after federal guidelines on social distancing and personal protective equipment were published March 9, according to 25 interviews with employees, elected officials, regional health officials, union leaders and federal safety inspectors as well as dozens of documents, including worker complaints filed with local and federal officials.

*Id.*

46. Magaly Licolli, Opinion, *As Tyson Claims the Food Supply Is Breaking, Its Workers Continue To Suffer*, CIVIL EATS (Apr. 30, 2020), <https://civileats.com/2020/04/30/as-tyson-claims-the-food-supply-is-breaking-its-workers-continue-to-suffer/> [https://perma.cc/786N-U42G]. Licolli reported that:

Workers have told me that it wasn’t until April 23, after more than 5,000 cases had developed among meat processing workers, that Tyson finally equipped its line workers with personal protective equipment.

. . . In spite of CDC guidelines to distance workers and install physical barriers between them, the workers I’ve spoken to say that Tyson complied incompletely or not at all.

. . . .

In spite of the company’s public relations claims, the workers who I’ve seen become infected have not been entitled to pay during quarantine.

*Id.*

and then even more severely by the April 28th Order founded in reliance on the DPA.

Private business interests (those with some shares not on the stock exchange but definitely not public service corporations) already had captured the ear of the President and urged him to take action against the slaughterhouses' employees and deprive them of both unemployment insurance and the precautions necessary to render the plants safer workplaces. In fact, labor concerns may have been the true impetus for the Executive Order since the employers told the President that they did not want: 1) to change their plans for full shifts simply because workers were sick or died, 2) to face liability for dangerous working conditions the owners did not wish to address, and 3) together with the states, did not want to pay unemployment insurance if workers chose not to go back to the unclean plants.

John Tyson and his supporting owners wanted to re-open the slaughterhouse plants immediately while many workers were sick, *if and only if* the President precluded the sick workers from suing the slaughterhouses over working conditions that promote the spread of infectious disease such as COVID-19. Tyson and the other slaughterhouse owners wanted to take precisely no precautions and let the employees bear all the risk of working in an unprotected place, when wearing masks, testing, washing hands, maintaining six feet from other workers, and checking temperatures place some control on the spread of the virus.

The slaughterhouses tried hard to avert attention from the deleterious conditions in the plants that provide perfect set up for exponential spread. To deflect blame from themselves, they slurred their workers by suggesting that the workers themselves create the unhealthy conditions for the spread of the virus. That insinuation, however, allows people to infer that something may be the matter with the meat industry itself.

In Part III, I address the legal and constitutional arguments surrounding the President's invocation of federalism in issuing the Executive Order that sent the meat packers back to work and counteracted state supervision of the plants located in their jurisdictions because of a purported food supply crisis in meat products. But beyond John Tyson and his fellow slaughterhouse owners, analysts, industry observers, and others did not perceive a crisis in the meat supply. More objective observers saw only potential risk from the vulnerabilities to the workers in the plants. If a critical mass of infectious cases occurred due to the employers' failure to protect the workers' health, the meat supply might be implicated, but there would not likely be a crisis in the entire meat supply. The major reason for the Executive Order seems to have been the cry for help from Tyson and the three other global slaughterhouse companies: JBS, Smithfield Farms, and Car-

gill.<sup>47</sup> If sued, what constitutional arguments would the President's legal team make? Perhaps the legal team would argue for the revival of *Lochner*.

## II. SLAUGHTERHOUSES: THEN AND NOW, AMERICAN AND GLOBAL

Almost imperceptibly, starting in the late twentieth century, Tyson Foods began and completed its mission to become the largest slaughterhouse in the United States. Tyson's drive toward conglomeration also affected the size and concentration of the nation's slaughterhouses overall, as Cargill, Smithfield, and JBS made the same effort to acquire other slaughterhouses. Now these companies make contracts all around the world with similar economic and other conditions among the trading companies and countries. This consolidation meant the President could treat meat as critical infrastructure of both the U.S. and his re-election campaign. Many independent farmers and cattle ranchers throughout the Midwest and across the South bring their animals to feedlots, which in turn sell to the big slaughterhouses. The President, by working with the big four slaughterhouses and promoting sales of meat and poultry in China, could line up a large part of the whole industry by smoothing over American trade difficulties in China, which all might be favorable for the President's re-election plans.

Today, the concept of a local, independent, or artisanal butcher, as opposed to one of the major grocery-store distributors, is more a dream of the slow food movement<sup>48</sup> than a realistic choice for large numbers of Americans. Relatively few have access to specialty meats, although some restaurants directly source meat from a local farmer or distributor. One side-effect of the explosion of COVID-19 cases in this country was the surge in demand for meat from local butchers.<sup>49</sup> How did we lose our way?<sup>50</sup> The lack of enforcement of antitrust laws because of a

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47. See sources cited *infra* note 74 (discussing how coordination among the major slaughterhouses is a fair inference in this case in light of the relationship among the companies and the political environment within which they operate).

48. *The Slow Food Movement*, DI CENSO FINE FOODS: SLOW FOOD BLOG (Feb. 6, 2018), <https://www.dicenso.com.au/the-slow-food-movement> [https://perma.cc/77DL-6R2C]. The slow food artisanal butcher, surrounded by slaughterhouse products sold more cheaply in a grocery store, respects "the animal . . . when it arrives in store and is divided into primal cuts . . . devoid of fillers." *Not Your Ordinary Butchers*, DI CENSO FINE FOODS <https://www.dicenso.com.au/> [https://perma.cc/XK2S-AFC3] (last visited Feb. 22, 2021).

49. Jason Allen, *Local Butchers, Meat Markets See Surge in Customers Amid Coronavirus Pandemic*, CBS DALL.-FT. WORTH (Mar. 20, 2020, 5:32 PM), <https://dfw.cbslocal.com/2020/03/20/local-butchers-meat-markets-see-surge-in-customers-amid-coronavirus-pandemic/> [https://perma.cc/H7LU-VPXA].

50. Swanson & Yaffe-Bellany, *supra* note 9 ("Critics have said American meat processors are partly to blame for their vulnerabilities. Decades of consolidation

loss of faith in regulation is responsible in large part. Lobbyists presenting the surface advantages of economies of scale can easily persuade regulators,<sup>51</sup> both major political parties, and upscale voters.<sup>52</sup> McDonald's and other fast-food businesses gave customers "freedom" from buying ingredients and preparing foods, just as large grocery store franchises and chains were becoming popular. The public at large was unable to see that the slaughterhouses had consolidated into four large companies, two foreign-owned and two American-owned, until it was done. The consolidation of the industry makes it difficult to observe the operations of the slaughterhouses, which are now powerful enough to shield themselves from much disclosure.

It is difficult to state slaughterhouse production capacity, before or after the Executive Order ordering the meat plants to re-open, despite the large numbers of workers struck by COVID-19. Some available statistics are rendered uncertain through the unwillingness of slaughterhouses and state governments to reveal the number of tests administered and the number of workers who have contracted COVID-19.<sup>53</sup> A series of emails from a county health official in Colorado writing about an outbreak at a Cargill plant in April demonstrate how little power local officials have in enforcing safety measures at plants when up against powerful, privately held giants.<sup>54</sup> The county health official refused to do "anything to cast [Cargill] in a bad light" because "[b]ad news spreads way faster than the truth."<sup>55</sup> Thus, even state and local health officials often protect the big corporate employers against their

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have left the nation's food supply in the hands of relatively few companies. And labor groups have long criticized meatpacking plants for pushing to increase production speeds at the expense of worker safety.").

51. *See id.* As the authors explain:

The meat producers successfully lobbied for the federal government to unveil a rule last year allowing pork plants to run their production lines as fast as they want, with fewer food inspectors keeping watch. The United Food and Commercial Workers [UFCW] union sued to block the rule, saying it would put workers in danger.

*Id.*

52. Evan Osnos, *How Greenwich Republicans Learned To Love Trump*, NEW YORKER (May 3, 2020), <https://www.newyorker.com/magazine/2020/05/11/how-greenwich-republicans-learned-to-love-trump> [<https://perma.cc/6CAT-JSNG>] (explaining the prevailing attitude that allowed this situation to occur and remain firmly in place today).

53. *See* Michael Corkery et al., *As Meatpacking Plants Reopen, Data About Worker Illness Remains Elusive*, N.Y. TIMES (May 25, 2020), <https://www.nytimes.com/2020/05/25/business/coronavirus-meatpacking-plants-cases.html> [<https://perma.cc/SH7Z-DMUE>] ).

54. *Id.* ("The tussle over whether plants should test workers has stretched for months in some states, creating critical delays in isolating infected workers. Local health authorities concede that asymptomatic employees are still coming to work with the virus, fueling the spread.").

55. *Id.*

sick employees,<sup>56</sup> just as the President hoped his Order would work to deter action against a plant in the wake of an outbreak, allowing plants to forego orders to clean the plant, give out protective masks to workers, or stagger hours to reduce the number of workers who must encounter each other. As the reporters concluded, “[a]t many of the nation’s largest plants, zero information has been released about coronavirus cases.”<sup>57</sup>

Today’s four major slaughterhouses allow us to see how this oligopoly-like, if not monopolistic, concentration can let us down very badly in a crisis.<sup>58</sup> While economies of scale may save the slaughterhouses money in easy times, the margin for error may be too risky if anything derails the tight plans involving huge numbers of workers at one time.<sup>59</sup> That was, of course, one of the pressures on John Tyson when

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56. *Id.*

57. Megan Sheets, *Cases of Meat Plant Workers with Coronavirus Soars from 3,700 to More than 15,000 in a Month—As Experts Warn Meat Supply Could Drop by a Third and Prices Could Spike by 20%*, DAILY MAIL (May 26, 2020, 10:18 AM), <https://www.dailymail.co.uk/news/article-8357717/Cases-meat-plant-workers-coronavirus-triples-3-700-15-000-month.html> [https://perma.cc/TJS3-49HQ]; see, e.g., Jacob Bunge, *Coronavirus Surge Tests Safeguards for Meatpacking Workers*, WALL ST. J. (July 2, 2020, 3:52 PM), <https://www.wsj.com/articles/coronavirus-surge-tests-safeguards-for-meatpacking-workers-11593719573> [https://perma.cc/843R-NL6C] (describing how the dearth of information has been a constant since the beginning of the COVID-19 pandemic). Workers’ unease is understandable when the head of human resources at Tyson Foods indicates that the workers already have slower production lines, but the reason is hardly reassuring: so many workers are out sick. *Id.* The workers wanted deliberate action to provide better conditions for their health and not the unavoidable by-product of significant worker illness. In other words, workers want the production lines to be slow because of greater distances between workers and not because fewer workers were available to work. Tyson’s head of human resources also admitted to speaking with union officials about “processing speeds” while professing to exceed or meet other safeguard recommendations from the CDC and OSHA. *Id.* Similarly, workers in poultry plants were at risk in Georgia, Arkansas, Alabama, and North Carolina. The president of the Retail, Wholesale and Department Store Workers estimates that perhaps thirty percent of their poultry-plant members are still not back to work. *Id.*

58. See Swanson & Yafee-Bellany, *supra* note 9. The authors explain:

Companies want assurances that they will not be held legally liable if a worker or customer contracts the virus at their warehouse, coffee shop or grocery store. That issue is expected to come to a head during the next round of congressional negotiations, with Republican lawmakers suggesting that any further aid to states would be conditioned on indemnifying businesses against lawsuits.

*Id.*

59. Kristen Leigh Painter, *Hormel Sells Nebraska Pork Plant to Group of Minnesota, S.D. Farmers*, STAR TRIB. (Aug. 16, 2018, 9:30 PM), <https://www.startribune.com/hormel-sells-nebraska-pork-plant-to-group-of-minnesota-s-d-farmers/491028371/> [https://perma.cc/K2J6-W9TH] (explaining that according to Michael Boland, University of Minnesota professor of agricultural economics, “[i]f you think about meat slaughter, it’s not a high-margin business . . . . It’s labor intensive, you’ve got immigration issues, you have to be close to the product”). On a similar note:

he urged the President to issue the Executive Order. Large numbers of workers in close proximity to each other could trigger Tyson and other corporate officials' liability. After all, the corporations designed the factories and continue to offer very low wages out of a willingness to take advantage of immigrants who are desperate for employment, especially when they do not speak and write English fluently.<sup>60</sup> With

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Poultry companies in Arkansas rely on thousands of immigrant workers, many of whom had to continue working through the pandemic and did not qualify for the federal stimulus check or other coronavirus government relief packages, said Rev. Sara Milford, an Episcopal priest whose bilingual parish includes several poultry workers, some of whom have been directly impacted by the virus.

"If I'm going to preach the gospel of Jesus Christ, you know, Jesus didn't stand back from saying 'This is what's an injustice, this is what's hypocritical,' . . . . The corporations – they have a responsibility to care for the workers. I mean, that's just a Christian stance."

Olivia Paschal, *Protesters Demand Closure of Arkansas' COVID-19-Affected Poultry Plants*, FACING S. (June 1, 2020), <https://www.facingsouth.org/2020/06/protesters-demand-closure-arkansas-covid-19-affected-poultry-plants> [https://perma.cc/2K8Q-FATV]. Beyond Rev. Milford's work:

Venceremos, a poultry workers' rights organization based in Arkansas, began calling for increased protections for workers at Tyson and George's plants more than a month ago. At that point, the state had not confirmed any cases of COVID-19 at poultry plants, but organizers warned that working conditions were ripe for an outbreak—and that companies weren't doing enough to protect meatpacking workers crammed onto assembly lines. Just a few weeks later, the state government announced that hundreds of cases had been discovered in poultry plants in Benton and Washington counties . . . .

*Id.* These workers need various kinds of protection, and there is evidence that though federal and state agencies know how to provide sophisticated protection on technical matters, it is less evident that physical and mental health, in addition to other important needs, are given adequate consideration. For example, the CDC has addressed flour and spice exposure for poultry workers. CTR. DISEASE CONTROL & PREVENTION, EVALUATION OF SENSITIZATION AND EXPOSURE TO FLOUR, DUST, SPICE, AND OTHER INGREDIENTS AMONG POULTRY BREADING WORKERS (2013), <https://www.cdc.gov/niosh/hhe/reports/pdfs/2009-0131-3171.pdf?id=10.26616/NIOSHETA200901313171> [https://perma.cc/LV38-YQ4K]. The overwhelming difficulty the workers have faced during this pandemic could be called "benign neglect," a euphemism for the deliberate abrogation of regular health and safety provisions previously on the books in order to preclude liability for poultry and slaughterhouse neglect of the health and safety of the workers, which the executives consider too expensive to pay for, despite the risks for the workers of their health and possibly their lives.

