

**Where There’s At-Will, There Are Many Ways:
Redressing the Increasing Incoherence of Employment At Will**

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TABLE OF CONTENTS

I. EMPLOYMENT AT WILL: THE DOCTRINE, ITS INCREASING INCOHERENCE, AND ITS POSSIBLE FUTURE.....	2
A. Odes to “Employment At Will”: A Splintering Chorus	2
B. Exceptions to Employment at Will: Doctrinal Inconsistency Betraying Judicial Ambivalence	4
C. The Reform Agenda: A Coherent, Broad Range of Exceptions, Based on Economic and Social Norms Theories	6
II. Inconsistent Exceptions to a Supposedly Strong At-Will Rule: A Two-State Case Study	6
A. Opposing Sets of Common Law Claims in New York and Wisconsin	7
1. “Public Policy” Claims: Termination for Complying with Law.....	8
a. Wisconsin: Adoption of a Common Law Claim.....	8
b. New York: Rejecting Common Law Claims, Then Adopting Wholly Ineffectual Statute	10
2. “Fraudulent Inducement” Claims: Defrauding Employees into Their Jobs....	15
a. Wisconsin: No Claim for Employees, Only for Job Candidates.....	15
b. New York: A Strong Claim for Employees and Candidates Alike	18
3. “Implied Covenant” Claims: Termination Just Before Compensation Due ...	21
a. Wisconsin: No Implied Covenant Claims.....	22
b. New York: Unrecognized Doctrinal Chaos – Implied Covenant Claims, But Only in Federal Court?.....	23
B. Summary: Courts Alternately Citing and Ignoring “Employment at Will” Whenever Convenient to Reject or Accept Claims	26
1. Statutes as Substitutes for Rejected Common Law Doctrines?	27
2. Interstate Variation: Inherent to Common Law?	27
III. SIMILAR DOCTRINAL INCOHERENCE IN CONSTITUTIONAL LAW: WHEN COURTS NEITHER FOLLOW NOR REJECT ESTABLISHED RULES	28
A. Abortion: The Limbo Status of <i>Roe</i> , as “Fundamental Right” Gives Way to “Undue Burden”	29
B. Establishment Clause: No Consensus Rule after the Unacknowledged Death of <i>Lemon</i>	35
C. Summary: Doctrine Evolution, from Rule to Increasing Incoherence to Adoption of Vague Standard	40

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IV. BUILDING A BETTER STANDARD: SOME ECONOMIC THINKING ABOUT HOW TO RECOGNIZE EXCEPTIONS TO EMPLOYMENT AT WILL WITHOUT INVITING INCOHERENCE..... 41

A. Social Norms Against Unfair Terminations: A Real Phenomenon, But An Inadequate Substitute for Legal Protections..... 43

1. Is Law Unnecessary? Social Norms and Free Markets as Guarantors of Fairness and Efficiency 43

2. Interpreting the Survey Data and Lawyers’ Experiences: Social Norms Against Unfair Terminations 46

3. Employment Norms as Case Study in the Limits of Social Norms: What Makes Some Norms Powerful, Others Weak? 48

a. Characteristics of Employment Markets That Weaken Termination Norms 49

i. Limited Cost to Employers of Violating Norms 49

ii. Limited & Biased Information Flow..... 50

iii. Profitable Cheating: When Violating Norms is Worth the Cost..... 52

b. Characteristics of “Just Cause for Termination” Making it a Weak Norm.. 53

i. A Non-Consensus Norm? 53

ii. A Norm Flatly Contrary to the Law? 53

iii. An “Opt-Out” Norm?..... 54

B. Toward a More Coherent and Just Standard: Recognizing a Wide Range of Claims Based on the Limits of Social Norms and a Broad Economic Conception of Public Policy..... 54

1. The Limits of Social Norms 55

2. An Economic Conception of Public Policy: Externalities and Sequential Performance..... 56

V. CONCLUSION: EMPLOYMENT RIGHTS, PAST AND FUTURE 59

I. EMPLOYMENT AT WILL: THE DOCTRINE, ITS INCREASING INCOHERENCE, AND ITS POSSIBLE FUTURE

A. Odes to “Employment At Will”: A Splintering Chorus

For a doctrine so universal, employment at will – in the words of the late, great Rodney Dangerfield – “don’t get no respect.”¹ The doctrine that employees hold their jobs only “at [the employer’s] will” and have “no legal remedy for ‘an employer’s unjustified decision to terminate’”² is the rule in all states except Montana,³ despite California’s⁴ and New Hampshire’s⁵ brief flirtations with

¹ Gene Colter, *Moving the Market*, THE WALL STREET JOURNAL, DEC. 3, 2004, at C3 (describing an accounting rule as “the Rodney Dangerfield of bookkeeping regulation: It don’t get no respect.”).

² *Bammert v. Don’s SuperValu, Inc.*, 646 N.W.2d 365, 369 (Wis. 2002) (citations omitted).

³ See *infra* notes 218, 220.

⁴ California briefly expanded “implied contract” rights so broadly that long-term employees appeared protected against termination without just cause. See *Foley v. Interactive Data Corp.*, 765 P.2d 373, 385 (Cal. 1998) (recognizing an “implied contract” claim against termination without

abandoning it. Even when courts admit this allows unfair terminations, they stick to their guns: “The ‘antidote’ to the potential for unfairness in employment-at-will ‘is an employment contract’”⁶ requiring “just cause” for termination. The state case law is filled with almost romantic odes to employment at will:

employment-at-will . . . is central to the free market economy and “serves the interests of employees as well as employers” by maximizing the freedom of both. . . . [It] inhibits judicial “second-guessing” of discharge decisions – even those that are unfair, unfortunate, or harsh.⁷

employment-at-will . . . recognizes that employers need freedom to make their own business judgments without interference from the courts. “[A]n employer’s ability to make . . . independent assessments of an employee[] . . . is essential to the free-enterprise system.”⁸

But the reality of the love affair is never as good as the lyrics; courts do not show the uniform fealty to employment at will that they profess. Recent years have seen a boomlet of employment-at-will exceptions, in the form of new termination claims: common law doctrines against discharges violating “public policy”⁹ or “implied covenants of good faith”;¹⁰ and expanded discrimination¹¹ and whistleblower protection¹² statutes. What recent years have *not* seen, however, is the long-predicted death of employment at will.¹³ Many criticize the

cause, even absent express contract, based on “the personnel policies or practices of the employer, the employee’s longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry”). But the court quickly narrowed *Foley*. See *Guz v. Bechtel Nat’l, Inc.*, 24 Cal. 4th 317, 342 (Cal. 2000) (“restrict[ing]” *Foley*: “Absent other evidence of the employer’s intent, longevity, raises and promotions are their own rewards for the employee’s continuing valued service; they do not, in and of themselves, additionally constitute a contractual guarantee of future employment security”).

⁵ *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974) allowed a claim of unlawful termination for rebuffing sexual advances, with broad language possibly repealing employment at will: “a termination . . . of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract. . . . Such a rule affords the employee a certain stability of employment.” *Id.* at 551-52. However, *Howard v. Dorr Woolen Co.*, 414 A.2d 1273 (N.H. 1980) limited *Monge* to “where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn.” *Id.* at 1274. This limited “public policy” exception uncontroversially exists in many states. See *infra* Part II.A.1.

⁶ *Bammert*, 646 N.W.2d at 369 (citations omitted).

⁷ *Id.* (citations omitted).

⁸ *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 717 (Tenn. 1997); see also *infra* note 28

⁹ See *infra* Part II.A.1.

¹⁰ See *infra* Part II.A.3.

¹¹ See *infra* note 290, 294.

¹² See *infra* note 293.

¹³ See *infra* note 22

doctrine as unfair¹⁴ or argue that with so many termination claims, the exceptions are swallowing the rule, practically forcing employers to show just cause for any termination.¹⁵ Nonetheless, employment at will, “while it has eroded over the years, still remains firmly anchored in the common law.”¹⁶

B. Exceptions to Employment at Will: Doctrinal Inconsistency Betraying Judicial Ambivalence

Interestingly, there is little consistency to the case law limiting employment at will. States haphazardly adopt some proposed exceptions while rejecting others that similarly limit employers’ at-will discretion. More oddly, states cite the same rationales to adopt and reject *opposite sets of exceptions*. Part II, a case study of two states presenting an especially clear contrast,¹⁷ New York and

¹⁴ See, e.g., Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 685 (2000) (advocating a broad “abusive discharge tort” whenever “the employer had a wrongful motive that interfered with employees’ personal rights . . . [in] areas of an employee’s life in which his employer has no legitimate interest”); Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1657 (1996) (“Just cause protection is important not only in the majority of discharges that lie outside the ambit of wrongful discharge doctrines, but also in those fewer but more troubling discharges that are covered by those doctrines. Just cause protection provides a stronger foundation for the existing wrongful discharge protections that are widely accepted.”); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1841, 1844 (1980) (advocating “[a] good faith standard . . . after some reasonable period of satisfactory job performance. . . . In the first year of employment only maliciously motivated discharges would be considered to be in bad faith, but afterwards the broader good faith standard could be applied”).

¹⁵ See, e.g., MICHAEL J. ZIMMER, ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 115 (6th ed. 2003) (“While . . . the employer need not have a good reason to discharge as long as its reason is not a prohibited one (e.g., race, sex, or age), the enactment of antidiscrimination statutes tends toward a just cause rule: with African Americans, Caucasians, women, men older workers, individuals with disabilities, etc., all free to challenge adverse decisions as discriminatory, employers are well advised to have just cause.”); Samuel Estreicher, *Human Behavior And The Economic Paradigm At Work*, 77 N.Y.U. L. REV. 1, 4 (2002) (“For employers, there are a sufficient number of exceptions from the at-will rule . . . that it may be the wisest course to assume that virtually all employment decisions will be subject to legal scrutiny.”); William R. Corbett, *Waiting For The Labor Law of The Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 261-62 (2002) (“Notwithstanding the daunting power the employment-at-will doctrine supposedly bestows on employers, many insist that it is a myth, a ‘rule’ riddled with so many exceptions that it cannot be relied upon. . . . [E]mployers must be careful about whom they fire, why . . . , and how. . . . To prepare for possible litigation, employers must document everything negative about employees[] . . .”).

¹⁶ Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443, 1490 (2001); see also Joel Rogers, *Divide and Conquer: Further “Reflections on the Distinctive Character of American Labor Laws,”* 1990 WIS. L. REV. 1, 9 n.26 (1990) (“Recent state law departures from . . . [employment at will] represent an exception, but these are highly uneven, generally quite limited, and affect only a minority of workers.”).

¹⁷ While other articles examine employment at will with fifty-state surveys, a two-state case study is superior for present purposes. Two states suffice to illustrate that strongly employment-at-will

Wisconsin, illustrates this phenomenon of strongly employment-at-will states adopting and rejecting opposite exceptions. Wisconsin recognizes a common law claim of discharge in violation of public policy (*e.g.*, firing whistleblowers) but, citing adherence to employment at will, rejects common law employee claims of employer fraud and implied covenants of good faith. In contrast, New York rejects a general claim of discharge in violation of public policy, citing adherence to employment at will, but recognizes employee claims of fraud and implied covenants of good faith. Thus, one state accepts exception X to protect employees while rejecting exception Y to maintain employment at will; yet on the same rationales, the other state accepts Y while rejecting X. The striking dissonance is characteristic of other states as well,¹⁸ and it is dragging employment law “down the rabbit hole: a bizarre adventure where nothing is what the Court says it is and circular reasoning passes for analysis.”¹⁹

The significance of this doctrinal chaos is twofold. First, state declarations of “employment at will” do not help determine what claims will exist. When a state rejects a claim “because of employment at will,” it really provides no reason at all, given that it allows other similar claims; employment at will is a conclusory label, not a rationale. Second, courts betray great ambivalence about the doctrine by treating it so inconsistently. When courts *reject* a claim, they insist that employment at will prevents them from creating a new employment cause of action; yet when courts *adopt* a claim, they see it as no barrier.

As Part III discusses, inconsistent citation to the power of a major doctrine betrays judicial ambivalence: discomfort adhering to a rigid rule; discomfort rejecting it outright, and inability to find a well-conceptualized alternative. This is a recurring phenomenon in constitutional law as well. Recently, the Court has professed adherence to two expansive 1970s decisions on constitutional rights, *Roe v. Wade*²⁰ and *Lemon v. Kurtzman*.²¹ Yet the Court simultaneously has

states adopt and reject opposite sets of exceptions to the rule, and a two-state study can delve more deeply into the case law; even the best fifty-state surveys, as superficial glosses on complex common law, inevitably contain inaccuracies. *E.g.*, J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 844-45 (1995) (erroneously stating (1) that New York law does not allow any “implied covenant of good faith” claim to challenge a termination just before deferred compensation is due, see discussion *infra* Part II.A.3 about such claims, and (2) that New Hampshire “appears to have recognized an expansive version of the covenant that approaches a general good cause requirement” in *Monge*, see discussion *supra* note 5 as to the substantial narrowing of *Monge*).

¹⁸ See *infra* note 127.

¹⁹ Donna Coker, *Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827, 827 (2003) (citing LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND CHAPTER ONE (Broadview Press Ltd. 2000)).

²⁰ 410 U.S. 113 (1973).

²¹ 403 U.S. 602 (1971).

eviscerated those precedents, allowing extensive abortion restrictions (despite *Roe*) and church-state intermingling (despite *Lemon*). These examples are instructive because they have been so extraordinary and so extensively analyzed. They show that what is happening to employment at will is not just quirky case law. Rather, it is a common phenomenon in a doctrine's evolution: when courts start applying a doctrine inconsistently, that may herald a decline, but not a rejection, of the doctrine; and if courts handle the decline badly, the outcome can be doctrinal chaos. Accordingly, while it exaggerates to say that employment at will's growing exceptions presage its downfall,²² it equally exaggerates to say the doctrine remains strong,²³ given its increasing incoherence.

C. The Reform Agenda: A Coherent, Broad Range of Exceptions, Based on Economic and Social Norm Theories

Part IV advocates redressing the incoherence of employment-at-will doctrine with a realistic and well-theorized reform: providing a well-conceptualized basis for an expansive range of exceptions, without jettisoning the basic doctrine. Simple fairness or unconscionability arguments are too indeterminate to provide a principled basis for picking and choosing among exceptions, so Part IV suggests a two-part theoretical basis for recognizing exceptions: the limits of social norm theory, plus a broad economic conception of the "public interest."

Social norms, recent scholarship has argued, are powerful protectors of fairness that make employment lawsuits unnecessary; but a careful analysis of how social norms operate distinguishes settings, like employment, where social norms are too weak to substitute for lawsuits. As to economic theory, the most recognized exceptions to employment at will are justified by a broad economic conception of the "public interest": protecting against negative externalities (*i.e.*, effects on third parties), as well as protecting against the risk of opportunism inherent in employment relationships that, because they extend over time, involve sequential performance by employer and employee. Courts to date have recognized an inconsistent mix of some but not other employment claims; they can use this more theoretically sound approach to retain employment at will while also recognizing a number of related employee claims.

II. Inconsistent Exceptions to a Supposedly Strong At-Will Rule: A Two-

²² Compare, *e.g.*, Ballam, *supra* note 14, at 687 ("[C]urrent trends . . . suggest that employers soon will no longer be able to terminate employees for no cause. . . . The future of employment-at-will, then, is that it has no future.") with Estlund, *supra* note 14 at 1688 ("[S]tories of the demise of employment at will are greatly exaggerated. . . . The argument that wrongful discharge law has eviscerated employment at will is simply overstated.").

²³ *E.g.*, Horn v. New York Times, 790 N.E.2d 753, 755 (N.Y. 2003) ("While the twentieth century featured significant *statutory* inroads into . . . at-will employment, . . . courts have proved chary of creating common-law exceptions to the rule and reluctant to expand any exceptions."); *see also infra* notes 24-26

State Case Study

To illustrate the common law dissonance among the states, this Part presents a two-state case study of three major common-law employee claims: termination in violation of public policy; fraudulent inducement of employees by employers; and terminations breaching implied covenants of good faith. The two states analyzed, New York and Wisconsin, are merely one pair of states presenting an especially clear contrast, because both profess strong adherence to employment at will but do not agree on how that applies to any of the three claims. This interstate inconsistency is present in other states as well, leaving employment at will an incoherent doctrine badly in need of reform.

A. Opposing Sets of Common Law Claims in New York and Wisconsin

Like most states, New York and Wisconsin decidedly espouse employment at will. New York's high court, the New York Court of Appeals, insists that since the nineteenth century, it has "exhibited a strong disinclination to alter the traditional rule of at-will employment"²⁴:

The traditional American common-law rule undergirding employment relationships, which we adopted in *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895), is the presumption that employment for an indefinite or unspecified term is at will and may be freely terminated by either party at any time without cause or notice.²⁵

Wisconsin's high court, tracing its own employment-at-will rule back even further,²⁶ uses language just as categorical as New York's: "In the absence of contrary statutory or contract provisions, an employer may discharge his employees for any reason without incurring liability."²⁷ Other states have similarly strong and flowery pronouncements about the history and continued vitality of employment at will.²⁸

²⁴ *Horn*, 790 N.E.2d at 756.

²⁵ *Id.* at 755, 759.

²⁶ *Bammert v. Don's Super Valu, Inc.*, 646 N.W.2d 365, 369-70 (Wis. 2002) ("The employment-at-will doctrine is a 'stable fixture' of our common law, and has been since 1871.") (citations omitted).

²⁷ *Yanta v. Montgomery Ward & Co., Inc.*, 224 N.W.2d 389, 394 n.16 (Wis. 1974) (collecting cases).

²⁸ See *supra* notes 7-8 and accompanying text; see also *Lawrence Chrysler Plymouth Corp. v. Brooks*, 465 S.E.2d 806, 808 (Va. 1996) ("An employee is ordinarily at liberty to leave his employment for any reason. . . . Notions of fundamental fairness . . . extend[] a corresponding freedom to the employer."); *Wishart v. Meganck*, 66 P.3d 124, 128 (Colo. App. 2002) ("[A]t-will employment . . . restrains courts from inquiring into the basis for termination and advances the value of a free market."); *Horn v. New York Times*, 790 N.E.2d 753, 765 (N.Y. 2003) ("This State's interest in protecting both the employer's and the employee's freedom of contract undergirds the employment-at-will doctrine."); *Tolliver v. Concordia Waterworks Dist. No. 1*, 735 So.2d 680,

Despite their categorical-sounding assertions of the vitality and desirability of the employment-at-will rule, both states' laws feature substantial exceptions to that rule. Each state's exceptions, however, are inconsistent with the other state's, leaving each state with the apparent view that employment at will allows its own exceptions but forbids the other state's. As discussed in subpart (1) below, Wisconsin has a common law cause of action for termination in violation of any public policy established by the text or spirit of any law. New York, in contrast, rejects *any* such common law rule, and the New York legislature ultimately adopted an extraordinarily narrow whistleblower statute so widely acknowledged as impotent that it has become virtually a dead letter. As discussed in subpart (2), New York law does feature certain other employment-at-will exceptions based on employer bad faith: either defrauding employees into coming to or continuing work, or terminating employees just before they become entitled to certain lump-sum compensation. Wisconsin law, however, has accepted almost no such claims, with the exception of a narrow "fraud" claim that is restricted to new hires, but unavailable for incumbent employees. Finally, as discussed in subpart (3), Wisconsin flatly rejects any "implied covenant" claim protecting employees from being terminated just before deferred compensation is due. New York law, in contrast, is thoroughly incoherent, with New York state courts appearing to reject such claims, federal courts regularly recognizing those same sorts of claims under New York law, and no courts or scholars even appearing to notice this stark federal-state dissonance as to New York law.

1. "Public Policy" Claims: Termination for Complying with Law

In many states, courts recognize a public policy exception to the employment-at-will doctrine.²⁹ Typically, employees can challenge terminations on public policy grounds by proving that the employer (1) intentionally required the employee to perform an illegal act or prevented the employee from exercising a public duty or right, (2) did so in violation of an established public policy, and (3) fired the employee for refusing to accede to its wishes.³⁰ As discussed below, Wisconsin has a robust "public policy" claim of this sort, while New York courts consistently have rejected such common law claims.

a. Wisconsin: Adoption of a Common Law Claim

In *Brockmeyer v. Dun & Bradstreet*,³¹ the Wisconsin Supreme Court

682 (La. Ct. App. 1999) ("A man is at liberty to dismiss a hired servant attached to his person or family, without assigning any reason for so doing. The servant is also free to depart.").

²⁹ See, e.g., *Bowman v. State Bank of Keyserville*, 331 S.E.2d 797 (1985); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834 (Wis. 1983).

³⁰ See, e.g., *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100 (Colo. 1992); *Sterling Drug Inc. v. Oxford*, 743 S.W.2d 380 (Ark. 1988); *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505 (N.J. 1980).

