

Journal of Law & Commerce

Vol. 42, No. 1 (2023) • ISSN: 2164-7984 (online)
DOI 10.5195/jlc.2023.271 • <http://jlc.law.pitt.edu>

THE LOCHNERESS MONSTER: THE EVOLVING FEAR OF LOCHNERISM AND ITS CONTINUED VALUE FOR AMERICAN JURISPRUDENCE

John Ejzak



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.

Pitt | Open
Library
Publishing

This journal is published by [Pitt Open Library Publishing](http://pittopenlibrarypublishing.com).

THE LOCHNERESS MONSTER:
THE EVOLVING FEAR OF LOCHNERISM AND ITS CONTINUED
VALUE FOR AMERICAN JURISPRUDENCE

*John Ejzak**

ABSTRACT

This Note will canvas the history and legacy of *Lochner v. New York* and examine the effect that Lochnerism has had on American judges. It will discuss the Lochneress Monster, a new name for a familiar idea, and it will focus on how Lochnerism is utilized as an argumentative tool. Finally, it will discuss the importance of continuing to give Lochnerism the measured apprehension that it deserves.

* John is a JD candidate at the University of Pittsburgh School of Law, class of 2024.

I. INTRODUCTION

Lochnerism is alive and well. Exactly what it looks like and where it resides depends on who is asked. Whatever the details of its form and location, almost everyone can agree on one thing: Lochnerism is bad. It is a dismissive label for an argument that implies the argument is rigid, anti-progressive, plutocratic, or illegitimate.¹ It has come to represent whatever courts and judges should *not* do. A grotesque mix of law and politics, resulting in judicial overextension and judicial legislation, Lochnerism is a troubling presence in American jurisprudence. Judges have long feared a return to Lochnerism, whether in its original sphere of economic regulation, or in new areas of constitutional law.² This pattern of fear and fascination gives rise to a familiar phenomenon which I have given a new name: “The Lochneress Monster.” As explained in the following pages, this Monster has become a conceptual leviathan that is used to arouse fear, suspicion, and dissent through use of the universally reviled “Lochnerism” label.

The argumentative force behind the Lochneress Monster draws strength from a persistent desire to avoid a return to *Lochner*’s dangerous brand of overzealous judicial policymaking. No judge wants to make decisions in a way that resembles the judges of the original *Lochner* court, and they take great care to prevent even the accusation of doing so. While there are risks with the seemingly endless uses of the *Lochner* label, there is value in continuing to promote caution, if not fear, with regard to Lochnerism.³

Lochnerism has been an item of fear, disdain, and fascination since its birth. Much like a certain Scottish sea monster, the Lochneress Monster has eluded capture and continued to mystify and intrigue audiences in the judicial world. The use of Lochnerism has evolved over the years, taking new form. This Note will track these changes and explore the way in which the Lochneress Monster has been defined, avoided, and used to suit jurists’ needs since its creation. Finally, the Note will discuss why legal practitioners and

¹ Stephen Michael Shepherd, *Lochnerism*, WOLTERS KLUWER BOUVIER LAW DICTIONARY (desk ed. [2012] vol. II).

² See discussion *infra* section on “New Lochnerisms” (discussing First Amendment Lochnerism and Free Expression Lochnerism, showing that Lochnerism remains present, either in its original form or in some newer iteration).

³ See discussion *infra* sections (discussing the risks with expanding use and application of the “Lochnerism” term).

scholars alike would continue to benefit from a healthy mix of apprehension and fascination with the Lochneress Monster.

II. A BRIEF HISTORY OF *LOCHNER* AND LOCHNERISM

The history of the term naturally begins with the history of the case which is responsible for its creation. *Lochner v. New York* concerned a state law restricting the number of hours that employers in the baking industry could require their employees to work in a given week.⁴ The state law imposed a strict sixty-hour maximum work week for bakers.⁵ The main issue was whether the law violated the constitutional right of private businesses and individuals to freely make contracts.⁶ The Supreme Court, in a majority opinion by Justice Peckham, struck down the state law, declaring the law to be an unconstitutional infringement on the right of businesses and individuals to contract as they see fit.⁷ The Court stated that the constitutional guarantee of “liberty” included freedom of contract, and that it was protected by the Fifth and Fourteenth Amendments.⁸ The majority held that state interference with freedom of contract must serve a valid purpose within the state’s police power.⁹ However, in this case and many others after it, the *Lochner* Court took a position that resulted in finding constitutional violations in many state laws that critics believed were reasonable exercises of state legislative authority.

