

## Michigan Law Review First Impressions

---

Volume 112

---

2014

# What Does Social Equality Require of Employers? A Response to Professor Bagenstos

Brishen Rogers

*Temple University Beasley School of Law*

Follow this and additional works at: [http://repository.law.umich.edu/mlr\\_fi](http://repository.law.umich.edu/mlr_fi)

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

---

### Recommended Citation

Brishen Rogers, *What Does Social Equality Require of Employers? A Response to Professor Bagenstos*, 112 MICH. L. REV. FIRST IMPRESSIONS 83 (2014).

Available at: [http://repository.law.umich.edu/mlr\\_fi/vol112/iss1/20](http://repository.law.umich.edu/mlr_fi/vol112/iss1/20)

This Response is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review First Impressions by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# WHAT DOES SOCIAL EQUALITY REQUIRE OF EMPLOYERS? A RESPONSE TO PROFESSOR BAGENSTOS

*Brishen Rogers\**

Individual employment law can appear a bit like tort law did in the late nineteenth century: an “eclectic gallery of wrongs”<sup>1</sup> united largely by the fact that they do not fit into another doctrinal category. The field has emerged interstitially and today includes an array of state and federal common law and statutory claims not covered by labor law or employment discrimination law. These other subfields<sup>2</sup> have foundational statutes: the National Labor Relations Act of 1935 and Title VII of the Civil Rights Act of 1964, respectively. Each was passed in response to a major social conflict, and each defines some jurisdictional boundaries. Given its decentralized origins, can individual employment law even have a normative core?

Yes it can, or so argues Professor Samuel Bagenstos. Just as tort theorists have long sought to render the field coherent by mapping principles at work across categories of tort cases, Bagenstos identifies a rough order within this apparent doctrinal mishmash. Individual employment law, he argues, characteristically “seeks to ensure that hierarchies of work do not harden into class-type hierarchies of person”<sup>3</sup> or into more widespread relationships of “domination and subordination.”<sup>4</sup> This ideal of “social equality” renders certain doctrines coherent and explains longstanding critiques of other

---

\* Assistant Professor of Law, Temple University Beasley School of Law. Brogers@temple.edu.

1. John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 519 (2003); see also *id.* at 517 (“[A]s compared to property or criminal law, tort was regarded as occupying a less significant place within the legal system.”).

2. The law governing work in the United States has for several decades been broken into three subfields: labor law, which governs unionization and collective bargaining; employment discrimination, which covers individual and collective claims of discrimination based on protected class membership; and individual employment law, which includes both statutory and common law claims by individual employees. See Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 164 (2007).

3. Samuel Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 228 (2013).

4. *Id.* at 237; see also *id.* at 236–38 (discussing the dangers posed to social equality by commodification of certain human activities).

doctrines, and it does so better than theories based on ensuring efficiency or rectifying unequal bargaining power. Bagenstos also roots this argument in first principles of social justice, demonstrating an overlapping consensus among major strands of contemporary political theory to the effect that a just society will eliminate persistent hierarchies of status.<sup>5</sup>

I strongly agree with this argument. I also believe that Bagenstos's article helps answer a vexing question within employment law: When are employer duties justified even if they reduce efficiency and do not target immoral behavior by employers?<sup>6</sup> But I would emphasize different aspects of social equality in certain instances, and I am not optimistic that social egalitarian ideals will strongly influence courts in the run of cases.<sup>7</sup> In this brief Essay, I take up these matters in turn.

### I. SOCIAL EQUALITY AND THE CASE FOR EMPLOYER DUTIES

A basic question of institutional design helps illuminate Bagenstos's intervention: When should policymakers and courts advance particular social goals through regulation of the employment relationship rather than through alternative mechanisms? While Bagenstos does not address this question in detail, his argument from social equality helps answer it. Debates around minimum wage laws are illustrative. Economists and law-and-economics scholars have long criticized such laws for increasing unemployment and reducing overall efficiency.<sup>8</sup> Perhaps surprisingly, certain egalitarian liberal legal scholars have also criticized minimum wage laws.<sup>9</sup> Accepting neoclassical market models, such liberal scholars hold that

---

5. *Id.* at 232–35 (summarizing communitarian, republican, and liberal egalitarian cases for social equality).