³¹ 335 N.W.2d 834 (Wis. 1983).

established a “public policy” exception to the employment-at-will rule: “an employee has a cause of action for wrongful discharge when the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law.”³² The court insisted that it was refusing to modify employment at will with an employer duty to terminate at-will employees only in good faith. Yet the court’s language indicated that this new claim was a limited version of an implied duty of good faith, in that the court viewed the claim as arising from employers’ “implied covenants” not to undertake certain unlawful actions:

[D]eclarations of public policy are *inherently incorporated* into every employment at will relationship[.]³³ . . . predicated on the breach of an *implied provision* that an employer will not discharge an employee for refusing to perform an act that violates a clear mandate of public policy.³⁴

Sometimes, when a state establishes a new cause of action, later decisions limit it to those particular facts;³⁵ but in Wisconsin, later decisions expanded the public policy claim to various settings. Although *Brockmeyer* indicated that the source of the “public policy” must be a Wisconsin “constitutional or statutory provision,”³⁶ later cases held that the source instead can be an administrative rule,³⁷ federal law,³⁸ or merely a law’s “spirit” and “intent” (*i.e.*, not the text).³⁹

Recent cases have established that the public policy claim protects not only employee whistleblowing, but also employee refusals to participate in workplace safety violations; for example, employers cannot fire employees for refusing to drive without a required license⁴⁰ or refusing to violate doctor’s orders by returning to work early after a hospitalization.⁴¹ The latter case shows the breadth of the public policy claim: the only state law providing any relevant public policy was statutory and regulatory language prohibiting work hours

³² *Id.* at 840.

³³ *Id.* at 838

³⁴ *Id.* at 841.

³⁵ See *infra* Part II.A.1.b (discussing New York’s *Wieder v. Skala*).

³⁶ 335 N.W.2d at 840.

³⁷ *Winkelman v. Beloit Mem'l Hosp.*, 483 N.W.2d 211, 212 (Wis. 1992) (holding that an administrative rule suffices if it evidences a “fundamental and well-defined public policy”).

³⁸ *Strozinsky v. School Dist. of Brown Deer*, 614 N.W.2d 443 (Wis. 2000).

³⁹ *Wandry v. Bull’s Eye Credit Union*, 384 N.W.2d 325, 330 (Wis. 1986) (noting also that the law providing the public policy need not specifically state that it protects employees from termination).

⁴⁰ *Kempfer v. Automated Finishing, Inc.*, 564 N.W.2d 692, 698 (Wis. 1997). *Kempfer*’s employer required him to drive a truck for which he needed a commercial driver’s license he lacked – and ultimately fired him for refusing to drive without the license. The court held that Wis. Stat. § 343.05(2)(a), which sets forth the minimum requirements for a person operating a commercial vehicle, sufficiently constituted a fundamental and well-defined public policy. *Id.* at 695.

⁴¹ *Wilcox v. Niagara of Wisconsin Paper Corp.*, 965 F.2d 355, 356 (7th Cir. 1992).

“dangerous or prejudicial to the [employee’s] life, health, safety or welfare”;⁴² the law neither mandated any particular hours nor provided a private right to sue, but it sufficiently established a public policy for the employee to claim his termination violated that law.⁴³ Wisconsin courts continue to insist that the public policy claim is a “narrow” one,⁴⁴ but that just means that courts refuse to broaden the claim into a generalized employee right to do anything lawful. For example, courts have rejected public policy claims by employees fired for refusing to participate in a pension plan,⁴⁵ being unable to work their assigned hours,⁴⁶ or refusing to sign the employer’s non-competition agreement (Wisconsin does not ban all such agreements, only overbroad ones).⁴⁷

While this public policy claim is well established, a recent case illustrates how arbitrarily Wisconsin draws lines based on its perception of employment at will. *Bammert v. Don’s SuperValu*⁴⁸ rejected the claim of an employee fired in retaliation for his spouse’s actions.⁴⁹ The court’s rationale was little more than a generalized ode to employment at will,⁵⁰ which just begs the question: why does employment at will allow some but not other of the various common law claims that all limit the employer’s broad at-will prerogative to fire for any reason?

b. New York: Rejecting Common Law Claims, Then Adopting Wholly Ineffectual Statute

New York is among the small minority of states not recognizing a “public policy” exception to employment at will.⁵¹ The state’s high court has long

⁴² Wis. Stat. § 103.02.

⁴³ After Mr. Wilcox had worked 35 hours on Thursday and Friday to fix a malfunctioning computer system, he left at 9:30 p.m. Friday due to angina pains. Shortly thereafter on Friday night, his manager called him at home to tell him to report to work on Saturday and Sunday or be fired; Wilcox responded by assuring him the computer system would be up and running when it was needed, on Wednesday. Wilcox was hospitalized later Friday evening and released on Saturday with instructions to take it easy, which led him to choose not to work on Saturday or Sunday. Although the computer system was running on Wednesday, the company fired him anyway on Wednesday, citing his “poor management style.” *Wilcox*, 965 F.2d at 357-58.

⁴⁴ *E.g.*, *Bammert v. Don’s Super Valu, Inc.*, 646 N.W.2d 365, 368 (Wis. 2002).

⁴⁵ *Schultz v. Production Stamping Equip.*, 434 N.W.2d 780, 785 (Wis. 1989).

⁴⁶ *Scarpace v. Sears, Roebuck & Co.*, 335 N.W.2d 844, 845 (Wis. 1983).

⁴⁷ *Tatge v. Chambers & Owen, Inc.*, 579 N.W.2d 217, 225 (1998). (“Were we to apply the *Brockmeyer* exception to the facts of this case, at-will employees could indiscriminately decline to sign non-disclosure/non-compete agreements which in their own minds are ‘unreasonable’ and subsequently bring a wrongful discharge claim if terminated for doing so.”).

⁴⁸ 646 N.W.2d 365.

⁴⁹ *Id.* at 370-71 (“Discharges for conduct outside of the employment relationship by someone other than the discharged employee are not actionable under present law.”).

⁵⁰ *See supra* notes 2, 6, 7, 26

⁵¹ *Accord Brodsky v. Hercules, Inc.*, 966 F. Supp. 1337 (D. Del. 1997) (rejecting a *Brockmeyer* - type claim under Delaware law).

“exhibited a strong disinclination to alter the traditional rule of at-will employment”⁵² and, based on that principle, has “consistently declined to create a common law tort of wrongful or abusive discharge, or to recognize a covenant of good faith and fair dealing to imply terms grounded in a conception of public policy into employment contracts.”⁵³

The New York Court of Appeals definitively shut the door to a public policy discharge cause of action in the first twenty words of its decision rejecting such a claim in *Murphy v. American Home Products Corp.*⁵⁴ “This court has not and does not now recognize a cause of action in tort for abusive or wrongful discharge.”⁵⁵ This was not a case of bad facts leading to anomalous law; *Murphy*’s facts would have supported a public policy cause of action quite strongly, had the court any inclination to allow such a claim. Mr. Murphy alleged that he was fired for refusing to participate in massive, Enron-like illegal pension/accounting fraud and for making required reports of those illegalities.⁵⁶

After *Murphy*, the New York Court of Appeals only once has opened the door to a public policy whistleblowing claim, and it has since narrowed that claim almost out of existence. *Wieder v. Skala*⁵⁷ recognized an implied covenant of good faith that a law firm associate could not be fired for complying with legal ethics rules, but the court indicated that this doctrine might be limited to its facts: “It is in this distinctive relationship between a law firm and a lawyer hired as an associate that plaintiff finds the implied-in-law obligation on which he founds his claims.”⁵⁸ Plaintiffs’ lawyers pounced on *Wieder*, sensing an opening for a broad-based public policy exception to employment at will.⁵⁹ But the New York

⁵² *Horn v. New York Times*, 790 N.E.2d 753, 755 (N.Y. 2003) (“The traditional American common-law rule undergirding employment relationships, which we adopted in *Martin v. New York Life Ins. Co.* . . . (1895), is the presumption that employment for an indefinite or unspecified term is at will and may be freely terminated by either party at any time without cause or notice.”).

⁵³ *Id.* at 759.

⁵⁴ 448 N.E.2d 86 (N.Y. 1983).

⁵⁵ *Id.* at 87.

⁵⁶ “Plaintiff claims that he was fired . . . because of his disclosure to top management of alleged accounting improprieties on the part of corporate personnel. . . . [P]laintiff asserts that his firing was in retaliation for his revelation to officers and directors . . . [of] at least \$50 million in illegal account manipulations of secret pension reserves which improperly inflated the company’s growth in income and allowed high-ranking officers to reap unwarranted bonuses . . . , as well as in retaliation for his own refusal to engage in the alleged accounting improprieties. He contends that the company’s internal regulations required him to make the disclosure that he did.” *Id.*

⁵⁷ 609 N.E.2d 105 (N.Y. 1992).

⁵⁸ *Id.* at 108.

⁵⁹ For examples of such litigation, see *infra* notes 77-81; see also Sandra J. Mullings, *Wieder v. Skala: A Chink In The Armor Of The At-Will Doctrine Or A Lance For Law Firm Associates?*, 45 SYRACUSE L. REV. 963, 964 (1995) (noting, shortly after *Wieder*, that the court’s opinion “is so replete with language of limitation and qualification that it suggests the Court intended its holding to encompass only law firm associates who find themselves in *Wieder*’s precise circumstances.

courts have crushed that effort, confining *Wieder* to lawyers complying with ethics rules and refusing to apply it to any other context. With the sole exception of one lawyer in the exact same situation as Mr. Wieder surviving a lower court motion to dismiss,⁶⁰ in every subsequent reported case, courts have rejected *Wieder* claims:

- A non-attorney who reported a money laundering scheme failed when he argued “that the exception to the ‘at will’ employment doctrine . . . for licensed attorneys should be extended to securities dealers and ‘most probably, to any licensed business or profession whose continued practice is subject to compliance with laws or regulations governing the conduct of such business or profession.’”⁶¹
- A Chief Financial Officer fired for refusing to falsify taxes “does not fit within the limited exception . . . set forth in *Wieder*.”⁶²
- A doctor terminated for refusing to provide patients’ confidential medical information to unauthorized nonmedical personnel also failed to establish a *Wieder* claim, the New York Court of Appeals held.⁶³

The case law is filled with rejections of *Wieder* claims for other occupations,⁶⁴ and

However, the core of the opinion, the Court's pronouncement of an implied limitation on the employer's right to terminate based on extrinsic ethical standards, is quite broad. The potential scope of this limitation, together with the Court's failure to fully articulate the principles underlying the holding, will, at the least, provide fertile ground for litigation by other professionals.”)

⁶⁰ Lichtman v. Estrin, 282 A.D.2d 326, 326 (N.Y. App. Div. 2001) (reversing dismissal where plaintiff, a law firm associate, was told by his supervisor that “even if he were suspended or disbarred, he could continue his involvement in his law practice by ‘coming into the office at night and meeting his associates for ‘lunch.’ Plaintiff advised Estrin that the Disciplinary Rules . . . would prohibit him from any involvement in the practice of law if he were suspended or disbarred, and Estrin replied, ‘I can have lunch with a friend, can't I?’ Plaintiff commented that it was this attitude that got Estrin into trouble in the first place.”).

⁶¹ Mulder v. Donaldson, Lufkin & Jenrette, 623 N.Y.S.2d 560, 563 (N.Y. App. Div. 1995) (“We disagree with that expansive construction of *Wieder*.”).

⁶² Leibowitz v. Party Experience, Inc., 650 N.Y.S.2d 286, 287 (N.Y. App. Div. 1996)

⁶³ Horn v. New York Times, 790 N.E.2d 753, 753-54 (N.Y. 2003) (“At issue in this appeal is whether the narrow exception to the at-will employment doctrine adopted in *Wieder* . . . encompasses a physician employed by a nonmedical employer. For the reasons that follow, we conclude that it does not and decline to expand the *Wieder* exception to do so.”).

⁶⁴ See, e.g., DeFilippo v. Xerox Corp., 636 N.Y.S.2d 463, 465 (N.Y. App. Div. 1996) (rejecting “Plaintiff's attempt to have us fashion a new exception to the well-established rule permitting an employer to discharge an at-will employee at any time and for whatever reason due to the duties and responsibilities imposed upon him as a sales professional” based on *Wieder*); Haviland v. J. Aron & Co., 622 N.Y.S.2d 703, 704 (N.Y. App. Div. 1995) (retail jewelry); Kelleher v. Corinthian Media, Inc., 617 N.Y.S.2d 726 (N.Y. App. Div. 1994); Luck v. Mazzone, 52 F.3d 475, 477 (2d Cir. 1995) (state court employee); McConchie v. Wal-Mart Stores, Inc., 985 F. Supp. 273 (N.D.N.Y. 1997) (pharmacist); Fry v. McCall, 945 F. Supp. 655 (S.D.N.Y. 1996) (state deputy comptroller employee).

even for lawyers in only marginally different circumstances than Mr. Wieder.⁶⁵

While the New York Court of Appeals repeatedly has justified its refusal to recognize a common law public policy claim as a matter of judicial deference based on separation of powers – “such recognition must await action of the Legislature”⁶⁶ – the New York legislature has not exactly risen to the challenge. New York’s “whistleblower” statute, New York Labor Law Section 740, “is probably the most restrictive and arcane” among the states,⁶⁷ “provid[ing] very limited protection for employees who blow the whistle on employer misconduct that *both* (i) violates a law, rule, or regulation and (ii) creates and presents a *substantial and specific danger to public health or safety*.”⁶⁸ Those requirements are strict: a claim (i) “must be premised on an *actual* violation of law, rule or regulation; a *reasonable belief* of a violation is not enough,”⁶⁹ as it is under most anti-retaliation statutes;⁷⁰ and (ii) must involve whistleblowing about “a substantial and specific danger to the public health and safety,” not just any illegality. Accordingly, employees are unprotected when blowing the whistle on most unlawful (even criminal) activities, such as financial fraud, misuse of medical records, and defrauding the government.⁷¹ “Given the narrowness of this

⁶⁵ Geary v. Hunton & Williams, 257 A.D.2d 482, 483 (N.Y. App. Div. 1999) (rejecting claim by attorney alleging termination after he complained about a partner’s improper billing practices, because plaintiff reported the misconduct only internally within his law firm, and “neither reported the partner to the Disciplinary Committee, expressed to defendant an intention to make such a report, nor believed that he personally was obligated to make such a report”).

⁶⁶ Murphy v. American Home Prods. Corp., 448 N.E.2d 86, 87 (N.Y. 1983); *see also* Horn, 790 N.E.2d at 756-57 (citing with approval *Murphy’s* argument that employment protections must come from the legislature, not the courts).

⁶⁷ Wayne N. Outten, et al., *Overview Of Workplace Claims in New York: Perspective of Employees’ Counsel*, 662 PLI/LITIG. 1179, 1210 (Oct. 2001).

⁶⁸ *Id.* at 1210 (emphasis added).

⁶⁹ Rotwein v. Sunharbor Manor Residential Health Care Facility, 695 N.Y.S.2d 477, 482 (N.Y. Sup. Ct. 1999); *see also* Capobianco v. Am. Stock Exch., 649 N.Y.S.2d 688 (N.Y. App. Div. 1996) (finding that plaintiff failed to show that the complaint about asbestos removal involved an “actual” violation of the law); Bordell v. Gen. Elec. Co., 622 N.Y.S.2d 1001 (N.Y. Sup. Ct. 1995) (finding that nuclear reactor employee’s reasonable belief that there was a radiation leak was insufficient because § 740 requires an actual violation of law, rule or regulation, not mere belief that violation has occurred), *aff’d*, 644 N.Y.S.2d 912 (1996).

⁷⁰ Under most anti-discrimination and whistleblower laws, the employee “remains protected so long as the employee reasonably and in good faith believed that unlawful discrimination was occurring. Protection will be denied only if the employee’s professed belief that discrimination occurred is so far from the mark that [n]o reasonable person could have believed that the [conduct] . . . violated Title VII[.]” Wayne N. Outten, et al., *When Your Employer Thinks You Acted Disloyally: The Guarantees and Uncertainties of Retaliation Law*, 693 PLI/LIT. 151, 155-57 (2003); *see also* Laurence S. Moy, et al., *Whistleblower Claims under the Sarbanes-Oxley Act of 2002*, 1443 PLI/CORP. 193, 204 (2004) (noting that under Sarbanes-Oxley Act, “retaliation against a whistleblowing employee can be illegal even if the employee’s reports of corporate misconduct turn out to be unfounded. The Act only requires . . . ‘reasonable belief’ of illegal activity”).

⁷¹ Rotwein v. Sunharbor Manor Residential Health Care Facility, 695 N.Y.S.2d 477, 482 (N.Y.

protection, plaintiffs rarely have been able to succeed under § 740⁷²; only when the unlawful activity is literally a life-or-death matter⁷³ does an employee have any chance of statutory protection.⁷⁴

Sup. Ct. 1999) (opposing Medicare billing improprieties did not involve immediate threat to public health and safety; collecting cases noting that neither do “fraudulent billing practices,” “fiscal improprieties,” “disclosure of medical records,” or “fraudulent banking activities”).

⁷² Outten, *Overview of Workplace Claims*, *supra* note 67 at 1210.

⁷³ See, e.g., *Finkelstein v. Cornell Univ. Med. Coll.*, 702 N.Y.S.2d 285 (N.Y. App. Div. 2000) (reversing grant of summary judgment to employer where employee, a doctor, reported a hospital burn center colleague behaving in mentally disturbed manner and providing “questionable treatment”); *Rogers v. Lenox Hill Hosp.*, 626 N.Y.S.2d 137 (N.Y. App. Div. 1995) (noting “numerous actual violations”: “paramedics pronounced a live woman dead without examining her or attempting resuscitation, attempted to cover up a second call to the same location, did not transport the critically ill patient to the closest hospital, and engaged in improper resuscitation. . . . The risk of death or injury to patients attended by negligent, poorly trained, and undisciplined EMS paramedics is . . . [a] public health risk. . . . [T]he danger posed by the recurrence of a mishandled EMS call clearly meets the required threat to public health and safety.”); *Granser v. Box Tree South Ltd.*, 623 N.Y.S.2d 977 (N.Y. Sup. Ct. 1994) (holding that violations creating fire hazards sufficiently threatened public health and safety for § 740 claim); *Rosario v. Nat'l Housing Partnership Prop. Management, Inc.*, No. 96 Civ. 4633 (BSJ), 1998 WL 146207 (S.D.N.Y. Mar. 26, 1998) (threatened complaint regarding living conditions at housing project supported § 740 claim).

⁷⁴ New York provides different whistleblower protection for certain jobs. Most notably, New York Civil Service Law § 75-b, for public sector employees, is broader than § 740 in that it “does not require that the violation . . . pose a threat to health or safety, or that the violation be ‘actual’ – i.e., the plaintiff’s reasonable belief that an ‘improper governmental action’ has occurred will suffice.” Outten, *Overview of Workplace Claims*, *supra* note 67 at 1212. Yet in other respects, § 75-b is narrower than § 740: under § 75-b(2)(a), protection “applies to information reported within government only . . . [and] does not provide any protections against retaliation for public employees who disclose governmental misconduct or perceived misconduct to . . . the media” or make other informal or public complaints. William A. Herbert, *Protections For Public Employees Who ‘Blow The Whistle’ Appear To Be Inadequate*, 76 N.Y. ST. B.J. 20, 20 (2004). Also, employees are protected only if, before complaining to an external agency (e.g., an environmental protection agency), they formally complained internally, to officials in their own agency. § 75-b(2)(b) (requiring that for external complaints to be protected, employees must “have made a good faith effort to provide the appointing authority . . . the information to be disclosed and shall provide . . . a reasonable time to take appropriate action unless there is imminent and serious danger”).

These limits on § 75-b are strictly enforced: employees have lost when they made the requisite internal and external complaints but did not wait “a reasonable time” after the internal complaint. See *Garrity v. Univ. at Albany*, 301 A.D.2d 1015, 1017 (N.Y. App. Div. 2002) (affirming dismissal where pharmacist reported prescription record-keeping deficiencies to police and state authorities “‘the next day’ after [complaining to supervisors, which] . . . did not afford petitioner’s superiors a reasonable time to investigate and correct the problems” (citing § 75-b(2)(b)). Employees also have lost when their internal complaint was too informal and was made to the “wrong” officer. See *Brohman v. New York Convention Ctr. Oper. Corp.*, 293 A.D.2d 299, 300 (N.Y. App. Div. 2002) (affirming dismissal where “Plaintiff admittedly had no communications with either defendant’s Board . . . or [high] officer[s], but argues that his communications with one of defendant’s vice-presidents satisfied the pre-disclosure notice requirement. . . . [Plaintiff’s] communications with the vice-president were not for the purpose of informing defendant of its president’s improper governmental actions. . . . [H]e used the vice-president as a ‘friend and a soundboard,’ went to him

Thus, employees in New York enjoy virtually no protection against discharges that subvert “public policy.” They have no common law protection (except attorneys in rare circumstances); they have statutory protection only for whistleblowing (not for refusing to violate the law, nor for complying with legal duties), but under a statute so narrow that it almost never applies. New York has justified this state of affairs as a necessary corollary to the employment-at-will rule, even as Wisconsin does not see that same rule as a barrier to a robust common law rule against terminations violating a wide array of public policy.

2. “Fraudulent Inducement” Claims: Defrauding Employees into Their Jobs

Under an “employment at will” regime, employees cannot sue just because they are dissatisfied with their pay, duties, or working conditions. But what about an employee’s claim that the employer lied to her about what her pay or working conditions would be? In such circumstances, the employee may claim that she was induced to work for the employer by lies about her pay, duties, or working conditions. Under black-letter tort law, the employee may have a fraud claim that her employment relationship “was induced by false representations.”⁷⁵ The damages for such a fraud claim may be limited to reliance damages (the cost of taking the job or foregoing another job opportunity), but those may be sizeable in the context of ongoing compensation and missed opportunities.

