Exploding the Original Myth Regarding Employment-At-Will: The True Origins of the Doctrine

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The myth about the “employment at will” rule is that U.S. courts embraced the rule at the end of the nineteenth century because it served the needs of an expanding industrial society. This popular view also holds that courts adopted it based on the treatise writer Horace Wood’s groundless assertion that in the United States, unlike in England, at-will employment was common law. In recent years, this myth has been partially discredited by contemporary scholars, and in this article Professor Ballam completely dispels it: she shows that Wood was in fact correct in stating that at-will employment was the rule throughout the United States prior to its formal adoption by courts (although Wood did not adequately support his assertion). Professor Ballam proves that the nineteenth century courts simply declared the already-existing common law on employment agreements. Recently, Professor Morriss has argued that the courts adopted this rule not for economic reasons but rather to free their dockets of employment cases. In contrast, Professor Ballam demonstrates that it was precisely the nature of U.S. economic growth that gave rise to the rule of at-will employment. Bolstering her earlier study of New England states, she canvasses the economic development of Georgia, Illinois, Montana, Texas and California, identifying the conditions that caused the United States’ practice to deviate from the English rule of seasonal hiring. Professor Ballam concludes that when the courts finally expressly declared the employment at-will rule, they did so because it was already part of the common law that had been established by economic pressures.

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I  
INTRODUCTION

Unless an employment contract expressly specifies a term of employment, an employer may discharge an employee for a good cause, a bad cause, or no cause at all. This 'employment at will' rule, designed to protect freedom of enterprise, was adopted by most American jurisdictions during the last quarter of the 19th century despite its harsh impact on employees... H.G. Wood, who formulated the employment at will rule in his 1877 treatise on master-servant relationships... offered no analysis to justify the assertion of this rule or his rejection of the English tradition. He cited only four American cases as authority for his approach to general hirings, none of which supported him.¹

Authors of law journal articles, of course, inevitably hope to write a cutting edge piece that will change the way the law is understood or applied. The student authors of the note which contained the above quotes realized that fame. Their work became what has been called "the canonical citation for the proposition that at-will employment, in its departure from

¹  J. Peter Shapiro & James F. Tune, Implied Contract Rights to Job Security, 26 STAN. L. REV. 335, 341 n. 53-54 (1974). The four cases Wood cited are: Wilder v. United States, 5 Ct. Cl. 462 (1869), rev’d on other grounds, 80 U.S. 254 (1871); De Briar v. Minturn, 1 Cal. 450 (1851); Tatterson v. Suffolk Mfg. Co., 106 Mass. 56 (1870); Franklin Mining Co. v. Harris, 24 Mich. 115 (1871). Shapiro and Tune argued that none of these cases supported Wood’s assertion that employment-at-will was followed in the United States because they either did not directly address the employment relationship (Wilder and De Briar) or because the juries found an implied intent by the parties to enter into one year contracts (Tatterson and Franklin Mining Co.). As one commentator has pointed out, the Shapiro & Tune article triggered a scholarly debate over whether these cases support Wood’s assertion. Andrew P. Morriss, Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will, 59 MO. L. REV. 679, 680 (1994). For this debate, see Jay M. Feinman, The Development of the Employment-at-Will Rule Revisited [hereinafter Revisited], 23 Ariz. St. L.J. 733 (1991); Mayer G. Freed & Daniel D. Polsby, The Doubtful Provenance of “Wood’s Rule” Revisited, 22 Ariz. St. L.J. 551 (1990); Jay M. Feinman, The Development of the Employment at Will Rule [hereinafter The Development of the Employment at Will Rule], 20 AM. J. LEGAL HIST. 118 (1976).
the English rule that a ‘general’ or indefinite hiring was presumed to be for a year, was unsupported in United States’ case law,” and was simply made up in 1877 by a treatise writer, Horace Wood. The employment-at-will rule, and the debate regarding its continuing erosion, has fascinated legal scholars since the mid-1960s. In recent years, the rule’s origin has attracted increasing attention. The traditional view, as expressed in the quote above, is that until the late-nineteenth century, the United States followed the English annual hiring rule, which assumed that employment relationships were to last for a set time period during which the employer could not fire the employee at will. However, our courts rapidly discarded the English rule in the late-nineteenth century and adopted the employment-at-will rule. These courts cited as authority for employment-at-will an 1877 treatise by Horace Wood. The common assertion is that Wood simply made the rule up with absolutely no supporting authority. Courts then rapidly adopted the rule, citing Wood’s treatise as authority, because the rule suited the economic needs of employers who sought to maximize their freedom to

2. Freed & Polsby, supra note 1. Freed and Polsby note that the assertion that Wood made up the rule with no supporting authority was first lodged in a 1921 A.L.R. Annotation, Duration of Contract of Hiring Which Specified No Term, but Fixes Compensation at a Certain Amount Per Day, Week, Month, or Year, 11 A.L.R. 469, 475-76 (1921), and that the Shapiro and Tune Note revived this charge. Freed & Polsby, supra note 1, at 551-52.


4. HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES (1877). Wood included this passage in the treatise:

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.

Id. at 272.

5. For the allegation that Wood simply made up the rule with no authority to support it, see supra note 1.
terminate employees in an expanding industrial society.\textsuperscript{6} Industrialization, then, was the impetus for the rule.

In actuality, with the exception of a brief period in early colonial times, employment-at-will has been the norm in the United States. United States law generally has not imposed an obligation on an employer to maintain an employee for any time period, other than as reflected by a contract’s express terms. The only late-nineteenth century change was that some courts stopped interpreting fixed-term agreements for payment of wages as an agreement to employ the worker for that same term. However, the abandonment of that particular contract interpretation technique is a far cry from the revolutionary change that has been suggested. Such change by its terms suggests the concomitant abandonment of a principle that employers must maintain employees for certain time periods, even in the absence of an express contract. However, absent a contract to the contrary, employers in this country have always had the ability to terminate employees at will.

Nevertheless, scholars Jay Feinman and Sanford Jacoby have offered analyses of the rule’s origins that are consistent with the traditional view that the rule was suddenly adopted in the late-nineteenth century. These analyses delve into the underlying reasons for the rule’s adoption. Feinman argues that employment-at-will was adopted by the courts in the late-nineteenth century in response to lawsuits brought primarily by middle-level management employees seeking to apply the common law annual hiring rule to their situations.\textsuperscript{7} With industrialization, this group of employees became a more important part of the capitalist order.\textsuperscript{8} Courts rejected these attempts and in doing so “announced the new principle of employment at

\textsuperscript{6} For a description of the various approaches scholars have taken with respect to the economic explanation for the adoption of the rule, see Morriss, \textit{supra} note 1, at 690-94 (1994). For two major proponents of the economic explanation of the adoption of employment-at-will, see Feinman, \textit{The Development of the Employment at Will Rule}, \textit{supra} note 1, and Sanford M. Jacoby, \textit{The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis}, 5 Compl. Lab. L. 85 (1982).

\textsuperscript{7} Feinman, \textit{The Development of the Employment at Will Rule}, \textit{supra} note 1, at 132. However, Feinman did note that American law throughout the first half of the nineteenth century exhibited a confusion of principles and rules. \ldots In colonial times some hirings, such as of day laborers, were conventionally terminable at will. Agricultural and domestic service relations often followed the English rule of yearly hirings. In the nineteenth century, however, whatever consensus existed about the state of the law dissolved. \textit{Id.} at 122.

\textsuperscript{8} Feinman noted that these plaintiffs typically held the following positions: “corporate secretary, sales agent, attorney, plant superintendent, general manager and cashier, and chief building engineer.” \textit{Id.} at 131. They presented a threat to the capitalist order, Feinman argued, because salaried employees with little control of their employment situation became a larger proportion of the work force and an important segment of the economy. Engineers, foremen, and the new specialists in the management of larger enterprises were an important component of the new economic system, but for the most part they had less control over their positions than many of their predecessors. Thus, the many suits brought to establish interests in their jobs were an attempt by a newly-important group in the economy to apply a traditional doctrine to their new situation. \textit{Id.} at 132.
The courts were motivated by the desire to guarantee the capitalists’
control over their work force. According to Feinman, employees who
knew they could be dismissed at will would be less likely to “claim a voice
in the determination of the conditions of work or the use of the product of
their labor.” In addition, the courts sought to maximize employers’ ability
to decrease their work force during times of economic contraction. Thus,
the needs of advanced capitalism led to the rapid adoption of employment-
at-will, a rule that Feinman concludes “transformed long-term and semi-
permanent relationships into non-binding agreements terminable at will.”

Jacoby argues that the underlying reasons American courts diverged
from the English annual hiring rule in the late-nineteenth century related to
two factors. First, trade unions were weaker in the United States than in
England, and thus were unable to secure from the courts long-term job
protection that is encompassed in the annual hiring rule. Second, English

9. Id. at 132. Feinman’s assertion that employment-at-will was a “new principle” appears to
contradict his acknowledgement that there was no consensus on this issue in the nineteenth century. Id.
at 122-23.
10. Id. Prior to the late-nineteenth century, the mid-level management class did not exist in any
significant numbers. The small business owners themselves performed the functions later assumed by
mid-level management. For a discussion of the process whereby this changed occurred, see Alfred D.
11. Feinman, The Development of the Employment at Will Rule, supra note 1, at 133. Feinman
offered no evidence to suggest that the mid-level managerial employees attempted to do this. Indeed,
the major threat to capital’s authority in the late-nineteenth century came from the skilled artisans who
Feinman acknowledged were not covered by any annual hiring rule. See David M. Gordon et al.,
Segmented Work, Divided Workers: The Historical Transformation of Labor in the United
States (1982); David Montgomery, Workers’ Control in America: Studies in the History of
12. Feinman, Revisited, supra note 1, at 133-34.
13. Id. at 133. Feinman offered no evidence that mid-level managerial employees had long-term,
semi-permanent relationships that, prior to Wood’s rule, were protected by law.
14. Like Feinman, Jacoby acknowledged that the state of American law on the term of employ-
ment issue was confused throughout much of the nineteenth century:

The law was rather confused. Different courts might rule that an identical, indefinite contract
was either presumptively annual, terminable at will or terminable at the end of a payment
period. The textbooks of the period demonstrated the confused state of the law. Some
mentioned only the annual hiring rule, others only the rate of pay rule, while most referred to both.
The cases cited to support the annual hiring rule either were English, or irrelevant American
cases.

Jacoby, supra note 6, at 109. Also like Feinman, Jacoby argued that the employment-at-will doctrine
was a new doctrine, adopted at the end of the nineteenth century. Id. at 85. However, he also noted that
prior to the late nineteenth century, the courts “rarely invoked the annual hiring presumption.” Id. at
108.
15. Id. at 120-26. Jacoby did note that American industrial workers were not covered by the
annual hiring rule at any time in the nineteenth century. Id. at 105-06.

