

## THE PUBLIC'S INTEREST IN "PRIVATE" EMPLOYMENT RELATIONS

by  
Jeffrey D. Jones\*

*Few employment law scholars are satisfied with the current state of employment law. Beyond critiques of particular employment law rules, however, employment law scholars can expose and undermine the ideologies and doctrines that limit employment law to its current form. This Essay first offers one doctrinal explanation for the current limits of employment law. The explanation supposes that the perceived limits of employment law arise from a view of employment law as a wholly derivative product of contract and property law. The Essay then considers two alternative perspectives on the nature of employment law. Both perspectives imbue the employment relationship with independent public significance and imagine employment as a kind of public resource served, rather than only subordinated, by individual contract and private property rights.*

I.	INTRODUCTION .....	657
II.	FREEDOM OF CONTRACT AS A PARTIAL CONCEPTION OF THE GOOD & EMPLOYMENT LAW REFORM .....	658
III.	WHAT IS EMPLOYMENT? A BROAD LOOK AT PRIVATE EMPLOYMENT RIGHTS & PUBLIC POWER.....	663
	A. Land, Property—Labor, Employment.....	663
	B. Property, Employment, and the Balancing Role of Government.....	668
	C. The Idea of Public Employment Value.....	669
IV.	CONCLUSION .....	673

### I. INTRODUCTION

Few employment law scholars are satisfied with the current state of employment law. While all of us have ideas about particular statute- or common law-specific reforms that would advance some ideal of employment, almost nothing is written about *how* to spark employment law reform from within the academy. Beyond critiques of particular employment law rules, I believe there is something more employment law scholars can do. We can seek to expose and undermine the

---

\* Associate Professor of Law, Lewis & Clark Law School; J.D., The University of Michigan Law School; Ph.D. Philosophy, The University of Wisconsin–Madison.

ideological and doctrinal commitments that limit the structure of employment law to its current form.

Professor Bagenstos speaks for many of us when he writes:

We have reached, or will soon reach, the limits of what our current conception of employment discrimination law can do to solve the persistent problems of workplace inequity. Many of today's most significant problems are structural and are widely understood to lie beyond the responsibility of individual employers. It is only by generating a new politics of employment equity that judges can be persuaded to require employers to address these structural problems.<sup>1</sup>

This Essay first offers one doctrinal explanation for the current limits of employment law. The explanation supposes that the perceived limits of employment law arise from a view of employment law as a wholly derivative product of contract law. The employment contract and its at-will accoutrements are believed to have no public significance beyond limited public policy concerns regarding contractual bargaining inequalities. Property law further circumscribes government intrusion into the employment relationship because, as a matter of contract, employer and employee each get the value they bargain for through the employment relation. The remaining constraints upon the employment relationship are all external—arising from public policies that affect employment along with other areas of social life.

The Essay then considers two alternative perspectives on the nature of employment law. Both perspectives imbue the employment relationship with independent public significance and imagine employment as a kind of public resource served, rather than only subordinated, by individual contract and private property rights.

## II. FREEDOM OF CONTRACT AS A PARTIAL CONCEPTION OF THE GOOD & EMPLOYMENT LAW REFORM

The limit of reform approaches grounded directly in “rights talk”<sup>2</sup> is two-fold. First, the salience of proposals for alternative employment-rights regimes mostly flows from disputed political philosophies relating to the proper scope of government intervention and the nature of the employment contract. Rights reform proposals find affirmation only among those who already endorse the political perspectives that justify such new rights, and disaffirmation among all who reject the same. In this way “rights talk” is really not “reform talk” in any deep sense, because there is no engagement with the justificatory frameworks, which either lock in or dislodge rights structures.

---

<sup>1</sup> Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 47 (2006).

<sup>2</sup> On the subject of the limits and costs of “rights talk,” see generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

Second, the status quo distribution of employment rights between employers and employees, and in particular the preeminence of the at-will employment rule, forces new rights talk into a doctrinal and philosophical terrain that treats state interest in the employment relation as both settled and extremely limited. As many reform proposals do not lay plain underlying conceptions of justice, or touch upon what grounds the state could or should so interfere with employment contracts, the proposals do not present real challenges to the current, well-established employment law regime.

In order to create room for new and greater employment rights, it is first necessary to explain why the public interest in the employment relation is not adequately represented by the at-will presumption (and its numerous exceptions), and also why narrow ideas about contract are either mistaken or do not pose genuine barriers to progressive reform. Until then, proposals for new employment rights are most immediately interpreted as illegitimate state interferences with employer property rights. Several scholars have touched upon this conceptual problem, but no one more poignantly than Professor Clyde Summers. In one seminal work, Professor Summers questioned why the at-will presumption continues to have such deep force despite revelation of historical and doctrinal weaknesses<sup>3</sup> and its negative impacts upon employees:

The question, now more broadly stated, is, why does employment at will have such survivability in American labor law? Employment at will draws its strength from the deeply rooted conception of the employment relation as a dominant-servient relation rather than one of mutual rights and obligations. The employer, as owner of the enterprise, is viewed as owning the job with a property right to control the job and the worker who fills it. That property right gives the employer the right to impose any requirement on the employee, give any order and insist on obedience, change any term of employment, and discard the employee at any time. The employer is sovereign over his or her employee subjects.<sup>4</sup>

In another, much earlier piece, Professor Summers predicted the need for statutory fairness protections to supplement individually and

---

<sup>3</sup> Scholars disagree on precisely when and why employment-at-will became the predominant employment rule in the United States. See, e.g., Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-at-Will: The True Origins of the Doctrine*, 17 BERKELEY J. EMP. & LAB. L. 91 (1996); Deborah A. Ballam, *The Development of the Employment at Will Rule Revisited: A Challenge to Its Origins as Based in the Development of Advanced Capitalism*, 13 HOFSTRA LAB. L.J. 75 (1995); Deborah A. Ballam, *The Traditional View on the Origins of the Employment-at-Will Doctrine: Myth or Reality?*, 33 AM. BUS. L.J. 1 (1995); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of “Wood’s Rule” Revisited*, 22 ARIZ. ST. L.J. 551 (1990); Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679 (1994).

<sup>4</sup> Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 78 (2000).

collectively bargained contracts, should the employment-at-will doctrine ever be discarded.<sup>5</sup> There Professor Summers wrote:

The individual contract of employment provides a central legal concept for analyzing the rights and duties arising out of the employment relation, both when that relation is governed by collective bargaining and when it is defined by individual bargaining. . . . Recognition and protection of individual contract rights, however, will never give individual employees full, or even adequate, protection. Most employees are unable to protect their own interests, particularly when they must bargain individually with the employer. The contract itself may become an instrument of oppression. The law must not only enforce the contract of employment, but also require that it incorporate basic fairness.<sup>6</sup>

I believe that most employment law scholars today share Professor Summers' critique of the employment-at-will rule and the limits of the employment contract. However, proponents of this view face the question of why the current regime is an insufficient expression of the public's interest in private employment relations. Put differently, why is it permissible for government to further impose upon the private employment relationship, perhaps so far as to overturn employment at-will and regulate the substantive terms of employment contracts? The fact that the current employment regime falls short of certain egalitarian employment aims does not in itself speak to the proper limits of government, which are believed to be reached with the at-will rule and the robust freedoms of contract that flow from it.

In the employment discrimination context, the concern over the proper limits of government finds expression in the distance between using antidiscrimination law for the limited purpose of holding employers liable for their own acts of workplace discrimination and using employment law as a tool for improving the welfare of disadvantaged groups. It can be true that an employer does not discriminate against women and also that women are disadvantaged within the employer's workplace due to the disproportionate caregiving duties that fall upon women in our society.<sup>7</sup> It can be true that an employer does not discriminate on the basis of race and also that African-Americans are disadvantaged within the employer's workplace due to historic disparities in opportunity that correlate with lower test scores and test-taking ability.<sup>8</sup>

---

<sup>5</sup> Clyde W. Summers, *The Rights of Individual Workers: The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 *FORDHAM L. REV.* 1082, 1107 (1984).

<sup>6</sup> *Id.* at 1108.

<sup>7</sup> See generally Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 *U. MICH. J.L. REFORM* 371 (2001).

<sup>8</sup> I have in mind here the Supreme Court's reasoning in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009). See also Michael Selmi, *Understanding Discrimination in a "Post-Racial" World*, 32 *CARDOZO L. REV.* 833, 844-54 (2011).

It can be true that an employer does not discriminate on the basis of disability and also that people with disabilities are disadvantaged within an employer’s workplace because disability is a socially subordinated group status in U.S. culture generally.<sup>9</sup>

Moral notions of personal responsibility that underlie our employment discrimination law, including the doctrines of disparate treatment and disparate impact, limit that law largely to the project of individual nondiscrimination.<sup>10</sup> Requiring employers to help address structural discrimination of the sort described above—discrimination unrelated to employer choice—simply does not fit within the moral logic of our employment discrimination law.

The internal-coherence limits of our antidiscrimination law are not accidental, but rather are reasoned from the notion that employment law generally is only a subspecies of contract law. The moral intuitions and norms that inform contract law are, in the first instance, imported into employment law and made its foundation.<sup>11</sup> From this posture, prohibitions on discrimination first appear as intrusions upon freedom of contract which must be justified, not by appeal to the independent objectives of employment as a social institution, but rather using equitable considerations relating to inequality of contractual bargaining power: “In searching for a way to articulate the problem endemic in most employment relations,” Professor Aditi Bagchi writes, “inequality of bargaining power is appealing because it would appear to speak to a defect recognizable on the terms of classical, formal contract theory.”<sup>12</sup>

Professor Bagchi goes forward to argue that inequality of bargaining power neither accounts for observed negative employee outcomes in the employment relation nor, more importantly, what may be morally objectionable about such outcomes. According to Professor Bagchi, the latter has little to do with formal failures of contract bargaining and mostly to do with employee dependency upon employers due to limited resources, limited leisure time, and substantial constraints on freedom of schedule.<sup>13</sup> Instead of rejecting contract as the foundational prism through which to understand the employment relation, however, Professor Bagchi recommends replacing the explanatory tool of inequality of bargaining power with an explanatory tool that recognizes

---

<sup>9</sup> See Samuel R. Bagenstos, *Subordination, Stigma, and “Disability”*, 86 VA. L. REV. 397, 419–35 (2000).

