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# THE ANTI-REPUBLICAN ORIGINS OF THE AT-WILL DOCTRINE

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## I. INTRODUCTION

Perhaps the most significant, and most subordinating, employment doctrine in the United States today is the employment at-will rule.[1] Most American workers can be discharged at will. The at-will rule provides that employers may precipitously discharge employees for any reason, a bad reason, a ridiculous reason, or no reason at all.[2] Because almost all employees depend upon their jobs for their basic economic support, the precariousness of the at-will situation means that employees' economic security often hinges more on pleasing their managers than on doing good work. Moreover, as a result of the at-will rule, workers must submit to their managers' demands about matters that have little to do with their work. This criticism is not new; it is widely recognized in the literature[3] and documented in many, many court cases. Yet despite widespread

* Josephine Witte Professor of Law, University of Iowa College of Law. I thank Chris Drahozal, Lee Fennell, Jay Feinman, Joe Slater, Cesar Rosado, Alan Hyde, Charlotte Garden, William Forbath, Elizabeth Tippett, Mark Osiel, and Steven Siegel for their excellent comments. I also thank the participants in Princeton's LAPA program for their engaged commentary and the members of the Thirteenth Amendment Project, who have deepened my analysis. I thank Editor Felice Batlan, Christina Pössel, Victoria Barnes and the anonymous reviewers of the American Journal of Legal History for their insightful comments. I also thank Noelle Sinclair and Amy Koopman of the Iowa Law Library for their diligence and success in pursuing obscure sources. This research was informed by twelve years engaged in the American Law Institute's Restatement of Employment Law, which unfortunately chose to use the at-will doctrine as its core, despite the best efforts of many experts.

[1] *See infra* Part II.

[2] The notable exception is actually called an exception—the public policy exception—which prohibits termination for failing to do something illegal, whistleblowing, or claiming a legal entitlement like worker's compensation. Some bad reasons are prescribed by the public policy exception to the at-will doctrine in those states that recognize the exception; some are not. *See* Lea VanderVelde, *Where Is The Doctrine Of Good Faith In The Restatement Of Employment Law?*, 21 EMP. RTS. & EMP. POL'Y J. 335 (2018). This exception is narrow in some states and non-existent in others. *See generally* AMERICAN LAW INSTITUTE, RESTATEMENT ON EMPLOYMENT LAW (2015) [hereinafter ALI, EMPLOYMENT LAW]. Yet the public policy exception may not protect employers from coercing employees to engage in unethical activity if that activity is not illegal or contrary to a defined statutory prohibition, and some states do not recognize the public policy exception at all. *Id.* at Chapter 2, Section 2.01
It goes virtually without saying that employers can always discharge employees for good reasons. A good reason is just cause for discharge.

[3] Philosopher Elizabeth Anderson recognizes it in her recent book: ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) (2017). Law professor Clyde Summers described the phenomena in detail: Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65 (2000).

criticism of this injustice,[4] the at-will rule continues to operate in most states in some variation and still applies to most American workers.[5]

Of course, most responsible employers do not press their advantage to its full extent, that is, terminate workers who they wish to target without warning or explanation. (Replacing a worker already adapted to a job entails some cost to the employer, after all.) Yet, the fact that legally employers can do so, leaving workers without recourse—even when the decision is capricious or mean-spirited—implicitly threatens employees' well-being by continually subordinating them to their employers' favor. In fact, research shows that the longer one remains at the same job, the more significant the threat becomes, and the more employees feel that they must toe the line, acceding to even unreasonable employer demands.[6]

Surprisingly, as this article demonstrates, the discharge at-will rule first appeared in the written legal record immediately after Reconstruction, a reform movement animated by strong *anti*-subordination principles. Between 1864 and 1872, the nation engaged in debate about worker equality and free labor, as 4,000,000 enslaved persons were freed and introduced into a newly evolving system of wage work. As the United States Congress formulated new work conditions for freedmen, creating a labor system that secured their autonomy was a major theme driving the national reform. The congressional debates recognized that the employers' power to hold their employees in their "thrall" was a threat to American democracy. [7] The debates repeatedly emphasized that laborers must be independent and autonomous if the American nation was to become a true republic.

These systemic concerns were national in scope and virtually universal in their application to working men.[8] As Senator Henry Wilson stated, the Radical Republicans were concerned about the freedmen because they were the "most oppressed" laboring men in the country.[9]

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[4] The overwhelming majority of legal scholarship about at-will condemns the rule because it accentuates further the power imbalance between employers and employees. *See generally* Summers, *Divine Right*, *supra* note 3; Matthew Finkin et al., *Employment Contracts: Termination (Working Group on Chapter 2 of the Proposed Restatement of Employment Law)*, 13 EMP. RTS. & EMP. POL'Y J. 93 (2009). For further critique of the at-will rule, *see Symposium on The Restatement of Employment Law*, 21 EMP. RTS. & EMP. POL'Y J. 335 (2018) [hereinafter *Symposium*]. It is estimated that there are more than 300 works of legal scholarship critiquing and condemning this rule. *See* Joseph E. Slater, *The "American Rule" that Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL'Y J. 53, 53 n.4 (2007).

[5] *See* ALI, EMPLOYMENT LAW, *supra* note 2, Chapter 2, Section 2.01.

[6] Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8 (1993).

[7] *See infra* Part III.A.

[8] For reasons explored in my work with Gabriel Chin, Chinese immigrants were viewed as an exception to this norm. *See* Lea VanderVelde & Gabriel Chin, *The Seeds of Chinese Exclusion As The Reconstruction Congress Debates Civil Rights Inclusion*, ASIAN PAC. AM. L.J./TSINGHUA CHINA L. REV. (forthcoming 2020). I use the term "men" intentionally, because few in the Reconstruction Congress concerned themselves with the working conditions of women.

[9] Senator Henry Wilson stated, "[W]e have advocated the rights of the black man because the black man was the most oppressed type of the toiling men of this country. I tell you, sir, that the man who is the enemy of the black

Another congressman stated that working men "should have an opportunity to reap, under an equitable system *more* for the laborer, the reward of the months . . . it has cost to open this country to the institutions of freedom and compensated labor."[10] Some feared even then that capitalism, which would continue to grow in strength, could replace slavery as a means of oppressing laboring men.[11] As slavery had diminished the social standing of all working men, it was expected that the circumstances of all workers should improve with its abolition.[12]

Yet in a surprising turn-about, the at-will doctrine first surfaced in the written record after Reconstruction. The at-will doctrine was the antithesis of republican ideals of enhancing worker autonomy and ran contrary to the Radical Republicans' anti-subordination agenda of placing workers on an equal footing with their employers.[13] While there has been some excellent scholarship on the at-will doctrine's origins in the late 1870s, no work to date has situated its emergence in the heady national discussions of labor reform that immediately preceded it. So far, the at-will rule's history has been analyzed in terms of the shift from agricultural jobs to

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laboring man is the enemy of the white laboring man the world over. The same influences that go to keep down and crush down the rights of the poor black man bear down and oppress the poor white laboring man." CONG. GLOBE, 39th Cong., 1st Session 337 (Jan. 22, 1866) (remarks of Sen. Wilson).

In this article, I follow a formatting convention in citing the Congressional Globe of citing speaker, chamber of the Congress, Congress, and date rather than the Bluebook convention of citing session and page number of session volume. The reason for this change is that the Congressional Globe is available online at a number of websites:
at Google Books:
https://www.google.com/books/edition/The_Congressional_Globe/oJzd1i4YnQAC?hl=en&gbpv=0
at Internet Archive:
https://archive.org/search.php?query=title%3A%28%22Congressional+Globe%22%29&sort=-date
at the University of North Texas Digital Library at: https://digital.library.unt.edu/explore/collections/CGLOB/
at Hein On-Line:
https://home.heinonline.org/titles/Slavery-in-America-and-the-World-History-Culture--Law/Congressional-Globe/?letter=C&t=5391
Although the formatting and search functions of these platforms differ, it is no longer necessary to resort to the large volumes and oversize pages of the Congressional Globe in hard copy when locating the source of citation. The more elegant citation form gives the modern reader the essential citation location.

[10] CONG. GLOBE, 38th Cong. (Mar. 18, 1864) (remarks of Rep. Julian of Indiana in extolling the Homestead Act) (emphasis added). Julian spoke in terms of "the fathers and brothers and friends of these brave men" who had fought as soldiers. This rhetorical flourish extends the scope to all working men.

[11] *See infra* Part III.E. As Representative Shannon stated: "Now let it never be forgotten that our mission also is to elevate and disinthrall that most injured and dependent class of our fellow white men from their downtrodden and degraded condition, that they too may be men, and enjoy the independence and rights of manhood. And, Mr. Speaker, that Utopia was much nearer its realization three years ago than most of us dreamed." CONG. GLOBE, 38th Cong. (June 14, 1864) (remarks of Rep. Shannon). Representative Julian similarly described capitalism as a threat. "The maxim of the slaveholder that 'capital should own labor' will be as frightfully exemplified under the system of wages slavery . . . as under the system of chattel slavery, which has so long scourged the southern States." CONG. GLOBE, 38th Cong. (Mar. 21, 1864).

[12] *See generally* Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989).

[13] *See infra* Part III & Part IV.

industrial jobs in American society, the ascendency of formal contract over status,[14] and the ascendency of capitalism.[15]

This article provides a different perspective from which to view the doctrine's emergence, that is, as a retrenchment of railroads' authority over their workers at the very time that Reconstruction's egalitarian reform efforts were fading. Furthermore, when the rule was introduced, it was described in terms that applied not only to the railroads' day laborers, but to all employment settings. This article demonstrates that the at-will rule actually operates as the antithesis of free contract. It creates a substitute *status*, rather than a "contract," as the ubiquitous unspoken default rule. The employee's job is held only at their employer's pleasure, at will. With the at-will rule, the ideal of worker independence was overtaken by a doctrine that actually reinforced employee vulnerability to employer authority by extending that authority to issues far beyond the workday and beyond the designated tasks that the employee signed on for.[16] The at-will rule functions to insulate employer abuses and unreasonable demands from common law correction and further evolutionary development.[17]

The new evidence presented in this article shows that the rule was first proposed by persons who were closely associated with railroad interests. The article further demonstrates that the contemporary legal literature contained alternative, more worker-friendly rules based upon customs. Moreover, the rule's announcement was met with critique based upon Reconstruction values: the threat that at-will control posed to the republic's free institutions. That tension between the at-will rule's subordinating nature and republican anti-subordination principles was reflected in objections that the at-will rule empowered employers so substantially as to harm the nation's republican possibilities, much as slavery's oligarchy once had done.[18]

By viewing the rule's emergence against the backdrop of Reconstruction which preceded it, the rule can be seen more clearly as "anti-republican," which was the term the Reconstruction Congress used to describe regressive measures and regressive labor systems.[19] The at-will rule was not universally recognized before the late 1870s, despite its proponents' claims. Most treatise writers largely ignored at-will relationships as mere anomalies. And finally, despite the

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[14] The idea of the ascension of contract over status is attributed to Henry Sumner Maine. For the willingness of post-Reconstruction policy makers to buy into contract theory as the means to free labor, *see* AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998).

[15] Feinman points out that "contract theory has sometimes been identified as the source of the at-will rule." Jay Feinman, *The Development of the At-will Rule*, 20 AM. J. LEGAL HIST. 118, 124 (1976) (*citing* PHILIP SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE 130–37 (1969)).

[16] Anderson makes this point in ANDERSON, PRIVATE GOVERNMENT, *supra* note 3.

[17] Feinman describes the at-will rule as "the ultimate guarantor of the capitalist's authority over the worker." Feinman, *At-will Rule*, *supra* note 15, at 132–33.

[18] *See infra* Part II.

[19] *See infra* Part II. The terms, "unrepublican" and "anti-republican" were used interchangeably in the debates. In modern parlance, philosopher Elizabeth Anderson uses the term "republican unfreedom" to describe a lack of republican liberty. ANDERSON, PRIVATE GOVERNMENT, *supra* note 3, at 64.

prominence that at-will would later gain as a contract term, some authoritative treatises dismissed such an arrangement as a mere license, and not a contract at all. They explained that at-will as applied to a service relationship was simply so ephemeral and non-standard as to fail to meet the criteria necessary for a binding contract.[20] Yet on the strength of the at-will doctrine, the United States Supreme Court would later strike down progressive legislation as unconstitutional for interfering with freedom of contract.[21]

All legal history regarding labor must be set within the larger historical framework of the common law of master–servant relations, which dictated the terms for relationships through all of private life, from slaves to hirelings to wives and children. Blackstone's *Commentaries* on master and servant organized the legal rules into a system of formal inequality that subordinated servant to master.[22] In essence, this subordination was structured to authorize masters' exclusive legally enforceable privileges to command the lives of their servants as well as to provide masters with legal actions to constrain their servants. Servants, in turn, had almost no legally enforceable actions against their masters.[23] Moreover, Blackstone constructed the servant's legal status on the foundational platform of slave masters' total domination of their slaves' lives, rather than on the foundation of equal contracting parties.[24] Abolishing slavery therefore shook the very foundation of master and servant jurisprudence.

Reconstruction egalitarianism rejected such forms of domination. Radical Republicans injected a breath of fresh air as they criticized master–servant rules in the old structure. This presented an opportunity to redefine the relationship of working people to their masters. Egalitarian, levelling ethos guided the Reconstruction Congress as they brought about a revolution in basic rights and re-set the law in fundamental ways.[25] All workers were recognized

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[20] *See infra* Part V.

[21] Adair v. United States, 208 U.S. 161 (1908) (striking down federal legislation interfering with the at-will doctrine as an unconstitutional interference with liberty of contract); Coppage v. Kansas, 236 U.S. 1 (1915) (striking down state legislation interfering with the at-will doctrine as an unconstitutional interference with liberty of contract). *See also* Lochner v. New York, 198 U.S. 45 (1905).

[22] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, book 1, chapter 14. Blackstone stated that slavery did not exist, but maintained that involuntary servitude continued to exist. In his view, lifelong servitude was still permissible. His colloquial use of first names, "of John or Thomas," implies that these individuals may have been former slaves without last names, most likely people of color. "Yet, with regard to any right which the master may have acquired, by contract or the like, to the perpetual service of John or Thomas, this will remain exactly in the same state as before: for this is no more than the same state of subjection for life, which every apprentice submits to for the space of 7 years, or sometimes for a longer term." *Id.* at Part I. The Reconstruction Congress was quite clear that long-term servitude was abolished by the Thirteenth Amendment. *See infra* Part III.C.

[23] Lea VanderVelde, *Servitude and Captivity in the Common Law of Master-Servant: Judicial Interpretations of the Thirteenth Amendment's Labor Vision After Reconstruction*, 27 WM. & MARY BILL RTS. J. 1079 (2019).

[24] *Id.* at 1081-83.

[25] Bruce Ackerman calls these constitutional moments. BRUCE ACKERMAN, WE THE PEOPLE, VOLUME 2: TRANSFORMATIONS (2000). During the congressional debates, Congressman William H. Wadsworth of Kentucky remarked, "I did not mean it in any offensive sense. But if this is not a revolution I do not know what is." CONG. GLOBE, 38th Cong. (Jan. 25, 1864) (remarks of Rep. Wadsworth).

as entitled to the constitutional right to quit employment and leave their employers.[26] The right to quit employment was guaranteed as inviolable, as a necessary guarantee against involuntary servitude,[27] even when workers had signed written contracts.[28] Moreover, legal adjustments were needed for the newly freed workforce in a context in which the defeated masters sought to re-assert their dominance over their former slaves. This scrutiny also provided opportunities to dislodge the old hierarchical patterns entailed in the common law, as Congress specifically targeted subordination in work relations.[29] Thus, it is all the more surprising that such a subordinating doctrine as termination at-will made its first appearance so soon after this major, vital national movement toward worker parity.[30]

Blackstone's rule for employment duration, which was formulated on the norm of agricultural labor, provided that jobs lasted one year.[31] By the mid-nineteenth century, although legal sources still quoted Blackstone, this rule no longer suited non-seasonal workplaces, such as factories and railroads. Different customs had evolved in different kinds of employment settings to create durational standards that were much better suited to local expectations about the specific tasks of the employment.[32]

Yet when Horace G. Wood first announced the doctrine in *A Treatise on the Law of Master and Servant* (1877), at-will meant that the arrangement was moment to moment.[33] Wood claimed the rule was *uniform* across all work types, whether the rule was suitable to the situation or not. He described the rule in such a manner as to override customs and individual expectations,[34] and he also claimed that it was *inflexible* in governing most employment.[35] This meant that unfair termination claims were no longer judicially cognizable. Judges were denied the discretion to adjust the equities in the case, to recognize those moderating customs that existed in some workplaces, or to convene juries to ascertain the parties' true intent.

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[26] As Jim Pope has written, "[T]he inalienable right to quit can be explained as negating the 'involuntary' element of involuntary servitude. This definitional approach provides the irreducible minimum of constitutional protection. At the very least, the constitutional command that slavery and involuntary servitude 'not exist' must guarantee the right to be free from those conditions." James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"*, 119 YALE L.J. 1474 (2010). This position is supported by the opinions expressed in the Reconstruction debates. *See* VanderVelde, *Labor Vision*, *supra* note 12.

[27] Pope, *Contract*, *supra* note 26.

[28] *See infra* Part II.

[29] VanderVelde, *Labor Vision*, *supra* note 12, at 489–95 (analyzing congressional critique of the newly enacted race and labor codes in Virginia, Louisiana, South Carolina, and Georgia).

[30] Reconstruction congressmen were conscious that they were engaged in revolution.

[31] BLACKSTONE, COMMENTARIES, *supra* note 22, book 1, chapter 14.

[32] *See infra* Part VI.A.

[33] HORACE GAY WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (Albany, N.Y., J.D. Parsons, Jr. 1st ed. 1877).

[34] Feinman, *At-will Rule*, *supra* note 15, at 135.

[35] In announcing the rule, Horace G. Wood stated that "with us the rule is inflexible." WOOD, A TREATISE, *supra* note 33, at 265–66

This article first briefly summarizes how the at-will rule functions to subordinate employees. Second, it elaborates upon the profound overarching anti-subordination themes of the Radical Republican's debates in Congress as well as the list of specific initiatives targeted at equalizing power disparities. Furthermore, the Reconstruction Congress recognized that the Thirteenth Amendment minimally guaranteed workers' the right to quit their jobs, which is critical because it has been doctrinally embedded in the at-will rule's justification. Third, the article explores the republican counter-currents in treatises other than Wood's[36] and the dissenting opinion in the Tennessee Supreme Court case of *Payne v. Western and Atlantic Railroad*.[37] While Wood, a former railroad lawyer, advanced the at-will rule in his treatise, [38] other treatises imbued with a sense of republicanism advanced a different rule of duration based upon custom.[39] Finally, the article will examine the argument raised by some authorities that the at-will circumstances are so insubstantial a promise as to amount to no contract at all.

## II. THE AT-WILL RULE'S SUBORDINATING EFFECT

American workers are more susceptible to their employer's caprice than employees in any other Western country because they lack the most modest measures of economic stability and job security.[40] Law professor Clyde Summers recognized the doctrine's subordinating effect by bluntly stating, "[B]y giving total dominance to the employer, [the doctrine] endows the employer with the divine right to rule the working lives of its subject employees."[41] Philosophy professor Elizabeth Anderson describes the nature of an employer's power in terms of a dictatorship.[42] These statements are not hyperbole. As Anderson notes, "Employers' authority over workers . . . is sweeping, arbitrary, and unaccountable—not subject to notice, process or appeal."[43]

American workers lack even the right to advance notice that their employment will be terminated, something that would at least allow them to organize their affairs. While most employers do not exercise this power to their full advantage, there are hundreds of instances in the case law where employers abused customary social norms in discharging employees. There are examples where employers were permitted to act in mean-spirited ways described as "reprehensible" and others where they were allowed to dismiss employees when those

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[36] *Id. See infra* Part IV.B.

[37] Payne v. Western & A. R.R., 81 Tenn. 507, 519–20 (1884) (overruled on other grounds); Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915). For a discussion of dissents, see *infra* Part IV.C. Free labor dissents were also raised by dissenters in the *Slaughterhouse* cases. For a discussion of Justice Field's dissent, *see generally* William E. Forbath, *The Ambiguities of Free Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767.

[38] WOOD, TREATISE, *supra* note 33.

[39] For a discussion of Schouler's work, *see infra* Part IV.B.1.

[40] *See* Slater, *American Rule*, *supra* note 4, at n.4.

[41] Summers, *Divine Right*, *supra* note 3.

[42] ANDERSON, PRIVATE GOVERNMENT, *supra* note 3.

[43] *Id.* at 54.

employees objected to their employer's interference in their private, intimate, social, or political lives.[44] Given that employees rarely have the funds to challenge unfair dismissals in court, exactly at the time when they have lost their income, these cases are probably only the tip of the iceberg of instances of unjust employer treatment.