The gist of Jacoby’s argument is that because British unions were strong, they relied on that
strength, rather than on protective legislation, to protect their rights to organize and exist, as well as their
ability to protect workers from unjust dismissals. American unions, however, were weaker than their
British counterparts and were subject to a hostile, powerful capitalist class. Thus, American unions
turned to the state, by seeking protective legislation for their rights to organize and exist, and to protect
workers from arbitrary dismissals. However, American courts generally declared such labor laws un-
constitutional interferences with freedom of contract. Hence, Jacoby argued, American workers’ at-
white collar workers had a higher status in England than in the United States; hence, English courts were willing to extend the annual hiring rule to this class, while U.S. courts were unwilling to do so.\textsuperscript{16}

This traditional interpretation of the rule’s origins, including both Feinman’s and Jacoby’s analyses, has recently come under attack. In 1990, Mayer G. Freed and Daniel D. Polsby argued that, in fact, Horace Wood did not make up the rule, but rather had authority to support his treatise discussion.\textsuperscript{17} However, Freed and Polsby focused on defending the cases Wood cited in his footnote in support of the existence of the employment-at-will rule, and they did not provide an in-depth analysis of the rule’s origins. Thus, they did not undermine the traditional view which has continued to be cited for the origins of the rule.\textsuperscript{18}

Andrew P. Morriss’ 1994 article attacks the economic explanation for the rule’s origins.\textsuperscript{19} Morriss concludes that all but three states adopted employment-at-will after 1871.\textsuperscript{20} He performs an econometric analysis of the pattern of adoption in relationship to the pattern of industrialization and determines that the pattern of adoption was unrelated to when states industrialized.\textsuperscript{21} Thus, he concludes, economics was not the motivating factor.\textsuperscript{22} Rather, Morriss argues that courts adopted the rule in an effort to keep employment contract disputes off the dockets, because courts as institutions were ill-adapted to resolve such disputes.\textsuperscript{23}

Morriss claims that his analysis explodes the myths associated with the economic origins of the employment-at-will doctrine.\textsuperscript{24} For his study, Morriss assumes that each state adopted the rule either when it was codified into statute or when the state’s supreme court first clearly expressed the rule.\textsuperscript{25} In his discussion of the court decisions that he believed first adopted the rule, Morriss notes that “the earliest adopters generally cite no authority,” that “there is little attempt to support the adoption of the rule with arguments or analysis,” and that the “adoption was not controversial in most attempts to gain legislative protection for their rights backfired when courts, by invalidating these laws, firmly established the principle of employment-at-will. The courts then applied this employment-at-will principle to all categories of jobs, including the newly emerging mid-level management jobs.”

16. Id. at 119-20. The gist of Jacoby’s argument here is that white-collar mid-level management workers were considered by American society to be in the same class as skilled artisans. Hence, the mid-level managers would have no more job protection than would the skilled workers.

17. Freed & Polsby, supra note 1.


19. See generally Morriss, supra note 1.

20. Id. at 699.

21. Morriss determined that the pattern of adoption “moved generally from the west to the south and midwest and only into the more heavily industrialized northeast after several decades.” Id. at 701.

22. Id.

23. Id. at 696. The gist of Morriss's argument is that by applying employment-at-will to contract disputes, the case could be ended without submission to the jury. But, if courts applied the annual hiring rule, then contract disputes would have to go to trial and be submitted to the jury.

24. Id. at 762-63.

25. Id. at 697.
This article argues that Morriss should have gone one level deeper in exploding the myths. The reason the cases Morriss analyzes failed to cite authority, failed to support the "adoption" with arguments or analysis and did not contain controversy was because, in fact, these cases were not adopting the employment-at-will doctrine. Rather, they merely reflected the long-standing, long-accepted and long-understood state of employment law.

Freed and Polsby were on the right track with their argument that authority did exist for Horace Wood's 1877 assertion. However, in order to establish definitively the status of a common law principle, such as employment-at-will, one must conduct a comprehensive analysis of state law. I previously conducted such an analysis for four states from the original thirteen colonies: Massachusetts, New York, Pennsylvania and Maryland. I chose to begin with states from the original colonies because if the English annual hiring rule had simply been imported to North America from England, the strongest evidence of that importation should have appeared in the former colonies. I examined all employment-related cases from each state's supreme court from the time such decisions were reported until the date of that state's decision that is cited by Morriss as the case adopting employment-at-will. In addition, I examined historical evidence regarding actual employment practices in each of those states. After examining this evidence, I concluded that the employment-at-will rule was the norm in these four states, and these states generally did not follow the English annual hiring rule. The only exception was a brief period of time in early colonial Massachusetts.

However, because common law is made on a state-by-state basis, before one can arrive at a definitive conclusion regarding the origins of employment-at-will, it is necessary to examine additional states that would provide a more comprehensive geographic, as well as economic, sampling. The purpose of this article is to provide this additional analysis. This article focuses on five states: Georgia, Illinois, Montana, Texas and California. These states provide additional geographic coverage such that combined with the four states in the original study all regions of the country are covered. In addition, Illinois, Montana, Texas and California were established at varying times during the nineteenth century, under economic circumstances very different from the original colonies. Further, under Morriss's analysis, three of these states "adopted" employment-at-will by statute: Georgia, Montana and California. By including them, we have a sampling of states that purportedly adopted employment-at-will both by statute and by common law.

26. Id.
As with the original study, this analysis examines both legal and non-legal historical sources. It analyzes each state's supreme court decisions regarding the employment relationship from the date the decisions began to be reported until the date that Morriss claims each of these states adopted employment-at-will. In addition, this article examines historical evidence of the actual employer-employee relationship with respect to the employers' obligation to retain the employees for specified time periods. The conclusion for the five states herein is consistent with that for the four from the first study: throughout their existence, these five states followed the employment-at-will rule, and did not adopt the English annual hiring rule. This analysis, then, explodes the original myth surrounding the employment-at-will doctrine; that is, that it was suddenly adopted by the courts in the last quarter of the nineteenth century. Rather, the doctrine has been firmly embedded in our employment practices since colonial days.

This article is organized as follows: I discuss each state separately. First, I provide a brief summary of the state's economic development, including a discussion of the major types of occupations that existed. Second, I examine the historical evidence regarding the actual operations of the employment relationship in both agricultural and non-agricultural occupations. Third, I examine the case law development as reflected in the state's supreme court decisions. The last section of the article contains general conclusions and offers an explanation for why U.S. law diverged from English law.

II

GEORGIA

A. Economic Development

The Spanish settled Georgia in the late-sixteenth century, and it became an English colony in 1732. Population remained sparse until after the American Revolution, with 3,500 inhabitants in 1752, and 33,000 in 1773. From 1773 to 1820, population increased tenfold to 340,989. Land was plentiful, "almost free for the taking." Up to this point, the state was dominated by small farmers, with rice, cotton, and corn being the most important crops. After 1820, cotton plantations began to develop,
although small farming remained dominant. After the Civil War, many of the existing large plantations were sliced up into small farms. In 1870, seventy-six percent of the work force was engaged in agricultural pursuits.

Prior to 1820, manufacturing was practically non-existent, although during the decade of the 1820s, a small artisan class began appearing in urban areas. Most manufactured goods were obtained from England. As the Civil War approached, infant industries grew in cotton gins, mills, tanneries, mining, turpentine distilleries, and lumber. Still, only a small percentage of Georgia’s population worked in these industries. In 1850, Georgia’s population totaled 906,185, but only 8,368 Georgians were employed in manufacturing pursuits. By 1860, the total population had risen to 1,057,286, of which 11,575 were engaged in manufacturing. Industrialization increased after the Civil War, primarily due to the growth of cotton mills. By 1870, the number of Georgians employed in manufacturing had risen to 71,046 out of a total population of 1,184,109—still only 6% of the total. Although manufacturing activity did increase after the Civil War, Georgia remained primarily an agricultural state throughout the nineteenth and into the twentieth century.

B. Terms of Employment Relationships

Agricultural labor, then, was the dominant occupation for Georgians until well into the twentieth century. As did the other colonies, colonial Georgia suffered from a scarcity of labor, aggravated by a prohibition on slavery that remained in effect until 1749. After that time, slavery proliferated. Indentured servants were used, as well, throughout the colonial period and into the early-nineteenth century. Until the middle of the century, free white laborers were in short supply. Land was so cheap and easily obtainable that few free whites were willing to work for wage labor. Plantation owners typically hired overseers to supervise their plantations, worked by slave labor. Aside from the plantations, most of Georgia’s
economic activity centered on small, independent farmers who did not require a permanent hired labor force. Some historical evidence suggests that these small farmers did hire occasional labor during harvest or planting season, typically for a daily wage. Thus, prior to the Civil War, few of Georgia’s agricultural laborers would have been affected by the English annual hiring rule. Slavery was not a contractual relationship. Indentured servitude was the subject of express contracts for specified time periods. Occasional hired labor was just that—occasional, with no long-term commitment.

After the Civil War, the great plantations broke up, and sharecropping became a dominant form of working the land. Sharecropping, by its nature, involved express contracts for specific time periods and thus was not subject to the annual hiring rule. Landowners who did not work their land by sharecropping hired former slaves for their work force. However, the Freedmen’s Bureau, an agency established by the federal government to protect the rights of former slaves, insisted that these work arrangements be reduced to express contracts. Because both main types of agricultural labor used in the post-war years were subject to contract, the annual hiring rule would not have been used.

Manufacturing workers also appear not to have been affected by the annual hiring rule. Historian Dudley S. Johnson traced the work history of a Georgian, William Harris Garland, who worked in various manufacturing and clerical establishments from the 1830s through the 1870s. In his study, Johnson also discussed the work histories of Garland’s friends and family. Garland, a skilled artisan, worked in numerous establishments throughout his life. Some jobs he left voluntarily, while he was dismissed from others. For example, in the spring of 1841, he worked on a riverboat for less than two months, at which time he was discharged because “business was slow.” Garland then secured employment on another riverboat, but that job did not even last through the summer. His next job was as an

49. Id. at 162.
50. COLEMAN ET AL., supra note 28, at 226.
51. Id. at 226.
52. For discussions of the role of the Freedmen’s Bureau with respect to these labor contracts, see Thomas F. Armstrong, From Task Labor to Free Labor: The Transition Along Georgia’s Rice Coast, 1820-1880, 64 GA. HIST. Q. 432 (1980), and Sara Rapport, The Freedmen’s Bureau as a Legal Agent for Black Men and Women in Georgia: 1865-1868, 73 GA. HIST. Q. 26 (1989).
54. Id. at 41.
55. Id.
56. Id. at 43.
57. Id. at 44.
engineer at a sawmill.\textsuperscript{58} After his employer encountered financial difficulties, Garland was dismissed from the sawmill job, a position that he had held for nine months.\textsuperscript{59} For the remainder of his years, Garland either was self-employed or worked at a variety of wage-paying jobs which provided no job security.\textsuperscript{60}

Garland's friends and family suffered from the same lack of job security. Johnson describes the situation for Garland and his family and friends as follows:

Among his friends were sawmill and steamboat owners, clerks, storekeepers, school teachers, and farmers; they all experienced unemployment and periods of near destitution. They were so occupied with earning a living that when they wrote to each other they did not discuss politics but only those things of immediate concern, such as employment opportunities and illnesses which kept them from their jobs.\textsuperscript{61}

Other historians, who focused on studying specific non-agricultural industries, found the same pattern of job insecurity. Georgia lumber and turpentine industries were staffed primarily by African-Americans, as slaves prior to the Civil War and as free laborers after the war.\textsuperscript{62} After the war, some of the workers entered into annual contracts with the companies, while others worked as occasional or day laborers.\textsuperscript{63} The work's seasonal nature caused the variations in work arrangements.\textsuperscript{64} The economy also affected the demand for labor. Because of the "boom and bust cycles of the lumbering industry," workers "were subject to frequent lay-offs, shortages of pay, and periods of marginal employment."\textsuperscript{65} The same type of job insecurity existed in the cotton mills.\textsuperscript{66}

