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**ALL OR NOTHING:  
THE EMPLOYMENT SECURITY LAWS OF JAPAN  
AND THE UNITED STATES**

MELISSA H. KIM\*

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## ABSTRACT

*This note examines the laws governing employment security in Japan and the United States and compares their practical implications on the rights and statuses of employees, particularly during economic downturns. While the United States and Japan have two of the most advanced economies in the world, their laws on employment security strikingly diverge. In the United States, the doctrine of “employment-at-will” prevails, whereby employment can be terminated for any reason, and employees are provided with little to no job security. In Japan, on the other hand, the laws provide employees with long-term or lifetime employment and significantly restrict employers from dismissals under the “Abuse of the Right to Dismiss” doctrine. Under an employee-centered approach, this note analyzes the employment consequences of the recent 2008 recessions in the two countries and applies a “social citizenship (rights-based) model” to their laws and practices. This note argues that although American workers tend to have more bargaining rights — to other terms and conditions of their existing employment — their rights cannot effectively remedy the lack of legal protection from economic dismissals. Conversely, Japanese workers have fewer bargaining rights, but their right to job security protects their remaining rights and reflects the laws’ recognition of the employee’s well-being as well as their social and economic responsibilities. Drawing on these differences, the United States can learn from the Japanese system, which has survived a number of economic recessions, about the feasibility of covering economic dismissals and providing workers with the important right to employment security.*

## INTRODUCTION

Imagine that you have just entered the workforce. And given the current state of globalization, assume that you have the flexibility of working anywhere in the world. Now as a new employee, you have two options of where you can work. You can work in Country A, where employers are legally bound to employ you for life, but you have practically no say in terms of changing positions or setting your salary. Or you can work in Country B, where employers can easily fire you for any reason at all,<sup>1</sup> but you have more flexibility in terms of career changes, salaries, and terms of employment. As an incoming employee, you carefully mull over these considerations in this “all or nothing” situation: which one would you prefer?

The hypothetical posed above is based on the employment systems of Japan and the United States. While both countries are known for having

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<sup>1</sup> See, e.g., *Nelson v. James Knight D.D.S.*, 834 N.W.2d 64 (Iowa 2013) (firing an employee for attractiveness was not unlawful).

two of the most advanced economies in the world,<sup>2</sup> the two countries approach the issue of employment security in distinctly different ways. In the United States, the doctrine of “employment-at-will” prevails, whereby employment can be terminated for any reason, providing employees with little to no security. In Japan, on the other hand, employees are guaranteed long-term or lifetime employment, and employers are greatly restricted from terminating employees.

The two contrasting legal approaches to employment security raise a number of questions: how did their respective rules develop? How do these rules influence their economies? What are the employees’ legal rights under these systems? How do their employment laws actually affect their employees, in terms of the standard of living, job flexibility or job satisfaction? And ultimately, which one is better?

In a slightly different hypothetical, imagine that both countries are experiencing economic downturns. *Ceteris paribus* — assuming that the laws governing employment security are applied with the same force for economic dismissals — which employment system would you now prefer?

This second situation may perhaps lead to a different answer. Several scholars have approached the issue of employment security in the two countries, looking specifically at corporate governance, economic efficiency, and economic development.<sup>3</sup> The topic in this note, however, analyzes the effects of these laws on the rights and statuses of employees under an employee-centered approach,<sup>4</sup> in light of the late 2008 recession in Japan<sup>5</sup> and the 2008 sub-prime mortgage crisis in the United States.<sup>6</sup>

This note aims to demonstrate how Japan’s employment system is better for employees than the United States’ system, in preserving the values of individuals and protecting their rights. To do so, Part I first explains the historical developments that led to the different formations of the countries’ employment security laws. Part II then examines the statutes and caselaw governing employment security and provides an overview of employees’ rights in both Japan and the United States. Part III summarizes the current economic and employment conditions in both countries. Next, Part IV discusses the alternative approaches to this comparative study, namely those that focus on corporate governance and economic efficiency, and briefly evaluates these approaches. Finally, Part V

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<sup>2</sup> The United States and Japan have consistently been in the G7 for the past several decades. See *World Economic and Financial Surveys*, IMF (Oct. 2014), <https://www.imf.org/external/pubs/ft/weo/2014/02/weodata/groups.htm#mae>.

<sup>3</sup> See discussions *infra* Part IV.

<sup>4</sup> See *infra* Part V.

<sup>5</sup> *The World Factbook: Japan*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html> (last visited Feb. 6, 2016).

<sup>6</sup> *The World Factbook: United States*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited Feb. 6, 2016).

explains the “social citizenship (rights based) model” under an employee-centered approach, in which the right to employment security is central.

This note argues that although represented workers in the U.S. tend to have more bargaining rights regarding conditions and terms of their existing employment, their rights carry less weight, since they cannot remedy the lack of legal protection from economic dismissals during recessionary periods. Without a job through which an American worker can exercise their bargaining rights, these rights have significantly less practical meaning. On the other hand, while Japanese workers, who usually work through enterprise-based unions, have much fewer bargaining rights, their threshold right to job security protects these remaining rights. The Japanese system reflects a social citizenship model that recognizes the individual employee’s dignity and wellbeing as well as the social values of collective responsibility. Thus, under this approach, the Japanese employment system demonstrates that high job security is not only feasible, but also necessary to advance employees’ labor and employment rights, particularly during economic downturns.

## I. HISTORICAL BACKGROUND OF THE EMPLOYMENT LAWS IN JAPAN AND THE UNITED STATES

As an initial matter, it is important to have some historical background of these two countries to understand how the current employment systems developed. Though several contributing factors likely exist, for the purposes of this note, this Part distills these factors, looking mainly to early texts as well as certain political and economic circumstances as the major factors or causes for the distinct developments in the two countries. The nature of the causes as well as their later progressions likely helped set off the countries’ employment systems on the two divergent paths.

### A. *Japan: Post-War Origins*

Japan is “known for its lifetime or long-term employment practice,” which provides employees “with a high degree of employment security.”<sup>7</sup> This relatively new practice is arguably “the most distinguishing characteristic of the Japanese labor [and employment system].”<sup>8</sup> Although some scholars attempt to attribute this distinct practice to the culture or

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<sup>7</sup> Takashi Araki, *A Comparative Analysis of Security, Flexibility, and Industrial Relations in Japan*, 28 COMP. LAB. L. & POL’Y J. 443, 445 (2007) [hereinafter Araki, *Security, Flexibility and Industrial Relations*].

<sup>8</sup> Satoshi Shimizutani, *Has Japan’s Long-Term Employment Practice Survived? Developments Since the 1990s*, 62 INDUS. & LAB. REL. REV. 313, 313 (2009) (citations omitted).

religion of Japan,<sup>9</sup> the economic and political history seems to more readily demonstrate its role and development in the employment system.<sup>10</sup>

Before the 1940s, during which time the Japanese labor system was still underdeveloped, Japan was governed by a classic market economy.<sup>11</sup> Japan maintained competitive and capitalistic labor markets, with adversarial industrial relations and high turnover rates.<sup>12</sup> “[T]he key [provision] governing termination of employment contracts [was] contained in [Section 647 of] the Civil Code.”<sup>13</sup> Specifically, Section 647 provided: “Where the parties have not specified the term of an employment contract, either party may at any time make a request to terminate the contract, in which event the contract will be terminated two weeks after the request is made.”<sup>14</sup> Thus, before the 1940s, the Japanese employment system more closely resembled the United States’ at will model because either side could terminate employment.<sup>15</sup>

After World War II, however, the Japanese government faced dire economic and social conditions.<sup>16</sup> The country experienced a severe shortage of food and employment opportunities, wherein “[job] dismissal[s] meant a loss of livelihood.”<sup>17</sup> In these impoverished conditions, the government’s priorities notably shifted — it began to value employment more highly and aimed to better protect its workers.<sup>18</sup> As part of the larger scheme to “democratize the centralized Japanese economic system,” the Japanese government revamped its employment laws.<sup>19</sup> It

<sup>9</sup> See Atsushi Tsuneki & Manabu Matsunaka, *Labor Relations and Labor Law*, 20 PAC. RIM L. & POL’Y J. 529, 534 n.27, n.28 (2011) (attributing the Japanese practice to its “group-oriented culture” and also to Confucianism post-Meiji Restoration) (internal citations omitted) [hereinafter Tsuneki].

<sup>10</sup> See *id.* at 534-35, 535 n.29 (stating that “cultural theories are also questionable from a historical point of view” because the customs “did not exist from the beginning of the Japanese economy”).

<sup>11</sup> See *id.* at 535.

<sup>12</sup> See *id.*

<sup>13</sup> Daniel H. Foote, *Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of –Stability?*, 43 UCLA L. REV. 635, 639-40 (1996) (citing MINPŌ [CIV. C.], art. 627, No. 89 of 1896 [hereinafter 1896 CIVIL CODE]); see also Ronald Gilson & Mark Roe, Essay, *Lifetime Employment: Labor Peace and the Evolution of Japanese Corporate Governance*, 99 COLUM. L. REV. 508, 525 n.59 (1999) (“Since 1896, the Japanese Civil Code has specified that an employment contract without a fixed term could be ended by either party on short notice.”).

<sup>14</sup> Foote, *supra* note 13, at 640 (citing 1896 CIVIL CODE art. 627(1)).

<sup>15</sup> See *id.*

<sup>16</sup> Takashi Araki, *A Comparative Analysis: Corporate Governance and Labor and Employment Relations in Japan*, 22 COMP. LAB. L. & POL’Y J. 67, 79 (2000) [hereinafter Araki, *Corporate Governance*].

<sup>17</sup> See *id.* at 79-80.

<sup>18</sup> See *id.*; see also Tsuneki, *supra* note 9, at 539-40.

<sup>19</sup> Hiroshi Iyori, *Competition Policy and Government Intervention in Developing Countries: An Examination of Japanese Economic Development*, 1 WASH. U. GLOBAL

enacted legislation, such as the New Constitution of 1946, which established Japanese citizens' fundamental rights to work, organize, bargain, and act collectively.<sup>20</sup> The government also enacted the Labor Standards Law<sup>21</sup> and the Workers' Accident Compensation Law, which were both modeled after the high standards promulgated by the International Labor Organization of the United Nations.<sup>22</sup> The Employment Security Act of 1947 was also enacted to "provide every person with an opportunity to obtain a job conformed to his/her ability and meet the labor needs of industry through the provision of employment placement businesses."<sup>23</sup> During this period, the government legislated a number of laws granting more seniority and unemployment benefits.<sup>24</sup>

These new laws promoted employees' interests and rights, fostered employers' identification of interests with management, and organized industrial relations.<sup>25</sup> By and large, the Japanese government's dual efforts to democratize and increase Japan's economic capacity after the war resulted in significant legal protection for workers.<sup>26</sup> For the past several decades, the practice of long-term employment has proved successful in helping Japan maintain a steady workforce and eventually develop an advanced economy.<sup>27</sup>

## B. *United States: Woods' Rule*

Unlike Japan's employment laws that surfaced out of an unstable post-war era, the doctrine of employment-at-will largely emerged from a treatise, entitled "Master and Servant," around 1877.<sup>28</sup> Before this treatise, "the United States largely followed the English common law," under

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STUD. L. REV. 35, 38-39 (2002) (discussing the various economic, social, and political democratization policies that the Allied Powers introduced to Japan, i.e., Antimonopoly Law). *See also* Tsuneki, *supra* note 9, at 539-40.

<sup>20</sup> Tsuneki, *supra* note 9, at 540 n.59, n.60 (citing NIHONKOKU KENPO [KENPO] [CONSTITUTION], arts. 27, 28).

<sup>21</sup> *Id.* at 540 n.61 (citing Rodo kijun ho [Labor Standards Act] Law No. 49 of 1947 [hereinafter LSA]).

<sup>22</sup> *See id.* at 540.