Since the employment at-will doctrine places employees' continued economic well-being at the caprice of their employers, the rule endows employers with the power to keep the employee on tenterhooks as to whether her employment is likely to continue, or be dropped abruptly.[45] Research demonstrates that when employers do press the at-will rule to its most severe extent, and employees do gather the resources to sue, they are surprised to learn that courts will not respond to inequities that violate social norms, all because of the at-will rule.[46] Yet despite these recognized inequities, even moderate suggestions to reform the law have not been implemented.[47] With few exceptions,[48] courts have generally helped employers hold the line on the at-will doctrine.

Moreover, the at-will rule renders employees especially vulnerable to employer domination because, as Joseph Slater has demonstrated, the doctrine tends to erode almost every labor protection that is provided by statutory law.[49] Slater shows that even where federal law bans certain reasons for discharge—such as race discrimination or union activity—the background at-

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[44] For a critique of the Restatement of Employment Law, see *Symposium*, *supra* note 4. S*ee generally* VanderVelde, *Good Faith*, *supra* note 2, at 335 *passim*. Rulon-Miller v. Int'I Bus. Mach. Corp., 208 Cal. Rptr. 524, 528–29 (Cal. Ct. App. 1984) (employer interfered with employee's choice of who to date); *see also* Frank v. Walmart, No. 0-220/89-937 (Iowa Ct. App. Aug. 30, 1990) (same issue); Bodewig v. K-Mart, 635 P.2d 657, 659–60 (Or. 1981) (employer asked employee be strip-searched in front of customer to satisfy customer's request that employee had not stolen her money); Hudgens v. Prosper, 243 P.3d 1275, 1277 (Utah 2010) (employee urged by employer to be waterboarded to demonstrate his commitment to selling for the company); Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 510–11 (1884) (overruled in part on other grounds); Hutton v. Watters, 179 S.W. 134, 137 (Tenn. 1915) (employee prevented from buying at a particular grocery store under penalty of discharge); Murphy v. Am. Home Prods. Corp., 112 Misc. 507, 508–09 (Sup. Ct. N.Y. 1982), modified by 448 N.E.2d 86 (Ct. App. N. Y. 1983) (subjecting employee to summary discharge in an intentionally embarrassing manner); Crump v. P&C Food Markets, Inc., 576 A.2d 441, 448–49 (Vt. 1990) (subjecting employee to interrogation by requiring employee to remain in a closed room without water or the privilege of using a bathroom under threat of discharge should she leave).

[45] *See generally* Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

[46] Pauline Kim, *Bargaining With Imperfect Information: A Study of Worker Perceptions of Legal Protections in an At-Will World*, 83 CORNELL L. REV. 105 (1997).

[47] For example, the moderate suggestion that employees be given two weeks' notice of termination has never been enacted or judicially recognized. Rachel Arnow-Richman, *Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination*, 66 FLA. L. REV. 1513 (2014). Montana is, of course, the exception, as it repealed the at-will doctrine by statute. Wrongful Discharge from Employment Act of 1987, Mont. Code Ann. § 39-2-901 (1987).

[48] The exceptions to the at-will rule vary by state and are summarized in a variety of sources, including ALI, EMPLOYMENT LAW, *supra* note 2.

[49] *See generally* Slater, *American Rule*, *supra* note 4.

will rule tends to exculpate the employers from explaining their actions in unilaterally terminating the employee-plaintiff, because at-will employees can be fired for no reason at all.[50]

Finally, employee efforts to obtain even the slightest reassurance of job security falter because employment negotiation about most matters is done orally. The at-will rule applies where the hiring is "general," in that it does not meet the technicality of stating a specific date when the job will end. Since stipulating a specific end date is extremely rare, the at-will rule applies almost everywhere.[51] First, most hiring is done by verbal offers and acceptances. There may be writings involved where newly hired employees sign up for taxes or benefits with a written series of forms, but these forms do not state the job's end date, the necessary feature under the doctrine to give the employee any job stability. Of course, there is no question that employers can always terminate employees "for cause," even when the job is secure, because an employee's misfeasance or malfeasance always constitutes a breach of contract. But it is rare indeed that an individual employee has the bargaining leverage to contract with an employer for a promise to only be terminated for "just cause."[52] If anything is specified in writing when an employee is hired, such as in an employment manual, it is most likely to state the legal language that the employment is "only at will."[53] Empirical studies conducted in four states demonstrate that most employees have no idea of what this language means. Most employees believe that it merely means they cannot be conscripted to work for their employers, and most employees expect their employers to be reasonable.[54]

Second, after an employee is hired, oral communication continues to be the normal medium of day-to-day workplace agreements. Although most employees cannot negotiate the terms of authority that employers hold over them,[55] they may occasionally receive the benefit of some verbal concession from their manager. For example, an employee may seek permission to leave early, or an employer may request that the employee take on different or extra tasks, promising

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[50] *Id.*

[51] The major exceptions are collectively bargained contracts, which routinely include "just cause" provisions. Another situation where job security is protected is in the case of star performers scheduled for a series of dates. *Id.* Moreover, the rule controls even where a specific term of employment is orally agreed upon but was not reduced to writing. *See, e.g.*, McInerney v. Charter Golf, Inc., 680 N.E.2d 1347, 1352 (Ill. 1997). In the at-will context, courts are reluctant to use promissory estoppel to enforce oral agreements. *See, e.g.,* Jarboe v. Landmark Community Newspapers of Indiana, Inc., 644 N.E.2d 118, 122 (Ind. 1994) (stating, "[W]e decline to authorize the use of promissory estoppel as a basis for general wrongful discharge damages.") ALI, EMPLOYMENT LAW, *supra* note 2.

[52] Unions once offered the promise of "just cause" protection to their employees through collective bargaining. Indeed, it was the most commonly sought contract provision. However, collective bargaining agreements cover fewer and fewer employees in either the private or public sectors. *See generally* Slater, *American Rule, supra* note 4.

[53] This represents a more recent turn in employment practices, after courts recognized that some employment manuals with elaborate discharge provisions might give rise to an interpretation that an employee could only be fired according to those provisions. Many employment manuals were precipitously rewritten to state that employment was "at will," without defining what that meant in language that employees could easily understand. *See* employment manuals collection (on file with author).

[54] Kim, *Imperfect Information*, *supra* note 46.

[55] ANDERSON, PRIVATE GOVERNMENT, *supra* note 3, at 57.

that the reassignment will only last a few days. In legal terms, the at-will rule undermines employees' ability to rely on such promises. Employees may think they have their supervisor's permission to leave early, but that does not legally stop the supervisor from changing his mind and firing the employee thereafter. Such concessions, even when couched in the language of promises, are deemed only courtesies that the employer is not obligated to honor, even after the employee has relied upon them. While employees can be held to any concessions that they make—to work longer, harder, faster or more cheaply—under threat of discharge, there is no effective enforcement for employer concessions of more beneficial treatment or better working conditions. An employee can quit, but has no way to hold the employer to the benefit of a promise. Casual promises such as these are rarely reduced to writing, not only because writing down every such agreement is too cumbersome, but, more importantly, employers have no incentive to commit the agreements to writing because unenforceability runs in their favor.[56] Thus, the at-will doctrine prevents workers from enforcing the numerous minor, casually made employer concessions that often keep the relationship going because employees risk discharge if they insist that their supervisor's promise be kept. In this way, the at-will rule actually frustrates the enforcement of employer promises that result from bargaining, and thus undermines rather than promotes contracting between the parties. When employer commitments are rendered unenforceable, and jobs can be terminated instantly, the relationship seems far from contract-like.[57]

While employees can quit, quitting often imposes additional costs on the employee, such as the forfeiture of unemployment insurance. As the following section demonstrates, employees were accorded the right to quit by the Constitution's Thirteenth Amendment, not as a means of justifying at-will employment.

The sole enforceable term of an at-will arrangement is payment for work that has already been performed. Employees cannot even legally insist that an agreed rate of pay continue. With no terms that are enforceable prospectively, the contract, such as it is, is unbreachable by one party, the employer.[58] Nineteenth-century treatise writers deemed it to be merely a license.[59] An "unbreachable contract" is an oxymoron. Yet a contract that lasts only from minute to minute is unbreachable.

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[56] The enforcement of oral promises of job security or other benefits runs into obstacles (such as the Statute of Frauds) when the term is contemplated as extending for more than a year. *See, e.g.*, discussion of the issue in Kestenbaum v. Pennzoil Co., 108 N.M. 20, 766 P.2d 280 (1988). Employers' preferences not to be held to any concessions that supervisors may make is often reflected in employment handbooks stating not only that the employment is at will but also that any changes to that agreement must be made by higher executives in the company in writing. *See* employment manuals collection, *supra* note 53.

[57] For further discussion of this point, *see infra* Part IV.B.4.

[58] Even the wage rate can be decreased from one day to the next by the unilateral action of the employer. The reason is that if the employment is at-will, one day's wage rate need not hold to the next day.

[59] *See infra* Part IV.B.4.

## III. THE RADICAL REPUBLICANS' ANTI-SUBORDINATION AGENDA

The Reconstruction Congresses' anti-subordination measures operated along multiple social, political, and economic dimensions. Abolishing servitude and reformulating new labor systems for the freedmen had the potential to at least dislodge, if not revise, the considerable employer prerogative of domination that had taken root in the American common law.[60] Since the congressmen's vision of free labor was clearly in tension with the received common law (as evidenced by congressional critiques of its rules,[61]) Reconstruction held the potential to unravel the more over-bearing, oppressive and hierarchical aspects of master–servant law.[62] There is considerable evidence that eliminating the subordinating aspects of the master–servant relationship and limiting capitalists' influence to its proper sphere was in the Radical Republicans' sights as they formulated necessary new work rules for freedmen, enacted additional labor statutes, and sought to move the nation toward free labor.[63]

### A. A republic of free laborers

The ultimate objective in the Radical Republicans' view was a fully functioning republic comprised of free and equal working men. A labor system in which workers were in relative parity with their employers was essential to achieving that kind of republic.

The Radicals sought not merely to release the slaves from bondage and destroy the "peculiar institution" that existed in the South, but also to end all forms of captive labor throughout the country.[64] It was also imperative to keep the South from instituting oppressive labor codes to maintain the masters' dominance over their workers. Congress sought to ensure workers were free from their employers' influence and brought into parity with them. This, the Radicals believed, was essential not only for the workers' benefit; it was essential for the nation in order to issue into existence the kind of republic that was the nation's true promise. Simply abolishing slavery was insufficient to that task. According to this view, the nation and its democratic institutions had been pervasively corrupted since its founding by the oligarchical slave power.[65]

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[60] *See generally* VanderVelde, *Labor Vision*, *supra* note 12.

[61] *Id.* at 489–95.

[62] For example: "The relation of master and servant in Great Britain is affected by the pressure of a costly Government, which draws from labor, through capital, the means to defray its annual expenses. Servitudes differ in degree and they differ in kind, but the most important difference of the two—the one that is at once the most significant and the least changeable—is the difference in degree; a man may be nominally free, but if he is a workman without capital, and lives in a state of society of which it may be said 'once a peasant always a peasant; once a factory operative always a factory operative;'. . . he has little to boast of his freedom . . . ." CONG. GLOBE, 38th Cong. (Jan. 9, 1865) (remarks of Rep. Elijah Ward). *See also* ANDERSON, PRIVATE GOVERNMENT, *supra* note 3 (*citing* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1995)).

[63] *See infra* Part III.D. & Part III.E.

[64] *See infra* Part III.C.

[65] HENRY WILSON, HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA (Boston, James R. Osgood & Co. 5th ed. 1878).

Radical change—returning the nation to its roots to ensure its growth as a republic—was necessary to reverse this corruption and set the nation back on the right track. Many of the leading members of Congress embraced that name, "Radical," as they did the word "Republican."[66] This long-range vision that looked beyond the immediate situation of the freedmen to the cumulative effect that dependency in working conditions had upon the healthy functioning of the United States as a republic is what I call "labor republicanism."[67] Such a republic required that the laws be structured so that laboring men were accorded equality, independence, respect, and opportunity for advancement.

Constitutional amendment itself was radical, but the Reconstruction Congress did not stop there. It actively pursued a broad and multi-faceted program of initiatives, enacting both statutes and further constitutional amendments pursuing an anti-subordination agenda.[68]

Slavery was criticized as "an unrepublican system of labor."[69] Slavery obstructed a republican form of government because owning a slave amplified the master's power in the republic, creating a sort of aristocracy as it correspondingly oppressed the slave. In order to achieve a republican form of government, these classes had to be equalized and levelled. Over the course of Reconstruction, Congress was given the opportunity to assess whether other labor systems were "unrepublican" as they worked out what features of free labor were essential to a well-functioning republic.

The reformers' language spoke in terms of dependent workers being in the "thrall" of others.[70] To be in the thrall of another was to be involuntarily or coercively under another's

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[66] During Reconstruction, as the Republican party was in its infancy and continuing to evolve, it is difficult to distinguish between those who embraced the term, "republican" for themselves because they were party adherents and those who embraced the term philosophically as the foundation of the American Constitution: "republican form of government." U.S. Constitution, Article IV, Section 2. Similarly, after the mid-term elections favored the Republican party, conservatives such as Senator Cowan changed their party affiliation, and sometimes even described themselves as "radicals." As Cowan stated: "[W]hen the time comes I am a Radical, too, along with my fellow-Senators here." CONG. GLOBE, 39th (Cong Dec. 11, 1866.)
It is not within the scope of this article to attempt to draw hard lines in the shifting political sands. In this article, I use the term "radical" in the more encompassing philosophical sense. I use the term "radical" to designate the most reform-minded leaders in Congress, recognizing that some to the lead on labor issues, and others on race issues. As David Montgomery wrote, the Radicals' dream was "that 'no distinction would be tolerated in this purified Republic but what arose from merit and conduct.'" DAVID MONTGOMERY, BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS, 1862–1872, at 73 (1967).

[67] This broader notion of a nation comprised of independent working people distinguished the labor republicans from other reformers favoring abolition. As W.E.B. Dubois recognized, reform was driven by two movements—"Labor-Free Soil, and Abolition." He described them as exhibiting "fundamental divergence instead of becoming one great party of free labor and free land." W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880, at 21–22 (1935).

[68] *See infra* Part III.D.

[69] CONG. GLOBE, 38th Cong. (Feb. 26, 1864) (remarks of Rep. Scofield of Pennsylvania).

[70] The archaic term "thralldom" was used with some frequency. Some version of the word "thrall" appears thirty-one times in the 39th Congress alone, including thirteen uses of "thralldom" (list on file with author).

control. It was the antithesis of freedom. Congressional efforts sought to make freedmen "masters of their time, their labor, and themselves."[71] Freedmen and all men needed to be able to make their own decisions independent of anyone else's control. "[T]he spirit of American institutions," one congressman stated, "is that condition of the people wherein each is at liberty to regulate his own domestic affairs according to his own judgment or caprice, only being careful [of his neighbor's rights]."[72]

The Republicans emphasized that America could only become a true republic when all working people could participate in the American institutions, and to accomplish that required that they be guaranteed some meaningful sphere of independence as social and political equals. Free labor is a concept of considerable ambiguity, as others have pointed out.[73] Freedom, of course, can mean "free from" and "free to." At its most limited, free labor meant simply to be "free from" working under some form of compulsion.[74] A broader notion, "free to" includes autonomy that working people could enjoy a certain sphere of independence to freely pursue their lives and livelihoods without obstacles in their way.[75] Philosopher Elizabeth Anderson adds that there is a third form of freedom, "republican freedom," which she defines as freedom from the domination of others.[76] This is the freedom envisioned by the Radical Republicans of the Reconstruction Congress.

For a republic to flourish, its citizenry had to be comprised of autonomous, self-sufficient working men who were free from the thrall of other men. Working people should not in any sense to be "at the mercy" of their employers.[77] "Let the voting masses of any country be composed of an independent yeomanry . . . each one bearing a fair share of the responsibilities of the Government . . . ."[78] Proposing the eight-hour day law in 1868, Senator Cole reminded his colleagues,

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71 CONG. GLOBE, 38th Cong. (Feb. 21, 1865) (remarks of Rep. G. Clay Smith, of Kentucky).

72 CONG. GLOBE, 38th Cong. (June 14, 1864) (remarks of Rep. Shannon).

73 Forbath, *supra* note 37; and VICTORIA C. HATTAM, LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES, 1806-1896 (1993); MARK A. LAUSE, FREE LABOR: THE CIVIL WAR AND THE MAKING OF AN AMERICAN WORKING CLASS (2015). Within its range of meanings, the concept served the interests of workers and some entrepreneurs.

74 According the James Pope: "Today, Thirteenth Amendment rights claims generally fall into one of two categories: rights to be free from certain forms of race discrimination, conceptualized as 'badges and incidents of slavery,' and rights of labor freedom, analyzed under the involuntary servitude clause." James Pope, *What's Different About The Thirteenth Amendment and Why Does It Matter*?, 71 MD. L. REV. 189, 192 (2011).

75 "A man may be a slave for a term of years as fully as though he were held for life; he may be a slave when deprived of a portion of the wages of his labor as fully as if deprived of all; he may be held down by unjust laws to a degraded and defenseless condition as fully as though his wrists were manacled . . . ." CONG. GLOBE, 39th Cong. (Feb. 1, 1866) (remarks of Rep. Donnelly).

76 ANDERSON, PRIVATE GOVERNMENT, *supra* note 3, at 45–46.

77 In their debate over the breadth of Thirteenth Amendment, Senators Henry Wilson and Edgar Cowan both agreed that the workers should not be "at the mercy" of their employer. CONG. GLOBE, 39th Cong. (Jan. 22, 1866).

78 CONG. GLOBE, 38th Cong. (June 14, 1864) (remarks of Rep. Shannon).

> Our Republic stands upon the intelligence of the people; it has no other foundation; and unless the people are provided by law with some protection against the requirement which is now put upon them by the exorbitant demands of capitalists, they will not be so well prepared to perform the duties of American citizenship.[79]

Still later, in proposing a Bureau of Labor to regulate the relations of capital and labor, Representative Shanks said, "The laboring people of this nation think today that they are subjected unjustly to capital; . . . it is the duty of this Congress to redeem them from that thralldom . . . ."[80]

### B. The right to quit, the right not to be held to service after the Thirteenth Amendment and in relation to the at-will doctrine

In setting the stage for understanding the at-will rule, one must take note of the centrality of the right to quit in the constitutional order. In recent decades, it has become routine to claim that the at-will doctrine is justified because the employee gains the right to quit employment in mutual exchange for suffering the employer's right to fire him at will.[81] The Reconstruction Congress did not see it that way: the right to quit was fundamental and constitutionally guaranteed. This view was virtually unanimous.

With the passage of the Thirteenth Amendment, workers could no longer be compelled to work either by law or private influence. It banned involuntary servitude. Thus, even labor formally secured under written, signed, and notarized contracts could not be compelled when the worker chose to quit, because he was no longer performing the job voluntarily.[82] By forbidding compelled labor, the Constitution inherently guaranteed workers immunity from compulsion and accordingly a right to quit.[83]

Even Senator Cowan, who was never a progressive voice in the debates and consistently urged only the most restrictive interpretations of the Thirteenth Amendment, concurred in this interpretation:[84]

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[79] CONG. GLOBE, 40th Cong. (June 24, 1868) (remarks of Rep. Cole.)

[80] CONG. GLOBE. 42nd Cong. (Dec. 13, 1871) (remarks of Rep. Shanks, proposing a bureau of labor). "It has been the pride of the Republican party, and of this age, that the labor of this country has been rescued to a very great extent from the hands of capital. It remains now for the Representatives of the people to see to it that labor does not go back into the hands of capital." *Id.*

[81] *See* ALI, EMPLOYMENT LAW, *supra* note 2 (cases in appendix).

[82] The 39th Congress also discussed this topic in the context of a bill concerning immigrant laborers whose passage to the United States had been paid under a contract for their labor. *See infra* Part III.C.

[83] *See* Pope, *Contract, supra* note 26. A few senators seem to have supported the minimal remedy that the only remedy for compelled labor was bringing a writ of habeas corpus, but the momentum of Reconstruction took most of the congressmen much further.

[84] For a portrait of Cowan's position in the debates, *see* VanderVelde, *Labor Vision, supra* note 12, at 476–84.

> Has [a legislature] declared that a contract for the performance of labor can be specifically performed, and that you can compel specific performance in her courts? If she has such a law (and that is the only way I know by which the laborer can be put at the mercy of the hirer in a contract for labor; it is the only possible and conceivable way apart from slavery) such law is *clearly void.*[85]

He went on to state that "there is no possible difficulty in obtaining a remedy for it anywhere and everywhere."[86]

The right to quit was a right to exit any relationship that held that person to labor. This was the Thirteenth Amendment's direct repudiation of the fugitive servant clause in the original Constitution.[87] In some ways, being able to quit was the ultimate republican act, something essential in order to be free from an employer's thrall.

The debates repealing the Fugitive Slave Law elaborated upon this issue. Senator Charles Sumner, of Massachusetts, one of the leading Radicals, argued with Maryland Senator Reverdy Johnson, the pro-slavery advocate who had successfully argued the *Dred Scott* case, over the meaning of "held to labor."[88] The two disagreed about whether *owning a man* was in any way different than *owning a man's services* by contracting to buy them from him and holding him to his contract to provide them. The Radicals maintained that holding a man to his contract to provide services or owning his labor was essentially owning the person himself.

