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At Will as Taking

ABSTRACT. Employment at will is legally and politically entrenched. It is the default termination law in forty-nine states and controls the working lives of most U.S. workers, creating a political economy of precarity and exploitation. In light of these challenges, this Essay offers a novel framework for a constitutional challenge to the at-will termination regime under the Fifth Amendment's Takings Clause.

The argument advanced in this Essay is that at-will rules strip workers' job security and are, thus, unconstitutional takings of workers' property. Following the Supreme Court's lead, numerous courts equate public-sector workers' job security with property entitlements in their jobs under the Due Process Clause. I offer theories to expand this doctrine from the public sector to the private sector, and from the Due Process Clause to the Takings Clause. As a sword, takings claims can be raised against the prevailing termination regimes in forty-nine states. As a shield, at-will-as-takings claims can protect public-sector workers against increasing precarity in federal, state, and local government work.

This Essay makes two additional contributions. First, it rejects the premise underlying contemporary critiques of the Supreme Court's takings doctrine that identify employers as the only property owners on the job. Second, it offers a property-friendly progressive constitutional vision that rejects reliance on the administrative state as the only tool for progressive policy advancements.

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ESSAY CONTENTS

INTRODUCTION	2259
I. JOB SECURITY AS PROPERTY—THE STATE OF THE DOCTRINE	2268
II. EXPANDING PROPERTY RIGHTS	2276
A. Justifications for Tying Job Security to Constitutional Property	2276
B. From the Public-Sector Employer to the Private-Sector Regulator	2278
C. The Limits of the Due-Process Claim	2281
III. AT-WILL RULES AND THEIR EFFECTS	2284
A. The At-Will Regime	2284
B. At-Will Rules' Effects	2287
IV. AT-WILL RULES AS A TAKING	2289
A. Takings as a Shield	2292
B. Takings as a Sword	2295
V. THEORETICAL IMPLICATIONS	2297
A. Property and the Takings Clause	2297
B. Property and Progressive Constitutionalism	2300
CONCLUSION	2304

[The] purpose of the ancient institution of property [is] to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

—*Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)

INTRODUCTION

Property is a legal euphemism for sovereignty.¹ A legitimate claim of property rights endows autonomy, power, and deference. The question of who can do what to whom is often legally answered by first sorting out those who have a legitimate property claim from those who don't. In the workplace, the stakes of this question are immense.

Courts take for granted that employers are the sole property holders in the workplace.² Time and again, work-law³ conflicts are resolved by this narrative.⁴ This is seen, for example, by the doctrine that employers' right "to protect and continue . . . business" operations trumps striking workers' interest in not being permanently replaced.⁵ And more recently, employers' constitutional property right was leveraged to declare a California state law guaranteeing union organizers' access to farmworkers an unconstitutional taking under the Fifth Amendment.⁶

Statutory amendments have proven to be insufficient for challenging the constitutionally anchored employers' sovereignty.⁷ Instead, novel constitutional

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1. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 11 (1927) (identifying questions of property as questions of sovereignty); C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 751 (1986) (discussing the sovereignty function of property).
 2. See Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 308 (1994).
 3. The term "work law" encompasses employment law, labor law, and antidiscrimination law.
 4. See, e.g., *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 529-30 (1992) (discussing union organizers' access to the workplace); see Gali Racabi, *Abolish the Employer Prerogative, Unleash Work Law*, 43 BERKELEY J. EMP. & LAB. L. 79, 89 (tying the concept of the employer prerogative to property rationales) [hereinafter Racabi, *Abolish the Employer Prerogative*].
 5. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 341-45 (1938) (finding that Sections 7, 8 and 13 of the National Labor Relations Act do not protect striking workers from being permanently replaced).
 6. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 140 (2021).
 7. See, e.g., Racabi, *Abolish the Employer Prerogative*, *supra* note 4, at 111-15 (describing the ways employers utilize their prerogative to prevent and sterilize work-law legislation); see Gali Racabi, *Balancing is for Suckers*, 109 CORNELL L. REV. 63, 72-75 (2023) [hereinafter Racabi,

claims are needed. In this Essay, I develop such a claim under the Fifth Amendment's Takings Clause: workers have a constitutional property right in their job, which the state takes with at-will employment rules.⁸ Thus, at-will rules are a constitutional violation—a taking of workers' property rights without just compensation.

Anchored in state statutes and in judge-made doctrines,⁹ at-will rules allow employers to terminate workers for good reason, bad reason, or no reason at all.

Balancing is for Suckers] (describing how doctrinal balancing of workers' rights against employers' interests deflated the National Labor Relations Act).

8. The wording of such an entitlement will vary in this Essay, for contextual and stylistic reasons. Regardless of phrasing, the meaning is one: workers have a property claim to some if not all aspects of their work, depending on the particular work-as-property theory one chooses to adopt. *Infra* Part II.
9. Several states enacted statutory at-will rules. See ARIZ. REV. STAT. ANN. § 23-1501 (2012); CAL. LAB. CODE § 2922 (West 2023); GA. CODE ANN. § 34-7-1 (West 2023); LA. CIV. CODE ANN. art. 2747 (2023); N.D. CENT. CODE ANN. § 34-03-01 (West 2023); S.D. CODIFIED LAWS § 60-4-4 (2023); S.C. CODE ANN. § 41-1-110 (2023). In forty-nine states (Montana is the outlier), courts enforce at-will rules vigorously. See RESTATEMENT OF EMP. L. § 2.01 (AM. L. INST. 2015) (collecting resources for forty-nine states); *Webb Wheel Prods., Inc. v. Hanvey*, 922 So. 2d 865, 870 (Ala. 2005); *Crawford Cnty. v. Jones*, 232 S.W.3d 433, 438 (Ark. 2006); *Ross v. Raging Wire Telecomm., Inc.*, 174 P.3d 200, 208 (Cal. 2008); *Alexander v. Nextel Commc'ns, Inc.*, 61 Cal. Rptr. 2d 293 (Cal. Ct. App. 1997); *Widder v. Durango Sch. Dist. No. 9-R*, 85 P.3d 518, 526 (Colo. 2004); *Cweklinsky v. Mobil Chem. Co.*, 837 A.2d 759, 768 (Conn. 2004); *Rizzitiello v. McDonald's Corp.*, 868 A.2d 825, 830 (Del. 2005); *Fingerhut v. Child's Nat'l Med. Ctr.*, 738 A.2d 799, 803 n.6 (D.C. 1999); *Wynne v. Ludman Corp.*, 79 So. 2d 690, 691 (Fla. 1955); *Balmer v. Elan Corp.*, 599 S.E.2d 158, 228 (Ga. 2004); *Kamaka v. Goodskill Anderson Quinn & Stifel*, 176 P.3d 91, 119 (Haw. 2008); *Jenkins v. Boise Cascade Corp.*, 108 P.3d 380, 387 (Idaho 2005); *McInerney v. Charter Gold Inc.*, 680 N.E.2d 1347 (Ill. 1997); *Meyers v. Meyers*, 861 N.E.2d 704, 706 (Ind. 2007); *Theisen v. Covenant Med. Ctr.*, 636 N.W.2d 74, 82 (Iowa 2001); *Morriss v. Coleman Co., Inc.*, 738 P.2d 841 (Kan. 1987); *Commonwealth v. Solly*, 253 S.W.3d 537, 541 (Ky. 2008); *Quebedeaux v. Dow Chem. Co.*, 820 So. 2d 542, 545 (La. 2002); *Taliento v. Portland West*, 705 A.2d 696, 699 (Me. 1997); *Porterfield v. Mascari II, Inc.*, 823 A.2d 590, 601-02 (Md. 2003); *White v. Blue Cross & Blue Shield of Mass.*, 809 N.E.2d 1034, 1038 (Mass. 2004); *Lytle v. Malady*, 579 N.W.2d 906, 912 (Mich. 1998); *Anderson-Johanningmeier v. Mid-Minnesota Women's Ctr., Inc.*, 637 N.W.2d 270, 273 (Minn. 2002); *Harris v. Mississippi Valley State Univ.*, 873 So. 2d 970, 987 (Miss. 2004); *Crabtree v. Bugby*, 967 S.W.2d 66, 72 (Mo. 1998); *Trosper v. Bag 'N Save*, 734 N.W.2d 704, 707 (Neb. 2007); *Chavez v. Sievers*, 43 P.3d 1022, 1022 (Nev. 2002); *Porter v. City of Manchester*, 849 A.2d 103, 113 (N.H. 2004); *Wade v. Kesser Inst.*, 798 A.2d 1251, 1258, 1262 (N.J. 2002); *Trujillo v. N. Rio Arriba Elec. Coop., Inc.*, 41 P.3d 333, 341 (N.M. 2001); *Smalley v. Dreyfus Corp.*, 882 N.E.2d 882, 884 (N.Y. 2008); *Kurtzman v. Applied Analytical Indus., Inc.*, 493 S.E.2d 420, 423 (N.C. 1997); *Thompson v. Associated Potato Growers, Inc.*, 610 N.W.2d 53, 56 (N.D. 2000); *Leininger v. Pioneer Nat'l Latex*, 875 N.E.2d 36, 39 (Ohio 2007); *Darrow v. Integris Health Inc.*, 176 P.3d 1204, 1210 (Okla. 2008); *Ewalt v. Coos-Curry Electric Coop., Inc.*, 120 P.3d 1288, 1291 (Or. 2005); *Rothrock v. Rothrock Motor Sales, Inc.*, 883 A.2d 511 (Pa. 2005); *Neri v. Ross-Simmons, Inc.*, 897 A.2d 42, 47-48 (R.I. 2006); *Conner v. City Forest*

In fact, workers can be terminated with no notice nor other procedural obligations.¹⁰ Despite more than half a century of struggles and critiques,¹¹ at-will rules dominate labor markets today.¹² Although at will is a mere default rule, which

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- Acres, 611 S.E.2d 905, 910 (S.C. 2005); *Aberle v. City of Aberdeen*, 718 N.W.2d 615, 621 (S.D. 2006); *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 535 (Tenn. 2002); *Ed Rachal Found. v. D'Unger*, 207 S.W.3d 330, 331-32 (Tex. 2006); *Touchard v. La-Z-Boy*, 148 P.3d 945, 948, 950 (Utah 2006); *Adams v. Green Mountain R.R. Co.*, 862 A.2d 233, 235 (Vt. 2004); *Rowan v. Tractor Supply Co.*, 559 S.E.2d 709, 711 (Va. 2002); *Ford v. Trendwest Resorts, Inc.*, 43 P.3d 1223, 1226 (Wash. 2002); *Yunker v. E. Associated Coal Corp.*, 591 S.E.2d 254, 258-59 (W. Va. 2003); *Bammert v. Don's Super Valu, Inc.*, 646 N.W.2d 365, 371 (Wis. 2002); *Finch v. Farmers Co-Op Oil Co. of Sheridan*, 109 P.3d 537, 541, 544 (Wyo. 2005).
10. The canonical legal phrasing is found in *Payne v. Western & Atlantic Railroad*, 81 Tenn. 507, 518 (1884) (“[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employe[e]s at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act.”); see also RESTATEMENT OF EMP. L., *supra* note 9, § 2.01 (discussing the default rule of at-will employment); Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 65 (2000) (describing the at-will doctrine as “endowing employers with divine rights over their employees”); Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405-06 (1967) (noting that “the law has adhered to the age-old rule that all employers” may dismiss employees for any reason); Lea VanderVelde, *The Anti-Republican Origins of the At-Will Doctrine*, 60 AM. J. LEGAL HIST. 397, 403 (2021) (noting examples of employers being “permitted to act in mean-spirited ways”).
 11. See MODEL EMP. TERMINATION ACT 5 (UNIF. L. COMM’N 1991) <https://www.uniform-laws.org/committees/community-home?CommunityKey=ab6a797a-9641-43f9-9841-947581297e3a> [<https://perma.cc/GJZ8-FNCR>] (suggesting an alternative to the at-will regime); Summers, *supra* note 10 (criticizing the at-will rule); Blades, *supra* note 10 (same); PAUL C. WEILER, *GOVERNING THE WORKPLACE* (1990) (describing the inadequacy of the at-will rule as a default); Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 105-06, 111 (1997) (describing workers’ misperception of the at will rule); Andrew Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901, 1905-15 (1996) (criticizing doctrinal reliance on idealized economic models); Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. REV. 427, 429-34 (2016) (criticizing the at-will rule’s misfit within broader contractual principles); Kate Andrias & Alexander Hertel-Fernandez, *Ending At-Will Employment: A Guide for Just Cause Reform*, ROOSEVELT INST. 4-7 (2021), https://rooseveltinstitute.org/wp-content/uploads/2021/01/RI_AtWill_Report_202101.pdf [<https://perma.cc/79LE-SXAJ>] (criticizing the at-will rule and shedding light on legislative attempts of curbing it); VanderVelde, *supra* note 10, at 398 (debating the historical origin of the at-will rule); ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT)* (2017) (relying on the at-will rule as a prime example for the authoritarian nature of work); Joseph E. Slater, *The American Rule That Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL’Y J. 53, 93-108 (2007) (criticizing the stickiness of the at-will default).
 12. Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 125 (1976).

can be circumvented by employer-employee contracts or federal and state legislation, significant numbers of U.S. employees remain at-will workers today.¹³

The effects of the at-will rule are felt throughout the labor market. All workers are precariat by default because of the rule and this precarity is particularly troubling because the United States places jobs at the epicenter of workers' subsistence. Goods that in other Western democracies are provided on a public basis – such as health insurance, retirement savings, and more – are job-dependent in the United States.¹⁴

Thus, while at-will rules apply to the rich and poor alike, their bite is felt most by the low- and middle-income tiers of the labor market.¹⁵ Wealthy and thereby powerful employees can negotiate notice requirements, just-cause provisions, and extravagant severance packages.¹⁶ Public-sector and unionized workers can secure protectionist regulations and just-cause provisions in their own small patches of the labor market too.¹⁷ But workers on the middle and low levels of the labor market have limited information¹⁸ and no bargaining chips to contractually alter the default.¹⁹

Unlike some other default rules, at-will rules do not trace the expectations of workers.²⁰ Most workers *expect* a level of job security that simply does not exist

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13. Kim, *supra* note 11, at 106-07; Summers, *supra* note 10, at 65; Andrias & Hertel-Fernandez, *supra* note 11, at 9.
 14. William B. Gould IV, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, *BYU L. REV.* 885, 892 (1986); Andrias & Hertel-Fernandez, *supra* note 11, at 4.
 15. Andrias & Hertel-Fernandez, *supra* note 11, at 4.
 16. See Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 *WASH. & LEE L. REV.* 231, 248, 250, 252 (2006).
 17. See JANE BERGER, *A NEW WORKING CLASS: THE LEGACIES OF PUBLIC-SECTOR EMPLOYMENT IN THE CIVIL RIGHTS MOVEMENT* 4 (2022); Gary Minda, *The Common Law of Employment At-Will in New York: The Paralysis of Nineteenth Century Doctrine*, 36 *SYRACUSE L. REV.* 939, 946-49 (1985).
 18. Kim, *supra* note 11, at 106.
 19. See WEILER, *supra* note 11, at 71-73.
 20. For a helpful explanation of how other default rules work, see Lawrence Solum, *Legal Theory Lexicon: Default Rules and Completeness*, *LEGAL THEORY BLOG* (Sept. 30, 2012), <https://lsolum.typepad.com/legaltheory/2012/09/legal-theory-lexicon-default-rules-and-completeness.html> [<https://perma.cc/2AUP-RFLE>].