<sup>23</sup> Employment Security Law No. 141 of 1947, art. 1, [http://www.ilo.org/wcmsp5/groups/public/—ed\\_protect/—protrav/—ilo\\_aids/documents/legaldocument/wcms\\_117326.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_protect/—protrav/—ilo_aids/documents/legaldocument/wcms_117326.pdf) [hereinafter ESA].

<sup>24</sup> Tsuneki, *supra* note 9, at 540 n.63 (discussing the Unemployment Insurance Law and Emergency Countermeasures Laws) (citations omitted).

<sup>25</sup> *See id.* at 541-43.

<sup>26</sup> *See id.*; *see also* Gilson & Roe, *supra* note 13, at 525.

<sup>27</sup> *The World Factbook: Japan, Economy*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html> (last visited Mar. 1, 2016).

<sup>28</sup> Clyde Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. J. 66, 67 (2000) (citing HORACE G. WOOD, MASTER AND SERVANT § 134 (1877)) [hereinafter Summers, *The Divine Right*]. Admittedly, this treatise is only one of the many factors that shaped the at-will

which “employment relations [were] a contractual relationship that bound the parties to a continuing relationship.”<sup>29</sup> Typically, unless otherwise specified, the arrangement between an employer and an employee lasted for one year.<sup>30</sup> Unless there was good cause for discharge, the relationship could not be terminated except by mutual agreement.<sup>31</sup>

However, in 1877, Horace Wood, an American treatise writer, intending to distinguish American common law from English common law,<sup>32</sup> wrote:

With us, the rule is inflexible, that a general hiring 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 on 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.<sup>33</sup>

These words, which came to be known as “Wood’s Rule,” have captured the essence of the at-will doctrine.<sup>34</sup> The Rule abolished the presumption of a one-year employment contract by stating, with regard to employment obligations, that “no presumption attaches that it was for a day even.”<sup>35</sup> Moreover, it expressly established that if a contract failed to specify the length of employment, employment is “indefinite.”<sup>36</sup>

Woods’ Rule initially faced a great deal of resistance since this principle not only misstated existing law, but also departed significantly from English common law.<sup>37</sup> Strong economic and technological undercurrents at the time, however, began to push for Wood’s Rule; with the

doctrine, but for the sake of this comparison, I highlight this treatise as a distinguishing factor, to contrast the readily apparent post-war conditions in Japan.

<sup>29</sup> *Id.* at 66.

<sup>30</sup> Hum. Resources Mgmt. Emp. & Union Relations Guide, Understanding Employment-At-Will Considerations, 2009 WL 3893975, ¶400 (2010) [hereinafter HRME Guide].

<sup>31</sup> *Id.*

<sup>32</sup> Summers, *The Divine Right*, *supra* note 28, at 66-67.

<sup>33</sup> *See id.*; HORACE G. WOOD, MASTER AND SERVANT § 134 (1877) (emphasis added).

<sup>34</sup> HRME Guide, *supra* note 30.

<sup>35</sup> *See* Summers, *The Divine Right*, *supra* note 28, at 67 (“It explicitly rejected those decisions which held that there was a presumption that employment was for the period of stated pay and imposed the opposite presumption that such employment was at will. It also rejected those decisions where the court determined the intent of the parties without the weight of any presumption; instead, it imposed a blanket presumption of employment at will which no court had imposed before.”).

<sup>36</sup> *Id.* at 66-68.

<sup>37</sup> *See id.* at 67-68; Peter H. Cappelli & JR Keller, *A Study of the Extent and Potential Causes of Alternative Employment Arrangements*, 66 INDUS. & LAB. REL. REV. 874, 876 (2013) (“The notion that employees and employers could walk away

emerging concepts of freedom of contract and the growth of the United States' economy, the values and sentiments regarding employment began to change.<sup>38</sup> The at-will doctrine began to garner a great deal of support as it started to align with the increasingly popular idea of *laissez faire* capitalism.<sup>39</sup>

Nevertheless, the official approval of the doctrine culminated nearly two decades after the treatise's publication, when the prestigious New York Court of Appeals decided *Martin v. New York Life Insurance Co.*<sup>40</sup> In this first case recognizing Woods' Rule, the court held that "an employee hired for a stated annual salary could be lawfully discharged mid-year without cause."<sup>41</sup> Then, by 1930, the at-will rule became rooted into American law,<sup>42</sup> where employment relationship came to be seen as terminable at the will of either party for any period of time, for good reason, bad reason, or no reason at all.<sup>43</sup>

Thus, from Woods' treatise, the at-will doctrine was borne, and it continued to garner support from the various economic and legal theories during the industrial era.<sup>44</sup> This absolute principle has persisted for most of the twentieth century, but in recent years, a number of statutes and public policies have begun to carve out more exceptions to this doctrine, creating more barriers for employers and their rights to discharge.<sup>45</sup>

## II. THE LAWS AND CASES GOVERNING EMPLOYMENT SECURITY

With their distinct historical origins, the employment systems of Japan and the United States evolved in their own complicated ways. While the developments of both were gradual and on a case-by-case basis, the resultant laws and statutes differed in the kinds of substantive and procedural rights granted to employees. An examination of the judicial doctrines as well as the legal rights granted to employees demonstrates the exact scope of the two countries' employment security laws.

### A. Japan

Japan's employment security system has three defining characteristics.<sup>46</sup> First, protection is provided mainly by caselaw, not by legislation.<sup>47</sup>

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from employment arrangements at any time—this 'at will' idea—was a sharp departure from earlier arrangements.”).

<sup>38</sup> See Summers, *The Divine Right*, *supra* note 28, at 68.

<sup>39</sup> *Id.* (internal citation omitted).

<sup>40</sup> *Id.* at 67 n.10 (citing *Martin v. N.Y. Life Ins. Co.*, 42 N.E. 416, 417 (N.Y. 1895)).

<sup>41</sup> *Id.* at 67.

<sup>42</sup> *Id.* at 68.

<sup>43</sup> HRME Guide, *supra* note 30.

<sup>44</sup> See *id.*; Summers, *The Divine Right*, *supra* note 28, at 68-69.

<sup>45</sup> See generally Summers, *The Divine Right*, *supra* note 28, at 70-78.

<sup>46</sup> See Araki, *Corporate Governance*, *supra* note 16, at 79.

<sup>47</sup> See *id.* at 79-80 (internal citation omitted).



Second, the governing legal doctrine, which was judicially created, is known as the “Abuse of the Right to Dismiss.”<sup>48</sup> And third, the long-term employment policy is deemed a “relational, group contract,” whereby the terms and conditions of employment are specified by the employers’ work rules (*shugyo kisoku*) and apply to all employees of the company.<sup>49</sup>

### 1. Judicial Protection

Although the Japanese government enacted several laws in the 1940s to better protect its workers,<sup>50</sup> most of the rules governing long-term or life-time employment and restraints on economic dismissals emanated from caselaw.<sup>51</sup> During that time, Japan’s existing labor legislation either overlooked or underemphasized these employment issues.<sup>52</sup> For instance, Section 20 of the Labor Standards Act of 1946 permitted employers to dismiss a worker without cause as long as: (1) the employer paid for one month’s pay, and (2) it did not conflict with Section 19 of the Act, concerning injury-related or maternity leave.<sup>53</sup> Likewise, the Employment Security Act of 1947 lacked any provisions concerning safeguards from dismissals or grounds for just cause terminations.<sup>54</sup> Accordingly, a few courts, though in the minority, interpreted the laws as such; one court held that an employer “may discharge the worker at any time and without any special reason, in accordance with section 20, upon giving 30 days’ notice or, by paying compensation in lieu of notice, immediately.”<sup>55</sup>

Most Japanese judges, mindful of the postwar socioeconomic conditions, however, believed in greater employment security and thus

<sup>48</sup> See *id.* at 80-81.

<sup>49</sup> See *id.* at 83-86. See also Tsuneki, *supra* note 9, at 543.

<sup>50</sup> See *supra* Part I.A.

<sup>51</sup> See Araki, *Corporate Governance*, *supra* note 16, at 79.

<sup>52</sup> See Foote, *supra* note 13, at 640 (“On the issue of job security, the drafters of the LSA concluded that the Civil Code did not provide sufficient protection.”).

<sup>53</sup> See *id.* Article 20(1) of the Labor Standard Act provides that: “In the event that an employer wishes to dismiss a worker, the employer shall provide at least 30 days advance notice. An employer who does not give 30 days advance notice shall pay the average wages for a period of not less than 30 days. Provided, however, that this shall not apply in the event that the continuance of the enterprise has been made impossible by a natural disaster or other unavoidable cause nor when the worker is dismissed for reasons attributable to the worker.” LSA, art. 20(1). “Section 19 provides stronger protections for workers who take leaves in connection with job-related injuries and for female employees who take maternity leaves, stipulating that employers may not discharge such workers until at least 30 days after the workers have returned from those leaves.” Foote, *supra* note 13, at 641 n.14.

<sup>54</sup> See ESA, *supra* note 23. Nowhere in the statute does it mention economic dismissals or any related conditions.

<sup>55</sup> See Foote, *supra* note 13, at 641, 641 n.14 (citing (Shikoku Haiden (Shikoku Electric Power Case)), Chisai [Matsuyama District Court], Feb. 8, 1951 (Japan)).

expanded legal protections around terminations through cases.<sup>56</sup> A decision by the Nagoya District Court reflected that increasingly prevailing view:<sup>57</sup>

In current circumstances, employment constitutes the sole source of a worker's livelihood, so a worker's livelihood may be easily jeopardized by dismissal in that it is difficult to find a new job. Employers, on the other hand, can recruit workers relatively easily. Moreover, Article 27 of the Constitution [which guarantees workers 'the right to work'] exists. Taking the foregoing into consideration, dismissal without reasonable cause is usually considered an abuse of the right of dismissal.<sup>58</sup>

Through approximately fifty cases in five decades, Japanese judges gradually built the barriers around employment security.<sup>59</sup> Notwithstanding the "growing importance of the doctrine . . . it still had no clear statutory basis" during this time.<sup>60</sup> Only after the economic crisis in 1990 did the Japanese government enact statutes to expressly provide employees and employers with specific rights and obligations.<sup>61</sup> These statutes merely reflected the same principles in the judge-made rules, the most influential of which was the Abuse of the Right to Dismiss.<sup>62</sup>

## 2. The "Abuse of the Right to Dismiss" Doctrine

The doctrine of the Abuse of the Right to Dismiss nullifies and voids any dismissal without "just cause" as an abuse of the right to dismiss.<sup>63</sup> Under this judge-made rule, an employer must prove the existence of a just cause.<sup>64</sup> Courts tend to interpret "just cause" very narrowly, as a "sufficient cause to justify the dismissal, based on the common sense of

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<sup>56</sup> See *id.* at 641-42 (for examples of precedents "limiting the permissible grounds for discharge, even if the company was willing to provide notice," and independent of union activities or a company's internal discharge standards).

<sup>57</sup> *Id.* at 642 (citing Nagoya [District Court] Dec. 4, 1951, Chisai, 2-5 Rominshu 578, 579 (Japan)).

<sup>58</sup> *Id.* at 642-43 (internal citation omitted).

<sup>59</sup> See *id.* at 637-38, 643-48 (citing several cases in footnotes).

<sup>60</sup> *Id.* at 644.

<sup>61</sup> See Tsuneki, *supra* note 9, at 554-56 (discussing adjustments of labor relations and labor law after 1990s). For a list of Japan's labor laws, see JAPAN INST. FOR LAB. POL'Y & TRAINING, <http://www.jil.go.jp/english/laws/index.htm> [Last access Mar. 11, 2015].

<sup>62</sup> See Tsuneki, *supra* note 9, at 554-56.

<sup>63</sup> See Araki, *Corporate Governance*, *supra* note 16, at 79-80.