The constitutional dimension of the right to quit *employment* distinguished it from other relationships of service and dependency. No other domestic relation in Blackstone's catalog of

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[85] CONG. GLOBE, 39th Cong. (Jan. 22, 1866) (remarks of Sen. Cowan) (emphasis added).

[86] *Id.*

[87] U.S. CONST. art. IV, § 2, cl. 3:

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

[88] CONG. GLOBE, 38th Cong. (Apr. 19, 1864).

> Mr. JOHNSON. [The honorable member, Mr. Sumner] says now that it applies only to a person who is under a contract to render service to the party from whom he has escaped. Where does he get that meaning? The words used are, 'any person held to service or labor under the laws of a State,' not under contract, and the apprentice would be included, and the indented servant would be included, not because he was an apprentice by contract, not because he was an indented servant by contract, but because by the law of the State that contract was one from which he could not escape, because by the law of the State he was bound, having entered into the contract, to render the service for which the contract stipulated. But if the law of the State gave to one man a right to the service of another, and that law is legal, (which is not involved in this question,) if slavery as it exists in the States is legal, then he who owes service in a slave State to a citizen of the slave State owes service to such citizen 'under the laws thereof.'
> Mr. SUMNER. A slave cannot owe service, the Senator will bear in mind.
> Mr. JOHNSON. I cannot bear that in mind. I cannot get it into the mind.
> Mr. SUMNER. It is very essential in discussing this question.
> Mr. JOHNSON. I know it is absolutely essential, to come to your conclusion; but it is a conclusion I think that no other gentleman can well come to, because no other gentleman can well get that into his mind.

*Id.*

private relations[89] garnered this same constitutional guarantee. None of the other "great relations of private life," such as marriage, parenthood, guardianship—all domestic relations that involved first, *services* in the classic sense and second, the *dependency* of one party on the other as a practical matter—were guaranteed this inviolable right to quit.[90] Those respective dependents could not detach themselves from their domestic relationships, no matter how objectionable, as a constitutionally guaranteed matter, and in some states they could not ever exit the relationship, even despite physical abuse.[91] But in employment relationships, the bond could be broken by the weaker, the dependent party, the service provider, once the effort and continued interaction ceased to be voluntary.[92] Decades later, Justice Jackson would explain why: "When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work."[93]

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[89] BLACKSTONE, COMMENTARIES, *supra* note 22, chapter 14, Introduction.

[90] Pope, *Contract, supra* note 26. Pope disaggregates this in two forms:

> According to one, servitude becomes involuntary the moment that a worker wishes to cease work and is prevented from doing so. According to the other, servitude is involuntary only if it is entered into involuntarily. These two readings set two great freedoms against each other: freedom of contract and, as labeled by the Supreme Court, the 'freedom of labor.' If the laborer is granted the right to quit at any time, then she loses the freedom to make a fully enforceable labor contract. But if she enjoys the right to make a fully enforceable labor contract, then she could bargain away her freedom of labor and find herself in a relation of abject submission to her Employer . . . . With the benefit of hindsight, we know that the Supreme Court eventually resolved this tension in favor of labor freedom and the right to quit.

*Id.* at 1482.

I disagree with Pope, however, on the distinction he draws between Illinois and Indiana territories. The two regions moved in tandem and did not advance different rules. Instead, both regions changed their interpretation of involuntary servitude between 1818 and 1830. Initially both territories illegally permitted involuntary servitude until the case of Mary Clark, when the Indiana Supreme Court first changed its mind and found that the long-term indentures of African-American servants violated the language of the Northwest Territory banning involuntary servitude. This was not a philosophical disagreement but a historical shift.

[91] *See generally* HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY (2002) (restrictions on divorce). For a discussion of the analogy between the manner in which New York courts treated actresses' attempts to quit their jobs and wives' attempts to divorce their husbands, *see also* Lea VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L. J. 775 (1992). Congress was more progressive in authorizing divorce than most states were. The 41st Congress authorized enacted legislation that allowed women to get divorces in the District of Columbia (May 20, 1870) and in the Territories (Feb. 7, 1870). CONG. GLOBE, 41st Cong.

[92] It took the United States Supreme Court several decades to acknowledge this interpretation of voluntariness. In many cases, such as Robinson v. Baldwin, 165 U.S. 275 (1897), the Court thought that employment voluntarily entered into would continue to be voluntary despite the working person's true mind set. The Reconstruction Congress' interpretation was more consistent with the modern one. *See* discussion of peonage in New Mexico and whether it was involuntary or voluntary because it had been entered into voluntarily. Letter of Inspector General Department read aloud in the Senate, CONG. GLOBE, 39th Congress (Feb. 19, 1867) (discussion of abolition of peonage).

[93] Pollock v. Williams, 322 U.S. 4, 25 (1944).

This left open the possibility of whether quitting entailed any other legal consequences for the worker. Could workers depart cleanly when they chose to quit, or could they be pursued in suits for damages?

As a practical matter, it was simply impractical to attempt to obtain damages from someone who labored for his existence when he exercised his constitutional right to quit.[94] But the key question in terms of a republican system of free labor was whether employees who quit could be threatened by legal action at all. The Radicals repeatedly took the position that they could not be, each time the topic came up in other situations of actual debt servitude—service based upon the debt of advanced moneys. Although some congressmen argued that labor contracts were no different than other contracts and that debt servitude was no different than other methods of debt collection, the radical viewpoint prevailed in these arguments. One must also keep in mind that the Reconstruction Congress abolished imprisonment for debt, labelling it as barbaric, and formulated a nation-wide federal bankruptcy law. This bankruptcy law provided for liberal state exemptions for debtors, so that they could have a "first start" at a new life.[95]

If departing laborers were entitled to leave even when they had received an advance payment, there was less justification for contract enforcement when they did not. The objective of a free labor system to support a functioning republic was to ensure that workers were not in the thrall of their masters, their lenders, their creditors, not in the thrall of sheriffs, jailors, nor anyone who could unduly coerce them.[96] For the republic to function, the laboring men had to be independent, and "cower in no presence."[97]

### C. Congress' critiques of other "unrepublican" systems of debt labor

Congress addressed the issues of debt enforcement against working men in three regionally different contexts: 1) the system of peonage that had grown up in the Territory of New Mexico, 2) a system of procuring immigrant laborers from Europe and 3) the practice of bringing Chinese

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[94] Senator Morrill quoted a pamphlet from the American Emigrant Company in discussion of a proposed bill. "The ordinary 'consequences,' where a man breaks his contract, are, a liability to subjection in damages. But this liability is nothing to this class of men." CONG. GLOBE, 39th Cong. (July 23, 1866) (commas in original).

[95] Section 14 of the Bankruptcy Act of 1867 was the powerful provision that protected debtors from being completely stripped of their property because, according to Congressman John A. Kasson from Iowa, a "debtor cannot make his first start in the recovery of his prosperity and the comfort of his family unless he has a shelter for his wife and children." CONG. GLOBE, 39th Cong. (Mar. 27, 1866).

[96] For example, in heralding the new bankruptcy law, Senator Johnson said that it was

> fit and proper that every man should be made a freeman absolute, a freeman discharged from the thralldom of debt, a freeman discharged from the thralldom of laws which enforced may make a slave of a freeman . . . . And all that the law proposes is, that he who is in that condition of human thralldom shall be permitted to escape from it and be again a man, if he has innocently been brought to that condition.

CONG. GLOBE, 39th Cong. (Feb. 4, 1867) (remarks of Sen. Johnson).

[97] Senator Morrill of Vermont described the laboring men of this country as "independent, and minding their own business they cower in no presence." CONG. GLOBE, 41st Congress (Dec. 15, 1869).

laborers to the U.S. under debt.[98] Evaluating all three, the predominant assessment was that these systems were "anti-republican" in spirit, and Congress responded accordingly.

Under the system of peonage that had been developed in New Mexico, white settlers held Native Americans to labor through a practice of advancing them money or goods, and then requiring them to work off their debt.[99] To dismantle this system, Congress passed the Anti-Peonage Act under the Thirteenth Amendment's authority. In the debates, members contemplated whether the pre-arranged debt rendered the servitude voluntary. One senator, citing his own debts, felt this form of debt servitude was outside the scope of the Thirteenth Amendment.[100] Most senators, however, insisted that debt servitude violated the Thirteenth Amendment, calling it "qualified slavery" and "practical slavery," and the anti-peonage measure was enacted.[101]

In the second regional context, large capital interests, including railroads, were engaged in bringing immigrants to the United States from Europe on paid passage. Agents were sent to Europe seeking workers to bring to American shores and subsequently convey them west, where labor was in short supply. These immigrants were then obligated to work for the railroad. The Constitution's fugitive servant clause had always protected these firms before in cases where a worker abandoned his labor contract after arriving in the United States. The Thirteenth Amendment had blunted that instrument of enforcement, so the railroad interests pressed Congress to grant them additional statutory enforcement sanctions against departing workers.[102]

The debate quickly became heated when this bill was brought forward in the Senate.[103] Senator Wilson called the measure "a kind of slave trade."[104] Another senator stated that it "smacks so nearly of that trade which was . . . forbidden in the Constitution . . . ."[105] It was "so closely allied to the Coolie business" that it was astonishing that it was given a moment's consideration.[106] Yet another senator called it

> more monstrous . . . in character than the negro slavery that we have abolished . . . . These plans, cunningly devised, by which capital is to seize labor, by which labor is to be turned

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98 *See generally* VanderVelde & Chin, *Chinese Exclusion*, *supra* note 8.

99 *See* CONG. GLOBE, 39th Cong. The Anti-Peonage Act was discussed on Jan. 3, 1867, and again on Feb. 19, 1867.

100 *See* CONG. GLOBE, 39th Cong. (Feb. 19, 1867) (remarks of Sen. Davis).

101 *Id.* (remarks of Sen. Sumner). Senator Wilson insisted that the very fact that it could be enforced made it invidious, even if occasionally the servitude was "voluntary." *Id.* (remarks of Sen. Wilson).

102 In some ways, this immigration statute encompassed both the historic practice of redemptioner immigration and the fugitive servant clause that the Thirteenth Amendment had overwritten. *See, e. g.*, KARL FREDERICK GEISER, REDEMPTIONERS AND SERVANTS IN THE COLONY AND COMMONWEALTH OF PENNSYLVANIA (2010).

103 *Id.* (remarks of Senators Howe, of Wisconsin; Morrill, of Vermont; Conness, of California; Cowan, of Pennsylvania; Sprague, of Rhode Island).

104 CONG. GLOBE, 39th Cong. (July 23, 1866).

105 *Id.* (remarks of Sen. Morrill).

106 *Id.* "Another objection . . . is 'That the workman may be harshly treated, and so justified in running away.'" *Id.*

> up in its vise and held as if poverty were a crime, I am utterly opposed to, for they are repugnant to my sense, and all conceptions I have of what is right among men.[107]

However, a few senators acknowledged that the bill supported their constituents' interests and argued in its favor.[108] Senator Williams, of Oregon, claimed that it also benefited the immigrants themselves, to which another quickly replied that the very same argument had been made to justify slavery: that enslavement was for the benefit of the slave.[109] The senators debated whether this claim on a man's service constituted a "mortgage on the man himself."[110] Senator Reverdy Johnson again took the formalistic position that "[t]here is no slavery about it except the slavery that exists [when a man gets in debt and those debts] are made an incumbrance upon any real estate that he may have."[111] But obviously, in reality immigrants such as these had no real estate to levy upon. In the end, the statute was defeated,[112] with the overall sentiment against holding a huge debt over an impoverished man in such a way that he would be obligated to work if that work was involuntarily done.[113]

In a third context, Congress addressed Chinese immigrant labor brought to the United States under debt bondage to the Six Companies with similar condemnation. Congress enacted a bill to ban "Contracts for Servile Labor," to break up what they described as the system of "coolie labor" under which workers were brought to the United States and bound for years at a time.[114] As Senator Stewart of Nevada stated, "[S]ix months is all that any person should labor for his passage money . . . ."[115]

Perhaps the sole setting in which Congress acknowledged some possibility of the Freedmen's Bureau holding workers to their contracts was under some war-time exigency. Martial law and national security are special circumstances for compelling labor. Given the urgent post-war need to cultivate the crops necessary to feed the region's population, it is difficult to know whether contracts to labor were enforced in those circumstances. There is little

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[107] *Id.* (remarks of Sen. Conness).

[108] Senator Reverdy Johnson, of Maryland; Senator Morgan, of New York; and Senator John Conness, of California. *Id.*

[109] *Id.* (remarks of Sen. Conness responded to by Sen. Morrill).

[110] *Id.* (remarks of Sen. Morrill).

[111] *Id.* (remarks of Sen. Johnson).

[112] *Id.*

[113] "Mr. Howe. There is only one way of enforcing it, and that is specifically against the man.
Mr. Johnson: To make him labor.
Mr. Howe: Yes; make him labor. It means that or it means nothing . . . . I think that this law has stood on the statute-book too long. I therefore favor . . . repeal[ing] this act instead of enlarging it." *Id.*

[114] CONG. GLOBE, 41st Cong. (remarks of Sen. Stewart) (June 6, 1870 & July 8, 1870).

[115] *Id.*

evidence, however, that the Freedman's Bureau ever did enforce contracts against workers.[116] While many plantation owners complained of freedmen leaving their jobs, there is no indication that the Freedmen's Bureau assisted them in preventing the workers from doing so. In fact, the 41st Congress described Virginia's so-called "Vagrancy" Act, which authorized departing workers to be returned to their previous employers, as "so odious, so barbarous," that the military officers suspended it as "virtually re-establish[ing] slavery."[117] In any case, the Reconstruction Congress recognized that freedmen were entitled to quit whenever they found their working conditions objectionable.[118]

The Congress received numerous reports that southern masters were attempting to re-establish their dominance over the freedmen by challenging their exercise of some basic liberty or some degree of independence by threatening dismissal.[119] For example, some masters exercised petty tyranny over their workers by restricting their ability to raise livestock, collect wood or go hunting.[120] The congressmen condemned these attempts to control the freedmen as overreaching and overlordship. Other reports indicated that some freedmen were dismissed for attempting to vote, voting with the Radicals, or merely demanding to be paid.[121] Congressmen also condemned former slave masters who set unreasonable rules as a prerequisite for being hired or keeping a job and others who tried to intrude upon the employees' private lives under

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[116] Congress' primary directive to the Bureau, however, was to assist the freedmen in forming enforceable contracts for labor at just and fair wages. The gravamen of the directives to the Freedmen's Bureau was to ensure that freedmen got wages that were fair and just from masters who had previously paid them nothing at all.

[117] CONG. GLOBE, 41st Cong. (Jan. 13, 1870) (remarks of Rep. Palmer).

[118] Of course, this did not mean that long-standing practices and even new state laws would recognize this full freedom to quit once the Freedmen's Bureau was removed. During the Jim Crow era, these freedoms were violated. *See generally* DANIEL A. NOVAK, THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY (1978).

[119] Representative Ward submitted a resolution to investigate

> a form of contract to be entered into between the freedmen and their former masters in the State of South Carolina . . . whereby among other things, it is provided that the freedmen becomes the servant of the master for the period of one year; that he shall not be permitted to leave the premises where he is bound to labor, or to receive visits from relatives or friends thereon during said time without the master's consent, nor without such consent to keep any poultry, stock, etc. during the time; that if said free man is absent for two days without the master'**s** consent, no matter for what cause, he forfeits his whole year's pay, part of which goes to his master . . . and in case of any breach of any of the provisions of the contract by any servant he shall be liable to forfeit all his wages and be dismissed from the plantation; and whereas it is alleged that said freedmen are being induced to enter into such contracts . . . .

CONG. GLOBE, 39th Cong. (Jan. 10, 1866).

[120] *Id.* Representative Windom indicated his concern by reading aloud a letter to Major General Howard, CONG. GLOBE, 39th Cong. (March 2, 1866) (opposing such restrictions on freedmen's liberty). See also remarks of Rep. Rice of Maine: "Why, he can't even live without the consent of the white man. He has no land—he can make no crops except the white man gives him a chance. He hasn't any timber—he can't get a stick of wood without leave from a white man." CONG. GLOBE, 39th Cong. (Feb. 7, 1866).

[121] "I am told . . . that Governor Fitzpatrick . . . called up the men in his employment and threatened that if they went to the polls and voted for this constitution they should be dismissed from his employment, and that when they gave their votes he did dismiss them." CONG. GLOBE, 40th Cong (Mar. 9, 1868) (remarks of Sen. Wilson).

threat of dismissal.[122] This concern that freedmen were coerced to relinquish their liberties under threat of being driven away from their workplaces and homes demonstrates that the Congress sought more than releasing the freedmen from compulsory labor.[123]

In the Radical Republicans' view, freedmen (and all other workers as well) were entitled to perfect freedom of locomotion in their free time.[124] Moreover, freedmen, like all free men, were entitled to receive and fully enjoy the fruits of their labor.[125] Enjoying the "fruits of his labor" was a talismanic term in the reformers' discourse.[126] Workers fully enjoying the fruits of their labor entailed choosing where they wished to spend their earnings. It should be noted here that this is exactly the liberty that workers were denied in the first employment at-will case arising a decade later.[127] Representative William Windom of Minnesota argued that the object of the Civil Rights Bill was "to secure to a poor, weak class of laborers the right to make contracts for their labor, the power to enforce the payment of their wages, and the means of holding *and enjoying the proceeds of their toil*."[128]

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[122] Remarks of Rep. Rice, *supra* note 120. Some of the specific conditions that the Congressmen condemned were the need to seek permission to receive visits from relatives or friends, keep poultry or stock, or leave the premises without consent, see Remarks of Rep. Ward, *supra* note 119.

[123] "These people were driven out." CONG. GLOBE, 38th Cong. (Jan. 10, 1865) (remarks of Sen. Wade, lamenting a captain's field report); "They are swindling them in every conceivable way, and turning them adrift without a mouthful to eat and nowhere to go . . . . Hunger and starvation are hard masters." CONG. GLOBE, 40th Cong. (Feb. 4, 1868) (remarks of Rep. Julian); "Practically if the employer on a plantation chooses to drive a colored man off without his wages, alleging that he was insolent or insubordinate or neglectful of his duty, he is without remedy." *Id.* (Feb. 7, 1867) (testimony of General Schofield read aloud in Congress); "Upon many plantations, they are . . . driven off—flight being their only refuge from tyranny and abuse. Thus our people are meanly ignored, made suffering outcasts, and their interests willfully neglected." *Id.* (Feb. 22, 1867) (remarks of Sen. Yates).

[124] "[I]f any master refuses to allow his former slave to go at large, to leave his plantation, his county, or State, to have perfect right of locomotion, then it is within the power of the Federal Government, under this clause, to interpose, and to provide by law for punishment for such an attempt . . . ." CONG. GLOBE, 39th Cong. (Feb. 3, 1866) (remarks of Rep. Marshall). Blackstone's *Commentaries* was quoted by Representative James Wilson of Iowa, for the proposition that "[t]he right of personal liberty, . . . he says, 'Consists in the power of locomotion, of changing situation, or moving one's person to whatever place one's own inclination may direct.'" CONG. GLOBE, 39th Cong. (Mar. 1, 1866).

[125] For a discussion of the use of this phrase "fruits of one's labor" in the Reconstruction Congress, *see* VanderVelde, *Labor Vision*, *supra* note 12, at 473–74. "These laws or schemes, taken together, give the one twentieth the power to rob the other nineteen twentieths of the surplus products of all their labor and talents; and any system that authorizes and empowers one class to take from another class the fruits of their labor and talents without equivalent is practical slavery. I care not what it is called. When you deprive a man of the right to the enjoyment of the fruits of his labor and talents, there is no other right which he can long maintain. The continual and pressing wants of his physical nature will soon reduce him to abject slavery." CONG. GLOBE, 39th Cong. (Jan. 18, 1867) (remarks of Rep. Kuykendal, on the state of the economy); "By every sentiment of honor, by every dictate of duty, by every motive of self-interest, we are bound to give them security in their lives, their persons, and the fruits of their labors." CONG. GLOBE, 39th Cong. (Jan. 19, 1867) (remarks of Rep. Hiants of Ohio).

[126] The exact phrase "fruits of his labor" was used seven times in the 39th Congress, and with slight variations an additional twenty times (list on file with author).

[127] For a discussion of the Payne case, *see infra* Part IV.C.

[128] CONG. GLOBE, 39th Cong. (Mar. 2, 1866) (remarks of Rep. Windom) (emphasis added).

Throughout these discussions, no one articulated that this anti-subordinating constitutional protection—the right to quit—entailed a reciprocal right permitting masters the freedom to discharge workers at will. Empowering employees to discontinue work once it proved unsatisfactory to them advanced the anti-subordination principle that was guaranteed by the Thirteenth Amendment. Yet, this anti-subordination objective did not imply that masters had any parallel commensurate right to freely dismiss their employees. Masters unquestionably were entitled to dismiss servants if their work was unsatisfactory, yes, but not at will or for reasons of caprice. Accordingly, the worker should be entitled to quit when the job became unsatisfactory. Who was better able to assess whether the job was satisfactory than the worker?

