EXPLAINING THE SPREAD OF AT-WILL EMPLOYMENT AS AN INTERJURISDICTIONAL RACE TO THE BOTTOM OF EMPLOYMENT STANDARDS

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I. INTRODUCTION

The employment-at-will rule[1] is a default rule that courts apply when parties in an employment relationship have failed to specify the duration of that relationship. Courts in forty-nine of fifty states apply this rule.[2] The rule, succinctly stated, is that absent a prior agreement, either the employer or the employee may terminate the employment relationship at any time for any lawful reason without notice.[3]

In the late 1800s and early 1900s, the at-will rule replaced the English rule, described by William Blackstone, that employment should be presumed to be for a year, or "throughout all the revolutions of the respective seasons."[4] The

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1. For discussions of the at-will rule and its provenance, see generally Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-at-Will: The True Origins of the Doctrine*, 17 BERKELEY J. EMP. & LAB. L. 91 (1996) [hereinafter Ballam, *Exploding the Original Myth*]; Deborah A. Ballam, *The Traditional View on the Origins of the Employment-at-Will Doctrine: Myth or Reality?*, 33 AM. BUS. L.J. 1 (1995) [hereinafter Ballam, *Traditional View*]; Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551 (1990); Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L. 85 (1982); Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679 (1994); Theodore J. St. Antoine, *You're Fired!*, 10 HUM. RTS. 32 (1982); and Clyde Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976).

2. Montana is the outlier. *See* Wrongful Discharge From Employment Act, MONT. CODE ANN. §§ 39-2-901 to -915 (2007).

3. *See, e.g.*, Feinman, *supra* note 1, at 118.

4. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 413 (Univ. of Chi. Press 1979) (1765).

at-will rule often is attributed[5] to Horace Gay Wood, who described it in an 1877 treatise.[6] Over the next forty years, judges in most American states adopted the rule.[7] How and why the rule spread, however, has been the subject of considerable academic debate. This Essay argues that the at-will rule spread because states were economically pressured to keep their labor markets competitive with other states, thus precipitating a "race to the bottom" in employment standards.

The prevailing wisdom is that the at-will rule spread because of a judiciary fixated, from about 1890 to 1930, on laissez-faire reasoning and freedom of contract.[8] However, during this same time period, courts often imposed at-will terms on parties who clearly had intended to contract for something other than at-will employment.[9] As Professor Sanford Jacoby has explained, this refusal to consider party intent was inconsistent with the then-prevailing contractualist judicial philosophy.[10] For this reason, Samuel Williston, the leading contract scholar of the time, considered the at-will rule a deviation from general contract principles.[11]

Professor Jacoby proposes that weak American trade unions allowed the at-will rule to be imposed on manual laborers, and the rule then spread to white collar workers.[12] Professor Jay Feinman, on the other hand, suggests that the at-will rule actually spread in the opposite direction—from salaried mid-level managers to manual workers.[13] Feinman concludes from this that the spread of at-will employment must have been a product of industrialization.[14] As the American economy grew from local to national and the means of production shifted from artisanal labor to large factories, mid-level managers became more important, prevalent, and potentially powerful.[15] The emergence of the at-will

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5. *See, e.g.*, St. Antoine, *supra* note 1, at 33 (describing the at-will rule as having "spr[u]ng full-blown . . . from [Wood's] busy and perhaps careless pen").

6. H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 280–83 (1877).

7. *See, e.g.*, Feinman, *supra* note 1, at 126–27; Morriss, *supra* note 1, at 688.

8. *See, e.g.*, Phung v. Waste Mgmt., Inc., 491 N.E.2d 1114, 1118 (Ohio 1986) (Brown, J., dissenting); Mary Ann Glendon & Edward R. Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C. L. REV. 457, 458 (1979); Jacoby, *supra* note 1, at 116.

9. *See, e.g.*, Odom v. Bush, 53 S.E. 1013, 1014, 1016 (Ga. 1906) (finding that plaintiff was employed at-will notwithstanding facts that plaintiff had given up a job, sold his house and possessions, invested the proceeds in the defendant's business, moved hundreds of miles to establish the new plant, and existed on a subsistence salary while the new plant was being established).

10. Jacoby, *supra* note 1, at 116–18.

11. *See* 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS 60–63 (1920).

12. Jacoby, *supra* note 1, at 85–86.

13. *See* Feinman, *supra* note 1, at 130–31.

14. *See id.* at 131–32.

15. *See id.* at 132–33.

rule gave capitalists the ability to re-assert control over the workplace and entitlement to profits.[16]

Professor Andrew Morriss "explodes the myth" that at-will employment was linked to industrialization by demonstrating that the first states to adopt at-will employment tended to be western populist states and southern states, not the northeastern states presumably dominated by capital and big business.[17] Morriss's observation is valid, but his conclusion that this necessarily disproves any linkage between at-will employment and industrialization[18] should be rejected. Instead, it may have been precisely *because* the western and southern states were underindustrialized that they were among the first to adopt the at-will rule. Underindustrialized states needed a way to attract capital, and one of their options was to offer attractive employment rules to capitalists deciding where to build their next factory.

In any event—and more importantly—once the first underindustrialized states adopted the rule, other underindustrialized states would have been compelled to follow suit to remain economically competitive with the early adopters. Industrialized states would then have been compelled to adopt the rule, as well, to maintain their competitive advantage in the labor market. The adoption of the at-will rule by a handful of underindustrialized states, therefore, precipitated an interjurisdictional race to the bottom[19] in employment standards, culminating in the universal adoption of the at-will rule. This competitive labor market-based explanation for the spread of the at-will rule is consistent with contemporaneous attempts to regulate child labor, to establish an unemployment insurance program, and to set a minimum wage.

Although the focus of this Essay is on labor market conditions that existed as the United States was transitioning from a local to a national economy, the implications resonate today, as the United States and other developed countries transition from national to international economies. Just as underindustrialized states once obtained a competitive advantage in the national labor market by adopting at-will employment, so are underindustrialized countries today obtaining a competitive advantage in the global labor market through low wages and un- or underregulated working conditions. Likewise, just as industrialized states once sought to regain their competitive advantage in the national labor market by standardizing many employment terms (originally by

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16. *Id.* at 133.