\subsection*{C. Case Law Development}

Whether for agricultural or non-agricultural labor, there is substantial historical evidence to suggest that the English annual hiring rule did not operate in Georgia. An analysis of Georgia Supreme Court decisions supports this conclusion. Morriss argues that the Georgia Supreme Court adopted the employment-at-will rule in 1889 and that the legislature codified the rule in 1895.\textsuperscript{67} Prior to 1889, the Georgia Supreme Court ad-

\begin{itemize}
\item \textsuperscript{58} \textit{Id.} at 45.
\item \textsuperscript{59} \textit{Id.} at 45-46.
\item \textsuperscript{60} \textit{Id.} at 63.
\item \textsuperscript{61} \textit{Id.} at 53-54.
\item \textsuperscript{63} \textit{Id.} at 526.
\item \textsuperscript{64} \textit{Id.} at 528.
\item \textsuperscript{66} JACQUELYN D. HALL ET AL., \textit{LIKE A FAMILY: THE MAKING OF A SOUTHERN COTTON MILL WORLD} 101 (1987) (describing the cotton operatives as subject to arbitrary dismissals).
\item \textsuperscript{67} Morriss, \textit{supra} note 1, at 766.
\end{itemize}
dressed the law governing the employment relationship in eighteen cases. Four of these cases appeared prior to the Civil War, and as would be expected from the dominance of agriculture in the economy, all four involved agricultural labor. Three of the four dealt with overseer contracts. Two of the overseers had express contracts for terms of one year, with a dispute arising between the parties over alleged breach of the one-year contracts.68 Because these two cases involved express contracts for a specific time period, they do not answer the question of whether the annual hiring rule automatically applied in Georgia. However, the third case, Henderson v. Stiles, decided in 1853, provides clear evidence that the annual hiring rule did not apply.69 In this case, Stiles hired Henderson in January 1852 as the overseer for his plantation.70 In September, Stiles and Henderson had a dispute and Henderson left his employment.71 Henderson then sued for his wages for the nine months worked.72 The decision in the case hinged on whether the parties had agreed on a contract for the term of one year.73 The court described the state of Georgia law as follows:

The general law governing this class of cases was properly administered, to wit, that if a contract for the year was proven, and the plaintiff violated it, he was not entitled to recover anything. If he failed to comply with his covenants, or if he abandoned the service of his employer, he forfeited all right to any benefit under the contract. If there was no contract for a specified time, the plaintiff may recover on his quantum meruit count. And if there was proof of a contract, for the year, and the defendant Stiles broke his covenants by turning the plaintiff off or otherwise, then the plaintiff is entitled to recover for the time that he was in his service. These rules apply generally to this class of cases.74

The court's discussion of the law in the event there was no contract for a specified time did not indicate that such a contract would be implied under

68. See Rogers v. Parham, 8 Ga. 190 (1850), and Britt v. Hayes, 21 Ga. 157 (1857). The Rogers case presents an example of a contract whereby the employee was to be paid in farm produce instead of cash. Under the terms of the express, written contract, Parham was to work as Rogers' overseer for the year 1847. At the end of that year, Parham would receive a certain portion of the corn, cotton, fodder and wheat that had been produced on the plantation during that year. Rogers, 8 Ga. at 191. Because of the severe currency shortage that afflicted the country throughout the first three quarters of the nineteenth century, it is likely that many contracts provided for payment in goods rather than money. The currency shortage also likely explains why many other contracts, such as the one at issue in Brit, which did provide for payment in money, specified that the entire payment would be made at the end of the year. It is likely that the plantation owners would not have had the currency available to pay on a regular basis, but rather would have had to wait to sell the produce. Because payment would not have been made on many contracts until the end of the year, it certainly was to the employee's benefit to have the terms reduced to writing. This may explain the extensive use of written employment contracts throughout much of the nineteenth century.

70. Id.
71. Id.
72. Id.
73. Id.
74. Id. at 136-37 (emphasis added).
the English annual hiring rule. On the contrary, the court held that where no time period was specified, recovery would be had under quantum meruit, a theory designed to allow recovery for unjust enrichment in cases where no contract existed between the parties. If the English annual hiring rule had been in effect, the court would have relied on it.

Only the final pre-Civil War decision, *Hobbs v. Davis*, might be interpreted as supporting the annual hiring rule for agricultural labor in the absence of an express agreement to the contrary. However, upon close examination, this interpretation falls apart. In *Hobbs*, a slaveowner hired out one of his slaves to work for a cotton plantation owner "to make a crop for that year." However, the parties did not specify the date at which the contract would end. In May, the slaveowner withdrew the slave from the employment relationship, thereby causing the plantation owner to lose the entire cotton crop for that year. The slaveowner argued that he had not breached the contract by withdrawing the slave because no fixed term had been agreed upon. The Georgia Supreme Court disagreed, holding that "when a negro is hired for farming purposes, and no time is set for the termination of the contract for hire, that the law implies a hiring for the year." While this may appear to be a statement of the annual hiring rule, a closer analysis of the court's reasoning suggests otherwise. The court noted that when the time period is not specified for a contract of hire for a slave, the implied time period will be that "time necessary to complete the job and so of every contract of hiring." The court further noted that with cotton plantations the universal practice was to hire for the entire year. The decision, then, was based not on a rule of automatic hiring for a fixed term, but rather on what the court construed to be the parties', and particularly the employer's, implied intent regarding how long the employment relationship would continue. Finding an implied contract for a one-year term based on the parties' intent is quite different from finding an annual contract due to a legal presumption that employment contracts would last for one year. Thus, this case does not support the proposition that Georgia followed the annual hiring rule.

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75. *Id.* at 136.
76. 30 Ga. 423 (1860).
77. *Id.* at 423-24.
78. *Id.*
79. *Id.*
80. *Id.* at 425.
81. *Id.* at 426.
82. *Id.*
83. Jacoby interpreted *Hobbs v. Davis* as a case that applied the annual hiring rule. He described *Hobbs* as follows: "A slave hired from her owner to raise crops was presumptively hired for a year, but not a slave hired to build a house or chimney." Jacoby, *supra* note 6, at 105 n.126. However, the court actually treated both agricultural contracts and contracts to perform certain tasks, such as building a house or a chimney, in the same manner. The time periods for both types of contracts were to be interpreted as for the amount of time necessary to complete the job.
From the end of the Civil War through 1889, the Georgia Supreme Court addressed employment contract issues in fourteen cases. Ten of these cases involved breaches of express contracts and thus do not shed any light on the issue of whether the annual hiring rule applied. However, they do suggest that express contracts were used for a wide variety of occupations. Two of these cases involved agricultural labor, 84 five involved clerks, 85 one an overseer, 86 one a warehouse worker, 87 and one a baker. 88

The other four cases are worth examining in detail. The first, Slater v. Howard, 89 reflects the common practice in the post-Civil War era regarding employment of former slaves. This case is instructive because it illustrates the nature of the legal relationship between employers and former slaves. Slater was an enticement case in which one plantation owner, Howard prevailed in a suit against another, Slater, for enticing Howard's employees, all former slaves, to leave their employment with him and work for Slater. 90 Howard had prepared a written, one-year employment contract for each worker, subject to the Freedman's Bureau approval before becoming legally binding. 91 The ostensible purpose for this approval was to ensure that employers did not take advantage of the freedmen. However, the Freedman's Bureau was as concerned about ensuring a labor supply for employers as about protecting the freedmen. 92 Agents even permitted the use of specific performance to force the freedmen to carry out the term of the contracts. 93 Even if one were to interpret the Hobbs decision as support for the existence of the annual hiring rule, the Freedman's Bureau's requirement that employment contracts with freedmen be reduced to writing with wages and terms specified would have supplanted the operation of the rule, at least for the former slaves.

84. Day v. Oglesby, 53 Ga. 646 (1875) and Jones & Jeter v. Blocker, 43 Ga. 331 (1871). Day v. Oglesby is another example of a contract which provided that while the employee would receive room and board during the year of employment, he would not receive any cash payments until the conclusion of the year. 53 Ga. at 647.
85. Blun & Sterne v. Holitzer, 53 Ga. 82 (1874); Echols & Co. v. Fleming, 58 Ga. 156 (1877); Ansley v. Jordan, 61 Ga. 483 (1878); Newman v. Reagan, 63 Ga. 756 (1879) and 65 Ga. 513 (1875); and Isaacs v. Davies, 68 Ga. 169 (1881). The employee in the Echols & Co. case appeared to be one of the mid-level management employees that Feinman described. See supra notes 7-13 and accompanying text. The contract in this case was an express contract for one year, for Fleming's services as a bookkeeper.
86. Williams v. Jeter, 64 Ga. 738 (1880).
89. 43 Ga. 601 (1868).
90. Id. at 604.
91. Id.
92. For a discussion of the pro-planter bias of the Freedman's Bureau agents, see Rapport, supra note 52, at 31. Rapport concludes that "the record reveals that however much blacks attempted to control their labor, agents forced them to make and then abide by contracts with decidedly pro-planter terms." Id. Another goal of the Freedman's Bureau was to teach the former slaves the doctrines of free labor, including the tenets of contracts. Id. at 32.
93. Id. at 34.
The next significant post-war case to shed light on the existence of employment-at-will is *Western & Atlantic Railroad v. Bishop.* Bishop, a railroad employee, had signed a contract whereby he agreed to assume the risk of injury. The issue was whether such a provision was binding. The significance of the decision is the court's discussion of the general duties impliedly associated with employment contracts. With respect to such duties the court noted as follows:

Generally, the duties cast by law upon employer and employee are only implications of law, in the absence of stipulations of the parties. If one enters into the employment of another, and there be no stipulations as to wages, hours of labor, industry, etc., the law implies an obligation upon the employer to pay reasonable or customary wages, and upon the employee reasonable industry, and upon both reasonable hours of labor. It also implies various other duties and obligations, but, obviously, these are all only implications, in the absence of any agreement between the parties, and it would be a dangerous interference with private rights to undertake to fix by law the terms upon which employer and employee shall contract. For myself, I do not hesitate to say that I know of no right more precious, and one which laboring men ought to guard with more vigilance, than the right to fix by contract the terms upon which their labor shall be engaged... They should remember that the same law-giver which claims to make a contract for them upon one point, may claim to do so upon others, and thus, step by step, they cease to be free men.

For two reasons, this decision suggests that the annual hiring rule was not in operation. First, if such a rule did exist, one would expect the court to include it in a discussion of the general terms that are implied in an employment contract. The failure to mention it in this discussion suggests that it did not apply. Second, the discussion regarding the loss of freedom for employees if the law makes contracts for them suggests that no automatic time period applied to employment contracts.