Furthermore, considering this analytically from the modern perspective, it would be irrational to attempt to advance an anti-subordination agenda by tying the subordinate person's newly provided constitutional liberty to a quid pro quo benefit for the dominant party. As an anti-subordination principle, not only is it unnecessary, it is often even counter-productive to compensate the dominant individual's loss of position. Nor would it make sense for the subordinate person's right to quit to be conditioned on the dominant person receiving some commensurate right in the name of "mutuality of contract." Mutuality of benefit had no place in the constitutional guaranty against involuntary servitude. That would defeat the anti-subordination objective of attempting to level the relative power of each. The Reconstruction congress understood that levelling—protecting the subordinate individuals—required more than simply detaching dependent individuals to try to survive on their own. The dependent individuals' rights to detach themselves need not come at the cost of subjection to the vulnerability of being expelled and left without prospects.[129] To be fully free, freedpeople could quit when working conditions became unsatisfactory.[130] Yet, a mere decade later, the concept that these two rights were connected was used to bootstrap vulnerable workers' fundamental constitutional rights into a claim that the employer could fire employees at will. The employer's unrestrained ability to fire employees emerged as a quid pro quo for the employee's right to quit in the announcement of the at-will rule.[131]

### D. Employment-based anti-subordination initiatives of the Reconstruction Congress

[129] In the parallel context of dependency, guardian and ward, imagine according protection to redress a ward's vulnerability only if the guardian received something, too, or protecting wives dependent on or subordinated by their husbands from battery only if husbands received something commensurate to maintain their dominance.

[130] James Schouler implied this in his treatise on domestic relations, *see* JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS: EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT 7 (Boston, Little, Brown, & Co. 2d ed. 1874). For analysis of Schouler's text on the doctrine of dismissal, *see infra* Part IV.B.1.b.

[131] For a discussion of Payne v. Western and Atlantic Railroad, *see infra* Part IV.C. Two noteworthy United States Supreme Court cases, *Adair* and *Coppage v. Kansas*, spoke in terms of a manager's ability to fire employees at will bootstrapped on the employees ability to quit at will. Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908).

The Reconstruction Congress' overall anti-subordination spirit was demonstrated in its many progressive reforms.[132] For example, it revised the common law in the District of Columbia and the Territories. Congress also exercised plenary authority over its many federal employees and federal contractors. The number of domestic law reforms undertaken during this period was staggering.[133]

Although this active reform agenda was very broad, it was inevitably levelling. For example, in discussing the pay of federal workers, one congressman stated that "I want either that the wages of labor shall be leveled up or that the pay of public officers shall be leveled down."[134] Usually, however, Congress introduced laws that raised the stature of lesser individuals and empowered them vis-à-vis anyone who could hold them in their thrall. Congress passed legislation that brought greater parity to married women, tenants, heirs, debtors, and eventually Congress addressed additional protections for employment. These reforms shared an anti-subordination theme. As common law hierarchy had subordinated married women to their husbands under the doctrine of coverture, Congress enacted the Married Women's Property Reform in the District of Columbia to revise coverture.[135] As the common law subordinated tenants' interests to those of their landlords, Congress reformed the District's landlord–tenant law to provide tenants with notice before eviction and to abolish the status of tenancy at will.[136] As the law subordinated debtors to their creditors, Congress passed bankruptcy reform.[137]

### E. The Eight-hour day law

The federal government continued to directly employ many people and indirectly employ many others through government contractors even after the war ended. This placed Reconstruction

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[132] Many of the reforms targeting laws in the District of Columbia paved the way for the abolition of slavery nationally. KATE MASUR, AN EXAMPLE FOR ALL THE LAND: EMANCIPATION AND THE STRUGGLE OVER EQUALITY IN WASHINGTON, D.C. (2010); Lea VanderVelde, *Henry Wilson: Cobbler of the Frayed Constitution, Strategist of the Thirteenth Amendment*, 15 GEO. J. OF L. & PUB. POL'Y 173 (2017).

[133] One place to see the breadth of initiatives is the list of Henry Wilson's initiatives. VanderVelde, *Henry Wilson*, *supra* note 132, at 213.

[134] "The mechanics and laborers of the United States do not receive a compensation at all proportionate to that which is paid for official services." CONG. GLOBE, 40th Congress (June 5, 1868) (remarks of Rep. Lawrence, of Ohio).

[135] District of Columbia Marital Property Reform, *discussed in* CONG. GLOBE, 39th Cong. (Feb. 9, 1867); 40th Cong. (Mar. 27, 1868 & Feb. 27, 1869).

[136] Bill (S. No. 138) to regulate proceedings in cases between landlord and tenants in the District of Columbia. "That a tenancy at will shall not arise or be created without an express contract or letting to that effect; and all estates at will maybe determined by a notice, in writing, to quit, of 30 days, delivered to the tenant in hand or to some person of proper age upon the premises, or, in the absence of such tenant or person, then such notice maybe served by affixing the same to a conspicuous part of the premises, where it may be conveniently read." CONG. GLOBE, 38th Cong. (Mar. 17, 1864)

[137] *See supra* note 95.

Congress in a position to regulate these workers' employment conditions,[138] for example by enacting an eight-hour day law for all federal workers and subcontractors. In another initiative, Congress debated authorizing a government commission to look into wages, hours and the division of profits between workers and capitalists in private employment nationwide.[139]

Of the two measures, the justification for an eight-hour day received the most extensive debate, and echoed the anti-slavery critique. As Senator Cole of California put it, "[U]nless the people are provided by law with some protection against the requirement which is now put upon them by the exorbitant demands of capitalists, they will not be so well prepared to perform the duties of American citizenship."[140] Work hours had to be limited by law so laborers were not so beat down by work that they had no leisure for rest, study, or civic and political activity. Limiting the workday to eight hours would permit workers the necessary time to develop themselves as independent citizens. It would also give them sufficient time to devote to themselves, their families, and their own households. With adequate time away from the workshop, working men would have the autonomy and develop the skills to better participate in republican governance.[141]

The eight-hour day law seeking to adjust a work/life balance for federal employees was an edict rather than a program. It stipulated that a legal workday in all federal workshops lasted eight hours.[142] Though the law deemed that employees could not be required to work longer than that, no one seemed to be clear about how this durational limit would affect wages.[143] Its

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[138] Congress enacted generous pay raises for federal employees, so much so that one congressman quipped that "While almost all of the employees of this Capitol have had their compensation increased, . . . the fireman under the old Hall of the House of Representatives has been left out in the cold. [Laughter] I ask that we shall warm him as well as the others . . . ." CONG. GLOBE, 39th Cong. (July 27, 1866) (remark of Mr. Wright discussing pay raises for Federal employees).

[139] CONG. GLOBE, 42nd Cong. (introduced in the House, Apr. 10, 1871; debated Dec. 13, 1871 & Dec. 19, 1871; and passed Dec. 20, 1871). The bill was debated in the Senate Apr. 4, 1872, Apr. 27, 1872, May 29, 1872, and May 30, 1872.

[140] CONG. GLOBE, 40th Cong. (June 24, 1868) (remarks of Sen. Cole).

[141] As Senator Cole stated, "[T]he residue of the time . . . would well be devoted to the improvement of the mind and social faculties; and all American citizens should be enabled to devote some portion of their time to the cultivation of the intellect." CONG. GLOBE, 40th Cong. (June 24, 1868). *See also Id.* (remarks of Representative Stewart discussing H.R. 365).

[142] The eight-hour day was advanced by political arguments of workingmen's organizations, which sent supporting petitions to Congress from many different places in the country, *e.g.* Petition of Machinists' and Blacksmiths' Union No 4. of Indiana, introduced June 27, 1868 and Petitions of Mechanics' State Council of California introduced May 13, 1868 and again, June 5, 1868, CONG. GLOBE, 40th Cong. *Id.* For excellent accounts of how the management of time was a concern of labor movements, *see* DAVID A. ROEDIGER AND PHILLIP S. FONER, OUR OWN TIME: A HISTORY OF AMERICAN LABOR AND THE WORKING DAY (1989); BENJAMIN KLINE HUNNICUTT, WORK WITHOUT END. ABANDONING SHORTER HOURS FOR THE RIGHT TO WORK (1988); and ALEX GOUREVITCH, FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY (2014).

[143] Would employees be paid the same as they had before for working longer days, or not? Some congressmen thought that healthy, well-rested workers could accomplish the same amount of work in eight hours as tired workers could do in ten. CONG. GLOBE, 40th Cong. (June 24, 1868) (discussion between Senators Steward, Morton, and Conkling).

proponents were convinced it would enhance productivity.[144] Congress recognized this as an "experiment", but one that the federal government could afford to undertake.[145]

Senator Henry Wilson, a recognized leader of the Radical Republicans, supported the eight-hour law.[146] Other matters, however, were of greater concern to him, such as the laboring men "in the tens of thousands *who had been dismissed from employment* for voting according to their convictions."[147] The power to dismiss or threaten to dismiss a worker jeopardized that worker's autonomy, an argument that would be raised in the dissents in cases applying the at-will rule only a decade later.[148] The Reconstruction Congress could see that dismissing workers for thinking, speaking, voting, and acting independently of their employer's control was anti-republican.

### F. A congressional commission to investigate wages and the threat that capitalism posed to a well-functioning republic

Labor's relationship to capital was an issue that was intrinsically linked to republican forms of government. As Radical Republican congressman James Ashley stated, "[a]n intelligent discussion of slave ownership involved of necessity the question of the proper relation between labor and capital."[149] The critique that capital should not be able to dominate labor came up in discussions over a variety of measures.[150] And by the end of Reconstruction, the 42nd Congress considered a measure to inquire into the proper division of profits between capital and labor as well as into wages and hours.[151]

The debates about setting up a system of free labor were not framed in the agrarian language of planters and slaves, nor in terms of regional agricultural commodity, that land owners should not own farmworkers. Nor were the arguments framed in terms that whites should not own

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144 *Id.*

145 "That is an experiment which can be very well tested in the Government workshops." CONG. GLOBE, 40th Cong. (June 24, 1868) (remarks of Sen. Morton).

146 Senator Wilson said, "Whatever tends to dignify manual labor or to lighten its burdens, to increase its rewards or enlarge its knowledge, should receive our sympathies and command our support." CONG. GLOBE, 40th Cong. (June 24, 1868) (remarks of Sen. Wilson). The eight-hour measure would only affect several hundred workers in federal workshops, though some hoped the idea would spread.

147 *Id.*

148 *See infra* part IV. C. for discussion of Payne v. Western and Atlantic Railroad.

149 REBECCA ZIETLOW, THE FORGOTTEN EMANCIPATOR: JAMES MITCHELL ASHLEY AND THE IDEOLOGICAL ORIGINS OF RECONSTRUCTION (2017). Ashley attributed his opinions regarding unions and the relations of capital and labor as the logical outgrowth of his "early fight against the right of capital to legal ownership in man." *Id.* at 174.

150 This was expressed by both Rep. Kellogg of Michigan and Rep. Shannon of California on June 14, 1864. CONG. GLOBE, 38th Cong. *See also* CONG. GLOBE, 38th Cong. (Mar. 18, 1864) (remarks of Rep. Julian); CONG. GLOBE, 39th Cong. (Feb. 7, 1866) (remarks of Rep. Rice).

151 H.R. Bill number 394 provided for the appointment of commissioners. CONG. GLOBE, 41st Cong. (Apr. 10, 1871). According to Senator Sawyer, "The bill reported by the committee makes the duties of the commissioners consist in investigating 'the subject of the wages and hours of labor, and of the division of the joint profits of labor and capital between the laborer and the capitalist, and the social, educational, and sanitary condition of the laboring classes of the U.S., and how the same are affected by existing laws regulating commerce, finance, and currency; . . . .'" CONG. GLOBE, 41st Cong. (May 30, 1872).

blacks. Instead, they frequently invoked the terminology that "the capitalists of the country should not own laborers." The phrase became a rallying cry for republican congressmen.[152] Representative Kellogg of Michigan, for example, stated, "The atrocious sentiment that it was better for society that the capitalists of the country should own the laborers, whether white or black, found ready advocates among [Southerners]."[153] Slavery was the worst form of labor oppression.[154] The emphasis was on ownership as domination, not on the technical designation as chattel property. "Slavery . . . makes the many subject to the few, makes the laborer the mere tool of the capitalist, and centralizes the political power of the nation."[155]

Republican congressmen worried that capitalism's intensification in the north posed a similar threat to the republican ideal as slavery had. "In place of the slaveholding landowner of the South . . . we shall have the grasping monopolist of the North . . . ," warned one.[156] The increasing power of capital interests was also seen as a threat to the nation's social structure. "There is as much aristocracy at the North as the South, and a few years hence there will be more. . . . [So] far as [these interests] can erect a social aristocracy they will do it, regardless of the form of labor that works the land and plies the machinery of the capitalist."[157] Similarly, some congressmen feared that wage slavery was potentially as destructive of republican institutions.[158] Capitalists lived off the labor of others, just as slaveholders had done, and as the frequently reviled English capitalists did. As Senator Howard put it, "I see in the dim future of our country the same uneasy struggle between capital and labor—between the rich and the poor . . . that has marked the history of Great Britain for the last fifty years."[159] Senator Farwell summed up, "[M]y vote on all these questions will be governed by the amount that can be taken . . . from the accumulated wealth, and thus relieve the labor and the laboring classes."[160]

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[152] CONG. GLOBE, 38th Cong. (May 4, 1864) (remarks of Rep. Allison) (describing the South as an aristocracy founded upon the idea that capital should own labor); CONG. GLOBE, 38th Cong. (March 18, 1864) (remarks of Rep. Julian); CONG. GLOBE, 40th Cong. (Jan 5, 1869) (remarks of Rep. Cary). [153] CONG. GLOBE, 38th Cong. (June 14, 1864) (remarks of Rep. Kellogg).

[153] CONG. GLOBE, 38th Cong. (June 14, 1864) (remarks of Rep. Kellogg).

[154] *See* the language of Senator Henry Wilson, *supra* note 9.

[155] CONG. GLOBE, 38th Cong. (June 14, 1864) (remarks of Rep. Shannon).

[156] That "grasping monopolist's" control would "be more galling than slavery itself," the speaker opined, because at least sometimes slave owners recognized their self-interest in maintaining their "victims'" health, while capitalists did not. CONG. GLOBE, 38th Cong. (Mar. 18, 1864) (remarks of Rep. Julian).

[157] CONG. GLOBE, 38th Cong. (1865) (remarks of Rep. Brooks).

[158] "[A] system of wages-slavery [is] as much to be deplored as chattel-slavery." CONG. GLOBE, 38th Cong. (May 4, 1864) (remarks of Rep. Allison); "The maxim of the slaveholder that 'capital should own labor' will be as frightfully exemplified under the system of wages slavery . . . as under the system of 'chattel slavery' . . . ." CONG. GLOBE, 38th Cong. (Mar. 18, 1864) (remarks of Rep. Julian).

[159] CONG. GLOBE, 38th Cong. (Feb. 27, 1865) (remarks of Sen. Howard).

[160] CONG. GLOBE, 38th Cong. (Feb. 27, 1865) (remarks of Sen. Farwell).

This theme often arose when Congress considered peripheral measures, such as protective tariffs, the national debt, tax policy, and the gold standard.[161] For example, in considering the bill to ban contracts for servile labor, Senator Wilson said it seemed to him that "at the present day . . . there is a conspiracy of capital in this country to cast a dragnet over creation for the purpose of bringing degraded labor here to lower and degrade the laboring men of this country, and I think it is time to meet that question."[162] The Homestead Act was also an attempt to assure independence for working men. "The people [should have] the means whereby they may live independent of capitalists and land monopolists," according to Congressman Rice.[163]

Yet, near the end of Reconstruction, the 42nd Congress undertook one other significant initiative that has gone unrecognized: an initiative to address the imbalance of labor and capital directly in all workplaces throughout the nation. In 1871, the House passed a measure to create a bureau of labor and to authorize a special commissioner to examine the division of profits between labor and capital and wages and hours of workers throughout the nation.[164] According to Representative Hawley,

> The bill contemplates the inquiry whether there are now laws in existence that ought to be repealed, modified, or amended which have as their tendency and further result an infringement upon the rights of the laboring classes; whether or not the laws of the country

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[161] Contemplating the national debt, Representative Brooks lamented, "[W]e have abolished the slavery of the South, but in so doing we have become the slaves, the thralls, the bondmen of the capitalist of the North. We are mortgaged to them for life, ours and the coming generation, our children and our children's children. Our farms are mortgaged, our labor is mortgaged. We are 'held to service' for life to earn enough to pay the interest upon the principal of the great debt." CONG. GLOBE, 38th Cong. (Jan. 6, 1865) (remarks of Rep. Brooks). "Shall the funded debt of this nation be paid to the few in gold by the sweat of the many? Shall labor be held in thrall and branded as a serf of capital?" CONG. GLOBE, 38th Cong. (Mar. 2, 1865) (remarks of Rep. Cox); "I am for protecting the labor of my countrymen. Labor is at the foundation of all national prosperity. All the wealth, all the progress, and all the civilization of the world are based upon labor. If there is anything that I honor, revere, and wish to protect, it is labor and the laborer; and it is because of my devotion to labor and to the laborer that I want this proposition to prevail . . . ." CONG. GLOBE, 38th Cong. (Mar. 3, 1865) (remarks of Sen. Davis); "[T]he foundation of our national prosperity rests on the remunerative character of the labor of the lower classes, while the safety of our political institutions lies in the contentment of that class of population." CONG. GLOBE, 38th Cong. (Feb. 27, 1865) (remarks of Rep. Ward). Congressman Clay objected to a bill affecting small distillers, stating that the legislation would be "in favor of capital and against labor—the rich against the poor." CONG. GLOBE, 38th Cong. (Feb. 11, 1865) (remarks of Rep. Clay).

[162] CONG. GLOBE, 41st Cong. (June 23, 1870) (remarks of Senator Wilson).

[163] CONG. GLOBE, 39th Cong. (Feb. 7, 1866) (remarks of Rep. Rice). Land should be available to everyone, because no man who owned his own land could be made a slave. "[I]n a prosperous State labor must not only be free, but the cultivator of the soil must have a proprietary right in the soil itself." CONG. GLOBE, 38th Cong. (May 4, 1864) (remarks of Rep. Allison). To that end, Congress mounted a huge but ultimately unsuccessful effort attempting to redistribute the lands of disloyal Confederates to freedmen. The proposal was part of a bill to enlarge the powers of the Freedmen's Bureau. This issue was discussed in Congress on Jan. 23, 1866. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 70–71 (1988). Foner attributes the idea to a field order by General Sherman. Senator Henry Wilson describes its ending with the words: "The fifth section allotting one million acres . . . in forty acre lots to Freedmen, was stricken out, the public lands . . . having been opened to settlers, without distinction of color." HENRY WILSON, HISTORY OF THE RECONSTRUCTION MEASURES OF THE 39TH AND 40TH CONGRESSES. 1865–68 (Hartford, Hartford Publishing Co. 1868.)

[164] CONG. GLOBE, 42nd Cong. (Apr. 10, 1871). Mr. Hoar introduced H.B. 374 to Congress.

> are of such character as that they protect and foster capital as against labor instead of giving each its right and proper share of protection.[165]

Representative Hawley concluded his remarks by tying the measure to the Republican party's ideology. He urged Congress to "[a]ffirm that the Republican party has been from its commencement until now, and will continue to be, the friend of the laboring masses of our country."[166]

In the ensuing debate, one congressman proposed that the commissioner investigate the practice of "paying laborers in store orders instead of in cash" and report what could be done to prevent the practice.[167] This concern is noteworthy because this employer practice would later trigger *Payne v. Western & Atlantic Railroad,* the first legal opinion to introduce the at-will rule.[168]

Representative Bingham, who had authored the Fourteenth Amendment, supported the measure by stating:

> Let the whole record of America be made as clear as sunlight to the oppressed of other lands who have sought shelter upon these shores, and they will come to understand, what intelligent Americans everywhere understand, that it is the pride and the boast of America that here for the first time, by the direct intervention of law, has been secured a fair day's wages for a fair day's work.[169]

The Senate debated the bill for several days but never passed it. The reform momentum was dissolving. Some argued over whether the report should be completed in one or two years. Others fought over how the commission should be comprised: should it be partisan or neutral, pro-labor or a balance of labor and management? Some questioned the scope of the inquiry, whether its function was merely investigation, or investigation leading to law reform proposals. Some questioned Congress' authority under the Constitution to engage in this field. Proponents tied the bill to Congress' constitutional authority to examine the effect on laboring people of laws on "commerce, finance and currency," subjects that were in the federal government's appropriate purview.[170] As the vitality of Reconstruction was waning, so was the Radicals' influence in Congress, but much of the language they mustered in support of this bill was reminiscent of their successful efforts to bring the system of free labor as far as it had come.