17. Morriss, *supra* note 1, at 681, 753.

18. *See id.* at 753, 763.

19. "Top" and "bottom" are necessarily relative terms. A free-market economist like Richard Epstein might argue, for example, that at-will employment is at the "top" and that overregulation of the labor market is at the "bottom." *Cf.* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 951 (1984) (arguing in favor of employment contract constructions that "advance individual autonomy and . . . promote the efficient operation of labor markets"). This Essay, however, adopts the terminology used in most of the race-to-the-bottom literature and assumes that the "top" represents worker (investor, environmental, etc.) protection.

adopting at-will employment and later by setting wage rates through the Fair Labor Standards Act), the United States today is attempting to brake the race to the bottom in the global labor market by proposing an international trade framework that would standardize many employment terms such as child labor, forced labor, collective bargaining, and discrimination. Other aspects of the American experience with labor market competition may also prove instructive for developed countries addressing the international labor market.

II. THE EMPLOYMENT-AT-WILL RULE

In 1765, William Blackstone wrote in his Commentaries that the length of employment should be presumed to be a year, or "throughout all the revolutions of the respective seasons; as well when there is work to be done, as when there is not."[20] Blackstone's rule, predicated on the presumption of a largely agricultural workforce, was designed in part to avoid opportunism.[21] Because farmworkers worked long hours during the growing season but little during winter, they were at risk of being discharged in late fall after the harvest.[22] Likewise, the employer was at risk of workers leaving or demanding unreasonable wages during the summer and early fall.[23] Blackstone's rule also was designed in the shadow of earlier English statutes, such as the Statute of Artificers, which forbade hirings for less than a year as a means of restricting labor mobility,[24] and the Poor Laws, which used a test of residence and employment to determine which community was responsible for supporting a pauper.[25]

Scholars disagree about the extent to which Blackstone's rule was transported to the American colonies and later followed in American states. Professor Jacoby asserts that "[t]he colonies followed English usage" of employment for a set term.[26] In contrast, Deborah Ballam argues that at-will employment was common in practice, and at least to some extent reified in law, starting in the colonial period.[27] Professor Feinman describes American law from colonial days to the mid-1800s as "a confusion of principles and rules."[28]

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20. BLACKSTONE, *supra* note 4, at 413.

21. *See id.*; Ballam, *Traditional View*, *supra* note 1, at 1–2.

22. Ballam, *Traditional View*, *supra* note 1, at 2.

23. *Id.*; *cf.* Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 10–11 (1993) (arguing that modern employees and employers face similarly shifting risks of opportunism throughout the employment life cycle).

24. *See generally* Donald Woodward, *The Background to the Statute of Artificers: The Genesis of Labour Policy, 1558–63*, 33 ECON. HIST. REV. 32 (1980) (describing the policy goals motivating the Statute of Artificers and other Tudor-era labor laws).

25. *See* Ballam, *Traditional View*, *supra* note 1, at 2; *see also* 1 C.B. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT 39 (1913) (commenting on the statutory relationship between paupers and guardians).

26. Jacoby, *supra* note 1, at 91.

27. Ballam, *Exploding the Original Myth*, *supra* note 1, at 98.

28. Feinman, *supra* note 1, at 122.

In the colonies, he explains, day laborers tended to be employed at will, while agricultural laborers and domestic servants were usually hired on a yearly basis.[29] During the 1800s, though, he finds that "whatever consensus [had] existed about the state of the law dissolved."[30]

In any event, scholars seem to agree that most American states did not formally begin to adopt the at-will rule until Horace Gay Wood, a New York State treatise writer, published Master and Servant in 1877.[31] Wood wrote:

> [T]he rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. . . . It is competent for either party to show what the mutual understanding of the parties was in reference to the matter; but unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party . . . .[32]

Wood was not claiming to have invented a new rule. Instead, he thought that he was accurately summarizing an existing majority rule. Scholars have since questioned whether Wood correctly interpreted the law. Theodore J. St. Antoine, for example, has described the at-will rule as having "spr[u]ng full-blown . . . from [Wood's] busy and perhaps careless pen."[33]

The controversy centers on the four cases cited in Wood's Footnote 4.[34] None of the holdings of these cases are directly on point. Two of the cases were employee victories[35]—weak support for a supposed legal rule giving employers an unfettered right to fire. One of the cases did not involve an employment contract at all, but rather a contract between the U.S. Army and a private company for the transportation of goods.[36] The final case involved a

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29. *Id.*

30. *Id.*

31. *See* Ballam, *Exploding the Original Myth*, *supra* note 1, at 92–93 (discussing scholarship on Wood's statement of the at-will rule); *cf.* Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405 (1967) (citing a post-1877 case, *Payne v. Western & Atlantic Railroad Co.*, 81 Tenn. 507 (1884), for the "traditional rule" that an employer has absolute power of discharge and can terminate employment "'even for cause morally wrong'"). As of 1876, only seven states applied some form of an at-will rule. *See* Morriss, *supra* note 1, at 700 tbl.II.

32. Wood, *supra* note 6, at 272.

33. St. Antoine, *supra* note 1, at 33.

34. For a thorough discussion of these cases and evaluation of the quality of Wood's scholarship, see generally STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW: CASES AND MATERIALS 53–54 (2007); Feinman, *supra* note 1; and Freed & Polsby, *supra* note 1.

