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NOTES

Liberty, Equality, & Solidarity: A Constitutional Defense of Modern Work Law

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ABSTRACT

American work-law jurisprudence reflects a tension between the legal conceptions of positive and negative liberty. Which of these conceptions predominates has varied across historical periods, with judicial support for negative liberties reaching its apex during the Lochner era and waning during the New Deal. The Supreme Court has recently decided two lines of cases concerning the Federal Arbitration Act and the National Labor Relations Act that indicate that judicial opinion is swinging back in favor of strong negative liberties at the expense of congressionally enshrined positive liberties. This shift appears to be grounded in an understanding of the Constitution that favors absolute negative liberty, even where it conflicts with democratically selected positive liberties. This understanding of the Constitution is out of step with how the Framers understood the constitutional balance between negative and positive liberties. Subsequent Amendments have only further strengthened constitutional protections for positive liberties. Not only is the shift back towards a negative-liberty view of the Constitution anachronistic, it threatens the wellbeing of workers in the United States. Statutorily protected positive liberties reinforce worker's ability to vote, build wealth, and hold their employers accountable. Without these protections, the legal and economic landscape is likely to return to that which existed during the Gilded Age, not that which the Framers envisioned.

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I. Introduction

The constitutional concept of liberty is as complex as it is relevant. One division within liberty has become particularly relevant in a recent line of Supreme Court cases concerning work law: the division between negative liberties and positive liberties. Negative liberties are those an individual asserts against the state or a private actor and inherently preserve the status quo. Positive liberties are those that an individual asserts, with government assistance, to take action and can either alter or maintain the status quo.[1] The Constitution explicitly names examples of both sorts of liberties. Constitutional negative liberties include the rights to "life, liberty, and property," the right against double jeopardy, and the right against self-incrimination.[2] Four prominent constitutional positive liberties are the rights to petition, assemble, access due process, and vote.[3]

American jurisprudence reflects a periodically shifting balance between judicial support for both visions of liberty, with judicial support for negative liberties at its peak in the *Lochner* era,[4] and support for positive liberties peaking, though not as forcefully, towards the end of the period encompassing the New Deal and

1. For an excellent exploration of the distinction between these two classifications of liberty and the difficulty of distinguishing between the two at the margins, *see* Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. Chi. L. Rev. 1241, 1246 n.12 (2020).

2. U.S. Const. amend. V.

3. U.S. Const. amends. I, V, XIV, XIX, XXVI. Each of these liberties has both a negative and a positive aspect, as every liberty does. For instance, the positive right to vote includes a negative right that prevents the state from restricting your right to vote. However, these rights are typically viewed as falling into their assigned categories.

4. *See* Amanda Shanor, *The Tragedy of Democratic Constitutionalism*, 68 UCLA L. Rev. 1302, 1317 (2022).

Warren Court eras.[5] During the New Deal, Congress also recognized the need to create new positive liberties to meet the crisis of the Great Depression and novel economic inequities. It passed legislation that created positive liberties tracking the four noted above: petitioning, assembling, due process, and voting.[6] These new positive liberties increased equitable access to political, social, and economic levers of power.[7] In recent decades the Supreme Court has swung the balance back in favor of negative liberties, with notable cases in areas like commercial speech,[8] freedom of religion,[9] and personal rights to own firearms.[10] Because negative liberties inherently reinforce the status quo, this line of jurisprudence serves to entrench growing American economic and social inequality.[11]

"American work law" is a term that encompasses the laws governing how and under what conditions workers can contract to work but excludes corporate contracting and collectivization for business.[12] It presents a stark example of the tension between the negative and positive aspects of liberty and types of positive liberties the Constitution permits and protects. The typically negative "liberty of property" conceives of individuals as reasonable and permitted to use their property to bargain for whatever terms of employment they see fit.[13] The typically positive "liberty of association" conceives of individuals as unequal, with the economically disfavored subject to political and economic exclusion unless they are allowed to combine.[14] American work law jurisprudence has always provided more support to pure negative liberty of property, adopting it almost wholesale

5. *Id.* at 1307; *see, e.g.*, Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (holding that parade ordinances restricting assembly cannot vest law enforcement with too much discretion in permitting parades).

6. *See* 5 U.S.C. § 553, 556 (1946) (creating the administrative notice and comment and hearing procedures that parallels historical petitioning and due process protections); 29 U.S.C. § 157 (1947) (creating a right to form a union); 52 U.S.C. § 10101 (1965) (creating rights of action to enforce racially equitable voting).

7. *See* Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 168, 214 (2021).

8. *See* Lakier, *supra* note 1, at 1312–30.

9. *See* Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. L. 1, 1–2 (2014).

10. *See* Danny Li, *Antisubordinating the Second Amendment*, 132 YALE L. J. 1821, 1869–70 (2022).

11. *See* JULIANA MENASCE HOROWITZ ET AL., MOST AMERICANS SAY THERE IS TOO MUCH ECONOMIC INEQUALITY IN THE U.S., BUT FEWER THAN HALF CALL IT A TOP PRIORITY 12 (Pew Research Center, 2020); *see also* Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L. J. 1784, 1790 (2020).

12. Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539, 1539 (2005). Corporate law, which does encompass business-to-business contracts and incorporation, presents an interesting picture of its own with respect to the division between negative and positive liberties, with governments long willing to afford businesses positive rights for economic benefit and only recently granting these collectives negative rights under the guise of corporate personhood. *See* Johnson & Millon, *supra* note 8, at 1–2.

13. *See* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 124–25 (1976).

14. *See* 29 U.S.C. § 151.

during the infamous *Lochner* era.[15] However, it has often included support for limited positive liberties.[16] The strength of this support changes with the nature and complexity of the American economy, but it always includes the recognition of positive liberties to promote equal participation in political life.

The Supreme Court has recently decided two lines of cases that question the constitutionality, or at least the longevity, of positive liberties in work law. The first concerns the Federal Arbitration Act (FAA). Though the FAA was, for decades, used only to regulate contracts between equally powerful corporations (i.e. in corporate law), in the 1980s the Supreme Court began to apply the FAA to contracts between workers and employers (i.e. in work law) to restrict employees' right to sue in court to vindicate their positive liberties.[17] More recently, the Court has begun to use the FAA to prohibit access to statutorily guaranteed positive liberties, like class action lawsuits, when an employment contract waives the liberty in favor of individual arbitration.[18] The Court has grounded its reading in a view of absolute negative liberty of property that renders positive liberties, which Congress intended to be unwaivable, waivable.[19] In other words, the Roberts Court's recent application of the FAA allows negative liberties to overcome positive liberties in all instances so far presented.

The second line of cases concerning the supremacy of negative liberty over positive liberty concerns organized labor. Several statutes have been passed in the last century at both the federal and state levels safeguarding labor organizing as a positive liberty.[20] The Court has recently begun dismantling theses statutes in a series of cases grounded in the negative liberty of property.[21] Essentially what these cases hold is that the negative liberty to use one's property as one sees fit supersedes the positive liberty to bargain on equal footing. These decisions and the logic that undergirds them threaten to upend a century of labor law jurisprudence. They also do not comport with either the constitutional vision at the framing or as expressed in subsequent amendments. The Framers expressly enshrined positive liberties like voting, petitioning, due process, and assembly in the Constitution. Later amendments only strengthened those rights by expanding the groups that could exercise them and the methods by which they could be exercised. A good-faith originalist approach to constitutional interpretation would take these clear protections into account and balance negative and positive liberties rather than taking an absolutist stance in favor of one over the other.

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15. *See* Lochner v. New York, 198 U.S. 45, 65 (1905).

16. *See* Davis v. Gorton, 16 N.Y. 255, 257 (1857); 29 U.S.C. § 201 (1938); 29 U.S.C. § 151 (1947).

17. Ronald Turner, *The FAA, the NLRA, and Epic Systems' Epic Fail*, 98 Tex. L. Rev. Online 17, 21–25 (2019-2020).

18. *Id.* at 25–27.

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

20. *See* 29 U.S.C. § 151 (1947); Cal. Lab. Code § 1140 (West 2022); 5 Ill. Comp. Stat. 315/1 (2022).