6. See discussion *infra* Part I.

7. See discussion *infra* Parts II, III.

8. See, e.g., George J. Stigler, *The Economics of Minimum Wage Legislation*, 36 AM. ECON. REV. 358, 361 (1946) (“[T]he net effects of the minimum wage on aggregate employment are adverse.”); Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405, 406 (1997) (accord); see also Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax at Redistributing Income*, 23 J. LEGAL STUD. 667 (1994) (finding that transfers are generally superior to regulations as means of ensuring just distribution of resources).

9. See, e.g., Anne Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 YALE L.J. 967, 1004 (1999) (stating that “regulatory barriers” like the minimum wage are a major reason why urban poor have difficulty finding work); JOHN RAWLS, A THEORY OF JUSTICE 277 (1st ed., 1971) (transfers “may be more effective than trying to regulate income through minimum wage standards, and the like”); see also Brishen Rogers, *Justice at Work: Minimum Wage Laws and Social Equality*, 92 TEX. L. REV. (forthcoming 2014) (on file with author) (discussing liberal egalitarian critiques of minimum wage laws).

the job losses caused by such laws make taxation and transfer of resources a superior means of achieving distributive justice.<sup>10</sup> For their part, minimum wage advocates typically accept that the minimum wage is essentially a redistributive mechanism,<sup>11</sup> but they advance empirical evidence that minimum wage laws do not in fact increase unemployment and therefore have a net egalitarian effect on wealth distribution.<sup>12</sup>

Bagenstos's argument from social equality casts employer duties in a new light. The baseline goal of egalitarian social policy, he argues, is not material redistribution per se but rather the creation of "a society in which people regard and treat one another as equals . . . a society that is not marked by status divisions such that one can place different people in hierarchically ranked categories."<sup>13</sup> His argument is rooted in distributive justice, but of a distinctly Walzerian sort: a just society will not allow inequality in one social sphere to systematically undermine equality in other social spheres.<sup>14</sup> Refreshingly, this approach allows Bagenstos to criticize particular social outcomes without resorting to moralism, since class-type hierarchies may emerge via normal labor market processes, without any individual employer defrauding, coercing, or stealing from employees. Bagenstos's perspective is also largely ex ante rather than ex post. He does not ask how particular employers act in particular cases but rather how legal rules enable and reinforce particular social practices over time.

The employment at will doctrine is a prime example. While this doctrine certainly enables employers to act on malicious motives, the more fundamental problem is that employment at will underlies an "entire system

10. Shaviro, *supra* note 8, at 474–75 (defending earned income tax credit ("EITC") and negative income taxes as superior means of redistributing wealth to the working poor); Alstott, *supra* note 9 at 971–72 (endorsing unconditional cash grants to the poor along with reduction or repeal of minimum wage).

11. Noah D. Zatz, *The Minimum Wage as a Civil Rights Protection: An Alternative to Anti-Poverty Arguments?*, 2009 U. CHI. LEGAL F. 1, 4–5 (noting the narrowness of current debate).

12. DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE (1995); *Idea of the Day: A Higher Minimum Wage Will Help Employees—And It Won't Hurt Employers*, CENTER AM. PROGRESS (Feb. 15, 2013), <http://www.americanprogress.org/issues/general/news/2013/02/15/53664/a-higher-minimum-wage-will-help-employees-and-it-wont-hurt-employers/> (focusing on economic effects of minimum wage, including lack of negative employment effects); Jared Bernstein, *Raising the Minimum Wage: The Debate Begins. . . Again*, HUFFINGTON POST (Feb. 14, 2013, 3:16 PM), [http://www.huffingtonpost.com/jared-bernstein/raising-the-minimum-wage\\_b\\_2688688.html](http://www.huffingtonpost.com/jared-bernstein/raising-the-minimum-wage_b_2688688.html) (defending minimum wage in terms of resource distribution).

