The Development of the Employment At Will Rule Revisited: A Challenge to its Origins as Based in the Development of Advanced Capitalism

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THE DEVELOPMENT OF THE EMPLOYMENT AT WILL RULE REVISITED: A CHALLENGE TO ITS ORIGINS AS BASED IN THE DEVELOPMENT OF ADVANCED CAPITALISM

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Legal doctrine . . . is strongly influenced by economic conditions.¹

I. INTRODUCTION

U.S. historiography contains a long tradition of viewing economics as the causative factor behind historical change, particularly in shaping the judiciary's role in effecting change within legal doctrines.² Some historians have portrayed the judiciary as little more than an instrument controlled by the needs of the business community.³ The progressive school of historiography,⁴ which dominated U.S. history during approximately the first four decades of the twentieth century and continues to have adherents even today, viewed economics as the causative factor in history and interpreted U.S. history as a battle between the "people" and the "business interests."⁵ For example, Vernon Parrington, one of the

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  2. See id.
  3. See, e.g., RICHARD HOFSTADTER ET AL., THE PROGRESSIVE HISTORIANS 201 (1968) (asserting the once prevalent view of judges as "former corporation lawyers in black robes.").
  5. For a discussion of progressive historiography see HOFSTADTER, supra note 3. Until the last decade of the nineteenth century, United States historiography was dominated by amateur writers with no formal training in the writing of history. HOFSTADTER, supra note 3, at 35. In the 1880's the scientific study of history, whereby historians attempt to describe facts objectively without romanticizing history or passing judgment on its actors and events, took root at John Hopkins University. HOFSTADTER, supra note 3, at 38-39. By 1900, this scientific method of studying history had become widespread. HOFSTADTER, supra note 3, at 39. During this same time period in which the study of history underwent a metamorphosis, the United States experienced dramatic social,
founders of progressive historiography, examined the role of Chief Justice John Marshall in U.S. history. Parrington concluded that Marshall, who served as the Chief Justice from 1801 to 1835, was an instrument of the monied, propertied classes who was a “reactionary” with a “hatred of democracy.” One of the principles which drove Marshall to such disdain for democracy, Parrington argued, was his belief in the “sanctity of private property.” In the struggle between the interests of business and the people, Marshall sided with business.

Arnold Paul, a modern historian, continued in the tradition established by progressive historiography with a 1960 publication that examined the changes in the law during the late-nineteenth century. Paul, who examined doctrinal developments in the law that occurred from 1887-1895, argued that during the 1890’s the U.S. judiciary assumed a new importance in addressing social and economic issues by frequently invalidating legislation as an unconstitutional infringement on due process. This occurred, Paul argued, primarily because of economic, and political changes wrought by industrialization. Hofstadter, supra note 3, at 41. It was within this context (the rise of scientific history and the industrialization of the nation) that Progressive Historiography arose. Hofstadter, supra note 3, at 41-42.

Charles Beard, one of the most famous progressive historians, argued that the Constitution was shaped by needs of the dominant economic interests of the late eighteenth century. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1935). 6. VERNON L. PARRINGTON, The Romantic Revolution in America, in MAIN CURRENTS IN AMERICAN THOUGHT 20-27 (1927).

7. Id. at 23.
8. Id.
9. Id. at 23-27. The traditional view with regard to Marshall is that he intentionally used his position on the Court to promote nationalism, which he defined as the promotion of federal governmental power at the expense of the states in a way that preserved what legal scholar E.S. Corwin has described as the “doctrine of vested rights.” Edward S. Corwin, The Basic Doctrine of American Constitutional Law, 12 Mich. L. Rev. 247, 255 (1914). The Supreme Court developed this doctrine, Corwin concluded, to protect vested property rights “from legislative attack.” Id. at 275; see also Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat) 518 (1819) (where the Court interpreted a contract clause as protecting corporate charters from legislative interference).

Marshall’s place in history has undergone revisions in recent years. Many now believe that Marshall was not attempting to serve business interests, but rather was attempting to preserve the republican form of government which he believed demanded protection for vested property rights. For an extensive discussion of the Marshall era historiography see G. EDWARD WHITE, The Art of Revising History: Revisiting the Marshall Court, in INTERVENTION AND DETACHMENT, ESSAYS IN LEGAL HISTORY AND JURISPRUDENCE 50 (1994).


11. In a series of cases beginning with Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, the U.S. Supreme Court sanctified liberty of contract and substantive due process as limitations on state power, limitations that severely undermined the concept of dual federalism and state police power. St. Paul Ry., 134 U.S. 418 (1890). In the St. Paul Ry. case, the Court addressed the
pressure from the strengthened conservatism of the right wing of the legal community, a conservatism shaped by the increasing class conflict and social tensions of the 1890's. This crisis of the nineties prompted the judiciary to intentionally subvert years of precedent by using laissez-faire constitutionalism to strike down protective legislation and statutes regulating business activity. Protection of property interests from the threats of the masses, who were able to pressure legislatures to bow to their demands, provided the courts' motivation for striking down such legislation.

Paul concluded that in choosing to strike down protective legislation, a course which the judiciary followed until the mid-1930s, the courts assumed the role of defender of property rights against the masses.

U.S. legal history since the 1960s has been heavily influenced by what has come to be called "the new legal history." The new legal history, which may be traced to a 1956 publication, in combination with the constitutionality of a state statute that permitted no judicial review of commission-established rates. 

_id._ at 447. The Court, adopting the argument that the Constitution's Fourteenth Amendment guaranteed substantive as well as procedural due process, struck down the statute because it deprived the judiciary of the right to determine the reasonableness of the commission-established rates. 

_id._ at 458. For many contemporaries of the era, as well as subsequent legal scholars, the famed _Lochner_ case represented the apotheosis of laissez-faire constitutionalism. See _Lochner v. New York_, 198 U.S. 45 (1905). In _Lochner_, the U.S. Supreme Court struck down a New York law that limited working hours for bakers as a violation of freedom of contract. 

_id._ at 64. In his dissent, Justice Oliver Wendell Holmes charged that the majority's commitment to the principles of laissez-faire constitutionalism, as opposed to constitutional principles, had motivated the majority of the Court to overrule the state statute. 

_id._ at 75-76 (Holmes, J., dissenting).

12. _Paul_, supra note 10, at 234-35 (asserting that the insistence of laissez-faire right wing conservatives on the judiciary weakened the moderates).

13. An entire sub-debate within the field of legal history has examined the true motives for laissez-faire constitutionalism, a term whose genesis is rooted in the notion that the action of courts striking down legislation that regulates business activity has resulted in a laissez-faire environment with respect to the relationship between government and business. Some have argued that the judiciary simply sided with big business. Others argued that the Court was not siding with business interests, but instead was attempting to remain true to the Constitution's original intent that government would not permit class legislation — that is, legislation benefiting a particular class at the expense of another class. Many of the government regulations of this era, including some that were pro-business, were viewed by the courts as constituting class legislation and hence were invalidated on constitutional grounds. For an excellent summary of the different interpretations of laissez-faire constitutionalism, see HOWARD GILLMAN, THE CONSTATE BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 1-18 (1993).


15. _Paul_, supra note 10, at 221-22.

16. For an excellent description of the new legal history and how it differs from the old legal history see Harry N. Scheiber, _American Constitutional History and the New Legal History: Complementary Themes in Two Modes_, 68 J. AM. HIST. 337 (1981).

with criticism of the traditional notion of constitutional history, rejects analyzing legal history by focusing narrowly on changes in legal doctrine and attempts to place those changes within the social, economic, and political context within which they occurred. The new legal history, then, examines the way in which the law shapes, and is shaped by, society. Hurst, for example, argued that the dominant factor shaping U.S. legal change in the nineteenth century was society’s desire to "enlarge the options open to private individual and group energy."

The "options" to which Hurst referred focused on releasing individual and group energy to promote the economic development of the country. Thus, legal change in the nineteenth century created a "hospitable environment" for "the new business dynamics." The judiciary, and particularly the U.S. Supreme Court, in Hurst’s view, played a key role in allowing this release of energy to occur.

Lawrence Friedman produced the next major work on the new legal history, a synthesis of U.S. legal history from colonial times through the mid-twentieth century. One of the dominant themes of this work was the way in which business’ needs and the needs of a developing economy shaped the course of U.S. legal developments. For example, Friedman concluded that common law developments in the area of torts, particularly negligence, were shaped by the need of developing businesses to have limitations placed on their liability. The doctrines of duty of care and proximate cause, which Friedman concluded were developments of the mid-nineteenth century, were judicial attempts to create a more favorable environment for business development.