An 1885 case provides even more compelling evidence that Georgia did not recognize the annual hiring rule. In *Walker v. The Vale Royal Manufacturing Co.,* Walker sued for breach of the employment contract, alleging that the employer refused to pay him at the rate promised by the employer's superintendent. Although the legal issue involved the superintendent's agency authority, the testimony cited by the court in its decision addresses the annual hiring rule's existence. At the trial Walker testified as follows:

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94. 50 Ga. 465 (1873).
95. Id. at 468.
96. Id. at 466.
97. Id. at 470-73.
98. Id. at 470-71.
99. 75 Ga. 28 (1885).
100. Id. at 33.
I was not bound for any particular time by my agreement with Morse; suppose the longer I staid [sic] the better I would be liked. He told me there was no doubt about my getting the place. I had the right to quit when I pleased; he could have discharged me, if he wanted to, at any time, because there was no agreement.\textsuperscript{101}

The superintendent also testified that he had the authority to hire and fire workers "as he saw fit."\textsuperscript{102} In its decision, the court held that the superintendent's hiring of Walker as a day laborer "was no ratification . . . of a contract to give permanent employment at a much higher price."\textsuperscript{103} The parties' testimony coupled with the language from the court's decision strongly suggests that employment-at-will was the legal standard.

\textit{Magarahan v. Wright},\textsuperscript{104} not decided until 1889, is the case Morriss cites as the one in which Georgia first adopted employment-at-will.\textsuperscript{105} The Wright & Lampkin Company had hired Magarahan as a clerk for the sum of $50 per month.\textsuperscript{106} The contract did not specify any time period.\textsuperscript{107} The company fired Magarahan prior to the end of the first year, prompting Magarahan to file suit for wages due for the remainder of the year.\textsuperscript{108} The issue was whether the hiring was for the term of one year, even though the parties specified no express agreement for any time period.\textsuperscript{109} Upholding a verdict for the company, the court held that absent evidence suggesting that the parties actually intended the hiring to be for a specified period, the hiring was only for the time period specified for the payment of wages.\textsuperscript{110} Thus, this contract was for only one month because the payment specified was for $50 per month.

Clearly, the \textit{Magarahan} case rejected the employee's argument that if no time period is specified, then the hiring is impliedly for one year. Significantly, nothing in the case suggests that the court thought it was adopting a new principle or was changing the current state of the law. In fact, the case's holding was consistent both with prior Georgia Supreme Court employment decisions and with the historical evidence regarding the ability of Georgia employers to fire at will.

Thus, the combined legal and historical evidence suggests, first, that many Georgia employment arrangements were based on express contracts that specified the time period and, second, that for employment situations

\begin{itemize}
  \item \textsuperscript{101} \textit{Id.} at 30-31.
  \item \textsuperscript{102} \textit{Id.} at 31.
  \item \textsuperscript{103} \textit{Id.} at 33.
  \item \textsuperscript{104} 10 S.E. 584 (Ga. 1889).
  \item \textsuperscript{105} Morriss, supra note 1, at 766.
  \item \textsuperscript{106} \textit{Magarahan}, 10 S.E. at 584.
  \item \textsuperscript{107} \textit{Id.} at 585.
  \item \textsuperscript{108} \textit{Id.} at 584.
  \item \textsuperscript{109} \textit{Id.} at 585.
  \item \textsuperscript{110} \textit{Id.} at 585.
\end{itemize}
not covered by express contracts for a specified time period, Georgia followed employment-at-will.

III

ILLINOIS

A. Economic Development

Anglo-American settlers, primarily self-sufficient small farmers, first moved into Illinois after the Revolutionary War. Illinois was later admitted to the Union in 1818. The state continued to be populated by small farmers through the 1840s, and it suffered from a severe labor shortage until the late 1830s. Indeed, those making the westward trek became convinced, because of the labor shortage, that Illinois was unsuited for anything other than small farms, although coal mining was established on a rudimentary level in the 1820s. In the 1840s, Illinois was still described as a “simple rural democracy.”

The railroads arrived in Illinois in the decade of the 1850s, and by the end of that decade, a rail network connected the state. The railroads led to the demise of the frontier in Illinois and to increasing urbanization and industrialization. Chicago’s population, for example, grew from 29,963 in 1850, to 109,260 in 1860, and to 298,977 in 1870. By the 1850s, Chicago had become the railroad and commercial center of the west, with grain elevators, stockyards, and packing plants dominating the city’s economy. Also in the early 1850s, the state’s population exceeded one million, and by 1860, Illinois was the fourth most populous state in the Union, with 1,711,951 residents.

Coal mining and manufacturing grew synergistically with the railroads. Because of Illinois’ continuing focus on agriculture, with wheat and corn as the major crops, numerous agricultural machinery manufacturing firms developed, including McCormick’s reaper plant which moved to

112. Id. at 164.
113. Id. at 171. In fact, Davis reported that hired workers resisted any notion that they were inferior to their employers and would not tolerate being called a “servant.” Id. at 165.
114. Solon J. Buck, Illinois in 1818, at 136 (1917); Robert P. Howard, Illinois: A History of the Prairie State 251 (1972). Indeed, some of the Anglo-American settlers came with the intent of establishing large farms that would be worked by hired labor but were unable to establish such farms because of the severe shortage of labor. Buck, supra, at 135.
117. Id. at 1-2.
118. Id. at 2; Pease, supra note 115, at 139.
119. Howard, supra note 114, at 242, 269-70.
120. Id. at 255.
121. Id. at 251.
Chicago from Virginia in 1847.122 A variety of other small manufacturing concerns were established in the 1850s and 1860s.123 In the post-Civil War era, meat packing became the state's biggest industry.124 By 1860, the state had approximately 3,000 manufacturing establishments, although this was far fewer than the industrial giants: New York, Pennsylvania and Ohio.125 During the thirty-year period beginning in 1860, Illinois was the leading producer of corn and wheat.126

B. Terms of Employment Relationships

Historical studies of employment relationships in agriculture show a pattern in Illinois similar to Georgia's. A severe labor shortage continued to affect the state well into the 1850s.127 The shortage of available labor led to the dominance of small farms that could be worked without permanent hired workers, a pattern that was established early in the nineteenth century. Some laborers were available, but because the labor shortage meant they could always find work, many of these wage earners were day laborers who went from job to job. They stayed only a short time at each, apparently valuing their freedom more than permanent employment.128 Some farmers attempted to ensure some permanence in their labor supply by resorting to written contracts for specific terms.129 Other farmers eventually resorted to a contract labor system whereby foreigners were brought to Illinois under contract for a specified time, usually for a several-year period.130 Neighbors also helped each other with farm tasks.131 The annual hiring rule would not have applied to any of these types of agricultural labor relationships.

The historical evidence on non-agricultural labor also suggests that Illinois did not utilize the annual hiring rule. The 1850s was the first decade

122. Id. at 263.
123. Id. at 266-67.
124. Id. at 392.
125. Id. at 303.
126. Id. at 358.
127. Id. at 265.
128. Davis, supra note 111, at 168. The variety of jobs any individual might hold in a lifetime revealed the fluidity of jobs, a condition consistent with labor shortages. Davis recited the following recollection of a Swedish traveler in Illinois during this time period:

The speed with which people here change their life calling and the slight preparation generally needed to leave one calling for another are really surprising, especially to one that has been accustomed to our Swedish guild-ordinances. . . . A man who today is a mason may tomorrow be a doctor, the next day a cobbler, and still another day a sailor, druggist, waiter, or school master.

Id. Although this traveler may have exaggerated the frequency with which people changed jobs, as well as the variety of jobs held, the story does illustrate the lack of rigid rules governing the frontier labor market.

129. For a listing of the cases involving breaches of these agricultural contracts, see infra note 138.
131. Id.
in which any meaningful industrialization occurred in the state. A number of historians have chronicled the lives of Illinois workers during that decade and the next. In their general histories of Chicago and Illinois, both Bessie Pierce and Arthur Cole note that, by the 1850s, work in urban areas had become seasonal and uncertain, and that during the 1857 depression, workers suffered daily lay-offs.\(^{132}\) Periods of unemployment had become so prevalent that, by the 1850s, Illinois's urban areas found themselves facing the problem of caring for paupers.\(^{133}\)

Historians who have examined specific occupations and population groups also found uncertainty in employment. During the Civil War period, African-Americans migrated to Illinois. Although employers were willing to hire these workers because of the war-induced labor shortage, the same employers during down times were more likely to lay off African-Americans than white laborers.\(^{134}\) Because the 1850s was the boom period for railroad growth, many workers engaged in construction work. However, construction workers were paid by the day and had no more guarantee of steady work than did the African-American laborers. The railroad workers were not paid if they missed work due to illness, and they often were dismissed if either bad weather or material shortages caused delays—fairly frequent events.\(^{135}\) Carpenters, in great demand during the urban building boom period that began in the 1850s, experienced the same job insecurity. Carpenters were paid by the piece and had work only until the completion of a project. They experienced frequent periods of unemployment between jobs, which prompted the carpenters' union in 1870 to set up an unemployment benefit fund.\(^{136}\)

C. Case Law Development

The historical evidence, then, suggests that employment-at-will was the norm in Illinois just as it was in Georgia. The Illinois Supreme Court

\(^{132}\) Bessie R. Pierce, A History of Chicago: From Town to City, 1848-1871, at 156 (1940); Cole, supra note 116, at 202-203.

\(^{133}\) Cole, supra note 116, at 202. See also Otto M. Nelson, The Chicago Relief and Aid Society, 1850-1874, 66 Ill. St. Hist. Soc'y J. 48 (1966). Nelson reported that during one particularly cold part of the winter of 1869-70, Chicago had an unemployment rate of 50%, which suggests employers did not have any term obligations to their employees. Id. at 58.

\(^{134}\) Shirley J. Carlson, Black Migration to Pulaski County, Illinois, 1860-1900, 80 Ill. Hist. J. 37, 43 (1987). The example of Pulaski County is an indication of a contemporaneous general trend throughout Illinois.


\(^{136}\) Richard Schnierov & Thomas J. Sturmbur, Union Brotherhood, Union Town: The History of the Carpenter's Union of Chicago, 1863-1987, at 6-7, 17 (1988). Itinerant carpenters from Canada often flooded the Chicago labor market during the busy building season and left town for the winter. Id. at 7.
decisions that reflect the state of employment law are consistent with this historical evidence. Morriss asserts that Illinois adopted employment-at-will in 1874, in the case of *Orr v. Ward.* However, prior to *Orr,* the court issued fourteen decisions suggesting that Illinois did not recognize the annual hiring rule. All but one of these cases involved breach of an express employment contract. Seven of the express contract cases involved agricultural labor, one for sales, one for a maintenance job, one for a stage manager, one for a gardener, one for a bookkeeper, and one for a clerk. The fact that thirteen of the fourteen Illinois Supreme Court cases contained express employment contracts for a wide variety of jobs suggests the widespread use of such contracts. Four of these cases are worth exploring in more detail.

In an 1861 case, *Moline Water Power & Manufacturing Co. v. Nichols,* Nichols was employed as an engineer. After he was dismissed from the employment, he sued for his salary for one year, the time served, and expenses due. The employer argued on appeal that Nichols could not recover salary for one year unless he could prove the existence of a specific contract for that time period. In rejecting the employer's argument, the court determined that there was no need to prove the existence of a specific contract for a year's service if Nichols could prove that he, in fact, provided services for the year. If Illinois recognized the annual hiring rule, this issue would not have arisen. If the annual hiring rule had been in effect, the assumption would have been that the contract was for one year, unless the parties had specifically agreed otherwise. The fact that the rule was not discussed or applied in this case is strong evidence that it did not operate in Illinois.