in the at-will regime.²¹ Once workers gain information and bargaining power, they reveal a preference for job security as a premium asset in the labor market.²²

Furthermore, courts and regulators routinely cite workers' at-will status to justify workers' subpar workplace protections.²³ Examples are plentiful. Public-sector at-will workers enjoy less robust equal-protection rights.²⁴ Courts also construct workers' contractual rights—such as good faith and fair dealing—to align with at will's precarious nature.²⁵

At-will rules undermine not only the distribution of power vertically between employers and their employees,²⁶ but also the distribution of power horizontally among otherwise similarly situated privileged and disadvantaged workers. These rules do so by weakening equal-opportunity laws.²⁷ Where most workers are at-will, bosses' biases and structural discrimination can go unchecked.²⁸ When employees have no durable stake in their jobs, keeping grievances to themselves or simply quitting is a rational choice.²⁹ Thus, at-will rules

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21. See WEILER, *supra* note 11, at 71-73; RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT 10* (rev. ed. 2006); Alexander Hertel-Fernandez, *American Workers' Experiences with Power, Information, and Rights on the Job: A Roadmap for Reform*, ROOSEVELT INST. 24-25 (Apr. 2020), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_Workplace-Voice_Report_202004.pdf [<https://perma.cc/ECL8-R53L>]; Kim, *supra* note 11, at 116-17.
 22. See WEILER, *supra* note 11, at 74-75; Thomas A. Kochan, Duanyi Yang, William T. Kimball & Erin L. Kelly, *Worker Voice in America: Is There a Gap between What Workers Expect and What They Experience?*, 72 ILR REV. 3, 14-15 (2019).
 23. See RESTATEMENT OF EMP. L., *supra* note 9, § 2.01 cmt. a (“[T]he at-will default rule . . . reflects the long-recognized property rights of the employer and therefore any departure from that baseline should be bargained for.”).
 24. See *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 609 (2008) (denying equal-protection “class of one” claims for public-sector at-will workers).
 25. RESTATEMENT OF EMP. L., *supra* note 9, § 2.07 cmt. b (“Jurisdictions that recognize the implied duty [of good faith and fair dealing] in the employment setting therefore also recognize that the duty applies to at will employment in a manner consistent with the essential nature of such an at-will relationship . . .”).
 26. Cf. Guy Mundlak, *The Third Function of Labour Law: Distributing Labour Market Opportunities Among Workers*, in *THE IDEA OF LABOUR LAW* 315, 316 (Guy Davidov & Brian Langille eds., 2011) (analyzing how labor law distributes power and workplace opportunities).
 27. See Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO STATE L.J. 1443, 1459-60 (1996).
 28. Cf. Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1278 (2011) (observing that courts are reluctant to recognize discrimination when there are any plausible alternative explanations).
 29. See, e.g., ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 40 (1970); Anna Stansbury, *Do US Firms Have an Incentive To Comply With the FLSA and the NLRA?*, PETERSON INST. INT’L ECON. 18 (Sept. 2021), <https://equitablegrowth.org/wp-content/uploads/2021/09/092321-WP-Do-US->

undermine equal opportunity by chilling workers' voices about inequities and injustices in the workplace. By affecting the poorest and socially excluded workers the most, at-will rules are a regressive policy tool that transfers property rights from employees to employers and workplace power from marginalized groups of employees to socially privileged ones.

U.S. workers have all the skin in the labor market but no power or voice to affect where the market is going.³⁰ Facing increased risk of automation-induced layoffs,³¹ workers are often nowhere near the table where decisions are made about their lives.³² The at-will employment regime dictates that most U.S. labor-market participants have only an arms-length relationship to their jobs. Once workers become a liability, they are out³³ – a reality that is a direct result of a clear policy choice.

As they expanded, at-will rules displaced a web of common-law doctrines and legal assumptions under which employment duration was a year by default, and termination before a year had to be for cause and noticed.³⁴ When the

Firms-Have-an-Incentive-to-Comply-with-the-FLSA-and-the-NLRA-Stansbury.pdf [https://perma.cc/Y4RB-EW9G]; Andrias & Hertel-Fernandez, *supra* note 11, at 12.

30. See Racabi, *Abolish the Employer Prerogative*, *supra* note 4, at 98; Matt Bodie, *What If I Told You That Employer Power Is a Legal Construct*, JOTWELL (Nov. 26, 2021), <https://worklaw.jotwell.com/what-if-i-told-you-that-employer-power-is-a-legal-construct> [https://perma.cc/JM2E-A2A4]; Andrias & Hertel-Fernandez, *supra* note 11, at 5; Josh Bivens, Lawrence Mishel & John Schmitt, *It's Not Just Monopoly and Monopsony: How Market Power has Affected American Wages*, ECON. POL'Y INST. (Apr. 25, 2018), <https://www.epi.org/publication/its-not-just-monopoly-and-monopsony-how-market-power-has-affected-american-wages> [https://perma.cc/4NPK-PK2R].
31. See Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 YALE L.J. 254, 258 (2018).
32. See Valerio De Stefano & Virginia Doellgast, *Regulating AI at Work: Labour Relations, Automation, and Algorithmic Management*, 29 TRANSFER 9, 11-12 (2023) (discussing the difficulties faced by UK workers due to algorithmic management strategies); cf. David H. Autor, *Outsourcing at Will: The Contribution of Unjust Dismissal Doctrine to the Growth of Employment Outsourcing*, 21 J. LAB. ECON. 1, 27-28 (2003) (reviewing data showing that states with more union participation had higher growth in outsourcing and suggesting that employers in states with more union penetration may use outsourcing as a way to avoid union constraints).
33. Cf. Rick Ellis, *Exclusive: An Apple TV+ Executive Talks Streaming, The Strike & Global Television*, ALLYOURSREENS (June 6, 2023), <https://allyourscreens.com/latest-news/u-s/895-exclusive-an-apple-tv-executive-talks-streaming-the-strike-global-television> [https://perma.cc/YV6Q-7LLZ] (quoting a television executive, commenting about the Writer's Guild of America strike, "writers . . . think they're the center of the fucking universe. I know this strike is personal for them. . . . But this is all just numbers for the studios. What's the least amount we can get away with paying for everything?"); PETER CAPPELLI, OUR LEAST IMPORTANT ASSET: WHY THE RELENTLESS FOCUS ON FINANCE AND ACCOUNTING IS BAD FOR BUSINESS AND EMPLOYEES 156-63 (2023) (explaining from a corporate-accounting perspective the low value of investing in and maintaining workers).
34. Feinman, *supra* note 12, at 120-21; Summers, *supra* note 10, at 66.

Framers hired an employee-servant,³⁵ for example, a common-law rule guaranteeing some measure of job security – not the at-will rule – governed that employee-servant’s employment and termination.³⁶

Contractual default rules such as the common-law or at-will rule are not divine or natural laws, nor are they necessary background assumptions.³⁷ Instead, contractual default rules are public-policy choices that do something legally tangible in the world.³⁸ In the private sector, at-will rules center organizational control with management and immunize employers from employees’ legal claims related to termination. In the public sector, at-will rules justify immunity from workers’ claims and provide the benchmark for cutbacks and austerity policies. In both the private and public sectors, at-will rules are the legal tool that the state utilizes to immunize employers from employees’ job security.³⁹

Over the years, courts, regulators, scholars, and workers’ advocates have sought to broaden the exceptions to the at-will rule. The introduction of a public-policy exception, good-faith and fair-dealing doctrines, and the application of the intentional infliction of emotional distress tort narrowed the scope of at-will. Further, labor laws and antidiscrimination legislation created significant substantive and procedural limitations on employers’ ability to terminate employees at will. Most recently, state legislatures introduced sectoral just-cause provisions.⁴⁰

Yet, the proliferation of arbitration agreements in the private-sector labor market threatens to dismantle doctrinal limitations on the at-will rule. In other words, courts’ predictions about the diminishing importance of the at-will rule⁴¹ dissipated in the “black hole” of mandatory arbitration procedures.⁴² Statutory limitations, including canonical labor and antidiscrimination laws, are

35. “Servant” was – and in some parts of work law, still is – the legal name for an employee.

36. See *infra* Part III.

37. See Jack M. Beermann & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 915-16, 987 (1989).

38. Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 208 (2001) (“It is important to emphasize that the employer has these rights not by nature, and not as a result of anything consensual, but because of a distinctly legal decision to confer the relevant rights on the employer rather than the employee.”).

39. Beermann & Singer, *supra* note 37, at 920-21.

40. See Andrias & Hertel-Fernandez, *supra* note 11, at 26 (describing such recent legislative initiatives).

41. See, e.g., *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 896-98 (3d Cir. 1983) (predicting the diminished importance of the at-will rule following the expansion of doctrinal limitations).

42. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 689 (2018).

interpreted harmoniously with the at-will rule.⁴³ The exceptions to the at-will rule, in their current form, are sinking islands giving way to rising at-will sea levels.⁴⁴

The project of curbing the at-will rule by carving out statutory, doctrinal, and contractual exceptions is facing significant headwind. In this Essay, I develop a different approach: a *constitutional* claim.

In the public sector, workers' job security, when it exists, connotes a constitutional property right in continued employment.⁴⁵ Following the Supreme Court's decisions in *Board of Regents of State Colleges v. Roth*⁴⁶ and *Cleveland Board of Education v. Loudermill*,⁴⁷ federal and state courts routinely recognize public employees' property rights in their jobs.⁴⁸ In one of the more neglected corners of constitutional law – public-sector personnel law – workers, their unions, and advocates claim, define, and win workers' property entitlements in the workplace.⁴⁹ Although the doctrinal development is convoluted, its basic upshot is clear: when workers are not at-will, courts recognize such workers' constitutional property rights in their jobs.⁵⁰

Three possible theories justify how job security can create workers' property rights in a job. First, job security connotes a physical right not to be excluded from the workplace without a sufficient cause. Second, job security entails an *in rem* guarantee against job termination without a cause. Third, job security connotes entitlement to making legal claims in their jobs, of which contractual claims are the most straightforward examples. These three rationales elucidate why courts understand job security as producing a constitutional property right.

While the gap between the private-sector-rights desert and the public-sector doctrine is significant, the gap stems not from substantive legal principles concerning the relationship between job security and property rights but from the relative obscurity of state action in the private sector. We see claims to property rights in job security only in the public sector rather than in the private sector

43. See *infra* Section III.B.

44. Consider contractual limitations on at-will status. Union contracts were one of the main institutional alternatives to the at-will regime. Union density and collective bargaining coverage in the United States have been shrinking steadily for the past seventy years, and with them, the just-cause regime that such union contracts often included. See Michael Goldfield & Amy Bromsen, *The Changing Landscape of US Unions in Historical and Comparative Perspective*, 16 ANN. REV. POL. SCI. 231 (2013).

45. See *infra* Part I.

46. 408 U.S. 564 (1972).

47. 470 U.S. 532 (1985).

48. See *infra* Part I.

49. See *infra* Part I.

50. See *infra* Part I.

because constitutional-rights claims can only be brought against state actors, and state action is less obvious when the actor is a private-sector employer. Unlike public-sector workers, most private-sector workers have little chance of proving that they are not at-will and would have difficulty litigating a claim that their private-sector employers violated their constitutional property rights, as no state action is directly involved in *the specific act of termination*.

But state action is present even in private-sector employment. Private-sector workers can claim that the state is unconstitutionally taking their property by *enacting and enforcing the at-will regime*. As a sword, an at-will-as-takings claim can be used by private-sector workers to attack the prevailing at-will termination regime in forty-nine states.⁵¹ In most of the United States, workers are defined as property-less unless proven otherwise. In some states, this policy is manifested in state legislation and in others, in judge-made doctrine. Both regulatory instruments are state actions susceptible to takings claims.⁵²

Additionally, public-sector workers can add takings claims to their existing legal arsenals, which already include property-based claims but not *takings* claims. Concretely, as a shield, an at-will-as-takings claim can be used to defend public-sector workers from losing job security through the expansion of the at-will rule into public-sector workplaces.⁵³ Workers can use such a claim to push back against the privatization and precaritization of the public sector.⁵⁴

Following recent Supreme Court decisions such as *Cedar Point Nursery v. Hassid*,⁵⁵ some critics argue that the Court has gone too far in protecting property rights against the regulatory state under the Takings Clause. In this Essay, however, I claim that the current takings doctrine does not go *far enough*.

Scholars who caution against an aggressive takings doctrine for democratic,⁵⁶ egalitarian, or worker-facing⁵⁷ reasons concede the major premise that employers are the sole property owners in the workplace. These scholars perceive the existing regulatory state as the baseline from which a democratic and egalitarian polity may flourish. But this vision is as pragmatic as it is rigid. This Essay

51. See *supra* note 9.

52. See Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1541-44 (1990) (noting that the Supreme Court is unlikely to apply takings protections to judicial decisions but nevertheless advocating for takings protections to apply to the judiciary).

53. On the limitations of contemporary claims by public-sector workers, see Part I and Section II.C.

54. See *infra* Section II.A.

55. 594 U.S. 139 (2021).

56. See, e.g., Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 198 (2021).

57. See, e.g., Benjamin I. Sachs, *Safety, Health, and Union Access in Cedar Point Nursery*, 2021 SUP. CT. REV. 99, 123; Cynthia Estlund, *Showdown at Cedar Point: "Sole and Despotical Dominion" Gains Ground*, 2021 SUP. CT. REV. 125, 153.

diverges from the traditional path by proposing a new articulation of labor-oriented and progressive constitutional imagination. If workers and their communities seek to countervail the autonomy, power, and deference employers enjoy in the U.S. political economy, a systematic examination of first principles is called for.

This Essay proceeds as follows: Part I introduces the doctrine of job security as creating a property right; Part II describes the at-will rule's direct and indirect effects on workers; Part III draws the broad parameters of the at-will-as-takings sword and shield claims; and Part IV outlines some of the theoretical implications of this legal claim. A short conclusion follows.

I. JOB SECURITY AS PROPERTY—THE STATE OF THE DOCTRINE

Job security connotes workers' constitutional property rights in their jobs.⁵⁸ But currently courts only recognize these rights for public-sector workers, and only in individual constitutional due-process claims. In this Part, I will describe this existing body of law and propose two legal and theoretical leaps: first, from constitutional due-process claims to constitutional takings claims, and second, from public-sector employees' rights against public-sector employers to private-sector workers' rights against the state.

I will use established constitutional and property doctrines as applied to the public-sector workplace to argue for a general principle that job security is a constitutionally protected form of property right.⁵⁹ Subsequently, in the next Part, I will offer three justifications for that conclusion and defend the argument against possible critiques. In the following Parts, I will argue that at-will rules are taking workers' property rights and are thus susceptible to constitutional takings claims.⁶⁰

58. Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849, 881-82 (1994).