In 1977, Morton Horwitz published what has become one of the most often-cited works within the tradition of the new legal history that

19. See generally HURST, supra note 17, at 33-70 (discussing the control of environment and its impact on changes in legal doctrine); see also Scheiber, supra note 16, at 340 (observing that Hurst contends that "the history of the legal system should be considered . . . by use of analytic framework that reflected [the] laws of real life functions.").
20. HURST, supra note 17, at 39.
21. HURST, supra note 17, at 44.
22. HURST, supra note 17, at 45.
23. HURST, supra note 17, at 45-46.
25. Id.
26. Id. at 467.
27. See id. at 411-12. The author argues that business instruments, such as the bill of lading and the certified check, were invented by business and allowed by the courts. Id. at 468.
focusses on economics as the causative factor of U.S. legal change. In The Transformation of American Law, Horwitz examined changes in U.S. common law that occurred from the late-eighteenth through the mid-nineteenth centuries. He concluded that during this time dramatic changes occurred in common law doctrine, particularly in the areas of contract and property law. Horwitz further concluded that the judges who effected these changes did so with the intent of creating a favorable environment for business growth. During the first half of the nineteenth century, the law was transformed so as to enable "emergent entrepreneurial and commercial groups to win a disproportionate share of wealth and power in American society," and thus the law, as shaped by the judiciary, "became a major instrument in the hands of these newly powerful groups."

Some legal scholars have shared in the approach taken both by the progressive school of historiography and by the new legal history's economic interpretation of legal change. Critical legal studies scholars such as Karl Klare, for example, have provided analyses of the law that are consistent with historians who view the needs of the business community as a dominant factor driving the way in which the judiciary shapes U.S. law. In a series of articles Klare provided his analysis of the impact of the National Labor Relations Act ("NLRA") on the U.S.


30. Id. Horwitz described the role of judges as follows:
   "What dramatically distinguished nineteenth century law from its eighteenth century counterpart was the extent to which common law judges came to play a central role in directing the course of social change. Especially during the period before the Civil War, the common law performed at least as great a role as legislation in underwriting and channeling of economic development. In fact, common law judges regularly brought about this sort of far reaching changes that would have been regarded earlier as entirely within the powers of the legislature. . . . Indeed, judges gradually began to shape common law doctrine with an increasing awareness that the impact . . . had expanded beyond the necessity merely of doing justice in the individual case."

31. Id. at 1-2.

32. See The Politics of Law: A Progressive Critique (David Kairys ed., 2d ed. 1990) (discussing critical legal studies, as well as providing examples of works by critical legal studies scholars).

Klare's thesis is that while the NLRA itself had the potential to affect radical change upon society, the U.S. Supreme Court interpreted the NLRA in such a way as to subvert that radical potential and instead to turn that statute into a law that, in the name of industrial peace, served management's goals.

Both historians and legal scholars who argue that changes in U.S. legal doctrine have been shaped by the judiciary's desire to promote a favorable climate for business development have received sharp criticisms for their analyses and conclusions. While one may debate the legitimacy of some of these criticisms, there is one criticism that often appears to be well justified. The historians and legal scholars who have reached broad conclusions about the desire of the judiciary to change the law so as to support a favorable business climate have relied on an inadequate sampling of cases. For example, one of the radical transformations in contract law cited by Morton Horwitz was that U.S. courts began to refuse to invalidate contracts based on inadequacy of consideration. However, Horwitz based this conclusion on five Pennsylvania cases and two Massachusetts cases. In order to arrive

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at any valid conclusions, especially regarding common law developments, one must perform a more comprehensive assessment of the case law.

The purpose of this article is to perform such a comprehensive assessment with respect to the employment at will doctrine. Since the 1970s, the erosion of the employment at will rule has attracted substantial scholarly attention. While few of these examinations of the erosion of the rule devote much discussion to the rule's origins, nearly all contain, with no case precedent to support it, what has become the standard short statement that the rule was suddenly adopted by the U.S.


39. See, e.g., John D. Blackburn, Restricted Employer Discharge Rights: A Changing Concept of Employment at Will, 17 AM. BUS. L.J. 467 (1980) (discussing judicial recognition of the need to protect against the wrongful discharge of an employee at will); Lawrence E. Blades, Employment at Will vs. Individual Freedom: On Limiting The Abusive Exercise of Employer Power, 67 COLUM. L. REV. 1404 (1967) (discussing the need for government intervention in the area of employment to protect employees from the power of large corporations in their largely absolute right of discharge); Elletta S. Callahan, The Public Policy Exception to the Employment at Will Rule Comes of Age, 29 AM. BUS. L.J. 481 (1991) (discussing the elements that comprise a wrongful discharge claim); Richard A. Epstein, In Defense of the Contract at Will, 51 U. CHI. L. REV. 946 (1984) (discussing the utility of the employment at will doctrine); Matthew W. Finkin, The Bureaucratization of Work: Employment Policies and Contract Law, 1986 WISC. L. REV. 733 (1986) (arguing that courts have applied contract law to employment practices which have dramatically changed over time and are not refashioning the law on this subject); Mayer G. Freed & Daniel D. Polsby, Just Cause for Termination Rules and Economic Efficiency, 38 EMORY L.J. 1097 (1989) (arguing against the need for governmental review of employer decisions in the employment at will relationship because it would be too costly to society); S. Maya Iwanaga, A Comparative Approach to Japanese & United States Wrongful Termination Law, 13 HASTINGS INT'L & COMP. L. REV. 341 (1989) (discussing the employment at will doctrine in both countries and arguing that the United States may learn from the Japanese model of striving to guarantee "lifetime employment"); Kenneth T. Lopatka, The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the '80s, 40 BUS. LAW 1 (1984) (discussing various issues that would arise if the traditional employment at will rule was changed); Jane P. Mallor, Discriminatory Discharge and the Emerging Common Law of Wrongful Discharge, 28 ARIZ. L. REV. 651 (1986) (arguing that common law remedies in cases of discriminatory discharge further the policies that underlie both employment discrimination statutes and the common law of wrongful discharge); Ellen R. Pierce, et al., Employee Termination at Will: A Principled Approach, 28 VILL. L. REV. 1 (1982) (arguing for the abandonment of the employment at will rule and the adoption of a dual level dispute resolution mechanism); Michael J. Phillips, Toward A Middle Way in the Polarized Debate Over Employment at Will, 30 AM. BUS. L.J. 441 (1992) (discussing the ethical considerations of the employment at will doctrine and attempting to find a middle ground suitable for both employers and employees); J. Peter Shapiro & James F. Tune, Note, Implied Contract Rights to Job Security, 26 STAN. L. REV. 335 (1974) (arguing that the employment at will doctrine rests on a questionable justification); Todd M. Smith, Note, Wrongful Discharge Reexamined: The Crisis Matures, Ohio Responds, 41 CASE W. RES. L. REV. 1209 (1991) (arguing that Ohio courts should abandon the employment at will rule); Clyde W. Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 VA. L. REV. 481 (1976) (arguing that the "anachronistic legal rule that employees can be discharged for any reason or no reason should be abandoned and the protection now given by arbitration under collective bargaining agreements should be extended to employees not covered by collective agreements.").
judiciary in response to the demands of the late-nineteenth century's increasingly industrialized society. The traditional version of the adoption suggests that treatise writer Horace Wood simply created the rule in 1877, and judges readily adopted it in an attempt to support the business community's need for flexible employment relationships. Few of these works, however, seriously examine the rule's origins.

Marxist scholar Jay Feinman's article The Development of the Employment at Will Rule provided the first attempt to seriously examine the historical context within which the rule developed and to provide an explanation as to why the courts so readily adopted the principle stated in Wood's treatise. Mid-level managers first appeared in the work


Subject to certain exceptions, medieval English courts usually construed an indefinite-term employment contract as a hiring for one year. Some nineteenth century American courts continued this construction. Others rejected it while still finding indefinite-term employment contracts obligatory for some period or under some circumstances. Not until the last quarter of the nineteenth century did courts begin to read such contracts as terminable at will.

Id. at 445. See also HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (Albany, Parsons 1877).


The latter part of the nineteenth century was a time of economic uncertainty. Businessmen of that era faced many risks when launching their enterprises. Confronted with the common phenomenon of business failure, the economic, political, and social environment fostered practices protecting the employer, and through him the economy, from undue hardship. One practice was of such legal significance that to this day it carries great momentum. This practice is employment at will.

Id. at 467.