21. *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 585 U.S. 878 (2018); Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021).

This Note critiques the Supreme Court's view that the American legal concept of liberty requires the conclusions the Court has reached in its recent FAA and labor cases. Part II provides a history of American work law jurisprudence as it pertains to the competing concepts of negative and positive liberty and the evolution of American courts' understanding of the balance struck between the two. Part III turns to a more complete analysis of the reasoning in the Supreme Court's recent FAA and organized labor decisions and attempts to distill their distinctly negative view of legal liberty. Part IV offers a counterargument that the American legal conception of liberty as expressed at the framing does not compel the outcomes the Court has reached and, to the contrary, explicitly contemplates the protection of positive economic liberties in order to preserve negative economic liberties.

II. The History of Liberty in Free American Work Law

American law surrounding free labor conditions, as opposed to indentured or enslaved labor conditions,[22] has gone through several phases, each of which was supported by a different view of the balance between negative and positive liberties. Historical conceptions of negative and positive liberties have influenced the Supreme Court's recent cases interpreting the law of free labor conditions. Therefore, understanding the history of the evolution of negative and positive liberties is essential to understanding the current FAA and organized labor cases. Two of the four "pillars" of American work law,[23] employment law, the law of one-to-one employment contracts, and labor law, the law of collective contract bargaining and unions, are the clearest historical barometers of judicial views of liberty's protection of concerted action. Though each has its own inflection points, both have changed with the legal understanding of the American economy.

During the pre-industrial era, stretching roughly from the revolution to the end of reconstruction, English conceptions of liberty predominated, allowing for some positive liberties rooted in agrarian conceptions of equity while outlawing other positive liberties because of aristocratic concerns about worker action. The industrial era saw a pivot towards absolute negative liberty of property, where courts protected employers' ability to negotiate and enforce private contracts without state interference. Judges abandoned any existing positive liberties for workers and expressly disapproved any positive liberty of being able to form a collective or union. Finally, the New Deal infused work law with an appreciation

22. The history of laws imposed on slaves and indentured servants during the colonial and pre-industrial eras and their impact on modern worker liberties is a separate topic not treated in this paper, as its impacts continue to be felt but largely in agricultural, immigrant, and domestic/home-care labor, which is still treated separately in a great deal of modern law. For a more in-depth treatment of these topics, I recommend James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"*, 119 Yale L. J. 147 (2010) and Kitty Calavita, U.S. Immigration Law and the Control of Labor: 1820-1924 (2d ed. 2020).

23. Lobel, *supra* note 12, at 1539 ("employment law," "labor law," "employment discrimination," and "employee-benefits law").

of the need for some level of basic equality and positive liberty when considering how employers and employees approach contracting for work. This history informs the Supreme Court's recent decisions that signal yet another pivot.

A. Pre-Industrial Era

Early American employment and labor jurisprudence, like much of early American legal doctrine, relied heavily on English precedents.[24] Many of these precedents were rooted in the same agrarian and aristocratic paradigms that informed the Constitution.[25] While economic and social realities have changed dramatically since that period, many jurists still look to early American and contemporary English cases to inform their understanding of those documents, so it is helpful to appreciate how the law evolved in this period. Early American employment law varied from state to state, with different default presumptions depending on which jurisdiction one found oneself in, but overall, the law trended towards an assumed hiring period of one year.[26] Labor law, by contrast, was uniform across all jurisdictions and simply held that unions or any collective of workers were illegal.[27]

1. The English Implied Term of One-Year

English common law uniformly assumed that employment agreements, where silent about duration, were valid for one year.[28] This default position reflected the agrarian society in which the law developed and was meant to ensure a basic equity by preventing farmers from firing hands in the winter and hands from quitting during the harvest.[29] In spite of its rural roots, it applied to all types of servants and hired staff, including "school master[s]" and "commercial traveler[s]."[30] At least part of the reasoning for this extension was the difficulty all kinds of laborers would have in finding new lodgings when most leases were yearly and, somewhat circularly, how hard it would be to find new employment because most positions were year-to-year.[31]

Some American jurisdictions adopted this default entirely, implying yearly contracts in almost all contexts.[32] Others distinguished between day laborers, who could be terminated at will, and agricultural workers and clerks, who received the benefit of the year-long default.[33] Still others imposed the yearly rule but added a notice period in which both employers and employees could terminate the

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24. *See* Feinman, *supra* note 13, at 122; Benjamin Levin, *Criminal Labor Law*, 37 BERKLEY J. OF EMP. & LAB. L. 43, 51 (2016).

25. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *425; Feinman, *supra* note 13, at 22 (1976); CHARLES SMITH, MASTER AND SERVANT 41 (C.M. Knowles ed., 7th Ed., 1922).

26. *See* Feinman, *supra* note 13, at 121–23.

27. *See* Levin, *supra* note 24, at 51–54.

28. 1 WILLIAM BLACKSTONE, COMMENTARIES *425.

29. *Id.* at *413; Feinman, *supra* note 13, at 122.

30. SMITH, *supra* note 25, at 41; *see* Feinman, *supra* note 14, at 120.

31. SMITH, *supra* note 25, at 41–42.

32. *See* Davis v. Gorton, 16 N.Y. 255, 257 (1857).

33. *See* Feinman, *supra* note 13, at 121–22.

contract.[34] Usually this notice was three months to ensure that neither could terminate just before a favorable season.[35] What is clear, however, is that none of these courts understood the Constitution, or any similar state constitution, to contain a version of negative liberty of property that prevented the law from imposing default periods on contracts. Indeed, courts appear to have considered this set of default rules necessary to "give each party the benefit" of a valuable contract.[36] Therefore, the one-year default term was an early expression of a positive liberty. Courts in the 1960s incorporated similar defaults into the unconscionability doctrine, which also had the goal of equal economic access.[37] However, the needs of employers began to shift as the industrial revolution took hold in America and courts shifted the default to fit those needs.

2. Forming a Union as A Criminal Conspiracy

While state courts across the country struggled to discern a default length of employment, they were remarkably uniform in their interpretation of English common law prohibiting unions. At the time, unions were per se illegal in England, where courts viewed them as criminal conspiracies to coerce employers into increasing prices, as well as implicit threats to royal authority that would blossom into revolts.[38] Even guilds, which had held significant political sway in England since the Middle Ages, faced heavy criticism from figures such as Adam Smith for their negative effects on the liberty of property at the time of the founding.[39] By 1835, they too had been abolished.[40] American courts happily adopted the view that unions were illegal in virtually all contexts.[41]

Jurisdictions split on the basis for this new rule, but they amounted to the same basic reasoning: such a collective was a threat to society.[42] The first basis was that unions were, themselves, illegal means because they circumvented the democratic process and set prices and safety standards, domains the courts viewed as the exclusive provinces of the legislature.[43] This mirrored the English

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34. *See id.* at 122; SMITH, *supra* note 25, at 41–42.

35. *See* Feinman, *supra* note 13, at 122; SMITH, *supra* note 25, at 41–42.

36. *Davis*, 16 N.Y. at 257.

37. *See* Anne Fleming, *The Rise and Fall of Unconscionability as the 'Law of the Poor'*, 102 GEO. L.J. 1383, 1400 (2014).

38. *See* Levin, *supra* note 24, at 51.

39. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, pt. II (Project Gutenberg ed., 2021) (1776) (ebook).

40. COLUM. ELEC. ENCYC., *Guilds* (2024), https://www.infoplease.com/encyclopedia/social-science/economy/labor/guilds/medieval-european-guilds.

41. *See* Levin, *supra* note 24, at 52. Courts did not rely exclusively on English common law principles. Many could also look to state statutes explicitly outlawing "conspir[ing] . . . [t]o commit any act injurious . . . to trade or commerce." People v. Fisher, 14 Wend. 9, 14–15 (N.Y. Sup. Ct. 1835) (quoting 2 R. S. 691, § 8). Many would, nonetheless, go on to cite English precedents for their reasoning. *Id.* at 15.