35. Tatterson v. Suffolk Mfg. Co., 106 Mass. 56, 59 (1870); Franklin Mining Co. v. Harris, 23 Mich. 115, 116–17 (1871).

36. Wilder v. United States (Wilder's Case), 5 Ct. Cl. 462, 462 (1869), *rev'd*, 80 U.S. 254 (1871).

bartender who lived on the employer's premises; when he was fired, he challenged his eviction but not his discharge.[37]

Regardless of the rule's provenance, it quickly became the national norm.[38] As Feinman points out,

> Whatever its origin and the inadequacies of its explanation, Wood's rule spread across the nation until it was generally adopted. New York, for example, . . . adopted the rule in 1895, the Court of Appeals noting that the rule was "correct" and by then widely in use. Charles Labatt, author of the next great master and servant treatise and proponent of a different rule, in 1913 conceded that Wood's rule was the law in a "great majority of the states," and Williston, bemoaning the failure of the courts to adhere to true contract principles, admitted the universal application of Wood's employment at will rule.[39]

Thus, by the end of the 1930s, nearly every state had formally adopted the at-will rule.[40]

The at-will rule that courts adopted, however, was not identical to the at-will rule that Wood had described. Wood had described the at-will rule as a default rule and noted that parties to an employment arrangement were free to contract for a fixed term of employment.[41] Early cases, however, show that courts interpreted the rule as making it very difficult for employees to demonstrate that the parties intended anything other than at-will employment.[42] As Jacoby points out, courts invariably concluded that "permanent" or "lifetime" employment contracts were at-will, even in cases where the employees had bargained for long-term employment by agreeing to drop injury claims against their employers.[43]

Such decisions were common through the 1950s. One example is *Skagerberg v. Blandin Paper Co.*,[44] in which an employer promised an employee "permanent" employment in return for the employee's acceptance of a job offer, rejection of a competing offer, and purchase of a supervisor's home.[45] When the employee challenged his subsequent discharge, the court dismissed the case, stating that "[i]n case the parties to a contract of service expressly agree that the employment shall be 'permanent[,]' the law implies,

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37. DeBriar v. Minturn, 1 Cal. 450, 451 (1851).

38. *See* Morriss, *supra* note 1, at 688.

39. Feinman, *supra* note 1, at 126–27 (citing Martin v. N.Y. Life Ins. Co., 148 N.Y. 117 (1895); LABATT, *supra* note 25, at § 159 n.2; and WILLISTON, *supra* note 11, at § 39).

40. *See* Morriss, *supra* note 1, at 700 tbl.II.

41. Wood, *supra* note 6, at 272.

42. *See* Morriss, *supra* note 1, at 684.

43. Jacoby, *supra* note 1, at 117–18.

44. 266 N.W. 872 (Minn. 1936).

45. *Id.* at 873.

not that the engagement shall be continuous or for any definite period, but that the term being indefinite the hiring is merely at will."[46]

In 1959, the at-will pendulum began to swing in the opposite direction. In *Petermann v. International Brotherhood of Teamsters, Local 396*,[47] a California appellate court held that the employer's right to fire an at-will employee could be limited by considerations of public policy in a situation where the employee was terminated for refusing to commit perjury.[48] Since the mid-seventies, courts have eroded the at-will rule by applying contract and tort principles to restrict employers' ability to fire employees.[49] Courts, both federal and state, are far more likely today than they were forty years ago to enforce employer promises made orally[50] or in employee handbooks[51] and to apply the covenant of good faith and fair dealing[52] to employee discharges. Courts also are more likely to apply tort doctrines like wrongful discharge in violation of public policy[53] and intentional infliction of emotional distress[54] to employee discharges and other adverse employment actions. Similarly, Congress and state legislatures have passed statutes prohibiting discrimination (including discharge) on such bases as "race, color, religion, sex,"[55] pregnancy,[56] national origin,[57] age,[58] disability,[59] and now, perhaps, an employee's genetic information.[60]

Today, the at-will rule remains the default employment rule in every state but Montana[61] but is subject to myriad exceptions. Beginning with Lawrence

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46. *Id.* at 873–74 (citation omitted).

47. 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

48. *See id.* at 27.

49. *See* Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 12–13 (1988).

50. *See, e.g.*, Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 885 (Mich. 1980).

51. *See, e.g.*, Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1258, *judgment modified*, 499 A.2d 515 (N.J. 1985).

52. *See, e.g.*, Metcalf v. Intermountain Gas Co., 778 P.2d 744, 748 (Idaho 1989), *modified*, Sorensen v. Comm Tek, Inc., 799 P.2d 70 (Idaho 1990).

53. *See, e.g.*, Nees v. Hocks, 536 P.2d 512, 515–16 (Or. 1975) (in banc).

54. *See, e.g.*, Agis v. Howard Johnson Co., 355 N.E.2d 315, 317–18 (Mass. 1976).

55. 42 U.S.C. § 2000e-2(a) (2000); *e.g.*, 43 PA. CONS. STAT. ANN. § 955 (West 2007).

56. *E.g.*, 42 U.S.C. §§ 2000e(k), 2000e-2(a); *see, e.g.*, Dallastown Area Sch. Dist. v. Commonwealth, Pa. Human Relations Comm'n, 460 A.2d 878, 880 (Pa. Commw. Ct. 1983).

57. *E.g.*, 42 U.S.C. § 2000e-2(a); 43 PA. CONS. STAT. ANN. § 955.

58. *E.g.*, 29 U.S.C. § 623 (2000); 43 PA. CONS. STAT. ANN. § 955.

59. *E.g.*, 42 U.S.C. § 12112 (2000); 43 PA. CONS. STAT. ANN. § 955.

60. *See* Karen L. Werner, *Discrimination: Genetic Nondiscrimination Measure Approved by House Panel Despite Scope, Impact Issues*, 57 DAILY LAB. REP. (BNA) A-1 (Mar. 26, 2007), *available at* 57 DLR A-1, 2007 (Westlaw) (discussing proposed legislation "that would prohibit employers and health insurers from discriminating against individuals on the basis of genetic information").

61. *See* Wrongful Discharge From Employment Act, MONT. CODE ANN. §§ 39-2-901 to -

Blades's trailblazing 1967 article,[62] scholars have widely criticized the rule as an anachronism.[63]

III. EXPLANATIONS FOR THE SPREAD OF THE AT-WILL RULE

All but two of the states that adopted the at-will employment rule in the forty years after Wood wrote his treatise did so by judicial decision rather than by statute.[64] These courts made "little attempt to support the adoption of the rule with arguments or analysis" and often provided little or no citation to authority.[65] For this reason, it is probably impossible to know for certain why a given court or judge decided to adopt the rule. The best that researchers can do is examine other social, political, and legal trends and infer causation from juxtaposition. Commentators have proposed several possible explanations.

