ORIGINALISM, SOCIAL CONTRACT, AND LABOR RIGHTS: WHAT THE REAWAKENING OF NATURAL LAW MEANS FOR EXCLUSIVE UNION REPRESENTATION

ALEXANDER T. MACDONALD*

ABSTRACT

In a recently released book, *Mere Natural Law*, Amherst College Professor Hadley Arkes examines the relationship between originalism and natural law. He argues that, while the two were once seen as antonyms, they are in fact linked. The founding generation was steeped in natural law and social-contract philosophy. They wrote the Constitution with those concepts in mind, and they expected their handiwork to be interpreted and applied accordingly. Originalism, in turn, requires us to take those understandings seriously. If the Constitution was originally understood to operate against a backdrop of natural law, then it must still operate against that backdrop today.

That argument might once have made Arkes an outlier. But today, there is a growing consensus that the Constitution incorporates unwritten norms embedded in the Western legal tradition. Those norms include natural law and the common law, which itself drew on natural-rights and social-contract philosophy. Even strict originalist and textualist scholars have gravitated toward this view. They agree that the Constitution, as it was originally understood and as it exists today, imported some basic tenets of natural law.

That conclusion has profound implications for many substantive fields of law, none more so than labor law. Among the rights most closely guarded by natural law was the right to work. That right was seen as a type of property right—in fact, it was the most fundamental property right. It was the source of all property, and thus all other rights. It was also closely linked to the common law's hostility toward monopoly power. Government-bestowed monopolies were seen as antithetical to the right to work because they excluded people from their chosen professions. They were disfavored and often declared invalid as against natural right and reason.

Yet modern labor law is built around just such a monopoly. Today, section 9(a) of the National Labor Relations Act gives a union the exclusive right to represent employees within a bargaining unit. It has also been

* Alex MacDonald is a shareholder in the Washington, D.C. office of Littler Mendelson. He is a core member of the firm's Workplace Policy Institute. His practice focuses on the intersection of workplace law and public law, including in administrative, regulatory, and constitutional contexts. He is a 2012 graduate of the William & Mary School of Law.

interpreted to deny individual employees the right to bargain for themselves. That interpretation effectively turns modern unions into government-backed monopolies. It allows unions to control all bargaining within a defined labor market and to exclude all competitors. And in that way, it interferes with the employees' right to pursue their chosen calling on their own terms.

That result, however, is not inevitable. Courts once interpreted section 9(a) to allow individual employees to bargain for themselves. And the basis for that interpretation is still in the statutory text. Should courts revive natural-law principles, which seems increasingly likely, they could return to that approach. They could revert to the earlier meaning of the statute—a meaning that would better respect the natural right to work. The statute need not be amended, revised, or struck down. It could simply be refurbished and made more consistent with fundamental background norms.

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I. INTRODUCTION

Mere Natural Law feels like a culmination. The 2023 book by Amherst College Professor Hadley Arkes argues that constitutional law includes more than just the Constitution's literal words.[1] Properly understood, it also includes unwritten norms of justice, logic, and "common sense."[2] These norms predate the Constitution's text and are essential to its interpretation.[3] More important, they are just as enforceable as anything in the document's explicit provisions.[4] They are, quite literally, the law.[5]

Arkes isn't alone in that view. In recent years, scholars have increasingly recognized that the Constitution was drafted against a backdrop of traditional and customary law, often called "natural law."[6] Natural law, in short, was the

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1. HADLEY ARKES, MERE NATURAL LAW: ORIGINALISM AND THE ANCHORING TRUTHS OF THE CONSTITUTION 2-3, 11-18 (2023).

2. *Id.* at 18-19.

3. *See id.* at 2-4, 6 (ascribing natural-law ideas to founders like Jefferson and James Wilson), 18-19 (arguing that natural law informed the founders and was embedded in the Constitution's original meaning).

4. *Id.* at 59-60, 265 (arguing in favor of judicial enforcement of natural law).

5. *See id.*

6. *See, e.g.*, *id.* at 95 (arguing that framers designed the Constitution to protect natural rights); ANTHONY B. SANDERS, BABY NINTH AMENDMENTS: HOW AMERICANS EMBRACED UNENUMERATED RIGHTS AND WHY IT MATTERS 115-16 (2023) (arguing that Lockean natural-rights theory influenced the founders and drafting of the Constitution); STUART BANNER, THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED 73 (2021) (explaining that the Bill of Rights in the new American Constitution was understood to recognize preexisting natural rights rather than create new ones); JOSEPH W. KOTERSKI, GALE RESEARCHER GUIDE FOR: NATURAL LAW THEORY IN ST. THOMAS AQUINAS 4 (2018) (finding "echoes of natural law tradition within American political thought"); R.H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 142 (2015) (explaining that the Constitution was often described as being "declarative of natural law"); KURT T. LASH, THE LOST HISTORY OF THE NINTH AMENDMENT 177 (2009) ("Scholars have been right,

law inherent in human nature.[7] It was a basic assumption of the founding generation; the founders took it for granted and wrote the Constitution with it in mind.[8] It is therefore essential to understanding the Constitution's original meaning.[9] And thanks to originalism, original meaning matters to modern law.[10] So even textualist scholars—who tend also to be originalists—have started asking what a revival of natural law would mean for contemporary doctrine.[11]

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then, to insist that the Ninth Amendment as originally understood protected individual natural rights."); DANIEL A. FARBER, RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE 6-9 (2007) (arguing that the framers incorporated Lockean theory of natural law through the Ninth Amendment); EDWARD KEYNES, LIBERTY, PROPERTY, AND PRIVACY: TOWARD A JURISPRUDENCE OF SUBSTANTIVE DUE PROCESS xi (1996) (arguing that the framers drew on natural-law theory, as well as on social-contract theory and the Anglo-American common-law tradition).

7. *See, e.g.*, *On the Laws (De Legibus)*, NATURAL LAW, NATURAL RIGHTS, AND AMERICAN CONSTITUTIONALISM (quoting MARCUS TULLIUS CICERO, ON THE LAWS 1.18 (David Fott, trans., 2014)), https://www nlnrac.org/classical/cicero/documents/de-legibus [https://perma.cc/QP85-KL9J] (describing law as the "highest reason, implanted in nature, which orders those things that ought to be done and prohibits the opposite"); CAROLINE WINTERER, THE CULTURE OF CLASSICISM: ANCIENT GREECE AND ROME IN AMERICAN INTELLECTUAL LIFE: 1780-1910 4-5, 17, 25 (2002) (observing that Americans in the antebellum period turned to Roman thinkers like Cicero for political and legal philosophy, including "general principles of Universal Law"); CHRISTOPHER G. TIEDMAN, UNWRITTEN CONSTITUTION OF THE UNITED STATES 67 (1890) ("Perhaps no product of the Roman law has exerted so potent an influence upon the development of modern jurisprudence as the Roman doctrine of [natural law].").

8. *See, e.g.*, ARKES, *supra* note 1, at 18 (arguing that natural law was so well established and its principles so well known that founding-era thinkers like "James Wilson and Oliver Ellsworth regarded it as an embarrassment that they should be written down"); JAMES W. ELY, JR., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY 55 (2016) [hereinafter THE CONTRACT CLAUSE] (explaining that "both federal and state courts cited fundamental natural rights as a basis for constitutional decisions, especially to safeguard the rights of property owners"). *Cf.* Fletcher v. Peck, 10 U.S. 87, 143 (1810) (Johnson, J., concurring) (relying explicitly on natural law to declare state law revoking prior grant of property invalid) ("I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity."); JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 135 (1690), Project Gutenberg (updated Dec. 25, 2021) (arguing that natural law—the law existing in a state of nature—remains in effect after people form civil societies).

9. *See* Brian T. Fitzpatrick, *Originalism and Natural Law*, 79 FORDHAM L. REV. 1541, 1541 (2011) ("At the time of the founding, both private and public law were understood to embody natural law and judges were expected to consult it in the cases before them."). *See also* Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 467 (1909) (conceding that framers relied on natural law even as he criticized it as a method for interpreting modern legislation) ("Not only, however, is natural law the fundamental assumption of our elementary books and of professional philosophy, but we must not forget that it is the theory of our bills of rights.").

10. *See, e.g.*, ANTONIN SCALIA ET AL., A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997) [hereinafter A MATTER OF INTERPRETATION] (arguing that constitutional text should be interpreted in the way it was originally understood); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351, 2392-95 (2015) (arguing that originalism entails an inquiry into the text's meaning at the time it was adopted and that judges have a continuing duty to enforce that meaning).

11. *See, e.g.*, ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION 164-67 (2022) (examining modern First Amendment doctrine through the lens of "common-good constitutionalism," a theory borrowing heavily from natural-law philosophy); Devin Watkins, *Defending Substantive Due Process on Originalist Grounds*, FEDSOC

While these scholars have identified several areas ripe for reassessment, they've homed in on labor law. In particular, they've written extensively about the "right to work."[12] They've shown that this right was deeply woven through the natural-law tradition.[13] Its roots stretched as far back as the English common law of the sixteenth and seventeenth centuries—perhaps even earlier.[14] It was closely associated with concepts like freedom of trade,

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BLOG (Jan. 22, 2019), https://fedsoc.org/commentary/fedsoc-blog/defending-substantive-due-process-on-originalist-grounds [https://perma.cc/3R8K-9K4Q] (arguing that originalist methods implicate greater protections for economic rights) ("There are certain liberty rights, including economic liberty rights, such as the right to earn a living in a lawful profession, which cannot be taken away except through a court of law."). *See also* Alexander T. MacDonald, *Collective Constitutionalism: Common-Good Theory and Community Rights at the Intersection of Labor Law and the First Amendment*, 51 CAP. U. L. REV. 318 (2023) (examining how a common-good approach would affect modern labor law).

12. *See generally* TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW (2010). *See also* Golden Glow Tanning Salon, Inc. v. City of Columbus, 52 F.4th 974, 982 (5th Cir. 2022) (Ho, J., concurring) (citing scholarship saying the right to earn a living enjoys a better historical pedigree than many unwritten rights enforced by modern courts).

13. *See, e.g.*, TIEDMAN, *supra* note 7, at 79-81 (locating the right to pursue a trade in natural law, as developed from Roman and English common law, and arguing that the Constitution provides a basis for striking down legislation interfering with that right); *cf.* ARKES, *supra* note 1, at 52-54 (arguing that the Supreme Court correctly struck down a minimum wage law for women in *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) because it irrationally denied some women a right to work without any offsetting benefit); THOMAS M. COOLEY, TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 277 (1880) (describing the "right to follow all lawful employments" as a "important part of civil liberty"); JAMES W. ELY JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 132 (3d ed., 2008) [hereinafter HISTORY OF PROPERTY RIGHTS] (describing the "right to pursue lawful callings" as a "central tenet of late-nineteenth-century jurisprudence"); ALAN RYAN, PROPERTY AND POLITICAL THEORY 1 (1984) [hereinafter PROPERTY & POLITICAL THEORY] ("[T]he 'naturalness' of labour as the moral title to what is created by that labour has been a commonplace of political and economic radicalism for three hundred years . . . .").

14. *See, e.g.*, SANDEFUR, *supra* note 12, at 2 ("As a legal matter, the right to earn an honest living can be traced far back in the English common law."); *Golden Glow Tanning*, 52 F.4th at 982 (Ho, J., concurring) ("For over a century before our Founding, English courts protected the right to pursue one's occupation against arbitrary government restraint."); *cf.* THE CONTRACT CLAUSE, *supra* note 8, at 55 ("Americans of the founding generation tended to conflate natural law with the traditional 'rights of Englishmen' and common-law guarantees."); Robert N. Wilkin, *Cicero and the Law of Nature*, *in* ORIGINS OF THE NATURAL LAW TRADITION 1-2 (Arthur L. Harding ed., 1954) (tracing natural-law theory to Greek philosophy and Roman legal thought, in particular the writings of Cicero); DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT 12-15 (2011) (tracing doctrine of natural contract rights to seventeenth-century Whig philosophers and even Roman writers such as Cato the Younger); BANNER, *supra* note 6, at 169 (tracing natural-law philosophy to Greek and Roman law); DAVID CHAN SMITH, SIR EDWARD COKE AND THE REFORMATION OF THE LAWS 5 (2014) (describing reliance of common-law lawyers and courts on "ancient constitutionalism," including natural rights of English subjects); CHARLES FREEMAN, THE REOPENING OF THE WESTERN MIND 23-24 (2023) (explaining that references to natural law appeared as early as Antigone's *Sophocles* in 441 B.C. and resonated throughout the history of western thought).

liberty of contract, and hostility toward monopolies.[15] And for generations, it enjoyed widespread support on both sides of the Atlantic.[16]

And yet, the right to work has left almost no trace on modern labor law. That's in part because labor law operates under different assumptions.[17] Whereas natural law emphasizes individual freedom,[18] labor law emphasizes collective power.[19] Labor law assumes that workers are better off when they present a united front.[20] So, it pools them together and assigns their bargaining rights to a single representative—an approach called "exclusive

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15. *See, e.g.*, MICHAEL J. TREBILCOCK, THE COMMON LAW OF RESTRAINT OF TRADE 1-3 (1986) (explaining that common-law doctrine of trade restraints originated as an effort to protect the right to use one's own labor); MAYER, *supra* note 14, at 70 (explaining that courts saw the right to pursue a lawful trade as one aspect of freedom of contract); THE CONTRACT CLAUSE, *supra* note 8, at 4 (explaining that courts enforced limits on monopolies through contract doctrine, as reflected in *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837)); Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J. L. & PUB. POL'Y 983, 989-1042 (2013) (describing shared historical roots of common-law's anti-monopoly doctrine and the right to pursue a lawful trade).

16. *See, e.g.*, Gillespie v. People, 58 N.E. 1007, 1008 (Ill. 1900) (finding that rights protected by due process "embrace all our liberties, personal, civil, and political, including the rights to labor, to contract, to terminate contracts, and to acquire property"); Ritchie v. People, 40 N.E. 454, 459 (Ill. 1895) (recognizing a fundamental right to contract for the terms of labor and declaring that a legislature may not use its power to "invade" that right); *In re* Jacobs, 98 N.Y. 98, 105 (1885) (holding that legislature could not arbitrarily ban certain types of business because such a ban would interfere with property rights, including the right to pursue a "lawful trade"); M.R. Denning et al., *Edwards v. Soc'y of Graphical & Allied Trades*, 9 MANAGERIAL L. 1, 7 (1970) (refusing to enforce union rule requiring payment of dues as condition of employment) ("The reason lies in the man's right to work."); The Case of the Tailors of Ipswich (1614) 77 Eng. Rep. 1218, 1219-20 (declaring rules of the tailors' guild unenforceable because they interfered with the right to work). *See also* SANDEFUR, *supra* note 12, at 18-23 (connecting origins of the right to work in the United States with seventeenth century English common law and hostility to monopolies, which were seen to interfere with a person's ability to pursue her chosen calling).

17. *See* TREBILCOCK, *supra* note 15, at 30 (distinguishing modern labor law from common-law treatment of unions and explaining that modern view emphasizes potential negative externalities from voluntary private agreements). *See also* JOHN V. ORTH, COMBINATION AND CONSPIRACY: A LEGAL HISTORY OF TRADE UNIONISM, 1721-1906, at vii-viii (1991) [hereinafter HISTORY OF TRADE UNIONISM] (explaining that close regulation of labor relations is a modern phenomenon; for much of history, it was a matter of individual contract under laissez faire principles).

18. *See, e.g.*, Calder v. Bull, 3 U.S. 386, 388 (1798) (arguing there are natural limits on a legislature's power over the individual citizen implicit in the "first principles of the social compact"), LOCKE, *supra* note 8, § 14 ("[F]or truth and keeping of faith belong to men as men, and not as members of society."). *See also* HISTORY OF PROPERTY RIGHTS, *supra* note 13, at 63 (examining natural-law philosophy behind *Calder* opinion).

19. *See* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967) ("National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions.").

20. *See* 29 U.S.C. § 151 (declaring a federal policy of promoting collective bargaining to address an "inequality of bargaining power" between employees and employers); Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 62 (1975) ("Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority." (footnote omitted)). *Cf.* TREBILCOCK, *supra* note 15, at 34 (observing that modern labor law rejects natural-rights ideology and reflects instead a "welfarist conception of justice").

representation."[21] Workers cannot opt out of representation; they cannot choose to bargain for themselves.[22] They have no individual right to negotiate their own terms.[23] Instead, they have only a right to equal representation within the group.[24]

Whatever the merits of that approach as a matter of policy, it would have been foreign to natural law.[25] Natural-law philosophers saw labor rights as fundamental—so fundamental, in fact, that they were the fount of all other rights.[26] Labor rights were tied up in property rights generally; and those rights included one's property in oneself.[27] Property rights protected people from all sorts of arbitrary invasions and so were an essential check on tyranny.[28] As a result, natural-law philosophers would never have countenanced a system that stripped away bargaining rights entirely.[29] They

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21. *See* 29 U.S.C. § 159(a).

22. *See* 29 U.S.C. § 158(a)(5), (d); J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944) (holding that direct bargaining between employers and employees in workplace with certified bargaining representative violates the National Labor Relations Act). *See also* DEREK C. BOK & JOHN T. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 99 (1970) (observing that exclusivity blocks individual employees from negotiating separate agreements even when they think they could get a better deal alone).