42. Jay Feinman, The Development of the Employment at Will Rule, 20 AM. J. LEGAL HIST. 118 (1976). Subsequent to the publication of Feinman's article, other scholars have examined the issue of the doctrine's origins. Industrial relations scholar Sanford Jacoby acknowledged that, prior to the issuance of Wood's treatise in 1877, many U.S. courts did not follow the annual hiring rule, although Jacoby agrees with Feinman's basic analysis that the employment at will doctrine was not the generally accepted rule until the period of 1890 to 1910. Sanford M. Jacoby, The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis, 1982 COMP. LAB. L. 85, 115-16 (1982).

Legal scholars Mayer G. Freed and Daniel D. Polsby questioned the traditional view that Wood simply made up the employment at will rule in his 1877 treatise. Mayer G. Freed & Daniel D. Polsby, The Doubtful Provenance of "Wood's Rule" Revisited, 22 ARIZ. ST. L.J. 551, 551-52 (1990). Freed and Polsby found several pre-1877 cases that they interpreted as following the employment at will doctrine. Id. at 554-55. However, they did not conduct any comprehensive analysis.

In a 1994 article, Andrew P. Morriss argued that courts adopted the employment at will doctrine in the late-nineteenth century to serve a gatekeeper function and not because of the needs of developing businesses. Andrew P. Morriss, Exploding Myths: An Empirical and Economic
force in significant numbers during the last three decades of the nineteenth century. Feinman’s thesis is that the judiciary adopted the employment at will rule to defeat the efforts of these mid-level managers, to obtain the protection of the annual hiring rule. By denying any job permanence or job security to mid-level managers, the courts thereby guaranteed to employers maximum freedom to control the workplace:

Employment at will is the ultimate guarantor of the capitalist’s authority over the worker. The rule transformed long-term and semi-permanent relationships into non-binding agreements terminable at will. If employees could be dismissed on a moment’s notice, obviously they could not claim a voice in the determination of the conditions of work or the use of the product of their labor.

Employment at will, Feinman concluded, was adopted to support “the dominion of the owners of capital over their employees and their enterprises... a basic element of the capitalist system.” Feinman arrived at this conclusion after examining the late-nineteenth and early-twentieth century New York cases that expressly announced the employment at will principle. Feinman chose New York because it was at that time both an important commercial state and an important contributor in forming the common law. Feinman asserted that the development of New York case law was “typical of other states” and hence “is an appropriate vehicle for tracing the way the employment at will rule came to be dominant,” although he provides no authority to support this proposition.

Feinman concluded that prior to 1894, the New York courts often applied the English rule of annual hirings. Under this rule, the employment relationship was assumed to exist for one year, during which

Reassessment of the Rise of Employment At-Will, 59 Mo. L. Rev. 679, 681-82 (1994). However, Morriss did not question the assumption that employment at will was a late-nineteenth century development. Id. at 698.

44. See AMANDA BENNETT, THE DEATH OF THE ORGANIZATION MAN 67 (1990) (discussing how factories increased the need for middle level managers).
45. Feinman, supra note 43, at 133.
46. Feinman, supra note 43, at 133.
49. Feinman, supra note 43, at 127.

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time neither party could terminate the relationship, absent just cause. However, the courts inconsistently decided those cases where the parties expressly agreed to one year contracts and the employees continued working beyond that year without renewing their contracts. Some courts found an implied extension for the original time period agreed upon while others found the employment relationship terminable at will. However, Feinman concluded that in 1895, the New York Court of Appeals "settled the issue" by expressly applying Wood's rule in *Martin v. New York Life Insurance Co.* The plaintiff in *Martin* was a high-level management employee who had worked for the company for eleven years and made $10,000 per year, a substantial salary for the 1890s. In April 1892, Martin received notice that the company was discharging him at the end of the month. Martin, who was paid on a monthly basis, received his salary for April. When the company refused to pay him for the remainder of the year, Martin filed a breach of contract action, alleging that his employment contract with the company was a yearly contract. In rejecting Martin's claim, the New York Court of Appeals found that absent evidence that the parties actually intended a yearly contract, a salary stated at an annual rate was insufficient to establish such a contract. Further, the court cited Wood's Rule as authority for the proposition that a general hiring, for which no duration was stated, was an "indefinite hiring" that was "determinable at will by either party."

Upon examining *Martin* and subsequent New York cases that raised the issue of employment duration, Feinman discovered that the plaintiffs were neither common laborers nor domestic workers, but rather mid-level

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52. Feinman, supra note 43, at 127.
53. See, e.g., Greer v. Peoples Tel. & Tel. Co., 18 Jones & S. 517 (1884).
55. 42 N.E. 416, 417 (N.Y. 1895); Feinman, supra note 54, at 128.
57. *Id.* at 417.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

In England [under Wood's Rule] it is held that a general hiring, by the terms of which no time is fixed, is a hiring by the year... [but in the United States] the rule is inflexible that a general or indefinite hiring is, prima facie, a hiring at will; and if the servant seeks to make out a yearly hiring, the burden is upon him to establish it by proof.

*Id.*
employees who were relatively well-paid in comparison to the average worker of that time period.\textsuperscript{62} Feinman concluded that:

> The employment at will rule developed in America in response to cases presented by a particular group of workers—middle-level managers. The overriding factor making the rule compelling was the position of these workers as an example of all workers in the developing modern capitalist economy. Seen thus, the rule is more than a particular response of the legal system to a particular economic problem; termination at will is the law's development of a fundamental principle of the economy.\textsuperscript{63}

Thus, in Feinman's view, the changing needs of capitalists, which was brought about by industrialization, was the causative factor leading the judiciary to adopt the employment at will principle.\textsuperscript{64}

Feinman's conclusion that employment at will was adopted suddenly in the late-nineteenth century to support capitalist control over the workplace is based on three assertions.\textsuperscript{65} First, Feinman asserts that New York often applied the annual hiring rule prior to 1894, yet he cites only two cases\textsuperscript{66} to support this conclusion. Other than the two cases that led him to conclude that New York courts often applied the annual hiring rule prior to 1895,\textsuperscript{67} Feinman did not do any further analysis of the historical development of employment law in New York as it relates to the issue of duration of contracts. Second, Feinman asserts that the 1895 Martin case effected a dramatic change in New York law because New York's highest court adopted Wood's rule in this case.\textsuperscript{68} He arrives at this conclusion because this is the first case in which the New York Court of Appeals made express reference to Wood's rule.\textsuperscript{69} Third, Feinman asserts that a change in the legal status of middle-level management employees occurred in the late-nineteenth century whereby courts rejected the application of the annual hiring rule to these

\textsuperscript{63} \textit{Id.} at 118.
\textsuperscript{64} \textit{Id.} at 131-32.
\textsuperscript{65} \textit{Id.} at 133-34.
\textsuperscript{66} Adams v. Fitzpatrick, 26 N.E. 143 (N.Y. 1891) (affirming judgment that plaintiff's contract was renewed for one year); Davis v. Gorton, 16 N.Y. 255 (1857) (holding that an indefinite hiring is taken to be a hiring for a year, or from year to year).
\textsuperscript{67} Feinman, \textit{supra} note 62, at 127.
\textsuperscript{68} Feinman, \textit{supra} note 62, at 128-29.
\textsuperscript{69} See Feinman, \textit{supra} note 62, at 128.
workers. He bases this conclusion on his analysis of thirty cases that arose in New York during the two decades after the issuance of Martin. These cases dealt with the duration of employment contracts.

This article will revisit these three assertions as well as Feinman's ultimate conclusion. The first part will examine Feinman's assertion that New York courts often applied the annual hiring rule prior to 1895. The second part will focus on his finding that Martin effected a dramatic change in New York law. The third part will address whether a radical change in the law regarding the duration of employment contracts for middle-management employees did occur in the late-nineteenth century. The conclusion of this article is that Feinman was wrong on all three counts. There is little evidence that New York followed the annual hiring rule at any time in its history. Indeed, the historical evidence suggests the contrary — New York always followed the employment at will doctrine. Thus, Martin did not effect a dramatic change in New York law and no radical change occurred in the late-nineteenth century with respect to the duration of employment contracts for middle-management employees.