The first proffered explanation is that the at-will rule is the product of a judiciary fixated on laissez-faire reasoning and freedom of contract. At-will employment became firmly entrenched in the United States at about the same time the Supreme Court was invalidating, on due process grounds, multiple legislative attempts to regulate the employment relationship.[66] Therefore, many courts and commentators have assumed that courts readily adopted the rule of at-will employment because that rule was consistent with the prevailing judicial orthodoxy of laissez-faire contractualism.[67]

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915 (2007).

62. Blades, *supra* note 31, at 1404–05.

63. *See, e.g.*, 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, 106–08 (1997); Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631, 675 (1988); Daniel J. Libenson, *Leasing Human Capital: Toward a New Foundation for Employment Termination Law*, 27 BERKELEY J. EMP. & LAB. L. 111, 118 (2006); Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 9–10 (1993); Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 67 (1988); Summers, *supra* note 1, at 484.

64. *See* Morriss, *supra* note 1, at 700 tbl.II. The two states adopting the at-will rule by statute during that period were the Dakota Territory (now North and South Dakota) and Montana. *Id.*

65. *Id.* at 697.

66. *See, e.g.*, Adair v. United States, 208 U.S. 161, 178, 180 (1908), *overruled in part by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 186–87 (1941); Lochner v. New York, 198 U.S. 45, 53, 64 (1905), *overruled in part by* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 422–24 (1952); *cf.* Muller v. Oregon, 208 U.S. 412, 421 (1908) (acknowledging the "general right to [freedom of] contract" under the Fourteenth Amendment but upholding protective legislation for women as an exception to that rule, on the basis that their "physical structure and the performance of maternal functions place [them] at a disadvantage in the struggle for subsistence . . . especially . . . when the burdens of motherhood are upon" them).

67. *See, e.g.*, Morriss v. Coleman Co., 738 P.2d 841, 852 (Kan. 1987) (Herd, J., concurring) ("The doctrine of employment-at-will and termination without cause is a carry-over from 19th Century laissez faire economic philosophy . . . ."); Pierce v. Ortho Pharm. Corp., 417

As described in Part II, though, the at-will rule adopted by courts at the turn of the nineteenth century was different from the at-will rule Wood had articulated in 1877.[68] Wood's rule was a default rule, while the judicial version of the rule was virtually impermeable.[69] Williston, and later Jacoby, explained that a strict contractarian would have considered rate of pay (such as "income of $1000 per month") to be evidence "that the parties intended the employment to last at least for one such period" of payment.[70] Most courts, however, refused to do so.[71] Moreover, a strict contractarian would have considered the parties' intent in construing contracts for "permanent" or "lifetime" employment.[72] Courts instead construed such contracts reflexively as at-will employment contracts.[73] Thus, while Wood's default rule was largely contractualist because an employee could rebut the presumption with evidence that the parties intended otherwise,[74] the judicial version of the rule was anti-contractualist because it made party intent essentially irrelevant.[75] Therefore, the at-will rule adopted by courts at the turn of the nineteenth century represented not laissez-faire contractualism, but rather a doctrine whereby an employer has nearly absolute control over employment terms.[76]

A.2d 505, 509 (N.J. 1980); Kurt H. Decker, *Pennsylvania's Whistleblower Law's Extension to Private Sector Employees: Has the Time Finally Come to Broaden Statutory Protection for All At-Will Employees?*, 38 DUQ. L. REV. 723, 731 (2000); Matthew W. Finkin, *Shoring Up the Citadel (At-Will Employment)*, 24 HOFSTRA LAB. & EMP. L.J. 1, 24–25 (2006) (noting "the judiciary's . . . wholehearted embrace of *laissez-faire* in the last quarter of the nineteenth century, captured by the at-will rule . . ."); Matthew C. Palmer, Note, *Where Have You Gone, Law and Economics Judges? Economic Analysis Advice to Courts Considering the Enforceability of Covenants Not to Compete Signed After At-Will Employment Has Commenced*, 66 OHIO ST. L.J. 1105, 1112 (2005) ("Coupled with the laissez faire economic philosophy that reigned supreme at the time, the employment at will doctrine became established as a fundamental aspect of labor relations."); Matthew White, Comment, *Conscience Clauses for Pharmacists: The Struggle to Balance Conscience Rights with the Rights of Patients and Institutions*, 2005 WIS. L. REV. 1611, 1628 ("The employment-at-will doctrine is an extension of the venerable laissez-faire notion that, in most cases, it is better to keep the law away from how private individuals manage their capital.").

68. *See supra* text accompanying notes 41–43.

69. *See supra* text accompanying notes 41–43.

70. WILLISTON, *supra* note 11, at 62; Jacoby, *supra* note 1, at 117 (quoting *id.*).

71. WILLISTON, *supra* note 11, at 61–62; Jacoby, *supra* note 1, at 117.

72. Jacoby, *supra* note 1, at 117; *see* WILLISTON, *supra* note 11, at 62.

73. WILLISTON, *supra* note 11, at 61; Jacoby, *supra* note 1, at 117.

74. *Cf.* Feinman, *supra* note 1, at 130 (arguing that Wood's original rule was not purely contractualist because "an artificial presumption of terminability was introduced; the parties' intentions were secondary, to be considered only rarely to rebut the presumption").

75. WILLISTON, *supra* note 11, at 61–62; Jacoby, *supra* note 1, at 116–18.

76. *See* Morriss, *supra* note 1, at 690 (noting that the at-will rule constituted "an active state intervention in favor of employers rather than [the] state neutrality" implied by the term *laissez faire*).