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[165] CONG. GLOBE, 42nd Cong. (Apr. 10, 1871) (remarks of Rep. Hawley of Illinois).

[166] *Id.*

[167] CONG. GLOBE, 42nd Cong. (Apr. 10, 1871) (remarks of Mr. Speer of Pennsylvania).

[168] *See* discussion of Payne v. Western and Atlantic Railroad, *infra* Part IV.C.

[169] CONG. GLOBE, 42nd Cong. (Apr. 10, 1871) (remarks of Rep. Bingham).

[170] CONG. GLOBE, 42nd Cong. (May 29, 1872) (remarks of Mr. Logan).

When opponents made fun of the bill, the proponents responded that thirty years earlier, abolition had been laughed at, too.[171]

The Reconstruction Congress did not address at-will employment because, as the following section demonstrates, there is little evidence that it existed at the time. Yet, throughout several successful—and unsuccessful—reform initiatives, there were voices repeating the sentiment that for a republic to function, working men could not be held in their employers' thrall.[172]

## IV. COUNTERVAILING COMMON LAW RULES WHEN THE AT-WILL RULE WAS FIRST ARTICULATED

The origins of the at-will rule are dubious.[173] The first time it was announced as definitive in a treatise is in Horace G. Wood's on the law of master and servant in 1877.[174] There has been considerable debate about whether Wood's claim that at-will employment was the governing rule was supported by any case law at all.[175] The first mention of the doctrine by an appellate-level court is attributed to a Tennessee Supreme Court case, *Payne v. Western & Atlantic Railroad*, which was not decided until 1884, seven years after Wood's first edition. It is puzzling that there is no thread of citation linking the two. Moreover, Wood's second edition (1886) never noted the Tennessee case, nor did it add much in the way of other case law supporting his claim that the

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171 CONG. GLOBE, 42nd Cong. (May 29, 1872) (remarks of Mr. Sawyer).

172 The Radical Republicans, led by Senator Henry Wilson, were the most stalwart in this message. Senator Charles Sumner, though a Radical Republican, emphasized abolitionist rather than free labor themes. Wilson could usually count on Sumner's vote on these measures, as Sumner could count on Wilson's. Once the Republican party swept both houses of Congress, many congressmen jumped on the bandwagon of identifying themselves as "Radical," including Senator Cowan, who claimed he was a "conservative Radical." Other congressmen supporting the free labor themes were James Ashley and William D. Kelley. California congressmen supported free labor themes, but not as applied to Chinese workers. *See* VanderVelde & Chin, *Chinese Exclusion*, *supra* note 8. Many Republicans believed that sufficient opportunities continued to exist to allow workers to become entrepreneurs with hard work and diligence. At the level of general principle, there were few congressmen who would have disagreed with the notion that a functioning republic required that workers enjoy some substantial independence from their employers.

173 Feinman, *At-will Rule*, *supra* note 15. The Arizona Supreme Court recognized doctrine's dubious origins. Wagenseller v. Scottsdale Memorial Hospital, 147 Ariz. 370, 710 P.2d 1025 (1985).

174 WOOD, A TREATISE, *supra* note 33. Feinman, *At-will Rule*, *supra* note 15; Summers, *Divine Right*, *supra* note 3. *But see* Deborah A. Ballam, *The Development of the Employment At Will Rule Revisited: A Challenge to its Origins as Based in the Development of Advanced Capitalism*, 13 HOFSTRA LAB. L.J. 75 (1995). Several works speculate on the origins: Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. REV. 427 (2016); J. Peter Shapiro & James F. Tune, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 340–47 (1974); Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 717–20 (1994); Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the U.S. and England: An Historical Analysis*, 5 COMP. LAB. L. 85, 95 (1982). For a discussion of the historical development in New York, *see* Gary Minda, *The Common Law of Employment At-Will in New York: The Paralysis of Nineteenth Century Doctrine*, 36 SYRACUSE L. REV. 939 (1985).

175 *See* Feinman, *At-will Rule*, *supra* note 15; and Ballam, *At-Will Rule Revisited*, *supra* note 174. Although Wood listed a few cases as supporting the rule, scholars disagree as to whether those cases actually do.

rule was uniform, inflexible, and pervasive throughout all employment of all types.[176] Thus, there is some question if the rule was actually legally recognized before Wood wrote it.

### A. Continuing questions about nineteenth-century employment practices and customs

It is difficult to ascertain what the employment termination practices actually were in the nineteenth century. There is almost no empirical evidence on the subject.[177] Contemporary writers observing employment customs in the United States commented upon the shortage of domestic workers, their refusal to be subservient, and their tendency to quit whenever they pleased.[178] Employment practices were undoubtedly local and job-specific. It is unlikely that Blackstone's rule, stipulating one year's duration, still governed the diverse types and increasing number of jobs in factories and other trades, though it may still have been relevant in agricultural labor.[179]

As tens of thousands of new workplaces emerged across the United States, there was probably little standardization. There was simply no mechanism to standardize the law. Because then, as now, employees rarely sued their employers,[180] few courts were given the opportunity to announce a rule, let alone determine that there was a rule that was uniform and well-settled.[181] The Tennessee Supreme Court made no such claim in *Payne v. Western & Atlantic Railroad*. Treatise writer James Schouler suggested in 1870 that there was a plurality of different legal rules and different customs operating.[182] Joseph Story's *Treatise on Contracts* similarly suggested legal plurality by stating that custom applied in determining the term, that each case was to be determined by a jury, and that the law of notice to terminate was unsettled.[183] It would appear that different workplace settings invented work rules to suit the circumstances without a

[176] Payne v. Western & Atlantic Railroad Company, 81 Tenn. 507, 519–20 (1884) (overruled on other grounds); Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915). *Payne*, 81 Tenn. was not cited in Wood's 1886 second edition either. Andrew Morriss makes some attempt to address differences between Wood's first and second edition, but does not explain the absence of the *Payne* case. He speculates that Wood may not have thought he needed further support for his claim. Morriss, *supra* note 174 at 757.

[177] Amy Dru Stanley notes, "Evidence is sparse of the contract practices in all of these trades." STANLEY, FROM BONDAGE TO CONTRACT, *supra* note 14, at 58. Nevertheless, she reads Wood's statement of the law as fact. *Id.* at 59. Feinman and others doubt the truth of Wood's claim, attributing the rule's invention to him. Feinman, *At-will Rule*, *supra* note 15, at 119.

[178] MRS. E.F. ELLET, SUMMER RAMBLES IN THE WEST (New York, J.C. Riker 1853); FRANCES TROLLOPE, DOMESTIC MANNERS OF AMERICANS (London, Whitaker, Treacher & Co. 1832).

[179] The Reconstruction Congress contemplated that most freedmen who were employed in agriculture would be employed under contracts for a year. The Freedmen's Bureau reported that freedmen who left their employment did so out of a dissatisfaction that was justified under the working conditions.

[180] Even in *Payne*, 81 Tenn., when the Tennessee Supreme Court first announced the rule, it was not in a context where employees had sued their employer.

[181] Story's Treatise on Contracts stated in 1874 that "there is no inflexible rule that an indefinite hiring is for a year; it is a question for the jury in each case. WILLIAM W. STORY, 2 A TREATISE ON THE LAW OF CONTRACTS, 5th ed. 1874 By Melville M. Bigelow, 465.

[182] *See infra* Part IV.B.1.

[183] STORY, CONTRACTS, *supra* note 181, at 465-67.

uniform default rule.[184] Different trades undoubtedly operated on different cycles with beginnings, middles, and endings. Customs probably evolved based on those cycles, just as the one-year rule had been based on the agricultural growing seasons. Custom was built on the pay period, whether weekly, monthly, or semi-annually.[185] Household domestics, for example, were employed on a month-by-month basis, giving servants a month's notice to find a new job.[186]

Thus, it is quite unlikely that any single rule was expected to apply across all industries and employments as the default rule. Then as now, employers dictated the terms, but with the labor shortage occasioned by the war and opportunities for dissatisfied workers to move west, employers could not ignore workers' expectations. Day laborers were the most vulnerable of workers, since they were hired and paid only by the day. To make employment at-will the default rule would mean that all employees in every industry in every region of the country were in fact "day-laborers," with no legitimate expectation of continued employment. This seems counter-intuitive given the contemporary references that distinguished "day-laborers" as a distinct class of workers from "operatives," "mechanics," and "artisans" who occupied different niches in the labor market. [187]

There is further reason for skepticism of Wood's claim. Other contemporary treatise writers mentioned the at-will rule as an anomaly, if they even mentioned it at all.[188] If employment at-will actually had been the widely accepted as an established rule or as the predominant custom, it

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[184] Story states: "The following contracts have been held to be hirings for the week. The hiring of a gardener, 'at 6s. a week for the winter, and 9s. a week for the summer;' of a maidservant, 'at 1s. 4d. a week, and board and lodging, for as long as they wanted a servant;' and of an assistant plumber and glazier, 'at 6s. a week wages, board, lodging, and washing, summer and winter.'" (footnotes omitted.) *Id.* at 467.

[185] Story maintains that the pay period, "as per week, or month, or half-year, such circumstance, standing alone, indicates that the hiring is for such period." *Id.* at 466. He indicates further variability by stating that in giving notice, "the length of notice required does not seem to be exactly settled, and in the absence of any special agreement it is governed by custom and the circumstances of the case. A reasonable time of notice is, however, required . . . ." *Id.* at 484.

[186] *See infra* note 234.

[187] Congress differentiated between day laborers and other employees in discussions of the government's labor force. *See, e.g.*, the language of describing the workers of New York City as "artisans, mechanics, and day laborers," CONG. GLOBE, 39th Cong. (Jan. 5, 1867) (remarks of Rep. Bundy). *See also* the discussion by Senator Edmunds distinguishing grades of employees at the custom-house: "[E]very other employee, except a day laborer, in the custom-house is appointed in that way." CONG. GLOBE, 39th Cong. (Jan. 16, 1867).

[188] The few other contemporary treatises bearing on the subject were: SCHOULER, TREATISE *supra* note 130; WALTER C. TIFFANY, A HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS (St. Paul, Minn., West Publishing Co. 1896); IRVING BROWNE, ELEMENTS OF THE LAW OF DOMESTIC RELATIONS AND OF EMPLOYER AND EMPLOYED (Boston, The Boston Book Company 2d ed. 1890); and a treatise on contracts that mentioned services at will: C. G. ADDISON, A TREATISE ON THE LAW OF CONTRACT (James Appleton Morgan ed., New York, N.Y., James Cockcroft & Company 1875). But see Story, who adds the following reference regarding the termination of a seller's agent: "A hiring for an indefinite time is only at will, and an agent under such a hiring may be discharged without notice." STORY, CONTRACTS, *supra* note 181, at 465 (citing Kirk v. Hartman, 63 Penn. St. 97 (1869). This sentence appears for the first time in Story's 1874 5th edition, and it is tacked on to a paragraph that stresses that determination as to term in general hiring are questions for the jury in each case. In Kirk v. Hartman, the court found that at-will was actually the parties' intent.

should have been noticed and noted by other scholars engaging in gathering and summarizing the rules of the common law of master and servant in their treatises during the same decade.

### B. Competing legal rules of employment termination in nineteenth-century treatises

Though Wood's treatise and the *Payne* case are widely acknowledged as the first mentions of the at-will rule in the context of employment,[189] there has been little recognition that there were countervailing voices at the time, and of the degree to which these were ideologically linked to Reconstruction's anti-subordination theme. In *Payne,* two of the five judges argued against the at-will rule in republican terms: that it would destroy the nation's free institutions. James Schouler, the author of another prominent treatise, proposed a more nuanced rule regarding the termination of employment, based upon custom and pay period, which was more consistent with the ideals of worker independence and labor republicanism.[190] Thus, despite Wood's claim in 1877 that the rule was settled, for more than a decade thereafter, his contemporaries failed to even acknowledge its existence as an operational rule.[191] Yet, by the twentieth century,[192] the at-will employment rule had become the standard doctrine, and for most of the twentieth century, that doctrine was virtually immutable.[193]

In the late 1870s, when both James Schouler and Horace G. Wood wrote treatises on master and servant law, they took opposing directions.[194] Comparing the two, both in language and in selection of rule for the duration and termination of employment, demonstrates Schouler to be a labor republican and Wood to be an anti-republican.

#### *1. James Schouler as republican*

There is no doubt that James Schouler considered himself a "republican." He demonstrated his enthusiasm for the subject by authoring a book entitled *Ideals of the Republic*.[195] Schouler devoted several sections of the monograph to the subject of labor and capital.[196] These same ideals are evident in his legal treatise first published in 1870, at the end of Reconstruction and seven years before Wood's treatise.[197] His treatise suggests there was a plurality of practices at

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189 *See* articles listed *supra* note 174.

190 *See infra* Part IV.B.1.b.

191 *See infra* Part IV.3 & Part IV.4 discussing other treatises' treatments.

192 This occurred during the era of the United States Supreme Court decisions in Adair v. United States, 208 U.S. 161 (1908); and Coppage v. Kansas, 236 US 1 (1916) (allowing managers to fire employees for joining unions).

193 *See* articles listed *supra* note 174.

194 WOOD, A TREATISE, *supra* note 33. There were a few additional treatises on the topic, *discussed infra* Part IV.3, but these two scholars provide the sharpest and most complete contrast.

195 JAMES SCHOULER, IDEALS OF THE REPUBLIC (Boston, Little, Brown & Company 1908).

196 *Id.* at 272–76. Schouler begins the section by observing, "The corporate magnate grows autocratic; he displaces subordinates who will not subserve his ends, and employs facile minions . . . . And thus do we find the gulf yawning wider and wider between the rich and the poor of the land, between the few who seek to occupy all avenues to wealth and the many who are pressed to gain a livelihood by subserviency . . . ." *Id.* at 272.

197 SCHOULER, TREATISE *supra* note 130. He published several further editions during his long life.

the time.[198] Schouler revised his treatise several times, yet he did not mention the at-will rule until the sixth edition, in 1905.[199]

Schouler's writings echo concerns, arguments, and even stock phrases of Reconstruction-era Republican congressmen. In keeping with the anti-subordination theme, he began his section on employment law by observing that the subject traditionally named "master–servant" entailed caste-like circumstances that were unsuited to the American republic. He exalted the republican thinking that masters and servants should be social equals in America, and expressed concerns about power disparity when discussing common law rules.[200] The rule Schouler posited for ending employment when there was no specified end date was to follow local custom, often relative to the pay period, and moderated by "sympathy" between the parties. Rather than claim that employers could bluntly terminate employees without reason, Schouler went to some lengths to describe what reasons justified dismissal.[201] His careful examination of which reasons were justifiable underlined the very importance that employers have reasons for dismissing employees.

Though his treatment of employment law has been overlooked, in his time, James Schouler was a scholar of some significance. He was highly regarded in both law and history circles in Boston and in Washington, D.C. He wrote prolifically, both historical monographs and treatises. In 1896–97, he was president of the American Historical Association. He moved in mainstream Northern legal circles. After attending Harvard College before the Civil War, Schouler read law in Cambridge during the war, and moved to the nation's capital shortly thereafter. Both of his residences would suggest that he was familiar with the public debates engulfing the nation, often focused upon the debates in Congress. His home state, Massachusetts, was represented by the two leading Radical Republicans, Senators Henry Wilson and Charles Sumner. Schouler praised them in his writings.[202] But it is his choice of language and themes in discussing the employment relationship that so closely parallel the language and themes of reformers in the Reconstruction debates.

Overall, Schouler's chapter on the law of master and servant was perhaps the best *republican* version of the existing common law rules that could be written at the time. No treatise could ignore discussing Blackstone as the point of departure, but Schouler repeatedly questioned the harshness of the *Commentaries*' doctrines. Schouler distinguished English rules' severity

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198 *Id.*

199 JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS: EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT 7 (Boston, Little, Brown & Co. 6th ed. 1905).

200 Notably the Rule of Forfeiture in case the entire contract was not performed.

201 *See infra* notes 241–46, and accompanying text.

202 Schouler also wrote a multi-volume history of the Constitution, including its amendments during Reconstruction. 6 JAMES SCHOULER, HISTORY OF THE UNITED STATES OF AMERICA, UNDER THE CONSTITUTION. 1861–1865 (New York, Dodd, Mead & Company 1899). But unlike his contemporary Henry Wilson's work, Schouler wrote nearly forty years after the events. Schouler praised Massachusetts senators Sumner and Wilson for their leadership, noting that "each helped the other in turn." *Id.* at 230.

from the more progressive spirit of modern America where, as he insisted, "more might be claimed for the servant and less for the master."[203] In section after section, Schouler spoke of an "old rule"—that is, some principle found in Blackstone—and then softened the purchase of that rule by indicating more recent exceptions, American revisions, or countervailing considerations. He distanced Blackstonian principles by references to their age and, presumably, out-datedness,[204] or by suggesting their suitability was limited to rigid caste-like societies like England.[205] Warning the reader about English precedents, Schouler announced a general caveat: "[S]o widely do the English and American systems differ in these . . . matters, that judicial precedents may not always be safely interchanged between the two nations."[206] Nor did Schouler care much for the British judiciary or parliament. He criticized English magistrates as "petty" and "always inclined to obsequiousness . . . . [T]heir tribunals had not the confidence of the working classes, as remains the fact to this day."[207] Schouler implied that American judges could do better than to follow them. Even English industrial legislation was criticized as "lean[ing] decidedly in favor of the master."[208] Schouler's disparagement of the unhappy, subordinated position of English working men also echoed Republican speeches.[209] He derided the received English common law as fixing social rank and blocking opportunities for workmen to improve their lot.

> In the early days of the common law, [the law of master and servant] formed a distinct part . . . in a state of society where landed proprietors are few and wealthy, where rank and titles are maintained with ostentatious display, where the humble born are taught to obey rather than aspire . . . .[210]

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[203] *Id.* at 706.

[204] Examples of his language include: "the *old law* construes it into a year's hiring," SCHOULER, TREATISE, *supra* note 199 at 607; "there are instances to be found in the *old books*" *Id.* at 626; "*The old writers* say that the servant may justify a battery . . . ,"*Id.*; "The *old rule* was that a master deprived" of a servant's services might sue. *Id* at 632. (emphasis added). The Reconstruction Congress also continuously contrasted American spirit against the Old World: "The despots of the Old World have no love for our free institutions and democratic form of government . . . ." CONG. GLOBE, 38th Cong. (June 14, 1864) (remarks of Rep. Ross).

[205] "Contracts for life are not illegal at common law; but they are very strongly objectionable; and, in this country, it is doubtful whether they would ever be enforced, so contrary are they to the spirit of our institutions. Yet . . . in England agreements whereby, in substance, workmen engaged to serve, for a term of seven years . . . were considered valid and unobjectionable." *Id.*

[206] *Id.*

[207] *Id.* at 8.

[208] *Id.* at 644.

[209] The Reconstruction congressmen also compared American labor's prospects favorably to those of its English counterparts. For example, one congressman said, "Why, sir, look at England, where a single landholder can mount his horse in front of his dwelling and ride a hundred miles in a straight line to the sea on his own land; and not only owning the soil, but the laborers who till it, and governing them according to his absolute will. This system of English serfdom is scarcely less galling than was our own system of chattel slavery . . . ." CONG. GLOBE, 40th Cong. (Feb. 4, 1868) (remarks of Rep. Julian).

[210] SCHOULER, TREATISE, *supra* note 199, at 689–70.

In those societies, "this must so continue." In short, Schouler leaned against the received common law of master–servant as much as possible.

Moreover, in confronting the structure, Schouler consciously upended the hierarchy of Blackstone's subordinating schema by altering its order of presentation. While Blackstone began with the master's domination of the slave, Schouler brushed slavery aside, stating that it was "the common barbarian accompaniment of barbarian triumphs; and in spirit, if not in the letter, once fastened upon the common law, while the feudal system lasted."[211] Instead, Schouler chose to reverse the order of examination, taking up workmen, then apprentices, and "then we can consider the relation of hired servants in its wider sense more at our leisure." [212]

Furthermore, Schouler set his discussion of law in the context of soaring idealistic themes, using two favorite phrases of Republican reformers: "free institutions" and "caste." According to the Republicans, a legal order that bore the "marks of caste" was no more to be respected than one that bore the badges and incidents of slavery. [213] Schouler contrasted "caste" to the desired values of free institutions, the importance of respect and social equality between employees and employers, and an optimism about the reformist direction that opportunity and American ideals would take over time.

Schouler's opening paragraph stated

> The relation of master and servant presupposes two parties who stand on an unequal footing in their mutual dealings; yet not naturally so . . . . This relation is, in theory, hostile to *the genius of free institutions*. It bears the marks of *social caste*. Hence it may be pronounced as a relation of more general importance in ancient than in modern times, and better applicable at this day to English than American society.[214]

Thus, Schouler rendered Blackstonian principles as ancient and English. He used the term "might be" in the phrase "more might be claimed for the servant in modern America"—as if equality between servant and master was not already established but would resolve itself as future cases were decided. The statement is almost an admonishment against past precedent and a nudge to judges to reformulate their rulings under the more enlightened American attitudes of workplace justice and worker independence.