II. THE ANNUAL HIRING RULE IN NEW YORK PRIOR TO 1895

The traditional view is that the English annual hiring rule was brought to this country during colonial times and remained unchanged until the late-nineteenth century when U.S. courts adopted the employment at will doctrine. Feinman stated that prior to the nineteenth century, the colonists generally applied the annual hiring rule to agricultural and domestic workers, but excluded day laborers. However, in the nineteenth century, Feinman noted that "whatever consensus existed about the state of the law dissolved." He arrived at this conclusion based on a reading of the nineteenth century treatises that dealt with master-servant law. One 1846 treatise noted

70. Feinman, supra note 62, at 132-33.
71. Feinman, supra note 62, at 128.
73. See Feinman, supra note 62, at 128-29.
74. See Feinman, supra note 62, at 132-35.
75. See supra notes 40-42 and accompanying text.
76. Feinman, supra note 62, at 122.
77. Feinman, supra note 62, at 122.
78. Feinman, supra note 62, at 122-24. One explanation for the confusion in the law could be rooted in the treatises that were available during the first two-thirds of the 19th century. Many of them were English treatises with American footnotes. See, e.g., CHARLES M. SMITH, A TREATISE
that the annual hiring rule did not apply in Connecticut,79 while Smith's treatise on master-servant law,80 which was published in 1852 and represented the first treatise devoted to U.S. law on the topic, noted that there was a "presumption that a general hiring was a yearly hiring for all servants."81 This presumption was rebuttable by evidence to the contrary.82 However, based on a 1857 New York case, Davis v. Gorton,83 Feinman concluded that New York followed the English annual hiring rule.84 A review of New York law from the colonial period to 1895, however, suggests that the Davis case was inaccurate. New York did not generally follow the annual hiring rule at any time in its history. Although one may find isolated examples of lower courts applying the rule,85 New York colonial law, the decisions of New York's highest courts Davis notwithstanding, and a review of other historical evidence supports the conclusion that New York, beginning in colonial times, always followed the employment at will rule.86

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81. Id. at 41.
82. Id. at 47; see also Feinman, supra note 62, at 123.
83. 16 N.Y. 235 (1857) (holding that the English rule of yearly hiring was still in effect in New York).
85. See, e.g., Greer v. People's Tel. Co., 50 N.Y. Sup. Ct. 517 (App. Div. 1884) (holding that remaining in service for any time past the completion of a yearly contract by the consent of an employer renews the contract for one year).
86. A more detailed discussion of the historical development of employment-at-will in New York can be found in Deborah A. Ballam, The Traditional View on the Origins of the Employment-at-Will Doctrine: Myth or Reality?, 33 AM. BUS. L.J. 1 (1995). This article also examines the development of the law in Massachusetts, Pennsylvania, and Maryland. In a subsequent article, Deborah A. Ballam, Exploding the Original Myth Regarding Employment-at-Will: The True Origins of the Doctrine, BERKELEY J. EMPL. AND LAB. LAW (forthcoming 1996), I examined five additional states: Georgia, Illinois, Texas, Montana, and California. My conclusions in the two articles are the
Because no legal tradition existed in the colonies at the time of their founding, colonial law was largely codified law.\textsuperscript{7} The New York colony's codification contained laws regulating the master-servant relationship.\textsuperscript{8} However, these statutes made no mention of the duration of the employment term for free laborers. The absence of such a provision is significant because for a brief duration, the Massachusetts colonial codification contained a provision adopting the annual hiring rule.\textsuperscript{8} One reasonable conclusion that can be derived from the absence of the annual hiring rule from a New York's statute regulating relations between employer and employee is that colonial New York lawmakers intentionally rejected the annual hiring rule in favor of employment at will. Such a conclusion is consistent with actual employment practices, as will be discussed later.\textsuperscript{9}

A review of cases from New York's highest courts, issued after New York became a state, also suggests that the annual hiring rule was
not utilized in New York at any time during the nineteenth century. From 1799, when New York decisions began to be reported, until the issuance of Martin in 1895, the state's highest courts issued twenty-seven decisions that addressed the employment relationship. Seven involved the "entire contracts" issue of whether when a fixed duration for the employment contract does exist, do employees sacrifice their wages when they leave prior to the expiration of the contract term. Eight were wrongful discharge actions alleging termination prior to the expiration of the fixed term of the contract, and the remaining twelve dealt with a variety of employment issues.

91. Wolfe v. Howes, 20 N.Y. 197 (1859) (holding that where performance is rendered impossible by the death of a party, recovery may be had for actual labor done); Monell v. Burns, 4 Denio 121 (N.Y. 1847) (holding that where a party contracts to work for a fixed period and resigns without cause before the expiration of the term, that party may not recover for work completed); Marsh v. Rulesson, 1 Wend. 515 (N.Y. Sup. Ct. 1828) (holding that the period of service for a contract is a condition precedent to be performed before payment for service can be demanded); Reab v. Moor, 19 Johns. 337 (N.Y. Sup. Ct. 1822) (holding that in a fixed period employment contract, the work for the whole period is a condition precedent to be performed before a party can sue for hire); Lantry v. Parks, 8 Cow. 63 (N.Y. 1827) (holding that where a party abandons performance of a contract without cause, that party cannot maintain an action for labor actually performed); Thorpe v. White, 13 Johns. 53 (N.Y. Sup. Ct. 1816) (holding that in the context of a fixed period employment contract, the servant cannot recover wages until the servant has served the whole period); M'Millan v. Vanderlip, 12 Johns. 165 (N.Y. Sup. Ct. 1815) (holding that a contract for a specified period is entire and must be performed as a condition precedent before an action can be brought for labor completed).

92. Linton v. Unexcelled Fireworks Co., 124 N.Y. 533 (1891) (holding that the burden is on an employer to justify the dismissal of an employee prior to the expiration of the fixed term of a contract); Paine v. Howells, 90 N.Y. 660 (1882) (holding that an employer waives its right to declare a forfeiture of compensation when it does not discharge an employee for just cause); Emerson v. Powers, 89 N.Y. 527 (1882) (holding that an employee may bring an action for wrongful dismissal prior to the expiration of the term of the contract); Parry v. Dickerson, 85 N.Y. 345 (1881) (holding that a judgment for wrongful dismissal does not bar subsequent action for wages earned prior to the wrongful dismissal); Gifford v. Waters, 67 N.Y. 80 (1876) (holding that a wrongfully discharged employee may recover damages estimated from criteria fixed in the contract); Howard v. Daly, 61 N.Y. 362 (1875) (holding that where an employer repudiates a contract, the employee may recover damages for breach of the contract); Costigan v. Mohawk & Hudson R.R., 2 Denio 77 (N.Y. 1846) (holding that where an employer wrongfully discharges an employee before the expiration of a fixed term, it is generally bound to pay the full amount of the contracted wages); Haywood v. Miller, 3 Hill 90 (N.Y. Sup. Ct. 1842) (holding that a servant has an action in assumpsit for breach of contract when evicted from quarters provided for in the employment contract).

93. Douglass v. Merchants' Ins. Co., 118 N.Y. 484 (1890) (holding that an employer may discharge an employee at any time provided that no contract exists abridging the employer's right of removal); Lacy v. Getman, 119 N.Y. 109 (1890) (holding that the death of an employer terminates the employment contract, allowing the employee to recover only the proportionate amount earned at the time of the death); In re Gardner, 103 N.Y. 533 (1886) (holding that a statute of limitations precludes recovery for any services rendered more than six years before a partial payment was made); Turner v. Kouwenhoven, 100 N.Y. 115 (1885) (holding that no recovery can be had for partial performance of a contract unless performance was prevented by an act of God or some other
These cases are notable because not one of them applied the annual hiring rule. Further, they illustrate the widespread use in the nineteenth century of express contracts, specifying the term of labor, even for unskilled positions. This practice was consistent with an economy characterized by a scarcity of labor, which existed throughout much of the eighteenth and the first half of the nineteenth centuries in all of North America.\footnote{See Marcus W. Jernehan, Laboring and Dependent Classes in Colonial America, 1607-1783, at 55 (1931); Paul W. Gates, The Farmers' Age: Agriculture, 1815-1860, at 271-78 (1960).} Employers were anxious to ensure themselves a labor supply for a fixed period and attempted to bind their employees by express contracts.\footnote{See generally Gates, supra note 94, at 271-75.} Moreover, while some of these contracts were for a term of one year, others varied widely—ten and a half months,\footnote{See, e.g., M'Millan v. Vanderlip, 12 Johns. 165, 166 (N.Y. 1815).} eight months,\footnote{See, e.g., Reab v. Moor, 19 Johns. 337, 339 (N.Y. 1822).} fourteen days,\footnote{See, e.g., Marsh v. Ruleson, 1 Wend. 515 (N.Y. 1828).} seven months—suggesting that some employers were willing to be bound to contracts only for the specific period needed, rather than an automatic one year period.