60. Kirstin Downey Grimsley, *Tyson Foods Indicted in INS Probe*, WASH. POST. (Dec. 20, 2001), <https://www.washingtonpost.com/archive/politics/2001/12/20/tyson-foods-indicted-in-ins-probe/1979cb63-8d7d-4c8c-9c5f-90f0e79bbb7c/> [https://perma.cc/CV7J-27LD]. Accurate figures are difficult to estimate with many undocumented workers coached by employers on where to obtain the proper (but forged documents):

[N]early 80 percent of frontline meatpacking jobs are occupied by immigrants, refugees, or people of color. Because more than half are non-native English speakers, union meetings and newsletters have been replaced with informal networks in dozens of different languages; word

these low wages, the workers cannot keep their immune systems in the best condition to fight off germs, or otherwise obtain the best care for themselves when they have physically demanding jobs.<sup>61</sup>

The dirty little secret hidden in the government's "benign" neglect of enforcement is that the workers are at serious risk when their employers face no consequences for choosing not to follow the now-voluntary or recommended regulations for the health and safety of the line workers. The negligent (or better-named, reckless) policy already in place at the CDC and OSHA in February foreshadowed the stated policy in the Executive Order of April 28th but was known only to the workers and their not-powerful-enough unions, who were already writing to the enforcement units of the federal agencies in March seeking help for the workers. The publication of the Order informed the general public and, to some extent, journalists who were not yet fully apprised of the behavior of the slaughterhouses. These employers were free to act with impunity in the face of the agencies' non-enforcement policies. Secretary of Agriculture, Sonny Perdue, and Secretary of Labor Eugene Scalia, empowered under the Executive Order, made the administration's stance clear in press announcements following the dismissal of suits seeking enforcement of federal regulations against non-compliant slaughterhouses.<sup>62</sup>

At the same time this spring, the small numbers of independent butchers were deluged with new customers, but fit these likely temporary patrons into their previous schedules and routines.<sup>63</sup> While the

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of changes to their work routines often travels slowly. Packing companies strongly discourage line workers from missing days for injury or illness, and line jobs are among the most dangerous in America . . .

Genoways, *supra* note 8. Despite willfully declining to enforce health and safety regulations, the government has been aggressive in arresting poultry and meat assembly line workers. Matt McConnell, *US Immigration Raids Target Meat Industry: Massive Crackdown Highlights Need for Better Protection of Workers*, HUM. RTS. WATCH (Aug. 8, 2019, 2:17 PM), <https://www.hrw.org/news/2019/08/08/us-immigration-raids-target-meat-industry#> [<https://perma.cc/GN6P-RKF5>] ("Like many dangerous, demanding, and dirty low-wage industries, the meat industry in the US relies heavily on immigrant labor, and immigration enforcement authorities have routinely carried out high-profile, mass arrests of workers in meat and poultry plants.")

61. Press Release, AFL-CIO, *AFL-CIO Sues OSHA for Emergency Temporary Standard to Protect Workers* (May 18, 2020), <https://aflcio.org/press/releases/afl-cio-sues-osha-emergency-temporary-standard-protect-workers> [<https://perma.cc/BYV8-759T>]; Matthew Daly, *Court Backs Trump Administration on Virus Safety at Work*, WASH. TIMES (June 11, 2020), <https://www.washingtontimes.com/news/2020/jun/11/court-backs-trump-administration-on-virus-safety-a/> ("U.S. Court of Appeals for the District of Columbia Circuit declared that the Labor Department's workplace safety arm [OSHA] 'reasonably determined' that an emergency rule 'is not necessary at this time.'")

62. *See infra* notes 104, 156.

63. Jason Allen, *Local Butchers, Meat Markets See Surge in Customers Amid Coronavirus Pandemic*, CBS DALL.-FT. WORTH (Mar. 20, 2020, 5:32 PM), <https://>



newer conglomerate and global business model is structured around of cutting costs before all else, some independent butchers are perhaps a glimpse into the world we have lost. For example, two Dallas-Fort Worth meat-market owners “were consciously working to help supply seniors and those who now may be experiencing job losses.”<sup>64</sup>

Other reporters also tried to examine the way pandemic-related economics affected the operation of the meat supply businesses from the major slaughterhouses to small, independent butchers and meat markets, to grocery stores serviced by large supply companies, to the more expensive, but relatively quite small, independent markets. As supply dried up and prices increased, the large slaughterhouses did not wish to reveal any information about their businesses, the health of their workers, and meat supplies.<sup>65</sup>

It is no surprise that the slaughterhouses wish to reveal as little as possible, lest the information negatively affect their stock prices (other than Cargill, which is a private company and already secretive) or profits. Perhaps unsurprisingly, they are often permitted to simply opt out of disclosure and other requirements, presumably because of the amount of power and influence they wield. As previously mentioned, emails obtained by the *New York Times* revealed how little power local officials have in enforcing safety measures at plants when up against giant meat processing firms. What is surprising is the extent to which state health officials protect the big corporations and how often state health departments side with large-scale employers, rather than protect public health. As the *Times* reporters concluded, the plants themselves have left much to be desired regarding the release of information about COVID-19 cases.<sup>66</sup>

Even so, the Agriculture Department tracks meat production and statistics on the sale of meat are available.<sup>67</sup> On May 18th, 2020, Car-

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dfw.cbslocal.com/2020/03/20/local-butchers-meat-markets-see-surge-in-customers-amid-coronavirus-pandemic/ [https://perma.cc/H7LU-VPXA] (“Z Bar Cattle Co. in Keller was seeing as many customers in a single day as they usually average in a week.”).

64. *Id.* (“[Meat-market owner] Chadwick said he was trying to fill even the smallest orders for those who [were] on a tight budget,” while Kirkland’s store had coolers with “free selections for those in need, half-price items for those able to afford it and some wildly over-priced cuts, as a way for people with the means to donate to the effort”).

65. *See* Sheets, *supra* note 57 (reporting that meat supplies could decline by about “35 percent while prices spike 20 percent this month, and the impact could become even ‘more acute later this year’”).

66. *See supra* notes 55–57 and accompanying text.

67. Jacob Bunge & Jaewon Kang, *Meat Plants Reopen, but Burgers Stay Pricey*, WALL ST. J. (May 31, 2020, 10:00 AM), <https://www.wsj.com/articles/meat-plants-reopen-but-burgers-stay-pricey-11590933601> [https://perma.cc/Y2C3-YM9M] (explaining that in the last week of May, a month after the Executive Order, beef and pork production lagged seven percent below the year before and had declined even more at the time the Order was issued). The USDA reported that for the

gill re-opened its last plant closed due to the outbreak of COVID-19 among the workers. Nevertheless, Cargill said that its beef business “is running at about 70% of normal,” as the illness of employees continued while workers adjusted to new safety measures, such as plastic dividers between each line worker.<sup>68</sup> Cargill estimated it would take several more weeks to reach previous levels of ground beef and steak production.<sup>69</sup> Meanwhile, Cargill is to some extent protected from loss by the increased prices due to consistent demand but smaller production.

The after-effects from the disruptions due to plant closures, including confusion about the release of information about illness among the workers at the slaughterhouses, remain and may continue for some time. Companies as large as Tyson and privately-owned Cargill<sup>70</sup> are shielded from greater losses by large and even extreme (if temporary) retail price hikes. The large slaughterhouse business model is to sell cheaply<sup>71</sup> but provide enormous supplies to supermarkets through

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week ending June 27, 2020, beef production was five percent higher and pork fourteen percent higher than the same week in 2019; Chicken production was about two percent lower. Jacob Bunge, *supra* note 57 (reporting these figures occurred simultaneously with new surges in COVID-19 infections of poultry workers in Georgia, the largest chicken-producing state, Arkansas, Alabama, and North Carolina).

68. Bunge & Kang, *supra* note 67.

69. *Id.*

70. *Cargill*, FORBES (Nov. 23, 2020), <https://www.forbes.com/companies/cargill/#50182d8f1960> [<https://perma.cc/WE5K-P4DT>].

71. Part of the business model of these largest slaughterhouses is to pay ranchers and farmers as little as possible for their products, even paying below-market, artificially low prices to the farmers and ranchers who

claim the meatpackers are purposefully driving down the price the cattle raisers get for their beef. In 2015, meatpackers started to pay ranchers less for their cattle. It would make sense then, that the price of ribeye in the supermarket would also drop around that time. But that didn’t happen.

Morgan Kuehler, *Ranchers Say “Big Four” Meatpackers Colluded To Keep the Price of Beef Down*, KERA News (Apr. 19, 2019, 12:53 PM), <https://www.KERANews.org/post/ranchers-say-big-four-meatpackers-colluded-keep-price-beef-down> [<https://perma.cc/V2AV-52N7>]. A lawsuit filed by Ranchers-Cattlemen Action Legal Fund, claims that the slaughterhouses “used a variety of means to actually make it harder for ranchers to sell their beef to feedlots.” *Id.* (quoting Joe Fassler, features editor at the *New Food Economy*). Because four companies process over eighty percent of the beef in the U.S., those companies wield great economic power “to influence the price that ranchers will take for their beef.” *Id.*; see also Genoways, *supra* note 8 (explaining onerous contract agreements). In return for “knowing they have a buyer for their finished livestock from the moment they’re conceived,” farmers, in an unfavorable position as supply contractors, must accept extraordinary conditions allowing “meat-packers to capture the efficiencies of specialized, high-speed equipment at their large plants.” Farmers must:

have a precise number of animals ready on a particular week at an exact weight, and often those animals must meet even more refined specifica-

their very large grocery-store distributors. Tension based on simultaneously seeking safe working conditions, maintaining the domestic meat supply, and above all, fulfilling export contracts “highlights a potential weakness of the modern-day U.S. meat industry.”<sup>72</sup>

While the ranchers selling their beef to the feedlots are independent workers, the concentration in the slaughterhouses held down what was, in effect, the ranchers’ wages. Pay for workers in slaughterhouses and other factories is likewise held down by the concentration in the industry.<sup>73</sup> As each factory business became larger, and at the same time the number of owners decreased through mergers and takeovers, the few remaining businesses became much more powerful, depressing labor’s share of national income by about one-fifth.<sup>74</sup> In

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tions, such as thickness and distribution of fat. For packers, however, contracts rarely come with conditions—not even for unforeseen circumstances such as their own plant closures.

*Id.* Thus, the farmers are left with the unwanted supplies of hogs, which no other possible contractors might want or be able to take. *Id.* For a discussion of the refined specification animals must meet, see Debra Neutkens, *Sorting for the Perfect Weight*, NAT’L HOG FARMER (Nov. 15, 2002), [https://www.nationalhogfarmer.com/mag/farming\\_sorting\\_perfect\\_weight](https://www.nationalhogfarmer.com/mag/farming_sorting_perfect_weight) [<https://perma.cc/2ZDQ-TSDR>].

72. Bagenstose, *supra* note 8. A “reevaluation of how much power rests in the hands of just a few meatpacking companies whose primary mission is to grow exports” must be in order, given the business model the slaughterhouses have chosen. *Id.* The damage arises from the overwhelming commitment to export above all. *Id.* The consequences of deliberately leaving farmers without contractual rights even in emergencies means that almost every inhumane situation imaginable arises. At first the farmers kept the hogs alive, but when the slaughterhouses docked them for every pound over the demanded weight, their profits were wiped out because they did not even get a return on the cost of feeding the hogs. It proved cheaper to kill the hogs rather than send them late for less money. Genoways, *supra* note 8 (noting that “the industry expects to cull more than 10 million in all by year’s end. . . . Iowa State University has a hotline to help farmers cope with PTSD and depression as the logic of the food supply chain turns against them” and reporting that rural communities are badly affected economically and psychologically by being powerless in the face of the oligarchic slaughterhouses); see also Michael Corkery & David Yaffe-Bellany, *Meat Plant Closures Mean Pigs Are Gassed or Shot Instead*, N.Y. TIMES (May 14, 2020), <https://www.nytimes.com/2020/05/14/business/coronavirus-farmers-killing-pigs.html> [<https://perma.cc/TSTP-EASW>] (discussing the culling of hogs and cows); Temple Grandin, *Big Meat Supply Chains Are Fragile*, FORBES (May 3, 2020, 6:00 AM), <https://www.forbes.com/sites/templegrandin/2020/05/03/temple-grandin-big-meat-supply-chains-are-fragile/?sh=7a328f55650c> [<https://perma.cc/G64S-QW3Y>] (“Big operations are extremely cost efficient. . . . The downside is the fragility of the supply chains, as Covid-19 proves. This pandemic is going to be a wakeup call . . .”).
73. *Power is Money*, ECONOMIST, June 2, 2018, at 70 (explaining that during this century, wages have grown by about one percent a year in rich countries, except for low-wage workers (the bottom twenty percent of workers) whose wages have stagnated).
74. Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 538 (2018); see also Genoways, *supra* note 8 (illustrating a specific problem that needs antitrust remedies and explaining how lax enforcement and easy settlement of antitrust violations have emboldened oligopolists); *Pilgrim’s Pride*

short, the concentration of companies in the slaughterhouse business means that they are empowered to set both pay and productivity.

Similarly, to keep share prices up, the big three publicly held slaughterhouses make sure to find loopholes to exclude their shareholders (as well as the general public and health professionals) from information about the productivity of the plants.<sup>75</sup> “Tyson said because the temporary suspension of its operations was voluntary and the company was already meeting or exceeding federal guidance, it was not required to submit a reopening plan to the USDA.”<sup>76</sup> The USDA, like some state health officials, cut the big slaughterhouses some slack and allowed them to forgo compliance with health regulations that should have been a prerequisite to re-opening plants. These regulations are expensive for the corporate bottom line and shareholders primarily concerned with extracting every penny possible from the corporation.<sup>77</sup> Shareholders pose a threat because if the insiders sold great numbers of shares at the same time, the share price would decline.

Thus, Tyson and the other slaughterhouses pronounced that “[t]he safety of our team members is paramount, and we only reopen our facilities when we believe we can safely do so,” but did not have to present the proof in a pre-opening inspection.<sup>78</sup> For example, the *New York Times* reported that on April 21, 2020, health officials in Dallas

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*CEO Indicted over Alleged U.S. Chicken Price-Fixing*, REUTERS (June 3, 2020, 12:17 PM), <https://www.reuters.com/article/us-usa-pilgrims-pride-charges/pilgrims-pride-ceo-indicted-over-alleged-u-s-chicken-price-fixing-idUSKBN23A2TF> [<https://perma.cc/74FS-ZBUM>] (discussing a Department of Justice indictment of executives at Claxton Poultry and JBS-owned Pilgrim's Pride).

75. Noah Manskar, *Coronavirus Cases Surge in Meat Industry as Plants Restart*, N.Y. POST (May 26, 2020, 12:28 PM), <https://nypost.com/2020/05/26/coronavirus-cases-surge-in-meat-industry-as-plants-restart/> [<https://perma.cc/D2LP-JCQW>]; Taylor Telford, *The Meat Industry Is Trying To Get Back to Normal. But Workers Are Still Getting Sick – and Shortages May Get Worse*, WASH. POST (June 8, 2020, 9:52 PM), <https://www.washingtonpost.com/business/2020/05/25/meat-industry-is-trying-get-back-normal-workers-are-still-getting-sick-shortages-may-get-worse/> [<https://perma.cc/TW25-2SB8>].
76. Amy Forliti, *Little Enforcement in Place To Protect Meatpacking Workers from Coronavirus; New OSHA, CDC Guidance Isn't Mandatory*, DES MOINES REG. (MAY 21, 2020, 4:45 PM), <https://www.desmoinesregister.com/story/news/politics/2020/05/21/osha-cdc-meatpacking-safety-recommendations-largely-unenforceable/5239950002/> [<https://perma.cc/PUY8-EK8V>]; see also Corkery et al., *supra* note 53 (providing information on Tyson's response to the pandemic).
77. See Martin Lipton, *Milton Friedman's Essay and the True Purpose of the Business Corporation*, COLUM. L. SCH.: CLS BLUE SKY BLOG (Sept. 18, 2020), <https://clsbluesky.law.columbia.edu/2020/09/18/milton-friedmans-essay-and-the-true-purpose-of-the-business-corporation/> [<https://perma.cc/YHL9-SK78>] (explaining the true purpose of the business corporation in terms of maximizing value for shareholders).
78. Manskar, *supra* note 75 (quoting Gary Michelson, director of media relations for Tyson, in an interview with the *Washington Post*).