<sup>10</sup> See, e.g., *id.*

<sup>11</sup> See Franklin G. Snyder, *The Pernicious Effect of Employment Relationships on the Law of Contracts*, 10 TEX. WESLEYAN L. REV. 33, 42–43 (2003).

<sup>12</sup> Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579, 586; see also Snyder, *supra* note 11, at 34 (arguing that employment was always, and remains, inherently a status relationship despite attempts to force the relationship into contract law).

<sup>13</sup> Bagchi, *supra* note 12, at 587–95.

the relatively low status employees typically occupy in the employment relation.<sup>14</sup>

Here is not the place to evaluate the promise of Professor Bagchi's innovation. What is relevant here is that the innovation occurs upon the same *employment-as-mere-contract* terrain which disadvantages any claims that the employment relation itself has special, independent moral force, the source of which is not contract. The employment-as-mere-contract view is not just a point of legal doctrine. Insofar as it is rooted in deep moral notions regarding individual responsibility and natural-law-derived property rights, it is a partial, contested conception of the good.<sup>15</sup> Rarely is the position recognized as such in employment law, however, probably because both contract and property have much to do with employment law as a legal order. But although contract and property are essential ordering tools of any defensible theory of employment law, the classic interpretation of employment-as-mere-contract is only one such account of how contract and property fit within employment law.

We might say that the employment-as-mere-contract perspective is *privileged* within employment law theory. To say that the perspective is privileged is partly to say that reform proposals that would abrogate contract or redistribute property beyond what the model permits must first answer to the model to gain any measure of legitimacy. The perspective has prevailed in our employment law despite its contested ideological position and despite the growth in social inequalities manifested in and through the employment relation. This is perhaps what is most troubling about the ascendancy of the employment-as-mere-contract perspective. The perspective locks in classic contract and property rights in a manner that perpetuates structural employment disadvantage. In terms of public opinion, the perspective appears to rob those same structural employment disadvantages of their quality as social injustice.

What is needed is a perspective on the public interest in the employment relation that to some degree is entitled to subordinate contract and property law to a larger redistributive employment ideal. The next Part examines two approaches to defining the public interest in private employment relations, which implicate individual contract and property rights differently than does the employment-as-mere-contract perspective. Both of the approaches discussed in the next Part drag the issue of the role of contract and property in employment law back into contested terrain, as contrasted with its current theoretical and public political position as the default reason.

---

<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., *id.* at 597; Snyder, *supra* note 11, at 34, 37–38.

### III. WHAT IS EMPLOYMENT? A BROAD LOOK AT PRIVATE EMPLOYMENT RIGHTS & PUBLIC POWER<sup>16</sup>

On the surface, private property seems to divide up nature itself—the land—into pieces; an owner here, an owner there. But it really doesn’t do that. Nature remains an integrated whole. What private property does is divide up control over nature. It delegates to particular people special powers to manage particular parts of the land. The problem with this allocation of power, of course, is that planning is possible only if the government maintains some level of managerial control over the land. So who gets to manage a particular parcel of land? The individual owner? Some governmental body? The two together? Maybe neighbors have some role? The issue is about managerial control, about how we divide up power to manage nature. That’s what our country is debating today.

At the moment we are confused about this basic issue of power. We’ve always displayed a deep current of distrust over public power, and that distrust has now focused on government’s role in constraining private land uses. Most everyone realizes that the public deserves a role here; we can’t just let landowners do whatever they want. But by the same token, the government can’t take control and push the owner out of the picture. Somehow we need to find a middle ground. . . .

Private property is in bad shape today, not economically or politically, but rather *intellectually*. We’re having trouble making sense of it as an institution, in terms of how it works, why it exists, and how the rights of one owner fit together with the rights of other owners and of the community as a whole. The world is changing, our landscapes included. Allocations of power that might have made sense in the past make less sense today. What we lack is a principled way of deciding how to make adjustments that are fair to landowners and communities alike.<sup>17</sup>

#### A. *Land, Property—Labor, Employment*

All of the statements made in the above quotation about the proper division of control over the institution of private property apply with equal force today to the proper division of control over the institution of employment.

The institution of employment and the institution of property have a lot in common. In both cases the law exists to divvy up control of a public resource—land in the case of property law, labor in the case of employment law. Employment and property as institutions also share this phenomenon: under both institutions the law allocates special

---

<sup>16</sup> The title to this Part and the Part itself are modeled after Professor Eric T. Freyfogle’s article, *What Is Land? A Broad Look at Private Rights and Public Power*, PLAN. & ENVTL. L., June 2006, at 3.