<sup>64</sup> Foote, *supra* note 13, at 643.

society.”<sup>65</sup> Courts generally “tend to deny the validity of [a] dismissal,” as the presumption is strongly in favor of the worker.<sup>66</sup>

As Japan’s Supreme Court held, even if reasons for a discharge exist, an employer is not always permitted to discharge the worker if the dismissal is “unduly unreasonable so that it cannot be recognized as appropriate based on the common sense of society.”<sup>67</sup>

Any termination decision must be considered under four factors:<sup>68</sup>

- (1) the urgent necessity of dismissal for the survival of the firm;
- (2) fulfillment of duty of efforts to avoid dismissal;
- (3) propriety of the selection criteria for the dismissed; and
- (4) procedural reasonableness.<sup>69</sup>

The first factor involves the “presupposition” for dismissals based on economic or business justifications.<sup>70</sup> Japanese courts have typically held that adjustment dismissals should not only be a “reasonable means,” but the *last* reasonable means to deal with present or future deficits.<sup>71</sup> The second factor requires employers to initially exhaust all reasonable alternatives to avoid the dismissal, such as: “reduction in overtime; reduction in regular hiring or mid-term recruitment; implementation of transfers or ‘farming out’ with respect to redundant workers; non-renewal of fixed-

<sup>65</sup> *Id.* (citing *Iwata v. Tokyo Seimei Hoken Sogo Gaisha* (Tokyo Life Insurance Co.) Chisai [Tokyo District Court] May 8, 1950, 1-2 Rominshu 230, 235-36 (Japan)). See also Araki, *Corporate Governance*, *supra* note 16, at 80.

<sup>66</sup> Araki, *Corporate Governance*, *supra* note 16, at 79 (“A court considers all of the facts favorable to a worker’s case and strictly scrutinizes the reasonableness of the dismissal.”). However, this presumption can be rebutted by demonstrating any serious or illegal misconduct by the worker. *Id.* See also Foote, *supra* note 13, at 649 (“Where discharges were based on misconduct outside the workplace, such as arrests, the courts generally required a showing of concrete harm to the business”). *Id.* at 650 (citing *Masaoki Shiota v. Kochi Broadcasting*) Saikosai [Supreme Court] Jan. 31, 1977, 268 Rodo hanrei 17 (Japan) (voiding a dismissal of a newsreader from a broadcasting company, who overslept and failed to deliver the morning news at 6:00 a.m., twice within a two week period; his failures to attend work were not caused by malice)).

<sup>67</sup> Foote, *supra* note 13, at 643-45 (emphasis added).

<sup>68</sup> Tsuneki, *supra* note 9, at 544. Some courts have required that all four must be analyzed. See *id.* (citing *Tokyo Koto Saibansho* [Tokyo High Ct.] Oct. 29, 1979, 330 Rodo Hanrei at 78-79); see also Araki, *Corporate Governance*, *supra* note 16, at 82. Whereas, other courts have only analyzed some. See *id.* at 82 n.36 (citing *National Westminster Bank* (3rd Provisional Disposition), *Tokyo Koto Saibansho* [Tokyo Dist. Ct.] Jan. 21, 2000, 782 Rodo Hanrei 23 (holding that if one of the “four factors” is not met, an economic dismissal can be valid by taking all other factors)).

<sup>69</sup> Tsuneki, *supra* note 9, at 544.

<sup>70</sup> See *id.* at 544 n.90 (citing *Osaka Chiho Saibansho* [Osaka Dist. Ct.], May 8, 2000, 787 Rodo Hanrei 18, 27 (Japan) (invalidating the dismissal because the need for economic dismissals had dwindled)).

<sup>71</sup> Araki, *Corporate Governance*, *supra* note 16, at 81.

term contracts or contracts of part-timers; and, solicitation of voluntary retirement.”<sup>72</sup> This factor is logistically the most difficult to satisfy, as it involves the most time-consuming process of combing through all of the alternatives.<sup>73</sup> The third factor protects workers from subjective, unreasonable bases for dismissal, which courts have deemed illegal.<sup>74</sup> Finally, the fourth factor requires employers to consult with labor unions in good faith before a decision is rendered.<sup>75</sup> Once a dismissal is deemed illegal, the employer is required to continue the employment relationship and pay the employee for this period.<sup>76</sup>

For years, lower courts have prompted the adjudication of the “Abuse of the Right to Dismiss” doctrine.<sup>77</sup> Finally, in 1975, the Supreme Court of Japan endorsed it.<sup>78</sup> The Supreme Court’s decision to better protect workers from economic dismissals was partly motivated by the 1973 Oil Shock.<sup>79</sup> By relying on a general clause of the Civil Code that prohibits abuse of rights, the Supreme Court decided that workers should be provided a high degree of protection by restricting the employer’s right to dismiss at will.<sup>80</sup> As such, this doctrine was then codified in the Labor Standards Law in 2003.<sup>81</sup> In March 2008, this provision, with the same principle, became a part of the new Employment Contract Law.<sup>82</sup>

This judge-made doctrine, which emerged from bleak post-war conditions, has greatly restricted employers from dismissing their employees, even during economic downturns, such as the 1970s Oil Crisis and the 1990s recession.<sup>83</sup> This principle, now embedded in Japanese statutes, not only reflects Japanese social norms, but also actively protects employees from loss of livelihood.

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<sup>72</sup> *Id.*

<sup>73</sup> *See id.*

<sup>74</sup> *See id.*; Tsuneki, *supra* note 9, at 544-45.

<sup>75</sup> Tsuneki, *supra* note 9, at 544.

<sup>76</sup> *Id.* at 545 (citation omitted).

<sup>77</sup> *See id.* at 543-45.

<sup>78</sup> *Id.* at 545 (citing Saiko Saibansho [Sup. Ct.] Apr. 25, 1975, 29 Saiko Saibansho Minji Hanreishu [Minshu] 456, 457-58 (Japan); Saiko Saibansho [Sup. Ct.] Jan. 31, 1977, 268 Rodo Hanrei 17, 18-19 (Japan)).

<sup>79</sup> *Id.*

<sup>80</sup> *See id.* (citing CIVIL CODE art. 1, ¶ 3 (“No abuse of rights shall be permitted.”)).

<sup>81</sup> *Id.* (citing Rodo Kijunho [Labor Standards Law], Law No. 49 of 1947, art. 18-2 Labor Standards Act). (For an English-version of Japan’s Labor Standards Law, see NATLEX, *Labour Laws of Japan*, ILO, <https://www.ilo.org/dyn/natlex/docs/WEBTEXT/27776/64846/E95JPN01.htm#a089>.)

<sup>82</sup> *Id.* at 545 n.102 (citing Rodo Keiyakuho [Employment Contract Law], Law No. 128 of 2007, art. 16 (identical to the former article 18-2 of Labor Standards Law that was later removed from Labor Standards Law)).

<sup>83</sup> *See* Araki, *Security, Flexibility and Industrial Relations*, *supra* note 7, at 445; Tsuneki, *supra* note 9, at 548.

### 3. Japanese Employees' Rights

Although Japan's employment security laws restrict employers from making economic dismissals, placing a heavy burden of proof upon them, these laws do little to address employees' rights to the other terms and conditions of their employment.<sup>84</sup> The relationship between employment security and employment flexibility appears to be zero-sum: this high degree of employment security tends to mean less flexibility for employers to adjust the number of employees.<sup>85</sup> To compensate and manage this balance, particularly during economic downturns, Japanese employers have often "farmed out," or transferred redundant or unproductive employees to other sections in the same company or elsewhere.<sup>86</sup> In other cases, employers have changed, and oftentimes worsened, the terms and conditions of employment so they become more economically viable.<sup>87</sup>

To begin with, most employment contracts in Japan do not specify the place, conditions, or type of work.<sup>88</sup> The work rules, which employers draft, establish the uniform rules and conditions in the workplace.<sup>89</sup> The Labor Standards Law mandates that in drafting these rules, employers must comply with certain standards, namely minimum hours, wages, and safety standards,<sup>90</sup> and employers must publicize these work rules to all employees.<sup>91</sup> While employers must obtain the opinion of a majority worker representative, employers can still unilaterally make changes, as long as they provide workers notice of the change, and the change is "reasonable considering various factors including the necessity of the changes in working conditions, the extent to which the disinterested workers will suffer, and the process of amendment."<sup>92</sup> Employers then submit the work rules to the public agency in Japan, known as the Labor Standards

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<sup>84</sup> See Tsuneki, *supra* note 9, at 542-43; Araki, *Corporate Governance*, *supra* note 16, at 84.

<sup>85</sup> See Araki, *Corporate Governance*, *supra* note 16, at 84 (citations omitted).

<sup>86</sup> See *id.* at 86-87 ("In short, Japanese employers promised not to lay off redundant employees as a result of increased productivity and to maintain their employment by transfer and re-training."). See also Araki, *Security, Flexibility and Industrial Relations*, *supra* note 7, at 446-47.

<sup>87</sup> Araki, *Security, Flexibility and Industrial Relations*, *supra* note 7, at 446.

<sup>88</sup> See *id.* at 447.

<sup>89</sup> *Id.* at 446-47. See also Tsuneki, *supra* note 9, at 546 (citation omitted).

<sup>90</sup> Araki, *Security, Flexibility and Industrial Relations*, *supra* note 7, at 446-47. See also LSL, arts. 89-93 (on rules of employment).

<sup>91</sup> See Tsuneki, *supra* note 9, at 546 (citing Rodo Keiyakuho [Employment Contract Law], Law No. 128 of 2007, arts. 8-9).

<sup>92</sup> *Id.* at 546-47. For a list of cases about employers' changing the work rules, see *id.* at 547 n.114. See also Araki, *Security, Flexibility and Industrial Relations*, *supra* note 7, at 446-48.

Inspection Office, which then reviews the rules under legal regulations and collective agreements.<sup>93</sup>

In theory, Japanese workers have the rights to organize and bargain collectively to change the work rules under the New Constitution.<sup>94</sup> The current union density rate of 17.8%<sup>95</sup> — which has dropped from the post-war rate of 50%<sup>96</sup> — reflects the extent of their workers' rights and level of participation. Notwithstanding this rate of union organization, in practice, employers often unilaterally establish and modify work rules.<sup>97</sup> Moreover, as Japanese unions are enterprise or company unions, not industry-based ones as in the United States, the employer and the labor union often have “common interests.”<sup>98</sup>

A protective mechanism for employees that has been recognized by Japanese courts is the “reasonable modification rule.”<sup>99</sup> Under this judge-made rule, an unfavorable change in the work rules has a binding effect on all workers, including opponents of the changes, *only if* such modifications are considered “reasonable.”<sup>100</sup> Japanese courts, however, often deem most modifications as “reasonable,” given the predominant social norms and high priority of employment security in Japan.<sup>101</sup> Employees are simply expected to accept these “reasonable” changes in conditions and terms in exchange for their highly secured source of livelihood.<sup>102</sup>

As such, Japan's employment system, in itself, seems to be all-*and*-nothing: employees have the highest degree of employment security — with the “strictest set of restrictions on dismissals in the world”<sup>103</sup> — but they have practically no say or flexibility in the workplace. Although the government initiated all of the post-war legislation that expressly pro-

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<sup>93</sup> See Tsuneki, *supra* note 9, at 546 (internal citation omitted).

<sup>94</sup> *Id.* at 540 (citing article 27 of the New Constitution). See also NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] art. 28.

<sup>95</sup> *Trade Union Density, Japan*, ORG. FOR ECON. CO-OPERATION & DEV., [https://stats.oecd.org/Index.aspx?DataSetCode=UN\\_DEN#](https://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN#) (indicating labor statistics between 1999 and 2013) (last visited Feb. 5, 2016).

<sup>96</sup> Tsuneki, *supra* note 9, at 540 (citing MINISTRY OF HEALTH, LABOUR & WELFARE, 2007 WHITE PAPER ON WELFARE AND LABOR: DATA APPENDIX 118 (2007)).

<sup>97</sup> See *id.* at 546.

<sup>98</sup> *Id.* at 533 (internal citations omitted).

<sup>99</sup> See Araki, *Security, Flexibility and Industrial Relations*, *supra* note 7, at 447-48.