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137. 73 Ill. 318 (1874); see Morriss, *supra* note 1.
138. Eldridge v. Rowe, 7 Ill. 91 (1845); Badgley v. Heald, 9 Ill. 64 (1847); Schoonover v. Christy, 20 Ill. 426 (1858); Angle v. Hanna, 22 Ill. 429 (1859); Swanzey v. Moore, 22 Ill. 63 (1859); Hansell v. Erickson, 28 Ill. 257 (1862); and Thrift v. Payne, 71 Ill. 408 (1874).

Only *Swanzey* involved a one-year contract. The others involved time periods from three and two-thirds months to eight months. These differing time periods suggest that the employing farmers wanted to pay for labor only during the busy harvest seasons, as well as suggesting their desire to ensure a labor supply.

139. Pfund v. Zimmerman, 29 Ill. 269 (1862).
140. Thomas v. Cook County, 56 Ill. 351 (1870).
141. Fuller v. Lilte, 61 Ill. 21 (1871).
142. Trustees v. Shaffer, 63 Ill. 243 (1872).
144. Mahon v. Daly, 70 Ill. 653 (1873).
145. The case that did not involve an express contract was *Moline Water Power & Mfg. Co. v. Nichols,* 26 Ill. 90 (1861).
146. *Id.*
147. *Id.* at 92.
148. *Id.* at 93.
149. *Id.*
150. *Id.*
The 1862 case of Pfund v. Zimmerman\textsuperscript{151} involved one of the mid-level management employees that Feinman describes.\textsuperscript{152} Zimmerman had been hired by Pfund as a salesman at a salary of $1,000 per annum.\textsuperscript{153} Zimmerman's employment ended after 16 months, and he sought recovery for unpaid wages.\textsuperscript{154} The issue was whether the agreement to pay $1,000 per annum established the terms of the contract on a yearly basis.\textsuperscript{155} The court held that it did not, and that no evidence had been presented to support a finding that the parties had agreed on an annual term of service: "The evidence in this case does not show a hiring for any specified time."\textsuperscript{156} Thus, the stated salary of $1,000 per annum was merely a "rate of compensation" and "not a specification of any particular term of service, agreed upon."\textsuperscript{157} If the annual hiring rule applied, the court would not have needed to concern itself with the parties' intent; rather, it would have found an automatic one-year contract. This decision's language strongly suggests that employment-at-will was the standard in Illinois in 1862, far before both Wood's 1877 treatise and Morriss' 1874 Orr v. Ward.\textsuperscript{158}

In 1872, the Illinois Supreme Court issued a decision that contained a clear statement of the employment-at-will principle. In Trustees of Soldiers' Orphans' Home v. Shaffer, the parties had an express employment contract for a one-year term.\textsuperscript{159} After Shaffer, who was employed as a gardener, was discharged without cause before the year's end, he brought an action for wages for the remainder of the year.\textsuperscript{160} Finding for Shaffer, the court noted that the trustees did not have the power "at pleasure and without cause, to discharge the servants of the institution, when a special contract had been made."\textsuperscript{161} The court further noted that "[i]f a corporation desires to retain the right of removal at its discretion, it must not bind itself by a special contract."\textsuperscript{162} This language supports the conclusion that employers could dismiss employees at will in the absence of a special contract. Nothing in the decision indicates that the court believed it was adopting new law or offering a new interpretation of existing law.

A decision issued one year later, in 1873, further supports the conclusion that Illinois already followed employment-at-will. In Chiles v. Belleville Nail Mill Co., the sole issue was whether the parties had entered into

\textsuperscript{151} 29 Ill. 269 (1862).
\textsuperscript{152} See supra notes 7-13 and accompanying text.
\textsuperscript{153} 29 Ill. at 269.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id. at 271.
\textsuperscript{157} Id.
\textsuperscript{158} 73 Ill. 318 (1874)
\textsuperscript{159} 63 Ill. 243 (1872).
\textsuperscript{160} Id. at 244.
\textsuperscript{161} Id. at 245.
\textsuperscript{162} Id. at 246.
an employment contract for one year. The company argued that the contract did not specify a fixed term. The court noted that there was a conflict in the evidence, but, after examining the pre-contractual negotiations in an attempt to determine the parties' intent, the court concluded that the parties indeed had intended to enter into a one-year contract. If the annual hiring rule were in effect, the court would have relied on it, rather than on the parties' intent as reflected in the negotiations.

Thus, by the time the Illinois Supreme Court issued its decision in Orr v. Ward, the case by which Morriss asserts Illinois first adopted employment-at-will, that principle was already firmly established in Illinois law. The Orr decision was not without importance, however. It did reaffirm the Pfund holding that an employer's agreement to pay wages at an annual rate did not commit the employer to a contract for that same time period; only an express provision regarding a time period could do that. However, Orr in no way abandoned an annual hiring rule and adopted employment-at-will; that had occurred during Illinois' early settlement, as reflected in the state's employment practices and law throughout the nineteenth century.

IV
TENAS

A. Economic Development

Texas was still a part of Mexico in the 1820s when Anglo-Americans first began to settle there. When Texas declared its independence from Mexico in 1836, its population numbered approximately 25,000, most of whom were farmers. Texas became a state in 1845. By 1850, the population had grown to 212,592, of whom 58,161 were slaves. At this time, most Texans were small farmers. Urban areas were sparse, with only four percent of the population living in towns. The largest town in 1850 was Galveston, with a population of 4,177. The chief impediments to business development in Texas at this time were the lack of adequate banking facilities and the absence of roads or other transportation systems. By 1860, the state's population had swelled to 604,215, of whom 182,921

163. 68 Ill. 123 (1873).
164. Id. at 124.
165. 73 Ill. 318 (1874).
167. Id. at 59.
168. Id. at 131.
169. Id. at 149.
170. ERNEST WALLACE, TEXAS IN TURMOIL, 1849-1875, at 13 (1965).
171. RICHARDSON ET AL., supra note 166, at 164. No other town had a population of as many as a thousand. Id.
172. Id. at 65, 165. Lack of banking and roads had plagued Texas from the earliest days of its settlement. Id. at 165.
EXPLODING THE MYTH

were slaves.\textsuperscript{173} San Antonio had become the largest town with 8,236 inhabitants.\textsuperscript{174} Approximately one-half of Texans listed themselves in the 1860 census as farmers; most were still small farmers, although some large plantations existed.\textsuperscript{175} Cotton and corn were the most important crops.\textsuperscript{176} Cattle ranching had spread through Texas during the 1830s-1840s.\textsuperscript{177} By 1860, Texas had six times as many cattle as people.\textsuperscript{178}

Although manufacturing was not significant in the antebellum Texas economy, it did exist.\textsuperscript{179} The 1860 census indicated that 3,449 people were employed in manufacturing, for 983 manufacturing firms.\textsuperscript{180} The milling and lumber industries had been present for many years.\textsuperscript{181} Cotton gins and sugar cane processing became established by the 1850s.\textsuperscript{182}

In 1870, Texas was still primarily an agricultural state, with its industrial production occurring on a small scale, designed only to serve the demands of local communities.\textsuperscript{183} According to the 1870 census, industrial workers made up less than one percent of the total population of 818,579.\textsuperscript{184} Texas industries produced only two percent of the nation’s manufactured goods.\textsuperscript{185} The 1870s also witnessed the growth of sheep ranching.\textsuperscript{186} Only 6.7 percent of the population lived in urban areas, the largest of which was, again, Galveston with a population of 13,818, followed by San Antonio’s 12,256 inhabitants.\textsuperscript{187} No other Texas town numbered over 10,000.\textsuperscript{188}

Although railroad construction began in the 1850s, the rail network did not cover most of the state until the 1880s.\textsuperscript{189} As the railroads covered more of the state through the 1870s and 1880s, the pace of industrialization increased, although Texas remained an agricultural state throughout the nineteenth century.\textsuperscript{190} By 1880, out of a population of 1,591,749, only

\begin{itemize}
  \item \textsuperscript{173} Id. at 149.
  \item \textsuperscript{174} Id. at 164.
  \item \textsuperscript{175} SEYMOUR V. CONNOR, TEXAS: A HISTORY 182 (1971). In 1860, Texas had “51,569 farmers, 2,576 stockmen, and 265 planters among the 105,491 persons listed with occupations.” \textit{Id.}
  \item \textsuperscript{176} RICHARDSON ET AL, supra note 166, at 158-59.
  \item \textsuperscript{177} Id. at 258.
  \item \textsuperscript{178} Id.
  \item \textsuperscript{179} CONNOR, supra note 175, at 181; RICHARDSON ET AL, supra note 166, at 158.
  \item \textsuperscript{180} RICHARDSON ET AL, supra note 166, at 158.
  \item \textsuperscript{181} CONNOR, supra note 175, at 271.
  \item \textsuperscript{182} Id. at 182. Other, less significant, industries of this time period included “liquor distilleries, furniture manufacturers, tin and sheet iron producers, cement makers, iron works (makers of boilers, kettles, and small steam engines),” and weaving and spinning mills. \textit{Id.} at 181-82.
  \item \textsuperscript{183} RICHARDSON ET AL, supra note 166, at 272. In fact, a large portion of Texas was totally uninhabited. \textit{Id.}
  \item \textsuperscript{184} Id. at 280, 397.
  \item \textsuperscript{185} CONNOR, supra note 175, at 271. Twenty percent of these manufactured goods came from flour and grist milling. \textit{Id.}
  \item \textsuperscript{186} RICHARDSON ET AL, supra note 166, at 267.
  \item \textsuperscript{187} Id. at 285-86.
  \item \textsuperscript{188} Id. at 286.
  \item \textsuperscript{189} Id. at 165, 263.
  \item \textsuperscript{190} CONNOR, supra note 175, at 270-71.
\end{itemize}
twelve thousand Texans were employed in manufacturing pursuits. While the total industrial output almost doubled from that of 1870, the Texas economy remained dominated by agriculture. Flour milling and lumbering were the leading industries, although meat packing, textiles, and mining also were becoming significant industries.

B. Terms of Employment Relationships

While manufacturing activity did pick up in the state during the last two decades of the nineteenth century, Texas remained primarily an agricultural state until well into the twentieth century. The primary concentration of labor throughout nineteenth-century Texas remained in the agricultural sector. Prior to the Civil War, much of this work was done either by slaves, who would not have been covered by the annual hiring rule, or by the small farmers themselves. After the Civil War, Texas followed the same pattern as Georgia. The Freedmen's Bureau required that the freedmen's labor arrangements be reduced to written contracts detailing employment terms. Sharecropping was prevalent. Thus, the annual hiring rule would not have covered many types of the hired agricultural labor in Texas. Evidence also exists suggesting that Texas ranches hired extra help, on a short-term basis, during the busy times of the year.

The Texas manufacturing pattern paralleled that in both Georgia and Illinois. A study of the experiences of Czech immigrants to Texas provides profiles of three immigrants who worked a variety of jobs in mid-nineteenth century Texas. Frantisek Branecky, who lived in Houston in the 1850s, held a number of short term jobs. He began in agriculture as a day laborer on a small farm for 30 cents a day; he worked for another farmer for one month. He then worked at a brick factory for a short period, followed by a two week stint hauling oysters. Jan Ustynik worked in several small towns in the 1860s. Like Branecky, he first worked on a farm, for a two month period. Then in 1868, he worked part of the year as a carpenter and part of the year at a cotton gin. The next year, he worked four months at a different cotton gin. Josef Lebeda worked in Monterrey during the 1860s.

