

Saint Louis University School of Law  
**Scholarship Commons**

---

All Faculty Scholarship

---

2020

## **Taking Employment Contracts Seriously**

Matthew T. Bodie

Follow this and additional works at: <https://scholarship.law.slu.edu/faculty>



Part of the [Labor and Employment Law Commons](#)

---



**SAINT LOUIS UNIVERSITY SCHOOL OF LAW**  
Legal Studies Research Paper Series

No. 2020-20

Taking Employment Contracts Seriously

Matthew T. Bodie  
*Saint Louis University - School of Law*

Seton Hall Law Review, Vol. 50, 2020

# Taking Employment Contracts Seriously

Matthew T. Bodie\*

I. INTRODUCTION ..... 1261  
 II. THE CONTESTED ROLE OF CONTRACT IN EMPLOYMENT ..... 1263  
 III. THE IMPORTANCE OF CONTRACTS IN EMPLOYMENT..... 1267  
 IV. THE IMPORTANCE OF SOCIETY IN CONTRACT LAW..... 1271  
 V. THE ROLE OF ORGANIZATION IN CONTRACT AND EMPLOYMENT ..... 1278  
 VI. CONCLUSION ..... 1282

## I. INTRODUCTION

Jobs are contracts. Or, to put it more precisely: the employment relationship finds its legal representation in a contract. The decision to provide labor on behalf of another person or organization is legally cemented through the creation of an agreement that is express or implied, oral or written, term or at-will. The role of contract, however, is often overlooked in the world of labor and employment law. The basic employment agreement has been layered over with a dizzying variety of federal and state statutes that impose specific responsibilities on the parties. As recent legislative efforts such as California A.B. 5<sup>1</sup> have made even clearer, the parties do not choose whether the relationship is characterized as employment or not; the characterization is based on the relationship’s structure. Employment has moved closer towards becoming a status—a set of legal obligations that come with a particular role, rather than obligations

---

\* Callis Family Professor and Co-Director, Wefel Center for Employment Law, Saint Louis University School of Law. This essay was prepared as part of the Symposium in Honor of the Work of Charles A. Sullivan. I would like to thank Dean Kathleen Boozang, Professor Tim Glynn, Editor-in-Chief Tatiana Laing, and the editors of the *Seton Hall Law Review* for their excellent hosting of this event. Thanks as well to the editors for their work on this essay. And I am especially grateful for Charlie Sullivan’s work, support, and thoughtful commentary from the beginning of my career on into the future.

<sup>1</sup> *AB-5 Worker Status: Employees and Independent Contractors*, CAL. LEGIS. INFO., [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200AB5](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5) (last visited Mar. 27, 2020).

individually assumed by the particular parties.<sup>2</sup>

Despite the importance of these statutory interventions, the reality remains that employment requires a contract to exist.<sup>3</sup> As a result, the employment relationship is governed in part by the common law of contract—the collection of judicial decisions that together form the core of contract law. Professor Charles Sullivan—the subject of this much-deserved festschrift—has not forgotten the common law’s importance. In a series of articles on contractual terms in employment agreements, Sullivan has dug into the landscape of common-law precedent and scholarship to unearth important understandings about the role of law in contract. In this still relatively young century, Sullivan and Professor Rachel Arnow-Richman<sup>4</sup> have done the most to contribute to our understanding of contract law in the employment context. As their scholarship reminds us, the employment contract is not a formality to be rushed past, but rather an important touchstone for both the parties and the community in setting the terms and expectations of the relationship.

This essay takes contracts and contract law seriously in thinking about the nature of the employment relationship. Part II considers the traditional debate between status and contract and depicts the debate as one between forms of communitarianism and libertarianism. In Part III, I discuss Sullivan’s work on the employment contract and the role of common-law doctrine in the context of those contracts. Sullivan highlights the

---

<sup>2</sup> See, e.g., Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 380 (2006) (noting that the employment relationship is “fundamentally contractual” but “is also constrained by employee rights and entitlements that are established by external law, that reflect public values and interests, and that typically cannot be varied or waived by contract”); Bryce Yoder, Note, *How Reasonable Is “Reasonable”? The Search for a Satisfactory Approach to Employment Handbooks*, 57 DUKE L.J. 1517, 1521 (2008) (arguing that “a strict contract-based analysis of the validity and interpretation of employment handbooks should be abandoned in favor of a common-sense approach that acknowledges the employment relationship as one of status”).

<sup>3</sup> There are instances where a worker recovers in restitution, but in those cases either the worker was an employee who also had a contractual relationship, see, e.g., *Britton v. Turner*, 6 N.H. 481 (1834), or the worker was a quasi-volunteer who only performed because no contract could be created, see, e.g., *Cotnam v. Wisdom*, 104 S.W. 164 (Ark. 1907).

<sup>4</sup> Professor Arnow-Richman is one of Sullivan’s co-authors and also a presenter at this symposium. For some examples of her scholarship on the role of contract in employment law, see Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. REV. 427 (2016); Rachel Arnow-Richman, *Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination*, 66 FLA. L. REV. 1513 (2015); Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1 (2010); Rachel Arnow-Richman, *The Role of Contract in the Modern Employment Relationship*, 10 TEX. WESLEYAN L. REV. 1 (2003).

importance of contractual terms in his articles on clergy contracts, unenforceable terms, and contractual remedies. Part IV compares Sullivan's scholarship to the work of private-law scholars who have focused on the relations between individual contracting parties. Like these private-law scholars, Sullivan highlights the importance of common law and the nuances of understanding that can arise from careful legal craftsmanship. But Sullivan also reminds us that contract law is shaped by societal concerns, and that common-law judges have reflected public policy concerns in the doctrine. Part V discusses one aspect of the common-law employment relationship that extends beyond private contract: namely, organizational rights. The role of the worker within the organization is one aspect of the relationship that Sullivan, and many others, have in my view underappreciated, and I explain my perspective here. The essay concludes in Part VI.

## II. THE CONTESTED ROLE OF CONTRACT IN EMPLOYMENT

Employment is both contractual and non-contractual. On the one hand, the employment relationship requires a contract; without an agreement, there is no relationship. A worker who offers her work without a promise or expectation of payment is a volunteer—not an employee.<sup>5</sup> The agreement may be implied-in-fact, but the worker must at least have an expectation of compensation for her labor to be as an employee.<sup>6</sup> On the other hand, the employment relationship is determined by the nature of the relationship itself, rather than by the express terms of the agreement. The two parties cannot mutually agree that an “employee” (as defined by factors set forth in a particular statute) is nevertheless not an employee.<sup>7</sup>

This duality also represents competing perspectives on the normative framework for employment. A contractual perspective on employment

---

<sup>5</sup> RESTATEMENT OF EMPLOYMENT LAW § 1.02 (AM. LAW INST. 2015) (“An individual is a volunteer and not an employee if the individual renders uncoerced services to a principal without being offered a material inducement.”).

<sup>6</sup> California has developed a doctrine of implied-in-fact contract to rebut the state's statutory presumption of at-will employment. See *Guz v. Bechtel Nat. Inc.*, 8 P.3d 1089, 1101 (Cal. 2000) (“The contractual understanding need not be express, but may be *implied in fact*, arising from the parties' *conduct* evidencing their actual mutual intent to create such enforceable limitations.”); Julia Barnhart, *The Implied-in-Fact Contract Exception to At-Will Employment: A Call for Reform*, 45 UCLA L. REV. 817, 819 (1998) (“Pursuant to this exception, a California employee can rebut her at-will status by showing the existence of an implied-in-fact contract with the employer such that the employee can be terminated only for good cause.”).