42. *See generally* Levin, *supra* note 24, at 51–53; Commonwealth v. Hunt, 45 Mass. 111, 111 (1842).

43. *See* Commonwealth v. Grinder, 4 Doc. Hist. 335, 356 (Pa. 1836). While this explanation was ultimately rejected by most courts before the civil war, *see, e.g., Hunt*, 45 Mass. at 136, it is entirely

concern that unions might represent the first stages of revolution and allow the lower classes to foment rebellion.[44] Ironically, this reasoning highlights the positive liberty that New Deal thinkers thought unions represented, namely another layer of democratic deliberation in the private sector.[45] The second basis was that unions used illegal means to exact higher wages and better conditions from employers because they were inherently violent and could only use the "threat to injure" their employer to "compel" them into giving up higher wages in violation of their negative liberty of property.[46] This much more functional basis was similarly reflected in English precedents that raised concerns about employers forced to accept wage agreements against their will.[47] No matter the basis, the courts were uniform in their understanding: the positive liberty of association exercised in the form of a union was a threat to the negative liberty to use one's property without coercion.

B. Industrial/Lochner Era

Underpinning the assumptions of the pre-industrial era seems to have been a fundamental belief that the trade of labor ought to be "free,"[48] and that employers and employees had "equal liberties" to negotiate the terms of employment.[49] This fundamental but erroneous belief in actual bargaining equality grew stronger and became the defining lynchpin of the next period: the industrial/*Lochner* era. Diminishing need for specialized craftsmen, like the bootmakers and weavers whose cases dominated the prior era, and an increase in lower-skilled industrial jobs gave rise to the "employment at will" doctrine, which presumed equal bargaining for terms of employment to justify its lack of positive liberties.[50] At the same time, labor unions overcame the per se assumption of illegality but found on the other side an essentially identical assumption that any tactic they employed to reach their goals was illegal. Courts increasingly assumed that individual employers and employees should be left free to negotiate. In other words, courts protected the negative liberty to use one's property without the imposition of outside terms.[51] But protecting employers' negative liberty of property came at the

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likely that had it survived, it might have been struck down under the 14th Amendment during the *Lochner* era because it was widely held then that price setting and safety regulation were *not* the province of state legislatures, *see* Lochner v. New York, 198 U.S. 45, 65 (1905).

44. *See* Levin, *supra* note 24, at 51.

45. *See* Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, 94 MARQ. L. REV. 765, 804 (2011).

46. *Fisher*, 14 Wend. at 17–18. Often, as in this case, courts would couch their reasoning in terms of violent threats by one group of workers against another group, rather than targeted at the employer, but the discussion revolves around the setting of "wages" and threats to withhold labor from "employers unless they would discharge" those working for less. *Id.* at 15–16. Thus the ultimate concern was for "violent" tactics employed against employers.

47. *See* Levin, *supra* note 24, at 51.

48. *Fisher*, 14 Wend. at 11.

49. Commonwealth v. Grinder, 4 Doc. Hist. 335, 336 (Pa. 1836).

50. *See* Feinman, *supra* note 13, at 124–25.

51. *See* Levin, *supra* note 24, at 54.

expense of workers' positive liberties to bring claims under implied contract terms or form bargaining collectives.

1. The Rise of Employment at Will

The Industrial Revolution undermined the inherited English, agrarian basis for the one-year presumed term of employment.[52] While workers would still be injured by being fired when they were no longer needed by their employer, new industrial employers were not as worried about their workers quitting in peak season because their lower-skilled jobs in population-dense cities were easily filled.[53] Langdellian contract law and the institutionalization of earlier notions of individual negotiation into written doctrine further disfavored the relatively protective positive liberty to insist on a one-year presumed term.[54] Still, it was unclear what the new default assumption would be. A relatively mysterious New York treatise writer, Horace Gray Wood, provided the answer.[55] Without much support and apparently either misreading precedent or lying about it,[56] he stated that with courts "the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring *at will*."[57] Essentially this meant that an employer could fire their employee at any time and for any reason and an employee could quit at any time and for any reason and that only a contract between the two, not the law, could say otherwise.[58]

Courts latched on to this presumption of "at-will" employment almost immediately.[59] Judges allowed employers to ban employees from shopping at certain stores on pain of immediate termination, even though in doing so they bankrupted the prohibited stores.[60] They also allowed employers to fire employees for refusing to take a 25% pay reduction.[61] Further, courts permitted employers to fire employees without notice after ten years of service and with no hope of finding a replacement role for months.[62] They even began to strike down state statutes. In *Lochner*, the case that would come to define the era, the Supreme Court struck down a state statute pressed for by bakers that limited the hours they could be forced to work and controlled the conditions of the worksite.[63] The Court implicitly endorsed Horace Gray's reasoning by relying on a fundamental constitutional "liberty . . . of free contract," heretofore unrecognized by any court, that did not permit any interference, public or private, with an individual's negative liberty to

52. *See* Feinman, *supra* note 13, at 121–22; SMITH, *supra* note 25, at 41–42.
53. *See* Feinman, *supra* note 13, at 123.
54. *See id.* at 124–25.
55. *See id.* at 126 (noting that Mr. Wood was a prolific treatise writer and apparently a practicing attorney but does not appear to have been a member of the New York State Bar).
56. *See id.*
57. HORACE GRAY WOOD, MASTER & SERVANT § 134 (1877) (emphasis added).
58. *See* Feinman, *supra* note 13, at 124.
59. *See id.* at 127–129.
60. Payne v. W. & Atlantic R.R. Co., 81 Tenn. 507, 519–520 (1884).
61. Booth v. Nat'l India Rubber Co., 36 A. 714, 714–15 (R.I. 1897).
62. Laughlin v. Sch. Dist. No. 17 of Jackson, 57 N.W. 571, 572 (Mich. 1894).
63. Lochner v. New York, 198 U.S. 45, 46–47 (1905).

use their property (or time) as they saw fit.[64] Accordingly, courts used the employment at will rule to strike down several positive liberties, such as the nascent right to bring workers compensation claims against abusive employers[65] and the right to join a union.[66]

2. Collective Bargaining as a Tort

Unions fared slightly better than individual employees in the *Lochner* era, but not by much. Under the employment at will default, courts began to recognize that it was not "criminal for men to agree together to exercise their own acknowledged liberties [of property], in such a manner as best to subserve their own interests."[67] Though it predates the advent of employment at will, *Commonwealth v. Hunt* is often cited as the first case to explicitly abrogate the rule that unions were per se illegal; most jurisdictions would not follow suit until decades later.[68] The reasoning of *Hunt* unmasks the tortured logic of prior decisions that considered unionization a per se illegal means. *Hunt* found that simply forming a collective is not a means to any end.[69] To be illegal, the collective has to "accomplish some criminal or unlawful purpose" or "accomplish some purpose, by criminal or unlawful means."[70] Thus, simply forming a collective like a union cannot be a per se illegal action because it has no express end.

However, having removed that barrier, courts immediately erected another by declaring essentially any means a union might use "criminal or unlawful" and allowing employers to sue under tort for an injunction, rather than the classic criminal indictment.[71] Courts considered picketing, even peacefully, a form of unlawful intimidation because of the overwhelming "social pressure" it placed on other workers.[72] Strikes and boycotts were illegal means because they would "seriously interfere with the business" of employers.[73] The publication of non-union members' names under the title "scab" was "frighten[ing]" to both employers and employees and illegal.[74] Holding a banner across the street from an employer politely asking others not to work there was a public nuisance and illegal.[75] Even notifying an employer of an employee's union status was tortious

64. *Id.* at 53–54.
65. *See* Ives v. S. Buffalo Ry. Co., 124 N.Y.S. 920, 920 (Sup. Ct. 1910).
66. *See* Coppage v. Kansas, 236 U.S. 1, 9–11 (1915).
67. Commonwealth v. Hunt, 45 Mass. 111, 130 (1842).
68. Levin, *supra* note 24, at 52–53.
69. *See Hunt*, 45 Mass. at 111.
70. *Id.*
71. Levin, *supra* note 24, at 54.
72. *See* Vegelahn v. Guntner, 44 N.E. 1077, 1077 (Mass. 1896).
73. *See e.g.,* Plant v. Woods, 57 N.E. 1011, 1012 (Mass. 1900); State v. Glidden, 8 A. 890, 891–92 (Conn. 1887).
74. State v. Stewart, 9 A. 559, 568–69 (Vt. 1887).
75. Sherry v. Perkins, 17 N.E. 307, 308 (Mass. 1888).

interference with an employment contract.[76] So rather than throwing off an oppressive means test, the unions had simply traded one for another. They could organize but would be enjoined from further exercising any positive liberty to assemble to improve their conditions or wages. It is worth noting that even though the courts continued to discuss these cases primarily in terms of the workers that were supposedly injured by the unions' actions, employers and the state filed almost all of the suits.[77] Here, too, the courts were unconcerned with the inherent inequity caused by requiring individual workers to bargain with their much wealthier employers for their sustenance. Instead, they held that the negative liberty of property outweighed the positive liberty to bargain equally.