Jacoby points out that a variety of socio-legal developments preceded the formal adoption of the at-will rule by courts in the late 1800s and early 1900s.[77] These developments, including changes in laws that had permitted settlement by hiring, the lack of criminal enforcement of long-term employment contracts, and the absence of a rule requiring notice before termination of employment, facilitated the shift in presumption from Blackstone's annual hiring to at-will employment.[78] Jacoby demonstrates that the formation of trade unions in the United States precipitated the formal adoption of the at-will rule.[79] American courts were hostile toward unions, so the unions relied on legislation, such as laws prohibiting discriminatory dismissals and yellow-dog contracts, and collective bargaining agreements to protect workers.[80] Courts reacted by asserting that employers nonetheless had the "'fundamental right' to dismiss trade unionists at will"[81]—an assertion readily adapted to salaried employees as well.[82]

Feinman builds on this observation by pointing out that salaried workers and mid-level managers, rather than manual workers, brought the cases in which the at-will rule was originally adopted.[83] From this, Feinman offers a third explanation for the spread of the at-will employment rule: "[T]he rule was an adjunct to the development of advanced capitalism in America."[84] As the American economy grew from local to national and the means of production shifted from artisanal labor to large factories, professionals and mid-level managers became more important, prevalent, and potentially powerful.[85] Thus, they "might have been expected to seek a greater share in the profits" and degree of control over the companies for which they worked.[86] The at-will rule made the employment of these mid-level employees precarious and permitted owners to reassert absolute control over the workplace and entitlement to profits.[87] At-will employment, then, was "the ultimate guarantor of the capitalist's authority over the worker."[88]

Andrew Morriss, on the other hand, argues that the spread of at-will employment was unrelated to industrialization.[89] He compares the dates that

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77. *See* Jacoby, *supra* note 1, at 103–08.

78. *See id.*

79. *See id.* at 120–22.

80. *Id.* at 121–22.

81. *Id.* at 122, 126 (quoting Adair v. United States, 208 U.S. 161, 180 (1908), *overruled in part by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 186–87 (1941)); *see also, e.g.*, *Adair*, 208 U.S. at 172–76 (concluding that the Fifth Amendment prohibited Congress from interfering with employers' freedom of contract).

82. Jacoby, *supra* note 1, at 126.

83. Feinman, *supra* note 1, at 130–31.

84. *Id.* at 131.

85. *Id.* at 131–32.

86. *Id.* at 133.

87. *Id.*

88. *Id.* at 132–33.

89. Morriss, *supra* note 1, at 681.

various states formally adopted the at-will rule[90] with state-by-state patterns of industrialization[91] and concludes that the correlation was both negative and not particularly strong.[92] For example, the first states to adopt the rule through the common law were Maine (1851) and Mississippi (1858),[93] while Pennsylvania (1891) and New York (1895)—which together accounted for approximately one-fifth to one-third of the national economy—were relative latecomers.[94] The pattern of adoption was from the underindustrialized West and South to the industrialized East.[95] Morriss therefore proposes a fourth explanation for the spread of the at-will rule. Noting that the rule was adopted sooner in states where supreme court judges were popularly elected than in states with appointed judges,[96] Morriss concludes that courts adopted the rule in an effort to keep difficult employment contract disputes out of the courts.[97]

Morriss's conclusion, however, does not correspond with his evidence. He may be correct that employment cases were difficult for judges and juries to evaluate, and that judges in the South and West, where judges were few and distances large, would have been particularly attracted to a legal rule that effectively kept these cases out of the courts.[98] But many types of cases present difficult issues of proof; Morriss does not explain why employment cases were singled out for a particularly restrictive legal rule. More importantly, Morriss provides no link between his observation that the at-will rule was adopted sooner in southern and western states with popularly elected judges and his conclusion that judges desired to keep employment cases out of the courts. If anything, his conclusion is counterintuitive. One would expect that judges elected by a population "influenced by Populist and Granger rhetoric against large employers"[99] would be less, not more, likely to adopt the decidedly pro-employer rule of at-will employment.

IV. AT-WILL EMPLOYMENT AND THE RACE TO THE BOTTOM OF EMPLOYMENT STANDARDS

Morriss's observation that early adoption of the at-will employment rule was negatively correlated to the degree of industrialization is valid, but his conclusion that this disproves any linkage between the two is unsatisfactory. Instead, it was precisely *because* the underindustrialized states were underindustrialized that they were among the first to adopt the at-will rule.

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90. *Id.* at 700 tbl.II.
91. *Id.* at 724–36.
92. *Id.* at 736.
93. *See id.* at 704.
94. *Id.* at 703.
95. *Id.* at 703.
96. *Id.* at 745.
97. *Id.* at 753.
98. *See id.*
99. *Id.*

Industrialized states then joined the underindustrialized states in an interjurisdictional race to the bottom of employment standards.

The concept that interjurisdictional competition can create a race to the bottom in law was pioneered by William Cary, who observed that various states, particularly Delaware, were competing for corporate charters by reducing shareholder protection.[100] In recent years, legal scholars have observed similar phenomena in other areas of law such as trust law,[101] property law,[102] "banking law, environmental law, income taxation, local-government law, bankruptcy, and family law."[103] Similarly, the adoption of employment at-will was a race to the bottom in employment law.

A. The Race to the Bottom in At-Will Employment

By the late 1800s, industrialization and advances in transportation had transformed the American economy from local to national.[104] Capital, however, was still heavily concentrated along the East Coast, particularly in New York and Pennsylvania.[105] Western and southern states, by contrast, remained largely agrarian.[106] A major challenge of these states, therefore, was attracting capital investment and creating jobs.

One way that underindustrialized states may have attempted to attract capital and foster job creation was by offering employment rules that would

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100. William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 663, 705 (1974); *cf.* Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 254–62 (1977) (describing this race to the bottom and its effect on the capital market).

101. Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1039 (2000).

102. *See generally, e.g.*, John V. Orth, *"The Race to the Bottom": Competition in the Law of Property*, 9 GREEN BAG 47 (2005) (discussing this phenomenon).

103. Sterk, *supra* note 101, at 1038–39. *See generally, e.g.*, Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473 (1991) (local government); Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745 (1995) (family law); Henry N. Butler & Jonathan R. Macey, *The Myth of Competition in the Dual Banking System*, 73 CORNELL L. REV. 677 (1988) (banking law); Louis Kaplow, *Fiscal Federalism and the Deductibility of State and Local Taxes Under the Federal Income Tax*, 82 VA. L. REV. 413 (1996) (income taxation); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (environmental law); David A. Skeel, Jr., *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 TEX. L. REV. 471 (1994) (bankruptcy law).