<sup>7</sup> RESTATEMENT OF EMPLOYMENT LAW § 1.01 cmt. g (“The underlying economic realities of the employment relationship, rather than any designation or characterization of the relationship in an agreement or employer policy statement, determine whether a particular individual is an employee.”).

focuses on the private ordering that leads to the agreement between the parties. In order to enter a contract, both parties have to voluntarily agree to an exchange.<sup>8</sup> The idea that contract is an extension of free will is supported by both moral theories and economic theories of the law. Contracts have been characterized as “essentially self-imposed” obligations undertaken through promise,<sup>9</sup> as well as exchanges which will render both parties better off as a result.<sup>10</sup> Based on these twin rationales, the law presumes that properly formed contracts should be enforced on their own terms. This presumption applies to employment contracts as well. As one prominent casebook in the field recognizes: “[i]n reality then, despite substantial federal regulation, the many aspects of the most important terms of the employment relationship—job security, wages, benefits—are left to private ordering between employers and employees.”<sup>11</sup>

As originally conceived (or at least justified), the move to a contractual basis for the employment relationship freed workers from their status as “servants” under the law. Under a status-based system, masters had the right to command servants based simply on their social position and not on negotiated agreements.<sup>12</sup> The conception of employment as contractual was seen as liberating, since it gave employees the power to control their own destinies.<sup>13</sup> This perspective developed as part of a general approach to the employment relationship as one of contract, rather than status.<sup>14</sup> The Supreme Court during its much-maligned “*Lochner* Era”

---

<sup>8</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981) (defining a contract as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty”).

<sup>9</sup> CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 2 (2d ed. 2015).

<sup>10</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 115 (8th ed. 2011) (noting the “importance of voluntary exchanges in moving resources from less to more valuable uses”).

<sup>11</sup> TIMOTHY P. GLYNN, RACHEL S. ARNOW-RICHMAN & CHARLES A. SULLIVAN, *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS* xxvii (2d ed. 2011).

<sup>12</sup> See CHRISTOPHER TOMLINS, *LAW, LABOR AND IDEOLOGY IN THE AMERICAN REPUBLIC* 278–92 (1993).

<sup>13</sup> See SIR HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 169–70 (14th ed. 1984) (1861) (“If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract.”); Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579, 598 (2009) (“Status is associated with unfreedom. Not just the requirement of consent, but also its dispositive role in contract, guard against a rigid social order imposed from above.”).

<sup>14</sup> MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW: CASES AND MATERIALS* 3 (7th ed. 2011) (“Traditionally, the law considered employment to be a matter of private contract between the employer and employee.”).

2020] *TAKING EMPLOYMENT CONTRACTS SERIOUSLY* 1265

endeavored to preserve freedom of contract by striking down workplace regulation.<sup>15</sup> Workers and employers should be free, concluded the Court, to arrive at their own arrangements without intervention from federal and state legislatures.<sup>16</sup> Although the constitutional power of the Contracts Clause has significantly diminished, nevertheless there is still significant academic and judicial support for a primarily contractual approach to employment.<sup>17</sup>

The modern status-based or regulatory approach to employment recognizes its contractual nature but believes in the necessity of guardrails on behalf of employees. The New Deal began a steady march of statutory regimes that imposed minimum terms or legal mechanisms on the employment relationship: the National Labor Relations Act,<sup>18</sup> the Fair Labor Standards Act,<sup>19</sup> Title VII of the Civil Rights Act,<sup>20</sup> the Employee Retirement and Income Security Act,<sup>21</sup> the Occupational Safety and Health Act,<sup>22</sup> the Americans with Disabilities Act,<sup>23</sup> and the Family and Medical Leave Act,<sup>24</sup> to name the basics. Accompanying these federal statutes are state laws that supplement or expand upon these protections. Labor and employment laws restructure the employment relationship in myriad ways.<sup>25</sup>

---

<sup>15</sup> See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525, 559–62 (1923) (negating minimum wage law), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Coppage v. Kansas*, 235 U.S. 1, 26 (1915) (rendering prohibitions against yellow-dog contracts invalid); *Lochner v. New York*, 198 U.S. 45, 53–55 (1905) (striking down limitation on working hours).

<sup>16</sup> See, e.g., *Adkins*, 261 U.S. at 545 (“Within this [contractual] liberty are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining.”); *Adair v. United States*, 208 U.S. 161, 174 (1908) (“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.”).

<sup>17</sup> See GLYNN, ARNOW-RICHMAN & SULLIVAN, *supra* note 11, at xxviii (noting that “in recent decades there has been a retreat from mandates and a corresponding increased commitment to private ordering”); Richard A. Epstein, *Contractual Solutions for Employment Law Problems*, 38 HARV. J.L. & PUB. POL’Y 789 (2015). Cf. DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 23 (2011) (defending the *Lochner* decision as a defense of small business and individual rights).

<sup>18</sup> 29 U.S.C. §§ 159–169 (2018).

<sup>19</sup> *Id.* §§ 201–219.

<sup>20</sup> 42 U.S.C. §§ 2000e–17 (2018).

<sup>21</sup> 29 U.S.C. §§ 1001–1381.

<sup>22</sup> *Id.* §§ 651–678.

<sup>23</sup> 45 U.S.C. §§ 12101–12213 (2018).

<sup>24</sup> 29 U.S.C. §§ 2601–2654.

<sup>25</sup> Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539, 1539 (2006)

Supporters of regulation in the labor market—which would likely encompass most of the labor and employment academy—seek to justify these interventions, either each individually or together as an overall approach.<sup>26</sup> Although it would be impossible to characterize the universe of justifications accurately and concisely, the most common approach focuses on the disparity in power between employers and employees. Even assuming that private ordering might make sense for relatively equal economic actors, goes the argument, it does not make sense when individual workers are bargaining with large organizations over terms and conditions of work. The bargaining is too unfair.<sup>27</sup> If we just leave the parties to the market, employees will be taken advantage of, and possible third-party harms will result as well.<sup>28</sup> Regulation is required to balance out the playing field and prevent opportunistic behavior.<sup>29</sup>

These two normative frameworks—private ordering versus regulation—nudge their supporters to focus on these respective areas of law. Private-ordering proponents spend more time on the law of contract, while interventionists tend to spend their time elucidating the interventions. In fact, many supporters of aggressive regulation have argued that contract law is not merely passive; it is instead actively enlisted to keep workers oppressed. As Robert Gordon argued:

“Freedom of contract” in practice was not a *laissez[-]faire* regime in which the parties were left at large to bargain out the content of their contracts. It was rather a regime in which the

---

(describing the four pillars of work law as “employment law, labor law, employment discrimination, and some variation of a tax-oriented employee-benefits law”).

<sup>26</sup> See, e.g., Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L.J. 357, 376 (2002) (defining employee vulnerabilities along three metrics: democratic deficits within the relationship, economic dependency, and social/psychological dependency).