59. In the following Part, I rely heavily on 2 ISIDORE SILVER, PUBLIC EMPLOYEE DISCHARGE AND DISCIPLINE § 17 (2017).

60. My focus is on federal constitutional law, as I leave state constitutional requirements for future study. For a discussion of property rights in state constitutional law, see, for example, *Durham v. Fields*, 588 A.2d 352, 357-61 (Md. Ct. Spec. App. 1991), which discusses state constitutional due-process rights; and *Evans v. Cowan*, 510 S.E.2d 170, 173-74 (N.C. Ct. App. 1999), which notes that North Carolina constitutional due process is generally equivalent to federal due process.

In the public sector, as in the private sector, the default termination rule is employment at will.⁶¹ This means that, without other indications (from a myriad of possible sources, such as contractual language, managerial promises, or statutory language), courts assume a worker is employed at will.⁶² Such public-sector at-will workers enjoy no job protection.⁶³

Public-sector at-will rules are often coded into concrete authorities or broad defaults of the appointing public body.⁶⁴ Examples can be found in city ordinances,⁶⁵ state constitutions⁶⁶ and laws,⁶⁷ federal regulations, and statutes. The Director of the CIA's statutory authority to discharge, for example, has been construed as establishing an at-will-type termination regime in the agency, precluding property-based claims.⁶⁸

In jurisdictions where at-will rules are not expressly codified, courts can derive workers' at-will status from a particular governance structure. For example,

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61. See, e.g., *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 896 (1961) (“It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer.”); *Reid v. White*, 703 F. Supp. 428, 433 (W.D.N.C. 1988) (finding that North Carolina employees are “at-will” absent a “contractual agreement . . . establishing a *definite* period of employment”); *Cobb v. Vill. of Oakwood*, 789 F. Supp. 237, 240 (N.D. Ohio 1991) (finding that a statutory provision stating certain employees are at will does not mean others are not at will); *Batson v. Montgomery Cnty.*, 557 A.2d 65, 66 (Pa. Commw. Ct. 1989); *Taylor v. Graham Cnty. Chamber of Com.*, 33 P.3d 518, 527 (Ariz. Ct. App. 2001) (holding that a presumption of at-will employment governs the contract); *Taylor v. Wash. Metro. Area Transit Auth.*, 109 F. Supp. 2d 11, 14 (D.D.C. 2000) (finding that at-will status controls unless rebutted by evidence of a contrary intention); *Shows v. Morehouse Gen. Hosp.*, 463 So. 2d 884, 886 (La. Ct. App. 1985); cf. *Truax v. Raich*, 239 U.S. 33, 38 (1915) (finding that there is no at-will assumption in the public sector).
 62. See Michael E. Caples & Kenneth J. Hanko, *The Doctrine of At-Will Employment in the Public Sector*, 13 SETON HALL L. REV. 21, 21 (1982).
 63. See, e.g., *Zeigler v. Jackson*, 716 F.2d 847, 849 (11th Cir. 1983) (holding that the absence of a for-cause clause in a city ordinance meant that workers were at will).
 64. See, e.g., FLA. STAT. § 30.53 (2023).
 65. *Randolph v. Bd. of Pub. Utils.*, 983 F. Supp. 1008, 1015-16 (D. Kan. 1997) (finding that an at-will city ordinance trumped just-cause personnel instructions).
 66. See, e.g., LA. CONST. ANN. art. 10, § 8 (2024); *Shows*, 463 So. 2d at 886 (finding that a contrary contract guaranteeing an employee two years of employment was invalid).
 67. See, e.g., ME. REV. STAT. ANN. tit. 30-A, § 2601(1) (2023); MISS. CODE ANN. § 21-3-5 (West 2018); N.J. STAT. ANN. § 2A:159A-6, -15 (West 2003); N.Y. PUB. OFF. LAW § 5 (McKinney 2023); OR. REV. STAT. ANN. § 204.601 (West 2023); *Salisbury v. Stone*, 518 A.2d 1355, 1359 (R.I. 1986) (describing a statutory class of “unclassified” employees “serv[ing] at the pleasure of their appointing authority”). Even Montana, with its employment-protection laws, treats public-sector employees, generally, as at will. See MONT. CODE ANN. § 39-2-503 (1995).
 68. *Doe v. Gates*, 981 F.2d 1316, 1320 (D.C. Cir. 1993) (holding that the NSA allows the CIA director to use discretion in termination decisions when he deems it is in “the interests of the United States”).

in municipalities, courts have derived the at-will status of some employees from a “council-manager”⁶⁹ or an “aldermanic” form of local government.⁷⁰ In the federal government, workers hired as “excepted service,” meaning outside of traditional competitive-hiring procedures (to fill urgent vacancies, for example),⁷¹ are considered at will by default and can face significant obstacles in obtaining job security.⁷²

Despite the at-will default, some public-sector workers have leveraged their job security to gain recognition of their constitutionally protected property entitlement. Courts overwhelmingly affirm the connection between public-sector job security and property rights. In fact, for many courts, these terms—job security and property rights on the job—are synonyms. The most common term for a property-granting job-security employment arrangement is “just cause.” If public-sector employees prove that an employer can terminate them only for “just cause,” courts recognize that these employees have property rights in their positions.⁷³ The recognition of this property right generally occurs in the context of the state’s due-process obligations under the Fifth and Fourteenth Amendments.⁷⁴

Courts recognize various sources of job security and, therefore, multiple sources of property entitlements in their jobs. Consider some examples. Both state laws and local ordinances can create property rights when those sources

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69. *See, e.g.,* *Mills v. Leath*, 709 F. Supp. 671, 674 (D.S.C. 1988) (stating that the Council-Manager form of government naming the City Manager the “Chief Executive officer” of the administrative branch of the municipal government effectively makes all municipal employees “at-will”).
70. *Finck v. City of Tea*, 443 N.W.2d 632, 634 (S.D. 1989) (citing S.D. CODIFIED LAWS § 9-14-13 (1890)) (holding that in the aldermanic form of government, the mayor is the city’s CEO and has the power to terminate appointive city officers whenever he believes it is in the interests of the city, but he must report his reasons to the council).
71. *Types of Hires*, OFF. PERS. MGMT., <https://www.opm.gov/policy-data-oversight/hiring-information/types-of-hires> [<https://perma.cc/PFK5-ECHY>].
72. *Lenoir v. Fed. Deposit Ins. Corp.*, 709 F. Supp. 830, 833 (N.D. Ill. 1989) (finding that an excepted service worker did not have a property right in his job).
73. *See, e.g.,* *Bailey v. Kirk*, 777 F.2d 567, 574 (10th Cir. 1985) (holding that when a public employee could not be suspended without pay except for cause, it created a property interest in continued employment); *Mancini v. Northampton Cnty.*, 836 F.3d 308, 315 (3d Cir. 2016) (holding that just-cause employment entails a protected property interest in the job); *Clouser v. City of Thornton*, 676 F. Supp. 228, 230 (D. Colo. 1987) (noting that when an employee can only be dismissed for cause, property rights are involved).
74. *Riano v. McDonald*, 833 F.3d 830, 834 (7th Cir. 2016) (citing *Carmody v. Bd. of Trs. of the Univ. of Ill.*, 747 F.3d 470, 474 (7th Cir. 2014)) (finding property interest in the job created due-process obligations); *McCauley v. Thygerson*, 732 F.2d 978, 982 (D.C. Cir. 1984) (holding that an employee had “no expectation of continued employment absent ‘cause’ for dismissal” and therefore did not have a property interest protected under the Due Process Clause).

indicate workers have job security.⁷⁵ The same goes for broad policy statements an employer makes.⁷⁶ Collective-bargaining agreements,⁷⁷ individual contracts,⁷⁸ employee handbooks,⁷⁹ and internal merit systems have also been found to entitle workers to job security and property rights.⁸⁰ Courts have even found that more informal sources—including an employer’s oral statements,⁸¹

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75. See, e.g., *Pearson v. City of Paris*, 839 F. Supp. 645, 648, 650 (W.D. Ark. 1993) (holding that a state statute created a property entitlement for a policy chief); *Ellis v. City of Lakewood*, 789 P.2d 449, 451-52 (Colo. App. 1989) (asserting that a home-rule charter was sufficient to confer upon employees a property interest); *Duck v. Jacobs*, 739 F. Supp. 1545, 1548-49 (S.D. Ga. 1990) (holding that a “for cause” city ordinance created a property interest in continued employment); *Christian v. Cecil Cnty.*, 817 F. Supp. 1279, 1284 (D. Md. 1993) (holding that a county code could create property entitlements); *Vereen v. Holden*, 468 S.E.2d 471, 474 (N.C. Ct. App. 1997) (finding that an ordinance may confer a property interest on a plaintiff). *But see Zeigler v. Jackson*, 716 F.2d 847, 849 (11th Cir. 1983) (holding that a grievance procedure created by a city ordinance did not create a property right because it did not “indicate that a city employee may be dismissed only for cause”).
76. See, e.g., *Nicholson v. Gant*, 816 F.2d 591, 597 (11th Cir. 1987) (holding that an employee handbook policy discussing for-cause termination supported plaintiff’s claim to a constitutionally protected property interest).
77. *Brew v. Sch. Bd. of Orange Cnty.*, 626 F. Supp. 709, 714 (M.D. Fla. 1985) (recognizing that a union contract may serve as the basis of property rights); *In re Grievance of Morrissey*, 538 A.2d 678, 683 n.1 (Vt. 1987) (confirming that a collective-bargaining agreement requiring “just cause” for termination vests employees with a property interest in continued employment).
78. *Breeden v. City of Nome*, 628 P.2d 924, 926 (Alaska 1981) (holding that an employment contract may create job-security entitlement); *Ray v. Nampa Sch. Dist.*, 814 P.2d 17, 22 (Idaho 1991) (finding that an electrician may have a property interest in his employment even without a formal employment contract); *Romano v. Harrington*, 664 F. Supp. 675, 681-82 (E.D.N.Y. 1987) (noting that a faculty advisor of a school newspaper may have a property interest in his position).
79. See, e.g., *Hardric v. City of Stevenson*, 843 So. 2d 206, 209-10 (Ala. Civ. App. 2002) (noting that violation of handbook termination procedure may be a basis for a due-process claim); *Anderson-Free v. Steptoe*, 970 F. Supp. 945, 954-55 (M.D. Ala. 1997) (finding that a nontenured teacher may possibly establish a property interest based on language in an employee handbook); *Baum v. Webb*, 863 F. Supp. 918, 922-23 (E.D. Ark. 1994) (deciding a handbook entitled an employee to a property interest in his job, but that his procedural due-process rights were not violated); *Saxe v. Bd. of Trs. of Metro. State Coll. of Denver*, 179 P.3d 67, 77-78 (Colo. App. 2007) (holding that an employee handbook may be found to contain a vested right in tenure); *Conley v. Bd. of Trs. of Grenada Cnty. Hosp.*, 707 F.2d 175, 181 (5th Cir. 1983) (noting that reliance on an employee handbook created a property interest).
80. *Hummel v. Baldwin Cnty.*, 926 So. 2d 1043, 1050 (Ala. Civ. App. 2005) (reversing summary judgment based on an employee’s claim of property interest in his job due to the alleged “merit-system” nature of his job differing from his stated position, possibly making him a full-time employee who would have been deprived of due-process rights).
81. *Green v. City of Hamilton*, Hous. Auth. 937 F.2d 1561, 1564 (11th Cir. 1991) (holding that an employee with a “permanent” contract can establish a property interest in continued employment, and such a “permanent” contract may be oral).

promises and assurances,⁸² and practices and customs⁸³—can count toward de facto job security and, in some cases, recognized property entitlement.⁸⁴ In addition, various state employment and contract doctrines have also been found to establish property rights via job security for workers.⁸⁵ In other words, all of these diverse sources create what can be constitutionally recognized as job security sufficient for a property right.⁸⁶

The test that courts use for identifying job security sufficient for constitutional protection is consistent with the Supreme Court's ruling in *Board of Regents v. Roth*.⁸⁷ There, the Court held that “[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”⁸⁸

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82. *Lee v. City of Gadsden*, 592 So. 2d 1036, 1038-39 (Ala. 1992) (addressing the authority of a supervisor to promise long-term employment and alter at-will status); *Gladden v. Ark. Childs. Hosp.*, 728 S.W.2d 501, 505 (Ark. 1987) (stating that employee-handbook conditions may modify otherwise at-will employment); *Thomas v. City of L.A.*, 676 F. Supp. 976, 982-84 (C.D. Cal. 1987) (finding that an employee has a property interest based on his employer's promise of long-term employment as well as a hearing before dismissal). *But see Santella v. City of Chi.*, 936 F.2d 328, 332 (7th Cir. 1991) (deciding an employee has no legitimate property interest in a title that was promised to him because the promise was “unauthorized, non-binding, and without legal effect”).
83. *Koopman v. Water Dist. No. 1*, 972 F.2d 1160, 1164-66 (10th Cir. 1992) (stating that agency practice could create property entitlement through an implied contract); *Jones v. City of Topeka*, 790 F. Supp. 256, 259 (D. Kan. 1992) (finding that even without direct language, personnel rules imply a just cause requirement and therefore confer a property interest on the employee); *Daniels v. Bd. of Curators of Lincoln Univ.*, 51 S.W.3d 1, 7-10 (Mo. Ct. App. 2001) (holding that custom and policy can create property entitlement). *But see Johns Hopkins Univ. v. Ritter*, 689 A.2d 91, 96, 101 (Md. Ct. Spec. App. 1996) (noting that de facto academic tenure is rarely recognized).
84. *W. Va. Univ. v. Sauvageot*, 408 S.E.2d 286, 289-90 (W. Va. 1991) (holding that thirteen consecutive one-year contracts can create property entitlements).
85. *Compare Speichler v. Bd. of Coop. Educ. Servs.*, 681 N.E.2d 366, 369, 372 (N.Y. 1997) (accepting tenure via the doctrine of estoppel), *with Berrios v. Bd. of Educ.*, 87 A.D.3d 329, 334 (N.Y. App. Div. 2011) (rejecting tenure via estoppel).
86. *But see Hartnett v. Stern*, 670 F. Supp. 155, 156-57 (W.D. Pa. 1987) (stating that only the state legislature can create property interests), *aff'd*, 845 F.2d 1012 (3d Cir. 1988) (unpublished table decision); *Kando v. R.I. State Bd. of Elections*, 880 F.3d 53, 59-60 (1st Cir. 2018) (holding that even if the state board of elections had wanted to override the plaintiff's at-will status, state law prohibited it from doing so); *Hasanaj v. Detroit Pub. Schs. Cmty. Dist.*, 35 F.4th 437, 448 (6th Cir. 2022) (“If a plaintiff is not entitled to tenure under a governing statute, he has no ‘legitimate claim’ to job tenure regardless of the institution's policies and conduct.”).
87. 408 U.S. 564 (1972).
88. *Id.* at 577.

Following *Roth*, the test courts use is whether the employee could reasonably expect their employment would not be terminated without cause.⁸⁹ In other words, if an employee manages to circumvent the assumption of at-will status, courts recognize the employee's property entitlements in their job.⁹⁰ Remove the at-will status and what you are left with is a property right.