23. *See* Vaca v. Sipes, 386 U.S. 171, 182 (1967) ("The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee."); *Emporium Capwell*, 420 U.S. at 62 (recognizing that collective bargaining subordinates individual interests to collective ones); *J.I. Case*, 321 U.S. at 338 (reasoning that labor law must bar individual bargaining because individual deals would undermine employee solidarity and the union's legitimacy); *Allis-Chalmers Mfg.*, 388 U.S. at 180 (stating that national labor policy "extinguishes the individual employee's power to order his own relations with his employer").

24. *See Vaca*, 386 U.S. at 177 (explaining that union owes a "duty of fair representation" to members, which translates to equal, nonarbitrary treatment).

25. *Cf.* TREBILCOCK, *supra* note 15, at 30-31 (explaining that modern approach to labor agreements resulted in part from criticism and subsequent rejection of natural-rights philosophy).

26. *See* Golden Glow Tanning Salon, Inc. v. City of Columbus, 52 F.4th 974, 981-82 (5th Cir. 2022) (Ho, J., concurring) (observing that right to earn a living has strong historical pedigree dating back to English common law). *See also supra* note 14.

27. *See, e.g.*, State v. Julow, 31 S.W. 781, 782 (Mo. 1895) ("The right to use, buy, and sell property, and contract in respect thereto, including contracts for labor, which is, as we have seen, property, is protected by the constitution." (quoting State v. Goodwill, 10 S.E. 285, 287 (W. Va. 1889), *overruled by* White v. Raleigh Wyo. Mining Co., 168 S.E. 798, 799 (W. Va. 1933))); Gillespie v. People, 58 N.E. 1007, 1008 (Ill. 1900) (reaching the same conclusion); State v. Kreutzberg, 90 N.W. 1098, 1100 (Wis. 1902) (reaching the same conclusion).

28. *See* MAYER, *supra* note 14, at 21 (explaining that state courts from 1790 to 1850 regularly incorporated principles from English common law to restrain arbitrary invasions of personal rights, including property rights). *See also* Adair v. United States, 208 U.S. 161, 173 (1908) (concluding that the Fourteenth Amendment protected a fundamental right to bargain over the terms of employment by both employees and employers), *overruled by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941).

29. *See Gillespie*, 58 N.E. at 1008 (concluding that right to contract to buy and sell labor protected by due process against arbitrary restraints); *Kreutzberg*, 90 N.W. at 1100 ("A man's right . . . to determine when or where or with whom he will work, is a right in precisely of the same nature, and entitled to the same protection as a man's right to trade or work . . . ." (quoting Allen v. Flood [1898] 1 AC 181 (Eng.))).

would have recoiled from such a system—especially one that assigned bargaining rights to what is in effect a government-created monopoly.[30]

As it seems increasingly likely that some version of natural rights will reenter our law,[31] we should start to reexamine this system now. Fortunately, there are paths available. Exclusive representation is not an inevitable feature of labor law; it stems from a judicial gloss on the National Labor Relations Act ("NLRA").[32] Courts could change that gloss. Recognizing that exclusivity burdens natural rights, courts could reinterpret the NLRA to allow workers to bargain for themselves.[33] The words they need are already in the statute.[34] They would only have to reevaluate the statute with an eye toward respecting natural labor rights.[35]

That approach has always been available. In fact, it's how courts once read the NLRA. They once allowed employees to bargain for themselves, in part because any other approach would have raised serious constitutional questions.[36] They could do so again, and they need not discard anything

30. *See infra* notes 117-58 (tracking common-law reaction to labor and monopolies). *See also, e.g.*, *Golden Glow Tanning*, 52 F.4th at 982 (Ho, J., concurring) (explaining that right to earn a living emerged out of common-law hostility to monopolies); HERBERT HOVENKAMP, THE OPENING OF AMERICAN LAW 244 (2014) [hereinafter OPENING OF AMERICAN LAW] (explaining that nineteenth century American theorists saw emerging labor unions as a form of monopoly and tried to combat them with "substantive due process" doctrine).

31. Ian Ward, *Critics Call it Theocratic and Authoritarian. Young Conservatives Call it an Exciting New Legal Theory*, POLITICO MAG. (Dec. 12, 2022, 11:12 AM) https://www.politico.com/news/magazine/2022/12/09/revolutionary-conservative-legal-philosophy-courts-00069201 [https://perma.cc/8829-2SYH] (reporting that theories such as "common good" constitutionalism, which draw heavily on natural law, have drawn increasing interest from liberal and conservative scholars, judges, and lawyers). *Cf.* BANNER, *supra* note 6, at 8 (noting that even while natural-law concepts have fallen out of legal doctrine they remain implicit in much of our jurisprudence and their explicit reintroduction would change little of substance).

32. *See* J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944) (inferring a ban on individual bargaining from the concept of "exclusive" representation). *See also* James E. Bond, *The National Labor Relations Act and the Forgotten First Amendment*, 28 S.C. L. REV. 421, 447 (1977) (criticizing *J.I. Case* for ignoring earlier interpretations that allowed individual bargaining and for minimizing the doctrine's effect on individual liberty).

33. *See, e.g.*, HELMHOLZ, *supra* note 6, at 40 (explaining that courts often used natural-law principles not to strike down statutes, but to guide statutory interpretation); BANNER, *supra* note 6, at 72 (same).

34. *See* 29 U.S.C § 159(a) (allowing workers to present their own "grievances" and have those grievances "adjusted" without interference by the "exclusive" representative). *See also infra* Section IV.

35. *Cf., e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 577-78, 580 (1988) (interpreting NLRA ban on secondary picketing not to cover hand-billing to avoid conflict with First Amendment); NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 506-07 (1979) (interpreting NLRA not to apply to schools run by Catholic diocese under the assumption that Congress surely would not have intended to violate constitutional rights). *See also infra* Section IV.

36. *See* Precision Castings Co. v. Boland, 13 F. Supp. 877, 884-85 (W.D.N.Y. 1936) (refusing to infer ban on individual bargaining because such a ban would have raised, in the court's mind, serious constitutional doubts). *See also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44-45 (1937) (rejecting a due-process challenge to NLRA in part because the exclusivity principle barred the employer only from contracting with another representative; it did not prevent the employer

important in the process. They could respect collective bargaining *and* natural labor rights.[37] Even better, they could foster a more equitable, coherent, and voluntary system—a system that accommodates both contemporary needs and the natural right to work.

II. NATURAL LAW AND THE FRAMERS: MERE ORIGINALISM?

The argument for natural law isn't new.[38] Natural law was once as familiar to American lawyers as due process, free speech, and the billable hour. It was, in effect, the law inherent in human nature.[39] It applied to all people at all times.[40] It was unwritten, but could be discovered through reason and careful study of human society.[41] It depended not on some official authority or institution, but its own moral and logical force.[42] It applied

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from negotiating "'such individual contracts' as the company might 'elect to make directly with employees'" (quoting Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 549 (1937))).

37. *See* Tom Campbell, *Exclusive Representation in Public and Private Labor Law After* Janus, 70 SYRACUSE L. REV. 731, 733 (2020) (arguing end of exclusivity as practiced today would result in a voluntary system that "might prove beneficial to a restoration of health for unions in the private sector, where membership has been steadily declining").

38. *See, e.g.*, FREEMAN, *supra* note 14, at 23-24, 198-99, 644 (tracing a line of natural-law philosophy from the Greek Stoics to Roman thinkers such as Cicero, medieval philosophers such as Thomas Aquinas, and early modern writers such as John Locke); BANNER, *supra* note 6, at 47-55 (describing prevalence of natural-law concepts in common law imported into the colonies and ultimately received into American law); JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 3 (2003) [hereinafter HISTORY OF DUE PROCESS] ("Natural law, in one sense or another, has guided judges since the Middle Ages.").

39. *See, e.g.*, KOTERSKI, *supra* note 6, at 4 ("Natural law is the moral code that can be discovered by reason through a careful examination of human nature."); *On the Laws*, *supra* note 7 (describing law as "the highest reason, implanted in nature" (quoting MARCUS TULLIUS CICERO, ON THE LAWS 1.18 (David Fott, trans., 2014))); CICERO, DE OFFICIIS 3.23 (Walter Miller, trans., 1913), https://topostext.org/work/616 [https://perma.cc/X9PX-Z5QW] (describing law as "reason which is in nature, which is the law of gods and men"). *Cf.* ALAN RYAN, ON POLITICS 137, 490, 578, 585 (2022) [hereinafter ON POLITICS] (exploring how Cicero's thinking on natural law influenced later politicians and philosophers, including John Locke and Thomas Jefferson); SMITH, *supra* note 14, at 151, 154 (examining Cicero's influence on Edward Coke, who agreed that law was reason "fixed in nature").

40. ARKES, *supra* note 1, at 27; HARDING, *supra* note 14, at 2 (describing natural law as the "principles of individual and social life which are not arbitrary, local, or temporal, but rational, universal, and eternal"); FARBER, *supra* note 6, at 6 (explaining that founders saw natural rights as "the birthright of all humans everywhere"); HELMHOLZ, *supra* note 6, at 7-8 (explaining that natural law did not change over time; it merely changed in application to evolving circumstances). *See also* Day v. Savadge (1614) 80 Eng. Rep. 235, 237 (stating that the laws of nature are unchangeable ("immutabilia")).

41. *See* THOMAS AQUINAS, THE SUMMA THEOLOGIAE OF SAINT THOMAS AQUINAS art. 1, q. 94 (CreateSpace Indep. Pub. Latin-English ed., 2009) (explaining that "the natural law is something appointed by reason, just as a proposition is a work of reason"). *See also* ARKES, *supra* note 1, at 43 (citing Aquinas); BANNER, *supra* note 6, at 58 (explaining that common-law lawyers saw both common law and natural law as grounded in reason); SMITH, *supra* note 14, at 143 (explaining that seventeenth-century common-law jurists such as Edward Coke saw reason as the "very essence" of law).

42. *See* AQUINAS, *supra* note 41, art. 1 q. 94; DE OFFICIIS, *supra* note 39, at 3.5.

necessarily because it was by definition true.[43] If it wasn't true in every case, it wasn't natural law.[44]

That may all sound hopelessly abstract. But in *Mere Natural Law*, Arkes makes it concrete with homely examples. Early in the book, he describes a boy on his way home from school.[45] The boy is accosted and beaten up by his classmates.[46] The classmates are stronger than he is; there is nothing he can do to stop them.[47] Yet he—and we—feel that the classmates are wrong.[48] We understand implicitly that the classmates are not justified simply because they are bigger, more numerous, or throw better punches.[49] We know that might does not make right.[50] And by that principle, we know that a government is not right simply because it has the power to enforce its commands.[51] It needs something other than power to make its commands legitimate.[52] Power alone is not its own justification.[53]

From there, Arkes launches into a critique of modern interpretive methods. He describes himself as an originalist.[54] Yet even modern originalism, he says, has been reduced a kind of arid positivism.[55] Contemporary judges, even originalist ones, reflexively elevate the law's written words over deeply held precepts.[56] And in doing so, they drag the law in starkly unoriginalist directions.[57] They strike down statutes the framers would have found benign while enforcing many the framers would have abhorred.[58] Worse, they claim to be doing nothing more than applying objective techniques to plain texts.[59] They deny making any value judgments; indeed, they say those kinds of judgments are beyond their scope.[60] In effect,

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43. ARKES, *supra* note 1, at 28, 41, 50 (explaining that test of natural law is whether it is necessarily true).

44. *Id.* (explaining that the "anchoring ground" of natural law is that its principles are true in every case; that's how we know what natural law is).

45. *Id.* at 33.

46. *Id.*

47. *Id.*

48. *See id.* (arguing the scenario upsets people because they have an inborn sense of justice).

49. *Id.* at 33-34.

50. *See id.* at 35.

51. *Id.*

52. *Id.*

53. *Id.* at 33.

54. *Id.* at 17 ("I must count myself, for the record, as an original originalist.").

55. *See id.* at 18-19, 36 (arguing law stripped of moral significance loses its meaning); *id.* at 265 (arguing that it is a mistake to treat the Constitution as a mere "artifact[] . . . of Positive Law").

56. *Id.* at 11-12.

57. *See id.* at 11-14, 76-77.

58. *See id.* at 11, 15-16.

59. *See id.* at 9, 11, 15-16.

60. *See id.* at 9, 160-63 (criticizing modern speech doctrine as moral "relativism").

they implicitly—and sometimes explicitly—discard the moral anchors that once made law coherent and legitimate.[61]

Those views might once have made Arkes an outlier. But today, they put him at the center of a budding consensus. Scholars increasingly agree that the Constitution should be understood against a backdrop of unwritten legal norms.[62] This consensus has grown to include even prominent originalists, such as William Baude,[63] Evan Bernick, and Randy Barnett.[64] These scholars are among the best known originalist thinkers of our day; they have unimpeachable originalist bona fides and are well respected within textualist circles.[65] Yet even they have converged on the idea that constitutional law embraces some kind of unwritten law.[66]

And increasingly, scholars are finding that unwritten law in the natural-law tradition.[67] For example, in a 2022 book, *The Decline of Natural Law*,

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61. *See id.* at 3, 6-7, 9.

62. *See, e.g.*, *id.* at 78-81 (arguing that natural law informed founders' thinking about and drafting of Constitution, and citing statements by, among others, William Blackstone, James Wilson, and Alexander Hamilton); ANDREW FORSYTH, COMMON LAW AND NATURAL LAW IN AMERICA xi (2019) ("Natural law, in short, undergirded the development of American jurisprudence."); HELMHOLZ, *supra* note 6, at 142 (explaining that the Constitution was often said to be "declarative of natural law" because it gave definite shape to natural-law principles); JAMES E. FLEMING, CONSTRUCTING BASIC LIBERTIES 159-62 (2022) (arguing that the Constitution does not enact a specific set of historical practices because it's unlike a traditional positive text and instead it creates instead a "moral" structure for governing ourselves). *See also* Pound, *supra* note 9, at 465 (describing late-nineteenth century jurisprudence of the U.S. Supreme Court) ("Constitutional law is full of natural law notions."); ON POLITICS, *supra* note 39, at 587-97 (arguing that natural-law philosophy formed part of the intellectual core behind the Declaration of Independence and the Constitution of 1787).

63. *See* William Baude, *2023 Scalia Lecture William Baude: Beyond Textualism?*, YOUTUBE (Feb. 28, 2023) [hereinafter *Beyond Textualism*], https://www.youtube.com/watch?v=RUseqPHoCII&t=2s [https://perma.cc/UW9P-SUVJ]. *See also* Rachel Reed, *Textualism is 'Missing Something,'* HARV. L. TODAY (March 1, 2023), https://hls harvard.edu/today/textualism-is-missing-something [https://perma.cc/39GC-USTG] (reporting on Baude's remarks).

64. *See* Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599, 1604 (2019) (arguing that recent scholarship shows that the "original meaning of the Fifth Amendment's Due Process of Law Clause protects natural and customary rights against legislative deprivations").

65. *See generally, e.g.*, Baude, *supra* note 10, at 2349 (arguing that "our current constitutional law is originalism"); Randy E. Barnett & Evan D. Bernick, *The Letter and The Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 1-2 (2018) (setting forth an originalist framework for constitutional "construction").

66. *See* Barnett & Bernick, *supra* note 64, at 1604 ("Even scholars who continue to defend something resembling the once-dominant originalist interpretation of substantive due process have made important modifications of that view."). *See also* Watkins, *supra* note 11 (arguing that originalist methods require courts to consider unwritten legal principles widely understood in founding generation); SANDERS, *supra* note 6, at 119 (arguing that Barnett's theory of a "presumption of liberty" supports the idea that the Ninth Amendment protects unenumerated, fundamental rights); Fitzpatrick, *supra* note 9, at 1541-42 (observing not only that the framers expected natural law to play a role in interpretation, but also that several constitutional clauses, including the Ninth Amendment, explicitly presuppose an existing body of natural rights).

67. *See, e.g.*, HEINRICH A. ROMMEN, THE NATURAL LAW 161 (1998) (asserting that it is a "historical fact" that natural law shaped the thinking of the founders); FORSYTH, *supra* note 62, at

UCLA professor Stuart Banner showed that founding-era lawyers treated natural law as commonplace, one with roots stretching back to the dawn of the Western legal tradition.[68] It was as obvious to them as textualism is to us.[69] Similarly, in 2015's *Natural Law in Court*, R.H. Helmholz showed how lawyers on both sides of the Atlantic made practical use of natural law.[70] Mixing it with common-law methods,[71] they deployed it in legal argumentation well into the nineteenth century.[72] Still, other scholars, such as Notre Dame's Vincent Phillip Muñoz, have shown that natural law informed the framers' views on specific constitutional issues, such as religious freedom.[73] The framers believed that people had certain unalienable rights—rights they did not surrender merely by forming a civil society.[74] Those rights stemmed not from any constitution, statute, or charter, but from the natural law.[75] And that view of natural law was widespread, foundational, and rarely questioned.[76] It seemed so obvious that it often went unsaid.[77]

But if natural law was so deeply embedded in the founding era, why is it so unfamiliar now? The answer lies in social and economic change.[78] In the

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3, 47-50 (tracing natural law's influence in America to the Puritans, who drew on religious beliefs, and Blackstone, who tied natural law to the common law).

68. *See* BANNER, *supra* note 6, at 19-22, 64-72.

69. *See id.* at 80-81 (describing natural law as uncontroversial and generally accepted in founding generation).

70. HELMHOLZ, *supra* note 6.

71. *See* KEYNES, *supra* note 6, at 26 (explaining that the natural-law and common-law traditions were often seen as complementary rather than conflicting; both helped judges define proper limits of legislation); FORSYTH, *supra* note 62, at xi, 146 (arguing common-law and natural-law methods were "intertwined").