13. Bagenstos, *supra* note 3, at 227 (quoting David Miller, *Equality and Justice*, 10 RATIO 222, 224 (1997)).

14. See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 20 (1983) ("No social good x should be distributed to men and women who possess some other good y merely because they possess y and without regard to the meaning of x.").

of social relations” in which employers and employees are systematically unequal.<sup>15</sup> By permitting employers to terminate employees for no reason or even a bad reason, employment at will can place employees at the employers’ mercy, even if that power is held in reserve.<sup>16</sup> Moreover, there is no clear solution to this problem apart from switching the default rule,<sup>17</sup> whether directly through legislation or common law, or indirectly by encouraging unionization and therefore enabling workers to bargain for just-cause provisions.

In a forthcoming piece, I apply a similar analysis to minimum wage laws, defending them on grounds of social equality rather than resource distribution per se. Patterns of behavior and belief learned and adopted in the workplace—particularly some employees’ deferential attitudes toward employers—are core foundations for class and status divisions and are relatively independent of the distribution of wealth.<sup>18</sup> Thus, very low-wage work, like work subject to employment at will, can lead to systemic harms without any individual employer acting immorally. Minimum wage laws then help reduce class and status divisions in several ways: they reduce a society’s reliance on very low-wage work, they signal that the broader society respects low-wage workers’ contributions, and they require employers themselves to bear particular redistributive burdens toward workers. Like just-cause termination rules, minimum wage laws mitigate the domination and subordination emergent from workplace relationships.

## II. SOCIAL EQUALITY INSIDE AND OUTSIDE THE WORKPLACE

I also agree with Bagenstos that social equality helps explain why various other employer practices are problematic. Those include prohibiting or compelling employee political speech, regulating employees’ off-duty conduct, and retaliating against employees for exercising legal rights.<sup>19</sup> But where Bagenstos emphasizes employees’ rights to participate fully in political

---

15. Bagenstos, *supra* note 3, at 245.

16. See Cynthia Estlund & Alan Bogg, *Freedom of Association and the Right to Contest*, text accompanying note 41, in VOICES AT WORK: CONTINUITY AND CHANGE IN THE COMMON LAW WORLD (forthcoming 2014) (on file with author) (“Even good employers in an at-will world are a dominating presence in the lives of their employees because they have *the capacity to interfere for ill* in their employees’ choices.”).

17. *But see* Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1 (2010) (advocating for liquidated damages for termination rather than a for-cause regime as a means of reducing the economic uncertainty that results from employment at will).

18. Rogers, *supra* note 9.

19. Bagenstos, *supra* note 3, at 254–62.

and civic life, I would emphasize the risk of work-related domination and subordination. These are related but distinct aspects of social equality, and their policy implications sometimes diverge.

For example, Bagenstos argues that employer control of employee speech is unjust because it lets firms leverage their economic power into greater political power.<sup>20</sup> While I agree, I suspect that some differences in political power among citizens are inevitable and perhaps even desirable. Corporate leaders have expertise in economic management, they can help state officials understand the needs of leading sectors and the likely effects of regulations, and their buy-in helps ensure that regulations are designed and implemented effectively. Moreover, if and when corporations gain excessive political power, campaign finance laws may be the best response—just as transfer payments may be the best means of ensuring a fair distribution of material resources per se. Employers' power over employees is arguably a minor threat compared to the post-*Citizens United* regime of relatively unrestricted corporate political spending.<sup>21</sup>

But perhaps duties not to control employee political speech target a distinct concern: the risk of interpersonal domination. In a just society, employees will not be subject to their employer's every whim both inside and outside the workplace. As Walzer wrote: "[t]he experience of subordination—of personal subordination, above all—lies behind the vision of equality." A dominant group's ability to leverage one social good into another has gone too far once it leads to or reinforces relationships of domination and subordination, and therefore becomes self-perpetuating over time. A similar idea informs contemporary class theory: individuals learn class-coded behavior via social interactions that enact hierarchical distinctions between those in different social groups. Such hierarchies tend to impact our belief systems and our sense of self-worth, to harden into intergenerational differences, and to asymmetrically limit groups' life chances. Duties not to control employee political speech thus enhance employees' autonomy by mitigating the extension of workplace hierarchies into other spheres of life.