But when workers have at-will status, courts tend not to recognize a property right.⁹¹ Workers with temporary statuses, like probationary workers, for whom employment can be ended unilaterally by the employer, do not have a property right.⁹² Additionally, workers in a position not contractually guaranteed to them do not have a constitutionally protected right to a future job. When such a worker's fixed-term contract ends, they cannot claim a constitutionally protected right to continued employment beyond the contractual term's end.⁹³ In *Roth*, for example, the Supreme Court rejected a state-university assistant professor's claim to have a property interest stretching beyond the explicit one-year contractual term that he had signed on for.⁹⁴ But the Court has recognized property interests in jobs where academic job-security protections, such as tenure, were

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89. See *McGraw v. City of Huntington Beach*, 882 F.2d 384, 390 (9th Cir. 1989) (stating the reasonable expectation test); *Hawkshhead v. Cnty. of Sarasota*, 738 F. Supp. 470, 473 (M.D. Fla. 1990) (repeating plaintiff's argument for expectation of job security as a possible reason for the departure from at-will employment); *Goodisman v. Lytle*, 724 F.2d 818, 821 (9th Cir. 1984) (explaining that unilateral, subjective expectation of tenure does not create a property right).
90. See *Meade v. Moraine Valley Cmty. Coll.*, 770 F.3d 680, 687-88 (7th Cir. 2014) (holding that a fixed-duration contract is not at-will and therefore confers property entitlements); *Campbell v. City of Champaign*, 940 F.2d 1111, 1112-13 (7th Cir. 1991) (explaining that service "at pleasure" is at-will and therefore does not grant property entitlements).
91. See, e.g., *DeWitt v. Gainous*, 628 So. 2d 418, 420 (Ala. 1993) (holding that at-will workers "serve at the pleasure of" their employers); *O'Bannon v. Town Ct. Nursing Ctr.*, 447 U.S. 773, 796 (1980); *Laureano-Agosto v. Garcia-Caraballo*, 731 F.2d 101, 103 (1st Cir. 1984); *Beitzell v. Jeffrey*, 643 F.2d 870, 874 (1st Cir. 1981); *Cordero v. De Jesus-Mendez*, 867 F.2d 1, 16 (1st Cir. 1989).
92. See, e.g., *Wright v. Tarrant City Bd. of Educ.*, 518 So. 2d 144, 145-46 (Ala. Civ. App. 1987) (holding that a probationary teacher did not have a property right in her job); *Baron v. State*, 270 F. App'x 706, 708-09 (9th Cir. 2008) (same for probationary public employee).
93. See, e.g., *Price v. Bd. of Educ. of Chicago*, 755 F.3d 605, 609-11 (7th Cir. 2014) (holding that a lack of right in filling vacancies after layoffs indicates that no property interest was involved).
94. 408 U.S. 564, 578 (1972).

involved,⁹⁵ and have found due-process protections in cases of termination without cause during a contractual term.⁹⁶

The legal threshold for what counts as a sufficient rebuttal of at-will status is murky⁹⁷ for both the public and private sectors alike.⁹⁸ Part of the difficulty is that courts and advocates identify a wide variety of legal sources as guaranteeing job security.⁹⁹ But once workers jump through the governing legal hoops to break out of their at-will status, a property right in their job is recognized. Such rebuttals of at-will status happen mostly in the context of termination (the classic scenario) but can apply to denial of promotions¹⁰⁰ and raises¹⁰¹ too.

Job security is the key to recognizing property rights on the job.¹⁰² In other words, as long as the employer retains the authority of unilateral action over an employee's continued work, no property right is recognized.¹⁰³ Property rights have been acknowledged where workers achieved and maintained a just-cause job in an honest (nonfraudulent) way.¹⁰⁴

While plaintiffs utilize many sources to prove their claims of job security, courts are cautious of overreach. Courts are explicit, for example, that not *all*

95. *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551, 558-59 (1956) (explaining that tenure provides property interests in employment).

96. *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952) (holding that statutorily conditioning continued employment can affect workers' due-process rights); *Connell v. Higginbotham*, 403 U.S. 207, 208-09 (1971) (same).

97. *See, e.g., Jenkins v. Cnty. of Riverside*, 41 Cal. Rptr. 3d 686, 697-704 (Cal. Ct. App. 2006) (holding that public-policy considerations determine whether or not a temporary employee is eligible for de facto tenure); *McGraw v. City of Huntington Beach*, 882 F.2d 384, 388 (9th Cir. 1989) (finding general policy statements sufficient to establish job security).

98. *Summers*, *supra* note 10, at 84.

99. *See, e.g., Clukey v. Town of Camden*, 717 F.3d 52, 58-59 (1st Cir. 2013) (finding collective-bargaining agreement as a source of protected job security).

100. *See, e.g., Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d 412, 417 (7th Cir. 1988) (holding that a promotion can be considered an employee's property right if reasonable expectation is established).

101. *See, e.g., Sanchez v. City of Santa Ana*, 915 F.2d 424, 428-29 (9th Cir. 1990) (recognizing merit pay as property interest).

102. *Caples & Hanko*, *supra* note 62, at 26; *see also McLeod v. Chilton*, 643 P.2d 712, 720 (Ariz. Ct. App. 1982) (stating that an employee who "serves at the pleasure" of an employer has no property interest).

103. *Proctor v. E. Cent. Ark. Equal Opportunity Comm'n*, 724 S.W.2d 163, 165 (Ark. 1987) (holding that a contract where an employer maintains discretion does not create a property right); *Holland v. Bd. of Cnty. Comm'rs*, 883 P.2d 500, 505-06 (Colo. App. 1994) (holding that a contract terminable at any time does not create entitlements).

104. *See, e.g., Hannon v. Turnage*, 892 F.2d 653, 661 (7th Cir. 1990) (holding that there is no property interest involved where an appointment to a public position was void due to lack of disclosure).

rights on the job are sufficient to establish a property entitlement. For example, an employer's obligation to justify a termination decision,¹⁰⁵ or the mere existence of an internal grievance procedure a worker can utilize to appeal a termination decision, is insufficient to create a property entitlement.¹⁰⁶ Instead, the judicial inquiry tends to focus on whether there is a major limitation on the employer's discretion.

Some limitations on employers' rights to terminate – such as statutory prohibitions on terminating employment for discriminatory reasons – are insufficient to create a property entitlement.¹⁰⁷ In addition, contractual protections against termination for specific causes (as opposed to generalized just-cause provisions) do not generate the level of job security sufficient to create a property entitlement.¹⁰⁸ The limitation on employers' power needs to be universal, encompassing an open-ended set of causes for protection.¹⁰⁹ Furthermore, claims of injustice, even severe ones, cannot by themselves create a property entitlement; a property right exists because of the parties' relations to each other and workers' reasonable expectations for job security, not because a worker suffered a harm.¹¹⁰

The above limitations on finding a worker's property interest in their job illustrate the rule. If an employer maintains unlimited discretion over a worker's continued employment, that worker has no job security and thus no constitutionally recognized property right. But courts are thin on justifications. In the

105. *Evans v. City of Dallas*, 861 F.2d 846, 850 (5th Cir. 1988) (holding that unilateral expectation of employment security because of the existence of a termination procedure is insufficient to create a property right).

106. *See, e.g., Stow v. Cochran*, 819 F.2d 864, 866 (8th Cir. 1987) (holding that the existence of a grievance procedure is insufficient to create a property interest); *Hogue v. Clinton*, 791 F.2d 1318, 1324 (8th Cir. 1986); *Szell v. Lamar*, 414 So. 2d 276, 277-78 (Fla. Dist. App. 1982); *Nickum v. Vill. of Saybrook*, 972 F. Supp. 1160, 1166-67 (C.D. Ill 1997); *Eftekhara v. Dep't of Child. & Fam. Servs.*, 661 F. Supp 522, 526-27 (M.D. Ill. 1987); *Russillo v. Scarborough*, 935 F.2d 1167, 1170-71 (10th Cir. 1991); *Batterton v. Tex. Gen. Land Off.*, 783 F.2d 1220, 1224 (5th Cir. 1986). *But see Adams Cnty. Sch. Dist. v. Dicket*, 791 P.2d 688, 695 (Colo. 1990) (finding property entitlements are present in a progressive-discipline case).

107. *Evans v. Pugh*, 902 F.2d 689, 693 (8th Cir. 1990) (holding that an act preventing age discrimination did not create a property right); *Fink v. Kitzman*, 881 F. Supp. 1347, 1398-1400 (N.D. Iowa 1995) (holding that an antidiscrimination ordinance did not alter at-will employment).

108. *Ganz v. Zagel*, 550 N.E.2d 1007, 1057 (holding that a training-manual provision allowing for reassignment in case of personality conflict is not sufficient to create property entitlements).

109. *See, e.g., Copple v. City of Concordia*, 814 F. Supp. 1529, 1537 (D. Kan. 1993); *Whitehead v. Univ. of Tex.*, 854 S.W.2d 175, 181 (Tex. Ct. App. 1993) (holding that there is no property right if employers' substantive decisionmaking powers are not limited).

110. *Wulf v. City of Wichita*, 644 F. Supp. 1211, 1222 (D. Kan. 1986) (holding that a property right on the job cannot stem from the mere act of termination), *rev'd on other grounds*, 883 F.2d 842 (10th Cir. 1989).

next Part, I will attempt to draw out some of the principles underlying the doctrine's connection of job security to constitutional property.

II. EXPANDING PROPERTY RIGHTS

Although courts have recognized job security as creating workers' property entitlements in their jobs, they have done so only in the public sector and usually under the Due Process Clause. By identifying justifications for recognizing such employees' property rights, I can then expand the constitutional claim from the public-sector to the private-sector employer and from due-process claims to takings claims.

A. *Justifications for Tying Job Security to Constitutional Property*

In this Part, I offer three substantive justifications for connecting workers' property on the job to their level of job security. Such theoretical exercise is necessary, because the Constitution does not define what it means by "property," nor has the Supreme Court clearly filled in the apparent gap.¹¹¹ It is unclear, for example, if the word "property" means the same thing in all clauses in the Constitution and in all contexts. We do know that constitutional property stretches beyond land or physical "things." A state can unconstitutionally "take" a contract, for example.¹¹² And the examples in Section I.A show that employees can have property rights in their jobs. Still, identifying a coherent principle to delimit what is constitutional property has proven to be a consistent challenge.

One common legal strategy for overcoming property's definitional ambiguity is to determine property by its source. This source theory of property accepts that property, including federal constitutional property, is whatever state law defines as property.¹¹³ But this anchoring offers little help, as states are not immune from judicial scrutiny in cases of constitutional claims for breaches of constitutional property rights, such as takings claims.¹¹⁴ States cannot defeat constitutional property claims simply by defining property narrowly. For example, restricting property usage by regulation can count as a constitutional taking even if done by state law.¹¹⁵

111. James Y. Stern, *Property's Constitution*, 101 CALIF. L. REV. 277, 279 (2013).

112. *Id.*

113. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

114. *See, e.g., Moore v. Harper*, 600 U.S. 1, 34 (2023) (citing *Roth* for the proposition that state law can define property rights but noting that states are still subject to the Takings Clause).

115. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 162 (2021).

I acknowledge the difficulty of defining property. Because my goal is to develop a takings claim, I will also avoid relying on the source theory of constitutional property, which creates circular reasoning in takings contexts. Instead, I will examine substantive justifications for connecting workers' property in their jobs to their level of job security.¹¹⁶

In this Part, I explore three theories: property stems from reliance and control; property on the job stems from a theory of physical space; and the property in job security is the ability to raise a legal claim against the employer.

The physical theory is perhaps the most intuitive one: job security creates a right to physically occupy the workplace, and the right to physically occupy a space is one traditionally associated with property ownership. Job security means that no one, including the employer, has a right to remove the worker from the workplace without a sufficient reason.¹¹⁷ The right that workers with job security have – and the right at-will workers do not have – is the right to physically occupy space. This theory ties the strength of property protections to the security of employees' positions because the more robust the job security, the greater the employee's claim against physical exclusion from their workplace. Under this framework, at-will employment allows an employer to exclude a worker from their premises "at will."¹¹⁸ On the other hand, a just-cause regime protects the worker from exclusion from the employer's property unless good cause is present.

Under the physical theory, just-cause public-sector workers hold constitutionally protected property rights not to be excluded from their workplace. Such understanding of the workplace as a specific physical location has deep roots in work law history.¹¹⁹ Common-law treatment of master-servant relations provides some internal restrictions on what rights a property owner *qua* employer holds. Such a common-law employer shared a property – that is, a household – with a quasi-just-cause employee once such a relationship was established. At-will rules modified this common-law understanding of shared property rights by excluding at-will workers from property entitlements.

116. See WANJIRU NJOYA, *PROPERTY IN WORK: THE EMPLOYMENT RELATIONSHIP IN THE ANGLo-AMERICAN FIRM* 59 (2007) (explaining the history of the "concept of job property or the ownership of jobs").

117. I owe this way of looking at employment relations to Professor Mark Tushnet. E-mail from Mark Tushnet, Professor of L., Harv. L. Sch., to Gali Racabi, (Apr. 5, 2021, 9:53 PM) (on file with author).

118. Beermann & Singer, *supra* note 37, at 946.

119. See Yiran Zhang, *Home as a Non-Workplace*, B.U. L. REV. (forthcoming 2024) (manuscript at 7-12) (on file with author) (describing work as place-bound activity and surveying the history of the home as a workplace).

A second justification for the link courts make between job security and a property entitlement is workers' reliance and dependence on their jobs.¹²⁰ Property relations connote a formal recognition and cementation of stable relations between people, communities, and objects. And property on the job entails legal entrenchment of stable relations between a worker and their work against others—those in the community and their boss. This theory of job security's relationship to property rights pervades the public-sector case law. Once an employee demonstrates a reasonable expectation of continuation of employment—rebutting the at-will presumption—a property interest is recognized.

Such reliance-based property rights are rights against the world, or rights *in rem*.¹²¹ Under contemporary employment law, all workers (at will and not) already have a limited, yet judicially recognized, property right against third-party interventions in their employment contracts. In other words, all workers already enjoy an almost complete *in rem* right against intervention in their work. Job security closes the *in rem* loop by immunizing workers from certain actions by employers. Thus job security is property because workers are protected from arbitrary interference in their job against all.

The third theory rests on the understanding that legal claim-making is itself a property right. Here, job security is a shorthand for all work-law claims, first and foremost contractual claims, which are available to just-cause workers. Such contractual claims are significantly limited under an at-will regime.

All three of these theories can support the recognition of workers' constitutionally protected property rights in their jobs outside of the public sector and under the Takings Clause. To put it differently, these theories, although derived from cases concerning job security as a property entitlement in the public sector and under the Due Process Clause, are not limited to those contexts, and apply equally to the private sector and to Takings-Clause claims. In the following Section, I will show that the rationales underlying the recognition of job security as creating a form of property in the public sector also apply to private-sector work.

B. From the Public-Sector Employer to the Private-Sector Regulator

Outside the public sector, it is both rare for workers to prove they have a constitutionally protected property interest in their job against their private-sector employer and also difficult for such a property interest to form the basis of a legal claim. It is rare because at-will rules that govern the majority of U.S. workers undercut the availability of job security as a basis for these workers' property-based claims. But even if a private-sector worker had the necessary job security

120. Beerermann & Singer, *supra* note 37, at 947.

121. Stern, *supra* note 111, at 292.

to assert a constitutionally recognized property interest, their legal claim would be futile without a state actor to blame for their deprivation of property. One of the main propositions of this Essay is that the Takings Clause can be used precisely as this bridge from workers' property-based claims in the public workplace to the private one.