72. *See* HELMHOLZ, *supra* note 6, at 125, 170.

73. VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING 6, 9 (2022) (arguing that the framers saw religious liberty as an "inalienable natural right").

74. *Id.* at 48-49. *See also* LOCKE, *supra* note 8, § 135 (making the same point).

75. MUÑOZ, *supra* note 73, at 31.

76. *See, e.g.*, ARKES, *supra* note 1, at 18 ("The Founders took for granted those anchoring axioms of the Natural Law as the moral ground for the Constitution they were seeking to put in place."). *See also* THE FEDERALIST NO. 81 (Alexander Hamilton) (arguing that the people gave up no preexisting rights when they entered Constitution, thus implying that they possessed some preexisting unwritten rights); BANNER, *supra* note 6, at 80-81 (describing framers' widely shared belief in natural rights). *Cf.* SMITH, *supra* note 14, at 252 (explaining that common-law jurists of seventeenth century shared similar view: the relationship between government and subject began "primordially outside society in the law of nature," which was "encoded" in structure of law and government); CARL J. RICHARD, GREEKS AND ROMANS BEARING GIFTS: HOW THE ANCIENTS INSPIRED THE FOUNDING FATHERS 10, 17-20 (2008) (describing influence on the founders of classical thinkers like Cicero, sometimes seen as the popularizer of natural-law philosophy).

77. ARKES, *supra* note 1, at 60-61 (conceding that the founders wrote little about natural law but arguing their very silence shows they took natural law for granted); KEYNES, *supra* note 6, at 26 (explaining the framers relied heavily on natural-law theory, as well as common-law tradition).

78. *See* KEYNES, *supra* note 6, at 212 (tracing new limits on economic liberties to economic boom and social upheaval following the Civil War); BANNER, *supra* note 6, at 143 (noting that American lawyers started to doubt natural law only in the late nineteenth century).

late nineteenth century, industrialization swept the economy.[79] New technologies, new markets, and new methods of production transformed the relationship between industry, labor, and the state.[80] Governments reacted by intervening more directly in markets and passing ever more complex regulatory codes.[81] As codes proliferated, legal minds changed.[82] "Realist" thinkers like Roscoe Pound and Oliver Wendel Holmes began to reject natural-law precepts.[83] They argued that the law was not some abstract moral principle or "brooding omnipresence."[84] It was a discernible political fact.[85] It was produced by public will and reified through political processes: it was

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79. *See* THE CONTRACT CLAUSE, *supra* note 8, at 147 (describing "sweeping" changes in late nineteenth century, including industrialization and urbanization); HISTORY OF PROPERTY RIGHTS, *supra* note 13, at 8 (explaining that by "late nineteenth century, urbanization and industrialization had transformed American society, creating novel pressures" aimed at private property).

80. *See* THE CONTRACT CLAUSE, *supra* note 8, at 147 (describing increased regulatory intervention in late nineteenth and early twentieth centuries); HISTORY OF PROPERTY RIGHTS, *supra* note 13, at 8 (same); OPENING OF AMERICAN LAW, *supra* note 30, at 277 (same); SANDEFUR, *supra* note 12, at 13 (making similar observations about changing economic and regulatory climate in late eighteenth century).

81. *See* THE CONTRACT CLAUSE, *supra* note 8, at 147 (observing that states reacted to economic change by intervening more aggressively in markets with new regulation and legislation); KEYNES, *supra* note 6, at 122-23 (noting proliferation in late nineteenth century of economic regulation, including wage laws and antitrust laws); SANDEFUR, *supra* note 12, at 13 (Late-nineteenth century regulation went further than anything that came before. "Government's primary role was now viewed as *the shaping of society* rather than the protection of individual rights . . . .").

82. MAYER, *supra* note 14, at 120-21 (describing rise of realist and positivist critiques arising in late-nineteenth and early-twentieth centuries). *Cf.* WINTERER, *supra* note 7, at 107-08 (describing similar intellectual trends in other fields, such as economics and the natural sciences, which reinforced one another).

83. *See* Pound, *supra* note 9, at 487 (criticizing Supreme Court's "liberty of contract" jurisprudence, based in natural-law precepts, as out of step with modern legal thought and "artificial in their reasoning"); Oliver Wendell Holmes, *The Path of the Law*, *in* THE ESSENTIAL HOLMES 169-72 (Richard Posner ed., 1992) [hereinafter *Path of the Law*] (arguing that law is not history or tradition, but rather what judges decide in court). *See also* ARKES, *supra* note 1, at 30 (crediting Holmes with leading the movement to deny the connection between human nature and law); BANNER, *supra* note 6, at 170-74 (crediting Pound and Holmes with spurring intellectual movement that ultimately rejected natural-law philosophy); SANDEFUR, *supra* note 12, at xiv (crediting Pound and the realist movement with purging the law of moral connotations and thus stripping out natural law and obscuring the right to work).

84. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified . . . .") *superseded by statute*, Longshoreman's and Harbor Workers' Compensation Act of 1927, Pub. L. No. 98-426, 44 Stat. 1424, *as recognized in* Dir., Off. of Workers' Comp. Programs, U.S. Dep't of Lab. v. Perini N. River Assocs., 459 U.S. 297, 306 (1983). *See also* SANDEFUR, *supra* note 12, at 47 (describing Progressive-era rejection of natural law in favor of positivist notions).

85. *See Jensen*, 244 U.S. at 222 (Holmes, J., dissenting); *Path of the Law*, *supra* note 83, at 169-72; Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 43 (1918) [hereinafter *Natural Law*] (arguing that there is no "cosmic truth" in the law; truth is a matter of consensus).

whatever the legitimate authorities said it was.[86] It needed no justification other than its power to command.[87] Might, in other words, did make right.[88]

This "positivist" view dominated American legal thought for the better part of a century.[89] But in recent years, it has been complicated by originalism.[90] Originalism requires us to ask what a text meant when it was enacted.[91] That question embraces not only the text's literal words, but also the relevant social and linguistic context.[92] And as Banner, Arkes, and others have shown, the relevant context included natural law.[93] Natural law was bound up in the founders' ideas about government.[94] It animated much of their thinking about structure, limited powers, and individual rights.[95] It was, in effect, their baseline for thinking about the law.[96]

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86. *See Path of the Law*, *supra* note 83, at 169-72. *See also* FORSYTH, *supra* note 62, at 126 (describing Holmes's approach as a "prediction theory of law"—lawyers predicted based on experience what judges would do in any given case).

87. *See Jensen*, 244 U.S. at 222 (Holmes, J., dissenting); *Path of the Law*, *supra* note 83, at 169-72; *Natural Law*, *supra* note 85, at 41-42.

88. *See* SANDEFUR, *supra* note 12, at 12-14 (describing change in legal thought wrought by new regulation, Progressive politics, and the positivist legal movement) ("Having rejected the idea of natural rights, the Progressives held that the freedom to engage in a trade was really just a permission, which could be invoked when the government saw fit."). *See also* ARKES, *supra* note 1, at 212-13 (describing debate between positivism and natural-law methods as one over whether law is binding because it is moral or because the majority can overpower the minority); *Natural Law*, *supra* note 85, at 41-42 (arguing that legal rights are merely principles with the threat of public force behind them).

89. *See* FORSYTH, *supra* note 62, at xii, 126 (crediting Holmes and other positivists with killing off natural law theory in American jurisprudence); BANNER, *supra* note 6, at 180 (explaining that natural law has lost currency since the early twentieth century as a legal philosophy and has instead been treated as a matter of personal conscience). *Cf.* HISTORY OF PROPERTY RIGHTS, *supra* note 13, at 141 (describing the Supreme Court's retreat from enforcing unwritten rights under "substantive due process" doctrine after 1937).

90. *See* Watkins, *supra* note 11 (arguing that original understanding of the Constitution included greater protection for economic rights than courts have afforded those rights in twentieth and twenty-first centuries).

91. *See* A MATTER OF INTERPRETATION, *supra* note 10, at 38 (arguing that original meaning, rather than current meaning, of a text should control).

92. *See* Watkins, *supra* note 11 (arguing that original understanding takes into account historical principles as articulated in English common law).

93. *See, e.g.*, ARKES, *supra* note 1, at 95; BANNER, *supra* note 6, at 19-22, 64-72; THE CONTRACT CLAUSE, *supra* note 8, at 54-55 (explaining that natural law informed jurisprudence of founding-era judges in state and federal courts).

94. *See* ARKES, *supra* note 1, at 95 ("James Wilson and the Founders understood when they wrote the Declaration of Independence that the very purpose of government, its rationale and justification, was to protect natural rights.").

95. *See, e.g.*, THE CONTRACT CLAUSE, *supra* note 8, at 34-35, 48 (noting that some of the earliest Supreme Court decisions interpreting the new Constitution, including *Ogden v. Saunders*, 25 U.S. 213 (1827), incorporated ideas about preexisting natural rights and understood the text to protect those rights); KEYNES, *supra* note 6, at 71 (arguing that founders saw the need to protect rights as an inherent part of the structure of republican government).

96. *See, e.g.*, ARKES, *supra* note 1, at 83-84 (arguing that the founders "grounded [the Constitution] in principles that were already there"); FARBER, *supra* note 6, at 6 (arguing that the Declaration of Independence "embodied the perspective of natural law: that individual rights are not simply privileges granted in legal documents, but instead they are the birthright of all humans everywhere").

An honestly originalist approach, then, would require us to reject strict positivism.[97] We would instead have to reconstruct the natural-law baseline.[98] No other approach would capture the Constitution's true original meaning.[99]

III. PROPERTY, LABOR, AND FREE MARKETS: AN ANTI-MONOPOLY IDEOLOGY

As scholars have started to accept the natural-law baseline, they have also started to explore its content.[100] It's one thing to say that natural law influenced the founding generation; it's another to say what natural law entailed. What, exactly, did natural law protect?

For many scholars, one answer has been property rights.[101] There is near-universal acceptance that the founders saw property as a pillar of natural

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97. *See* FORSYTH, *supra* note 62, at 147 (arguing that an understanding of natural law is essential to understanding the law as it stood at the founding). *Cf.* ARKES 1, at 18-19, 95 (arguing that original understanding of Constitution included natural-law precepts).

98. *See* FORSYTH, *supra* note 62, at 147 ("To adopt a natural law interpretation of common law today . . . is necessarily to confine in conversation with foundational figures in American law."). *See also, e.g.*, LOCKE, *supra* note 8, § 142 (arguing that legislatures of all civil governments are limited by the "law of God and nature"); HISTORY OF PROPERTY RIGHTS, *supra* note 13, at 58 (arguing that the framers "incorporated the Lockean view of property rights into the Constitution").

99. *See* THE CONTRACT CLAUSE, *supra* note 8, at 54-55 (explaining that natural-law philosophy was intertwined with constitutional ideology in founding era; courts had a distinct "tendency" to rely on natural-law precepts to interpret the Constitution's text); Watkins, *supra* note 11 (arguing that courts must consider fundamental principles understood by founders to recover original constitutional meaning); HISTORY OF PROPERTY RIGHTS, *supra* note 13, at 32 (arguing that natural law, particularly its view of property rights, "strongly influenced" the drafting of the Constitution).

100. *See, e.g.*, ARKES, *supra* note 1, at 7 (posing the question: how we can know the content of natural law?).

101. *See, e.g.*, HISTORY OF PROPERTY RIGHTS, *supra* note 13, at xi (describing a "outpouring of scholarly literature" about the role of property rights in forming constitutional law); FREEMAN, *supra* note 14, at 644 (examining the central role property rights played in the natural-law theory of John Locke, whose thought greatly influenced the founders); BANNER, *supra* note 6, at 142 (noting that many lawyers in eighteenth and mid-nineteenth centuries believed property was a natural right), 206 (describing property as the "quintessential natural right"); HISTORY OF DUE PROCESS, *supra* note 38, at 12 (explaining that early common law had a "precocious interest in property"). *Cf.* FLEMING, *supra* note 62, at 140 (arguing that due process protects property and other economic interests alongside "personal" liberty interests); ON POLITICS, *supra* note 39, at 236 (tracing natural law's interest in property rights to Thomas Aquinas, who saw property as "one of the most important" human rights). *But see* BANNER, *supra* note 6, at 180 (pointing out that philosophers like Jeremy Bentham saw property rights as proceeding from the state and thus not natural at all).

law.[102] In fact, they often defined natural law by reference to property.[103] One often-repeated example was a hypothetical law taking property from A and giving it to B.[104] Such a law, the founders assumed, would violate natural rights because it was arbitrary: it dispossessed one person merely to benefit another.[105] And if the government could do that, it could do anything.[106]

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102. *See, e.g.*, HISTORY OF PROPERTY RIGHTS, *supra* note 13, at xi (stating that property rights played a "pivotal role . . . in fashioning the American constitutional order"), 30 ("Drawing on natural law principles, four state constitutions affirmed the freedom to obtain property."); THE CONTRACT CLAUSE, *supra* note 8, at 11 ("Historians generally agree that the establishment of safeguards for private property was one of the principal objectives of the constitutional convention of 1787."), 26-27 (stating that founding-era lawyers referred to contract obligations as a matter of "natural justice" and believed in "fundamental rights derived from natural-law philosophy"). *See also* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 147 (Max Farrand ed., 1937) ("The primary objects of civil society are the security of property and public safety." (quoting James Madison)); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW pt. IV, at 1 (1830) (counting among the "absolute rights of individuals" the "right to acquire and enjoy property"). *Cf.* SMITH, *supra* note 14, at 261 (describing views of Edward Coke, who thought property rights were inherent and sprang from God's gift of the earth to Adam); HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836-1937 69 (1991) [hereinafter ENTERPRISE AND AMERICAN LAW] ("American constitutional law came to be built on the political economy of an unreconstructed Adam Smith."); Jamelle Bouie, *There is One Group the Roberts Court Really Doesn't Like*, N.Y. TIMES (June 6, 2023), https://www.nytimes.com/2023/06/06/opinion/roberts-court-glacier-labor-workers html [https://perma.cc/ZNP4-GXT9] ("The Constitution itself was written, in part, to protect the rights of property in the face of democracy and the spirit of egalitarianism.").

103. *See* ARKES, *supra* note 1, at 92 (explaining that in the founders' view, we enter civil society merely to protect "our natural right not to have our lives or property taken, our liberties restricted in a lawless way, without justification").

104. *See* HISTORY OF DUE PROCESS, *supra* note 38, at 11 ("Taking from A and giving to B had become . . . the shorthand to describe what substantive due process was designed to prevent."). *See also, e.g.*, Davidson v. New Orleans, 96 U.S. 97, 102 (1877) (drawing on English common law and declaring that a law taking property from A and giving it to B would violate due process); Bowman v. Middleton, 1 S.C.L. 250, 252 (1792) (finding that act purporting to transfer title to property from one private party to another was "against common right and reason, as well as against Magna Carta; therefore, *ipso facto*, void"); Terrett v. Taylor, 13 U.S. 43, 50 (1815) (relying on background principles of law to invalidate attempt by state to transfer land previously granted to private church to another private party; forced divestiture would violate the "common sense of mankind and the maxims of eternal justice"); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 356-57 (2d ed., 1871) [hereinafter CONSTITUTIONAL LIMITATIONS] (explaining that such a law would be an arbitrary deprivation of property beyond the inherent authority of a properly constituted government); DE OFFICIIS, *supra* note 39, at 3.5 (arguing that taking another man's property is contrary to the law of nature).

105. *See, e.g.*, CONSTITUTIONAL LIMITATIONS, *supra* note 104, at 357 ("But there is no rule or principle known to our system under which private property can be taken from one man and transferred to another for the private use and benefit of such other person, whether by general laws or by special enactment."); HISTORY OF PROPERTY RIGHTS, *supra* note 13, at 93-94 (explaining that there was general agreement among legal thinkers until late nineteenth century that the government could not transfer property from one private person to another, even with compensation). *Cf.* United States v. Butler, 297 U.S. 1, 61 (1936) (disallowing excise tax under Agricultural Adjustment Act as an "expropriation of money from one group for the benefit of another" and thus beyond Congress's taxing powers).

106. *See, e.g.*, HISTORY OF PROPERTY RIGHTS, *supra* note 13, at 56 (stating that rights are not secure "where arbitrary restrictions, exemptions, and monopolies deny to part of [the] citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word, but are also the means of acquiring property" (quoting James Madison, *Property*, *in* 14 THE PAPERS OF JAMES MADISON 266-68 (Robert A. Rutland &

There would be no check against official whim; private rights would be meaningless.[107]

But here, we must be careful with our terminology. Modern lawyers distinguish between property rights and "personal" rights.[108] But that distinction would have been meaningless to the founders.[109] For them, "property" was the ultimate personal right.[110] It included not only land and moveable possessions, but also the rights one had in oneself.[111] It

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Thomas A. Mason eds., 1983))); CONSTITUTIONAL LIMITATIONS, *supra* note 104, at 357. *Cf.* SMITH, *supra* note 14, at 260 (describing similar view among seventeenth century English jurists, who thought property rights were the "very essence" of liberty and without them, Englishmen were nothing but the King's "tenants").