<sup>100</sup> See *id.*

<sup>101</sup> See *id.*

<sup>102</sup> See *id.* “Courts recognize that workers normally expect continual employment and firms employ workers on the premise that workers would expect to.” See, e.g., “Fukuoka Koto Saibansho [Fukuoka High Ct.], Oct. 24, 1979, 427 Rodo Hanrei 64, 65-66 (Japan); Tokyo Koto Saibansho [Tokyo High Ct.] Mar. 31, 1993, 629 Rodo Hanrei 19, 23 (Japan).” Tsuneki, *supra* note 9, at 545 n.88.

<sup>103</sup> Foote, *supra* note 13, at 651.

tected employees' rights, courts have hollowed out the meaning of their rights and placed the remaining shells under the most important consideration of employment security. Thus, during recessions, though workers may have jobs, workers seem to have very few rights to the other terms and conditions of employment.

## B. *United States*

The United States' employment system has four defining characteristics.<sup>104</sup> First, employment at-will was first shaped by a treatise and later by case law.<sup>105</sup> Second, it is the default rule in nearly all states.<sup>106</sup> Third, no common law or statutory protection exists against economic dismissals or discharge without just cause, but several exceptions to the at-will rule have recently emerged.<sup>107</sup> And fourth, American workers, through union membership, tend to have more relatively rights with respect to the conditions and terms of their employment.<sup>108</sup>

### 1. Employment At-Will

The at-will doctrine is the default rule in all American jurisdictions, except Montana.<sup>109</sup> Under this doctrine, an employer can “discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act *per se*”<sup>110</sup>—unless the reason for the employer's decision is “specifically forbidden by some external source of law, such as an anti-discrimination statute.”<sup>111</sup> Since Woods' treatise, courts have greatly expanded the scope of the at-will doctrine.<sup>112</sup>

In *Skagerberg v. Blandin Paper Co.*,<sup>113</sup> a Minnesota court held that the employment contract between an engineer and a university, which

<sup>104</sup> See generally Paula G. Ardelean et al., *The Development of Employment Rights and Responsibilities from 1985 to 2010*, 25 ABA J. LAB. & EMP. L. 449 (2010).

<sup>105</sup> See *supra* Part I.B.

<sup>106</sup> See *infra* Part III.B.1.

<sup>107</sup> See *infra* Part III.B.2.

<sup>108</sup> See *infra* Part III.B.3.

<sup>109</sup> See Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 245 (2013) (citing MONT. CODE ANN. § 39-2-901 to 2-915 (2011)).

<sup>110</sup> Ardelean et al., *supra* note 104, at 451 (citing *Payne v. W. & Atl. R.R.*, 81 Tenn. 507, 518 (1884)).

<sup>111</sup> Bagenstos, *supra* note 109, at 245 (citing Title VII of Civil Rights Act of 1965, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-2000h-6 (2006))).

<sup>112</sup> See Summers, *The Divine Right*, *supra* note 28, at 78 (“[O]ther courts demonstrated a willingness to innovate by creating exceptions [to the at will rule], but instead of generously expanding them, niggardly constricted them.”).

<sup>113</sup> 266 N.W. 872 (Minn. 1936).

offered “permanent employment” was still an at-will contract.<sup>114</sup> Specifically, the court reasoned:

[T]he words “permanent,” “lasting,” “constant,” or “steady” applied to the term of employment, do not constitute a contract of employment for life, or for any definite period, and such contracts fall under the rule “that an indefinite hiring at so much per day, or per month, or per year, is a hiring at will, and may be terminated by either party at any time.”<sup>115</sup>

This case reinforced the absolutism of the at-will rule by transforming the phrase “permanent employment” to “indefinite” employment.<sup>116</sup>

In *Main v. Skaggs Community Hospital*,<sup>117</sup> a Missouri court held that a contract that only stated that employment could be terminated for “just cause” with sixty days’ notice was an at-will contract.<sup>118</sup> The court reasoned that because the contract did not specify a duration, the employment “was at-will and the employee could be discharged without just cause and without notice.”<sup>119</sup> By judicial logic, “just cause” turned into “no cause.”<sup>120</sup>

These two cases not only helped establish the legal roots of the at-will doctrine but also clarified its scope — namely, that the doctrine does not trigger the “elementary principles of contract interpretation,” such as reliance or promissory estoppel.<sup>121</sup> These cases demonstrate that “unless a contract specifies a definite time, the employee can be discharged at any time, without reason and without notice.”<sup>122</sup> Though the early rationales mainly concerned the emerging theories of *laissez-faire* capitalism and freedom of contract,<sup>123</sup> the current justification for the at-will rule seems to be more egalitarian.<sup>124</sup> That is, the at-will rule is supposed to reflect a “symmetry” between the rights of employers and employees — “serv[ing] equality interests” by “allowing either party to terminate the relationship at any time.”<sup>125</sup>

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<sup>114</sup> Summers, *The Divine Right*, *supra* note 28, at 69 (citing *Skagerberg v. Blandin Paper Co.*, 266 N.W. 872 (Minn. 1936)).

<sup>115</sup> *Skagerberg*, 266 N.W. at 877.

<sup>116</sup> Summers, *The Divine Right*, *supra* note 28, at 69.

<sup>117</sup> 812 S.W.2d 185 (Mo. Ct. App. 1991).

<sup>118</sup> Summers, *The Divine Right*, *supra* note 28, at 70 (citing *Main v. Skaggs Cmty Hosp.*, 812 S.W.2d 185 (Mo. Ct. App. 1991)).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *See id.* at 68.

<sup>124</sup> *See Bagenstos*, *supra* note 109, at 245 (citing Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 954-55 (1984)).

<sup>125</sup> *Id.*



During economic downturns, however, the weight of the rights are obviously not even closely symmetrical, as it is more likely that the worker needs a particular job than the employer a particular worker.<sup>126</sup> Consequently, employers in the United States tend to have greater authority over their employees, possibly resulting in more restrictive or oppressive work environments.<sup>127</sup> It is important to note that the “United States, unlike almost every other industrialized country, . . . has neither adopted through the common law or by statute a general protection against unfair dismissals, economic dismissals or discharges without just cause, nor even any period of notice.”<sup>128</sup> In other words, “[t]here is no constitutional or statutory right to work, let alone a right to work at the job of an employee’s choice.”<sup>129</sup> The at-will doctrine fails to provide any protections from these types of terminations.<sup>130</sup> Recently, however,

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<sup>126</sup> See *id.* (“The at-will rule therefore gives bosses ample power to require employees to engage in the ‘bowing and scraping, fawning and toadying’ that is the bête noire of social equality.”).

<sup>127</sup> See *id.*

<sup>128</sup> Summers, *The Divine Right*, *supra* note 28, at 65. The lack of a more coherent employment termination statute has been observed by several labor and employment law academics. See, e.g., Robert M. Bastress, *A Synthesis and a Proposal for Reform of the Employment At-Will Doctrine*, 90 W. VA. L. REV. 319, 346 (1988) (advancing “an alternative system, analogous to arbitration in the collective bargaining context” that would give employees “a cause of action sounding in tort, complete with the full range of legal and equitable remedies, for any discharge accomplished without just cause”); Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89 (2008) (advocating a universal law of termination under federal law).

<sup>129</sup> Anne Marie Lofaso, *Talking is Worthwhile: The Role of Employee Voice in Protecting, Enhancing, and Encouraging Individual Right to Job Security in a Collective System*, 14 EMPLOYEE RTS. & EMP. POL’Y J. 55, 66 (2010) (contrasting the U.S. at-will rule to the ILO Constitution, Declaration Concerning the Aims and Purposes of the International Labour Organization, art. III, May 10, 1944, 49 Stat. 2712, 15 U.N.T.S. 35 (Annex to ILO Constitution) (reaffirming the fundamental principle that I(a) “labour is not a commodity”; and recognizing the solemn obligation of the organization to further programs that will achieve III (a) “full employment and the raising of standards of living”; III(b) “the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being”; and III(d) “policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection.”)) [hereinafter Lofaso, *Talking is Worthwhile*].

<sup>130</sup> See Michael A. DiSabatino, *Modern Status of Rule that Employer May Discharge At-Will Employee for any Reason*, 12 A.L.R.4th 544 (1982) (citing *Watson v. Zep Mfg. Co.*, 582 S.W.2d 178 (Tex. App. 1979) (rejecting contention that job security is so important to workers individually and to economic and social welfare generally that the employment-at-will rule is contrary to public policy and that the law

courts and legislatures have been more receptive to carving out exceptions to the broad, absolute rule.<sup>131</sup>

## 2. Limitations on Employment At-Will

Four major exceptions to the at-will doctrine have emerged since the 1980s: “(1) statutory exceptions for protected classes; (2) public-policy exceptions; (3) implied-contract exceptions; and (4) exceptions based on the covenant of good faith and fair dealing.”<sup>132</sup> The cumulative effect of these four exceptions is arguably the slow erosion of the at-will doctrine.<sup>133</sup>

First, the statutory exceptions mainly concern anti-discrimination for a number of protected classes.<sup>134</sup> Title VII of the Civil Rights Act of 1964,<sup>135</sup> the first statutory exception, prohibits employers from terminating employees on the basis of race, color, sex, religion, or national origin.<sup>136</sup> Congress soon thereafter passed the Age Discrimination in Employment Act<sup>137</sup> (“ADEA”), which added age to the list of protected classes.<sup>138</sup> Over the next twenty years, the protected classification expanded.<sup>139</sup> For instance, Oregon law now recognizes over twenty statutorily protected classes, including employee’s source of income, preferred gender identity, and off-duty use of tobacco products.<sup>140</sup>

The second “public policy” exception is twofold: the first type of exception “protect[s] an important public function, such as jury duty” or whistle-blowing, and the second “protects an employee’s exercise of important private rights of public concern, such as the right to the . . . workers’ compensation scheme for an on-the-job injury.”<sup>141</sup> Courts attempted to latch the public policy exception onto the statutory excep-

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should impose a duty on employers to deal fairly with workers in terminating their employment, and, therefore, not to discharge them without cause)).

<sup>131</sup> See Ardelean et al., *supra* note 104, at 449.

<sup>132</sup> *Id.* at 452. See also *Employment At-Will Exceptions by State*, NAT’L CONF. OF ST. LEGIS., (Apr. 2008) <http://ncsl.org/default.aspx?tabid=13339> (last visited Feb. 4, 2016). This website is apparently still the most current on at-will information on states.

<sup>133</sup> See Ardelean et al., *supra* note 104, at 457.

<sup>134</sup> *Id.* at 452-53.

<sup>135</sup> 42 U.S.C. § 2000 (2006).

<sup>136</sup> Ardelean et al., *supra* note 104, at 452 (citing 42 U.S.C. § 2000e (2006)).

<sup>137</sup> 29 U.S.C. §§ 621-634 (2006).

<sup>138</sup> Ardelean et al., *supra* note 104, at 452 (internal citation omitted).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* (citing OR BUREAU OF LABOR & INDUS., TECHNICAL ASSISTANCE FOR EMPLOYERS PROGRAM, PROTECTED CLASSES OVERVIEW: FEDERAL AND OREGON CIVIL RIGHTS LAWS (2005), [www.oregon.gov/BOLI/TA/ProtectedClassesOverview.pdf](http://www.oregon.gov/BOLI/TA/ProtectedClassesOverview.pdf)).