Workers' lack of property interests in their private-sector jobs is generally assumed rather than reasoned. Entire books¹²² and articles¹²³ both document and critique the tendency of courts to assume away workers' property-based claims. Unlike employees, employers routinely use constitutional claims to shape the private workplace.¹²⁴ But outside the public sector, workers rarely bring constitutional claims against their employers.¹²⁵

Employers have honed constitutional arguments against worker-protective statutes, agencies, and regulators. Workers sue employers, employers sue the state. But this pattern is a political habit more than a reasoned baseline.

If public-sector work is equivalent to private-sector work with regard to the justifications for recognizing job security as creating a property right, then transposing such rights is a technicality. All three theories of why job security creates property entitlements are not unique to the public-sector employer. For example, private-sector job security means workers have a right to the physical space of their workplace. An employer does not need to be in the public sector for a court to recognize such a property interest. Reliance, perhaps the hallmark of constitutional property, is not dependent on whether an employer is a private or a public entity; both can create legitimate expectations sufficient for the creation of constitutional property. Same with the claim-making theory described in Section II.A – it matters not whether that property right was formed vis-à-vis a public employer or a private one.

One likely rebuttal is the argument that the public workplace is not analogous to the private one. Critics might argue that when courts identify a property interest resulting from public-sector job security, they actually find a property

122. See generally JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983) (critiquing implicit values and assumptions in U.S. labor law that are unsympathetic to workers).

123. See generally Beermann & Singer, *supra* note 37 (critiquing proemployer biases in courts' "baseline" assumptions underlying legal reasoning); Racabi, *Balancing is for Suckers*, *supra* note 7, at 101-06 (critiquing courts' and the NLRB's balancing of workers' statutory rights against employers' interests).

124. See, e.g., Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2179 (2018).

125. A notable outlier is the public-policy exception to the at-will rule, which at least in one state can include constitutional free speech arguments. See *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 899-901 (3d Cir. 1983).

interest in a state-based benefit or privilege; public-sector jobs are equivalent to welfare payments.¹²⁶ In this view, public-sector employment is nothing more than a perk. Thus, like other state-based privileges, when a court identifies a sufficient reliance interest, that privilege can rise to the level of a property interest for the sake of a due-process claim.

Under current public-sector due-process doctrine, this reasoning is not explicit. But perhaps it can be ascertained from the judicial demand that workers identify a monetary harm before raising a constitutional claim for property in their jobs. Mere damage to intangibles, like personal growth or satisfaction, is insufficient to demonstrate harm to property.¹²⁷ Public-sector work is thus analogous to welfare payments in that work is nothing but a state-based cash flow which is guaranteed by a property right.

In this case, the critic would conclude that the analogy between public-sector and private-sector work is inapt because in the private sector, work is simply work, and in the public sector, work is a public benefit. Thus, the constitutional law governing property interests in the public sector is inapplicable to the private sector due to this substantive difference between the two.

Although applying existing doctrine from the public sector to the private one does require a novel extension, the above challenge is unpersuasive.

First, courts do recognize property rights in private-sector employment, including at-will employment, albeit outside of constitutional claims. Indeed, the notable exception for finding workers' property rights in their job *without* job security comes from the private sector, where the Supreme Court recognized at-will employment as bestowing property rights against third-party interventions under federal law.¹²⁸ Workers' reliance interests in their jobs—held by the worker against intervening third parties, not against the employer—are already recognized by private-sector employment law.

Second, courts generally do not treat public-sector employment as a privilege or even as a welfare benefit. Courts have recognized welfare as property since the 1970s,¹²⁹ but compared to public-sector job-security adjudication, welfare-as-property litigants have had much less success in constitutional doctrine.¹³⁰

126. The classic formulation of public-sector employment as a privilege is found in *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 518 (Mass. 1892).

127. *Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988, 996-97 (5th Cir. 1992); *Holloway v. Reeves*, 277 F.3d 1035, 1038-40 (8th Cir. 2002).

128. *Haddle v. Garrison*, 525 U.S. 121, 125-27 (1998).

129. *Stern*, *supra* note 111, at 281.

130. *Id.* at n.12. *Stern* cites for the proposition of *Richardson v. Belcher*, 404 U.S. 78, 81 (1971) (“[T]he analogy drawn in [*Goldberg v. Kelly*, 397 U.S. 254 (1970)] between social welfare and

Constitutional doctrine explicitly rejected the premise that public-sector employment is a mere privilege,¹³¹ and public-sector employment as property is still good and evolving law.

Third, public-sector employer-employee relations are more akin to private-sector employer-employee relations than they are to the relations between welfare-benefit recipients and the state. For example, like private-sector work law, public-sector employment law recognizes and emphasizes the importance of workplace control. Public-sector work law emphasizes control not just for reasons of managing expenditures and budgets but also because of specific workplace-related features.¹³² For example, it is legally enshrined that effective management of workers is a crucial limiting factor in deciding how far and deep the Constitution reaches into the public-sector workplace.¹³³ This concern mirrors courts' handling of private-sector matters.¹³⁴ If there is a substantive difference between public- and private-sector workplaces, it is not an obvious one.

In sum, all three theories connecting property rights and job security can make the jump from their public-sector-law origins to the private sector. In fact, there would be little doctrinal coherence in limiting their applicability to the public sector. The implication of this doctrinal shift alone could be substantial. But still, the claim that at-will employment constitutes a constitutional taking requires an additional doctrinal expansion: the transposition of the property entitlement under the Due Process Clause to the Takings Clause context. The first step is understanding the limits of a due-process claim.

C. *The Limits of the Due-Process Claim*

Most cases recognizing workers' property rights in their jobs have been brought under the Due Process Clauses of the Fifth and Fourteenth Amendments. But the due-process right provides no substantive protection for public-sector employees and immunizes legislative deprivations of property. Such

property cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits." (internal quotation marks and citation omitted)).

131. See, e.g., *Garrity v. New Jersey*, 385 U.S. 493, 499-500 (1967).

132. See generally Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33 (2008) (discussing the public-sector managerial prerogative vis-à-vis workplace harassment and academic freedom); Racabi, *Abolish the Employer Prerogative*, *supra* note 4, at 125-26 (framing the employers' prerogative as a key consideration in public sector constitutional adjudication).

133. See, e.g., *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 600 (2008) (citing managerial flexibility as a key consideration in the adjudication of public-sector constitutional rights).

134. Rosenthal, *supra* note 132 (making the comparison); Racabi, *Abolish the Employer Prerogative*, *supra* note 4, at 92-95 (same).

limitations make due process difficult to pursue as a collective remedy. Takings claims, both against broad public-sector reforms and private-sector at-will rules, are collective challenges. Thus, expanding claims beyond the Due Process Clause to the Takings Clause would be beneficial.

Another significant weakness of due-process claims is that courts treat law-making and legislation as inherently fulfilling procedural-due-process requirements.¹³⁵ Thus, public-sector workers can bring constitutional due-process claims when they have sufficient levels of job security, but only as to the procedure that led to their individual job-removal decisions – such as the decision to terminate, not extend an employment contract, or degrade the terms and conditions of employment.¹³⁶ They cannot bring due-process claims against legislative reforms that deprive entire classes of workers of their job security. Further, due-process claims are limited in scope. Even employees with a recognized property interest in a job are not entitled to personal hearings when the state eliminates that property for all similarly situated workers.¹³⁷

The individualized nature of due-process claims and the relative immunity of legislative bodies to them prove problematic for workers who experience broad restructuring of their workplaces. Though the result of such public-sector reorganization might be the termination of an individual employee, public-sector reforms often start with a legislative act or a broad regulatory decision. A property right that can be raised only against the executing entity (the employer) and not against the deciding body (the legislator) is a weak property right.¹³⁸ But legislative bodies and their statutory outputs are not immune against takings claims. While a due-process right is considered to be exhausted by the legislative body's deliberation, no similar assumption exists for takings.

Much like the boundaries between the public and private sector, the lines separating a property right under the Due Process Clause and a property right

135. See, e.g., *Bd. of Regents v. Roth*, 408 U.S. 564, 570 (1972) (“[T]he range of interests protected by procedural due process is not infinite.”); *Wolf v. Larson*, 897 F.2d 1409, 1412-13 (7th Cir. 1990) (holding that the repeal of a local ordinance did not harm an official’s due-process rights); *Eiche v. La. Bd. of Elementary & Secondary Educ.*, 582 So. 2d 186, 190-91 & n.7 (La. 1991) (holding that a statutory framework fulfilled due-process requirements); *Fumarolo v. Chi. Bd. of Educ.*, 566 N.E.2d 1283, 1307 (1990) (“[T]he legislative process itself created all the procedural safeguards necessary to provide the plaintiffs with due process.”).

136. See, e.g., *Fumarolo*, 566 N.E.2d at 1306-07 (holding that the statutory abrogation of tenure is not a constitutional due-process violation).

137. *Yates v. City of Chicago*, 58 F.4th 907, 908-09 (7th Cir. 2023) (citing *Bi-Metallic Inv. Co. v. Colo. Bd. of Equalization*, 239 U.S. 441 (1915); *Atkins v. Parker*, 472 U.S. 115 (1985)).

138. Daryl J. Levinson, *The Supreme Court 2015 Term – Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 112 (2016) (distinguishing between decision powers and executing powers).

under the Takings Clause are fraught.¹³⁹ Some courts do insist there is a distinction,¹⁴⁰ but their explanations are sparse. For example, some courts, including the Supreme Court, have simply stated that welfare payments may be “property” within the meaning of the Due Process Clause but are not “property” covered by the Takings Clause.¹⁴¹ In determining the scope of protected property rights, courts can also rely on the level of certainty in the right and the possible discretion in its allocation.¹⁴² Such tests resemble the overall framework for identifying property interests of public-sector workers outlined in this Essay. Other courts, however, rely on custom¹⁴³ or on categorical distinctions based on “types” of property.¹⁴⁴ In other words, the case law evinces neither clear reasoning nor uniformity.

This lack of clarity has driven constitutional-law scholars to urge the courts to develop a uniform approach to constitutional property. Such an approach ought to be constructed around first principles of why property is protected in the first place—avoiding the arbitrariness of customary distinctions between what can and cannot constitute protected constitutional property.¹⁴⁵

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139. See Cameron Misner, *Toward a Uniform Meaning of the Fifth Amendment Property* (draft paper) (on file with author) (reviewing the arguments for a uniform definition of property under the Fifth Amendment).
140. See *Kizas v. Webster*, 707 F.2d 524, 539 (D.C. Cir. 1983) (finding that the “presupposition . . . that a ‘legitimate claim of entitlement’ rises to the level of ‘property’ protected by the takings clause . . . is without foundation”); *Adams v. United States*, 391 F.3d 1212, 1220 n.4 (Fed. Cir. 2004) (“[E]ntitlements are often referred to as ‘property interests’ within the meaning of the Due Process Clause in cases decided under that clause, but such references have no relevance to whether they are ‘property’ under the Takings Clause.”); *Hignell-Stark v. City of New Orleans*, 46 F.4th 317, 323 (5th Cir. 2022) (“But there’s a big difference between saying that something is property for purposes of procedural due process and saying that it is property for purposes of the Takings Clause.”).
141. See *Goldberg v. Kelly*, 397 U.S. 254, 261–63 (1970) (holding that welfare benefits are property that cannot be taken from individuals without due process); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 575–76 (1979) (holding that Congress may entirely eliminate social security benefits at any time); *Kizas*, 707 F.2d at 540.
142. See *Bowers v. Whitman*, 671 F.3d 905, 912 (9th Cir. 2012).
143. *Hignell-Stark*, 46 F.4th at 323.
144. *Adams*, 391 F.3d at 1225.
145. Stern, *supra* note 111, at 290–92; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 459 n.11 (1978) (“The body of rules determining which expectations constitute compensable property interests and which do not . . . plainly requires reconsideration in light of the broader definition of property interests now employed in the law of procedural due process. . . . There seems no good reason why the broader definition should not be extended to the takings context.”).

This Part first outlined the current parameters of job-security-as-constitutional-property claims in existing public-sector case law. It then elaborated on three theories that justify how this established line of cases connects job security to workers' property entitlements in their jobs: a physical-property theory (job security is a right to work in a particular physical space); a control-and-reliance theory (job security entails a right to hold and control aspects of a job); and a claim-making theory (job security connotes the ability to raise claims in court). This Part then defended the transposition of this doctrine into the private-sector workplace and described the limitations of claims brought under the Due Process Clause.

Following the conceptual and pragmatic limitations of recognizing job security as a property right under the Due Process Clause, the next Part will explore the application of the Takings Clause. If workers hold a constitutional property right tied to job security, how do the legal rules that remove job security function? And what are the effects of such a broad labor-market default?

III. AT-WILL RULES AND THEIR EFFECTS

Many workers don't know it,¹⁴⁶ but they are likely at-will employees.¹⁴⁷ This means that they can be terminated for good reason, bad reason, or no reason at all. In this Part, I will make the case that the at-will rule is first, a policy choice not a law of nature; and second, a policy choice with broad and entrenched outcomes for workers, their jobs, and their communities.

A. *The At-Will Regime*

At-will rules are the public policy of choice of forty-nine states and the District of Columbia.¹⁴⁸ There once was a time when at-will employment was a synonym for freedom of contract against intervening legislation.¹⁴⁹ That time is no more. Instead, at will is now considered mere statutory or common-law-based state law.

Some exceptions to the at-will rule exist.¹⁵⁰ For example, courts have developed the public-policy exception, good-faith and fair-dealings doctrines, and

146. See Kim, *supra* note 11, at 106.

147. See *supra* note 9 and accompanying text.

148. *Id.*

149. *Adair v. United States*, 208 U.S. 161, 174 (1908) (treating at-will doctrine as equivalent to liberty of contract); *Coppage v. Kansas*, 236 U.S. 1, 11 (1915) (same).

150. RESTATEMENT OF EMP. L., *supra* note 9, § 2.02-2.05; Summers, *supra* note 10, at 70-75.

limited tort claims.¹⁵¹ Antidiscrimination statutes also include a prohibition on termination due to a worker's protected characteristics. And labor law prohibits employers from intervening in concerted activities by workers by terminating them. Further, certain low-wage sectors now benefit from local just-cause provisions.¹⁵² And one state, Montana, has a general private-sector just-cause statute.¹⁵³ Nevertheless, most scholars, while disagreeing about whether the cup is one-eighth full or seven-eighths empty,¹⁵⁴ agree that the at-will rule is robust, aggressively enforced, and the lived experience for most U.S. workers.¹⁵⁵

At-will rules displaced the traditional common-law termination regime in the nineteenth century.¹⁵⁶ At common law, as chronicled in Blackstone's *Commentaries*, a contract for the performance of labor was presumptively for one year, and termination before the contract's term required "cause" and notice. As Blackstone described, the common-law default rule was job security:

If the hiring be general without any particular time limit, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons, as well when there is work to be done, as when there is not¹⁵⁷

The common law required employers to give notice or, if no notice, a cause for termination. Damages for violating the common-law rule and terminating without cause were assessed in conjunction with the penalty owed for a lack of

151. See Alex B. Long, *Using the IIED Tort to Address Discrimination and Retaliation in the Workplace*, 2022 U. ILL. L. REV. 1325, 1336; Robin Shea, *New Hipness in Employment Law*, CONSTANGY, BROOKS, SMITH & PROPHETE LLP (Dec. 2, 2022), <https://www.constangy.com/employment-labor-insider/new-hipness-in-employment-law-boredom> [https://perma.cc/XEE2-G9WA].