3. A Dark Era for Workers

These legal shifts away from workers' positive liberties had a direct and immediate impact on the lives of workers and their families. The loss of the due process right to sue for a fixed-period employment displaced workers and led to a massive drop in wages.[78] Displacement also forced workers into housing that was haphazardly constructed, lacked access to utilities, and in which they had no ownership stake.[79] These poor housing conditions increased rates of food-borne illnesses, parasites, and respiratory disease, which collectively reduced worker life expectancy.[80] Workers were particularly likely to die young due to gruesome factory injuries.[81] Their children were not exempt from this decline, as decreasing wages and frequent injury forced children into the workforce alongside their parents.[82] At the same time, wealth inequality was rising precipitously, reducing workers' overall buying power and property ownership.[83] As courts rolled back the limited pre-industrial positive rights of workers, workers' negative rights to life, liberty, and property were directly undermined.

The erosion of negative rights had secondary effects on other positive rights held by workers. Workers experiencing economic deprivation were significantly less likely to vote, as that took time and effort away from their long working hours.[84] Employers leveraged class and race divisions to undermine organizing

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76. *See* Lucke v. Clothing Cutters' & Trimmers' Assembly, 26 A. 505, 506–08 (Md. 1893).

77. *See* Levin, *supra* note 24, at 52 n.47 (citing Old Dominion Steam-Ship Co. v. McKenna, 30 F. 48, 50 (C.C.S.D.N.Y. 1887)).

78. Michael J. Hiscox, *Class Versus Industry Cleavages: Inter-Industry Factor Mobility and the Politics of Trade*, 55 INT'L ORG. 1, 9 (2001).

79. Paul A. Shackel & Matthew M. Palus, *The Gilded Age and Working-Class Industrial Communities*, 108 AM. ANTHROPOLOGIST 828, 833 (2006).

80. *Id.* at 836.

81. *See id.*

82. *Id.* at 833.

83. *See* Mark Stelzner, *The Labor Injunction and Peonage—How Changes in Labor Laws Increased Inequality During the Gilded Age*, 42 J. POST KEYNESIAN ECON. 114, 114 (2019).

84. Steven J. Rosenstone, *Economic Adversity and Voter Turnout*, 26 AM. J. POL. SCI. 25, 41 (1982).

attempts, further degrading the right to associate.[85] Not only were courts less likely to support workers' claims for better working conditions, but the company towns in which workers lived were far away from the courts.[86] Even when workers could reach the courthouse, powerful company executives wielded so much influence that they could determine the outcomes of cases.[87]

C. The New Deal to Modern Era

The superiority of the negative liberty of property over workers' positive liberties persisted until the New Deal. Then the National Labor Relations Act (NLRA), the Fair Labor Standards Act (FLSA), and several strategic Supreme Court cases redefined the notion of "equality," which broadened the sorts of constitutionally permitted positive liberties.[88] Since then, the legal landscape has been defined by a push and pull of wins and losses for workers' access to positive liberties. In employment law, both the FLSA and the courts have provided several new positive liberties for workers to bring claims against abusive employers, but courts still "presume that [parties] intended to obligate themselves to a relationship at will" by default.[89] In labor law, the NLRA's most significant contribution was the recognition of functioning unions as a significant new positive liberty, but "the Act does not interfere with the normal exercise of the liberty of the employer to select its employees or to discharge them."[90] Recently, however, this push and pull has begun to tip back towards a pre-New Deal conception of liberty—this time grounded in the same absolute negative liberty of property.

1. Employment at Will at Sufferance

Employment at will remains the default rule in most state courts, but the changing nature of work and the rise of the administrative state have riddled the default with several exceptions.[91] The first exception to emerge was ushered in by courts beginning to realize that employment at will posed a threat to the administration of justice, and, by extension, the positive liberty to seek judicial or administrative remedies for harms caused by criminal employers.[92] Courts eliminated the negative liberties of employers to fire employees for refusing to commit a

85. *See* Shackel, *supra* note 79, at 832. Employers would exclude Black workers from their workforces until nascent unions threatened to strike, at which point they would hire those Black workers on to break the strike. *Id.* This not only undermined worker association, but also deepened racial mistrust between working whites and Blacks. *Id.*

86. Alessandro Portelli, *Patterns of Paternalism in Harlan County*, 17 APPALACHIAN J. 140, 140–41, 147 (1990).

87. *See id.* at 147.

88. *See* Levin, *supra* note 24, at 55–57.

89. Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 885 (Mich. 1980).

90. N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937).

91. Sheets v. Knight, 779 P.2d 1000, 1005–10 (Or. 1989) (summarizing the several exceptions).

92. *See* Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 388 (Conn. 1980) (noting the threat to public health of allowing employers to fire employees reporting public health violations).

crime,[93] exercising a statutorily protected positive liberty,[94] engaging in a legally required duty,[95] or reporting statutory violations.[96] Many of these positive liberty exceptions were made possible by state statutes, such as workers compensation laws,[97] or legal duties to report statutory violations.

However, a set of federal statutes explicitly created a second set of exceptions to employment at will by removing the negative liberty to fire workers for things like protected class membership[98] or collective bargaining activity.[99] While the Supreme Court was careful to state in cases upholding these statutes that they did not, and implicitly could not, eliminate the negative liberty to use one's property as one saw fit, they nevertheless recognized that this negative liberty was not constitutionally absolute.[100]

The third exception, less logically novel but potentially more radical, was the implied "for cause" contract provision. Courts began to recognize that employer promises often engendered genuine employee reliance interests that courts were empowered to protect. These interests were incurred when employers made implied promises of job security to prospective employees,[101] modified existing policies that prevented at-will firing,[102] or made implicit agreements that an employee's long-term, continued employment would prohibit at-will termination.[103] Courts were willing to consider employer motive in making promises to employees and modifying employee manuals, suggesting that this exception is more radical than the prior two.[104] This logic parallels that of the pre-industrial era implied year-long contract,[105] and coincided with the development of the unconscionability doctrine in consumer contracting that explicitly held that unequal bargaining power could render a contract invalid.[106]

These myriad exceptions to absolute liberty of property in contracting were beginning to have spillover effects and courts started to question the value of the employment at will default all together.[107] However, the Supreme Court has

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93. *See* Petermann v. Intl. Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Loc. 396, 344 P.2d 25, 27 (Cal. App. 2d Dist. 1959).

94. *See* Frampton v. C. Ind. Gas Co., 297 N.E.2d 425, 427 (Ind. 1973).

95. *See* Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975).

96. *See Sheets*, 427 A.2d at 478.

97. *See Frampton*, 297 N.E.2d at 427.

98. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973); The Civil Rights Act of 1964, 42 U.S.C. § 2000e.

99. *Jones & Laughlin Steel Corp*., 301 U.S. 1, 22–25 (1937); 29 U.S.C. § 151.

100. *See McDonnell Douglas*, 411 U.S. at 802–03; *Jones & Laughlin Steel*, 301 U.S. at 45.

101. Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 884 (Mich. 1980).

102. *See* Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1264 (N.J. 1985).

103. *See* Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 925–26 (Cal. App. 1st Dist. 1981).