County, Iowa, emailed Tyson Foods that they could provide rapid testing kits for workers at its local plant in Perry. Although the county health officials strongly urged Tyson to comply, the county's legal adviser watered down the language to suggest Tyson consider the testing, apparently because the lawyer "did not believe the health department had the authority to order Tyson to conduct tests."<sup>79</sup> The health department worked with Tyson to administer the tests and after about two weeks, large numbers (fifty-eight percent) of employees at the Dallas County plant tested positive for COVID-19.<sup>80</sup> Because of state and local government involvement, Tyson could not hide these numbers for some plants.<sup>81</sup> In Wilkesboro, North Carolina, Tyson "revealed it had reopened following a deep clean" after 570 of the over 2,000 employees tested between May 6 and May 9, 2020, tested positive for COVID-19.<sup>82</sup> The company's May 26, 2020, news release stated that the majority of the workers who tested positive were not showing symptoms and, "otherwise would not have been identified."<sup>83</sup> However, Tyson's reputation for being less than forthcoming or skewing disclosures has prompted the public's distrust of the company's COVID-19-related reporting. For example, one Wilkesboro hair salon imposed a short-term moratorium on Tyson clients because their work "puts them at risk."<sup>84</sup> Despite disclosures, Tyson and its cohorts in the mass animal slaughterhouse business have a history of deep-seated, assumedly self-protective, and misguided desire for nondisclosure.<sup>85</sup>

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79. Corkery et al., *supra* note 53 (county attorney Chuck Sinnard explained that "[i]t was in the vein of choosing wording cautiously and conservatively so we didn't get in a position where we were overstepping our bounds").

80. Tony Leys, *Coronavirus Infects More than 1,600 Workers at Four Iowa Meatpacking Plants*, DES MOINES REG. (May 5, 2020, 5:43 PM), <https://www.desmoinesregister.com/story/news/health/2020/05/05/coronavirus-infects-thousands-iowa-meat-packing-plant-workers-covid-19-waterloo-perry/5170796002/> [<https://perma.cc/3A7Q-MN2V>] (reporting that at the Waterloo Tyson plant seventeen percent of those tested were positive for COVID-19 and twenty-six percent of those tested were positive at the Columbus Junction Tyson plant).

81. *Id.* Iowa Deputy Public Health Department Director Sara Reisetter said "her department has decided to report publicly when manufacturing plants have more than 10% absenteeism because of outbreaks of the disease." *Id.*

82. Sheets, *supra* note 57.

83. *Id.*

84. *Wilkesboro SmartCuts Not Letting Anyone Who Works at Nearby Tyson Plant Get Haircut Until June 8 Due to Virus Outbreak*, Fox8 (May 26, 2020, 1:02 PM), <https://myfox8.com/news/coronavirus/wilkesboro-smartcuts-not-letting-anyone-who-works-at-nearby-tyson-plant-get-haircut-until-june-8-due-to-virus-outbreak/> [<https://perma.cc/F65K-YSGK>]; Sheets, *supra* note 57.

85. See Sheets, *supra* note 57 (noting that slaughterhouses and local health officials alike are open to criticism for refusal to release data about outbreaks of COVID-19, and therefore, unions and the press try to make end runs around the brick wall by looking at local sources of news and whatever public records are available); see, e.g., Corkery et al., *supra* note 53 ("A spokeswoman for North Carolina's

Eric Reeder, president of the United Food & Commercial Workers Local 293 in Omaha, Nebraska, where Brazilian-owned JBS has a plant, points out that from the workers' point of view, "[w]hen a plant hits several hundred cases, they get more tight-lipped, and that makes it difficult for workers to protect themselves and their families."<sup>86</sup>

This exemplifies the conflict for health officials pressured by companies that ask for support because they control large numbers of jobs in the county or state in question, vaguely threatening that these large numbers of jobs might go away, notwithstanding large investments already made in facilities and other infrastructure. For example, in April of 2020, the director of the Central District Health Department in Grand Island, Nebraska, Teresa Anderson, informed JBS that COVID-19 testing would be available at a park near JBS's plant, which employs 3,700 people. Emails between JBS compliance official Nicholas White and Anderson, disclosed to the *New York Times*, revealed White asked Anderson to "not disclose that information as part of any public disclosure of the testing results."<sup>87</sup> Nevertheless, on April 21, 2020, the health department made it public that more than 200 people connected to the Grand Island JBS plant had contracted COVID-19.<sup>88</sup> JBS's argument for non-disclosure was formalistic, namely that only plant workers were being tested when other residents in the areas were not, suggesting that because JBS workers were overrepresented in the pool of individuals tested, the

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health department, Amy Ellis, declined to reveal plant-specific data. She said the state has recorded a total of 1,952 cases across meat plants in 17 counties.").

86. Corkery et al., *supra* note 53; see also Isabel Vincent, *Corrupt Billionaire Brothers' Meat Plants Are Riddled with Coronavirus*, N.Y. POST (Apr. 18, 2020, 4:24 PM), <https://nypost.com/2020/04/18/billionaire-brothers-meat-plants-riddled-with-coronavirus/> [<https://perma.cc/5H4V-H6VH>] (providing information regarding JBS); Kimberly Kindy, *This Foreign Meat Company Got U.S. Tax Money. Now It Wants To Conquer America*, WASH. POST (Nov. 7, 2019, 5:00 PM), [https://www.washingtonpost.com/politics/this-foreign-meat-company-got-us-tax-money-now-it-wants-to-conquer-america/2019/11/04/854836ae-eae5-11e9-9306-47cb0324fd44\\_story.html](https://www.washingtonpost.com/politics/this-foreign-meat-company-got-us-tax-money-now-it-wants-to-conquer-america/2019/11/04/854836ae-eae5-11e9-9306-47cb0324fd44_story.html) [<https://perma.cc/Y9VA-5PYF>] (explaining that JBS has become a major player in the United States, even as it faces price-fixing and other investigations from the federal government).
87. Corkery et al., *supra* note 53.
88. *Id.* (explaining that by May 5, at least 328 employees had tested positive (referencing Michael Grabell, *What Happened when Health Officials Wanted To Close a Meatpacking Plant, but the Governor Said No*, PROPUBLICA (May 7, 2020, 1:12 PM), <https://www.propublica.org/article/what-happened-when-health-officials-wanted-to-close-a-meatpacking-plant-but-the-governor-said-no>)); see also Rachel Siegel, *Outbreak at JBS Pork Plant Triggers Another Meat Industry Closure*, WASH. POST (Apr. 20, 2020, 1:59 PM), <https://www.washingtonpost.com/business/2020/04/20/meat-plant-pork-close> [<https://perma.cc/K68A-TPSD>] (discussing the closure of a JBS plant in Worthington, Minnesota, after it was reported that twenty out of the fifty-six people in the county who were confirmed to have COVID-19 worked at the plant, and another five were related to plant workers).

resulting data, showing that JBS was connected to a disproportionately high percentage of COVID-19 cases, painted a distorted picture. JBS ignored, deliberately or negligently, the particular need for disclosure of cases coming from one source in which the victims worked cheek by jowl, thereby causing more rapid spread of COVID-19 than in less concentrated areas of the community.<sup>89</sup>

Pushback against disclosure of COVID-19 cases at the slaughterhouse has the same intensity at Smithfield Foods, the world's largest pork processor and hog producer, which had been heavily indebted during much of this century. In 2013, WH Group, an international Chinese business, bought Smithfield, including its debt, for \$4.7 billion.<sup>90</sup> As it happened, only five years later an outbreak of African swine fever killed about half of China's pigs "and pushed prices so high that Chinese importers [were] willing to pay hefty tariffs that Beijing imposed on U.S. pork as part of the countries' bruising trade war."<sup>91</sup> This disaster allowed Smithfield Foods to reposition itself and supply China with much of its great need for pork, mostly from Smithfield's Virginia plant, while other plants continued to serve American needs.

"The Smithfield Foods plant in Tar Heel, N.C., is one of the world's largest pork processing facilities, employing about 4,500 people and slaughtering roughly 30,000 pigs a day at its peak."<sup>92</sup> "Smithfield said it continued to 'report all Covid-19 cases to state and local health officials, as well as the C.D.C.' and was working to provide free testing to all its employees," but this was not true at Tar Heel.<sup>93</sup> The county

89. Corkery et al., *supra* note 53 (Cameron Bruett, spokesperson for JBS, "said the company did not want to publicize the number of positive cases at the plant because little testing was being conducted in the broader area. Releasing the data, he said, 'would distort any one company's role in community spread'"); see also Luke Kenton, *Brazilian Billionaire Brothers Are Forced To Close Two of Their US Meat Packing Plants*, DAILY MAIL (Apr. 19, 2020, 3:15 PM), <https://www.dailymail.co.uk/news/article-8233591/JBS-close-two-plants-enforcing-work-sick-culture-saw-employees-die-COVID-19.html> [https://perma.cc/R56G-76YD] (discussing the closure of JBS plants in Greeley, Colorado, and Souderton, Pennsylvania, after four employee deaths and over 100 positive COVID-19 tests).

90. Jennifer Wang, *The Chinese Billionaire Whose Company Owns Troubled Pork Processor Smithfield Foods*, FORBES (Apr. 16, 2020, 5:57 PM), <https://www.forbes.com/sites/jenniferwang/2020/04/16/the-chinese-billionaire-whose-company-owns-troubled-pork-processor-smithfield-foods/#5c13f0e02c55> [https://perma.cc/JAR8-R7WA].

91. Tom Polansek, *At Smithfield Foods' Slaughterhouse, China Brings Home U.S. Bacon*, REUTERS (Nov. 5, 2019, 2:07 AM), <https://www.reuters.com/article/us-china-swinefever-smithfield-foods-foc-idUSKBN1XF0XC> [https://perma.cc/Z2V9-F73S].

92. Corkery et al., *supra* note 53.

93. *Id.* The plant at Tar Heel "is said to have seen a substantial number of cases—but Smithfield and state and local health officials have refused to give a specific count." *Id.* Smithfield cut corners wherever it could:

health department director expressed worry about “a stigma associated with the virus, so we’re trying to protect privacy,” which seems a strange concern when the primary purpose of all public health officials ought to be to contain and control a dangerous infectious disease.<sup>94</sup> Professor Nicole Huberfeld explains the public health aspects as: “Alerting a community about the number of cases in a particular place is a standard public health response . . . . People need to act appropriately if they are exposed.”<sup>95</sup> Given the relevant public health principles, the conclusion about refusals to test for COVID-19 or to disclose the location of COVID-19 hot spots should be clear. “The tussle over whether plants should test workers has stretched for months in some states, creating critical delays in isolating infected workers. Local health authorities concede that asymptomatic employees are still coming to work with the virus, fueling the spread.”<sup>96</sup>

### III. THE HOLDING IN *LOCHNER* DRESSED AS MEAT FOR THE FOOD SUPPLY IN AN EXECUTIVE ORDER

“*Lochner*-ism” was alive and well under various identities, such as originalism,<sup>97</sup> and economic disguises, such as the efficient capital market<sup>98</sup> and anti-scientific libertarianism,<sup>99</sup> long before April 2020, when the President spoke on the telephone about the “crisis” in the meat supply with John Tyson (and possibly his closet cohorts in the slaughterhouse business).<sup>100</sup> The ancient Roman military term “co-

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Workers told the BBC that the rapid spread would have been preventable had Smithfield not ignored employee requests for PPE, not insisted that sick workers remain on the line, and not withheld information about the spread of the virus at its facilities. At the time, Smithfield claimed that masks and other PPE had been difficult to source because of “the stress on supply chains.”

Genoways, *supra* note 8.

94. Sheets, *supra* note 57.

95. *Id.*; see also Nicole Huberfeld et al., *Federalism Complicates the Response to the COVID-19 Health and Economic Crisis: What Can Be Done?*, 45 J. HEALTH POL. POL’Y L. 951 (2020) (discussing how the U.S.’s COVID-19 response has been complicated by the variety of states’ actions and conflicting messages received from various federal and state officials).

96. Corkery et al., *supra* note 53.

97. Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 409 (2013) (explaining that today originalism is less tied to “the importance of judicial restraint than it once was” but now emphasizes a “public meaning of the constitutional text”).

98. Eugene Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383 (1970).

99. John Haltiwanger, *The Anti-Science Leadership of Trump, Bolsonaro, and Putin Led to the Worst Coronavirus Outbreaks in the World*, BUS. INSIDER (June 20, 2020, 4:05 PM), <https://www.businessinsider.com/trump-putin-and-bolsonaro-anti-science-leadership-worst-coronavirus-outbreaks-2020-5> [https://perma.cc/8H58-XVM4].

100. See, e.g., Purdy, *supra* note 42.



hort” seems fitting to describe the coordinated lobbying interests of these four slaughterhouses who often successfully plead their interests before the highest echelons of American government as well as less rarefied business circles. The meatpackers’ precision in striking early to deal with the effects of COVID-19 on their businesses is central to this Article’s argument. Meatpacking companies accessed political and legal support to attack their own employees in the effort to cut their losses when their employees fell ill in large numbers from the spread of the infectious disease.

The spread of COVID-19 among the slaughterhouse employees was caused in large part by the business model the cohort chose earlier in the century.<sup>101</sup> Maximizing profits for shareholders led meat packing companies to crowd their employee butchers on the line similar to the way the processed animals had spent much of their lives. Crowding workers allows the slaughterhouse to operate at minimum cost and maximum efficiency, unless something goes wrong. The business model depends on leaving few, if any, reserve funds to deal with emergencies, since all the revenue is allocated to profit for the shareholders, and no consideration of contingencies is acknowledged. This business model carries within itself its own activist shareholders, namely the management of the company.

How do we know that this business model admits no contingent plans to keep meat production going, should some unforeseen or unexpected situation arise? The tactics the cohort of four slaughterhouses used, including asking the Executive Branch to cut off implementation, operation, and enforcement of usual measures to contain infectious diseases, permit the inference.<sup>102</sup> During an epidemic of an infectious disease like COVID-19, the CDC should require testing, taking temperatures, providing masks, portable hand washing facilities, staggered shifts and break times, and plastic barriers around each worker, among other precautions. The union asked for the court’s help in protecting its members’ health and possibly their lives, as citizens had a right to do at common law, as Chief Justice John Marshall

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Like the old *Lochner*-ism, today’s new anti-regulatory doctrines are rooted in ideas: that personal freedom has an economic dimension that the Constitution protects, and that government efforts to equalize or otherwise direct economic power are pernicious and constitutionally suspect. Like the old cases, the new ones end up protecting economic power as a form of freedom, which ties the hands of government and leaves lots of people less free.

Jedediah Purdy, *The Roberts Court v. America*, DEMOCRACY J. IDEAS (2012), <https://democracyjournal.org/magazine/23/the-roberts-court-v-america/> [https://perma.cc/Y2T8-K6F5].