104. *See* HAROLD G. VATTER, THE DRIVE TO INDUSTRIAL MATURITY: THE U.S. ECONOMY, 1860–1914, at 61 (1975).

105. *See* Morriss, *supra* note 1, at 703.

106. *See* VATTER, *supra* note 104, at 89; *see also* Morriss, *supra* note 1, at 701 (noting that the Northeast was more heavily industrialized than the West and South during the late 1800s).

have been attractive to capitalists. Other things being equal, capitalists would have preferred to build manufacturing facilities in the Northeast, where they could take advantage of proximity to product markets, access to international shipping lanes, and a larger workforce (fed by immigration) that was more accustomed to factory work than were their rural contemporaries. The advent of at-will employment in southern and western states might have served as an inducement for capital investment in those states. This inducement would have seemed particularly attractive because it came just as manufacturers were beginning to wrest control over the production process from artisanal craft unions, leading to significant labor unrest in the Northeast.[107]

This argument is strengthened by the fact that the South and West at this time actively sought to attract capital investment from the Northeast. In the South, for example, agricultural employment declined significantly during this period; southern leaders sought to offset this decline by attracting cotton textile factories and promoting logging, lumber production, and mining.[108] Similarly, the West and Midwest experienced a growing interest in manufacturing as a way to offset a slow decline in the relative importance of farming and to take advantage of the availability of raw materials, water power, and a seasonable climate.[109]

It would be a stretch to claim that Maine or Mississippi, two of the earliest adopters of the at-will rule,[110] adopted the rule specifically to attract capital investment. Indeed, the first courts to adopt the at-will rule may have done so by mere happenstance; no one can definitively explain why the rule was first adopted. The main point here is that once the rule was adopted in a handful of underindustrialized states, other such states would have felt economic pressure to follow suit to avoid being left behind in attracting capital. The industrialized states would then have felt similar pressure to adopt the rule to maintain their competitive advantage in the labor market.

B. Contemporaneous Labor Market Races to the Bottom

Contemporaneous attempts to regulate child labor, to set a minimum wage, and to create unemployment insurance programs illuminate the market forces that created this economic pressure.

By 1916, when the last of the states were formally adopting the at-will rule,[111] some progressive states had also passed restrictive child labor legislation.[112] Though the Supreme Court had upheld state legislation

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107. *See* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 24–25 (2004).

108. VATTER, *supra* note 104, at 89–90.

109. *See id.* at 99, 102–05.

110. Morriss, *supra* note 1, at 704.

111. *Id.* at 700 tbl.II.

112. *See* Hammer v. Dagenhart, 247 U.S. 251, 273 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941). I thank my colleague, John Bickers, for his insights on this case.

protecting women and children from the Lochnerian labor marketplace,[113] these states were nevertheless at an economic disadvantage compared to states that permitted child labor.[114] Because the dormant commerce clause prohibited states from erecting barriers to interstate commerce,[115] the states with restrictive standards could not stop products made with child labor at the border. Further, Congress could not directly regulate child labor at the national level on account of the Supreme Court's then-restrictive interpretation of Congressional power under the interstate commerce clause.[116] Thus, Congress attempted to level the playing field among the states in 1916 by prohibiting, for one month, the shipment in interstate commerce of goods created by child labor.[117] The idea behind this restriction was that increasing the storage costs of the goods would offset their competitive advantage, thereby protecting states with restrictive child labor legislation from competitive pressure by the other states.[118]

When the federal statute came before the Supreme Court in *Hammer v. Dagenhart*, the Court explicitly recognized Congress's intent to ameliorate the interstate competitive pressure that was retarding the progress of meaningful child labor laws: "[T]hat the unfair competition, thus engendered, . . . be controlled by closing the channels of interstate commerce to manufacturers in those [s]tates where the local laws do not meet what Congress deems to be the more just standard of other [s]tates."[119]

Nonetheless, the Court struck down the statute as unconstitutional.[120] This early effort at national child labor legislation illustrates vividly the competitive labor market pressure pushing states toward a race to the bottom in employment standards—a pressure that was not relieved until Congress passed (and the Supreme Court upheld[121]) the child labor provisions in the Fair Labor Standards Act of 1938 (FLSA).[122]

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113. *See, e.g.*, Muller v. Oregon, 208 U.S. 412, 421 (1908) (upholding protective legislation for women).

114. *See Hammer*, 247 U.S. at 273.

115. *See* Gibbons v. Ogden, 9 U.S. 1, 199–200 (1824) ("[W]hen a State proceeds to regulate commerce . . . among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do.").

116. *See generally* United States v. E.C. Knight Co., 156 U.S. 1 (1895) (discussing the commerce power); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 243 (2d ed. 2002) ("Between the late nineteenth century and 1937, the Court was controlled by conservative Justices deeply committed to laissez-faire economics and strongly opposed to government economic regulations. Many federal laws were invalidated as exceeding the scope of Congress's commerce power . . . .").

117. Act of Sept. 1, 1916, Pub. L. No. 64-249, 39 Stat. 675.

118. *See Hammer*, 247 U.S. at 273.

119. *Id.*

120. *Id.* at 277.

121. *See* United States v. Darby, 312 U.S. 100, 125 (1941) (upholding the entire Act in the context of a dispute over the wage and hour provisions).

122. Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2000)).

A second example of labor market forces pressuring states toward minimalist employment standards is unemployment insurance. Early state attempts to create such a program failed because states were afraid that enacting a payroll tax would put their employers at a competitive disadvantage vis-à-vis employers in other states.[123] Only one state, Wisconsin, was able to enact an unemployment insurance statute[124] prior to passage of the 1935 federal Social Security Act (SSA).[125] Unsuccessful state efforts to create unemployment insurance programs prior to 1935 do not represent a race to the bottom, as those states were already at the bottom, but they do illustrate how labor market forces tend to impede any effort to reverse course and create a "race to the top."