104. *See Woolley*, 491 A.2d at 1266 ("Our courts will not allow an employer to offer attractive inducements and benefits to the workforce and then withdraw them when it chooses, no matter how sincere its belief that they are not enforceable.").

105. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *425.

106. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 450 (D.C. Cir. 1965).

107. Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) (Kilgarlin, J., concurring) ("Absolute employment at will is a relic of early industrial times, conjuring up visions of the sweat shops

recently begun to rule again that the negative liberty of property can supersede positive liberties,[108] signaling a potential return to *Lochner*-era views on employment practices.

2. Collective Bargaining as Essential to Positive liberty

The fundamental shift in labor law from collective bargaining being criminally liable to presumptively legal came with the precursors to, and eventual passage of, the NLRA.[109] In contrast to the slow erosion of the employment at will presumption, the switch to fully legal unionization was immediate. Once the Supreme Court confirmed the law's constitutionality,[110] collective bargaining in many forms was legal and protected. Unions were explicitly permitted to strike to gain better wages and benefits for their members, a positive liberty in its own right, and employers were explicitly forbidden from firing members for doing so.[111] The statute granted the positive liberty to organize co-workers into a union.[112] Even outside of the union context, workers could now act in concert to collectively bargain with their employer and bring a complaint to a federal board if dismissed for doing so.[113] Crucially, while the Act does not require employers to agree to worker demands—a limitation meant to protect negative liberty of property—they are required to bargain in good faith with their workers and face sanctions for failure to do so.[114] Although the Act does declare certain historical union practices, such as boycotts of businesses at which they did not operate, to be illegal,[115] the statute nevertheless marked a watershed of new positive liberties.

Underpinning this pivot was a similarly significant pivot in how the law viewed liberty of property. It included an understanding that collective bargaining was essential to "restoring equality of bargaining power between employers and employees."[116] The law now recognized that "equality of bargaining power" was essential to workers' liberty of property, because it was required for "the stabilization

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described by Charles Dickens and his contemporaries. The doctrine belongs in a museum, not in our law."); Kastner v. Blue Cross & Blue Shield of Kan., Inc., 894 P.2d 909, 915 (Kan. App. 1995) ("Due to the potential for harsh and unjust results arising from the employment-at-will doctrine, judicially created exceptions have eroded the doctrine."); Sutton v. Tomco Machining, Inc., 950 N.E.2d 938, 942 (Ohio 2011) ("This is commonly known as the employment-at-will doctrine, which was judicially created and thus may be judicially abolished."). In Montana, this logic has carried far enough that the legislature has intervened and eliminated the employment at will default entirely by statute. *See* Mont. Code Ann. § 39-2-904 (2021).

108. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018).

109. Levin, *supra* note 24, at 56.

110. *See* N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

111. *See* 29 U.S.C. §§ 158, 163 (1947); *see also* Intl. Union of United Auto., etc. Workers v. O'Brien, 339 U.S. 454, 457 (1950).

112. *See* 29 U.S.C. § 159 (1947).

113. N.L.R.B. v. Wash. Aluminum Co., 370 U.S. 9, 16 (1962).

114. *See* 29 U.S.C. § 158(d) (1947).

115. *See id.* at § 158(e) (1947).

116. *Id.* at § 151 (1947).

of competitive wage rates and working conditions" for workers.[117] In other words, without the liberty of collective bargaining, workers had no hope of vindicating their own negative liberty of property. The power of this new understanding has waxed and waned with different federal administrations' willingness to adhere to it in their enforcement of the NLRA,[118] but it has generally improved workers' ability to collectively bargain. However, as in the employment law context, the Supreme Court has recently taken steps to undermine this logic. First, it has read the FAA to limit employee's positive liberty to bring class action suits against their employers where they have signed an arbitration agreement.[119] Second, and perhaps more troublingly, the Court has revived the constitutional "protection of property" argument, which was the support for the pre-industrial view that unions were a criminal conspiracy,[120] and used it to justify the invalidation of state laws that parallel the NLRA.[121] The NLRA itself may now be at risk.

III. Recent Supreme Court Decisions Suggest Another Pivot

The Supreme Court has recently decided two lines of cases that evidence an intent to unwind the New Deal positive liberties in favor of an industrial-era regime of absolute negative liberties. The first line concerns the FAA and the Court's view that federal right to select arbitration, itself cognizable as a positive liberty, indirectly invalidates several protections for the positive liberty of equal bargaining. The second line directly invokes liberty of property to strike down state and federally recognized positive liberties of association and freedom to bargain equally. Both lines are grounded in a vision of liberty that places negative liberty above positive liberty, even where the invalidation of positive liberties threatens the negative liberties of unequally situated workers.

A. The FAA Cases: Return of Lochner Era Liberty of Property

The recent statutory and judicial grants of positive liberties in the work law context evidence an appreciation for the threat that inequality poses to workers' negative liberties, such as the use of their own property and the need for positive liberties to account for that inequality.[122] This appreciation recognizes that certain negative liberties, such as absolute liberty of property, are harmful to negative liberties because they allow concentration of wealth in a small percentage of the population, who then exercise outsized political power and restrict the negative liberties of others.[123] Though the New Deal balance of negative and positive

117. *Id.*

118. *Compare* Register Guard, 351 N.L.R.B. 1110, 1128 (2007) *with* Purple Commc'ns, Inc., 361 N.L.R.B. 1050, 1050 (2014).

119. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1620 (2018).

120. *See* People v. Fisher, 14 Wend. 9, 17–18 (N.Y. Sup. Ct. 1835).

121. *See* Cedar Point Nursery v. Hassid, 594 U.S. 139, 149–50 (2021).

122. *See* Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 Yale L. J. 616, 652 (2019).

123. *Id.* at 636. This appreciation of the political consequences of wealth concentration is hardly new; it was at the core of Adam Smith's critique of British colonial policy and the apparent capture of

liberties was far from perfect, it at least recognized the need for compromise between prioritizing negative liberty and protecting positive liberty in order to preserve negative liberty equally for all. The Supreme Court's recent FAA cases suggest a return to an era where that balance is neither valued nor present.

The first case to assert the FAA as a source of legal support for absolute liberty of property came in 1983, nearly 60 years after the passage of the FAA.[124] In *Moses Cone*, the Court announced that the FAA evinced a "liberal federal policy favoring arbitration agreements."[125] Therefore, the majority held that in determining whether parties consented to an arbitration agreement, courts should construe the parties' intentions "generously" in favor of arbitrability.[126] For several years, this meant that employees forced to sign employment contracts containing arbitration clauses had to abandon the significant positive liberty of filing suit in federal court to vindicate their rights to wages. However, the Court was careful to reassure affected parties that a "party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[127] In other words, the Court promised that it was merely substituting one positive liberty for another: arbitration for suit.

Though arbitration may be another form of positive liberty, it is significantly less protective of workers' individual property liberties than civil suit. In arbitration, employees win substantially fewer cases for substantially less money than they would in court.[128] For the next 25 years, the Supreme Court contented itself with expanding both the number of claims which could be forced into arbitration rather than court[129] and the types of contracts to which the FAA applied.[130] This period saw a significant limitation of the positive liberty of recourse to the courts in favor of a view that the FAA mandated absolute liberty of property with respect to arbitration clauses, because an employer could use their outsized wealth to force a worker to sign a contract with an arbitration clause they might not have understood or felt able to deny. However, at least theoretically, these cases left open a procedure to vindicate protections for the positive liberty to bargain

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the parliament by mercantile interest to the detriment not only of the colonies, but of average Britons and even the merchants themselves. SMITH, *supra* note 39, at 185.

124. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983). It is worth noting that the new wave of interpretation of the FAA that this case initiated is still younger than the period preceding it and will remain so until 2038.

125. *Id.* at 24.

126. Turner, *supra* note 17, at 22 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985)).

127. *Mitsubishi Motors*, 473 U.S. at 628.

128. Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 1 (2011).

129. *See, e.g.,* Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477 (1989) (securities violations); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (employment discrimination); Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995) (foreign commerce).