<sup>141</sup> *Id.* at 452-54. For examples of cases involving protected activities, see RESTATEMENT (THIRD) OF EMPLOYMENT LAW §5.04 (2014) (proposed final draft).

tions of Title VII and the ADEA.<sup>142</sup> However, courts declined to do so because the public policy exception covers employers with fewer than the required number of employees under the aforementioned laws.<sup>143</sup>

According to the Restatement (Third) of Employment Law, some of the sources of public policy may be federal and state constitutions, statutes, ordinances, administrative decisions, and “well-established principles of professional or occupational conduct protective of the public interest.”<sup>144</sup> The Restatement also enumerates several cases that have involved protected activities, as an illustration of the broadening scope of this exception.<sup>145</sup> As such, in light of this exception, employers may now consider whether their termination decision “could be perceived as reflecting adversely on some unknown or previously unconsidered important public policy.”<sup>146</sup>

The third exception invokes the principles of contract interpretations, namely the concept of implied-contracts in the absence of any express language.<sup>147</sup> While a “contract” typically is assumed to mean “written contract,” some courts have begun to find ways “in which an employer’s conduct or statements could be cobbled together to constitute an employment contract,” namely through handbook language, offer letters, disciplinary warnings, or other verbal expressions.<sup>148</sup> In fact, some courts now readily hold that employers waived the at-will language in their handbooks through verbal expression.<sup>149</sup> One interesting case involved a disciplinary letter that enumerated specific actions that the employee could take to avoid being terminated, and the court found that the letter evidenced a waiver of at-will employment.<sup>150</sup> The “best practices for maintaining the ‘at-will’ nature of the employment relationship” require employers to “periodically reinforce that the relationship remains at will, despite the underlying impact such reinforcement is sure to have on employee loyalty and morale.”<sup>151</sup>

The last exception involves the covenants of good faith and fair dealing.<sup>152</sup> Courts have at times used these covenants “to mitigate the harsh results” of any bad faith conduct, such as exploitation.<sup>153</sup> Though these covenants are usually “implied in all contracts,” its application is often

<sup>142</sup> See Ardelean et al., *supra* note 104, at 453.

<sup>143</sup> See *id.* (discussing the threshold amounts and stating that fewer than twenty workers are required in Title VII and ADEA)

<sup>144</sup> RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 5.01 (2014).

<sup>145</sup> See *id.* §5.04.

<sup>146</sup> Ardelean et al., *supra* note 104, at 454.

<sup>147</sup> *Id.* at 454-55.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 455 (citing *Bennett v. Farmers Ins. Co.*, 26 P.3d 785, 792 (Or. 2001)).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

“directly at odds with the at-will doctrine.”<sup>154</sup> The covenant of good faith and fair dealing, though limited, effectively “remove[s] an employer’s ability to fire for ‘bad cause,’ leaving intact the employer’s right to fire for ‘good cause’ or ‘no cause’” — both of which are, in practice, difficult to demonstrate.<sup>155</sup> Thus, this last exception generally compels employers to clarify specific causes for terminating employment.<sup>156</sup>

In light of these four exceptions, the strength of the at-will doctrine appears to be diminishing.<sup>157</sup> Although none of the exceptions directly concern economic dismissals, they continued to develop even after the 2008 sub-mortgage crisis, and in effect continue to increase employment security and the rights of employees.<sup>158</sup> The continuing trend, which will be discussed in greater detail below, tends to suggest the possibility of a public policy exception covering recessions and economic dismissals.

### 3. American Employees’ Rights

Although the at-will doctrine overlooks the issue of employment security, other labor and employment laws in the United States try to compensate for it by providing employees with the rights to organize and collectively bargain. In 1935, Congress passed the Wagner Act, also known as the National Labor Relations Act (“NLRA”), which “granted collective bargaining rights to employees and set the framework for the introduction of arbitration into the workplace.”<sup>159</sup>

The NLRA expressly protects the rights of workers “of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”<sup>160</sup> Under Section 8(a)(5) of the NLRA, it is also an unfair labor practice for an employer

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<sup>154</sup> *Id.* (noting also that only twenty states currently apply such covenants of good faith and fair dealing to the at-will doctrine). See also *Guz v. Bechtel Nat’l, Inc.*, 8 P.3d 1089, 1110 (Cal. 2000) (“The covenant of good faith and fair dealing . . . exists merely to prevent one contracting party from unfairly frustrating the other party’s right to receive the *benefits of the agreement actually made.*”).

<sup>155</sup> Ardelean et al., *supra* note 104, at 455-56 (“While theoretically an employer may be able to rely on a ‘no reason’ defense, those who litigate employment claims know that when you are standing in front of a jury, with your client accused of wrongful termination based upon some allegedly bad act, you had better be able to offer a just and valid reason for the decision to terminate a person’s livelihood.”).

<sup>156</sup> *Id.* at 456.

<sup>157</sup> *Id.*

<sup>158</sup> See generally *supra* Part III.B.2.

<sup>159</sup> Steven C. Kahn & Barbara Berish Brown, *Employment at Will and Employment Contracts*, in *AVOIDING WRONGFUL-DISCHARGE CLAIMS, LEGAL GUIDE TO HUMAN RESOURCES* § 8:47 (2014).

<sup>160</sup> 29 U.S.C. 151 (1935).

“to refuse to bargain collectively with the representatives of his employees.”<sup>161</sup>

Workers tend to have additional protections through unions. Under union-based collective bargaining agreements, “employer[s] may not change the terms and conditions of employment of represented employees [that are ‘subject to mandatory bargaining’] without first providing their work representative with prior notice and an opportunity to bargain over such changes.”<sup>162</sup> “[A]n employer’s unilateral change in conditions of employment under negotiation is . . . a violation of §8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of §8(a)(5) much as does a flat refusal [to negotiate].”<sup>163</sup> The mandatory subjects of bargaining are numerous, broadly including: “overtime and other pay, bonuses, pensions and other employee benefits, wage increases, work schedules, promotions, transfers, work and discipline rules, drug testing policies and grievance and arbitration procedures.”<sup>164</sup>

The most illustrative case concerning the scope of workers’ bargaining rights is *NLRB. v. Katz*.<sup>165</sup> In *Katz*, the employer changed the wage rates, sick-leave policy, and promotion process, without notifying or consulting the union, in the course of existing negotiations with the union.<sup>166</sup> The Supreme Court held that the employer violated Section 8(a) of the NLRA, reasoning that the employer’s duty to bargain with the union “encompasses a duty to refrain from implementation [of any modifications], *at all, unless and until*” both parties have reached “an overall impasse . . . on bargaining for the agreement as a whole.”<sup>167</sup>

The Supreme Court, however, dictated one exception to its rule in *Katz* — “a situation of economic exigency or business emergency, [where] unilateral action on a mandatory subject of bargaining is allowed.”<sup>168</sup> Under this exception, an employer unilaterally may implement changes “in line with [its] long-standing practice” since these changes amount to “a mere continuation of the status quo.”<sup>169</sup> Similar to the laws in Japan, this business-based exception places the burden of proof on the *employer*, “requiring a showing of extraordinary events which are an unforeseen

<sup>161</sup> 29 U.S.C. 151 § 8(a)(5).

<sup>162</sup> LEE MODJESKA ET AL., *FED. LAB. LAW*: § 9:8 (2016). *See also* *NLRB v. Katz*, 369 U.S. 736 (1962); Lofaso, *Talking is Worthwhile*, *supra* note 129, at 80-82.

<sup>163</sup> Lofaso, *Talking is Worthwhile*, *supra* note 129, at 80 (citing *Katz*, 369 U.S. at 743).

<sup>164</sup> *Id.* (internal citations omitted).

<sup>165</sup> LEE MODJESKA ET AL., *supra* note 162 (citing 369 U.S. 736 (1962)).

<sup>166</sup> *Id.* *See also* *Katz*, 369 U.S. at 739.

<sup>167</sup> LEE MODJESKA ET AL., *supra* note 162 (emphasis added) (internal citations omitted).

<sup>168</sup> *Id.* *See also* *Katz*, 369 U.S. at 747.

<sup>169</sup> LEE MODJESKA ET AL., *supra* note 162; *Katz*, 369 U.S. at 746.

occurrence, having a major economic effect on business and requiring the company to take immediate action to stave off disaster.”<sup>170</sup>

In theory, this high burden on employers appears to balance the weights of the rights of employers and represented employees during economic downturns;<sup>171</sup> nevertheless, the courts’ express recognition of the “economic” or “business” exception only seems to demonstrate the accessible or viable justification of at-will terminations or reductions in force.

As such, the scope of the NLRA seems limited. Even though “layoff practices and subcontracting are mandatory subjects of bargaining, the decision to close a plant is not a mandatory subject,” especially if it is one based on purely economic reasons.<sup>172</sup> Following *Katz*, in *First National Maintenance Corp. v. NLRB*,<sup>173</sup> the Supreme Court reasoned that “an employer’s need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union’s participation in making the decision.”<sup>174</sup> The Court went on to say that “the decision itself [to close a plant] is not part of §8(d)’s ‘terms and conditions’ . . . over which Congress has mandated bargaining.”<sup>175</sup>

Even though arbitration has been the most favored means of resolving workplace disputes,<sup>176</sup> the crucial reality is that the union membership rate in the United States is at a low 11.1%.<sup>177</sup> Even if employees (albeit a very small percentage) are covered by collective bargaining agreements, they still have no right to bargain over economic dismissals. Following *First Maintenance*, the Supreme Court decided other seminal cases that further strengthened employers’ right to make decisions based on economic or business reasons, clearly demonstrating the lack of job security, particularly during economic downturns, such as in the cases of *NLRB v.*

<sup>170</sup> LEE MODJESKA ET AL., *supra* note 162 (internal citations omitted). For a list of recent federal and NLRB cases from the 1980s to 2000s that illustrate the scope of “economic exigency,” see *id.* at n.18.

<sup>171</sup> See Bagenstos, *supra* note 109, at 245.

<sup>172</sup> Lofaso, *Talking is Worthwhile*, *supra* note 129, at 77-78 (internal citations omitted).

<sup>173</sup> 452 U.S. 666 (1981).

<sup>174</sup> Lofaso, *Talking is Worthwhile*, *supra* note 129, at 78 (citing *Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 686 (1981)).

<sup>175</sup> *Id.* (citing *Nat’l Maint. Corp.*, 452 U.S. at 686).

<sup>176</sup> Kahn et al., *supra* note 159 (“After World War II, arbitration quickly expanded to industries throughout the country as the most favored means of resolving workplace disputes. Today, arbitration provisions can be found in more than 95% of collective bargaining agreements covering unionized workers.”).

<sup>177</sup> *Economic News Release: Union Membership Surveys*, BUREAU OF LAB. STATISTICS (Jan. 23, 2015), [www.bls.gov/news.release/union2.nr0.htm](http://www.bls.gov/news.release/union2.nr0.htm) (compared to 1983 rate of 20.1%). “The union membership rate for public-sector workers (35.2%) was substantially higher than the rate for private-sector workers (6.7%).” *Id.*

*Mackay Radio & Telegraph Co.*<sup>178</sup> and *American Ship Building Co. v. NLRB.*<sup>179</sup>

Recently, however, as of 2011, a number of courts have ruled more favorably towards represented employees, reaffirming employers' high evidentiary burden of proof of an "economic exigency" to unilaterally change working conditions and terms.<sup>180</sup> Though these recent cases do not explicitly mention the impact of the recent 2008 recession, perhaps courts are now becoming more receptive to such "public policy" exceptions in the context of economic dismissals, mentioned above.

Ultimately, like Japanese workers, American workers are also in an *and-nothing* situation. While union-represented workers seem to have a great deal of bargaining power over most other working conditions and have greater protections against unilateral changes by employers *while* employed, American workers, even those covered by the collective bargaining agreement, still do not have the threshold right to job security during recessions. As a matter of law, employers have the wide discretion to make unilateral changes based on economic or business reasons, notwithstanding the burden of proof. Thus, without the fundamental right to job security, American workers' rights to organize and collectively bargain seem to carry much less weight since these rights cannot effectively remedy the lack of legal protection from economic dismissals.<sup>181</sup> And the reality of the low union membership rates further reflects the narrow scope of their rights.

<sup>178</sup> *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938).

<sup>179</sup> *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965).