Lochner v. New York commenced what became the infamous *Lochner* Era, where the Supreme Court repeatedly struck down state economic regulations in what many now believe were inappropriate and overzealous extensions of judicial power into state authority and legislative processes unbefitting of the nation’s highest court.¹⁰ From 1905 until well into the 1930’s, the Court began augmenting the Due Process Clause’s protection of

⁴ *Lochner v. New York*, 198 U.S. 45 (1905).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 53, 56.

⁹ *Id.* at 61 (the Court further held that the law must be necessarily connected to public health such that without it, there would be “material danger to the public health or to the health of the employees”).

¹⁰ *Obergefell v. Hodges*, 576 U.S. 644, 697 (2015) (J. Roberts describing the effects of *Lochner* in the decades following the decision).

economic liberties and property rights, reading in previously nonexplicit rights stamped with the enhanced authority of the Supreme Court.¹¹ In the early twentieth century, the Court manifested its economically conservative leanings in the invalidation of numerous state and federal regulations, many concerning workers' rights and industry standards.¹² Broad interpretation of the Due Process Clause, imbued with the Court's *laissez-faire* philosophy, had a sweeping effect on reducing state regulation and promoting big business.¹³

III. LOCHNERISM'S ORIGINAL DEMISE

The *Lochner* Era began to decline in the 1930's, with the Progressives' rise to power and the regulatory needs created by the Depression putting pressure on the *Lochner* Court to relent.¹⁴ The bell officially tolled for the *Lochner* Era in 1937 with the Supreme Court's decision in *West Coast Hotel v. Parrish*.¹⁵ By that point, the consensus had formed that the *Lochner* Court had acted improperly in striking down so much state legislation.¹⁶ With the end of the *Lochner* Era, constitutional law over the last century has been dominated by a desire to avoid Lochnerism.¹⁷ Courts have struggled to preserve the validity of fundamental judicial powers like judicial review while steering clear of the appearance of judicial overreach.¹⁸ The process of avoiding the "evils of Lochnerism" has given birth to what I have termed the Lochneress Monster.¹⁹

¹¹ Michael Rustad, *Happy No More: Federalism Derailed by the Court that Would Be King of Punitive Damages*, 64 MD. L. REV. 461, 502 (2005).

¹² *Id.* at 503.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), which finally and officially condemned the judicial approach used in *Lochner* and delivered a general criticism of the *Lochner* era's abuses of judicial power).

¹⁶ Rustad, *supra* note 11, at 503.

¹⁷ Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 63 (1989).

¹⁸ *Id.* at 63–64.

¹⁹ *Id.* at 63.

IV. THE LOCHNERESS MONSTER: WHAT IS IT?

While the *Lochner* Era may have officially ended in 1937, the disdain and fear surrounding a return to Lochnerism has endured. The Lochneress Monster is simply a new name for a familiar phenomenon. “Lochnerism” has become a term of slander, a pejorative. So much so that judges will go to great lengths to avoid it.²⁰ Lochnerism may have been a real threat to the constitutional integrity of the judiciary, but the use of the term has created a separate phenomenon based entirely on the fear of that threat. Judges and scholars have helped create and sustain the fear of this threat, this Lochneress Monster, such that accusations of resembling or emulating the *Lochner* Era usually send listeners running for the hills.

The negative associations are well-summarized by the words of two of the original dissenters in the *Lochner* case: Justices Harlan and Holmes. Justice Harlan was among the first to describe the dangerous threat created by the majority’s method, a decision that would have “consequences of a far-reaching and mischievous character.”²¹ Justice Harlan elaborated:

No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people’s representatives.²²

What may have been cause for fear or concern for Justice Harlan was cause for condemnation for Justice Holmes. In his brief dissent, Justice Holmes criticized the action of the majority, accusing them of investing the Due Process Clause with their own personal, ideological predispositions.²³ Holmes stresses that the Constitution “is not intended to embody a particular economic theory.”²⁴

The dissents in the parent case set the tone for decades of Lochnerism critiques to follow, as judges and scholars alike expressed wariness toward

²⁰ *Troxel v. Granville*, 530 U.S. 57, 75–76 (2000) (expressing, through concurring and dissenting opinions, the desire to avoid the “‘treacherous field’ of substantive due process” that is risked in *Lochner*-style analysis).

²¹ *Lochner*, 198 U.S. at 73.

²² *Id.* at 74.

²³ Rustad, *supra* note 11, at 503.