152. Andrias & Hertel-Fernandez, *supra* note 11, at 4.

153. See *supra* note 9 and accompanying text.

154. See Cynthia Estlund, *Rethinking Autocracy at Work*, 131 HARV. L. REV. 795 (2018) (reviewing ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT)* (2017)).

155. Beermann & Singer, *supra* note 37, at 917.

156. *Id.* at 920-21; Feinman, *supra* note 12, at 118-19; Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMPAR LAB. L. 85, 85 (1982); Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 717 (1994). *But see* Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-at-Will: The True Origins of the Doctrine*, 17 BERKELEY J. EMP. & LAB. L. 91, 94 (1996) (tracing the origin of the at-will rule in the United States back to the colonial period).

157. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *413.

notice.¹⁵⁸ Alternatively, workers who quit before the contract's end were denied payments for services rendered.¹⁵⁹ This was the law of the land for most of the eighteenth century, with varying degrees of enforcement across the states.¹⁶⁰

Contrary to the common-law rule, at-will employment today is a no-strings-attached labor contract.¹⁶¹ The history of the spread of at-will regimes throughout the United States is a subject of debate.¹⁶² But what is certain is that by the end of the nineteenth century, most states had replaced the common-law rule with new at-will defaults to govern open-ended employment contracts.¹⁶³

Scholars often characterize the shift from the common-law rule to the at-will rule as a bargain between workers and employers.¹⁶⁴ Such rhetoric conjures an image of workers sitting around the national bargaining table, negotiating an agreement about the default terms and conditions of employment and, ultimately, deciding to waive partial compensation in case of termination for a no-cause and no-notice termination regime. That is not what happened. While the historical debate about the circumstances that led to the adoption of the at-will rule is ongoing,¹⁶⁵ it is consensual that workers had no agency in creating the at-will rule and played a limited role in its spread across the nation.

This distinction is vital because at-will rules were not discovered roaming freely in the wild, nor were they negotiated by contract; rather, at-will rules were regulations imposed on workers by state legislatures and courts to the benefit of employers.¹⁶⁶ Our clearest indication of what workers actually want, if given sufficient information and deliberation time, is their demands in collective bargaining. There, job security and just-cause rules are priorities.

The transition to the at-will regime is justified by the deal rhetoric according to which workers got flexibility and earned pay and employers got the at-will

158. FREDERIC MEYERS, *OWNERSHIP OF JOBS: A COMPARATIVE STUDY* 20 (1964).

159. Beermann & Singer, *supra* note 37, at 920; KATHERINE V. W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* 23 (2004); Joseph Slater, Book Review, 10 *N.Y.U. J.L. & LIBERTY* 404, 407-08 (2016) (reviewing JEFFREY KAHANA, *THE UNFOLDING OF AMERICAN LABOR LAW: JUDGES, WORKERS, AND PUBLIC POLICY ACROSS TWO POLITICAL GENERATIONS, 1790-1850* (2014)).

160. NJOYA, *supra* note 116, at 30-31.

161. Beermann & Singer, *supra* note 37, at 921.

162. Feinman, *supra* note 12, at 122-29; STONE, *supra* note 159, at 23-24; Summers, *supra* note 10, at 66-70; Ballam, *supra* note 156, at 93-98.

163. Beermann & Singer, *supra* note 37, at 920-21.

164. *Id.*; STONE, *supra* note 159, at 23-24.

165. See Feinman, *supra* note 12, at 129-135; Summers, *supra* note 10, at 66-68; Ballam, *supra* note 156, at 92-98.

166. James Atleson, *Confronting Judicial Values: Rewriting the Law of Work in a Common Law System*, 45 *BUFF. L. REV.* 435, 446-47 (1997).

rule. In more contemporary discussions, at will is pushed by the state to serve public-facing goals, namely creating and facilitating flexible labor markets.¹⁶⁷ The idea is that contractual flexibility in the labor market will maximize overall productivity.¹⁶⁸

Because at-will rules are anchored in public-policy justifications, courts despise intervening in them. In some cases, courts simply state that an exception to the at-will rule must be applied narrowly.¹⁶⁹ In other cases, the public-facing consideration of workers' rights is carried out by courts using a faux cost-benefit analysis, weighing workers' job security against employers' discretion.¹⁷⁰ Consider, for example, the treatment of the at-will rule as public policy in a Tennessee court's discussion of a claim for an exception to the at-will rule:

[B]ased upon our review of [employment at-will] we are compelled to note that any substantial change in the "employee-at-will" rule should first be microscopically analyzed regarding its effect on the commerce of this state. There must be protection from substantial impairment of the very legitimate interests of an employer in hiring and retaining the most qualified personnel available or the very foundation of the free enterprise system could be jeopardized . . . Tennessee has made enormous strides in recent years in its attraction of new industry of high quality designed to increase the average per capita income of its citizens and thus, better the quality of their lives. The impact on the continuation of such influx of new businesses should be carefully considered before any substantial modification is made in the employee-at-will rule.¹⁷¹

Note that enforcing the at-will rule is anchored in public-policy choices made by classic public-policy vehicles and for public use. The following is a short survey of at-will rules' effects.

B. At-Will Rules' Effects

At-will rules are both sticky and imperialist. They are sticky because, although at-will rules are mere contractual defaults, employees, courts, legislatures,

167. Beermann & Singer, *supra* note 37, at 922.

168. Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 982 (1984).

169. See, e.g., *Weaver v. Harpster*, 975 A.2d 555, 563 (Pa. 2009) (applying the public-policy exception to the at-will rule only in the "most limited circumstances").

170. See Beermann & Singer, *supra* note 37, at 925; Racabi, *Balancing Is for Suckers*, *supra* note 7, at 79-81.

171. *Whittaker v. Care-More, Inc.*, 621 S.W.2d 395, 396-97 (Tenn. Ct. App. 1981).

and regulators struggle to modify or amend the rules once they are instituted.¹⁷² In other words, at-will rules are politically and legally entrenched. Then, at will is an imperialist doctrine because courts extended the at-will termination default to all other adverse employment decisions.¹⁷³ For example, reduction in pay, failures to promote, and other workplace sanctions are also thought of as “at-will” because no substantive or procedural limitations on the employers’ power exist in at-will status, unless an employer chooses to bind itself.¹⁷⁴

Courts treat at-will employment as a particular category of arms-length contractual relations with very few contractual defenses available to workers.¹⁷⁵ For example, one of the implications of employment at-will is that, under the rules of most states, almost all employment contracts are susceptible to unilateral changes by the employer, typically without a notice requirement.¹⁷⁶

The most explicit articulation of at will’s stickiness is how reluctant courts are to acknowledge contractual agreements rebutting the default. For example, courts did not recognize promises of “fair treatment” as refuting the at-will status of workers.¹⁷⁷ A guarantee of “maximum job security” was also not enough.¹⁷⁸ It was also insufficient to alter at-will status with an employer statement of “full time, permanent employment,”¹⁷⁹ a guarantee that the worker’s job is safe “as long as she achieved her sales quota,”¹⁸⁰ or that the position is a “good cause” position.¹⁸¹ Those seemingly legitimate and binding contractual terms did not alter the default: at will.

At will makes enforcing all other workers’ protections, such as equal-opportunity laws, more difficult.¹⁸² At will, as a default, places the burden on workers

172. Racabi, *Abolish the Employer Prerogative*, *supra* note 4, at 115-121 (identifying legal and political mechanisms resisting legislative change in work law).

173. RESTATEMENT OF EMP. L., *supra* note 9, § 2.01.

174. *But see* Scott v. Pac. Gas & Elec. Co., 904 P.2d 834, 839 (Cal. 1995) (“Conceptually, there is no rational reason why an employer’s policy that its employees will not be demoted except for good cause, like a policy restricting termination or providing for severance pay, cannot become an implied term of an employment contract. In each of these instances, an employer promises to confer a significant benefit on the employee, and it is a question of fact whether that promise was reasonably understood by the employee to create a contractual obligation.”).

175. *See* Beermann & Singer, *supra* note 37, at 942-43.

176. *See* Arnow-Richman, *supra* note 11, at 437; Racabi, *Balancing Is for Suckers*, *supra* note 7, at 102-03.

177. *See* LeBlanc v. United Parcel Serv., 972 F. Supp. 827, 831 (D. Vt. 1997).

178. *See* Smith v. Am. Greetings Corp., 804 S.W.2d 683, 686 (Ark. 1991).

179. *See* Minihan v. Am. Pharm. Ass’n, 812 F.2d 726, 727, 729 (D.C. Cir. 1987).

180. *See* Rowe v. Montgomery Ward & Co., 473 N.W.2d 268, 270-71 (Mich. 1991).

181. *See* Guinn v. Bosque County, 58 S.W.3d 194, 200 (Tex. Ct. App. 2001).

182. *See* Blades, *supra* note 10, at 1413-14.

to demonstrate and prove the hostility, bad intention, and animus needed to triumph under some statutory provisions.¹⁸³ Courts perceive common-law protections of workers as weaker in operation for at-will workers.¹⁸⁴ Courts are reluctant to adopt exceptions to employers' power,¹⁸⁵ and they are hesitant to disrupt employers' discretion.¹⁸⁶

At will is a policy-created desert where workplace protections cannot grow without a significant investment of legal and political resources unparalleled in other legal systems. This Part drew out some of the consequences of at-will rules and the stripping of job security. The next Part will outline the main contours of the legal argument claiming at will is a constitutional violation.

IV. AT-WILL RULES AS A TAKING

For the large majority of people, their job is their principal asset. They have invested their skill and their strength in the job: Just as the Government may . . . for the public good, deprive a person of land and other property, so it may be . . . that a person may have to sacrifice his job. But in both cases a rule of social ethics requires that he who sacrifices an asset should receive a fair amount of compensation.¹⁸⁷

Private-sector workers lost job security in the transition from a common-law termination regime to an at-will regime – and they continue to be deprived of job security by courts' aggressive enforcement of the at-will rule. Similarly, public-sector employees lose job security in civil-service reforms to the baseline termination rules. As job security is a form of workers' property, the state commits a taking when it deprives workers of job security.

The Fifth Amendment to the Constitution stipulates that “private property [shall not] be taken for public use, without just compensation.”¹⁸⁸ Some state constitutions contain similar constraints on the State's taking authority as well.¹⁸⁹ Although contemporary takings law is complex and intricate, resembling

183. See McGinley, *supra* note 27, at 1445, 1456-57.

184. See Beermann & Singer, *supra* note 37, at 923; Kate Andrias, *Constitutional Clash: Labor, Capital, and Democracy*, 118 NW. U. L. REV. 985, 989 (2024).

185. See ATLESON, *supra* note 122; Beermann & Singer, *supra* note 37, at 919; Racabi, *Abolish the Employer Prerogative*, *supra* note 4, at 1.

186. See *Kelley v. Action for Bos. Cmty. Dev., Inc.*, 419 F. Supp. 511, 525 (D. Mass. 1976).

187. OTTO KAHN-FREUND, *LABOUR LAW: OLD TRADITIONS AND NEW DEVELOPMENTS* 38 (1968).

188. U.S. CONST. amend. V.

189. See, e.g., ALA. CONST. art. I, § 23 (“[P]rivate property shall not be taken for, or applied to, public use unless just compensation be first made therefor . . .”).

an “escape room,”¹⁹⁰ the basic takings claim requires three elements: (1) a property (2) being taken for public use (3) without just compensation.¹⁹¹

Part I of this Essay established the existing link between job security and constitutional property entitlements. Part II argued for the expansion of job protection as constitutional property beyond the public sector and the Due Process Clause; Part III then outlined the property deserts that states’ at-will rules create. This Part will now outline a takings claim: when an at-will rule displaces an alternative job-security regime, or when at-will rules are enforced by state actors to prevent workers from obtaining job security, workers’ property has been taken and just compensation is due.

Takings involve “benefits received at the expense of another”¹⁹² – not simply the annihilation of property. With at-will employment, employers enjoy the taking of workers’ reliance interests. But at-will rules are not simple theft; instead, as I described in Section III.B, at-will rules were cemented for public-policy reasons. And courts cite these public-policy reasons when enforcing at-will employment contracts, or when refusing to narrow or constrain the law. In the three direct theories tying job security to property – the legal-claim-making, dependence, and physical-property-rights theories – what the state takes with at-will rules, employers receive. All three theories can be conceptualized as distributing power and control in a zero-sum game. Control over the physical workplace an employee occupies is with either the employee or the employer. Reliance on continued work either belongs to the employee or belongs to the employer to reallocate or terminate completely. Legal claim-making, whose absence is a hallmark of at-will employment, comes at the direct expense of an obligated employer. At will immunizes an otherwise liable employer.

Takings can be done via physical possession or invasion of a physical space, and by regulation too. Contemporary doctrine, articulated in *Cedar Point Nursery v. Hassid*,¹⁹³ considers “whether the government has physically taken property for itself or someone else – by whatever means,” thus triggering a physical takings claim, “or has instead restricted a property owner’s ability to use his own property,” thus triggering a regulatory takings claim.¹⁹⁴ One distinction between physical and regulatory takings claims is that an uncompensated physical taking is *per se* unconstitutional while the constitutionality of an uncompensated

190. See Lee Anne Fennell, *Escape Room: Implicit Takings After Cedar Point Nursery*, 17 DUKE J. CONST. L. & PUB. POL’Y 1, 1 (2022).

191. See Michael B. Kent, Jr., *Public Pension Reform and the Takings Clause*, 4 BELMONT L. REV. 1, 14 (2017).

192. Stern, *supra* note 111, at 314.

193. 594 U.S. 139 (2021).

194. *Id.* at 149.

regulatory taking depends on the extent to which the property's use and value are limited.

Out of the three theories connecting just-cause employment and property interests, one theory relies on a physical notion of property and taking. Under the physical theory of job security, workers' property right in their jobs entails their right to physically occupy workplace space and denies the employer's authority to physically remove them from that space without just cause. Accepting this physical theory of job-security-as-property would trigger a *per se* analysis of at-will rules. At-will rules allow the mass physical relocation of employees by removing their legal right to remain in the workplace, and they do so without compensation. They are, thus, unconstitutional.

Other theories linking job security and property do not foreground the physical aspect. But in all theories at-will rules limit to a significant extent the ability of the worker to utilize their property. Under the reliance theory, at-will rules explicitly remove the most significant benefit workers draw from just-cause employment: a legitimate right of reliance. Sure, workers can still gain alternative forms of reliance on the job, just as property owners can still find income outside their specific regulated property, but the reliance right that stems from a different default-termination rule, or a different public-sector law, is regulated away by at-will rules. At-will rules remove such reliance not in one fell swoop, but in an ongoing manner—repeatedly, and across the lifespan of all workers. Theories of job security as property anchored in other legal rights stemming from job security, or ones that hold job security as a necessary and sufficient condition to the creation of property, are limited in the same extensive and continued ways by at-will rules.