107. *See* HISTORY OF PROPERTY RIGHTS, *supra* note 13, at 43 ("Property rights must be secured . . . or liberty cannot exist." (quoting John Adams, *Discourses on Davila*, *in* 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851))). *See also* LOCKE, *supra* note 8, § 139 (arguing that granting arbitrary power to government over property would be to leave people with no real property rights at all); CONSTITUTIONAL LIMITATIONS, *supra* note 104, at 357 ("No reason of general public policy will be sufficient to protect such transfers where they operate upon existing vested rights."); THE CONTRACT CLAUSE, *supra* note 8, at 269 ("There can be no freedom, where there is no safety to property, or personal rights." (quoting Joseph Story, *Discourse on the Inauguration of the Author as Dane Professor of Law in Harvard University*, *in* THE MISCELLANEOUS WRITINGS, LITERARY, CRITICAL, JURIDICAL, AND POLITICAL, OF JOSEPH STORY 447 (James Munroe ed., 1835))). *Cf.* SMITH, *supra* note 14, at 6 (stating that Coke and other common-law English jurists also insisted on the importance of property rights as a check on government despotism); *In re* Jacobs, 98 N.Y. 98, 106 (1885) ("The constitutional guaranty would be of little worth, if the legislature could, without compensation, destroy property or its value, deprive the owner of its use, deny him the right to live in his own house, or to work at any lawful trade therein.").

108. *See* PROPERTY & POLITICAL THEORY, *supra* note 13, at 18 (explaining that modern people do not often think of property as a personal right, such as life or liberty). *See also, e.g.*, MAYER, *supra* note 14, at 116 (explaining that distinction between personal and property rights arose in twentieth century to distinguish decisions protecting bodily and personal autonomy from decisions protecting economic interests); HISTORY OF PROPERTY RIGHTS, *supra* note 13, at 139 (tracing the distinction to post-New Deal jurisprudence); KEYNES, *supra* note 6, at 156 (describing a shift in twentieth century toward "personal" rights to distinguish *Lochner*-era precedents); Bert Co. v. Turk, 298 A.3d 44, 84-85 (Pa. 2023) (Wecht, J., concurring) (noting the Supreme Court's transition in the twentieth century away from protecting "economic" rights and toward protecting "personal" rights).

109. *See, e.g.*, HISTORY OF PROPERTY RIGHTS, *supra* note 13, at 140-41 ("The distinction between property rights and personal liberties runs counter to the framers' belief that rights are closely related and that the protection of property ownership is essential to the enjoyment of political liberty."); MAYER, *supra* note 14, at 17 (observing that founding-era state constitutions, including those in Virginia, Massachusetts, and New Hampshire, closely equated liberty and property rights). *See also* VA. CONST. of 1776, § 1 (declaring that "all men are by nature equally free and independent, and have certain inherent rights . . . namely, the enjoyment of life and liberty, with the means of acquiring and possessing property").

110. *See, e.g.*, HISTORY OF PROPERTY RIGHTS, *supra* note 13, 3 ("Historically, property ownership was viewed as establishing the economic basis for freedom from government coercion and the enjoyment of liberty."). *See also* CICERO, *supra* note 39, at 3.5 (reasoning that property ownership is essential to human society and in accordance with "nature's laws" (*leges naturae*)); TIEDMAN, *supra* note 7, at 81-82 (equating property rights and individual liberty).

111. *See* LOCKE, *supra* note 8, § 27 (arguing that people have property in their own bodies and labor), 44 (arguing that each person had "in himself the great foundation of property"). *See also* FREEMAN, *supra* note 14, at 644 (explaining that under social-contract and natural-rights theory, as expounded by Locke, property included not only possessions but personal status). *Cf.* HISTORY OF DUE PROCESS, *supra* note 38, at 61 (attributing similar ideas to the followers of Adam Smith).

encompassed the right to be free of arbitrary physical restraint, to make contracts of one's own free will, and to enjoy the fruits of one's own labor.[112]

That last part was crucial. To natural-law philosophers, labor and property were indistinguishable.[113] Perhaps the most famous of those philosophers, John Locke, described labor as the source of all property: he argued that a person created property by drawing on the "common stock" (i.e., the resources available to everyone in common) and improving it with labor.[114] Labor was therefore the origin of property.[115] The two were as inseparable as they were fundamental, and neither could be taken away arbitrarily.[116]

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112. *See* LOCKE, *supra* note 8, § 27 ("The labour of his body, and the work of his hands, we may say, are properly his."). *Cf.* Truax v. Raich, 239 U.S. 33, 41 (1915) (finding an implicit right to earn a living protected by the Fourteenth Amendment) ("It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."); Golden Glow Tanning Salon, Inc. v. City of Columbus, 52 F.4th 974, 983 (5th Cir. 2022) (Ho, J., concurring) (explaining that belief in right to pursue a lawful calling was widespread among founding generation).

113. *See, e.g.*, DE OFFICIIS, *supra* note 39, at 3.5 (arguing that great labor is in accordance with the laws of nature). *See also* State v. Julow, 31 S.W. 781, 782 (Mo. 1895) ("Necessarily blended with [property rights] are those of acquiring property by labor, by contract, and also of terminating that contract at pleasure . . . ."); MAYER, *supra* note 14, at 24 (observing that nineteenth-century courts equated labor and property rights); HISTORY OF TRADE UNIONISM, *supra* note 17, at 2 (observing common-law jurists conceived of labor as a form of property: the "poor man's capital").

114. LOCKE, *supra* note 8, §§ 27-33, 37. *See also* PROPERTY & POLITICAL THEORY, *supra* note 13, at 17-18.

115. LOCKE, *supra* note 8, § 28 (explaining that labor was the dividing line between commons and personal property). *See also* PROPERTY & POLITICAL THEORY, *supra* note 13, at 45 (arguing that properly understood, Locke's claim was not that we had a right to property, as we understand that word, but a right to "a living").

116. *See* LOCKE, *supra* note 8, §§ 30 (describing labor as the "original law of nature" observed in all societies), 135 (arguing that rights cannot be denied arbitrarily by civil government because people do not surrender their natural right to be free of arbitrary treatment). *See also* HISTORY OF PROPERTY RIGHTS, *supra* note 13, at 43 (describing influence of Locke's property-rights philosophy on framers); FARBER, *supra* note 6, at 6 (same). *Cf.* CONSTITUTIONAL LIMITATIONS, *supra* note 104, at 356 (explaining that deprivations of property had to be tested against "those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure"); *In re* Jacobs, 98 N.Y. 98, 106 (1885) ("The third absolute right inherent in every Englishman is that of property which consists in the free use, enjoyment and disposal of all his acquisitions without any control or diminution, save only by the law of the land." (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *138)).

This view of labor rights manifested in some surprising ways. One was a hostility to monopolies.[117] Steeped in natural-law philosophy,[118] seventeenth-century courts viewed monopolies with skepticism.[119] They thought monopolies harmed society in various ways, not least of which was their effect on labor.[120] If a single producer monopolized a trade, it could exclude other people.[121] Those people would be blocked from their chosen professions.[122] And the right to pursue a profession was, for these courts, a fundamental tenet of the common law.[123]

But again, we must be careful with our terminology. Today, we think of monopolies as large, private businesses.[124] But that's not the kind of monopoly that concerned common-law courts.[125] The courts were more

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117. *See Golden Glow Tanning*, 52 F.4th at 982 (Ho, J., concurring) (explaining that the right to earn a living "emerged out of the struggles between the Crown and the courts over the problem of monopoly"). *Cf.* Pearsall v. Great N. Ry. Co., 161 U.S. 646, 664 (1896) (narrowly construing corporate charter to avoid delegation of monopoly to private party) ("[A]n exclusive right to enjoy a certain franchise is never presumed . . . ."); THE CONTRACT CLAUSE, *supra* note 8, at 165-66 (arguing that judicial hostility to state-bestowed monopolies continued to build in American courts through the late nineteenth century, as demonstrated by cases such as *Pearsall*); OPENING OF AMERICAN LAW, *supra* note 30, at 255 (noting that classical legal thought recognized a right to operate a lawful business and was hostile to monopoly, which it saw as an obstacle to that right).

118. *See* FORSYTH, *supra* note 62, at xii (tracing the deep links between common-law and natural-law methods; in fact, natural law was the "source or justification for common law"), 146 (arguing that legal thinkers from seventeenth to twentieth century saw the common law and natural law as intertwined).

119. *See, e.g.*, Davenant v. Hurdis (1599) 72 Eng. Rep. 576, 591 (finding that bylaws of local tailors' guild were unenforceable under common law because they gave the guild a monopoly over local trade); The Case of the Tailors of Ipswich (1614) 77 Eng. Rep. 1218, 1219-20 (holding that bylaws of another tailors' guild were invalid for the same reason and because they tended to restrain the free pursuit of a lawful trade). *See also* SMITH, *supra* note 14, at 166-68 (describing common-law skepticism of monopolies).

120. *See, e.g.*, *Ipswich Tailors*, 77 Eng. Rep. at 1219-20; Bonham v. Coll. of Physicians [1610] 77 Eng. Rep. 638, 640 (holding that college of physicians could not impose penalties on physicians who practiced without license issued by the college itself in part because of the effect it had on ability to pursue a lawful trade).

121. *See, e.g.*, *Davenant*, 72 Eng. Rep. at 591 (disallowing guild bylaw passed under authority of ordinance because it interfered with right of nonmembers to participate in lawful trade). *See also* William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 361-62 (1954) (describing *Davenant* and later development of anti-monopoly doctrine).

122. *See Davenant*, 72 Eng. Rep. at 591; Letwin, *supra* note 121, at 362 ("[A] rule of such nature as to bring all trade or traffic into the hands of one company, or one person, and to exclude all others, is illegal." (quoting *Davenant*, 72 Eng. Rep. at 591)).

123. *See Davenant*, 72 Eng. Rep. at 591 (recognizing fundamental right to pursue a trade); *Bonham*, 77 Eng. Rep. at 640 (same). *See also* Letwin, *supra* note 121, at 363 (explaining that courts often struck down exclusive charters because they "depriv[ed] various workmen of a living").

124. Calabresi & Leibowitz, *supra* note 15, at 984.

125. *Cf.* Rogers v. Perry [1603] 72 Eng. Rep. 326, 327 (enforcing restraint among two private carpenters because it was supported by valuable consideration and limited in scope); Calabresi & Leibowitz, *supra* note 15, at 1065 (arguing that *Rogers* shows how common-law courts were more lenient toward private trade restraints than they were toward government-bestowed monopolies). *Cf. also* Calabresi & Leibowitz, *supra* note 15, at 985 ("But a man has by natural right the exclusive power of vending his own produce or manufacturers, and to retain that exclusive right is not a *monopoly* within the meaning of law." (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828))).

concerned with monopolies created by the state.[126] State monopolies did not result from negotiated covenants, in which the excluded party at least received the benefit of its bargain.[127] Rather, state monopolies were produced by government fiat.[128] The excluded workers received nothing in exchange.[129] And the resulting exclusivity was nearly impossible to dislodge.[130]

The Crown, of course, benefited from these monopolies by selling them.[131] In the early seventeenth century, the Stuart regime was chronically short of funds.[132] So with Parliament reluctant to grant new taxes, it repeatedly turned to monopolies for revenue.[133] These monopolies were widely resented, and they contributed to criticisms of King Charles's "personal rule"—criticisms that eventually helped spark the English Civil War.[134]

But even before war broke out, common-law courts were pushing back.[135] The ultimate common-law jurist, Sir Edward Coke, made his name

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126. *See* Calabresi & Leibowitz, *supra* note 15, at 984-85; Golden Glow Tanning Salon, Inc. v. City of Columbus, 52 F.4th 974, 982-83 (5th Cir. 2022) (Ho, J., concurring) (explaining that common-law courts directed their ire at traders who had been given exclusive privileges by the crown). *See also* Darcy v. Allen (1603) 77 Eng. Rep. 1260, 1262 (declaring exclusive charter to deal in trading cards granted by the crown invalid and repugnant to the common law).

127. *See* Calabresi & Leibowitz, *supra* note 15, at 985, 990-94 (explaining that common-law courts saw licensing schemes as a form of protectionism that interfered with natural right to pursue a trade).

128. *Id.* at 994-95.

129. *See* Mitchel v. Reynolds (1711) 24 Eng. Rep. 181, 193 (arguing that general trade restraints were invalid because they benefited no party, "unless he intends a monopoly, which is a crime"). *See also* United States v. Addyston Pipe & Steel Co., 85 F. 271, 279 (6th Cir. 1898) (explaining that the common-law hostility to trade restraints was the result in part of a fear that the excluded worker would be "disabled . . . from earning a livelihood" and become "a public charge").

130. *See* Calabresi & Leibowitz, *supra* note 15, at 986 (explaining how government licensing schemes impede entry by new competitors—a fact that informed common-law opposition to monopolies). *Cf.* Charles River Bridge v. Warren Bridge, 36 U.S. 420, 422 (1837) (narrowly reading corporate charter to avoid finding a grant of a perpetual monopoly to a single bridge company—a grant that, the Court assumed, would injure the public interest); THE CONTRACT CLAUSE, *supra* note 8, at 70 (observing that some justices thought *Charles River Bridge* didn't go far enough and would have "preferred a more categorical rule that states could not make irrevocable grants of monopoly status").

131. TREBILCOCK, *supra* note 15, at 3-4; JONATHAN HEALEY, THE BLAZING WORLD 63 (2023).

132. *See* Calabresi & Leibowitz, *supra* note 15, at 994-95. *See also* HEALEY, *supra* note 131, at 63 (describing conflict between Parliament and King James I over monopolies, which Parliament saw as interfering with the common law right to pursue a trade).

133. Golden Glow Tanning Salon, Inc. v. City of Columbus, 52 F.4th 974, 982 (5th Cir. 2022) (Ho, J., concurring).

134. HEALEY, *supra* note 131, at 63, 100-01 (describing role monopolies played in lead-up to war).

135. *See* SMITH, *supra* note 14, at 17-18 (describing development of idea of common law as an independent check on monarchy in reaction to perceived Stuart despotism).

fighting monopolies.[136] In *Darcy v. Allen* he declared a royal monopoly on trading cards repugnant to the common law.[137] According to Coke, the monopoly was unenforceable because it interfered with the right to pursue a legitimate trade.[138] And the common law abhorred trade restraints as a violation of natural rights.[139]

When it came down, *Darcy* was seen as a case about economic liberty.[140] It represented the strongest endorsement on record of the right to pursue a lawful calling.[141] Later, it produced other anti-monopoly, pro-worker decisions such as *The Case of the Tailors of Ipswich*.[142] It remained influential in the framers' day when it was cited on both sides of the Atlantic.[143] And crucially, it informed the common law's approach to labor unions.[144]

It should be no surprise that the common law disfavored unions.[145] Unions were, at bottom, a device for restraining trade.[146] When a union called

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136. *See* Calabresi & Leibowitz, *supra* note 15, at 992-95 (describing Coke's role in developing anti-monopoly principles in seventeenth century, as both an advocate and a jurist).

137. (1603) 77 Eng. Rep. 1260, 1262. Coke was not yet on the bench when *Darcy* was decided; he was instead responsible for writing the case report that has made the decision famous (and perhaps shaded its meaning). *See* Jacob I. Corré, *The Argument, Decision, and Reports of* Darcy v. Allen, 45 EMORY L.J. 1261, 1261 (1996) ("As with so many other cases from its era, *Darcy v. Allen*'s fame is largely due to the reports of Edward Coke.").

138. *Darcy*, 77 Eng. Rep. at 1262.

139. *Id. See also* SMITH, *supra* note 14, at 274-77 (describing role of natural-rights theory in *Darcy*); TREBILCOCK, *supra* note 15, at 1 (explaining that common-law doctrine of trade restraints originated in desire to protect the right to use one's own labor).

140. Calabresi & Leibowitz, *supra* note 15, at 993.

141. *Id.* at 993-95. *See also* HEALEY, *supra* note 131, at 63; SMITH, *supra* note 14, at 274-77.

142. The Case of the Tailors of Ipswich (1614) 77 Eng. Rep. 1218, 1219 ("[T]he common law abhors all monopolies, which prohibit any from working in any lawful trade . . . ."). *See also* Calabresi & Leibowitz, *supra* note 15, at 995 (describing influence of *Darcy* on *Ipswich Tailors*).

143. *See* Calabresi & Leibowitz, *supra* note 15, at 996 (reporting that the framers accepted Coke's report in *Darcy* and his description of the common law as an accurate reflection of the underlying legal principles). *See also* Golden Glow Tanning Salon, Inc. v. City of Columbus, 52 F.4th 974, 982 (5th Cir. 2022) (Ho, J., concurring) (explaining that American courts imported English common-law aversion to monopolies in own common-law jurisprudence); Calabresi & Leibowitz, *supra* note 15, at 1007-08 (pointing out the Crown's continued insistence on issuing monopolies, including the East India Company monopoly over the sale of tea, was a direct cause of the Revolutionary War). *Cf.* Edward D. Re, *Due Process, Judicial Review, and the Rights of the Individual*, 39 CLEV. ST. L. REV. 1, 4 (1991) (noting that American courts relied on Coke's decision in *Bonham*'s case to strike down laws as early as 1657 (citing Giddings v. Brown, 2 RECORDS AND FILES OF THE QUARTERLY COURTS OF ESSEX COUNTY, MASS. 1656-1662 47 (1912))).

144. *See* TREBILCOCK, *supra* note 15, at 25 (tracing common-law approach to labor combinations to earlier decisions on restrictive covenants, especially those dealing with the right to work). *See also* Calabresi & Leibowitz, *supra* note 15, at 998 (explaining that concern with monopolies began with guilds and fraternal societies of artisans, which through Royal charters were able to control access to professions in their cities).

145. *See* HISTORY OF TRADE UNIONISM, *supra* note 17, at 155 (arguing that the common law was "inherently hostile" to labor's "organizational aspirations").