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[211] *Id.* at 7. Schouler was far too optimistic in his claim that abolition had "well-nigh removed all traces of the institution." *Id.*

[212] "But let us invert the order, disregarding general service for the present. In other words, let us glance rapidly at the relationship of workmen and next of apprentices; then we can consider the relation of hired servants in its wider sense more at our leisure." *Id.*

[213] Eliminating caste was a major theme in Senator Wilson's accounts of Reconstruction. *See* WILSON, SLAVE POWER IN AMERICA, *supra* note 65. The word "caste" is used more than thirty times in Wilson's book, always pejoratively. It appears hundreds of times in the Reconstruction Congress debates. *See* list on file with author.

[214] SCHOULER, TREATISE, *supra* note 199, at 690.

Ultimately, Schouler's approach produced a different rule of employment dismissal to Blackstone's, one softened by the Enlightenment ideal that those actions which significantly affect other people should be accompanied by reasons. Schouler proposed a rational and enlightened rule of termination rather than Wood's formulation that the employer could fire an employee suddenly for a bad reason or no reason at all.

*a. The terminology of master and servant and its inherent servility*

By the 1870s, the term "servant" had already for decades been criticized for its association with servitude and subjecting oneself to a servile state.[215] The Radical Republicans claimed the term as insulting.[216] Such terminology also distinguished Schouler's treatise from Wood's.[217]

While Schouler apologized for the terms' disparaging connotations, Horace G. Wood showed no such sensitivity, repeating them extensively in all of his books.[218] According to Schouler, the "repulsive" terminology of master and servant was "fast losing favor in this republican country," despite its unfortunate continued usage in the common law courts.[219] "In these days, we dislike to call any man master." He lamented, "[W]e constantly find an offensive term used in court to denote duties and obligations which rest upon the pure contract of hiring."[220] Similarly, he wrote in his monograph,

> [t]he word "servant" or "master" suits better an aristocratic state of society than a democratic one; and hence a milder synonym is coined for American households, to reconcile those once brought under the influence of our *free institutions* with those unequal conditions which the relation itself seems to imply.[221]

According to Schouler, workers were not inherently diminished socially by virtue of being hired to work for an employer. He writes, "[I]t is gratifying to reflect that the servant is frequently the social equal, or even the superior, of his master."[222] Less than five years earlier, Senator Henry

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215 SEAN WILENTZ, CHANTS DEMOCRATIC: NEW YORK CITY AND THE RISE OF THE AMERICAN WORKING CLASS, 1788–1850 (1984); ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350–1870 (1991).

216 Senator Henry Wilson called attention to the use of the objectionable term "master" in the phrase "master–servant" in the title of a Southern legislative bill. VanderVelde, *Henry Wilson*, *supra* note 132, at 198.

217 *See infra* Part VI.B.2. for discussion of Wood's use of the terms.

218 Counting the occurrences of these terms in his text demonstrates this. Wood used the term "master" (3,470 times) more than ten times as often as he used the term "employer" (338 times) in his 1877 treatise. Similarly, "servant" (3,831 times) exceeds the use of "employee" (203 times). These counts were performed by the author on digitized versions of Wood's 1877 treatise in the author's possession.

219 "But it cannot be denied that master and servant is rather a repulsive title, and fast losing favor in this republican country . . . ." SCHOULER, TREATISE, *supra* note 199, at 7–8 (introduction).

220 *Id.* at 690.

221 SCHOULER, IDEALS, *supra* note 195, at 233. "We employ 'help,' 'domestics,' 'housework girls' in our homes."

222 SCHOULER, TREATISE, *supra* note 199, at 692.

Wilson had repeatedly made this point in virtually identical language in public debate.[223] Schouler's concern for disparity of power extended to his further admonishment that to be valid a contract for service had to be "reasonable and not oppressive."[224]

Schouler was not blind to the fact that the nature of work required individuals to subordinate themselves to its necessary *tasks.* But, like the Radical Republicans, he found this was not demeaning, because work was a universal human condition. Since it was universal, it could not mark a subordinated class, or divide society into classes.[225] "[P]ut the symbols as we may, we shall not escape in its wider scope that subordinate service in life to which *most of us must conform* in order to make a living." Somewhat naively, Schouler did not see employees' and employers' interest in constant conflict, however. "[B]usiness life can[not] flourish without that wise inter-dependence . . . ; and the true reconciling bond of all close relations of service is sympathy."[226] According to this rosy view, tensions between those who give orders and those who follow them should thus be resolved by "sympathy."[227] In essence, he preached accommodation of interests and in a further progressive step, he favored arbitration when disputes arose.[228]

*b) A labor republican approach to the rule governing employment duration and termination in general hirings*

Schouler's choice of a rule governing employment termination suggests that employers were obligated to follow principles of good faith and fair dealing in regard to their employees. Schouler utilized contract terminology,[229] but guided by the invocation that employers exercise some consideration (sympathy) in dealing with their employees. "[T]he master is always bound

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[223] Similarly, Senator Wilson, who had been a successful shoe manufacturer, repeatedly emphasized that some of his employees "in moral excellence and purity of character, I could not but feel, were my superiors." VanderVelde, *Henry Wilson*, *supra* note 132, at 189.

[224] SCHOULER, TREATISE, *supra* note 199, at 651.

[225] "Yet, whether nominally as agent or as servant, whether as one of the family or as one living in his own home, he whose employment comes under any contract of hire in these days is subjected to one and the same fundamental law, as to rights, remedies and responsibilities; and every one employed in a private corporation, from president down to janitor, is in a certain sense a servant to that impersonal master, as he is likewise an agent." *Id.* at 232.

[226] *Id.* (emphasis added).

Schouler seems to retain the oppressive language of master and servant with regard to domestic institutions, however: "And merely as a domestic institution associated with husband, wife and children, I thoroughly believe in the good oldfashioned relation of 'master and servant,' as mutually helpful and beneficial in any household when conscientiously and considerately pursued." *Id.* at 233.

[227] SCHOULER, IDEALS, *supra* note 195, at 233.

[228] "No principle so beneficial to workmen has been introduced as that of arbitration." SCHOULER, TREATISE, *supra* note 199, at 644.

[229] "As a general rule, every person of full age, free from all other incompatible engagements, may become either a master or a servant; and the service need not be performed under a legally binding contract, for the service may be constituted de facto. The usual law of contracts applies to all who enter the relation. And arrangements for remunerating a servant by a portion of the profits may, under some circumstances, constitute him a partner rather than a mere servant." *Id.* at 702.

to consider justly the circumstances . . . ."[230] Schouler may have merely been proposing best principles here, rather than stating binding law, but he described the legal situation as fluid and he clearly expected courts to step in and move the common law in this direction.

Schouler criticized English jurisprudence for permitting masters too much privilege in punishing employees. "There are some English cases where conduct which might ordinarily seem justifiable on a servant's part has been punished by dismissal . . . ."[231] He continued, "So have many decisions seemed to sustain the master, where the servant lacked in blind devotion to his selfish interests, or asserted *a generous independence of opinion* a little too boldly. But at the present day, certainly in America, more might be claimed for the servant and less for the master."[232] In the words of the Reconstruction reformers, Schouler expected that American employees should be free from their masters' thrall.[233]

Schouler framed his rule of duration in the legal language of "determinable" conditions, as all treatise writers did. The legal term "determinable" is extensively used in the law of property estates and addresses the question of how long a term lasts.[234] The endings of terms are said to "determine" upon the occurrence of some event, such as the employee's death, or the closure of the business. Schouler stated that the pay period was relevant here. This would protect the employee from being blindsided by the employer's displeasure and his own dismissal. [235] Schouler also noted that there were circumstances where a sudden termination was appropriate, such as when the work required "close proximity" between employer and employee, but even then, the servant deserved a month's wages so that he was not left destitute.[236]

Schouler contemplated that an at-will employment was not illegal, but only when it was expressly contracted for.[237] But regarding contracts in which no duration was specified, Schouler departs most strongly from Wood. Schouler noted that Blackstone's rule had been modified by

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[230] SCHOULER, TREATISE, *supra* note 199.

[231] *Id.* at 655.

[232] *Id.*

[233] *See supra* Part III.A.

[234] "Determinable" is used in the ending of tenancies that are "determine" upon a signaling condition, the "life estate determinable," the "fee simple determinable," the "tenancy determinable," etc.

[235] *See generally* AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW SECOND, PROPERTY 2D, LANDLORD AND TENANT (1977), and other materials on estates in land.

[236] It was particularly important to be able to end an employment relation where "the parties [were in] such close proximity. . . .[T]the frequency of intercourse [is] valuable only when mutually agreeable and otherwise intolerably annoying . . . ." In these circumstances, the relationship "should be readily terminated at the option of either party"; "We find at the outset, then, a distinction made in practice between servants menial or domestic, and other servants; which distinction is founded upon a custom of dissolving the relation, not at the end of a year but at any time upon giving the servant a month's wages." SCHOULER, TREATISE, *supra* note 199, at 700.

[237] He states that employees can be terminable at will by either party only "when the agreement [so] provides . . . ." *Id.* at 719. "*Where the agreement provides that either party may terminate it at any time*, the servant may quit at any time on his own motion, and recover on the contract for services rendered." (emphasis added). *Id.* at 655.

custom and the custom for domestic servants was a month's notice.[238] He reiterates, "*By custom* such contracts have become *determinable* . . . ."[239] As to other hirings, "whether written or unwritten, express or implied, the year's duration is modified by custom to the period of their wage payments."[240] Custom had modified the one-year rule, and "the date and frequency of periodical payments were material circumstances in each case."[241]

Schouler meticulously articulated the circumstances that justified an employer's decision to terminate the employee immediately for fault.[242] Certainly there would have been no need to go into such detail if he presumed that employments were basically at-will. Schouler's list resembles what would now be called "just cause." [243] In the same vein, Schouler articulated the modern principle now called "progressive discharge," that a good employee should not be terminated upon his first minor offense.[244] Finally, Schouler stated that an employee cannot be dismissed for refusing to commit an illegal act.[245] Today, this is one of the better-known exceptions to the at-will doctrine, but after at-will took hold in the early 1900s and permitted discharge for even "bad reasons," this exception did not develop until the end of the twentieth century.[246]

According to Schouler, the legal principle was "substantial justice."[247] When termination was necessary, Schouler advises employers to be principled rather than harsh, and to preserve the

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238 "If the hiring be general, without any particular time limited, the old law construes it into a year's hiring. But the equity of this rule extended only to such employment as the change of seasons affected; as where the servant lived with his master or worked at agriculture. By custom, such contracts have become determinable in the case of domestic servants, upon a month's notice, or, what is an equivalent, payment of a month's wages." *Id.* at 698.

239 *Citing* Nolan v. Ablett, 2 Cr. M. & R. 54; Fawcett v. Cash, 5 B. & Ad. 904; Fewings v. Tisdal, 1 Exch. 295, 2 Yr. (N. J.) 343.

240 SCHOULER, TREATISE, *supra* note 199, at 648.

241 "Laborers are hired frequently by the day, and to hire by the week is not unusual." *Id.* at 698.

242 "We are now to inquire in what manner the relation of master and servant may be terminated." *Id.* Implying the need for reasons from an extensive list of reasons for discharge is actually a technique used in interpreting employment handbooks for implied promises of job security. *See, e.g.*, Hunter v. Board of Trustees of Broadlawns Medical Center, 481 N.W.2d 510 (Iowa 1992).

243 "Good grounds of discharge" in Schouler's list included: insolence and willful disobedience of orders, betraying the master's confidence, habitual negligence, or unsatisfactory work due to "wantonness or palpable inefficiency." *Id.* at 705–706. For a modern standard definition of "just cause," *see* ALI, EMPLOYMENT LAW, *supra* note 2.

244 SCHOULER, TREATISE, *supra* note 199, at 698.

245 "An obstinate refusal to do an unlawful act is clearly no ground for dismissal." *Id.* at 705.

246 *See* Blades, *Employment At Will*, *supra* note 45 (writing in 1967 that there should be exceptions to the at-will rule); *and generally Symposium*, *supra* note 4 (tracing post-1967 developments).

247 SCHOULER, TREATISE, *supra* note 199, at 710–11.

servant's dignity.[248] He concludes by stating, "The master is always bound to consider justly the circumstances . . . ."[249]

All in all, five features mark Schouler's writing as labor republicanism. First, he repudiated the demeaning terms "master and servant."[250] Second, he stressed that employees and their employers were social equals, and that the law should regard them as such,[251] just as the Republicans had emphasized in the Reconstruction Congress.[252] Third, Schouler advocated that courts modify the pro-employer privileges because they smacked of overlordship. Fourth, like the Republicans, Schouler envisioned more reforms toward a steadily improving and more republican future for the nation. He optimistically predicted that old master–servant practices would fall away in America as time progressed, and as American courts replaced the hierarchical English rules. Thus, he relegated the received common law rules that favored masters to an antiquated past. And fifth, again like the Radical Republicans, Schouler espoused the almost unshakeable belief that circumstances were fluid in America, America was the land of opportunity, there were ladders of upward mobility that rewarded hard work and prevented American society from ever becoming a caste or class-based society.[253]

### *2. Horace G. Wood as anti-republican*

In Albany, and the New York world of railroad expansion, H.G. Wood was writing a very different treatise. Little is known about Horace G. Wood's background.[254] His *New York Times* obituary simply states that he was born in 1831, in Vermont, where he received his education, practiced law and became a member of the Vermont legislature. He engaged in extensive railroad and corporate litigation, for some years acting as counsel for the Rensselaer and Saratoga Railroad. It was when his health became impaired that he began to write treatises.[255] Another source states that he moved his practice to Albany, New York, and adds mysteriously

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[248] "As to terminating a contract of service peremptorily, the summary and harsh method which befits a real master is to discharge the servant. The servant on his part will summarily withdraw from the service, if dissatisfied, or, by striking, as it is called, invite his prompt discharge. The milder termination of the employment relation is by a servant's resigning; and a fair employer will often prefer to induce his employee, if he can, to tender his resignation and then accept it, rather than resort to dismissal and a discharge." *Id.* at 712.

[249] *Id.*

[250] *See* VanderVelde, *Labor Vision*, *supra* note 12.

[251] SCHOULER, TREATISE, *supra* note 199, at 692.

[252] See Senator Wilson's remarks, *supra* note 223.

[253] W.E.B. Dubois called this "the American Assumption," a belief which he says characterized the Reconstruction Congress. W.E.B. DUBOIS, BLACK RECONSTRUCTION, *supra* note 67, at 182–83.

[254] Feinman calls him "an enigma." Feinman, *At-will Rule*, *supra* note 15, at 126.

[255] Obituary of Horace G. Wood, N. Y. TIMES, Jan. 10, 1893, at 5, available on Proquest Historical Newspapers. Obituary of H.G. Wood, Esq., PETERBORO TRANSCRIPT (Peterboro, New Hampshire), Jan. 12, 1893, at 2 (on file with author).

that subsequently, "Mr. Wood lost his reputation and left Albany under a cloud" in 1880.[256] By 1885, he appears to have recovered both his health and his reputation, because he is said to have resumed practicing law.

Rather than following the national debates over abolition and republican ideals, Horace G. Wood was actually listening to different voices: the voices of the dead from the spirit world. While practicing law in Vermont, Wood was conducting daily séances, claiming to be in contact with the long-deceased Thomas Paine. In 1864, Wood published a book that he claimed was actually authored by Paine; he claimed he was merely Paine's scribe.[257] According to Wood, he communicated with Paine's spirit, who also spoke to others in the spirit world, like Ethan Allen, and Paine's ghost passed their insights on to Wood to write down. (Actually, most of the work deals with the spirit world; there is very little in the book that reflects Paine's ideas in his celebrated works *Common Sense* and *The Rights of Man*, and there are some statements bordering on religious heresy were they not dictated by the ghost of a distinguished gentleman.)[258]

The most salient of these biographical facts is that for most of his practice, Wood worked as a railroad attorney. Wood cited this experience with pride. "Having been for several years . . . attorney for a leading railway company, by a varied and extensive experience I learned some of the needs of the profession . . . ."[259] While many nineteenth-century attorneys served railroad interests, Wood distinguished his devotion to them by writing an expansive three-volume, 816-

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[256] MARCUS DAVIS GILMAN, THE BIBLIOGRAPHY OF VERMONT: OR, A LIST OF BOOKS AND PAMPHLETS RELATING IN ANY WAY TO THE STATE. WITH BIOGRAPHICAL AND OTHER NOTES 339 (Burlington, VT, Free Press Association 1st ed. 1897).

[257] THOMAS PAINE, THE PHILOSOPHY OF CREATION: UNFOLDING THE LAWS OF THE PROGRESSIVE DEVELOPMENT OF NATURE, AND EMBRACING THE PHILOSOPHY OF MAN, SPIRIT, AND THE SPIRIT WORLD (Horace G. Wood ed., Boston, Bela Marsh 1864). The book's introduction states:

> [T]he medium, Mr. H. G. Wood, of Vermont, . . . was accustomed to hold daily 'sittings' for public investigation, when the present work was proposed to be commenced by a company of spirits, purporting to be Thomas Paine, James Marsh, . . . Professor in the University of Vermont, Ethan Allen, of revolutionary memory, and Benj. Day, and to be written by one spirit, and by Thomas Paine—the materials being contributed by all. . . . For some six months . . . , the spirit of Mr. Paine was almost daily present, managing all our circles with the greatest judgment, and giving multitudes of evidences which unmistakably identified him as the veritable spirit who purported to communicate. . . . I do not deem it necessary to enter into any details to prove the spiritual origin of this little treatise . . . ; but I will content myself with simply stating that the writer was Thomas Paine, there are two convincing arguments to be offered: the one, that the chirography is a facsimile of Mr. P's; the other, that the style of composition is peculiarly his own—and that is acknowledged to be almost inimitable. The admirers of Mr. P. as an independent thinker and uncompromising writer, will be gratified to learn that Mr. P's residence in the spirit land has not at all either impaired his intellectual vigor, or changed his disposition to make war on all error, from whatever source it may come.

*Id.* at 4-5. I thank librarian Noelle Sinclair for her assistance in locating this source.

[258] *See, e.g.*, "The Bible is entirely, wholly, in this instance, based upon imagination. It is the mere creation of a wild and sickly fancy." *Id.* This may have been more problematic for Wood to publish if it was attributed to Wood, rather than someone in the spirit world.

[259] 1 H. G. WOOD, A TREATISE ON THE LAW OF RAILROADS. IN THREE VOLUMES (BOSTON: CHARLES C. SOULE, 1885), preface.

page treatise on the law of railroads.[260] Railroads were the economic sector driving the development of employment relations in the late nineteenth century. Railroad companies went to court, and were taken to court often, resulting in new common law rules.[261] The railroad for whom he served, the Rensselaer and Saratoga Railroad, was managed by none other than Jay Gould during Gould's first sortie into the railroad industry, where he would later become the undisputed "boss."[262]

Wood's master–servant treatise demonstrates a very strong identification with the interests of employers and managers. Rather than express sympathy for employees, as Schouler did, Wood took the management's perspective at every turn. Wood never commented upon the indignity implied in the terms "master and servant," he never disparaged social hierarchy or caste, and servility did not concern him. Moreover, in contrast to Schouler, Wood expressed approval for the stricter English versions of certain master—servant rules, using the justification that although strict, those rules could not be injurious to servants, because they had survived in England.[263] While Schouler criticized British law as the unfortunate carry over of Britain's anti-republican hierarchical society, Wood urged that American law remain in step with the English common law in the preambles to his books.[264] The rare injustice he decried was the employers' misfortune when they were *at the mercy* of employees' who quit.[265] The term "republican" appeared only once, in the context of a lawyer's misfortune when ethically obligated to serve a client without the guarantee of compensation. That, Wood says, is repugnant to republican ideals.[266] Wood's only reference to something being objectionably "slave-like" was the case of a

[260] *Id.*
[261] Payne v. Western & Atlantic Railroad, *discussed infra* Part IV.C., is just such a case. In the *Lochner* era, two of the more labor restrictive U.S. Supreme Court opinions were drawn from railroad settings: Coppage v. Kansas, 236 U.S. 1 (1915); and Adair v. United States, 208 U.S. 161 (1908).
[262] Jay Gould became involved in this railroad because it was owned by his father-in-law, who was keen to see Gould succeed in business. *See Jay Gould*, WIKIPEDIA (Mar. 8, 2020), https://en.wikipedia.org/wiki/Jay_Gould.
[263] "The rule is rigidly enforced in England as well as in the courts of this country, and cannot be said to have operated injuriously to servants." WOOD, TREATISE, *supra* note 33, at 293.
[264] Wood also celebrated the impact of English rules on the American common law in the two British common law treatises that he annotated: ADDISON ON CONTRACTS: BEING A TREATISE ON THE LAW OF CONTRACTS (Boston: Charles H. Edson & Co. 1888) and ADDISON, A TREATISE ON THE LAW OF TORTS (New York, James Cockcroft & Co. 1876). In his preface to the torts treatise, he stated "There is such an identity between the law applicable to private wrongs in England and this country, as to render an English work upon the subject fully as valuable, and I am inclined to think even more valuabWle to an American lawyer, than one purely American." *Id*. at iii. He similarly stressed this in his preface in the treatise on contracts. "There is but little difference in the law relating to contracts as administered in the Courts of England and this country . . . ." *Id.*
[265] WOOD, TREATISE, *supra* note 33, at 352-53.
[266] "Under the English rule, however, an attorney was not expected to perform services gratuitously, but was left . . . to the mercy of his employer as to compensation. The absurdity of this doctrine is quite apparent, and it has not found favor in our courts. It may comport with aristocratic notions, but it is repugnant to republican ideas, where rank and class finds no favor, except it is based on actual merit." WOOD, TREATISE, *supra* note 33, at 352–53.

father's lengthy indenture of his son.[267] Yet in the same treatise, he liberally cited pre-Civil War cases involving slaves' compelled labor without apology or disapprobation.[268]

Generations of scholars have wondered what lead Wood to the "at will" rule.[269] There were as many alternatives to choose from as there were local variations in custom and vocation. If agriculture's one-year rule was replaced in cases involving shoemakers, the customs in that trade would have differed from those involving dressmakers, railroad workers, or factory mill workers. But railroads were the industry in which Wood practiced and which he studied most closely.