Once again, New York, the state so strictly adhering to employment at will that it disallows any meaningful claim for discharges violating public policy, allows a much broader range of fraudulent inducement claims than Wisconsin, the state far more liberally allowing public policy claims. In New York, any employee can sue for fraud by alleging that the employer used misrepresentations to induce him or her to take or keep a job. In Wisconsin, however, the courts construe employment at will as precluding any fraud claim by employees once they start working – a substantial restriction on who can bring such claims.

a. Wisconsin: No Claim for Employees, Only for Job Candidates

In Wisconsin, employees can sue for being defrauded into accepting a job – but not for being defrauded into remaining at a job (e.g., with a promise of a promotion, raise, transfer, change in duties, etc.). This limitation means that employees have no protection against employer fraud during their employment, such as employer misrepresentations inducing them to stay on the job or turn down another offer. The Wisconsin Supreme Court so held in *Mackenzie v.*

for ‘advice,’ did not ask him to put an end to the alleged improprieties, and had a mutual understanding . . . their conversations would ‘absolutely’ go no further”). Thus, § 75-b protection “remains inadequate, and may not be sufficient to allay the natural and inherent fear of reprisal felt by most employees.” Herbert, *supra*, 76 N.Y. St. B.J. at 20.

⁷⁵ Stewart v. Jackson & Nash, 976 F.2d 86, 88 (2d Cir. 1992).

Miller Brewing Co.,⁷⁶ reasoning that “those who are party to an at-will contract must seek recourse in contract rather than tort law,” which is to say that at-will employees without employment contract protections lack any recourse at all.⁷⁷ There, the plaintiff claimed that, amidst a corporate downsizing, his employer defrauded him into remaining with the company by not disclosing that his position had been downgraded.⁷⁸ The court refused to undercut employment at will with a common law fraudulent inducement claim, “because such a cause of action would have a profound effect on potentially millions of employees.”⁷⁹

The extent to which the *Mackenzie* court feared upsetting the employment-at-will rule is noteworthy in two respects. First, the court went so far as to create an at-will immunity to a general, well-established tort cause of action, just to protect employers from liability to at-will employees.⁸⁰ Second, the court’s trepidation about tinkering with employment at will led it to exaggerate substantially the limited impact of this claim. As to effects on “millions”: at the time, 2.854 million people were employed in Wisconsin.⁸¹ Yet far from all of those were “at-will” employees; many government workers,⁸² union members,⁸³ and others (e.g.,

⁷⁶ 623 N.W.2d 739 (Wis. 2001).

⁷⁷ *Id.* at 739, 742.

⁷⁸ *Id.* at 741.

⁷⁹ *Id.* at 745.

⁸⁰ The lengthy majority opinion boils down to adopting this rule . . . : When an employer deliberately and intentionally lies to an at-will employee to induce the employee to continue employment and the employee continues to work relying on those lies, and then sustains damages as a result . . . , the employee cannot sue in a tort action for damages Wisconsin’s general rule of law is that everyone is liable for damages for intentional misrepresentation. The majority opinion carves out an exception to this general rule and states that employers are not liable to at-will employees for damages for intentional misrepresentation. It’s one thing to say that the elements of the tort of intentional misrepresentation have not been met in the present case. I therefore concur. It’s entirely another thing to say . . . that the tort of intentional misrepresentation never applies in an employment at-will relationship.

Id. at 750 (Abrahamson, C.J. & Bablitch, J., concurring).

⁸¹ Bureau of Labor Statistics, “Employment status of the civilian noninstitutional population by sex, age, race, and Hispanic origin, 2001 annual averages,” page 61 of 62 (Wisconsin statistics), available at <http://www.bls.gov/lau/table12full01.pdf>. (Statistics are for 2001 because that was the year *Mackenzie* was decided.)

⁸² In 2000, Wisconsin’s workforce included 413,700 government workers. “Bureau of Labor Statistics, State and Area Employment, Hours, and Earnings” (statistics on government workers in Wisconsin), available at <http://data.bls.gov/cgi-bin/dsrv>.

⁸³ See Steven L. Willborn, *Workers in Troubled Firms: When Are (Should) They Be Protected?*, 7 U. PA. J. LAB. & EMP. L. 35, 37 n.8 (2004) (noting that nationally, “ninety-seven percent of union contracts require cause or just cause for discharge”). In 2001, 17.9% of “nonagricultural workers” (a category that includes but is not limited to government workers) in Wisconsin were union members. Barry T. Hirsch et al., “Estimates of union density by State,” *Monthly Labor Review* 51-55 (Bureau of Labor Statistics, July 2001), at <http://www.bls.gov/opub/mlr/2001/07/ressum2.pdf>. With total “nonfarm” employment in 2000 at 2.8338 million (close to total employment, so there

white-collar workers)⁸⁴ have some job security through protections in civil service law, collective bargaining agreements,⁸⁵ and employment contracts.⁸⁶ Also, there would be *no* effect (much less a “profound” one) on any employees without fraudulent inducement claims. There is no basis for the hyperbole that recognizing fraudulent inducement claims would impact “millions.”

Mackenzie followed, and confirmed the narrow scope of, a prior decision allowing an at-will employee to claim fraudulent inducement. In *Hartwig v. Bitter*,⁸⁷ the Wisconsin Supreme Court found actionable an employer’s *pre*-employment misrepresentations (mostly about hot prospects for deals) to a job candidate to induce him to take the job.⁸⁸ The court allowed the claim “because no employment relationship existed at the time of the misrepresentations.”⁸⁹

were few “farm” workers exclude from these figures), over 500,000 of Wisconsin’s employees were union workers who likely enjoyed at least some job protections taking them out of the pure employment-at-will rule the court feared upsetting.

⁸⁴ Verkerke, *supra* note 17, at 867 (1995) (surveying non-union employment and finding that “more than one in seven (15%) contract expressly for just cause protection”).

⁸⁵ See, e.g., Willborn, *supra* note 83 at 37 (2004) (“For union workers, ... collective bargaining contracts almost uniformly require employers to have ‘just cause’ to discharge employees”; citing data “that ninety-seven percent of union contracts require cause or just cause for discharge”).

⁸⁶ See, e.g., *Coelho v. Posi-Seal Intern., Inc.*, 544 A.2d 170 (Conn. 1988) (affirming verdict for discharged employee who “contended that he had been terminated as a result of his disputes with the director of manufacturing and that the reduction in force was a mere pretext for discharging him ... a reduction in force may be a pretext for a termination in violation of an ... agreement not to discharge an employee without just cause”).

⁸⁷ 139 N.W.2d 644 (1966).

⁸⁸ *Id.* at 646. The plaintiffs alleged that the defendant gave them “a list of ‘prospects’ and stated that those persons were in fact interested in buying or selling business enterprises.” *Id.* The plaintiffs also claimed that “the defendant represented to Hartwig and Wendt that the sales to these persons would result in earning large sums of money.” *Id.* Finally, the plaintiffs contended that the defendant told them that “he was closing sales ‘right along.’” *Id.* The plaintiffs alleged that “the persons on the ‘prospect’ list were not interested in buying or selling a business.” *Id.* Furthermore, they asserted “that the defendant knew that his representations as to future earnings were false.” *Id.* The court found that these statements could constitute fraud because, even “though a matter asserted is an opinion, it is actionable if the maker is aware of present facts incompatible with that opinion.” *Id.* The court held that a “statement of opinion in a business transaction [based] upon facts not disclosed or otherwise known to the recipient may reasonably be interpreted as an implied statement that the maker knows of no fact incompatible with his opinion.” *Id.* Consequently, if, “at the time of the assertion, the utterer is aware of facts that are incompatible with his opinion or if he has [no] intent to perform in the future, the fraud is in praesenti.” *Id.*

⁸⁹ *Id.* at 647. The Court said that a “closer question is presented by the allegation that Hartwig and Wendt were falsely told they would earn large sums of money.” *Id.* If the defendant was only “‘puffing’ the potential of the employment,” it would not be actionable. *Id.* However, the statement was actionable in this case because “the defendant knew that nine previous salesman over a period of four years had grossed commissions not in excess of \$752.50. Hence, . . . the defendant, who was in a unique position to know the facts, was aware of facts that were incompatible with his representations in regard to the future. This allegation states a cause of

Mackenzie confirms this curious distinction: pre-employment misrepresentations are actionable, but during-employment misrepresentations are not.⁹⁰ One would think that employers have *more* duties to *their own employees* than to strangers, yet the court sees employment at will as commanding otherwise: employers freely can defraud employees, but not mere job candidates. Moreover, this strong adherence to employment at will came from the same court that crafted a substantial common law public policy exception,⁹¹ indicating that the court selectively and inconsistently decides whether employment at will precludes a common law claim.

b. New York: A Strong Claim for Employees and Candidates Alike

New York strongly recognizes employee fraudulent inducement claims, and despite the state's purported strong adherence to employment at will, courts in the state identically recognize claims by new and incumbent employees alike, in stark contrast to Wisconsin law. *Stewart v. Jackson & Nash*,⁹² the leading case recognizing such claims under New York law, deemed employee fraudulent inducement claims an uncontroversial application of basic tort and fraud law.⁹³ *Stewart* held that an employer may be liable for making fraudulent statements of fact (there, mainly about the client base and practice areas of the new employer, a law firm⁹⁴) that induced an employee to give up other job opportunities to *enter*,

action." *Id.* at 648. Finally, the court held that the "defendant falsely told the plaintiff . . . that he was closing sales 'right along.' This is a misrepresentation of an existing fact and is actionable." *Id.* Accordingly, the court found that the allegations of the plaintiffs did "state facts sufficient to state a cause of action for deceit." *Id.*

⁹⁰ Similarly, an employer's misrepresentations to an employee may (at least according to one lower court) be actionable if they occur *after* the at-will employment ends. The Wisconsin Court of Appeals so held in *Betterman v. Fleming Cos.*, 677 N.W.2d 673 (Wis. Ct. App. 2004), allowing an employee to sue when his employer lied about his termination, telling him he was not in fact terminated. Unlike in cases in which the misrepresentations occurred while the at-will employee was still employed, the plaintiff was no longer employed at the time of the misrepresentations, so the employer was not protected from fraud liability by the employment-at-will rule. *Id.* at 679 ("[T]he rule barring intentional misrepresentation claims where there is an at-will contract does not apply when there is no employment relationship.").

⁹¹ See *supra* Part II.A.1.

⁹² 976 F.2d 86 (2d Cir. 1992).

⁹³ *Id.* at 88-89 ("[U]nder New York law '[i]t is elementary that where a contract or transaction was induced by false representations, the representations and the contract are distinct and separable.... Thus, fraud in the inducement of a written contract is not merged therein so as to preclude an action for fraud.'") (alteration in original) (citation omitted).

⁹⁴ *Id.* at 89 (plaintiff, an environmental lawyer, left her existing job to join the defendant law firm based on defendant's "four misrepresentations: (1) '[defendant] Jackson had recently secured a large environmental law client'; (2) 'Jackson was in the process of establishing an environmental law department'; (3) 'Stewart would head the environmental law department'; and (4) '[Stewart would] be expected to service the firm's substantial existing environmental law client.'")

and also to *remain*, in the defendant's employ.⁹⁵

Following *Stewart*, New York courts repeatedly have recognized fraudulent inducement claims by employees claiming that they *either* (a) were new employees defrauded into coming to work for the employer⁹⁶ or (b) were incumbent employees defrauded into remaining with the employer.⁹⁷ The latter class of employees would have no claim in Wisconsin, purportedly because employment at will is inconsistent with such a claim. Yet New York does not

⁹⁵ *Id.* at 87 (“Upon her arrival, Stewart alleges that Jackson & Nash put her to work primarily on general litigation matters. When she inquired about the promised environmental work, Herzog repeatedly assured her that it would be forthcoming and ‘also consistently advised [her] that she would be promoted to . . . head of Jackson's environmental law department.’”).

⁹⁶ *See, e.g.*, *Gabriel v. Therapists Unlimited, L.P.*, 218 A.D.2d 614, 616 (N.Y. App. Div. 1995) (inducement to come work for defendant: reversing dismissal of plaintiffs' fraudulent inducement claim where “[t]he false representation alleged to have been made by defendant was that it had existing contractual arrangements with health care facilities where plaintiffs could be placed, so as to satisfy the State license requirements” for plaintiffs to practice speech/language pathology); *Navaretta v. Group Health Inc.*, 191 A.D.2d 953, 953-54 (N.Y. App. Div. 1993) (inducement to come work for defendant: reversing dismissal of plaintiff's claim that defendant “represented that the proposed [written] tests were unimportant when in fact they were crucial to her employment. . . . Plaintiff claims that Nikles made these false representations and withheld pivotal information for the purpose of inducing her to terminate her previous employment and work for defendant”).

⁹⁷ *See, e.g.*, *Cole v. Kobs & Draft Advertising, Inc.*, 921 F. Supp. 220, 224 (S.D.N.Y. 1996) (inducement to remain in defendant's employ: “Cole alleges that Kobs made phantom promises of a promotion and sustained employment as part of a fraudulent scheme to induce her to remain at Kobs long enough to maneuver a new employee into position”; her at-will status was no barrier because even though “New York courts routinely reject attempts by employees to circumvent an employer's termination right merely by alleging claims sounding in tort,” Cole's claim, like that in *Stewart*, “seeks damages related to Kobs's allegedly successful effort at sabotaging her [client] relationship . . . and tainting her reputation within the direct market advertising industry, rather than for any damages caused by the termination decision itself”); *Backer v. Lewit*, 180 A.D.2d 134 (N.Y. App. Div. 1992) (inducement to come work for defendant and also to remain in defendant's employ: “plaintiff was induced to leave his prior employment and to continue his marketing efforts in reliance upon the representations that Trendstar was an ongoing business, that the individual defendants would produce a fall 1989 line, when, in fact, defendants at all times only wanted plaintiff to liquidate the inventory,” *id.* at 139; defendant also told plaintiff that if he “develop[ed] a national sales force for Trendstar his employment would be extended and he would thereby earn not only a salary but substantial commissions as well,” *id.* at 136; “Plaintiff alleges that the assurances made during the first six months of employment were false, that the defendants knew they were false, that he relied upon those assurances to continue his work as a sales manager of Trendstar,” *id.* at 136); *Shaitelman v. Phoenix Life Ins. Co.*, 517 F. Supp. 21, 23 (S.D.N.Y. 1981) (inducement to remain in defendant's employ: allowing plaintiffs' tort claim despite at-will status, because “the defendant allegedly breached a duty independent of the contract by making affirmative misrepresentations to induce plaintiffs' continuing performance and reliance,” *i.e.*, defendant “fraudulently induced [plaintiffs] to continue in its employ by knowingly and falsely representing . . . [1] that their earnings were unlimited and that they had the unlimited financial potential of commissioned salesmen although they were employees at will [and] . . . [2] that they would receive monies earned and accumulated in the form of surplus credits thereby inducing plaintiffs to believe that they had a financial incentive to continue in [defendant's] employ”).

see any such conflict. For example, in *Shaitelman v. Phoenix Life Insurance Co.*, the plaintiff alleged fraudulent inducement to remain in the defendant's employ but lost his termination claim because "New York courts continue to adhere to the principle that employment contracts for an indefinite period of time are terminable at will."⁹⁸ That the parties' employment "contract" was terminable at will, however, just meant there was no contract or termination claim; it did not preclude an "independent" tort claim, because

New York courts have long held that an action for fraudulent misrepresentation, independently pleaded, can constitute a cause of action which may be pleaded in addition to, or as an alternative to, an action for breach of contract. . . . [Defendant] breached a duty independent of the contract by making affirmative misrepresentations to induce plaintiffs' continuing performance and reliance."⁹⁹

Another court allowed fraudulent inducement claims by at-will employees for similar reasons:

[A]s an "at will" employee[,] . . . she is not suing defendant based on a breach of her employment contract but on a tort claim that defendant's agent fraudulently misrepresented facts to induce her into entering into employment with defendant. Such a cause of action is cognizable if specific enough and if the plaintiff alleges misstatements of existing fact as opposed to expressions of future expectation. . . . [The at-will rule] does not prevent plaintiff from potentially recovering for injuries resulting from her reliance on defendant's allegedly false statements.¹⁰⁰

Thus, New York rejects Wisconsin's notion of an irreconcilable conflict between employment at will and fraudulent inducement claims. As with the other doctrines discussed, two states asserting a century of fealty to employment at will have recently been reaching quite contrary conclusions as to exactly what claims the doctrine allows or forbids.

⁹⁸ *Shaitelman*, 517 F. Supp. at 24.

⁹⁹ *Id.* at 22-23.

¹⁰⁰ *Navaretta* 191 A.D.2d at 954 -55 (citing *Stewart*, 976 F.2d at 88) (other citations omitted). Notably, where a New York court rejects such a claim, it is not on the premise that the claim does not exist, but instead because the particular plaintiff's claim happened to be a loser – for example, when an at-will employee cannot prove "reasonable reliance" on a highly specific term of employment, such as start date. *E.g.*, *Marino v. Oakwood Care Ctr.*, 774 N.Y.S.2d 562, 563 (N.Y. App. Div. 2004) ("defendants offered the plaintiff the position of Director of Social Work at a skilled nursing facility which was still under construction. The plaintiff did not allege that the parties entered into an agreement which required the defendants to employ her for a definite and specified term, or which otherwise limited the defendants' right to change the terms of their employment offer by deferring her proposed starting date. . . . Furthermore, since the plaintiff was offered only at-will employment, she cannot establish reasonable reliance, a necessary element to recover damages on theories of fraudulent misrepresentation . . .").

3. “Implied Covenant” Claims: Termination Just Before Compensation Due

Many employees have “deferred compensation” arrangements providing pay weeks or months after they perform particular work. Salespeople and other employees often receive part of their remuneration from commissions paid some time after the sale is made.¹⁰¹ Deferred compensation also is common outside the sales context; for example, white-collar jobs may feature lump-sum “guaranteed bonus” payments, or bonuses contingent only on reaching fixed financial targets (e.g., 10% bonus if X profitability target reached).

Such arrangements leave at-will employees vulnerable to exploitation when large payments are due them. Employers may be tempted to terminate the employee about to be due a large guaranteed bonus or an unusually large commission for a recent sale. Commission plans are contracts, and under basic contract law, employers can decline to pay terminated employees any not-yet-due commissions, even on sales already completed, so long as the employer’s commission plan says that employees will receive their commissions only if they are still employed on a certain date, such as the date the deferred payment is due¹⁰² or the date the customer pays the funds generating the commission.¹⁰³

Some jurisdictions apply an “implied covenant of good faith and fair dealing” to “scrutinize discharges . . . when plaintiffs allege that they were fired to prevent them from receiving compensation for already completed services.”¹⁰⁴ This “implied covenant,” however, is a substantial exception to employment at will; just as employers ordinarily can fire, they ordinarily can cut an employee’s pay or commission entitlement at any time, for any reason. Strong adherence to employment at will would leave employees unprotected; if employees want job security against unfair terminations just before their compensation due date, they can negotiate appropriate contract terms.¹⁰⁵ Indeed, “[a] decided majority of

¹⁰¹ *E.g.*, Tuttle v. Geo. McQuesten Co., 642 N.Y.S.2d 356, 358 (N.Y. App. Div. 1996) (allowing plaintiff, after resigning, to recover “hold over monies” – commissions he had earned but that, under his employment agreement, were vested and due to be paid only at the end of the year or later).

¹⁰² *E.g.*, Dwyer v. Burlington Broadcasters, Inc., 744 N.Y.S.2d 55, 56 (N.Y. App. Div. 2002) (denying employee’s claim for post-termination commissions where her contract “expressly stated Defendant’s policy ‘not to pay commissions on spots broadcast after the effective date of the termination of your employment . . . regardless of when the sale was made’”).

¹⁰³ *E.g.*, Goldsmith v. J.I. Sopher & Co., 672 N.Y.S.2d 303, 304 (N.Y. App. Div. 1998) (“Plaintiff . . . was not entitled to . . . commissions received by defendant after the date of his termination. Plaintiff’s . . . agreement provided for payment to plaintiff of a percentage of the gross commissions generated by sales agents under plaintiff’s management and ‘collected’ by defendant. The commissions in dispute were not ‘collected’ prior to the termination of plaintiff’s employment.”).

¹⁰⁴ Verkerke, *supra* note 17, at 844-45.

¹⁰⁵ *See supra* note 6.

jurisdictions . . . refuse[s] to apply the covenant to employment contracts under any circumstances . . . [A] duty of good faith is fundamentally inconsistent with an employer's right to discharge at will."¹⁰⁶

One might intuit that states strictly construing employment at will to preclude common law "public policy" claims would similarly preclude common law "implied covenant" claims. Conversely, one might suspect that states allowing public policy claims would be less doctrinaire about employment at will and therefore would allow implied covenant claims. However, New York and Wisconsin do exactly the opposite: the state essentially rejecting public policy claims (New York) is the one often allowing these implied covenant claims, while the state strongly recognizing public policy claims (Wisconsin) is the one rejecting implied covenant claims. Worse, the situation is even more incoherent in New York, where federal and state courts are waging a silent, unacknowledged war over whether to recognize implied covenant claims.

a. Wisconsin: No Implied Covenant Claims

Wisconsin is part of the majority categorically rejecting any "implied covenant" claim for employees terminated just before they were due certain compensation. Wisconsin expressly and repeatedly has rejected Massachusetts's *Fortune v. National Cash Register Co.*,¹⁰⁷ the leading case recognizing this sort of implied covenant claim,¹⁰⁸ even as Wisconsin simultaneously created the public policy discharge claim.¹⁰⁹ Wisconsin courts have continued to reject any claim¹¹⁰ that "[w]here an employer deprives an agent of his commission by

¹⁰⁶ Verkerke, *supra* note 17, at 845.