192. Connor, supra note 175, at 271.
193. Jones, supra note 191, at 102. Jones described Texas as "industrially backward," producing only one dollar worth of goods for every $367 produced nationally. Id.
194. Richardson et al., supra note 166, at 280-81.
196. Id. at 210-211.
197. Id. at 221.
198. Coleman McCampbell, Texas Seaport: The Story of the Growth of Corpus Christi and the Coastal Bend Area 58 (1952). McCampbell reports that sheep ranchers hired "extra help, mostly from Mexico, . . . for dipping, for lambing time, and for shearing twice a year." Id.
200. Id. at 39-65.
first for a few months as a coachman, then at an undisclosed occupation for a Mr. Novak. However, soon after he began work for Mr. Novak, Lebeda "fell ill and was released from work."

C. Case Law Development

Thus, it appears that Texas workers suffered from the same types of job insecurity as did those in Georgia and Illinois. Texas Supreme Court decisions provide no more support for the existence of the annual hiring rule than does the historical occupational evidence. Morriss asserts that Texas adopted employment-at-will in 1888 with the Texas Supreme Court decision of *East Line & R.R.R. Co. v. Scott.* Before that decision, the Texas Supreme Court addressed employment contracts in thirteen cases. Seven were issued prior to the Civil War. Six of these involved express employment contracts specifying fixed terms: four were overseer contracts, in one a slaveowner contracted a slave to another plantation for a year, and one involved a school teacher.

The seventh decision, *D. & R. Meade v. Rutledge,* was issued in 1853; it indicates that even then, Texas did not recognize the annual hiring rule. There, the parties had entered into a contract providing an annual salary of $600, payable monthly, plus room and board in exchange for Rutledge's overseer services. However, the written contract did not specify a term. A few months after Rutledge took up his position, Meade fired him. Rutledge then sued for the balance due on his salary for the remainder of the year. Meade denied liability, arguing that because the written contract did not specify a fixed term, he was not obligated to pay Rutledge for the remainder of the year. Meade argued that the rule was well-established in Texas that a written contract "must be taken for what it expresses upon its face, without adding to or diminishing therefrom." Because the parties had not specified a time period, the court could not read one into the contract.

Rutledge responded that although the written agreement did not specify a time period, the parties intended it to be a one-year contract:

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201. *Id.* at 87.
202. *Id.*
203. 10 S.W. 99 (Tex. 1888); see Morriss, *supra* note 1, at 772.
207. 11 Tex. 22 (1853).
208. *Id.* at 47.
This was a general employment or hiring, and was for a year. . . . If a contract is made for labor or services for a certain period, and the employer discharges the employee before the expiration of the time, without any fault of the latter, he may recover for the whole time stipulated.

Rutledge cited a treatise, *Chitty on Contracts*, to support the contention that he was entitled to the salary for the remainder of the year. The specific pages cited in *Chitty* addressed the issue of the right to payment when an employee is discharged without cause prior to a fixed term's expiration. However, the three pages preceding those cited discuss the English hiring rule. As was typical of nineteenth-century treatises, *Chitty* was an English law treatise and the textual discussion summarized English law. The U.S. version of these English treatises contained footnotes for U.S. cases, even though the text was limited to English law. If Texas recognized the English annual hiring rule, one would have expected Rutledge to use this rule and to cite these pages from *Chitty*. The fact that he did not do so suggests that Texas did not recognize the rule.

The court determined that the contract was for a one-year term and ordered recovery for Rutledge. However, the court did not rely on the English annual hiring rule in making this decision. The court found that the contract was for one year for two reasons. First, overseers generally were hired for one-year terms, and if the parties had intended anything different, they would have so specified in the contract. Second, at trial, Meade did not deny the existence of a one-year contract; thus, he probably regarded it as such. The court did not mention the annual hiring rule or any other automatic hiring rule. If such a rule were recognized, one would expect that the court would have relied on it. Nor did the court base its decision on the fact that the wage was stated on a per annum basis. Rather, it based its decision on the parties' intent. This case thus provides strong support for the proposition that Texas did not recognize the English annual hiring rule.

The Texas Supreme Court addressed the term of employment issue in six post-Civil War cases. Three of these provide examples of breaches of express contracts that did contain fixed terms. One was for a bookkeeper, one for a mill operator, and one for a farm manager. Three
additional cases involved railroad employment. One, involving the issue of assumption of risk, contained language indicating the employees were free to quit rather than use dangerous machinery.\textsuperscript{219} Nowhere did the case suggest that the employees risked a breach of contract action for doing so, or that the employer had breached an annual employment contract by forcing the workers to use dangerous machinery. However, because the court did not directly address this issue, it is difficult to draw strong conclusions from this case. A second railroad case affirmed the railroad’s right to dismiss employees who were guilty of misconduct or poor work;\textsuperscript{220} this holding is not inconsistent with the annual hiring rule. The third railroad case suggests that employers can give their agents full power to hire and fire.\textsuperscript{221} Although this case did not involve any firings (it addressed the fellow-servant rule), its reasoning is not necessarily inconsistent with the annual hiring rule.

By the time the Texas Supreme Court decided the \textit{East Line} case in 1888,\textsuperscript{222} which, according to Morriss, first adopted the employment-at-will rule, Texas law was less clear than that of Georgia and Illinois. However, the \textit{East Line} language suggests that employment-at-will was already the standard in Texas. In this case, the issue was not whether the parties had agreed to a fixed term, but rather whether they had entered into a contract at all. Scott, an engineer, suffered an on-the-job injury in 1882.\textsuperscript{223} The railroad settled with him by paying him $4,500 and agreeing to employ him for as long as he desired to be employed, once he recovered from his injuries. Four years later, in 1886, Scott recovered sufficiently to return to work, but the railroad refused to reemploy him. Scott then filed suit for breach of contract.\textsuperscript{224}

The decision contains a summary of both sides’ arguments. The railroad raised four issues: 1) the Statute of Frauds applied because the alleged agreement (which was not in writing) was that Scott could work the rest of his life; 2) the railroad agent who dealt with Scott lacked the authority to bind the company; 3) the alleged agreement lacked mutuality of obligation because Scott did not agree to commit himself to work for the company for a specific period of time, although Scott claimed the railroad agreed to employ him for life; and, 4) there was no means of calculating

\textsuperscript{217} Basse v. Allen, 43 Tex. 481 (1875). In this case, the contract provided for service for one year, but contained a provision permitting either party to terminate by giving one month’s notice. \textit{Id.} at 482.
\textsuperscript{218} Heame v. Garrett, 49 Tex. 619 (1878). The contract provided that Hearne would pay Garrett $100 in gold at the end of the year’s service. \textit{Id.} at 620.
\textsuperscript{219} G.,H., & San Antonio Ry. v. Drew, 59 Tex. 10, 13 (1883).
\textsuperscript{220} Burton v. G., H., & San Antonio Ry., 61 Tex. 526, 534 (1884).
\textsuperscript{221} Douglas v. Texas Mexican Ry., 63 Tex. 564, 567 (1885).
\textsuperscript{222} 10 S.W. 99 (Tex. 1888).
\textsuperscript{223} \textit{Id.}
\textsuperscript{224} \textit{Id.}
damages for breach of this contract because the parties had not agreed to a fixed term. Scott responded to the first argument by asserting that the contract did not come within the Statute of Frauds because it could possibly be performed within one year. Second, Scott argued that the railroad's agent had apparent authority to bind the railroad to the contract. Third, Scott maintained that the railroad ratified the agreement by accepting the benefits of the original compromise that the agent negotiated. The summary of the arguments does not reflect an attempt by Scott to address the mutuality or indefiniteness issues.

The court determined that the railroad's agent did have authority to bind the company to the compromise agreement. However, the court held that mutuality of obligation was lacking because while Scott had secured a promise from the railroad to employ him for life, Scott had not in turn promised to work for life or for any time period at all. Thus, the term of service depended totally upon Scott's "own will." The court then noted that

[It is very generally, if not uniformly, held, when the term of service is left to the discretion of either party, or the term left indefinite, or determinable by either party, that either may put an end to it at will, and so without cause.]

Nothing in the court's decision suggests the judges believed they were adopting any new principle or changing the existing state of the law. In fact, the language that employment-at-will is the general rule clearly suggests the judges believed this to have already been the law.

Although the evidence with respect to Texas is not as clear as with Georgia and Illinois, it is important to note that the Texas Supreme Court never, in any of its decisions, used the term "annual hiring rule," or any version thereof. In fact, it could have done so with the 1853 Rutledge decision, but it based its holding instead on the parties' intent and not on an automatic hiring rule. While the case law may not be as clear regarding Texas practice, the historical evidence tips the balance toward the conclusion that Texas did not recognize the rule.

225. Id.
226. Id.
227. Id.
228. Id. at 101.
229. Id. at 102.
230. Id.
Settled by the Spanish in the late-eighteenth century, California was part of the Mexican territory that revolted from Spanish rule in 1822. Mexico ceded California to the United States in the 1848 treaty ending the Mexican War. Gold was discovered near San Francisco in that same year. Prior to the discovery of gold, California’s economy was primarily a pastoral one focused on producing sufficient food supplies for the inhabitants. However, the gold rush altered that pastoral economy. The demands of miners led to the development of manufacturing, initially in lumbering and sawmills. The discovery of gold also led to the development of a market for agricultural goods. In the decade of the 1850s, then, California was both a mining and an agricultural frontier.

Only two years after acquiring the California territory, the United States admitted it to the Union as a state. At the time of admission, the state’s population numbered 92,597. The gold rush spawned dramatic population growth, which reached 380,015 by 1860 and exceeded 500,000 by 1870. In the early 1860s, mining still employed more Californians than any other occupation. The state’s first meaningful railroad development occurred in the 1860s, but labor shortages presented a serious problem for the companies constructing the railroads. Much of California’s labor force was devoted to mining and its supporting occupations. The railroads recruited Chinese immigrants to build the railroads. A labor surplus did not appear in California until the mid-1870s.