<sup>17</sup> *Id.*

management power that quickly comes to be conflated with notions of absolute ownership and control. The fee titleholder of a parcel of land quickly conflates such status with complete managerial freedom over owned property. Likewise the business owner relies upon the fact of ownership to infer that its status as employer comes with complete managerial freedom over the employment relation. The leap from landowner to absolute control over property is direct. The leap from business owner to absolute control over the employment relation is accomplished only with the intermediate assumption that “employer” is a derivative product, or an incident,<sup>18</sup> of being an “owner.”

On this view, employment and the character of the employment relation is at the sole discretion and privilege of the business owner, much in the same way that rights to enter upon another’s land is trespass without the landowner’s permission. Just as a landowner may freely limit the scope of a visitor’s invitation onto owned land, the business owner may, in its derivative role as employer, freely limit the scope of an employee’s invitation to employment. From this perspective, the opportunity of employment and the entire employment relation is a *business asset*, a species of intangible commercial property represented by a business owner’s choice to create employment rather than direct those underlying resources elsewhere. Private employment of every kind is corporate gratis, the conditions of which are at the behest of the great provider.<sup>19</sup>

The law of property settled long ago that landowners are dead wrong in conflating fee title to land with absolute managerial control over property.<sup>20</sup> Land is something different than “property.” “Property,” a sovereign creation, is a legal conclusion regarding the roles we need land to serve within a political community. These roles include robust private property rights but are not limited to them. The institution of property does not exist merely to protect the interests of landowners, much less to express any natural rights to land. The institution of property exists for all of us—landowners, the landless, and government—because we need property to accomplish certain things in our community for it to flourish.

It is no surprise then, that the law of property is not fixed, nor do the expectations of landowners fully control the evolution of property law. When property ceases to accomplish the public goals for which we have the institution, we change the law of property. Again, when we change

---

<sup>18</sup> See A.M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107 (1st Ser., A.G. Guest ed., 1961). A summary of Honoré’s incidents of property ownership appears in N. SCOTT ARNOLD, IMPOSING VALUES: AN ESSAY ON LIBERALISM AND REGULATION 69 (2009).

<sup>19</sup> This reasoning is buttressed by the wide discretion government has to condition grants of public resources. On this issue see Charles A. Reich’s classic article, *The New Property*, 73 YALE L.J. 733 (1964).

<sup>20</sup> *Id.* at 772–74.



our minds about the public goals for which we have property, we change the law of property.

Employment law is nowhere so far along in its maturity. Employment law remains beholden to a view of the employment relation as one born of a business owner’s investment of private property as expressed through the terms of an employment contract. This viewpoint limits the public interest in private employment relations to contractual compliance with external constitutional and legal norms, such as antidiscrimination, religious accommodation, family leave, etc., all of which boil down to variations upon employer conduct in violation of public policies outside of the employment relation.

From this viewpoint, there is nothing internal to the nature of the employment relation that could produce normative standards or expectations or extra-contractual rights. Nor can this viewpoint on the employment relation comment upon substantive inequalities achieved and reinforced through employment contracts. For the employment relation is but a shell, a placeholder, for a rather commonplace form of contracting. As such, the only internal normative standards for the employment relation are the ones placed upon contracting in general. Barring disability, duress, impossibility, unconscionability, and other bargaining failures, employment has achieved its ideal form.

Here is the fundamental flaw in this viewpoint: it misses that “employment” is a sovereign creation just like “property.” Just as the sovereign regulates the raw resource of land into property, the sovereign regulates the raw resource of labor into employment.

Labor and employment aren’t the same things. *Labor* is something that every community needs, and which every community will somehow obtain, from most of its able-bodied adult members. *Employment* is the legal organization of labor supply to meet communal needs. The most common method of legally (and illegally) organizing labor into employment has been force. For example, in waterfronts of port cities in the Pacific Northwest, states sanctioned the brutal practice of “shanghaiing” or “impressment.”<sup>21</sup> This violent collection of sailors to man merchant ships for emerging international trade was in direct response to labor shortages. Indentured servitude and slavery are additional ways to turn labor into employment. The legal prohibition on physical force and extortion to make employment out of labor, and their replacement with contract as the preferred vehicle for making voluntary employment ascendant, does not change the fact that labor is a raw resource and employment the legal regime dedicated to labor’s direction toward community needs.