¹⁰⁷ 364 N.E.2d 1251 (Mass. 1977); see Gary Minda, *Employment At-Will in the Second Circuit*, 52 BROOK. L. REV. 913, 918 (1986) ("*Fortune* . . . held that a former salesman could bring suit to recover alleged sales commissions under a terminated at-will employment contract on the ground that 'in every contract there exists an implied covenant of good faith and fair dealing' which prevents contract parties from 'destroying or injuring the right of the other party to receive the fruits of the contract.'").

¹⁰⁸ Through 2004, *Fortune* had been cited in the court decisions of 42 states, the District of Columbia, and Puerto Rico, and 425 times overall (Westlaw search performed in February 2005, limited to decisions through 2004).

¹⁰⁹ Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 838 (Wis. 1983). In addition to rejecting *Fortune*, Wisconsin courts never have cited *Wakefield*, perhaps the second leading case establishing this claim, and the case that first established the claim under New York law.

¹¹⁰ Wisconsin does have a statute allowing employees to sue for unpaid wages, but it covers only fully earned compensation, so it does not allow an employee to sue for money she was *about* to earn (and that the employer terminated her to avoid paying). Tennyson v. School Dist. of Menomonie Area, 606 N.W.2d 594, 595 (Wis. Ct. App. 1999) (noting that under Wisconsin wage protection statute, "the term 'wages' does not include unearned salary due and owing to a discharged employee"). Thus, in Wisconsin, there simply is no claim for an employee in the *Wakefield* or *Fortune* situation.

terminating the contractual relationship, the employer has acted in bad faith.”¹¹¹

b. New York: Unrecognized Doctrinal Chaos – Implied Covenant Claims, But Only in Federal Court?

The situation is far muddier in New York. Despite the state’s loyalty to the strong form of employment at will in other contexts (*e.g.*, rejecting “public policy” claims), federal courts recognize an “implied covenant” claim for employees under New York law. The leading, *Wakefield v. Northern Telecom, Inc.*,¹¹² recognized a salesman’s claim that he was fired to deprive him of hefty sales commissions; the Second Circuit conceded that he was employed at-will but noted that “[w]here, however, a covenant of good faith is necessary to enable one party to receive the benefits promised for performance, it is implied by law as necessary to effectuate the intent of the parties.”¹¹³ Various federal courts since have reaffirmed the availability of such claims under New York law.¹¹⁴

¹¹¹ *Lemon v. Fry*, 349 N.W.2d 109 (Table), 1984 WL 180467, at *3-4 (Wis. Ct. App. March 27, 1984) (rejecting dissent’s argument that plaintiff stated a claim that defendant, “[w]ithout any basis, . . . discharged [plaintiff] and the other two agents who had accumulated a substantial investment in the renewal commissions earned during their employment,” because (in dissent’s view) “[an] employment contract contains an implied agreement of good faith and fair dealing so that a termination not made in good faith but rather in order to prevent the agent from collecting renewal commissions on policies he had already sold would constitute a breach of contract. *See Fortune* . . . Where an employer deprives an agent of his commission by terminating the contractual relationship, the employer has acted in bad faith. Courts throughout the country have often applied this rule to prevent overreaching by an employer and the forfeiture by employees of benefits already earned by the rendering of substantial services.”); *see also Andersen v. Mid-Plains Comm.*, 394 N.W.2d 316 (Wis. Ct. App. Feb 12, 1986) (Table, text in WESTLAW, NO. 84-2042) (“[A]s in *Fortune*, Mid-Plains fired Andersen to avoid paying him commissions. . . . The *Fortune* court held that the salesman’s employment contract contained an implied covenant of good faith and that a bad faith discharge constituted a breach of contract. The *Brockmeyer* court expressly rejected this position, however, refusing ‘to impose a duty to terminate in good faith into employment contracts’ . . . [i]n addressing the scope of the public policy exception to the at-will doctrine”) (citation omitted).

¹¹² 769 F.2d 109 (2d Cir. 1985).

¹¹³ *Id.* at 112.

¹¹⁴ *See Knudsen v. Quebecor Printing*, 792 F. Supp. 234, 238-40 (S.D.N.Y. 1992) (reaffirming applicability of *Wakefield*, denying motion to dismiss Plaintiff’s “claim that Defendant violated its implied covenant of good faith and fair dealing by terminating him in order to avoid paying sales commissions”); *Murphy v. Gabelli*, No. 93 Civ. 1539 (LBS), 1994 WL 560982, at *7 (S.D.N.Y. Oct. 12, 1994) (citing *Knudsen*, denying defendants summary judgment on claim that they “improperly terminated [plaintiff’s] employment in order to avoid paying him commissions”); *In re Vasu*, 129 F. Supp. 2d 113, 122 (D. Conn. 2001) (applying New York law and denying defendant motion to dismiss, because “[a]s in *Wakefield*, a provision in the Letter can be construed to limit Vasu’s rights to recover earned commissions if Vasu was not employed at the time the commissions were paid. Construed favorably to Vasu, the complaint can be read to allege that avoiding payment of Vasu’s earned commissions was a substantial motivating factor in Tremont’s decision to terminate”); *Lawford v. New York Life Ins. Co.*, 739 F. Supp. 906, 918 (S.D.N.Y. 1990) (finding that under *Wakefield*, “plaintiff has made an adequate showing of improper motive

New York's *stat* courts, however, have *not* recognized this sort of "implied covenant" claim. Yet, amazingly, neither have they rejected *Wakefield* or the other federal cases recognizing such claims under New York law. In *Gallagher v. Lambert*,¹¹⁵ the New York Court of Appeals rejected an implied covenant claim where an employee was fired the day before he would have earned a windfall due to an increase in his stock buyback price; in the roughly contemporaneous *Ingle v. Glamore Motor Sales, Inc.*,¹¹⁶ the same court rejected a very similar claim. *Gallagher's* rejection of implied covenant claims came after *Wakefield*, but it neither rejected nor distinguished *Wakefield*; it simply did not mention it (and neither did *Ingle*).

These decisions by the state's high court would seem dispositive, but the federal courts since *Gallagher* and *Ingle* have continued to accept such claims, protecting *Wakefield* by asserting that "[a]lthough *Gallagher* can be read as a rejection of *Wakefield*, such a reading is not necessary. . . . *Wakefield* was ignored by the [*Gallagher*] majority. . . . *Gallagher* does not disturb the authority of *Wakefield*, at least in the context of employment sales commission provisions."¹¹⁷ Only one federal case, *Collins & Aikman Floor Coverings Corp.*

to allow his claim of wrongful termination to avoid commissions"); *Metzler v. Harris Corp.*, No. 00 Civ. 5847 (HB), 2001 WL 194911, at *2 (S.D.N.Y. Feb. 26, 2001) ("While the New York Court of Appeals held that 'this state neither recognizes a tort of wrongful discharge nor requires good faith in an at-will employment relationship[.]' the Second Circuit's decision in *Wakefield* clouds that holding so that, at this stage of the litigation, the motion to dismiss must be denied" (citation omitted)); *Mirabella v. Turner Broad. Sys., Inc.*, 2003 WL 21146657, at *1-2 (S.D.N.Y. May 19, 2003) (citing *Wakefield* and *Knudsen* for rule that "an at-will employee could recover under a breach of covenant of good faith and fair dealing theory if the employee could demonstrate that his employment was terminated so that the employer could avoid paying him earned commissions on completed sales," but rejecting plaintiff's claim on the facts because "[the] performance incentives for which plaintiff was eligible were entirely discretionary. . . . Consequently, no fixed amount could have been due to the plaintiff at the time of his termination, and thus the defendant remained free to terminate plaintiff at-will").

¹¹⁵ 549 N.Y.S.2d 945 (1989).

¹¹⁶ 73 N.Y.2d 183 (N.Y. 1989) (rejecting claim where defendant fired at-will employee for purpose of triggering stock buyback agreement, even where it did this for purpose of denying employee-shareholder a right to benefit from impending transaction).

¹¹⁷ *Knudsen v. Quebecor Printing (U.S.A.) Inc.*, 792 F. Supp. 234, 238-40 (S.D.N.Y. 1992) ("*Gallagher* is distinguishable[.] . . . involv[ing] a buy-back provision for employee stock, whereas *Wakefield* . . . involve[d] sales commissions due and owing to employees. A sales commission provision provides for an employer to pay its employees commissions earned through the employees' own efforts. In contrast, a stock buy-back provision affords employees a form of compensation that is related merely to the employees' length of tenure rather than to the extent of their efforts. The Second Circuit's finding of an implied covenant of good faith and fair dealing, while compelling in the sales commissions context, is less so in the stock buy-back context because buy-back provisions do not relate as directly to the efforts of employees as do sales commission provisions."); *see also* *Lawford v. New York Life Ins. Co.*, 739 F. Supp. 906, 918 (S.D.N.Y. 1990) (allowing *Wakefield* claim, interpreting *Ingle* as holding only that "plaintiff may not recover for his termination per se" because "[t]he only time an employee may maintain a wrongful termination

v. *Froehlich*,¹¹⁸ cites *Gallagher* as an abrogation of *Wakefield*.¹¹⁹

The state courts' response to this conflict in authority has been quiet and murky. No state court cases follow the federal authority to allow implied covenant claims.¹²⁰ Some state cases interpret *Gallagher* and *Ingle* broadly, as precluding any implied covenant claims, but none address the specific claim the federal cases recognize: that employers cannot terminate at-will employees to avoid paying impending earned commissions or other deferred compensation.¹²¹

Despite the dissonance between the state and federal authority, no state court decisions have addressed this state-federal tension, and neither have any law reviews. No state cases have responded to *Knudsen's* aggressive defense of *Wakefield* and distinguishing of *Gallagher*; neither have any state courts responded to *Collins*, the federal decision viewing *Wakefield* as abrogated. Only one state court case even has cited *Wakefield* and either *Gallagher* or *Ingle*: *Naylor v. CEAG Elec. Corp.*,¹²² which rejected plaintiff's claim "alleging a breach of an implied duty of good faith on defendant's part by terminating plaintiff in an attempt to avoid the payment of commissions justly owing to him."¹²³ Despite asserting that under *Ingle*, "there is no implied obligation of good faith and fair dealing" for at-will employees, *Naylor* did not categorically reject *Wakefield*, instead distinguishing it based on that employee's stronger contractual argument for his commissions.¹²⁴

In sum, Wisconsin clearly rejects any implied covenant claim, whereas in New York there is no clear rule: employees' rights under state law depend on

claim is when the employee has an oral or written contract for a definite term").

¹¹⁸ 736 F. Supp. 480 (S.D.N.Y. 1990).

¹¹⁹ *Id.* at 485-86.

¹²⁰ No state court cases cite any of the federal cases, *see supra* note 114, as to whether an implied covenant claim is available under New York law.

¹²¹ *See Parker v. Hill & Knowlton, Inc.*, 723 N.Y.S.2d 664 (N.Y. App. Div. 2001) (holding, without recounting any of the facts relied upon, that "defendant could terminate plaintiff at any time for any reason or no reason, i.e., plaintiff has no cause of action for breach of contract, breach of an implied covenant of good faith and fair dealing," citing *Ingle* and *Murphy*); *Naylor v. CEAG Elec. Corp.*, 551 N.Y.S.2d 349 (N.Y. App. Div. 1990) (distinguishing *Wakefield* as involving a clearer contractual right to commissions, but also reading *Ingle* and *Murphy* broadly: "The Court of Appeals has continuously held that when an employment is at-will, there is no implied obligation of good faith and fair dealing. Because the employer has the unfettered right to terminate an at-will employee at any time, an implied obligation of good faith and fair dealing would be inconsistent."). No other state court case cites either *Gallagher* or *Ingle* as to the availability of an implied covenant claim of the sort recognized in *Wakefield*.

¹²² 551 N.Y.S.2d 349 (N.Y. App. Div. 1990).

¹²³ *Id.* at 351-52.

¹²⁴ *Id.* at 352 (stating that in *Wakefield*, "the commissions contract created rights distinct from the employment relationship").

whether they meet the jurisdictional prerequisites to sue in federal court.¹²⁵ In other words, New York law is not only inconsistent with that of other states, but so incoherent *within* the state that substantive employment rights depend entirely on unrelated jurisdictional doctrine about which court can hear the case.

B. Summary: Courts Alternately Citing and Ignoring “Employment at Will” Whenever Convenient to Reject or Accept Claims

As discussed above, both Wisconsin and New York entirely reject certain common law employee claims on the theory that employer liability to employees would violate the employment-at-will rule. Yet each state recognizes some employee claims despite employment at will and, bewilderingly, each state seems to accept and reject almost the exact opposite set of claims as the other state:

Common Law Claim	Wisconsin	New York
Termination in Violation of Public Policy	Yes	No , except in extremely narrow circumstances ¹²⁶
“ Fraudulent Inducement ” to Work for Employer	No for employees Yes for job candidates	Yes
Breach of Implied Covenant (fired just before pay due)	No	? (recognized in federal court, not in state court)

This sort of dissonance is typical among the states.¹²⁷ With each state asserting adherence to employment at will as its reason for adopting and rejecting opposite claims (all of which infringe on employers’ broad at-will prerogative to set employment conditions and fire), “employment at will” is an insufficient explanation for what employment claims can exist, and for that reason it cannot be all that drives courts’ decisions.

Is there a principled explanation for this apparent interstate inconsistency? Two possible explanations merit discussion: can the apparent discrepancy be explained by either (1) states’ reliance on statutory rather than common law

¹²⁵ 28 U.S.C. § 1367 (providing for federal court “diversity jurisdiction” over state claims where the parties are from different states and at least \$75,000 is in controversy).

¹²⁶ No claim exists other than (a) the extremely narrow and ineffectual statutory “whistleblower” claim and (b) the extremely narrow and almost never applied claim for attorneys claiming retaliation for their compliance with ethical rules. *See supra* Part II.A.1.b.

¹²⁷ *E.g.*, Virginia parallels Wisconsin, recognizing public policy discharge claims, *see* Lawrence Chrysler Plymouth Corp. v. Brooks, 465 S.E.2d 806, 808-09 (Va. 1996) (“Even though we strongly adheres to the employment-at-will doctrine, there are narrow exceptions,” including public policy claims covering discharges contravening even a statute not expressly providing a right to sue.) (citation omitted), while rejecting implied covenant of good faith claims by terminated salespersons denied commissions, *see* Derthick v. Bassett-Walker, Inc., 904 F. Supp. 510, 522 (W.D. Va. 1995) (“Virginia does not recognize . . . claim[s] for breach of this implied covenant.”).

protections (2) the inherent inter-state variability of common law doctrine?

1. Statutes as Substitutes for Rejected Common Law Doctrines?

The above discussion focused principally on common law doctrines; are there state statutes filling in the apparent gaps in their common law? If so, there would be no inconsistency as to substantive law, just differing use of statutes versus common law to create employment rights. A quick examination of New York's and Wisconsin's employment statutes shows that in neither state do statutory rights play nearly enough of a meaningful role to explain the gaps and inconsistencies in the common law doctrine:

- *Public Policy Claims:* New York's rejection of such claims cannot be based on the alternative of statutory protection. New York rejected any common law public policy claim in 1983, when there was *no* meaningful statute providing such protection;¹²⁸ in 1984 the legislature enacted the notoriously useless Labor Law § 740;¹²⁹ and the state courts have stood by their 1983 decision ever since.
- *Implied Covenant Claims:* Both New York and Wisconsin have similar wage statutes essentially codifying contract claims to earned commissions; neither statute protects the right not to be deprived of commissions via an at-will termination.¹³⁰
- *Fraudulent Inducement Claims:* Neither state has a relevant statute. New York accepts such claims purely as a matter of tort common law; Wisconsin rejects employee claims while accepting job candidates' pre-employment claims, also purely under tort common law.

Thus, neither state substantially relies on statutes relevant to the common law claims discussed above, and neither state has applicable statutes very different from the other's. Reliance on statutes, though a theoretical explanation for rejecting a common law doctrine, simply does not explain the common law incoherence discussed above.

2. Interstate Variation: Inherent to Common Law?

Is this sort of inconsistency simply inherent to common law doctrine? After all, part of the job of a judge, especially on a state high court, is to make judgments about how to balance competing legal principles, such as employment at will and other public policies; judges in different states just may happen to reach different conclusions about how to balance those competing principles.

¹²⁸ See *supra* Part II.A.1.b (discussing *Murphy v. Am. Home Prods. Corp.*).

¹²⁹ See *supra* Part II.A.1.b (discussing Labor Law § 740).

¹³⁰ See *supra* note 110 (recounting the limitations of Wisconsin's wage statute). Accord N.Y. Lab. L. Art. 6 (providing similarly circumscribed statutory protection).

Perhaps, but the lack of candor about employment at will remains: courts should not pretend that employment at will ties their hands, allowing them to recognize certain new claims but binding them from recognizing certain others that similarly infringe on the employment-at-will rule.

Moreover, it is significant that, over the past two decades, courts (a) have recognized numerous legal claims that substantially infringe on the employer's long-established employment-at-will prerogatives, (b) have been unable to agree on which claims an employment-at-will regime can permit, and (c) have refused to acknowledge that they are weakening the established employment-at-will doctrine. This phenomenon – increasing exceptions, inconsistency as to which exceptions, and refusal to acknowledge the weakening of old doctrine – is not unique to employment law. It arises partly from the very nature of common law judicial decisionmaking, as frequently illustrated by another, more prominent area of “common law” decisionmaking: constitutional law.¹³¹

III. SIMILAR DOCTRINAL INCOHERENCE IN CONSTITUTIONAL LAW: WHEN COURTS NEITHER FOLLOW NOR REJECT ESTABLISHED RULES

There are striking parallels between recent developments in employment at will and two fields of constitutional law: abortion rights and the prohibition on laws “respecting an establishment of religion” (the “Establishment Clause”). These fields have experienced developments similar to the increasing incoherence of employment at will, so examining them can help illuminate what is happening to employment at will. In both abortion and Establishment Clause doctrine, a decades-old precedent established a strict rule: a fundamental right to abortion under *Roe v. Wade*;¹³² a strict separation of church and state under *Lemon v. Kurtzman*.¹³³ While constitutional doctrines never are 100% bright-line rules, these two were quite categorical. They eschewed the ad hoc and balancing tests then common in constitutional law,¹³⁴ instead imposing wide-ranging

¹³¹ Constitutional law is not literally “common law,” of course, but constitutional and common-law interpretation share a critical feature: an entire body of modern law has derived from a series of cases, spanning decades or centuries, interpreting broad principles like “employment at will” or “make no law respecting an establishment of religion.” See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 885 (1996) (“Our written constitution has, by now, become part of an evolutionary common law system, and the common law – rather than any model based on the interpretation of codified law – provides the best way to understand the practices of American constitutional law.”). But see Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959, 980-982 (2004) (recounting criticism of Strauss for dismissing the effects of constitutional text on the cultural evolution that guides common law development).

¹³² 410 U.S. 113 (1973).

¹³³ 403 U.S. 602 (1971).

¹³⁴ E.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976) (holding that social security disability benefits recipient had no right to hearing before (as opposed to after) benefits termination; declaring that three-factor balancing test determines Due Process rights to procedural safeguards: (1) private interest at stake; (2) public interest affected by the procedures sought; and (3) risk of erroneous

restrictions based on broad interpretations of “at best opaque” doctrines.¹³⁵

Recently, however, the Court has whittled away at both *Roe* and *Lemon*, allowing abortion restrictions and government involvement in religion that clearly would not have passed muster under *Roe* and *Lemon* as originally formulated. Yet to the surprise of many, the Court expressly has declined to overturn *Roe* and *Lemon*, even as it repeatedly limited both. This dissonance has left these constitutional doctrines incoherent, with a strict precedent still on the books but ignored whenever the Court sees fit to allow something the precedent would disallow – a phenomenon quite similar to the status of employment at will.

Ultimately, in these two areas, the Court has shifted from a strict “rule” to a context-specific “standard.”¹³⁶ The new standard lacks clarity, however, and not just because standards tend to be less clear than rules.¹³⁷ Because of the Court’s refusal to acknowledge the rule’s decline, the new standard is of necessity a vague, confusing attempt to reconcile the irreconcilable: (a) the broad principles of the old rule, and (b) the new cases inconsistent with the rule. The Court’s lack of forthrightness about its jurisprudence has negatively impacted the coherence of the emerging doctrine – a cautionary tale for courts not acknowledging the weakening of any established doctrine, like employment at will.