<sup>27</sup> Bagchi, *supra* note 13, at 580 (noting that the inequality between employees and employers is “multi-dimensional”).

<sup>28</sup> Robert W. Gordon, *Britton v. Turner: A Signpost on the Crooked Road to “Freedom” in the Employment Contract*, in *CONTRACTS STORIES* 186, 225–26 (Douglas G. Baird ed., 2007) (“‘Freedom of contract’ is a slogan whose practical meaning is that the state should not—at least, not very visibly—change the constellation of rules so as to disturb the legal system’s status quo distribution of state power to coerce people through its award of rights to grant and withhold valuable resources, and its conferral of organization capacity.”).

<sup>29</sup> See, e.g., Cynthia Estlund, *Labor Law Reform Again? Reframing Labor Law as a Regulatory Project*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 383, 385 (2013) (“[W]e need to envision the regulation of work as one among many fields of regulation, alongside the regulation of consumer products, the environment, and financial integrity. Reconceiving of labor law as a regulatory project brings into view an alternative set of analytical levers and tools of governance, as well as additional reservoirs of political support for the ultimate ends pursued by labor law.”).



legal system supplied implied terms largely favoring employers and in other ways threw its weight behind employers' power to impose contract terms, backed up by the sanctions of dismissal and even (in some periods and situations) criminal prosecutions and injunctions.<sup>30</sup>

In other words, contract law has been part of the problem—not merely an innocent bystander to the employer's predations.

Charlie Sullivan certainly does not shy away from regulatory interventions into the employment contract.<sup>31</sup> But neither does he neglect the common law of contract or dismiss the contract itself. Instead, he returns to these topics to probe more deeply into contract law's treatment of the underlying fairness concerns driving the regulatory perspective. The common law of contract does, in fact, have doctrines that protect workers against certain terms and conditions, and it does have a tradition of policing agreements for fairness.<sup>32</sup> Moreover, Sullivan also recognizes the importance of contracts and contract terms to the parties and the courts. Because contracts matter, Sullivan takes them seriously on their own terms. The next section explores a few examples of how Sullivan's scholarship drills down into the employment contract while not deferring to a private-ordering perspective.

### III. THE IMPORTANCE OF CONTRACTS IN EMPLOYMENT

What if employers and employees could not form binding contracts? What if they could negotiate agreements, but those agreements were not enforceable in court? This strange scenario may be in play when it comes to religious organizations and clergy. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,<sup>33</sup> the Supreme Court held that antidiscrimination laws did not apply to churches with respect to their clergy members—those who “preach their beliefs, teach their faith, and carry out their mission.”<sup>34</sup> A church employee had brought an Americans with Disabilities Act claim with no specific connection to religious doctrine or practice; nevertheless, the Court held that religious organizations needed

---

<sup>30</sup> Gordon, *supra* note 28, at 223.

<sup>31</sup> See, e.g., Charles A. Sullivan & Timothy P. Glynn, Horton *Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013, 1020 (2013) (arguing that the NLRA prohibits class-action arbitration waivers); Charles A. Sullivan, *Employing AI*, 63 VILL. L. REV. 395, 428 (2018) (arguing for stronger antidiscrimination protections in the face of AI human-resources decision-making).

<sup>32</sup> Bagchi, *supra* note 13, at 584 (“Numerous courts have observed a disparity in bargaining power between employers and employees, and many have justified pro-employee defaults or interpretations on this basis.”).

<sup>33</sup> 565 U.S. 171 (2012).

<sup>34</sup> *Id.* at 196.

an exemption from the statute in order to avoid unconstitutional entanglement with the free exercise of religion.<sup>35</sup>

Since the Court exempted churches from claims under unrelated statutory employment protections, it seems to follow that any legal claim by a minister against the church would be barred, including common-law claims. The Court, however, did not reach this question.<sup>36</sup> In his article *Clergy Contracts*, Charlie Sullivan takes it up and argues that “a refusal to enforce contracts by churches can itself be seen as discriminatory against the church as an institution.”<sup>37</sup> As Sullivan points out, “contract law remains the primary legal regulator of a vast and complex economy.”<sup>38</sup> If churches were denied the ability to contract, that would render them “second-class citizens,” like minor children or the mentally incompetent.<sup>39</sup> Preventing churches from engaging in enforceable agreements might seem to benefit those institutions, but it also denies them the autonomy to make binding promises to their leaders, teachers, and celebrants.<sup>40</sup> Churches could not credibly commit to terms and conditions of employment, and ministers would be less secure in the promises made and thus perhaps less likely to take a particular position. Sullivan argues that such contracts should be enforceable if the underlying issue does not involve an interpretation of church doctrine. He also argues that these agreements should include a dispute-resolution mechanism that would be better able to resolve ecclesiastical concerns than would a secular court.<sup>41</sup>

It is important to note, I think, that Sullivan is not arguing for contractual enforceability simply to protect employee rights. Rather, Sullivan recognizes that contract is an important mechanism in establishing the relationship between the parties. Nullifying all such contracts would be “seriously problematic from the perspective of religious educational institutions generally and perhaps of any kind of religious institution that needs the security of contracts in order to structure its operations.”<sup>42</sup> If the church can walk away from the contract at any time, it is not really a

---

<sup>35</sup> *Id.* at 188 (“By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments.”).

<sup>36</sup> *Id.* at 196.

<sup>37</sup> Charles A. Sullivan, *Clergy Contracts*, 22 EMP. RTS. & EMP. POL’Y J. 371, 375 (2018) [hereinafter Sullivan, *Clergy Contracts*].

<sup>38</sup> Sullivan, *Clergy Contracts*, *supra* note 37, at 399.

<sup>39</sup> Sullivan, *Clergy Contracts*, *supra* note 37, at 399–400; *see also id.* at 375 (“Infants and incompetents are restricted in their ability to contract, thus rendering them less than full members of our society.”).

<sup>40</sup> Sullivan, *Clergy Contracts*, *supra* note 37, at 393.

<sup>41</sup> Sullivan, *Clergy Contracts*, *supra* note 37, at 406–07.

<sup>42</sup> Sullivan, *Clergy Contracts*, *supra* note 37, at 406.

contract at all.<sup>43</sup> While allowing that there is some value to purely hortatory documents, Sullivan nevertheless illuminates the problematic ramifications of the Supreme Court's effort to separate religious institutions from secular law.

Agreements sitting outside the scope of judicial protection are also considered in Sullivan's *The Puzzling Persistence of Unenforceable Contract Terms*.<sup>44</sup> Certain categories of contract terms, such as liability waivers, noncompete clauses, and arbitration agreements, can be written so as to be unenforceable due to public policy or fairness concerns. For example, covenants not to compete cannot be unreasonably overbroad by restricting employees for too long a time period or too wide a geographic region. These clauses, however, still exist in "the wild" in real contracts applying to real people. There may be a temptation to just ignore their existence, as courts will not enforce them, rendering them toothless. But Sullivan takes this as a theoretical challenge: why might these clauses still find their way into contracts?