232. Id. at 121.
234. BECK & WILLIAMS, supra note 231, at 153.
235. JOHN W. CAUGHEY, CALIFORNIA 314 (1940). Selvin reported that by 1850 approximately a third of California workers held occupations that supported the mining communities. SELVIN, supra note 233, at 5.
236. CAREY McWILLIAMS, CALIFORNIA: THE GREAT EXCEPTION 107 (1949). Because of the demand for fresh goods, prices were astronomical. Fresh peaches were sold in the mines for $3 a piece. Id.
237. Id. at 84.
240. CAUGHEY, supra note 235, at 306.
241. SELVIN, supra note 233, at 9.
242. CAUGHEY, supra note 235, at 306. The peak for gold mining occurred in the early 1850s, but other types of mining gradually became more important. Id.
243. BECK & WILLIAMS, supra note 231, at 218-220.
244. Id. at 220-21.
245. Id. at 252.
In May 1869, when the Central Pacific and the Union Pacific railroads met at Promontory Point, Utah, the California and national markets connected, an event that would have a dramatic impact on the state’s economy.\textsuperscript{246} The railroads spurred the development of California commercial agriculture, with wheat becoming an export crop by the 1860s.\textsuperscript{247}

Agriculture dominated the California economy until the turn of the century, although mining remained important.\textsuperscript{248} The manufacturing that did develop prior to this time was associated with the needs of an agricultural and mining society.\textsuperscript{249} Because of the need for lumber in mining, railroad construction, and housing construction, the lumber industry developed rapidly.\textsuperscript{250} Other manufacturing concerns arose in the consumer goods arena: meatpacking, milling, food processing, leather goods, textiles, wagon making, breweries, and iron works.\textsuperscript{251} However, other types of industrialization did not develop until the state was united by a rail network in the 1880s.\textsuperscript{252}

\textbf{B. Terms of Employment Relationships}

The major occupations for Californians in the second half of the nineteenth century were in agriculture and mining, with railroad building and commercial manufacturing activities providing some jobs. Unlike in other states where small farmers dominated, California land was evenly divided between small farmers and large landholders.\textsuperscript{253} This land-holding pattern was a legacy of the days of Spanish and Mexican control, during which time extensive land grants consisting of thousands of acres were made to individuals.\textsuperscript{254} Typically, Mexican, Chinese and Native American laborers worked these large land holdings on a seasonal basis.\textsuperscript{255} Thus, California agricultural labor was seasonal from the earliest days, remained as such throughout the nineteenth century, and continues today in the same pattern.\textsuperscript{256} These seasonal farm workers spent the winter unemployed, going from odd job to odd job at a daily rate, if they were lucky enough to find such work.\textsuperscript{257} Miners had no greater job security than did agricultural laborers. Most miners worked on a daily wage basis, although some worked

\textsuperscript{246.} \textit{Id.} at 225.
\textsuperscript{247.} \textit{Id.} at 255, 278.
\textsuperscript{248.} \textit{Id.} at 291.
\textsuperscript{249.} \textit{Id.} at 294.
\textsuperscript{250.} \textit{Id.} at 295.
\textsuperscript{251.} \textit{Id.}
\textsuperscript{252.} \textit{Id.} at 299.
\textsuperscript{253.} \textit{Id.} at 259.
\textsuperscript{254.} \textit{Id.} at 258-59.
\textsuperscript{255.} \textit{Id.} at 259.
\textsuperscript{256.} McWILLIAMS, \textit{supra} note 236, at 108, 137.
\textsuperscript{257.} SELVIN, \textit{supra} note 233, at 33.
on contracts that paid them a certain wage per foot mined. They suffered from the same seasonal unemployment, widespread in the winter months, as did agricultural workers.

Winter unemployment on the farms and in the mines affected employment in the industries dependent on agriculture and mining. The workers in these industries often labored either on a piece rate or on a daily rate, and were subject to the vagaries of both the economy and the weather. In the winter of 1852, a newcomer to San Francisco found widespread destitution and unemployment. In the winter of 1856, three thousand San Francisco laborers were out of work, out of a total population of 50,000, many of whom were not even part of the labor market.

C. Case Law Development

The historical evidence suggests that California followed employment-at-will. The case law from the California Supreme Court supports that conclusion. Morriess asserts that California adopted employment-at-will by statute in 1872. However, prior to 1872, the California Supreme Court issued seven decisions that addressed the term of employment.

In DeBriar v. Minturn, an 1851 decision, the employee had been hired as a barkeeper for $300 per month plus room and board. The employer discharged the barkeep and gave him notice to vacate the room he occupied. When the employee refused to comply, the employer had him ejected by force. The employee then sued. The court found for the employer, holding that because the barkeep had not been hired for any definite period, the employer had the right to discharge him and eject him from the premises. The court noted that under the terms of the employment, the barkeep had “the privilege of occupying a room so long as he remained in the defendant’s employ.” The court reasoned that because the employee “was not hired for any definite period, and he was discharged by the defendant . . . the plaintiff had no right to remain in the defendant’s house

259. Selvin, supra note 233, at 8.
261. Selvin, supra note 233, at 8.
262. Id.
263. Morriess, supra note 1, at 765.
264. 1 Cal. 450 (1851).
265. Id. at 451.
266. Id.
267. Id.
268. Id.
269. Id.
after being notified to leave, and the defendant had a right to eject him." 270
Because the right to occupy the premises was part of the employment con-
tract, one would have expected the court to find the ejection illegal if the
employer had breached an annual hiring contract by early discharge. 271
However, because it is not squarely on point, one cannot reach a definitive
conclusion based solely on this decision.

Prior to 1872, the California Supreme Court addressed employment
contracts in six additional cases. 272 All of these cases involved interpreta-
tions of express contracts. One is worth exploring in more detail because it
addressed the issue of how to interpret the contractual relations of the par-
ties once the initial agreed-upon employment period had expired. In Nich-
olson v. Patchin, 273 the employee had been hired as a clerk for one month at
a salary of $100. At the end of the month, the employee continued work-
ing, although the parties did not further discuss the salary or expressly agree
to any rate of compensation. A dispute then arose as to the amount of
salary to which the employee was entitled. 274 The court held that in these
circumstances, the presumption is that the parties intended the original sal-
ary of $100 per month to continue. 275 There was no mention of the annual
hiring rule. If such a rule were recognized, one would have expected the
court to address it in this case. This case does support the proposition that
some courts did equate payment terms to terms of employment.

Another case, Bates v. Sierra Nevada Lake Water & Mining Co, 276
issued in 1861, provides some evidence of the contractual status of mid-
level management employees. The plaintiff was hired to be a company’s
general superintendent. The contract specified an annual payment term and

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270. Id. De Briar is one of the cases Wood cited in his 1877 treatise in support of the employment-
at-will rule. Wood, supra note 4, at 272 n.4. Shapiro and Tune argue that Wood’s reliance on this case
was misplaced because the issue was not an employment contract issue, but rather the right of ejection
and it “touched only tangentially on the employment relationship.” Shapiro & Tune, supra note 1, at
341-342 n.54. While it is true that the case touches only “tangentially” on the employment law issue,
nevertheless it does provide some evidence of the state of California law which, taken with the other
evidence of actual employment practices, suggests that employment-at-will was always followed in
California.

271. The headnote for the case contains a clear statement of the employment-at-will rule: “Where
no definite period of employment is agreed upon between a master and servant, the master has a right to
discharge the servant at any time.” 1 Cal. at 450. The headnote, of course, is not part of the official
decision and may not even have been written contemporaneously with the decision. The volume in
which I found this case was published in 1887 and, thus, it must have been written before that date.
However, if the headnote was written for the 1887 publication, it certainly is possible that it was written
based on Wood’s interpretation of the case. Thus, the headnote is not very helpful in understanding the
court’s view of the law in 1851.

272. Hutchinson v. Wetmore, 2 Cal. 324 (1852); Nicholson v. Patchin, 5 Cal. 474 (1855); Hogan
v. Titley & Prince, 14 Cal. 255 (1859); Bates v. Sierra Nevada Lake Water & Mining Co., 18 Cal. 171
(1861); Webster v. Wade, 19 Cal. 291 (1861); and Moulin v. Columbet, 22 Cal. 508 (1863).

273. 5 Cal. 474 (1855).

274. Id. at 475.

275. Id.

276. 18 Cal. 171 (1861).
it provided that the contract was terminable on six months notice by either party. While the decision does not address the annual hiring rule, it does suggest that employers knew how to protect their interests against mid-level managers’ claims of having a right to long-term job security.

California case law prior to 1872 is not definitive on the issue of employment-at-will. However, there is no case where the California Supreme Court adopted the annual hiring rule, or even referred to it. The De Briar language and the absence of discussion of the annual hiring rule, combined with the historical evidence on California employment practices, suggests that California followed the employment-at-will rule and did not suddenly adopt it with the 1872 codification. Indeed, the 1872 codification specified that the code provisions “so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments.” The 1872 statute merely codified the law as it already existed.

VI
MONTANA
A. Economic Development

The discovery of gold in the Montana hills in the 1860s brought the first waves of white settlement to the area. In 1870, the population remained sparse, at just over 20,000. Mining blossomed, and by the 1870s was conducted primarily by corporations rather than by individual miners. Because of the intense need for wood supports in mines, the lumber industry grew alongside mining, just as it had in California. Unlike in the other states examined in this study, agriculture initially was not an important part of Montana’s economy. In 1880, only 12 percent of Montanans were engaged in agriculture; by 1890 that number had risen only to 20 percent, out

277. Id. at 172.
278. CAL. CIV. CODE § 1999 (1872).
279. Id., at § 5. In fact, the 1872 code adopted two provisions dealing with terms of employment: one, section 1999, for employees which appear to have been independent contractors and two, sections 2010-11, for servants, who fell within the traditional definition of servants. Section 1999 specified that “an employment having no specified term may be terminated at the will of either party, on notice to the other.” Section 2010 provided that where the parties had not agreed on a term of service, but had agreed on a term for payment of wages, the term of service would correspond with the period for the payment of wages. Section 2011 provided that where the parties had agreed neither on term of service nor wages, the presumption would be a monthly contract at reasonable wages.
281. Id. at 74. Over a third of the population were immigrants. Id.
283. MALONE & ROEDER, supra note 280, at 253.
284. Id. at 130-33.
of a total population of 132,159. Cattle and sheep farming developed in the 1870s and 1880s. By the time Montana became a state in 1889, mining and agriculture, including cattle and sheep farming, were the two primary industries. They remain so today.

B. Terms of Employment Relationships

The primary occupations in late-nineteenth century Montana were mining, building the railroads, lumbering, cattle and sheep ranching, and farming. Workers in these occupations suffered from the same lack of job security as workers in the other states examined in this study. Miners received good wages, but worked on a daily wage basis and were subject to unemployment both during the winter months and when rainy conditions filled the mines with water. Railroad workers also suffered from irregularity of employment. In a study of nineteenth-century railroad workers, historian Shelton Stromquist found that the available work on the railroads alternated with the periods of the railroads' expansion and contraction. The regularity of the railroad workers' employment depended on “the season, the state of business, and their seniority.” Even the cowboys on the cattle and sheep ranches lacked job security. At roundup time, the ranchers appointed one “roundup captain” who had “unlimited authority to hire, fire, and command any cowboy from any ranch.” Thus, frontier workers suffered generally from a lack of steady work. Historian Carlos Schwantes reports that frontier workers “seldom worked long for an employer.”

C. Case Law Development

Morriss asserts that Montana adopted employment-at-will by an 1895 statute. Prior to 1895, the Montana courts addressed employment contracts in only five cases. Three of these provide examples of express contracts, one for a mine manager, and one for a school teacher and one for a


286. MALONE & ROEDER, supra note 280, at 110.

287. Id. at 261.

288. Id. at 129.


291. Id. at 116.

292. MALONE & ROEDER, supra note 280, at 120.

293. Carlos Schwantes, Images of the Wageworkers' Frontier, 38 MONT. MAG. WEST. HIST. 38, 40 (1988).

294. Morriss, supra note 1, at 769.

295. Isaacs v. McAndrew, 1 Mont. 437 (1872).

ranch foreman, but otherwise do not provide any guidance on the existence of employment-at-will. The mine manager case, however, provides evidence that employers knew how to protect themselves from claims of mid-level managers for long-term job security. The mine manager's contract was for a five-year term, but could be dissolved or canceled at any time by either party. In a fourth case, the court found an implied contract for services rendered, but did not address the employment-at-will issue. The final case, Alvord v. Hendrie, provides some hints about the Montana court's view on the employment relationship, and thus is worth examining in more detail.