Although the earliest reported New York case that addressed the issue of duration of contracts was issued in 1815,\footnote{16 N.Y. 255 (1857).} it was not until the 1857 case of Davis v. Gorton,\footnote{16 N.Y. 255 (1857).} that the New York courts even mentioned the existence of an annual hiring rule. While the language in Davis indicates that New York followed the English annual hiring rule, sufficient legal excuse); Swift v. City of New York, 83 N.Y. 528 (1881) (holding that the police department of the City of New York is merely a subdivision of the City government and therefore cannot be sued upon a liability incurred through it; the remedy is by mandamus); Weed v. Burt, 78 N.Y. 191 (1879) (holding that a wrongfully dismissed employee has an action for damages for breach of the contract); Smith v. Velis, 60 N.Y. 106 (1875) (holding that in an employment at will situation, subsequent agreements fixing wages for a specified period do not raise the presumption that future wages will be the same); Huntington v. Claffin, 38 N.Y. 182 (1868) (holding that dismissal for just cause works the forfeiture as a voluntary abandonment of service); Bergin v. Wemple, 30 N.Y. 319 (1864) (holding that an employer, upon a promise of compensation, is liable in an action for work and labor performed); Davis v. Gorton, 16 N.Y. 255 (1857) (holding that if services are performed under a general retainer, the law will regard the hiring as year to year); Whitmarsh v. Hall, 3 Denio 375 (N.Y. Sup. Ct. 1846) (holding that an infant may recover for partial performance even if he leaves the employment without cause); Woodward v. Washburn, 3 Denio 369 (N.Y. Sup. Ct. 1846) (holding that an employer may sue for the loss of the employee's services where that loss is caused by imprisonment of the employee).
rule, as Feinman concluded, the case itself does not apply the rule.

The point at issue in Davis was not the duration of an employment contract. Rather, the issue was whether the Davis family, which had lived on and worked Mrs. Davis’ father’s farm for thirteen years with no express agreement and without receiving any compensation, could collect from the father’s estate for services performed. The precise legal issue in the case was whether New York’s six-year statute of limitations, which began to run at the termination of the contract, prohibited recovery for the entire thirteen years of work or for merely the first seven years of work. To resolve this issue, the court had to determine the termination date of the contract. If it were viewed as a single thirteen year contract, then the statute of limitations would not operate to bar recovery for any part of the claim. If, however, it were viewed as thirteen one-year contracts, then the statute of limitations would bar recovery for the first seven annual contracts. The court rejected the argument that this was one thirteen-year contract because such a contract would have been extremely unusual. Rather, in determining that this was a series of thirteen one-year contracts, the court compared the Davis’ arrangement to “the hiring of clerks, servants in husbandry and other similar employments, in which ... to give each party the benefit of all the seasons during the year, an indefinite hiring is taken to be a hiring, for a year, or from year to year ....” The court cited two English cases, but no U.S. nor New York cases, to support the assertion that the annual hiring rule applied in New York.

Although the court in Davis clearly made reference to the annual hiring rule, the case itself is not an example of an application of the rule. Furthermore, subsequent New York cases did not regard Davis as having adopted the annual hiring rule. Until the issuance of the 1895 Martin decision, Davis was cited eight times by New York courts.

103. Id. at 127-28.
104. Davis, 16 N.Y. at 256.
105. Id.
106. See id.
107. Id. at 257.
108. Id. at 256-57.
109. Id. at 257.
111. Davis, 16 N.Y. at 257.
seven of which involved the issue of whether the statute of limitations had run on claims against estates and one time in a case involving the duration of an employment contract. The Jagau court, in the employment contract case, cited Davis to support the proposition that when no duration is expressly agreed upon but wages are stated on a monthly basis, a month-to-month contract is created. This case represented an attempt to determine the parties' intent based upon the agreed payment terms, rather than an application of an automatic hiring rule.

New York's highest court made no further reference to the English annual hiring rule until the 1891 case of Adams v. Fitzpatrick. Adams' initial employment contract specified a duration of one year. At the end of the first year, Adams continued working for the employer even though no express extension of the original contract was agreed upon. When Adams was dismissed in the middle of the second year, he sued to secure his salary for the remainder of the year, arguing that when he began working for the second year, the original contract terms were automatically renewed. The court agreed with Adams, citing

113. In re Gardner, 9 N.E. 306 (N.Y. 1886) (under six year statute of limitations, where there was no express agreement regarding time or amount of compensation, plaintiff could recover only for services rendered during the six years prior to the first payment made); Burnett v. Noble, 5 Redfield 69 (N.Y. Co. Sur. Co. 1880) (where implied contract existed, compensation was barred by the statute of limitations for services rendered more than six years prior to the death of the testatrix); In re Teyn, 2 Redfield 306 (N.Y. Co. Sur. Ct. 1876) (where agreement for compensation is found between estate's executors and another party, the law will find it to be a yearly contract, and the statute of limitations as to each yearly contract will begin to run at the end of that year); Nicholl v. Larking, 2 Redfield 236 (N.Y. Co. Sur. Ct. 1876) (absent an agreement to the contrary, an implied contract for compensation runs from year to year, and the statute of limitations for each contract begins to run from the end of that year); Turner v. Martin, 27 N.Y.S. 661 (Sup. Ct. 1865) (where the plaintiff delivered to the defendant a brown stone for a house being constructed, the court held the law implies a contract immediately upon the delivery of the stone, thus the statute of limitations begins to run at such time); Rider v. Trotter, 28 N.Y. 385 (1863) (where the plaintiff left certain chattels in the possession of the defendants under the expectation that the latter would purchase them and the defendant's agent used the same in their business under the belief that they had been purchased, the court held that the statute of limitations was no bar to an action for the use of this property during the six years immediately preceding the commencement of this suit); Carney v. Wadhams, 9 N.Y. Civ. Pro. 204 (1885) (where the plaintiff was employed by the deceased, referee found statute of limitations would bar recovery for work performed more than six years prior to the death of the testator).

115. Id. at 146. 
116. See id.
117. 26 N.E. 143 (N.Y. 1891).
118. Id. at 144.
119. Id.
120. Id. at 143.
Wood's 1877 treatise as well as a number of cases from New York and other states that held that when parties expressly agree on contract terms and the services continue beyond the originally-agreed upon time, the original terms are impliedly renewed. This holding, however, does not equate to the application of the annual hiring rule, which is applied absent any original agreement among the parties. However, the confusion about the Adams case regarding the applicability of the annual hiring rule arises from dicta which suggested that the annual hiring rule did apply in New York state. To support its assertion, the Adams court cited two English cases and a U.S. treatise on master-servant law. However, the decision failed to note that Schouler's treatise specified that the annual hiring rule was based on English rather than U.S. law. Moreover, although the decision cited Wood's 1877 treatise for the proposition that a contract is impliedly renewed once the employee continues working beyond the original agreed upon time, it failed to note Wood's additional assertion that employment at will, rather than the annual hiring rule, was the norm in the U.S. Thus, it appears that the dicta in Adams was flawed, and that it was based on a sloppy reading of the treatises. The discussion of the annual hiring rule was not necessary in Adams, a point specifically eluded to by the Martin court. It is unclear why the Adams court even included it within the opinion. The 1895 Martin case, which specifically rejected the Adams court's discussion of the annual hiring rule, thus appeared to adopt the employment at will doctrine. How-

121. HORACE G. WOOD, MASTER AND SERVANT (Albany, Parsons 1877).
124. Adams, 26 N.E. at 145.
125. Id. The court stated that "the rule still is that, if master and servant engage without mentioning the time or frequency of payment, it is a general hiring, and, in point of law, a hiring for a year." Id.
126. Fawcett v. Cash, 5 Barn. & Adol. 904 (1834) (where the court found a contract for one year when plaintiff entered the service of the defendant, who agreed to pay the plaintiff a set sum per month for the first year); Emmens v. Elderton, 4 H.L. Cas. 624 (1853) (where the court found a promise to employ plaintiff, an attorney, for a term of one year).
128. SCHOULER, supra note 127, § 438.
129. Adams, 26 N.E. at 145.
130. WOOD, supra note 121, § 134.
132. Id.
However, the twenty-seven New York cases reported prior to *Martin*, none of which applied the annual hiring rule, provide substantial evidence that the rule was not applicable in New York in the first place. Furthermore, the historical evidence regarding actual employment relationships supports the conclusion that New York did not follow the annual hiring rule.