Such concerns seem especially acute in some of Bagenstos's examples because the speech at issue advanced corporate leaders' preferences rather than obvious firm-wide interests. For example, employees forced to help elect a CEO's favored presidential candidate are required to take sides on issues that do not concern the firm, such as abortion. They may also be forced to act against their self-interest in a distributive conflict *within* the firm, for example if the election will impact income taxation and labor and

---

20. *Id.* at 256.

21. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

employment law rules.<sup>22</sup> Employees forced to write trite political messages on coffee cups may experience themselves as subject to their employer's arbitrary personal whims.<sup>23</sup> While many employees will recognize that such acts chill First Amendment rights or narrow public discourse, this seems likely to remain a secondary consideration. For most, I expect that such employer commands will primarily generate or reinforce a sense of powerlessness. This will likely be true even of apolitical employees subject to a prohibition on speech: since such employees have no desire to speak in the first place, their loss of an opportunity to speak cannot be a grave harm. The loss of the power to *make one's own decision* whether to speak, however, is quite a different matter.

A primary focus on domination and subordination may also forgive certain employer acts that Bagenstos criticizes. Threats to social equality seem less acute, for example, where an employer encourages political speech on a matter that would benefit the firm as a whole, rather than simply enact executives' personal preferences. This seems to have been the case in *Novosel*, where an employee disagreed with a proposed policy reform that would help the firm's bottom line.<sup>24</sup> One can imagine easier cases, such as a start-up company lobbying for make-or-break tax or regulatory treatment. The threat of subordination also seems less acute when employees have particular expertise in the matter at hand, even if they are not lobbyists whose jobs are to engage in politics.<sup>25</sup> In all these instances, employers might be permitted to encourage but not to require political speech by certain professional employees.

The goal of preventing social relationships of domination and subordination can also inform legal analyses of employee privacy and employer retaliation. While Bagenstos notes this point, his main criticisms of retaliation and privacy infringements relate to their effects upon workers' political and civic participation.<sup>26</sup> Regarding privacy, as was the case with political speech, many employees will have little desire to engage in off-work

---

22. See Bagenstos, *supra* note 3, at 226, 254–59.

23. *Id.*

24. See *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 896 (3d Cir. 1983).

25. See Bagenstos, *supra* note 3, at 258–59 (defining and defending a narrower bona fide occupational qualification (“BFOQ”) for employer restrictions on employee political speech).

26. *Id.* at 251–52 (stating that privacy intrusions applied only to less skilled workers may be evidence of effort to “establish or maintain a status hierarchy”); *id.* at 264 (finding that retaliation “communicates the worker’s subordinate status clearly and effectively”). *But see id.* at 251 (noting that employee privacy protections may be important to protect “access to political and civil life”); *id.* at 262 (“Antiretaliation laws centrally protect the ability of workers to participate in public discourse in those areas in which they have the most distinctive contributions to make as employees.”).

conduct that employers seek to constrain, yet an employer's successful restraint may nevertheless signal employees' subordinate status. Similarly, employer retaliation against workers who seek to effectuate their rights is problematic independent of its (quite real) effects on public discourse; an employer who retaliates, threatens to retaliate, or even holds the power to retaliate will stand as a sort of quasi-sovereign entity, nullifying the legal protections otherwise afforded employees by the state. That said, this shift in emphasis does not have a clear doctrinal payoff, and I do not disagree with Bagenstos's policy recommendations.