130. *See* Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 106 (2001) (all employment contracts not with "transportation workers").

equally, such as those under the FLSA or Title VII, intact. Then came *Stolt-Nielson* and *Concepcion*.

In 2010 the Court decided *Stolt-Nielson S.A. v. AnimalFeeds International Corp.*[131] The majority held that the FAA bars compelled *class* arbitration—that is, arbitration where several plaintiffs can bring their claims at the same time against a single alleged offender—unless it is clear in the contract they intended to allow it.[132] This is because "class-action arbitration changes the nature of arbitration to such a degree that" it no longer functions as intended.[133] In doing so, the Court declared that arbitration under the FAA was an exclusive positive liberty, capable of destroying other positive liberties, such as class action suits. Rather than broadening the scope of available positive liberties, the Court chose to limit workers to the one positive liberty least likely to award them substantial damages. A year later in *AT&T Mobility LLC v. Concepcion*, the Court began to use this logic to entirely eliminate certain claims meant to support positive liberty.[134] Here, the majority struck down workers' ability to bring a FLSA collective action claim, a crucial protection for the positive liberty of equal bargaining. The justices reasoned that if a statute provides a claim that can only meaningfully be brought as a class action, either because of cost or explicit statutory restrictions, and a contract contains an arbitration clause that does not authorize class arbitration, the claim simply cannot be brought because the arbitration clause bars bringing the claim in court, and *Stolt-Nielson* bars bringing it in arbitration.[135] Since then, the Court has struck positive liberties to bring consumer fraud,[136] loan regulation,[137] wage protection,[138] banking regulation,[139] antitrust,[140] and even state criminal claims.[141]

The reasoning underpinning these cases is not new: it directly parallels the *Lochner* Court's "notions about employers' and employees' constitutional" liberty of property.[142] Indeed the language in some of the FAA cases is strikingly similar to that in *Lochner*. In *Concepcion*, the Court reasoned that "[r]elationships between securities dealers and investors, for example, may involve unequal bargaining power, but we have nevertheless held that agreements to arbitrate in that context are enforceable."[143] In *Lochner*, the Court similarly acknowledged that a

131. 559 U.S. 662 (2010).
132. *Id.* at 687.
133. *Id.* at 686.
134. 563 U.S. 333 (2011).
135. *See id.* at 351.
136. *See id.* at 352; DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 47 (2015).
137. *See* Mo. Title Loans, Inc. v. Brewer, 563 U.S. 971, 971 (2011) (car loans); Affiliated Comput. Servs., Inc. v. Fensterstock, 564 U.S. 1001, 1001 (2011) (student loans).
138. Sonic-Calabasas A, Inc. v. Moreno, 565 U.S. 973, 973 (2011) (state); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1612 (2018) (federal).
139. Branch Banking & Tr. v. Gordon, 565 U.S. 1031, 1031 (2011).
140. Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 228 (2013).
141. Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1906 (2022).
142. *Epic Sys.*, 138 S. Ct. at 1634 (Ginsburg, J., dissenting).
143. 563 U.S. 333, 346 n.5 (2011).

state statute passed based on the belief that "employers and employees . . . were not upon an equal footing," but held that states were not empowered "in determining the question of power to interfere with liberty of [property]." [144] Both iterations of the Court rested the decision to strike down a positive liberty of equal bargaining on the grounds that employers' negative liberty to use their property to force employees into unconscionable contracts was superior to that positive liberty. This was true even though workers' own liberty of property would be diminished as their wages fell.

It is worth reiterating that the Court's new conclusion about the FAA supporting an absolute liberty of property with respect to forcing workers to sign arbitration agreements is not a forgone one. For nearly 60 years prior to *Moses Cone*, the Court had struck a conscious balance between the negative liberty of property and the positive liberty of equal bargaining. First, before deciding *Circuit City* in 2001, the Court had not applied the FAA in employment contract cases at all. The Justices reasoned that intent of the statute was to increase the use of arbitration between similarly situated merchants, rather than unequal employers and employees,[145] in part because the statute contained an explicit carve out for employment contracts of any employee "engaged in . . . interstate commerce."[146] Second, the Court took the position that claims arising from statutes passed *after* the FAA clearly stating that the right to a claim could not be waived cannot be made waivable by the FAA, because the FAA predates the creation of those claims.[147] By contrast, the way the Court now reads the statute, requiring arbitration to preempt class action claims effectively renders the FAA incapable of repeal unless the repealing statute totally retracts the FAA. Finally, the pre-*Moses Cone* Court explicitly enumerated several positive liberties it found essential to vindicating statutory employment claims that arbitration could not match and which the FAA could, therefore, not render waivable. These positive liberties included the rights to trial by jury, presenting evidence, confronting witnesses, legally instructed judges, and published judicial decisions.[148] By reading the FAA to preempt these positive liberties, the Roberts Court has undermined Congress' clear intent to grant these liberties to workers and created unnecessary conflict between different sections of the federal code.

B. Unwinding Labor Law in Favor of Negative liberties

New Deal legislation and subsequent labor statutes explicitly included an understanding that certain negative liberties were empty promises without

144. 198 U.S. 45, 69 (1905).

145. Turner, *supra* note 17, at 20.

146. 9 U.S.C. §1 (2012). Justice Kennedy in his *Circuit City* majority opinion interpreted this phrase in light of the surrounding text to include only those workers "engaged in transportation," Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 121 (2001), in spite of the fact that the FLSA, passed only 13 years later, used precisely the same phrase and has been read to sweep in nearly every business in the United States, *see* 29 U.S.C. § 203(s)(1) (2022).

147. Wilko v. Swan, 346 U.S. 427, 434–35 (1953).

148. Turner, *supra* note 17, at 21 (citing Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 203 (1956)).

positive liberties supporting their meaningful exercise.[149] The drafters of these statutes had firsthand evidence to support the need for strong worker associations and bargaining equality. The NLRA passed in the midst of the Great Depression, which saw some of the lowest political participation rates in US history due to the stress caused by economic deprivation.[150] Indeed, many politicians feared the immediate political consequences of a potential violent revolution like the one that had recently taken place in Russia if Congress did not grant more positive liberties to bolster its legitimacy.[151] It is fairly clear, then, that at least a substantial portion of the justification for passing these statutes was to enshrine certain positive liberties in the labor context in order to shore up the political system and protect all forms of liberty in the long run. This expansion of positive liberties necessarily meant that certain other negative liberties were nominally limited in order to ensure their ultimate preservation. The Supreme Court has recently suggested in a series of cases that it will invalidate any laws that impose even minor limitations to the negative liberties it considers absolute.

The first case to illustrate this pivot to law-invalidation in the labor context was *Janus v. AFSCME*.[152] To be sure, the trend of the Court declaring certain negative liberties so absolute as to destroy federal protections for positive liberties had started earlier,[153] but *Janus* marked its expansion into the labor context. *Janus* concerned an Illinois state statute that required non-union members to pay "agency fees" to public sector unions that covered their workplace.[154] The Court had previously upheld such statutes not only as a solution to a free-rider problem that threatened the positive liberty of association, but also as essential to maintaining "labor peace."[155] Labor peace refers to a NLRA objective to avert the threat of labor violence that Congress was worried about developing into revolution. This concern spurred Congress' attempt to infuse the system with increased

149. 29 U.S.C. § 151 (1947) ("The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association . . . [is a] recognized source[] of industrial strife and unrest."); CAL. LAB. CODE § 1140.2 (West) ("It is hereby . . . the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers."); 5 ILL. COMP. STAT. 315/2 (2022) ("It is the public policy of the State of Illinois to grant public employees full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours and other conditions of employment.")

150. *See* Rosenstone, *supra* note 84, at 42.

151. Michael Goldfield, *Worker Insurgency, Radical Organization, and New Deal Labor Legislation*, 83 AM. POL. SCI. REV. 1257, 1275 (1989).

152. 585 U.S. 878 (2018).

153. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) is perhaps the best known of these cases where the Court declared that an unprecedentedly broad reading of the First Amendment rendered protections meant to vindicate the collective liberty of voting unconstitutional in spite of that collective liberty also being enshrined explicitly in the Fifteenth Amendment.