The first context in which a takings claim against an at-will regime can be made is as a shield—protecting public-sector workers from changes in their termination regime. The second context, and the more radical one, is as a sword—attacking the prevailing at-will rules in the private sector.

What follows is by no means a complete argument. It is best treated, instead, as a proof of concept or an outline for an argument. The intuition is that workers lost something essential and constitutionally significant in the transition to at-will employment. And, with sufficient development, workers can have constitutional recourse through the Takings Clause.

A. *Takings as a Shield*

Public-sector employees constitute a large expenditure within government budgets.¹⁹⁵ As a result, the allocation of government jobs—and the terms and conditions of public-sector workers’ employment contracts—are often politically contested.¹⁹⁶ Public-sector workers and their unions have advocated against austerity and privatization of the public sector.¹⁹⁷ Attacks on civil service vary in scope and depth.¹⁹⁸ Massive reforms often target civil public-sector job security, stripping tenure or hindering grievance procedures.¹⁹⁹ Such attacks can also include restricting collective-bargaining rights or unilaterally terminating or modifying collective-bargaining agreements.²⁰⁰ All of these examples are commonplace components of “fiscally responsible,” conservative public-sector reforms.²⁰¹ Through these reforms, public agencies seek to cut workers’ job security, transforming workers’ status to at will.

For public-sector workers, as for private-sector workers, at-will status eliminates more than just job security. Government at-will employees lack certain constitutional protections that workers with job security enjoy.²⁰² Thus, the stakes of public-sector reform are high.

Rules and statutes classifying public-sector workers as at-will employees have been attacked constitutionally.²⁰³ These attacks clarify that while at-will

195. Stephen F. Befort, *Unilateral Alteration of Public Sector Collective Bargaining Agreements and the Contract Clause*, 59 BUFF. L. REV. 1, 1 (2011).

196. See generally Nicholas Handler, *Separation of Powers by Contract: How Collective Bargaining Reshapes Presidential Power*, 98 N.Y.U. L. REV. (forthcoming 2024), <https://ssrn.com/abstract=4519120> [<https://perma.cc/FN7D-TTUV>] (placing public-sector labor relations in the context of ongoing debates around presidential powers).

197. *Id.* (manuscript at 18-19).

198. Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 608 (2021) (offering an example of how presidential administrations can hinder effective staffing in agencies).

199. See *id.* at 608-09.

200. See Befort, *supra* note 195, at 1-2.

201. See *id.* at 1; Donald D. Slesnick II & Jennifer K. Poltrock, *Public Sector Bargaining in the Mid-90s (The 1980s Were Challenging, but This Is Ridiculous)—A Union Perspective*, 25 J.L. & EDUC. 661, 663-67 (1996).

202. See, e.g., *Waters v. Churchill*, 511 U.S. 661, 679 (1994) (“[A]n at-will government employee . . . generally has no claim based on the Constitution at all.”); *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 607 (2008) (discussing how “the class-of-one theory of equal protection has no application in the public employment context”).

203. See *Fumarolo v. Chi. Bd. of Educ.*, 566 N.E.2d 1283, 1306-07 (Ill. 1990) (rejecting a due-process-based claim against a state law stripping tenure from principals and other school officials).

workers may enjoy fewer constitutional protections,²⁰⁴ the act of classifying or reclassifying workers as at-will can be susceptible to constitutional scrutiny. This distinction between courts' ability to scrutinize particular managerial decisions regarding at-will workers and their ability to scrutinize state classifications of whole classes of workers in a category of employment makes sense. The rationale for limiting scrutiny in the first type of cases is to avoid micromanaging the government as an employer.²⁰⁵ This rationale weakens as the scope of state action includes more workers, agencies, and departments.

Constitutional pushback against such broad public-sector reforms usually comes from public-sector unions. Those constitutional attacks on reforms tend to focus on the Contract Clause²⁰⁶ or on state constitutional protections of workers' collective-bargaining rights.²⁰⁷ One example of a legal challenge to reform efforts, albeit an unsuccessful one, was brought by workers' unions in Texas.²⁰⁸ There, advancing a theory of job security as physical property, unions argued that privatizing their particular government office, including terminating their jobs and transferring the physical office space and equipment to private hands, was an unconstitutional taking.²⁰⁹ Although the case suffered significant headwinds, its core complaint was similar to the claim I outline here, which may become more commonplace considering contemporary attacks on tenure and civil-service systems.²¹⁰

Consider another recent example of constitutional pushback against public-sector reform efforts. Missouri had a merit-based personnel administration system since 1945.²¹¹ This system gave certain workers seniority consideration in position allocation, grievance procedures, and, most notably for our purpose, just-cause and notice requirements.²¹² Public-sector labor regulations allowed

204. See, e.g., *Engquist*, 553 U.S. at 607 (2008) (“[A] government’s decision to limit the ability of public employers to fire at will is an act of legislative grace . . .”).

205. See, e.g., *Connick v. Myers*, 461 U.S. 138, 143 (1983) (“[G]overnment offices could not function if every employment decision became a constitutional matter.”).

206. See, e.g., *Befort*, *supra* note 195, at 39-54.

207. See *Am. Fed’n of State, Cnty. & Mun. Emps., Council 61 v. State*, 653 S.W.3d 111, 119 (Mo. 2022).

208. *Tex. State Emps. Union/CWA Local 6184 v. Tex. Workforce Comm’n*, 216 S.W.3d 61, 63-64 (Tex. App. 2000), *abrogated in part by Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217 (Tex. 2004).

209. *Id.*

210. See, e.g., Matthew Adam Bruckner, *Terminating Tenure: Rejecting Tenure Contracts in Bankruptcy*, 92 AM. BANKR. L.J. 255, 282-83 (2018) (suggesting possible Takings Clause arguments against encroachments on tenure).

211. *Am. Fed’n*, 653 S.W.3d at 117-19 (describing the history of legal action).

212. MO. REV. STAT. § 36.380 (2018).

public-sector workers to unionize and sign collective-bargaining agreements with the state.

In 2018, however, the Missouri legislature enacted SB 1007, which excluded most public-sector workers from its merit system and mandated the state treat those workers as “at-will”:

Except as otherwise provided in section 36.030 all employees of the state shall be employed at will, may be selected in the manner deemed appropriate by their respective appointing authorities, shall serve at the pleasure of their respective appointing authorities, and may be discharged for no reason or any reason not prohibited by law²¹³

Public-sector unions filed claims arguing that SB 1007’s creation of at-will status for large segments of the state’s public sector violates their state-constitutional right to organize and engage in collective bargaining.²¹⁴ These claims did not persuade the Missouri Supreme Court.²¹⁵

Workers are often powerless when facing such legislative reform efforts. Since the state legislature is the entity acting to strip workers of their job security, and the legislative process is generally understood to comport with the requirements of due process, procedural-due-process claims are practically useless. The Missouri litigation effort reveals that some state constitutions offer guarantees that might be plausibly invoked to counter such reforms. But those efforts don’t seem to be effective – or at least not yet.

On rare occasions, public-sector workers do raise constitutional takings claims when they are terminated.²¹⁶ But those claims are generally treated as mere rhetorical tropes not deserving of in-depth analysis.²¹⁷ Some scholars treat workers’ takings claims as within the realm of legal possibility, but still unrealistic.²¹⁸ This Essay demonstrates that takings claims ought to have a role in the constitutional toolbox of public sector workers and unions fighting against the precarization of the state. Removing workers’ job security is an unconstitutional

213. MO. REV. STAT. § 36.025 (2018).

214. *Am. Fed’n*, 653 S.W.3d at 119.

215. The claim had some limited follow-ups. *See, e.g.*, *Mo. Corr. Officers Ass’n v. Mo. Off. Admin.*, 662 S.W.3d 26, 34-44 (Mo. Ct. App. 2022).

216. *A.M. v. United States*, 161 Fed. Cl. 1, 5 (2022) (rejecting takings claims on the basis of the alleged illegality of termination); *Tex. State Emps. Union/CWA Loc. 6184 v. Tex. Workforce Comm’n*, 16 S.W.3d 61, 64 (Tex. App. 2000), *abrogated in part by Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217 (Tex. 2004).

217. *See, e.g.*, *Arnett v. Kennedy*, 416 U.S. 134, 178 (1974) (White, J., concurring in part and dissenting in part) (portraying the supposed takings claim as a question of due process).

218. *See Kent, supra* note 191, at 33-34; *Stern, supra* note 111, at 281-82.

taking of workers' property entitlements. For example, this kind of claim can be used when public-sector universities' employees are threatened with tenure stripping and removal.²¹⁹

B. *Takings as a Sword*

As a sword, the at-will-as-takings claim can attack the at-will regimes currently in effect. There are two possible structures for such a claim. The first is that workers enjoyed property rights under the common-law termination rule prior to the at-will regime. The property right in a job created by job security was taken from workers when the at-will regime was instituted and each time the at-will rule is enforced by courts. The second possible claim is that the at-will rule is a preemptive or definitional taking that establishes a status quo of no workers' property rights in their jobs.

The basic structure of the first argument is a takings claim against the state for displacing a common-law rule that provided workers with property entitlements in their job. At-will rules took property from employees and transferred those property rights to employers for public-policy reasons, with no compensation.

Common-law rules are complex and intertwined. Pinpointing which rule the at-will rule actually displaced can be challenging.²²⁰ But the critical question is whether, under the previous common-law default rules, employees could expect their employers not to unilaterally terminate them.²²¹ In modern parlance, did workers enjoy a just-cause regime or an equivalent protection?²²² Many factors might affect that question: the period of employment, the type of working relations, the specific sector and occupation, and more. But the fundamental question is about the nature of the parties' relations and their expectations—an answer, or at least a beginning of an inquiry can start from the mutual expectations Blackstone outlines in the commentaries.²²³

Similar sword-like claims have been made against at-will rules, but all of the claims I found eventually fizzled out of courts without decisions made on the merits. For example, the Supreme Court of Arizona adopted a public-policy

219. Deepa Das Acevedo, *The War on Tenure*, 91 TENN. L. REV. (forthcoming 2024) (manuscript at 26-27), <https://ssrn.com/abstract=4183048> [<https://perma.cc/UW2K-UT96>].

220. Donna R. Mooney, *The Search for a Legal Presumption of Employment Duration or Custom of Arbitrary Dismissal in California 1848-1872*, 21 BERKELEY J. EMP. & LAB. L. 633, 636-39 (2000); Slater, *supra* note 159, at 418.

221. MEYERS, *supra* note 158, at 1.

222. *See supra* Part I.

223. *See* BLACKSTONE, *supra* note 157, at *413.

exception to at-will rules, protecting terminated workers who were asked to expose themselves in front of a crowd.²²⁴ Arizona's legislature responded by codifying the at-will status of Arizona workers in the Employment Protection Act of 1996 (EPA 1996), limiting the scope of judicial review of at-will status terminations.²²⁵ Following the enactment of the law, several employees, while litigating unlawful-termination claims, challenged the constitutionality of EPA 1996.²²⁶ Those claims eventually coalesced into a showdown between the Supreme Court of Arizona and the state's legislature about the respective authority of each state actor, setting aside workers' claims about the state-constitutional harms caused to them by solidifying the at-will rule.²²⁷

EPA 1996 created a work-law rights desert, stripping workers of possible workplace legal claims. If job security is connected to property through the assortment of legal claims available to workers, then reforms like EPA 1996 are clear takings. Before the EPA 1996, workers' status enabled certain legal claims that are now void. If job security stands for the ability to make claims against termination, or if workers had a property right in those legal claims, then workers have a valid takings claim.

Note that there is no need to trace a plaintiff who transitioned from the common law to at will to make this type of taking claim. This was not a requirement in takings cases like *Cedar Point Nursery v. Hassid*, where there was no mandate to find a suitable plaintiff in continuous business from before the enactment of the California labor law. The regulation in and of itself was a taking of property, even if all of California's agribusinesses were incorporated after the regulation was in place.²²⁸

Cedar Point also expanded takings from a temporal occurrence to a structural one. Instead of recognizing as takings only instances where A, a legal entity, had property that was taken from them, *Cedar Point*-type arguments imply a situation where B's relations to a complete and uninterrupted property entitlement is severed by state action—a preemptive or definitional taking.

Agribusinesses in California formed after the Agriculture Labor Relations Act²²⁹ was enacted still suffered a taking of their property simply by not being

224. *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1033 (Ariz. 1985).

225. ARIZ. REV. STAT. ANN. § 23-1501 (2023).

226. See Amy Abdo Anderson & Barney M. Holtzman, *Constitutional Showdown: The Employment Protection Act of 1996*, 35 ARIZ. ATT'Y, no. 8, Apr. 1999, at 30, 31, 42 (collecting resources).

227. *Cronin v. Sheldon*, 991 P.2d 231, 239, 241-42 (1999).

228. See Rebecca Hansen & Lior Jacob Strahilevitz, *Toward Principled Background Principles in Takings Law*, 10 TEX. A&M L. REV. 427, 445-48 (2023) (describing other procedural-as-substantive limits on takings claims).

229. Cal. Lab. Code § 1140 (Deering (2024)).

able to take advantage of their full physical property for a full 365 days a year. The challenged law enacted a taking simply by preventing, or preempting, beneficial utilization. A similar argument can be made about at-will rules.

Here, at-will rules take workers' property by serving as a default that obstructs a path along which property interests might run. The benchmark analysis in cases involving these rules, as in *Cedar Point*, is not chronological – what happened before the adoption of the taking regulation (the California Agriculture Labor Code or the at-will rule) – but structural – what happens alongside it. Alongside the at-will regime is a for-cause one, and by setting the default to at-will, the state takes property rights otherwise available to workers.

V. THEORETICAL IMPLICATIONS

The right of the masters to confer names extends so far that one should allow oneself to grasp the origin of language itself as the expression of the power of the rulers: they say “this is such and such”, they put their seal on each thing and event with a sound and in the process take possession of it.

– FRIEDRICH NIETZSCHE²³⁰

Extending constitutional property rights in employment beyond the public sector and its confining procedural-due-process framework not only generates new legal claims, but also sheds light on important theoretical debates in legal scholarship.

I focus here on two ongoing conversations: the discussion about takings and democratic institutions following *Cedar Point* and a related strand of scholarship examining new possibilities for progressive and labor-oriented constitutionalism.

A. *Property and the Takings Clause*

In *Cedar Point Nursery v. Hassid*, the Supreme Court nullified a California regulation that allowed union organizers the right of limited access to farms in order to reach farmworkers. The Court interpreted the law as a physical taking because the law took away the farm owners' right to exclude the organizers from their property.²³¹

230. FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 13 (Douglas Smith trans., Oxford Univ. Press 1996) (1887).

231. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 152 (2021).