That the legal institution of employment is directed toward communal ends rather than merely respecting the employment contract

---

<sup>21</sup> See Lance S. Davidson, *Shanghaied! The Systematic Kidnapping of Sailors in Early San Francisco*, CAL. HIST., Winter 1985, at 10, 11.

is most obvious when one considers how nations respond to labor shortages—where preconceived notions of freedom and individual contract and property rights rather quickly give way to employment regulation designed to meet public need. Ample historical examples exist where current contract and property expectations were overridden in order to create labor supply: King Edward III's issuance of the Statute of Labourers in 1351 in response to the Black Death,<sup>22</sup> widespread sanction and use of "impressment" to build the Royal Navy and U.S. shipping industry,<sup>23</sup> and current regulation (and cries for deregulation) of illegal immigration.<sup>24</sup>

The obstacle to embracing my view of employment law is the employment-as-mere-contract perspective—that view of employment and the employment relation as a commercial asset of business owners who are free to condition distribution of the asset more or less as serves their purposes. The designations "employer" and "employee" distract us in this regard. In the history of modern Western political philosophy, as well as in the U.S. history of labor relations, the term "employee" is largely synonymous with "labor," and both are closely aligned with "working class."<sup>25</sup> These terms connote a particular socioeconomic and historical position—and struggle—in relation to repositories of private wealth and power, most notably corporations. Within the political rhetoric and narrative of industrial relations, it does not make sense to refer to business owners or employers as "labor." For there, labor refers to those who work for those who own the means of production.

For purposes of distinguishing the sovereign legal enterprise of employment from the raw resource that is labor, however, describing business owners as "laborers" makes perfect sense. To be sure, a business owner is a different kind of laborer than a wage laborer. Any

---

<sup>22</sup> See Snyder, *supra* note 11, at 37–38 ("Pre-industrial England was just such a place, where the 14th century Statute of Labourers and the 16th century Statute of Artificers—with subsequent legislation and judicial decisions—enforced a regime of 'quasi-feudal servility.' The regulations fixed maximum wages and punished employers who paid too much, made it a crime for workers to refuse to accept the legally set maximum, punished those who enticed a worker away with promises of higher wages, and required servants who desired to leave the parish to obtain a certificate from their masters that they were allowed to leave. Two striking features of the law were that the master's interest was viewed as a *property* interest in the servant, and the fact that employers could enlist the courts to compel servants to serve out their full employment." (footnotes omitted)). See generally L.R. Poos, *The Social Context of Statute of Labourers Enforcement*, 1 LAW & HIST. REV. 27 (1983).

<sup>23</sup> See generally NICHOLAS ROGERS, *THE PRESS GANG: NAVAL IMPRESSMENT AND ITS OPPONENTS IN GEORGIAN BRITAIN* (2007); Kevin Costello, *Habeas Corpus and Military and Naval Impressment, 1756–1816*, 29 J. LEGAL HIST. 215 (2008); Davidson, *supra* note 21.

<sup>24</sup> See generally Peter Margulies, *Stranger and Afraid: Undocumented Workers and Federal Employment Law*, 38 DEPAUL L. REV. 553 (1989).

<sup>25</sup> See Ellen Dannin, *Not a Limited, Confined, or Private Matter – Who is an "Employee" Under the National Labor Relations Act*, 59 LAB. L.J. 5, 8 (2008).

employment law regime concerned to marshal labor into efficient, directed employment would be foolish to treat business laborers the same as wage laborers. But business laborers do not enjoy any special claims or natural rights to control the sovereign's creation of employment. They stand before the law of employment like every other laborer, with a unique set of interests and concerns that must be respected as the sovereign discerns what pattern of rights and duties, privileges and no-rights, powers and liabilities, and immunities and disabilities<sup>26</sup> will accomplish the communal aims of employment.

To be sure, the sovereign will operate under constraints. The constraints include duties to do its best to respect contracts, property and other legal expectations. But considerations of freedom of contract and private property are not ends for employment law, nor are they always penultimate or overriding. Like most other legal expectations, contracts and property interests are conditional and can sometimes be outweighed by the communal demands placed upon employment as a legal institution.

The suggestion, then, that business owners are the progenitors of employment and the employment relation simply is false. They do play a very special, essential role in the employment relation—but *so do wage laborers*. If the point is that in crafting an employment law regime, business owners, as a unique class of laborers, have some claim that the sovereign reserve to them ample discretion over the employment relation and private property protection over their business investments, the claims seem both reasonable and worthy. These claims are very different than assertions that the employment relation belongs to business owners because their unique contribution somehow makes up the whole of the value created by the institution of employment.

Similarly, the fact that business owners bring much private property to the employment relation is no bar to the regulation of private property placed within the employment relation for the institutional goals of employment. Here, the voluntariness of business owners *cum* laborers to choose to enter employment markets—and to enter as business laborers rather than wage laborers—is important. Such choices are discretionary, much in the sense that wage laborers are free to reject any position the terms of which they deem unsatisfactory. This kind of argument rings hollow whether laid against wage laborers or business laborers, but whatever force the argument has, it applies equally to business and wage laborers. What is good for the goose is also good for the gander. It follows that the exceptionally favorable treatment of corporations in the U.S. is not forced by natural law or even conservative understandings of contract and private property. It is a sovereign choice that can be changed for many valid reasons, including reasons that might be called workplace fairness or substantive justice in the employment relation.

---

<sup>26</sup> See generally Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28–59 (1913).

Free of the notion that business laborers have special claims upon the employment relation as private property, and seeing that employment is a sovereign institution, there is room to build normative conditions into the employment relation. Such conditions will be derived from some normative account of the ends of employment as a public institution.