²⁴ *See Lochner*, 198 U.S. at 75.

judicial legislating. The Lochneress Monster remained an ever-present threat, and not long after Lochnerism's original demise, judges were issuing warnings about the return of the philosophy. In 1952, Justice Douglas clarified that the Court does "not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."²⁵ Justice Douglas continues with a warning: [the courts must] leave issues as respects business, economic, and social affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the *Lochner*, *Coppage*, and *Adkins* cases."²⁶ The last sentence is striking. Justice Douglas does little more than mention *Lochner*, and the imperative of avoiding it, and that serves as sufficient justification for the decision.

The Court in *Ferguson v. Skrupa* echoes the sentiment. Naming *Lochner* and several of its progeny, the *Ferguson* majority contrasted its own position, reassuring readers that "we have returned to the . . . [position] that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."²⁷ Just two years later, in *Griswold v. Connecticut*, the Lochneress Monster was present in both the majority and dissenting opinions. The majority took pains to emphasize that it did not make its decision as a judicial legislature, based on personal economic or public policy preferences.²⁸ It specifically mentioned *Lochner* and sought to distance itself from its shadow.²⁹ This did not stop Justice Black, in dissent, from issuing a scathing critique of his "Brethren" in the majority, accusing them of Lochneresque decision-making.³⁰ Justice Stewart joined Justice Black and wrote his own dissent, also making sure to mention *Lochner* and its evils.³¹ Although they disagreed on how Lochnerism operated in the case at hand, the Justices were united in their disdain for it. They were also equally eager to use it to their advantage, either taking pains to avoid the Lochnerism label, or being sure to attach it to their ideological opponents.

²⁵ *Day-Brite Lighting Co. v. Missouri*, 342 U.S. 421, 423 (1952).

²⁶ *Id.* at 424–25.

²⁷ *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

²⁸ *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

²⁹ *Id.*

³⁰ *Id.* at 529.

³¹ *Id.*

Some suggest that perhaps the *Lochner* decision was not wrong for the reasons commonly stated (judicial activism, personal political and economic encroachment on legal decision-making).³² Or, to take it a step further, *Lochner* may not have been incorrect at all.³³ This provocative suggestion might illuminate what have become common misconceptions about *Lochner*, but it does not change the effect of Lochnerism's impact on American jurisprudence. The truth is, even if based on an inaccurate reading of the original opinion, Lochnerism and what it has come to represent remains a dangerous threat in hearts and minds. Regardless of its truth or historical accuracy, the image of the Lochneress Monster is no less frightening.

V. THE MONSTER RESURFACES

Lochnerism in its original form officially ended in 1937 with *West Coast Hotel*. But the specter of the Lochneress Monster continues to haunt Justices on the Roberts Court. In *Obergefell v. Hodges*, the Chief Justice himself lambasted the majority for letting their own political beliefs guide their legal decision.³⁴ Chief Justice Roberts even included a brief history of Lochnerism and its ill effects on American jurisprudence in his opinion, before once again scolding the majority for “converting personal preferences into constitutional mandates.”³⁵ Of course, the merits of his accusation can be debated, and the Chief Justice has himself been accused of practicing Lochnerism, but the point remains: the Lochneress Monster is absolutely alive and kicking in the current judicial era.³⁶

The Monster was even lurking in the background of *Dobbs v. Jackson*, already perhaps the most famous case of the century.³⁷ Amid the unprecedented circumstances of overturning *Roe v. Wade*, Justices on all

³² Randy Barnett, *Was Lochner Right? Natural Rights and the Fourteenth Amendment* (Mar. 31, 2009), <https://law.duke.edu/video/randy-e-barnett-was-lochner-right-natural-rights-and-fourteenth-amendment>.

³³ *Id.*

³⁴ *Obergefell v. Hodges*, 576 U.S. 644, 686 (2015). See also Ariane de Vogue, *Roberts Issues Stern Dissent in Same-Sex Marriage Case*, CNN (June 26, 2015, 5:52 PM), <https://www.cnn.com/2015/06/26/politics/john-roberts-gay-marriage-dissent/index.html>.

³⁵ *Obergefell*, 576 U.S. at 695–97.

³⁶ See Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329, 1330 (2016).

³⁷ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

sides of the issue utilized *Lochner* in their reasoning. Writing for the majority, Justice Alito reflected with a shudder on the “freewheeling judicial policymaking” of Lochnerism, and contrasted it with his own approach to the issue, which he assured readers was guided by principles of history and tradition.³⁸ In concurring with the majority, Justice Kavanaugh stressed what a mistake that *Lochner* was and the necessity of correcting its mistakes.³⁹ Justice Breyer characterized Lochnerism as a misguided and untenable judicial philosophy, and extolled *Lochner’s de facto* overruling in *West Coast Hotel* as a triumph of judicial self-correction, as the Court “recognized through the lens of experience the flaws of existing legal doctrine.”⁴⁰ While Justices tended to agree that Lochnerism was a dangerous mistake, their use of the *Lochner* label changed based on their argumentative needs.