154. *See* 585 U.S. 878 at 896.

155. Abood v. Detroit Bd. of Ed., 431 U.S. 209, 224 (1977).

legitimacy via increased positive liberty.[156] But in *Janus*, the Court dismissed that concern and instead held that because unions engage in political speech, forcing non-members to pay agency fees was the same as forcing them to subsidize the speech of the union with whom they did not agree.[157] In other words, the cost of a positive liberty, effective association, was a minor intrusion on a negative liberty, non-coerced speech. The majority declared the Illinois statute unconstitutional, essentially holding that the free speech liberty, no matter how tangentially limited, was so absolute that no amount of concern about governmental legitimacy or effective association could justify its limitation.[158]

The Court's next declaration of unconstitutionality was grounded in an even more spuriously "absolute" negative liberty: excluding others from one's property.[159] The case at issue, *Cedar Point Nursery v. Hassid*, dealt with a regulation under the California Agricultural Labor Relations Act (CALRA).[160] CALRA was passed against a similar backdrop of labor unrest and claims of political illegitimacy as the NLRA.[161] It created the California Agricultural Labor Relations Board (CALRB) and empowered it to promulgate regulations safeguarding agricultural organizing liberties,[162] a direct parallel with the National Labor Relations Board and its powers under the NLRA.[163] CALRB promulgated a regulation requiring agricultural employers to permit union organizers onto their property for no more than three hours per day for no more than 30 days per year and only after the union provided notice.[164] The majority determined that this regulation constituted "a per se physical taking" because it "appropriate[d] for the enjoyment of third parties the owners' right to exclude," and was, therefore, a violation of the Fifth Amendment.[165] In doing so, the Court not only had to stretch existing takings precedents beyond permanent takings of easements to temporary "takings" of only a single property liberty,[166] but also had to implicitly overrule its

156. *See* Goldfield, *supra* note 151, at 1266; 29 U.S.C. § 151 (1947).

157. *Janus*, 585 U.S. at 884–86.

158. *See id.*

159. Cedar Point Nursery v. Hassid, 594 U.S. 139, 149–50 (2021).

160. *See id.* at 144.

161. David Willhoite, *The Story of the California Agricultural Labor Relations Act: How Cesar Chavez Won the Best Labor Law in the Country and Lost the Union*, 7 CAL. LEGAL HIST. 409, 409–10, 414–15 (2012). The reason California was compelled to pass this separate statute from the NLRA is that southern Democrats had forced Congress to exclude agricultural workers from protection under the NLRA. *Id.* This exclusion was explicitly based on the fact that agricultural workers in the south at the time were predominantly Black. *Id.*

162. *See Cedar Point*, 594 U.S. at 144.

163. *See* 29 U.S.C. § 156 (1947).

164. *See Cedar Point*, 594 U.S. at 144 (citing Cal. Code Regs., tit. 8, § 20900(e)(1)(A), (B) (2020)).

165. *Id.* at 149.

166. *See Cedar Point*, 594 U.S. at 153–54 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 n.12 (1982)). Ironically Justice Marshall's opinion in *Loretto* not only explicitly disavowed temporary intrusions as per se takings but was clear that it was drawing the absolutist individual rights line at "the most treasured strand[] in an owner's bundle of property rights" so as to

own precedent that allowed this exact activity under the NLRA.[167] Thus, again, the justices defined a very narrow negative liberty, the liberty to exclude temporary and non-destructive persons, as absolute and capable of invalidating laws explicitly promulgated to protect positive liberties in support of political legitimacy.

This trend has shown no signs of slowing. The Court recently decided a case declaring that property liberties are so absolute that federal statutes cannot preempt state tort claims where an employer claims that a union took "affirmative steps to endanger [the employer's] property."[168] As the Court continues to take these cases, its revival of the *Lochner*-era absolutist view of certain negative liberties will continue to strike down federal and state labor laws protecting positive liberties. This tendency is concerning both for the practical effects it is likely to have on economic paradigms that have been in place since the New Deal, and for the effects it is currently having on fundamental positive liberties. Projections in the wake of *Janus* have suggested that the rising cost to union members of dues will trigger a drop of anywhere between 15 and 71% in union membership.[169] *Cedar Point* threatens organizing liberties as well as the value of the frequent presence of organizers and regulators on employer property. That presence protects positive association liberties and other positive liberties, such as overtime wage laws and safety regulations.[170] Not only is this return to *Lochner*-era conceptions of liberty dangerous, but it is also divorced from the framing era's notion of liberty as a balance between negative liberties and the positive liberties necessary to preserve them.

C. The Direct Impact of Lost Positive Liberties

While the Court's reduction of workers' positive liberties is fairly recent, it has already begun to directly impact workers' negative liberties. Workers who are forced to bring their employment discrimination claims in arbitration are anywhere from 15% to 36% less likely to win and lose out on an average of $32,000-114,000 in compensation when they do win.[171] These recoveries are often for lost wages, a core property right. This is reminiscent of trends in the *Lochner* era, when workers' wages declined as a result of a reduction in positive liberties. Now, rather than being able to insist on a year's worth of wages, workers are

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give the government breathing room with respect to other property rights to protect collective liberties. *See Loretto*, 458 U.S. at 428, 434–35.

167. *Cedar Point*, 594 U.S. at 157 (quoting N.L.R.B. v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956)) (Where "employees were otherwise 'beyond the reach of reasonable union efforts to communicate with them'" the employer must allow the union access to its property.). *Babcock* was, itself, a property exclusion limitation on a regulatory right granted by the NLRB for organizers to contact workers on company property, but rather carefully did not declare a per se taking, instead creating a balancing framework grounded in equity concerns. Tellingly, the court in *Cedar Point* said of *Babcock & Wilcox* that "*Babcock* did not involve a takings claim," implying that if it had, it might well have been decided differently and may have been wrongly decided at the time. *Id.*

168. Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 598 U.S. 771, 785 (2023).

169. Aaron Tang, *Life After Janus*, 119 COLUM. L. REV. 677, 695 (2019).

170. Benjamin I. Sachs, *Safety, Health, And Union Access in* Cedar Point Nursery, 2021 SUP. CT. REV. 99, 122 (2021).

171. *See* Colvin, *supra* note 128, at 5 tbl.1.

unable to insist as a group that they are owed the wages for the hours that they worked. No matter the mechanism, workers are out wages that they are owed. As the Court continues down this path, workers are sure to lose not only positive liberties, but also the negative liberties they are meant to protect.

IV. The Constitutional Case for Workers' Positive Liberties

The Framers of the U.S. Constitution were deeply concerned with governmental legitimacy and its relationship to the protection of positive liberties in order to preserve negative liberties. One need only look at the First and Fifth Amendments and Article I to appreciate this. The First Amendment contains explicit protections for free association and petitioning, the Fifth Amendment expressly guarantees due process in legal proceedings, and Article I itself requires the House of Representatives be elected by voting,[172] all liberties that are explicitly positive. The Framers knew and understood the value of these positive liberties as an avenue of redress when negative liberties were tyrannically subverted. They had the context of English legal traditions, like the Petition of Right, which involved both a petition drafted by parliamentarians and an assembly that many of those parliamentarians worried was legally suspect because the meeting to draft the petition was a meeting of parliamentarians not sanctioned by the King.[173] In addition, they had the perspective of the Parliament of 1685 when King James prorogued Parliament, effectively banning both their assembly and hindering their liberty to petition, but the Parliament's supporters nevertheless assembled in spite of explicit prohibitions to hold bonfires in support of their cause.[174] They were also aware that the King had suspended judicial due process and limited voting, both essential positive liberties, and central grievances in both periods.[175]

The Framers were also acutely aware of the fact that the King's failure to protect these positive liberties had significantly undermined popular belief in the legitimacy of his government and led to revolution in both instances.[176] Indeed, as close followers of John Locke and perpetrators of their own revolution grounded in beliefs of illegitimacy, the Framers largely viewed these English revolutions as justified.[177] Refusal to respond or allow attempts at redress are definitionally

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172. U.S. Const. art. 1, § 2, cl. 1, amends. I, V.