146. *See, e.g.*, Am. Fed'n Musicians U.S. & Canada v. Carroll, 391 U.S. 99, 106 (1968) (observing that the aim of any labor union is to eliminate competition over labor standards); ENTERPRISE AND AMERICAN LAW, *supra* note 102, at 213 (observing that labor unions function by

a strike, it blocked an employer's access to a labor market.[147] When it blacklisted the employer, it stopped the employer from finding labor in another market.[148] And when it negotiated a "union shop" agreement, it blocked nonunion workers from employment.[149] In a pre-NLRA world, these tactics were the union's only way to extract concessions.[150] The union had no enforceable right to bargain; its only tool was coercion.[151] But even necessary coercion was still coercion, and courts treated it just as strictly as any other restraint on trade.[152] At times, they flatly declared unions to be illegal

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limiting supply of labor—a dynamic that led courts to treat them as effectively labor cartels), 232 (explaining that many eighteenth and nineteenth century thinkers and jurists saw the closed union shop as a form of monopoly).

147. *See* R v. Ferguson (1819) 171 Eng. Rep. 489, 492 (treating strike and boycott by journeymen as a criminal conspiracy in part because it prevented employer from hiring other workers). *See also* HISTORY OF TRADE UNIONISM, *supra* note 17, at 118 (explaining that theoretically, a strike was simply "an attempt by labour to render capital unproductive until it met certain conditions").

148. *See Ferguson*, 171 Eng. Rep. at 492. *See also* Vegelahn v. Guntner, 44 N.E. 1077, 1077-78 (1896) (treating labor boycott and blacklisting as a form of coercion actionable under common-law tort doctrine); Commonwealth v. Pullis, *in* 3 DOC. HIST. OF AM. IND. SOC. 59 (2d ed., 1910) (charging leaders of cordwainers' society with coordinated labor boycott against the common law); Quinn v. Leathem [1901] A.C. 495 (Eng.) (holding that labor picketing in support of wage demands for higher wages and a closed shop violated common law and English Combination Acts).

149. *See, e.g.*, NLRB v. Hershey Foods Corp., 513 F.2d 1083, 1085-86 (9th Cir. 1975) (describing history of debate over union shops and Congress's "compromise" in the Taft-Hartley Act, allowing union shops but reducing obligations of membership to the payment of dues); Int'l Bhd. of Teamsters, Loc. 309 v. Hanke, 339 U.S. 470, 480-81 (1950) (sustaining injunction to bar picketing for union shop under state law designed to protect right to work without compelled union membership). *See also* CHARLES J. MORRIS, THE BLUE EAGLE AT WORK 81 (2005) (observing that pre-NLRA unions often followed members-only agreements with a demand for a closed shop, which blocked nonmembers from working in the organized workplace). *Cf.* HISTORY OF TRADE UNIONISM, *supra* note 17, at 119 ("[I]f in its primary aspects the strike was economic warfare against capital, it was patent to every observer that some strikes also involved civil war within the ranks of labour.").

150. *See* MORRIS, *supra* note 149, at 8-9 (observing that before NLRA created mandatory bargaining rights, unions enforced demands mainly through direct action).

151. *See* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 530-31 (1985) (observing that before statutes gave unions the right of exclusive representation, the effectiveness of strikes and boycotts depended on the union's ability to monopolize the supply of labor and coerce potential dissenters into honoring strikes and picket lines). *Cf.* Grandview Dairy v. O'Leary, 285 N.Y.S. 841, 843 (N.Y. Spec. Term 1936) (characterizing union picketing and boycott as a form of economic coercion) ("[I]ntimidation of [a business's] customers . . . amounts to a coercion of their judgment; and the law never countenances coercion.").

152. *See* R v. Journeymen-Tailors of Cambridge (1721) 88 Eng. Rep. 9, 10 (concluding that union committed crime by conspiring to withhold labor in an effort to damage another's interests) ("[A] conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it . . . .").

combinations.[153] They also convicted union members of conspiracy.[154] And they punished these offenses with harsh penalties: fines, hard labor, and sometimes even jail.[155]

Today, the conspiracy prosecutions are seen as a black mark on the historical record.[156] They have been described as an illiberal reaction against working-class agitation—a defense of the strong against the weak.[157] But that view commits the error of presentism: it imports modern notions of morality into a pre-modern world. We may now perceive the prosecutions as class warfare, but that's not how they were seen at the time.[158] Courts didn't think they were protecting a capitalist class; they thought they were protecting the right to work.[159] They believed in the autonomy of workers and the right to

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153. *See Journeymen-Tailors*, 88 Eng. Rep. at 9-10 (applying doctrine of conspiracy to private combination of laborers); R v. Mawbrey (1796) 101 Eng. Rep. 736, 737 (applying criminal conspiracy doctrine to alleged business combination intended to deceive local residents of state of repairs on highway); *Pullis*, *supra* note 148, at 59 (charging jury that combination to raise wages and coerce union membership was illegal at common law). *See also* TREBILCOCK, *supra* note 15, at 28 (explaining that courts treated trade unions designed to raise wages as illegal combinations through the late nineteenth century, when their activities were eventually legalized by legislation); R v. Eccles (1783) 168 Eng. Rep. 240, 276-77 ("[E]very man may work what price he pleases, but a combination not to work under certain prices is an indictable offense.").

154. *See, e.g.*, *Pullis*, *supra* note 148, at 59 (instructing jury that combination to raise wages was a conspiracy at common law). *See also* HISTORY OF TRADE UNIONISM, *supra* note 17, at 8 (explaining that even after Parliament began to ban combinations by statute, courts continued to prosecute them also under the *lex non scripta* (unwritten law) of common law).

155. HISTORY OF TRADE UNIONISM, *supra* note 17, at 8-9, 19, 42. *See also* CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 134 (1993) (describing punishments handed out for conspiracy charges in United States in early nineteenth century—in particular, the *Pullis* prosecution, which was the first American conspiracy prosecution on record).

156. *See, e.g.*, Gary Minda, *The Common Law, Labor and Antitrust*, 11 INDUS. RELS. L.J. 461, 485 (1989) (criticizing conspiracy doctrine as inconsistent and creating an artificial asymmetry between workers and employers); WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 62, 90 (1991) (criticizing the conspiracy prosecutions on similar grounds); Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. UNIV. CHI. L.J. 969, 995-97 (2016) (same).

157. *See* HISTORY OF TRADE UNIONISM, *supra* note 17, at 56-58 (describing reaction of later historians, who described the prosecutions as "monstrous" class warfare).

158. *See* TREBILCOCK, *supra* note 15, at 3-4 (explaining that common-law courts perceived of trade-restraint doctrine as judicial defense of ancient rights dating back to before the Norman Conquest); HISTORY OF TRADE UNIONISM, *supra* note 17, at 23-24, 30-35 (describing rationale behind the early bans on combination and conspiracy, which often emphasized right to work and dictate one's own prices). *See also* Darcy v. Allen, (1603) 77 Eng. Rep. 1260, 1262 (explaining that common law abhors monopoly because it restricts the right to pursue a lawful trade).

159. *See, e.g.*, Letwin, *supra* note 121, at 355 ("When English and American judges during the eighteenth and nineteenth centuries decided cases against monopolists . . . they thought they were continuing a tradition that reached back into 'time of which man hath no memory.'"); TREBILCOCK, *supra* note 15, at 3-4, 8 (describing views of common-law judges, including Edward Coke). *See also* Dyer's Case (1414) 2 Hen. V fol. 5, pl. 26 (declaring agreement not to operate a trade void under the common law); Letwin, *supra* note 121, at 374 (explaining that common-law courts read *Dyer's Case* as a declaration against trade restraints and for an "individual's right to work"). *Cf.* SANDEFUR, *supra* note 12, at 7 (arguing that judges who protected economic rights in late nineteenth century were not thinking from an economic perspective, but instead from a legal, moral, and philosophical one).

sell one's own labor.[160] They viewed that right as embedded in the common law and tied up in natural rights.[161] And they declared that it could not be denied arbitrarily, especially by a government-bestowed monopoly.[162]

IV. FREE LABOR IN THE TWENTY-FIRST CENTURY: A RIGHT TO BARGAIN

That history has startling implications for modern labor law. In particular, it calls into question the practice of "exclusive representation."[163] As the name suggests, exclusive representation assigns all bargaining rights to a single union.[164] Only the union can bargain with the employer about wages, hours, and working conditions.[165] Individual employees cannot bargain for themselves.[166] Even if an employee votes against the union—or just thinks she can get a better deal on her own—she still has to let the union bargain on her behalf.[167] And whatever deal the union makes, she's stuck with it.[168]

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160. *See* TREBILCOCK, *supra* note 15, at 11 (observing that courts described the doctrine as serving two purposes: protecting individual freedom and promoting economic growth and thus the general welfare). *Cf.* Golden Glow Tanning Salon, Inc. v. City of Columbus, 52 F.4th 974, 982 (5th Cir. 2022) (Ho, J., concurring) ("[M]embers of the Founding generation agreed on the fundamental importance of the right to pursue one's occupation.").

161. *See, e.g.*, Davenant v. Hurdis (1599) 72 Eng. Rep. 576; *Darcy*, 77 Eng. Rep. at 1262. *See also* Mayor of Hudson v. Thorne, 7 Paige Ch. 261, 263 (N.Y. Ch. 1837) (refusing to enforce city ordinance restricting certain buildings because it imposed unequal burdens on right to pursue a trade) ("[T]he common council cannot make a by-law which shall permit one person to carry on the dangerous business, and prohibit another, who has an equal right, from pursuing the same business.").

162. *Cf.* HISTORY OF PROPERTY RIGHTS, *supra* note 13, at 53-54 (explaining that framers such as Madison and Jefferson were hostile to exclusive privileges, such as government-bestowed monopolies, and sought to limit them through the new Constitution); OPENING OF AMERICAN LAW, *supra* note 30, at 248 (describing view of nineteenth-century courts, who saw workers as individuals and unions as labor cartels).

163. *See* 29 U.S.C. § 159(a).

164. *See* J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944).

165. *Id.*

166. *Id. See also* Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 62-63 (1975) (explaining that exclusive representation "extinguishes the individual employee's power to order his own relations with his employer"); McLaren Macomb, 372 N.L.R.B. No. 58, slip op. at 2 (Feb. 21, 2023) (holding that employer violated section 8(a)(5) of the NLRA by negotiating severance agreements directly with represented employees); U.S. Postal Serv., 281 N.L.R.B. 1015, 1015-17 (1986) (holding that employer violated section 8(a)(5) of the Act by negotiating directly with employees to resolve administrative discrimination complaints).

167. *See J.I. Case*, 321 U.S. at 338.

168. *See id.* (holding that employer violated the law by negotiating individual contracts with employees who were represented by a NLRB-certified union); BOK & DUNLOP, *supra* note 22, at 99 (recognizing that exclusive representation may hurt some employees who could bargain for better deals individually). *See also* Bond, *supra* note 32, at 441-42 ("Even though the employee may not have voted for the union and even though he may not belong to the union, he must depend upon the union to press his claims.").

The result is an anomaly in American law. Much of American law, including constitutional law, emphasizes individual rights.[169] But labor law consciously subverts individual rights to collective ones.[170] It takes the view that employees as a class are better off when they maintain a united front.[171] More startling is that "benefit" is sometimes used as a reason to silence dissenters and minorities.[172] No less an ally of minority rights than Justice Thurgood Marshall once defended exclusivity on just that ground:

> In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority. . . . "[T]he complete satisfaction of all who are represented is hardly to be expected."[173]

That argument would have shocked common-law jurists. Steeped in natural labor rights,[174] they would have balked at what was effectively a government-bestowed monopoly over labor.[175] They would have seen that, once certified,

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169. *See, e.g.*, MUÑOZ, *supra* note 73, at 52 (describing the individualist thrust of classical constitutionalism, built on social-contract theory) ("Th[e] mutual recognition of one another's rights, and mutual consent to form one civil and political association, allow naturally free and independent individuals to become fellow citizens in a single society governed by the rule of law."). THE CONTRACT CLAUSE, *supra* note 8, at 61 (explaining that early contract clause jurisprudence read contracting rights as an "expression of individual autonomy"); MAYER, *supra* note 14, at 26-27 (making the same point); PROPERTY & POLITICAL THEORY, *supra* note 13, at 18 (describing Locke's natural-rights property philosophy as individualist).

170. *See* Vaca v. Sipes, 386 U.S. 171, 182 (1967) (observing that exclusivity "subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit").

171. *See* 29 U.S.C. § 151 (declaring it the policy of the United States to promote collective bargaining to correct imbalance of bargaining power between workers and employers). *See also J.I. Case*, 321 U.S. at 338 (reasoning that purpose of collective bargaining is to "supersede the terms of separate agreements for employees with terms which reflect the strength and bargaining power and serve the welfare of the group").

172. *See* Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 62-63 (1975) (concluding that employees were not engaged in protected conduct when they sought to deal with employer outside the union to address alleged racial discrimination); U.S. Postal Serv., 281 N.L.R.B. 1015, 1016 (1986) (holding that employer violated section 8(a)(5) of the Act by negotiating directly with employees to resolve administrative discrimination complaints).

173. *Emporium Capwell*, 420 U.S. at 62 (quoting Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953)) (footnote omitted).

174. *See* HISTORY OF PROPERTY RIGHTS, *supra* note 13, at 55 (arguing that judges "steeped in Lockean common law tradition" naturally saw traditional principles as "a substantive check against the arbitrary and unreasonable exercise of government power").

175. *See, e.g.*, R v. Salter (1804) 170 Eng. Rep. 125, 125 (convicting unionists for conspiracy when they tried to "extort" a fine from another employee who violated union rules and to have him discharged from service). *See also* Denning, *supra* note 16, at 7 (refusing to enforce union rule requiring payment of dues as condition of employment) ("The reason lies in the man's right to work."); THE CONTRACT CLAUSE, *supra* note 8, at 72-73 (explaining that early eighteenth century American courts were skeptical of exclusive licenses to private parties and interpreted grants to avoid them), 187 (explaining that jurists like Justice Stephen J. Field relied on natural-rights philosophy to develop view of "the right to pursue lawful callings"). *Cf.* Golden Glow Tanning Salon, Inc. v. City of Columbus, 52 F.4th 974, 982 (5th Cir. 2022) (Ho, J., concurring) (explaining that founders, including Thomas Jefferson, Benjamin Franklin, and George Mason, expressed both

a union could use its power to control access to work.[176] If an employee refused to join and pay dues, the union could demand that she be fired.[177] The union could, in effect, exclude her from the workplace.[178] And in that way, the union would differ from the old common-law monopolies only in name.[179] Like them, it could control access to a market.[180] And, like them, it could block others from pursuing their chosen professions.[181]

If that sounds extreme, recall that a similar view once prevailed at the U.S. Supreme Court. In *Adair v. United States*, the Court struck down a law forbidding "yellow dog" contracts, i.e., agreements not to join a union.[182] The Court held that the law violated the Due Process Clause of the Fourteenth Amendment.[183] In an opinion for the Court, Justice John Marshall Harlan wrote that due process protects people from "an invasion of the personal liberty, as well as the right of property."[184] And that property right included "the right to make contracts for the purchase of labor of others, and equally the right to make contracts for the sale of one's own labor."[185] That is, the Constitution protects a fundamental right to bargain over the terms of an

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support for right to earn a living and aversion to state-conferred monopolies); Calabresi & Leibowitz, *supra* note 15, at 1010-11 (same).

176. *See* HISTORY OF TRADE UNIONISM, *supra* note 17, at 19-20 (describing rationale for eighteenth-century combination laws, which aimed to prevent trade associations from interfering with the right of other workers to pursue lawful trades).

177. *See* 29 U.S.C. § 158(a)(3) (allowing unions to negotiate agreements requiring employees to pay dues as a condition of employment); NLRB v. Gen. Motors Corp., 373 U.S. 734, 742 (1963) ("Under the second proviso to [Section] 8(a)(3), the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues.").

178. *Cf.* RICHARD EPSTEIN, FREE MARKETS UNDER SIEGE ch. 5 (2008) (ebook) (arguing that by passing the NLRA, "the labor movement was able to achieve its two major goals: the ability to organize its own members and the ability to get state assistance in the exclusion of rivals").

179. *See id.* (describing exclusive unions as a "state monopoly for the individual firm that has been organized"). *Cf* State v. Julow, 31 S.W. 781, 783 (Mo. 1895) (condemning law protecting union members from discharge as "special" legislation designed to benefit the union rather than the public at large).

180. *See* EPSTEIN, *supra* note 178, at ch. 5 (describing how NLRA insulates unions from competition and allows them to exclude competitors from a defined labor market).

181. *See* 29 U.S.C. § 158(a)(2)-(5) (permitting unions to negotiate mandatory membership provisions in their contracts and requiring employers to bargain in good faith over such provisions). *Cf.* Denning, *supra* note 16, at 7 (The right to work is especially important in "closed shop" settings because the closed shop means "that no man can become employed, or remain in employment, with a firm unless he is a member of the union. If his union card is withdrawn, he has to leave the employment. He is deprived of his livelihood.").

182. 208 U.S. 161, 174-75 (1908), *overruled by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941). *See generally* Lincoln Fed. Lab. Union No. 19129 v. Nw. Iron & Metal Co., 335 U.S. 525, 534-35 (1949) (defining and describing so-called yellow-dog contracts).

183. *Adair*, 208 U.S. at 180.

184. *Id.* at 172.