VI. NEW LOCHNERISMS

With the passage of time, the Lochneress Monster has evolved and changed its appearance. New “Lochnerisms” have materialized in the past half-century, each adding complexity to the perceived threat of Lochnerism to American constitutional law. The Roberts Court has been generally accused of a “neo-Lochnerism” approach in its management of modern economic legislation.⁴¹ There is concern that certain economic circumstances, combined with the Justices’ conservative views on the market economy, could harm existing economic power inequalities and replicate the *Lochner* Era of old.⁴² The *Lochner* Era helped perpetuate Gilded Age inequalities at the turn of the twentieth century, and some believe that the Roberts Court could perpetuate similar economic rifts in the New Gilded Age of the twenty-first century.⁴³

³⁸ *Id.* at 2248.

³⁹ *Id.* at 2308 n.3.

⁴⁰ *Id.* at 2341.

⁴¹ Rahman, *supra* note 36, at 1330.

⁴² *Id.* at 1332–33. See also Sabeel Rahman, *From Economic Inequality to Economic Freedom: Constitutional Political Economy in the New Gilded Age*, 35 YALE L. & POL’Y REV. 321, 322, 325 (2016).

⁴³ Jedediah Purdy, *The Roberts Court v. America: How the Roberts Supreme Court is Using the First Amendment to Craft a Radical, Free-Market Jurisprudence*, 23 DEMOCRACY (2012), <http://democracyjournal.org/magazine/23/the-roberts-court-v-america/> (describing the *Roberts Court’s* revival of *Lochner*-style reasoning and its resultant exacerbation of economic inequalities).

There are others who believe Lochnerism has currently spread beyond the economic sphere to First Amendment jurisprudence. “First Amendment Lochnerism” refers to overactive court intervention in economic regulations that have a collateral effect on freedom of speech, religion, and other First Amendment rights.⁴⁴ The Court is charged with using individual rights in the First Amendment context to protect the economically powerful and resist legislative efforts to advance the interests of the economically disadvantaged.⁴⁵ The landmark case, *Citizens United v. FEC*, was a primary target for those criticizing the Court’s Lochnerian tendencies in the First Amendment arena.⁴⁶ Critics argue that the Court’s support of corporations in *Citizens United* mirrored the pro-business, deregulatory bent of the *Lochner* Court over a century ago.⁴⁷ The Lochneress Monster has undeniably traveled beyond its traditional territory. While economic regulation is still the primary area of focus, it is clear that Lochnerism as a term has been expanded and utilized further afield.

VII. IS THERE STILL A MONSTER?

Lochnerism as a label has long been used as a threat and a weapon to suggest that the accused is inserting their personal political views to an unacceptable degree in the application of legal doctrine.⁴⁸ Darkening those accused with the shadowy threat of judicial activism, use of the Lochnerism label is increasingly common. However, this increase is not without its risk. As Lochnerism expands and evolves, mistakes in its application are bound to be made, and these can be costly considering the term’s ideological baggage.

⁴⁴ Enrique Armijo, *Faint-hearted First Amendment Lochnerism*, 100 B.U. L. REV. 1377 (2020). See also Tim Wu, *Beyond First Amendment Lochnerism: A Political Process Approach*, KNIGHT FIRST AMENDMENT INSTITUTE (Aug. 21, 2019), <https://knightcolumbia.org/content/beyond-first-amendment-lochnerism-a-political-process-approach>.

⁴⁵ Jeremy Kessler, *The Search for an Egalitarian First Amendment Lochnerism*, 118 COLUM. L. REV. 1953 (2018).

⁴⁶ *Citizens United v. FEC*, 558 U.S. 310 (2010). See Armijo, *supra* note 44.

⁴⁷ Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 183–86 (2016). See also Howard Wasserman, *Bartnicki as Lochner: Some Thoughts on First Amendment Lochnerism*, 33 N. KY. L. REV. 421 (2006). See also Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. 959 (2020) (discussing accusations of Lochnerism against the Court in several twenty-first century cases and the Court’s attempt to defend itself).

⁴⁸ This is perhaps based on an inaccurate analysis of the original *Lochner* opinion. See Barnett, *supra* note 32. See also Kessler, *supra* note 45, at 1962 n.54.