<sup>180</sup> See *NLRB v. Whitesell Corp.*, 638 F.3d 883, 892 (8th Cir. 2011) (finding that the employer failed to bargain in good faith and in particular noting that demonstration of economic exigency justifies prompt implementation of a company's proposals); *Franki v. HTH Corp.*, 832 F. Supp. 2d 1179, 1202-03 (D. Hawaii 2011) (finding that employer failed to demonstrate "economic exigency" and stating that "economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action") (internal citations and quotations omitted). *But see Atchison v. Sears*, 666 F. Supp. 2d 477 (E.D. Pa 2009) (granting summary judgment to employer for its economic reasons to terminate employee — pointing to employer's handbook which stated that "[e]conomic or business conditions may create a situation, which makes it necessary to cut back our workforce. Qualifications, job performance, merit, and seniority are some of the guidelines upon which job elimination decisions are made.").

<sup>181</sup> See Lofaso, *Talking is Worthwhile*, *supra* note 129, at 63-65 (exploring the possible avenues for job security). For a more in-depth comparison of bargaining rights between Japan and the United States, see Kenneth Dau-Schmidt, *The Relative Bargaining Power of Employers and Unions in the Global Information Age: A Comparative Analysis of the United States and Japan*, 20 *IND. INT'L & COMP. L. REV.* 1 (2010).

### III. THE CURRENT ECONOMIC AND EMPLOYMENT CONDITIONS

While a comparison of the laws and caselaw of the two countries' employment systems certainly provides important theoretical insights, the comparative analysis becomes more applicable when it is placed in the context of the current economic and employment realities of the two countries. The statistics in these categories not only help clarify the details of their systems but also help illustrate the practical implications of their distinct rules on the country's economy and on the individual worker.

#### A. Japan

Before the late 2008 recession, which ensued from a sharp downturn in business investment and in global demand for Japan's exports,<sup>182</sup> the Labor Standards Law of 2003, which codified the Abuse of the Right to Dismiss doctrine, governed employment relations.<sup>183</sup> Then in 2008, Japan enacted the new Employment Contract Law, which contained those same provisions in the Labor Standards Act.<sup>184</sup> Though the government recently attempted to regulate the working conditions and hours to respond to new global pressures — the diversification of the workforce and the increasing dependence on technologies — the long-term employment practice and the employment security laws seems to remain intact.<sup>185</sup>

The most current estimation of Japan's labor force is 64.32 million, ranking Japan ninth in the world.<sup>186</sup> Most of the labor force, around 69.8%, work in services, with the remaining in industry or in agriculture.<sup>187</sup> With the current labor force, the unemployment rate is 3.3%, which has dropped from 4.4% since 2012.<sup>188</sup> Japan is ranked twenty-seventh in terms of unemployment rates.<sup>189</sup> The GDP per capita is \$38,200 (2015 est.), which has increased incrementally in the past couple of years

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<sup>182</sup> *The World Factbook: Japan*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html> (last visited Mar. 1, 2016).

<sup>183</sup> Tsuneki, *supra* note 9, at 545. See also *supra* Part II.A.

<sup>184</sup> See *supra* note 82.

<sup>185</sup> See Tsuneki, *supra* note 9, at 561. See also Araki, *Corporate Governance*, *supra* note 16, at 251 (discussing the complex factors that contribute to changes to employment systems, namely “economic pressures and intensified competition caused by the global market, structural changes from secondary to tertiary industry, technological developments that change the nature of work, individualization and diversification of the workforce, demographic changes, etc.”).

<sup>186</sup> *Japan*, CIA, *supra* note 182.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*



(compared with \$36,300 (2012 est.) and \$35,600 (2011 est.)).<sup>190</sup> For GDP per capita, Japan is currently ranked thirty-sixth in the world.<sup>191</sup>

### B. *United States*

Before the sub-prime mortgage crisis of 2008, which was largely a product of “falling home prices, investment bank failures, tight credit,” and pressures from the global economy, the at-will rule governed employment relations in the United States and has continued to prevail since 2008.<sup>192</sup> The current labor force is 156.4 million, ranking the United States fourth in the world.<sup>193</sup> Like Japan, most of the labor force works in services, 79.4%, with the remaining in industry (19.5%), and agriculture (1.1%).<sup>194</sup> With the fourth largest labor force in the world, the unemployment rate is 5.2%, based on a 2015 estimate, which has dropped from 8.1% since 2012; and the United States is currently ranked fifty-fourth in terms of unemployment rate.<sup>195</sup> The GDP per capita in 2015 is \$56,300, ranking the United States at nineteenth, and the GDP has marginally increased since 2011 (\$52,400 (2012 est.) and \$51,400 (2011 est.)).<sup>196</sup>

### C. *Comparison of Economic and Employment Data*

To simplify the comparison, below is a table listing the economic and employment statistics of the two countries. The numbers indicate that under the employment at-will system, there are still significantly more unemployed citizens in the United States, with an unemployment rate of 5.2%.<sup>197</sup> The United States’ ranking at fifty-fourth place in the world suggests that the rate is relatively high — especially compared to Japan, which is twenty-seventh, halfway between the United States and Cambodia (0.3%, 2015 est.).<sup>198</sup>

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *The World Factbook: United States*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited Feb. 6, 2016).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *The World Factbook, Country Comparison: Unemployment Rates*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2129rank.html?countryname=United%20States&countrycode=us&regionCode=noa&rank=79#us>.

COMPARISON OF ECONOMIC AND EMPLOYMENT DATA OF  
THE UNITED STATES AND JAPAN

	<b>United States</b>	<b>Japan</b>
Labor Force (2015 est.) (million)	156.4	64.32
Rank	4	9
Unemployment (2015 est.)	5.2%	3.3%
Rank	54	27
GDP (per capita) (2015 est.)	\$56,300	\$38,200
Rank	19	36

The unemployment rate of 5.2% reflects the scope of the at-will practice: American employers are more freely able to dismiss workers for economic or business reasons, as there is still no common law or express statutory protection against economic dismissals.<sup>199</sup> The qualification of this relatively higher percentage, however, is that the United States has a significantly larger labor force than Japan, with a workforce population of 156.4 million — nearly 100 million more than in Japan.

Nevertheless, with the ninth largest labor force in the world, Japan's unemployment rate is about half of that of the United States, at 3.3%. This relatively low rate in Japan suggests that the set of restrictions on employers' rights to dismiss have been effective in not only protecting employees' job security but also retaining employees. This number also tends to reflect the strength of the judicial presumptions in favor of workers in dismissal cases and the prevailing beliefs of Japanese courts in prioritizing employment.<sup>200</sup> This relatively low rate may also be telling of employees' loyalty or willingness to remain at their respective companies, particularly during and after recessions.

However, on average, the GDP per capita is much higher in the United States than in Japan: American workers make 47% more than Japanese workers, earning \$56,300 compared to Japanese workers earning \$38,200. The significance of this income differential reflects the legal restrictions on Japanese employers — in particular, their inflexibility to adjust the number of workers and thus their resort to spreading the earnings to more employees.<sup>201</sup> This GDP per capita differential also perhaps reflects the American employees' bargaining power and rights to better working conditions and terms, including higher salaries.<sup>202</sup> As such, despite that fewer workers have been employed in the United States after

<sup>199</sup> Lofaso, *Talking is Worthwhile*, *supra* note 129, at 66. *See also supra* Part II.B.3.

<sup>200</sup> *See supra* Part II.A.2.

<sup>201</sup> *See supra* Parts II.A.2-3.

<sup>202</sup> *See supra* Part II.B.2-3.

recessions, compared to those in Japan, the employed are earning significantly more in the United States than in Japan.

#### IV. ECONOMIC APPROACHES AS APPLIED TO JAPAN AND THE UNITED STATES

Some of the major approaches to analyzing Japan's and the United States' employment laws have centered on "corporate governance" and "economic efficiency." While it is helpful to understand the leading scholarship in this discourse, both hinge on different underlying values and assumptions. For the purposes of this note, an alternative framework based on the "social citizenship model" is utilized to demonstrate how one employment system is better than the other. But to provide some context, a brief overview of each of the prevailing views and the critiques of such views is provided.

##### A. *The Corporate Governance Approach*

One common approach to employment security is the "corporate governance" approach, which uses a "shareholder versus stakeholder model" to analyze the two countries' employment systems.<sup>203</sup> Within this framework, Japan follows a stakeholder model, in which employees are not only seen as factors of production, but as "important constituents," who are paid out corporate assets before management and shareholders.<sup>204</sup> Many boards of large Japanese firms also are composed of "insider-employees,"<sup>205</sup> that is, actual employees at the company versus outside consultants, counsel, or financiers. As such, "[e]mployees' voices are reflected and respected in corporate governance through internal promotion of board members, including directors-with-employee-function, and through joint labor-management consultation."<sup>206</sup>

The rationale behind the Japanese stakeholder model is based on "the fact that the contributions and risk exposure of the core employees are greater than those of shareholders, and that employees invest a hidden contribution via the seniority based wage and retirement allowance sys-

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<sup>203</sup> See, e.g., Takashi Araki, *Changing Employment Practices, Corporate Governance, and the Role of Labor Law in Japan*, 28 COMP. LAB. L. & POL'Y J. 251 (2007) [hereinafter Araki, *Changing Employment Practices*]; Takashi Araki, *Comparative Analysis: Corporate Governance and Labor and Employment Relations in Japan*, 22 COMP. LAB. L. & POL'Y J. 67 (2000); Ronald Gilson & Mark Roe, *Lifetime Employment: Labor Peace and the Evolution of Japanese Corporate Governance*, 99 COLUM. L. REV. 508 (1999).

<sup>204</sup> Araki, *Corporate Governance*, *supra* note 203, at 67 (An example of this is the order in which a corporation's assets are distributed: (1) creditors; (2) regular workers; (3) management; (4) shareholders; and (5) non-regular workers).

<sup>205</sup> Gilson & Roe, *supra* note 203, at 508.

<sup>206</sup> Araki, *Corporate Governance*, *supra* note 203, at 88.

tem.”<sup>207</sup> Employees are commonly referred to as “members of the family.”<sup>208</sup> Moreover, firms want to invest in human capital — any investment towards the employees and their skill sets, which are typically divided into “general” skills and “firm-specific” skills.<sup>209</sup> As one scholar observed, “Japanese firms pay more of the costs of training in general skills than do American firms.”<sup>210</sup> Thus, the assurance of long-term or lifetime employment as well as the various investments into or involvement of employees reflect Japan’s employee-centered corporate governance and its appreciation of their “stakeholders” and human capital.<sup>211</sup>

On the other hand, like many Anglo-Saxon countries, the United States follows a “shareholder model,” which is “highly diversified” but tends to overlook employees and their risks and contributions.<sup>212</sup> The shareholder model focuses almost exclusively on the interests of shareholders and management.<sup>213</sup> It assumes that the employee “has no legal interest or stake in the enterprise other than the right to be paid for the work performed.”<sup>214</sup> Thus, under this model, the employment-at-will system reflects “American employers’ dominance of enterprise” and their priority of shareholders and management over employees.<sup>215</sup>

The corporate governance approach, with the use of its “stakeholder versus shareholder” model, provides substantial insight into the operations and culture of large corporate firms in Japan and the United States. It helps explain which interests are considered for corporate decisions, how a corporation prioritizes and protects its members, and what the underlying rationales and values are for the respective organizations. Although this approach is useful for learning about corporate culture and governance in the two countries, it looks only at the micro-level of the comparison — restricted to the corporate workplace. The advantages and disadvantages are framed in terms of corporate value or corporate structure — namely about decision-making, payments or dividends, and investments among other aspects. The next approach, economic efficiency, on the other hand, provides a much broader macro-level perspective.

<sup>207</sup> *Id.* at 67 (internal citation omitted).

<sup>208</sup> Clyde Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, 69 CHI-KENT L. REV. 129, 134 (1999) [hereinafter Summers, *Employee Voice*].

<sup>209</sup> Gilson & Roe, *supra* note 203, at 508, 510-11 (internal citations omitted).

<sup>210</sup> *Id.* at 511, 511 n.12 (citing prior economic studies).

<sup>211</sup> *See id.* at 509-10.