A. Abortion: The Limbo Status of *Roe*, as “Fundamental Right” Gives Way to “Undue Burden”

deprivation, considering the value of possible safeguards). “The difficulty of predicting how the Supreme Court will employ the *Matthews* balancing test,” Jason T. Jacoby, *M.L.B. v. S.L.J.: “Equal Justice” for Indigent Parents*, 32 U. RICH. L. REV. 571, 581 n.58 (1998), has been noted widely. See, e.g., John B. Mitchell, *Why Should the Prosecutor Get the Last Word?*, 27 AM. J. CRIM. L. 139, 215 n.249 (2000) (noting “criticism of the *Matthews* test as permitting total flexibility in result”).

¹³⁵ *Lemon*, 403 U.S. at 612 (describing First Amendment’s religion clauses as “at best opaque, particularly when compared with other portions” of the Constitution).

¹³⁶ Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992). Sullivan observes that “the Court showed surprising moderation” in early 1990s constitutional law, including in the abortion case *Planned Parenthood v. Casey* and the Establishment case *Lee v. Weisman*. *Id.* at 24-25 (discussed *infra*). She argues this moderation reflected the Justices’

split over the choice of rules or standards – over whether to cast legal directives in more or less discretionary form. Similar divisions have split the Court before[;] . . . Justice Black favored absolute rules, Justice Frankfurter favored more flexible balancing. In that round of the debate, rules were allied with liberal positions and standards with conservative ones. In this round, the political valences were the opposite. . . . [T]he Justices of standards braked the rightward thrust of the Justices of rules.

Id. at 26. “When Justices O’Connor, Kennedy, and Souter proved to be Justices of standards, they slowed the Court’s predicted veer to the political right. . . . Ideological poles tend to attract rules. Standards tend to dive for the middle and split the difference between ideological pole.” *Id.* at 122.

¹³⁷ *Id.*

Roe v. Wade,¹³⁸ the first Supreme Court case recognizing a constitutional right to abortion, deemed the recently established right to privacy¹³⁹ “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”¹⁴⁰ *Roe* did not lay out minimalist protection for this unenumerated right; it declared abortion a “fundamental right” protected against infringement with “strict scrutiny.”¹⁴¹ More unexpectedly, unlike most constitutional decisions, *Roe* did not just invalidate the law at issue; it fleshed out the new right with an unusually specific, broad ruling going well beyond the case facts.

- (1) In the first trimester, the abortion right is categorical and cannot be infringed.¹⁴²
- (2) As of the second trimester, the government has very limited ability to regulate: only to protect “the health of the mother” by “regulat[ing] the abortion procedure in ways that are reasonably related to maternal health,”¹⁴³ such as with licensing and qualification requirements for abortion providers.¹⁴⁴
- (3) Only once “the fetus becomes ‘viable,’ that is, potentially able to live outside the mother’s womb, . . . [which is] usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks,”¹⁴⁵ does government’s interest in “potential[.]” . . . life” become “compelling” enough to override the mother’s rights, allowing government to “regulate, and even proscribe, abortion except . . . [as] necessary [for] . . . the life or health of the mother.”¹⁴⁶

Given the many subtleties of such a complex issue (*e.g.*, the many different reasons to have an abortion; the difference between pre- and post-viability abortions), *Roe*’s rules were about as categorical and bright-line as they could be. Justice Rehnquist’s dissent noted that infringements of “liberties” not enumerated in the Constitution typically draw only deferential “rational basis” scrutiny.¹⁴⁷

¹³⁸ 410 U.S. 113 (1973) (invalidating Texas ban on all abortions unless necessary for mother’s life).

¹³⁹ *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (striking down an anti-contraception statute, in holding that married couples enjoy a “relationship lying within the zone of privacy created by several fundamental constitutional guarantees”).

¹⁴⁰ *Roe*, 410 U.S. at 153.

¹⁴¹ *Id.* at 155 (holding that “regulation limiting these rights may be justified only by a ‘compelling state interest,’ and the legislative enactments must be narrowly drawn to express only the legitimate state interests at stake”).

¹⁴² *Id.* at 164.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 163.

¹⁴⁵ *Id.* at 160.

¹⁴⁶ *Id.* at 165 (in summary at end of Blackmun opinion).

¹⁴⁷ *Id.* at 173 (Rehnquist, J., dissenting).

He also criticized as improper judicial legislation “[t]he decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the state may impose in each one.”¹⁴⁸ But even *Roe*’s supporters were struck by the breadth of the new right and its far-reaching impact.¹⁴⁹

Although seven Justices comprised the *Roe* majority,¹⁵⁰ by the late 1980s, three new Justices¹⁵¹ had joined the *Roe* dissenters to limit and possibly overturn *Roe*. In *Webster v. Reproductive Health Services*,¹⁵² the Court upheld a Missouri ban on abortions after twenty weeks absent a medical test verifying that the fetus was not viable.¹⁵³ A three-Justice plurality¹⁵⁴ criticized “the rigid *Roe* framework”; Justice Scalia called for *Roe* to be “overrul[ed] . . . explicitly”;¹⁵⁵ and Justice O’Connor more cryptically wrote that in a future case, “there will be enough time to reexamine *Roe*. And to do so carefully.”¹⁵⁶ Dissenting, the three remaining *Roe* majority Justices criticized *Webster* for “discard[ing] a landmark case”;¹⁵⁷ more dispassionate observers noted that *Webster* “was the first [case] to abandon *Roe*’s trimester framework, which had been reaffirmed [three years earlier]. . . . [and] to hold that the state’s interest is compelling even before viability – again, a direct rejection of *Roe*.”¹⁵⁸ There was “little doubt that *Webster* was a significant departure from *Roe*,” yet most of the Justices issuing this “direct rejection of *Roe* . . . expressly declined to overrule *Roe*,” leaving *Roe* in constitutional limbo, with the Court poised to ““modify and narrow *Roe*.””¹⁵⁹

¹⁴⁸ *Id.* at 174 (Rehnquist, J., dissenting).

¹⁴⁹ *E.g.*, Lawrence H. Tribe, *Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 2 (1973) (“[I]n *Roe*[,] . . . when the Court had its most dramatic opportunity to express its supposed aversion to substantive due process, it carried that doctrine to lengths few observers had expected, imposing limits on permissible abortion legislation so severe that no abortion law in the United States remained valid.”).

¹⁵⁰ Only Justices Rehnquist and White dissented.

¹⁵¹ President Reagan appointed Justice O’Connor in 1981, Justice Scalia in 1986 (while simultaneously elevating Justice Rehnquist to Chief Justice), and Justice Kennedy in 1987.

¹⁵² 492 U.S. 490 (1989).

¹⁵³ *Id.* at 501 (noting that Missouri’s law also declared that life begins at conception and prohibited use of government funds or facilities for abortions (or “encouraging or counseling” about abortion)).

¹⁵⁴ Chief Justice Rehnquist’s opinion was joined by Justice White (the sole other dissenter in *Roe*) and Justice Kennedy.

¹⁵⁵ 492 U.S. at 532 (Scalia, J., concurring in part and concurring in the judgment).

¹⁵⁶ *Id.* at 526 (O’Connor, J., concurring in part and concurring in the judgment).

¹⁵⁷ *Id.* at 560 (“[T]he plurality discards a landmark case of the last generation. . . . For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.”) (Blackmun, J., dissenting, joined by Brennan and Marshall).

¹⁵⁸ David C. Blickenstaff, *Defining the Boundaries of Personal Privacy: Is there a Paternal Interest in Compelling Therapeutic Fetal Surgery?*, 88 NW. U. L. REV. 1157, 1165 (1994).

¹⁵⁹ Blickenstaff, *supra* note 158, at 1165 (quoting *Webster*, 492 U.S. at 521 (Rehnquist, J., plurality

*Planned Parenthood v. Casey*¹⁶⁰ only increased the dissonance created by the Court's refusal to admit that it had eviscerated *Roe*. *Casey* largely upheld Pennsylvania's abortion restrictions: (a) upholding a mandatory 24-hour waiting period following detailed "informed consent" disclosures to women seeking abortions;¹⁶¹ (b) upholding parental consent requirements for minors;¹⁶² and (c) striking spousal notice requirements for married women.¹⁶³ To reach this outcome, *Casey* lessened the status of the abortion right. No longer were abortion restrictions presumptively *invalid* under strict scrutiny for fundamental rights. Rather, even *pre*-viability restrictions were presumptively *valid*, unless they "impose[] an undue burden" on the choice to have an abortion.¹⁶⁴

Yet the *Casey* plurality remarkably asserted that it was not reversing *Roe*, even while expressly "rejecting the trimester framework," criticizing its "unnecessary . . . rigidity,"¹⁶⁵ and upholding pre-viability abortion restrictions that *Roe* clearly would have forbid.¹⁶⁶ Instead, the plurality asserted that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."¹⁶⁷ But it defined that "essential holding" narrowly: "a State may not

opinion)).

¹⁶⁰ 505 U.S. 833 (1992).

¹⁶¹ *Id.* at 881-87 (plurality joint opinion of O'Connor, Kennedy, & Souter), *overruling* Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) and Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747 (1986).

¹⁶² The parental notice requirement posed no "undue burden" in part because the statute allowed for a "judicial bypass," in which a judge could waive the requirement in certain specified circumstances. 505 U.S. at 899-900 (plurality joint opinion of O'Connor, Kennedy, & Souter).

¹⁶³ The plurality deemed the spousal notification requirement an "undue burden" because of the possibility that it would force notification of husbands who are abusive and/or might coerce the woman not to have an abortion. *Id.* at 887-98 (plurality joint opinion of O'Connor, Kennedy, & Souter).

¹⁶⁴ *Id.* at 874 (plurality joint opinion of O'Connor, Kennedy, & Souter); see Kathryn Kolbert and David H. Gans, *Responding to Planned Parenthood v. Casey: Establishing Neutrality Principles in State Constitutional Law*, 66 TEMP. L. REV. 1151 (1993):

Despite the strong language in *Casey*, the Court actually backed away from affording women the highest level of constitutional protection for the abortion choice.... *Casey* rejected the strict scrutiny standard of review mandated by *Roe*, adopting instead a more permissive 'undue burden' standard.... [T]he right to choose abortion is no longer a fundamental right and thus, women seeking abortions are no longer entitled to the strong protections afforded other fundamental rights, such as the right to free speech and the right to vote.

Id. at 1154.

¹⁶⁵ 505 U.S. at 872-873 (plurality joint opinion of O'Connor, Kennedy, & Souter).

¹⁶⁶ See Chris Whitman, *Looking Back on Planned Parenthood v. Casey*, 100 MICH. L. REV. 1980 (2002) ("[*Casey*'s] reinterpretation of *Roe* led the plurality Justices to uphold provisions of the Pennsylvania statute that would have been unconstitutional under prior law.").

¹⁶⁷ 505 U.S. at 845-46 (plurality joint opinion of O'Connor, Kennedy, & Souter).

prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.”¹⁶⁸

There is clear tension between what the plurality *did* and what it *said* it did. The plurality avoided saying that it was reversing *Roe* by insisting that it had “retained and . . . reaffirmed” its “central” or “essential” holding, but only by defining that holding far downward. Abortion morphed from fundamental right to limited right government can abridge with anything short of a functional ban¹⁶⁹ – an “undue burden,” the only major example of which was spousal consent, which the Court rejected because it risked physical coercion of women.¹⁷⁰

Casey would have been more intellectually honest had the Court admitted it really overruled *Roe* and replaced “fundamental right”/“strict scrutiny” protection with a more deferential standard allowing many abortion restrictions. Though announced with fanfare, the survival of *Roe* was more spin than substance, as Justice Rehnquist’s dissent colorfully argued:

[The plurality] retains the outer shell of *Roe v. Wade*, but beats a wholesale retreat from the substance¹⁷¹ While purporting to adhere to precedent, the joint opinion instead revises it. *Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere façade to give the illusion of reality. Decisions following *Roe* . . . are frankly overruled in part under the ‘undue burden’ standard expounded in the joint opinion. . . .¹⁷² [*Roe*] stands as a sort of judicial Potemkin Village, which may be pointed out to passers-by as a monument to the importance of adhering to precedent. But behind the façade, an entirely new method of analysis . . . decide[s] . . . state [abortion] laws.¹⁷³

While it is predictable for a dissent to criticize the plurality, commentators across

¹⁶⁸ *Id.* at 879 (plurality joint opinion of O’Connor, Kennedy, & Souter) (emphasis added).

¹⁶⁹ “[*Casey*] protects women only against total prohibitions on their right to choose to have a safe abortion.” Whitman, *supra* note 166, at 1981. The decision is “a compromise that will protect women only from the most overwhelming and total coercion.” *Id.* at 1985. “What *Casey* gives a woman is simply ‘some freedom to terminate her pregnancy’ if she does so before the fetus becomes viable.” *Id.* at 1988.

¹⁷⁰ 505 U.S. at 893-94 (plurality joint opinion of O’Connor, Kennedy, & Souter) (noting that the “millions of women . . . who are the victims of regular physical and psychological abuse at the hands of their husbands . . . may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion,” and with a spousal notification requirement, those women “are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion”).

¹⁷¹ *Id.* at 944 (Rehnquist, J., dissenting).

¹⁷² *Id.* at 954 (Rehnquist, J., dissenting) (citations omitted).

¹⁷³ *Id.* at 966 (Rehnquist, J., dissenting).

the ideological spectrum essentially agreed as to the undignified fate of *Roe*.¹⁷⁴

Furthering the confusion, the post-*Casey* Court has remained splintered; even the three *Casey* plurality co-authors split three different ways as to what their joint opinion meant. In the Court's next abortion case, *Stenberg v. Carhart*,¹⁷⁵ Justice Kennedy parted ways with his co-authors, Justices O'Connor and Souter, to pen a dissent joined by the remaining *Casey* dissenters.¹⁷⁶ Justices O'Connor and Souter joined the *Stenberg* majority striking down Nebraska's ban on a controversial mid-to-late-term abortion procedure;¹⁷⁷ under *Casey*, the law imposed an "undue burden" on abortion because it (a) lacked an exception allowing the procedure to preserve the woman's health and (b) had ambiguous wording that could be construed as banning other, earlier-term abortions.¹⁷⁸ In unusually strident tones, Justice Kennedy criticized the majority's

misunderstanding [of] the record, misinterpretation of *Casey*, outright refusal to respect the law of a State, and statutory construction in conflict with settled rules. . . . [T]he people of Nebraska were forthright in confronting an issue of immense moral consequence[,] . . . a procedure many decent and civilized people find so abhorrent as to be among the most serious of crimes against human life. . . . The Court closes its eyes to these profound concerns.¹⁷⁹

It is almost surreal that one of the three *Casey* plurality authors accused his co-authors of a "basic misunderstanding of *Casey*."¹⁸⁰ But the disagreement

¹⁷⁴ See, e.g., Akhil Reed Amar, *The Document and the Doctrine*, 114 HARV. L. REV. 26, 41 & n.44 (2000) (viewing *Casey*, in a dispassionate rather than ideological analysis, as an example of the Court "admitting error" only in a "grudging and indirect" way, "quietly overruled various lesser-known cases while loudly pledging allegiance to precedent in general and the more prominent case of *Roe* in particular"); Whitman, *supra* note 166 ("*Casey* can also be viewed as a significant betrayal of the hopes raised by *Roe*," *id.* at 1986; "Although the expected deathblow to *Roe v. Wade* was not delivered, when the plurality concludes its discussion of the Pennsylvania statute, it is apparent that only a sliver remains," *id.* at 1988); Blickenstaff, *supra* note 158 ("Women's reproductive rights have eroded significantly since *Roe*," *id.* at 1162, and "*Casey* . . . represents the emergence of a new approach to abortion jurisprudence . . . [in which] woman no longer enjoy the kind of rights the Court recognized in *Roe*," *id.* at 1166); Kolbert & Gans, *supra* note 164.

¹⁷⁵ 530 U.S. 914 (2000).

¹⁷⁶ Chief Justice Rehnquist and Justices Scalia and Thomas (all *Casey* dissenters) joined Justice Kennedy's *Stenberg* dissent; Justice White retired after *Casey*, replaced by Justice Ginsburg.

¹⁷⁷ The statute targeted primarily a procedure known as "dilation and extraction" ("D&X") in medical terms, or "partial birth abortion" in the terminology of legislation banning the procedure – a procedure controversial because it is used primarily after the sixteenth week of pregnancy, see 530 U.S. at 927-28, and because many view the procedure as bearing a "resemblance to infanticide," *id.* at 963 (Kennedy, J., dissenting).

¹⁷⁸ The other abortion procedure at issue was the "dilation and evacuation" ("D&E"), which is common in weeks 12 to 24. *Id.* at 924.

¹⁷⁹ *Id.* at 979 (Kennedy, J., dissenting).

¹⁸⁰ *Id.* at 964 (Kennedy, J., dissenting).

among the three did not even end there. Parting ways with Justice Souter, Justice O'Connor concurred separately to explain that other states' similar statutes would pass constitutional muster under *her* interpretation of *Casey*: [U]nlike Nebraska, some other States have enacted statutes more narrowly tailored. . . . [O]nly proscrib[ing] the D&X method . . . [with] an exception to preserve the life and health of the mother would be constitutional in my view.¹⁸¹ Thus, the three *Casey* co-authors wrote a new standard and promptly illustrated its hopeless vagueness by splitting *three different ways* on how to apply it. "Realistically, this does not end with [*Stenberg v. Carhart*]," because the Court issued "a split decision,"¹⁸² as the mixed bag of post-*Stenberg* lower-court decisions shows.¹⁸³

In sum, a majority of Justices clearly had become uncomfortable adhering to *Roe*, but also uncomfortable overruling it. The result? An "undue burden" standard whose vagueness is its only virtue: it can claim consistency with *Roe* but allow abortion restrictions *Roe* never would have allowed. This simultaneous upholding and gutting of *Roe* is more chaos than compromise, leaving the law so unsettled that even the three authors of the undue burden test split three ways as to what it means. When co-authors differ so starkly as to what they meant, there is little hope for lower courts or legislatures to glean a definitive meaning.

B. Establishment Clause: No Consensus Rule after the Unacknowledged Death of *Lemon*

Under the Establishment Clause, a spectrum of views exists as to how much government can support or participate in religious activity and expression. The "separation" view advocates for the proverbial "wall of separation between church and state," with no religious activity in the public sector and government barred from providing religious entities any but the most basic, universally available public benefits. The "accommodation" view, in contrast, allows religious expression in the public sphere and public benefits for religious entities, reasoning that the constitution bars only establishing an official state religion or coercing religious activity. In the middle is the "neutrality" position, a more context-specific view that government can allow and support religious activities,

¹⁸¹ *Id.* at 950-51 (O'Connor, J., concurring).

¹⁸² Robert E. Barry, *Partial Birth Abortion and the Powers of the State*, 22 WHITTIER L. REV. 197, 247 (2000).

¹⁸³ *See, e.g.*, *Richmond Medical Center for Women v. Gilmore*, 224 F.3d 337 (4th Cir. 2000) (striking down a law "indistinguishable from the Nebraska statute at issue in *Sternberg*"); *WomanCare of Southfield, P.C. v. Granholm*, 143 F. Supp. 2d 849 (E.D. Mich. 2001) (striking down law that included an exception allowing "partial-birth" abortions to preserve the *life* of the pregnant woman, but not her *mental and/or physical health*); *Women's Medical Professional Corp. v. Taft*, 353 F.3d 436 (6th Cir. 2003), rehearing & suggestion for rehearing en banc denied (Apr. 1, 2004) (upholding, in 2-1 panel decision, a "partial birth abortion" law meeting Justice O'Connor's criteria).

as long as it does so on the same terms as for similar non-religious activities.¹⁸⁴

From 1947¹⁸⁵ to 1980, the Supreme Court adhered most closely to the separation view, barring governmental religious expression (*e.g.*, even voluntary prayer in schools¹⁸⁶) and financial support for even partially religious activities (*e.g.*, state aid to religious schools for secular subjects¹⁸⁷).¹⁸⁸ *Lemon v. Kurtzman* codified the Court's strict "test" during this era,¹⁸⁹ holding that for a government activity to survive judicial scrutiny, the government must prove the following: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"¹⁹⁰

Starting in the 1980s, however, the Court began allowing more public religious activity, including some religious holiday displays on public property,¹⁹¹ more public funds for parochial schools,¹⁹² and increased religious group access to public facilities.¹⁹³ Yet the Court has not trod all that far towards the "accommodationist" view, splitting the difference as to which holiday displays are permissible¹⁹⁴ and continuing to forbid prayers¹⁹⁵ in even peripheral

¹⁸⁴ See generally ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 1266-1270 (Aspen Publishers 2001) (discussing the three theories).

¹⁸⁵ The earliest modern Establishment Clause case was *Everson v. Bd. of Educ.*, 331 U.S. 1 (1947).

¹⁸⁶ *Engel v. Vitale*, 370 U.S. 421 (1962).

¹⁸⁷ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

¹⁸⁸ See generally Ira C. Lupo, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1993).

¹⁸⁹ *Lemon* expressly stated that it was not creating a new test, but rather was codifying a test based on its "consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases" *Id.* at 612.

¹⁹⁰ *Id.* at 612.

¹⁹¹ *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 491 U.S. 573 (1989).