*B. Property, Employment, and the Balancing Role of Government*

There is an important difference between property and employment as to the locus of public distrust. With private property, the distrust always is between how government will resolve matters of private and public nuisance, not in the limited tort sense of those terms, but in the larger sense that the whole purpose of government regulation of private property is to balance the interests of two kinds of the dispute: landowner-to-public disputes (e.g., eminent domain, zoning and other land-use regulations) and landowner-to-landowner disputes (e.g., trespass and nuisance, easements and covenants).<sup>27</sup>

First, since every person can imagine himself or herself a landowner, the concern over government trampling of private property is of universal concern. As a result, limiting the extent to which government may manage private property is a permanent political-agenda item. In some sense all of us, the propertied and the propertyless, respect in principle the need for limits to governmental interference with private property. Second, although there are many different kinds of landowners, the varied interests in land seem not to have given rise to class disputes. Residential landowners do not view their interests as diametrically opposed or in tension with commercial or agricultural landowners.

Such conflicts do arise in property law when multiple individuals hold mutual interests in land, however: landlord and tenant, joint tenants, restrictive covenanters, present estates and future interests, etc. Here, the abstract concern over government trampling of private property melts away, for at the point of dispute in these relationships, both parties not only acknowledge government power to regulate private property, but are thankful for it and crave it. Examples include the landlord seeking summary eviction, the tenant seeking to cease rent for breach of quiet enjoyment, the joint tenant seeking partition, the restrictive covenantor seeking either enforcement or non-enforcement, and the remainderman seeking an injunction under the doctrine of waste to reign in an abusive life estate-holder.

These latter co-relationships in property, relative to government regulation of private property, are akin to disputes within the employment relation. The difference here between property and employment is that employment doctrines have missed what should

---

<sup>27</sup> See Freyfogle, *supra* note 16, at 3–4.

always have been their primary target—the balancing of mutual interests in a sovereign relation created by government—and instead have used doctrines designed to protect fictitious claims by business owners to preexisting contract and property rights. In place of the balancing doctrines and rationales that permeate property law, employment law has the at-will presumption and the general prohibition on assigning extra-contractual affirmative obligations by employers toward employees.

For these reasons, public distrust of government as concerns the employment relation centers upon government’s willingness or ability even to recognize, much less protect, the communal interests in employee welfare through the employment relation. Here, the realized worry is that of co-option. Government will either be made the hand puppet of business laborers or, worse, fooled into accepting supposed preexisting claims of business owners to freedom of contract and private property in employment. Where either of these circumstances occurs, government is disabled from protecting the employee-side communal interests in employment.

### C. *The Idea of Public Employment Value*

It is not surprising to have such parallel reasoning about land and property, on the one hand, and labor and employment on the other hand, or that we associate both with something like deep or natural rights. From political philosophy through to our constitutional sensibilities, the two are of a piece. The Lockean notion of property that exerted great influence upon the Founding Fathers and which continues to have influence today, posits that, as a matter of natural law, individuals own their labor and come to own property by mixing their labor with things.<sup>28</sup>

A central part of Locke’s theory is the labor theory of value: the view that the economic value of things is mainly attributable to the labor that goes into them.<sup>29</sup> The natural scheme of private property rights that emerges from Locke’s theory is that private property rights track improvement value, and improvement value tracks labor investment:

God gave the World to Men in Common; but since he gave it them for their benefit, and the greatest Conveniencies of Life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of *the Industrious and Rational*, (and *Labour* was to be *his Title* to it;) not to the Fancy or Covetousness of the Quarrelsome and Contentious.<sup>30</sup>

But Locke’s labor theory of value can be divorced from its natural rights foundation. Absent a priori contract- and property-rights claims to

---

<sup>28</sup> See JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 27, at 287–88 (Peter Laslett ed., student ed. 1988) (1690).

<sup>29</sup> *Id.* § 42, at 297.

<sup>30</sup> *Id.* § 34, at 291 (first emphasis added).

control the employment relation, defenders of the employment-as-mere-contract perspective likely may shift to arguments about economic value. This type of argument for broad managerial control of the employment relation, including at-will contracting and robust protection of business property, turns on the claim that businesses generate most of the economic value produced through the employment relation.

Two conclusions are believed to follow from this argument. First, since we need the employment relation to generate economic value, the continued success of employment as a social project depends upon business investment and creativity, which are harmed by employment regulations that diminish business control. Second, if the arc and scope of private property follows the creation of economic value, then business owners are entitled to most of the fruits of the employment relation. Diminishing business claims to lion's shares of employment value violates this fairness rule of property distribution. It will be added to this second argument that violation of this fairness rule of property distribution also lowers the incentives of businesses to participate in the institution of employment at all.