101. See *supra* notes 58, 59, 71, 72 and accompanying text.

102. Swanson & Yaffe-Bellany, *supra* note 9.

recorded.<sup>103</sup> Nevertheless, the federal district court prevented the union from obtaining enforcement of measures and upheld the Executive Order which, under the DPA, allowed the slaughterhouses to escape mandatory compliance. The court deferred to the Department of Agriculture, which reports to the President, and dismissed the union's case.<sup>104</sup> It is as shocking to see the court override the best public health procedures by deferring to executive authority in 2020 as it is to read that it was beyond the authority of New York State to bar bakers' employees from working more than ten hours a day, six days a week in 1905.<sup>105</sup>

In both cases, the government is permitted to abdicate its responsibility, leaving those without any chips to fend for themselves at the bargaining table. What's more, although the rhetoric of *Lochner* would have had us believe that the baker near the furnace eschewed the protection of New York State as much as the owner of the bakery. The Court may<sup>106</sup> have been asserting that liberty of contract is so important theoretically that distribution of bargaining chips does not matter. The Court in *Lochner* was content to leave a reader with this assertion that the reader knows goes against human nature. *Lochner*-and market-style enforcement is easy because none is necessary: the market metes out the punishment (losses) and rewards (profits). In 1905 and in 2020, government oversight or regulation is rendered irrelevant in this escape from accountability in which the judiciary is

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103. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.”).

104. *See Trump Orders Meat Processing Plants To Remain Open*, *supra* note 36. Secretary of Agriculture Sonny Perdue issued a triumphal press release on the dismissal:

“Since President Trump issued his Executive Order last week to keep these critical facilities operating, USDA has been working hand in hand with OSHA and the CDC to ensure meat processing facilities are abiding by Federal guidelines. This ruling is directly in line with what the Federal government has been calling for companies and communities to do in light of the President’s Executive Order. If we continue to work together, *we can maintain the critical supply of meat and poultry for Americans* while also protecting worker health and safety.”

Press release, U.S. Dep’t Agric., USDA Applauds Missouri Court Ruling on Meat Processing Plants (May 6, 2020) (emphasis added) (quoting Perdue), <https://www.usda.gov/media/press-releases/2020/05/06/usda-applauds-missouri-court-ruling-meat-processing-plants> [<https://perma.cc/A8K9-6JMC>].

105. *See generally* Bakeshop Act, ch. 415, art. VIII, 1897 N.Y. Laws 485.

106. *See* MICHAEL J. PHILLIPS, *THE LOCHNER COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S* (2001) (disputing some criticisms of the *Lochner*-Era Court and asserting the Court was not intentionally favoring business interests over social legislation).

complicit.<sup>107</sup> Having all the chips in one player's hand—the employer, the investor, the politician, the business raider—leaves out the employees, the public shareholders, the constituents, and the victims of the takeover. That is precisely the desire in a “winner take all” model such as the slaughterhouses, where profits are immediately accepted while losses are palmed off onto the nearest victims. These are the very factories protected under the President's Order.

The master of the bakery and the workers stationed at the bakery furnace are emblematic of the different legal interests that should be represented in the employment contract or other contracts in which there is a large imbalance of power. The ancient impetus for making the laws public has often been the lack of trust between the parties. In *Lochner*, the state of New York provided the trust by mandating certain working conditions and hours of work.<sup>108</sup> Minimum wages, when not too out of date to be useful, provide a statutory monitor for the trust that should exist in a functioning society.

Still, the laws are customarily written by the powerful who often favor themselves and their interests. It is the age-old struggle of the powerful to keep economic and legal advantages on their side. The core question about corporate regulation and so much else is how to achieve more balance in legislation and regulation. Naturally, a company does not want to disclose information, while almost everyone else, even in public corporations, highly values information relevant to their decisions about where to invest, what products and services to purchase, or whether to bring a claim for wrongdoing. A company favoring privacy and non-disclosure often only subjects itself to the

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107. The notion that economic principles and the operation of the market provide the only solution or judgment necessary is espoused by judges including Judge Richard Posner, now retired, and Judge Frank Easterbrook, both on the Seventh Circuit. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (9th ed. 2014); Note, *Judge Frank H. Easterbrook, A Faithful Adherent of the Law & Economics Approach Advocated by Professor Frank H. Easterbrook*, 50 L. & CONTEMP. PROBS. 265 (1987).

108. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (recognizing that states and the federal government make many laws the Court leaves in place without approving or agreeing with the content of these laws). In his dissent, Holmes stated:

[S]tate constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. . . . The other day we sustained the Massachusetts vaccination law. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court.

*Id.* (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)). See generally G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* (1993); THOMAS HEALY, *THE GREAT DISSIDENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* (2013).

disclosure rules applicable to public companies because it needs funding from the public to expand its business.<sup>109</sup>

As the facts in *Lochner* allow us to observe, one more important dynamic operates in the relationship between the company's executives and employees or other constituents of the company. The dynamic is one of imbalanced bargaining power and sheer one-sided strength in all issues when employees and others have little, if any, say about working conditions, hours, wages, or time off for illness. In some sense, this dynamic provides the framework for Justice Peckham's opinion for the 5-4 majority in *Lochner*, seeking to distinguish the state law from a health provision under the police powers and limit the law to a less serious labor law. Justice Peckham was willfully blind on two issues important for human flourishing: sleep and autonomy. (For when a person must work more than ten hours a day, how much sleep could the baker get, especially if he did not live in the bakery dormitory, and how much independence does he have, since his employer thus exerts almost total control over every hour of every day?) The central discussion in *Lochner* revolves around the question of whether the New York Bakeshop Act improperly interfered with free bargaining (liberty of contract) or was a legitimate exercise of state police power in the good ordering of society, based on the reports and literature demonstrating the health and safety risks.

The stark differences in the individual Justices' interpretations of the facts before them in 1905 is compelling. The majority of the Justices saw the situation as a labor negotiation concerning hours worked, in other words, a matter of contract, protected by the "Federal Constitution" so that the master and the bakers at the furnace could work out their sacred agreements under the protection of the Fourteenth Amendment.<sup>110</sup> Justice Harlan considered the lives of the bakers. The baker working in the basement at the furnace often had no

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109. Corkery & Yaffe-Bellany, *supra* note 9 ("Meatpackers are notoriously secretive, and it's unclear how many of the nation's plants are designed to ship carcasses to China.").

110. Why is labor law unavailable as the subject of state legislation? Some think it may have been due to the persistence of erroneous economic notions of value, to which the "masters" (now called employers but equally powerful vis-à-vis the workers) and their friends nevertheless adhered. Today the language of supply and demand conveys some of the same notions, considering whether a worker who makes \$57,500 would be likely to put themselves out for a job that might pay \$60,000 a year if it required more hours. Assuming money is the major consideration in the worker's decision to change jobs, the worker might require at least \$62,500 to move. EMERY KAY HUNT & MARK LAUTZENHEISER, *HISTORY OF ECONOMIC THOUGHT: A CRITICAL PERSPECTIVE* 98-102 (3d ed. 2011) (explaining that theories of value from Ricardo to Marx may involve spending power and marginal utility); see also Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 433 (1926) ("[L]iberty' of the states is being unduly sacrificed to this new conception of the 'liberty' of the individual.").

hard floor and therefore stood in slippery mud. The flour itself was composed of small particulate matter which blew around as dust and entered the eyes, noses, and throats of the bakers.<sup>111</sup> The temperatures were horrifically hot at the furnace. Justice Harlan read what the doctors said.<sup>112</sup> He concluded that long hours were not healthful for a worker and, in fact, could shorten the worker's life. The majority of the Court unhelpfully dismissed medical science, not recognizing, or refusing to recognize, that a healthy society creates a "healthy" economy.<sup>113</sup>

The majority read the same documents but reached the conclusion that the workers should have wanted no help from the State of New York. According to Justice Peckham, the law interfered with the workers' liberty to "assert their rights and care for themselves without the protecting arm of the State,"<sup>114</sup> overlooking the difficulty of doing so without any bargaining power. Even viewed as a labor law, the state simply leveled the playing field so bakers had some leverage to defend their rights themselves.<sup>115</sup> Justice Peckham concluded that "[t]here is

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111. *Lochner*, 198 U.S. at 70–71 (Harlan, J., dissenting).

112. *Id.* at 70 ("Professor Hirt in his treatise on the 'Diseases of the Workers' has said: 'The labor of the bakers is among the hardest and most laborious imaginable, because it has to be performed under conditions injurious to the health of those engaged in it.'").

113. Gerd Gigerenzer, *How To Make Cognitive Illusions Disappear: Beyond "Heuristics and Biases,"* 2 EUR. REV. SOC. PSYCH. 83 (1991), [www.stat.columbia.edu/~gelman/communication/Gigerenzer1991.pdf](http://www.stat.columbia.edu/~gelman/communication/Gigerenzer1991.pdf) [<https://perma.cc/2ZX5-E96F>] ("[T]he presence of an error of judgment is demonstrated by comparing people's responses either with an established fact (e.g. that the two lines are equal in length) or with an accepted rule of arithmetic, logic, or statistics." (quoting D. Kahneman & A Tversky, *On the Study of Statistical Intuitions*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 493, 493 (D. Kahneman & A Tversky eds., 1982))). Years ago, the child who was asked in the classroom "what's wrong with this flea?" often got the answer right. The scientist looked at the flea and carefully entered six legs into his workbook. He pulled off one leg and said to the flea "jump" and the flea jumped . . . and he repeated the same command after he pulled off each leg, as he did when he got to the sixth leg, but then the flea sat still. What happened? Couldn't the flea hear anymore? Lots of giggles let the teacher know the children got it before the teacher said, that's not the problem, is it? The Justices in *Lochner* and many people today may never have learned the story of the flea or perhaps are just dismissive of what, by the time we reached high school, was called "straight thinking" and later in college "logic." What happened? Didn't the Justices like medical science or reasoning? No, they lost their hearing (or more seriously, their listening power) as they focused on how the bread tasted to them while the bakers died at the average age of forty-two. Their "intellectual" descendants do the same today.

114. *Lochner*, 198 U.S. at 57.

115. Where were unions when they were needed? Very many employers and states were, then as now, proponents of the "right to work" but not for decent salaries or good working conditions; unions, which might be expected to negotiate better terms and conditions were therefore harshly prevented from organizing workers in many cases and were hobbled in other states by restrictions. Steven Wishnia,

no reasonable ground, on the score of health, for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.”<sup>116</sup> Justice Peckham narrowed the issue and limited himself to dealing “with the right of free contract on the part of the individual, either as employer or employ[ee],” as though this were the pre-eminent concern of the workers.<sup>117</sup>

Therefore, Justice Peckham dismissed the evidence about the bakers’ working conditions and need for the state’s protection with these words: “In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others.”<sup>118</sup> Justice Peckham showed disdain for the state’s concern and justification for the exercise of its police authority, stating that “[i]t might be safely affirmed that almost all occupations more or less affect the health. . . . But are we all, on that account, at the mercy of legislative majorities?”<sup>119</sup> For the quintessence of lack of empathy, this quotation placing the Justice “at the mercy of legislative majorities” demonstrates not only lack of concern for the health and welfare

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*“Right to Work”: From Racist Roots to Recent Resurgence*, LABORPRESS (Mar. 24, 2017), <http://laborpress.org/right-to-work-from-racist-roots-to-recent-resurgence/>. Efforts to de-unionize factories continue, sometimes with explicit government backing. For example, President Trump established an advisory board to monitor the economic impact of the pandemic. One appointee, Ronnie Cameron, is one of Trump’s biggest donors and the owner of Mountaire, one of the leading chicken producers in the country, where jobs “rank as among the most dangerous and worst paid in America.” Mayer, *supra* note 4. Cameron is among the country’s top campaign contributors, which gives him the kind of influence that directly serves his personal interests. For instance, Cameron donated one million dollars to the National Right to Work Committee, and the following year, the head of that organization represented the Mountaire employee challenging the union and labor contract the union had negotiated with the company. *Id.*

116. *Lochner*, 198 U.S. at 57. Justice Peckham continues:

Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act.

*Id.*

117. *Id.* at 59.

118. *Id.* Contemporary governmental actions have faced similar dismissive attitudes. Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases and member of the White House Coronavirus Task Force, warns that an “anti-science bias,” pervasive in the United States, is a serious problem because many people still do not understand the gravity of the pandemic or the necessity of social distancing to prevent more outbreaks. Cassidy Morrison, *Fauci Warns of ‘Anti-Science Bias’ in US*, WASH. EXAM’R (June 18, 2020, 11:39 AM), <https://www.washingtonexaminer.com/news/fauci-warns-of-anti-science-bias-in-us> [https://perma.cc/NK4C-NSV4] (describing contemporary perspectives on health and science issues through the economic lens of the bottom line).

119. *Lochner*, 198 U.S. at 59.

of the workers but also dismisses the constitutional role of the states' police power, declaring the hours limitation in the first section of the Bakeshop Act an example of "unconstitutionality"<sup>120</sup> and "an illegal interference with the rights of individuals, both employers and employ[ees], to make contracts regarding labor upon such terms as they may think best."<sup>121</sup>

Justice Peckham found that the parameters of state police power were set by *Jacobson* and several other cases.<sup>122</sup> *Jacobson* involved an adult refusing to be vaccinated in a community facing "a dangerous disease."<sup>123</sup> The statute compelling vaccination "was held valid as a

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120. Justice Peckham divided up the laws discussed in *Lochner* into health laws and laws about wages and hours, which he insisted could not affect health. Justice Peckham claimed wages and hours laws as part of contract law, and "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution." *Id.* at 53 (citing *Allgeyer v. Louisiana*, 165 U.S. 578 (1897)). He falsely flattered the bakers, who he said did not need "the protecting arm of the State," *id.* at 57, because bakers are intelligent. Regardless of the disingenuousness of that statement, it explicitly avoided the health question in order to delegitimize New York's authority to limit working hours. Furthermore, Justice Peckham deliberately concealed the very important factual power imbalance the bakers suffered vis-à-vis their masters by pretending that "the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor." *Id.* at 56.

121. *Id.* at 61. See also Lawrence O. Gostin, *Jacobson v. Massachusetts at 100 Years: Police Power and Civil Liberties in Tension*, 95 AM. J. PUB. HEALTH 576 (2005). According to Gostin, *Jacobson* "established a floor of constitutional protection that consists of 4 overlapping standards: necessity, reasonable means, proportionality, and harm avoidance. These standards, while permissive of public health intervention, nevertheless required a deliberative governmental process to safeguard liberty." *Id.* at 579. Similarly, Justice Harlan reflects on *Jacobson* in *Lochner* :

We are not to presume that the State of New York has acted in bad faith. Nor can we assume that its legislature acted without due deliberation, or that it did not determine this question upon the fullest attainable information, and for the common good. We cannot say that the State has acted without reason nor ought we to proceed upon the theory that its action is a mere sham. Our duty, I submit, is to sustain the statute as not being in conflict with the Federal Constitution, for the reason—and such is an all-sufficient reason—it is not shown to be plainly and palpably inconsistent with that instrument. Let the State alone in the management of its purely domestic affairs, so long as it does not appear beyond all question that it has violated the Federal Constitution. This view necessarily results from the principle that the health and safety of the people of a State are primarily for the State to guard and protect.

*Lochner*, 198 U.S. at 73 (Harlan, J., dissenting); see also Note, *Toward a Twenty-First-Century Jacobson v. Massachusetts*, 121 HARV. L. REV. 1820, 1837 (2008) (discussing how the precedent set in *Jacobson* is insufficient to adequately address the issues raised by modern medicine).

122. *Lochner*, 198 U.S. at 56. Justice Harlan directly answered Justice Peckham's arguments in his dissent. See *infra* notes 126–134 and accompanying text.