In specifying the rule governing the duration and termination of general hirings, Wood's at-will rule utilizes the standard legal terminology of conditions that *determine* the relationship's end. But instead of becoming determinable because of a foreseeable event that could be anticipated, like the end of the pay period or of the work task, Wood says the relationship is determinable *at will*.

> [I]n this country a general hiring, or any hiring indefinite as to time, is a mere hiring at will, and may be put an end to at any time by either party, 'unless from the language of the contract itself it is evident that the intent of the parties was that it should, at all events, continue for a certain period, or until the happening of a certain contingency.'[270]

Wood is resolute in stating, "With us the rule is inflexible that a general or indefinite hiring is prima facie a hiring *at will* . . . ."[271] Was Wood drawing on his own railroad practice when he said "with us"? Was he informed by the fact that most railroad workers were day laborers? Where Schouler and Joseph Story said that the pay period was material in interpreting the duration of a general hiring, Wood claimed it was not, and that it carried no presumption at all. "A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was *for a day even* . . . ."[272] Although Wood repeated this

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267 "Such binding on the part of the father *savored too strongly of slavery* . . . ." *Id.* at 56.

268 Wood cited cases involving the services of slaves four times in his *Treatise on Railroad Law* and thirty-seven times in his TREATISE.

269 Feinman wonders,

> The puzzling question is what impelled Wood to state the rule . . . . Wood's master and servant treatise, like his other works, won him acclaim for his painstaking scholarship, but that comprehensiveness and concern for detail were absent in his treatment of the duration of service contracts. First, the four American cases he cited in direct support of the rule were in fact far off the mark. Second, his scholarly disingenuity was extraordinary; he stated incorrectly that no American courts in recent years had approved the English rule, that the at-will rule was inflexibly applied in the U.S., and that the English rule was only for a yearly hiring, making no mention of notice. Third, in the absence of valid legal support, Wood offered no policy grounds for the rule he proclaimed.

Feinman, *At-will Rule*, *supra* note 15, at 126.

270 WOOD, TREATISE, *supra* note 33, at 265–66 (quoting Harper v. Hassard, 113 Mass. 187).

271 *Id.* at 272.

272 *Id.* (emphasis added).

point four times within the space of only two pages, he never supplied case citations supporting his claim.[273]

Wood emphasized a sense of reciprocity in that *either party* can end the relationship at will. This rhetorical move, using formal symmetry stylistically in the context of sharply asymmetrical power, is a classic pattern in disputes where the stronger party's exercise of his power is questioned.[274] These symmetrical statements elide the fact that one party has much more power than the other. Yet the Thirteenth Amendment already guaranteed the employee's right to quit work as a constitutional protection against involuntary servitude. Therefore, the employee's ability to leave should have been self-evident as constitutionally guaranteed, rather than a boot-strap to invent a privilege for the more powerful party.

Indeed, the one place where Wood comments upon inequity of power is when he laments the employees' right to quit as harming employers.

> If servants could be permitted to leave their employers *at will*, simply compensating them for the loss sustained, by a deduction, from the wages earned, of the little pittance that the law allows as a measure of such loss, contracts for service would be of little value, and *the interests of employers would be constantly at the mercy of employees*.[275]

Given that this was the general rule for damages in breach of contract cases, Wood had no basis to find fault with it. He did not comment upon the fact that the at-will rule placed employees at the mercy of their employers constantly.

Wood's continued use of the terms "master and servant," his continued non-critical embrace of hierarchical English common law rules, his sympathy of the losses employers sustain when servants quit—unmatched by any feelings of sympathy when employees are subjected to the at-will rule—mark Wood as an anti-republican. Wood's anti-republican tilt was further evident in his support for two other common law rules that favored the master: 1) the doctrine of the

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[273] The four statements are: "[U]nless 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." In another passage,**:** "Such contracts are determinable at the pleasure of either party, and no cause therefore need be alleged or proved. It is only when a definite term is fixed that the parties are liable for a breach of the contract . . . ." And again: "But a contract to pay one $800 a year for services is not a contract for a year, but a contract [that is] determinable at will by either party;" "Where a person is employed at a yearly salary, . . . the contract creates a mere hiring at will, which may be put an end to by the master at any time . . . ." *Id.* at 273–74.

[274] This emphasis on the formal symmetry is a sleight of hand. It is a Trojan horse pretending to gift some liberty to a vulnerable subordinate as it simultaneously enhances the power of the dominant party over that subordinate: "Either party has the option," "for one or the other." Courts followed that rhetorical form in cases such as Lochner v. New York, 198 U.S. 45 (1905). Yet, the New York statute limiting bakers' hours enhanced the bakers' power relative to the bakery owner. One did not find New York bakers clamoring for a statute to ensure their opportunity to work over 60 hours a week.

[275] WOOD, TREATISE, *supra* note 33, at 281.

entirety of contract, and 2) enticement actions. But the employment at-will doctrine, which placed employees at the mercy of their employers, is the rule for which he is known.[276]

*3. Determinability as a flexible concept in other master–servant treatises*

The other contemporary treatise writers on the topic—Walter C. Tiffany, Irving Browne, Joseph Story, and C. G. Addison—describe employment's ending in terms of "determinability."[277] The legal consequence of determinability is that the contract has just run out; neither party has breached; there is no fault; it has just ended by the determination of a condition that was specified beforehand.[278] The concept of determinability is an open template. Any condition can mark the ending.[279] Hence, the concept permits infinitely more options than simply the dyadic opposites that the employment either ends at will or lasts forever.

The range of variability entailed in the legal concept of determinability demonstrates how very narrow Wood's rule was. By claiming that the rule was inflexible and that custom, pay period, or circumstances were immaterial to consider, Wood framed the available options as two and only two. Either the hiring was for a specified length of time, or it was determinable "at will."

Although Wood insisted upon the rule as "inflexible" and authoritative, other treatises did not.[280] As we saw above, James Schouler declared that employment at will was not illegal, but needed to be express.[281] Joseph Story said that the rule had applied to "an agent."[282] Treatise writer Walter Tiffany utilized the terminology of "at-will" sparingly,[283] emphasizing a contract may be ended "by the happening of conditions subsequent expressed or implied in the contract."[284] Irving Browne, writing a compacted treatise for law students, failed to mention any hirings as being "at-will." Instead, he followed Schouler: "A general hiring, without any limitation of time . . . is modified *by contract*; by *custom*; and by *date and frequency of*

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[276] *Id.*

[277] For example: "A contract of hiring, like other contracts, may contain within itself express or implied provisions for its determination under certain circumstances. Such provisions are called 'conditions subsequent.'" WALTER C. TIFFANY, HANDBOOK, *supra* note 188, at 462.

[278] And hence financial and other interests under the arrangement are divided at the point that the arrangement has "determined." For example, a contract of hire ends or "determines" at the death of the employee or when the employer goes bankrupt.

[279] The legal concept of determinability utilizes the language that the arrangement ends when a condition has "determined."

[280] BROWNE, ELEMENTS, *supra* note 188; TIFFANY, HANDBOOK, *supra* note 188.

[281] *See supra* Part IV.B.1.b.

[282] STORY, CONTRACTS, *supra* note181, at 465. The following sentence appears for the first time in Story's 1874 edition and its only American citation involves a land sales agent. "A hiring for an indefinite time is only at will, and *an agent* under such a hiring may be discharged without notice." (emphasis added, citing Kirk v. Hartman, 63 Penn. St. 97 (1869). The sentence is preceded by "But there is no inflexible rule that an indefinite hiring is for a year; it is a question for the jury in each case." STORY, CONTRACTS, *supra* note 181, at 465.

[283] TIFFANY, HANDBOOK, *supra* note 188.

[284] *Id.*

*payments*."[285] Given that Browne claimed he had read Wood's treatise, [286] one wonders how he could have failed to re-state the at-will rule if it was, as Wood claimed, predominant and well-settled.

Employment at will appears to have been modelled on tenancy at will. Indeed, it is ironic that exactly at the time that the employment at will rule first emerges in the common law of master and servant and successfully became the norm, at-will tenancies were regarded as oppressive because the rule gave landlords such capricious, complete and total dominion over their tenants.[287] Treatise writers had warned of the potential for sharp imbalance of power in at-will tenancies.[288] Already by the 1840s Timothy Walker suggested that at-will tenancies conformed to arbitrary notions of a landed aristocracy. Walker characterized at-will tenancy as "slavish."[289] He reported that the at-will rule for tenancies had fallen into disfavor as notions of liberty gained ground in the United States. As a result, provisions requiring tenants to be given

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[285] In the case of agricultural servants, it is construed as a year. "By custom," Browne continued, "in the case of domestic servants the hiring is construed as monthly. The rule of the common law is modified by contract; by custom; and by date and frequency of payments; but generally the common-law rule still holds." BROWNE, ELEMENTS, *supra* note 188, at 123–24.

[286] BROWNE, ELEMENTS, *supra* note 188, at iii–iv.

[287] New York prevented landlords from removing tenants at will except pursuant to a statute that gave the tenant a period of notice. SUMMARY PROCEEDINGS TO RECOVER THE POSSESSION OF LAND IN CERTAIN CASES: OF POSSIBLE ENTRIES AND DETAINERS, 3 N.Y. Rev. Stats. (6th ed. 1875) tit. X, art. I. Feinman also notes that

> [t]he law as to duration of indefinite leases, unlike the law as to duration of indefinite employment contracts, was consistent with pure contract doctrine and did not develop a presumption like Wood's rule. In a lease in which the duration is not specified, a court looks at all the terms of the lease, including the period of rent payment, and the surrounding circumstances, including the conduct of the parties, in an attempt to determine what the parties intended the duration to be.

Feinman, *At-will Rule*, *supra* note 15, at 130.

[288] Under the older version of the common law, landlords could evict tenants at will without notice. As Blackstone described the tenancy at will, "[T]he lessor may determine his will, and put [the lessee] out whenever he pleases." BLACKSTONE, COMMENTARIES, *supra* note 22, Book 2, ch.9. Even Blackstone saw the danger of abrupt terminations to the vulnerable party: "The law is however careful, that no sudden determination of the will by one party shall tend to the manifest and unforeseen prejudice of the other." *Id.* "And, upon the same principle, courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year so long as both parties please, especially where an annual rent is reserved . . . ." *Id.*

As early as 1837, treatise writer Timothy Walker wrote critically of at-will tenancies:

> An estate at will was originally where the tenant occupied at the mere pleasure of him who had the next estate; and who could terminate the tenancy at any moment without previous notice. Such a connection between landlord and tenant harmonized perfectly with the arbitrary notions of a landed aristocracy. But as notions of liberty began to gain ground, the slavish character of this tenancy became gradually changed. It was first settled that . . . neither could terminate the tenancy without fair notice to the other. The next improvement was to determine, that, unless there was an express agreement to hold at will, all tenancies for no stipulated term, should be construed as periodical tenancies from year to year, or some shorter period, according to the facts of the case. The establishment of this wholesome doctrine is a virtual abolition of estates at will; and it has been fully recognized in this state.

TIMOTHY WALKER, WALKER'S INTRODUCTION TO AMERICAN LAW: DESIGNED AS A FIRST BOOK FOR STUDENTS, 279 (Cincinnati, H. W. Derby & Co. 2nd ed. 1846) (1837).

[289] *Id.* at 322.

advance notice became the norm. Walker praised this as the better legal result. [290] Even the Reconstruction Congress had abolished at-will tenancies in the District of Columbia as one of their anti-subordination measures.[291]

*4. "Merely at-will" and "less than a contract" meaning "no contract at all"*

The 1874 American edition of *Addison on Contract* went even further in devaluing service arrangements that were at will. Addison's treatise posited that service "at will" was not even a contract. The significance of this is that there is no reason for courts to respect some presumed contract in the face of objectionable consequences for the more vulnerable party. Under the heading "Service at Will," Addison cited three cases as examples: 1) a boy employed to work "for meat, drink, and clothes, as long as he had a mind to stop [in that place]," 2) an assistant workman "to come and go as he liked," and 3) a stable hand and his master who were "to be at liberty to separate when they pleased."[292] In all three examples, the "at-will" limitation was express, not implied. Furthermore, by their expressly transitory terms, none of the examples suggested a full-time employment commitment of any permanence.[293] Addison concluded that all three were "at will," and because they were "at will," they were "in truth no contract of hiring at all."[294]

Ironically, Horace G. Wood himself later annotated an American edition of Addison's contract treatise quoting these very words in 1888.[295] Wood was not only aware of this assessment of the at-will rule, in editing notes for the treatise, he passed over it without any comment at all.[296]

Addison's assessment that service at will was in truth not a contract is consistent with the parallel legal assessment of tenancies at will. For example, property scholar Richard Chused describes the at-will tenancy as hardly a tenancy and more akin to a hotel guest than a lease

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[290] *Id.* State enactments of Forcible Entry and Detainer laws transformed at-will tenancies into circumstances where tenants were no longer subjected to momentary expulsion and were accorded rights of advance notice to quit. Brian J. Delaney, *Landlord-Tenant Law: Protecting the Small Landlord's Rights During Summary Process*, 37 SUFFOLK U. L. REV. 1109 (2004). By the mid-nineteenth century, courts were requiring that landlords seeking to end tenancies provide tenants with notice to quit in advance of the actual eviction. Gleason v. Gleason, 62 Mass. 32, 32 (1851) (holding termination of tenancy at will requires notice to quit).

[291] *See* bill *cited at supra* note 136.

[292] *Id. (citing* R. v. Christ's Parish, York, 3 B. & C. 459; 5 D. & R. 314; R. v. Gt. Bowden, 7 B. & c. 679; and, for the conclusion that there is no contract at all in these cases, (L) R. v. St. Matthew's, Ipswich, 3 T. R. 449).

[293] The "boy" appears to have been someone transitioning to adulthood.

[294] ADDISON, THE LAW OF CONTRACT, *supra* note 188, Section 887 (entitled "Service at will").

[295] See Wood's annotated edition of Addison's contract treatise cited *supra* note 265.

[296] Wood's annotations for the entire work are to be found in the very last volume. ADDISON, THE LAW OF CONTRACT, *supra* note 188, Appendix. He skipped over all of Chapter 60, the chapter on "Master and Servant" of Addison's work. This chapter runs from sections 882 to 908, but none of them are referenced in Wood's appendix.

tenant.[297] As juridical equivalents, the use of the term "merely" links the concepts further. In many treatises' descriptions, the word "merely" appears most often to describe both of these at-will relations and none other.[298] Accordingly, a tenancy merely at-will was not really a tenancy, and service merely at-will was not really a contract.

### C. Republican and anti-republican opinions in the decision of *Payne v. Western & Atlantic Railroad*

In 1884, Tennessee's was the first state supreme court to articulate the at-will doctrine. The majority in *Payne v. Western and Atlantic Railroad*[299] squarely adopted what has come to be known as the at-will rule:

> Either the employer or employee may terminate the relation at will, and the law will not interfere . . . . All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.[300]

Despite the case's notoriety, few have noted how close the decision was. The plaintiff had won in the lower court, and on appeal, the vote was close, 3:2.

More importantly, the majority and dissent take different positions on whether it is lawful for employers to command where their employees spend their wages, on penalty of dismissal. The majority reinscribes the Blackstonian household hierarchy with anti-republican analogies,[301] while the spirited dissenting opinion resonates with the Republican's Reconstruction concerns. The majority opinion regards railroad workers as if they were simply live-in household servants (or slaves) entitled to no household of their own, and accordingly, as limited in spending their wages as a household servant would be in spending the master's money.[302]

This lawsuit was brought by a small businessman, Lindsey Payne, against the Western and Atlantic Railroad, the employer of many of his customers. The railroad had orchestrated a boycott of his grocery, located near the yards, by issuing an order to its employees that they would be fired if they purchased from Payne's store.

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[297] RICHARD CHUSED, CASES, MATERIALS, AND PROBLEMS IN PROPERTY 593 (2nd ed. 1999). Now, "[i]f the tenancy is a tenancy at will, the landlord may issue the notice to quit at any time but must give the tenant at least one month's notice before initiating court proceedings." Delaney, *Landlord-Tenant Law*, *supra* note 290, at 1115.

[298] Usages of "mere" and "merely" are usually found in passages on categorization, with the term "mere" attached to the slighter of the two categories or the slightest of several.

[299] Payne v. Western & A. R.R., 81 Tenn. 507, 519–20 (1884) (overruled on other grounds); Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915). Feinman, *At-will Rule*, *supra* note 15.

[300] *Payne*, 81 Tenn. at 519.

[301] For a discussion of Blackstone's structure of master and servant, *see* VanderVelde, *Servitude and Captivity*, *supra* note 23.

[302] *Payne*, 81 Tenn. at 518.

There is no evidence to explain what precipitated this order.[303] Payne's attorney characterized the railroad's act as malicious, but specified no motivation for its ill-will. The brief stated simply that Payne had "the misfortune to incur the railroad's displeasure."[304] Throughout the litigation, the railroad never gave an explanation, because as the case went forward, the court held that the railroad did not need to; it could discharge its employees without any reason at all, and therefore could threaten to discharge them with impunity and without explanation. The at-will rule meant the defendant need not give reasons.

Lindsey Payne ran a store near the railroad yard that supported his family of seven children.[305] Payne's was not a house of ill-repute, nor is there evidence that he supplied the workers with too much alcohol or unhealthy products. The most likely explanation for the company's order to boycott him was that Payne was accumulating railroad company scrip, a form of printed I.O.U.s with dollar amounts used by the railroad company to pay its employees instead of giving them cash.[306] Companies that issued scrip generally ran company stores and preferred that their employees spend their wages at the company store. If Payne accepted scrip for the workers' purchases, he could then seek to redeem them as I.O.U.s against the railroad. Thus, the railroad may have acted out of resentment because Payne was becoming its creditor and costing them more overall, because scrip spent at the company store could (through inflated prices) save the company money.

It was the railroad that introduced the proposition that it could terminate whomever they wanted for whatever reason they chose.[307] The railroad called the employees its "hands," and most of these men were probably day laborers with little job security.

Yet despite the significance this case would have for basic workers' rights, the dispute in this case was over clientage rather than over labor rights. It was left to a merchant to raise the free labor claims of his customers. The most extensive argument raised by Payne's lawyer was that the railroad tortiously interfered with Payne's legitimate business. Under established tort law, even a legal act was actionable if done maliciously to harm Payne. One recognizes the issue of worker autonomy only near the end—at page 13 of the plaintiff's 15-page brief: "But suppose

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[303] There is no evidence to suggest a personal enmity between Payne and the railroad supervisors. The order was signed by superior officer, J. C. Anderson, and issued to the yardmaster, J. T. Robinson. Neither of these men were Payne's neighbors nor identifiable with any groups, ethnicities, or religions that could have been a basis for hostility or contention at the time. I could not find any cause, such as a prior lawsuit, for bad feeling between these men and Lindsey Payne. Nor was I able to find any connection between Payne and the railroad's owners and officers.

[304] Brief for Lindsey Payne in the Tennessee Supreme Court (Aug. 8, 1884) (original in the Tennessee State Library and Archives, Nashville, Tn., copy on file with author).

[305] U.S. Census for 1880, Chattanooga, Tennessee, available at Ancestry.com. https://www.ancestry.com/search/collections/6742/?residence=_chattanooga-hamilton-tennessee-usa_35863 Payne was a southerner, not a "carpet bagger;" having previously run a store elsewhere in the south, as one can tell by the birthplaces of his children.

[306] One can actually buy Western and Atlantic Railroad scrip as a collectible antique on ebay. *See* photo of advertisement (on file with author).