Rather than harmless tchotchkes, Sullivan argues, these clauses do in fact have power. They can act as a starting point in the judicial negotiation—a first offer that sets the bar.<sup>45</sup> In addressing overbroad covenants not to compete as well as unbalanced arbitration agreements, courts often pare back the offending terms until they become reasonable.<sup>46</sup> The result is a no-lose situation for employers: either the clause is enforced as written, or the clause is rewritten to be enforceable. Sullivan also notes that employees may make decisions based on the (naïve) view that the clauses do in fact apply to them.<sup>47</sup> As a result, they may decide not to switch to another job or may fail to bring a claim under a seemingly unfair arbitration agreement. The appropriate response to this opportunism would seem to be punishment, rather than accommodation, and courts have

---

<sup>43</sup> Sullivan, *Clergy Contracts*, *supra* note 37, at 377.

<sup>44</sup> Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127 (2009) [hereinafter Sullivan, *Puzzling Persistence*].

<sup>45</sup> Sullivan, *Puzzling Persistence*, *supra* note 44, at 1147 (finding that "courts, while refusing to enforce the clause as written, typically enforce a cleaned-up version of it"). Extreme clauses can also have an anchoring effect on the parties, warping their sense of what would be fair. Under anchoring and adjustment, "the first number with which a decision-maker is presented has a demonstrable effect on that person's ultimate choice. In essence, the first number heard becomes the place away from which any adjustment is made." Rebecca Hollander-Blumoff & Matthew T. Bodie, *The Effects of Jury Ignorance About Damage Caps: The Case of the 1991 Civil Rights Act*, 90 IOWA L. REV. 1361, 1378 (2005); see also Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453, 457–58 (1981) (finding anchoring effects even when participants know the number has been randomly generated).

<sup>46</sup> Sullivan, *Puzzling Persistence*, *supra* note 44, at 1157.

<sup>47</sup> Sullivan, *Puzzling Persistence*, *supra* note 44, at 1136, 1175, 1177.

refused to enforce the agreement at all if they found the clause was drafted and negotiated in bad faith.<sup>48</sup> Sullivan, however, notes that a background norm of contract law may dampen this sanction.<sup>49</sup> Courts generally try to follow the will of these parties so as to honor their private agreement. This desire to hew as close as possible to the original bargain may drive courts to reform, rather than reject.<sup>50</sup> Instead of cutting back on unenforceable clauses, Sullivan argues that common-law courts should generally refuse to enforce them at all, and only reform them if the deviation is “truly minor and unintentional.”<sup>51</sup> Otherwise, the employer will be able to take advantage of both employees and the courts that do their modifications for them.

Remedies are generally neglected in academic writing, as they cut across substantive subject areas and involve technical, somewhat mundane matters. But Sullivan has an eye for the unexamined, as evidenced by his review of the *Restatement of Employment Law*'s chapter on remedies.<sup>52</sup> Contract remedies may seem straightforward in the employment context: employees get backpay, and employers get injunctions against employee competition. As Sullivan explains, however, important details lurk beneath the surface. Framing his inquiry under the usual standard for contractual expectation relief, Sullivan compares and contrasts the nuances of the doctrine to determine its overall balance as represented by the Restatement.<sup>53</sup> Among his observations: both the Restatement and most courts permit injunctions against employees in too many cases;<sup>54</sup> health care insurance is improperly left out of the Restatement's consequential damages;<sup>55</sup> and collateral sources such as unemployment compensation are not to be deducted from employee damages.<sup>56</sup> Sullivan does a particularly

---

<sup>48</sup> See RESTATEMENT OF EMPLOYMENT LAW § 8.08 (finding that a noncompete clause should not be modified if “the employer lacked a reasonable and good-faith basis for believing the covenant was enforceable”).

<sup>49</sup> Sullivan, *Puzzling Persistence*, *supra* note 44, at 1170–74.

<sup>50</sup> The psychological heuristic of anchoring may also play a role. By setting forth the original (and unenforceable) version of the clause, the employer encourages the court to anchor from that version and then move away from it, rather than coming up with the best possible answer from scratch. See, e.g., Tversky & Kahneman, *supra* note 45, at 457–58.

<sup>51</sup> Sullivan, *Puzzling Persistence*, *supra* note 44, at 1176.

<sup>52</sup> Charles A. Sullivan, *Restating Employment Remedies*, 100 CORNELL L. REV. 1391 (2015) [hereinafter Sullivan, *Restating Employment Remedies*].

<sup>53</sup> Sullivan, *Restating Employment Remedies*, *supra* note 52, at 1402 (“Traditional contracts doctrine generally vindicates the injured party’s expectation interest, which means giving her a sum that will put her in a position she would have occupied had the contract been performed.”).

<sup>54</sup> Sullivan, *Restating Employment Remedies*, *supra* note 52, at 1394–98.

<sup>55</sup> Sullivan, *Restating Employment Remedies*, *supra* note 52, at 1399–1400.

<sup>56</sup> Sullivan, *Restating Employment Remedies*, *supra* note 52, at 1409.

detailed examination of mitigation, discussing how courts may fail to include various relevant factors, such as geographic location, reputational consequences, and the length of time elapsed.<sup>57</sup> Overall, Sullivan concludes that the Restatement reflects the pro-employer slant of common-law remedies, with some minor tweaks that may level the playing field a bit.<sup>58</sup>

Sullivan's careful exegesis of employment contract remedies reflects both his concern for employee welfare as well as his facility with minutiae. He judges the Restatement based on how employee-friendly it is, ultimately finding it a "mixed bag" on that score.<sup>59</sup> At the same time, he engages with the Restatement point-by-point, often getting most animated with a particular illustration or an ambiguous doctrine. He obviously cares about legal craftsmanship. And he believes that even though the common law of contract is tilted towards employers, it is worth engaging with it, even if only to improve it incrementally. To provide one example, Sullivan is perturbed at the Restatement's solicitousness towards an obscure area of the law known as "lowered-sights" doctrine, which pertains to mitigation after a length of time.<sup>60</sup>

These three articles illustrate Sullivan's approach to contract and contract law. He is not enamored with private ordering; he does not want to leave the parties to their own market-related devices. Nevertheless, he takes contracts and contract law seriously, and he advocates for an approach that makes sense within the doctrine while acknowledging and adjusting for the bias against employees within the realm of private contract. Critical to Sullivan's approach is the recognition that the common law of contract takes the needs of society into account. Sullivan has revived and illuminated the importance of contract law to third parties and society. He recognizes that it is not simply private ordering.

#### IV. THE IMPORTANCE OF SOCIETY IN CONTRACT LAW

By taking contracts and contract law seriously, Charlie Sullivan shares intellectual commitments with the private-law theorists who do the same.

---

<sup>57</sup> Sullivan, *Restating Employment Remedies*, *supra* note 52, at 1404–09.

<sup>58</sup> Sullivan, *Restating Employment Remedies*, *supra* note 52, at 1420.

<sup>59</sup> *Id.*; *see also id.* at 1392 (noting the "tension between, on the one hand, faithfully counting judicial noses and, on the other, adopting some better view—often as expounded in the law reviews and by a few courts who are more employee-friendly than most").

<sup>60</sup> Sullivan, *Restating Employment Remedies*, *supra* note 52, at 1407–08; *see id.* at 1408 ("It would be preferable to simply continue with the current majority rule, which would apply the same standard to whether mitigation was required regardless of how much time passes.").