185. *Id.*

employment relationship.[186] A state could not interfere with that right arbitrarily.[187]

Like many decisions of its era, *Adair* has faded into desuetude.[188] It has been dismissed as a relic of the Court's quixotic struggle to shelter economic rights against a wave of New Deal legislation.[189] But that view may be changing.[190] The Court has recently signaled a renewed interest in protecting rights grounded in "history and tradition."[191] Decisions like *Dobbs v. Jackson*

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186. *See id.* at 174 ("The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it."). *See also* Coppage v. Kansas, 236 U.S. 1, 14 (1915) (finding a constitutional right to make contracts for "personal employment, by which labor and other services are exchanged for money or other forms of property"), *overruled by Phelps Dodge*, 313 U.S. at 177. *But cf.* Slaughter-House Cases, 83 U.S. 36, 82-83 (1872) (rejecting argument that Fourteenth Amendment banned monopoly on slaughterhouses because it interfered with the right to pursue a lawful business); Calabresi & Leibowitz, *supra* note 15, at 1046-47 (explaining that the majority in the *Slaughter-House Cases* effectively rejected a natural-law approach to property and labor rights).

187. *See* HISTORY OF DUE PROCESS, *supra* note 38, at 41-50 (explaining that the principle that one could not take from A and give to B was but one example of a broader natural-law principle against arbitrary legislation). *See also, e.g.*, *Adair*, 208 U.S. at 172 (explaining that government could not interfere with right to bargain over terms of employment except when terms were "inconsistent with the public interests, or as hurtful to the public order, or as detrimental to the common good"); *Coppage*, 236 U.S. at 14 ("If this right [to make employment contracts] be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense."); Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) (concluding that "liberty" guaranteed by Fourteenth Amendment included a person's right "to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned"). *Cf.* BANNER, *supra* note 6, at 190 (describing the "substantive due process" employed by courts in early twentieth century in cases like *Adair* as a replacement for natural-law methodology; both pursued the same ends by different names).

188. *See, e.g.*, *Phelps Dodge*, 313 U.S. at 187 (lumping *Adair* in with other superseded *Lochner*-era decisions); Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded."); Greenville Nursing & Rehab., LLC v. Majors, No. 4:22-CV-00156-JHM, 2023 WL 3216764, at *4 (W.D. Ky. May 2, 2023) (describing *Lochner*, *Allgeyer*, and other decisions of their era as "outdated, disfavored, and overruled").

189. *See* MAYER, *supra* note 14, at 84 (observing that many modern commentators regard *Adair*, along with other "substantive due process" decisions of its era, as "erroneous").

190. *See, e.g.*, Bert Co. v. Turk, 298 A.3d 44, 95 (Pa. 2023) (Wecht, J., concurring) (observing that Court's attitude to fundamental rights may be evolving yet again) ("None of the Supreme Court's pronouncements were (or are) received at Mount Sinai on stone tablets. The Supreme Court recently has demonstrated its willingness to reconsider longstanding precedent in the realm of substantive due process."); HISTORY OF PROPERTY RIGHTS, *supra* note 13, at 9 (arguing that historical evidence and 150 years of pre-New Deal case law shows that the "relegation of property rights to a lesser constitutional status is not historically warranted"), 143 (observing that the Supreme Court has become more interested in protecting property rights since the 1970s). *Cf.* MAYER, *supra* note 14, at 84-87 (arguing that *Adair* and similar decisions are misunderstood; they were not based on employers' freedom of contract alone, but instead on equality of contracting rights, which were themselves embedded in Anglo-American historical practice).

191. *See* Golden Glow Tanning Salon, Inc. v. City of Columbus, 52 F.4th 974, 982 (5th Cir. 2022) (Ho, J., concurring) (observing that the Supreme Court has said it will recognize rights rooted in nation's history and tradition); Jacob Neu, *The Short History and Checkered Tradition of*

Women's Health Organization[192] and *New York State Rifle & Pistol Association v. Bruen*[193] relied less on the Constitution's literal words than on its historical context.[194] And that context includes widespread social norms and beliefs about what the text meant when it was adopted.[195]

Given that premise, it's clear that we should account for unwritten legal norms.[196] But not just any norms: only those embedded in the Constitution's original understanding.[197] That category would include fundamental rights filtered through the framers' natural-law philosophy.[198] And as we've seen,

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"History and Tradition," IUS & IUSTITIUM (July 8, 2022), https://iusetiustitium.com/the-short-history-and-checkered-tradition-of-history-and-tradition [https://perma.cc/WL2M-CX5H] (noting that Supreme Court relied on history and tradition in multiple major cases at end of 2022 term). *See also* Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (explaining that modern substantive-due-process analysis allows courts to enforce rights "deeply rooted in this Nation's history and tradition").

192. 597 U.S. 215 (2022).

193. 597 U.S. 1 (2022).

194. *See, e.g.*, John Malcolm, *Grading the SCOTUS: Originalism Rules, and that's a Good Thing*, HERITAGE FOUND. (July 11, 2022), https://www heritage.org/courts/commentary/grading-the-scotus-originalism-rules-and-thats-good-thing [https://perma.cc/23Q9-GHD2] ("The three words that describe the Supreme Court's decisions this term are text, history, and tradition."). *Compare* Michael Waldman, *Originalism Run Amok at the Supreme Court*, BRENNAN CTR. FOR JUST. (June 28, 2022), https://www.brennancenter.org/our-work/analysis-opinion/originalism-run-amok-supreme-court [https://perma.cc/H2Y8-GXDT] (arguing that *Bruen* and *Dobbs* represent the culmination of a long-running effort to cement originalism as Court's dominant approach to constitutional interpretation), *and* David H. Gans, *This Court Has Revealed Conservative Originalism to Be a Hollow Shell*, ATLANTIC (July 20, 2022), https://www.theatlantic.com/ideas/archive/2022/07/roe-overturned-alito-dobbs-originalism/670561 [https://perma.cc/M59T-28GZ] (arguing that "history and tradition" is the "new calling card of a Supreme Court that is willing to upend our constitutional order in the name of traditionalism"), *with* Axon Enter., Inc. v. FTC, 598 U.S. 175, 196-99 (2023) (Thomas, J., concurring) (noting that property rights were among the core "private" rights historically considered to appertain to people as individuals, not members of society, and interpreting modern doctrine through that historical lens).

195. *See, e.g.*, Baude, *supra* note 10, at 2356-61 (describing role of historical practices and framers' views in originalist theory); *Turk*, 298 A.3d at 99-100 (Wecht, J., concurring) (observing that particular justices, including Justice Thomas, have increasingly emphasized the "historical understanding" of constitutional provisions, including the Privileges and Immunities Clause of the Fourteenth Amendment); B. Jessie Hill, *Resistance to Constitutional Theory: The Supreme Court, Constitutional Change, and the "Pragmatic Moment,"* 91 TEX. L. REV. 1815, 1819 (2013) ("[E]very act of interpretation, including constitutional interpretation, inevitably draws not only on text but on context, and that the relevant context extends beyond both the written document and the historical context of its origination to contemporary social and cultural facts on the ground.").

196. *See, e.g.*, *Golden Glow Tanning*, 52 F.4th at 982 (Ho, J., concurring) (recognizing that the Supreme Court has protected unwritten rights); *Turk*, 298 A.3d at 85 (Wecht, J., concurring) ("The United States Constitution protects unenumerated rights.").

197. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997). *See also* Palko v. Connecticut, 302 U.S. 319, 325 (1937) (explaining that due process includes "immunities . . . implicit in the concept of ordered liberty"), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969); ARKES, *supra* note 1, at 257 (arguing that the "ordered liberty" prong of the *Palko* test is just as important as the "history and tradition" prong; it reflects the fundamental moral values woven through natural law).

198. *See, e.g.*, LASH, *supra* note 6, at 27 (observing that "scholars have long recognized the founders' widespread belief in retained individual natural rights"); FARBER, *supra* note 6, at 4 (arguing that the framers understood fundamental law as being grounded in "natural law" and the "law of nations"), 6 (arguing that "the idea of natural law had broad intellectual support in the eighteenth century"). *See also* THE CONTRACT CLAUSE, *supra* note 8, at 34 (arguing that belief in

there were few rights more deeply rooted in that philosophy than the right to work.[199]

V. COLLECTIVE BARGAINING AND NATURAL LAW: COMPETITION AND ACCOMMODATION

There are, of course, objections to this view. Chief among them is the supposed indeterminacy of natural law itself.[200] For more than a century, critics as diverse as H.L.A. Hart and Antonin Scalia have argued that natural law is no law at all; it is moral philosophy posing as law.[201] For his part, Scalia believed in natural rights.[202] But he also believed that natural rights

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natural law, which "preexisted the organization of government," was widely shared by founding-era lawyers and jurists, including the first Chief Justice of the United States, John Marshall). *Cf.* State v. Julow, 31 S.W. 781, 782 (Mo. 1895) (explaining that concept of due process incorporated "law of the land" tracing back through English common law).

199. *See Golden Glow Tanning*, 52 F.4th at 981 (Ho, J., concurring) ("If we're going to recognize various unenumerated rights as fundamental, why not the right to earn a living?"), 984 ("[V]arious scholars have determined that the right to earn a living is deeply rooted in our Nation's history and tradition—and thus should be protected under our jurisprudence of unenumerated rights."). *See also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (listing among the fundamental liberties protected by the constitution "the right of the individual to contract" and "to engage in any of the common occupations of life"); Slaughter-House Cases, 83 U.S. 36, 109 (1872) (Field, J., dissenting) ("[T]he pursuit of the ordinary avocations of life, and a declaration that all grants of exclusive privileges, in contravention of this equality, are against common law and void."); Coffeyville Vitrified Brick & Tile Co. v. Perry, 76 P. 848, 849 (Kan. 1904) ("The right to follow any lawful vocation, and to make contracts, is as completely within the protection of the Constitution as the right to hold property free from unwarranted seizure, or the liberty to go when and where one will . . . . Every citizen is protected in his right to work where and for whom he will; he may not only select his employer, but his associates."); HISTORY OF PROPERTY RIGHTS, *supra* note 13, at 4 ("The framers of the Constitution were deeply concerned with the need to safeguard property rights."); SANDERS, *supra* note 6, at 8 (arguing that the right to "pursue the occupation of one's calling" is among the rights reserved under the Ninth Amendment and state equivalents). *Cf.* Raffensperger v. Jackson, 888 S.E.2d 483, 492 (Ga. 2023) (explaining that the Georgia constitution has long been interpreted to protect a right to earn a living under the state due-process clause). *But see* FLEMING, *supra* note 62, at 141 (arguing that property rights and other economic rights are *so* firmly rooted in our culture and tradition that they need no extra protection in court).

200. *See* David VanDrunen, *A Response to the Symposium on* Politics After Christendom, 36 J.L. & RELIGION 424, 425 (2021) (responding to arguments that natural-law method is too indeterminate to be of practical use).

201. *See* H.L.A. HART, THE CONCEPT OF LAW 167-71 (Oxford Univ. Press 3d ed. 2012) (denying that morals are natural to society or that there is any such thing as moral law); Troxel v. Granville, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) (denying that judges could enforce unwritten fundamental norms through the Ninth Amendment or any other provision of the Constitution). *See also, e.g.*, Pound, *supra* note 9, at 487 (criticizing natural-law methods as "artificial" and even "evil"); *Natural Law*, *supra* note 85, at 41 (describing practitioners of natural law as "naïve" thinkers who confuse traditional practices with inevitable practices).

202. *See Troxel*, 530 U.S. at 91 (Scalia, J., dissenting) (stating that, in his view, the people retained certain unalienable rights as reflected by the Declaration of Independence and the Ninth Amendment).

could not be enforced by judges.[203] In that sense, he was a strict positivist.[204] He saw the "law" as the specific words adopted by legitimate authorities.[205] Any attempt to draw on other sources would open a juridical Pandora's box.[206] It would allow judges to import their own preferences under the guise of "doing justice." There would be no way to distinguish between the law and what the judge had for breakfast.[207]

But that argument proves too much. Taken literally, it would stop judges from considering *any* history, tradition, or widespread norms.[208] And our legal system has never worked that way.[209] Even textualist judges refer to background principles and presumptions.[210] Nowhere in the Constitution will you find the words "privacy," "enumerated powers," or "federalism." Yet judges rely on those concepts just as surely as they rely on any explicit provision of the Bill of Rights.[211] These concepts are as much "the law" as any words on the page.[212]

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203. *See id.* at 92 (explaining that while a state may have no power to infringe unenumerated rights) ("I do not believe that the power which the Constitution confers on me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe on what is (in my view) that unenumerated right.").

204. *See Beyond Textualism*, *supra* note 63, at 10:34 (explaining that "positivist" textualism is the idea that judges must follow external sources of law).

205. A MATTER OF INTERPRETATION, *supra* note 10, at 22 ("The text is the law, and it is the text that must be observed.").

206. *See id.* at 21 (arguing that consideration of other sources, such as legislative intent, would be "nothing but an invitation to judicial lawmaking").

207. *See id.* at 22 ("It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is."). *See also* Fitzpatrick, *supra* note 9, at 1543 ("Trying to figure out what most people in the framing generation thought the natural law encompassed is fraught with ambiguity, and, as they do when confronted with ambiguities in other legal sources, judges may turn, consciously or unconsciously, to their own policy preferences.").

208. *See* ARKES, *supra* note 1, at 22-23 (arguing that Scalia's concerns about natural rights are not resolved by his own methods and, at any rate, are inconsistent with our legal tradition); FARBER, *supra* note 6, at 5-6 (arguing that Scalia's approach would prevent judges from enforcing any unenumerated rights, which would be inconsistent with the Constitution's text and design).

209. *See* HISTORY OF PROPERTY RIGHTS, *supra* note 13, at 62-63 (describing methods eighteenth-century courts used to protect property rights) ("Looking to the precepts of natural law rather than any specific clause of the Constitution, some federal judges adopted the doctrine of vested rights to protect established property rights from legislative interference.").

210. *See* Neomi Rao, *Textualism's Political Morality*, 73 CASE W. RSRV. L. REV. 191, 193 (2022) ("Our mature and sophisticated legal tradition is built on principles of natural law, common law, and concepts rooted in the Roman law. In determining the meaning of a statute, textualists may rightly turn to these *legal* sources for guidance."). *See also* HISTORY OF DUE PROCESS, *supra* note 13, at 43 (explaining that in the nineteenth century, American judges imported natural-rights concepts into constitutional doctrine through the concept of due process).

211. *See* Rao, *supra* note 210, at 197 (describing background principles informing textualist methods as "postulates of *law*").

212. *See* FARBER, *supra* note 6, at 6 (arguing that to the framers, natural rights were not "merely collections of pious wishes to embroider political rhetoric . . . [and] had very real legal application"). *Cf.* Bond v. United States, 564 U.S. 211, 221 (2011) (discussing the role federalism principles play in constitutional interpretation and, in particular, in protecting individual rights); Rao, *supra* note 210, at 203 (arguing that fundamental background principles of law, including natural law, are essential even to a textualist interpretation) ("A faithful textualist interprets statutes in light of these foundations.").

In fact, unwritten law is so well accepted that it often goes unnoticed.[213] There have always been certain rules that lawyers just "know."[214] For example, we all know that an accused person is innocent until proven guilty beyond a reasonable doubt.[215] Most of us also know that this rule is grounded in the Constitution.[216] But search your pocket Constitution for those words, and you will not find them. Instead, you will find them in the shared assumptions of our legal culture—the way we talk, think, and even argue about the law.[217] They are so basic that we never even bother to look them up.[218]

That may sound imprecise, but it works.[219] Every day, in courtrooms across the country, we protect rights deeply woven into our legal fabric.[220] Sometimes, of course, we disagree about what those rights are. But, disagreements on the margins don't undermine the premise.[221] We are still able to search the caselaw, draw out the principles, and develop a framework.[222] That task is not always easy.[223] But it would be no more

213. ARKES, *supra* note 1, at 44 (arguing that despite conservative skepticism, natural law is not vague or hazy; it is so woven in our consciousness and decision-making that we do not notice it).

214. *See, e.g.*, ARKES, *supra* note 1, at 18 (arguing that the founders thought some principles were so well established that it was an "embarrassment" to write them down).

215. *See* William F. Fox, Jr., *The "Presumption of Innocence" as Constitutional Doctrine*, 28 CATH. U. L. REV. 253, 253-54 (1979) (describing the presumption as an "incantation . . . that borders on the mystical").

216. *See id.* at 253 (arguing that the presumption is "consistently invoked, but rarely analyzed") (footnote omitted). *See also In re* Winship, 397 U.S. 358, 363 (1970) (describing the presumption as a "bedrock" of criminal justice).

217. *See* Taylor v. Kentucky, 436 U.S. 478, 483 (1978) (describing the assumption as "undoubted law, axiomatic and elementary" (quoting Coffin v. United States, 156 U.S. 432, 453 (1895))). *See also* ARKES, *supra* note 1, at 160-63 (arguing that even non-lawyers are capable of discerning certain fundamental principles that do, or should, guide legal analysis).

218. *See* ARKES, *supra* note 1, at 44 (arguing that natural-law principles are so woven into legal culture that we don't notice them). *Cf.* LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES 14 (2010) (noting that nearly all judges and scholars agree that legal interpretation involves some mix of linguistic analysis, contextual reasoning, and substantive value judgment).

219. *See* Rao, *supra* note 210, at 203 (distinguishing fundamental principles developed through judicial methods over time from freewheeling moral methods, such as those proposed by Ronald Dworkin). *See also* ARKES, *supra* note 1, at 20 (arguing that the indeterminacy of unwritten fundamental law is overblown; most people can understand it and agree on it).