In Hendrie, the issue involved the application of Montana's mechanics' lien statute. Hendrie had agreed to work for Alvord, a mine owner, as a mechanic for the salary of "$2,500 per annum." A dispute arose over what the term of payment meant with respect to the time period of employment. Hendrie worked for Alvord for twenty-one months. At the conclusion of the work, Hendrie filed a mechanic's lien pursuant to the territorial statute. The mechanics' lien law required the employee to perfect the paperwork for the lien within 60 days after completion of the work. Alvord argued that Hendrie was precluded from obtaining a lien for the first year's work, which Alvord argued constituted a separate contract from the subsequent nine months Hendrie had worked for him. Because it was a separate contract, Alvord argued that the lien for wages due for that year had to have been filed within 60 days of the completion of that first year.

The court determined that the words "$2,500 per annum" referred only to the rate of pay and did not mean a yearly contract:

The contract between the parties was, that the plaintiff was to work . . . for the consideration of $2,500 per annum; i.e., by the year, or at the rate per year, not for one year. The time was indefinite; it might extend to many years; and, indeed, from the character and nature of the business, we might infer that it might extend to many years, if they could agree.

The court determined that the twenty-one-month period constituted the contract period and that it was a single contract. Thus, Hendrie had properly perfected his lien.

We can draw two conclusions from this case that provide some evidence that employment-at-will was the standard in Montana. First, if the annual hiring rule were in effect, one would have expected Alvord to use it to support his argument that the agreement should be viewed as a series of

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298. Isaacs, 1 Mont. at 448.
299. Felton v. West Iron Mountain Mining Co., 40 P. 70, 71 (1895).
300. 2 Mont. 115 (1874).
301. Id. at 117.
302. Id. at 122-23.
303. Id. at 123 (emphasis in original).
annual contracts. The fact that he did not use this argument suggests that the annual hiring rule was not recognized in Montana. Second, the court’s ruling that “$2,500 per annum” refers only to a method of payment and not to the term of the contract suggests that the annual hiring rule was not recognized. Because no definite term was stated in this contract, if the annual hiring rule was recognized, one would expect the court to at least offer an explanation of why it did not apply in this case. Again, the fact that no explanation was offered suggests that the rule was not recognized.

Because Anglo-Americans did not settle in Montana until the 1860s, the time period available for examination of this issue is much shorter than for the other states. Thus, Montana does not provide an abundance of evidence to analyze. Although the case law does not shed a great deal of light on the annual hiring rule versus employment-at-will issue, the historical evidence on work relationships suggests that employment-at-will was the recognized standard.

VII
Conclusion

The employment-at-will rule was not a sudden judicial creation that first appeared in the late-nineteenth century. Rather, it has been the norm throughout the history of the United States. This conclusion raises three questions. First, why did the United States not follow the English annual hiring rule? Second, if it was not a creation of the late-nineteenth century, how did the myth arise that it was? Third, why did court decisions in the late-nineteenth century begin containing express language rejecting the annual hiring rule, if it generally had not been applied in this country?

As to the first issue, the English annual hiring rule was not adopted in this country because the economy and the labor market created a set of conditions not conducive to the annual hiring rule. The North American colonies were settled primarily as agricultural communities. While some small-scale manufacturing existed in colonial times, the colonies remained agriculturally-based economies throughout the colonial period, and well into the nineteenth century. The territories that were settled in the nineteenth century were also primarily agriculturally based, and remained so through much of the nineteenth century. Additionally, while some of the agricultural land was held by large landholders, particularly in the southern states and California, much of it was held by small, subsistence farmers. Land was readily available, at very low cost; hence, few barriers to establishing small farms existed.

This agricultural labor market, from colonial times until well into the middle of the nineteenth century, was characterized by severe labor scarcity. The shortage had two main effects with respect to the inhospitality of conditions for the adoption of the annual hiring rule. First, much of the
pre-Revolutionary War labor force in the United States consisted of either slaves or indentured servants. Approximately one-half of the 350,000 Caucasian workers who arrived in North America between 1580 and 1775 came as indentured servants bound to their masters by multi-year contracts which removed them from the annual hiring rule’s scope.304 From 1700 to 1790, approximately 250,000 slaves arrived in the North American colonies, and of course would not have been covered by the annual hiring rule because slavery is not a contractual status.305 If one considers both indentured servants and slaves, approximately three-fourths of all immigrants to the North American colonies prior to 1790 came as “unfree laborers” who would not have been covered by the annual hiring rule.306 Most of the others either became land-owners immediately or worked as occasional or day laborers while they accumulated the funds to buy their own land—an easy task due to the abundance of cheap land.

The second effect of the labor shortage on the annual employment rule was that the scarcity created a high demand for the little labor that was available, thus driving up wages. However, employers could not afford to pay high wages for year-round labor, and as we have seen, employers typically resorted to hiring occasional or day labor. Employers could neither afford to be bound by the annual hiring rule, nor did they wish to be. Similarly, free laborers likely did not want to be bound to labor contracts for long time periods. Most free laborers wanted to work only long enough to make sufficient money to buy their own land. Further, most of the cases from the five states examined in this study that made their way to the state supreme courts involved express written contracts. This suggests that many contracts for other than occasional or day labor were reduced to writing. The labor shortage is the likely explanation for the common use of written employment agreements that specified the employment contract’s duration. Although employers did not want to be bound to labor contracts on a year-round basis, they did want to ensure a labor supply during their busy seasons. Because labor shortages promote mobility among workers, an employer would want to use a written contract to bind an employee to the promised services for the necessary time period. Employment relationships that were defined by express contracts for specified time periods obviously would not fall within the annual hiring rule’s purview.

It is reasonable to conclude, then, that because of the extensive use of indentured servitude, slavery, and express contracts for specified terms, and because of the severe labor shortage, few laborers would have been in situations where the annual hiring rule could have applied. The agricultural

306. WORK AND LABOR IN EARLY AMERICA 10 (Stephen Innes, ed., 1988).
economy, which was dominated by small subsistence farmers who did not need permanent hired help, plus the general labor shortage, militated against the adoption of the annual hiring rule in this country.

If the annual hiring rule generally did not apply in this country, then, how did the myth arise that it did apply? Some late-nineteenth-century cases suggest that the annual hiring rule applied.\(^{307}\) However, one would be hard-pressed to find a case that actually applied the rule. Thus, courts cited the rule's existence but held that it did not apply in the case at hand.\(^{308}\) If one examines the state of legal authority on which the courts could rely throughout most of the nineteenth century, a likely explanation suggests itself: until the last two decades of the nineteenth century, judges and lawyers had to rely primarily on treatises for their legal authority. The regional reporters did not appear until 1879, and the citation system for finding authority appeared shortly thereafter.\(^{309}\) Many of the treatises that did exist during the nineteenth century were English treatises which contained footnotes for U.S. cases.\(^{310}\) *Chitty on Contracts*, which was cited in the 1853 Rutledge case from Texas,\(^{311}\) was of this type. In describing the annual hiring rule, the text in *Chitty* did not specify that this was an English rule, although the only footnotes it cites in support of the rule are English cases.\(^{312}\) Because judges and attorneys relied extensively on treatises, it is probable that they believed that some courts did follow the annual hiring rule, even though they may never have witnessed its application.\(^{313}\)

If employment-at-will has been the norm throughout our history, why did court decisions in the last two decades of the nineteenth century suddenly begin to contain express language rejecting the annual hiring rule, as noted in the decisions that Morriss argues adopted employment-at-will? Prior to this time, the decisions generally did not address the rule at all, as we have seen from the case analysis herein. Feinman argues that employment-at-will was adopted by the courts in an effort to protect employers from the demands of mid-management workers.\(^{314}\)

\(^{307}\) For example, see Kirk v. Hartman, 63 Pa. 97 (1869), which noted that there may be contracts in which a hiring for a year may be implied. However, the contract in this case was not one of these because of the nature of the contract. *Id.* at 105.

\(^{308}\) *Id.*

\(^{309}\) LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 408 (2d ed. 1985).

\(^{310}\) See, e.g., CHARLES M. SMITH, A TREATISE ON THE LAW OF MASTER AND SERVANT (Law Library Ed. with Notes & References to American Cases, 1852); C.G. ADDISON, A TREATISE ON THE LAW OF CONTRACTS (2d Am. ed, with Notes & References to American Decisions, 1857).

\(^{311}\) See supra notes 210-212 and accompanying text.

\(^{312}\) CHITTY, supra note 210, at 575-578.

\(^{313}\) Because the treatises were the major source of legal authority, it is almost certain that some lower courts applied the annual hiring rule, assuming it to be the rule in this country. However, it is clear from the case analysis at the state supreme court level, the rule was not generally recognized.

\(^{314}\) See supra notes 7-13 and accompanying text.
management workers did not begin to appear in the work force in any significant numbers until after the Civil War. Feinman makes a convincing case that many of the plaintiffs in the cases he identifies as establishing the employment-at-will principle were middle-level management employees. In an effort to attain job security, these workers might have relied on the treatises that contained the annual hiring rule to establish job security. The courts clearly rejected this attempt. However, this does not mean that the courts were establishing new law. This analysis shows that they were simply reaffirming the existing state of the law, and not attempting to protect capital from these workers’ demands. Moreover, Feinman’s argument that the courts were attempting to protect capital by denying job security to middle-level management workers does not ring true for another reason. As this case analysis shows, the courts of the late-nineteenth century clearly honored the terms of express contracts. If employers needed to deny long-term job security to their middle-level management employers, they could easily have done so in the terms of the job contracts. They did not have to wait for a change in the common law to accomplish this.

While I agree with Feinman and Jacoby that economics explained the adoption of employment-at-will in the United States, I disagree with them over the issue of when it happened. The rule was adopted in colonial times due to the needs of an agricultural economy characterized by labor scarcity, and not in the late-nineteenth century in order to meet the needs of capital in an industrial society.

Morriss argues that the late-nineteenth century courts adopted employment-at-will to serve a gatekeeper function. Courts and juries were ill-equipped to resolve employment disputes, and thus, the courts adopted employment-at-will to take the issue out of the juries’ hands. Again, while I disagree with Morriss that this was when employment-at-will was adopted, his gatekeeper theory may explain a significant change in the law that did occur in the late-nineteenth century. Prior to the 1870s, as we have seen, some courts held that the contract term was dictated by the period by which wages were to be paid. If the parties agreed to a monthly salary, then the contract period was month to month; if they agreed to an annual salary, the contract was an annual one. However, many courts in the cases brought by middle-level management employees in the late-nineteenth century began rejecting this rule of contract interpretation and began to hold, instead, that an express agreement on the term itself was needed to bind the parties to a time period. The courts themselves did not explain why they made this change. Thus, Morriss’s gatekeeper explanation may well be the reason.

315. For a discussion of the rise of this class of workers, see Robert Wiebe, The Search for Order (1967).
316. See supra notes 19-26 and accompanying text.
My analysis of the five states discussed in this article, and the four states that I examined in my earlier work, provide substantial support for the proposition that the United States always has followed the employment-at-will doctrine. Thus, when late-nineteenth century jurists expressly applied the doctrine to mid-level management employees, they simply were relying on preexisting law—not creating new doctrine. It is now time to put to rest the original myth surrounding employment-at-will, that it was a creation of treatise writer Horace Wood, readily adopted by late nineteenth century jurists intent on protecting the new industrial order.