Unlike the discipline of law and economics, which judges the law by its maximization of utility, private-law theorists can broadly be said to support the idea that “the purpose of private law is to be private law.”<sup>61</sup> In other words, the law need not be a mere means to another end; the law can be an end unto itself.<sup>62</sup> Such an appeal to formalism may seem hopelessly naïve after the barrage of critiques from legal realism, critical legal studies, and the aforementioned law and economics. But the project of private-law theorists, particularly supporters of the New Private Law Theory, could be fairly characterized as a return to the importance of doctrine.<sup>63</sup>

Sullivan, of course, does care about outcomes—he is consistently pro-employee and advocates for rules that favor employees. But more than most labor and employment academics, he also cares about doctrine. This is his self-confessed interest.<sup>64</sup> But it is also demonstrated in his articles and their conscientious attention to the specifics of doctrine. In this way, he shares important methodological principles with private-law theorists, who are also known for their attention to doctrinal nuances. This description of New Private Law could apply as well to Sullivan’s work:

New Private Law theorists recognize the value of a pragmatism that is sensitive to which functions the law serves, critical as to how well it is serving those functions, and open-minded about how it might better serve them. We insist, however, that understanding private law goes far beyond an appreciation of its salutary functions and its limits. The task requires understanding the concepts and principles entrenched in the law and the structures, institutions, and languages that implement these concepts through the practices of courts, legislators, and lawyers.<sup>65</sup>

Although, to my knowledge, Sullivan has not written on or in the New Private Law tradition, there would seem to be fruitful grounds for a

---

<sup>61</sup> ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 5 (1995).

<sup>62</sup> John Oberdiek, *Method and Morality in the New Private Law of Torts*, 125 HARV. L. REV. F. 189, 190 (2012) (“To understand how to resolve a legal question, in short, formalism demands that we appeal to the law, not to some extralegal goal, whatever its merits are as a goal.”).

<sup>63</sup> *Id.* (characterizing New Private Law as “self-consciously aspir[ing] to draw insight from both instrumentalism and formalism”).

<sup>64</sup> Charles A. Sullivan, *When Employee = Employer*, JOTWELL (Feb. 10, 2011), <https://worklaw.jotwell.com/when-employee-employer/> (“I admit to being old-fashioned enough to like well-done doctrinal articles. Especially ones that upset conventional wisdom—the courts, the agencies, and the law reviews—by suggesting that, not to put too fine a point on it, everybody’s wrong. Doctrinally.”).

<sup>65</sup> Benjamin C. Zipursky, Palsgraf, *Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757, 1757 (2012).

crossover.<sup>66</sup> Private-law theorists have written on the importance of an “internal” perspective to common-law subjects, including contracts.<sup>67</sup> The internal perspective refers to the idea that individuals are not all bad actors who seek to violate the law whenever rational to do so. Instead, some people internalize the law and follow it because it is the law.<sup>68</sup> Rebecca Stone has discussed how certain contract doctrines are best described as efforts to protect good-faith internalizers from the predations of rational and rule-breaking externalizers. For example, in discussing the supercompensatory damages that are sometimes awarded in the context of willful breach, she states: “we should define a willful breach as one where the contract breaker acts for the wrong reasons under conditions in which the promisee is unlikely to be able to use the legal system to protect his expectation interest.”<sup>69</sup> This idea matches up extremely well with Charlie’s concern about overbroad noncompete and arbitration agreements.<sup>70</sup> In these situations, employers have written intentionally overbroad clauses that would not be enforced by courts; as Charlie emphasizes, employees may be “unaware of the fact and likely to remain unaware” that the clause is unenforceable.<sup>71</sup> As a result, we have a situation analogous to the willful breach: one sides acts with the knowledge that the other side is unlikely to vindicate her rights. In both of these situations, the lawbreaker should be punished, not just made to compensate, to discourage efforts to use contract

---

<sup>66</sup> Sullivan has written about the importance of common law as part of the overall fabric of legal protections. See Charles A. Sullivan, *Is There a Madness to the Method?: Torts and Other Influences on Employment Discrimination Law*, 75 OHIO ST. L.J. 1079, 1079–80 (2014) (“The question before us is the influence of tort law on the interpretation of the anti-discrimination statutes, and I’ll spare the reader an historical exegesis that might lead us to conclude that it’s torts all the way down. However maybe the broader point is that it’s law all the way down, and that our current system of categorizing legal doctrines into neat subject matters may be due more to our need to teach law students pieces of the so-called seamless web than to any natural cleavages in intellectual discourse.”).

<sup>67</sup> Andrew S. Gold, *Internal and External Perspectives: On Methodology in the New Private Law*, in THE OXFORD HANDBOOK OF NEW PRIVATE LAW (Andrew S. Gold et al. eds., forthcoming 2020) (“If there is a common feature that cuts across New Private Law scholarship, it is an interest in the internal point of view.”), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3379364](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3379364); Rebecca Stone, *Economic Analysis of Contract Law from the Internal Point of View*, 116 COLUM. L. REV. 2005, 2008 (2016) (defining internalizers as “agents who adopt legal rules as reasons for action even when their self-interest (and other things they care about) dictates doing otherwise”).

<sup>68</sup> Stephen A. Smith, *The Normativity of Private Law*, 31 OXFORD J. LEGAL STUD. 215 (2011) (contending that legal duties themselves motivate individuals to follow the law); Stone, *supra* note 67, at 2007 (considering “the more realistic assumption that many legal subjects are motivated to conform to the law because it is the law”).

<sup>69</sup> Stone, *supra* note 67, at 2043.

<sup>70</sup> See Sullivan, *Puzzling Persistence*, *supra* note 44.

<sup>71</sup> Sullivan, *Puzzling Persistence*, *supra* note 44, at 1136.

law opportunistically.<sup>72</sup>

Overall, the New Private Law theorists have reverence for the traditions and complexities of the common law and respect for the practice of private citizens engaging with the law.<sup>73</sup> Sullivan is, essentially, asking employers and courts to engage in the same practice. If employers took seriously their normative duties to contract appropriately, employment contracts would better reflect the ideal bargain between the two parties. Instead, employers—on the advice of counsel, and with the tacit support of economists—have often acted like Holmes’ “bad man,” trying to get away with as much as they can.<sup>74</sup> Sullivan and the New Private Law theorists would find common cause in supporting a more considered and attentive approach to common-law responsibilities on behalf of employers and their representatives.<sup>75</sup>

There is one axis upon which Sullivan and the private-law theorists would have a sharp divide: the relationship between private law and public law—or, more broadly, between private law and society. Private-law theorists bring their focus to the interactions between individuals to the

---

<sup>72</sup> Cf. Nathan B. Oman, *Consent to Retaliation: A Civil Recourse Theory of Contractual Liability*, 96 IOWA L. REV. 529, 532 (2011) (“I label the core interpretive claim of this Article—that contractual liability consists of consent to retaliation in the event of breach—the civil recourse theory.”).

<sup>73</sup> As John Goldberg has described it:

The New Private Law is thus in part an effort to recapture the normative dimensions of private interactions (that is, interactions within civil society). In doing so, it rejects the supposition that the norms of private law reduce down to norms of public law. It also rejects the contrary supposition that private interaction is a “Hobbesian” domain in which self-interest is given free rein, or in which persons interact atomistically. Contracting, for example, is a distinctively normative practice. It is governed by legal concepts that include, most basically, the idea of a bargained-for exchange (as opposed to a gift or a sham exchange) and good faith in performance. The basic challenge for courts in applying contract law is to determine in a given case the particular ways in which parties have or have not obligated themselves to one another, within the terms permitted by law.