Until the late-nineteenth and early-twentieth centuries, in New York and indeed throughout the country as a whole, agriculture provided the bulk of employment opportunities. It was not until 1870 that the number of non-agricultural workers equaled that of agricultural workers. Evidence regarding employment terms for New York agricultural workers can be found both in the reported cases and in historical descriptions of agricultural labor. As early as 1815, New York courts suggested in dicta that agricultural hirings were subject to express agreement and not to an automatic hiring rule. The issue in *M'Millan* was whether a skilled laborer, who had agreed to work for a ten and one-half month period, had a right to collect for work done if he left before the expiration of the agreed upon time period. In holding that the entire contract had to be performed before the worker could sue for wages due, the court noted that the policy supporting its holding was that the employer had a right to the full benefit of the

133. Linton v. Unexcelled Fireworks Co., 124 N.Y. 533 (1891); Lacy v. Geltman, 119 N.Y. 109 (1890); Douglas v. Merchants’ Ins. Co., 118 N.Y. 484 (1890); In re Gardner, 103 N.Y. 533 (1886); Turner v. Kouwenhoven, 100 N.Y. 115 (1885); Emerson v. Powers, 89 N.Y. 527 (1882); Paine v. Howells, 90 N.Y. 660 (1882); Parry v. Dickerson, 85 N.Y. 345 (1881); Swift v. City of New York, 83 N.Y. 528 (1881); Weed v. Burt, 78 N.Y. 191 (1879); Gifford v. Waters, 67 N.Y. 80 (1876); Howard v. Daly, 61 N.Y. 362 (1875); Smith v. Volle, 60 N.Y. 106 (1875); Huntington v. Claffin, 38 N.Y. 182 (1868); Bergin v. Wemple, 30 N.Y. 319 (1864); Wolfe v. Howes, 20 N.Y. 197 (1859); Davis v. Gorton, 16 N.Y. 255 (1867); Monell v. Burns, 4 Denio 121 (N.Y. 1847); Costigan v. Mohawk and Hudson R.R., 2 Denio 77 (N.Y. 1846); Whitmarsh v. Hall, 3 Denio 375 (N.Y. 1846); Woodward v. Washburn, 3 Denio 367 (N.Y. 1846); Haywood v. Miller, 3 Hill 90 (N.Y. 1842); Marsh v. Rulison, 1 Wend. 515 (N.Y. 1828); Reab v. Moor, 19 Johns. 337 (N.Y. 1822); Lantry v. Parks, 8 Cow. 63 (N.Y. 1827); Thorpe v. White, 13 Johns. 53 (N.Y. 1816); M’Millan v. Vanderlip, 12 Johns. 165 (N.Y. 1815).


135. See *Clarence H. Danoff, Change in Agriculture: The Northern United States, 1820-1870*, at 10 (1939).


137. See, e.g., *M’Millan v. Vanderlip, 12 Johns. 165* (N.Y. 1815) (where plaintiff was unable to recover for work performed because he did not perform the work as agreed upon in the contract).

138. *Id.*

139. *Id.*

140. *Id.* at 166.

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bargain made.\textsuperscript{141} In dicta the court stated that "the general practice, in hiring laborers or artisans, is, for 6 or 12 months, at so much per month: the farmer hires a man for 6 or 12 months, at monthly wages; and he takes his chance of the good, with the bad months."\textsuperscript{142} Because the employer is bound for the agreed upon time, the employee also must be bound and cannot collect unless the entire contract is performed.\textsuperscript{143} In a specific reference to farm labor, the court noted that to hold otherwise would disadvantage an employer who had kept the employee on during slow work periods, only to have the employee leave during the heavy work season causing the employer to be short-handed.\textsuperscript{144}

Two aspects of the \textit{M'Millan} decision provide evidence suggesting that no automatic hiring rule was recognized in New York. First, the court's notation that hirings of laborers or artisans usually were for either six or twelve months suggests that there was no automatic hiring period.\textsuperscript{145} If such an automatic period existed, it would be for one time period. The fact that there is a choice of six or twelve months suggests that the parties had to agree on a time period. Second, in a discussion on how to properly interpret the contract, the court noted that the modern practice is to interpret contracts "according to the real intentions of the parties" and not according to "subtle notions" of technical rules.\textsuperscript{146} This dictates that the clear intentions of the parties also govern the duration of the contract.

However, because the actual issue in \textit{M'Millan} was not the annual hiring rule, one cannot arrive at any definitive conclusions regarding the existence of that rule based solely on this case. Subsequent agricultural labor cases, however, support the notion that parties customarily agreed upon the duration of employment and did not rely on an annual hiring rule.\textsuperscript{147} First, there were no agricultural labor cases which involved an

\textsuperscript{141} \textit{Id.} at 167. The Court used the example of a farmer who hires a laborer for one year. \textit{Id.} The laborer will perform more work in the summer than in the winter, but the farmer bargains for work in its entirety. \textit{Id.}

\textsuperscript{142} \textit{Id.}

\textsuperscript{143} \textit{See} \textit{Id.} at 166.

\textsuperscript{144} \textit{Id.} at 167.

\textsuperscript{145} \textit{See} \textit{Id.}

\textsuperscript{146} \textit{Id.} at 166.

\textsuperscript{147} \textit{See}, \textit{e.g.}, \textit{Marsh v. Rulesson}, 1 Wend. 515 (N.Y. 1828) (holding that because plaintiff left employment without cause he was not entitled to recover for work performed); \textit{Monell v. Burns}, 4 Denio 121 (N.Y. 1847) (based on the plaintiff's seven month employment contract allowing either party to abandon the agreement if they were dissatisfied, the court held that the plaintiff could not recover for work after leaving the job without alleging any dissatisfaction); \textit{Bergin v. Wemple}, 30 N.Y. 319 (1864) (holding that if the helper of a country poor house employs one of the paupers residing therein to perform services for his individual benefit upon a promise of compensation, the
alleged breach of the annual hiring rule. Second, three of the six agricultural labor cases that were reported involved express contracts for specific time periods that were neither for six or twelve months; one was for fourteen days, the other for seven months, and one was for eight months. The other three were one-year contracts. Two of these referred to a contract for one year, although the cases do not reflect how that one-year period was derived. The third, however, an 1842 case, indicated that the parties had a written contract that specified a one-year term of service.

The reported cases provide no support for the notion that New York used the annual hiring rule for agricultural labor. Instead, they affirmatively suggest that the rule did not apply. Historical evidence regarding agricultural employment practices is consistent with the cases. Farmers' account books from eighteenth century New York reflect frequent hiring of agricultural laborers, but only for a few days at a time. The prevalence of these short-term hirings were likely due to two factors. First, many eighteenth century farms were small and a permanent labor force was not needed. Second, to the extent that permanent labor was needed, indentured servants who were bound to multi-year express contracts and for whom the master generally had to provide only room and board, but no wages, were readily available to fill the need and were preferred over hiring (on a long-term basis) free labor which was both

149. Monell v. Burns, 4 Denio 121 (N.Y. 1847).
152. Haywood v. Miller, 3 Hill 90 (N.Y. 1842).
153. Id. at 90.
155. See generally Gates, supra note 136, at 22-50.
scarce and expensive.\textsuperscript{156} Evidence from other states is consistent with New York practices regarding agricultural laborers. Farms tended to hire indentured servants for long-term labor and hired free labor only for shorter periods of time.\textsuperscript{157} Although indentured servitude began to fade by the first third of the nineteenth century,\textsuperscript{158} there is no evidence to suggest that farmers' employment practices with respect to free labor changed in the nineteenth century.

After agriculture, the two other prevalent forms of labor in the nineteenth century consisted of domestic labor and manual labor — both skilled and unskilled.\textsuperscript{159} The practice with respect to these categories of labor appears to have been similar to that of agricultural labor.\textsuperscript{160} There is no evidence within the case law or the historical information that suggests that the annual hiring rule was applied to these categories of labor. Although dicta in an 1846 case indicated that domestic servants must be given one month's notice of termination,\textsuperscript{161} the only other case from New York's highest court on the employment term for domestic servants, issued in 1875,\textsuperscript{162} expressly rejected the argument that "a contract from year to year" would be implied for such services absent evidence that this was the parties' intent.\textsuperscript{163} Actual employment practices also provide no evidence that the annual hiring rule applied to domestic labor. Eighteenth-century employers' diaries described a severe shortage of domestic servants and complained that because of the shortage, domestic workers could easily change jobs and did so frequently.\textsuperscript{164} Evidence from the nineteenth century indicates that many domestic


\textsuperscript{158} The Traditional View, \textit{ supra} note 157, at 7.

\textsuperscript{159} The Traditional View, \textit{ supra} note 157, at 27-30.

\textsuperscript{160} The Traditional View, \textit{ supra} note 157, at 30.

\textsuperscript{161} Costigan v. Mohawk & Hudson R.R. Co., 2 Denio 609, 612 (N.Y. 1846).

\textsuperscript{162} Smith v. Velie, 60 N.Y. 106 (1875).