123. *Id.*

proper exercise of the police powers with reference to the public health.”<sup>124</sup> However, he distinguished the Court’s holding in *Jacobson*, decided only two months before *Lochner*, as “far from covering the [case] now before the court.”<sup>125</sup>

It is important to contrast Justice Harlan’s explanation that the purpose of the Court’s review of state statutes exercising police power is to flag unconstitutional abuses of that power with the majority’s willingness to strike down poorly conceived, worded, or applied statutes the Justices would draft differently if they were the legislators.<sup>126</sup> In other words, for Justice Harlan, scrutiny of a statute expressing the state’s police powers requires the Court only to find a rational basis for the statute in its review. The New York Bureau of Statistics of Labor concluded that “[s]horter hours of work, by allowing higher standards of comfort and purer family life, promise to enhance the industrial efficiency of the wage-working class—improved health, longer life, more content and greater intelligence and inventiveness.”<sup>127</sup> Regulations like the New York State Bakeshop Act “are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State.”<sup>128</sup>

According to Justice Harlan’s view, New York’s authority under its police powers was rationally exercised to protect workers against the interests of employers, including *Lochner*, the “master” himself, who was subject to the New York State Bakeshop Act. Justice Harlan previously observed if each person exercising their own liberty acted “regardless of the injury that may be done to others,” society would devolve into disorder and anarchy.<sup>129</sup> Justice Peckham determined that the limits to individual liberty did not apply in *Lochner*, even though *Jacobson* seemingly should have left New York’s legislation in-

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124. *Id.* at 55.

125. *Id.* at 56.

126. *Id.* at 67 (Harlan, J., dissenting). Specifically,

unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference.

*Id.*

127. *Id.* at 71 (quoting JOHN McMACKIN, N.Y. BUREAU LAB. & STAT., EIGHTEENTH ANNUAL REPORT OF THE BUREAU OF LABOR STATISTICS OF THE STATE OF NEW YORK FOR THE YEAR 1900, at 82 (1901)).

128. *Id.* at 67.

129. *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905). Justice Harlan’s majority opinion in *Jacobson* recognized that police powers are necessary “in every well-ordered society” to maintain health and safety, and thus “the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.” *Id.* at 29.



tact since simply not working more than sixty hours a week arguably interferes less with people's lives than a vaccination. Nevertheless, Justice Peckham goes beyond that difference to paint New York's legislation as deserving strict, if not extreme, review.

Justice Harlan, the author of the opinion for the Court in *Jacobson*, wrote in dissent in *Lochner*, relying on *Jacobson* and many earlier precedents to find that "the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare or to guard the public health, the public morals or the public safety."<sup>130</sup> Justice Harlan recognized that no right is absolute; everything has limits, but Justices Peckham and Harlan described the limits differently. In our own terms, Justices Peckham and Harlan applied different levels of scrutiny to judge the validity of the statute prohibiting excessive hours. Justice Peckham set an unusually high level of scrutiny as the proper tier of review when he suggested that the New York State legislature may have had what he deemed an improper motive in limiting the bakers to a sixty hour work week. To Justice Peckham, such a motive prevented the Court from deeming the statutory provision constitutional.<sup>131</sup>

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130. *Lochner*, 198 U.S. at 67 (Harlan, J., dissenting).

[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.

*Jacobson*, 197 U.S. at 26. See generally G. Edward White, *John Marshall Harlan I: The Precursor*, 19 AM. J. LEGAL HIST. 1 (1975) (providing background on Justice Harlan).

131. Harlan addressed Peckham's concerns about the legislature's motive for limiting the work week for bakers at the furnace to sixty hours a week:

It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employ[ees] in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that . . . labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation it is not the province of the court to inquire. . . . So that in determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the State are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health, as involved in the daily work of the persons, male and female, engaged in bakery and confectionery establishments.

*Lochner*, 198 U.S. at 69 (Harlan, J., dissenting). Justice Harlan concludes:

Therefore I submit that this court will transcend its functions if it assumes to annul the statute of New York. It must be remembered that this statute does not apply to all kinds of business. It applies only to work in bakery and confectionery establishments, in which, as all know,

Justice Harlan, on the other hand, was satisfied by the words of the statute itself that the state was properly exercising its police powers.<sup>132</sup> Today, simple conservative textualism might avoid the fatal obstacle of legislative motivation that Justice Peckham imposed on the protection of the workers in *Lochner*. The extent of judicial second-guessing of legislative motives for the content of the legislation, in addition to its stated legislative purposes, would be irrelevant even if bakeries included onsite dormitories for those working extended shifts. Because the master/employer held so much power, the workers might as well be deemed powerless without the state's intervention.<sup>133</sup>

The relevant factor to examine when considering the constitutionality of a state's exercise of its police power is whether the legislature has crafted a reasonable and relevant legislative provision. In short, to determine the state's "power to interfere with liberty of contract, the court may inquire whether the means devised by the State are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health."<sup>134</sup> The excessive scrutiny to which Justice Peckham subjected the New York State legislation was designed to allow the majority to declare the provision unconstitutional.

Judges have used many tactics when they wish to ensure an outcome different from that which objective judicial examination would produce. These tactics include changing the issue, ignoring relevant facts, and applying the wrong tier of review to bend the law to the majority's sentiment—what another court deemed a decision in "accordance with the length of the Chancellor's foot," rather than in ac-

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the air constantly breathed by workmen is not as pure and healthful as that to be found in some other establishments or out of doors.

*Id.* at 70.

132. *Id.* at 67. Here, Justice Harlan sums up the position respecting the police powers left to the states: "I take it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare or to guard the public health, the public morals or the public safety." *Id.* G. Edward White describes "a concurrent theory of state sovereignty in a federal system and a belief that the states, under the guise of their police powers, could infringe upon individual rights for the sake of community welfare." White, *supra* note 130, at 2. This position was deemed paternalism by its enemies: "advocates of free enterprise identified paternalism as the ideology most potentially subversive of time-honored American values." *Id.* at 3.
133. See generally KENS, *supra* note 3, at 28–48 (detailing the political background of the case); Scott H. Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1 (1980).
134. *Lochner*, 198 U.S. at 69 (Harlan, J., dissenting) ("Whether or not this be wise legislation it is not the province of the court to inquire."); see Jeffrey M. Sharman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161 (1984).

cordance with the rule of law. In a final contrast with Justice Peckham's position, Justice Harlan emphasized that "[t]he preservation of the just powers of the States is quite as vital as the preservation of the powers of the General Government."<sup>135</sup>

Those same selfish interests we met in *Lochner* are always around; sometimes we know how the advocates for those interests are arranging things for themselves while other times we do not notice what they are up to. But, a person's desire to avoid sharing profits or to accept the losses with the profits may lead that person to take the rights of both bargaining parties for themselves to provide some purported moral justification for their own interests prevailing over societal interests.

Why do legislatures today fail to balance the state code with some legal remedies for the state's residents? One reason may be that local and state legislators rely on campaign funds, which come from corporations, now deemed persons with a voice in the legislative process.<sup>136</sup> Coercion is disguised as freedom of corporate speech in *Citizens United v. Federal Election Commission* in the same way it was disguised as freedom of contract in *Lochner*. Therefore, accountability for people in power must be paramount if we are ever to approximate a just society.

The new language of personhood in *Citizens United* is easily contrasted with the language of liberty or freedom of contract in *Lochner*, but both cases set forth a strong, almost unassailable constitutional right for each prevailing party, human or artificial. However, this is old wine in newfangled containers—the unqualified demands of the litigants in *Citizens United* and donors who telephoned the President just before the Order was issued on April 28, 2020, express the same age-old desire to control destiny and to eliminate uncertainty as Loch-

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135. *Lochner*, 198 U.S. at 74 (Harlan, J., dissenting); cf. White, *supra* note 130, at 3 (setting forth another view of the states' police powers, which "combined a sense that state regulation of [business] was economically inefficient with a philosophical conviction that private rights against the state were sacred and inalienable"). At the turn of the nineteenth century, people used the term *laissez-faire* to signal general suspicion of governmental regulation that they considered paternalistic intervention in private conduct. *Id.* According to this view, "the state had no obligation to help those who had proven themselves unfit in the struggle for existence." *Id.* at 4.

136. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); Note, *Citizens United at Work: How the Landmark Decision Legalized Political Coercion in the Workplace*, 128 HARV. L. REV. 669, 669 (2014) (urging Congress "to protect employees from being coerced to participate in their employers' political activities"); see also Joel Seligman, Professor of Pol. Sci. and President Emeritus, Univ. Rochester, *Is the Corporation the Person?: Reflections on Citizens United v. Fed Election Comm'n* (May 6, 2010), [https://www.rochester.edu/president/citizens-united/\[https://perma.cc/B7GD-XE67\]](https://www.rochester.edu/president/citizens-united/[https://perma.cc/B7GD-XE67]) ("The holding itself [which refers to corporations as persons] is narrow and solely deals with specific forms of corporate expenditures 30 days before a federal primary and 60 days before a federal election.").

ner did over a century ago. The old liberty of contract in *Lochner* is the new corporate personhood in *Citizens United*, as the demands arise from the same protective emotion seeking exercise of their powers as far as they can be extended—in short, total exercise of their absolute and unlimited rights.<sup>137</sup> Were Justices inclined to give over to the absolute rightists any semblance of decency in order to uphold the notion of unrestrained freedom of contract? Alas, the majority of the United States Supreme Court in *Lochner* dismantled the authority and ability of a state (in that case, New York) to introduce some small balance into the unbounded desire to exploit the laborer.

In *Lochner*, the master/employer argued to protect freedom of contract for both parties, but in reality *Lochner* won his freedom to bargain for other people's labor without the laborer's having any rights. The protections of the state law, intended to place a thumb on the scale of justice for the workers who had little, if any, bargaining power were, in the Court's view, beyond the state's authority.<sup>138</sup>

The applications of freedom of labor or freedom of contract did not address the dangerous working conditions the bakers in *Lochner* faced. Sadly, we see that the law itself could not provide any meaningful solutions to the real-life problems people in New York State faced. We might ask today how the conditions have changed for factory workers or even small independent workers. The lobbyists' theorizing has endless applications to eliminate the serious obligations that entrepreneurs or employers might otherwise face, even without the *Lochner*-style Order of April 28, 2020, or judicial versions of the same principles in cases such as *Citizens United*.<sup>139</sup>

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137. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). *Jacobson* is cited in both majority and dissenting opinions in *Lochner* as helping to define what, if any, limits restrain absolute liberty of contract. *Lochner*, 198 U.S. at 55–56; *Id.* at 67 (Harlan, J., dissenting).

138. See generally DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011). This book embraces the small government that precludes states from helping their citizens with unhealthful and dangerous working conditions, very low wages and very long hours. It should be clear that the President's Executive Order promotes the type of government action Bernstein applauds: the Order of April 28th prevents workers from accessing otherwise available protections for workers such as unemployment insurance and ability to sue employers for unsafe and unsanitary conditions. This Executive Order is designed to make the government, which serves the four slaughterhouse companies by abrogating normal relief for citizens or liability for the slaughterhouses, too limited in its conception to help its citizens. This small-minded government is only capable of assisting the already-powerful masters.

139. *Citizens United*, 558 U.S. 310; see also Tamara R. Piety, *Citizens United and the Threat to the Regulatory State*, 109 MICH. L. REV. FIRST IMPRESSIONS 16, 16 (2010) ("The opinion in *Citizens United* is replete with rhetoric identifying corporations as 'citizens,' as if they were real persons.").

The “law and economics movement,” which analyzes law under the aegis of the economic interpretation that practitioners such as Judges Richard Posner and Frank Easterbrook have adopted, has broadly expounded on the Court’s position in *Lochner*. The absolutism of their positions, whatever position is in fashion at the moment in question, is as characteristic of this law and economics movement as the excessive and extreme application of scrutiny Justice Peckham offered in *Lochner*. The major difference between this law and economics formalist approach and other formalist approaches to law is the subservience of the very notion of law to the godlet economics, which in adherents’ eyes, supersedes the need for law. This absolutism obviates human judgment and reasonable assessment of each type of situation.

For the advocate of absolute *Lochner*-like principles (in Justice Peckham’s language, the master, the bakers’ employer, buys the labor of the bakers, who need no help or protection from the State of New York) and a law and economics adherent, the answer is preordained, long before any problem arises. The determinism and outsized claims for economic solutions persist even when a market is not operating in the relevant field (for example, health care insurance) or when near monopolies have cornered what should be a market (for example, the sale of meat), leaving the masters (the bakery owners in *Lochner* and the four slaughterhouses in Executive Order 13917) in powerful control. If the market is operative in the area of law in question, the market controls. If there is no market, the same principles apply as though a market were present in the theory of the case, which abases the law even further than Justice Peckham’s disregard for New York State’s constitutional authority to pass legislation on hours for workers. If a theoretical market solution is unavailable in a particular situation or problem, this movement does not look beyond the canon that the model version of the market controls. There is no leaven from behavioral economics.<sup>140</sup> Professor James Boyd White has studied the

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140. Apart from whatever the efficient capital markets hypothesis might say about the perfections of the stock market, more realistic interpretations of economics provide insights about human nature and the operation of human society without attempting to supplant legal concepts of equal bargaining, trust, or social justice. See generally RAGHURAM G. RAJAN & LUIGI ZINGALES, *SAVING CAPITALISM FROM THE CAPITALISTS: UNLEASHING THE POWER OF FINANCIAL MARKETS TO CREATE WEALTH AND SPREAD OPPORTUNITY* (2003) (considering societal benefits of the free market and providing recommendations for improvement); BENJAMIN M. FRIEDMAN, *THE MORAL CONSEQUENCES OF ECONOMIC GROWTH* (2005) (exploring abstract benefits of economic growth); RICHARD H. THALER, *MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS* (2015) (introducing a psychological perspective to the understanding of economic concepts); ROBERT J. SHILLER, *NARRATIVE ECONOMICS: HOW STORIES GO VIRAL AND DRIVE MAJOR ECONOMIC EVENTS* (2019) (exploring social factors as catalysts for economic events); GEORGE A. AKERLOF & ROBERT J. SHILLER, *PHISHING FOR PHOOLS: THE ECONOMICS OF MANIPULATION AND DECEPTION* (2015) (emphasizing the give-and-take relationship between economic

substance and rhetorical presentation of Judge Posner's economic ("pragmatic") interpretation of the law. White finds that in some instances, Judge Posner's approach reduces the role of law to accommodate economic principles, which has negative consequences for "the authority of legal texts and the fundamental principle of separation of powers."<sup>141</sup>

In *Economic Analysis of Law*, first published in 1973 and now in its ninth edition, Judge Posner set forth the tenets of the efficient capital market hypothesis,<sup>142</sup> in which the market plays a dominant role at the center of the law, thereby precluding governmental oversight and regulation. Judge Posner cloaks his analysis in language "favoring efficiency and individual liberty at the expense of equality, fairness, and justice in law and economics."<sup>143</sup> It is a theory born of a deep-seated fear that others will impinge on the power of the self-centered actor, who arrays all protections for himself. In this scheme, a huge infringement of another's rejected "rights" as a human being pales before the absolutely free person in powerful control in society.