A third example of labor market pressure, this time coming a few decades after most states had formally adopted the at-will rule, is the set of minimum wage provisions of the FLSA.[126] The FLSA was most strongly opposed by legislators in southern states who believed it would eliminate the competitive advantage those states enjoyed in the form of low wage rates.[127] Likewise, the FLSA was most strongly supported by legislators in northern states who believed the statute would slow the rapid flow of capital and jobs from, for example, northern textile mills to southern textile mills, where labor was cheaper.[128] The FLSA therefore represented an effort by the industrialized states to avert a race to the bottom in wage rates by federally fixing a rate that was relatively high by southern standards.

C. Reacting to a Race to the Bottom

In a national economy, no state wants to put its employers at a competitive disadvantage by adopting a major new employment law that is radically different from, and more costly than, the norm. Both the FLSA and the SSA represent one way that states "on the top" can react to competing states that are

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123. *See Economic Security Act: Hearings Before the Comm. On Ways and Means*, H.R., 74th Cong. 32 (1935) (Report of the Comm. on Economic Security) [hereinafter *ESA Hearings*]; Willborn et al., *supra* note 34, at 617.

124. *ESA Hearings*, *supra* note 123, at 27; WILLBORN ET AL., *supra* note 34, at 617.

125. Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301–1397jj (2000)).

126. 29 U.S.C § 206 (2000).

127. *See* Robert K. Fleck, *Democratic Opposition to the Fair Labor Standards Act of 1938*, 62 J. ECON. HIST. 25, 26 (2002); Andrew J. Seltzer, *The Political Economy of the Fair Labor Standards Act of 1938*, 103 J. POL. ECON. 1302, 1315 (1995); *see also* GAVIN WRIGHT, OLD SOUTH, NEW SOUTH: REVOLUTIONS IN THE SOUTHERN ECONOMY SINCE THE CIVIL WAR 224–25 (1986) (suggesting that "the South succumbed to the 'Yankee plot' to impose northern wages" as a means to eliminate black jobs).

128. *See* Fleck, *supra* note 127, at 26; Seltzer, *supra* note 127, at 1315 ("[T]here is strong evidence that northern legislators sought to impose national wage standards in order to prevent the flow of capital to the South."); *see also* Henry C. Simons, *Some Reflections on Syndicalism*, 52 J. POL. ECON. 1, 10–11 (1944) (describing this as the motivation for northern workers' and employers' lobbying efforts).

"at the bottom" or, having significantly changed their laws, are threatening a race to the bottom. They can overcome market forces and stay on top by using a federal statute to impose new labor market terms on a national scale. This pattern has repeated several times over in the adoption of major workplace legislation such as the prohibition of discrimination[129] and the regulation of workplace safety.[130]

The race to the bottom sparked by the early adopters of employment at-will represents a second approach states can take to an impending race to the bottom: "If you can't change 'em, join 'em." While the at-will rule was spreading, *Hammer*,[131] *Lochner*,[132] and their progeny would have made a federal statute regulating the term of employment unthinkable. States that had not yet adopted the at-will rule thus had either to adopt the at-will rule or to put their employers at a competitive disadvantage in the labor market.

States facing an impending race to the bottom of employment standards also have a third possible approach—offset the competitive disadvantage by creating a competitive advantage elsewhere in the labor market. New York, for example, might have ceded the southern flight of textile jobs, but attempted to offset that loss by creating a highly educated workforce and concentrating on the creation of jobs in the financial sector.

In the meantime, an explanation must be proffered for the "outlier" states. If labor market forces create a race to the bottom in employment standards, why was Wisconsin able to pass an unemployment statute in 1932? What explains the contract and tort inroads in employment at-will that have occurred in the last fifty years? And how is it that Montana deviates from the at-will-rule norm?

The answer to these questions, in part, is that only *major* changes in law will shift the competitive landscape sufficiently to create a race to the bottom. Minor tinkering at the margins—such as, arguably, the contract and tort inroads[133]—is not likely to put one state at a significant competitive advantage or disadvantage. The same is true of Montana's statute, which was designed less as an employee windfall and more as a mechanism for relieving employers of high damage awards.[134] The Montana statute gives employees just-cause

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129. *See, e.g.*, 42 U.S.C. §§ 2000e-2 to 2000e-3 (2000).

130. *See* Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–78 (2000).

131. Hammer v. Dagenhart, 247 U.S. 251 (1918).

132. Lochner v. New York, 198 U.S. 45 (1905).

133. One could certainly argue, of course, that the contract and tort inroads were, and are, far more than "minor tinkering." Nonetheless, because all states adopted contract and tort inroads to some degree, and did so incrementally over a period of years, these changes likely would not have affected the labor market to the same degree as an abrupt change in the standard of baseline employment or the imposition of a significant payroll tax.

134. Libenson, *supra* note 63, at 130–31. State workers' compensation statutes similarly were designed in part to relieve employers of high tort damage awards. Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 800 (1982).

employment only after a period of probationary at-will employment;[135] recent decisions concerning the statute even suggest that employers may be able to extend the probationary period indefinitely.[136] Similarly, Wisconsin's unemployment insurance statute was significantly less onerous for employers than was the later-passed federal unemployment statute, and therefore may not have created the type of overwhelming labor market pressure that precipitates a race to the bottom (or prevents states at the bottom from climbing back up).[137]

On the other hand, Wisconsin may be an example of a fourth way that states can react to race-to-the-bottom labor market forces. It was probably no accident that Wisconsin—home of Robert LaFollette, the most powerful progressive in the country[138]—was the only state to pass an unemployment statute prior to the New Deal. Strong political willpower, therefore, may be an antidote to race-to-the-bottom labor market forces, at least in the short term.[139]

V. RACING TO THE BOTTOM IN A GLOBAL LABOR MARKET

Though the focus of this Essay is on labor market conditions that existed as the United States transitioned from a local to a national economy, the implications resonate today as the United States and other developed countries transition from national to international economies. The developed-country labor markets today are in much the same economic position as the northeastern states were in the late 1800s:[140] Relative to most of the developing world, they have an educated, highly paid workforce.[141] The labor market in developing

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135. MONT. CODE ANN. § 39-2-904 (2007); Richard A. Lord, *The At-Will Relationship in the 21st Century: A Consideration of Consideration*, 58 BAYLOR L. REV. 707, 712 n.6 (2006).