Before attempting to answer the question about the sources of employment value, notice how different this issue is from claims to control employment as a matter of prior contractual or property right. This issue concerns the constitutional limits of employment law, not any issue about the constitutional power of government to broadly regulate the employment relation. Here, the limits that contract and property rights place on government regulation of the employment relation can only be posed after the sovereign has made such otherwise legitimate choices. Concerns over the proper distribution of employment value enter this way: at what point does regulation of the fruits of the employment relation begin to mock anything that could genuinely be called contract or property rights? This is a valid question, which accepts that within certain boundaries government may subordinate individual contract and private property to the ends of employment.

The search for sources of employment value recreates the ideological controversy raised by the employment-as-mere-contract view at a level *that appears* closer to the ground. Framing the ideological issue in terms of *who* creates employment value purports to rely upon "facts" more so than ideology. But the claim is thin. Who brings the most value to the employment relationship of slavery?—the slave, the master, or the government that authorizes the master to force unlimited work upon the slave through unlimited violence rather than voluntary contract? How one answers this ideological question fixes the "fact" that either the slave, or the master, or the government, brings the most economic value to cotton profits and is therefore, as a matter of property policy, entitled to the largest share of discretionary power and profits.

In what remains of this Part, I mean only to show that theories exist that might be used to isolate the economic value government regulation creates through the employment relation. Such "public" employment

value would not belong to employers or employees, not to business laborers or wage laborers. On the theory that property rights follow creators of economic value, public employment value belongs to the government; it is the government's return on its regulatory investment in the employment relation. Public employment value entitles government to insist upon redistributive activity within the employment relation.

Professor Freyfogle illustrates one possible approach to the identification of public employment value. In answer to the question why land parcels can so differ in economic value, Professor Freyfogle writes:

Roughly speaking, there are two reasons. One is that the landowner has improved the land—mixing labor with it, to use John Locke's language from the 17th century. This increase in value is due to action by the landowner or some preceding owner. Land value can also go up for reasons unrelated to the landowner. A landowner might stand back, do nothing, and watch a city rise up around his property. As the city is built, the land skyrockets in value. The value of land is due to the surrounding land uses. In other words, the value of one parcel is due to what other people have done on surrounding lands. A land parcel can rise greatly in value because of the efforts of the surrounding community. One of the main sources of our intellectual confusion about private land and private property in the United States today arises because we fail to distinguish between these two types of land value. One value is created by the owner, the other by the community.

Why is this distinction important? An obvious point is that the distinction seems pertinent when a landowner complains about regulations that decrease property values. When we hear this complaint, we might just want to ask: What value has gone down? Is it value that the landowner has created through her own efforts, or is it instead value that the community has created? Maybe we'll be much more sympathetic if the value is due to the effort of the owner than if the community has created the value. After all, if the community created the value, why can't the community claim it? That is a serious question.

....  
... The truth is, fairness doesn't require us to let landowners capture the value in their land created by the surrounding community. Indeed, we might say just the opposite. As a matter of fairness, if the community creates land value, community members ought to benefit from it.<sup>31</sup>

I do not take seriously disclaimers of any benefit of government regulation of the business environment, whether in the area of real property transactions, employment, or elsewhere. For purposes of Professor Freyfogle's approach to finding public value, I will assume the existence of such value. But I am not convinced that the existence of publicly created value forces the conclusion that government may

---

<sup>31</sup> Freyfogle, *supra* note 16, at 6–7.

rightfully claim it. The reason is that government is in a very different position than property owners or employers and employees because it is subject to important constitutional constraints that have temporal significance.

The existence of rights presumes the crystallization of a set of normative expectations that must be respected, and perhaps held inviolate, by the sovereign. The term “economic value” may be read to suggest a point in the process of private activity where a titleholder fully and rightfully expects to absorb all losses and so also to succeed to all gains related to the risks of an enterprise. If that is what “economic value” means, then this game is rigged. After such a point, it does not seem to matter whether the economic value at issue is attributable to owner choice, communal developments, moral luck, or the favorable conditions created by government regulation. The issue at that point is constitutional restraint upon government from taking what is now cognizable as private property.

An alternative approach to the identification of public employment value flows from appreciating the intellectual coherence of the modern liberal position that government should have an ownership stake in productive assets, and that this project takes priority over ordinary private property claims. This position is set forth in Professor Scott Arnold’s recent book, *Imposing Values: An Essay on Liberalism and Regulation*.<sup>32</sup>

Professor Arnold observes that the battle over government regulation of the employment relation, as with the battle over government regulation of private property, stems from ideological disagreements between classical and modern liberals over the proper roles of government.<sup>33</sup> He adds that although both classical and modern liberal thinkers in the United States quickly rejected “creeping socialism”<sup>34</sup> and proposals to nationalize private firms or entire industries, the great exception to this posture is that “the state has nevertheless owned considerable productive assets, including, notably, land.”<sup>35</sup>

The modern liberal stance toward public ownership stakes in productive assets grows from belief that:

[I]nequalities in wealth and income beyond a certain limit, or inequalities in some of the things that can be bought with wealth and income, such as health care, are unjust or otherwise morally objectionable, and it is the state’s task to ensure a more equitable—which is understood as a more equal—distribution of wealth and income or of some things that wealth and income can purchase, such as the basic necessities of life.<sup>36</sup>

---

<sup>32</sup> ARNOLD, *supra* note 18, at 37–38.