220. *See* ARKES, *supra* note 1, at 48 (offering as an example the principle that all criminal defendants are due a fair trial); *Beyond Textualism*, *supra* note 63, at 38:53 (arguing that even modern textualism supplements text with unwritten legal rules, such as custom and "pre-realist tenets of our legal tradition").

221. *See* ARKES, *supra* note 1, at 22-23 (arguing that disagreement over truths does not mean that truths do not exist).

222. *See* KEYNES, *supra* note 6, at 156 (observing that the common-law method with emphasis on precedent prevents judges from engaging in "freewheeling" jurisprudence); Rao, *supra* note 210, at 203 ("These principles are neither plucked from the air nor found in the heart of the judge; they are the principles integral to the distinct province of the law.").

223. *See* ARKES, at 22-23 (pointing out that difficult legal questions produce disagreement even under textualist or positivist approaches).

difficult if we called it what it often is: discovering and enforcing the natural law.[224]

And yet, textualism is itself now deeply rooted in our legal culture.[225] It informs how we answer almost any legal question. So, even judges open to the natural-law approach may demand a textual hook.[226] How, they will ask, can they restrain Congress unless something in the Constitution gives them that power?[227] What in the document can they point to?

But the question itself betrays a degree of historical forgetfulness. Often, we assume that the main checks on federal power are those listed in the Bill of Rights. But the founders never saw it that way.[228] To the contrary, they resisted a Bill of Rights precisely because they worried that people would read it as exclusive.[229] That is the story of the Ninth Amendment.[230] The framers inserted the Ninth Amendment to remind us that the Constitution was never meant to enumerate all the rights "retained" by the people.[231]

Rather than list all the people's rights, the framers protected them by limiting the federal government's scope.[232] They gave the new government

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224. ARKES, *supra* note 1, at 2-3 (arguing that natural law has remained embedded in our law and language even as we've stopped calling it natural law), 59-60 (arguing that modern judges apply natural law without knowing it; they are like the Moliere character who discovers he's been speaking prose all his life); Rao, *supra* note 210, at 203 (explaining that textualist methods properly incorporate "deep foundations" and "background legal principles" that "reflect moral values drawn in from the natural law and the reasoned working through of legal principles over time").

225. *See, e.g.*, BedRoc Ltd., LLC v. United States, 541 U.S. 176, 177 (2004) ("The inquiry begins with the statutory text, and ends there as the text is unambiguous."); Diarmuid F. O'Scannlain, *"We are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 304 (2017) (arguing that today "any competent lawyer knows that when construing a statute one begins with the text"). *Cf.* Rao, *supra* note 210, at 191 (describing herself as a textualist, even as she accepts the role of fundamental legal norms in statutory interpretation).

226. *See* Rao, *supra* note 210, at 191 (describing a narrow view of textualism that regards external principles as out of bounds or extra-legal).

227. *See id.*

228. *See, e.g.*, Bert Co. v. Turk, 298 A.3d 44, 85-86 (Pa. 2023) (Wecht, J., concurring) (describing rationale that led to enumeration of rights in Bill of Rights and purpose of Ninth Amendment); SANDERS, *supra* note 6, at 7 (arguing that Ninth Amendment's main purpose was to avoid negative implication that by enumerating certain rights the federal government could not violate, the Constitution gave the federal government the power to violate other rights).

229. *See Turk*, 298 A.43d at 95-96 (Wecht, J., concurring).

230. *See id.*; Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 3, 11-21 (2006).

231. *Turk*, 298 A.43d at 95 (Wecht, J., concurring). *See also* LASH, *supra* note 6, at 80-81 (noting the close relationship between the doctrine of enumerated powers, the Ninth Amendment, and the Lockean theory of natural rights); FARBER, *supra* note 6, at 44 (arguing that the purpose of the Ninth Amendment was to protect unenumerated rights); BANNER, *supra* note 6, at 74 (explaining that Ninth Amendment was intended to prevent courts from construing the Constitution to deny preexisting natural rights); ON POLITICS, *supra* note 39, at 594, 609-10 (arguing that natural-rights theory led Madison to oppose a bill of rights to begin with and ultimately informed language of Ninth Amendment).

232. *See* SANDERS, *supra* note 6, at 19-20. *See also* LASH, *supra* note 6, at 280 (explaining that before the Civil War, the Ninth Amendment was seen not as a source of rights in itself, but as a statement of limited federal power to invade rights); HISTORY OF PROPERTY RIGHTS, *supra* note

only specific, enumerated powers.[233] They expected the government to use those powers to address certain pressing issues of the day, such as a recent profusion of debtor-relief laws.[234] But they never expected it to violate natural rights.[235] They thought natural rights would simply be beyond the new government's reach.[236]

That means we don't need to look for a specific textual hook. Such a hook is not only unnecessary but ahistorical. The founders thought that if Congress tried to interfere with natural rights, it would simply exceed its powers.[237] And judges could block its action as *ultra vires*.[238]

Methodological concerns aside, some critics will also object on substance. They will see the natural-labor-rights approach as merely another way to squash unions.[239] They will say that the loss of exclusivity would

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13, at 48 (explaining that the framers expected federalism and limited powers to protect individual rights).

233. *See* U.S. CONST. art. I, § 8 (enumerating powers of Congress); THE FEDERALIST NO. 45 (James Madison) (explaining that powers not delegated to federal government remain with the states). *See also* United States v. Morrison, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."). *Cf.* SANDERS, *supra* note 6, at 5-6 (arguing that Ninth Amendment and its state equivalents protect unenumerated rights, including the right to earn a living).

234. *See* HISTORY OF PROPERTY RIGHTS, *supra* note 13, at 8-41, 43-45 (surveying contemporary debates that informed the Constitution's structure and various provisions, including the Takings and Contract Clauses).

235. *See* SANDERS, *supra* note 6, at 19-20. *See also* LASH, *supra* note 6, at 158 (arguing that the Ninth Amendment's chief function is to protect unenumerated rights from overbroad exercises of federal power), 177 ("Scholars have been right, then, to insist that the Ninth Amendment as originally understood protected individual natural rights.").

236. *See* LASH, *supra* note 6, at 167 (explaining that founders meant to protect natural rights by means of federalism and doctrine of limited powers). *Cf.* State v. Julow, 31 S.W. 781, 782-83 (finding that legislature could not forbid parties from contracting to sell labor under arbitrary terms) ("We deny the power of the legislature to do this, to brand as an offense that which the constitution designates and declares to be a right, and therefore an innocent act . . . .").

237. *See* LASH, *supra* note 6, at 167.

238. *See* Marbury v. Madison, 5 U.S. 137, 176-77 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written . . . . It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it . . . ."). *See also Morrison*, 529 U.S. at 607 (recognizing that courts must refuse to enforce laws passed outside Congress's powers); Calabresi & Leibowitz*, supra* note 15, at 1055-56 (arguing that the framers meant to deny extension of special privileges and monopolies, and it is the job of courts to enforce that ban); SANDERS, *supra* note 6, at 133, 146 (arguing that for fundamental rights to mean anything, they must be fully enforceable in court). *But cf.* MAYER, *supra* note 14, at 11 (arguing that an explicit textual hook for enforcing property rights does exist: the Due Process Clause of the Fourteenth Amendment); HISTORY OF PROPERTY RIGHTS, *supra* note 13, at 79 (arguing that Due Process Clause of Fifth Amendment originated with Magna Carta and was meant to incorporate existing understandings of the "law of the land").

239. *Cf.* William B. Gould IV, *How Five Young Men Channeled Nine Old Men:* Janus *and the High Court's Anti-Labor Policymaking*, 53 U.S.F. L. REV. 209, 215-16 (2019) (criticizing Supreme Court's free-speech doctrine for a perceived bias against unions); Paul, *supra* note 156, at 973 (accusing courts of twisting common law and antitrust law to disadvantage workers and unions).

undermine unions' legitimacy and bury an already moribund labor movement.[240] They will frame it, in short, as results-oriented originalism.[241]

But that view oversimplifies the issue and prejudges the outcome. An end to exclusivity need not harm unions at all. Natural labor rights would do nothing to prevent unions from performing their core function—bargaining collectively for their members.[242] And in fact, natural rights might even help them find new relevance in the twenty-first century.[243]

To see why, we first have to understand how natural law interacts with positive law.[244] We often think of judicial review as a binary process: a statute either is or isn't constitutional.[245] But natural law didn't work that way.[246] Rather than presenting judges with an up-or-down choice, it gave them an interpretive principle.[247] It told them to interpret statutes whenever possible to respect natural rights.[248] In that way, it resembled modern canons like the rule of lenity,[249] the presumption against retroactivity,[250] and the "major

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240. *Cf.* Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 CAL. L. REV. 1821, 1836-40 (2019) (surveying the practical difficulties associated with a loss of exclusive status and concluding that any nonexclusive solution would be suboptimal).

241. *Cf., e.g.*, Adrian Vermeule, *Beyond Originalism,* ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037 [https://perma.cc/42NX-Q6M2] (arguing that judges use originalist theory as a methodological screen for reaching their preferred policy outcomes); Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379, 389 (2018) ("[A] skeptic of originalism might be *even more concerned* that originalism's advocates are abusing their ability to selectively appeal to the constitutional text, in order to reach their preferred outcomes *today*.").

242. *See* MORRIS, *supra* note 149, at 124 (arguing that the "natural purpose" of a union is to bargain for its members—something it can do even without exclusive status).

243. *See id.* at 11 (arguing that a members-only bargaining scheme could reinvigorate labor movement and return unions to their roots). *See also* Campbell, *supra* note 37, at 733 (arguing that a nonexclusive scheme would force unions to compete for members on their own merits and thus provide an incentive to offer better services).

244. *See generally* BANNER, *supra* note 6, at 30-31 (explaining that natural law and positive law were seen not to conflict, but to complement one another) ("[N]atural law provided broad principles to govern certain matters, while positive law provided the finer-grained rules needed to put those principles into practice . . . .").

245. *See id.* at 19 (contrasting natural-law methods with modern views of judicial review, under which a statute violating the constitution is deemed "void").

246. *See id.* (observing that while courts sometimes discussed natural law in terms of voiding statutes, they much more often sought to harmonize statutes with natural law).

247. *See* HELMHOLZ, *supra* note 6, at 112-16 (explaining that judges used natural law as an interpretive tool; it was used not to challenge statutes but to shape their meaning). *Cf.* SMITH, *supra* note 14, at 148 (explaining that jurists like Edward Coke didn't think unwritten principles could trump written words of text; the principles merely guided judges in interpretation of those texts).

248. SMITH, *supra* note 14, at 170-71 (explaining that English jurists like Edward Coke used common-law maxims the same way, interpreting acts of Parliament to be consistent with longstanding principles of law whenever possible). *But see* Day v. Savadge (1614) 80 Eng. Rep. 235, 237 ("[E]ven an Act of Parliament, made against natural equity . . . is void in it self [sic], for [the laws of nature are unchanging] . . . .").

249. *See* Moskal v. United States, 498 U.S. 103, 107 (1990) (describing rule of lenity as a method for resolving statutory ambiguity).

250. *See* Landgraf v. USI Film Prod., 511 U.S. 244, 265 (1994) ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.").

question" doctrine.[251] These canons tell judges that when multiple interpretations are available, they should choose the one that best respects the relevant underlying principle (e.g., we assume that Congress doesn't delegate authority over major questions to agencies without saying so).[252] Natural law did the same thing.[253] The only difference is that it drew its principles not from a single legal rule (e.g., all lawmaking power belongs to Congress) but from an entire legal tradition.[254]

So even if exclusive representation clashes with natural law, it isn't necessarily "unconstitutional."[255] It just needs to be interpreted to accommodate natural rights.[256] And fortunately, such an interpretation is available. Exclusive representation comes from section 9(a) of the NLRA.[257] Section 9(a) says that when a union wins an election, it becomes the exclusive

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251. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2367-68, 2374 (2023) (deploying presumption against delegation over "major" policy decision to executive branches to resolve question of statutory interpretation). *See also* Rao, *supra* note 210, at 196-203 (describing how "background source[s] of legal meaning," including legal maxims, constitutional structure, and natural law, inform the interpretive process and provide statutory meaning even in textualist approaches); HELMHOLZ, *supra* note 6, at 170-71 (comparing the methods common-law judges used to interpret and limit English legislation to the methods American judges use to review statutes for conformance with Constitution).

252. *See* Nat'l Fed'n Indep. Bus. v. U.S. Dep't of Lab., 595 U.S. 109, 121-26 (2022) (Gorsuch, J., concurring) (invoking both "major question" doctrine and nondelegation principles to narrowly read congressional grant of authority to Occupational Health and Safety Administration); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 243-317 (2012) (setting out "substantive" canons, such as the rule of lenity, used by courts to interpret legal texts). *But cf. Biden*, 143 S. Ct. at 511-12 (Barrett, J., concurring) (describing the "major question" doctrine as a linguistic canon, rather than a substantive one).

253. *See* HELMHOLZ, *supra* note 6, at 165 (explaining that judges would interpret statutes to avoid conflicts with natural law); BANNER, *supra* note 6, at 19 ("[N]atural law was used much more often to *interpret* statutes rather than to strike them down."), 244 (comparing modern canons of construction to natural-law methods). *Cf.* SMITH, *supra* note 14, at 143-44 (explaining that seventeenth-century common-law jurists saw legal maxims as distillations of reasoning that served as the basis for all law and set it apart from arbitrary personal rule).

254. *See* HELMHOLZ, *supra* note 6, at 22 (explaining that natural-law method drew on several traditions, including Christian ethics and Roman law); FORSYTH, *supra* note 62, at 2 (explaining that natural-law method drew on "a broad mainstream of Western moral thought"). *Cf.* Charles River Bridge v. Warren Bridge, 36 U.S. 420, 422 (1837) (narrowly interpreting corporate charter to avoid grant of exclusivity in part because such a grant would contradict Anglo-American legal tradition); SMITH, *supra* note 14, at 143-45 (explaining that common-law judges thought statutes should be read against backdrop of unwritten principles embedded in law through reason).

255. BANNER, *supra* note 6, at 19 (explaining that natural law provided a baseline from which the legislature was presumed not to want to deviate).

256. *Compare* Darcy v. Allen, (1603) 77 Eng. Rep. 1260, 1262 (interpreting exclusive license granted by the Crown as unenforceable under the assumption that the Queen would surely not have intended to violate natural law), *with* NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 506-07 (1979) (interpreting NLRA not to apply to schools run by Catholic diocese under the assumption that Congress surely would not have intended to violate constitutional rights). *See also* HELMHOLZ, *supra* note 6, at 111-12 (describing *Darcy* as an example of how judges interpreted positive law to avoid conflict with natural law); Crowell v. Benson, 285 U.S. 22, 62 ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

257. 29 U.S.C. § 159(a).

representative.[258] But the statute also says that employees retain the right to process their own "grievances" and seek their own "adjustments."[259] Over the years, courts have read those words narrowly, applying them only to formal contractual grievances.[260] But that interpretation isn't the only possible one.[261] The words are capacious enough to embrace other circumstances. A "grievance" might be any complaint, concern, or request for different treatment.[262] And an "adjustment" might be any response or concession from the employer.[263] That is, the statute could be read to allow for a bilateral exchange and, thus, individual bargaining.[264] It wouldn't need to be amended, repealed, or struck down. It would only need to be reinterpreted.[265]

And in fact, that "reinterpretation" wouldn't even be novel: it would revert the statute to an earlier understanding. Soon after the NLRA was passed, employers challenged it as unconstitutional.[266] Courts rejected those challenges in part because they thought the statute allowed individual

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258. *Id.*

259. *Id.*

260. *See, e.g.*, Indus. Union of Marine & Shipbuilding Workers of Am. v. NLRB, 320 F.2d 615, 619 (3d Cir. 1963) (concluding that despite statutory language, the union retains ultimate control over whether to prosecute particular grievances); W. Tex. Utils. Co. v. NLRB, 206 F.2d 442, 446 (D.C. Cir. 1953) ("Although any grievance may be a subject of collective bargaining, not all subjects of collective bargaining are grievances. As we view the word 'grievances' it does not encompass, for example, the setting of wage rates for a large percentage of the employees in a certified bargaining unit.").

261. *Cf.* Bond, *supra* note 32, at 439 (arguing that courts have extended exclusivity under section 9(a) beyond the statute's natural and original meaning).

262. *See, e.g.*, *Grievance*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "grievance" to include "[a]n injury, injustice, or wrong that potentially gives ground for a complaint" and "[t]he belief that one has been treated unfairly or illegally"); *Grievance*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2001) (defining "grievance" to include "[a]n actual or supposed circumstance regarded as just cause for a complaint"); *Grievance*, WEBSTERS UNABRIDGED NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1968) (defining "grievance" to include "[t]hat which causes grief or uneasiness").

263. *See, e.g.*, *Adjustment*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "adjustment" to include "[t]he act of adapting or conforming to a particular use; orderly regulation or arrangement" and "[t]he act of settling or arranging, as a dispute or other difference"); *Adjustment*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2001) (defining "adjustment" to include "[a] modification, fluctuation, or correction").

264. *Cf.* NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 506 (1979) (reading the NLRA narrowly to avoid constitutional infirmity—namely, a conflict with the Free Exercise Clause); Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 751 (1988) (reading NLRA narrowly to avoid free-speech and free-association problems).