The perfect illustration of this desire and the proper legal response to this demonstration of super-ego is *Jacobson* itself. *Jacobson* involves a person during an epidemic who does not wish to accept a vaccine for himself, even though he knows he could transmit the disease to other people who might die from the communicable disease. The Court knew then and arguably may still know today that such people may not risk the lives of others for their own individual interests. Public health expert Professor Lawrence Gostin's assessment of *Jacobson*, written in recognition of the 100th anniversary of the decision, reflects the competing views about the usefulness of Justice Harlan's analysis in *Jacobson* and the right to freedom from regulation of the employ-

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events and various social factors); ROBERT J. SHILLER, *MACRO MARKETS: CREATING INSTITUTIONS FOR MANAGING SOCIETY'S LARGEST ECONOMIC RISKS* (1993) (discussing potential opportunities to reduce inequalities and manage economic risks).

141. Lincoln Caplan, *Rhetoric and Law*, HARV. MAG. (Jan.–Feb. 2016) (quoting JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* 224 (2d ed. 1994)), <https://www.harvardmagazine.com/2015/12/rhetoric-and-law> [<https://perma.cc/K67M-YSD2>]. Judge Posner applied economic analysis to market and nonmarket activities alike. However, theoretically, a judge's role in writing an opinion is to

expose to the reader the grounds upon which her judgment actually rests, with as full and fair a statement of her doubts and uncertainties as she can manage. Such an opinion would establish a relation of fundamental equality with the reader, who might follow the whole argument, consider himself enlightened by it, but come to the opposite conclusion.

WHITE, *supra*.

142. Fama, *supra* note 98.

143. Caplan, *supra* note 141 (stating the criticism that Judge Posner "was a full-fledged formalist—with economics the self-contained field of knowledge whose methods of reasoning he swore by").

ment relationship claimed in *Lochner*:<sup>144</sup> “*Jacobson* endures as a reasoned formulation of the boundaries between individual and collective interests in public health.”<sup>145</sup> As Justice Harlan applied *Jacobson* in *Lochner*, the individual interest would be *Lochner* himself, while the public health interest would include the line bakery workers and the bread-buying members of the public.

Under the Executive Order, the equivalent individual interest would be the four slaughterhouses and the “critical infrastructure” of the meat supply, which the Order assumes would make the economic statistics hum. The line butchers in the slaughterhouses and the general public (vegetarian and meat-buying alike) are the groups included under the public health interest, but without the federal agencies, such as the CDC and OSHA, enforcing rules designed to insure public health as much as possible. Rather, these agencies are diverted to serve the business and economic interests in keeping every sector open, whatever the health risks.

How are the President’s Executive Order and the opinion in *Lochner* essentially alike in their meaning, significance, and thrust? This country is a republic with a democratic deficit, and the decision-makers concerned with wielding power and the manipulation of wealth put policies ahead of people in both instances. The liberty of contract portrayed in *Lochner* can only have reflected a theoretical model of economic freedom, not the reality where the power the employer held over the individual workers changed the actual behavior of both.

In *Lochner*, the Court took a theoretical approach to liberty of contract, which led to an unsympathetic ruling that suggested unless workers were incompetent wards of the state, they would prefer to be free from government interference. But to achieve that outcome, the Justices had to apply an improper, heightened standard of review.<sup>146</sup> In short, the judges had to write an absurd opinion, crossing over from Gilbert and Sullivan’s susceptible chancellors to the find the workers trapped in a situation similar to that found in George Feydeau’s *A Flea in Her Ear* (*La Puce à l’oreille* (1907)), written only two years after the opinion in *Lochner*.<sup>147</sup>

In a pageant of contracting life, the workers in the farce could only say “yes, of course, we’d like to work more than ten hours a day, and

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144. Gostin, *supra* note 121, at 580. Compare Gostin’s appreciation of Justice Harlan’s rule of reason in *Jacobson* with the less favorable article by Wendy K. Mariner et al., *Jacobson v. Massachusetts: It’s Not Your Great-Great-Grandfather’s Public Health Law*, 95 AM. J. PUB. HEALTH 581 (2005).

145. Gostin, *supra* note 121, at 580.

146. Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 753 (2009) (“[W]e only assume that *Lochner*-era courts adopted a strong, trumping view of fundamental rights.”).

147. See STUART BAKER, *GEORGES FEYDEAU AND THE AESTHETICS OF FARCE* 12 (1981).

while you are at it, we have more hours now, so why don't we work for less money each hour in order to come out with the same low wage?"<sup>148</sup> Indeed, in the opinion freedom of contract was imagined to go both ways, but even then, before behavioral economics, it was easy for most people to understand that this conceit of the bargaining worker was proffered for the Justices to save face. The rhetoric purported to protect the sacred relationship of free contracting, the very model of a mercantile society with robust bargaining, as the hallmark of the free person. They would not admit to protecting, rather than restraining, the more powerful party—the master.<sup>149</sup> In this way, the Court struck down the New York State hours section of the Bakeshop Act and upheld the absolute rights of the employer, who had more power than the workers, to dictate not only the number of hours, but the rate of pay.

#### IV. CONCLUSION

The latest challenge to the Affordable Care Act (ACA)<sup>150</sup> displays the same reasoning the President's Executive Order and the *Lochner* Court used in emphasizing the primacy of business and the economic system and the importance of the freedom of contract within that system. In the ACA situation, eighteen state attorneys general, who do not believe that the state should help poor workers obtain and pay for healthcare insurance, sued to have the ACA declared unconstitutional. These states were joined by the Trump Administration, which did not write to uphold federal legislation as might have been expected, but sided with the plaintiff states.<sup>151</sup> Accordingly, the Justice Department filed a brief asking the Supreme Court to invalidate the ACA, arguing that without the individual mandate and other key pro-

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148. *Lochner v. New York*, 198 U.S. 45, 52–53 (1905) (“The employ[ee] may desire to earn the extra money, which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employ[ee] to earn it.”).

149. See Strauss, *supra* note 34, at 386 (“[J]udicial review requires courts to recognize the complexity of the issues they confront and to develop doctrines that, while vindicating constitutional rights, also accommodate values that are in tension with those rights. *Lochner* presented the latter, but the Court treated it as the former, and that is why *Lochner* deserves the reputation it has today.”).

150. *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019), *vacated*, *California v. Texas*, 141 S. Ct. 2104 (2021) (holding plaintiffs lacked standing to challenge the constitutionality of the ACA); see Michael Bihari, *Understanding Health Insurance Exclusion & Creditable Coverage*, VERY WELL HEALTH (May 26, 2020), <https://www.verywellhealth.com/pre-existing-conditions-exclusions-1738633> [<https://perma.cc/A4ND-UJF6>].

151. Robert Barnes et al., *Supreme Court Appears Ready To Uphold Affordable Care Act over Latest Challenge from Trump, GOP*, WASH. POST (Nov. 10, 2020, 5:35 PM), <https://www.washingtonpost.com/politics/2020/11/10/scotus-hearing-aca-live-updates/> [<https://perma.cc/R6VF-SEFN>].



visions, “the remainder of the ACA should not be allowed to remain in effect.”<sup>152</sup> Thus, the Solicitor General emphasized that “the entire ACA thus must fall with the individual mandate.”<sup>153</sup> Analogizing the suit to *Lochner*, the ACA is like the Bakeshop Act’s ten-hours-per-day cap, and an individual’s right to go without health insurance (to “self-insure”) or to independently “bargain” with massive health insurance companies for a suitable policy, despite the enormous disparity in knowledge, leverage, and power, is akin to the bakery worker’s freedom of contract protected in *Lochner*.

Therefore, analytically, the arguments to invalidate the ACA in the contemporary suit and the first section of the Bakeshop Act in *Lochner* are exactly the same—protecting the rights to bargain individually for health insurance or working hours without help from the state and federal government. The most important concern, which may, according to some, define liberty or freedom in these two factually different health situations, is the lack of bargaining power of the baker and the insurance applicant. The baker and the insurance applicant are now left by legal freedom without any physical rest or health care insur-

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152. Ariane de Vogue, Tami Luhby & Sarah Mucha, *Trump Administration Asks Supreme Court To Invalidate Obamacare*, CNN (June 26, 2020, 9:42 AM) (quoting Solicitor General Noel Francisco’s Justice Department filing), <https://www.cnn.com/2020/06/25/politics/trump-administration-obamacare-supreme-court/index.html> [<https://perma.cc/ZEV9-CDYT>]; Sheryl Gay Stolberg, *Trump Administration Asks Supreme Court To Strike Down Affordable Care Act*, N.Y. TIMES (June 26, 2020), <https://www.nytimes.com/2020/06/26/us/politics/obamacare-trump-administration-supreme-court.html> [<https://perma.cc/FQZ3-S2HS>].
153. de Vogue et al., *supra* note 152; Lydia Wheeler, *Trump Administration Pushes Justices To Invalidate Obamacare (2)*, BLOOMBERG L. (June 16, 2020, 5:21 AM), <https://news.bloomberglaw.com/health-law-and-business/pandemic-is-wrong-reason-for-upholding-obamacare-gop-states-say> [<https://perma.cc/5C99-EKEX>]. Nevertheless, on July 1, 2020, Oklahomans voted to expand Medicaid within a week of the Trump administration’s filing to end the ACA entirely. Sarah Kliff, *G.O.P. Bid To End Health Act Faces Voter Push To Expand It*, N.Y. TIMES (July 2, 2020), <https://www.nytimes.com/2020/07/01/upshot/oklahoma-obamacare-Republican-voters-expand.html> [<https://perma.cc/KS6M-3Q2N>] (explaining that the states did not have to participate in Medicaid expansion and that therefore only about twenty-five states joined but that now twelve more states and the District of Columbia have joined). Oklahoma was a surprise since it voted very heavily for President Trump. *Id.* But even more surprisingly, Oklahoma voters pursued a constitutional initiative which would prevent the governor or legislature’s attempts to interfere with the voters’ wishes. Oklahoma is the fifth state (the other four are Maine, Utah, Idaho, and Nebraska) to override gubernatorial refusals to expand Medicaid. *Id.* Despite the fact that Missouri joined the states seeking to overturn the ACA, a voters’ initiative to expand Medicaid on the primary ballot August 4, 2020, shows the desire for more healthcare coverage. *Status of State Medicaid Expansion Decisions: Interactive Map*, KAISER FAM. FOUND. (Apr. 13, 2021), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/> [<https://perma.cc/Y2RT-24K9>] (reporting that voters in Missouri approved the ballot initiative to expand eligibility for MO HealthNet to provide insurance to more than 230,000 additional people).

ance. Economic rights are paramount in both cases, according to these arguments. Health rights (of workers and individuals) are not.

Similarly, the President's Executive Order prioritizes economic concerns, and thus workers are forced to take great risks at the slaughterhouses.<sup>154</sup> Even if workers are sick, they may be called in to work. If the workers do not come, they cannot apply for state unemployment insurance. The slaughterhouses are obliged only to take into account the suggestions labeled "voluntary" by the CDC under the aegis of the virologist Robert Redfield.<sup>155</sup> Here, the President is not pretending that the noble worker is aspiring to a sacred contractual relationship with the employer. On the contrary, the President clearly states that the worker must answer any call to come to work or forfeit unemployment insurance benefits and that the worker shoulders the risks of walking back into in an unsafe, unhealthful workplace, as his Executive Order and arguments defending it demonstrate.<sup>156</sup>

OSHA worded its information to businesses about best practices as recommendations, rather than requirements, in accordance with the Executive Order 13917.<sup>157</sup> Under instructions from the Order, busi-

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154. See Bagenstose, *supra* note 8. What's more, the risks are assumed under the false premise that if workers are absent, a meat shortage will occur. *Id.* Debbie Berkowitz, former chief of staff and senior policy adviser at OSHA and currently with the National Employment Law Project, criticized the administration, saying, "[t]hey just decided those lives were OK to sacrifice . . . and for what? . . . So many of (the) plants sent their pork to China. It wasn't about feeding America." *Id.*

155. Russ Choma, *Trump's CDC Director Has a History of Controversial Opinions on Controlling Viruses*, MOTHER JONES (Mar. 7, 2020), <https://www.motherjones.com/politics/2020/03/trumps-cdc-director-has-a-history-of-controversial-opinions-on-controlling-viruses/> [https://perma.cc/W23A-LT4B].

156. Exec. Order No. 13917, *supra* note 6. AFL-CIO President Richard Trumka responded:

We are very disappointed that three judges did not deem the lives of America's workers worthy of holding an argument or issuing a full opinion . . . . The U.S. Court of Appeals for the [DC] Circuit's Post-It-length response to our petition acknowledges the 'unprecedented nature of the COVID-19 pandemic' but repeats the false claim by big business that the [OSHA] already has done what is needed to protect workers.

*Court Rejects AFL-CIO Lawsuit To Force OSHA To Issue an Emergency Temporary Standard*, SAFETY+HEALTH, (June 17, 2020), <https://www.safetyandhealthmagazine.com/articles/19978-court-rejects-afl-cio-lawsuit-to-force-osha-to-issue-an-emergency-temporary-standard> [https://perma.cc/GK9F-CMXH]. Secretary of Labor Scalia responded by asking Trumka to "show due respect for the steps the dedicated men and women at OSHA are taking now." *Id.* Mike Wright, United Steelworkers director of health, safety, and environment, also expressed disappointment in the case's outcome: "The politicians talk about how people who are still at work performing essential services—health care workers, people in the supply chain—are heroes . . . . But they're unwilling to do anything to protect them." *Id.*

157. Nevertheless, by "July 7th, OSHA had received more than six thousand coronavirus-related workplace complaints but had issued only one citation, to a

nesses were allowed to save money on whatever recommended matters they wished. For example, businesses could save money by not providing masks, not social distancing with plastic dividers for butchering line functions, not testing the workers, and not conducting contact tracing. With this flexibility, slaughterhouses could cut down on expenses while shifting the risk to their workers—without exposing the company to liability.<sup>158</sup> Secretary of Labor Scalia demanded that the people affected by lax enforcement respect OSHA's failure to be definite, thus excusing the slaughterhouse from spending money on protections and from subsequent liability for lawsuits, such as the AFL-CIO's.<sup>159</sup> Had OSHA retained its usual power, or had the judges, acting in accordance with John Marshall's passing on the older tradition of Coke and Blackstone, listened to the workers, fewer workers might have died because where there is a harm, there also should have been a judicial remedy.<sup>160</sup>

What's more, slaughterhouse workers' illness did not cause the meat shortage. In fact, while President Trump was in Japan for the

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nursing home in Georgia," raising the question of how much respect was due to OSHA's procedures. Mayer, *supra* note 4.

158. An early example of the pressure slaughterhouses put on employees to work, even when sick comes from the story of Annie Grant.

Grant, 55, had been feverish for two nights. Worried about the coronavirus outbreak, her adult children had begged her to stay home rather than return to the frigid poultry plant in Georgia where she had been on the packing line for nearly 15 years. But on the third day she was ill, they got a text from their mother. "They told me I had to come back to work," it said.

Miriam Jordan & Caitlin Dickerson, *Poultry Worker's Death Highlights Spread of Coronavirus in Meat Plants*, N.Y. TIMES (Apr. 9, 2020), <https://www.nytimes.com/2020/04/09/us/coronavirus-chicken-meat-processing-plants-immigrants.html> [https://perma.cc/T4GK-Y95G]. Ms. Grant ended up in a hospital on a ventilator for a week before she died. *Id.* The point is that the slaughterhouses, in the effort

to keep the plants open without interruption, have not taken into consideration the health of either the sick workers who they attempt to force back to work or of the workers not yet sick who might become infected by sick workers close to them on the line. By this time, both the unions and the Democratic Party had asked OSHA "to issue an emergency rule forcing businesses to comply with the Centers for Disease Control's health guidelines for COVID-19, but the Labor Department refused." Mayer, *supra* note 4.