John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1661–62 (2012).

<sup>74</sup> See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) (“But what does [the notion of legal duty] mean to a bad man? Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money.”); Stone, *supra* note 67, at 2007 (“The Holmesian ‘bad man’ view of the law that economists favor follows from a positive conception of legal subjects as agents who know what is best for themselves and single-mindedly pursue their own self-interest.”).

<sup>75</sup> Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483, 1484 (2005) (discussing theories from Charles Fried and Stephen Smith that have offered “unified theories around the moral force of promising”).



exclusion of government actors.<sup>76</sup> Nate Oman and Jason Solomon provide the following description: “[w]hen invoking the term ‘private law,’ we . . . simply mean to refer to common-law subjects like torts, contract, and property (and their statutory counterparts) that involve primary rights by individuals that can be enforced by the rights-holders themselves against other individuals and entities.”<sup>77</sup> By focusing on individual actors, private-law theorists seek to strip out societal concerns and focus on dyadic interactions. Private law emphasizes the autonomy of the person and the moral gravity of individual choices.<sup>78</sup> It is important to note that this emphasis on private relationships cannot be equated with the commitment to private ordering in law and economics. Private-law theory has largely rejected the calculus of utility maximization as the appropriate metric; instead, the moral dilemma of the choice is paramount.<sup>79</sup> Despite these differences, however, both New Private Law and law and economics focus on the respect given to individual choices, and the need to enforce private agreements.<sup>80</sup>

This focus on dyadic interactions, however, fails to represent the concern the common law has traditionally had for the societal ramifications of these individual interactions. Courts have long been suspicious of liquidated damages, covenants not to compete, and arbitration agreements, even if mutually agreed upon; all of these are subject to reasonableness

---

<sup>76</sup> Goldberg, *supra* note 73, at 1640 (“Private law defines the rights and duties of individuals and private entities as they relate to one another. It stands in contrast to public law, which establishes the powers and responsibilities of governments, defines the rights and duties of individuals in relation to governments, and governs relations between and among nations.”).

<sup>77</sup> Nathan B. Oman & Jason M. Solomon, *The Supreme Court’s Theory of Private Law*, 62 DUKE L.J. 1109, 1111–12 (2013).

<sup>78</sup> See, e.g., ARTHUR RIPSTEIN, *PRIVATE WRONGS* 6 (2016) (arguing that private law should be based on “the moral idea that no person is in charge of another”).

<sup>79</sup> Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1725 (2012) (“Conventionally it is thought that moral and philosophically oriented theories of property (and private law) are incompatible with law and economics and other related functional or consequentialist approaches.”); see also Seana Shiffrin, *Could Breach of Contract Be Immoral?*, 107 MICH. L. REV. 1551, 1552 (2009) (finding that “there are occasions on which breach of contract is immoral because the contractual breach is a relevant instance of an immoral form of breach of promise”).

<sup>80</sup> See, e.g., Ian Ayres & Gregory Klass, *One-Legged Contracting*, 133 HARV. L. REV. F. 1, 3–4 (2019), <https://harvardlawreview.org/2019/11/one-legged-contracting/> (“A distinctive feature of contractual obligations is that they are both voluntary and chosen. Contractual obligations are voluntary in the sense that the parties must agree to them, unlike most duties found in tort or criminal law. Contractual obligations are chosen in the sense that the parties get to decide for themselves the content of the obligations.”); see also Steve Hedley, *The Rise and Fall of Private Law Theory*, 134 L. Q. REV. 214 (2018) (discussing both law and economics and moral theories of private law as overly attentive to individual relationships rather than societal concerns).

tests under the common law.<sup>81</sup> Moreover, other default rules or presumptions build in public policy to standard doctrine. The interpretive canon of *contra proferentum*—construing an ambiguous term against its drafter—incentivizes clarity but also helps the consumer in a boilerplate agreement.<sup>82</sup> Throughout common law doctrines, courts have incorporated broader concerns about disparity in bargaining power<sup>83</sup> and vindication of public policy.<sup>84</sup> The common law frequently incorporates societal perspectives in its ecosystem of private rights and wrongs.

The public orientation of many common-law doctrines can sometime be lost in the academic literature. This predisposition is certainly rooted in history, as courts have repeatedly used common-law doctrines to restrict workers' rights.<sup>85</sup> The importance of broader social concerns within the private law, however, is never far from view in Sullivan's scholarship on common-law doctrines. He recognizes the traditions of equity and public policy that are still alive within the common law. Although a great deal of his scholarship has centered around federal antidiscrimination statutes,<sup>86</sup> Sullivan has not glossed over the common law as a meaningful body of law. Rather, he has focused on how the common law has been used and can be used to achieve societal ends, including the protection of employees.

This focus on broader societal concerns is evident in Sullivan's treatment of several contract doctrines in the context of employment. In his treatment of covenants not to compete, Sullivan emphasizes the third-party harms from noncompete clauses that come not only from depressed hiring markets for employees but also restraint of trade and loss of productive work.<sup>87</sup> Allowing employers to have the benefit of the doubt in rendering such clauses "reasonable" after the fact only adds to these societal

---

<sup>81</sup> See generally RESTATEMENT (SECOND) OF CONTRACTS § 208 (unconscionability), § 356(1) (liquidated damages); RESTATEMENT OF EMPLOYMENT LAW §§ 8.05–08 (covenants not to compete).

<sup>82</sup> See generally RESTATEMENT (SECOND) OF CONTRACTS § 206. This presumption has been applied against employers. See, e.g., *Jamesbury Corp. v. Worcester Valve Co.*, 443 F.2d 205, 213 (1st Cir. 1971) (noting that any doubt over the definition of a term would be resolved against the employer, because the "agreement was a standard form contract drawn up by [the employer]" who "had superior bargaining power").

<sup>83</sup> See, e.g., Bagchi, *supra* note 13, at 586 ("In searching for a way to articulate the problem endemic in most employment relations, 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>84</sup> RESTATEMENT OF EMPLOYMENT LAW §§ 5.01–03 (public policy tort).

<sup>85</sup> See SAMUEL ESTREICHER & MATTHEW T. BODIE, *LABOR LAW* 24–28 (1st ed. 2016).

<sup>86</sup> See, e.g., Charles A. Sullivan, *The Curious Incident of Gross and the Significance of Congress's Failure to Bark*, 90 TEX. L. REV. 157 (2012); Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613 (2011).