¹⁹² *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (allowing government to provide tuition vouchers that students' parents can use to pay their parochial school tuition); *Mitchell v. Helms*, 530 U.S. 793 (2000) (allowing lending of public school equipment to parochial schools); *Agostini v. Felton*, 521 U.S. 203 (1997) (allowing public school teachers to be sent to parochial schools to provide remedial education; expressly overruling the contrary holding of *Aguilar v. Felton*, 473 U.S. 402 (1985)).

¹⁹³ *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (allowing church to use public school after hours for religious film, because school was open to other social and civic groups); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (holding similarly for evangelical Christian group seeking to engage in prayer event at public school). This line of case law began with the Court's holding in *Widmar v. Vincent*, 454 U.S. 263 (1981), that a state university could not restrict facility use to only non-religious student groups.

¹⁹⁴ *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573 (1989) (allowing a tree-plus-menorah display but disallowing a crèche).

¹⁹⁵ *Wallace v. Jaffree*, 472 U.S. 38 (1985) (banning mere "moments of silence" intended to

school settings, like graduations¹⁹⁶ and football games.¹⁹⁷ This hodgepodge of dos and don'ts made clear that, "contrary to the Supreme Court's announcement of a categorical test for the establishment clause, the jurisprudence . . . actually involves a balancing of interests,"¹⁹⁸ and observers advocated "a more candid acknowledgment of the establishment clause balancing process and a more consistent treatment of the factors that enter into it."¹⁹⁹

The clear shift in case outcomes, however, has not been accompanied by a clear shift in doctrinal analysis. Since the 1980s, the Court has been upholding and rejecting government actions not under the *Lemon* test, but under different tests. Sometimes the Court looks to whether government action "constitutes an endorsement or disapproval of religion" (Justice O'Connor's "endorsement test");²⁰⁰ other times, the Court allows government action unless it would "coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so'" (the "coercion" test).²⁰¹ As early as 1989, "it became clear that *Lemon* was destined for the constitutional graveyard, though it was unclear what would replace it."²⁰²

Surprisingly, the Supreme Court never has overruled or expressly rejected *Lemon*. As when it declined to overturn *Roe* while substantially changing abortion doctrine, the Court, even when applying a test as different from *Lemon* as "coercion," flatly stated that it would "not accept the invitation . . . to reconsider . . . *Lemon*."²⁰³ Since declining that "invitation," however, the Court has veered from virtually ignoring *Lemon* in deciding an Establishment Clause case²⁰⁴ to admitting that it has "modified *Lemon*" but only slightly and only in the context of parochial school aid.²⁰⁵ This state of affairs has led Justice Scalia to

facilitate "meditation or voluntary prayer")

¹⁹⁶ *Lee v. Weisman*, 505 U.S. 577 (1992) (prayer led by clergy).

¹⁹⁷ *Santa Fe Independent Sch. Dist. v. Doe*, 120 S. Ct. 2286 (2000) (prayer led by student).

¹⁹⁸ *Developments in the Law – Religion and State*, 100 HARV. L. REV. 1609, 1611 (1987).

¹⁹⁹ *Id.*

²⁰⁰ *E.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984).

²⁰¹ *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Four Justices (Rehnquist, Scalia, Kennedy, and Thomas) apply this test.

²⁰² Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 813 (1993).

²⁰³ *Lee*, 505 U.S. at 587.

²⁰⁴ *Bd. of Educ. of Kiryas Joel Village v. Grumet*, 512 U.S. 687 (1994) (citing *Lemon* only twice as a "see also" and twice more merely in recounting lower court citations to *Lemon* in this case).

²⁰⁵ *Mitchell v. Helms*, 530 U.S. 793 (2000) ("[I]n *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors. . . . [We] recast *Lemon*'s entanglement inquiry as simply one criterion relevant to determining a statute's effect," the second *Lemon* factor, *id.* at 808); *but see* David S. Petron, *Finding Direction in Indirection: The Direct/Indirect Aid Distinction in Establishment Clause Jurisprudence*, 75 NOTRE DAME L. REV. 1233, 1245 (2000) ("*Agostini* brought a more thorough overhaul of the *Lemon* test than . . . [the

depict with a bizarre metaphor how, even though six Justices had criticized *Lemon*, the Court has “conspicuously avoided using the supposed ‘test’ but also declined the invitation to repudiate it”:²⁰⁶

As to the Court’s invocation of the *Lemon* test: Like some ghoul in a late- night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again. . . . Its most recent burial, only last Term, was, to be sure, not fully six feet under: . . . [*Lee*] conspicuously avoided using the supposed “test” but also declined the invitation to repudiate it. . . .

The secret of the *Lemon* test’s survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. . . . When we wish to strike down a practice it forbids, we invoke it . . . ; when we wish to uphold a practice it forbids, we ignore it entirely Sometimes, we take a middle course, calling its three prongs “no more than helpful signposts” Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.²⁰⁷

Less colorfully, the Court’s refusal to reject *Lemon* outright has damaged the coherence of its case law. With *Lemon* still “good law” but clearly not guiding the Court, Justices have been unable to rule based on a single, established test. The problem is not just the choice of inherently fluid standards over rigid rules,²⁰⁸ and not just the Court’s use of multi-factor analysis in Establishment Clause cases.²⁰⁹ The main problem is that the post-*Lemon* case laws chaos has left a legacy of confusion and prevented any but the most vague “tests” from emerging.

Lemon is difficult to harmonize with the more recent case law; thus, it makes

Court] indicated . . .”).

²⁰⁶ *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

²⁰⁷ *Id.* at 399 (Scalia, J., concurring). Numerous scholars have agreed with Justice Scalia. See, e.g., Paulsen, *supra* note 202, at 882 (“The *Lemon* test is dead and gone. It has not been applied by the Court as the test of constitutionality in any of the last four major Establishment Clause cases and Weisman reveals that the test has few, if any, supporters remaining on the Court . . . [regardless of] the fact that the Weisman Court did not use the words ‘overrule’ and ‘Lemon’ in the same sentence.”); David S. Petron, *Finding Direction in Indirection: The Direct/Indirect Aid Distinction in Establishment Clause Jurisprudence*, 75 NOTRE DAME L. REV. 1233 (2000) (“[T]he Court has refused to overrule *Lemon* and sign its death certificate[, e]ven in *Agostini*” in 1997).

²⁰⁸ See *supra* notes 136-137.

²⁰⁹ Cf. *Developments in the Law – Religion and State*, *supra* note 198, at 1678 (observing “that despite the Court’s reaffirmation of the *Lemon* framework, many of the Court’s decisions . . . can best be understood as reflecting a number of competing factors that cannot be analyzed consistently within the confines of the *Lemon* test. . . . *Lemon* in fact masks a balancing of interests”).

sense that Justices have had to resort to vague, least-common-denominator principles, such as searching for “endorsement” of religion, an ad hoc inquiry in which each case depends on “unique circumstances.”²¹⁰ Echoing Justice Stewart’s infamously vague definition of obscenity (“I know it when I see it”), Scott Ward has noted that the Court’s Establishment Clause cases “struck many observers as inconsistent and unprincipled. . . . [T]he Court’s actual approach to an establishment clause violation is . . . ‘we know it when we see it.’”²¹¹

Additionally, the Court has fractured badly: “In all the years of its effort, the Court has isolated no single test of constitutional sufficiency.”²¹² Even “endorsement,” the one post-*Lemon* test drawing some support from a majority of Justices, does not have one formulation supported by a majority. The vague term “endorsement” begs many questions, and one has particularly split the Court: from whose perspective should “endorsement” be assessed? Justice O’Connor and two others focus on whether “endorsement” of religion would be perceived by “a hypothetical observer . . . possess[ing] a certain level of information that all citizens might not share . . . [and] aware of the history . . . of the community[,] . . . how the public space in question has been used in the past.”²¹³ This formulation considers endorsement perceptions without accounting for individuals with lesser knowledge or minority groups with greater sensitivity. In contrast, Justices Stevens and Ginsburg apply a “reasonable person passing by” standard: would someone with *incomplete* information perceive endorsement? They criticize Justice O’Connor’s formulation, in which the “‘reasonable person’ comes off as a well-schooled jurist” who fails to perceive endorsement only because of his extensive legal and historical knowledge.²¹⁴ There is a similar split among the four Justices advocating a “coercion” test.²¹⁵

Thus, two decades after *Lemon* started to lose support, the Court has not rejected *Lemon*, and no alternative test commands a majority. *Lemon* clearly no longer governs, but because of the Court’s failure to reject it outright, the emergent alternatives, endorsement and coercion, are vague and conclusory; they

²¹⁰ *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984); *see also Mitchell v. Helms*, 530 U.S. 793, 869 (2000) (Souter, J., dissenting) (“Particular factual circumstances control, and the answer is a matter of judgment.”).

²¹¹ Scott J. Ward, *Reconceptualizing Establishment Clause Cases as Free Exercise Class Actions*, 98 *YALE L.J.* 1739, 1742 (1989).

²¹² *Mitchell v. Helms*, 530 U.S. 793, 869 (2000) (Souter, J., dissenting).

²¹³ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780-81 (1995) (O’Connor, J., concurring, joined by Souter & Breyer).

²¹⁴ *Id.* at 800 (Stevens, J., dissenting, joined by Ginsburg).

²¹⁵ Only Justice Kennedy recognizes a broader concept of “coercion”: not only government mandates, but also “subtle coercive pressure[,] . . . public pressure, as well as peer pressure, on attending students to stand [during a graduation prayer] This pressure, though subtle and indirect, can be as real as any overt compulsion.” *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

had to be, in order to be consistent with both the newer cases and *Lemon*. In short, the vagueness required by the Court's refusal to repudiate *Lemon* has left its Establishment Clause jurisprudence muddled and unsettled.

C. Summary: Doctrine Evolution, from Rule to Increasing Incoherence to Adoption of Vague Standard

The recent history of these two fields of constitutional law can be summarized as occurring in three stages.

- (1) *Increasing Exceptions and Limitations to a Strict Rule, But No Acknowledgment of the Rule's Decline*: It is a recurring phenomenon, in various fields of law: courts increasingly recognize exceptions and limitations to an established strict rule, but they do not acknowledge the decline of that rule. This inconsistency signals judicial discomfort: courts no longer are comfortable with the strictures of the rule, yet they are not ready to reject it.
- (2) *Refusing Invitations to Jettison the Rule*: As exceptions and limitations proliferate, courts are invited to jettison the strict rule as outdated. Yet courts may surprise many by refusing to do so, instead reasserting the rule, often in a reality-denying, categorical manner that ignores how greatly recent decisions have weakened the rule. The doctrinal chaos may remain for a long time, until courts finally develop a satisfactory alternative doctrine.
- (3) *Shift from an Exception-Riddled "Rule" to a Context-Dependent "Standard"*: As the exceptions and limitations become entrenched, courts eventually acknowledge that the old "rule" has evolved into a context-dependent "standard" (e.g., "endorsement" or "undue burden"). Standards are more flexible but less clear and predictable than rules;²¹⁶ the extent of the clarity and predictability problem depends on whether the standard is (a) a clear, well-conceptualized statement of principles and factors guiding future cases or (b) a vague statement purporting to explain recent precedents but not helping to resolve future cases. Unfortunately, after years of precedents purporting to adhere to the strict rule even as that rule lost its force, the emerging new standard is far more likely to be the latter than the former. That is, courts resolve their ambivalence about the old rule by adopting an unhelpful standard whose main appeal is that it is vague and indeterminate enough to be arguably consistent with both (a) the old strict rule and (b) the newer exceptions.

Given these similarities, abortion and Establishment Clause jurisprudence are

²¹⁶ See Sullivan, *supra* note 136.

cautionary tales for employment law: unless courts adopt clear, well-defined principles for adopting certain limitations to employment at will, the evolving doctrine may remain murky and unpredictable for a long time.

IV. BUILDING A BETTER STANDARD: SOME ECONOMIC THINKING ABOUT HOW TO RECOGNIZE EXCEPTIONS TO EMPLOYMENT AT WILL WITHOUT INVITING INCOHERENCE

To recap, employment at will is undergoing a three-stage process culminating in doctrinal incoherence:

- (1) Employment at will is on the decline as a categorical “rule,” with recently established common law termination claims arising as significant exceptions.
- (2) Despite its decline, the at-will doctrine is not being replaced by a general requirement of “just cause” for all terminations, as some have speculated.
- (3) State recognition of these common law termination claims (the exceptions to employment at will) has been haphazard and inconsistent, with courts ambivalent about employment at will: unwilling to comply with the harsh pure form of the doctrine; unwilling to reject it entirely; and unable to find any consistency as to what exceptions to recognize.

Given this incoherence, employment common law is crying out for a well-conceptualized basis for either accepting or rejecting proposed modifications of the pure employment-at-will rule.

A full comparison of the normative appeal of employment at will and a just cause requirement is beyond the scope of this Article; that debate has raged for years, in many lengthy articles focused on that point.²¹⁷ This section discusses a more limited normative question: Given that courts’ selective adoption of employment-at-will exceptions has engendered incoherence, is there a way to provide legal redress for workplace unfairness without inviting doctrinal anarchy?

Part (A) discusses the most obvious solution, the only real “rule” amidst all the “standards”: eliminating all employment claims, and returning to pure employment at will. Recent scholarship supports an argument that informal social norms and free-market incentives adequately deter unjust terminations, rendering employment litigation unnecessary. Part (A), however, notes that while social norms can be quite powerful, economic and behavioral economic analysis shows them to have certain systematic weaknesses. Labor markets are a

²¹⁷ See *supra* notes 14-16

classic setting in which social norms have limited power, so legal exceptions to the pure employment-at-will rule remain necessary. Pure employment at will is the only categorically clear “rule” among the options, so if that is not the solution, then the remaining alternatives are context-dependent “standards.”

The tough road ahead is to find a standard less ad hoc and arbitrary than the status quo of adopting and rejecting various claims without any consistent rationale. One option would be a universal “just cause” rule; that once was a popular cause, but aside from Montana’s Wrongful Discharge from Employment Act,²¹⁸ “[t]he Model Employment Termination Act (META) . . . [of] 1991 has not been adopted, or even seriously considered, by any state.”²¹⁹ Even Montana’s law is not a true “just cause” standard: courts broadly interpret “legitimate business reasons” for termination to “take into account the right of an employer to exercise discretion over who[m] it will employ”; even modest economic imperatives like “reduction in warehouse inventory” can constitute legitimate business reasons.²²⁰ Thus, Montana’s statute, which represents the far extreme of states’ willingness to restrict employment at will, is not so radical, not nearly as strong a guarantee of job security as the meatier “just cause” provisions common in collective bargaining agreements.²²¹ As meaningful “just cause” legislation is a cause with little past and no immediate future, serious discussion of reform must look elsewhere.

Part (B) discusses more realistic alternatives to pure employment at will and a universal “just cause” regime. Advocating for courts to recognize various employment claims without devolving into unprincipled ad hocery, Part (B) focuses on two theoretical grounds for allowing legal claims challenging some, but not all, allegedly unjust terminations: (1) the limits of social norms; and (2) a broad conception of public policy that includes protecting the core bargains struck by employers and employees against the opportunism that sequential

²¹⁸ Montana is the only state to reject employment at will categorically. Montana’s “Wrongful Discharge from Employment Act” of 1987, Mont. Code Ann. § 39-2-901, is unique among the states in providing any terminated employee a cause of action whenever (after a presumptively six-month probationary period) “the discharge was not for good cause.” *Id.* § 39-2-904(1)(b). The statute defines “good cause” as “reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer’s operation, or other legitimate business reason.” *Id.* § 39-2-903(5).

²¹⁹ William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 133 (2003).

²²⁰ *Braulick v. Hathaway Meats, Inc.*, 980 P.2d 1, 3-4 (Mont. 1999) (citing *Buck v. Billings Montana Chevrolet, Inc.*, 811 P.2d 537, 540 (Mont. 1991)).

²²¹ See Lisa B. Bingham & Debra J. Mesch, *Decision Making in Employment and Labor Arbitrations*, 39 INDUSTRIAL RELATIONS 671, 677 (Oct. 2000) (“Labor arbitrators have interpreted the just cause standard to include . . . reasonable performance standards, notice, investigation, proof, even-handed administration of discipline, and a penalty proportionate to the offense in light of the employee’s work history.”); see also *supra* notes 85-86

performance risks. More traditional “fairness”-based rationales would support a challenge to just about any allegedly unfair termination; in contrast, this Part’s theoretical structure advises courts to recognize only certain specific claims, like the three discussed in this Article: discharge in violation of public policy; fraudulent inducement of employees; and termination depriving deferred compensation in violation of an implied covenant of good faith. This normative recommendation has several advantages: it is realistic; it would be a substantial improvement on the status quo of doctrinal incoherence; and it would be consistent with long-term and recent trends in expanding employment rights.

A. Social Norms Against Unfair Terminations: A Real Phenomenon, But An Inadequate Substitute for Legal Protections

If the problem is doctrinal incoherence, then the first solution that comes to mind is the clearest rule: pure employment at will, with no exceptions. Regularly rejected as too harsh, pure employment at will has drawn new support from scholarship extolling the virtues of social norms as a substitute for lawsuits based on enforceable legal doctrines. This section acknowledges that social norms occasionally can create “order without law,” as the title of the seminal book in the field states – but not always. Based on economic and behavioral economic analysis, this section argues that employment markets have several key characteristics of settings in which social norms can be quite weak: “cheating” (violating the norm) at times is quite profitable; the penalties for cheating often are limited; cheating is unlikely to be “caught” due to information limitations endemic to workplaces and employees; and the social norm itself is weak, in that it is far from clear and universal. Given the weakness of social norms in employment, norms are no substitute for lawsuits based on legal rights.

1. Is Law Unnecessary? Social Norms and Free Markets as Guarantors of Fairness and Efficiency

Contemporary observations about the previously unrecognized power of social norms trace back to Robert Ellickson’s groundbreaking book, “Order Without Law: How Neighbors Settle Disputes,” an extensive discussion of a rural county where informal norms, not tort law, prevent and redress civil wrongs such as trespass and property damage among cattle ranchers.²²² Informal enforcement of social norms against “cheaters” (*e.g.*, those who do not pay voluntarily for property damage they cause), without any recourse to litigation or police power, worked because in the tight-knit rural community, “members transact visibly (and so cannot cheat . . . easily) and are interdependent (and therefore subject to punishment for cheating).”²²³

²²² ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

²²³ Scott A. Moss & Daniel A. Malin, *Public Funding for Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA*, 33 HARV. C.R.-C.L. L. REV.

In the past decade, legal scholars persuasively have found various settings, not just Shasta County, to be governed by social norms, which can be defined briefly as “nonlegal rules of behavior that are enforced by private individuals through social sanctions such as gossip and ostracism,”²²⁴ or defined at greater length as follows:

A social norm . . . is a rule that is neither promulgated by an official source, such as a court or legislature, nor enforced by threat of legal sanctions, yet is regularly complied with. . . . The rules of etiquette, including norms of proper dress and table manners; the rules of grammar; standard business practices; and customary law in . . . private associations are all examples of social norms.²²⁵

For example, Dan Kahan has noted that while sudden, dramatic new laws (“hard shoves” to social norms) can backfire by triggering widespread resistance (*e.g.*, the 1920s prohibition of alcohol, or excessive punishment of low-level marijuana use today),²²⁶ more modest adjustments to the law (*e.g.*, limited smoking bans)²²⁷ are more promising. Because of their reasonableness, they quite effectively serve as “gentle nudges” to social norms, inducing widespread compliance and ultimately changing people’s perceptions of what is and is not proper behavior (*e.g.*, smoking in enclosed spaces).

More recently, many have argued that the power of social norms “casts doubt on whether law is the most efficient means of social control[,] . . . [because] social groups often ‘opt out’ of the legal system in favor of pursuing informal mechanisms of social control such as gossip, shunning, mediation, and self-help.”²²⁸ In this vein, Jesse Rudy has argued that a “just cause” rule is unnecessary, because Ellicksonian social norms will prevent most workplace unfairness.²²⁹ Survey data show most employees to be unaware of the employment-at-will rule; most think they have “termination only for cause” protection.²³⁰ While many see this data as undercutting employment at will,

197, 200-01 (1998).

²²⁴ Douglas Litowitz, *A Critical Take on Shasta County and the “New Chicago School,”* 15 YALE J. L. & HUMAN. 295, 295 (2003).

²²⁵ RICHARD POSNER, FRONTIERS OF LEGAL THEORY 288 (2001).

²²⁶ Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem,* 67 U. CHI. L. REV. 607, 632 (2000).

²²⁷ Kahan, *supra* note 226, at 625-28.

²²⁸ Litowitz, *A Critical Take on Shasta County,* *supra* note 224, at 307-08 (collecting recent scholarship in this vein).

²²⁹ Jesse Rudy, *What They Don't Know Won't Hurt Them: Defending Employment-At-Will in Light of Findings That Employees Believe They Possess Just Cause Protection,* 23 BERKELEY J. EMP. & LAB. L. 307 (2002).