<sup>212</sup> Araki, *Corporate Governance*, *supra* note 203, at 94-95.

<sup>213</sup> *See id.*

<sup>214</sup> Summers, *The Divine Right*, *supra* note 28, at 65.

<sup>215</sup> *See id.*; *see also* Araki, *Corporate Governance*, *supra* note 203, at 94-95.

### B. *The Economic-Efficiency Approach*

Another common approach is the “economic-efficiency” approach, which examines either “production efficiency; allocative or Pareto efficiency; Pareto superiority; or Kaldor-Hicks efficiency” to determine the success of the different employment systems.<sup>216</sup> While these kinds of efficiencies vary in scope, as Japan and the United States have two of the most advanced economies, any contributing factors, including the efficiencies of their respective employment systems, are of particular interest to scholars, lawyers, and government officials.<sup>217</sup>

Under the basic “efficiency” approach, economists view “[a] production process . . . to be productively efficient if either of two conditions holds: (1) it is not possible to produce the same amount of output using a lower-cost combination of inputs, or (2) it is not possible to produce more output using the same combination of inputs.”<sup>218</sup> Meanwhile, Pareto efficiency focuses mainly on individual preferences and utility, ensuring that no one is made worse by a move; and allocative efficiency applies such principles to the particular context of bargaining.<sup>219</sup>

In the specific context of labor economics, Kaldor-Hicks efficiency “requires, not that no one be made worse off by the move, but only that the increase in value be sufficiently large that the losers could be fully compensated,” “assum[ing] a corrective conception of justice” — that is, “contractual breaches are permissible and even encouraged if, after compensating the non-breaching party, the breaching party still profits.”<sup>220</sup> Thus, as it is applied to the workplace, the argument essentially goes as follows: “labor standards (contractual, statutory, or regulatory) lower efficiency because the greater the employees’ expectancy, the more costly the employer’s breach of the employment contract. The lower the labor standards, the easier-more efficient-it becomes for the employer to breach the employment relationship.”<sup>221</sup>

Another common theory, posited by Milton Friedman, provides that all unemployment is either “frictional” — that is, always-present unemployment resulting from temporary transitions or from misinformation between employees and employers — or is voluntary, which is the more common phenomenon in Milton’s view.<sup>222</sup> Under such theory, which is

<sup>216</sup> See, e.g., Anne Marie Lofaso, *Toward a Foundational Theory of Workers’ Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1, 4-11 (2007) (summarizing some of the major economic theories, i.e. free market theory surrounding the workplace) [hereinafter Lofaso, *Toward a Foundational Theory*].

<sup>217</sup> See *id.* (citing works of Friedrich A. Hayek, Richard Posner, Milton Friedman, among others to explore the U.S.’s at-will employment system).

<sup>218</sup> *Id.* at 7-8.

<sup>219</sup> See *id.*

<sup>220</sup> *Id.* at 8, n.31 (internal citations and quotations omitted).

<sup>221</sup> *Id.* at 8 (citations omitted).

<sup>222</sup> *Id.* at 11, 11 n.53 (citations omitted).

based on a “modified Phillips Curve,”<sup>223</sup> any government regulation, beyond “smooth[ing]” free market operations, “interferes with the natural rate of unemployment and causes stagflation — high unemployment coupled with high inflation.”<sup>224</sup>

Under the aforementioned views, several scholars have argued how Japan’s long-term employment practice is economically inefficient.<sup>225</sup> In reality, however, this practice has produced a number of efficient outcomes, by creating millions of new jobs, increasing the employment rate, building up employee morale and loyalty from human capital investments and decreasing dispute and litigation costs.<sup>226</sup> But admittedly, this practice proved to be less efficient during the long run stagnation in Japan in the 1990’s.<sup>227</sup> In the new global economy, in which technical innovation has become competitive and the diversification of the labor force has been increasing, the requirement of firm-specific human capital has become less necessary.<sup>228</sup> As such, this practice seemed to “preserve an unproductive sector of the economy, impede the development of new and productive industries, and rescue unwanted or unmotivated workers.”<sup>229</sup> In the face of these inefficiencies, the government then adopted a more “market-friendly” approach while still directly regulating the areas of employment protection and working hours.<sup>230</sup>

Similarly, in the United States, the at-will practice proved to be successful since the beginning of the industrial era in the early 1900’s.<sup>231</sup> The large scale application of the at-will model resulted in “a reasonably stable group of skilled workers” cushioned by “an ever-changing casual workforce” (notwithstanding “turnover rates of [approximately] 300%”).<sup>232</sup> “Given the extraordinary diversity of employment relationships in the United States,”<sup>233</sup> the at-will system proved to be valuable throughout the century for the “flexibility afforded by the free mar-

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<sup>223</sup> The Phillips Curve is “an equation that describes the trade-off between inflation and unemployment.” *Id.*

<sup>224</sup> *Id.* (citations omitted).

<sup>225</sup> See Tsuneki, *supra* note 9, at 560.

<sup>226</sup> See *id.* at 552-60.

<sup>227</sup> *Id.* at 529-30.

<sup>228</sup> *Id.* at 555.

<sup>229</sup> *Id.* at 561.

<sup>230</sup> *Id.* at 530.

<sup>231</sup> See Cappelli & Keller, *supra* note 37, at 876.

<sup>232</sup> *Id.*

<sup>233</sup> John P. Frantz, *Market Ordering Versus Statutory Control of Termination Decisions: A Case for the Inefficiency of Just Cause Dismissal Requirements*, 20 HARV. J.L. & PUB. POL’Y 555, 556, 603 (1997). From my own experiences, I have seen a wide range of employment relationships: independent contractors, unpaid interns, annual contracts, fixed-term contracts, union-related employment among many others. See also Cappelli & Keller, *supra* note 37, at 876.

ket.”<sup>234</sup> The at-will system has avoided several unnecessary costs, namely monitoring costs, transaction costs, and the costs of retaining inefficient or unproductive employees.<sup>235</sup>

Some economists have persuasively argued how employment at-will is economically efficient,<sup>236</sup> perhaps more so than the Japanese model, or alternatively, the “just cause” model.<sup>237</sup> But other economists, namely game theorists, have argued that employment systems of the two countries can be characterized as “two possibly efficient equilibria of the same game played by similarly rational players facing different institutional environments.”<sup>238</sup> Nevertheless, the economic efficiency approach is helpful to the extent that it simplifies the interplay between the various participants and institutions and their respective incentives, and provides some pragmatic guidance on a country’s economic growth and health.

### C. Critique of Economic Approaches

Despite their valuable contributions to the discourse on employment security, the two common approaches of corporate governance and economic efficiency, however, overlook the employee. Under these views, the employee is seen as ancillary to management of a corporate firm, or, in the cost-benefit economic analysis, secondary to the composition of employment structures. Employees’ interests are merely viewed as price-points or as commodities in economic analyses.<sup>239</sup> The end goal in both approaches is clearly not the general welfare of the individual employee. Rather, it is the profit-maximization of the business enterprises, or the

<sup>234</sup> Frantz, *supra* note 233, at 556, 603.

<sup>235</sup> See *id.* at 560-68 (discussing all of the costs borne by employers under a “just cause” regime).

<sup>236</sup> See, e.g., Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 955-975 (1984). Epstein argues for the at-will rule on two grounds: “first, the parties should be permitted as of right to adopt this form of contract if they so desire. The principle behind this conclusion is that freedom of contract tends both to advance individual autonomy and to promote the efficient operation of labor markets;” and second, “the contract at will should be respected as a rule of construction in response to the perennial question of gaps in contract language: what term should be implied in the absence of explicit agreement on the question of duration or grounds for termination?” *Id.* at 951.

<sup>237</sup> See *id.* at 950-51; Frantz, *supra* note 233, at 603. See also Tsuneki, *supra* note 9, at 557-58 (discussing the potential sources of economic efficiencies and economic distortion by legal regulations).

<sup>238</sup> See Tsuneki, *supra* note 9, at 530-31 (citing Yoshitsugu Kanemoto & W. Bentley MacLeod, *The Theory of Contracts and Labor Practices in Japan and the United States*, 12 MANAGERIAL & DECISION ECON. 159 (1991); MASAHIKO AOKI, INFORMATION, INCENTIVES AND BARGAINING IN THE JAPANESE ECONOMY 49 (1988) (providing an economic analysis of Japanese firms)).

<sup>239</sup> See Lofaso, *Toward a Foundational Theory*, *supra* note 216, at 22.

efficiency or wealth-maximization of the employment structure, from the vantage points of the employer or the enterprise.<sup>240</sup>

Not only have some scholars argued that the goal of wealth maximization in itself is “inherently unstable and internally consistent,” as the goal depends entirely on “starting points,” but also, that these approaches by and large dismiss the practical realities of the employment security laws for the individual employee.<sup>241</sup> As Professor Anne Marie Lofaso articulated, “[b]y treating business welfare as an end in itself and human labor as a commodity, the market model collapses the community’s interests with those of business and disregards the significant differences between the interests of capital and labor in a market-driven economy.”<sup>242</sup> Thus, this note employs the alternative approach that serves as the optimal platform for the employee to assess the significant consequences of the employment security laws, particularly during recessionary periods.

#### V. THE EMPLOYEE-CENTERED APPROACH AND THE SOCIAL CITIZENSHIP MODEL

Obviously, employment plays a major role in human life and experience.<sup>243</sup> As Professor Lofaso explained, “[i]t defines individuals in relation to oneself, to others in the community, and to other community members.”<sup>244</sup> Alternatively, unemployment greatly impacts the individual and community as well: “[o]nly a job can make [the unemployed] feel needed and socially useful.”<sup>245</sup> Thus, employment security is a pressing universal issue. As Clyde Summers, a renowned labor law professor, observed:

Instability of employment . . . is a painful fact of our modern market economy, beyond the reach of any country to prevent or even influence significantly. Indeed, for a country to prosper it must embrace and accelerate changes which introduce new products and increase production. These changes, however, with their dislocation of workers, inevitably bring substantial personal and social costs. The costs must be borne either by the workers, the employer, or by society in general. How we distribute those costs implicitly expresses our social values, and may in the long run affect our readiness and ability to absorb those changes rather than to attempt to resist them.<sup>246</sup>

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 25-26 (citing RONALD DWORKIN, *MATTER OF PRINCIPLE* 238 (1985); Ronald Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 192 (1980)).

<sup>242</sup> *Id.*

<sup>243</sup> See Lofaso, *Toward a Foundational Theory*, *supra* note 216, at 1.

<sup>244</sup> See *id.*

<sup>245</sup> See *id.* at 1-2 (internal citation omitted).

<sup>246</sup> Clyde W. Summers, *Worker Dislocation: Who Bears the Burden? A Comparative Study*, 70 NOTRE DAME L. REV. 1033, 1034 (1995) [hereinafter Summers, *Worker Dislocation*].



The right to employment security not only recognizes the intrinsic value of employment to an individual (such as self-respect) but also reflects the “social value” of collective responsibility and participation.<sup>247</sup> Guaranteeing employment security recognizes the importance of the employee’s role and voice in industrial relations.<sup>248</sup>

Thus, the right to employment security serves as the foundation for the “social citizenship (rights-based) model,” which stems from an analysis of social security in general but can be applied to the context of the workplace.<sup>249</sup> For the purposes of this analysis, under this employee-centered “social citizenship model,” the principles of “substantive autonomy, dignity, and substantive justice” serve as the cornerstones that help “reinforce . . . for more participatory industrial democratic solutions to unemployment.”<sup>250</sup> Essentially, under this view, employees should share the social and economic responsibilities during recessionary periods and should continually, collectively participate in industrial relations.<sup>251</sup>

As applied to the two countries, Japan’s employment system reflects the social citizenship model, clearly recognizing employees’ right to work and valuing their wellbeing during downturns.<sup>252</sup> Moreover, both Japanese employers and employees share the social and economic responsibilities during recessions; under the Abuse of the Right to Dismiss doctrine, employers bear the economic responsibilities by first having to exhaust all feasible alternatives, such as a reduction in overtime, reduction in regular hiring or mid-term recruitment, “farming out” with respect to redundant workers, non-renewal of fixed-term contracts or contracts of part-timers,

<sup>247</sup> See Lofaso, *Toward a Foundational Theory*, *supra* note 216, at 1-2 (“employment security coupled with collective responsibility [is] the foundation for social action and labor [is] the instrument by which people could act together responsibility [sic] to build society”) (internal citation omitted).