159. *In re AFL-CIO*, No. 20-1158 (D.C. Cir. June 11, 2020); *see also* Mike LaSusa, *AFL-CIO Asks Full DC Circ. To Revisit Virus Safety Rule Suit*, LAW 360 (June 18, 2020), <https://www.law360.com/articles/1284710> [https://perma.cc/3JZ9-W9CK] ("The AFL-CIO asked the full D.C. Circuit on Thursday to revisit a panel decision last week that tossed the group's suit aiming to force the U.S. Department of Labor's workplace safety arm to issue an emergency rule requiring employers to protect workers from COVID-19.")

160. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); *see supra* note 103 and accompanying text.

meeting of the G20 nations on June 29, 2019,<sup>161</sup> the President begged the Chinese dictator to revise trade agreements permitting the U.S. to export large amounts of pork and other meat to China.<sup>162</sup>

Overall, Secretary Scalia did not give workers any reason whatsoever to respect OSHA, as the public had done in past epidemics, because the agency's authority to exact protections was hobbled by the Executive Order's reliance on the DPA.<sup>163</sup> For example, not long after the D.C. Circuit dismissed the AFL-CIO's emergency claim on June 11, 2020, Tyson announced on June 19th that 481 (out of 3,700 tested) workers "recently tested positive for coronavirus at locations in Arkansas, nearly half of whom were at the Springdale plant . . . and all but 26 of the [481] people who tested positive had no symptoms."<sup>164</sup> Those testing positive without personal symptoms make this complicated new coronavirus even more a candidate for the old OSHA's mandatory directives, precluded by the President in his Executive Order of April 28, 2020. Nevertheless, Tyson Foods, secure in its support from the federal government, was able to remain "confident our products are safe" and "hopeful [that] consultations between the US and Chinese governments will resolve this matter."<sup>165</sup> It remains to be seen how receptive the Chinese government will be.<sup>166</sup>

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161. Bolton, *supra* note 10 ("Trump, stunningly, turned the conversation to the coming U.S. presidential election, pleading with Xi to ensure he'd win."). From the Chinese point of view, the African swine flu outbreak among Chinese pigs in 2018 "was widely seen as a factor in pushing China last November [2019] to lift an import ban on U.S. poultry as Beijing and Washington negotiated compromises ahead of January's phase one trade agreement. Chinese authorities said that lifting the ban could help the country meet the demand for meat." Laura He, *China Halts Imports from Tyson Foods Plant over Coronavirus Fears*, CNN BUSINESS (June 22, 2020, 4:46 AM), <https://www.cnn.com/2020/06/22/business/tyson-foods-china-coronavirus-intl-hnk/index.html> [<https://perma.cc/U2Y5-2MKR>]. Tyson Foods said in February 2020, that it is at a pricing disadvantage in China because of China's tariffs, and "[i]f tariffs are lifted or reduced, we would likely see an acceleration of already increasing global demand for U.S. pork, beef and chicken." *Id.*

162. "USDA leadership is still using the argument [about the workers' illness as the cause of the meat shortage] publicly." Bagenstose, *supra* note 8. In reality: [O]verall trends of meat production and export began to diverge by early April and grew further apart leading up to Trump's executive order . . . . [P]roduction of beef and pork dipped below 2019 levels, but exports soared above the amounts seen a year earlier. In the week ending April 23, the industry exported 98.6 million pounds of pork overseas, the second-highest total of 2020.

*Id.* By June 9, "meat production had returned to 95% of 2019 levels, USDA Secretary Sonny Perdue again justified the push to keep meatpacking plants open by citing risks to the domestic food supply." *Id.*

163. *See Court Rejects AFL-CIO Lawsuit*, *supra* note 156.

164. He, *supra* note 161 (emphasis added).

165. *Id.* (Tyson's statement was made to CNN Business).

166. *Id.* China's decision came "as the country continues to deal with fallout from a Covid-19 outbreak originally linked to a wholesale food market in Beijing. Traces

The President professes that the Executive Order protects the “critical infrastructure” of the food supply (generally meat and, in particular, pork), giving it the value and degree of protection the *Lochner* court afforded the sacred liberty of contract.<sup>167</sup> Along the way, the cohort of slaughterhouse executives is rewarded in the same way as the masters in *Lochner*. Companies might have adhered to state statutory or regulatory requirements such as unemployment insurance, plant closures, or clean-up requirements for the slaughterhouses, if the Executive Order did not free them from the expensive and time-consuming obligations. The workers are forced to bear the cost of the conditions in the slaughterhouse that the owners chose for them.

Judge Kays’ dismissal of the workers’ suit in Missouri<sup>168</sup> approves of the jurisdiction of the Agriculture Department in the same way that judges, ruled by the law and economics movement, put absolute trust in the market (or whatever they deem a market equivalent), perhaps a version of due respect, leaving open what is actually “due.”<sup>169</sup> Certainly the workers serve no greater role in the Executive Order than that of obstacles to be overcome on the road to the profits made by supplying China with pork.<sup>170</sup> That many current activists and originalists embrace *Lochner* shows that its essential holding still lives.

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of the virus were reportedly detected in multiple environment samples taken from the market, including on a chopping board used by a seller of imported salmon.” *Id.* According to reports on the COVID-19 outbreak in Springdale, Arkansas, “Jim Sumner, president of the USA Poultry & Egg Export Council, said he hopes the move won’t hurt the overall relationship with China, which had been improving after a new trade deal was signed early this year.” Josh Funk, *US Meat Industry Puzzled by China’s Import Ban for 1 Plant*, NBC MONTANA (June 23, 2020), <https://nbcmontana.com/news/nation-world/us-meat-industry-puzzled-by-chinas-import-ban-for-1-plant> [<https://perma.cc/FT6G-S6QN>] (explaining that China promised “to buy \$40 billion in U.S. agricultural products per year under a trade pact signed in January although there have been some recent questions about whether China will fulfill that pledge”).

167. Bagenstose, *supra* note 8 (“As meat production now nears 2019 levels, signaling a return toward some semblance of normalcy, the White House did not say if Trump has made any determination under what circumstances he would rescind the order.”).
168. For the Missouri suit by the Rural Community Workers Alliance, see *supra* note 43 and note 104 and accompanying text.
169. See Strauss, *supra* note 34, at 382 (“A defender of the *Lochner* Court might acknowledge that enforcing freedom of contract was . . . a deliberate, conscious policy choice—and then plausibly insist that it was a good choice, a better choice than restrictions on freedom of contract, from the point of view of both constitutional legitimacy and moral desirability.”).
170. See Bagenstose, *supra* note 8. “Tony Corbo, [at the] nonprofit Food & Water Watch, said he saw ‘a disconnect between the alarming language the industry used in April and the continued exports.’” Tyson Foods and Smithfield Foods cried that the workers’ illnesses would “cause all kinds of disruptions to the domestic meat supply” while “behind everybody’s back they’re exporting.” *Id.*

The choice in values, as the Executive Order makes clear, is the same choice the Supreme Court made in *Lochner*. The economic right of the entrepreneur to unfettered liberty of contract was more important than the health and safety of the line bakers at the furnace.<sup>171</sup> We know this is so because the Supreme Court backed up the importance of this very central contractual right with the power of the Fourteenth Amendment.<sup>172</sup> Now the economic contracts of the cohort of slaughterhouses occupy the same privileged status as *Lochner* enjoyed in 1905, although no interest in the desire of the line butchers of today to bargain for their health and safety is even considered. The Order's delegation of authority to the Secretaries of Agriculture and Labor meant that the workers had no say in the conditions of their employment and could not challenge unsafe work environments in court.<sup>173</sup>

In the Executive Order, the President stated the primary issue as the protection of the economic health of the four slaughterhouses, to insure the "critical infrastructure" of the American meat supply.<sup>174</sup> Under the Order, the line butchers' health was forgotten and they were to sacrifice themselves to the meat supply, or lose their jobs without the possibility of applying for state unemployment insurance. In *Lochner*, too, the primary issue had become the economic right of *Lochner* and other master bakers to determine employment contracts without reasonable regulation under law—such as the first section of the Bakeshop Act. That economic issue in *Lochner*, dressed up as freedom of contract, took primacy over the health, life, and safety of the line bakers. With virtually no bargaining power (let alone equality in bargaining) to exact concessions for their health and safety, freedom of contract was a deliberate chimera, even a farcical assumption within the majority's opinion.<sup>175</sup> Have we simply traded "where's the bread?"

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171. Strauss, *supra* note 34, at 384 (explaining what the majority in *Lochner* refused to acknowledge: "Monopoly power in a market, such as a labor market, undermines the autonomy justification for freedom of contract and, importantly, can have distributive consequences that might be rectified by a restriction on freedom of contract.").

172. For the invocation in *Lochner* of the Fourteenth Amendment of the "Federal Constitution," see *supra* notes 42, 120.

173. For the duties of the courts to protect individual workers under the law, see *supra* notes 103, 129 and accompanying text.

174. See Mayer, *supra* note 4 ("Why is OSHA AWOL? Democrats pushed for the agency to issue an emergency rule forcing businesses to comply with the Centers for Disease Control's health guidelines for COVID-19, but the Labor Department refused. Instead, on April 28th, forty-eight hours after Tyson Foods, the world's second-largest meat company, ran a full-page ad in several newspapers warning that 'the food supply chain is breaking,' Trump issued an executive order defining slaughterhouse workers as essential.").

175. See Richard H. Thaler & Cass R. Sunstein, *Who's on First*, NEW REPUBLIC (Aug. 31, 2003) (reviewing MICHAEL LEWIS, MONEYBALL: THE ART OF WINNING AN UNFAIR GAME (2003)), <https://newrepublic.com/article/61123/whos-first> [<https://perma.cc/W77T-587V>] ("Like most people, including experts, they tend to rely on

for “where’s the meat?” and hot, pollution-filled furnaces for very cold refrigerators?

The Executive Order worked so well with the courts that challenges to the working conditions in the plants were dismissed due to judicial deference to the executive branch. Republican Senate Majority Leader Mitch McConnell, based on this deference, made plans to limit similar COVID-19 liability claims for all workers, students, and patients; he and Senator John Cornyn proposed liability-shield legislation to the White House for its approval.<sup>176</sup> With this proposed legislation, perhaps we have outdone even *Lochner*, or at least fully realized its implications. In the process, we have not redeemed the promise of Chief Justice John Marshall to carry out the first duty of government by providing the courts as a forum for the people with legal injuries arising from someone else’s behavior.<sup>177</sup> Instead, through Executive Order 13917 and liability-shield legislation, we

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simple rules of thumb, on traditions, on habits, on what other experts seem to believe. Even when the stakes are high, rational behavior does not always emerge. It takes time and effort to switch from simple intuitions to careful assessments of evidence.”).

176. Andrew Duehren, *Senate GOP Aims To Funnel Covid Liability Cases to Federal Courts*, WALL ST. J. (July 16, 2020, 8:13 PM), <https://www.wsj.com/articles/gop-senators-move-ahead-with-coronavirus-liability-plan-11594929198> [<https://perma.cc/K8BU-LE CZ>] (explaining under the Public Readiness and Emergency Preparedness Act, legal protections for defendants would include: a suit would only be available if defendants did not “make reasonable efforts to comply with public-health guidelines and instead demonstrated gross negligence or intentional misconduct;” defendants can remove the case to federal court, which will use a clear-and-convincing evidence burden of proof; a cap on damages and heightened pleading standards; protections for defendants would “backdate” to December 2019 and end in 2024). Other provisions (proposed by such groups as the U.S. Chamber of Commerce) protect against “warrantless lawsuits.” *Id.* Democrat Representative Nancy Pelosi, Speaker of the House, has called for strengthening OSHA’s rules and bolstering protections for workers rather than for employers on more than one occasion; in no way will Senator McConnell compromise. Janet Adamy, *Families File First Wave of Covid-19 Lawsuits Against Companies over Worker Deaths*, WALL ST. J. (July 30, 2020, 3:30 PM), <https://www.wsj.com/articles/families-file-first-wave-of-covid-19-lawsuits-against-companies-over-worker-deaths-11596137454> [<https://perma.cc/8XQB-T44Y>]. *But see* Jeff Stein & Erica Warner, *White House Willing To Cut a Stimulus Deal Without ‘Liability Shield,’ Breaking with McConnell*, WASH. POST (July 31, 2020, 10:29 AM), <https://www.washingtonpost.com/business/2020/07/31/liability-shield-congress-bailout> [<https://perma.cc/SF4W-Y49C>] (“White House spokeswoman Kayleigh McEnany told reporters on Friday that the liability shield was McConnell’s priority but that Trump wanted unemployment insurance extended.”).
177. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); *see also supra* note 74 and accompanying text (regarding governmental failure to access and pursue antitrust remedies).

have revoked the promise of judicial remedies set forth in *Marbury v. Madison*.<sup>178</sup>

As events surrounding and after President Trump's Executive Order transpired, it was almost immediately clear that the DPA was not being used in the same way that President Truman had tried to use the Act, requiring steel producers to work on arms manufacture during the Korean conflict.<sup>179</sup> The 2020 Order was designed to protect employers (sometimes also friends and donors) and federal government agencies from employees, sickened by lack of protection against COVID-19 (protective gear, temperature checks, partitions, social distancing on the butchering lines, and paid sick leave). The employees, through any unions their factory may have, want to sue the government agencies (such as the Labor and Commerce Departments) and health information agencies (such as the CDC) for enforcement of the CDC's duties when employers infringed the previously stated (but now no longer in effect) rules for the protection of the workers in the meat and poultry factories and slaughterhouses. With a little perspective, it became readily apparent that the clearest useful case to shed some light on these events is *Lochner*,<sup>180</sup> dealing with poor employees' working conditions, long hours, and low wages, which government regulations were designed to ameliorate.<sup>181</sup>

*Lochner* dealt with constitutionalized property rights such as freedom of contract for the stronger bargaining party.<sup>182</sup> In *Lochner*, employers became free from the interference of the state with working

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178. Though the liability shield proposal was ultimately omitted from the stimulus package passed in late 2020, Joel Rosenblatt, *Why Congress Ducked This Covid Legal Fight (for Now)*, BLOOMBERG L. (Jan. 2, 2021, 11 PM), [https://www.bloomberglaw.com/bloomberglawnews/business-and-practice/X5L9NDB8000000?bna\\_news\\_filter=business-and-practice#cite \[https://perma.cc/Y9LW-DX36\]](https://www.bloomberglaw.com/bloomberglawnews/business-and-practice/X5L9NDB8000000?bna_news_filter=business-and-practice#cite [https://perma.cc/Y9LW-DX36]), state legislators in thirty states have enacted "broad protection from Covid-19 liability lawsuits," Chris Marr, *Covid-19 Shield Laws Proliferate Even as Liability Suits Do Not*, BLOOMBERG L. (June 8, 2021, 4:31 AM), [https://news.bloomberglaw.com/health-law-and-business/covid-19-shield-laws-proliferate-even-as-liability-suits-do-not \[https://perma.cc/FQW4-NEER\]](https://news.bloomberglaw.com/health-law-and-business/covid-19-shield-laws-proliferate-even-as-liability-suits-do-not [https://perma.cc/FQW4-NEER]).