### III. THE DREAM OF THE UNIFIED FIELD?

Taking a broader view, ideals of social equality may provide a common normative foundation for worker protections across current subfields of labor and employment law. Bagenstos has now argued that both employment discrimination and individual employment law reflect values of social equality, and I have defended the minimum wage in similar terms. I have also argued elsewhere that workers often take collective action or seek to unionize, not for purely economic reasons, but to vindicate their sense of what is just and fair.<sup>27</sup> Other labor scholars have defended collective bargaining laws on the grounds that they help reduce hierarchies of status by extending rights and norms of equal citizenship to the workplace.<sup>28</sup> The basic idea that workplace inequalities should not harden into class-like differences of status may be a common thread among all three subfields, an alternative to analyses based on efficiency or material resource distributions. Future scholarship might fruitfully investigate this overlap.

Yet in the run of cases, labor and employment law jurisprudence arguably discounts norms of social equality. In labor law, ideals of "industrial peace" and deference to common law entitlements have traditionally been more influential than notions of industrial citizenship and have underlain doctrines that limit workers' power vis-à-vis employers.<sup>29</sup> Similarly, the

---

27. See Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L. L. REV. 313 (2012).

28. See, e.g., William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 90–91 (1999).

29. See, e.g., *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 268 (1965) (deciding that it is not an unfair labor practice to shut down an entire business, even if motivated in part by anti-union animus); see also Karl E. Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731, 741–48 (1985) (stating that labor law in the postwar period was marked by, inter alia, judicial tendencies to defer to private ordering processes and weak commitments to workplace democracy); Rogers, *supra* note 29, at 328–31 (summarizing restrictions on workers' collective action during organizing drives); Katherine V.W. Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1518–44 (1981) (cataloguing labor law doctrines informed by



Supreme Court has narrowed disparate impact doctrine over time, weakening antidiscrimination law's power to remedy systemic racial inequalities that do not arise from intentional discrimination.<sup>30</sup> As Bagenstos demonstrates, finally, individual employment case law often *undermines* social equality by immunizing employers from liability for small slights and harms that may accrete over time into broader patterns of subordination.<sup>31</sup>

Perhaps this is unsurprising. Demands for social equality come most clearly from egalitarian social movements' efforts to change unjust legal and social structures.<sup>32</sup> But implementing the statutes and doctrinal innovations that such movements achieve involves common law-esque processes, and the common law tends to be concerned with individualized rather than systemic harms. Within labor and employment law at least, social equality may be most tractable as a normative frame for critique and reconstruction.

That is not meant as a criticism of Bagenstos's article. In this era of increasing inequality, when much legal scholarship "fairly drips" with efficiency analysis,<sup>33</sup> his argument that basic employment regulations reflect first principles of social justice is both timely and illuminating. Many labor and employment scholars and activists intuitively feel that unfair workplace practices are a question of justice. Bagenstos's argument from social equality ratifies that sentiment.

---

"industrial pluralist" view of labor relations); *id.* at 1511 (defining industrial pluralism as the "view that collective bargaining is self-government by management and labor").

30. *See, e.g.,* Wal-Mart Stores v. Dukes, 131 S. Ct. 2541, 2553 (2011) (finding robust statistical evidence of gender disparities in promotion insufficient for a class-action disparate impact claim in the absence of evidence that such disparities resulted from a centralized company policy); Ricci v. DeStefano, 557 U.S. 557, 593 (2009) (holding that an employer engages in disparate treatment discrimination by disregarding test results that overwhelmingly favored white over minority applicants where, if used as the basis for promotions, test results would create a prima facie case for disparate impact).

31. *See, e.g.,* Bagenstos, *supra* note 3, at 229 (discussing how social equality "offers a critical lens" on current doctrine); *id.* at 244–47 (explaining why the employment at will doctrine threatens social equality).

32. *See* Elizabeth Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 319–20 (1999) (noting the role of "democratic equality"—Anderson's term for an ideal quite similar to Bagenstos's "social equality"—in motivating egalitarian social movements).

33. Bagenstos, *supra* note 3, at 229.