136. Lord, *supra* note 135, at 713–14 n.6.

137. The Wisconsin statute capped an employer's payroll tax at 2%, Harold M. Groves & Elizabeth Brandeis, *Economic Bases of the Wisconsin Unemployment Reserves Act*, 24 AM. ECON. REV. 38, 44 (1934); George Wheeler & Eleanor Wheeler, *Individual Employer Reserves in Unemployment Insurance*, 43 J. POL. ECON. 246, 250 (1935), while the federal statute capped the tax at 3%, *see ESA Hearings*, *supra* note 123, at 33. Moreover, the Wisconsin statute created employer-financed company reserve plans that allocated the cost of maintaining the unemployed within specific industries, *see* Groves & Brandeis, *supra*, at 38–40; Wheeler & Wheeler, *supra*, at 246–47, whereas the federal statute created a general unemployment fund, *see ESA Hearings*, *supra* note 123, at 32–33.

138. *See* David P. Thelen, *Author's Preface* to ROBERT M. LA FOLLETTE AND THE INSURGENT SPIRIT, at vii, vii (Oscar Handlin ed., 1976).

139. I am indebted to my colleague, John Bickers, for suggesting this argument.

140. The analogy is not a perfect one. For example, capital markets are far more liquid today than they were in the late 1800s, and the common currency among American states made it impossible for southern states to amass capital by artificially deflating their exchange rates, as China is doing today. Nevertheless, the labor market dynamics are similar.

141. *Cf.* David A. Gantz, *The United States and the Expansion of Western Hemisphere Free Trade: Participant or Observer?*, 14 ARIZ. J. INT'L & COMP. L. 381, 393 (1997) (noting the apparent demand in Mexican factories for "high-tech U.S.-source parts" and the concomitant increase in jobs for "well-trained U.S. workers").

countries today is similar to the labor market that existed in southern and western American states in the late 1800s—largely agrarian, with aspirations to industrialization and a surfeit of low-skilled, inexpensive labor.[142] Just as the South and West once obtained a competitive advantage in the national labor market by adopting at-will employment, so developing countries today are obtaining a competitive advantage in the global labor market through low wages and unregulated or underregulated working conditions.[143]

Of course, important differences exist between the nineteenth century United States labor market and the twenty-first century global labor market, such as radically different political, economic, and social systems. Nonetheless, existing wage disparities and increasing global trade disparities set the stage for another possible race to the bottom in employment standards, this time on a global scale. As the American experience with at-will employment, child labor, unemployment insurance, and the minimum wage illustrate, the United States and other developed countries can respond in four non-mutually-exclusive ways.

First, developed countries could attempt to regain their competitive advantage in the global labor market by standardizing employment terms on a global scale, much as northeastern states did by passing a national minimum-wage law.[144] In fact, the United States recently proposed an international trade framework that would standardize many employment terms such as child labor, forced labor, collective bargaining, and discrimination.[145] The framework would require signatories to free trade agreements "to 'adopt, maintain, and enforce' . . . International Labor Organization language on core labor standards."[146] This approach to standardizing employment terms has two obvious limitations. First, it would not standardize all employment terms; it would not, for example, impose an international minimum wage. Second, the terms that are standardized would be binding only on signatory countries.

The second method by which developed countries could respond is the "if you can't change 'em, join 'em" approach. Perhaps this is one explanation for the relaxation—some might say evisceration—in recent decades of federal laws governing workplace safety and union membership, as well as the historically low minimum wage.[147] Or perhaps these trends are merely a product of the current political winds, subject to change with the next election.

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142. *Cf., e.g., id.* at 383 ("Mexico . . . desired . . . that the NAFTA would serve as a tool for medium- and long-term economic development and industrialization.").

143. *Cf., e.g., id.* at 392–93 (noting that "NAFTA-related job losses" in the U.S., though ultimately negligible, are largely attributable to the move of low-skilled U.S. factory jobs to Mexico).

144. *See supra* text accompanying notes 126–128.

145. *Administration, Democrats Reach Deal on Labor Standards in Free Trade Pacts*, 75 U.S.L.W. 2680, 2680 (2007).

146. *Id.*

147. *See* Stephen Labaton, *Congress Passes Increase in the Minimum Wage*, N.Y. TIMES, May 25, 2007, at A12. In May 2007, more than a decade after the last increase, Congress

Third, developed countries could attempt to offset the high price of labor by adding value. One such attempt would require these countries to substantially increase their investment in the enhancement of worker productivity through education, worker training, and technology.

Fourth, developed countries could demonstrate strong political willpower by keeping their wages high and maintaining safe working conditions despite the countervailing market forces. Perhaps if developed countries set a positive example, the rest of the world will follow, much as the American federal government followed Wisconsin's lead in creating unemployment insurance. This approach, however, may come with a short-term cost as employers in developed countries continue to send jobs overseas to countries where labor costs are lower. The alternative, though, may be to join the developing world in a race to the bottom in employment standards.

VI. CONCLUSION

Scholars have proposed several theories to explain why states rapidly adopted the at-will employment rule after Horace Gay Wood described it in his 1877 treatise. A new theory may also apply: that the spread of the at-will rule can be explained as a race to the bottom in employment standards created by interjurisdictional competition for investment capital and jobs. Today, the United States and other developed countries face a similar scenario, this time on a global scale, as developing countries gain an advantage in the global labor market by offering low wages and unregulated or underregulated working conditions. Developed countries may learn a lesson from America's experience with the at-will rule and use creative lawmaking to halt this race to the bottom of international employment standards.

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enacted legislation (as part of an Iraq War spending bill) that will increase the national minimum wage by $2.10 over a two-year period. *Id.*; *see* Fair Minimum Wage Act of 2007, 29 U.S.C.A. §§ 201, 206 (Supp. 2007).