<sup>248</sup> See *id.* at 40-42.

<sup>249</sup> See generally *id.* at 51-58 (citing Alan Ware & Robert E. Goodin, *Introduction to NEEDS AND WELFARE* 1, 5 (Alan Ware & Robert E. Goodin eds., 1990); RICHARD M. TITMUS, *SOCIAL POLICY: AN INTRODUCTION* (Brian Abel-Smith & Kay Titmuss eds., 1974) (slightly different classifications)). Professor Lofaso initiates the “inquiry into the foundations of social and economic justice,” arguing to “rebuild a more dignified workplace that will treat all people- workers, property owners, managers, and others-with equal respect and give all people the opportunity to become part author of their lives, regardless of the roles they play in society.” *Id.* at 64-65.

<sup>250</sup> *Id.* at 56-57 (citing CAROLE PATEMAN ET AL., *PARTICIPATION AND DEMOCRATIC THEORY* (1970)).

<sup>251</sup> See *id.* at 39-40, 55-56 (“[W]orker autonomy can emanate from the job itself both through job satisfaction and job security; arise from the worker’s personal experiences at the workplace; or arise from the worker’s ability to control his or her working life.”).

<sup>252</sup> For discussions about the New Constitution and Japanese workers’ rights, see generally *supra* Part II.A.

among others.<sup>253</sup> The low unemployment rate of 3.3%, even after the 2008 recession, demonstrates not only the efficacy of the doctrine's restrictions but also the extent of employers' loyalty and commitment to the rule.<sup>254</sup> Japanese employees also bear the social responsibilities during economic downturns. Even though they are granted bargaining rights under the New Constitution, employees seem to yield to employers' unilateral changes to the other working conditions, in order to make the terms more economically viable.<sup>255</sup> The lower GDP per capita for Japanese workers tends to reflect the workers' social acceptance of the employers' control.

Not all Japanese workers, however, agree with the employment practice. Recent studies have found that younger Japanese workers are growing dissatisfied with the lifetime or long-term employment policy, are less committed to the firms, and are more likely to voluntarily leave.<sup>256</sup> One study stated that the long-term employment practice, especially during the recessionary period, has led management to demand long working hours and have high worker expectations.<sup>257</sup> Several economic and industry analysts have also found increasing dissatisfaction among younger Japanese, who may be less willing to accept the inflexibility of lifetime employment and the longer hours expected under such a system.<sup>258</sup>

But another study, which examined the efficacies of the labor tribunal systems in Japan, stated that the number of disputes concerning dismissals has decreased from 25% in 2008 to 16.9% in 2012.<sup>259</sup> This shift suggests that after the 2008 recession, Japanese employees have been less

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<sup>253</sup> See *supra* Part II.A.2.

<sup>254</sup> See *supra* Parts III.A, C.

<sup>255</sup> See *id.*

<sup>256</sup> See Takashi Tatsuse, *Explaining Global Job Satisfaction by Facets of Job Satisfaction: the Japanese Civil Servants Study*, 16(2) ENVIRON HEALTH PREV. MED. 133 (2010), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3047668/>. Wei-hsin Yu, *Enduring an Economic Crisis: The Effect of Macroeconomic Shocks on Intragenerational Mobility in Japan*, U.S. NAT'L LIBR. OF MEDICINE, NAT'L INST. OF HEALTH (Nov. 2010), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3026593/> (last visited Mar. 12, 2015) [hereinafter Yu, *Enduring an Economic Crisis*]. Although this latter study looks at a different recession period, it is still insightful for employees' general attitudes and behaviors during downturns.

<sup>257</sup> Wei-hsin Yu, *Better Off Jobless? Scaring Effects of Contingent Employment in Japan*, U.S. NAT'L LIBR. OF MEDICINE, NAT'L INST. OF HEALTH (Mar. 2012) <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3408094/> (last visited Mar. 12, 2015). See also Yu, *Enduring an Economic Crisis*, *supra* note 256.

<sup>258</sup> See *supra* notes 256-257. See also TRADE REGULATION REPORTER, ¶ 50,109 U.S., GERMANY, JAPANESE BUSINESS PRACTICES – GENERAL ACCOUNTING OFFICE REPORT, 2010 WL 271059 (Aug. 1, 1993).

<sup>259</sup> Megumi Honami, *How Successful is Japan's Labor Tribunal System*, 16 ASIAN-PAC. L. & POL'Y J. 83 (2014).

concerned with issues regarding dismissals (or the lack thereof) but on the aggregate, have been troubled by other conditions or issues in the workplace.<sup>260</sup>

Nevertheless, as the New Constitution expressly grants all employees the right to organize and collectively bargain, Japanese employees have the secured opportunity to exercise their rights over these other issues through their enterprise unions. The current union density rate of 20% reflects Japanese workers' willingness to participate in industrial relations.<sup>261</sup> Thus, the right to employment security in Japan not only protects workers' remaining labor and employment rights, but also reflects the social citizenship model of valuing and engaging workers in democratic industrial relations.

The at-will system in the United States only reflects the social citizenship model to a very limited extent. The laws do not provide employees with the right to work, let alone the right to employment security. To date, there is still no common law or statutory protection against economic dismissals.<sup>262</sup> The unemployment rate of 5.2% in the United States, a little less than twice the rate in Japan, demonstrates the employers' relatively strong reign over economic decisions.<sup>263</sup> Nevertheless, under the social citizenship model, American employees who are union members and are covered by collective bargaining agreements, can participate in discussions about workplace modifications.<sup>264</sup> Under the NLRA, these employees can exercise their rights to organize and collectively bargain to discuss a vast range of "mandatory" workplace topics.<sup>265</sup> The relatively higher GDP per capita tends to reflect American employees' bargaining power.<sup>266</sup>

Even though American union members have the rights to bargain over the effects of any employer's decisions, union members only make up 11% of the workforce.<sup>267</sup> And regardless of the collective bargaining coverage, workers still have no right to bargain over their economic job security.<sup>268</sup> The scope of the NLRA's protection is very limited, as the decision for economic dismissals is not a mandatory bargaining topic.<sup>269</sup> As such, under most collective agreements, which only cover a small fraction of the workforce, the employers' burden is little more than it would

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<sup>260</sup> *Id.* at 86, 86 n.21 (citing Press Release, Statistics on the Individual Labor Dispute Solution System in 2012, Ministry of Health, Lab. & Welfare, 2, <http://www.mhlw.go.jp/stf/houdou/2r985200000339uj-att/2r985200000339w0.pdf>).

<sup>261</sup> *See id.* at 86.

<sup>262</sup> Lofaso, *Talking is Worthwhile*, *supra* note 129, at 66; *see also supra* Part II.B.

<sup>263</sup> *See supra* Part III.C.

<sup>264</sup> *See supra* Part II.B.3.

<sup>265</sup> *See id.*

<sup>266</sup> *See supra* Parts III.B-C.

<sup>267</sup> Bureau of Lab. Statistics, *supra* note 177.

<sup>268</sup> Lofaso, *Talking is Worthwhile*, *supra* note 129, at 66; *see also supra* Part II.B.

<sup>269</sup> *See supra* Parts II.B-C.

be if no collective agreement was in effect: employers are not required to mitigate or avoid economic dismissals, and “they are free to decide how many employees to dismiss and when.”<sup>270</sup> To that end, the at-will system undervalues the continual rights of employees to participate in economic decisions, and it unevenly distributes the economic and social responsibilities during recessionary periods.<sup>271</sup> Under the American system, the majority of employees are primarily responsible for their own economic and social wellbeing in cases of economic dismissals.

Particularly after the 2008 recession, the issue of economic security has become a major concern in the United States. Based on empirical surveys, an early 2008 Gallup study conducted immediately before the 2008 recession revealed that most American employees reported to be completely satisfied with their job security (55%).<sup>272</sup> However, after the recession, another study revealed that employees’ concerns about job security greatly increased because of the high unemployment rate after the recession.<sup>273</sup> Therefore, although employees in the United States have much more job flexibility and admit to routinely changing jobs in “search of better pay, better benefits, or simply a change of pace,”<sup>274</sup> employment security, particularly during recessionary periods, is still a major problem.

The implication of this comparative analysis is that high employment security is not only feasible but necessary for workers in order to protect their bargaining rights and to promote democratic industrial relations. As mentioned above, employment is a platform through which an individual can share the social and economic responsibilities and contribute to society,<sup>275</sup> particularly during downturns. Even though the employment structure can come at the expense of exercising some bargaining rights, employees nevertheless still can have the secured opportunity to exercise their rights and participate in industrial relations. Notwithstanding the greater flexibility in their existing employment from collective bargaining agreements, American workers cannot effectively remedy the lack of protection through their bargaining power and thus their remaining rights are not fully protected.

With the increasing diversification of the workforce and the constantly changing economic and technological landscape, it is difficult to predict whether the United States will someday enact any legal protection against economic dismissals during downturns, but perhaps it may come

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<sup>270</sup> Summers, *Worker Dislocation*, *supra* note 246, at 1036.

<sup>271</sup> Lofaso, *Toward a Foundational Theory*, *supra* note 216.

<sup>272</sup> *Id.*

<sup>273</sup> Elizabeth Mendes, *U.S. Job Satisfaction Struggles to Recover to 2008 Levels*, GALLUP (May 11, 2011), <http://www.gallup.com/poll/147833/Job-Satisfaction-Struggles-Recover-2008-Levels.aspx> (last visited Mar. 12, 2015)

<sup>274</sup> See Ardelean et al., *supra* note 104, at 455.

<sup>275</sup> See Lofaso, *Toward a Foundational Theory*, *supra* note 216, at 65.

under the growing statutory and public policy exceptions to the at-will rule. The United States has a great deal to learn from the Japanese system, with its high employment security and a low unemployment rate. Perhaps by allowing employees to participate in discussions about economic dismissals, with the hopes of circumventing or mitigating them, the American system can more closely align with the social citizenship model, by sharing with their employees the social and economic responsibilities during recessions.<sup>276</sup>

### CONCLUSION

This comparative study hopes to have shed light on not only the underlying values of the two bodies of employment security laws, but more broadly, the idea that the values that one society accepts, may not be shared by another similarly advanced society.<sup>277</sup> The Japanese employment model highly values the employee, providing them with the right to job security and considers the employee as an equal participant in industrial relations during economic recessions. On the other hand, the American model values the employee to the extent that they are currently employed and covered by a collective bargaining agreement, during which time the employee tends to have more bargaining power to influence the terms and conditions of work. Nevertheless, the American employee's bargaining rights fall short not only because such rights are only granted to a small fraction of the workforce, but also because these rights cannot effectively remedy the lack of legal protection against economic dismissals.

As such, under the employee-centered approach, the Japanese employment system, with its promise and successful implementation of high job security even during recessions, is better for the employee. Even though Japanese workers have less pragmatic bargaining rights during these times, they evidently share the social and economic responsibilities and have secured opportunities to exercise them through the "reasonable modification rule" and through their unions. The United States can certainly learn from the Japanese system, which has survived a number of recessions. Under the employee-centered approach, the Japanese system demonstrates that employment security, driven by the principle of collective responsibility, is feasible and can serve as the foundation for society.<sup>278</sup>

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<sup>276</sup> See *id.*

<sup>277</sup> See *id.* at 3. See also Summers, *Worker Dislocation*, *supra* note 246, at 1072-73.

<sup>278</sup> See Lofaso, *Toward a Foundational Theory*, *supra* note 216, at 1-2 (internal citations omitted).