[307] Brief of Western and Atlantic Railroad in the Tennessee Supreme Court (Sept. 10, 1883) (on file with author).

we take another view of it. What right has the RR Co. [sic] to make any such order? Where does it get authority to control & govern its employees in this private business matter & domestic concerns?"[308]

In this encapsulation, the shopkeeper's lawyer challenged the employer's overreaching attempt to control its employees' right to spend their wages as they pleased. The railroad supervisors' demand exceeded whatever authority they had as employers and substantially restrained the employees' freedom. The company's order interfered with its employees' liberty to make decisions about their off-work lives as they pleased, their liberty to buy from and contract with this merchant, and spend their earnings as they chose. This denied them the full enjoyment of the "fruits of their labor." It was a basic tenet of labor republicanism that free men should be able to buy and sell where they pleased.[309] Even congressmen who were not Radical Republicans, like Representative Kerr of Indiana, had stated that "real, living freedom" entailed "freedom for . . . people to go where they please and to do what they please, provided they do not infringe [on] others; freedom to *buy what they please* and sell what they please, and *where they think best* . . . ."[310] Moreover, the company's order restricted the employees' ability to run their own households by choosing how to spend those wages they had already earned or use the scrip they had already collected. These were the freedoms that, according to Radical Republican views, all free men were entitled to.

Finally, this order blatantly attempted to hold workmen in the railroad's thrall.[311] Payne's lawyer articulated the order's inevitable effect, an effect which must have been obvious to all.

> Who does not know the Power RRs [sic] have over their employees. A threat to discharge is a threat to take their meat & bread from them. It means to turn them out of their houses, and drive them hither or thither over the country. We know from the practical workings of those things, that no RR employee would dare disregard such an order, however unreasonable.[312]

The railroad manager's command had nothing to do with directing the work. The plaintiff's brief concluded: "Clearly employers have no such power [to issue such a threat]. They do an unlawful act when they attempt it . . . ."[313]

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[308] Brief for Lindsey Payne, *supra* note 299, at 13.

[309] CONG. GLOBE, 39th Cong. (Dec. 21, 1864) (remarks of Senator Wilson); CONG. GLOBE, 39th Cong. (Dec 13, 1865) (remarks of Senator Trumbull); and again CONG. GLOBE, 39th Cong. (Jan. 19, 1866). Senator Wilson maintained, "These freedmen are as free as I am, to work when they please, to play when they please, to go where they please, to work at what they please, and to use the product of their labor . . . ." CONG. GLOBE, 39th Cong. (Dec. 13, 1865).

[310] CONG. GLOBE, 39th Cong. (Feb. 27, 1867) (remarks of Rep. Kerr of Indiana, describing the basic rights and privileges of free men in discussing tariffs) (emphasis added).

[311] *See* discussion *supra.*

[312] Brief for Lindsey Payne, *supra* note 299 (abbreviations in original).

[313] *Id.* (abbreviations in original).

This is the free labor principle in essence: a claim that rather than deferring to private ordering, judicial authority should intervene when an employer attempts to exercise an overbearing control over its workers that it has no authority to exercise. But, of course, the shopkeeper's lawyer did not represent the railroad employees, so the argument was never developed in terms of fully guaranteeing the laborers' autonomy. Instead, the plaintiff's lawyer focused upon another Republican tenet—that large concentrations of power could threaten small businessmen like the shopkeeper.[314] The capitalist could become an oligarch threatening the nation's free institutions. The lower court ruled in Payne's favor.

On appeal, the Tennessee Supreme Court grounded the railroad's authority to tell its employees where they could and could not shop on the authority that masters had formerly had to direct their household servants. Writing for the majority, Justice Ingersoll asked rhetorically:

> May I not dismiss my domestic servant for dealing, or even visiting, where I forbid? And if my domestic, why not my farm-hand, or my mechanic, or teamster? And, if one of them, then why not all four? And, if all four, why not a hundred or a thousand of them?[315]

Domestic servants generally resided in their employer's households, and as servants *intra moenia* were subject to the "rules of the house."[316] Moreover, domestic servants customarily went to market to purchase goods for their masters with their masters' money, in which case it would be sensible to suggest that the master could direct where his servant, as agent, spent his money for groceries. Yet, generalizing from a household servant, who were subject to house rules, to all other employees ignored the special justification for the restrictions. Even Blackstone had noted a difference between servants *intra moenia*—living within the walls of the master's home—and those entitled to greater liberties.[317] As Blackstone had used slaves' status to

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[314] To this end, Payne's lawyer accused both corporations and unions of exercising power by aggregating individual interests into much larger entities. The brief proceeds:

> Then when is this thing to end? No, the curse of the hour is unlawful combinations & conspiracies to accomplish unlawful ends. The air is full of talk about "Trade Unions," "Labor Unions," "Amalgamated associations," Monied combinations, RR monopolies, . . . & all sorts of combinations for the purpose of tearing down one man or one set of men & building up others. In many instances these combinations are illegal & this objects unlawful & the manner of obtaining this objects in violation of law. They are breeding trouble all over the land. We can scarcely read a newspaper that we do not see an account of a "strike," or a "lockout," . . . or an illegal combination of some kind to force up wages or depress prices of certain commodities. . . . It remains with the courts to suppress them. . . . RR's have their pools, shoemakers have their "unions." Iron makers have their "associations," trades men have their "boards of trade" and capital its combinations to accomplish these ends. While the man and individual has only the law of the land & an enlightened court to protect him from these, sometimes oppressive & aggressive combinations.

*Id.* at 16. This statement is similar to James Schouler's concerns in THE IDEALS OF THE REPUBLIC, *see supra* Part IV.B.1. Parenthetically, both texts perceive aggregations of capital and unions as similarly threatening republican institutions.

[315] Payne v. Western & A. R.R., 81 Tenn. 507, 518 (1884).

[316] BLACKSTONE, COMMENTARIES, *supra* note 22, chapter 14.

[317] "A third species of servants are labourers, who are only hired by the day or the week, and do not live intra moenia, as part of the family . . . . There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial, capacity; such as stewards, factors, and bailiffs." *Id.*

construct the privileges of mastery and the status of other servants, the Tennessee Supreme Court used the status of housemaids as the foundation on which to base the rules for all employment relationships. The Court failed to recognize that railroad employees were not subjects in the railroad's household. They were grown men, some with households of their own, and entitled to spend their wages as they saw fit, however they pleased. Rather than regard the employees as entitled to their independence to pursue private spending as they saw fit, the Tennessee Supreme Court reasoned that all employees were subject to the limits that householders could impose on their domestic servants.

By contrast, the two dissenting justices elaborated free labor principles. By the time that this case reached the Tennessee Supreme Court in 1884, the Court was no longer in the control of the political factions who had taken charge of Tennessee's Reconstruction. In the early days of Reconstruction, Tennessee had been run by Radical Republicans, who disenfranchised those who had served as officers in the Confederacy for five years. The Reconstruction phase ended, "when a repudiated Court changed the franchise rules so as to allow the previously disfranchised ex-Confederates to vote in the 1869 election."[318] Thereafter, the Conservatives rapidly consolidated their power and restructured the Tennessee Supreme Court, enabling a Conservative panel to be elected to the bench in 1870.[319] This configuration still comprised the Court in 1884. Ironically, the two justices who objected to the railroad's overreaching were both former Confederate officers.[320]

Justice Freeman, writing for the two-person dissent, stated that the railroad lacked authority to issue such an order restraining its employees in their purchasing choices. "It is argued that a man ought to have the right to say where his employees shall trade. I do not recognize any such right. A father may well control his family in this, but an employer ought to have no such right conceded to him."[321] Moreover, there might be legitimate reasons justifying such an order, the dissent recognized, but they should be stated and raised by way of defense. "[T]he party may always show . . . that the trader was unworthy of patronage; that he debauched the employee, or

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[318] R. Ben Brown, *The Tennessee Supreme Court During Reconstruction and Redemption*, *in* A HISTORY OF THE TENNESSEE SUPREME COURT, 101(James W. Ely ed., 2002).

[319] *Id.* At 99–151

[320] Justice Thomas Freeman, the opinion's author, had been a Confederate Army colonel, and after leaving the Tennessee Supreme Court became first dean of the University of Tennessee's Law Department in 1889. https://en.wikipedia.org/wiki/James_W._Deaderick (July 16, 2020); https://law.utk.edu/wp-content/uploads/2015/03/Tennessee-Law-Fall-15-web.pdf (July 16, 2020). Justice Peter Turney had been a colonel of the First Tennessee Regiment, one of the first Tennessee units to join the Confederate Army. He later became governor of the state. As governor, Turney ended the state's convict lease system and enacted other prison reform measures, although as Chief Justice he had issued rulings favorable to the convict lease system. His reform legislation called for the construction of a state penitentiary and the purchase of coal and farm lands where inmates would work instead of being leased to private companies. *Peter Turney*, WIKIPEDIA (July 14, 2020), https://en.wikipedia.org/wiki/Peter_Turney.

[321] Payne v. Western & A. R.R., 81 Tenn. 507, 542 (1884) (Freeman, dissenting).

sold, for instance, unsound food, or any other cause, that affected his employees' usefulness to him, [and that] justified the withdrawal of custom from him."[322]

The dissent continued that the employer "[should] not do this solely for the purpose of injury to another, or hold the threat over the employee in terrorem to fetter the freedom of the employee . . . . "[323] The dissenting justices further noted with alarm the prospect that the at-will rule gave employers unbounded power over their employees. According to Justice Freeman, such a principle would allow employers "to require employees to trade where they may demand, to vote as they may require, or do anything . . . that the employer may dictate, or feel the wrath of the employer by dismissal from service."[324] The dissent foresaw the rule's eventual effect quite clearly.[325] Much as the dissent highlighted the rule's potential that employers could influence their employees' voting, the Reconstruction Congress had spent weeks discussing the problem of employers' voting influence.[326] The Tennessee Supreme Court after all was specifically authorizing employers to fire their employees even for bad reasons.

The dissent raised the concern that the employee was compelled to submit, because "[e]mployment is the means of sustaining life to himself and [his] family . . . ."[327] Concentrations of power, like the railroads', and like the slave power before them, could destroy the "free institutions" of the republic.[328] This had also been an anti-slavery mainstay.[329] Justice Freeman wrote similarly,

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[322] *Id.*

[323] *Id.*

[324] *Id.*

[325] *See supra* part II.

[326] *See generally* CONG. GLOBE, 40th Cong. *E.g.* "I expect nothing else but that for many years their old masters will to a great extent control the vote of their former slaves and servants." CONG. GLOBE, 40th Cong. (Mar. 15, 1867) (remarks of Senator Nye). *See also* remarks of Senator Wilson, *supra* note 9. This concern almost derailed the enactment of the Fifteenth Amendment extending suffrage to freedmen. "We need not expect too much from those newly-enfranchised people or a superiority over the white race. Go through the New England States, into their vast manufacturing establishments, and when the hordes that flock out from there go to the polls to vote they vote more or less as representing the wishes of their employer, although their employer may not say one word to them about it. Go among these people and you will find the same fact existing, that unconsciously they are more or less swayed by the will of their former master." CONG. GLOBE, 40th Cong. (Mar. 15, 1867) (remarks of Sen. Nye).

[327] Payne v. Western & A. R.R., 81 Tenn. 507, 544 (1884) (Freeman, dissenting) (emphasis added).

[328] *See infra* note 329.

[329] The term "free institutions" was talismanic for reformers in the Reconstruction debates. It was invoked 96 times in the 38th Congress and 103 times in the 39th Congress (*see* list on file with author). In the language of the Radical Republicans, "free institutions" were those that marked a republican form of government. "Constitutional defense of free discussion by speech or press has been a rope of sand south of the line which marked the limit of dignified free labor in this country. South of that line an organized element of death was surely sapping the foundations of our free institutions . . . ." CONG. GLOBE, 38th Cong. (Mar. 12, 1864) (remarks of Sen. Wilson). "[T]he imperishable records of the Republic will bear to future ages the evidence that slavery has ever been hostile to the spirit of her free institutions." CONG. GLOBE, 38th Cong. (Mar. 28, 1864) (remarks of Sen. Wilson). "The contest between slavery and freedom, between slave institutions and free institutions under the same Government, was inevitable . . . ." CONG. GLOBE, 38th Cong. (May 3, 1864) (remarks of Rep. Gooch). *See generally* HENRY WILSON, HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA (Boston, James R. Osgood & Co. 5th ed. 1878).

> In view of the immense development and large aggregations of capital in this favored country . . . giving the command of immense numbers of employees . . . , it is the demand of a sound public policy . . . that the use of this power should be restrained within legitimate boundaries. [Consider] the larger manufacturing establishments of the country [where] thousands upon thousands of hard-working operatives will be employed. . . . If these masters of aggregated capital can use their power over their employees as in this case, all other traders except such as they choose to permit will be driven away or crushed out . . . . The result is that capital may crush legitimate trade . . . and *the employee be subject to its grinding exactions at will*. . . . Capital . . . may control the employment of others to an extent that in time may *sap the foundations of our free institutions.* . . . [P]ublic policy and all the best interests of society demands it shall be restrained within legitimate boundaries, and any channel by which it may escape or overleap these boundaries, should be carefully but judiciously guarded. . . . [A]gainst its illegitimate use I feel bound, for the best interests both of capital and labor, to protest. [330]

These two dissenting justices espoused the value of independent free labor in a way that the Confederacy's commitment to slavery had formerly been accused of undermining. Could it be that these former confederate officers now recognized the importance of autonomy for a free labor work force, the railroad's work force?[331] The *Payne* dissenters include a free market salvo, to be sure, but they maintain that the free market can only work if there is free competition—and free institutions can only thrive if working men can exercise their freedom.

The employees of the Western & Atlantic Railroad did not voluntarily consent to the railroad's order. They complied, rather than consented, and then only under the threat of discharge. They had no voice in the contract or even in challenging the rule in the very court case that introduced it. The case was litigated between one very strong commercial interest that employed them and another that wished to sell them goods.

In the years to come, scrip was banned in the state of Kentucky, but the labor vision of the Reconstruction Radicals lost further ground. Legislatures enacted successive worker protections, and courts invalidated them.[332] Statutes requiring corporations to assign reasons for discharging their employees were even declared unconstitutional.[333] Statutes requiring corporations to pay

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[330] Payne v. Western & A. R.R., 81 Tenn. 507, 544 (1884) (Freeman, dissenting) (emphasis added).

[331] H. SHELTON STROMQUIST, A GENERATION OF BOOMERS: THE PATTERN OF RAILROAD LABOR CONFLICT IN NINETEENTH-CENTURY AMERICA (1987).

[332] *See generally* Forbath, *supra* note 37.

[333] "A statute requiring corporations to assign reasons for discharging their employees has been held constitutionally invalid. Wallace v. Georgia, &c. Ry. Co., 94 Ga. 732, 22 S. E. 579" *cited in* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW, 259 (1901) and again in THEOPHILUS PARSONS, THE LAW OF CONTRACTS, 36 (John M. Gould, ed. 9th ed. 1904) (citing unconstitutional legislation as to employees.)

their employees weekly were declared unconstitutional as interfering with liberty of contract.[334] State enactments were infamously struck down by courts as beyond the state's police power to advance health, safety, and welfare, in cases such as *Lochner v. State of New York*.[335] But the at-will doctrine thrived.

## V. CONCLUSION

Wood had insisted that the at-will rule was inflexible. "Inflexibility" is actually a concept that is inconsistent with the ascribed virtues of the common law and freedom of contract. The term "inflexible" is rarely found in legal treatises,[336] and usually only used pejoratively as something the common law avoids, as in the phrase "[T]his rule is not inflexible."[337] General statements about the common law in treatises praise flexibility as its virtue.[338] For example, in his treatise on torts, Thomas Cooley wrote: "It is the peculiar merit of the common law that its principles are *so flexible* and expansive as to comprehend *any new wrong* that may be developed by the inexhaustible resources of human depravity." [339]

To deem that a particular rule is inflexible is also inconsistent with freedom of contract.[340] Freedom of contract shares—in fact, exalts—flexibility as a virtue.

To render all general hirings, regardless of workplace, sector, custom or individual circumstance as subject to an inflexible default rule limits rather than expands the enforcement of verbally negotiated contracts, the most common form of workplace contracting. As Feinman wrote: "The essence of contract was the voluntary assumption of legal obligation. [Parties] were free to design their own relationships through contract, and the law would then give effect to

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[334] Under the heading "unconstitutional legislation as to employees," Parsons' 1904 treatise lists: "Or interference with liberty of contract, as by a statute requiring weekly payment by corporations of its employees' wages. Frorer v. People, 141 Ill 171, 31 N.E. 395; Ramsey v. People, 142 Ill. 380, 32 N.E. 364; Braceville Coal Co. v. People, 147, 111. QQ, 35 N.E. 62; 37 Am. State Rep. 206; *and note* Tilt v. People, 155, 111, 98, 40 N.E. 462; *see* State v. Brown & Sharpe Manuf. Co., 18 R. I. 16, 25 Atl. 246 . . . ." *Id*. My point here is not whether the editor of Parsons' treatise interpreted these cases correctly or not; it is that these were statements circulating in treatises.

[335] Lochner v. New York, 198 U.S. 45 (1905).

[336] Tiffany only refers to a rule that "is a flexible, and not an absolute, term." TIFFANY, HANDBOOK, *supra* note 188, at 396.

[337] The critique of inflexible common law rules is present in statements like: "[I]t is against inflexible rules that one man should be allowed to base his recovery for his own benefit on a wrong done to another . . . ." 1 THOMAS M. COOLEY & JOHN LEWIS, A TREATISE ON THE LAW OF TORTS, OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT (Chicago, Callaghan & Company students' ed.1907). In another section: "But there is no inflexible rule to this effect, and it would be a reproach to the law if there were." *Id.* at 934. In a third section: "In Virginia it is held that 'the law does not prescribe a rule so inflexible or unwise . . . .'" *Id.* at 1047.

[338] *See generally* TIFFANY, HANDBOOK, *supra* note 188.

[339] COOLEY & LEWIS, TORTS, *supra* note 337, at 9 (quoting the New York Court in Johnson v. Girdwood, 7 Misc. 651, 28 N.Y.S. 151 (1894). Other salutations to the common law's flexibility in Cooley include, "A remedy, not provided by statute but springing from the flexibility of the common law and its adaptability to the changing nature of human affairs, has long existed for the redress of the wrongs of the husband." *Id.* at 478.

[340] Richard A. Epstein, *In Defense of the Contract At-Will*, 51 U. CHI. L. REV. 947 (1984).

their design."[341] By subjecting the thousands of individual negotiated arrangements reflecting the diverse set of intentions about workplace terms to a single inflexible presumption deemed generally irrefutable, the rule constrains those parties from designing their own contractual relationships in the oral manner which is customary.

Similarly, by deeming all hirings that lack an end date as contracts at will, Wood's rule defeats the possibility of customizing employment contracts to better suit the parties' expectations. Any additional employee benefits that employers promise to provide are simply unenforceable. The employer can repudiate any promise or negotiated agreement with impunity simply by terminating the employee beforehand if he or she insists. What the at-will doctrine has done is to create an anomaly: the unbreachable contract. This means that, as the early treatise writer Addison already noted, employment "merely at will" is not a contract at all. More than a century later, theorist Phillip Selznick observed that this entire species of "contract" is merely a feature of employer prerogative.[342] Indeed, instead of actually implementing a set of enforceable commitments, the at-will doctrine is actually a contract not to make a contract.[343] The doctrine gives the illusion of a contract, but it actually insulates employers from liability for agreements they make, rather than enforcing their promises as commitments. The doctrine exacerbates employee vulnerability by making the one thing that workers value most dearly, continued income stability, subject to the employer's prerogative.[344]

Most importantly, the rule undermines the possibility of a republic of truly free and independent workers by subjecting employees to their employers' thrall. By virtue of the widespread at-will doctrine, employers enjoy unbounded, unchecked, and undeserved authority over employees, who are more dependent upon keeping a job than employers are upon keeping the employee. Laborers in the modern economy are the flotsam and jetsam swilled around in the labor market: flotsam as part of the wreckage of the ship of capitalism, and jetsam as that which is deliberately thrown overboard whenever a ship is in trouble. Employees are reduced to dependency upon the good will of their employers. All employees, even those middle-class employees with many years of service and vested pension plans, have only the precarious job stability of day laborers. Constitutional Reconstruction's promise of a republic of free and independent laborers has remained unfulfilled.[345]

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[341] Feinman, *At-will Rule*, *supra* note 15, at 124.

[342] PHILIP SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE 130–37 (1969).

[343] I thank Marc Galanter for this turn of phrase (Discussion at Law & Society meeting, Mexico City, 2017).

[344] The at-will employment doctrine has been called "the prerogative contract" by Selznick. SELZNICK, INDUSTRIAL JUSTICE, *supra* note 342, at 124–37.

[345] For different reasons, Richard White draws a similar conclusion in his chapter on the "Triumph of Wage Labor." "[W]age labor, though allowing workers to come and go as they chose, was not free in the sense that proponents of free labor had once imagined." RICHARD WHITE, THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865–1896, at 252 (2017).