With *Lochnerism*, there is a great risk of term inflation, or overuse to the point of devaluation. The *Lochneress Monster's* presence in *TXO Production Corp. v. Alliance Resources Corp.* indicates some of the possible consequences of term inflation.⁴⁹ In *TXO Production*, respondents attempt to use *Lochner* to denigrate petitioner's argument, "unabashedly" labeling cases cited by petitioner's as "*Lochner*-era precedents."⁵⁰ Despite affirming judgment in favor of the respondent, the plurality did not look kindly on the respondent's use of the *Lochner* label.⁵¹ Justice Stevens cast respondent's use of the *Lochner* label as an ultimately erroneous attempt to undermine the petitioner's argument.⁵² The *Lochner* label was attached merely as a means of undercutting the justification used by Justice Stevens and the rest of the plurality. This was all despite respondent's ultimate victory in the case. The fact that the Court ruled in favor of respondents amplified the plurality's critique of their clumsy accusation of *Lochnerism*.

The dissent, despite its different opinion on the proper outcome, nonetheless agreed with the plurality's treatment of the respondent's use of *Lochnerism*. Justice O'Connor complimented the plurality, agreeing that respondent's attempt to use the *Lochner* label to attack petitioner's position was "properly rebuff[ed]" by the Court.⁵³ This is indicative of the broadly shared fear of *Lochnerism*, but also of the impatience the Court will have for erroneous or disingenuous use of the *Lochnerism* term.

As use of the *Lochner* label grows, so too will its ingenuine or mistaken use. Fear of the *Lochneress Monster* will likely dissipate as the accusations lose force in the face of unfounded use. This is a problem. Whether or not one believes that the *TXO Production* plurality's analysis was in fact resembling *Lochnerism*, if lawyers and judges come to trivialize use of the *Lochner* label, we run the risk of ignoring almost a century's worth of safeguards against returning to the evils of *Lochnerism*.

TXO Production is a reassuring example of the Court uniting to rebuff false or clumsy accusations of *Lochnerism*. But this should not blind us to

⁴⁹ *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993). See also Wasserman, *supra* note 47, at 422 (describing the use of *Lochnerism* as an "unthinking pejorative").

⁵⁰ *Id.* at 455.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 479.

the possibility that the use of “Lochnerism” could eventually become so watered-down that no one will take it seriously. Lochnerism is a real threat when it is really being practiced. Overuse of the term could create a boy-who-cried-wolf situation where true instances of judicial impropriety are missed in a maelstrom of false alarms.⁵⁴

VIII. FINAL THOUGHTS

The Lochneress Monster continues to haunt and fascinate the jurisprudential landscape. As we have seen generations of Justices use *Lochner* to justify their decisions or criticize the decisions of others, we must ask ourselves: Are their accusations of Lochnerism genuine? Are they true to the original meaning of the term?

While seeking to prevent judges from substituting their own policy judgments for those of the legislature is a worthy pursuit, empty accusations of Lochnerism risk cheapening the term beyond its current state. Verbal inflation could devalue the *Lochner* label to the point of nonrecognition.

As major constitutional rights continue to be examined (and re-examined, as we saw with *Dobbs*), it will be interesting to see how the Lochneress Monster exerts its influence. Same-sex marriage, for example, would be just one right that might see change in the coming years.⁵⁵ The legacy of Lochnerism would likely play a part in that change, especially considering the current composition of the Court. Roberts’ dissent in *Obergefell* clearly suggests that judicial restraint should have prevented the Court from imposing its political views on the Fourteenth Amendment’s application to laws and regulations regarding marriage. The dreaded *Lochner* label could once again be used by Justices to suit their individual needs, either to escape the shadow of Lochnerism or to place their opponents within it.

The Lochneress Monster is real, but as with its Scottish counterpart, we should be wary of those who claim to see it. Accusations of a return to the *Lochner* Era should be taken seriously, but empty claims should be discarded. We must be able to tell the difference between a real Monster

⁵⁴ See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 940 (1973). Without commenting on the merits of the author’s argument, the title and central idea of the Article prompts the general assertion that overuse of the Lochnerism term risks devaluation.

⁵⁵ Jasmine Aguilera, *What Will Happen to Same-Sex Marriage Around the Country if Obergefell Falls*, TIME (Dec. 14, 2022, 10:26 AM), <https://time.com/6240497/same-sex-marriage-rights-us-obergefell/>.

sighting and a permissible and necessary exercise of legitimate judicial authority. The use of the Lochnerism label by American judges is all but certain to continue, but familiarity with the term and what it has come to mean will be helpful in discerning its future applications.