173. *See* The Petition of Right (1627), 3 Car. 1, c.1, ¶ I.

174. *See* Tim Harris, Revolution: The Great Crisis of the British Monarchy 209 (Penguin Books 2007).

175. *See* Robert H. George, *A Note on the Bill of Rights: Municipal Liberties and Freedom of Parliamentary Elections*, 42 Am. Hist. Rev. 670, 677 (1937).

176. *See* Jonathan Gaunt, *Five Knights for Freedom: The Story of the Petition of Right 1628*, Falcon Chambers (May 7, 2020), https://www.falcon-chambers.com/publications/articles/five-knights-for-freedom-the-story-of-the-petition-of-right-1628; Tim Harris, Revolution: The Great Crisis of the British Monarchy 14 (Penguin Books 2007); The Bill of Rights 1688, 1 W. & M. c.2 (Eng. & Wales).

177. *See* John Locke, Second Treatise of Government, § 216 (Project Gutenberg ed., 2021) (1690), https://www.gutenberg.org/files/7370/7370-h/7370-h.htm; *see* The Declaration of Independence para. 1 (U.S. 1776).

arbitrary and undermine trust in a sovereign more consistently than any other government action.[178] The Framers expressed these concerns both when attempting to prevent the revolution from happening and in the eventual declaration of revolution. The petition that the First Continental Congress sent to King George III explicitly grieved that "reasonable petitions from the representatives of the people ha[d] been fruitless," "[a]ssemblies ha[d] been frequently and injuriously dissolved," "colonists may be tried in England for offences alleged to have been committed in America," and that "[t]he agents of the people ha[d] been discountenanced."[179] The Declaration of Independence rather famously complained that the King and Parliament had "dissolved representative houses repeatedly," "obstructed the administration of justice," and "impos[ed] taxes on [them] without [their] consent" in spite of the fact that they had "petitioned for redress in the most humble terms."[180] It hardly follows, then, that the Framers would have countenanced a legal system that declared a wide set of uncontestable negative liberties so absolute as to render all positive liberties mere nullities. After all, they were responding to the English Parliament's belief that the absolute negative liberty of every English merchant to profit off the establishment of a colony overrode colonial voting liberties.[181]

This original constitutional support for positive liberties was then further reinforced by subsequent amendments that also spell out specific protections for positive liberties. Each of the Fourteenth, Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments expanded protections either for due process or voting positive liberties, always to the detriment of contemporary visions of negative liberty. The Fourteenth Amendment expanded due process protections to state proceedings.[182] Congress immediately used that expansion to pass statutes mandating that states prosecute lynching in spite of the fact that many states had recognized a negative liberty against prosecution for lynching because lynching was required to redress a rape.[183] The Fifteenth, Nineteenth, and Twenty-sixth Amendments extended the positive liberty of voting to racial minorities (predominantly African Americans), women, and eighteen-year-olds, respectively,[184]

178. *See id.* §§ 221–22.

179. THE PETITION OF THE GRAND AMERICAN CONTINENTAL CONGRESS, TO THE KING'S MOST EXCELLENT MAJESTY 4 (U.S. 1774).

180. THE DECLARATION OF INDEPENDENCE paras. 7, 10, 19, 30 (U.S. 1776).

181. This is, in effect, what happened. *See* THE MASSACHUSETTS GOVERNMENT ACT paras. 1–2 (Gr. Brit. 1774).

182. U.S. CONST. amend. XIV § 1.

183. *See* Magdalene Zier, *Crimes of Omission: State-Action Doctrine and Anti-Lynching Legislation in the Jim Crow Era*, 73 STAN. L. REV. 777, 781, 783 (2021). It is no secret that lynching was largely racially motivated and was rarely conducted for actual redress of rapes, but the legal justification was still offered as the excuse for its continuance. *See id.* In any case, individual violence to redress moral wrongs is one of Locke's quintessential individual liberties in the state of nature that humans gave up when they entered society, *See* JOHN LOCKE, *supra* note 177, §§ 7, 123. Even though the individual liberty explanation for lynching in the reconstruction south was largely a sham, the argument that the Fourteenth Amendment displaced an individual liberty in favor of collective one stands.

184. U.S. CONST. amends. XV § 1, XIX, XXVI.

significantly displacing individual property liberties that older white men had with respect to each group prior to their enactment.[185] The Twenty-fourth Amendment, however, provides quite possibly the strongest parallel between constitutional conceptions of positive liberty and modern work law because it guarantees the positive liberty of voting regardless of ability to pay.[186] This explicit recognition of the role that wealth frequently plays in exercising positive liberties also had essential spillover effects onto the liberty of property itself, as certain loan contracts had been structured around providing funds on condition of certain votes.[187]

Many modern work-law developments and statutes operate to effectuate precisely the same four positive liberties: petitioning, assembling, due process, and voting. The liberty to petition the government effectively without concern for a loss of one's livelihood is protected by both the judicial development of the exception to the at-will firing rule for reporting statutory violations to the government and the anti-retaliation provisions of Title VII, the FLSA, and the NLRA.[188] The liberty to assemble not only to address employment grievances with employers, but also explicitly with the government itself via political lobbying and other forms of contact, is protected by the NLRA.[189] The liberty of due process is necessarily bolstered by each of the claims provided for in not only the listed statutes but also by judicial interpretation of the common law in the post-New Deal era. The liberty of voting is perhaps the least explicitly protected by any of these sources, but as the history of the Great Depression demonstrates, economically deprived workers are less likely to vote.[190] Therefore, as workers are forced into contracts with arbitration clauses or required to accept lower pay they are less likely to vote. To protect the exercise of that positive liberty, Congress, through the FLSA, Title VII, the NLRA, and others have provided protections for the liberty to bargain equally.

V. Conclusion

The Supreme Court has recently decided two lines of cases concerning the FAA and constitutional conceptions of negative liberty that threaten to undermine congressionally protected positive liberties. In doing so, it has returned to a constitutional definition of liberty that concerns only absolute negative liberties and not a balance between those negative liberties and the positive liberties needed to

185. *See generally* Michelle Veena Chandra, The Black/White Wealth Gap: The Transgenerational Effects of Sharecropping Systems and Anti-Black Racial Systems on African Americans Today (Aug. 2011) (M.A. Thesis, University of British Columbia) (on file with University of British Columbia Library); Elizabeth Cady Stanton et al., Declaration of Sentiments and Resolutions para. 1 (1848).

186. U.S. Const. amend. XXIV.

187. William M. Brewer, *The Poll Tax and Poll Taxers*, 29 J. Negro Hist. 260, 283 (1944).

188. *See* Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 478; 42 U.S.C. § 2000e-3(a) (1972); 29 U.S.C. § 215(a)(3) (1950); 29 U.S.C. § 158(a)(4) (1947).

189. 29 U.S.C. § 157 (1947); Eastex, Inc. v. N.L.R.B., 437 U.S. 556, 564 (1978).

190. *See* Rosenstone, *supra* note 84, at 42.

protect them. This vision has its roots neither in the modern conception of work law nor in the founding-era conception of liberty. It is instead founded in concepts first popularized during the *Lochner* era and subsequently disavowed by both the courts and Congress. This pivot threatens not only the current American economy, but also the preservation of the very negative liberties that the Court so prizes. The Court has already struck down several state labor law protections for positive liberty and stripped federal statutes of protections essential to their effective implementation. It shows no signs of stopping and may eventually strike these federal statutes down as well. These decisions will have dire consequences. The positive liberties those federal statutes protect were recognized both at the time of the founding and during the New Deal as bulwarks against tyranny and economic deprivation. Without those positive liberties both the founders and Congress recognized that governmental legitimacy was at risk and that revolution was not only likely but potentially justified. A corrected reading of the constitutional concept of liberty would account for the necessary balance between negative and positive liberties that gives citizens the opportunity to vindicate their negative liberties when faced with what they view as tyrannical overreach. The Court needs to seriously consider this balance as it continues to take cases that concern the future of these liberties.