265. *Cf.* Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 768-69 (1961) (interpreting Railroad Labor Act's authorization of agency-fee agreements to avoid conflict with First Amendment); NLRB v. Fruit & Vegetable Packers & Warehousemen, 377 U.S. 58, 71-72 (1964) (interpreting NLRA's ban on secondary picketing not to include "product" picketing to avoid conflict with First Amendment). *Cf. also* Rao, *supra* note 210, at 197-203 (listing constitutional structure and doctrine of constitutional avoidance alongside natural law as permissible sources of meaning for textualist methods). *But see* KOTERSKI, *supra* note 6, at 7 (stating that "judicial review has sometimes invoked natural law reasoning as the ground for overturning legislation").

266. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 43-45 (1937) (considering due-process challenge); Bond, *supra* note 32, at 446 (surveying challenges).

bargaining.[267] For example, in *Precision Castings Co. v. Boland*, an employer argued that exclusive representation interfered with its right to bargain individually with its employees.[268] But the district court disagreed.[269] The court recognized that while one *could* read the NLRA to ban individual bargaining, that interpretation would raise serious constitutional questions.[270] And the court had a duty to avoid constitutional conflicts whenever possible:

> Construction, if possible, must be given so as to sustain the act rather than invalidate it. As we construe the act, it does not provide for any unconstitutional interference with the freedom of contract include within the guaranties of the due process clause of the Fifth Amendment. It is true that the act requires the employer to bargain with representatives of the majority of the employees of any appropriate unit. It goes no further than that. It does not preclude other employees being heard. There is no provision in the being heard. There is no provision in the act which expressly or by inference compels the employer to accept dictation from the representatives of the majority as representatives of all employees, nor is there any penalty imposed for failure so to do.[271]

Individual bargaining would not, therefore, be an unprecedented departure.[272] It would be a plausible reading courts could use to respect natural labor rights. They have done it before, and they could do it again.[273]

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267. *See* Bond, *supra* note 32, at 446 (arguing that interpretation allowing individual bargaining was key to upholding NLRA's constitutionality against initial challenges).

268. 13 F. Supp. 877, 884-85 (W.D.N.Y. 1936).

269. *Id.*

270. *Id.*

271. *Id.* at 884. *Cf.* Crowell v. Benson, 285 U.S. 22, 46 (1932) (explaining that a "statute is to be construed to support rather than defeat it").

272. *See Precision Castings*, 13 F. Supp. at 884. *See also Jones & Laughlin*, 301 U.S. at 43-45 (accepting government's description of exclusivity under the NLRA, which would not have barred employers and employees from direct bargaining); NLRB v. Sands Mfg. Co., 96 F.2d 721, 724 (6th Cir. 1938) ("The National Labor Relations Act does not prevent the employer from hiring individuals on whatever terms he may by unilateral action determine . . . ."), *aff'd,* 306 U.S. 332 (1939).

273. *See* Adair v. United States, 208 U.S. 161, 175 (1908) ("[T]he employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."), *overruled by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941); Coppage v. Kansas, 236 U.S. 1, 14 (1915) (conceding that contract rights are subject to reasonable regulation, but concluding that denial of right to decide with whom to contract and on what terms in an employment relationship was arbitrary), *overruled by Phelps Dodge*, 313 U.S. at 187. *Cf.* Consol. Edison Co. v. NLRB, 305 U.S. 197, 231-32 (1938) (observing that even without certification as an exclusive representative, a union can negotiate a members-only contract, and enforcing just such a contract over the Board's objection). *See also* NEB. REV. STAT. ANN. § 48-838 (West 2011) (permitting individual employees to bargain for themselves even within a represented bargaining unit); Fisk & Malin, *supra* note 240, at 1838-39 (noting that several states have experimented with nonexclusive bargaining schemes in which employees can bargain for themselves if they choose).

Yet even this precedent will leave some critics unsatisfied. They will still see the possibility of individual bargaining as a threat to unions.[274] They will say that individual bargaining would strip unions of their lock on bargaining.[275] Employees would flee unions to negotiate their own deals.[276] This outflow would sap unions' ability to protect their remaining members.[277] Individual deals would clash with the collective one.[278] And riddled with exceptions, collective bargaining would collapse.[279]

But that view assumes that monopoly status helps unions now—a conclusion hard to sustain in light of real-world experience. As monopolies, unions have had little incentive to improve their services. Their sales pitch has gone stale, and workers have increasingly failed to see their value.[280] Even as workers continue to say they like unions in the abstract, they have increasingly declined to join one.[281] But if workers could bargain for

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274. *See, e.g.*, Fisk & Malin, *supra* note 240, at 1836-40 (arguing that past experience with nonexclusive bargaining regimes in the states shows that it is an impractical way to handle collective bargaining); Ann C. Hodges, *Imagining U.S. Labor Relations Without Union Security*, 28 EMP. RESPS. & RTS. J. 135, 142 (2016) (detailing threats to union stability that would emerge without exclusive representation).

275. *See* Fisk & Malin, *supra* note 240, at 1838 (arguing that loss of exclusive status will cause unions shed members, often to other unions).

276. *Cf.* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2490 (2018) (Kagan, J., dissenting) (making a similar point about unions' inability to collect agency fees from nonmembers); DANIEL DISALVO, PUBLIC SECTOR UNIONS AFTER *JANUS* 4 (2019), https://media4 manhattan-institute.org/sites/default/files/IB-DaD-0219.pdf [https://perma.cc/4W6G-7KJV] ("*Janus* weakens public-sector unions economically, as they will lose revenue from agency fees. Furthermore, because government workers can now receive most of the benefits of union representation without paying for them, public unions are likely to lose some members (and their dues money) in the coming years.").

277. *See* Sarah W. Cudahy et. al., *Total Eclipse of the Court?* Janus v. AFSCME, Council 31 *in Historical, Legal, and Public Policy Contexts*, 36 HOFSTRA LAB. & EMP. L.J. 55, 103 (2018) (arguing that allowing individual employees to pursue and adjust their own grievances might "adversely impact the substantive the substantive terms of negotiated agreements").

278. *See* Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 68-69 (1975) (speculating that conflict between separate deals and collective ones would increase the "probability of strife and deadlock"); J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944) (predicting that "advantages to individuals may prove as disruptive to industrial peace as disadvantages").

279. *See J.I. Case*, 321 U.S. at 337 (stating that without exclusive union bargaining, the NLRA would be "reduced to a futility"). *Cf.* Abood v. Detroit Bd. of Ed., 431 U.S. 209, 220 (1977) (portraying exclusivity as a "central element in the congressional structuring of industrial relations"), *overruled by Janus*, 138 S. Ct. at 2478.

280. *See* Sean P. Redmond, *Union Membership Rate at Record Low in 2022*, U.S. CHAMBER OF COM. (Jan. 23, 2023), https://www.uschamber.com/employment-law/unions/union-membership-rate-at-record-low-in-2022 [https://perma.cc/HZ2A-MYAW] (hypothesizing that low unionization rates suggest that modern employees do not find union representation "attractive"). *Cf.* Alexander T. MacDonald, *Permanent Replacements: Organized Labor's Fall, Employment Law's (Incomplete) Rise, and the Way Forward*, 50 IDAHO L. REV. 19 (2013) (arguing that proliferation of employment laws over second half of twentieth century reduced workers' incentive to form and join unions, which they no longer needed to secure basic minimum terms).

281. *Compare* Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx [https://perma.cc/B568-XBZK] (reporting that unions enjoy a seventy-one percent approval rating among general public), *with Union Membership Rate Fell by 0.2 Percentage Point*

themselves, the incentives would flip. Unions would face new pressures to perform.[282] They would have to prove that they could negotiate better deals.[283] Only if their collective agreements were better than individual ones could they to recruit new members.[284] Competition would drive improvement.[285]

That dynamic would be even more powerful if courts discarded the so-called duty of fair representation.[286] The duty is a judicial creation. It appears nowhere in the NLRA's text. It has instead been constructed as a corollary to exclusive representation: courts assume that if the union has the right to bargain for everyone, it must also have a duty to represent everyone fairly.[287] So, they have forced unions to negotiate agreements that treat members and nonmembers alike.[288]

But if employees could bargain for themselves, that rationale would evaporate.[289] There would be no reason to force a union to protect nonmembers if nonmembers were free to protect themselves.[290] Courts could, therefore, discard the fiction of fair representation.[291] And without it, unions would be free to negotiate contracts purely for the benefit of their

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to 10.1 Percent in 2022, U.S. BUREAU OF LAB. STAT. (Jan. 24, 2023), https://www.bls.gov/opub/ted/2023/union-membership-rate-fell-by-0-2-percentage-point-to-10-1-percent-in-2022.htm [https://perma.cc/288X-MQU6] (reporting that unionization rate fell to 10.1% in 2022, the "lowest [rate] on record").

282. *See* Campbell, *supra* note 37, at 733, 772 (arguing that a nonexclusive bargaining regime would reintroduce competitive pressures into the representation system).

283. *See id.* at 733 (noting that unions would have to recruit members on the strength of their services).

284. *See id.*

285. *See id.* at 772 (arguing that in the absence of exclusivity, "unions would compete for membership").

286. *See* Logan Householder, *A New Stage for Grievances?: Members-Only Grievance Insurance and the Duty of Fair Representation Post-*Janus, 83 OHIO ST. L.J. 753, 759 (2022) (arguing that if courts retained the duty without a corresponding right to exclusivity, they would put unions in a "double bind" of being forced to protect the interests of people they had no right to represent).

287. *See* Vaca v. Sipes, 386 U.S. 171, 177 (1967) (inferring a duty of fair representation as corollary of exclusive representation).

288. *See id.* (citing Humphrey v. Moore, 375 U.S. 335, 341 (1964)) (describing the duty of fair representation as the duty "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct").

289. *See* Cudahy et al., *supra* note 277, at 63 (observing that the "primary rationale" for the duty of fair representation is the need to ameliorate potential abuse of the union's exclusive status). *Cf.* Fisk & Malin, *supra* note 240, at 1834 (arguing that to make members-only representation work, governments would have to abolish the duty of fair representation).

290. *See* Fisk & Malin, *supra* note 240, at 1834; Householder, *supra* note 286, at 771 (noting a "fundamental unfairness" in requiring a union to safeguard the interests of employees who opt out of representation). *Cf.* Coppage v. Kansas, 236 U.S. 1, 19-20 (1915) (suggesting that unions had a constitutional right to set terms of their own membership and refuse to admit any person who would not abide by those terms), *overruled by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941).

291. *Cf.* Cudahy et al., *supra* note 277, at 63 (arguing that courts would *have* to jettison the duty to avoid compelled-speech problems).

members.[292] Those contracts would give unions a chance to show their value.[293] If they negotiated better deals, they would attract more members.[294] And with more members, they would have more bargaining leverage, which would allow them to extract even better deals.[295] The result would be a virtuous cycle. Unions could experience a membership boom—a boom built on their own performance and consistent with natural labor rights.[296]

VI. CONCLUSION: MERE BARGAINING?

This result wouldn't simply bring labor law more in line with historical principles; it would also bring the law more in line with a common sense of justice. In your author's experience, most non-lawyers dislike the idea of exclusive representation.[297] When a person learns that she could be forced to bargain through a union, she's shocked.[298] Something about involuntary representation offends her sense of fairness.[299] Why should she have to let someone else bargain for her?[300] Maybe collective bargaining would help her; maybe it wouldn't.[301] But shouldn't she have a choice?[302]

That appeal to common sense is more than rhetorical. It tells us something about the correct legal result. As Arkes explains in *Mere Natural*

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292. *See* Fisk & Malin, *supra* note 240, at 1834 (arguing that members-only bargaining would require allowing unions to negotiate agreements that favor their members).

293. *See* Campbell, *supra* note 37, at 733 ("Unions would . . . compete for members on the basis what they can provide them."). *Cf.* Householder, *supra* note 286, at 775-76 (arguing that nonexclusive unions could recruit more members by offering benefits such as grievance insurance).

294. *See* Campbell, *supra* note 37, at 733. *Cf.* Householder, *supra* note 286, at 776 ("By leveraging their membership to distribute costs, unions can offer their members increased security and ease of access to grievance procedures.").

295. *See* Campbell, *supra* note 37, at 733 (predicting that the end of exclusive representation would spur competition for bargaining services).

296. *See id. Cf.* Coppage v. Kansas, 236 U.S. 1, 17-18 (1915) (concluding that property rights, including right to contract to sell one's own labor, was a "human right" and liberty right the state could not interfere with arbitrarily), *overruled by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941); Slaughter-House Cases, 83 U.S. 36, 110 (1872) (Field, J., dissenting) (describing the right to pursue a lawful profession on equal terms as the "fundamental idea upon which our institutions rest").

297. *Cf.* Householder, *supra* note 286, at 776 ("[E]xclusive representation naturally breeds concerns about fairness, specifically to nonmembers.").

298. *Cf.* BOK & DUNLOP, *supra* note 22, at 13 (tracking historical polling data and concluding that the public consistently disapproves of forced union membership and mandatory dues).

299. *See id.* at 13, 18 (showing that while large majorities approve of the right to join unions, similar majorities oppose mandatory membership, and many distrust union leaders), 98 ("No issue has aroused greater furor in the field of labor relations than the status of the union shop.").

300. *Cf.* Bond, *supra* note 32, at 441-42 (criticizing exclusivity for denying employees a choice over whether to pursue their own complaints directly with their employer).

301. BOK & DUNLOP, *supra* note 22, at 99 (pointing out that collective bargaining won't benefit everyone; some employees would be better off bargaining individually).

302. *Cf.* Campbell, *supra* note 37, at 772 (arguing that exclusivity silences individual employees and "denies workers the right to associate with representatives of their choosing").

Law, natural law is universal in part because everyone understands it.[303] Everyone knows that it's wrong for a group of boys to beat up a defenseless classmate.[304] They know it's wrong to cheat, steal, or kill.[305] And they know, in some rough way, that people have a right to earn a living.[306] They know that work is part of the "pursuit of happiness."[307] And they know it's wrong to arbitrarily deny someone that opportunity.[308]

That intuition undergirds natural labor rights theory.[309] Natural labor rights give every worker the same chance to bargain for her own terms of work.[310] Few rights are more deeply embedded in the natural law tradition.[311] That tradition was once front of mind for American lawyers; it guided legal decision-making as surely as any written text.[312] It has since fallen out of

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303. *See* ARKES, *supra* note 1, at 17 ("[T]he real surprise of the Natural Law is that people have the sense that they have known these things all their lives."), 37 (arguing that natural law is readily understood by ordinary people).

304. *Id.* at 33.

305. *See id.* at 17, 30, 37 (describing the role of intuition and widely held beliefs in natural law).

306. *Cf.* SANDEFUR, *supra* note 12, at xv-xvi (explaining how personal experiences representing workers and small-business owners led to strengthened belief and interest in the right to work).

307. *Cf.* State *ex rel* Zillmer v. Kreutzberg, 90 N.W. 1098, 1099-1100 (Wis. 1902) (connecting fundamental property rights to the pursuit of "happiness").

308. *See* ARKES, *supra* note 1, at 53-54 (reasoning that the Supreme Court was right to strike down minimum wage laws for women in early twentieth century because the laws effectively denied the women an opportunity to seek gainful employment). *Cf.* Denning, *supra* note 16, at 7 (stating that the right to work is "fully recognised by law" and that a union cannot restrict that right arbitrarily) ("If the union should assume to make a rule which destroys that right or puts it in jeopardy—or is a gratuitous and oppressive interference with it—then the union exceeds its powers. The rule is *ultra vires* and invalid.").

309. *See* ARKES, *supra* note 1, at 30, 37 (explaining role of intuition and inborn sense of justice in natural law).

310. Coppage v. Kansas, 236 U.S. 1, 20-21 (1915), *overruled by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941).

311. *See, e.g.*, *Coppage*, 236 U.S. at 21 (finding that right of both sides to bargain for terms of employment relationship was a right recognized by an "almost unbroken current" of state and federal decisions). *See also* Golden Glow Tanning Salon, Inc. v. City of Columbus, 52 F.4th 974, 983 (5th Cir. 2022) (Ho, J., concurring) (surveying scholarship showing the deep tradition of the right to earn a living) ("[M]embers of the Founding generation agreed on the fundamental importance of the right to pursue one's occupation."); State v. Julow, 31 S.W. 781, 782-83 (Mo. 1895) (finding that concept of due process protected a right to contract for terms of employment, seen as a species of property right).

312. *See, e.g.*, THE FEDERALIST NO. 31 (Alexander Hamilton) (arguing that there were "maxims in ethics and politics" as certain as the natural laws of geometry). *See also* ARKES, *supra* note 1, at 18-20 (arguing that founders took natural law for granted and drafted Constitution with it in mind); FARBER, *supra* note 6, at 8 ("Natural law continued to play an important role in American law well into the nineteenth century. In particular, natural law ideas influenced the drafters of the Fourteenth Amendment at the end of the Civil War.").

memory, lost in the march toward codification and regulation.[313] But if recent scholarship is any indication, it may soon return to center stage.[314]

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313. *See* BANNER, *supra* note 6, at 170-80 (tracking how natural-law concepts fell out of legal discourse in late nineteenth century).

314. *Cf.* FELIX FRANKFURTER, OF LAW AND MEN 19 (Philip Elman ed., 1956) ("Yesterday, the active area in this field was concerned with 'property.' Today it is 'civil liberties.' Tomorrow it may again be 'property.' Who can say that in a society with a mixed economy, like ours, these two areas are sharply separated, and that certain freedoms in relation to property may not again be deemed, as they were in the past, aspects of individual freedom?").