<sup>87</sup> See Sullivan, *Puzzling Persistence*, *supra* note 44, at 1151.

maladies.<sup>88</sup> Moreover, in discussing the English phenomenon of “garden leave,” where employees are paid not to compete for a period of time, Sullivan admits that such contracts seem like a big step up from uncompensated noncompetition periods.<sup>89</sup> And indeed, focusing merely on the employer-employee relationship, garden leave gives the employer its period of protection while providing the employee with wages and benefits. Sullivan, however, also recognizes the societal costs of competition restrictions, as well as the possibility that judges may be more likely to allow such restrictions when garden leave is included. In his view, the overall assessment of garden leave is “a very complicated inquiry.”<sup>90</sup>

Similarly, Sullivan has been a consistent skeptic of arbitration in the employment context. In part, he has looked to statutory protections to restrain or nullify employer access to arbitration as a dispute-resolution forum.<sup>91</sup> Although a private-ordering approach would look more receptively on the possibility of contractually created dispute resolution, Sullivan favors striking down these agreements when they have infringed upon workers’ rights to collective adjudications.<sup>92</sup> Scholars have argued that the state has an obligation to intercede in these private agreements to protect access to justice.<sup>93</sup> Sullivan supports this tradition and believes that these agreements have more to do with the lack of employee power than they do with the sanctity of moral engagements—or with Pareto-optimal decision-making.<sup>94</sup> This concern with employer overreaching also has a tradition within the common law.<sup>95</sup>

---

<sup>88</sup> *Id.*

<sup>89</sup> Charles A. Sullivan, *Tending the Garden: Restricting Competition Via “Garden Leave,”* 37 *BERKELEY J. EMP. & LAB. L.* 293, 323–24 (2016).

<sup>90</sup> *Id.* at 325.

<sup>91</sup> Timothy P. Glynn & Charles A. Sullivan, *Murphy Oil and Norris LaGuardia to the Rescue: Preserving Employee Rights to Concerted Dispute Resolution in an Era of Mandatory Individual Arbitration*, 70 *RUTGERS U. L. REV.* 401 (2018); Sullivan & Glynn, *supra* note 31.

<sup>92</sup> See Glynn & Sullivan, *supra* note 91, at 414 (arguing that federal statutes protect employees’ right to collective dispute resolution).

<sup>93</sup> See Margaret Jane Radin, *The Fiduciary State and Private Ordering*, in *CONTRACT, STATUS, AND FIDUCIARY LAW* 315, 315 (Paul B. Miller & Andrew S. Gold eds., 2016) (arguing that American “legal institutions are flouting their fiduciary obligation to the American people” by allowing the enforcement of arbitration clauses in consumer contracts).

<sup>94</sup> See Sullivan & Glynn, *supra* note 31, at 1065 (discussing the employer’s interest in deterring employee suits).

<sup>95</sup> See, e.g., *Jamesbury Corp. v. Worcester Valve Co.*, 443 F.2d 205, 213 (1st Cir. 1971) (noting that any doubt over the definition of a term would be resolved against the employer, because the “agreement was a standard form contract drawn up by [the employer]” who “had superior bargaining power”); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6

In making the point about Sullivan's commitment to the public good, I may be drawing the lines too sharply. Private-law theorists have recognized that "[a]lthough private law is concerned to address the interactions of individuals and entities, it does so as part of a political system in which government is the bearer of powers over, and duties owed to, those individuals and entities."<sup>96</sup> Nevertheless, Sullivan would undoubtedly agree with the sentiments of Steve Hedley's concerns about power imbalances in contract:

And if we truly seek to respect the rights of individuals, we cannot confine our attention to the two-party relationships favoured by corrective justice theorists. It is all too probable that at least one of the parties will be a "repeat player," who participates in these two-party relationships on a routine basis, and so acts in a manner very different from first-time players. Our theories of contract should therefore not neglect the possibility that one side will (say) produce a set of standard terms, and refuse to deal on any other basis, even though the other party lacks the time or the experience to comprehend those terms; asking whether any resulting agreement is one that the law should enforce is a very different question from those that corrective justice theorists ask.<sup>97</sup>

There is one respect, however, in which I think Sullivan, private-law theorists, private-ordering supporters, and even the common law have all overlooked an important aspect of the employment relationship. And that is in the organizational relationship between the employer and its employees.

#### V. THE ROLE OF ORGANIZATION IN CONTRACT AND EMPLOYMENT

Employees do not work for themselves. In the tautological definition provided by several federal statutes, an employee is "any individual employed by an employer."<sup>98</sup> It takes an employer to have an employee.<sup>99</sup>

---

P.3d 669, 690 (Cal. 2000) ("Given the lack of choice and the potential disadvantages that even a fair arbitration system can harbor for employees, we must be particularly attuned to claims that employers with superior bargaining power have imposed one-sided, substantively unconscionable terms as part of an arbitration agreement."); *Ravetto v. Triton Thalassic Techs., Inc.*, 941 A.2d 309, 325 (Conn. 2008) ("[B]ecause the employer generally enjoys superior bargaining power in the employment relationship, it is incumbent upon the employer to make any obligation for reimbursement explicit in the employment agreement.").

<sup>96</sup> Goldberg, *supra* note 73, at 1658.

<sup>97</sup> Hedley, *supra* note 80, at 236.

<sup>98</sup> See, e.g., 29 U.S.C. § 1002(6) (2018); 42 U.S.C. §§ 2000e(f), 12111(4) (2018).

<sup>99</sup> Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 665 (2013) ("There can be no employee without an employer.").

But unlike the traditional “masters” of yore, employers are almost never individuals; rather, they are economic firms.<sup>100</sup> These firms have their representation in law as one of a number of forms of business associations, with the most common being the corporation. Employees have traditionally not had governance representation within the business organization; corporate law, for example, provides that only shareholders have the right to elect directors.<sup>101</sup> Nevertheless, in terms of the ongoing economic phenomenon that is a firm, employees have a critical role to play. In fact, Ronald Coase argued: “[w]e can best approach the question of what constitutes a firm in practice by considering the legal relationship normally called that of ‘master and servant’ or ‘employer and employee.’”<sup>102</sup>

My view—elaborated at length elsewhere—is that employment law should really be organizational law.<sup>103</sup> Rather than casting the employer as an entity separate from employees, we should consider employees an important part of the economic firms that employ them. As participants in the firm, they are entitled to participation in governance as well. Governance rights would give employees more power to advocate for themselves within the firm and give them more negotiating power to improve their terms and conditions of employment. Unfortunately, corporate law has effectively divorced employees from firm governance,<sup>104</sup> and employees are left with the right to collective representation under labor law as the closest approximation to governance power.<sup>105</sup>

Recognizing this resulting power imbalance, employment law scholarship exists in a world of “us vs. them,” where employees are almost

---

<sup>100</sup> *Id.*

<sup>101</sup> Matthew T. Bodie, *Employees and the Boundaries of the Corporation*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 86 (Claire Hill & Brett McDonnell eds., 2012) [hereinafter Bodie, *Boundaries of the Corporation*].

<sup>102</sup> R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 403 (1937).

<sup>103</sup> See, e.g., Bodie, *Boundaries of the Corporation*, supra note 101; Matthew T. Bodie, *Employment as Fiduciary Relationship*, 105 *GEO. L.J.* 819 (2017) [hereinafter Bodie, *Employment as Fiduciary*].

<sup>104</sup> Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 *U. PA. L. REV.* 1861, 1864 (2003) (exploring “how, in the course of the twentieth century, legal scholars and political theorists helped remove the interests of workers (as differentiated from shareholders, officers, and directors) from the core concerns of corporate law and theory”).