²³⁰ Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of*

Rudy looks at the data showing a relatively low number of arbitrary terminations²³¹ and argues another interpretation:

[T]he low number of arbitrary discharges [shows] that “no discharge without cause” is a “norm”²³² . . . [L]egal protection is unnecessary because the norm provides adequate protection for employees, even in the absence of the law.²³³ . . . [E]mployers feel constrained not to fire at will even though they are legally permitted to do so.²³⁴

In line with Ellickson’s analysis of informal, interpersonal “enforcement” of social norms, Rudy notes that employers may be deterred from violating the “no discharge without cause” norm by the consequences of violating the norm with an unjust termination:

If the employer violates the norm often, she may be subject to feelings of guilt and, more importantly, to non-legal sanctions from her employees. . . . Current employees may begin to look for alternative employment and gossip that the employer is a bad actor may spread among current employees as well as to prospective job applicants[,] . . . put[ting] the employer at a disadvantage when competing to hire and retain top employees. On the other hand, if the employer follows the “no discharge without cause” norm consistently, her employees will be encouraged to make greater investments in the employment relationship than they would with less job security.²³⁵

Rudy’s analysis adds the persuasive power of modern social norm theory to the older free-market economic arguments that widespread employer unfairness is both unlikely and untroubling. “One tendency of competitive markets is to drive out inefficient forms of behavior, with discrimination as with anything else,” Richard Epstein notes; employers that reject good employees for personal reasons (*e.g.*, discrimination or personal animosity) are sacrificing valuable

Legal Protection in an At-Will World, 83 CORNELL L. REV. 105 (1997) (surveying unemployed workers and concluding, “this study raises serious doubts about whether workers have the most basic information necessary for understanding the terms on which they have contracted. . . . For example, although the common law rule clearly permits an employer to terminate an at-will employee out of personal dislike, so long as no discriminatory motive is involved, an overwhelming majority of the respondents--89%--erroneously believe that the law forbids such a discharge,” *id.* at 110-111); Rudy, *supra* note 229 (replicating Kim’s results with incumbent employees).

²³¹ Rudy, *supra* note 229, at 342-43, 346.

²³² *Id.* at 344.

²³³ *Id.* at 345.

²³⁴ *Id.* at 346.

²³⁵ *Id.* at 348.

productivity and thereby placing themselves at a competitive disadvantage.²³⁶

Enforceable legal rules may be unnecessary to police labor markets, the argument goes, because of the power of social norms to discipline employer misbehavior, as well as the power of the free market to discipline such inefficient behavior. Wrongful terminations cannot be a common phenomenon in a competitive free market, according to these theories, and when they occur, employers pay a price for mistreating workers. That “price” is an example of social norms, and the free market, deterring and redressing workplace unfairness.

2. Interpreting the Survey Data and Lawyers’ Experiences: Social Norms Against Unfair Terminations

Rudy is at his most persuasive when interpreting the survey data as evidencing a social norm that employers terminate only for just cause.²³⁷ His survey data, and the similar earlier survey by Pauline Kim,²³⁸ show that strong majorities of at-will employees hold the flatly incorrect view that they enjoy “just cause” protection against termination:

The mistakes made by Kim’s and my own respondents . . . represent a systematic over-estimation of the amount of job security afforded employees by the law. . . . [E]mployees are almost four times as likely to incorrectly believe that a lawful discharge is unlawful as they are to incorrectly believe that an unlawful discharge is lawful, indicating a strong over-estimation of job security. . . . Employees erroneously believe that the law prevents employers from discharging them in a wide variety of situations where the law does not protect them.²³⁹

Many have argued, even before this survey data, that widespread employee ignorance militates in favor of jettisoning employment at will, because the doctrine is dangerously out-of-step with public sentiment and employer-employee understandings of their contractual relationships.²⁴⁰ Rudy, however,

²³⁶ Richard Epstein, *Standing Firm, On Forbidden Grounds*, 31 SAN DIEGO L. REV. 1, 2 (1994).

²³⁷ Rudy, *supra* note 229, at 344-47.

²³⁸ Kim, *supra* note 229; *see* Rudy, *supra* note 229, at 314-15 (discussing and critiquing Kim’s survey findings).

²³⁹ Rudy, *supra* note 229, at 329-30.

²⁴⁰ *See, e.g.*, Kim, *supra* note 229, at 150-51 (“[D]efenders of the at-will rule commonly argue that the frequency with which the at-will contract is found in the real world indicates its desirability as a default term. . . . With strong evidence that many employees do not know or understand the relevant default rule, the observed market outcome can no longer be assumed to be a reliable indicator of the true preferences of the parties.”); Cass R. Sunstein, *Rights, Minimal Terms, and Solidarity: A Comment*, 51 U. CHI. L. REV. 1041, 1055 (1984) (“[I]t may well be the case that some workers assume that they may not be discharged without cause. This type of ‘information failure’ forms a conventional economic justification for government regulation. Even an express at-will provision may not carry the requisite information to some categories of employees.”) (citation omitted); Note, *Protecting At Will Employees Against Wrongful Discharge*, *supra* note 14 at 1830

looked closely at the data and reached a different conclusion. In both his and Kim's studies, managerial employees were just as ill-informed as anyone: "responsibility for hiring and firing other employees had no measurable effect on . . . perceptions of the law, . . . [which] may indicate that employers similarly are confused about the at-will default rule or that they have chosen not to give their agents the freedom to discharge other employees at-will for one reason or another."²⁴¹ If most employers, who either know the at-will rule or could learn it without much difficulty as part of their business,²⁴² will not fire without just cause, then employees' beliefs that they will not be fired except for cause actually are accurate. Employer and employee beliefs reflect not the state of the law, but a prevalent norm that employees be fired only for just cause.

Confirming Rudy's hypothesis of a social norm against unfair terminations are the experiences of labor and employment lawyers – evidence that is anecdotal, but (like most qualitative evidence) allows for deeper scrutiny than simple polling.²⁴³ Employees consulting lawyers consistently express shock that the law allows them to be terminated for virtually any reason, even an "unfair" one;²⁴⁴ this ignorance extends to even white-collar managerial employees, who often think they neither can fire nor can be fired without just cause.²⁴⁵

(focusing on employee ignorance not of the law, but of the odds of a future termination, to argue that "[w]hen . . . inadequate access to information prevents parties from properly valuing the benefits of job security, judicial intervention is justified to ensure a more efficient result").

²⁴¹ Rudy, *supra* note 229, at 331.

²⁴² Employer "confusion" is unlikely in large companies, which surely have *some* knowledgeable managers or legal counsel, and even truly ignorant companies are, in a sense, choosing not to exercise an at-will prerogative, because their unawareness is a classic example of "rational ignorance": a rational choice not to bother becoming informed about an unlikely eventuality (*i.e.*, that the employer would fire without just cause). *See id.* at 341 (discussing and collecting citations on rational ignorance).

²⁴³ *See, e.g.*, Tracey L. Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593 (2002) ("While scholars can theorize about what lies behind statistical estimates, additional qualitative evidence is needed to confirm inferences. Qualitative research provides a context for understanding and interpreting regression analyses.").

²⁴⁴ Interviews and correspondence with numerous employee-side lawyers confirm this. *See, e.g.*, Email from Bradford D. Conover, Esq., dated March 24, 2005 (on file with author) ("Having practiced in this area for more than 10 years, . . . I think that the common misconception arises not just because employees are unaware of the employment at will doctrine, but because these are areas of fundamental fairness, and clients are incredulous and in denial. Some pretty outrageous things can happen at work, and the notion that there is no law to protect the client runs counter to gut notions of what is fair or unfair."); Email from Elissa Devins, Esq., dated March 24, 2005 (on file with author) (attorney at non-profit legal services organization reporting: "I would say that a majority of my intake callers do not know the employment at will rule. I also conduct trainings with young adults at community based centers on employment law and none of these teenagers and young adults know[s] the rule.").

²⁴⁵ Email from Wayne N. Outten, dated March 24, 2005 (managing partner at leading employment law firm recounting that, in his decades of experience, "even many managers and supervisors think

Reciprocally, employees' attorneys admit that employers terminating at-will employees for *permissible* reasons sometimes offer surprisingly generous severance packages, well out of proportion with the low odds of a frivolous lawsuit forcing them to pay attorney's fees or (even less likely) an eventual verdict.²⁴⁶ Both possible explanations for generous severance offers, purely emotional generosity or purely rational investing in a reputation for fairness, are classic examples of compliance with social norms of fairness.

3. Employment Norms as Case Study in the Limits of Social Norms: What Makes Some Norms Powerful, Others Weak?

Even if survey and anecdotal data show a social norm against unfair terminations, there remains the critical question of how powerful that social norm is. If a social norm is weak, providing little disincentive to deviant behavior, then it is no substitute for legal enforcement. More broadly, the observation "there is a social norm" just raises the more complicated and more interesting question: in what markets, and under what circumstances, are social norms powerful and reliable enough to obviate the need for legal enforcement?

This question is fundamental to any application of social norms. Employment markets have proven a fertile ground for examining contemporary economic theories, such as behavioral economics²⁴⁷ and the interplay of feminist theory and economic theory.²⁴⁸ Employment markets are an equally promising subject matter for examining the power of social norms, because they feature many of the characteristics that can make social norms weak: (1) limited information flow and biased information processing, which make norm violations

they can't fire or be fired without good cause, because they've been told by Human Resources officials that they have to have a good reason and that they have to document, go through progressive discipline, etc.").

²⁴⁶ E.g., Wayne N. Outten, *Negotiations, ADR, and Severance/Settlement Agreements: An Employee's Lawyer's Perspective*, 604 PLI/LIT. 235, 287 (1999) ("Even absent . . . a legal claim . . . the employee can try to 'push the buttons' of the employer. . . . The 'buttons' include fairness, guilt (can be a great motivator), fear (e.g., bad publicity, government, higher management), friendship, etc. In some companies with some employees, it works.").

²⁴⁷ See, e.g., Christine Jolls, *Fairness, Minimum Wage Law, and Employee Benefits*, 77 N.Y.U. L. Rev. 47 (2002) (as part of NYU's "Symposium: Research Conference on Behavioral Law and Economics in the Workplace," discussing examples of how, "while behavioral law and economics may sometimes be more likely than traditional law and economics to support legal intervention, in other cases the opposite is true"); Matthew T. Bodie, *Questions About the Efficiency of Employment Arbitration Agreements*, 39 Ga. L. Rev. 1 (2004) (analyzing employment arbitration agreements by "incorporat[ing] recent developments in the field of behavioral law and economics concerning systematic irrationalities that may influence the process").

²⁴⁸ See, e.g., Scott A. Moss, *Women Choosing Diverse Workplaces: A Rational Preference with Disturbing Implications for Both Occupational Segregation and Economic Analysis of Law*, 27 HARV. WOMEN'S L. J. 1 (2004). Cf. Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727 (2000) (race theory and economic theory).

hard to spot; (2) difficulty of valuing assets (workers), which limits the cost to an employer of being “shunned” by workers; and (3) highly profitable opportunities for employers to “cheat.” This analysis has implications well beyond employment law, because it is generalizable: In any markets with characteristics similar to these features of employment markets – limited information, hard-to-value assets, and profitable opportunities to violate the norm – social norms may be quite weak, and thus poor substitutes for legally binding rules.

Finally, with social norms, as with so many other things, the devil is in the details: certain features of the “no termination without just cause” social norm severely hamper its strength. Unlike many norms, this norm (1) may not be universal, (2) is the exactly opposite of the default legal rule (employment at will), and (3) allows parties to “opt out” (*i.e.*, when employers expressly state that employment is at will in a contract or handbook). These features limit the norm’s binding nature and potential for punishment.

a. Characteristics of Employment Markets That Weaken Termination Norms

i. Limited Cost to Employers of Violating Norms

To an employer, the main cost of violating a norm against unfair terminations is that it can “put the employer at a disadvantage when competing to hire and retain top employees.”²⁴⁹ For some jobs, there are substantial, measurable differences in employee performance or talent (*e.g.*, lawyer billable hours or revenue; retailers’ sales made), so losing out on better employees is a real cost to employers. But for many jobs, the cost may be minimal, because the difference between the worker fired and his or her replacement may be minimal, either (a) because for the job in question there is no meaningful difference between most employees (*e.g.*, certain low-skill jobs) or (b) because the differences are hard for employers to spot or measure (a common and much-noted problem of limited employer information about worker quality²⁵⁰). Thus, in the reality of uncertainty-filled labor markets, the free-market economics analogy between labor markets and capital markets – that an inefficient termination is like passing

²⁴⁹ Rudy, *supra* note 229, at 348.

²⁵⁰ See RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS 158 (8th ed. 2003) (“[I]t may prove expensive for firms to extensively investigate the background of every individual who applies for a job to ascertain his or her skill level. . . . [J]udging individuals by group characteristics[,] . . . rely[ing] on credentials, or signals, “is rational but has “obvious costs,” both rejection of some who “may be fully qualified” and acceptance of “unproductive workers among the group”); Moss, *Women Choosing Diverse Workplaces*, *supra* note 248, at 15 (“Even when employers do ask . . . , employees may lie or genuinely may not know certain information in advance (*e.g.*, whether a woman will become pregnant or whether a disability will worsen and then require accommodation). Moreover, employers can invest only so much time and effort in the hiring process; they often ‘do not have the resources to examine the individual . . . applicants.’”) (citation omitted).

up a valuable asset and therefore cannot occur very often – may not hold up.²⁵¹

Moreover, many employment markets feature surplus labor, whether because of an economic downturn, depressed economic conditions, or the prevalence of above-market “efficiency wages” that employers use (primarily when it is costly to scrutinize workers) to motivate employees and generate a large applicant pool.²⁵² With workers in large supply, employers suffer little when they upset some workers by violating termination norms.

If unjustified terminations cost employers little, then they will not destroy a company’s competitive position any more than the litany of other commonplace economically inefficient corporate behaviors, such as nepotism, charitable giving (in excess of what is necessary for public relations), or above-market executive compensation. These are common phenomena among successful businesses even though all may be economically inefficient, in the narrow economic sense of sacrificing profits. Such inefficiencies may be common, because institutions often suffer a “principal-agent problem[,] . . . that managers may pursue their own goals, even at the cost of obtaining lower profits for owners.”²⁵³ The self-interested manager does not fear getting caught because “owners can’t monitor everything that employees do” and therefore cannot “ensure that their managers . . . [are] working effectively” in making day-to-day decisions such as hiring and firing lower-level employees.²⁵⁴ Terminations that are not only unfair but inefficient may be just one of many minor inefficiencies that companies suffer with regularity. Accordingly, there is little reason to believe that free-market competitive pressures will meaningfully penalize companies for terminations that are inefficient or violate social norms.

ii. Limited & Biased Information Flow

When an employer violates a termination norm by firing a worker unfairly, it will pay the price in reputation only if others learn what it did. It is dubious

²⁵¹ See John J. Donohue III, *Employment Discrimination in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583, 2595-96 (1994).

²⁵² See David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for “High-Level” Jobs*, 33 HARV. C.R.-C.L. L. REV. 57, 60-61, 78 (1998) (noting that, by design, efficiency wages yield a “surplus of equally competent” workers); see generally EHRENBERG & SMITH, *supra* note 250, at 359-62; PINDYCK & RUBINFELD, MICROECONOMICS § 17.6 at 616-18 (5th ed. 2001); POSNER, ECONOMIC ANALYSIS OF LAW, at § 26.1, 370 n.4 (5th ed. 1998) (noting that above-market payments to an agent is one solution to the “principal-agent” problem (that the principal cannot know or trust that a difficult-to-monitor agent is pursuing the principal’s best interests), because the above-market payments raise the cost to the agent of being caught shirking or misbehaving). Efficiency wages may well have existed for a long time and in a wide range of sectors of the economy, such as on Henry Ford’s early automobile production line. See EHRENBERG & SMITH, *supra*, at 361.

²⁵³ PINDYCK & RUBINFELD, MICROECONOMICS, *supra* note 252, § 17.4 at 609.

²⁵⁴ *Id.*

whether news of an unfair termination always spreads widely enough to hurt an employer's reputation.²⁵⁵ Economists and legal scholars alike note that "information about job opportunities . . . is imperfect," especially for job applicants and new workers.²⁵⁶ But even for longtime workers, information about who was fired (and especially about *why*) can be limited and unreliable, because nefarious motives usually are covert; "[e]mployers are rarely so cooperative as to include a notation in the personnel file' that the firing is for a reason forbidden by law"²⁵⁷ or by an established social norm. The employer unfairly firing someone always will assert a legitimate-sounding, performance-based reason, and the truth will be hard to spot. Especially in the many jobs in which performance evaluation is subjective, it is hard to assess whether the employer's asserted reason for the firing is pretextual.²⁵⁸ It may be easy for the employer to find another worker just as qualified (or better qualified) when there is a labor surplus in the relevant employment market, which is often the case.²⁵⁹ Thus, it often will be difficult for workers to know whether a firing was unfair, unlawful, or (as the employer asserts) legitimately based on performance.

The main costs to employers of violating a social norm against unfair terminations are that (1) new employees will be harder to recruit and (2) valued existing employees will suffer lower morale and be harder to retain.²⁶⁰ The second cost, lower employee morale or retention, may be especially limited because the most valued current employees, the high-morale and high-performing "star" employees, are especially unlikely to be receptive to negative information about the employer. Star employees are likely to think well of their employer, likely to be skeptical when told that the employer fired someone unfairly. That skepticism may be exaggerated because of the "confirmation bias,"²⁶¹ the tendency for people to be "not equally open to all information, but

²⁵⁵ See Robert C. Ellickson, *The Twilight of Critical Theory: A Reply to Litowitz*, 15 YALE J. L. & HUMAN. 333, 334 (2003) (noting that "the legal system became more influential," and social norms weaker, "as . . . the social distance between disputants grew").

²⁵⁶ EHRENBERG & SMITH, *supra* note 250 at 510; see also Shawn Pompian, *Expectations of Discrimination as a Justification for Affirmative Action*, 8 VA. J. SOC. POL'Y & L. 517, 547-48 (2001) ("[I]ndividuals have much less information about the reputations of institutions within specific areas of activity when they first begin to make decisions about education and career paths").

²⁵⁷ *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 464-65 (2d Cir. 1989) (quoting *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 638 (5th Cir. 1985)).

²⁵⁸ See, e.g., Charny & Gulati, *supra* note 252, at 98 ("[H]ard-to-observe, subtle discrimination in high-level jobs . . . is near impossible to prove where the [employment] decision involves a large number of similarly qualified individuals and subjective qualifications.").

²⁵⁹ See *supra* note 252 and accompanying text (discussing circumstances leading to labor surpluses, such as "efficiency wages" and depressed economic conditions).

²⁶⁰ See *supra* Part IV.A.3.a.i.

²⁶¹ See P.C. Wason, *On the Failure to Eliminate Hypotheses in a Conceptual Task*, 12 Q. J. EXPERIMENTAL PSYCHOL. 129 (1960) (finding that after people make initial, premature guesses as

more open to that which comfortably confirms their views, more inclined to spin disconfirming evidence to fit those views, and more apt to seek confirmatory facts and opinions actively.”²⁶² Presented a less-than-iron-clad story of employer unfairness, a star employee will be a tough sell. Moreover, high-morale employees often are high-performing employees, because their high morale may stem from the employer’s praise of their performance or their pleasure in doing their job well. Thus, the star employees that employers most fear losing are least likely to believe negative rumors about their employers’ termination practices, which further limits the power of social norms to discipline employers.

iii. Profitable Cheating: When Violating Norms is Worth the Cost

While the *cost* of violating the social norm is limited (as discussed above), in certain situations the dollar *benefit* to the employer of violating the norm may be high. Certain “unfair” terminations are instances of highly profitable employer opportunism, such as firing an employee to save money or avoid other significant exposure.²⁶³ Especially given the limited cost of violating the norm²⁶⁴ and the limited odds that an employer violation will become sufficiently widely known to harm the employer’s reputation,²⁶⁵ it is entirely likely that there will be situations in which violating the norm will be worth the cost to the employer. Ellickson made this point with regard to Shasta County,²⁶⁶ and Rudy concedes this in noting why some exceptions to the employment-at-will rule may be appropriate, though he pleads agnosticism about which exceptions are warranted.²⁶⁷

If employers terminate without cause only when doing so would be

to a numerical pattern, they skew their interpretation of subsequent evidence in straining to preserve the initial guess).

²⁶² Moss & Malin, *supra* note 223, at 208.

²⁶³ See *infra* Part IV.B.1 (discussing how employers often profit greatly from breaching norms in ways that would violate public policy, would amount to fraudulent inducement, or would violate implied covenants regarding deferred compensation).

²⁶⁴ See *supra* Part IV.A.3.a.i.

²⁶⁵ See *supra* Part IV.A.3.a.ii.

²⁶⁶ See Ellickson, *The Twilight of Critical Theory*, *supra* note 255, at 334 (noting that “as stakes increased . . . the legal system became more influential” relative to social norms).