179. See *supra* note 43 (detailing Truman's Executive Order at the center of *Youngstown Sheet & Tube Co. v. Sawyer*).

180. *Lochner v. New York*, 198 U.S. 45 (1905).

181. Eric Morath & Rachel Feintzeig, "I Have Bills I Have To Pay": *Low-Wage Workers Face Brunt of Coronavirus Crisis*, WALL ST. J. (Mar. 21, 2020, 11:58 AM), [https://wsj.com/articles/i-have-bills-i-have-to-pay-low-wage-workers-face-brunt-of-coronavirus-crisis-11584719927 \[https://perma.cc/LJA6-W2K7\]](https://wsj.com/articles/i-have-bills-i-have-to-pay-low-wage-workers-face-brunt-of-coronavirus-crisis-11584719927 [https://perma.cc/LJA6-W2K7]) (pointing out that "[l]ower wages correlate with closer personal interactions at work," aside from healthcare professionals who are more likely to receive higher wages, "meaning people with [lower wages] have a greater potential to be exposed to contagious diseases" and analyzing Labor Department data).

182. See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 78–108, 81–82 (1776). ("Masters are always and everywhere in a sort of tacit, but constant and uniform, combination, not to raise the wages of labour above their actual rate. . . . Masters, too, sometimes enter into particular combi-



conditions for employees. Line bakery workers faced huge, extremely hot basement ovens built right on the muddy dirt flooring, emitting coal fumes that bakers inhaled along with microscopic bits of flour dust. Employers, after the state statute was struck down, were free to say ten hours a day was not enough. That is abusive use of monopoly power. No sense of the police power or common good survived in *Lochner*. The result in *Lochner* runs parallel with the small number of suits unions were able to bring against agencies for not doing their protective duties and enforcement work against employers.<sup>183</sup> How analytically and substantively different are: 1) the cases under the constitutionally protected employers' freedom of contract and 2) federal government agency and employer protective Executive Order parameters? While *Lochner* featured the constitutionally protected freedom of contract, no constitutional protection was invoked in the meatpackers' situation. The Executive Order was the authority for denying the meatpackers protection.

Arguably, the Order is representative of contemporary federalist policy principles. Federalism morphs from generation to generation, and a century ago, the Reagan-Rehnquist revolution in interpretation of the Commerce Clause and interstate commerce pared down what the House of Representatives might propose to assist and protect the average worker. Harry Scheiber, a legal historian, observed:

The intense preoccupation of conservatives with the issues of centralized versus decentralized power is cast, typically, in terms of "principled" beliefs rooted deeply in the old federal creed. It is equally important to recognize, however, that the modern conservative record offers considerable reason to doubt that the imperatives of a principled federalism will consistently override other policy priorities. That is to say, there is abundant direct evidence that New Federalism devolutionists stand ready to permit priorities such as

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nations to sink the wages of labour even below this rate. These are always conducted with the utmost silence and secrecy . . .").

183. See *supra* notes 43, 104 (regarding the Missouri Rural Community Workers Alliance suit); Cassidy Arena, *Iowa Included in Federal Investigation into Meat Packing Plant Virus Outbreaks*, IOWA PUB. RADIO (Feb. 1, 2021, 3:50 PM), <https://www.iowapublicradio.org/ipr-news/2021-02-01/iowa-included-in-federal-investigation-into-meat-packing-plant-virus-outbreaks> [https://perma.cc/75WX-G7YE]. "As a result of at least 270 deaths and thousands of positive cases in the nation's meatpacking plants, the House Select Subcommittee on the Coronavirus Crisis sent letters to Tyson Foods, Smithfield Foods and JBS USA" requesting information about incidents of infection and death in Iowa and Nebraska. *Id.* Tyson's press release stated that the company conducted an investigation but has not released the results. *Id.* "In a separate letter, the subcommittee also inquired about the role [OSHA] played in the outbreaks when under the Trump administration." *Id.* During the outbreaks, OSHA "only suggested non-binding guidance that companies are free to ignore," leading to a mere eight COVID-19-related safety violations issued during the Trump Administration. *Id.*

property rights to trump what strict adherence to federalism ideals would seem to require.<sup>184</sup>

How does federalism look in the twenty-first century?<sup>185</sup> The ordinary person on Main Street was left to struggle alone when their pleas for aid after the Great Recession were turned down.<sup>186</sup> Generally, the wealthy enjoyed a relatively quick and full recovery while many average people are still awaiting a full recovery. In fact, the recovery, such as it was for many poor people, was not strong enough to avoid much more serious health and financial crises which have surfaced in the last year. Those facing near disaster in both health care and financial sustainability are the people who received no government bailouts for the system's sake during or after the Great Recession, but who were abandoned to their own meager resources.<sup>187</sup>

The same attitude remains regarding emergency COVID-19 recovery and aid bills. “Principled” federalists wish not to give any money to state and local governments and propose significantly less pandemic relief aid. In terms of today's dollars, the “principled” amount is based on the assumption, contrary to fact, that the federal government has no power to tax, as was the case when *Lochner* was decided in 1905, when the states were more powerful actors than they now are. This “principled” amount runs counter to the notion that we are all in this together, and when we rescue people in trouble, they have a much better chance of recovery and growing the economy.

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184. Harry N. Scheiber, *Redesigning the Architecture of Federalism—An America Tradition: Modern Devolution Policies in Perspective*, 14 *YALE L. & POL'Y REV.* 227, 290 (1996). An additional example of another “value” taking precedence over federalism is taxation:

[W]hile proclaiming the virtues of the states and local government in their rhetoric, the conservative leaders of New Federalism have lent their enthusiastic support to the anti-tax movement in the states and more generally to the populist-style antigovernmental movement in its various manifestations. To that degree, the shifting of policy responsibilities to the states, at least in the redistributive field, will all too often mean—since in redistribution policy “race to the bottom” considerations will ineluctably come into play—that it is a predictable way of further cutting programs, reducing social benefits, and in the end harming most the elements of the population who are most deprived.

*Id.* at 291 (footnote omitted).

185. See generally Catherine M.A. McCauliff, *Originalism: Privileges v. Fundamental Values*, 47 *HOFSTRA L. REV.* 1279 (2019).

186. See generally Catherine M.A. McCauliff, *Didn't Your Mother Teach You To Share?: Wealth, Lobbying, and Distributive Justice in the Wake of the Economic Crisis*, 62 *RUTGERS L. REV.* 2 (2010).

187. See, e.g., Jessica Bennett, *Three American Mothers, on the Brink*, *N.Y. TIMES* (Feb. 4, 2021), <https://www.nytimes.com/interactive/2021/02/04/parenting/covid-pandemic-mothers-primal-scream.html> [<https://www.perma.cc/VMS6-68ZX>] (part of “The Primal Scream,” a series examining the pandemic's effect on working mothers in America).

One of the difficulties with the last Administration is that the President did not present a clear view of federalism. At an April 13, 2020, Coronavirus Task Force briefing, President Trump stated: “[Y]ou can call it ‘federalist,’ you can call it ‘the Constitution,’ but I call it ‘the Constitution.’”<sup>188</sup> The coveted seat at the table for each person does not figure into this view of federalism. For example, Governor Pete Ricketts of Nebraska, son of TD Ameritrade founder Joe Ricketts, refused to give undocumented workers a shot at getting the vaccine.<sup>189</sup> That stance was politically damaging since it alienated many communities with people who wanted the vaccine. It is also economically short-sighted and scientifically ignorant when more than 5,200 COVID-19 cases and twenty-two deaths came from twenty-three separate outbreaks at plants in Nebraska.<sup>190</sup> Nevertheless, in a very red state, the wounds rest with the victims, who have no leverage to put up a candidate who will respect workers and immigrants’ rights. Unsurprisingly, this deliberately insensitive stance has also led to litigation.<sup>191</sup> The virus does not study legalities and will take its

188. Jennifer Selin, *Trump Versus the States: What Federalism Means for the Coronavirus Response*, CONVERSATION (Apr. 17, 2020, 1:38 PM), <https://theconversation.com/trump-versus-the-states-what-federalism-means-for-the-coronavirus-response-136361> [<https://perma.cc/48UT-PAWF>] (“Throughout the coronavirus crisis, the president has made contradictory statements about who is responsible for key aspects of the nation’s response to the pandemic. For example, while Trump asserted he has the authority to order the states to reopen the economy, he also insisted that it is the governors’ responsibility to manage coronavirus testing.”); see also Kathryn Watson, *No, Trump Doesn’t Call the Shots on Reopening States*, *Constitutional Scholars Say*, CBS NEWS (Apr. 20, 2020, 3:52 PM), <https://www.cbsnews.com/news/no-trump-cant-order-states-to-reopen-constitutional-scholars-say> [<https://perma.cc/EZN8-TFF6>] (“After weeks of touting states’ rights to decide whether to issue stay-at-home and other mitigation orders, President Trump now says the decision to ‘open up the states’ rests with him, not governors, amid the coronavirus pandemic. But constitutional scholars disagree.”); Jared Kushner Makes Coronavirus Briefing Appearance, Draws Backlash from ‘Our Stockpile’ Comment, USA TODAY (Apr. 3, 2020, 8:50 AM), <https://www.usatoday.com/story/news/politics/2020/04/03/coronavirus-jared-kushner-draws-backlash-our-stockpile-comment/2938648001/> [<https://perma.cc/G5XF-Z52U>] (“White House senior advisor Jared Kushner made a rare appearance during Thursday’s coronavirus task force briefing, an appearance that drew backlash when he referred to the national stockpile of medical supplies as ‘our stockpile’ and not one belonging to the states.”).

189. Megan Sheets, *Undocumented Workers at Nebraska Meat Plants Won’t Get COVID Vaccines*, DAILY MAIL (Jan. 5, 2021, 10:21 PM), <https://www.dailymail.co.uk/news/article-9112633/Undocumented-workers-Nebraska-meat-plants-NOT-COVID-vaccines.html> [<https://perma.cc/F7NR-WVK3>] (Ricketts is governor of a state where “undocumented workers make up a large section of Nebraska’s meatpacking industry—which is the largest in the US with roughly 26,600 workers in total. . . . Nebraska has recorded 169,000 coronavirus cases and 1,672 [deaths] to date.”).

190. *Id.*

191. *Alma v. Noah’s Ark Processors*, ALCU (Dec. 30, 2020), <https://www.aclu.org/cases/alma-v-noahs-ark-processors> [<https://perma.cc/L8P7-DYHW>] (describing

opportunity to jump from an undocumented victim of the pandemic to anyone—even a governor or members of his family and group of friends. In this case, principled federalism means rigid federalism, sometimes colloquially deemed cutting off one’s nose to spite one’s face.

Economists have tracked the need for more aid and have realized that insufficient aid leaves a trail of debilitating consequences for the individual victims as well as the robustness of the overall society and economy. Lessons from the Great Recession, where the lack of individual aid led to poor outcomes for average people, have reoriented perspectives on the importance of aid for individual citizens and for prompting an economic rebound sufficient to withstand the next crisis.<sup>192</sup> Competing theories about the need for aid to people who have lost their jobs in a flood, fire, hurricane, tornado, landslide, or pandemic may be grounded in various frameworks—economic models focus on the system, while behavioral economics recognizes human displacement and suffering as well as the dangerous effects on the society trying to recover from the disaster. The more serious the disaster, the greater the need for more direct payments to victims. For standard-issue economists, the answer is the same no matter the size of the disaster: people recover on their own, so long as the economic and banking systems are protected. This position is symbolized by the meager GOP proposals for aid.

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*Alma v. Noah’s Ark Processors*, the suit filed by plaintiffs represented by the American Civil Liberties Union and Scottsbluff attorney Maren Chaloupka, against Noah’s Ark Processors, which operates a Hastings, Nebraska, meat processing plant); see also *Alma v. Noah’s Ark Processors*, No. 4:20-CV3141, 2021 U.S. Dist. LEXIS 37778 (D. Neb. Mar. 1, 2021) (dismissing the claim for lack of standing); Maria Ines Taracena, *Nebraska Activists Want Undocumented Essential Workers Prioritized for COVID-19 Vaccination*, DAILY KOS (Jan. 26, 2021, 1:15 PM), <https://www.dailykos.com/stories/2011973> [<https://perma.cc/8USZ-WKQK>]. The ACLU complains that Noah’s Ark Processors persistently refuses “to take obvious health precautions—physical distancing, adequate sick leave, testing, and clean masks—to protect its workers and the surrounding community.” *Id.* In the other suit against Smithfield Foods, Inc., line meat packers “were named essential workers at the expense of their health. They didn’t have a choice from the beginning,” said “an organizer” one point they were being applauded . . . and all of the sudden [for the governor] to turn around and say . . . ‘you’re heroes but your health is not important to us. You’re only important as far as you’re producing something.’ It is especially harmful to communities of color and undocumented immigrants who are already in a vulnerable position.” *Id.*

192. Rosamond Hutt, ‘Act Fast and Do Whatever It Takes’ To Fight the COVID-19 Crisis, *Say Leading Economists*, WORLD ECON. F. (Mar. 23, 2020), <https://www.weforum.org/agenda/2020/03/covid-19-economic-crisis-recession-economists/> [<https://perma.cc/MFC5-VUMR>] (“More than 40 high-profile economists, including IMF Chief Economist Gita Gopinath and former President Barack Obama’s top economic adviser, Jason Furman . . . advocate using heavy fiscal firepower for a ‘whatever-it-takes’ economic response to the COVID-19 crisis.”).

Whatever the nomenclature from the point of view of economic, constitutional, or political theory (harsh v. kinder, gentler federalism),<sup>193</sup> the enduring motivations in human nature will not be ignored. “What I earn is mine alone” (greed unfiltered) is, at least in theory, balanced by a greater concept of a society with a seat for each one at the table, a concept of equal rights not discussed this past year due to its disfavor among powerful actors operating under Executive Order 13917, just as it was absent among those granted a constitutionally protected freedom of contract in *Lochner*. Modern federalists encourage the flow of power away from the federal government, even though many states are poorer than they once were since the Sixteenth Amendment shifted the relative wealth to the federal government. Thus, West Virginia Governor Jim Justice urged Congress to “go big” in enacting the federal relief package because West Virginia, and many states in similar positions, could not adequately help their needy citizens without federal assistance.<sup>194</sup> If the advice of the economists who have studied the need for a generous, rather than stingy, rescue program prevails, the COVID-19 relief act will go a fair distance in restoring solvency for many and, at the same time, in reducing the democratic deficit in the American republic.

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193. Heather Gerken, *Q&A: Professor Heather Gerken Discusses Progressive Federalism*, YALE L. SCH. (Dec. 6, 2016), <https://law.yale.edu/yls-today/news/qa-professor-heather-gerken-discusses-progressive-federalism> [https://perma.cc/CN5Q-8SBP] (Heather Gerken is the Dean and Sol & Lillian Goldman Professor at Yale Law School and a founder of the “nationalist school” of federalism.).

194. Alexander Bolton, *West Virginia Governor Urges Congress To ‘Go Big’ on COVID-19 Relief*, HILL (Feb. 1, 2021, 12:26 PM), <https://thehill.com/homenews/state-watch/536771-west-virginia-governor-urges-congress-to-go-big-on-covid-19-relief> [https://perma.cc/U6HP-SM8D] (“Justice doubled down on his statement in a follow-up interview with MSNBC in which he urged Congress to ‘go big.’ ‘I absolutely believe we need to go big,’ he said, chastising lawmakers in Washington over the months-long standoff before Congress passed a compromise \$900 billion relief package in December.”).