The state law, in place since the 1970s, was enacted after decades of farmworkers' labor organizing.²³² Farmworkers are excluded from the National Labor Relations Act (NLRA) and have no right to organize under federal law. But following some of the most challenging organizing campaigns in the United States, in the 1960s, California began to experiment with agricultural labor-relations regulations,²³³ culminating in the enactment of the California Agricultural Labor Relations Act. Soon after enactment, the new law survived the same type of constitutional takings claim that was raised in *Cedar Point* and it remained in place for about five decades.²³⁴ The law has some known failures,²³⁵ but none relate to the lack of growers' rights. In fact, since the law has been in place, labor power has waned significantly and employers' power has grown exponentially.²³⁶

Labor-rights-oriented scholars were alarmed by *Cedar Point*.²³⁷ They lamented that the Court was missing that, although the California regulation may be a taking of growers' property, it could be justified on public-policy grounds, including those the Supreme Court has recognized as necessary to consider in takings analysis (like public health).²³⁸

Scholars also sounded the alarm over the implications the ruling might have for antidiscrimination laws or antiretaliation protections that prevent an employer from terminating an employee for prohibited reasons, both of which now might be vulnerable to a takings challenge on the ground that an employer has a right to exclude anyone they wish.²³⁹ Additionally, the administrative state's capacity to operate depends on its ability to send inspectors onto employers' property. Terminating this capacity could deal a devastating blow to the already flailing capabilities of the U.S. administrative apparatus, especially in worker and environmental areas.²⁴⁰

232. Bowie, *supra* note 56, at 185.

233. *Id.* at 186-87.

234. *Agric. Lab. Rels. Bd. v. Superior Ct.*, 546 P.2d 687, 692 (Cal. 1976).

235. William B. Gould, *Some Reflections on Contemporary Issues in California Farm Labor*, 50 U.C. DAVIS L. REV. 1243, 1247 (2016) (“[U]nion organizational activity in California agriculture is moribund.”).

236. MARSHALL GANZ, *WHY DAVID SOMETIMES WINS: LEADERSHIP, ORGANIZATION, AND STRATEGY IN THE CALIFORNIA FARM WORKER MOVEMENT* 239-51 (2009) (detailing the collapse of farmworker organizing).

237. *See* Bowie, *supra* note 56.

238. Sachs, *supra* note 57, at 122-23.

239. Bowie, *supra* note 56, at 162-63; Amy Liang, *Property Versus Antidiscrimination: Examining the Impacts of Cedar Point Nursery v. Hassid on the Fair Housing Act*, 89 U. CHI. L. REV. 1793, 1810-14 (2022).

240. Bowie, *supra* note 56, at 195-98.

Overall, scholarly critiques paint a portrait of a Supreme Court that guards propertied interests against the will, benefit, and well-being of the majority of the United States. The Court is framed as dismembering the democratic institutions of self-governance – from unions to the administrative state – and thus becoming an antidemocratic force in the U.S. political economy.²⁴¹

Others, perhaps sharing the core of these criticisms, note that the path is not necessarily as predetermined and bleak. First, some scholars note that temporal limitations might apply to takings claims.²⁴² The tack, they suggest, is to argue that many potential regulatory takings claims are arguably time barred, and the potentially vulnerable regulations have come to constitute a de facto part of the common-law background rules and are therefore immune from takings claims.²⁴³ Other scholars point out that although takings doctrine has become more powerful and cryptic, it has a built-in vulnerability to solve that Gordian knot: the government can pay for what it takes.²⁴⁴ Thus, even if the Supreme Court declares large swaths of action by the administrative state to be takings, the government can pay for what it takes and cure the alleged unconstitutionality.

I do not dispute any of those arguments. But I do dispute the underlying implicit agreement of those scholars with the Supreme Court regarding who holds property rights worthy of constitutional protections on the job. We need not accept that constitutional property belongs to employers, leaving proworker scholars and advocates struggling to find ways to challenge or circumvent the Takings Clause. Employers certainly did not approach takings from this defensive posture. Employers fought their battle over the basic defaults, namely, who has property on the job? Who is entitled to make workplace decisions? What are the default conditions of termination? They forced workers and their advocates into an uphill battle of finding workarounds: building an administrative state to enforce work laws, creating statutory and court-based exceptions to at will, and carving up the employer's prerogative. Efforts to circumvent the employer-tilted property defaults wind up being litigated in courts, watered down, evaded in a whack-a-mole fashion – and, on occasion, abolished.

What I offer is a different premise and a different critique of *Cedar Point*-type decisions: a claim that workers hold property in their jobs. My position about the kinds of factors that create workers' property rights in the job is a limited one. I stick to workers with job security. Courts already recognize those kinds of relations as property entitlements in the job. With a supermajority conservative

241. Bowie, *supra* note 56, at 200-04.

242. Hansen & Strahilevitz, *supra* note 228, at 454.

243. *Id.* at 432.

244. Fennell, *supra* note 190, at 1.

Supreme Court in place poised to eviscerate existing work-law institutions, I see no legal or analytical reason to concede any of the Court's premises. Significantly, perhaps, not the basic ones.

B. Property and Progressive Constitutionalism

The constitutional stakes of this debate about the scope of the Takings Clause extend beyond the specific clause itself to a broader ongoing conversation about progressive constitutionalism. This Essay adds a new facet to this debate — a progressive utilization of constitutional property.

Contemporary writings on the connections between the Constitution and political economy identify two constitutional frames: the bosses' constitutional vision²⁴⁵ and the New Deal's constitutional structure.²⁴⁶ The former manifests in a line of Supreme Court cases protecting freedom of speech, freedom of religion,²⁴⁷ employers' property rights, and more. The latter is anchored in ninety-year-old precedent defending New Deal legislation, such as the NLRA and the Fair Labor Standards Act, from constitutional attacks.

Both constitutional visions are bad for contemporary workers, labor, and their progressive allies. New Deal constitutionalism, almost by definition, and definitively in practice, is a losing legal and political position. New Deal institutions are profoundly exclusionary, allocating work-law protections and rights, with all the political-economy benefits those inclusions entail, to workers that were historically white, male breadwinners. Even today, institutions remain modeled on their image.²⁴⁸ Legally, New Deal constitutionalism asserts only that laws and institutions protecting workers' rights are not *necessarily* violative of the

245. See Purdy, *supra* note 124, at 2162-66.

246. See Andrias, *supra* note 184, at 1001-07.

247. For an example tying religious freedom to a conservative broader movement, see Kate Redburn, *The Law and Political Economy of Religious Freedom*, LPE BLOG (Sept. 8, 2022), <https://lpeproject.org/blog/the-law-and-political-economy-of-religious-freedom> [https://perma.cc/PW3V-UKM6].

248. See generally IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2005) (examining how "New Deal programs set out deliberately to exclude various minority groups" and arguing that "the New Deal and policies in subsequent periods actually exacerbated the gap between white and black Americans"); IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* (2013) (arguing that, with the New Deal, "American democracy was both saved and distorted by a Faustian collaboration that guarded racial segregation as it built a new national state to manage capitalism and assert global power"); ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA* (2001) (showing how "a deeply embedded set of beliefs . . . shaped seemingly neutral social legislation to limit the freedom and equality of women").

Constitution, not that they are constitutionally *required*.²⁴⁹ Additionally, at their very best, the New Deal's major constitutionally valid legislative wins cemented policies fitting for a New Deal-era industrial-relations system, very far from a service-, information-, and platform-centered economy. And while defending the existing regulatory system on the one hand, the New Deal constitutional regime gave employers the keys to altering it, making whatever constitutional triumphs workers had practically meaningless.²⁵⁰

For a while, it seemed like the choice was between those two bad options: the bosses' constitutional vision or New Deal constitutionalism. But new scholarship urges us to envision alternative ways of structuring the relationship between the state, labor, and capital.²⁵¹ Scholars have uncovered lost constitutional histories²⁵² and identified new constitutional meanings in contemporary labor actions.²⁵³ These scholars seek to develop new progressive and labor-power-oriented constitutional visions.

Joseph Fishkin and William E. Forbath remind contemporary audiences of a lost, or forgotten, progressive constitutional vision they call "democracy of opportunity," encompassing substantive demands and non-litigation-focused modes of constitutional politics.²⁵⁴ Substantively, this constitutional vision includes a concern over the concentration of power (political and economic) in the hands of the few, striving toward a mass of people enjoying middle-class life, and an emphasis on inclusion for an array of various social groups, genders, ethnicities, and races.²⁵⁵ Fishkin and Forbath trace the long history of this vision and call for its strategic utilization in contemporary constitutional politics.

Strategically, Fishkin and Forbath embrace a turn away from the courts, treating litigation and even court victories as detrimental to the actualization of

249. Andrias, *supra* note 184, at 1009-12, 1041-42.

250. DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 3-5, 17-18 (2014); Warren Sneed, *The Supreme Court as an Agent of Policy Drift: The Case of the NLRA*, 117 AM. POL. SCI. REV. 661, 663 (2022); Racabi, *Balancing Is for Suckers*, *supra* note 7, at 68-69.

251. Andrias, *supra* note 184, at 1064-80.

252. See, e.g., JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY* (2022) (recovering the history of "an American tradition of constitutional argument that directly addresses the central problems of oligarchy and inequality that we now face").

253. See, e.g., Diana S. Reddy, *After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions*, 132 YALE L.J. 1391, 1395 (2022) (arguing "that the American conversation about unions has been unduly constrained . . . because of how the law has framed them").

254. See generally FISHKIN & FORBATH, *supra* note 252 (detailing this vision).

255. *Id.* at 10.

their vision.²⁵⁶ This vision was forgotten and forsaken by politicians and activists around the 1970s and is waiting, as Forbath and Fishkin describe, to be rediscovered.

Kate Andrias identifies an incipient constitutional program within the past two decades of labor activity.²⁵⁷ Andrias translates contemporary labor actions and legal strategies into explicit “small c” constitutional demands. For example, she proposes that we understand Starbucks workers’ organizing as a constitutional rejection of the public-private dichotomy in constitutional law.²⁵⁸ She conceptualizes workers’ material demands and policy wins (especially at the state level) as an embrace of constitutional social and economic rights.²⁵⁹ In addition, she urges us to understand labor’s decades-long attempts to include previously excluded populations in New-Deal-type regulations as a welcome emphasis on broader constitutional inclusivity.²⁶⁰

Andrias frames the contemporary right-wing constitutional onslaught as a response to this nascent vision.²⁶¹ We are witnessing a constitutional cold war between labor and capital. Still, for some pragmatic reasons, capital’s constitutional actions are well-articulated and argued before the courts, but labor’s is not.²⁶²

In recent writing, Diana Reddy identifies, and suggests we reject, labor’s traditional role as an apolitical vehicle for increasing consumers’ consumption.²⁶³ According to Reddy, such a role necessitates an economic consumer-oriented cost-benefit analysis attached to all labor-related policy questions. Post-New Deal unions embraced their apolitical roles, abrogating the more holistic political stance they took before the New Deal, which Reddy calls to be reawakened.²⁶⁴

These authors all recognize three vantage points in the contemporary constitutional analysis of labor and workplace issues: the New Deal constitutional mandate, the bosses’ constitutional plan, and contemporary labor’s emerging vision. They all call for the articulation of a progressive and labor-oriented constitutional project.

I want to make two contributions to this debate. First, workers’ property in their jobs can serve as the foundation of this constitutional vision. And second,

²⁵⁶ *Id.* at 29.

²⁵⁷ Andrias, *supra* note 184, at 989.

²⁵⁸ *Id.* at 1015-19.

²⁵⁹ *Id.* at 1025-31.

²⁶⁰ *Id.* at 1031-37.

²⁶¹ *Id.* at 992.

²⁶² *Id.* at 992-93.

²⁶³ Reddy, *supra* note 253, at 1399.

²⁶⁴ *Id.* at 1401-05.

the role of the state vis-à-vis workers, though benevolent at times, has never been a haven. True, California agricultural labor laws may have offered some potential for limited organizing wins. But ultimately the state's role in structuring labor relations is not only that of enforcing progressive labor regulations or equal-opportunity legislation. The state, first and foremost in the labor market, enforces the at-will rule.

As might be clear, suggesting that just-cause workers have constitutional property rights in their jobs does not mean that those workers cannot be terminated or that laws governing workplace termination cannot pass. Takings happen. Property is not an ultimate trump-all right.²⁶⁵ But it is a right nonetheless; property has both practical legal connotations and value-laden normative significance.²⁶⁶ Property can represent security, autonomy, self-governance, responsibility, independence, and entitlement.²⁶⁷ Ignoring those values or accepting the assumption that they belong solely to employers is a dangerous and unnecessary concession.

Current workers and unions use this constitutional tool to their advantage; their problem, as I view it, is of scale, not meaning. Property rights on the job make sense if understood as control, physical place, or a right to a legal claim. Workers' property rights to their jobs make sense to workers who see their workplace ties become precarious and severed.²⁶⁸

Workers' property doesn't make sense for those who see the administrative state as the sole basis for workers' power. Property indicates control. And workers' control has always been in tension with some broader societal goals that progressives wanted to achieve. Workers' voices and power face significant pushback, even from the most labor-facing President that the United States has seen in fifty years. And because workers' unions are abysmally weak at this point, the kneejerk response is to protect the strongholds that progressives maintain – the administrative state and some states and local governments.

What public sector workers are fighting for – often against the federal government – is autonomy and control. Workers are fighting against physical exclusion from their community and lifeline and for their ability to actualize their rights. This different vision for constitutionalism is worth pausing on.

265. JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART* (2021).

266. NJOYA, *supra* note 116, at 2. See generally Beermann & Singer, *supra* note 37 (exploring the philosophical and practical intersections of employment law and property rights).

267. HANOCH DAGAN, *A LIBERAL THEORY OF PROPERTY* (2021).

268. Gould, *supra* note 14.

CONCLUSION

The lynchpin of takings jurisprudence is the question of who owns property; without property ownership, there can be no taking under the Fifth Amendment. Following *Cedar Point*, courts are now facing a flood of claims by employers that New Deal-type regulations interfere with *their* property rights.²⁶⁹ For example, in *Glacier Northwest*, a recent case at the U.S. Supreme Court about the NLRA's preemption of state torts, an employer argued that if the NLRA barred it from bringing tort suits against its striking workers, the statute "took" its property under the Takings Clause.²⁷⁰

By taking for granted the answer to the question of who owns property in the workplace, work law enshrines a distributional tilt in favor of employers. Expanding our understanding of who owns property at work for constitutional purposes could have far-reaching consequences. At-will rules have a devastating effect on workers' rights, but as long as we accept that only employers have property rights at work, we erase the harms to workers.

Recognizing workers' property rights in their jobs enables a new challenge to at-will rules: a constitutional takings claim. Drawing on decades of public-sector workers' litigation, I identify an established connection between job security and property rights. At-will rules negate job security, transfer whatever property entitlements workers have in their jobs to their bosses, and wreak havoc on workers' lives and the broader political economy. This Essay then provided two arguments defending from and attacking at-will rules.

"*Who owns the property?*" is a central question to our constitutional order and political economy. The answer is not set in stone, despite existing doctrines holding that only employers have property rights in jobs. In eliminating job security and bringing about a political economy of precarity, U.S. employers have lost the right to such legal and political assets. Workers, unions, scholars, and activists should strive to constitutionally name their rights, hold the state accountable for taking them, and claim their property back.²⁷¹

269. FISHKIN & FORBATH, *supra* note 252, at 477-79.

270. See Andrias, *supra* note 184, at 1051 (citing Brief for Petitioner at 2, *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174*, 598 U.S. 771 (2023) (No. 21-1449)).

271. William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC'Y REV. 631, 635-36 (1981).