<sup>33</sup> *Id.* at 3–4, 37–38.

<sup>34</sup> *Id.* at 38–40.

<sup>35</sup> *Id.* at 40.

<sup>36</sup> *Id.* at 60.



How does the modern liberal conception of property translate into state prerogatives to regulate the employment relation? The answer grows out of a concern mentioned earlier, that is common to both property and employment disputes: the scope of rights to resource management and control:

Management rights in productive assets can be defined as the rights exercised over productive assets in the production of goods and services. The exercise of these rights includes decisions about how to organize production, what production processes to use, and what contracts to enter into with suppliers, including labor contracts. Management rights in personal property, including land held for personal use, are essentially use rights. Both are constrained by the prohibition on harmful use [of property] . . . .

The twentieth century witnessed the dramatic growth of restrictions on the right to manage productive assets, restrictions that have typically taken the form of government regulations. Most of these restrictions fall into two categories: (1) regulations governing the employment relation and (2) environmental regulations.<sup>37</sup>

The modern liberal view of the state as steward of productive assets in land, education, and now employment, sees these resources either as partly public property or imbued with great public significance.<sup>38</sup> The strong relationship between access to these resources and prospects for social well-being inspires this view. The conception of justice or fairness underlying this view is inconsistent with major privatization of these resources and typical private rights to exclude. The concern to preserve wide access to these resources for all citizens will sometimes outweigh ordinary contract and property rights.

This perspective on the role of contract and property in the employment relation depends upon a contested conception of the good, just as does the employment-as-mere-contract perspective. As a partial conception of the good, however, this view is defensible and makes the case for progressive regulation of the employment relation as a kind of public resource. If government may legitimately amass public property from recognition of the importance of access to public land, it may also legitimately regulate the employment relation so that the benefits for which the institution exists are widely available to all. Freedom of contract and private property are not an absolute bar to either of these social aims.

#### IV. CONCLUSION

I have tried to show that the public interest in so-called “private” employment relations is greater than is expressed in current employment

---

<sup>37</sup> *Id.* at 76–77.

<sup>38</sup> *See, e.g., id.* at 41–44.

law doctrine. In particular, the public interest in the employment relation is more than sufficient to impose affirmative obligations on employers in the context of employment discrimination and elsewhere, for purposes of equal access to the benefits of employment as a social institution (or productive asset). The public interest in the employment relation is also sufficient to regulate the employment relation in a manner that balances bargaining power between employers and employees, or that more directly insists that the economic value generated by the employment relation be distributed in accord with some employment *ideal*.

The debate over the public interest in private employment relations is one locus of the larger debate over the public-private distinction. There is no final answer to where such line should be drawn; such lines may be drawn differently as to different resources, and well-considered, partly persuasive, and conflicting views abound.<sup>39</sup> The boundaries between public and private are set and reset according to institutional values and social circumstances that change over time. Here, I am partial to Professor Larry Alexander's observation that:

[T]he fact that public and private realms are not hermetically sealed off from one another in terms of effects tells us to be conscious of those effects in making public policy and in assessing the constitutionality of public policy. The constitutionality of public policy should turn in part on both the public effects of laws maintaining the private sphere and on the private effects of laws clearly located within the public sphere.<sup>40</sup>

Professor Alexander's pragmatism is preferable to scholars who claim to have settled for all time that the public-private distinction must constitutionally be drawn at classical liberal or modern liberal points on all social issues.

A crucial issue on which classical and modern liberals differ, and which is central to disagreements over the nature of the employment relation, is whether a certain level of material equality between citizens is a precondition of political legitimacy—equality of opportunity, social justice, fairness, what have you. On this question, the dependence of nearly all Americans upon the institution of employment for economic self-sufficiency, and for decent lives, is, for me, dispositive. As Lawrence E. Blades echoed long ago:

We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the

---

<sup>39</sup> See, e.g., Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 CONST. COMMENT. 361 (1993); Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); James L. Huffman, *The Public Interest in Private Property Rights*, 50 OKLA. L. REV. 377 (1997).

<sup>40</sup> Alexander, *supra* note 39, at 369 n.28.

2012]

## “PRIVATE” EMPLOYMENT RELATIONS

675

various forms of social security. Such dependence of the mass of the people upon others for *all* of their income is something new in the world. *For our generation, the substance of life is in another man's hands.*<sup>41</sup>

While the employment-as-mere-contract view is not directly responsible for the structural inequalities that continue to plague many of our citizens, its view of freedom of contract and private property does much work in barring employment regulation meant to reach these disadvantages. If that is what fairness in employment means, then for many Americans there is much less point in respecting private property rights. Such rights are virtually meaningless to generations of citizens who are absolutely certain to never own anything. This is not where the public-private distinction in the employment relation falls.

---

<sup>41</sup> Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404 (1967) (quoting FRANK TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951)).