<sup>105</sup> And the failings of collective bargaining to provide power to workers, at least since the mid-20th century, have been well documented. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 *COLUM. L. REV.* 1527, 1528 (2002) (“The labor laws have failed to deliver an effective mechanism of workplace representation, and have become nearly irrelevant, to the vast majority of private sector American workers.”); Michael H. Gottesman, *Wither Goest Labor Law: Law and Economics in the Workplace*, 100 *YALE L.J.* 2767, 2767–68 (1991).

always in need of protection against the predations of their employers. There is much truth in this picture. But it ignores the fact that employees generally want to have jobs, generally want to participate in the life of their companies,<sup>106</sup> and even want to have a cooperative relationship with management.<sup>107</sup> Yes, autoworkers may rail against General Motors or Ford on the picket line; at the same time, GM workers are in competition with Ford workers and will benefit from GM's success against Ford in the marketplace. Coal workers understand better than anyone the dangerous conditions of mining and how companies can risk their lives to save money. But coal workers also have largely stood up in support of the industry and have seen the Obama Administration's harsh environmental regulations as a betrayal.<sup>108</sup> So at least some aspects of employment-law scholarship should move beyond the oppositional employer-employee dichotomy and instead explore the role of employees within the organizations that employ them.<sup>109</sup>

Charlie Sullivan's work is unabashedly pro-employee and, as a corollary, anti-employer. In his assessment of the Restatement of Employment Law, his metric is employee friendliness.<sup>110</sup> He is skeptical of covenants not to compete and employment arbitration agreements; he worries that employers will use their manifold powers to take advantage of their workers. These normative positions are fairly unremarkable in the labor and employment law academy and, given the subordinate state of employee power in our economy, justifiably so.

Sullivan, however, has also recognized the role of organization in the employment relationship. In his article on clerical contracts, he is frustrated by the likelihood that courts will not enforce such agreements at all. Although such a result may help religious organizations facing a lawsuit, Sullivan notes that this species of paternalism will render churches and their employees worse off in the long run.<sup>111</sup> In working through the

---

<sup>106</sup> RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 4 (1999) ("American workers want more of a say/influence/representation/participation/voice (call it what you will) at the workplace than they now have.").

<sup>107</sup> *Id.* at 5.

<sup>108</sup> Matthew T. Bodie, *Worker Participation, Sustainability, and the Puzzle of the Volkswagen Emissions Scandal*, in *THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY* 246, 247 (Beate Sjøfjell & Christopher M. Bruner eds., Cambridge Univ. Press, 2020).

<sup>109</sup> Some have argued that private law scholarship has embraced this dichotomy as well. Hedley, *supra* note 80, at 214 ("What I want to suggest is that they nonetheless share a core sentiment—roughly, that of distrust of collective action or purpose—which is quite alien to much of the writing which preceded them.").

<sup>110</sup> Sullivan, *Restating Employment Remedies*, *supra* note 52, at 1420.

<sup>111</sup> Sullivan, *Clergy Contracts*, *supra* note 37, at 374.

puzzle, Sullivan proposes an internal organizational resolution: namely, a form of ecclesiastical arbitration.<sup>112</sup> While still advocating for judicial resolution of claims that do not relate to religious dogma, Sullivan notes that internal church dispute resolution has a long history and has even engendered an “ecclesiastical abstention” doctrine.<sup>113</sup> An internal system of arbitration would allow courts to remain free of religious entanglement while ensuring that clerical contracts were not empty words.

And in perhaps his deepest dive into the role of employees in organizational governance, Sullivan examined the scope of employee fiduciary duties and the potential for devastating damages for their violation. In *Mastering the Faithless Servant?: Reconciling Employment Law, Contract Law, and Fiduciary Duty*, Sullivan argues that employees should not be susceptible to compensation forfeiture for relatively nominal or marginal breaches of the fiduciary duty of loyalty.<sup>114</sup> Because of their relative power within the typical employer’s organizational governance, he argues, most employees should not be considered fiduciaries at all and instead should only have contractual duties.<sup>115</sup> Rather, only higher-level employees should have fiduciary duties related to their positions within the firm’s hierarchy.<sup>116</sup> Justifying those duties, Sullivan argues: “[a]lthough in theory even higher-level employees are subject to the control of the employer, typically a corporation’s board of directors, in practice the exercise of such control is likely to be weak or even nonexistent, a reality that has generated numerous proposals for reform of corporate governance.”<sup>117</sup> But only these employees who are “effectively free from supervision” should have the responsibility of fiduciary duties owed to the organization.<sup>118</sup>

I agree with Sullivan that employees’ responsibility to and for the organization should be the quantum for determining their fiduciary duties to that organization.<sup>119</sup> And as a corollary, I believe that an employer should owe fiduciary duties to its employees when they cannot participate

---

<sup>112</sup> Sullivan, *Clergy Contracts*, *supra* note 37, at 407–08.

<sup>113</sup> Sullivan, *Clergy Contracts*, *supra* note 37, at 406.

<sup>114</sup> Charles A. Sullivan, *Mastering the Faithless Servant?: Reconciling Employment Law, Contract Law, and Fiduciary Duty*, 2011 WIS. L. REV. 777, 777–78 (2011)[hereinafter Sullivan, *Mastering the Faithless Servant?*].

<sup>115</sup> Sullivan, *Mastering the Faithless Servant?*, *supra* note 114, at 819.

<sup>116</sup> *Id.*

<sup>117</sup> Sullivan, *Mastering the Faithless Servant?*, *supra* note 114, at 821.

<sup>118</sup> *Id.*

<sup>119</sup> Bodie, *Employment as Fiduciary*, *supra* note 103, at 868 (noting that, if employees have governance power, “instead of being tribute paid to a master, the duty of loyalty would be a pact among equals not to engage in opportunism”).

in governance.<sup>120</sup> More broadly, employment law should recognize that employees are part of their firms, care about their businesses, and generally want the overall enterprise to be successful. Yes, opportunism is rampant. But employment law should focus on defusing that opportunism while not pitting employees and employers against one another in a cycle of eternal combat. Employees deserve a role in governance.

## VI. CONCLUSION

Charlie Sullivan has taken employment contracts seriously. In his exploration of contract terms and the common law doctrines that pertain to them, he has illuminated an area of legal research and practice that might otherwise have gone overlooked by the academy and bar. His work in this area respects the nature of contractual obligation. At the same time, he has carefully examined the layers of common-law precedent that represent societal responses to private-ordering problems. I very much appreciate this work.

Sullivan's scholarship has greatly informed our understanding of the employment relationship and the common law that governs it. He has given us new insights on the workings of, *inter alia*, clergy contracts, garden-leaves, non-enforceable terms, and duties of loyalty. He roots for employees, but his scholarship finds ways of working within the grand tradition of the law and positioning it to best follow the path of justice. And in particular, I appreciate his sense of curiosity, novelty, and (good-natured) contrariness. While the crowd is rushing off to look at birds, he lifts up the stump to see the complicated ecosystem at work below the surface.<sup>121</sup> And he does so with a glint in his eye, and a wave of his hand to come over—"Look what I've found!"

---

<sup>120</sup> Bodie, *Employment as Fiduciary*, *supra* note 103, at 864–65.

<sup>121</sup> *Cf. This American Life: Get A Spine!*, WBEZ 91.5 (May 10, 2019), <https://www.thisamericanlife.org/674/transcript> (discussing how most animal behavioral scientists study birds or mammals, even though invertebrates and the variety of invertebrate species greatly outnumber vertebrates and the types of vertebrate species).