²⁶⁷ Rudy, *supra* note 229, at 357-58 (“[T]here are . . . situations when the employer’s rational incentives direct it to discharge its employees without just cause. . . . [Some] are morally questionable, but they are also rational (i.e., the employer would gain more than she would lose from the discharge), preventing the economic considerations discussed above to stop them. These cases do not create a need for a blanket rule of just cause protection for all employees. Rather, these cases, due to their small number and similar characteristics, can be dealt with more efficiently, and more effectively, through narrowly tailored exceptions to the at-will default rule. . . . Each particular exception to the just cause rule has both pros and cons, which are beyond the scope of this paper.”).

especially profitable, then the relative rarity of these events exacerbates the “information flow” problem:²⁶⁸ there will not be enough “data points” in the rumor mill to confirm that the employer does not comply with termination norms. Thus, if employers are relatively restrained, violating termination norms only when especially profitable, then such terminations easily may be worth the cost. This may well be how employers behave, as evidenced by the data Rudy cites about the possibly rarity of unfair terminations.²⁶⁹

b. Characteristics of “Just Cause for Termination” Making it a Weak Norm

The preceding discussion illustrated that even if a norm of just cause for termination exists, that norm would be quite weak due to myriad characteristics of employment markets: the limited cost to employers of violating the norm; the limited likelihood that the employer’s violation will become sufficiently known for the employer to pay any sizeable reputational cost; and the profitability to employers of “cheating” on those norms. In addition to those characteristics of *employment markets*, there also are three characteristics of *the particular social norm* that make it weak: (1) limited consensus as to the norm; (2) conflict between the norm and the law; and (3) employer ability to “opt out” of the norm.

i. A Non-Consensus Norm?

On the one hand, Kim’s and Rudy’s survey data show many employees and employers believing that employees cannot be fired without just cause. On the other hand, this belief is far from universal: as many as 4 in 10 (depending on the subgroup and the particular question) recognized the legality of a termination without just cause. Granted, some of those 4 in 10 may nevertheless believe that unfair terminations violate workplace “norms”; but we do not really know. The survey evidence therefore cannot be conclusive proof of a norm held more than about 60%. Truly strong social norms, such as those against trespassing and property damage in Shasta County, are nearly universal. They had better be, if a violation is to generate the widespread social sanctions that make norms powerful. The employment survey evidence simply does not let us conclude that there is a sufficiently universal termination norm.

ii. A Norm Flatly Contrary to the Law?

Ellickson’s Shasta County norms had another strength that a termination norm lacks. Norms against trespassing and damaging property are broadly consistent with the law, even if the details of the norm and the law may vary (*e.g.*, a norm of strict liability, “pay for damage you cause,” even if the law is less categorical). Indeed, the substantial overlap between the norm and the law was

²⁶⁸ See *supra* Part IV.A.3.a.ii.

²⁶⁹ Rudy, *supra* note 229, at 342-344.

why Ellickson was struck by how rarely Shasta County neighbors sued each other: social norms served not so much to provide a *different rule* as to provide a *different enforcement means*. Informal social sanctions replaced litigation as Shasta County's preferred means of enforcing society's rules.

In contrast, in an employment-at-will legal regime with a "just cause termination" norm, *the norm is exactly contrary to the law*. This conflict limits the norm's power. The level of moral opprobrium for violating a norm is weaker when the norm violation is not also illegal. Moreover, the conflict creates confusion: the answer to "can they fire you without just cause" is not a simple yes or no, because the answer is different depending on whether we are talking about the law or the norm.²⁷⁰ Indeed, this norm/law confusion may help explain Kim's and Rudy's survey results.

iii. An "Opt-Out" Norm?

Finally, a truly strong social norm is mandatory. Ranchers in Shasta County do not contract *ex ante* for the right to violate the norm; Ellickson does not report of subgroups of ranchers who decide to be governed by the legal default rules rather than by the local social norms. In contrast, major employers often expressly tell their employees *ex ante* (*i.e.*, at the start of their employment, well in advance of any termination) that their employment is at-will.²⁷¹ While many employees may not understand such disclaimers, that ignorance is far from universal.²⁷² Is a social norm really violated by a termination in compliance with at least formally agreed-upon, and certainly disclosed, "at-will" terms of employment? It might, but perhaps not with the same level of moral opprobrium as a termination by an employer not expressly providing for employment at will. There simply is not a good analogue to this "opting out" of social norms in settings like Shasta County where social norms have true strength.

B. Toward a More Coherent and Just Standard: Recognizing a Wide Range of Claims Based on the Limits of Social Norms and a Broad Economic Conception of Public Policy

With social norms an inadequate substitute for legally enforceable restraints on unjust terminations, the only truly clear and categorical "rule" on the table (pure employment at will, no exceptions) is no solution to the problem of incoherent doctrine. Accordingly, the only real options all are "standards"; the choice is simply between standards that are more predictable and principled, and those that are less so. The chaotic status quo falls decidedly into the "less so"

²⁷⁰ See *supra* note 245 (noting managers' confusion of legal standards and norms about human resources practices).

²⁷¹ Verkerke, *supra* note 17, at 867-70.

²⁷² See *supra* Part IV.A.3.b.i (noting that a substantial minority of employees do know and understand their at-will status).

category; the order of business is to find a standard with a more principled basis for allowing challenges to some, but not all, allegedly unfair terminations.

This Part suggests that courts can retain employment at will but recognize the three major common law employment claims: discharge in violation of public policy; fraudulent inducement of employees; and termination depriving deferred compensation in violation of an implied covenant of good faith. There are two theoretical grounds for allowing these legal claims: (1) the limits of social norms; and (2) a broad conception of public policy that includes protecting the core bargains struck by employers and employees against the opportunism that sequential performance risks. This perspective differs from more traditional rationales for extra-contractual protections, such as moral outrage: whether a certain kind of employment action is “unconscionable” in the sense of being “shocking to the conscience, monstrously harsh, and exceedingly calloused.”²⁷³ Such purely fairness-based rationales threaten a slippery slope – why not allow challenges to *all* allegedly “unfair” terminations? – not presented by this Part’s specific theoretical basis for allowing certain but not all employment claims.

1. The Limits of Social Norms

Employers are especially unlikely to be deterred from the sorts of misdeeds covered by the three relevant legal doctrines (public policy, fraudulent inducement, and implied covenants regarding compensation), because those misdeeds can be greatly profitable.

- *Public Policy Claims:* An employer can avoid substantial regulatory or other headaches by firing an employee to prevent her from halting or blowing the whistle on unlawful employer activities (*e.g.*, polluting to avoid environmental compliance costs).²⁷⁴ Even if the whistleblower already has blown the whistle, a retaliatory termination can deter other employees from cooperating in the ensuing investigation or engaging in their own whistleblowing. Social norms cannot be counted on to deter an employer from firing an employee whose activities pose a serious threat to the employer.
- *Implied Covenant Claims:* Terminating an employee just before the due date of compensation, in violation of the “implied covenant of good faith,” is another example of employer opportunism too profitable to be deterred by social norms alone. Firing an employee

²⁷³ See, *e.g.*, *Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1259 (9th Cir. 2005) (finding mandatory arbitration agreement favoring employer to be unconscionable; “‘Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh.’ . . . ‘Shocking to the conscience,’ ‘monstrously harsh,’ and ‘exceedingly calloused’ are terms sometimes used to define substantive unconscionability.”) (citations omitted).

²⁷⁴ See *supra* Part II.A.1 (collecting cases of alleged retaliation against whistleblowers).

just before his or her productive sales efforts yield a sizeable bonus or commission payment can save the employer substantial sums.²⁷⁵

- *Fraudulent Inducement Claims:* Similarly, an employer also can realize significant financial gains by backing off expensive promises made to recruit or retain workers.²⁷⁶ (Additionally, social norms are likely to be weak against fraudulent inducement because the employee does not suffer a termination – the employment event most likely to generate the moral outrage necessary for social norms to impact the employer’s reputation.)

In contrast, social norms are more likely to redress certain more commonplace acts of workplace unfairness, such as firing a worker due to minor personality conflicts or nepotism, which do not promise such great gains for the employer.²⁷⁷ The limits of social norms therefore support recognizing legal claims against certain kinds of employer misdeeds that, if not redressed, can be especially profitable to employers, at least the unscrupulous ones who need some form of deterrence to do the right thing.

2. An Economic Conception of Public Policy: Externalities and Sequential Performance

In addition to the limits of social norms, the commonalities of the three claims support recognizing all of them. Facially, the three claims seem to have little in common. Public policy claims are justified by the public interest, whereas the other two are really extra-contractual protections for one of the two parties. Moreover, fraudulent inducement claims are not even termination claims, like the other two.

Yet at a higher level of abstraction, all three are unified as protections of the public interest, as an economic analysis would define “public interest.” Public policy claims clearly reflect the public interest, not only because they exist to protect public legislation from being subverted, but also in an economic sense: public policy claims exist to prevent externalities, *i.e.*, negative effects on third parties.²⁷⁸ When an employer fires an employee for complying with a public duty, for example, the harm goes beyond the parties (*i.e.*, beyond employer and

²⁷⁵ See *supra* Part II.A.3 (collecting cases of employees denied impending commissions).

²⁷⁶ See *supra* Part II.A.2 (collecting cases of alleged fraudulent inducement of employees to accept or remain in a job with the employer).

²⁷⁷ Social norms may not provide reliable redress for even these situations, but that is an argument for a universal “just cause” standard; such arguments are beyond the scope of this Article, which focuses on how employment common law can be made more just and more coherent without a revolutionary shift to a just cause regime.

²⁷⁸ See PINDYCK & RUBINFELD, *MICROECONOMICS*, *supra* note 252, at 294; Moss & Malin, *supra* note 223, at 203.

employee); the harm extends to all those who benefit from that public duty, whether pollution controls, safety regulations, jury duty, etc. Preventing parties from freely imposing negative externalities is a classic economic rationale for government intervention to remedy the market failure of ignoring costs imposed on others;²⁷⁹ it provides a strong justification for limiting a laissez faire, free-market doctrine like employment at will.

Less obviously, a properly robust economic analysis would define the public interest sufficiently broadly to justify extra-contractual protections against fraudulent inducement and implied covenant claims. In both claims, the problem is that the employees must perform their end of the bargain first: in the implied covenant situation, making the sales generating the commissions; in the fraudulent inducement context, accepting the new job or declining to leave for a new job opportunity. After performing first, however, the employees must hope their employers perform their own end of the bargain: paying the commissions (implied covenant); and delivering on the promises that induced the employee to start or remain on the job (fraudulent inducement).

In terms of economic incentives, implied covenant and fraudulent inducement cases reflect classic problems of ensuring sequential performance. As Richard Posner explains, “the problem of contract opportunism arises from the sequential character of economic activity”: the party performing first is vulnerable to renegeing by the later-performing party.²⁸⁰ Without expressly citing law-and-economics lingo, the case law reflects similar logic.²⁸¹ The leading implied covenant case of *Wakefield*, for example, distinguished the situation of the plaintiff, an at-will employee terminated to deprive him of commissions, from the more typical at-will context, where “even a whimsical termination does not deprive the employee of benefits expected in return for the employee’s performance[,] . . . because performance and the distribution of benefits occur simultaneously, and neither party is left high and dry by the termination.”²⁸²

The public policy at stake is a significant one, economically speaking: protecting employees’ trust that their employers will not renege on delayed performance, such as paying commissions or complying with representations inducing employment. Without such protections, employees would have to

²⁷⁹ See PINDYCK & RUBINFELD, MICROECONOMICS, supra note 252, at 294.

²⁸⁰ POSNER, ECONOMIC ANALYSIS OF LAW, supra note 252, § 4.1 at 102 (speaking of “contract opportunism” generally, not specifically in the context of deferred compensation).

²⁸¹ *Wakefield*, 769 F.2d at 111 (2d Cir. 1985) (recognizing at-will employee’s claim that he was terminated to deprive him of commissions, and distinguishing the employment-at-will doctrine, under which “even a whimsical termination does not deprive the employee of benefits expected in return for the employee’s performance[,] . . . because performance and the distribution of benefits occur simultaneously, and neither party is left high and dry by the termination.”).

²⁸² 769 F.2d 109, 111 (2d Cir. 1985).

assume some risk of renegeing, which would make them less likely to enter into relationships featuring sequential performance. Posner notes that “the absence of legally enforceable rights would bias investment toward economic activities that could be completed in a short time; and this would reduce efficiency.” Employment markets would suffer exactly this sort of short-term bias without implied covenant or fraudulent inducement protections. Employees would be less likely (or, identically, would demand a premium) to accept deferred compensation deals or to accept employer representations inducing their employment. Diminished employee acceptance of such deals would be a substantial inefficiency: deferred compensation schemes often are desirable because they can help employers structure employee incentives efficiently (*e.g.*, higher compensation for better salespeople) and may offer tax advantage;²⁸³ and employees’ uncertainty-filled job decisions are more efficient when they can rely upon employer representations about the job and the company. The traditional way to assure sequential performance is a contract specifying the later-performing party’s duties in detail,²⁸⁴ but that is often not feasible in these employment contexts. Contractual assurances of job security might be feasible as a way to assure deferred compensation, but that would mean that deferred compensation is possible only for non-at-will employees, which would not protect most workers. Neither are contractual assurances a feasible way to prevent fraudulent inducement; in many of the fraudulent inducement cases, the disputed representations are about the employer’s imminent plans and impending deals,²⁸⁵ which the employer may be understandably reluctant to memorialize in writing for various reasons, such as fear of risking premature public disclosure, or the difficulty of reducing to writing a fluid “best efforts” type of promise to procure more deals for the party’s benefit.²⁸⁶ Broadly speaking, these employment situations are examples of contexts in which the cost or impracticability of drafting contract provisions is prohibitive. Prohibitive contract drafting costs are a classic economic rationale for courts to recognize extra-contractual protections, to protect material expectations that the parties could not reduce to writing.²⁸⁷

²⁸³ EHRENBERG & SMITH, *supra* note 250, at 252.

²⁸⁴ “It can be argued that if the manufacturer had wanted such protection he would have negotiated for it.” POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 252, § 4.1 at 102.

²⁸⁵ See *supra* notes 92–100 and accompanying text (recounting fraudulent inducement cases).

²⁸⁶ “In the famous case of *Wood v. Lucy, Lady Duff Gordon*, for instance, Judge Cardozo found consideration by reading into an exclusive agency contract an implied promise of best efforts on the part of the promisee.” Avery Wiener Katz, *The Option Element in Contracting*, 90 VA. L. REV. 2187, 2193 (2004) (citing *Wood*, 118 N.E. 214, 215 (N.Y. 1917)).

²⁸⁷ See, *e.g.*, Royce de R. Barondes, *The Business Lawyer As Terrorist Transaction Cost Engineer*, 69 FORDHAM L. REV. 31, 78 (2000) (“[T]he covenant of good faith prevents opportunism in contract performance that could not have been contemplated when the contract was formed.”) (citing *Market St. Assocs. Ltd. Partnership v. Frey*, 941 F.2d 588, 596 (7th Cir. 1991)) (Judge

In short, there is a substantial public policy interest underlying all three of these common law claims. While public policy claims aim to prevent externalities, perhaps the most traditionally recognized rationale for intervening in a free market, both implied covenant and fraudulent inducement claims serve the public interest as well. Both are necessary to minimize the risk of opportunism inherent in relationships involving sequential performance. Minimizing that risk has an important economic efficiency justification: encouraging trust in long-term economic relationships. Accordingly, there is a public interest justifying recognition of all three common law claims, even as courts otherwise retain employment at will and decline to allow employees to challenge any and all terminations as “unjust.”

V. CONCLUSION: EMPLOYMENT RIGHTS, PAST AND FUTURE

This Article discusses why various common law employment claims can and should draw wider recognition, despite the employment-at-will rule. Failing to recognize them leaves employees vulnerable to terminations undercutting important public policies; and the courts’ spotty recognition of some but not all claims has left employment law regrettably incoherent. One final note is that, broadly speaking, recognizing all of these common law claims is consistent with the trend in the past century of employment law: maintaining employment at will but broadening the classes of workers protected from termination.

Even the New York Court of Appeals, a staunch defender of employment at will, noted that “the twentieth century featured significant statutory inroads into the presumption of at-will employment, most notably with passage of the National Labor Relations Act [NLRA] in 1935 and [T]itle VII of the Civil Rights Act of 1964.”²⁸⁸ Yet by so simplifying, the court understated the trend of “significant inroads.” The NLRA and Title VII just brought certain constitutional rights into the private sector – the NLRA, freedom from retaliation for union members’ speech and association; Title VII and similar laws, discrimination protections for “discrete and insular minorities.”²⁸⁹ Only much more recently have employment rights gone substantially beyond such

Posner) (deeming contracts to contain “implied conditions” or “good faith” duties are “ways of formulating the overriding purpose of contract law, which is to give the parties what they would have stipulated for expressly if at the time of making the contract they had had complete knowledge of the future and the costs of negotiating and adding provisions to the contract had been zero.”); POSNER, *ECONOMIC ANALYSIS OF LAW*, supra note 252, § 4.1 at 104 (noting that one function of contract law is “filling out the parties’ agreement by interpolating missing clauses. This function too is related to the sequential character of contract performance. The longer their performance will take – and remember that ‘performance’ includes the entire stream of future services . . . – the harder it will be for the parties to foresee the various contingencies that might affect performance”).

²⁸⁸ Horn v. New York Times, 790 N.E.2d 753, 755 (N.Y. 2003).

²⁸⁹ United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

fundamental constitutional principles, mainly in the 1990s and early 2000s.²⁹⁰ Recent employment protections have proscribed discriminating against employees in vulnerable positions due to a temporary or volitional status that Constitution protects little or not at all:²⁹¹ (1) disabilities and medical leave needs²⁹² – often a temporary (or at least suddenly arising) condition; (2) whistleblowing by employees²⁹³ – entirely a matter of choice by the employee; and (3) sexual orientation²⁹⁴ – which may be innate, but much of the relevant “discrimination” is based on the employee’s choice to be “out of the closet.”

Progressives looking for “the next thing” in employment rights have missed the boat in advocating, or predicting, that employment at will be replaced by a requirement of just cause for termination. “The next thing” is not a just-cause requirement. Rather, it is an expansion of the range of employees protected from termination. We already have moved through three stages of employment

²⁹⁰ See Charles E. Frayer, *Employee Privacy and Internet Monitoring: Balancing Workers' Rights and Dignity with Legitimate Management Interests*, 57 BUS. LAW. 857, 872 (2002) (“[S]everal federal laws already supersede the employment-at-will doctrine by prohibiting termination for a variety [of] reasons. For example, Title VII forbids discharge on the basis of race, color, religion, sex, or national origin; the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA) restrict discharges based on disability or age; and the NLRA prohibits discharge in retaliation for exercising rights granted therein, as do several other statutes[,] including the Occupational Safety and Health Act (OSHA), the Fair Labor Standards Act (FLSA), and the Family & Medical Leave Act (FMLA).”). Many of these laws are of recent vintage, such as the ADA (1990), 42 U.S.C. §§ 12101 *et seq.*, and the FMLA (1994), 29 U.S.C. §§ 2601 *et seq.*

²⁹¹ See, e.g., Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1119 n.333 (1995) (noting that under the Equal Protection Clause, “the Court has accorded strict or intermediate scrutiny to classifications based on race, gender, ethnicity, illegitimacy, and alienage. However, other groups that represent vulnerable populations have not been given the same protection. These include groups based on age, sexual orientation, and disabilities.”) (citations omitted).

²⁹² See *supra* note 296 (discussing ADA and FMLA).

²⁹³ See *supra* Part II.A.1 (common law doctrine of discharge in violation of public policy); Noah P. Peeters, *Don't Raise That Hand: Why, Under Georgia's Anti-Slapp Statute, Whistleblowers Should Find Protection from Reprisals for Reporting Employer Misconduct*, 38 GA. L. REV. 769 (2004) (noting that “Congress has chosen to enact a number of specific statutory protections for employee whistleblowers over the past fifty years,” *id.* at 792, and listing many such laws, e.g., “When it passed the Sarbanes-Oxley Act in the summer of 2002, Congress enacted new whistleblower protections for those reporting corporate misconduct. . . . These protections include a prohibition on employers using discharge, demotion, suspension, threat, harassment, or any other manner of discrimination against an employee who provides information or otherwise assists an investigation regarding certain securities frauds at publicly traded companies,” *id.* at 792 n.160 (citing Sarbanes-Oxley Act of 2002, Pub. L. No. 107- 204, 116 Stat. 745, codified at 18 U.S.C.A. § 1514A)).

²⁹⁴ E.g., Ryan E. Mensing, *A New York State of Mind: Reconciling Legislative Incrementalism with Sexual Orientation Jurisprudence*, 69 BROOK. L. REV. 1159, 1167 (2004) (recounting the 31-year journey from bill to law of New York’s “Sexual Orientation Nondiscrimination Act” (“SONDA”), which took effect in January 2003; “The practical effect of SONDA’s passage was to add ‘sexual orientation’ to New York State’s already existing civil rights law,” which forbid discrimination “in housing, employment, credit, or public accommodations.”).

common law: (1) pure at-will employment; (2) protection of constitutional values; and then (3) protection of temporary vulnerabilities (*e.g.*, medical) and choices society deems deserving of respect, whether based on the public interest (*e.g.*, whistleblowing) or respect for autonomy (*e.g.*, sexual orientation).²⁹⁵

Broadening employment protections to include the common law claims that courts inconsistently have started recognizing over the past few decades (public policy, implied covenant, and fraudulent inducement) is consistent with this third stage in the evolution of employment law. The early employment rights statutes were right to focus on core constitutional principles such as free speech and race/gender discrimination. But courts and legislatures should continue along the path they have chosen, albeit only implicitly: that the next step for employment rights is to expand protection of employees vulnerable to employer retaliation or opportunism because of choices and temporary vulnerabilities that merit society's protection.

²⁹⁵ *Cf.* Ballam, *supra* note 14, at 686 (noting and advocating trend toward employee rights to “maximum ability to make free choices with no negative consequences from their employers”).