\textsuperscript{163} Id. at 110.

\textsuperscript{164} See Mary B. Norton, \textit{Liberty's Daughters: The Revolutionary Experience of American Women, 1750-1800}, at 22-23 (1980) (discussing diaries and letters of women who "did largely as they pleased, knowing that with the endemic American shortage of labor they could always find another position.").
servants remained in their positions for only a few months, and that some were hired for a short term to perform specific tasks such as "spring cleaning," while others assisted with domestic chores during the few months of the harvest season. Historical evidence also suggests that domestic servants were subject to arbitrary dismissals with no notice whatsoever, a practice consistent with employment at will.

Similar evidence exists with respect to manual labor. During both the eighteenth and nineteenth centuries, skilled laborers generally were paid by the piece, and were not considered bound to any term of employment, absent an express contract to the contrary. Unskilled laborers generally worked on a day to day basis and had no job security. In fact, by the early nineteenth century employers began to prefer free, unskilled labor over indentured servants because of the absence of long-term commitment to the free laborers. By the 1840s, factory labor became more prevalent in New York. Factory employment was tied to economic conditions and seasonal demands for products with the result that factory workers were subject to frequent lay-offs. Employment at will, then, was always the standard for manual labor.

Even though the dicta in Davis v. Gorton and Adams v. Fitzpatrick suggests otherwise, there is no evidence in the case law or in the descriptions of actual employment practices of agricultural laborers, domestic servants, and manual laborers which would indicate that the annual hiring rule was applied to any category of free labor in New York during the eighteenth or nineteenth centuries. Rather, employment at will appears to have been the standard practice for all categories of labor from colonial times through the nineteenth century. Thus, New York, contrary to Feinman's conclusion, did not follow the annual hiring rule prior to the 1895 Martin case.
III. THE SIGNIFICANCE OF *MARTIN v. NEW YORK LIFE INS. CO.*

Feinman asserted that New York effected a dramatic change in its law by adopting Wood’s employment at will rule in the 1895 case of *Martin v. New York Life Insurance Co.* However, the preceding analysis indicates that employment at will was always the standard and that the *Martin* case merely articulated a long-standing practice. What, then, was the significance of *Martin*? Although *Martin* did not adopt the employment at will principle, it did clarify an important issue in employment law. Prior to *Martin*, New York courts differed on how to interpret an agreement to pay an employee at a rate stated by a specific time period. Some courts held that a rate stated for a specific time period equated to a contract for that same period, while others held that the stated rate was nothing but a payment term that did not constitute an agreement to employ for a specific length of time.

In *Martin*, the New York Court of Appeals settled this issue by holding that a salary stated at an annual rate did not create a contract for that same time period. In its decision, the court quoted approvingly from Wood’s 1877 treatise:

In England it is held that a general hiring, or a hiring by the terms of which no time is fixed, is a hiring by the year. . . . With us, the rule is inflexible that a general or indefinite hiring is, prima facie, a hiring at will; and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. . . . A contract to pay one $2,500 a year for services is not a contract for a year, but a contract to pay at the rate of $2,500 a year for the services actually rendered, and is determinable at will by either party. Thus, it will be seen that the fact that the compensation is measured by so much a day, month, or

173. 42 N.E. 416 (N.Y. 1895).
175. *See supra* notes 56-74 and accompanying text.
176. *See, e.g.*, Jagau v. Goetz, 32 N.Y.S. 144 (Com. Pl. 1895) (holding that a month-to-month contract is implied from an agreement to pay wages on a monthly basis).
177. *See, e.g.*, Douglass v. The Merchants’ Ins. Co., 118 N.Y. 484 (1890) (holding that the statement of the salary at an annual basis did not equate to an agreement to employ for the year).
year does not necessarily make such hiring a hiring for a day, month, or year, but that in all such cases the contract may be put an end to by either party at any time, unless the time is fixed, and a recovery had at the rate fixed for the services actually rendered.\textsuperscript{179}

Thus, it is obvious that the decision contains a clear statement of support for the employment at will doctrine. However, a statement of approval does not equate to an adoption. The doctrine of employment at will had long been followed in New York.\textsuperscript{180} The significance of the case, however, is that it clarified the legal effect of payment terms. After \textit{Martin}, payment terms were to be interpreted as rates of pay and not as commitments to a fixed duration for an employment contract.\textsuperscript{181} This was a significant decision, but did not represent the dramatic break in the law as portrayed by Feinman.\textsuperscript{182}

IV. THE STATUS OF EMPLOYMENT CONTRACTS FOR MIDDLE-LEVEL MANAGERS

Feinman further asserted that \textit{Martin} signaled the beginning of a series of cases that effected a dramatic change in the legal treatment of employment contracts of middle-level managers.\textsuperscript{183} Before \textit{Martin}, Feinman argued, middle-level management employees enjoyed a "presumption of long-term hiring or reasonable notice."\textsuperscript{184} \textit{Martin} signaled the beginning of a trend whereby "the courts substituted a new presumption of termination at will."\textsuperscript{185} Feinman concluded that this change was effected in order to guarantee the "capitalist's authority over the worker. . . . If employees could be dismissed on a moment's notice, obviously they could not claim a voice in the determination of the conditions of work or the use of the product of their labor."\textsuperscript{186}

\textsuperscript{179} Id.
\textsuperscript{180} See supra notes 86-90 and accompanying text.
\textsuperscript{181} See \textit{Martin}, 42 N.E. at 417.
\textsuperscript{182} Indeed, a majority of states did not change the rate of pay rule until well into the first half of the twentieth century. Sanford M. Jacoby, \textit{The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis}, 5 \textit{COMP. LAB. L.} 85, 114 (1982). Thus, although the rate of payment rule changed in 1895 for New York's middle-level management employees, it did not immediately change for middle-level management employees in many other states. \textit{Id.} at 114-15.
\textsuperscript{184} \textit{Id.} at 129.
\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Id.} at 132-33.
Feinman’s conclusion presumes that capitalists were unable, through contractual arrangements, to escape from the burden of long-term employment contracts with their middle-level managers and required a change in the law in order to gain this freedom. An analysis of pre-Martin cases from New York which dealt with the employment contracts of middle-level managers illustrates three points.

First, no reported cases applied the annual hiring rule to middle-level managers. Second, as was the case with other types of employment relationships, case law suggests that contracts for middle-level management employees were often express contracts for specific time periods. The same scarcity of labor that promoted the use of express contracts for agricultural and other types of non-skilled labor in the first part of the nineteenth century likely accounted for the use of express contracts for middle-level management employees. For example, an 1871 Connecticut case indicates that a corporation entered into a two-year express contract with a factory foreman because no competent foreman “could be had for less than two years.”

Third, employers already possessed the legal tools necessary to avoid long-term commitments to their middle-level managers, and no change in the law was necessary to empower them to dismiss at will. Two pre-Martin New York cases provide evidence that employers had the ability to negotiate contracts that gave them the freedom to dismiss at will. In Douglass v. Merchants’ Insurance Co., the issue was whether a corporate secretary, who had served for twenty-eight years, could be dismissed without notice and with no pay for the remainder of the year during which he was terminated. In rejecting the employee’s claim that he had an annual contract because his pay was stated on an annual basis, the court noted that the corporation’s 1850 by-laws, which were in effect when the

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187. See, e.g., Linton v. Unexcelled Fireworks Co., 124 N.Y. 533 (1891) (express written contract for two and one-half years for a factory superintendent); Drake v. Seaman, 97 N.Y. 230 (1884) (express contract for three year period for a salesman); Paine v. Howells, 90 N.Y. 660 (1882) (express contract for two year period for a salesman); Gifford v. Waters, 67 N.Y. 80 (1876) (express contract for one year period for a clerk).


189. One might ask why employers needed these contractual tools if the annual hiring rule was not recognized in New York. While they did not need to protect themselves from the operation of the annual hiring rule, they could use them to protect themselves against the operation of the payment of wages rule and the rule that an express contract for a specific period is impliedly renewed for the same time period if the employee continues working beyond the original period without entering into another express contract.

190. 118 N.Y. 484 (1890).

191. See id. at 486.
plaintiff originally was hired by the corporation, "provided that 'the president, vice-president, secretary, surveyor and clerks shall respectively hold their offices during the pleasure of the board of directors.'"192 This provision, the court noted, permitted the corporation to dismiss the plaintiff without notice and without any obligation of paying his salary beyond the time actually served.193 This case suggests, then, that as early as 1850, corporations knew how to ensure that they could dismiss employees at any time.

