During Her Installation as the Charles Nagel Professor of Constitutional Law & Political Science, Pauline Kim discussed the changing role of constitutional rights for private and public sector workers.

Kim opened her address with a reference to a 1991 article by Joseph Grodin who believed that much of contemporary employment law could be understood in terms of bringing constitutional values into the private sector workplace. At the time, public sector workers, in fact, had rights analogous to citizens in a political community, and their employers were subject to constitutional standards and laws. However, matters were more tenuous in the private sector, Kim explained. Grodin argued that both statutory and common law were bringing constitutional values into private workplaces, and he believed this trend would continue into the future.

Nearly 20 years later, we now know Grodin’s prediction was wrong. The trend he identified has slowed and even halted, with far less legislative activity aimed at protecting workers and with common law courts cutting back on pro-employee doctrines, Kim said. Instead, a strange reversal has occurred. Rather than constitutional protections being extended to private sector workers, the earlier analogy between public and private workplaces is now being used to justify cutting back constitutional rights of public employees. In several recent cases, Kim explained, there has been an implicit assumption that public sector employees should have no more constitutional protections than private sector employees.

However, Kim contended that rules in the private sector are not an appropriate guide for interpreting constitutional standards in the public sector. Since public employees are in a sense “our” employees, Kim argued that we should take a greater interest in their work conditions and be concerned with whether those conditions comport with our society’s basic values. While our interest in seeing that government work is performed competently and efficiently demands some deference to managerial judgment, it would be a mistake to assume that public interest always coincides with the interest of the public manager, she said.

Transparency is an equally important goal, and protecting employee rights will often serve the goal of transparency. Pegging public employees’ rights to the rules of the private sector leaves them far too vulnerable, Kim stated, as the private sector is subject to market forces, union action, and frequently shifting legislation. Constitutional rights were meant to be more durable.

“How workers are treated in the private workplace also implicates fundamental societal values and interests,” Kim said. Restricting their rights threatens the freedom and dignity of individual workers, she argued. Just as restraints are essential to protecting our democracy, respecting constitutional values in the workplace not only protects workers, but often serves the public interest as well.

Kim is a nationally recognized expert on employment law and judicial decision-making. She has written widely on issues such as job security, employee privacy, the federal judiciary, and the influences on judicial decision-making and is the co-author of one of the leading textbooks on work law. Kim served as the law school’s associate dean for research and faculty development from 2008 to 2010 and was the recipient of the law school’s first John S. Lehmann Research Professorship in 2007–08. She is a member of the American Law Institute (ALI) and an adviser to the ALI’s Restatement of Employment Law.

Nancy Staudt, the Class of 1940 Research Professor of Law at Northwestern University, introduced Kim during the October 28, 2010 installation ceremony. Chancellor Mark S. Wrighton and Kent Syverud, dean and the Ethan A.H. Shepley University Professor, also gave remarks.

“In addition to her teaching and service, the Nagel professorship recognizes Pauline’s demonstrated commitment to groundbreaking empirical research that is contributing greatly to the field of employment law,” Syverud said.

The Nagel professorship was made possible through the estate of Daniel Noyes Kirby, who received his bachelor’s degree in 1886 and his law degree in 1888, both from Washington University. The professorship is named for Kirby’s law partner, Charles Nagel, LLB 1875. Nagel served as secretary of commerce and labor in President Taft’s cabinet and was a member of both the Republican National Committee and the Missouri House of Representatives. He first became prominent in the legal field through his work as regular counsel to the Augustus Busch family. A part-time lecturer in the areas of constitutional law and medical jurisprudence, Nagel also served on the Washington University Board of Directors.