An 1881 case, *Swift v. City of New York,*194 provided an example of another means by which employers could guarantee their right to dismiss employees at will.195 The plaintiff in *Swift* had been hired to remove debris from the city's streets.196 The employment contract, which was entered into in 1874, provided that the plaintiff was to be paid $800 per month "so long as his employment should continue."197 The court interpreted this language as making the contract "terminable at the pleasure" of the employer.198 Although the plaintiff's position was not what one would consider a middle-level management job, presumably the language "so long as his employment should continue"199 would be interpreted similarly regardless of the position held. These two cases illustrate the approaches employers could take if they wanted to guarantee their ability to dismiss employees at any time with no liability. Thus, decades before *Martin* was decided, New York employers had the ability to contractually clarify that their employment contracts were at will. They did not need the judiciary to change the law to achieve this.

Although employment at will was not suddenly adopted in the late-nineteenth century in order to allow capitalists to assert control over middle-level management employees, a significant change in the law that had its greatest impact on middle-level management employees did occur during this time. Feinman analyzed thirty decisions issued by New York courts that addressed the duration of employment issue in the two decades following *Martin.*200 While these cases do not support

192. *Id.* at 486-87.
193. *Id.* at 488.
194. 83 N.Y. 528 (1881).
195. *Id.*
196. *Id.* at 530.
197. *Id.*
198. *Id.*
199. *Id.*
Feinman's conclusion that they extended the adoption of employment at will, they do illustrate two important changes in employment contract interpretation. Prior to this line of cases, courts often interpreted payment terms stated by particular time periods as employment contracts for that same duration. In addition, some courts held that if the parties expressly agreed to employment for a specific duration, the contract was impliedly renewed for the same duration if the employee continued working beyond the original term without an additional express contract. Martin and its progeny eliminated these two doctrines. As a result, salary stated by a time period was no longer interpreted as a promise to employ during that same duration, and express contracts were no longer considered to be impliedly renewed when the employee continued working beyond the original term.
tant changes, they were not the radical changes suggested by Feinman.

One can not know with certainty the true motivations of the judiciary in effecting change in legal doctrine. It may be the case that the courts that made these changes to contract interpretation were motivated out of a desire to support the capitalist class' wishes to maximize control over its work force. However, since employers had already possessed the ability to ensure dismissal at any time through recognized contract doctrines, Feinman's explanation does not seem to be a convincing one. A more likely explanation is that offered by Andrew Morriss.\footnote{Andrew P. Morriss, Exploding Myths: An Empirical and Economic Reassessment of the Rise Of Employment at-Will, 59 Mo. L. Rev. 679 (1994).} Morriss, who like Feinman concluded that employment at will was adopted in the late-nineteenth century, argued that courts readily adopted the doctrine because it served a useful gatekeeper function that kept cases from going to trial.\footnote{Id. at 696.} Although this article concluded that employment at will was not suddenly adopted during the late-nineteenth century, Morriss' gatekeeper theory may explain why the courts initiated the two changes in contract interpretation described above.\footnote{See id. By shifting the initial inquiry to the issue of contract duration, courts gave themselves a gatekeeper through which they could control the exercise of jury discretion. The rise of the at-will rule was not, therefore, the response of a compliant judiciary to the demands of its capitalist masters. It was the development of an institutional mechanism which enabled courts to control cases through shifting claims away from juries where judges did not view the juries as reliable.} As a result, a contract for a specific duration would no longer be recognized absent evidence that the parties had expressly agreed to such a duration.

IV. CONCLUSION

An examination of New York law, from colonial times to the

and such a hiring is a hiring at will, and may be terminated at any time by either party."

For a further discussion regarding the court's refusal to recognize a salary stated in annual terms as a guarantee of employment for the length of that period, see Gressing v. Musical Instrument Sales Co., 154 N.Y.S. 420 (Sup. Ct. 1915), rev'd on other grounds, 118 N.E. 627 (N.Y. 1918); Alger v. New York Post Graduate Medical Sch. & Hosp., 140 N.Y.S. 394 (Sup. Ct. 1913); Donoghue v. City of Yonkers, 123 N.Y.S. 315 (Sup. Ct. 1910); Copp v. Colorado Coal & Iron Co., 46 N.Y.S. 542 (City Ct 1897).

\footnote{See id.}

\footnote{See id. at 696.}

\footnote{See id. By shifting the initial inquiry to the issue of contract duration, courts gave themselves a gatekeeper through which they could control the exercise of jury discretion. The rise of the at-will rule was not, therefore, the response of a compliant judiciary to the demands of its capitalist masters. It was the development of an institutional mechanism which enabled courts to control cases through shifting claims away from juries where judges did not view the juries as reliable.}
nineteenth century, and historical evidence regarding working relationships in the dominant types of labor illustrates that New York has always followed the employment at will doctrine. Further, the doctrine was not the creation of a late-nineteenth century judiciary intent on creating a favorable legal climate for business development. However, to conclude that employment at will was not the creation of the judiciary does not negate this article’s opening quote, that “legal doctrine . . . is strongly influenced by economic conditions.”

If one accepts the conclusion that employment at will always was the rule in New York, one must still inquire as to why New York practice differed so dramatically from English law. When the original thirteen colonies were founded, they adopted much of their law from the English, or at least the colonists’ recollection and understanding of English law. Why, then, did New York fail to adopt the English rule of annual hirings? The likely explanation is rooted in economics. Economic conditions in the North American British colonies were very different from those in England that gave rise to the annual hiring rule. While early nineteenth century England was characterized by a labor surplus and a shortage of land, the colonies were characterized by a labor shortage and an abundant supply of cheap land. English employers benefitted from the annual hiring rule because it ensured that they would not keep someone on their payroll during the slack seasons only to have them leave prior to the beginning of the busy seasons. English employees benefitted from the rule for the reverse reason; employers would not be able to hire them for the busy season and cast them off during the slack times. English communities also benefitted from the rule.

Because of the English poor laws, discharged employees, who could not easily obtain other jobs or land of their own because

208. Feinman, supra note 183, at 135.
209. Feinman, supra note 183, at 122.
210. PETER C. HOFER, LAW AND PEOPLE IN COLONIAL AMERICA xi (1992). Very few of the early colonists were lawyers, and thus, the law they brought with them was based on their recollection of legal practices and customs. Id.
211. Feinman, supra note 183, at 131.
213. See id. at 95.
214. Id. at 90.
215. See id. at 95-102; Feinman, supra note 183, at 119-22.
216. Feinman, supra note 183, at 120.
217. See Jacoby, supra note 212, at 90.
of the shortage of property, became charges on their community and the communities bore the brunt of supporting them. The annual hiring rule, then, served a number of interests in England. However, these same factors were not in operation in the colonies. Discharged employees easily found other jobs due to the labor shortage, and the abundance of free land also made it much easier for the colonists to become property owners. In addition, due to the high wages attributable to the labor shortage, employers did not want to make long-term commitments to their employees unless they were lower-cost indentured servants or slaves who basically worked for room and board. Further, the rate of poverty in the colonies was not as high as in England, and many of the poor women and children who were unable to work were forced into indentured servitude. Thus, although in some of the colonies the poor laws made the respective communities responsible for paupers who had resided there for at least one year, the pressures on communities to care for the poor were not as great during the seventeenth and eighteenth centuries as they were in England. Therefore, the economic conditions in the colonies militated against the adoption of the English annual hiring rule.

Certainly the judiciary has played an important role in shaping U.S. law. There also is substantial evidence to suggest that at times the judiciary did help to shape the law in such a way as to create a favorable environment for business development. However, scholars examining legal history need to be wary of reaching conclusions based only on an examination of a few cases, or on reaching conclusions without examining the non-legal historical evidence regarding actual practices. An examination limited to the Davis, Adams, Martin, and post-Martin cases, like the one that Feinman did, could reasonably lead to the conclusion that New York courts suddenly adopted employment at will in the late-nineteenth century in an attempt to protect capital from...

218. See Jacoby, supra note 212, at 90-91.
219. See Jacoby, supra note 212, at 91.
222. For information on U.S. poor laws, see MORRIS, supra note 221, at 14-16; MARCUS W. JERNEGAN, LABORING AND THE DEPENDENT CLASSES IN COLONIAL AMERICA, 1607-1783, at 55 (1931); George Daltsman, Labor and the "Welfare State" in Early New York, 4 LAB. HIST. 248 (1963).
223. Feinman, supra note 183, at 132-34.
middle-level managers. However, a more in-depth analysis of the employment law of New York's colonial days through the nineteenth century, in tandem with the historical evidence regarding employment practices, would clearly lead to a very different conclusion.